30 May 1995

HUMAN SCIENCES RESEARCH COUNCIL

HSRC INVESTIGATION INTO NATIONAL SYMBOLS

SUBMISSION ON NATIONAL SYMBOLS IN THE NEW CONSTITUTION

Attached is a submission on national symbols in the form of excerpts from the third report of the HSRC investigation which is nearing completion, entitled A New Symbolic Order: National and Other Symbols of South Africa. More information about the report and the investigation can be found in the attached Introduction to the report. Our previous two reports were used by decision makers to help them decide on interim national symbols.

The excerpts were chosen to reflect our latest findings on the perceptions and popularity of the three interim national symbols: the flag, anthem and coat of arms. On the basis of media analyses and surveys the following is clear:

In the first year following their adoption, the new flag and the combined anthems have become very popular with most South Africans.

Although it is too early to say what the public's reaction to the shortened version of the anthem will be, the popularity of the present combination would suggest that the shortened version will be even more acceptable since it retains the spirit of both anthems and is now also much easier to sing.

Few people have any knowledge about the coat of arms and the emblems incorporated in it are not known. The decision to retain the old arms elicited almost no controversy in the media.

The HSRC researchers involved in the investigation would therefore like to make the following recommendations concerning the status of the national symbols in the new constitution:

The interim national flag should be adopted without any changes.

The interim coat of arms should be adopted without any changes. This will maintain a link with South Africa's heraldic tradition. The general public are not interested in the individual, controversial emblems in the arms and the cost of replacing the arms would be prohibitive.

A combination of the two interim anthems should be adopted as the new national anthem. Some time may be needed to evaluate and possibly adapt the proposed combined version. Prof. James Khumalo complained in a TV programme that it has not been widely disseminated and sung in public. The committee's combined version is admirable, but it can
be criticised on a number of points. Since public involvement is crucial in choosing national symbols in order to establish a sense of collective "ownership" - sufficient time for comments and proposals should be allowed before final decisions on the lyrics and music are taken. The principle of a combination of the two anthems can be enshrined in the new constitution, and a final decision can later be taken by means of a proclamation by the president.

The combined version was published as follows:

1. Nkosi Sikelel' iAfrika
   Maluphakanyisw'uphondo Iwayo
   Yizwa Imathandazo Yethu
   Nkosi Sikelela, Thina Lusapho Iwayo

   Translated  (God bless Africa
   May its horn be raised
   Hear our prayers
   Lord bless us, its (Africa's) children)

2. Morena Boloka setjhaba sa heso
   0 fedisa dintwa le matshwenyeho
   0 se boloke (0 se boloke) satjhaba sa heso
   Satjhaba sa South Africa, South Africa

   Translated  (Lord bless our nation
   And stop all wars and suffering
   Preserve it (preserve it) our nation
   Preserve our South African nation, South Africa)

3. Uit die blou van onse hemel
   Uit die diepte van ons see
   Oor ons ewige gebergtes
   Waar die kranse antwoord gee

4. We can hear the land rejoicing
   With a voice not heard before
   Let the people of our country
   Live in peace for evermore.

Examples of points of criticism that may be raised are the following:

Stanzas 1, 2 and 4 all contain an invocation but the Afrikaans stanza does not even have a verb that should logically follow ('antwoord gee’ only refers to “kranse”). Linguistically, the stanza only makes sense when read in conjunction with stanza 4,
but this deviates from the pattern in the other stanzas and it remains uncomplete as a linguistic unit on its own. It was intended only as a preamble.

The invocation in stanza 4, for peace, is a repetition of the invocation to stop wars and suffering in stanza 2. This means that an opportunity is lost to include one of the other powerful metaphors from the two original anthems.

The published shortened version does not have a title.

Judging personally - since I hold a doctorate in literature - I believe that a committee of literary scholars and linguists who should deal with the contents, can produce a better version. They could then make recommendations to the present committee.

We trust the information and submission will be of value to you. If you need further information, you are most welcome to contact me.

CHARLES MALAN
PROGRAMME LEADER

INTRODUCTION

0.1 BACKGROUND AND PROBLEM AREA

In view of the drafting of a new constitution for South Africa in the near future, the urgent need for research on national symbols has become obvious. Such research is imperative for informed political decisions.

The importance of unifying national symbols was pointed out in the report of the HSRC Investigation into Intergroup Relations, completed in 1985 (HSRC, 1987). Following exploratory research on national symbols during 1991-1992, the present HSRC investigation was launched at the beginning of 1993. This project was initiated and funded by the Council as an independent venture, with the intention of serving the interests of all South Africans.

The need for research on the subject was stressed repeatedly at a workshop "Towards a National Policy for Monuments, Museums and National Symbols" held in Bloemfontein on 18 and 19 March 1992. The workshop was organised by the ANC and attended by representatives of the Department of National Education, the HSRC and many conservation bodies and university departments. Consensus was reached that decisions on future policy and symbols should be taken as democratically as possible and only after a process of consultation with a variety of interested parties.
The HSRC felt that not only official symbols such as the national flag and anthem should be investigated, but also informal symbols of a national nature, such as geographical names and various emblems. Research on monuments, musea, memorials, landmarks, and so on is already being undertaken by institutions concerned with conservation and the field will accordingly not be investigated in depth in this research programme.

The projects will all be largely descriptive and analytic - they will not be aimed at influencing the democratic processes of decision making, but rather at supplying the necessary historical, contextual, heraldic and other information on which informed decisions can be based.

0.2 RESEARCH DESIGN

0.2.1 OBJECTIVES OF THE RESEARCH PROGRAMME

To analyse national symbols within their historical, cultural, political, social and other contexts.

To clarify concepts and definitions related to symbols and present criteria for the evaluation of national symbols.

To survey representative segments of the entire population with a view to eliciting their opinions on existing and possible new symbols and the bases of symbols, such as colours.

To make recommendations regarding the strategies and conditions for decision-making processes concerning symbols, also based on the experience in other relevant countries, especially in Africa.

0.2.2 OBJECTIVES OF THE FIRST PROJECT

To analyse the existing national symbols within their historical and other contexts.

To supply information regarding symbols and national symbols in general.

To identify problems and areas for further research regarding the existing symbols.

0.2.3 CONTENT AND AREAS OF THE RESEARCH PROGRAMME

Categories of symbols, their nature, functions, heraldic background, history and contemporary significance.

The position of official symbols within a constitutional context, in comparison with the situation in other countries.

The meaning and acceptability of particular symbols, tested among a cross-section of the population, and taking into account the perceptions and wishes of specific cultural and other groups.
Ways in which symbols are used and can be made acceptable through democratic decision-making processes.

0.2.4 RESEARCH PHASES

Phase 1 consisted of broad descriptive and historical analyses, focusing on the present South African national flag, anthem, fauna and flora emblems, and coat of arms.

Phase 2 will consist mainly of surveys aimed at gleaning the views of the population on the subject. Other symbols of national significance such as public holidays and geographical names will also be investigated at this stage (see the list of possible symbols to be included in Secton 3-50 Various political role players will be consulted about the nature and content of the surveys.

During the third phase particular problems concerning the introduction of new symbols will be addressed, such as ways to introduce new symbols and avoid conflict, and the implications for regional symbols.

0.2.5 RESEARCH TEAM AND COMMITTEES

The research is guided by a broadly representative Advisory Committee, with assistance given to the HSRC research team by heraldic and academic experts. The team liaised with the Bureau of Heraldry, the Office of the State President, the Departments of Constitutional Affairs, National Education and Home Affairs, other organisations that have relevant information, and community representatives.

The HSRC Planning Committee for the project consisted of the following members of the Social Dynamics Group: Dr Charles Malan (programme leader), Mr Patrick Molatedi, Dr Karel Prinsloo, Dr Nic Rhoodie, Mr Jabu Sindane and Dr Gerhard-Mark van der Waal. The Advisory Committee was represented by Dr Bok Marais, Prof. Lawrence Schlemmer and Dr Arie Oberholster.

0.2.6 ADVISORY COMMITTEE

The following individuals were invited to serve on the Advisory Committee, in their personal capacity:

Dr Bok Marais (Vice-President: Research Development, HSRC - chairperson)
Prof. Sol Chapole (Head, Department of African Languages, Vista University)
Mr Ernst de Jong (Director, Ernst de Jong Studios, Pretoria)
Prof. Pieter Kapp (Department of History, University of Stellenbosch)
Prof. James Khumalo (Department of African Languages, University of the Witwatersrand)

Ms Marilyn Martin (Director, South African National Gallery, Cape Town)
Dr Arie Oberholster (Acting General Manager, Social Dynamics Group, HSRC)
Prof. Nina Overton (Department of Communication Science, Rand Afrikaans University)
0.2.7 THEORETICAL CONSIDERATIONS

In view of the interdisciplinary nature of the research, contributors were not requested to adhere to any particular theoretical paradigm. Most of the contributions in this report are historical analyses. The discussions of symbols and related systems of signification were largely informed by cultural theory, as it has been developed within the field of contemporary cultural studies, and theories of semiotics.

0.2.8 CONSULTATION AND THE DISSEMINATION OF RESEARCH FINDINGS

All political groups, major cultural organisations, other interested groups and members of the public were invited to send submissions on existing and alternative symbols to the Research Committee. Letters of invitation for submissions were sent to the largest organisations and the invitation was also included in the media release in which the research programme was announced. The Research Committee has already received a number of submissions from organisations and individuals - these will be considered during the next stages of the research and, where feasible, will be summarised or included as appendices in the following reports. Eventually they will all be submitted to

the decision-making authorities who will decide on future symbols. The HSRC will obviously not evaluate proposals for alternative symbols.

The reports will be made available to all political interest groups, and the research findings will be widely disseminated. At least three reports will be written, as well as articles, memoranda and guides to introduce the various symbols.

0.3 GENERAL CONSIDERATIONS GUIDING THE RESEARCH

The following general considerations were decided on by the Planning Committee and included in the media release that announced the research programme:

The research will be for the benefit of the whole population and the results will be available to all. Care will be taken to ensure that no particular interests are promoted and that no groups are excluded as far as submissions are concerned.
All groupings should be given the opportunity to participate in democratic decision making concerning new national symbols. This is essential for the larger process of nation building as every citizen has an interest in such symbols.

The research will form part of a comprehensive process of information dissemination, making people aware of the issues and debating these issues.

The whole area of investigation will be approached holistically. Symbols have both positive and negative significance for different observers - problems with perceptions should not be avoided but rather be addressed frankly.

0.4 CONSIDERATIONS REGARDING THE NATURE AND CONTENT OF THIS REPORT

In spite of the lengthy debates on South Africa's national symbols which have been conducted for many years in the media and in parliament, remarkably few comprehensive studies and publications on the subject are available. For the purposes of this project, it was therefore decided to supplement basic information on the nature and functions of symbols and national symbol in general and then to focus on the present national symbols of the Republic of South Africa.

Unless other distinctions are made (see a.a), in this report, South African "national" symbols will generally refer to (a) those official symbols proclaimed and controlled by the state (the national flag, anthem and coat of arms), and (b) other symbols recognised by a considerable section of the population as being "national". The latter group will include the national flora and fauna emblems, which have not been proclaimed by law and are not registered by the Bureau of Heraldry, and the anthem 'Nkosi Sikelel' iafrika' which for many years has been described as "the Bantu National Anthem" (Shaw, Coleman and Cartledge, 1975:472; Loots, 1985:35) or the "Pan-African anthem especially among the southern Bantu" (Boyd, 1980:47).

In view of the long struggle for recognition of some of the present symbols, particularly of the national flag and anthem, a historical perspective is essential within this investigation. The only comprehensive historical survey of the visual symbols, however, is at present still unpublished, namely F.G. Brownell's National and Provincial Symbols and Flora and Fauna Emblems of the Republic of South Africa. Large sections of the historical overviews in this report are based on this manuscript.

0.5 CRITICAL EVALUATION AND THE POSITION OF ALTERNATIVE SYMBOLS

Since the purpose of this report is to present only historical and contextual information on the present symbols and to identify the main problem areas for further investigation, no attempt was made to analyse the proposals for alternative symbols or to reflect fully the recent debates. This critically important area will be covered during the second phase of the study.
The fact that only existing national symbols have been singled out in this report does not imply any kind of evaluation of their status by the researchers or the Advisory Committee. Moreover, any important features that have not been dealt with in this report, can still receive attention during the following phases.

0.6 REPRESENTATIVENESS IN THE RESEARCH PROCESS

It was considered essential that all contributions and submissions, particularly by marginalised and disadvantaged groups, should be accommodated. Specifically the views of illiterate people, who constitute 55% or more of the population (depending on the definition of illiteracy), should be taken into account. Written submissions will form a relatively small proportion of the information gathered. The invitation to submit contributions was intended to give all organisations, and (literate) individuals, the opportunity to express their views in writing. Illiterate people will be consulted mainly through individual and focus group interviews. The HSRC has considerable experience in conducting this kind of survey in rural areas and in the townships, also among squatters.

It is obvious that visual symbols will play a crucial role, particularly for illiterate people, during the transitional and election processes in the country. Flags, colours, badges and emblems (also on ballot papers) will be symbolic shorthand for millions of people.

Taking into account the need for relevant research expertise, it was also agreed that the aim should be to reflect the symbolic weight of representativeness in the teams that conduct the research.

CHAPTER 5

SOUTH AFRICAN FLAGS

5.1 INTRODUCTION

The adoption of a new interim South African national flag in 1994 was another episode in a long history of new flags replacing others in this country. Apart from the national anthem, no single symbol is able to rouse so many, often conflicting, emotions as a country’s flag. Early South African visual symbols, including flags, have already been discussed in Section 3.4. In this chapter, flags in general will be looked at briefly before the flags of the Union are surveyed. Most of the historical survey will be devoted to the national flags since 1928. Finally, the present national flag will be discussed --- an illustration of the flag can be seen in Appendix B.

5.7 INTERPRETATION OF THE NEW NATIONAL FLAG

*Charles Malan*

The absence of fixed meanings
The state herald, Mr Fred Brownell, has repeatedly explained in the media that no fixed meaning can be attached to the colours or composition of the new flag. In the above analysis of symbolic meaning it was stressed that meaning is attached only through contextualisation, convention, and so on. Popular interpretation of the new flag will no doubt eventually attach some more or less fixed meanings to the features of the flag.

On the basis of flag conventions and the long tradition of South African flags it is, however, possible to venture some preliminary interpretations. It may well be that the interpretations presented below differ from popular perceptions.

**Composition**

In the composition of the new Rag the old and the new have been effectively combined. Although the design of the new flag is "revolutionary" in its use of the arrow-like green pall and black triangle, the well-known tricolour arrangement has basically been retained. The width of the pall with its white and yellow fimbriations is one third the width of the flag. The rectangular shape in the proportion of two in the width to three in the length is also conventional. The overriding impression of a red, green and blue arrangement is also in accordance with a traditional tricolour flag.

The design of the pall lends itself to the interpretation that two "streams" have been symbolically united in the New South Africa. These "streams" could represent Europe and Africa, the old and the new, even the white and black populations. This interpretation is complemented by the joining of two sets of colour combinations (red-white-blue and black-yellow-green) which will be discussed below. It is further echoed in the combination of the two national anthems which also represent two distinct traditions.

The tricolour arrangement can be seen as a fixed, conventional arrangement that represents tradition and stability (particularly in combination with the use of the "Western" colours red, white and blue). This stability is balanced by that of the triangle at the host, which is emphasised by the yellow fimbriation. A triangle is usually seen as a symbol of unity and strength.

The pall introduces a new and indeed revolutionary element. The arrow design is dynamic: and indicates movement towards the right ("forward", as Western reading convention dictates). The "point" of the pall is the same length as the "arrow" triangle, The point therefore also indicates an element of stability and, with its length, continuity. The dynamic element is thus balanced by stability. To simplify the interpretation: the South African nation has been united, is moving forward into the future and has entered a period of stability and growth (growth is also emphasised by the symbolism of the colour green).

The overall composition is typical of distinctive indigenous African designs. Ndebele designs, in particular, favour the use of white lines to separate bright colours from each other. (The arrangement of the white fimbriations in the flag ensures that the composition will not be seen as representative of the Ndebele culture only.) Thus Western heraldic designs, in particular the tricolour, have been harmonised with African designs.
Colour arrangement

Two sets of colours in the flag are divided by the white fimbriation. Together with the white, the red and blue form the well-known Western tricolour arrangement of red-white-blue. This is the arrangement of the Dutch flag which was so influential in the past in South African flag designs. Moreover, since the chili red contains an element of orange, the overall impression of the previous flag's combination of orange, white and blue has to some extent been retained.

The second, "new" set of colours is isolated by the pall, namely black, yellow and green. This is the exact combination of the original flags of the black freedom movements, in particular those of the two largest groups, the African National Congress (ANC) and the Inkatha Freedom Party (IFP). The ANC colours are therefore fully included in the present flag and, by means of the arrow arrangement, even "inserted" into the "old" flag. The IFP added white and red to their flag when they became a political party, in the same combination that is found in the upper half of the national flag. Thus both groups can "recognise" their own flags in the new combination.

A comparison of flag colours

The flag colours of a political organisation become a powerful mobilising mechanism during an election because they immediately connote the organisation and a particular symbolism, even for illiterates. It is therefore evident that every organisation would like to see its colours reflected in the national flag. The use of well-known colours shared by a variety of organisations may be a powerful unifying force in itself. A survey of some of the largest organisations' flags shows a number of commonalities.

(a) The ANC, IFP and PAC

The ANC, the oldest political organisation in the country, first flew its flag in 1925. Green is for South Africa's fertile land, black for its people (in 1925 there were only black members) and gold for its wealth.

The PAC initially used the same flag, but broke away in 1959 and now uses a flag with embellishments: a map of Africa with a star over Ghana where black nationalism enjoyed its first success.

The IFP also used the same flag as the ANC, but in 1990 added red, for blood spilled, and white, for peace, when it became a political party.

(b) AZAPO/Black Consciousness

AZAPO's flag at the top has a golden triangle for the wealth of the country, a black triangle for the people and a red star in the gold for its commitment to socialism.

(c) National Party
An orange flag bearing a powder horn was used between 1948 and 1960. The NP used the colours of the previous national flag in their logo with the letters NP until 1993, then adopted a new flag with the colours blue, white and green, with a yellow sun (with red rays) imposed on it.

(d) The "Africa freedom flag"

After the liberation of Ghana in 1957 the Ghanian flag with the colours gold, green and red became known as the Africa freedom flag. The colours are the most popular colour combination in Africa and are included in the flags of 17 countries. Ironically they are also the colours used in the shield of the South African coat of arms.

A survey of the colours most often used by South African organisations reveals the following:

Green and yellow/gold: ANC, PAC, IFP, NP, springbok colours, the Zionist Christian Church

Black and yellow/gold: PAC, ANC, IFP, AZAPO

Red: IFP, SACP, AZAPO, NP (the rays of the sun)

White: NP, IFP, the previous national flag

Blue: NP, the previous national flag

The "rainbow flag" and its colours

The general acceptance of the present flag can probably to a large extent be ascribed to the fact that it accommodates so many of the popular colour and composition combinations described above. Its six colours are too many for "a simple yet striking" design that is usually required for a flag. However President Nelson Mandela and Archbishop Desmond Tutu's reference to South Africa's "rainbow people" during the transition struck a responsive chord and the symbolism of a multicoloured nation is reflected in the colourfulness of the new flag.

Based on previous interpretations of South African flag colours and international conventions, some tentative interpretations of the colours in the new flag are presented below. Where applicable the interpretations refer to (a) South Africa's geographical features, (b) its people, (c) other concrete meanings, (d) abstract meanings such as values, and (e) heraldic meanings.

Red: Africa's sun; blood of the people spilled; the life-giving principle and highest power that controls the people's destiny; their passion and eagerness to serve their fatherland

Green: the country's fertile land and growth; its youth; its people's adaptability, freedom, health and hope
Blue: the country's skies and seas; the people's religious devotion, fidelity and steadfastness

White: the moon over Africa; the peace, purity and truth that should reign; the people's wisdom, innocence and joy

Black: the country's fertile soil; Africa's people and its nights, mourning for its lost children

Yellow: the rays of the African sun; gold and wealth of the African earth; the people's understanding, respect and virtue

5.8 ACCEPTABILITY OF THE FLAG

In his study of the flag controversy of the late 1920s, Saker (1980) stresses black opposition to the adoption of any new flag during the early days of the Union. Blacks had consistently voiced their opposition to the adoption of a flag in addition to or instead of the Union Jack (Saker, 1980:263), which they then regarded as the symbol of a political administration much more sympathetic to their cause than any of the white South African political parties participating in government. When the flag controversy reached its climax in 1927, a petition requesting the British monarch to prevent the introduction of a new flag was circulated among the black population. Although it collected some 97,000 signatures (Saker, 1980:264), it did not achieve its objective.

The South African flag has remained at the centre of the controversy that has raged around the national symbols. With South Africa's re-entry into the international sporting world after 1990, and with the amalgamation of most of the traditionally white sports bodies with their counterparts from the opposite side of the political spectrum, the use of the South African flag at sports meetings became problematic to say the least.

Debates on the old and new symbols were discussed in the previous chapter - consequently only a few representative reactions during the period before the adoption of the new flag will be discussed here.

The South African Football Association (SAFA) adopted their own flag and used it in March 1991 at international matches. Similarly, the South African Rugby Football Union used a flag of its own at international rugby matches, and an alternative flag was designed by NOCSA for the Olympic Games in 1992.

The reaction of some whites to the introduction of alternative flags was simply to wave the previous national flag more enthusiastically at sports meetings. At the same time Mr Ronnie Mapoena of the ANC's PWV Media Department stated that many people had no allegiance to the previous flag and anthem: "These symbols," he stated, "represent oppression and are a stark reminder of the reality that most South Africans still do not have a vote in the country of their birth" (Mayibuye, December 1991, 2 [111:29].
The new national flag has been received with enthusiasm by people from all population and most political groups. Some of the reasons for this popularity could relate to the above interpretation of the symbolism and contextual meanings of the new flag.

CONCLUSION

By the time the negotiations for a permanent new South African constitution were drawing to a close, the public debate and controversy about the new flag had all largely dissipated. When Freedom Day was celebrated on 27 April 1995 the proud display of thousands of flags by people from all sectors of South African society indicated the enormous popularity of the new flag. All surveys pointed to the overwhelming acceptance of the symbol. There are therefore no obvious reasons why it should be substituted or altered in a permanent new constitutional dispensation.

More than any other symbol the new flag symbolised South Africa's acceptance by the world community as it flew alongside the flags of other countries at the buildings of the United Nations, the Organisation of African Unity and other bodies. Countless replicas of the flag of all sizes have been distributed or sold in South Africa. It was waved at every opportunity during the visit of Queen Elizabeth II in March and April 1995. It has also appeared as bumper stickers, face paint decorations and on caps and T-shirts.

It seems that after all the bitter years of "flag struggles" South Africa has finally found a flag behind which its people can rally.

CHAPTER 6

SOUTH AFRICAN NATIONAL COATS OF ARMS

6.1 INTRODUCTION

The tradition of heraldry and the uses of coats of arms have been discussed in Sections 1.5 and 3.2. In the survey below the history of the national coat of arms, its legal and functional context, and the acceptability of the present coat of arms are considered. The national arms are illustrated in Appendix A.

THE ACCEPTABILITY OF THE ARMS

In the large number of newspaper reports generated by the debate on national symbols during the recent past (i.e. roughly between 1990 and 1993), scant direct reference - positive or negative - to the acceptability of the coat of arms has been encountered. However it has been pointed out (Malan, 1992:17) that "the arms and their representation in seals are usually not seen by the people as 'their' symbol, but rather as a formal image of state administration used to legitimise documents, money, etc.
The national coat of arms has therefore not overtly or consciously been associated with, or implicated in, the heated public debate on the status of the national symbols in the transition to a new South Africa. This may seem curious, given the fact that the national arms are one of the most important national symbols, and have remained so over the 80 odd years of their existence and use.

The reason for the unscathed status of the national coat of arms may be that it has always represented a highly complex signal that needs a considerable degree of patience and knowledge to analyse and appreciate properly, a fact precluding the involvement of the general public. Its use has also been limited to official contexts, i.e. to contexts with no overt political quality, so that the public perception of the symbol has not been politically mobilised.

Since there has been so little debate on the coat of arms in the media, reference will be made here to the interviews and surveys conducted in August 1993 for the second HSRC report on national symbols (Malan, 1993b: 16-37). The National Party offered no proposals on the arms and said decisions on the matter should be left to the negotiating process. Mr Olaus van Zyl of the NP did not foresee any problems in maintaining the name "Republic of South Africa" on the Great Seal. The creed "Ex Unitate Vires" would reinforce the process of nation building.

Prof. Temba Sirayi of the ANC referred to his discussion paper on ANC policy as the party's official policy proposals. These sections dealing with national symbols and heraldry did not contain recommendations on the coat of arms. In Section 3.5 of the paper it is stated that the ANC believes that "heraldry and national symbols in apartheid South Africa foster apartheid ideology and serve sectarian interests and values. The majority of South Africans do not identify with or bear allegiance to the current heraldic and national symbols because they represent oppression, dispossession, domination and disenfranchisement". ANC policy will provide for mechanisms for democratic re-assessment of the current heraldic and national symbols, new symbols "that are representative and reflect the interests and values of a democratic South Africa" and democratic mechanisms for decision making.

Dr J.N. Reddy, MP, leader of the Solidarity Party, felt that arguments about minor details in the coat of arms served no purpose. The design of the arms should be left to independent experts who were in the best position to create something new and to bring together various traditions. The immigrants who contributed to the country should be accommodated in the symbolism of the arms. Mr Schalk Burger of the Afrikaner-Volksunie (AVU) felt that the arms were aesthetically old-fashioned. However acceptance of new arms would depend on how this symbol was changed. Unlike some other Afrikaner parties, the AVU did not feel strongly about antiquated symbols such as the ox wagon, and the heavy, ornate design of the current coat of arms.

During the various regional focus group interviews with widely representative young people, academics, teachers, and others there was general consensus that the coat of arms was much less problematic than the other symbols because it was not an emotional issue. The groups generally felt that there was no clear indication as to whether it should be replaced or not. Few people had any knowledge of the arms and the emblems incorporated in them. Although most participants felt that a new coat of arms would also be needed in the spirit of changing all existing symbols, many
felt that there was no real need to change the existing arms because they did not have the negative connotation of the other symbols. Negative factors that were mentioned was the colonial legacy presented by the arms and the fact that they had no direct bearing on the new regions that were being negotiated.

The scant reaction to the decision to retain the old coat of arms as an interim national symbol confirmed the general feeling expressed during the surveys that the choice of the arms was not an emotional issue. Retention of the arms would mean that one of the oldest links with the country's colourful heraldic traditions would remain intact.

CHAPTER 7

SOUTH AFRICAN ANTHEMS
Arlene Grossberg

7.1 INTRODUCTION

With the adoption of two interim anthems for the Republic of South Africa on 27 April 1994, the country found itself in a unique situation. Strong feelings have been evoked by both anthems, and the government decided to accommodate all sections of the population by adopting the two anthems, "Die Stem van Suid-Afrika" ("The Call of South Africa") and "Nkosi Sikelel' iafrika". This decision, a symbolic gesture of reconciliation in itself, brought together officially two long traditions of essentially "Western" and "African" anthems that had for some time been sung concurrently in the same country.

In previous chapters, only visual symbols were individually treated, with references to heraldic, legal, functional and other contexts. In respect of anthems, similar background information will be supplied, followed by historical surveys of "Die Stem van Suid-Afrika" (hereafter referred to as "Die Stem") and "The Call of South Africa", and of "Nkosi Sikelel' iafrika" (hereafter referred to as "Nkosi"). The anthems are included as Appendices D and E respectively. The process leading up to the decision to adopt both anthems has already been discussed in Chapter 3 and only relevant additional information will be included here.

A general overview of anthems, including criteria relating to their nature and function, is presented in Section 7.2.

The multiparty negotiations, 1993

The work and decisions of the Commission on National Symbols have already been discussed in Section 3.4. It was decided that representatives from bodies such as the Foundation for Creative Art Centres in South Africa and the National Arts Initiative would be nominated as assessors to assist the commission in deliberating on the desired musical qualities of a national anthem. The commission received 119 entries for an anthem, from which a shortlist of six entries, including "Die Stem" and "Nkosi Sikelel' iafrika", was compiled for the final section. The commission felt that
although these six songs were good, none of them fully complied with the requirements. It was recommended that "Vunwe", composed by Shalati Joseph Khosa (a musician from Gazankulu) in Tsonga and English, be considered as an alternative to "Die Stem" and "Nkosi". The commission responded as follows: "The text (sic) of the anthem can play a leading role in rallying diverse people around the statement of unity, respect for each other and towards a realisation that South Africa is for all. In the text the future is for all, the past does not feature."

Most commission members favoured the official anthem "Die Stem" and the traditional "Nkosi" as dual anthems for the transitional period. In a minority report, three members of the commission favoured "Nkosi" but were prepared to accept the playing of a few bars of "Die Stem" as well.

The initial and the final report of the commission were released at the World Trade Centre at Kempton Park on the same day. The initial report appeared in the morning of 19 October 1993, but was later withdrawn and stripped of most of its annexures, and the final report was made available that same afternoon. The Negotiating Council debate, which took place on the morning of 21 October, was attended by members of the commission and concentrated on the national anthem, particularly the minority report. Emotions flared, and the debate had to be terminated by the chairman.

It was reported (*Sunday Star*, 24 October) that the failure of the Commission on National Symbols to find a single unifying anthem had caused considerable tension at the talks. Some negotiators stated that the anthem had become a divisive rather than a unifying issue as politicians hurled abuse at "Die Stem" and "Nkosi" in turn. Commission member Dr Musa Xulu reported that rightwingers lobbied to retain "Die Stem", while others with a leaning towards NP ideology argued that with minor textual changes "Die Stem" could be made acceptable to all South Africans. At the same time there was a strong lobby, especially among black political groups and some leftist politicians, in favour of "Nkosi" as the new national anthem. Some people in this lobby felt that with a few word changes and the removal or adaption of the Sotho part, "Nkosi" could be acceptable to all South Africans. Another school of thought supported the coexistence of both anthems during the transitional period until one gained overwhelming support, or both disappeared in favour of a new anthem. The final lobby according to Dr Xulu, which was federalist in nature, argued for a completely new anthem that could play a unifying role. Regional states that wanted to retain either anthem or to adopt their own new anthem as a second regional anthem, should be allowed to do so.

Mr Joe Slovo (SACP) said that for the majority of South Africans, the words of "Die Stem" about "protecting what our fathers built" sounded like a sick joke (*Citizen*, 23 October 1993). Mr Blade Nzimande of the ANC said that "Die Stem" was an anthem of oppression. It was reported that the ANC favoured singing only "Nkosi", followed by just the tune of "Die Stem". It was however realized that it would be impossible to prevent "Die Stem" supporters from singing along, and any attempt to suppress the words would only aggravate tensions. The commission's proposal that "Die Stem" be suitably "sanitised" of sectional overtones, notably the reference to oxwagons, was also criticised. The Democratic Party's Dene Smuts warned against efforts to make "Die Stem" politically correct. The issue was then left in the hands of the Planning Committee of the Negotiating Council.
Further process, 1993

The new interim constitution for South Africa agreed to by the Negotiating Council was tabled at a special session of parliament in December 1993. The clause relating to the national anthem states: "The national anthem of the Republic shall be determined by the President by proclamation in the Gazette."

By the end of 1993 no concrete decision had thus been reached and the matter of a national anthem remained in abeyance for a few months. On IS February 1994 the national symbols question was considered by the Transitional Executive Council (TEC) which subsequently delegated a two-person subcommittee (comprising Cyril Ramaphosa and Roelf Meyer) to make recommendations on South Africa's new national anthem. This committee duly proposed the adoption of both "Die Stem" and "Nkosi" as dual anthems for the transitional period and stated that an elected Constitutional Assembly should make a final decision on the anthem. The TEC would advise the president to include a proclamation on the matter in the interim constitution.

Government's proposed interim constitution, 1994

According to the proposed interim constitution in 1994, both "Die Stem" and "Nkosi" should enjoy the status of national anthem when the Government of National Unity took power. A proclamation to this effect was published in the Government Gazette on 20 April 1994 and came into force seven days later.

At the presidential inauguration on 27 April 1994, South Africans of different races came face to face with the gulf created by history. The Star of 11 May reported that many normally conservative whites raised their hands while "Nkosi" was being played and some blacks did the same during "Die Stem", which was a "first" in South African experience. New South African norms would take time to develop, but in the week of reconciliation, the right will was displayed. Many who were not au fait with the anthems, mouthed the words in respect.

The Protocol Committee that arranged the inauguration had little time to select lyrics of "Nkosi" that would be acceptable to most people. The official order of performance was "Die Stem" followed by "Nkosi". Some adaptions were made to the English translation of the Lovedale Press version. Archbishop Tutu's suggestion "may her spirit rise high" was included, instead of "may her horns rise high", and "block out all its unrighteousness" replaced "block out all its wickedness" (which appeared in the original Lovedale version). The inaugural programme included the classic Xhosa version of "Nkosi" with an English translation, and Afrikaans and English versions of "Die Stem" (see Appendix ?). Those attending were free to sing both anthems in whatever language they preferred.

Promotion of both anthems

President Mandela insisted that both anthems should enjoy equal status during the rule of the Government of National Unity (Sunday Tribune, 9 October 1994). He warned that the anthems should not be allowed to become divisive rather than unifying factors. He told a crowd at a soccer
match between South Africa and Zambia that people should make a habit of singing both anthems, learning the words if they did not know them. It is only when symbols are rejected by a section of the population or are seen to be under threat by those to whom they are meaningful that people cling to them, to the exclusion of others.

On another occasion at a South African embassy reception attended by 1 000 people in Washington during October 1994, President Mandela insisted, speaking in Afrikaans, that "Die Stem" also be sung when it became apparent that the guests were not about to sing the second anthem. He said that "We are South Africans, we must sing 'Die Stem'".

History was made when "Die Stem" was played at the opening session of the Frontline States' last meeting after the entrance of President Mandela and President Robert Mugabe (chairman of the Frontline States), heads of states and other representatives.

The dual anthem was sung for the first time at a rugby match when South Africa played England on 4 June 1994, at Loftus Versveld. The first time "Nkosi" was heard on a rugby tour abroad was before the Springboks opening match of their New Zealand tour against King's country in Taupo, in June 1994. There was concern that some team members knew the words of "Die Stem" but not those of "Nkosi".

During November 1994, various attempts at reconciliation were made by ANC regional representatives. "Die Stem" was sung at the first provincial congress of the ANC in the Northern Cape. Free State Premier Patrick Lekota criticised the Free State ANC's provincial congress members for not singing "Die Stem" and asked them in the interest of reconciliation to make a concerted effort to learn the Afrikaans version of "Die Stem".

Sportsmen supported reconciliation and were eager to accommodate political developments. Francois Pienaar, captain of the Springbok rugby team, gave President Mandela the assurance that his team would sing "Nkosi" whilst on tour again in New Zealand (Star, 27 June). The team practised the song and learnt the words.

**Star/MMR opinion poll, 1994**

Four months into the new South Africa, according to a 1994 Star/MMR opinion poll, only 16 % of South Africans said that they could sing both anthems, and 37 % said that they could sing only one, but intended learning the other. Thirty-five per cent said they had no intention of learning the "other" anthem. (Of these, 78 % were Freedom Front supporters, 43 % ANC supporters and 40 % Inkatha Freedom Party supporters). Twelve percent of the country's citizens knew neither of the country's anthems.

**Request for a shorter anthem**

As in 1933 (with "God Save the King" and "Die stem") singing two anthems was found to be a lengthy business. In 1994 President Mandela complained in Seshego (outside Pietersburg) that singing "Nkosi" in Sesotho followed by "Die Stem", was boring and meant that people had to stand
too long. He suggested that one verse of "Nkosi" be sung in Xhosa and Sesotho each, followed by one verse of "Die Stem". The singing of the two anthems would thereby be reduced to three verses.

In September 1994, whilst addressing mourners at the funeral of the ANC's treasurer-general, Mr Thomas Tito Nkobi, President Mandela reiterated the need for shorter anthems and formally requested Deputy President Thabo Mbeki to raise the issue with the cabinet. He also asked for a ruling on whether or not he should raise his hand during the singing of "Die Stem", as he had been criticised for doing so and also for failing to do so. A special Anthem Committee was accordingly set up to investigate the matter. On behalf of the committee, Mr Cyril Ramaphosa proposed to Cabinet that nothing should be taken away or added to the national anthems, but that on formal occasions only the first verse of "Nkosi" and "Die Stem" should be sung. These should also be a composition for military and other non-formal band use. It was further suggested that public opinion should be surveyed and the findings sent through to Deputy President Thabo Mbeki.

The Conservative Party Congress (Patriot, 28 October) which was held in October 1994, expressed its deep disapproval at what it considered to be the degrading of "Die Stem" and undertook to promote the anthem. On 25 August Die Afrikaner reported that (conservative) Afrikaners were tired of the manner in which their anthem ("Die Stem") was being tampered with, and regarded it is a further attack on their national symbols and sentiments. It was also reported that any attempt to deviate from the original setting and words would be unacceptable. The Afrikaner Weerstandsbeweging (AWB) reacted strongly to the suggestion of toning down and merging the anthems - AWB spokesman Fred Rundle (The Citizen, 17 August) referred to this as a "socialist, communist plot to undermine the Afrikaner".

**Attempts to combine "Die Stem" and "Nkosi"**

Cape Town composer Peter van Dijk was commissioned to arrange a combined standard version of "Nkosi" and "Die Stem", which was played in public for the first time by the National Symphony Orchestra at the Altron Prestige Concert in Johannesburg in November 1994. Premier Tokyo Sexwale observed that it would require professional training to sing the new composition (Sunday Times, 6 November 1994). Other musical arrangements are being experimented with unofficially by various South African composers.

Late in 1994 Prof. J.S.M. Khumalo (University of the Witwatersrand) was appointed chairman of a committee on the shortening of the anthem comprising of Mr R. Cock (SABC), Drs. J. Zaidel-Rudolph (composer) and W. Serote, Profs. F. Meer (University of Natal), E. Botha (Unisa), J.M. Lenaka (Unisa), K. Mngoma (University of Zululand), M. Mazisi Kunene (University of Natal) and J. de Villiers (University of Stellenbosch, grandson of the composer of "Die Stem"), and Mrs Anna Bender (musician). At a meeting held on 10 February 1995, some suggestions were put forward as to how the anthem could be modified and the duration drastically shortened. A subcommittee of Cock, Khumalo and Zaidel-Rudolph was appointed to implement the committee decision (The Star, 5 May 1995). Two submissions were submitted to Cabinet, and the shorter of the submissions, approved on 19 April 1995, with the recommendation for certain alterations to
wording. The Committee will be consulted again to attend to the matter, and a second submission will be made to Cabinet.

The submission of the Committee as it stands is as follows:

I Nkosi Sikelel' iAfrika
Maluphakanyisw'uphondo Iwayo
Yizwa Imathandazo Yethu
Nkosi Sikelela, Thina Lusapho Iwayo

Translated (God bless Africa
May its horn be raised
Hear our prayers
Lord bless us, its (Africa's) children)

2 Morena Boloka setjhaba sa heso
0 fedisa dintwa le matshwenyeho
0 se boloke (0 se boloke) satjhaba sa heso
Satjhaba sa South Africa, South Africa

Translated (Lord bless our nation
And stop all wars and suffering
Preserve it (preserve it) our nation
Preserve our South African nation, South Africa)

3 Uit die blou van onse hemel
Uit die diepte van ons see
Oor ons ewige gebergtes
Waar die kranse antwoord gee

4 We can hear the land rejoicing
With a voice not heard before
Let the people of our country
Live in peace for evermore.

The combined anthem which took 5 minutes and 7 seconds to play, has been cut to 1 minute and 35 seconds. It includes five 5 languages in its four verses, incorporating Xhosa and Zulu in the first stanza, followed by stanzas of South Sotho, Afrikaans and English. A musical bridge was created between the two anthems to lead the singing from two verses of "Nkosi" straight into two verses of "Die Stem". (The Star, 20 April 1995).

**Popularity of the dual anthem**
During the first year of the combined anthem's use South Africans clearly became accustomed to the dual anthem arrangement. It was sung enthusiastically at schools, national sporting events and festivities. School children throughout the country learnt at least the first stanzas of each separate anthem. Although most of the white population did not know the words of "Nkosi", it was obvious that the song had become increasingly popular. The support of black leaders for the singing of "Die Stem" in Afrikaans greatly contributed to the spirit of reconciliation represented by the dual arrangement. The stage was therefore set for the acceptance of a shortened version by the majority of the population.

Comparison of "Die Stem and "Nkosi"

Despite the negative comparisons that were often drawn between the two anthems, they actually have a considerable number of commonalities. The most striking is that both evidence a trust in God and conclude with an appeal to bless the land and the nation (people). Although "Die Stem" has sectional images in the earlier stanzas, it ends with a prayer that unites the land and the nation. "Nkosi" also refers to "union" and "mutual understanding" in the closing stages (Stanza 7).

In both anthems the land is portrayed as a living being: "Die Stem" refers to "the voice of our beloved" (1) as soothing (3) and to the population as children (3); "Nkosi" expresses the wish "May her horn rise high up" (1) and that Africa's wickedness, transgressions and sins be blotted out (8). The land is shown as a being worthy of loyalty, devotion and God's blessing. Although gender specification is avoided in "Die Stem" (compared to "Thou hast borne us" in "The Call of South Africa", 2), in both anthems the land is seen as an archetypal mother. The unity of her children and their dependence on her and on the blessing of God are emphasised.

Both anthems are founded on the premise of desirable, life-enhancing social, religious and moral values such as devotion, loyalty, trust, freedom, fraternity, unity, the upliftment of the nation as a whole, the value of work and the raising of the quality of human life.

Both poems contain metaphors relating to nature, agriculture (oxen/stock raising) and the cyclic ages of man (birth/death, cradle/child/youth/woman/men). They succeed in creating a strong sense of unity of space and time, and the transcendence of life and death.

By joining the two poems as interim national anthems, their differences have served to unite Western and African references symbolically. "Die Stem" contains Western references such as Afrikaners, oxwagon, wedding bells and "lanfer van ons rou" (in the blackness of our mourning). A typical rural, African context is evoked by references in "Nkosi" to chiefs, the horn, agriculture and stock raising. The merging of these differences - seen in conjunction with the many points in common between the poems - has resulted in a symbolic unification that may be even more powerful than that evoked by the flag.

Conclusion

As in the case with the new national flag, the merging of indigenous African and Western symbolic traditions in the anthem has laid an ideal foundation for the song to contribute to reconciliation and
nation building. The objection that both "Die Stem" and "Nkosi" were being "tampered with" in the dual arrangement, is to a certain extent set aside by the new, shortened version. This meant that the two existing songs (also "The Call of South Africa") can still be sung and respected as they are by differing cultural groups. The use of the inspiring music of both songs, combined with the evocative metaphors in the references to the country, its scenery and its people, ensures that the new version has the qualities to instill respect, reverence and patriotism. Again, as in the case with the flag, the new symbolic order that the country has entered may see the end of long and acrimonious debates.

9.4 THE NEW NATIONAL CONSTITUTION

Godswill Langa

Introduction

The need for a re-interpretation of history and a redressing of past mistakes within the context of the nation-building described above, received its most powerful focus with the adoption of the interim constitution. Provisions in the constitution on the national state symbols have already been discussed at length. However the constitution also introduced an additional range of highly significant symbols in their own right. They include the democratic constitution itself, the name of the unified country, the state form, a bill of rights, official languages and the office of the head of state. Some of these symbols were new, some were adapted and some remained the same as in the previous political dispensation. Symbolic continuity and compromise were thus ensured.

The "new" South Africa an the constitution

In his introduction to the book, Birth of a Constitution (1994:xiii), de Villiers observes: "Since February 1990 the ideal of a 'new' South Africa became a common unifying symbol to an overwhelming percentage of the South African population. " De Villiers further points out that there has never been clarity about what the "new" South Africa should entail. The parties at the Convention for a Democratic South Africa (CODESA) agreed on general concepts but they disagreed on detail. The elements in the new constitution were the product of negotiation and sufficient consensus among the parties and therefore amount to compromise.

The subsequent acceptance of the 33 principles, which would be applicable to the transitional as well as all future constitutions, ensured that these principles became symbolic of the "new" South Africa. Any future constitutional provision that was in conflict with these provisions would be considered invalid (De Villiers, 1994:41).

The spirit of the new and highly symbolic constitutional order that was entered into, is captured in the first sentence of the Preamble of the Constitution of the Republic of South Africa, 1993: "We the people of South Africa declare that ... there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so
that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms The "new order" that had to be created was indeed a new symbolic order.

The highly symbolic importance of unity in diversity is acknowledged in the constitution and it is recognised that "provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution". The sense of unity reflected in the country's motto is also represented in the name of another important symbol: the Government of National Unity (GNU). The widely differing parties comprising the GNU became the custodians of the new constitutional principles.

The interim constitution has provided a sound basis for a future constitution, which has been widely debated. The publication date of this report prevents discussing details of the final constitution here, but its symbolically most important principles have been guaranteed in the constitution.

**The old and the new constitutions**

The 33 democratic principles that guided the drafting of the 1993 Constitution and all future constitutions are in sharp contrast to the previous constitutional laws collectively known as the 'apartheid laws'. These laws formed the basis of the system the world came to regard as synonymous with oppression. Olivier (1994:50) lists some of these laws as "the withholding of the franchise from black South Africans; the domination, within the tricameral parliament, over Indians and coloureds; the system of parliamentary sovereignty; the absence of a justiciable bill of human rights; the statutory prohibition of a substantive testing right for the courts regarding legislation and executive acts; the subjugation of the executive authority by the party enjoying the support of the majority in parliament; the system of so-called independent states and self-governing homelands; the emasculation of the provincial system, etc." The new constitutional principles represent the "new" South Africa in much the same way that these laws represented the "old" South Africa.

De Villiers (1994:42) mentions ten categories required for the establishment of a new democratic dispensation. Some have already acquired rich symbolic value for the citizens of South Africa. This may be because the application of specific principles has received extensive media coverage and because these principles have engendered the most debate and their reception has been the most mixed and controversial. Of the ten categories mentioned by De Villiers, five have become high-profile issues. These are the following:

- The sovereignty of the constitution and the role of the courts, especially the Constitutional Court, as guardians of the constitution is acknowledged,

- Separation of tiers of government, with the legislative, the executive and the judicial branches functioning independently,

- A representative and responsible government that will be established through general elections on the basis of proportional representation with minority parties guaranteed effective participation and special majorities required for specific matters.
Rights and freedoms that will be protected by a bill of rights and that will ensure that individuals are treated equally. Language and cultural diversity will be recognized and certain collective rights of minority groups and groupings in civil society acknowledged.

The constitutional power of all three levels of government, namely, national, provincial and local, which will be guaranteed.

De Villiers (ibid.47) pertinently asks whether these principles are merely temporary or whether they will be permanent. "The key question is therefore whether the principles in fact reflect the values, spirit, convictions, and democratic culture of the country, or whether they were just a temporary political escape mechanism to keep the negotiations on track - just the proverbial sugar coating of the bitter pill.

During the first year after its adoption it became clear that the interim constitution, notwithstanding its political genesis as a document of compromise, had become a symbol of legal refuge for the man on the street. Minorities, women and even common-law prisoners demanded constitutional protection, rights and guarantees. One could therefore argue that the 33 principles truly reflect the values, spirit and convictions of the country's new democratic culture.

Despite the mystification of the intellectual discourse on the principles, the new interim constitution has enjoyed public acclaim as shown by its frequent usage in informal public discourse. The basic meaning of the various constitutional symbols has acquired far more symbolic significance than the legal language of its clauses would imply. The meaning is a shared one for all South Africans.

The ANC's constitutional principles

The compromises arrived at for the adoption of the interim constitution may well be related to the fact that the priorities of the largest party, the ANC, coincided with those of the other major parties. In a document compiled by the ANC entitled Constitutional Principles for a Democratic South Africa (ANC, 1993), the ANC gives five requirements for a united South Africa: the territorial unity and constitutional integrity of the country; a single citizenship, nation and a common loyalty; the dismantling of all apartheid structures and their replacement by institutions of government that are truly non-racial and democratic; a single system of fundamental rights guaranteed on an equal basis for all; and the flag, names, public holidays and other symbols of the country which should encourage a sense of shared South Africanness.

Additional constitutional symbols

In addition to the 33 principles some other elements of the constitution have high symbolic significance. The name of the country, Republic of South Africa, has been retained in spite of its association with the past. The only difference is that in terms of the new constitution the
sovereignty of this territory now includes the former TBVC states. More will be said about the name of the country in the following section.

The office and authority of the president have been considerably enhanced. The normal powers and functions of the president, including the appointment and reception of ambassadors, plenipotentiaries and diplomatic representatives, and the negotiation and signing of international agreements (De Villiers, 1994:60), have been expanded. The constitution has created the possibility for the first president to become an internationally respected statesman whose views are crucial to economic, military and technological trade between South Africa and other countries.

The interim constitution emphasises the minor role of Government in imposing laws and recognises that power resides in the people. Terms like "people-driven sustainable development" or "people-needs analysis" became so popular after the elections that they have sometimes been reduced to the level of mere rhetoric. The equally symbolic Reconstruction and Development Programme can only succeed through "people participation".

**Official languages**

For almost a century the choice of official languages has been one of the most contested areas of cultural power. During the previous political dispensation the privileged position of English and particularly Afrikaans as the only official languages caused much resentment. Provision for the widest possible compromise is made in the interim constitution:

1. Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siswati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.

2. Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for the rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).

Although the languages that are mainly spoken in parliament are English and Afrikaans, members of parliament have been known to quote extensively from other official languages as well.

It is clear that the interim constitution has served as a unifying factor for a highly diverse South African society. Its framers aimed at satisfying and safeguarding everybody’s interests, while at the same time limiting the powers of government.

These twin aims may prove hazardous. For instance, the private individual's right to access to confidential information held by the government pertaining to himself/herself may compromise the state's right to gather information it deems crucial to its security. It is therefore not surprising that the function of the Constitutional Court to interpret and give final judgement on such disputes has
led to its being perceived as the most powerful court in the land. The Constitutional Court is itself a symbol of hope for the individual against the possible tyranny of the state.

Major disputes between political parties have been defined by either the inclusion of elements in or their exclusion from the constitution. An example was the dispute between the Inkatha Freedom Party and the African National Congress on whether or not international mediation is required, which has replaced traditional weapons issues as sites and symbols of the political struggle. The degree of central as opposed to regional powers as defined in the constitution is also a constant source of conflict.
The shape of the new South African society will be profoundly affected by the new constitution, which can be said to be national culture in the making.

9.5 PLACE NAMES AS SYMBOLS

Lucie Moller

The old order changeth, yielding place to new...

Introduction

Place names, from whichever language they originate, are used by all the inhabitants of a country. This renders them a common cultural asset, although these names may at the same time be ethno-culturally based. As such they may become a unifying factor that can promote national identity and a shared nationhood. However since names are amongst the most powerful symbolic signs, they can either promote unity within a multi-cultural diversity, or cause irreparable divisions.

(EXCERPT)

The name of the country

Thus far and constitutionally the official name of the country has still been retained as Republic of South Africa and Republiek van Suid-Afrika in the former two official languages. Suggested name changes included that of the country, where Azania was quoted as a possible alternative in earlier reporting. Although some debates in the media proposed the name Azania for the new South Africa, even President Mandela commented "that it is far-fetched to presume that South Africa's name is to be changed to Azania... " (Die Burger, May 3, 1994). This name has, over the years, drawn mostly negative reaction, especially from the nationalists and far-right, but also from other groups, even the ANC in general, mainly probably because of its resemblance to the Azanian Peoples Organization (AZAPO) as well as its military wing APLA; also because of its racist connotation of a designation referring to "the country of black tribes (blacks)", and its reference in old Arabic documents as a region somewhere in middle Eastern Africa and not Southern Africa (Hilton, 1994).

To know and use the name of the country in all eleven national languages has now become important in all forms of communication. A list of the short forms of the name is included here:
THE RASTAFARIANS OF SOUTH AFRICA

MEMORANDUM

TO: The Constitutional Assembly - Theme committee No. 4
RE: Rastafarian rights of Livity and Religion
DATE: 30 June 1995

INTRODUCTION

The Rastafarians of South Africa are part and parcel of the marginalised communities and have fought side by side with the oppressed masses for the liberation of our country. We have found our own answers to the cultural economic and educational underdevelopment which plagued us during apartheid reign.

In this presentation we aim to share with the Constitutional Assembly (theme committee 4), how we could assist in bringing peace amongst the people and through our example, introduce the people to a sustainable lifestyle (1 and I Livity).

The attached documents merely serves to shed some light on our outlook and how we fit into society at large. The diversity in the individual submissions which came before the C.A., proves that we hail from all layers and backgrounds of our society. Our movement is in a process of centralisation and a working committee was established to intervene on behalf of the national structure of the broader rastafarian movement.

HISTORICAL BACKGROUND

For many years we slowly emancipated ourselves from babelon thinking and developed principles which guide us. We also live a life now which is integrated with the aspirations of descendants of the African Diaspora. Through apartheid years we used our music and lyrics to call for the downfall of babelon and for the release of our leaders from prison, president Mandela being the one who received our most ardent attention.

Our life style is aimed towards a sustainable environment. There are laws that exists however, which makes it impossible for us to achieve this sustainable environment. This has led to a conflict between ourselves and the state and subsequently being misrepresented as mere criminals because of our lifestyle. By making this representation to the C.A. we aim to set in motion a programme of engaging with the government in a positive way rather than from opposite ends. We are Africans who believe that Africa must find a solution to its problems, not aggressive western governments.
Through our Afrikan socialism, rastafarians have fed our poor, clothed our naked, gave shelter to our homeless and nourished our sick.

**RECOGNITION OF RASTAFARIAN WAY OF LIFE**

The government must of necessity recognise the positive forces at work amongst the people. Failure to do so will mean ditching important allies in the fight against the problems of poverty and crime. We need to be told that we are on the right track by this government. The people already know how they benefit from our lifestyle and positive intervention in matters pertaining community life. However, the state appears to be caught in a grip of political paralysis concerning our freedom of religion and recognition of our rastafarian way of life and principles. If this legitimate government do not recognise us, our mediating work in the communities will continually be undermined. We represent hope, we offer practical solutions.

**RECOMMENDATION**

We recommend that the state afford us the opportunity to address parliament. We also wish to have an audience with the state president in person.

Further, we recommend that we become part of a government task force to carry out feasibility and viability studies on the matters raised in the body of the submission, so that the state can prove for itself beyond doubt, that the rastafarians are on the right track. We suggest that the state seriously look at the laws which prohibits us from carrying out our freedom of religion, particularly pertaining our alter practices.

**INTERIM WORKING COMMITTEE of the RASTAFARIANS OF SOUTH AFRICA**

**DOCUMENTS INCLUDED:**

1 DREAD RASTAFARI  Background information on Rastafarians

2 NYABHINGI GUIDELINES  * About our Religion

3 HEMP AND ITS USES  * Scientific Research done by BACH

4 GANJA INFORMATION  * Information gleaned from the internet

5 APPENDICES  Submissions by the Movement of Jah people
  Submission by the Burning Spear movement
1. **DREAD RASTAFARI**

We are certain that you have knowledge of the Rasta way of life. Yet it is our duty to inform you of our conceptions, aspirations and desires.

Glory to Word, Sound and Power, to the one who wears the holy banners of creation and destruction upon his breast plate that testify his ordained sanctity and dominion over his entire earthical and universal realms. The one true Lord and saviour manifest for all to see in his physical presence through the ancient lineage of King Solomon and the Empress Makeda, the Queen of Sheba 3500 B.C and traces his dynasty to the Cush 6500 B.C. His Imperial Majesty Emperor Haile Selassie I is the 225th descended in the lineage of the Solomonic Dynasty and the 66th ruler of Ethiopia since 13th century restoration.

**PROPHESY FULFILLED**

Those who are aware of the history of Ethiopia can never forget the mystical manifestation of the birth of Ras Tafari (Jesus reincarnation) on 23rd July 1892. This was fulfilment of Isaiah 9:6.

Tafari grew up with great wisemind and knowledge, and regard to prodigy. From the day he was brought forth into the world, he identified a new beginning for humanity, a new philosophical perspective, one oriented to the nature and global environment, one destined to realise that the prophesies of the Old Testament book of Isaiah are indeed real. At a young age, the prophesied son had already held numerous great positions with the government, he had already begun to structure the identity by which people should pursue the moral conduct-of life and idealism of self-determination. On 2nd November 1930, Ras Tafari was crowned Emperor of Ethiopia and he took the new name and title - His Imperial Majesty, Haile Selassie I (power of Trinity), King of Kings, the Conquering lion of the tribe of Judah, Elect of God.

**THE GRAND CORONATION - MORE PROPHESY FULFILLED**

The grand coronation of the Emperor which was attended by thousands of people including heads of many African states and other foreign dignitaries from all over the world was a direct fulfilment of prophecy as recorded in-Revelation 5:1-5

**LEAGUE OF NATIONS AND UNITED NATIONS CHARTER**

As an Emperor of Ethiopia, Selassie I was instrumental in bringing Ethiopia and other African states into the League of Nations, which proved to be pivotal to black Africa in its quest to gain the
Recognition and respect for the world it rightly deserves. Just before Ras Tafari became Emperor in 1930, he gave people of Ethiopia their first written constitution. His plea before the League of Nations in 1936, as Ethiopia was ravaged by Mussolini’s Army and anguished exile during the following years are etched in the memory of world history. H.I.M refused even to allow retaliation against the defeated invaders (Italians). When the United Nations charter was drawn up after World War II, Haile Selassie I was one of its original drafters.

THE ORGANISATION OF AFRIKA UNITY

In 1963, he established the Organisation of African Unity to encourage cooperation amongst African states and to co-ordinate their efforts to build a better life for all the people of Africa. His teachings and philosophy spoke of a wisdom attained from Powers Most High. For InI (us) it is hard to comprehend how any single human being could possess such knowledge and, how he could constantly generate such accolades, for all who heard H.I.M speak acclaimed his philosophy and were astonished by his moral authority, his Godly wisdom.

THE SOLOMONIC LINEAGE

From the loins of the biblical King David who sat on the throne and ruled divinely, came forth the successor to the throne. King Solomon's gift from Jah was a cup overflowing with wise-mind, knowledge and understanding. For Solomon did not ask God for world material things, but instead asked to be a perfect instrument in the sight of Jah, to carry out His works as a perfect balance, to discern good from evil. InI all know the story of King Solomon and the Queen of Sheba, and the conception of the Solomonic Dynasty in the Hola land of Ethiopia. This is the beginning of Solomonic lineage in Ethiopia. From the beginning of this worthiness revealed in King Solomon, through his lineage, 225 Kings later, the power of the Trinity, Jah H.I.M-self, revealed his face onto man, seated on the throne of Solomon.

THE ARK OF THE COVENANT

Ethiopia, an island of Christianity is recorded in history as having received the old testament, and then the new testament, earlier than most countries of the world. As a nation, Ethiopia is the symbol of free people and the ever-living foundation of truth and rights. Ethiopia is the seat of the living I. It is forever hold" strong, forever preserving the original order of mankind. More importantly, Ethiopia is were the Ark of the covenant is kept, the dwelling place of Jah on earth. For, it was here that the laws of Jah were brought forward to the Rastaman Moses, symbolic of a covenant between Jah and man. Here is where the Ark of the covenant will be amongst His people.

I AND I FREEDOM OF RELIGION

From the love and careful study of the Holy Scriptures together with the history of man on earth (since the Almighty God has placed no limitations on man's mental conceptions), Rasta have derived conceptions based upon the character and divinity of Emperor Haile Selassie I. Rastafari Idrens by divine inspiration depict as the living God, the returned Messiah, the Ancient of days, the leader and reviver of our nations' ancient glories.
THE CRACK OF A WHIP IN THE SLAVESHIP

I remember the days of slavery where African people were taken away from the land of their forefathers to the western world for cheap labour in plantations. These people were taken from all parts of the continent Africa (Ethiopia) We remember particularly the sufferation, killing and the unhealthy living conditions these people were subjected to. Slavery days significantly crippled the lives of black people internationally. The violence in the ghettos, crime, drugs are the echoes of slavery. The anger, frustration, hate and destructive syndrome amongst our people are the result of slave mentality forcefully instilled in the minds of our people. InI have been racially discriminated against, dehumanised and deprived of the will to change. These are problems that are real and must not be tolerated. Even in our communities the healing process has to take place. Those conscious few who are equipped to deal with these issues have to be given that opportunity.

REPATRIATION

Since the emancipation of slaves and the abolition of slavery, Africans in the diaspora have been involved in negotiations with various governments and organisations regarding the issue of repatriation to the motherland Africa (Ethiopia).

The Rastafari brethren are currently keeping the flame burning, agitating vigorously in this hemisphere for governments to subsidise transportation for the slave descendants of Africa to be repatriated back to Africa.

MARCUS MOSIAH GARVEY

AFRICA FOR THE AFRICANS

A black conscious leader and father of Pan-Africanist ideology Marcus Mosiah Garvey is one of the sons of the soil who have made a great contribution in Africa's struggle against colonialism, imperialism, oppression and racial discrimination. The vision of Marcus Garvey was to promote the cause of morality internationally and historically. As a man of destiny and as a man of colour, he endeavour to promote black pride and black nationalism. Africa is the land of our forefathers, were all mankind originated. It is the cradle of civilisation. In his own words, Marcus said "Africa is for the Africans, those at home and abroad". As far as Garvey was concerned, when that has been accomplished, we will bring back the earth to a peaceful place as it was in the beginning. And the springs of joy and happiness, and kindness and love and unity shall flow across the universe as the waters cover the seas.

WORLD PEACE AND UNITY

As a young man, Mosiah grew to maturity while developing the sensibility which would make him a world leader and mark him as a man of destiny. As he was widely travelled, he learned much from his experience of the world. A very crucial mission for 'the President of Africa' was to ensure world peace, world unity equal and citizenship to all. He saw people of colour being suppressed and oppressed by their colonial masters. During this time, he also saw the alleged leaders of the
oppressed selling their people away to those who could pay. With these experiences, Marcus Garvey developed his important philosophy of equality - that all beings should live in peace and harmony while their lives should be filled with worldly love. With this philosophy, Garvey fought battles with the expectation of an important time when all would be equally recognised, a time when all races and all peoples will live together in peace and harmony. Having seen black oppression and the pain of millions across the world Marcus knew the true meaning of hope.

ONE AIM! ONE JAH! ONE DESTINY!

In his return to Jamaica from exile, Mosiah Garvey launched the Universal Negro Improvement Association (U.N.I.A) also known as the back to Africa Movement. His main ambition was to unite the negro race by establishing a country and government of the black race first - a country founded on the idealistic motto One Aim! One God! One Destiny! In 1919 the organisation had 30 branches across the country with a membership of approximately 2 million, the largest international African organisation and mass movement in modern history. To further spread his message, Marcus started a weekly newspaper for the negro world. The negro world then became known as an early vehicle of black cultural and political empowerment. His objective was to provide readers with tools necessary for them to regain their identity, enabling them to use these as weapons in the struggle for political independence. With Marcus Garvey's dream spreading across the world and his influence growing everywhere, his fight for dignity never ended. That Mosiah had true leadership abilities was seen in the oppressed who wished to hear his voice, to know his words, to live by his principles all the time. Garvey's vision was specifically for the oppressed: for those who are sick, for those despised because of the colour of their skin.

LOOK TO AFRICA

Garvey was constantly in trouble with the Jamaican system who harassed him and frequently brought charges against him throughout the years of his struggle. In 1929 Garvey formed a political party to change those conditions which unjustly hounded him. The name of the party was People's Political Party. They issued a manifesto which was presented to the people, elaborating on the reforms the he black masses still manifesto proposed, reforms that would have benefited labouring under the heavy yoke of British Imperialism and colonialism. When Marcus was imprisoned after he was found guilty for the manifesto, his party was eliminated. It was during this period of trial and tribulation that Marcus is remembered to have prophesied: “LOOK TO AFRICA, WHERE A KING SHALL BE CROWNED, FOR THE DELIVERANCE IS NEAR”

As a man of destiny, a philosopher and visionary who lived his life meeting and conquering along the way numerous adversities of mankind, Marcus Garvey and his work will continue to inspire others to take up his burden, to live within the spirit of truth, to become a people of one destiny. ONE JAH! ONE AIM! ONE DESTINY! - these were the foundation of Marcus Garvey's ways.

RASTAFARI

In Ethiopia, the word Ras means king and Tafari stands for Head Creator. Rastas are called by his name Jah Rastafari, Emperor Haile Selassie I. The word Jah is short for Jahovah, the name used for God in the bible before it was translated by King James. Rasta are hear to make the world a better
place to live in. Rastafari is the way of life, InI culture, a complete eternal life binded by faith. Peace, love, non-violence, humbleness, respect for humanity, healthy mind and body, equal rights and justice as well as true righteousness are InI guiding principles. We are closer to nature through daily living, we consume food that comes directly from the soil. InI is people of the past living in the present and stepping into the future.

HUMAN RIGHTS

According to the Human Rights Bill, every citizen have fundamental rights that have to be observed and respected by fellow citizens. We of the Rastafari community would like our livity to be overstood and our fundamental human rights to be respected. As law abiding citizens of this country, we would like to call on the state to ensure that our rights are not violated.

RIGHTS TO PRIVACY

Rasta do not have privacy even in ii own backyards, because of the continuous raids by the police. About the use of cannabis presently illegal in the country, InI is endlessly harassed because InI is known to use this herb by the police in particular and society in general. This is really a violation of rights to privacy because the manner in which these raids have been conducted is inhuman. They do not produce any search warrants and when confronted them use force.

RIGHT TO RELIGION BELIEF AND OPINION, THE RIGHT TO LANGUAGE, CULTURE AND CUSTOMS

Rastafari Faith

InI faith needs to be understood by everyone so that it can get the respect it deserves. The motto of the Rastafari faith is peace and love tithe whole earth. Rightful Justice to the whole earth and its inhabitants. Our works in the faith of Rastafari is righteous living together, for we are convinced that righteousness must cover the earth as the water covereth the seas - good must rule over evil.

NYAHBINGHI ORDER

We are also of the order of Nyahbinghi originally used by Melchisedek the biblical high priest and kings of righteousness The order of the Nyahbinghi carries the instrument of justice and judgement. The judgement of the Order of the 'Binghi is to liquidate and terminate all evil conceptions The justice thereof for the just is to guide and call everybody to step in the road which leads to cities of everliving life. The Theocracy Reign (as opposed to democracy) is a righteous government, and is administered through divine principles. All instruments of authority are in holiness.

CANNABIS SATIVA

The herb which is known as Cannabis Sattiva and is criminally called dagga or ganja, is commonly used by Rasta, sons and daughters of the faith. Rastafari at home and abroad without fear, for divine purposes, for medicinal purposes and dietary purposes use this miracle plant given unto I and I by Jah. This is in accordance with the Bible and the laws of nature. Cannabis is also used in
divine ritual and in hola communion in the Order of the Melchisedek Nyahbinghi. It is typically burned by InI around the wide field of the assembly.

In the time of a government of national unity, Rasta who were also in the forefront of the liberation struggle today find themselves being subjected to the same unjust laws of the apartheid government.

INDIGENOUS PEOPLE

I and I are the true cultivators of the land which we completely depend on for providing for our agricultural needs and everyday food. Historically, we are the true Khoisan African. InI forefathers are indigenous cultural people from the Ethiopian highlands that trekked downwards to the south to become the first inhabitants of the southern African point. We have a right to practice our indigenous culture in our forefathers land. We need land to plant our own vegetables and fruits and to build I and I shelter. On this note, it is of leading importance to state that land is a means of production Rasta finds difficult to live without especially regarding that a highly significant part of InI food comes direct from the ground.

5. RASTAFARI MOVEMENT OF JAH PEOPLE
CAPE TOWN BRANCH

Minister of Arts. Culture, Science and Technology
Parliament
Cape Town

Dear Deputy Minister

DEMAND TO LEGALIZE GANJA

Ganga is incense for burning in the temple of I&I body. I&I are not drug takers as the government tries to claim since "The herbs are for the healing of the nations" (Rev 22 vs;Psalms 104 vs 14 and Genesis 1 vs 29). Rasta believe that the ganja is seen by the system as an excuse to economically exploit I&I through such methods as: heavy court fines for possession of even the smallest of quantities; huge sales of RIZLA wrapping paper, the revenue from which the state; and by hypocritical and underhand international government tradings in ganja and allow key businessmen to safely trade while prosecuting I&I. The government also use their laws on ganja as a way to debase I&I traditions and to use their police to brutalize I&I for what they call illegal possession, even if the plant it on us themselves.
Scientific and medical evidence proves that cigarettes and alcohol both favoured by the government are harmful to health. How the ganja herbs have been used for centuries in Afrikan and India to heal many ailments. It has been used as one of the herbs in the communal peace-pipe because, when smoked in a group, ganja induces oneness of Spirit and mind in righteousness. Many "non" Rastas are now Smoking ganja as an escape and for a "kick" and a thrill. However, Rastas use it as a traditional sacrament in Spiritual enlightenment and meditation on Jah, Haille Selassie I.

Ganja herb is Spiritual food and is blessed before use, just as our Grace or Thanks is given to Jah (God) for body food. Likewise, as overeating and other abuse of food will cause ill health, so misuse and abuse of ganja will cause negative mental and psychical health, contrary to it's role of providing "healing for the nations".

For centuries, cultures all over the world have been using the ganja herb, and it's been accepted that people of all ages benefit from regular use of ganja. Ganja has been known to man ever since the beginning of creation. Ganga psychoactive qualities were documented by the Greek historian Herodotus. The Chinese were familiar with ganja medical qualities 5000 years. The first jeans were made from ganja (cannabis) canvas sail material. Their is food value in the ganja seed. Even today it is widely used all over the world to treat cancer, pain in Aid sufferers, gout, asthma, migraine and pain in birth. It's lessons spasms caused by multiple sclerosis and reduces eye pressure for glaucoma patients. South African doctors are following international trends and calling for ganja to be legalised for limited medical use. Up to 70% of doctors treating cancer patients with chemotherapy are already "prescribing" ganja to help their patients relive the nausea that follows treatment, according to Cape Town neurologist and research, Professor Frances Ames. Ganja already has a lengthy pedigree as a medical herb. Nigel Gericki, Director of U.C.T. Traditional Medicine Programme, adds that it has been proven that ganja is a painkiller and has anti-asthmatic, anti-epileptic, anti-tumour, and antibacterial properties. The herb has been used by cultures, all over the world for at least 5000 years, treating amongst other ailments, inflammation, digestive disorders, depression, rheumatism and migraines.

The first Europeans who came into contact with ganja were the Spanish colonists in America. The Aztecs, Mexicans and the Indians were working in their cultures with ganja. For them they were for religions, or medical means. Ganja is the EAST INDIAN name for the herb, and, among Rastas, it's highest -form is "KALI" named after the INDIAN goddess in whole honour ganja is smoked along the river GANGES.

HOW GANJA CAN SAVE THE WORLD

By growing ganja we can save the world. Young people in S.A. only know about ganja. On hearing the name hemp, the connection with a shirt may spring to mind, probably remember from long forgotten school books. Mankind walk in hemp (ganja) made clothes since the bronze age. We would have a letter from the Middle Ages on paper, if the paper hadn't -For the main part been made from ganja fibre. Even now banknotes in America are still being made mainly of ganja fibre.
THE MEANING OF GANJA FOR THE FUTURE

GANJA can replace fossil fuel (like petroleum) and derivations of it (like plastics). It's been said that it could be possible to make environmental-friendly fuel from hemp, as well as plastics, paper, textile fibre, paint, varnish and building materials. Ganga with it's biological mass production could well be the raw material for these products. The seed, which is rich in oil and protein, can also be applied in many ways. It would be highly appropriate as food, the seed contains more protein than soya. Precisely because of the numerous possibilities for application, the subject of ganja doesn't only concern the smoker but everybody who believe in a better future.

In spite of the many possibilities ganja is little used at the moment. The insufficient information about it plays a certain part in this. The most important reason is the taboo on the herb. Because the flower of the female plant contains mind expanding substances, the historical meaning and possibilities are kept in the dark.

STUDY OF GANJA IN U.S.A. AND THE NETHERLANDS

The advantages of using ganga were already shown in the thirties (30s) by the U.S.D.A. (United States Department of Agriculture). In a report the department mentions that 10,000 hectares of ganga produce as much pulp (biological mass) as 41,000 hectares of normal pulp land. Woods, that is. You probably understand that, in this way, ganja offers the possibility to quit cutting down trees. However, these aren't the only advantages for the environment. The vegetation is good for the structure of the soil. Over fertilized and sick soil can be restored by growing ganja and the grown can be cultivated on the same land for several years. The, ganja (or vegetable material in general) can be made into many products is clearly shown by the German elephant-grass-project. Here the petrochemical industry has proven that many fabrics can be produced by vegetable material (plastic, fuel, etc.) For further research into the possibilities the European Community has awarded grant of 300 million marks.

Ganja can be used in the art of cooking, for instance by mixing ganja in cookies, cakes, or muffins. When smoked ganja caused no addiction or physical dependency, it is possible with the user (smoker) habit formation may occur. Also long lasting use does not cause any permanent damage. Although it's often stated that the intensive use of ganga products will lead to addiction of harder drugs, it has never been proven. It is possible that the user of ganja does move on to hard stuff, but that is due to environmental factors (social, economical educational) rather that physical ones. Everybody knows very well that in the Netherlands no action is taken against ganja users. It has been like this since the beginning of the seventies when the government received many requests from many different directions to take the use and the possession of small quantities out of the domain of criminal law. The government reduced the private use of ganja from a criminal offence to a misdemeanour. And as it is known, you will not be persecuted so quickly for a misdemeanour (think about the parking tickets). In 1976 the differentiation concerning the persecution and prosecution of soft and hard drugs was adopted in the Opium Act. Since then the possession of less than 30 grams of ganja are no longer considered a criminal offence. N.B.: the possession and the trading of ganja CAN be persecuted, but in reality the small retail is legalized. The Dutch Justice department and the police are aiming at wholesale. A well known name for their policies is
tolerance. I&I hope the S.A. Gcvernment will take a lesson -from the Dutch books and make life easier -for all the people of S.A.

The R.M.J.P. hope that your immediate attention is given to the information in this letter and your response be made accordingly.

Yours faithfully,

for RASTAFARI MOVEMENT
of JAH PEOPLE.

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THE BURNING SPEAR MOVEMENT

MARCH ON GRASSY PARK
POLICE STATION

SUNDAY 5 DECEMBER
9.30am Parkwood Ave

CALLING FOR:
1. THE RECOGNITION OF RASTAFARI AS A TRUE RELIGIOUS MOVEMENT;
2. EMPEROR HAILE SELASSIE 1 AS THE ROOT OF KING DAVID, KING OF KINGS AND LORD OF LORDS, CONQUERING LION OF JUDAH (1 TIMOTHY 2v 1 5; REVELATIONS 5v5);
3. FOR THE FREEDOM OF SPEECH, ASSEMBLY AND INFORMATION;
4. RIGHT OF ASSOCIATION, RELIGION AND CULTURE;
5. A CEASEFIRE AMONG ALL INHABITANTS OF AFRICA.
6. AN END TO THE SAP HARASSMENT OF ALL RASTAFARIANS

WE THE BURNING SPEAR MOVEMENT IS CALLING FOR THE AWARENESS OF THE "DREADED HERB", GANJA. DAGGA, CANNABIS, HEMP, . COLLIE. WEED. ETC.

IT IS TO WORLD CONSCIOUSNESS THAT THIS PLANT IS A MIRACLE PLANT. IT HAS HUNDREDS OF THOUSANDS OF USES AND MAKES TONS OF MONEY (R12- BILLION A YEAR. UNTAXABLE).

GANJA CAN BE USED TO MAKE OIL, ROPE, CLOTH, BRICK AND PAPER. IT CAN SERVE AS A FUEL, FOOD, MEDICINE. IT CAN GROW IN ANY CLIMATE AND COULD HELP TO REVERSE THE GREENHOUSE EFFECT. IT IS ALSO ILLEGAL BUT AFTER 83 YEARS IN SOUTH AFRICA THE BAN'S DAYS ARE NUMBERED.
IT IS TIME THAT WE LOOKED AT DECRIMINALIZATION OF THIS PLANT. WE ARE IN A NEW SOUTH AFRICA WITH A NEW CONSTITUTION. THE BAN ON GANJA SINCE 1911 AFTER THE UNION OF SOUTH AFRICA IN 1910 WAS A RACIAL BAN. NO BLACKS HAD THE VOTE AND A PART OF THEIR CULTURE WAS BANNED.

FOR RASTAFARIANS IT IS THE DEPRIVATION OF THE RIGHT TO RELIGIOUS FREEDOM. UNDER THE NEW CONSTITUTION CLAUSE 14 SAYS "EVERY PERSON HAS THE RIGHT TO FREEDOM OF CONSCIENCE, RELIGION, THOUGHT, BELIEF AND OPINION."

FACTS OF GANJA

1. ENVIRONMENTALISTS SAY THAT IT IS THE CURE FOR DEFORESTATION, OZONE DEPLETION AND MANY MORE.

2. THE DOCTORS, PROFESSORS, TRADITIONAL HEALERS, HERBALISTS SAY THAT IT IS A MIRACLE HEALER BECAUSE IT CAN CURE SO MANY ILLNESSES AND INCREASE THE ZEST FOR LIFE.

3. IT WILL FUND THE RDP, CHILD WELFARE AND VARIOUS OTHER CHARITABLE ORGANIZATIONS AND CREATE THOUSANDS OF JOBS FOR THE PEOPLE.

4. WILDLIFE FEDERATIONS KNOW IT IS A GREAT NUTRITIONAL FEED FOR ANIMALS.

5. HISTORY TEACHES US THAT ALL ROOTS, CULTURAL OR NATIVE PEOPLE WORLD WIDE. NAMELY AFRICANS, AMERICAN INDIANS, CHINESE BUDDHISTS, ABORIGINES OF AUSTRALIA, PEOPLE OF THE AMAZON IN BRAZIL AND EVEN HERE THE KHOIKHOI OF SOUTHERN AFRICA. AND MANY OTHER !INDIGENOUS PEOPLE ALL USE GANJA AS A DAILY SOURCE OF LIFE.

6. IT IS THE ANSWER FOR THE WORLD’S DRUG AND CRIMINAL PROBLEM. IT HAS MORAL AND ETHICAL VALUE WITHIN SOCIALLY DISRUPTED SOCIETY.

7. WE THE RASTAFARIANS ARE UPRIGHT AND JOLLY PEOPLE AND WE ASK FOR THE DECRIMINALIZATION OF THIS PLANT IN A SCALE OF UNITY AND EASE THE BURDEN OF THOUSANDS OF BRETHREN WHOSE FAMILIES SUFFER AND FEEL THE PAIN OF THE CRIMINALIZATION OF THIS NATURAL HERB.

IT IS TIME FOR THE TRUTH TO BE SPOKEN. EVERY CONSCIOUS NATURE-LOVING PERSON SHOULD BE THERE. THIS IS AN IMPORTANT EVENT.
AN INFORMATION KIOSK WILL BE OUTSIDE THE SABC BUILDING FROM MONDAY 5TH TO FRIDAY 9TH DECEMBER.

ONE GOD   ONE AIM   ONE DESTINY
3-5-1995

CHURCH OF THE PROVINCE OF SOUTHERN AFRICA
ANGLICAN
Barkly East

PREAMBLE

I agree wholeheartedly with the words of the highly respected Michael Cassidy and believe we will not be offending any of the atheists of our country by retaining "humble submission to Almighty God". We need a reference outside of ourselves.

The Church continues to uphold the leaders of our land in this difficult time of transition. May the wisdom of God guide our land.

Our anthem does appeal "God bless Africa."

MICHAEL HALL
(Rector and Archdeacon)
SUBMISSION OF THE AFRIKAANSE TAAL- EN KULTUURVERENIGING (ATKV) TO THE THEME COMMITTEES OF THE CONSTITUTIONAL ASSEMBLY IN RELATION TO THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993 (the CONSTITUTION)

1. INTRODUCTION

1.1 WHAT IS THE ATKV?

The ATKV is a voluntary cultural organisation established in 1930 with its main aim the preservation, upholding and furtherance of the Afrikaans culture.

1.2 WHAT IS CULTURE?

"Culture" can be described as the way of living of a specific group of people and consists of components like religion, social customs, the economy, the judicial system, languages (including dialects of a specific language), art and sport. All these components together form a cultural unity which identifies a specific group of people and creates a milieu of security for the specific group.

BASIS FOR THE SUBMISSIONS

South Africa is now one sovereign state wherein a common South African citizenship is recognised (Constitutional Principle 1) in the midst of a diverse multi-lingual nation (Constitutional Principle XI).

The individual's recognised fundamental right to human dignity fails within the recognition and protection of his right to free participation in cultural activities in order to establish and protect his own identity and milieu wherein he (in his group, if needed) can experience a sense of security. This will ensure an effective, and healthy unity amongst all citizens.

2. SUBMISSION - SECTION 31: LANGUAGE AND CULTURE

Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

The ATKV supports the present section 31 of the Constitution for the reasons given.
Legalizing pornography

With the spiralling increase of violence in the country, South Africa cannot afford to fling open the doors of immorality and immodesty by the least exposure to pornography.

Pornography, at every level, is indeed a crime and at least abominable to all sensible people. It hurts to bear that in our civilized world there are "academics" and "intellects", who very well know the consequences of this sin, should even give it a thought to entertain society in this manner. Adding to the list of vices creeping into our community, pornography may vie as the most prominent and hence destroy the very embryo of our society.

Therefore in the interest of all South Africans, we strongly call for the total ban on pornography.

Thank you and God bless

AHMED KATHRADA
RELATIONS OFFICER
13 March 1995

Subtheme Committee 6.1

SUBMISSION WITH REGARD TO THE RELATIONSHIP BETWEEN THE PUBLIC SERVICE COMMISSION AND THE NATIONAL DEFENCE FORCE

During the public hearing on Public Administration and the Constitution on Monday 27 February 1995, an invitation was extended to the South African Defence Force (SANDF) to render a submission on the relationship between the Public Service Commission (PSC) and the SANDF.

A staff paper has been prepared by the SANDF for submission to Subtheme Committee 6.4. A copy of the staff paper is enclosed for contemplation by Subtheme Committee 6.1.

Your invitation to submit this staff paper is greatly appreciated.

(SGD) (VICE ADMIRAL P VAN Z LOEDOLFF)
CHIEF OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE:
GENERAL

STAFF PAPER
01 JURISDICTION OF THE PUBLIC SERVICE COMMISSION IN MATTERS CONCERNING THE SANDF

INTRODUCTION

1. It is universally acknowledged that the military profession is clearly distinguishable from any other dispensation which the State is responsible. The unique demands placed on military personnel differ markedly from those required of other Public Servants. Ultimately soldiers are by implication expected to endanger their own lives to protect the State. The Defence Force has to remain intact, retain credibility and impartiality and prove reliable even when other organs of State fail or are severely disrupted.

2. The Constitution (Sec 21 0(1)(a)) sets out the role and function of the Public Service Commission and includes the SANDF in the Public Service (Sec 21 2(8)).

AIM
The aim of this submission is to motivate for a special provision to give the SANDF greater management autonomy in respect of those unique service conditions pertaining to the SANDF and direct access to the Public Service Commission in regard of all other service benefits of a common nature.

DISCUSSION

4. The majority of the uniformed members of the SANDF serve in terms of the Military Practitioner Personnel Administrative Standard (PAS). The SANDF already has wide delegated powers with regard to the following functions:

(a) Organisation and administration of the SANDF. For a number of years the SANDF has been authorised to create its own structure and to create posts in the Military Practitioner PAS without reference to the PSC.

(b) Personnel practices, appointments, promotions, transfers, discharge and other career incidents and matters in connection with employment of uniformed members have been delegated to the SANDF and handled internally within the SANDF without reference to the PSC.

(c) The SANDF has always been wholly responsible for its own promotion of efficiency and effectiveness.

(d) The Code of Conduct for the SANDF is promulgated in the Military Discipline Code which is part of the Defence Act. The PSC does not play any role in the upholding of the provisions as laid down.

5. The PSC is, however, responsible in all matters concerning salaries, pay and allowances and other conditions of service of members of the SANDF as part of its mandate to make recommendations and give directions in this regard for the whole public service. It is particularly in this area where specific problems occur when the Office of the PSC amends and prioritises or rejects Defence Force submissions.

(a) Very specific career prospects are applicable to the military especially the requirement for shorter term service as well as more flexibility in respect of service dispensation to ensure the necessary supply of young, fit junior ranks and to retain personnel for middle and senior level position in the SANDF.

(b) Occupational allowances, operational duty allowances and very specific dispensations for example with regard to service outside the borders of the country (now that UN Peace-keeping Operations are anticipated) require decisions vastly different to the rest of the public service.

(c) Quick reaction time is often essential to guarantee success. The Defence Force is frustrated and impeded in having to stand in line and at times wait years for directives from the Office of the PSC.

(d) The position of the members of the SANDF who are excluded from the Central Bargaining Chamber due to their exclusion from the mechanism of bargaining through the formal labour/trade union movement is, to say the least, unenviable.

(e) The Constitution will have to address the problem of providing a mechanism through which the members of the SANDF can enter into negotiation with the State especially with regard to wage and similar disputes.
The role which the PSC presently plays in the Central Bargaining chamber places it on the "same side of the table" as the SANDF, so no proper bargaining structure is created.

(f) The role which the Secretary for Defence can play in addressing this significant lacuna, which is further expanded in the staff paper on the freedom of association and labour relations, connected to the limitations of fundamental rights and the staff paper on interrelated levels of authority, is acknowledged.

6. The endeavour of the Office of the PSC to keep all public service benefits regarding employment, remuneration and all other conditions of service in balance, is appreciated. It is clear, however, that although the SANDF's personnel could be classified as public servants in the broader sense, their unique position necessitates special measures. As an instrument of State to manage and support the potential for maximum force with the sole purpose of ensuring its sovereignty, the demands of the State on the military stretch to the extreme of paying the ultimate price. Furthermore cost efficiency is essential in modern high tech defence, and to ensure that, superior capabilities and leadership are necessary. The struggle to increase flying pay to retain the services of qualified pilots in the NDF is a prime example of our ever present dilemma. Through the powers vested in the Minister of Defence (Sec 82 bis of the Defence Act) the NDF needs autonomy to make Regulations in respect of service conditions and benefits unique to the military.

7. All submissions and or requests must be channelled through the office of the Public Service Commission. The result of this is that decisions of the PSC are based on written and/or verbal information/argument presented to it by the officials of the Office of the PSC which may or may not agree with or appreciate the arguments and submitted needs of the SANDF. It is therefore often not a case of convincing the PSC, but of convincing the officials in the Office of the PSC. This is true both in respect of pay and allowances and non-cash conditions of service and benefits.

8. When there is a dispute between the SANDF and the Office of the PSC there is no dispute resolution mechanism to deal with it with the result that never ending negotiations between the SANDF and the office of the PSC follows unt. This leads to frustration on the part of management in the SANDF and probably unfair criticism of the Commission itself.

9. One of the most frustrating aspects for the SANDF is the competition with the broader Public Service for funds to satisfy the unique military needs of the SANDF. SANDF members only form a very small part of the total manpower of the Public Service. By the nature of things there is also a much greater commonality in the needs of the broad Public Service than between the SANDF and other Departments. The result is that when priorities in respect of needs have to be determined in the PSC forum created for this purpose, it is often a case of the SANDF against the rest. With the critical funds situation experienced over the last number of years, it is understandable that the needs of the SANDF are often outvoted by the majority looking after their own interests.

10. It is our submission that the NDF should be excluded from the stipulation in Sec 210 (1) (a) of the present Constitution requiring the PSC to "give direction" (Afrikaans: "gee lasgewing" is clearer) in respect of all unique military organizational and human resource matters. The Defence Secretary, by means of specific stipulations in the Defence Act, can perform the function of ensuring that fairness and equatability is reflected in human resource management in the military vis-a-vis the rest of the public service.

11. The problem of the exclusion of the military from the bargaining mechanism organized through the trade union movement has been addressed. A system has been initiated within the SANDF, on a trial basis whe
different forums at unit level provide separate groupings in the rank structure, the opportunity to reflect improvements in conditions of service and the formulation of proposals in this regard; the generation of improvements in the effective management of their work and the maintenance of high morale. The forums are formally structured and meet with the Officer Commanding at least once a month. The representation proceeds along the Command Channel right up to the Chief of the SA National Defence Force. Structured feedback is also passed down the chain of command back to forum level. The opposition from the labour/trade union movement welcoming the SANDF as a legitimate workers' representative is thought to be unfair as such an independent legitimate voice for the Military would in no way jeopardize their position. In any event it would provide the necessary stability to prevent factional interests in this one institution of State (namely the SANDF) where fragmentation could prove harmful to the very stability of the State and jeopardize the day to day functioning of the Public Service.

CONCLUSION

1 2. In essence our submission is that

   (a) the Minister of Defence be mandated to make regulations, subject to approval by Treasury, in respect of conditions of service including those pertaining to allowances and other benefits, but including those which cater for the unique and specific requirements of the SANDF;

   (b) provision be made for the Department of Defence (probably the Secretary for Defence) to put its case, with regard to salaries and pay, directly to the PSC without intervention by the Office of the PSC;

   (c) provision be made for a mechanism to review salaries, pay, allowances, benefits and other conditions of service of members of the SANDF, in the event of a dispute between individual members and the State. The recommendation would then be referred directly to an appropriate Parliamentary Committee. This should alleviate the problem of the military who do not have the right to organize, belong and negotiate as a trade union; and

   (d) if common benefits and service conditions are proposed by the Office of the PSC, and/or the Central Bargaining Forum, and are approved, such common benefits and service conditions should similarly apply to the SANDF.

1 3. It follows that the Constitution should exclude the National Defence Force from the provisions of section 21(a)(a)(iii) and furthermore make provision for

   (a) matters concerning

      (i) the running of;

      (ii) appointments in and to;

      (iii) promotions in;

      (iv) transfers in; and
(v) discharges from

the SANDF, and for matters of career incidents of all uniformed members of that Force to be recommended, be given directions in respect of and be enquired into by the minister of Defence as provided for in law and not by the Public Service Commission; and

(b) the making by the Minister of Defence of regulations providing for the matters referred to in subpar 1 2. supra.
CONTRALESA

POWERS AND FUNCTIONS OF TRADITIONAL LEADERS

1. Duties with regard to land

- The Traditional Leader is the custodian of all the land which he holds in trust for the people. He must deal with land sparingly and equitably.

Every breadwinner or family head is ENTITLED to:
- a residential site
- an arable allotment
& some grazing land (communal)
The same rights attach to a single woman who has borne children and appears unlikely to get married.
Land can never be sold; if it is abandoned, it reverts to the community.

2. Duties as legislator, administrator, admudicator

- All performed with advice of Council. Imbizo can nullify decision.
- 'Separation of Powers' an alien concept
- Duties and powers all devolve down to family head
- Checks and balances on Traditional Leaders, in the form of rebellion, even assassination.

3. Duties as head of the army

- Traditional Leader (with council) the only authority to declare war or negotiate peace.

4. General duties

Setting times for:
- ploughing
- planting
- harvest
- cultural events
- national ceremonies

Community resource intimes of need. Must keep 'open house' for the needy, the handicapped, refugees, travellers, etc. (Corollary is 'tribute labour' from the community).

WOMEN AS TRADITIONAL LEADERS

The institution is mainly patriarchal and male-headed. Notable exceptions found in parts of Venda and Lebowa, where women are Traditional Leaders in their own right. Elsewhere in South Africa they head the group mostly as regents or advisors of regents.

CONTRALESA DRAFT SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY ON THE CONSTITUTIONAL ROLE OF TRADITIONAL LEADERS

SUMMARY

INTRODUCTION

The pre-colonial system of government in Africa was comprehensive and effective, and revolved around traditional leaders who headed communities who resided within defined territorial boundaries. The legal system was based on custom and tradition; communal ownership of land formed the cornerstone of the economy.
Over time the institution became hereditary but was always underpinned by transparency and consensus-seeking.

THE HIERARCHY

Classically, the institution of traditional leadership can be analysed in the following hierarchial manner:-

- King (IKumkani, isilo, ingwenyama, Morena emoholo, Kgosi kuiu, etc.) - royalty
  - Chief (inkosi) - royalty
  - Headman (elected, but more often of royal blood)
  - Sub-headman (elected)

The most senior head of the tribe is Inkosi who rules in-council (headmen and other influential elders). The king is the head of the nation composed of the people headed by the different Amakhosi.

TRADITIONAL DEMOCRACY

- Imbizo (People's Assembly)
  The most important decision-making forum. Comprises all adult males and is characterised by free speech and consensus-seeking

- Inkundia I Knotia (Court)
  Dispute resolution, set apart by its aims of rehabilitation, reconciliation and compensation rather than confrontation and punishment

DISRUPTION DURING COLONIAL AND APARTHEID ERA

Contact with Europeans was the single most destabilising factor in the institution of fractional leadership. From the British, who sought to subordinate Traditional Leaders to the English Queen, to apartheid which set
Traditional Leaders against their own people, the aim was always the same: land dispossession.

TRADITIONAL LEADERS IN THE POST APARTHEID ERA

The following points militate strongly in favour of retaining the Traditional Leaders in an important role in the new South Africa:

a) The Constitutional Principles, which entrench the position of Traditional Leaders
b) The views of many people, who see Traditional Leaders as the key to peace, stability and unity

In these regards we must stress that Traditional Leaders are not nonpolitical. The nature of their role is political BUT this must be distinguished sharply from Party Political affiliation. To be effective, Traditional Leaders must rise above the latter so that they can truly unite their people.

Secondly, Traditional Leaders are cognisant of the Bill of Rights, the concept of constitutionalisation and the claims of democracy and non-sexism: what they ask is that in interpreting these concepts the African worldview must be central. Unlike in Canada, the USA and Australia, indigenous people are in the majority in this country

15 March 1995
SUGGESTED AMENDMENTS TO SECTION 28
OF THE INTERIM CONSTITUTION

1. ‘Rights in property’

The phrase ‘rights in property’ appears three times in section 28 of the Interim Constitution, once in each of the clause's constituent subsections. The problem with this formulation is that it institutionalises what has become known in United States constitutional law as the doctrine of 'conceptual severance'(1) or the 'parcelling problem'(2). The modern approach to property, both as a legal concept and as an allegedly fundamental human right, is to see it as a bundle of smaller component rights(3). It follows that a plethora of 'rights in property' might constellate around or flow from a single ownership relation in the traditional sense. Although this is not in itself problematic, the metaphor does give rise to certain difficulties when used in the eminent domain context. So, for example, if the test to see whether a right to property has been violated amounts to an examination of whether or not the property concerned has been 'physically invaded'; or if it is asked whether the property in question has been 'deprived of all economic use' (both very well-established takings inquiries, in the United States); the court will be more likely to answer these questions in the affirmative if it is having regard to just one 'stick' in the 'property bundle' rather than the entire 'parcel' of rights constituting the complainant's property. Since an affirmative answer in such a case usually means the difference between the state's having to compensate the complainant for the alleged invasion of his or her property and not having to pay any compensation at all, the conceptual severance approach can be used as a judicial device to frustrate social reform legislation(4).

Two United States Supreme Court cases are enough to demonstrate the very different results attendant upon all application or non-application of conceptual severance reasoning (5).

5. Any number of cases might have been chosen. See, for example, Kaiser Aetna v United States 444 US 164 (1979); Keystone Bituminous Coal Ass'n v De Benedictis 480 US 470 (1987); and Nollan v California Coastal Comm'n 483 US 825 (1987).
The case of *Penn Central Transportation Co v City of New York* (6) concerned a New York City Landmarks Preservation Law which imposed certain building restrictions additional to those contained in the ordinary zoning ordinances for that city (7). The court was asked to consider whether Penn Central's right to develop the Grand Central Terminal building into a multi-storey office block constituted a property right worthy of constitutional protection. Such development rights were in fact transferable between parcels owned by the same legal entity in terms of existing New York City zoning laws (8). Notwithstanding this fact, the Supreme Court rejected the appellants' submission that the denial of its development right in terms of the Landmarks Preservation Law constituted an uncompensated, and therefore unconstitutional, taking of property. United States eminent domain law did not, the court held, divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment had been entirely abrogated.'(9) Rather the court looked at the 'parcel as a whole' to decide whether the severity of the economic impact of the regulation warranted compensation (10). Because Penn Central was still able to put the Grand Central Terminal to other valuable uses, the court reasoned, the economic impact of the Landmarks Preservation Law was not so severe as to constitute a taking (11). Had the court applied conceptual severance reasoning, on the other hand, the loss of the development right - running into million of dollars clearly would have constituted a taking for which the City of New York would have been liable.

The case of *Lucas v South Carolina Coastal Council* (12) is just one example of a decision apparently contradicting the express rejection in the *Penn Central* case of the conceptual severance approach (13). In *Lucas* the United States Supreme Court decided that the right to build on one's land, in this case sensitive coastal duneland, did in fact constitute a distinct right in property. Although the court tried to hide its use of conceptual severance reasoning by alleging that the entire land parcel at issue had been rendered valueless by the relevant 1977 South Carolina environmental regulation, this land had not been established on the facts (14).

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7. Note that the ordinary zoning ordinances themselves were not even considered as potentially constituting a taking of property.
9. Ibid at 130.
10. Ibid at 131.
11. Ibid at 136.
12. 112 SCt 2886 (1992) discussed by RA Epstein *Lucas v South Carolina Coastal Council: A Tangled Web of Expectations* (1 993) 45 Stanford LR 1369 at 1375-77; Rubenfeld op cit note 2 at 1107; and Singer and Beermann op cit note 1 at 236-38.
13 See the cases cited in note 5 supra.
14 Singer and Beermann op cit note 1 at 237.
The Supreme Court's failure to refer the case back to a lower court for further evidence on this point betrayed its willingness to sever conceptually just that part of the land parcel affected by the regulation, with catastrophic results for South Carolina's environmental conservation programme.

The potentially disastrous consequences of such an approach being adopted in South Africa, where the constitutional validity of social reform legislation is of the utmost importance to the success of the Reconstruction and Development Programme, does not have to be spelled out. Recent case law has indicated that entitlements ranging from the right to the maintenance of the market value of one's home to the right not to be exposed to an increase in the crime rate or a deterioration in the quality of one's groundwater supply might all be adducted as incident, of ownership worthy of constitutional protection(15). Clearly, constitutional recognition of rights of this nature might well frustrate social reform legislation. It is thus very unfortunate that, at present, section 28 of the Interim Constitution seems to mandate the very conceptual severance approach which has proven so controversial in the United States.

This fact is all the more unfortunate when one considers that the phrase 'rights in property', at least as it appears in subsections 28(2) and 28(3) of the Interim Constitution, was almost certainly inserted erroneously. The draft property clause contained in the Fifth Progress Report of the Technical Committee on Fundamental Rights During the Transition, presented to the Negotiating Council on 11 June 1993, did not contain this formulation. Subsection (1) read 'everyone shall have the right to own property', whilst subsection (2) began 'expropriation of property by the State shall .....'

Subsection (1) was changed in the Sixth Progress Report to read: 'Every person shall have the right to acquire and dispose of rights in property'. No explanation was given for this change, but it is common knowledge that the intention of the Technical Committee was to counteract the impression created in the original draft that the right of ownership was to remain the most important or 'paradigmatic' property right in South African law(16). The idea was to give a clear indication to the Constitutional Court that lesser real rights in land, particularly in the rural areas, should enjoy equal constitutional protection along with the ownership rights which had been denied to the majority of South Africans under apartheid land law. At this stage, subsection (2) was quite properly left as originally formulated, i.e. to read property' rather than 'rights in property'.


Inexplicably, subsection (2) was changed in the Technical Committee's Tenth Progress Report of 5 October 1993 to the current 'rights in property' formulation. All that the Tenth Progress Report says is that various changes to the section were made, as a result of discussions with the Ad Hoc Committee [on Fundamental Rights During the Transition]'(17). The Ad Hoc Committee's minutes for the relevant time period do not, however, provide any more information on why this particular change was made. The minutes of 8 September 1993 do mention that the Technical Committee had reformulated subsections 28(2) and (3), but do not say why. At the Ad Hoc Committee's meeting of 4 October 1993, just before the changed Tenth Report was tabled before the Negotiating Council, nothing was apparently said about the impending change to subsection (2). The Ad Hoc Committee's discussions had by this stage moved on to the Restitution of Land Rights clauses now contained in sections 121-23 of the Interim Constitution.

One can only surmise that the change to subsection (2), which was copied in subsection (3) when this clause was added later, was made out of a misguided sense of symmetry, i.e. the Technical Committee believed that, for the sake of consistency, the formulation 'rights in property' should be used throughout. This rather curious decision lies at the heart of the difficulty posed by section 28 as it now stands. It is one thing to guarantee to all the capacity to acquire rights in property, in a well-intentioned effort to place lesser real rights in land on an equal footing with ownership rights, quite another to preclude the state from regulating property in the public interest without paying compensation for every imaginable 'right in property' that might be affected by such governmental activity. In the well-known words of Holmes J, 'government hardly could go on if, to some extent, value,-, incident to property could not be diminished without paying for every such change in the general law.'(18)

It is accordingly submitted that subsections 28(2) and 28(3) should be amended in the final constitution by returning to the original formulation as follows:

28(2): 'No deprivation of property shall be permitted otherwise than in accordance with law.'

28(3): 'Where property is expropriated.....'

If consistency is thought to be a necessary virtue of constitutional formulations, subsection (1) might be reformulated along similar lines, leaving it to the Constitutional Court to develop its own jurisprudence around the status of lesser real rights in land.

2. Deprivation versus expropriation
The distinction drawn in subsections 28(2) and 28(3) between the deprivation of rights in property, on the one hand, and the expropriation of rights in property, on the other, is less problematic in my view. The words 'deprivation' and 'taking' have long been separately construed in United States takings jurisprudence as a result of a similar distinction in the Fifth Amendment, the first part of which provides that 'no person shall ... be deprived of life, liberty or property, without due process of law' and the second part of which goes on to state: 'nor shall private property be taken for public use without just compensation' [emphasis mine]. That wording has given rise to a widely accepted distinction between 'deprivation' of property, on the one hand (meaning an exercise of the state's police power), and the taking of property, on the other (meaning an exercise of eminent domain stricto sensu). In Commonwealth jurisprudence, a similar analytic distinction has arisen between 'deprivation' and 'compulsory acquisition', the latter being the traditional English-law term for the American expression 'taking' (19). That the position in the Commonwealth jurisprudence is slightly confused is attributable not to any principled difficulty with making such a distinction, but rather to the fact that different Commonwealth constitutions have used different and sometimes conflicting terminology to express the same idea (20). Since the police power/eminent domain distinction has long been recognised in South African law (21) this difficulty is unlikely to arise here. The distinction between 'deprivation' and 'expropriation' in section 28 simply formalises, for the purposes of constitutional law, a distinction already familiar in South African expropriation law. Two recent commentaries on section 28 seem to agree that there will be little difficulty in reading the clause this way (22).

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21. See Antonie Gildenhuys 'Expropriation' in LAWSA Vol 10 at 3-4.

be achieved in the current formulation by inserting the word 'and' between subsections 28(2) and 28(3) and collapsing the two subsections into one, removing the then redundant reference to subsection 28(2). The new subsection 28(2) would thus read, taking account of the earlier submission made with regard to the phrase 'rights in property':

'No deprivation of property shall be permitted otherwise than in accordance with a law; and where property is expropriated, such expropriation shall be permissible for public purposes only ...'

The added virtue of this formulation would be to strengthen the sense that expropriation is a particular form of deprivation of property requiring heightened protection.

Theunis Roux
Research Fellow:
Institute of Development Law,
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3 April 1995

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East Cape Agricultural Union

21 FEBRUARY 1995

INTRODUCTION

The opportunity to make a contribution to the writing of a new Constitution for South Africa is sincerely welcomed by ALL the farmers of the Eastern Cape Province. Agriculture in the Eastern Cape Province and in particular the organised agriculture which acts as mouthpiece for the farmers, is structured in such a way that it represents ALL farmers’ groups. At the recent founding of "EPAC" - the Eastern Province Agricultural Council, the elected leaders from the largest agricultural organisations from the Eastern Cape and the previous Transkei and Ciskei were elected to the Council. The Council also recently introduced itself to the Eastern Cape Legislator as the only legitimate mouth-piece for all farmers in the province with whom agricultural matters will be consulted in the future.

On behalf of the OKLU and EPAC I would like to bring THREE of the most important matters concerning the agricultural sector to your attention, namely:

* THE PROTECTION OF THE RIGHT OF OWNERSHIP
* MAINTENANCE OF SAFETY AND SECURITY PARTICULARLY WITHIN THE RURAL ENVIRONMENT
* EFFECTIVE REPRESENTATION IN RURAL LOCAL GOVERNMENT

THE  IMPORTANCE OF PROTECTING THE RIGHT OF OWNERSHIP

The basis of land-ownership in a democratic country which strives after the principles of the free market is the right of ownership. This right is important for security and order and an absolute prerequisite to encourage investment, internally as well as abroad. Investment and economic growth are important to relieve structural problems in the SA national household, such as employment and provision of different social services, inter alia education, health and housing. Such a right must be applied to all property, for example house, motorcar, furniture and other personal possessions. It must include all forms of land ownership, namely land in private possession, in communal possession and even leasehold.

The OKLU and EPOC regard the protection of the right of property of such importance that we request that this RIGHT be protected EXPLICITLY in the new Constitution, and that it should be included in the list of principles (annexure 4 of the present Constitution).

The agricultural community has particular interest in the protection of the right to property in land because approximately 70% (R50 billion) of the capital investment of farmers is locked up in land. OF EQUAL IMPORTANCE IS THE PROTECTION OF PROPERTY RIGHTS FOR FUTURE OWNERS, in may cases small up-and-coming farmers who own land as an individual or community or who rent land in tennis of the leasehold system.
Only by protecting the right of ownership in the Constitution can it be ensured that all members of the community are protected against unfair or unlawful dispossession of land and other property by authorities or by people who simply occupy land.

**EXPROPRIATION OF LAND:**

The dominating principle which must be followed is that land needed by the State must be purchased on the open market. Expropriation must only be used where land cannot be purchased on the open market, and also only when the State needs the land for public purposes. **EXPROPRIATION AS INSTRUMENT IN THE REDISTRIBUTION OF LAND IS STRONGLY OPPOSED.**

Where land is expropriated the present landowner must be compensated at the ruling MARKET VALUE with regard to land and equipment to ensure that such an owner does not suffer a financial loss.

**MAINTENANCE OF SAFETY AND SECURITY PARTICULARLY WITHIN THE RURAL ENVIRONMENT**

**INTRODUCTION**

The alarming increase in stock-theft, attacks on farmers and crime compelled this Union and the newly established "Eastern Province Agricultural Council" to take a strong stand with regard to the under-mentioned matters. **THE PROTECTION OF LIFE AND PROPERTY IS THE BASIC RIGHT OF EACH CITIZEN IN SOUTH AFRICA, WHICH MUST BE RESPECTED BY THE GOVERNMENT AND ENTRENCHED IN THE CONSTITUTION.**

**STOCK-THEFT**

Measured against the rest of South Africa, the highest number of theft of sheep and goats and the fourth highest number of cattle thefts occurs in the Eastern Cape. **DURING 1993 THE FINANCIAL LOSS TO FARMERS AMOUNTED TO R4.1 MILLION AND AN UNPRECEDENTED LOSS OF R10.4 MILLION WAS NOTED IN 1994.** The situation has now reached a stage where the GOVERNMENT WILL HAVE TO TAKE FIRM AND DRASTIC ACTION to curb unlawfulness.

**IMPLICATIONS FOR AGRICULTURE AND THE PROVINCE AS A WHOLE:**

The Eastern Cape Agricultural Union alone represents 5 641 commercial farmers - directly or indirectly - who have approximately 90 271 workers with ± 541 626 dependants in their employ.
A total area of 14.6 million hectares used for agriculture is worth R 1180.7 million. When farmers are forced from their land as a result of crime, the consequences will be catastrophic. **JOB OPPORTUNITIES WILL BE LOST, FOOD PRODUCTION WILL DECREASE DRASTICALLY, PROVINCIAL GOVERNMENTS, INCOME WILL DECLINE AND SCARCE PRODUCTIVE AGRICULTURAL LAND WILL BE ALLOWED TO BE LOST.** Further implications of the high stock-theft problem are the DEPRECIATION OF PROPERTY, ERODING OF THE CORE-HERDS AND INCREASING UNEMPLOYMENT IN THE RURAL AREAS, because farmers will have to downscale their workers' corps as a result of financial losses. Small stock farming is more productive and work intensive and the fact that farmers are switching to cattle farming is alarming. The number of sheep in THE EASTERN CAPE WHICH IS THE LARGEST WOOL PRODUCING PROVINCE IN THE COUNTRY, is decreasing drastically, which also means a decrease in foreign currency for the country. The impact of this on agricultural related industries threatens the whole economy of the province.

**ATTACKS, MURDERS AND THEFT ON FARMS:**

The occurrence of crime in general has reached unacceptable levels and it appears as if it has become out of control. A general lack of trust is being experienced in the different communities and **THE PUBLIC HAS ALREADY THREATENED TO TAKE the LAW IN THEIR OWN HANDS.**

**UNCONTROLLED SQUATTING ON FARMS:**

Because of the lack of safety and security, people are busy claiming rights on land and legal grazing of farms is getting out of control. All possible measures to ensure that the RIGHTS OF PRESENT AND FUTURE LAND OWNERS BE RESPECTED AND PROTECTED MUST BE IMPLEMENTED IMMEDIATELY.

**EFFECTIVE REPRESENTATION IN RURAL LOCAL GOVERNMENT**

Rural areas and the circumstances here differ radically from urban and municipal areas. It is therefore essential that a custom-made system of Rural Local Management be implemented for these areas. It is absolutely essential that both interest groups who live and work in rural areas, that is taxpayers and inhabitants in own right, get fair representation in the Local Government system.

The following principles/viewpoints are important for this:

**PROPER VOTERS' LISTS** are a prerequisite for effective Rural Local Government elections.

Such VOTERS' LISTS must be able to be REVIEWED and UPDATED.
Areas must be DIVIDED INTO WARDS, so that representatives can be elected democratically - directly or indirectly.

DEMARCATED AREAS must be FEASIBLE and have the potential to provide necessary services and infrastructure to the local communities.

CANDIDATES /REPRESENTATIVES MUST BE PERMANENT RESIDENTS and must pay taxes in the specific ward/area which he represents.

Taxpayers must be represented by TAXPAYERS and inhabitants must be represented by INHABITANTS.

The LEVEL OF TAXES, stipulation of PRIORITIES and APPLICATION OF FUNDS can only be down sensibly if Rural Local Government is operated on an INCLUSIVE BASIS, as set out above.

Rural inhabitants are PREPARED to FUND their LOCAL GOVERNMENTS, as is the case with town inhabitants, but any additional taxes such as LAND TAX, WHICH STRIVE FOR THE REDISTRIBUTION OF LAND, ARE DISCRIMINATORY AND TOTALLY UNACCEPTABLE FOR THE FARMING COMMUNITY. We believe that these guidelines create a fixed inclusive and maintainable basis, which will create a widely acceptable basis of cooperation in the future of Rural Local Government.

CONCLUSION

Thank you once again for the opportunity to make a contribution on behalf of agriculture. It must, however, be clearly stated that the above-mentioned three points ARE NOT NEGOTIABLE, and are a PREREQUISITE to creating a peaceful environment in which production and job opportunities can be created in the interest of our country and its people.

B.P. ERASMUS

PRESIDENT : OKLU
CHAIRMAN: EPAC
SUBMISSION: FUNDAMENTAL RIGHTS

The purpose hereof is to make a submission to you for consideration in regard to the chapter on Fundamental Rights which will no doubt be included in the new Constitution. I will accordingly deal with the submission as set out further herein.

Submission that the death penalty be retained and provision therefore be made in the Bill of Rights.

It is a fact that in South Africa the incidence of violent crime has reached alarming proportions and is still increasing. It is furthermore particularly alarming that the brutality and the disregard for human life with which such violent crimes are being committed, is also increasing. The brutal murder of unarmed persons, elderly people and women has become a common phenomenon. In regard to armed robbery, the trend in the past has been that firearms were used by robbers to overcome resistance. The trend has now manifested itself, in that violence is used indiscriminately and irrespective of the necessity thereof. It appears that it is no longer merely the threat of violence which is the means to an end, but rather the use of violence itself. The use of sophisticated weaponry in crimes of violence such as automatic assault rifles and hand grenades is indicative of the criminal's disregard for human life. The way in which the criminals attack police officers and the numbers of police officers killed in South Africa, bear further witness of the total disregard for the law by the criminals in our society.

The information obtained by the police on a broad spectrum of communities are that violent criminals do not feel themselves threatened by the criminal justice system, particularly because of the moratorium on the death penalty. This is in particular the case in the Western Cape in areas where gangsterism is rife. This leads to whole communities being dominated by gangs. An alarming alternative to this is also emerging, namely the rise of vigilante groups and unofficial "court" structures amongst various communities which take the law into their own hands, meting out harsh and brutal punishment.

Despite the divergence of academic opinion on the deterrent value of the death penalty, there is no doubt, based on the experience at grassroots level by investigating officers and policemen in
contact with the perpetrators and victims of violent crime, that the death penalty has a very strong
deterrent value.

It is acknowledged that the right to life as contained in section 9 of the present Constitution,
should be retained in a new Constitution, but in an amended form to provide for the court in
appropriate cases of violent crimes, such as murder of police officials etceteras to have the power
to impose the death penalty. It is suggested that the wording of section 9 should read as follows:

"Every person shall have the right to life and shall not be deprived thereof save in the
execution of a sentence of a court in respect of a criminal offence of which he has been
convicted."

Submission that the right to Bail be restricted during the initial 48 hours of detention of suspects.

It is the experience, particularly in violent and gang related crime, that criminals make use of the
right to bail immediately after their arrest to the prejudice of the investigation of such crimes.
This results inter alia in the police not being able to investigate crimes effectively. Communities,
within which crimes of violence and in particular, gang related crimes are prevalent, have lost
confidence in the criminal justice system because criminals are allowed out on bail within hours of
committing offences. This has resulted in whole communities being intimidated and refusing to
assist the police in their investigations, which in turn results in the criminal elements' power
increasing within such communities.

It is submitted that the right to bail as presently contained in section 25(2)(d) of the Constitution
must be restricted in such a manner, in specified cases of violent crimes, that arrested persons
would not be entitled to bail within the initial 48 hours of detention.

I trust the above will be considered favourably.

N H ACKER
REGIONAL COMMISSIONER: WESTERN CAPE REGION
[Translator’s Note - I did not have access to the actual English text of the Criminal Procedure Act
(see pp 18 ff below). The standing text from the Act in this document is therefore an own
translation from the Afrikaans.]

Information Note

To:    Lieutenant-General NH Acker

Submission to Constitutional Assembly: Death Penalty and 48 hours' detention
1. Please refer to your instruction to draft a submission to the Constitutional Assembly, and specifically for the Theme Committee considering Fundamental Rights, in which the following principles should be embodied:

1.1 Retention of the death penalty as a punitive measure for murder; and
1.2 Exclusion of the right to bail during the initial 48-hour detention period.

2. The attached is a submission for your signature; should it meet with your approval, it will be delivered by hand to the offices of the Constitutional Assembly.

3. As background I consider it essential that certain comments regarding the above-mentioned viewpoints contained in the submission be explained herein.

4. Although the Constitutional Assembly invites submissions and consults as widely as possible concerning the new Constitution, I am nevertheless of the opinion that despite such submissions, the chapter which contains the Fundamental Rights will not differ radically from the present one as contained in the Interim Constitution. Substantial sections of the present Constitution of the Republic of South Africa, No 200 of 1993, encompassing the Fundamental Rights, are similar to or display the same tenor as most other Western democracies and developing and Third World countries with a Bill of Fundamental Rights. In particular, our Bill shows great correspondence with that of Canada. Furthermore one should specifically note that many of the rights contained in the Bill are so-called universally acknowledged rights. These are rights about which there is worldwide unanimity and which are contained in almost every Bill of Fundamental Rights. For example, the right to life - particularly germane to the imposition of the death penalty - is such a right. It is extremely unlikely that the Constitutional Assembly will discard this right, and in my opinion it would be futile even to suggest it. In light of the abovementioned, the submission should be aimed at offering the writers of the Constitution a realistic and acceptable alternative, rather than one which will simply be ignored. Consequently I was compelled to do a great deal of research in order to find soundly grounded arguments to motivate the viewpoints put forward in the submission concerning the reasons why certain rights in the Constitution should be limited in order to make provision for the death penalty and detention without bail. During this process I have studied the Constitutions of other countries concerning these aspects, and also the representations regarding the death penalty submitted to the Constitutional Court. Unfortunately the judgement of this court regarding this question is not yet available.

5. Death penalty
It is important to note that Chapter 3 of the Constitution does not prohibit the imposition of the death penalty, and in fact there is no mention of it in this Chapter at all. The argument that the imposition of the death penalty is unconstitutional, is based on an interpretation of Section 9, which reads as follows:

"9. Every person shall have the right to life."
The argument is that this provision excludes the death penalty.

6. However, it is a fact that no right, whether entrenched or not, is absolute. (See Cachalia and others, Fundamental Rights in the New Constitution, p 106.) This goes for the fundamental rights as well. The cardinal question, however, is the degree to which the right may be restricted, and the answer may be found in terms of the limitations clause, Article 33 - probably the most important provision in Chapter 3 and the one which will cause the most litigation. It reads as follows:

33. (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation --
(a) shall be permissible only to the extent that it is -
(i) reasonable; and
(ii) justifiable in an open and democratic society based on freedom and equality; and
(b) shall not negate the essential content of the right in question and provided further that any limitation to -
(aa) a right entrenched in section 10, 11, p, 14(1), 21, 25 or 30(1)(d) or (g) or (2); or
(bb) a right entrenched in section 15, 16, 17,18, 23 or 24, in so far as such right relates to free and fair political activity,
shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

I do not consider it necessary to provide herein a full explanation of the effect of Section 33, specifically with reference to the law abroad, apart from mentioning that at this stage our courts are already following the approach in the key Canadian judgement of R v Oakes (1986) 2 DLR (ALT) 200. See also the case D.A. Park-Ross and another v The Director: Office for Serious Economic Offences S.N. 1058/94 of the Cape of Good Hope Provincial Division. I am of the opinion that given the wording of Section 9, and in view of the tests required in the Oakes case, the constitutional court will very probably find that the death penalty negates the fundamental content of the right to life as contained in Section 9.

7. However, as already mentioned herein, it will serve no purpose to suggest that the right to life be completely eliminated from the Constitution, and I have consequently suggested in the submission that the right be retained, but with an inherent limitation similar to that which is the case in the constitutions of some other countries, for example India and Zimbabwe.

8. 48 Hours’ Detention Without Bail

Unlike the case of the question of the death penalty, I found it extremely difficult to formulate a well-founded legal argument in favour of the exclusion of a right to bail during the initial 48-hours' period of detention. Although I realise that the manner in which the courts presently apply the right to bail causes serious problems regarding the investigation of crime, I am nevertheless of the opinion that there is no real prospect that the Constitutional Assembly will consider a limitation to the right to bail to such an extent that a
One must keep in mind that during the previous dispensation, before the present Constitution was enacted, an arrested person was entitled to apply for bail from the moment of his arrest. See *SV Twayie en 'n Ander v Minister van Justisie en 'n Ander* 1986 (2) SA 101 (O). You will recall that an appeal to the Appeal Court was initiated from this division with the express purpose of limiting the right to bail during the initial period of 48 hours in the case of *Minister van Wet en Orde en Andere v Dipper* 1993 (3) SA 591 (A). As you will also recall, this attempt met with no success, and the appeal court was not prepared to limit an arrested person's right to bail in any way. In so doing, the appeal court hammered the last nail into the coffin of any attempt to limit the right to bail.

The right to bail is confirmed in Section 25(2)(d) of Chapter 3 of the Constitution. It reads as follows:

> 25. (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -
> (a) ---;
> (b) ---;
> (c) ---; and
> (d) to be released from detention with or without bail, unless the interests of justice require otherwise.

As is clear from the proceeding provision, it does contain an inherent limitation, apart from Section 33. In my opinion the above-mentioned provision did not materially extend the right to bail as it existed before the promulgation of the Constitution. The problems presently being experienced cannot be blamed on the right to bail as contained in the Constitution (Section 25(2)(d)), but to the incorrect application thereof in the magistrate's courts. In this connection it is significant to note that the South African Law Commission has issued a media statement in regard to their "Enquiry into Reforms of South African Law Regarding Bail" in which it was stated what steps were envisaged to remedy this position by means of legislation. A copy of the media statement mentioned is included herewith for your attention.

In summary:

11.1 There is no prospect whatsoever that the Constitutional Assembly will seriously entertain a suggestion that a person's right to bail within the initial period of 48 hours be removed;

11.2 The problems regarding the right to bail do not lie with Section 25(2)(d) of the Constitution, but with the practical application thereof by the courts;

11.3 Consequently there are no legal grounds for arguing that the right to bail should be limited as referred to above; and
The only grounds on which to base an argument that bail should be limited accordingly, is that investigations of crime are hampered. However, in light of developments in our legal system in the direction of a "Due Process" model, there is no doubt that no further encroachment on the right to bail, apart from that already contained in the present Constitution, will be tolerated.

Notwithstanding the above, I have nevertheless included the Proposal regarding bail in the submission to the Constitutional Assembly as per your instruction. Should you wish it to be excluded, it could be adapted accordingly.

E.W. Booth
District Head: Legal Services

Media Statement by the South African Law Commission
Enquiry into Reforms of South African Law Regarding Bail (Project 66)

On 17 November 1992 the Commission submitted a report on its enquiry into reforms to South African law regarding bail to the former Minister of Justice. In consequence of perceptions that bail is sometimes granted too readily in the case of serious offences, and that people released on bail have subsequently committed serious crimes, the Minister requested the Law Commission to undertake further consultation by means of a symposium or workshop. The Minister's request was acceded to and a workshop was held on 19 April 1994, during which all the main role players regarding bail proceedings were represented. A summary of the viewpoints put forward was submitted to the Minister.

Since then the present Minister of Justice announced - on 7 September 1994 in the Senate - that he had requested the South African Law Commission to undertake an enquiry into, amongst other things, the law regarding bail. The Commission once more considered its previous report and the viewpoints put forward during the workshop against the background of the relevant provisions of the Constitution 200 of 1993. The original report was considered anew and adapted, and was handed to the Minister on 1 December 1994.

The Commission is of the opinion that as far as our law regarding bail is concerned, a sound balance must be found between the rights of an arrested person as contained in Chapter 3 of the Constitution, and the rights of the community to safety and security and the combating of crime. In fact, the Constitution itself determines such an approach: Section 25(2) (d) provides that an arrested person has the right to be released from detention with or without bail, unless the interests of justice require otherwise. Furthermore, the right mentioned in Section 25(2)(d) is subject to the general limitation principles of Section 33(1), which determines, amongst other things, that legislation can limit the particular right if the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality and is also necessary.

In light of this constitutionally determined approach, the Commission is making suggestions which on the one hand will ensure that the rules of law presently in existence and which are incompatible with the rights of the arrested person are removed from the statute book or are adapted; and on the other hand will ensure that those rights are limited according to constitutional guidelines.
We will firstly deal with the measures that must in our opinion be adopted or the steps that must be taken to realise the rights of an arrested person according to the constitution:

- Someone arrested for committing an offence must be informed of his right to bail as soon as possible, and on his request must be brought before a court as soon as possible in order to institute bail proceedings should he not have been granted bail by a police officer in terms of Section 59 of the Criminal Procedure Act.

- If a person is arrested on the grounds of suspicion of having committed an offence, but a charge has not yet been laid against him because further investigation is necessary in order to determine whether a charge can be brought against him, such investigation must be completed as soon as possible, and such person must as soon as possible be either released or charged so that such person can institute bail proceedings.

- A police officer in charge of the police station concerned, or somebody duly authorised by him, must have the capacity to release on bail an accused in detention regarding any offence by depositing the amount of bail determined by that officer.

- The attorney-general's power (conferred by Section 61 of the Criminal Procedure Act) to prevent a court from considering the release on bail of an accused, must be scrapped.

- Because many accused are ignorant regarding their rights, and may not pose the question themselves, an onus should rest on presiding officers to themselves pose the question regarding release with or without bail.

- Despite the practical problems regarding the reconsideration of bail by legal officers other than those who made the decision in the first place, the Commission is of the opinion that there should be room for reconsidering bail on the grounds of changed circumstances.

- Consideration has been given to the question of legal representation at bail proceedings. At present the Constitution makes provision for the right of every detainee to consult with a legal practitioner of his or her choice, to be informed of this right without delay, and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state. Consequently no further recommendation is made.

Secondly we refer to proposals to limit the right to bail.

- Should it appear to the person who made the arrest or the investigating officer that essential evidence will be lost or will not be obtained should a person exercise his right to bail immediately after the arrest, such a person can be held for the maximum prescribed period of 48 hours before bail proceedings can commence.
The Law Commission's most important recommendation is that Section 60 of the Criminal Procedure Act should be amended in order to lay down clear guidelines to be taken into account by a court when determining whether an arrested person should be held in detention or not. The proposal will create greater legal certainty, and it is an attempt to clear up doubt which may presently exist about whether a person may be held in detention (and which may result in judgements that create a wrong perception among the public). Because this is the Commission's key recommendation, the proposed new Section 60(2) and (3) is quoted here in full:

(2) When considering the question whether there are sufficient grounds for detaining an accused, the court may take into account the following considerations as far as they are relevant:

(a) The likelihood that the accused will attempt to evade his or her trial, taking into account the following factors where relevant, namely --

(i) the accused's emotional, family, community or group orientation regarding the place where he or she is to be tried;

(ii) the accused's assets and where such assets are situated;

(iii) the means and travel documents in the accused's possession that may enable him to leave the country;

(iv) the degree, if any, to which the accused can afford to forgo the bail money determined;

(v) the question whether the accused's extradition could readily be accomplished should he or she flee across the Republic's borders in order to evade his or her trial;

(vi) the nature and seriousness of the charge against the accused;

(vii) the strength of the case against the accused and the incentive this may be for him or her to attempt to evade the trial;

(viii) the nature and seriousness of the punishment likely to be administered should the accused be found guilty on the charges against him or her;

(ix) the extent to which the conditions of bail are binding and effectively enforceable and the ease with which such conditions may be violated;

(x) any other factor which should be taken into account at the court's discretion;

(b) the likelihood that the accused, should he or she be released, will attempt to influence or intimidate witnesses or conceal or destroy evidence, taking into account, where appropriate, the following factors, namely --
(i) whether the accused has knowledge of the identity of witnesses and of the evidence they will be able to give against him or her;
(ii) whether the witnesses have already made statements and have agreed to testify;
(iii) whether the police investigation against the accused has already been completed;
(iv) the relationship of the accused to the various witnesses and to what degree they may be influenced or intimidated;
(v) the degree to which the conditions of bail prohibiting communication between the accused and witnesses will be efficient and enforceable;
(vi) whether the accused has access to evidence to be presented at his or her trial;
(vii) the ease with which evidence may be concealed or destroyed;
(viii) any other factor which should be taken into account at the court's discretion;

(c) the likelihood that should the accused be released, he or she will endanger the safety of the public or any particular person or that he or she may commit a serious offence, taking into account, where appropriate, the following factors, namely -

(i) the degree of violence against others contained in the charge;
(ii) any threats of violence the accused may have uttered against any person;
(iii) any grudge the accused allegedly harbours against any person;
(iv) any inclination to violence by the accused, as demonstrated by previous behaviour;
(v) any inclination to committing serious offences by the accused, as demonstrated by previous behaviour;
(vi) any failure on the part of the accused to adhere to conditions of bail;
(vii) any evidence that the accused previously committed a serious offence while he or she was on bail;
(viii) any other factor which should be taken into account at the court's discretion.

(3) When considering the question whether an accused should be released on bail or not, the court, taking into account the appropriate factors contemplated in subsection (2), shall weigh the public interest regarding sound administration of justice against the accused's right to his or her personal freedom, and in particular the likely disadvantage he or she will suffer should he or she be held in detention, taking into account, where appropriate, the following factors, namely --

(a) the length of time that the accused has already been in detention since his or her arrest;
(b) the likely period of detention up to the conclusion of the trial should the accused not be released on bail;
(c) the reason for any delay in conducting the trial and any part the accused may have played in such a delay;
(d) any financial loss the accused may suffer as a result of his or her detention;
(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal aid which may be caused by the detention of the accused; the accused's state of health;
(g) any other factor which should be taken into account at the court's discretion.

- A further key recommendation of the Commission is that Section 60 of the Criminal Procedure Act be further amended in order to provide that in considering a bail application, the court should act more inquisitorially and informally than at present and should therefore play a more active role in obtaining relevant information. It is also expressly stated that the presiding officer should not be bound to the view of the public prosecutor that the state does not oppose the granting of bail. The court must nevertheless weigh up the personal interests of the accused against the public interest according to the prescribed guidelines.

- Section 68 of the Criminal Procedure Act should be amended to extend the grounds on which bail may be withdrawn. There must be provision for such withdrawal on the grounds that the accused interfered with witnesses or tried to interfere with them or that he or she constitutes a serious threat to the safety of the public or a particular person. The Commission is of the opinion that the conditions of bail a court may impose should not be legally prescribed, but should still be left to the court's discretion.

- Bail is not granted pending extradition. The Commission is of the opinion that the present legal position should remain unchanged.

- Somebody released on bail and who deliberately or negligently fails to appear on the date and at the place determined for his or her appearance, or fails to remain present until the end of the proceedings at which he or she should appear, should be guilty of an offence. Furthermore somebody who without proper cause fails to give himself or herself up at the time and place determined by the court or in accordance with a written order, should be guilty of an offence. Suggestions regarding amendments to the law in order to embody these suggestions, are contained in the proposed bill.

- In a case where an order of a court with higher jurisdiction results in the implementation of a judgement against a condemned person, and a notice in terms of Section 307(3) (b) of the Criminal Procedure Act 51 of 1977 cannot be served on the condemned person because he or she cannot be found there, a warrant for his or her arrest as well as a warrant for the execution of the sentence should be issued and the bail be forfeited, unless he or she can show, within 14 days of the date of issue of the warrant that the failure was not due to any fault of his or hers.

- The Commission does not support a proposal that a higher court may reconsider a bail application on the grounds that new facts have come to light after a magistrate's court has refused bail in a case where the accused is pleading to a charge which fails under the jurisdiction of a higher court.

A copy of the proposed legislation is attached hereto.
The project leader in charge of this enquiry is Adv. GG Smit.

Issued by the Secretary: SA Law Commission
Date: p January 1995

Appendix C
Proposed legislation embodied in the Commission's 1994 Report

General Explanatory Note:

Words in bold type in square brackets indicate proposed deletions from existing legislation.

Words underlined with a solid line indicate additions to existing legislation.

Bill

To amend the Criminal Procedure Act 51 of 1977 in order to further regulate the detention of arrested persons; to extend the powers of certain police officers to grant bail; to make provision for accused in certain circumstances to have a right to bail; to indicate the factors to be taken into account in considering bail; to further regulate bail proceedings; to determine the power of a higher court to consider the granting of bail after such application was denied by a magistrate's court when an accused is standing trial in a higher court; to scrap the power of the Attorney-General to prevent the granting of bail in certain circumstances; to make punishable the non-appearance of a person on bail in certain cases; and to provide for additional matters.

Introduced by the Minister of Justice

It is determined by the Parliament of the Republic of South Africa as follows:


1. Section 50 of the Criminal Procedure Act, 1977 (Act 51 of 1977) (hereinafter referred to as the Principal Act), is hereby amended by substituting the following subsection for subsection (3):

(3) Subject to subsections (6) and (7) no provision of this section shall be interpreted as amending the provisions of this Act or another act under which someone who is being detained may be released on bail or on a warning or on a written notice to appear in court.

2. Section 50 of the Principal Act is hereby amended by inserting the following subsections after subsection 5:

(6) When a person is arrested for the alleged commitment of an offence, he or she must be informed as soon as possible of his or her right to institute bail proceedings, and if he or she is not granted bail in terms of section 59, he or she must on his or her request be brought before a lower court as soon as possible in order to consider his or her release on bail: Provided that should the person carrying out the arrest or the person charged with the investigation of the case have valid reasons to believe that the elapse of time occasioned by the institution of bail proceedings will result in the loss of essential evidence or in such evidence not being obtained, the accused may be held in terms of subsection (1) pending an investigation in order to obtain such evidence: Further provided that the investigation to
obtain such evidence should be completed as soon as possible and that the accused should be enabled at the earliest possible opportunity to institute bail proceedings.

(7) Should a person be arrested on the grounds of a suspicion that he or she has committed an offence, but no charge has yet been laid against him or her because further investigation is necessary in order to determine whether a charge can be laid against him or her, the investigation concerned must be completed as soon as possible and the person concerned must be released or charged as soon as possible and enabled in terms of section (6) to institute bail proceedings.


3. Section 59 of the Principal Act is hereby amended by substituting the following paragraph for paragraph (a) of subsection (1):

(a) An accused who is in detention in regard to an offence excepting an offence contemplated in Part 11 or Part III of Schedule 2 may, before his or her appearance before a lower court, be released on bail by [a] the police officer with the rank of non-commissioned officer or above in charge of the police station concerned or someone authorised by him regarding such an offence if the accused deposits with the police station the amount of money determined by the police officer concerned,


4. Section 60 of the Principal Act is hereby amended by substituting the following section:

60. Bail on first appearance of the accused in a lower court.

(1) An accused in detention for an offence is entitled to bail at his or her first appearance in a lower court or at any later stage until his or her conviction for such offence, unless the court finds that there are grounds why he or she should be held in detention. If the question of the accused's possible release on bail is not raised by the accused or the prosecutor, the court must enquire of the accused whether he or she wishes the matter to be considered by the court.

(2) In considering the question whether there are valid reasons why an accused should be held in detention, the court may take into consideration the following to the extent that it is relevant:

(a) The likelihood that the accused will attempt to evade his or her trial, taking into account the following factors where relevant, namely --

(i) the accused's emotional, family, community or group orientation regarding the place where he or she is to be tried:
(ii) the accused's assets and where such assets are situated;
(iii) the means and travel documents in the accused's possession that may enable him to leave the country;
(iv) the degree, if any, to which the accused can afford to forgo the bail money determined;
(v) the question whether the accused's extradition could readily be accomplished should he or she flee across the Republic's borders in order to evade his or her trial.
(vi) the nature and seriousness of the charge against the accused;
(vii) the strength of the case against the accused and the incentive this may be for him or her to attempt to evade the trial;
(viii) the nature and seriousness of the punishment likely to be administered should the accused be found guilty on the charges against him or her;
(ix) the extent to which the conditions of bail are binding and effectively enforceable and the ease with which such conditions may be violated;
(x) any other factor which should be taken into account at the court's discretion

(b) the likelihood that the accused, should he or she be released, will attempt to influence or intimidate witnesses or conceal or destroy evidence, taking into account, where appropriate, the following factors, namely --

(i) whether the accused has knowledge of the identity of witnesses and of the evidence they will be able to give against him or her;
(ii) whether the witnesses have already made statements and have agreed to testify;
(iii) whether the police investigation against the accused has already been completed;
(iv) the relationship of the accused to the various witnesses and to what degree they may be influenced or intimidated;
(v) the degree to which the conditions of bail prohibiting communication between the accused and witnesses will be efficient and enforceable.
(vi) whether the accused has access to evidence to be presented at his or her trial;
(vii) the ease with which evidence can be concealed or destroyed;
(viii) any other factor which should be taken into account at the court's discretion;

(c) the likelihood that should the accused be released, he or she will endanger the safety of the public or any particular person or that he or she may commit a serious offence, taking into account, where appropriate, the following factors, namely--

(i) the degree of violence against others contained in the charge;
(ii) any threats of violence the accused may have uttered against any person;
(iii) any grudge the accused allegedly harbours against any person;
(iv) any inclination to violence by the accused, as demonstrated by previous behaviour;
(v) any inclination to committing serious offences by the accused, as demonstrated by previous behaviour;
(vii) any failure on the part of the accused to adhere to conditions of bail;
(vii) any evidence that the accused previously committed a serious offence while he or she was on
(viii) any other factor which should be taken into account at the court's discretion.

(3) When considering the question whether an accused should be released on bail or not, the court, taking into account the appropriate factors contemplated in subsection (2), shall weigh the public interest regarding sound administration of justice against the accused's right to his or her personal freedom, and in particular the probable disadvantage he or she will suffer should he or she be held in detention, taking into account, where appropriate, the following factors, namely --

(a) the length of time that the accused has already been in detention since his or her arrest;

(b) the likely period of detention up to the conclusion of the trial should the accused not be released on bail;

(c) the reason for any delay in conducting the trial and any part the accused may have played in such a delay;

(d) any financial loss the accused may suffer as a result of his or her detention;

(e) any impediment to the preparation of the accused's defence or any delay in obtaining the legal aid which may be caused by the detention of the accused;

(f) the accused's state of health;

(g) any other factor which should be taken into account at the court's discretion.

(4) The court may obtain the information necessary for its decision or order regarding bail in an informal manner concerning matters not in dispute between the accused and the Prosecutor. As regards matters that are in dispute, the court may require the prosecutor or the accused, as the case may be, to present formal evidence.

(5) The fact that the prosecution does not oppose the granting of bail does not relieve the court of its duty to weigh the personal interests of the accused against the public interest.

(6) The court may make the release of an accused on bail subject to conditions that will, in the court's opinion, contribute to ensuring that the accused will appear on any date to which the proceedings may be postponed and which will ensure that he or she will refrain from interfering with the course of the proceedings.

(7) The court may order the accused to produce a guarantee, with or without sureties, that he or she will pay to the State the amount determined as bail or which has been increased or decreased in terms of section 63(1) or forfeit it in circumstances in which the amount, should it have been deposited, would have been forfeited to the State.

Amendment of section 63 of Act 51 of 1977

5. Section 63 of the Principal Act is hereby amended by substituting the following subsection for subsection (1):
A court before which a charge is pending concerning which bail has been granted, may at the request of the prosecutor or the accused, increase or decrease the amount of bail determined in terms of section 59 or 60, or amend or supplement a condition imposed in terms of section 60 or 62, either by that court or another court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused, and when the accused is present in the court, complete the application.

Substitution of section 64 of Act 51 of 1977

6. Section 64 of the Principal Act is hereby amended by substituting the following section:

64. Proceedings in connection with bail and conditions to be fully recorded.

The court which is considering [an application for] bail in terms of section 60 or which imposes a condition in terms of section 62 or which amends or supplements the bail amount or a condition, or refuses to do so, shall fully record the proceedings concerned, including the imposed conditions and an amendment or supplementation thereof, or shall cause such proceedings to be recorded, and where the said court is a magistrate's court or a regional court, a document purporting to be an extract of the record of the proceedings of that court and which purports to be duly certified by the clerk of the court, and which sets out the conditions of bail and an amendment or supplementation thereof, is by mere presentation thereof in a court in which the charge concerned is pending, prima facie evidence of the said conditions or an amendment or supplementation thereof.

Amendment of section 66 of Act 51 of 1977

7. Section 66 of the Principal Act is hereby amended by substituting the following subsection for subsection (1):

(1) If an accused is released on bail subject to a condition imposed in terms of section 60 or 62, including an amendment or supplementation of a condition of bail in terms of section 63, and the prosecutor makes an application to the court before which the charge is ending in connection with which the accused has been released on bail to present evidence to prove that the accused has failed to fulfil such a condition, the court shall, if the accused is present and denies that he or she has failed to fulfil the said condition or that the failure to fulfil said condition was due to no fault on his or her side, continue to hear the evidence that the prosecutor and accused present to it.

Insertion of section 67A

8. The following section is hereby inserted in the Principal Act after section 67:

67A Criminal liability of a person on bail due to failure to appear.
A person who is released on bail and who without valid reason fails to appear on the date and at the place determined for his or her appearance or fails to remain present until the proceedings have been completed, or who without valid reason fails to give himself or herself up at the time and place determined by the court in terms of a written order, is guilty of an offence and on conviction liable to a fine not exceeding five thousand rand or to imprisonment not exceeding one year.

Substitution of section 68 of Act 51 of 1977

9. Section 68 of the Principal Act is hereby substituted by the following section:

68. Withdrawal of bail

(1) A court before which a charge is pending concerning which the accused has been released on bail, may, on information under oath that the accused is about to escape from justice or is about to flee in order to escape from justice, or that the accused is interfering with witnesses or is threatening or attempting to interfere with witnesses or that he or she constitutes a serious threat to the safety of the public or a particular person, issue a warrant for the arrest of the accused and make the order it deems fit, including an order that the bail be withdrawn and that the accused shall be imprisoned in a prison until the end of the criminal proceedings concerned.

(2) A magistrate may, in circumstances in which it is not feasible to obtain a warrant for arrest in terms of subsection (1), on application by a justice of the peace and on a written statement under oath by an officer that he or she has reason to suspect that an accused released on bail is about to escape from justice, or that the accused is interfering with witnesses or is threatening or attempting to interfere with witnesses or that he or she constitutes a serious threat to the safety of the public or a particular person, issue a warrant for the arrest of the accused and may, if convinced that the ends of justice may be defeated should the accused not be placed in custody, withdraw the bail and cause the accused to be imprisoned in a prison, which imprisonment shall remain in force until the completion of the criminal proceedings concerned, unless the court before which the proceedings are pending, restores the bail.

Amendment of section 307 of Act 51 of 1977, as amended by section 17 of Act 56 of 1979 and section 8 of Act 64 of 1982.

10. Section 307 of the Principal Act is hereby amended --

(a) by substituting the following paragraph for paragraph (b) of subsection (2):

(b) if said person was not thus released on bail, [and the attorney-general has not objected to the granting of bail to that person in terms of section 61] release him or her on bail on condition the he or she deposits the amount of money determined by the court concerned with the clerk of the court or a member of the prison service at the prison where said person is in detention or with a police officer
at the place where such a condemned person is in detention; or by inserting the following subsection after subsection (3):

(3A)(a) Should the order contemplated in subsection (3)(b) not be served on the condemned person within 14 days of the issue thereof because he or she cannot be found at the address he or she supplied at the time that bail was granted to him or her, bail shall be provisionally withdrawn and the bail money provisionally declared forfeit, and a warrant for his or arrest shall be issued. (b) The provisions of section 67(2) concerning the ratification or suspension of the provisional withdrawal of bail or forfeiture of bail money, the making final of the provisional forfeiture of bail money, the provisions of section 67(3) concerning the hearing of evidence and the Provisions of section 70 concerning the cancelling of forfeited bail money shall mutandis mutatis be applicable to bail pending revision.

(c) by substituting the following subsection for subsection (6):

(6) The provisions of sections 63, 64, 65, [66, 671 and 68 shall apply mutatis mutandis to [the granting of] bail pending revision.

Amendment of section 309 of Act 51 of 1977

11. Section 309 of the Principal Act is hereby amended by the insertion of the following subsection after subsection (4):

(5) When a provincial or local division of the Supreme Court on appeal against a decision of a magistrate's court hands down a judgement and an appeal is lodged against such a judgement, said division of the Supreme Court shall have the powers granted to a magistrate’s court in terms of section 307 concerning the granting of bail.

12. Section 61 of the Principal Act is hereby repealed.
February 1995

1. **Introduction**

This presentation is made on behalf of Delegates for Christian Education of the National Synod of Reformed Churches in South Africa. Membership is about 160 000. View points and points of departure regarded by Christian circles, and in particular Reformed circles, as crucial to the education of our country's children are offered in this presentation, each principle being as brief as possible. In view of the concise nature of this presentation further information would be available on request.

2. **Principles regarding education in the RSA which according to Christian Reformed convictions should be included and entrenched in the RSA's new constitution**

2.1 Similar to the interim constitution, the new constitution should include a complete chapter on the protection of basic or fundamental rights of each South African. All fundamental rights of individuals as well as groups should be fully described and protected by the new constitution. Impairment of these fundamental rights should be regarded and handled by our courts as an offence against mankind and against mankind as God's creation.

2.2 Of primary importance is the protection of individuals' rights, followed by the protection of group rights. For this reason the protection of individual rights such as freedom of religion, association and conviction are of major importance. Recognition of these rights also guarantee group rights to which each individual is entitled.

2.3 Fundamental rights such as freedom of conviction, religion, life and world opinions as well as personal opinions are of utmost importance to education. Protection of these rights enables parents, teachers and children of similar persuasions to be grouped together in schools with a particular religious character.

2.4 In view of the fact that education never takes place in an ethnic-cultural vacuum, the protection of individuals' and groups, right to the realisation and maintenance of their own ethnic culture is important. People's right to realise their ethnic habits, customs, cultural activities, etc. should be included in the constitution. The right to own-culture and culture-particular education should be recognised in all forms (public, government supported, private, home schools).

In instances where individuals have no ethnic-cultural preferences, electing culture-egalisation education where for example all ethnic, cultural and language differences are purposely opposed and scrapped, such persons should be entitled to introduce, attend and maintain schools promoting this ideal. Individuals (parents, teachers and pupils) preferring own-culture, culture-bound and culture-particular education/schools, should honour the above schools.
2.5 Similar to the interim constitution, the reality of cultural pluralism should be recognised. The fact that people differ with regard to religion, ideologies, personal convictions, race, ethnicity, gender, age, class, retardation, background, sexual orientation, etc. should enjoy recognition.

2.6 Although this diversity of differences should be recognised by the constitution, any form of discrimination against any person as a result of his/her dissimilarity should be rejected and made punishable. The fact that people differ from each other, should not be a foundation for discrimination against others, for instance stereotropism, prejudice, disapproval, rejection, exclusion, etc. The fact that our diversity of people should be regarded as components of South Africa's copious community, should be reflected by the constitution.

2.7 For the above reasons the diversity of languages in our country should be recognised, some as official languages, some as regional languages and others used in practice by groups of people. The most effective education takes place in a pupil’s home language, a fact which should be covered by the constitution - once again without discriminating against children wishing to attend a school for personal reasons even though education in their home language is not offered. The school community's right to own culture and educational language should be recognised by such individuals.

2.8 In general the constitution should, particularly with regard to education, strive for a balance between: unity and diversity; individuality and universality; uniqueness and commonness; the interests of the individual and those of the group, the community, the nation. This golden thread should be observed throughout the constitution: on the one hand the uniqueness of the individual, on the other hand the interests of the groups and of the nation to which he belongs.

2.9 The right of parents, teachers and pupils to group themselves around religious convictions, to introduce and maintain schools reflecting their own convictions and where they could realise their educational convictions, should be protected.

2.10 The constitution should stipulate that parents and the larger community around the school should be able to determine and protect the school’s nature and character. The principle of parent involvement and say, generally accepted in education, should be formulated explicitly in the constitution. Following from this are significant conditions regarding the responsibilities of governing bodies, school committees and teachers/parents/pupils associations.

2.11 Four types of schools should be guaranteed by the constitution: ordinary government schools, government supported schools, private schools and home schools. The principles of parent involvement, cultural orientation of education and usage of the mother tongue for all of these should be included.

2.12 The principle of compulsory education in lieu of compulsory school attendance should be recognised by the constitution, particularly in view of limited available educational sources.
Although pupils should not be compelled to attend school, they should be compelled to be educated, meeting specific objective requirements stipulated by the authorities (i.e. educational authorities of the country and the province concerned). In this manner, pressure upon schools would be alleviated, as a considerable number of parents and teachers would exercise this option in accordance with standards stipulated by the authorities. Public, objective examinations should take place.

2.13 The principle that no one, neither the authorities nor educational authorities, should unilaterally change the ethos or character of a school or university, should be included in the constitution. This should happen only following negotiations with the governing body of the school or the university concerned. Section 247 of the interim constitution should therefore be included in some or other manner in the new constitution.

2.14 Also to be included is the principle that universities, technikons and colleges - similar to schools - should be able to realise their own ethos and character, religious as well as cultural, in all their activities. Mother tongue education and community involvement in the determination of the character of the university, technikon or college should also be included.

2.15 It is recommended that an accommodation model regarding religious instruction in schools be included in the constitution. The right of the school community (parents, pupils, the community around the school) to take a decision about the religion concerned, should be included in the constitution. The right of a school community to relate to a particular church or religious persuasion or association should be recognised and protected. minority-group pupils should be exempted from the majority's religious instruction, while the school community should ensure that they enjoy their own religious instruction - during school hours as well. The right of each child to his/her own religious instruction at school should be recognised by and included in the constitution.

The accommodation approach requires that each school community's right to determine the nature of religious instruction should be included in the constitution. Some school communities may agree to offer only one religion, others to offer a variety of religions on a comparative basis, all of which should be recognised by and included in the constitution.

2.16 The right of schools' governing bodies to word and introduce the religious, language and cultural character of education in schools' admission policy and credo should be recognised. This is essential to an individuals right to freedom of association; only by reason of the contents of these documents parents/pupils would be able to take a decision whether they should associate with a school (community) or not.

2.17 Admission policies, credo’s or other documents determining the religious, language and cultural character of schools, should strictly adhere to educational standards and criteria stipulating schools' religious, language and cultural character. No non-educational criteria, relating for instance to race or gender, should be included in such policy documents.
Individuals, right to freedom of association by reason of such documents should be recognised.

2.18 Should any individual wish to associate with a school/school community whose religion, language or ethnic-cultural character differ from those of the pupil concerned, the school community should be afforded the right not to yield to the demands of this individual should his demands be contrary to the religion, language, character or ethos of the school. On the other hand, the school should do everything possible to enable the individual wishing to associate with the school and its character to do so, for instance additional language instruction and cultural inclusion.

2.19 Although a degree of cultural inclusion, equalisation, acculturation and conformity in education is inevitable, the principle (philosophy, ideology) of cultural pluralism should be recognised by the South African community: the principle that although individuals are unique, equal in front of God, each entitled to personal freedom and rights varying among them, differences should be regarded as an asset; a healthy balance should exist between individual and group interests.

Prof J L van der Walt
Chairman: Delegates for Christian Education of the National Synod of Reformed Churches in South Africa
Griekwastad Community Development
Project

In my capacity of Chairman of the Griekwastad Community Development Project I wish to contribute to our new constitution the following:-

Unless we possess the required documents, our constitution is entrenching upon citizens' right to freedom of association across provincial as well as international borders.

Overseas investors and individuals furthermore guarantee investments in property in any of our country's nine provinces whereby profits or dividends are to be returned to their own countries.

Certain citizens however are denied the same right, for instance civil servants such as teachers who are not allowed to build or buy a government subsidised house outside a radius of about 150 kms from where he works.

This makes way for the notion that certain civil servants are unable to invest their hard-earned financial benefits within the borders of any town or city of choice.

We request that all South African citizens should be able to invest their benefits, either from private or public sectors, in any province, town or city and that this should be entrenched in the constitution.

Motivation: A person teaching in, say Kimberley, but with his family living in Griekwastad, is denied the right to build or buy a government subsidised house for his family in Griekwastad as a result of the fact that this would exceed the radius of about 150 kms. In order to take advantage of employment benefits he/she is subsequently compelled to move to Kimberley. The law should be amended in order to allow those able to commute on a daily basis to and from Griekwastad to build or buy a government subsidised house.

We believe that should this not be feasible the right to freedom of association would be affected.

We trust that this would be debated in parliament during the writing of our new constitution.

E. SCHOLTZ
CHAIRMAN

576 Gemsbok Street
GRIEKWASTAD 8365
At Kempton Park representatives of political parties across the political spectrum agreed on the principles which have to be included in a final Constitution for a new democratic South Africa. The AHI believes that these constitutional principles represent a common vision of a future South Africa and a firm foundation for the new Constitution.

The necessity for economic growth as a foundation for sustainable reconstruction and development is generally acknowledged, also in the Preamble to the White Paper on Reconstruction and Development. That Preamble also recognises that the Government will need active partnership with civil society, and with business and labour in particular, to succeed in the mutually dependent and reinforcing tasks of growth and development. It acknowledges that both business and labour "have the freedom in a democratic South Africa to protect and promote their immediate interests", while expressing the fervent hope that they will pursue the broader challenges of extending opportunities.

The Constitutional Assembly should be mindful that aspects of the Constitution could impact on the freedom of business to promote its immediate interests and at the same time contribute to the RDP objectives of meeting basic needs, developing human resources and building the economy. The AHI would like to submit a few considerations which we believe the Constitutional Assembly should take into account in this regard.

Fiscal discipline

The RDP White Paper envisages that state revenue will be raised by expanding the tax base through expansion of the South African economy, rather than by raising tax rates. In order to maintain fiscal discipline it is important that the new Constitution does not create the opportunity for a proliferation of new taxes or tax-collecting levels of government.

Non-proliferation of laws

The Transkei, Bophuthatswana, Venda and Ciskei had independent legislative authority with the result that in some cases they made their own laws and in other cases their laws differed from the rest of South Africa because they did not adopt amendments made in South Africa. The upshot was that different rules applied to taxation, companies, insurance and other commercial and business transactions in different parts of South Africa. This created uncertainty and made it difficult to do business and to work across boundaries. A process of harmonization and unification is now taking place to remove the fragmentation and divergencies in laws that have developed.

If provinces were empowered under the new Constitution to make their own laws and regulations on commercial and business matters a much worse situation could develop. A multiplicity of legal rules on basic aspects of business such as tax, company law, insurance law, investor protection, etc would restrict growth and be a strong disincentive to investment.
Protection against arbitrary government action

The promotion of entrepreneurship and investor confidence requires protection against arbitrary government action. This will be achieved by the retention of section 7(3) of the interim Constitution - which acknowledges that business firms, as well as unions, churches and other associations of civil society also have to be protected under the Bill of Rights. It is in keeping with the President's statement in the Preamble to the RDP White Paper that both business and labour have the freedom in a democratic South Africa to protect and promote their immediate interests.

Minimum restrictions on economic activity

Laws which restrict or impede free economic activity restrict economic growth. Where public interest requires restrictions and regulatory control, care must be taken not to restrict or regulate more than is necessary.

In order to find the best balance between free economic activity and restrictions based on public interest an enquiry into different aspects and considerations is required. This is best done through ordinary Acts of Parliament, rather than a Constitution, so that the necessary detail, qualifications and exceptions can be fully considered, debated and included in the legislation.

Protection of property rights and the right to enter into contracts

In order to achieve a growing economy and a prosperous society it is vital to safeguard property rights and contractual freedom in the Constitution.

Section 28 of the interim Constitution contains such a safeguard for the protection of rights to property. If it is changed substantially or left out it would be interpreted as a massive change to stated government policy and lead to investor reticence and disinvestment.

If there is uncertainty about the protection of property and contractual freedom, investment in fixed assets such as land, building, dams, machinery and in development of farms, factories and mines will be severely restricted. Skilled people and investors prefer to move to countries where there are property rights and contractual freedom and to stay away from countries where property rights and contractual freedom are perceived to be inadequately protected.

More importantly, the ordinary people who make up the population of a country are motivated to work harder and to improve their qualifications by the desire (and possibility) to buy and own their own property, ranging from food and clothes to houses and vehicles. If property is not protected in the bill of rights against loss through the unilateral action of the government, people's motivation and productivity are seriously affected.
We have not yet evolved a society in which the natural urges to achieve private gain at public expense have been replaced by a spontaneous devotion to public service. Patronage and nepotism are social diseases endemic in all human societies... 3

Pick a lesser developed country at random and leaf through almost any study tracing that country's post-colonial development and looming large amongst the reasons for its failure to meet its true potential will be a discourse on corruption in and

1 The bulk of the research for this article was completed during internships with the American Civil Liberties Union (ACLU) in Los Angeles and the International Centre for the Legal Protection of Human Rights (INTERIGHTS) in London in 1991-2. The writing of this article would not have been possible had I not had access to the library facilities available in those cities I wish to extend my thanks to the ACLU and INTERIGHTS for hosting me during my stay and to the International Human Rights Internship Program in Washington for their sponsorship. I am also grateful to Anselm Ondinkalu of the Civil Liberties Organization of Nigeria for his explanation of some of the intricacies of Nigerian constitutional development and to Alfred Cockrell and Peter Hathorn for their useful comments on the first draft of this article. Responsibility for the arguments and conclusions expressed here is, however, solely my own.

maladministration by the civil service. In the light of the social importance of this problem one might have assumed that the parties to the South African constitutional drafting process would have devoted considerable attention to an examination of constitutional mechanisms aimed at attempting to ensure that the future civil service will evolve into a constructive force well adapted to meet the challenges that lie ahead. Unfortunately this has not been the case. 4

4 Recent exposés of further widespread corruption in government have focused public and press attention on the need for remedies. The partially televised public hearings for appointments to the SABC board in May 1993 gave South Africans a taste of an open and accountable system of appointments. The Democratic Party is however the only participant in the Multi-Party Negotiations Process who has to date made any constitutional proposals dealing with the procedure to be adopted in the appointment process. (Democratic Party Response to the Fifth Report: Constitutional Issues, 9 July 1993.) The DP's submissions are discussed in the conclusion to this paper. The ANC, noting "the apparently bottomless pit of corruption that characterises the administration of the present government", has stated that: "We need to build strong institutions, independent of government, to ensure that corruption is rooted out... for without such structures there can be no true democracy in South Africa." (B.Ngeuka of the ANC Constitutional Committee, Cape Times 23-03-93. ) The ANC has as of yet however not made any proposals aimed at attempting to impose controls over a root cause for the presence of corrupt and incompetent public, servants, namely insufficient checks and balances in the appointment process. Instead it has concentrated on institutions such as the Ombudsman which, while performing a valuable function, can only attempt to mitigate the severity of the consequences of having allowed too may incompetent or corrupt officials to have been appointed in the first place. The SA Law Commission in its examination of the administration of the state makes no proposals and appears to view the present statutory regime (discussed hereunder) as adequate. (Project 77. Constitutional Models, 1991, p183-5 of the summary.)
This paper seeks to discuss some of the problems which might arise should the future SA Constitution not address the issue. Constitutional checks and balances aimed at reducing the effects of nepotism and corruption in the appointment process are discussed with reference to the experience of the UK and the USA. The problem of the tension arising out of the simultaneous application of affirmative action and merit principles in appointments and promotions is discussed with reference to Nigeria and India. The constitutional function of a Civil Service Commission is described as well as the models which may be adopted. The vexed issue of appointments of persons who violated human rights is referred to. What follows in conclusion are some tentative submissions on preferable constitutional options.

The first brand of mischief that is the concern of this essay is political corruption. In the context of public office the following are usually identified as the main types of corrupt behaviour: bribery (use of a reward to pervert the judgement of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit) and misappropriation (illegal appropriation of public resources for private uses). The second brand of mischief that concerns us is maladministration, that is incompetence and inefficiency in the public service. The two problems are obviously inextricably linked as a public service which allows for nepotistic appointments of persons lacking competence, or a public service which tends to only grant export licences in under 6 months when the wheels are greased, will generally not be characterised by efficiency or competence.

1. CORRUPTION AND MALADMINISTRATION IN THE AFRICAN AND SOUTH AFRICAN CONTEXT

In a leading text Robert Williams states that corruption is popularly viewed as the outstanding characteristic of African public life and that even if the accuracy of this perception is open to question there are many students on African affairs who believe that corruption has a profound and damaging effect on economic performance, administrative effectiveness and governmental
authority. 5 Evidence suggests that many African countries display precisely those combinations of institutional and political characteristics and socioeconomic conditions most likely to ensure that corruption will flourish.6

6 R.Williams, op cit, p2. Nepotism is obviously not unique to Africa and there are some who argue that ethnic nepotism -- favouritism towards kin - is today the predominant universal social cleavage for the simple reason that we are predisposed to support our kin as throughout history this has been highly advantageous in the struggle for survival. (see generally, T. Vanhanen, The Politics of Ethnic Nepotism - India as an Example, 1992. ) A myriad of factors may influence perceptions of what constitutes an ethnic group and thus provide a basis for ethnic nepotism. Ethnic groups may be both widely and narrowly defined and the ebb and flow of history may determine which level of ethnic group becomes politically relevant. (ibid,p13) Thus, for example, in India before independence the cleavage between the British and the Indians was originally the most important social cleavage. In the period immediately prior to independence the Muslim/Hindu cleavage became more important and since independence, in addition to religion, cleavages based on language, cast and tribe have acquired importance.(ibid,p13)

These characteristics and for the simple reason that we are predisposed to support our kin as throughout history this has been highly advantageous in the struggle for survival. (see generally, T. Vanhanen, The Politics of Ethnic Nepotism - India as an Example, 1992. ) A myriad of factors may influence perceptions of what constitutes an ethnic group and thus provide a basis for ethnic nepotism. Ethnic groups may be both widely and narrowly defined and the ebb and flow of history may determine which level of ethnic group becomes politically relevant. (ibid,p13) Thus, for example, in India before independence the cleavage between the British and the Indians was originally the most important social cleavage. In the period immediately prior to independence the Muslim/Hindu cleavage became more important and since independence, in addition to religion, cleavages based on language, cast and tribe have acquired importance.(ibid,p13)

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* To generate support nationalist leaders were obliged to assert that when they came into power the material conditions of the indigenous populations would improve substantially. When they came into power they were obviously under pressure to deliver. The most urgent and compelling source of this pressure was the party officials and activists anxious to taste the fruits of public office as recompense for their assistance in securing independence. 7 As they were owed jobs try the party they obviously did not see the need to apply for civil service posts by the ordinary merit system. (This approach is based on the perception that 'the spoils of victory belong to the victor'.)8
* To the extent that African officials often find themselves to be part of a wider kinship network which confers reciprocal rights and responsibilities they may find themselves in a delicate position. Where they have managed to obtain the education (which landed them their jobs) because of the support of their extended family or local community then they may be under a powerful social expectation to use the resources of public office to help relatives and friends now in need. Williams in fact says that to many officials this is the only natural and proper thing to do and failure to do so is a violation of basic social expectations.

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7 R. Williams, op cit, p44.
8 See further the discussion below on the development of UK and U.S.A. civil service law.
9 R. Williams, op cit, P45.
10 ibid.

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* The boundaries of most African states were drawn by reference to largely arbitrary and artificial criteria. In consequence 'the nation' which the government employee is supposed to be serving may well be, in the absence of any widely shared concepts of citizenship or national interest, a somewhat vague and meaningless abstraction. Viewed as such it is easier for the public servant to perceive of the state's resources as a legitimate target for diversion and redistribution according, to a different set of modalities than those described in the Official handbook.

* Western theory has it that because bureaucrats enjoy high job security they will be satisfied with less renumeration than may be available in the private sector. African officials do not however enjoy the job security of their Western counterparts. Reasons for this include the periodic purges which may accompany regime changes and the potential for the bankruptcy of the state and/or
superinflation to erode savings and pensions. This shorter time horizon may provide a powerful incentive to exploit the fruits of office while they last.12

For the purposes of this article it suffices to say that in a future South Africa some or all of the above-mentioned factors are likely to be present.

A further set of factors which should set the constitutional lawyer's alarm bells ringing is South Africa’s particular history. One of the pillars on which the Afrikaner nationalist struggle was fought was the exclusion of Afrikaners from the better posts in the civil service. A central organizational pillar in this struggle was the Broederbond - an efficient and highly structured nepotism machine if ever one existed. There is no doubt that the Bond viewed the civil service as one of the spoils of the Nats victory in 1948. In fact the Broederbond proudly claimed the promotion of its members in the civil service and "semi-civil service" as one of its major successes: " with the help of our own political leaders, success was achieved in opening the way to the top of these services ... for culture conscious Afrikaners."13 Cloete writes that in the late 1940's and the 1950's English speaking civil servants were purged from many departments and over time this process has led to "virtually, an exclusive white bureaucracy."14 Corruption has also been rife - the 'Info scandal'; the perennial resignations of Cabinet Ministers caught.. with their fingers in the till; the vast sums of unaudited taxpayers moneys handed to various murky organizations and bogus front companies linked to the 'state security' apparatus in the absence of adequate or any controls ~ all bear testimony to a system tarnished with a history of corruption. The parallel 'black government' structures - the black local authorities, the Bantustan governments, the Houses of Delegates and

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11 R. Williams, op cit, p46.
12 R. Williams, op cit, p120.
Representatives - by their very nature have laid a weak foundation for those hoping for a future with a 'clean administration'. The only real reward for participation in these structures was financial gain and it could thus hardly be expected that these institutions would be staffed by people with a strong devotion to public service.

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13 Broederbond internal document, Ons Taak op die Staatkundige Terrein (our Task in the Constitutional Field), 1972. Quoted in Wilkins and Strydom, The Super Afrikaners, 1980, p18. As an example of the explicit nepotism employed by the Bond, see Circular 6/77/78 of August 1977: "The attention of friends involved in education in the Transvaal is drawn to the fact that in the new education structure provision is made for the appointment of a head of department for vocational guidance at each school.

It is of the utmost importance that these posts ... are manned by teachers with the right attitudes ... Friends are asked to apply for these key positions."( Wilkins and Strydom, op cit, p23.) It should also be noted that the selection process would almost certainly have been controlled by the Bond.


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II. THE RSA CONSTITUTION ACT 110 OF 1983

The present statutory regime creates little in the way of checks and balances in the appointment process. The Constitution vests all powers in relation to the appointment and removal of Ministers, Deputy Ministers and public servants in the State President.16 The power to appoint or remove public servants may be delegated by the State President and in terms of s8 of the Public Service Act 111 of 1984 general powers of appointment and promotion are conferred on the relevant Minister or Provincial Administrator or their delegate. In
appointments or promotions due regard must be given to qualifications, merit and efficiency of the
candidate. 17 The Commission for Administration is empowered to make recommendations
concerning all matters affecting the employment of public servants. 18 Although public
servants may be members of political parties they may not use their position as public servants to
promote or prejudice the interests of any political party. 19

III. THE UNITED KINGDOM

The real "Second Chamber", the real "constitutional check" in England, is provided, not by the
House of Lords or the Monarchy, but by the existence of a permanent civil service, appointed on a
system

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15 For a contrary view on the SA public service see J.N.N. Cloete, "The Bureaucracy", in De
although "it has been customary for classified posts... to be filled by Whites" nepotism has been
almost non-existent! (ibid,p66) Cloete is also of the view that SA has been fortunate as the cases
where the "evils" of nepotism and victimization have been revealed "are so rare that they have been
condemned on all sides." (ibid,p74)

16 Sections 24, 27 and 28.

17 s10(1)(b) of Act 111 of 1984.


19 s19 of Act 111 of 1984.

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independent of the opinion or desires of any politician and holding office during good behaviour.20
Our interest in Britain is twofold. Firstly we are concerned with the political developments of the mid to late 19th century as it is these developments that gave rise to the model on which the civil service in English speaking countries is based. Secondly, those who might be inclined to believe that rampant patronage and nepotism are endemic to Africa, can take heart from the fact that a similar disease once afflicted Britain causing the drafters of the Northcote-Trevelyan Report of 1854 on the Organisation of the Permanent Civil Service to make the revolutionary suggestion that appointments and promotions to the public service should be based on merit and qualifications.21 The overwhelming method of appointments at that time was patronage, pure and simple. The Report noted that this method had the result that the:

The civil service did not attract the noblest men, but instead it was sought after by the unambitious, indolent or incapable... The result was that the Service suffered both in internal efficiency and public estimation. 22

In the year after the Report a Civil Service Commission was established to give effect to the 'merit system', as it is now known. The system of holding open competitions for posts was also introduced and by these methods the patronage system was gradually

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20 G.Wallas, Human Nature in Politics, 1948, p262. For a contrary view see W.Plowden,"Whitehall and the Civil Service" in R.Holme and M.Elliot eds, 16881988 Time for a New Constitution, 1988. Plowden notes that as the power of British civil servant to act as a constitutional check on improper conduct depends on convention and not law the complacent view that the civil service does or could act as an effective constitutional check is naive.(ibid, pp183-195.)


22 Quoted in Chapman, op cit,p26.
undermined or destroyed.

The current legal position is that with certain exceptions no person may be appointed to a permanent position until his or her qualifications have been approved by the Civil Service Commissioners and they have issued a certificate of qualification in his or her favour.24 The most important 'exempted posts' are those where the holder is appointed by the Crown. 25 The Commissioners, while responsible to Ministers as regards general recruitment policy, are completely independent of ministers in matters concerning the recruitment of individuals.26 The general conduct of civil servants is not governed by statute but by "a general code of conduct" setting out standards of acceptable behaviour. 27

As almost all British civil service law is contained in conventions it is submitted that our principal interest should be restricted to a narrow survey of the broad sentiments expressed therein. For the more concrete manifestations of these sentiments it is to the former colonies that we must now turn.

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23 Chapman, op cit, p32. The word undermined is probably more accurate as I'm not sure that one can hope to destroy patronage. Certainly there are those who would say that ex-Oxbridge students are more likely to be appointed to top Whitehall posts than graduates of other universities. Even though this is patronage it is of a vastly different form to that which plagues Africa as in the UK the complaint is not that unqualified and incompetent people are being appointment as a result of patronage but that out of a set of candidates who are generally speaking similarly competent some are more likely to be appointed than others. The former form of patronage has very serious effects on the running of the country. The latter, although unfair between the candidates, obviously has fewer negative societal implications and thus does not need to be as zealously guarded against.

25 ibid.
IV. THE UNITED STATES OF AMERICA

Civil service reform is always popular with the 'outs' and never with the 'ins', unless with those who have a strong expectation of soon going out.28

Mindful of the needs for checks and balances in the appointment process the framers of the 1787 US Constitution provided in Art. II, Section 2, cl. 2, that the President:

.. shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, ... and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such Inferior Officers, as they may think proper, in the President alone, ... or in the Heads of Departments. 29

Art. II, s 2, cl. 2, the Appointments Clause, however only provided a basis for a checking procedure for ensuring meritorious appointments to top posts (through what is now referred to as "the confirmation process"). As regards the appointment of inferior officers the politicians of the New World would for the next century or so follow the patronage system favoured by their former colonial masters and in 1865 the "spoils to the victor" selection system was still viewed as being firmly entrenched. 30 After the assassination of President Garfield by a disappointed office-seeker it was apparent that legislative intervention was needed to undermine the predominance of spoils Politics and Congress passed the Civil Service Act of 1883 ("the Pendleton Act") which required

28 Congressman Benjamin Butler, 42 Cong., 2 sess. at page ix, quoted in A. Hoogenboom, Outlawing the Spoils, p.267.
29 This provision also makes reference to judicial appointments. Questions concerning the procedure most suited to judicial appointments fall beyond the scope of this paper.

30 Hoogenboom, op cit, p.4.

- some jobs to be filled on the basis of merit and protected federal employees from being removed for political reasons.31

As might be expected the politicians immediately set about devising schemes to preserve their powers to bestow patronage and the struggle between those who seek to retain spoils politics and those who seek to extend the merit system continues to this day. Notable milestones in this process include:

* While the 1883 Act only covered a narrow range of jobs, over time the merit system was extended to cover the overwhelming majority of federal employees who are now hired on the basis of criteria such as test scores, training, education and experience. 32

* The establishment in 1912 of a Civil Service Commission to formulate rules to shield government employees from arbitrary dismissal. The Commission was replaced in 1979 by the office of Personnel Management which now bears responsibility for maintaining the merit system. 33

* The 1939 Hatch Act which bars employees from participating in partisan elections except by voting and the 1978 Civil Service Reform Act which guarantees the rights of employees to be union members and which offers protection against harassment and dismissal to 'whistleblowers' - civil servants willing to come forward to expose agency problems and abuses to Congress and the media. 34
The most notable and unique contribution of the US system is, it is submitted, the confirmation process. The Appointments Clause was inserted in the Constitution with the intent to deny Congress any

authority itself to appoint those to whom substantial executive or administrative authority is given by statute. The framers feared that to grant the power of appointment to Congress would place too much power in the hands of the legislative branch. Accordingly the President would select officers as a check on Congress and Senate would confirm or reject his selections as a check on the President.

Prior to discussing the confirmation process in greater detail it is noted that confirmation is not required for of the vast majority of appointments. It is only required for appointments to 'top jobs.' The balance are exempt and the criteria used to demarcate the division between exempt and non-exempt positions are discussed below.

(a) The confirmation process

[The confirmation process [is] an arrangement which permits a group of elected men and women to tell the President when he is too far offside in his proposed appointments...
Where confirmation is required practice has established two general procedures for filling public office by action of the President and the Senate. In the case of an office located in one of the states, one or both of the senators from that state will inform the President of one or more appointees who they prefer; when the President has been given a name acceptable to him he will submit a

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35 Buckley v Voleo 424 U.S. 1, 129. (1976)

36 ibid. In either event appointments were (and are) not a legislative function.

37 “The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.” (Buckley, supra, at 121.)

38 There are over 2.8m federal civil servants. I am advised that the confirmation process applies to somewhere between 500 and 1000 appointments.

39 Hyneman, op cit, p185.

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nomination to the Senate and the Senators will by majority vote approve or disapprove of the nomination, ordinarily acceding to the wishes of the Senators of the majority party in the relevant state. 40 With offices that do not fall within this practice of "Senatorial Courtesy", the President will obtain advice as to potential appointees where he pleases and will then nominate his preference; the Senators will then approve or disapprove by majority vote, their inclination to approve or not being determined by the nature of the office in question and the sympathies or otherwise of the majority to the president. 41

The object of the system is more one of deference rather than a scheme whereby conflictual relations between competing organs of state power are provoked. As the President is aware that
Senate approval is required; he will usually not risk the embarrassment that would ensue from a rejection. He will thus pass over some hopefuls whom he might otherwise have appointed and it is at this stage that one would expect that an incompetent claimant to the rewards of patronage may be expected to be less optimistic about his or her career prospects than would be the case under a different system. For, as obligated to his faithful client as the President may be, both he and his client may be aware that his appointment would be politically impossible.

If the system has not operated as a deterrent and our hypothetical ambitious incompetent is indeed nominated then the Senators in opposition will make sure that the issue is aired in public and a fight at the top levels of government will then ensue. 42

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40 Charles Hyneman, Bureaucracy in a Democracy, 1950, p179. The hearing will be before the relevant Senate committee concerned with the sphere of governmental activity in which the appointee would perform his functions. The Senate is not obliged to accept the recommendation of the committee which held the hearing.

41 Hyneman, op cit, p180.

42 There are no doubt some, schooled and content in the less robust methods of behind closed doors appointments, who view the U.S. system as somewhat unseemly and in bad taste. As Hyneman, op cit, p184, however points out: "A fight at the top levels commands public interest. This is the way the nation gets its political education. A sharp debate over the qualifications of a man for high office may give the people more understanding of the functions of an administrative department and more appreciation of what government might do for them than they would acquire in a lifetime from less sensational disclosures." in addition it should be added that the appointment of incompetent figures to positions of power is to my mind far more unseemly and has consequences of longer duration than a political dog fight.
The most important objection to the process is that it may cause competent nominees who are supported by the President and the majority of the confirming body to reject nomination as they are unwilling to risk the abuse which they fear may be visited upon them.43 This is by no means what usually happens, but it does happen from time to time.44 There is no convincing evidence that fear of undeserved embarrassment or arouse has had a significant effect on the availability of candidates for public office and even if it has this possible negative factor is greatly outweighed by the positive impact of the confirmation procedure.45

A further argument in support of the necessity for democratic scrutiny over top appointments is derived from an analysis of the way in which the modern state has evolved. The once popular assumption of the relationship between elected officials and the bureaucracy was that the elected officials enacted the laws and the bureaucrats merely enforced them. In contemporary government the line between 'making the law' and 'administering the law' has almost disappeared. Many, if not most, laws are written in broad terms that delegate considerable discretionary power to the agencies that administer the laws, transforming in many instances the applicable 'inferior enactments' (be they regulations, rules or administrative circulars) into the very laws which impact most directly upon the lives of the voting public. That being so it is submitted that greater democratic control over the very officials

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43 Hyneman, op cit, p186. This situation is most likely when the opposition are spoiling for a fight with the President and the nominee becomes for the time being the prime recipient of the attack.

44 ibid.

45 ibid. In either event it is submitted that an ability to stomach criticism is a quality that should attach to persons seeking high office.

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who oversee this law making process is required and a step in the right direction is to require confirmation of their appointments.46

The submissions previously advanced in favour of confirmation by the Senate would apply equally if appointments had to be approved by the principal legislative body, Congress. In fact to some this would be preferable inasmuch as Congress passes the laws that describe the activities which the administrative bodies are expected to administer and it may thus be expected that Congress should have the right to ensure that the officials who direct the administrative establishment would do so in sympathy with the objectives of the legislature. 47

(b) Exempt and non-exempt positions

While appointments to the lower ranks in the civil service require the application of standards to ensure that suitable persons are appointed on merit, there are obviously, better ways of achieving this object than by requiring review by the legislative body itself as it can be safely assumed that the members of a future South African parliament will not have the time required to give careful consideration to appointments to these posts.

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46 There are few safeguards in place in South Africa for control over administrative rulemakers. For a comparative analysis see Baxter, Administrative Law, 1984, p201-15. Under the present system in S.A. the principal check that does exist is that subordinate legislators are required to submit their legislation to a senior administrative official for approval. As parliament has seen fit to entrust senior officials with important lawmaking functions (which functions the electorate entrusted to parliament itself) it is now necessary to require greater democratic control over the appointment of these powerful subordinate legislators. One tried and tested way of doing this is to make the process by which they are appointed more open and accountable through insisting on confirmation procedures. If the voting public is not being given the right to elect this class of lawmakers then they, at the very least, have the right to scrutinize the reasoning behind parliament's decision to appoint.
Hyneman, op cit, p184. It would appear that the framers of the Constitution placed confirmation in the hands of the Senate to give the President the benefit of an advisory council and not in the hand of Congress as this would have amounted to a degree of legislative scrutiny out of kilter with the overall design of the Constitution as one of executive rather than legislative supremacy. (see Hyneman, op cit, p185.)

Should the future SA constitution provide for a confirmation process attention will have to be given to the question of which appointments should be exempt from this requirement. In the US the method for determining who is to be classified as an "inferior officer" and thus exempt from the requirement of Senate confirmation is principally established by reference to the desirability of confirmation and not an established concept or legal definition of "inferior officer." 48 When Congress in creating new administrative establishments decides where the authority to appoint should be located it is not guided by any consistent theory but by a consideration of applicability of the following three principles 49:

1. Where is the post's position in the hierarchy? If the statute creating the administrative agency confers the kind of authority which empowers the officials concerned to exert the kind and amount of authority which enables them to direct and control the officials below them, then this is a factor indicating that the officials should fall within the confirmatory class.

2. Does the official have the kind of authority over policy which can substantially influence the character of governmental action? There are many officials who, while not necessarily having the powers referred to in (1), still wield substantial influence over policy.

3. Would the official occupy a position of sufficient prominence such that if he or she were to make a fool of himself or herself in the eyes of the public it would embarrass the government? Should this be so Congress would not be willing, to entrust the screening entirely to administrative
Officials, even where the appointment is regulated by legislation and supervised by the Office of Personnel Management.

Examples of positions subject to confirmation include the following: the heads of every Cabinet-Level Department ("the Secretary") and their undersecretaries; the top administrators of the independent executive agencies (examples being the CIA, NASA and the EPA); and the top administrators of the independent regulatory agencies (examples being the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)).

It is recommended that the future SA constitution provide for a confirmation procedure to be adopted for senior appointments. The American experience with the system has been highly positive and there appears to be no reason why it should not be compatible with our future system of government. The mechanics of the introduction of a confirmation procedure, including draft provisions, are discussed in the conclusion to this paper.

V. AFFIRMATIVE ACTION AND THE CIVIL SERVICE - THE APPROACH IN NIGERIA AND INDIA

On the one hand there can be no doubt that because apartheid has created serious inequality in the allocation of positions in the civil service affirmative action programmes will be needed to undo existing inequalities. On the other hand there is also no doubt that merit is universally as the principal determinant of equality.
of opportunity both as regards initial employment and subsequent advancement in the public service. At this stage of the constitutional debate in SA no-one doubts that there will be constitutional recognition of the need for a programme to remedy past inequality. The challenge that faces us is how to formulate provisions which blend merit and affirmative action in a socially and legally satisfactory manner. For, as our case studies will demonstrate, the form that such constitutional recognition takes in societies ridden by ethnic conflict can have a significant impact on not only the functional ability of the civil service itself but also on whether competing groups may be willing to continue to view their continued participation in the nation state as being in their interests. Where there is large scale unemployment a position in the civil service is a limited resource and one must accept that the perception will develop in the minds of those who have been passed over that a certain group, (however defined in the popular consciousness), which exert great influence over central or regional state structures, is managing this national resource in an unfair and impartial manner. The question here posed is how best to manage this inevitable problem.
Otherwise stated, and seen from the perspective of the constitutional draftman, the crucial question is: "Should the derogation from the merit principle allow for some form of quota system which explicitly recognises the existence of previously disadvantaged groups (the traditional method) or can a more subtle yet workable approach be taken?"

(a) NIGERIA

Corruption, indiscipline and needless arrogance not only abound in the Nigerian civil service; it has become an abode for mediocrity, laziness, apathy, avoidable narrow mindedness, nepotism, favouritism and tribalism on a stupendous and incredible scale.52

Nigeria has since independence experienced a long history of attempts to convince competing groups of the benefits of commitment to the federal cause. The process has included evolution towards a strong decentralization component which has led to the increase in the number of 'states' from an initial 3 to a current 21 and, of particular interest to our study, the institutionalization of the 'federal character' principle.53

The federal character principle was incorporated into the 1979 Constitution with the aim of ensuring that "there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in .. [the] .. government [of the federation] or in any of its agencies." Derogation from the principle of equal opportunity in employment in the civil service was provided for by allowing for the imposition of "disability or restriction or... [the granting of] any privilege or advantage that, having regard to its nature and to special circumstances pertaining to the persons to whom it applies is reasonably justifiable in a democratic society."54 The 1992 Constitution explicitly provides that the composition of the officer corps and other ranks of the armed forces and recruitment to the public service and other federal institutions must reflect the 'federal character' of the Nigerian state.55
The principle was (and is still) applied in a context where the populace saw themselves as Hausas, Yorubas, Igbos and so on first and foremost and secondly as Nigerians. The federal character principle owes more to the theory of consociationalism than federalism as it is the former theory which submits that one way of managing the deep divisions in a plural society is to ensure that appointments to the public service should be proportional. 'Federalism' in this context is really a euphemism and ultimately the criterion by which the beneficiaries of positive discrimination, or the victims of negative discrimination, are identified is ethnicity.

Politicians wishing to promote their sectional interests used appointments to government positions as a much favoured way of distributing patronage, often under the pretence of promoting the federal character of Nigeria. Quotas were used as a cover for the partisan or arbitrary allocation of state resources. Posts had to be created to ensure proportionality and by 1983 the total number of ministerial portfolios at federal and state level came to more than 350. Between 1981 and 1983 employment in the public sector increased from 2.1 to 3.7m. Bach notes that while an emphasis on merit as the criteria for appointment and promotion will not ensure honesty and efficiency in the public service, the Nigerian experience demonstrates that:

[The statutory allocation of... national resources along quota lines acts as a boost to the development of corruption and clientelism. These practices are ruinous for the country's economy and carry little spillover]
effects for the mass of the population.61

(b) INDIA

In identifying the beneficiaries of positive discrimination the Nigerian constitution makes no attempt to take into consideration the economic condition or social status of the individual beneficiaries. State nationality is the determinant. The Indian Constitution however identifies historically unfavoured sociocultural categories in the population as the class whose interests are to be promoted. Article 16 provides:

16 (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them (sic), be ineligible for, or discriminated against in respect of any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to ... appointment to an office under the Government of, or any local or other authority within, a State.... any requirement as to residence within that State ... prior to such ... appointment.
Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the state.

61 op cit, p226. See also Gboyega in Ekeh and Osaghae (eds.), Federal Character and Nigerian Federalism, 1988 :"...Pragmatically, the application of the principle is... creating political tensions as many, if not most, Southern public servants believe its main purpose is to deprive them of jobs for the benefit of Northeners. This belief is also shared by most unemployed people of southern origin. It is also responsible for frustration among some public servants whose career expectations are adversely affected by the need to reflect the federal character. Above all, it does serious damage to the esprit de corps of the service."

Art 16(1) applies both to initial employment and subsequent promotion but Art 16(4) only to the reservation of initial appointments in favour of backward classes. 62 Art 16(4) is an enabling provision conferring a discretionary power on the State to make reservations in favour of backward classes. It confers no constitutional right upon members of the backward classes nor any corresponding duty upon the State to make reservations.63 A prohibition on reservation in the case of posts requiring a high degree of efficiency is therefore not unconstitutional.64 Backward classes for the purposes of Art 16(4) are (i) a class of citizens who are backward socially and educationally, and (ii) who are not adequately represented in the services of the State.65 Caste may be a relevant consideration but may not be the sole or dominant test for social backwardness.66

The provision was inserted because centuries of oppression reduced these sections of the community to a life of serfdom and in earlier periods it was State policy to keep them out of public
employment. They were not viewed as being well placed to gain by the inclusion of equality as a fundamental right in the Constitution due to their inability to compete in a system of open competition. Art 16(4) was thus intended to operate as a transitory measure “till such time when they could stand on their own legs.” Due to this historic inequality seats are also reserved in the national and state legislatures for the scheduled castes.

Legislating for positive discrimination in favour of the "backward classes" no doubt represented a sincere attempt to redress past and present discrimination via legislation which, as regards the public service, put the State in a better position to properly target deserving persons than is the case under the Nigerian Constitution. Potentially noble social engineering schemes backed by force of law must however be assessed by reference to their social impact and in this regard Gunewardene notes as follows:

The upper-caste Hindus have frequently revolted against reservation of seats and quotas for backward classes. In Gujarat the anti-reservation riots of 1985 sparked off by ... quota increases for backward classes left 200 people dead. In Tami Nandu, caste Hindus claim that the quota system ... actually perpetuates discrimination.... Caste has become a force even at regional level. . . . Several politicians have given into claims of caste groups merely for political gain in the upcoming
elections. For instance, in June 1989, "a high profile, three month drive to fill 35 000 central government vacancies for scheduled castes and tribes" was launched. . . Likewise in Tamil Nadu, under pressure from the Vanniar group, the existing fifty-percent quota for backward castes was subdivided into twenty percent for the most backward castes ... and thirty percent for all other backward castes. It is generally assumed that backward caste representatives will only represent their own caste interests, while highcaste or dominant-caste representatives will be leaders for the entire community.

Menski comments that the Indian "spray-can system" which aims to give preferential treatment to large groups by using quotas involves:

[Promising too much to too many people, raising expectations in the process which, if not fulfilled, are turning dreams of benefits into nightmares of communal riots. Such violent disturbances, now reported almost daily, appear to be motivated by religious and communal fanaticism, but are more often simply over access to scarce resources in the context of reservation policies. 71

(c) COMMENTARY

The experiences of India, Nigeria and Malaysia strongly suggest that legislation which provides legal justification for quotas creates scope for the expansion of the politics of ethnic nepotism of the worst kind. In addition it is submitted that any reference in the provision dealing with the public service to the creation of 11 programmes" and the like may create unrealistically high expectations
and demands for the creation of employment. Our case studies show that failure to meet these expectations may result in civil unrest in volatile societies.

Art. 3(b) of the Law Commission's proposals 72, Arts. 13 and 14 of the ANC's Working Draft 73, Art. 23 of the Namibian Constitution and Art. 8(2) of the Third Draft Constitution of the RSA 74 would allow for quotas and use of the language there employed in not recommended.

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71 Menski, "The Indian Experience and its lessons for Britain" in Hepple (ed), Discrimination: The Limits of the Law, 1992. Malaysia, modelling its affirmative action provisions on the Indian Constitution, also used quotas in favour of the majority Malay population at the expense of the minority Chinese and Indian segments. Race riots which led to the suspension of Parliament in 1969 were blamed on Malay discontent that positive discrimination was only benefitting a small group of the ruling elite. Positive discrimination is now regarded as such a volatile issue that it is an offence under the Sedition Act to discuss reform of the relevant provisions of the constitution. On Malaysia see Thompson, Legislating Affirmative Action: Employment Equity and lessons from developed and Developing Countries in Adams (ed), Affirmative Action in a Democratic South Africa, 1993.
74 10th report of the Technical Committee on Constitutional Issues to the Negotiating Council, August 1993.

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Part of the problem with all of the aforementioned proposals is that they attempt to simultaneously provide for the need for affirmative action in both the private and public sectors. This is to be avoided as in each case the purpose of legislative intervention differs considerably. The future government of South Africa will be sympathetic to need to restructure the public service to accommodate those previously discriminated against. As far as the public sector is concerned we do not require legislation which is aimed at forcing a future government to act to the benefit of the majority. Different considerations arise in the case of the private sector and the constitution will
require provisions tailor made to remedy past discrimination in this sector. Constitutional permission for the use of quotas in the Public sector has its rationale in the need to protect oppressed minorities against future discrimination. They are a sledgehammer for use in a hostile environment. In our context a legislative scalpel could be designed to achieve restructuring and in so doing we might be better equipped to avoid the problems which have resulted elsewhere from the use of over-broad legislation. An attempt at a satisfactory draft proposal is contained in the conclusion to this paper.

VI. CIVIL SERVICE COMMISSIONS

The South African equivalent of the body usually referred to as a Civil Service Commission is the Commission for Administration. Civil Service Commissions ("Commissions") are the principal central government organ responsible for the maintenance of the efficiency of the public service. Commissions traditionally exercise considerable powers in relation to the making of appointments to and promotion in the public service. The extent of their powers varies from country to country but a common feature in developing countries (and some developed countries) is for the powers that be to lean on the Commission in an attempt to promote the prospects of the beneficiaries of their patronage. If the Commissioners and

75 Discussion of the form of legislative intervention appropriate to the private sector is beyond the scope of this paper.

their Powers are not constitutionally protected they are exceedingly vulnerable to improper overtures and Adu recommends that unless a country has reached the point where the politicians appreciate that the administration's task is to be impartial and that selections and promotions are to be on merit the Commission requires constitutional protection.76
A further factor that then requires consideration is whether the Commission should be: (a) principally an advisory body within a framework where the power to appoint, promote and discipline is vested in the president or the cabinet and the president then delegates powers to the Commission to act executively in respect of all posts bar those which he deems to be of sufficient importance to warrant his personal attention ('the weaker model') 77; or (b) a body with complete executive responsibility over appointments, promotion and discipline in respect of all posts except those of sufficient importance to warrant direct appointment by the president or the cabinet (with or without the added check of sanction via confirmation) ('the stronger model').

The stronger model provides the greatest protection against patronage and nepotism as the Commission is not in law subject to the will of the president or cabinet members and would thus "remove temptation from the paths of Ministers who would otherwise yield to the pressure of party agitation for rewarding political zeal with plums of office in the Civil Service."78 Inasmuch as Ministers are required to execute their policies through these very officials it

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76 AL Adu, The Civil Service in Commonwealth Africa, 1969, p143. The Law Commission submits, without reasons, that the present statutory regime, which provides no constitutional protection, should be retained. (see SALC, Project 77 Constitutional Models, 1991, at page 185.) The report here referred to is the summary of the full report which has not yet been published. The possibility exists that the full report may contain a motivation for the view that constitutional protection is unnecessary.

77 Examples of a constitutionally created Commission whose powers are essentially advisory in nature are to be found in the Ghanian, Tanzanian and Namibian Constitutions.

78 Adu, op cit, P139.
should be accepted that they may wish to have some share in the appointment and promotion process. Under the stronger model they are not prevented from attempting to make their preferences known. Their legal power to interfere is however constitutionally barred. Adu notes that if they perceive themselves as being incapable of exercising their proper responsibilities by operation of the system they become inclined to find means of circumventing the constitution in order to achieve control. This is not however an argument which should lead one to conclude that the weaker model is preferable as the tension which is here referred to arises naturally out of the application of the separation of powers doctrine, the success of which is dependant on the ability of the administrators of the competing organs of state powers to conduct themselves in a manner not calculated to tip the apple cart. Under the stronger model Commissioners will, like the judges on the Constitutional Court, be required to exercise their powers judiciously.

It is submitted that the Commission is constitutionally protected the future constitution and that the strong model be used. A draft of the provisions that could be used to achieve this is contained in the concluding section.

VII. APPOINTMENTS: PERPETRATORS OF GROSS VIOLATIONS HUMAN RIGHTS

In all countries where gross violations of human rights were commonplace and a change of regime has occurred the question of the suitability for public office of persons who were responsible for violations of human rights has been a sensitive issue. As regards officials who transgress after the inception of the new bill of rights in South Africa the position is not, in theory, particularly problematic. Public servants, including the police and the army, are under a duty to uphold the Constitution and the principle that persons who commit gross violations of human rights or other offenses that render them unfit to be appointed to public office or

79 Op cit, p139-140.

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79 Op cit, p139-140.

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to continue in the employment of the state, should not be appointed or should not retain their employment, is not capable of being disputed. The issue which arises is whether this principle requires constitutional articulation. If it is not the government of the day will retain a discretion and our history has taught us that governments should not be trusted to 'do the right thing' when this issue arises. To attempt to ensure that in the future torturers, murderers and persons guilty of offences involving dishonesty should not be entitled to state employment or to retain their employment it is submitted that it would be preferable for suitable wording to be inserted in the Constitution to enable a party with standing to apply for a mandatory order preventing an appointment or to enforce a dismissal in the event of any future government being tempted to repeat the mistakes of the past.

It is however submitted that the Constitution is not the place where a shopping list of the various types of conduct which render persons unfit for public service should be set out. This task should be left to Parliament. The Constitution should nevertheless, in the light of the importance of the principle, state that persons guilty of gross violations of human rights shall not be entitled to enter or remain in the public service. Draft proposals in this regard are made in this article's conclusion.

If the Constitution refers to persons "guilty" of gross human rights abuses then this will be interpreted as a reference to persons found guilty in a court of law. In recent years a number of countries have had to deal with questions relating to the employment of persons who were responsible for human rights violations during the period in which the 'old regime' was in power but who were never prosecuted. There has been a tendency to attempt to side step this issue particularly where the transgressors are likely to be found in the ranks of both the old and new regime and the offenders are often people capable of seriously embarrassing political leadership by reason of the information at their disposal. The best way to keep them quiet is to keep them indebted by giving them a position in the new regime. Groupings such as Amnesty International have naturally opposed this practice and if South Africa is to avoid the negative precedent set by such appointments then it would be preferable to deal with the issue in the principal human rights instrument, the Constitution.
Recent events in Namibia have demonstrated that it would be foolhardy to expect an incoming ruling party to naturally steer clear of such appointments merely because of the political embarrassment that will result. As a consequence of dynamics internal to the party a ruling party may find itself politically incapable of avoiding such appointments. The issue is however not simple as the application of a universal across-the-board standard may give rise to legitimate calls for purges in the existing public service which some may view as detrimental to the process of national reconciliation between all South Africans.

The International Meeting Concerning Impunity for Perpetrators of Gross Human Rights Violations, convened under the auspices of the United Nations, met in 1992 to make recommendations on the attitude that countries in transition should adopt towards persons who committed serious human rights violations during the reign of the previous regime. In its report on the Meeting the International Commission of Jurists noted that history shows that when this category of violators benefits from impunity "it opens the door to the worst kind of conduct and, thus, to new crimes against humanity and new violations of human rights." In its Appeal to Nations the Meeting noted:

80 In 1991 the Namibian Government appointed Jesus Hawala as Commander of the Army. Hawala was the subject of repeated allegations of gross human rights violations in SWAPO prison camps. He was appointed notwithstanding extensive opposition, within the ranks of SWAPO itself, from a host of international human rights groupings, European pro-SWAPO solidarity organizations and diplomats. The Government response was that as he had never been convicted of any human rights abuses it could not said that he was guilty. Applying the old two wrongs make a right dictum, it was also said that as the services of some 'bad guys' from the old regime had been retained it was only 'fair' to not discriminate against Hawala for this reason.

* That absolute impunity is a denial of justice and a violation of international law; 82

* That the pre-eminence of human rights is a necessary base for a programme of national reconciliation;

* To the extent that national solutions involve restrictions on legal punishment to facilitate a transition to democracy decisions on appropriate restrictions should not be taken by the authors of the violations or their accomplices.

In South Africa, to facilitate the transition, impunity from prosecution has already been granted to a considerable number of perpetrators of gross violations of human rights. It however does not flow that the additional reward of state employment or retention of employment is a necessary corollary of such indemnity. National reconciliation does not demand this, for as the Meeting points out, reconciliation should be a process where the pre-eminence of human rights is advocated. The ground principle is simple: any person who committed gross human rights abuses is unfit to hold a position of authority as they have demonstrated by their past conduct that they abused the authority previously vested in them.

It is accordingly submitted that there should the constitutionally imposed bar on employment discussed above should also act against persons responsible for perpetrating gross violations of human rights prior to the inception of the constitution. In addition provision should be made for the creation of an independent tribunal for determining the cases of individuals whose suitability for employment or continued employment is in question. Wording to this effect is contained in the draft proposals which follow.

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82 It is noted that the first inter-governmental body to address this issue, the Inter-American Commission on Human Rights, recently found that Uruguay's 1986 amnesty law violated basic principles of the American Convention on Human Rights and the American Declaration on the Rights of Man. (Report No. 29/32) The case is discussed in ICJ Review, op cit, 73.
VIII. CONCLUSIONS AND RECOMMENDATIONS

Corruption and nepotism in the public service are endemic to all societies. South Africa's particular history of corruption and nepotism under the apartheid system of government and the experience of extreme forms of nepotism and corruption in many countries with comparable socioeconomic forces at play during a phase in their development akin to that which we are about to enter highlight the necessity for an array of combative constitutional mechanisms. Drafting a constitution at the end of the 20th century puts us in the fortunate position where we are able to draw on the positive and negative experiences of our predecessors and create an amalgam of the mechanisms most likely to serve our needs.

Unlike the more established areas of constitutional law, such as that concerning the procedures necessary to ensure a fair trial, there exists no comprehensive studies drawing together the various threads that arise out of an analysis of comparative jurisprudence. My limited research leads me to conclude that the subject matter here discussed would be better dealt with by a doctoral thesis than by a short article. In the circumstances the draft provisions set out hereunder are tentative and are made in the hope of prompting further debate. The motivation for the bulk of the provisions is apparent from what has been stated above. where necessary, I have inserted additional comments or clarifications by way of footnote.

Article A  Presidential Powers of Appointment

(1) The President shall appoint all Cabinet Ministers, their Deputies, Ambassadors, Administrator-Generals and such further senior public servants (including senior officers in the police, the defence force and the prison service) as may be authorized by Act of Parliament.83
83 It is not possible to create a list of every senior appointments which should require confirmation. The position would also change over time. The obvious positions are thus listed and it is then left to Parliament to determine which other positions should be subject to confirmation. I have included Cabinet Ministers. This is what occurs in the USA. I am aware that under the British tradition which we have inherited the practice would be to have no control over Cabinet appointments, the theoretical sanction for bad choices being via the ballot box. I am not convinced that checks and balances on the presidential power to appoint cabinet members are not warranted. If the President controls the majority he will not be unduly fettered. He may however be embarrassed should he attempt to appoint persons whose track record lays them open to attack or ridicule.

(2) All appointments by the President pursuant to the provisions of Sub-Article (1) hereof shall be made on the advice and with the consent of Parliament.

(3) Parliament shall create special procedures for the exercise of its powers in terms of Sub-Article (2) hereof which procedures shall include the holding of public hearings.

The Public Service Commission

Article B Establishment

(1) There shall be established a Public Service Commission which shall have the powers set out in Article C hereof.

(2) The Public Service Commission shall be independent and shall act impartially.

(3) The Public Service Commission shall consist of a Chairperson and x further members who shall be appointed by the President in accordance with the procedures set out in Article A hereof.
(4) Every member of the Public Service Commission shall be entitled to serve for a period of years unless lawfully removed from office on grounds of mental incapacity or for gross misconduct, and in accordance with procedures to be prescribed by Act of Parliament. Every member of the Public Service Commission shall be eligible for reappointment.

Article C    Powers and Functions

(1) The Public Service Commission shall appoint all members of the public service whose appointments are not herein otherwise provided for.
(2) The Commission shall have such further powers and perform such further functions as may be assigned to it by Act of Parliament.

(3) The Commission may, subject to such conditions as may be prescribed by Act of Parliament, delegate any power or function entrusted to it by this Constitution.

**Article D  Equality of opportunity**

(1) There shall be equality of opportunity for all citizens in matters relating to appointments or conditions of employment in the public service.87

(2) All appointments to and promotions in the public service shall be on merit.88

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86 The model is thus one where the President makes the most important appointments - subject to confirmation - and the balance are appointed by the Commission or its delegate. It is noted that the power to delegate is that of the Commission and not Parliament - were this not so Parliament could easily, as occurs in the USA, 'blanket out' certain posts to remove control over certain appointments from the Commission and transfer it to Cabinet-Ministers. One could then end up with scattered patronage zones.

87 The term "public service" will require suitable definition and this definition will depend, in part, on the structure of Government agreed to in the Constitution. A further issue would be whether the definition should include a reference to local authorities.

88 Compare Art.33(2) of the Basic Law of the Federal Republic of Germany which sets out the concept of merit in greater detail: "Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements."

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(3) In determining whether an appointment or promotion is on merit regard may be had to the fact that persons within South Africa have been disadvantaged in their prospects of employment
within the public service by past discriminatory practices and there accordingly exists the need to
achieve a balanced structuring of the public service, the police force, the defence force and the
prison service. 89

(4) Nothing in this Article shall prevent Parliament from making any law prescribing, in regard
to appointments to any regional or local government office, a requirement as to residence
within that region or locality.

Article E  Abuse of office

(1) During their tenure of office no public official shall use their position to directly or indirectly
enrich themselves or to directly or indirectly benefit any person in a manner which is not fit
and proper in the circumstances. 90

89  The wording here employed is based on the following considerations:
1. "That it is wrong in principle to discriminate in appointments and promotions in the civil
service against citizens on grounds of race ... and, therefore, as soon as the imbalance in racial
composition in the service is remedied, the policy should be one of merit being the only
consideration." (Adu, op cit, p118) 2. An appointment may be on merit where the applicant is able
to demonstrate that he or she possesses the aptitude to perform adequately if appointed, but, due to
past discrimination does not possess the qualifications of certain other applicants who were not
previously disadvantaged. Some universities in SA already apply this process of selection and the
wording here used is premised on the belief that it would empower the Commission to employ
rational criteria aimed at positive discrimination to remedy the imbalance in the public service.
Once the imbalance is redressed merit becomes the sole criteria. Until such time the Commission
may well decide to set informal certain targets as a modus operandi. However, if it is challenged to
justify an appointment, it cannot rely on these targets for legal justification, and will have to
demonstrate that the appointment was in accordance with the modified merit criteria authorized by
the constitution.
3. It is undesirable and unnecessary to refer to race. In addition other forms of discrimination will also need to be taken into account, such as discrimination against women.

90 The term "public official" will require suitable definition. The wording here is an adaptation of Article 42(1) of the Namibian Constitution which refers only to Cabinet Ministers. Special provisions may well be required to regulate their conduct and that of MPs, particular as regards disclosure of Directorships, holdings in companies and other financial interests which may create a conflict of interests.

2. Abuse of office in the manner contemplated by Sub-Article (1) hereof shall be an offence warranting dismissal.

3. No person guilty of gross violations of human rights shall be employed, or shall retain their employment, as a public official. 91

4. For purposes of Sub-Article (3) hereof the term "gross violations of human rights" shall include, but shall not be limited to, acts of torture or any other act where the conduct complained of involved cruel, inhuman or degrading treatment of any person.

5. In the event of the Government failing to dismiss any public official guilty of the conduct referred to in Sub-Article (1) and (3) hereof the Ombudsman or any person shall be entitled to approach a competent Court to enforce the provisions of Sub-Articles (2) and (3) hereof.

6. A public official shall be under a duty to expose conduct in breach of Sub-Articles (1) and (3) hereof and no public official shall be dismissed or in any way prejudiced in their conditions of employment as a consequence of their having made public conduct in breach of Sub-Articles (1) and (3) hereof.

7. Sub-Article (3) hereof shall apply in respect of offences committed prior to the coming into force of this Constitution.

8. For purposes of Sub-Article (7) hereof, the fact that a person has not been convicted of the alleged offence, whether by reason of indemnity, the extra-territorial nature of the alleged
offence or for any other reason whatsoever, shall not in itself be conclusive of the fact that
the person is not a person contemplated by Sub-Article (3) hereof, and Parliament shall make
laws for the creation of an Independent Tribunal for purposes of establishing whether the
person is a person contemplated by Sub-Article (3) hereof.

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91 Reference to the international law of human rights or a phrase such as "breaches of
the fundamental rights herein contained" would be too wide as a number of minor transgressions
could be construed as falling within the ambit of these terms.
DEVELOPMENT ACTION GROUP

RIGHT TO HOUSING CLAUSE

1. Everyone shall have a right to adequate housing, which shall include but is not limited to:
   a) Security of tenure and protection against arbitrary, unreasonable, punitive or unlawful eviction
   b) equitable access to appropriate land and services
   c) equitable access to credit, subsides and financing on reasonable grounds for disadvantaged households
   d) special measures to ensure adequate housing for households with special needs
   e) provision of appropriate emergency housing where necessary.

2. In order to safeguard the right to housing, it shall be the duties of the State to:
   a) Draw up and put into effect a housing policy that is based on urban planning that secures the existence of adequate transport and social facilities
   b) Encourage and support local authorities’ and communities' initiatives aimed at solving their housing problems
   c) Promote private sector involvement in housing, particularly lower income housing provision

3. The State and local authorities shall exercise effective supervision over immovable property, expropriate land where necessary and lay down the legal requirements for its use.

URBAN SECTOR NETWORK
PEOPLE’S DIALOGUE
HOMELESS PEOPLE’S FEDERATION
Theme Committee 4 (Fundamental Rights)

In the question whether there should be discrimination against anyone on the ground of sexual orientation a number of questions also arise, e.g.

If no discrimination against sexual preference of any nature is permissible, it then means that the SPCA can no longer refuse to employ a bestial; or a mortuary a necrophile; or a children’s home a paedophile; or the army a homosexual officer, who works with men daily and who accepts responsibility for them?

What about my rights as a parent? May I refuse to employ a baby-sitter for my two year old daughter, because of lesbianism? May I withdraw my 14-year old son from the Boy Scouts when I discover that the leader is homosexual? Will I be informed of sexual education programmes to which my child is exposed which encourages a perverse lifestyle? Or will my responsibility as a parent be gulped up?

What about my individual rights? Do I legally have the right not to call a homosexual minister to my congregation? May I refuse to accept an application of a homosexual flatmate? May I refuse accommodation in a hostel with a homosexual person? Or will my right to privacy and freedom of choice be dominated?

There are various medical facts which prove that homosexuality is a form of sexual perversion. Byne & Parsons found in the "Archives of General Psychiatry" that there is no evidence that Homosexuality is genetic. But even if Homosexuality were genetic it says nothing, because even if it is genetic it still does not make it right. Say for instance that murderousness is genetic, then it still does not give such a person a jacket of acceptability. This is also the case with homosexuality. Homosexuality is distorted sexuality. When 6,714 mortality lists of 16 USA homosexual journals of the past 12 years were compared to a spot check of mortality lists in ordinary newspapers, the following facts came to the fore: I

(J. Cameron P., Playfair W. and Willianzs. The lifespan of homosexuals: Paper presented at the Eastern Psychological Assn, Convention April 17, 1993.)

ordinary mortality list

married men: median age was 75 and 80% of the men were older that 65 at the time of death
Unmarried men: median age was 75 and 32% were older than 65 at the time of death
Married women: median age was 79 and 85% died old
Unmarried women: median age was 71 at the time of death.

homosexual mortality list

Only 2% became older than 65
If AIDS was the cause of death then the average age was 39. For the 829 homosexual men who did not die of AIDS the median age was 42 and only 9% died old.

A study (a random spot check of 4,340 adults)(2) which compared homosexuals (men as well as women) with heterosexuals on a wide variety of topics, proved that:

- homosexuals are twice as likely to reported sexually transmitted diseases (STD). And has twice as likely had at least two STDS.
- homosexuals are twice as likely to transmit an STD to someone else intentionally.
- homosexuals are five times as likely to commit suicide.
- homosexuals are four times as likely to report rape.

The rectum was not made for sexual coupling. It is thin, non-elastic and it produces no natural juices. Consequently it can easily be torn or damaged. Many homosexuals already suffer from complications of the intestines - the reasons for this are obvious. These complications include infections of the gut and an incapability to control intestinal movements, since the natural function of the rectum is damaged irreparably.

AIDS was originally called GRIDS: "Gay Related Immune Deficiency Syndrome. " Pressure by militant homosexual groups, however, convinced the media to change the name of this incurable disease. Although homosexuals at most make out 5% of the American population, 75% of all the AIDS casualties are still homosexual persons (David Chilton: Power in the Blood). Homosexuals also make up 50% of all the cases of syphilis and throat gonorrhoea in America.

Homosexual leaders such as Michael Swift made what they stand for very clear in the Gay Revolution: "We will molest your sons ... we will seduce them in your schools, in your dormitories, in your gymnasiaums, in your locker-rooms, in your sport centres, in your seminaries, in your bioscope cloakrooms, in your army barracks, at your truck stopping places, in your men's clubs, in your parliamentary buildings .. your sons will do as we demand. They will be recreated in our image. They will begin to yearn for us and idolise us. All churches which judge us will be closed. Our only gods are attractive young men. Should you dare to shout "firewood, fairies or 'queer' to us, we will stab you in your cowardly hearts and dishonour your dead, sickly bodies".
As Christians we do not deny anyone the basic rights as described in the Ten Commandments, e.g. You may not kill implies the right to life. Homosexuals, like anyone else, have the right to freedom of religion, work, property, privacy, justice and access to the truth. As Christians, however, we are against privileges to homosexuals, or any other group, above others.
1 March 1995

Sir

RE. MEDICAL AID FOR EMPLOYEES

The Witbank Coalfields Medical Aid Society is a non-profit organisation with 60 years of service to a large number of employers and their employees in the coal mining industry.

Based on our experience, we would like to forward two proposals to your assembly which we are confident will be in the interest of all citizens living in our country.

1. EMPLOYERS TO PREFUND MEDICAL INSURANCE FOR EMPLOYEES TO ENSURE ADEQUATE MEDICAL COVER AFTER THEIR RETIREMENT

Recent actuarial exercises have revealed that amounts in excess of R100 000 are required to fund retired persons' medical expenses during their period of retirement. The liability was calculated in today's money terms and is based on a life expectancy of 72 years.

Our country's medical inflation over the last number of years averaged 25% which makes it more and more difficult for pensioners to afford medical cover on their own.

In the event of an employer closing down, the problem of financing pensioners, medical expenses are further aggravated as there are no longer working members in the firm to subsidise their pensioners' medical costs.

The escalating medical costs often price pensioners out of private medical insurance, forcing them to become dependent on the State for medical services.

Such an event strains the Government's financial ability even further and should best be avoided.

In view of the above, we strongly wish to recommend that employers be obliged to provide sufficient funds while employees are still employed to ensure their continued medical cover after they have retired.

This practice is already enforced in some European countries and the U.S. for public companies because of the high risk of exposure to such liabilities.
2. RIGHT OF INDIVIDUALS TO CHOOSE OWN MEDICAL INSURANCE

We have always respected the right of individuals to exercise options in determining their own fate or destiny.

Our country's citizens are extremely proud of their individual rights and experience has shown that such rights have always been exercised responsibly.

We therefore wish to recommend that the individual's right to choose his or her own medical insurance should also be entrenched in a new Constitution for our country.

We trust that you will be able to accommodate our recommendations in the interest of all South Africans.

J A DE JAGER
MANAGER
Although we live in a land enjoying religious liberty, Seventh-day Adventists have not always been able to enjoy this privilege when it comes to employment. We are thinking here primarily of relationships with State institutions. Because of their observance of the seventh day of the week Saturday, as a holy day, Adventists have often been debarred from entering State employment. Others who were working for the State and became members of the church have had to resign in order to be faithful to their convictions.

The problem in the past has been evident in such institutions as the Post Office, Railway and Harbours, Forestry, the army, the police, the prisons, etc. While this has often been a hardship on members, the State is also deprived of willing workers who would in many instances prove to be reliable people of principle and hard-working.

EXISTING PROVISIONS IN THE CONSTITUTION

A. According to the Constitution of South Africa there are certain constitutional principles which should have a bearing on this issue:

Constitutional Principle I I - "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justifiable provisions in the Constitution..."

Constitutional Principle I I I - "The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity."

Constitutional Principle V - "The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender."
Constitutional Principle XXVI 1 1 - "Notwithstanding the provisions of Principle XI 1, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected Provision shall be made that every person shall have the right to fair labour practices.

Constitutional Principle XXX -

1. "There shall be an efficient, non-partisan career-oriented public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner ......

B. Provisions of FUNDAMENTAL Rights in Chapter 3 of the Constitution -

Equality

8. (1) "Every person shall have the right to equality before the law and to equal protection of the law. et

(2) "No person shall be unfairly discriminated against, directly, or indirectly and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religious conscience, belief culture or language.

(4) "Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection until the contrary is established "

Religion, belief and opinion
14. (I) "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

Administrative Justice

24. "every person shall have the right to:

(a) "low .ful administrative action where any of his or her rights or interests is affected or threatened.. " see also sections (b), (c.) and (d).

Economic action

26. (I) "Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory."

Labour relations

27. (I) "Every person shall have the right to fair labourpractices."

PROPOSAL

In the light of the Constitutional Principles and the Fundamental Rights in the Constitution, there is no ground for discriminatory labour practices against Seventh-day Adventist South Africans on the grounds of their religion, conscience or belief. Whereas it is difficult to name a specific group of people in a Constitution, the proposal is that a general provision be made within the Fundamental Rights which would take care of all citizens facing such problems.

Herewith a suggested added provision in the Fundamental Rights:
"Every person shall have the fundamental right to religiously observe one day in seven as a holy day if so desired."
"This right shall not jeopardize any labour opportunities or any academic privileges."
"This one day in seven may be Friday, Saturday or Sunday, or any other day of the week, provided it be a tenet of an established religious organization which recognizes the citizen concerned as a member."

This provision could become a part of item 14 of the Fundamental Rights - Religion, belief and opinion.

Dr Eric C Webster
UNIVERSITAS BRANCH
1 March 1995

The Universitas branch of the ATKV-Dames would like to voice its clear aversion and opposition to the undermentioned aspects and would like you to take note of it:

(a) Abortion  
(b) Free prostitution  
(c) Pornography

The ladies feel that abortion can only lead to the disintegration of the acknowledged norms and values of a good upbringing and that it can lead to the decline of decency and morals in society.

Free prostitution will definitely affect especially the younger generation and cause well educated youths very soon to be detrimentally influenced by the views of certain young people.

Pornography is the first step in the breaking down of well educated people. It is the point of departure of sinful thoughts which can ruin old and young.

The ladies also want to express themselves unequivocally in favour of the retention of the death penalty. It is the only real deterrent for murderers who have no respect for human lives, for rapists who have no respect for women and for robbers who think only of own gain when they attack, kill or disfigure old people.

The ATKV-Dames Universitas branch trust that this representation will be well considered.

[Signature]

PP. MANAGEMENT AND MEMBERS: ATKV-DAMES : UNIVERSITAS BRANCH
3 March 1995

According to this morning's Volksblad, views regarding the writing of a new constitution are invited, the closing date being 10 March 1995.

In our capacity as Commission of Education of the General Synod of the Dutch Reformed Church we wish to submit some input on:

1. Protection of the right to a mother tongue, own culture and religion in education.

2. The role of scriptural instruction and Biblical science.

3. Curricula(?), etc.

4. The role of the parent.

According to the office of Mr Renier Schoeman, Vice Minister of Education, input received late would be considered.

The Commission of Education of the Dutch Reformed Church will be meeting only towards the end of March 1995, after which input will be submitted to you.

DR E J HAY
SECRETARY : COMMISSION OF EDUCATION,
DUTCH REFORMED CHURCH
Dear Sir/Madams

I am writing to you as a fellow citizen of our New South Africa, and, as a mother and grandmother, I have great concern for our youth. I am sure you also have children/grandchildren and therefore share the disturbing emotions which all the caring parents in our land are experiencing. We have a high rate of rape and child molestations, which could only increase through the availability of pornographic material as seen in magazines such as hustler, penthouse, playboy, etc. I am aware of, and respect the freedom of expression of other people, but surely the right of Christians (and I am sure Moslem and Hindu mothers would also agree) to raise our children in a morally upright environment also has some bearing on the legislation of pornographic magazines.

I am aware that the editors of such material have their rights, and I am simply asking if it is possible to ensure the sale of these be restricted to certain sexual bookshops of which there are many, instead of their display in family stores such as Shoprite/Checkers, The Spar shops and OK Bazaars.

In the interests of the South African Youth, your serious attention regarding this matter will be greatly appreciated.

Yours sincerely

(MRS) E K L WHITE
The purpose of this memorandum is to convey to the relevant theme committee of the Constitutional Assembly the views of the stakeholders in local government in the Province of the Free State with regard to the constitutional dispensation most suitable for local government in the next Constitution.

To do this it is necessary to refer to principles that are essential in looking at the two key issues namely local government and the Constitution.

LOCAL GOVERNMENT

POSITION PAPERS

As a point of departure the Executive Committee FMA accepted four position papers on "Local Government in the Final Constitutional Dispensation" initially drafted by Dr Koos Smith of the FMA, accepted by the Standing Committee on Constitutional Affairs (FMA) and recommended for acceptance to the EXCO.

The four papers referred to are -

Position Paper 1 - General Principles
Position Paper 2 - Vertical Intergovernmental Relations
Position Paper 3 - Structure of Local Government
Position Paper 4 - Public Administration.

In its consideration of these proposals, the Management Committee of the Association highlighted the following issues contained in the above reports:

Position Paper 1: The Definition of Local Government:

A. "Democratic Local Government is that part of the government of a state comprising of directly elected representatives of the enfranchised residents of a defined geographical area within that state, who, as a legal entity separate of it's individual members, is vested with prescribed governmental authority which it may exercise relatively independent from the state control".

FMA noted that the question regarding directly elected representatives was the only critical issue to be discussed in this definition as at present the members of local
government comprise of directly elected representatives but in the case of metropolitan government and rural local government/regional services councils members were not directly elected, but were indirectly nominated to serve on the governmental bodies. This was an issue that did not come to the fore at the recent workshop and it was imperative that a clear decision be taken in this regard.

B  "This means that government must promote the well-being, i.e. the living standard and quality of life of all the subjects of the state. The well-being of society will be promoted where -

* ample and equal opportunities exist for each individual to subsist and through his/her own choice, to realise his/her full potential;

* suitable and sufficient public amenities, goods and services are rendered to liberate individuals from the struggle to satisfy their survival needs to the detriment of other, more sophisticated needs;

* the physical environment in which individuals subsist and live is satisfactory and they feel safe and secure”.

This principle was brought forward as at the workshop a new principle was formulated namely that local government is not only rendering services but also has a responsibility towards the development of the community. The developmental responsibility of local governments are strongly coming to the fore in the new dispensation and should be addressed in the new constitution. Chapter 10 of the Interim Constitution only provides for services and the new developmental aspects should also be addressed in the chapter dealing with local government.

C. "The fundamental point of departure underpinning this and following position papers are found in Constitutional Principle XVI which states:

**Government shall be structured at national, provincial and local levels**”.

During the workshop it was emphasised that there are very few countries in the world where local government, as a level of government, is constitutionally recognised.

It was reported that at the workshop Mr Andrew Boraine suggested that local government should refrain from using the word "level" and consider using the word "sphere". It was explained that the term "level" indicates that the one sphere of government is above the other, which was not the case. It should be borne in mind that "this principle suggests that all three levels of government shall enjoy powers and competencies, conducive to the achievement of the purpose of government as a whole".
D. **The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of services and such level shall accordingly be empowered to do so.**

EXCO noted that these were constitutional principles which were not negotiable at this stage. Any further exposition of the contents of the Constitutional Principles that relate to local government is accordingly unnecessary.

E. The Constitutional Principles, however, necessitate consideration of the following questions/issues:

2.1.1 What legislative and executive powers and functions are deemed appropriate and adequate for local government?

2.1.2 How may financial viability be ensured and good public administration be achieved at local level?

2.1.3 What powers, functions and structures of local government are so fundamental that it needs to be constitutionalized?

2.1.4 What are the essential elements of a democratic system of local government?

2.1.5 How should the local government system and processes be designed to ensure accountability, responsiveness and openness?

2.1.6 What fiscal powers are appropriate to local government?

2.1.7 What categories of local government may be expedient?

2.1.8 What constitutes an equitable share of national revenue or how is an equitable share of national revenue determined?

These are fundamental questions that should be borne in mind when considering inputs into the Constitution regarding local government.

F. "Several principles pertinent to this paper are included in Chapter 10 of the current Constitution. These are:

3.1 A hierarchy of local government institutions with differentiated powers, functions and structures may be established (174(2)) by law of a competent authority (174(1)) (XXV)

3.2 Local government enjoys relative autonomy limited by the concept of ultra vires (174(3); 175(1)) and does not enjoy general competence
3.3 The fundamental status, purpose and character of local government is to be maintained (174(4))

3.4 Local government is entitled to participate in legislative processes on enactments which may materially affect their status, powers and functions or the boundaries of their areas of jurisdiction (174(5))

3.5 Local governments are required to maintain and promote the well-being of the residents in their areas of jurisdiction (175(2))

3.6 Local government must promote the access to specified primary amenities, goods and services (water, sanitation, transportation facilities, electricity, primary health services, education, housing and security) (175(3))

3.7 Certain decisions require special majorities (176)

3.8 The council of a local government is required to ensure that the local administration is based on sound principles of public administration; good government and public accountability so as to render efficient services and ensure effective administration of its affairs (178(1))

3.9 Local tariffs shall be based on a uniform structure (178(2))

3.10 The local government electoral system shall include both proportional and ward representation (179(2)) and shall be regulated by law

3.11 An enforceable code of conduct for members and officials of local government shall be provided for (180)

3.12 Local governments must ensure a safe and healthy local environment (175(3))

3.13 Amenities, goods and services are to be rendered in a sustainable manner and must be financially and physically practicable (175(3))

3.14 A local government may create sub-municipal entities and assign specific functions to such entities (175(6))

It was explained that matters such as the special majorities were aspects that were very sensitive when the Interim Constitution was originally compiled with a view to power sharing. The question that should now be addressed was "if power sharing in a future constitution was still necessary in matters such as mechanisms for power sharing, to provide for minority representation in all executive structures, and to provide for special majorities."

G. PRINCIPLES DERIVING FROM ELSEWHERE IN THE CURRENT CONSTITUTION
With reference to these principles EXCO referred to Principle 4.2 of Position Paper 1 namely "The traditional leader of a community observing a system of indigenous law and residing on land in the area of a local authority, it ex officio entitled to be a member of that local authority (182)."

It was pointed out that at the workshop this principle was supported with the proviso that a traditional leader will have no vote in any matters where he served as an ex officio member of a local authority.

With reference to 4.3 of Position Paper 1 namely "Procurement of goods and services by local government shall be regulated by law and such law shall provide for the establishment of independent and impartial tender boards to deal with such procurements (187(1)). Tendering systems shall be designed to be fair, public and competitive (187(2)). EXCO noted that this was not as yet implemented on local government level.

He referred to 4.5 and 4.6 of the first Position Paper namely "A Commission for Remuneration of Representatives shall make recommendations to local governments regarding the nature, extent and conditions of the remuneration and allowances of councillors (207(2))".

"An act of Parliament shall make provision for the establishment by any local government of a municipal or metropolitan police service (221(3) with jurisdiction limited to crime prevention and the enforcement of by laws (221(3)(b))".

He pointed out that questions regarding primary legislative supremacy over local government and a clarification of selected principles included in the current constitution was discussed at the workshop and that it will be dealt with during the course of the day.

With reference to paragraph 6.5: Structure: Requirement to establish an executive committee - It will be recommended that this be deleted from the constitution as it is a matter to be dealt with at regional level.

**Position Paper 2:**

Position Paper 2 deals with the vertical inter-governmental relations. The three levels should view and treat one another as partners and not as principal and agent. Adequate powers and functions, including concurrent and exclusive powers and functions should be assigned to each level of government that will enable it to fulfill its objectives.

**Position Paper 3:**

Position Paper 3 deals with issues such as the separation of powers between various levels of government, the role of councillors, the executive status of the mayor. Emphasis is placed on the separation of powers.
The attention of EXCO was focused on the conclusion on page 11 of the report namely: "Constitutional Principle VI requires a functional and structural separation of powers between the three branches of government in a manner consistent with democracy. Since a negligible portion of a local government's work is dedicated to legislating and the bulk of its work is of an executive nature, it is suggested that the legislative and executive authority at local level, be unified in the elected council. The council should, however, be authorised to establish a committee to which it may delegate specific executive powers.

It was explained that in other levels of governments, that is provincial and national governments, the role function between the legislative assembly and the administration was clearly separated, but in the case of local government, these roles came very close together.

**Position Paper 4:**

**SUBMISSION TO SUBTHEME COMMITTEE 6.1:**

Local Government in the next Constitution: The Public Service

The main issue in this regard concerns the principle of whether local government should be included under the description of public service.

Public Service is dealt with in the Constitution. Traditionally local government has not been part of the description and the question was whether local government should be included as a public service in this description provided for in the Constitution.

It was recommended to Sub-Theme Committee 6.1 that local government administrations as part of the public sector, should be subject to the same normative/guiding principles as the regular public service. Local government administration should, however, not structurally or functionally be part of the public service.

This recommendation was based on the argument that local government is a functional area within the legislative competence of the provinces and will more than likely in future also be a functional area of provincial government. By including local public administration in the definition of public service, this competence of provincial legislatures will significantly be diminished. It is also submitted that local government is intended to be a level of government in its own right. As such local government is entitled to be as autonomous as possible.

**WORKSHOP : LOCAL GOVERNMENT BEYOND 2000**

Following on the adoption of the Position Papers 1 - 4 referred to above, the Free State Municipal Association hosted a conference and workshop on 3/4/5 April 1995 in Bloemfontein to provide
stakeholders (± 150) in local government the opportunity to consider, discuss and debate the constitutional dispensation most suitable for local government in the next constitution.

VISION FOR LOCAL GOVERNMENT

THE WORKSHOP FORMULATED THE FOLLOWING VISION FOR LOCAL GOVERNMENT:

We want local government to be dynamic, autonomous, democratically elected and financially viable in order to facilitate development and deliver effective and efficient services which will ensure and uplift the quality of life and the standard of living of the people it serves.

It was agreed that the vision may have to be further refined and developed to include the following considerations:

(a) The functional and structural re-integration of towns/cities which were separated in the past;
(b) Acceptance and adherence to national and provincial laws and policies by local government; and
(c) The question of (economic) viability and specifically the user-charge principle.

Comments 4.5.95:
* democratically elected (directly or indirectly?)
* Quality of life and standard of living - same thing?
* Autonomous (within parameters), subject to the provisions of applicable legislation.

MISSION OF LOCAL GOVERNMENT

The core-business of local government was stated and accepted, as follows:

We deliver services to, and facilitate development of, the communities we serve.

GUIDING PRINCIPLES OF LOCAL GOVERNMENT

The conference adopted the following values to which local government systems and processes should comply:
(a) Transparent and ethical behaviour.
(b) A participative and inclusive approach in terms of which all role-players accept reciprocal
(c) Accountability to the people served by local government and to other stakeholders such as
    national and provincial governments.
(d) Accessibility.
(e) Redressing imbalances of the past and ameliorating the conditions of the disadvantaged.
(f) Empowerment of local government employees and local communities.
(g) Environmental sensitivity.
(h) Creative and pro-active fulfilment of the mission of local government.
(i) Free and open horizontal and vertical intergovernmental relations.
(j) Promotion of a peaceful and secure environment.
(k) Effective and efficient local administration/government.
(l) Affordable and sustainable service delivery.

Comments: 4.5.95:
(m) Fair and effective legislation.

THE CONSTITUTION

Always keeping in mind the vision and mission of local government, the first question to be asked is
where does one start writing a constitutional chapter dealing with local government and are there
any guiding principles. As points of departure the association believes that at this stage there are
two sets of guiding principles which need to be considered -

A. The 34 Constitutional Principles and

B. The provisions dealing with local government in the Interim Constitution.

The reason for A - the 34 Constitutional Principles being relevant and important is that the Interim
Constitution provides that the new 1996 constitution must comply with these principles. The
Constitutional Court is given the power to strike down the whole or parts of the new constitution if
it violates any of the principles.
The reason for B. - the provisions of the present interim constitution are important in that they have been formulated in accordance with agreements reached at the Multi-Party Negotiations at Kempton Park. On the probabilities therefore one can expect the parties to adhere more or less to these provisions.

To this should be added the vision, mission and guiding principles of local government, referred to on pages 7 and 8 of these proposals.

**CONSTITUTIONAL PRINCIPLE 24**

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

The message is clear, the Constitution should only contain the bare framework of local government powers functions and structures. The detail shall be dealt with by national or provincial legislation.

The philosophy of constitutional principle 24 that is that the Constitution is to set out the framework only, is reflected in Topic B, namely the provisions dealing with local government in the present Interim Constitution. They are, amongst others, sections 174 to 180.

**SECTION 126: FUNCTIONS/POWERS OF LOCAL GOVERNMENT?**

The philosophy of all the constitutions since 1910 and also that of the Interim Constitution and of the constitutional principles is that control over local government is a function/power of the relevant provincial governments. That principle is enshrined in Schedule 6 to the Interim Constitution which sets out the powers of provincial legislatures and provincial governments and they include local government.

The inter relationship between the powers of a provincial government and that of the central parliament is fully dealt with in the Interim Constitution and particularly by Section 126. Section 126(3) is most important, as it contains the principle that a law passed by a provincial legislature in terms of the Constitution shall prevail over an act of parliament and then subject to certain well defined exceptions. In FMA's view the Interim Constitution deals fairly and squarely with the relationship between central and provincial legislatures. In this regard section 126(3) with all the exceptions makes the matter clear.

In drafting a new Constitution and dealing with local government the question accordingly is what should be provided as regards the powers of local government in relation to the powers of the province and the central government.
We have Sections 174 to 180 of the Interim Constitution dealing with local government and the question is why not simply adopt Sections 174 to 180 in the new constitution? Why waste time in trying to formulate new or better provisions, after all these provisions were negotiated at Kempton Park not so long ago, and they form the basis of the present system. only by asking and adequately answering these questions can we begin to formulate meaningful proposals for consideration.

The FMA is of opinion that the Interim Constitution can be improved.

CONSTITUTIONAL PRINCIPLES

The main problem presented by the Constitutional Principles read in conjunction with the Interim Constitution is that they are extremely vague. This leads us back to the question how does one draft a constitution dealing inter alia with local government?

MINIMALIST/MAXIMALIST APPROACHES

This question may be approached in two ways. The so-called minimalist or the maximalist approaches. The first system holds that the Constitution should contain broad principles only, leaving it to legislation to work out the finer detail. The maximalist approach leads to detailed complete provisions.

The problems created by the minimalist approach are manifold. It allows too wide a scope for central and provincial legislation, thus creating numerous potential clashes and ensuing constitutional court cases.

On the other hand an unqualified maximalist approach is also not acceptable. A constitution need not look like a laundry list. Too many details may cause as many problems as too few. The constitution must spell out the principles on which the country is to be governed in clear precise terms and it must not stop there. It must formulate the powers, functions and structures of each organ of government.

The challenge is to demarcate the competencies of the three tiers of government so that conflict can be avoided.

SECTION 126

As pointed out above in so far as the relationship between central and provincial government is concerned, Section 126 (3) of the Interim Constitution deals with this matter as far as the relationships between first and second tier governments are concerned quite adequately.

The question is accordingly - don't we need a similar demarcation between the powers of local government and that of central and provincial government? If the answer is yes, how do we
formulate the respective competencies of the three institutions and more specifically, that of local government.

(EXPLANATORY NOTE:

There is a line of thought that a variable schedule compiled in concurrence with organised local government should be promulgated detailing the functions of local government. This schedule should then be constitutionalised. As was pointed out, at present the philosophy of all the constitutions since 1910 and also that of the Interim Constitution is that control over local government is a function/power of the relevant provincial legislatures. In view of this fact FMA does not believe that is advisable to compile a list of functions, but rather that it should be included in subsidiary legislation).

SECTION 174

Let's start with the Interim Constitution. Let's look again at Sections 174 (3), (4) and (5).

It is accepted that the draughtsmen of the Interim Constitution in Sections 174 (3)(4) and (5) endeavoured to set out the definition of the various powers in those sections. Subsection (3) provides..... a local government shall be autonomous and within the limits prescribed by or under law shall be entitled to regulate its affairs.

What does that mean? What does it mean to say local government shall be autonomous and at the same time to say within the limits prescribed or under law?

FMA submits that it is a fatal contradiction to say that a legislative body shall be autonomous but only in so far as laws made by other bodies gives it that freedom!

The basic problem in the Interim Constitution as reflected in section 174(3) is that in the negotiating process at Kempton Park the parties could not find a solution to the problem whether there should be as far as local government is concerned, a devolution of power. A devolution of power meaning that substantial autonomy and a discretionary decision-making power at local level is given as opposed to a mere deconcentration of powers which implies limited delegated authority for the agent whose fundamental responsibility is merely to execute the will of the superior lawgiver.

Let's look at subsection (4). Parliament or a provincial legislature shall not encroach on the powers functions and structure of a local government to such an extent as to compromise the fundamental status purpose and character of local government. What does it mean to say that parliament as the supreme legislature shall not encroach on the powers, functions and structure of a local government. Does it mean that if a local government decides to exempt certain institutions e.g. churches from local tax and rates that parliament can make a law to say you cannot do that.
Indeed if we say Parliament shall not be able to do that, does it not mean that local government although it derives its powers, functions and structures from the central government has become so strong that it is in fact the sovereign power. That is the sort of provision which should be avoided at all costs.

Subsection (5) deals with the privileged opportunity to make representations. It has been noted that (3) says local government is autonomous and (4) says central and provincial legislation shall not encroach upon the powers etc. We then come to (5) which says that local government shall have an opportunity to make representations before legislation is passed. Subsection (5) seems to inhere a principle that the only right which a local government actually has is to make representations. Section 174(2) of the Constitution makes provision for three categories of local government, namely metropolitan, urban and rural with differentiated powers.

If one takes the Constitution literally, it implies that every square kilometre of our country will fall under one of the three types of local government. Is this really what the legislator intended?

**PROPOSED AMENDMENTS TO THE INTERIM CONSTITUTION**

FMA, bearing the foregoing principles and points of departure in mind, consequently focused on the existing provisions of the Interim Constitution and in regard to the specific sections mentioned below, recommends as indicated under the various sections.

1. **Section 158: Revenue Allocations by National Government**

It is recommended that this section remains as it is.

2. ** Sections 174 - 180: Chapter 10: Local Government**

Establishment and status of local government.

174. (1) Local governments shall be established to cover the entire area of South Africa for the residents of areas demarcated by law of a competent authority.

(2) A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.

(3) Local government shall, within the limits prescribed by or under law, have the right to exercise its powers and regulate its affairs and shall have such legislative and executive powers to allow it to function effectively with regard to its entrusted powers and functions.
NOTES:

(In view of the criticism with regard to section 174(3), (4) and (5), subsection (3) has been amended, subsections (4) and (5) have been deleted. Subsection (5) has been amended to ensure that local government shall be a partner with the provincial legislature when it comes to legislation for local government. This has been done by providing for a Local Government Commission as included in Chapter 10 new section 176.

Provision should be made so that matters relating to a particular province and local government within that province can be dealt with).

175. Powers and Functions of Local Government

(1) **Subject to the Provisions of Section 174 (4)** the powers, functions and structures of local government shall be determined by law of a provincial legislature.

(2) A local government shall be assigned such powers and functions as may be necessary to provide services for and to facilitate development of the communities it governs.

(3) The powers and functions referred to in subsection (2) shall include water, sanitation, transportation facilities, electricity, primary health and welfare services, education, housing and security within a safe and healthy environment provided that such service and amenities can be rendered in a sustainable manner and are financially and physically practicable.

(NOTE: See Mission)

(4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.

(5) A local government shall have such executive powers as to allow it to function effectively.

NOTE: Subsection (2) - maintenance and well-being development
Subsection (3) - provide access - delete
Subsection (6) - submunicipal entities - unacceptable

176. Local Government Commission
(1) There is hereby established a Local Government Commission for the Republic which shall have the powers and functions entrusted to it by this Constitution or by a law of a competent authority.

(2) The Commission shall consist of a chairperson and the number of members determined and appointed by the President: Provided that at least one half of the members of the Commission shall be appointed from nominations made by organised local government in a manner which shall ensure equitable representation of local government in each province.

(3) The object of the Commission is to facilitate the establishment, development and maintenance of local government and the Commission shall for the achievement of this object be competent -

(a) to advise Parliament with regard to legislation affecting local government;

(b) to advise the national government with regard to policies regarding local government systems, processes, institutions, powers and functions;

(c) to initiate any law or policy referred to in paragraphs (a) or (b);

(d) to initiate and conduct research with regard to any law or policy referred to in paragraphs (a), (b) or (c).

(4) No law affecting the status, powers or functions of local government shall be tabled in Parliament unless the Commission has had reasonable opportunity to consider such law and has made its report and findings thereanent available.

NOTES:

(Section 176(Council Resolutions) and Section 177 (Executive Committees) should be deleted. These sections must be included in provincial legislation. In fact, it has already been done with regard to local government in the Free State. Kindly refer to Proclamation 92/1994 (Section 19) and Proclamation 117/1994 (Section 2))

177. Provincial Intergovernmental Forums

A provincial law shall provide for the establishment of a provincial intergovernmental forum consisting of the member of the executive council responsible for local government in the province concerned, not more than four members of the provincial legislature concerned elected by such legislature and an equal number of members of local governments in the province concerned nominated by organised local government in the province concerned.

178. Administration and Finance
(1) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.

(2) A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions. Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on an uniform structure for its area of jurisdiction.

(3) A local government shall be entitled to an equitable and specifically allocated portion of national and provincial revenue, and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations, taking into account the different categories of local government referred to in section 174(2).

NOTES:

(Section 178 is supported provided that Section 200 of the Constitution is amended in order that Local Government should have equitable representation to that of central and provincial governments in the Financial, and Fiscal Commission).

Section 179 is acceptable as follows:-

179. ELECTIONS

(1) A local government shall be elected democratically, and such election shall take place in terms of an applicable law and at intervals of not less than three and not more than five years.

(2) The electoral system for a local government shall include both proportional and ward representation and shall be regulated by a law referred to in subsection (1).

(3) Subject to section 6, every natural person shall be entitled to vote in an election of a local government if he or she-

(a) is ordinarily resident within the area of jurisdiction of that local government or is under law liable for the payment of property rates, rent, service charges or levies to that local government; and

(b) is registered as a voter on the voters, roll of that local government.
A voter shall not have more than one vote per local government.

No person shall be qualified to become or remain a member of a local government if he or she-

(a) is not eligible to vote in terms of subsection (3);

(b) is a member of the National Assembly or the Senate or Provincial Legislature;

(c) is not qualified to become a member of the National Assembly;

(d) is an employee of a local government; or

(e) is disqualified in terms of any other law.

NOTE: - official cannot be own employer - see D above

180. CODE OF CONDUCT

An enforceable code of conduct and recall mechanism for members of local government shall be provided for by law.

3. Sections 181 - 182: Chapter 11: Traditional Authorities

EXCOM noted the suggestion by the workshop that a traditional leader should not be someone appointed by previous government, but the person who inherited that title. It also considered the provisions of Section 182 which states that the traditional leaders shall ex officio be entitled to be a member of a local government and that he/she shall be eligible to be elected to any office of such local government. EXCO noted the recommendation by the workshop that such a traditional leader should not have a vote as such.

The acceptance of this proviso in practice would mean that a traditional leader could not be elected to any position of mayor or chairperson of the executive committee/standing committees on the council because it would imply that he would not have a voting right.

FMA accordingly recommends that Section 182 be accepted as it stands.

4. Section 187: Procurement Administration

FMA recommends that Section 187 be supported as it stands.

5. Sections 198 - 200: Financial and Fiscal Commission
FMA is of the opinion that it is imperative for local government to be represented on this commission and accordingly emphasises the urgent need for this section to be amended to compel the President to ensure that local government, in numerical terms, has representation equal to that of central and provincial governments in the Financial and Fiscal Commission.

6. Sections 207 - 208: Commission on Remuneration of Representatives

FMA is convinced of the need to have local government representation on this commission and it is accordingly recommended that local government should be represented on the Commission on Remuneration of Representatives. (See the proposed amendment to Section 200 (5 above)).

7. Sections 212: The Public Service

EXCOM concurred with the recommendations made under Position Paper 4: Input to Subtheme Committee 6.1 namely that local government not be included under the description/definition of Public Service.

8. Section 221: Local Policing

FMA recommends that Section 221 remains as it is.

9. Section 245: Transitional Arrangements: Local Government

It is recommended that this section be deleted.
8 March 1995

The 'Rapportryerskorps' of Riebeek would like to make use of the invitation to air our views about certain matters regarding Theme Committees 1 and 4.

The respective Corps of the 'Rapportryers' movement function individually; they are loosely associated with the Federation of 'Rapportryerskorps'. So, the views aired here are those of the 'Rapportryerskorps' of Riebeek only. Should these views be at odds with what is stated at the National Conference of the Federation of 'Rapportryerskorps', the 'Rapportryerskorps' of Riebeek will reconsider its views.

Our purpose with this submission is to show that we -as members of this association realize the seriousness of the task of writing a new Constitution. We love this country and we consider it important that the rights of all individuals and cultural groups be recognized. We trust that this submission will give the authors of the Constitution somewhat of an idea of the needs of people who want to maintain their culture and grant the same to every other cultural group.

THEME COMMITTEE 1: NATURE OF THE DEMOCRATIC STATE

1. EQUALITY:
The Constitution must guarantee equality in terms of the law for all.

2. A SOVEREIGN STATE:
We do not believe that South Africa should be just one sovereign state. South Africans have regional loyalties. Let each region have its sovereignty.

THEME COMMITTEE 2: FUNDAMENTAL RIGHTS

1. NATURE OF THE BILL OF HUMAN RIGHTS AND ITS APPLICATION

1.1. We feel that the rights granted an individual may not raise him/ her to a status above the law. The rights of the individual must therefore not make it impossible to uphold the law. If Biblical principles are applied in the drafting of the Bill of Human Rights, people will find
their rightful place in the world and universe, and their relationship to the state and their fellow-citizens will be virtuous.

1.2. The right of the state to curtail these rights:

If the rights of the individual cause him/her to be law-abiding, it will not be necessary for the state to curtail any individual rights.

1.3. Duties of the individual:

Because we do not propose a social system, we hold that the individual's disposition should not be that the state owes him/her something. The individual's relationship with the state should be one of partnership, with the purpose of contributing to South Africa. The Bill of Human Rights should therefore also assign duties to the individual, such as paying tax, paying for services rendered, the proper usage of resources, and to show consideration for the rights of others.

We feel that "The Bill of Human Rights" should, instead, bear the title "The Bill of Human Privileges".

1.4. The Bill of Human Rights should apply to common law, religious rules, customs and rules of habit.

2. EQUALITY

2.1. The Constitution should guarantee equality for all in terms of the law.

2.2. There should be no discrimination on the basis of race, gender, religion, etc.

2.3. Affirmative action:

It seems that affirmative action currently consists of replacing competent people of one racial group with inexperienced people. This cannot be justified, because it is harming the country's economy.

Affirmative action in the fields of education and training, housing, and services to the disenfranchised, is acceptable, in so far as people from the old dispensation can be
replaced by people who are at least as competent. The Constitution should therefore make provision for benefiting the disenfranchised for a limited period of time, say three decades, in regard to housing as well as education and training. People who have by then not caught up, don't want to be helped.

Also, affirmative action should not hamper the initiatives of entrepreneurs who create jobs, such as the farmers.

3. HUMAN DIGNITY

3.1. The rights of the individual (see 1.1, above) must guarantee his/ her human dignity. The state may not violate these rights either!!!

4. THE RIGHT TO LIFE

4.1. When can the right to life be said to begin? We are very resolute that it is when conception takes place, that this is God's will. Abortion must therefore be deemed unacceptable, also by the Constitution. Those who are not able to independently think for themselves, like the fetus, have the fundamental right to live.

4.2. When does the right to life end? We believe that if you do not grant others the right to life, by for instance committing a murder, then you also forfeit your right to life.

Euthanasia is a humanitarian way of delivering someone from his/ her suffering. How and by who it is determined when euthanasia is justifiable, is a matter for religious leaders to decide on.

5. PRIVACY

5.1. Individual privacy cannot be rated higher than the prosperity of the country. The state should have the right to prevent crime as well as activities that can endanger the national security.

We hope that this submission will give you an insight into the thought pattern of conservative ("behoudende") Afikaners who have a burning desire for South Africa to become a leading nation.
The best of luck in this important task

D.J. Sadie

Chairperson
SUBMISSION OF THE FEDERATION OF EMPLOYERS’ ORGANISATION FOR THE LOCAL GOVERNMENT UNDERTAKING IN THE RSA TO THE PUBLIC REARING ON PUBLIC ADMINISTRATION AND THE CONSTITUTION: CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 6 - SPECIALISED STRUCTURES OF GOVERNMENT

1. SOURCES OF INFORMATION

1.1 It is usual when drawing upon sources of information in support of a position or hypothesis, to identify the source and give full recognition. This report makes no claim to conceptual originality and quotes are used extensively, but comprises an holistic distillation of numerous reputable sources. By virtue of the extreme time constraints under which this has been prepared, it has not been possible to incorporate detailed source recognition, and it is merely stated for the record that sources drawn upon include those appended hereto in the abbreviated bibliography. This submission should be seen as being a provisional outline and the forerunner of a more detailed submission still to be prepared.

2. CONTEXT

2.1 In order adequately to address the question of including Local Government in or excluding it from the definition of the Public Service, it is essential to clarify the place, constraints and objectives of Local Government relative to a number of reference points. The reasoning for the contextual references set out in paragraphs 3 to 8 and an understanding of the argument depends on a grasp of the context.

3. THE PLACE OF LOCAL GOVERNMENT IN PUBLIC ADMINISTRATION

3.1 Public Administration as a discipline is confined to the public sector. While some have argued that administration is administration wherever it may be practised, there are constraints and values uniquely applicable to the public sector that warrant the treatment of public administration as a separate discipline.

3.2 The Republic of South Africa Act, No 200 of 1993, recognises three tiers of government: national (chapter 4), with the legislative authority of the Republic vesting in Parliament; provincial (chapter 9), with the provincial legislature being empowered to make laws for the province on matters permitted by the Constitution; and local (chapter 10), with autonomy and entitlement to regulate its own affairs within the limits prescribed under law.
3.3 There are indications in recent enactments, official draft negotiation documents and the first report of Theme Committee 6 (Specialised Structures of Government) that local government has been overlooked or disregarded:

3.3.1 in the establishment of the National Economic, Development and Labour Council under sections 2 and 3 of the National Economic Development and Labour Council Act, 1994, no clear provision is made to accommodate local government, although it may arguably have a direct or indirect interest in all four chambers envisaged under section 2(2). While employee representatives from local government may qualify for membership of the council under section 3(1)(b) as "members who represent organised labour", employer representatives from local government are far less easily accommodated under the remaining three categories qualifying for membership under section 3(1). It is to be noted that whereas local government is a tier of government as set out in clause 2.2 above, it is not treated in practice or theory as "the State". As will further emerge herein, local government has been "lost" from the picture by a conceptual error.

3.3.2 The effect of the omission alluded to in paragraph 3.3.1 above is compounded by the provisions of section 53 of the Draft Negotiating Document in the Form of a Labour Relations Bill, promulgated under Notice 97 of 1995 in Government Gazette No 16259 of 10 FEBRUARY 1995. For the determination of what constitutes "essential services", the Minister of Labour, in consultation with the Minister for Public service and Administration and NEDLAC, shall establish an essential services committee. While this committee may fortuitously include employer (i.e. political) representatives of local government, the Draft Document does not specifically require this, although local government is a major renderer of essential services, with almost 800 employers (--99311994) and approximately a quarter of a million employees.

While there is no national minister with the specific portfolio of local government, it is understood that the Minister of Provincial Affairs and Constitutional Development attends to local government affairs at a national level. If this information is correct, such minister should be included with the Minister for Public Service and Administration and NEDLAC in the mandatory consultation envisaged in section 53. Why the Minister for Public Service and Administration is specifically mentioned and no-one specifically representing local government, may possibly be explained by the conceptual flaw on page 155 of the explanatory memorandum. Under the heading of "Public Sector", reference is made only to the public service. There is specific provision for the public service in section 201 under the heading "Public Sector", but no provision for the portion of the public sector falling outside the "public service", the latter being defined in section 183. The "public sector" has not been defined, but clearly includes local government as the third tier of government in terms of virtually any conceivable conceptualisation of the term.

3.3 “Specialised Structures of Government" lists certain key issues identified for further discussion. The reference to the Public Service in conjunction
3.3.4 While models of local government do exist where the primary employment relationship is not with an incorporated local community, but with a centralised, public service employer which seconds its employees to local communities, this arrangement is uncommon. It has also not been general practice in South Africa, although by way of exception the secondment of provincial employees to Black Local Authorities incorporated under Act 102 of 1982 has occurred. This secondment phenomenon undermines values the new local government should subscribe to, as is argued beneath, and cannot be supported as a trend, although rare exceptions based on exceptional circumstances may be justified as a temporary intervention.

4. LOCAL GOVERNMENT AND DEMOCRACY

4.1 Introducing the Nigerian local government reform of the second half of the 1970s, Brigadier Shehu M Yarl Adua stated:

"The Federal Military Government has therefore decided to recognise Local Government as the third tier of governmental activity in the nation. Local Governments should do precisely what the word government implies i.e. governing at the grass roots or local level."

4.2 Researchers on democratic theory and local government write:

"The need for healthy grass roots is continually emphasised. This does not mean that it is possible to speak of the democratic theory of local government. Local and national democracy are one system. There is no such thing as "local democracy", separate and autonomous, and justified solely in terms of the self-governing community. There is a democratic theory of government and society, in which there are different public and private bodies and a fabric of attitudes, behaviour and expectations. Local government is part of this society."

4.3 By way of background they record that "Historically, there have been three contradictory views of how local government and democracy are related. The first view,
that of Toulmin Smith and the mid-Victorian romantics, is that local self-government is a cherished tradition in total opposition to the elected democratic principal. The second view is that the principles of democracy - majority rule, egalitarianism and uniform standards for all - cannot accommodate the claims of local government which is parochial, diverse, varied and potentially oligarchic and corrupt. The critical view of modern local government is well argued by Langrod and Moulin. The third view is the John Stuart Mill tradition which holds the democracy and local self-government are necessarily related. Liberty is strongly defended: taxpayers must be allowed a voice in government; be informed and consulted; and people must also be free, in their towns and villages, to manage their own purely local interests.

4.4 As a brief summary:

"It has been said that history demonstrates the truth of Tocqueville's assertion the municipal institutions constitute the strength of free nations. A few decades later Mill underlined this by writing that local government is the school for democracy."

5. LOCAL GOVERNMENT AND REFORM

5.1 "Few government reforms have been as widespread as the reforms at the sub-national level that have taken place in the last two or three decades. Anyone looking for a Western country that has not experienced some local government reorganization in one form or the other would soon become discouraged. In some countries the reorganization has mainly consisted of redrawing the administrative boundaries of the territorial units, with or without a reshaping of the organizational structure. In other countries the emphasis has been much more on a redistribution of tasks among the various levels, most frequently combined with attempts at reshuffling the financial relations between them.

5.2 "The impression of variety is compounded by the fact that in some cases the reorganization has had a comprehensive character, its various elements being considered, decided and implemented in a fairly integrated fashion, while in other cases the process has been one of piecemeal change, each reform being enacted independently. Furthermore this general trend towards reorganization does not preclude striking differences in the politicization of the process, in some situations we have been confronted with a lively political debate on the reform proposals, with ideological principles pitched against one another, while in other instances discussion, if any, has been quite subdued and the reforms seemingly uncontroversial.'

"The short answer to the question, why so much reorganization, is that it is intimately linked to recent developments in the public sphere; it is a reflection of what we used to term the welf are state, but now more aptly tend to term the interventionist state. such a view, in all its generality, has lately gained wide currency. it is indeed obvious that local government reorganization would hardly have taken place without the dramatic expansion of the public sector in most advanced democracies since the Second World War. From this point of view local government reorganization may be
looked upon as an institutional afterthought. It appears everywhere as an attempt to solve the tension between the organizational requirements the expansion has given rise to and existing institutional arrangements. However, it is also evident that the ways in which the widening of the public sphere has taken place, the specific character it has had at various stages, and not least the ideological elements supporting local government, have had an impact on the types of reform, on their sequence in time and on the conflicts they have engendered."

5.4 "The reorganization pie could be divided in a number of ways. A framework that seems to capture the outstanding features of local government reorganization can be constructed on the bases of two dimensions. Firstly, the reforms might be differentiated according to whether they pertain to the relationship between the different levels, or whether they mainly concern the internal administration of local authorities. We might call this the scope of the transformation. It brings to our attention the fact that a direct impact on intergovernmental relations is only one of several goals of attempts at reorganization. Quite a few reforms are indeed solely aimed at internal changes, although they might eventually have an indirect impact on intergovernmental relations. It is analytically important to keep the two separate, as the ideologies behind them and the political processes they might engender are likely to differ."

5.5 "Secondly, the reforms may be subdivided according to whether they aim at (1) changing the organizational structure; (2) reshaping the type of decisions by local authorities; or (3) reorganizing the flow of financial resources. The second dimension might thus be termed the substantive content of the reforms. Who does what, how and with whose money, are each distinguishable issues and are likely to be dealt with differently in various situations. Even if somewhat blurred at the edges, these distinctions offer a starting point for a more specific categorization. Seen jointly and expressing them typologically, the two dimensions - scope and content - point to six categories of reforms:

5.6 | Adjustment of intergovernmental relations | Adjustment of local aspects |
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6. LOCAL GOVERNMENT AND LEGITIMACY

6.1 In the context of institutions of governance, legitimacy is a much voiced concept. It is pop
amostly exclusively as a political notion, but has an equally important functional dimension. History †
functional legitimacy by itself cannot address the requirements of political legitimacy. Political leg
does not translate rapidly into functional legitimacy may fall prey to the same fate.

6.2 Local Government as a system addresses the legitimacy issue in the following waits:

6.2.1 "RECOGNITION OF LOCAL DIFFERENCES

Most of these advantages are related to the differences which exist among the
dispersed local communities. In the first place, many of the present-day provinces
and municipalities existed in some form before the creation of the sovereign nations
of which they are now a part. Differences in ethnic, linguistic, cultural and religious
backgrounds and social institutions along with political and administrative
considerations, have generally made it imperative that these local entities be retained
in some form. The need for utilizing local institutions is underscored by variations in
the density of population, the intensity of needs and the scarcity of resources among
local communities. Particularly in the past two decades the potential importance of
local government has increased in conjunction with the accelerated demands for
local development and improved services. Whereas the phenomenon of rising
expectations has affected all local governments, demands upon those in large urban
areas are especially acute. The greater the congestion, the more intractable appear
to be the problems of crime, crowded streets, inadequate water supplies, obsolete
sanitary facilities, unsatisfactory schools and unemployment.
The disparity in local priorities points up the importance of establishing an effective
means of transforming central policies into local programmes in a responsive and
responsible manner. The handicaps inherent in running the array of services of a
variety of local communities directly from the various ministries headquartered in a
distant state capital are almost insuperable. Moreover, many of the officials in the
state bureaucracy have as little understanding of the diversity of local conditions as
most local residents have empathy with the state capital."

6.2.2 "Direct Citizen Contact
The direct contact with community residents which local leadership can exercise provides an
opportunity to gain a more specific understanding of local needs, a greater flexibility in mustering
resources and allocating priorities and increased possibilities of involving the residents - all of which
factors are essential to the development and preservation of an effective and economical
government system."
"Efficient Administration

Each of these factors is related to the administrative motivations for local government. Decentralized decision-making is likely to be more efficient in responding to problems especially in large areas with poor communications. Local administrations may make better use of local knowledge. It may draw forth leadership which might otherwise have remained unutilized. Decentralized administration provides less scope for the central government bureaucracy to make mistakes and spreads the risks of learning how to administer. Local units with some measure of homogeneity in population simplify the task of satisfying the populace. Smaller units provide a greater opportunity to co-ordinate the various services of government and allow local people to control their own bureaucracy. Moreover, the use of local government provides more opportunity for local residents to have contact with, to take an interest in and have an understanding of, to complain about, to exert influence upon and to participate in public affairs than does the use of central government. It provides a means for involving local residents who otherwise might be apathetic to, alienated from or even antagonistic to, the total governmental system."

6.2.4 "Representative Administration

Local representative government then, serves a two-fold purpose, one is the administrative one of supplying goods and services; the other is the 'representative' one of involving the citizens in determining specific local public needs and how they are to be met. Local representative government is a process which spans and connects representation, and 'administration' at the local level.

This linkage of representation and administration serves the interests of both the local residents and the central government. Through the representative body the local citizen is provided a more immediate means of affecting the development and the services of this locality than if he had to deal directly with the capital-oriented bureaucracy. Likewise, through the use of local representative bodies the central government has a means of securing local community interest and support.

7. DETERMINANTS OF SUCCESS IN LOCAL GOVERNMENT

7.1 Writing specifically in the context of African case-studies, researchers report:

"The governments of developing countries, particularly in Africa have historically been much more centralized than their industrialized counterparts. Cultural factors; the early emphasis of development economics on central planning, industrialization and centralization of development in major cities, scarce managerial and technical expertise; and, perhaps most
importantly, the existence of strong central governments dominated by particular tribal, ethnic or economic groups reluctant to share power, have all contributed to the weakness of local government."

7.2 "As central governments in developing countries reduce the growth and scope of their own activities in response to economic realities and donor pressures, interest in strengthening local authorities is on the rise. At the same time, there has been a growing awareness of the potentially productive role of local government in raising resources, providing services, expanding rural-urban linkages, stimulating private investment, and implementing national development policies."

7.3 "The emerging focus on a broader role for local government is strongly supported by multilateral development agencies. The 1988 World Development Report devotes an entire chapter to the importance of local government reform in developing countries, and a widely cited World Bank report states that an effective public sector in a modern developing country depends on the ability of the central government to harness the resources of lower levels of government. In conjunction with their emphasis on structural adjustment, donors have conducted research and held workshops on strengthening local government, and local participation is being required for some new programmes."

7.4 "Local government has also been promoted by revised policies of bilateral aid agencies. In the wake of the economic problems of the 1970s and 1980s, conservative governments moved into power in many industrialized countries, resulting in a redefinition of the types of overseas development activities they will support with grants and loans. There is less emphasis on financing central government programmes because of a reaction against central planning and control, and more emphasis on the market and decentralized institution-building that supports the growth of the private sector. Such policies are often administered through decentralized agencies of the central government and local governments. The additional burdens on local authorities have lead to calls for reforming them in many countries."

7.5 "Four factors regarding the reform of local government have been particularly emphasized with respect to Africa.

7.5.1 First effective local governments are perceived as providing opportunities to involve long-neglected citizens in the decision-making process, an issue that has become - with the rise of clasnost and perestroika - particularly pertinent for a colonized continent that gained independence during the Cold War era.

7.5.2 Second, mobilization of local governments may be particularly important in African countries because many of them have been so severely affected by structural adjustment cutbacks in central government budgets. The strengthening of African local governments could be regarded as "essential for the rehabilitation of national public finances and hence a means to sustainable growth' (World Bank, 1989, p.1.)
7.5.3 Third, local governments are perceived as having the potential - especially given Africa's rich local institutional heritage for helping to mitigate the negative effects of structural adjustment programmes on the poor. In a more empowered form local governments are likely to be in a better position than the central government...to recognize the precise impact of various adjustment policies and to allocate scarce resources where they will help the most (and consequently provide the poor with better access to services and infrastructure (World Bank, 1989, p1).

7.5.4 Fourth, some analysts believe that local government Initiative will be required to tackle the challenges of Africa's twin pressures, rapid population increase and urban growth, during a period when the severity of these problems is declining in many other parts of the world. Central government support and coordination is certainly required, but local governments need to take a more active role in providing adequate public services, promoting population control and developing a climate conducive to job generation, particularly in secondary cities and small towns.

7.6 The following criteria are common denominators in all the case studies researchers considered examples of successful local government:

7.6.1 LOCATION AND ECONOMIC BASE

Local authority success is, at least in part, a function of location, which is an important determinant of economic potential and revenue base.

7.6.2 ENABLING LEGAL FRAMEWORK

A precondition for sustained success is that local authorities have a clear legal status and well defined powers and responsibilities.

7.6.3 MOBILIZATION OF RESOURCES

An important aspect of local authority success is their ability to raise revenues effectively from their economic base. In urban areas, this normally means tapping land rates, various kinds of licenses and fees and user charges. In rural areas, success more typically requires effective use of agricultural taxes or marketing fees.

7.6.4 NATURE OF CENTRAL CONTROL AND SUPPORT Given the fairly high levels of political, administrative and fiscal centralization in the countries from which the sample cases are drawn, higher levels of government significantly affect the performance of decentralized authorities. Financial dependence actually varies a great deal within and across these countries. This diversity of experience across the success cases suggests that whether revenues are raised locally or centrally is not a key determinant of success per se, but it is clear that the central government must - one way or another - provide local authorities with access to sufficient resources.
7.6.5 EFFECTIVE LOCAL MANAGEMENT

Good management practices are a prerequisite to establishing local authority success. ... officials have made significant efforts locally to develop effective revenue collection and financial control practices, to recruit qualified staff and remunerate them adequately, to avoid employing more staff than necessary, to keep reasonably good records, and to use their records to help them in planning development activities and day-to-day operations. In some cases, they have also taken the initiative to participate in training programmes and taken advantage of other forms of support offered by the central government. Continuity of management can also contribute to effective performance by a local authority. In some countries where local authorities personnel matters are centrally controlled, there is frequent rotation of senior local authority officers. Continuity considerations suggest that these policies should be reconsidered.

7.6.6 "EFFECTIVE INTERNAL AND EXTERNAL RELATIONS"

Good internal and external relations facilitate local authority operations and improve their performance. Given the important role of central government successful local authorities also require good working relationships with the central government agencies with which they must regularly conduct business."

7.6.7 "RESPONSIVENESS TO CONSTITUENTS"

Not surprisingly, local authorities appear to be more effective when they are responsive to their constituents and the beneficiaries of particular development projects. There are many well documented instances in which the failure of local authorities to consult the local people resulted in the failure of development projects and the disillusionment of affected residents and service users.19

7.6.8 "INTERACTION WITH OTHER LOCAL AUTHORITIES"

Local authorities officials can learn a great deal from careful examination of the successes and failures of other local authorities.

7.6.9 "SUCCESS AS A CUMULATIVE PROCESS"

Local authority success is neither unidimensional nor spontaneous - it is a complex, ongoing and cumulative process that is enhanced through positive action taken by local and central officials. once some preconditions are established and initial steps towards success are taken, the process seems to intensify, a manifestation of potentially robust and mutually reinforcing linkages amount the contextual and managerial success factors outline. As a local authority gets stronger on various fronts, it is better able to deal with problems that arise."

8. LOCAL CENTRAL RELATIONS
8.1 Decentralisation Defined

Decentralization, in what might be called its 'classical' meaning, refers to 'devolution': the transfer of power to a lower level of jurisdiction with clear geographical boundaries, a legal status, specified functions, fixed financial resources and autonomous personnel. It also implies a system of rules sanctioned by electoral legitimacy. In fact Sub Saharan African governments have emphasized (or merged with devolution) other meanings of decentralization. They are more inclined towards ‘deconcentration’, transferring responsibility from headquarters ministries and departments to field staff who implement decisions. While these officials often have limited decision-making authority, they sometimes exercise delegated powers in cooperation with elected local leaders. Thus, there are several patterns of deconcentration, including: (a) cases where field staff have some latitude to adapt central government policies to take account of local realities; and (b) others where the central government officials in the field discharge their responsibilities in consultation with appointed local bodies.

8.2 Effects Of decentralisation

8.2.1 "As the pressures for larger organizational units, national minimum standards and central planning capabilities mount, so the concern for local autonomy grows. One of the most disturbing characteristics of contemporary society is said to be the concentration of power in fewer and fewer organizations, whether public or private. This is seen as the inevitable result of technological, organizational and political development. Few governmental functions are now the exclusive responsibility of local institutions. Local needs outstretch local resources in both developed and developing societies. The threat, and in some cases the reality, is of a large, remote impersonal administrative machine dominating the life of the individual."

8.2.2 "The attraction of decentralization is not merely that it is the opposite of centralization and therefore can be assumed to be capable of remedying the latter's defects. Decentralization has a positive side. It is commonly associated with a wide range of economic, social and political objectives in both developed and less-developed societies."

8.2.3 "Economically, decentralization is said to improve the efficiency with which demands for locally provided services are expressed and public goods provided. Market models of local decision-making see decentralization as a means of expanding the scope of consumer choice between public goods. Residential locational choice contributes to the realization of individual values and collective welfare. Decentralization is said to reduce costs, improve outputs and more effectively utilize human resources."
8.2.4 "Politically, decentralization is said to strengthen accountability, political skills and national integration. It brings government closer to people. It provides better services to client groups. It promotes liberty, equality and welfare. It provides a training ground for citizen participation and political leadership, both local and national. It has even been elevated to the role of guardian of basic human values."

8.3 Reasons for pursuing decentralization

Stated slightly differently from paragraph 7.2 but covering the same basic ground in a more detailed fashion, seven benefits promised by decentralization are put forward:

8.3.1 "First there is the idea that democratic decentralization is a more effective way of meeting local needs than central planning. It provides a mechanism responsive to the variety of circumstances encountered from place to place."

8.3.2 "Secondly, decentralization has been seen as particularly relevant to meeting the needs of the poor. It is argued that if development is to mean the eradication of poverty, inequality and material deprivation it must engage the involvement and mobilization of the poor."

8.3.3 "Thirdly, decentralization is said to improve access to administrative agencies."

8.3.4 "Fourthly, forms of decentralization in which people can participate are said to soften resistance to the profound social changes which development entails. Participation in local institutions should help overcome the indifference, pessimism and passivity of rural people. Decentralization can secure commitment to developments needing a change of attitudes."

8.3.5 "Fifthly, decentralization should reduce congestion at the centre. It provides for greater speed and flexibility of decision-making by reducing the level of central direction and control. Rural development, in particular, requires such flexibility during implementation when policy changes may be needed at short notice. The kind of initiative and effort required for flexible development administration is stifled by over-centralization."

8.3.6 Sixthly, there is a persistent belief that local democracy is necessary for national unity. In large countries with great social and economic diversity it is felt necessary to satisfy the legitimate political aspirations of subgroups, particularly those which are ethnically distinct."

8.3.7 Finally, the state needs to mobilize support for development plans. Popular energies need to be harnessed to the task of economic regeneration. Plans and objectives have to be communicated under difficult physical and cultural conditions. Local institutions can provide local data, interpretations of
local needs, indoctrination (into the benefits of health programmes for example), inputs (such as savings and direct labour) and community self-help projects. Advantage can be taken of what is believed to be a greater willingness to pay local rather than central taxes. Local government allows the maximum utilization of local resources which has an efficiency value quite apart from the other benefits, such as political education, which it may bring to society."

8.4 Power Relationship between local Government and national or provincial government

8.4.1 "The anglophane and hispanic traditions of municipal government emphasise its legal and functional separation from the apparatus of national or state administration. Local authorities have their own property, budgets and staffs, (even though their revenues may depend heavily on grants and their senior personnel may be seconded by central government). They have devolved functions which they perform exclusively, (even though these may be subject to policy direction, guidance and inspection by central government). Central or state/provincial government may well perform other functions at local level, in which case they will have branch organisations under their direct management in the municipality, parallel to, and separate from the apparatus of local government."

8.4.2 "other traditions, particularly Napoleonic and ottoman, regard local government as part of an integrated hierarchy of government. They perform a dual role, undertaking both duties delegated by the State and autonomous functions. The latter may be responsibilities formally devolved by statute, or simply services financed by their own revenues. State appointed governors may act both as chief executive of the city government and coordinator of government agencies as in Bangkok, Cairo, Conakry, Jakarta or Manila. Alternatively the elected Mayor may exercise some duties (usually regulatory) as representative of the State and subject to supervision by State officials. Local technical agencies such as Finance, Health or public works may act on behalf of both central and local government."

8.4.3 "The Socialist tradition, now largely abandoned in Eastern Europe but extant in China, acknowledge no distinct legal identity for local government. It is based on the principle of the "unity of state administration and property". Local bodies may exist within such a system with some degree of representative character and practical discretion, but with no powers or assets which are legally protected from State direction."

8.5 A Constructive approach

8.5.1 "A stress on local autonomy is an inadequate approach to urban government. The continued impact of central intervention has to be recognised and efforts promoted to make central-local relations as constructive as possible. Two current approaches to this challenge are described.
8.5.2 The first approach consists of trying to make central controls of local government more positive and supportive. This requires practical steps, illustrated in a number of countries, to prune controls, reduce delays and clarify the performance standards expected of municipal budgets, plans, projects and administrative conduct. Developing skills and attitudes in supervising ministries is important to this process, and can be a significant intervention by donors. Other public bodies can play a part, particularly those responsible for audit. The establishment of municipal finance commissions in a number of Indian states is also a positive experiment in developing less arbitrary and better informed decisions over financial relationships."

8.5.3 "The second positive approach is the development of co-operative mechanisms for investment planning. Specific and matching grants have provided a long standing instrument for reconciling national policy objectives with local knowledge of detailed priorities and circumstances. But they are liable to overspecification by central government and do not extend local influence to the direct investments of national agencies.

8.5.4 "More recently countries like France and Mexico introduced negotiated agreements between levels of government incorporating all their investments of local or regional significance. In the case of Mexico these agreements cover both the direct investments of federal agencies and an increasing volume and percentage of matching grants and loans, available for locally selected and executed schemes within mutually agreed priorities. These agreements are reached by state aid municipal level committees in which all levels of government are represented along with the private sector." 

8.5.5 "Responsiveness to urban growth, the needs of the urban poor and environmental degradation all require a co-operative approach between levels of government and jurisdictions, to overcome disparities in resources (both vertical and horizontal) and the impact of territorial and functional fragmentation. The recent development of collaborative investment planning between central, state and local government appears from case evidence to provide a positive framework for this."

9. LOCAL GOVERNMENT ADMINISTRATION BY THE PUBLIC SERVICE?

9.1 In order to address the question of how the Public Service is to be defined, and specifically whether local government should be covered by this definition, it has been necessary to place Local Government in context with reference to the following:

9.1.1 Public Administration
9.1.2 The Constitution
9.1.3 The Legislature
9.1.4 The Public Sector
9.1.5 Democracy
9.1.6 The Reform Process
9.1.7 Legitimacy
9.1.8 Successful Achievement of National objectives
9.1.9 Central I Local Relations

9.2 Under all the contextual headings addressed, it has consistently been demonstrated that local government encompasses dimensions of uniqueness which require that in order to serve both higher levels of government and communities, its administration can not be merged with a Public Service directly answerable to first or second tier government. Reasons for this assertion are generally reflected in the preceding submissions, but specifically in paragraphs 6.2, 7.6.5 and 8.1 to 8.3. Fundamental difference in what is required of a centralised civil service and a decentralised local government service render the prospect of merging such administrations not only ill-advised, but potentially catastrophic.

9.3 Appropriate reform of local government can improve its capacity to serve communities better. This submission is not directed against the notion of reform. However, the merging of local government administrations into a redefined civil service would not constitute reform, but retrogression, and there is no evidence to hand to justify such a prospect as being appropriate. Rather, a fleshing out of local government's place and rôle relative to the criteria set out above, as a unique tier of government in its own right, is now both appropriate and urgent.

ABBREVIATED BIBLIOGRAPHY


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MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION AND PUBLIC SERVICE COMMISSION

INPUTS TO SUB THEME COMMITTEE 6.1: PUBLIC ADMINISTRATION

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General opening Statement by the Minister for the Public Service and Administration to Theme Committee 6.1 of the Constitutional Assembly on 14 March 1995

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GENERAL OPENING STATEMENT BY THE MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION TO THEME COMMITTEE 6.1 OF THE CONSTITUTIONAL ASSEMBLY ON 14 MARCH 1995

INTRODUCTION

Chairperson, members of the Theme Committee, thank you for the opportunity to appear at this hearing.

Chairperson, may I introduce at this stage members of the Public Service Commission and its Office:

Dr R H Venter - Chairperson of the Public Service Commission
Dr Y Muthien - Member of the Public Service Commission
Mr I H Robson - Member of the Public Service Commission
Prof S S Sangweni - Member of the Public Service Commission
Dr S Vil-Nkomo - Member of the Public Service Commission
Dr L C A Stoop - Director-general, Office of the Public Service Commission.
The Public Service is a core instrument to execute the policies of the Government. Public servants are central to the effective and efficient delivery of services as well as the reconstruction and development of our country.

**CONSTITUTIONAL IMPERATIVES**

In considering is inputs the Ministry and the Commission have been guided by the provisions of sections 71 and 74 of the current Constitution, namely that the new Constitution shall comply with the Constitutional Principles contained in Schedule 4. These principles are entrenched in the Constitution and must be adhered to in the writing of the new Constitution. In this regard section 74(1) of the Constitution stipulates that "No amendment or repeal of .... the Constitutional Principles set out in Schedule 4 .... shall be permissible". Furthermore section 71(2) stipulates that "The new Constitutional text .... shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles". Also taken into account was practical experience with regard to the provisions of the current Constitution as far as they pertain to the Public Service, the Public Service Commission and the Provincial Service commissions. It must be said that the interim Constitution, having been in place for a relatively short time, has not been tested adequately. A number of problems arising from the above-mentioned provisions have, however, been identified. Proposals as to possible ways in which to constructively address these problems are included in these inputs.

We are of the opinion that aspects concerning the Public Service and the Public Service Commission, not directly linked to the above-mentioned principles and the drafting of the new Constitution, should be dealt with through legislative measures and at other appropriate fora such as the Portfolio Committee on Public Service and Administration.

In making these inputs the point of departure was that provision must be made in the final Constitution for the Public Service and a Public Service Commission as directed by Constitutional Principles XXX and XXIX, respectively.

**THE PUBLIC SERVICE**

With regard to the Public Service, Constitutional Principle XXX states that a specific character for the Public Service is to be provided for, namely, an efficient, non-partisan, career-orientated public service, broadly representative of the South African community, functioning on a basis of fairness and serving all members of the public in an unbiased and impartial manner. In order to ensure that the specific character is attained and maintained we believe it is equally important to retain the merit and the efficiency principles in the body of the Constitution. It may be mentioned that the merit principle is recognised in many countries of the world as a cornerstone for the administration of public services.
Constitutional Principle XXX also stipulates that provision should be made for every member of the Public Service to be entitled to a fair pension. We support the inclusion of this principle in the Constitution due to its stabilising effect on the Public Service. Stability in the Public Service enables it to give its full attention to its responsibility of loyally executing the lawful policies of the government of the day in the performance of its administrative functions. Similar provisions occur in the constitutions of countries such as Zimbabwe, Barbados, Uganda, Bahamas and Nigeria.

The importance and special character of the Public Service, and the sensitive environment in which it functions, necessitates a body alongside government which is charged with specific responsibilities regarding the Public Service. Such central personnel authorities are found in many countries. In South Africa the role is fulfilled by the Public Service Commission.

**THE PUBLIC SERVICE COMMISSION**

Constitutional Principle XXIX determines that the Public Service Commission must be independent, impartial and responsible for the maintenance of effective public administration and a high standard of professional ethics in the public service. In order to attain these objectives, a Public Service Commission should be responsible for ensuring/promoting transverse order, impartiality, representativeness, accountability, fairness, effectiveness, efficiency, transparency and ethical behaviour in the Public Service. To give effect to the above constitutional principle, both the functions and the composition of the Public Service Commission should be enshrined in the Constitution.

Although not expressly addressed in a Constitutional Principle, we are of the opinion that the position of Provincial Service Commissions should also be addressed in the final Constitution. Due to the volume of work generated by a workforce of approximately 1.25 million public servants (approximated because of rationalisation), there is justification for a degree of deconcentration of certain functions of the Commission. In this regard the Provincial Service Commissions have, in the short time since their inception, proved to be invaluable. If the principle is adhered to that Provincial Service Commissions may only operate within the provisions of the Constitution and other national laws regulating the Public Service to ensure that their actions are directed at serving one Public Service, there is no danger of a fragmentation of the Public Service. It is therefore believed that provision should be made in the final Constitution for Provincial Service Commissions broadly demarcating their area of competence and clearly stating that their actions are subject to the provisions of the Constitution and other national laws regulating the Public Service.

Finally in this regard, we provide through an annexure examples of how public services and public service commissions are provided for in certain other countries. We wish to make the point that it is not an anomaly for the principles and values underpinning the Public Service and the Public Service Commission to be enshrined in the Constitution.

**THE MINISTRY FOR THE PUBLIC SERVICE AND ADMINISTRATION**
An issue of particular concern at this time and which needs to be addressed is the creation of a component to provide administrative support to the Minister for the Public Service and Administration. The Commission has indicated that it does in principle support the creation of such a component. However, we hold the position that this question ought to be dealt with in terms of the Public Service Act, 1994, rather than through the Constitution. This matter is at present under discussion between the Commission and I. This will be followed by a recommendation to the State President for his consideration. At the same time we have taken stock of similar developments and debates in other parts of the world; e.g. Zimbabwe, Namibia, Australia, United Kingdom and Canada. Other models quite distinct from the above such as those in Sweden, Germany and the USA have also been studied.

**DOCUMENTS**

With this brief introductory statement, I would like to introduce to the Committee for discussion the following documentation:

A. Background notes on the Public Service and the Constitution  
B. Replies to questions: First report, Subtheme Committee 6.1: Public Administration, Theme Committee 6: Specialised Structures of Government  
C. Core proposals of the Public Service Commission regarding provisions on the Public Service, a Public Service Commission and Provincial Service Commissions for possible inclusion in the new Constitution

**A. BACKGROUND NOTES ON THE PUBLIC SERVICE AND CONSTITUTION**

**1. INTRODUCTION**

1.1 The Public Service is a major service delivery system in the country, mainly as a result of its size (approximately 1.25 million employees), the variety of services it delivers and its deployment country-wide. It is a major role-player in ensuring the development of the country.

1.2 The Public Service operates in a political environment which poses particular requirements as far as its proper administration is concerned. Chief amongst these requirements are own legislation and own institutions.

1.3 To ensure that the character of the Public Service is realised in a positive and acceptable manner, certain basic principles and values should underlie the ideals and objectives of the Public Service.

1.4 The Public Service should -
(a) perform those functions which rationally need to be performed by government departments and should therefore not involve itself in functions which should be performed by the private sector;

(b) be consistently administered on the basis of sound principles (refer to paragraph 2);

(c) be broadly representative (in staffing) of the South African community;

(d) be accepted and appreciated by society as being effective, efficient and unbiased in the rendering of services;

(e) provide a worthwhile career option to dedicated and talented people in order to attract sufficient personnel of high quality;

(f) be efficient in the performance of its functions and effective in satisfying the needs of society; and

(g) be noted for living up to ethical values as reflected in the manner it is administered as well as the conduct of public servants (which should be governed by a code of conduct).

2. BASIC PRINCIPLES CONCERNING THE PUBLIC SERVICE

2.1 The most important sound principles, recognised in many countries, on which the administration of the Public Service should be based (refer paragraph 1.4(b) above) are the following:

(a) **The career principle**

On joining the Public Service, a person enters into a career in the service of the State, and the assumption becomes operative that his career will continue - conditional on satisfactory performance - until he or she reaches the prescribed retirement age. He or she is a professional official and should be distinguished from a political appointee without tenure and outside the public service system.

(b) **The merit principle**

The merit principle means that public servants should be selected, assigned, promoted and compensated on the basis of ability and performance.

(c) **Efficiency principle**
The Public Service shall be staffed, trained, developed, utilised and administered so as to ensure that the best quantitative and qualitative results are achieved with the available human and other resources.

(d) **Public accountability principle**

The administration of the Public Service, in all its manifold facets, shall at all times be publicly accountable, especially to the legislative body or bodies which through budgetary and other legislation determine the programmes of activities in which members of the Public Service are engaged.

3. **SOME PERSPECTIVES ON THE ADMINISTRATION OF THE PUBLIC SERVICE**

3.1 Public servants need to be protected from political interference and arbitrary bureaucratic action. Protection of individual rights and respect for individual interests in employment are independent goals worthy in their own right.

Moreover effective and efficient government is best provided by public servants who are secure in the knowledge that they will be judged on the basis of how well they serve the public and that they will be treated with fairness and dignity.

3.2 It is expected of public servants to loyally serve the government of the day. The Public Service must therefore be protected to be in a position to ensure continuity and fulfil a stabilising role in periods of (political) change.

3.3 To ensure that the principles underlying the sound administration of the Public Service are at all times upheld, a non-partisan central personnel authority should be maintained. This is especially important in as far as the Public Service is to be viewed by the community as providing an unbiased service to all its members and also to ensure that public servants perceive that their career incidents are treated in an unbiased manner.

3.4 Public personnel policy should be geared to enhancing performance encouraging the development of individual capabilities and improving the quality of working life. Human resources planning and development must be such that human resources are snatched with anticipated needs (See Appendix).

3.5 To ensure a stable and productive workforce in the Public Service, it is important to protect certain care conditions of service, i.e. pensionable salaries, retirement ages, accrued pension benefits and pension fund(s). Public servants should fulfil their tasks with the assurance
that, except for reasons of disciplinary action, these core conditions of service will not be reduced unless they have consented to such a reduction.

4. CONCLUSION

In view of the aforementioned the Minister for the Public Service and Administration and the Public Service Commission is of the opinion that -

4.1 the Public Service should be founded on the Constitution (section 71 read with Constitutional Principle XXX in Schedule 4 of the Constitution, 1993);

4.2 the Constitution should -

(a) provide for all aspects of the composition and administration of the Public Service to be governed by law (the Public Service Act, etc.);

(b) stipulate the character of the Public Service, for instance that the Public Service -

* shall be administered as a career service;
* shall serve all sections of the community equally and equitably;
* shall be limited to a size commensurate with the efficient execution of the programmes of the government of the day and the services it has to render to society;
* shall be protected from improper political interference in its staffing and administration; and
* shall be broadly representative of the South African community;

(c) stipulate that the Public Service shall be accessible to all who comply with the prescribed entrance requirements;

(d) require the application of objective selection criteria in the personnel selection processes;

(e) protect acquired labour relations rights, which shall not be reduced;

(f) protect the core conditions of service of public servants, i.e. pensionable salaries, retirement ages, accrued pension benefits and pension fund(s);

(g) provide for continuity in the functioning of the Public Service; and
(h) provide for a Public Service Commission (section 71 read with Constitutional Principle XXIX in Schedule 4 of the Constitution, 1993) to fulfil a substantial role in the administration of the Public Service.

APPENDIX

HUMAN RESOURCE DEVELOPMENT, PUBLIC SERVICE TRAINING AND THE NEW CONSTITUTIONAL DISPENSATION

Background

1. While the training and development of public servants do not at first glance seem to be issues related to the process of drafting the new Constitution, these issues do have a place in the overall constitutional framework of the country.

2. The training and development of public servants operates within defined and definite statutory boundaries that are to be found in both the Constitution and the Public Service Act. There is a single Public Service for the Republic. In order to ensure that the training and development of public servants are done properly and effectively, these functions should be exercised within a clear overall division and allocation of responsibilities and organisation structures and establishments.

Present constitutional / statutory situation

3. The right to training and development in general, and with regard therefore also to public servants, is indirectly found in the Fundamental Rights contained in Chapter 3 of the (Interim) Constitution of the Republic of South Africa, 1993, particularly Economic Activity (section 26) and Education (section 32).

4. In terms of section 210(1)(a)(iv) of the Constitution, the Public Service Commission (PSC) is responsible for the promotion of efficiency and effectiveness in departments and the Public Service. In terms of section 3(3)(9)(vii) of the Public Service Act, 1994, this function includes the training of officers and employees.

5. Section 210 of the Constitution determines, inter alia, that only the PSC shall be competent to make recommendations and directions regarding personnel practices in the whole of the Public Service. In so far as this relates broadly to personnel utilisation, training is also relevant in this context.

6. Training and development are also instruments for the promotion of representivity in the Public Service, and therefore also for the related issue of affirmative action as they are at present addressed in sections 8(2) and 8(3)(a) of the Constitution.
7. Section 3 (Languages) of the Constitution states that a person shall have the right, wherever practicable, to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.

Proposals

8. The following issues are proposed for consideration in the debate on the new Constitution:

8.1 The right to the training and development of public servants should be recognised as a fundamental right as part of the general rights pertaining to economic activity and education.

8.2 In order to ensure that the training and development of public servants are done properly and effectively, these functions should be recognised, and should be exercised within (a) a clear overall division and allocation of responsibilities and (b) organisation structures and establishments.

8.3 The powers and authority, boundaries and functions of the national institutions (National Government, including Public Service Commission), as well as provincial institutions (Provincial Governments, including Provincial Service Commissions) should be formulated more explicitly, also concerning training and development. This naturally includes the relationship between PSC and Provincial Service Commissions.

8.4 The present provisions concerning the representivity of the Public Service, as well as the related issue of affirmative action, as they are at present addressed in sections 8(2) and 8(3)(a) of the Constitution, should be retained in order to ensure that the training and development of public servants, particularly new entrants, may continue to be conducted in such a way that the public service of the future will increasingly be representative of the South African society and ensure nation-wide efficient and effective service delivery.

8.5 The training of public servants should be linked to the rights of persons to be addressed in their dealings with any public administration at the national level of government in any official South African language of their choice.

B. REPLIES TO QUESTIONS: FIRST REPORT, SUBTHEME COMMITTEE 6.1: PUBLIC ADMINISTRATION, THEME COMMITTEE 6: SPECIALISED STRUCTURES OF GOVERNMENT

1. INTRODUCTION
Question:

1. Should the Public Service be regulated by way of a constitutional provision? If so, what should the content and form of the constitutional provision be?

Reply:

1. As indicated in the general opening statement, Constitutional Principle XXX implies that provision be made in the new Constitution for the Public Service. Refer to pages 7 - 10 of the document called "Core proposal regarding provisions on the Public Service, a Public Service Commission and Provincial Service Commissions for possible inclusion in the new Constitution" for the form and content (hereinafter referred to as "Core proposals").

2. THE ROLE OF THE PUBLIC SERVICE

2.1 How is the Public Service to be defined and which institutions of government should be incorporated in the definition? For example, should the army, police, health, education, local government and parastatals, as well as administrative personnel in the judiciary, be covered in this definition?

Reply:

2.1 The Public Service should be broadly defined in the Constitution to refer to those institutions performing governmental functions under the direct control of the President, an Executive Deputy President, a Minister, a Premier or a Member of an Executive Council of a province. It is possible to accommodate local government officials as part of the Public Service. In some other countries such as Sweden this is the case. However, before this will be practical the whole constitutional relationship among the three level of government will have to be revisited. Until that is achieved, it may be necessary for purposes of clarity to specifically exclude local government institutions from the Public Service. Since parastatals also function in the public domain, there are good reasons to apply the same discipline to conditions of service as the Public Service. A definition for the 'public service' is proposed (section 212(1)) on page 7 of the document "Core proposals".

Question:

2. What should be the guiding values and principles for the Public Service?

Reply:
2.2 The guiding values and principles should be those indicated in Constitutional Principle XXX and as embodied in subsections 212(2) to (5) on pages 8 and 9 of the document called "Core proposals".

Question:

2.3 What would be appropriate, speedy and effective mechanisms for ensuring accountability of public servants for their actions or inactions?

Reply:

2.3 The administration of the Public Service, in all its manifold facets, must at all times be publicly accountable, especially to the legislative body or bodies, which through budgetary and other legislation determine the programmes of activities in which members of the Public Service are engaged. Other mechanisms to be utilised to ensure accountability are representations to political office-bearers at national and provincial levels of Government, elected Members of the national and provincial Parliaments, heads of department/offices, the Public Protector, the provincial public protectors, Auditor-General questions in Parliament to political office-bearers and the media.

Question:

2.4 How should the concept of a representative Public Service be defined and what affirmative mechanisms and procedures will assist in achieving such representivity?

Reply:

2.4 Since the Public Service is directed at rendering services to the South African community at large, it is considered that the existing phrasing in the Constitution is correct, in that the states that the Public Service should be 'broadly representative of the South African community.' Thus formulated, it entails that all important variables practically pursuible, are indeed catered for, such as population group, gender and disabledness. Broad representivity should be the constitutional objective to be pursued in relation to the Public Service and affirmative action should be seen as one of the mechanisms to achieve the objective. Affirmative action itself can take many forms such as special recruitment schemes, special training schemes and special bursary schemes. It is not feasible or desirable to attempt to specify mechanisms to attain broad representivity in the Constitution.

Question:

2.5 Does representivity entail both deracialisation, as well as transformation of state institutions?
Reply:

2.5 Yes, in essence a broadly representative public service inter alia also be a non-racial public service. Programs aimed at promoting representivity, if properly managed, will result in the transformation of state institutions as far as the composition of such institutions is concerned. It is indeed important that such programs should also lead to substantial attitudinal changes towards achieving a non-racialistic mind-set and to changes in the organisational culture of the Public Service to reflect values of democracy, transparency and accountability, especially with regard to management style of the new public service. This will also impact positively on the planning and delivery of services.

Question:

2.6 Should the public and public employees be entitled to participate in formulating policy on public services and should Public Service managers be responsible for creating the mechanisms for such participation?

Put differently, should there be a duty on Public Service managers to consult employees and the public in relation to the provision of public services?

2.6 Yes, but with due regard to the particular circumstances and providing that there is no attempt to subvert the role of the specific political office-bearers. As indicated in the general opening statement, matters such as these do not relate directly to the constitutional process and should rather be dealt with in other appropriate fora.

Question:

2.7 Should there be an obligation on public managers to monitor and evaluate the implementation of public policy and what would be the appropriate mechanisms?

Reply:

2.7 Yes, the public manager has to monitor and evaluate. There are many qualitative and quantitative instruments to be used for this purpose. There are also standing instructions in this regard for example those in the financial instructions.

Question:

2.8 What forms of review and redress should the public/public employees have in relation to dissatisfaction with service delivery?
2.8 This calls to mind the familiar problem of the pensioner in a remote area who goes without her pension for two months in succession because of shortcomings or breakdowns in the pension payment system. Similarly the problem of failed water supply services in the townships comes to mind. On the other hand there is the water shortage problem existing in the rural areas in spite of the enormous efforts by the Department of Water Affairs and Forestry to provide adequate water supplies. The reality is that there is no water and that it could take up to 5 years to construct dams for the delivery of such services. Suitable forms of review and redress will emanate from a reform of the Slate structures so that political control over the handling of matters that are important to the people in their day to day lives is placed closer to the people (at local government level).

3. POLITICS AND ADMINISTRATION

Question:

3.1 Should there be a separation of powers between policy-making and administration?

Reply:

3.1 Although in theory separation is the ideal, absolute separation is impossible in practice. In practice officials do make inputs in this regard, based on their knowledge and experience, but the final decision with regard to policy-making rests with Ministers.

Question:

3.2 Should provision be made for limited political appointments in the South African Public Service? If so, what should be the procedure and criteria for such appointments?

Reply:

3.2 No. A public servant is a professional official and should be distinguished from a political appointment without tenure and outside the Public Service system. It is accepted that there is a need for political appointment, but such appointments constitute a distinct category of employment which should be distinguished from the Public Service as such. The concept of political executive appointments outside the Public Service requires further attention to further develop the concept and the procedures and criteria for such appointments.

4. THE PUBLIC SERVICE COMMISSION-
Question:

4.1 Should an institution such as the Public Protector be embodied in the final text of the Constitution? Is there a need for another body, such as the Public Service Commission, that deals exclusively with ombuds aspects relating to the Public Service? If so, what should be its role, particularly in relation to appointments, promotions, human resource development and performance evaluation of departments and employees? How should it be composed? By whom should it be appointed and what are the appropriate mechanisms for public accountability? Should any provisions for the above be made in the Constitution?

Reply:

4.1 The concept of a Public Protector is supported; however, this is a function distinct from the functions of the Public Service Commission. As far as the need for a Public Service Commission is concerned, this matter has been dealt with in the opening statement, the background notes as well as on page 1 of the "Core proposal".

Question:

4.2 What should be the respective roles and responsibilities of the Ministry for the Public Service and the Commission? What, if any, should be the relationship between the Ministry and the Commission?

Reply:

4.2 This matter has been dealt with in the opening statement

Question:

4.3 What role should Parliamentary Select Committees play in relation to the Public Service and the oversight of policy formulation and implementation? Should the Public Service Commission be accountable to a Select Committee on the Public Service?

Reply:

4.3 The Public Service Commission is accountable to Parliament. The Public Service Commission is required to submit an annual report as well as special reports, as necessary, to Parliament. These reports are submitted to the President, who forwards them to Parliament. The Select Committee has an important role with regard to the Public Service
Commission. It should inter alia consider and discuss with the Commission the reports submitted to Parliament.

**Question:**

4.4 **Should the Public Service Commission act as a body of appeal for public servants or should this role be entrusted to an independent agency?**

**Reply:**

4.4 This is a long-standing question without a clear-cut answer. In terms of Public Service labour legislation role players like the Industrial Court and the Labour Appeal Court are also involved in adjudicating grievances/disputes. After all the remedies provided for in the Public Service Act have been exhausted, an aggrieved public servant may approach the Public Protector. It must be borne in mind that public servants may at any time approach a court of law (including the Constitutional Court) with regard to a grievance and that this remedy is not superseded by the other remedies mentioned above.

**Question:**

4.5 **Who should represent the State as employer in the bargaining process and who mandates these representatives a the State as employer?**

**Reply:**

4.5 A composite team appointed by the Minister for the Public Service and Administration and the Minister of Education represents the state as employer. Each component of this team negotiates/consults within mandates from their respective principals. At the moment the team consists of representatives from the departments of Education, Finance and State Expenditure, the provincial administrations and the Office of the Public Service Commission.

**Question:**

4.6 **Should there be provincial Public Service Commissions? If so, what should their role be? What should be the relationship between the national and provincial Commissions? Should the Constitution contain any provisions on the above?**

**Reply:**
4.6 This matter has been dealt with in the opening statement as well as on pages 11-13 of the document called "Core proposals".

**Question:**

4.7 **How should norms and standards of public administration and management be developed and what, if any, should be the instruments of delegation from national to provincial governments?**

**Reply:**

4.7 National norms and standards for public administration (including public personnel management in the Public Service) should be developed in consultation with all the important role players (employee organisations, departments, Cabinet as collective employer, Provincial Service Commissions, etc.). The instruments of 'delegation' as contained in the Constitution, 1993, i.e. delegation, authorisation and the assigning of powers and functions, are appropriate. These measures should be retained in the new Constitution.

5. **THE PUBLIC SERVICE AS AN AGENT OF DEVELOPMENT**

**Question:**

5.1 **Should the Public Service act as an agent for development? If so, how can the Constitution create an enabling framework for such action or should this matter be dealt with elsewhere?**

**Reply:**

5.1 Yes. The Public Service should act as an agent for development. It is not necessary that an enabling framework should be provided for in the Constitution. At present this matter is comprehensively dealt with in the White Paper on the RDP.

**ANNEXURE**

**NOTES ON THE POSITION OF PUBLIC SERVICE COMMISSIONS AND PUBLIC SERVICES IN THE CONSTITUTIONS OF OTHER COUNTRIES**

1. The inclusion of a specific section in the Constitution regarding a Public Service Commission can be motivated as follows:
(a) It is important that an independent and impartial Commission must guard against the favouring or prejudicing of public servants.

(b) It is essential that the main purpose and functions of a central administrative authority such as a Public Service Commission be entrenched in the Constitution in order to ensure that the public service personnel caps remains a-political and serves the government of the day in an unbiased manner.

(c) Public Service Commissions are provided for in the Constitutions of various countries. Examples are the following:

(i) Namibia. The establishment of the Public Service Commission and its functions are embodied in articles 112 and 113, respectively (Annexure A).

(ii) Zimbabwe. The establishment, appointment and functions of the Public Service Commission are embodied in sections 74 and 75 (Annexure B).

(iii) Zambia. Service Commissions may be established in terms of section 109 of the Constitution of Zambia with functions relating to the public service or persons in public employment (Annexure C).


(v) Bahamas. Section 107 of the Constitution of the Bahamas provides for the establishment and composition of the Public Service Commission (Annexure E).

(vi) Barbados, Section 90 of the Constitution of Barbados provides for the establishment and composition of the Public Service Commission (Annexure F).

(vii) Uganda. Section 101 of the Constitution of the Republic of Uganda deals with the Public Service Commission, appointment of members and their discharge (Annexure G).

(viii) India. Sections 215 to 223 of the Constitution of India comprehensively deals with the position of a Public Service Commission for the Union and a Public Service Commission for each State (Annexure H).
2. As far as the inclusion in the Constitution of a specific section on the Public Service is concerned, the following serves as motivation:

(a) It is important that the public service should continue rendering services to the community irrespective of changes in government. This will create stability and provide the government of the day with expertise and support regarding the execution of the functions of government. Providing for the public service and its a-political character in the Constitution will promote this.

(b) The government of the day to a large extent is dependent upon the public service to give effect to its policies in practice. By providing for the public service in the Constitution the government could promote consistency in the services rendered by the public service personnel to the broad community.

(c) Provisions on the public service exist in the Constitutions of various countries. Examples in this regard are the following:

(i) Namibia. All personnel shall continue to hold office after the coming into operation of the Constitution - article 141 of the Constitution of the Republic of Namibia (Annexure I).

(ii) Zimbabwe. A public service is established in terms of section 73 of the Constitution of Zimbabwe (Annexure J), while Schedule 6 protects the pension rights of public officers (Annexure K).

(iii) Barbados. Section 103 of the Barbados Constitution provides for the protection of pension rights (Annexure L), while section 105 (Annexure M) deals with the removing from office of officers.

(iv) Uganda. Section 104 of the Constitution of Uganda deals with the appointment etc. of public officers (Annexure N) and section 106 and 107 provide for the protection of pension rights (Annexure O).

(v) Bahamas. Part 2 of the Constitution of the Bahamas provides for the appointments, etc. of public officers (Annexure P), while Part 3 provides for a Public Service Board of Appeal (Annexure O). Pension rights are protected in Part 6 (Annexure R).

(vi) Nigeria. Sections 167, 171 and 172 of the Constitution of the Federal Republic of Nigeria provide for the civil service, a code of conduct and the protection of pension rights (Annexure S).
(vii) Bolivia. Articles 43 and 44 of the Constitution of Bolivia state that public employees will serve the interests of the community and not of any political party and also guarantee an administrative career to them (Annexure T).

(viii) Portugal. Section IX of the Constitution of the Portuguese Republic deals with public administration and includes aspects such as the structure of administration, the civil service and liability of personnel (Annexure U).

(ix) Italy. Section II (articles 97 and 98) of the Constitution of the Republic of Italy deals with public administration which includes the organising of departments, duties and responsibilities of public officials as well as appointments (Annexure V).

**NOTE:** The United Kingdom does not have a Constitution.
(REV) AH JEFFREE JAMES  
Executive Secretary  
13 February 1995

THE PROTESTANT ASSOCIATION OF SOUTH AFRICA

Act No. 200 1993 - Constitution of the Republic of South Africa

We welcome the invitation extended by the President to all interested parties to submit memoranda relating to the drafting of a final Constitution designed to ensure the maintenance of justice and democracy in government and society in our land. We enclose herewith memoranda relating to the following matters under the general heading. Chapter 3, Fundamental Rights.

1. Application: Section 7 (4)

   The process aimed at obtaining a declaration of rights.

2. Human Dignity: Section 10, as this is threatened in the case of womanhood by the current attempts to interpret Section 15 as permitting explicit pornography.

3. Religion, belief and opinion: Paragraph 14

   The question of paramountcy: whether Section (3)(a) does in fact nullify, in certain specific areas, the rights declared in subsection 1.

We will be prepared to appear before the Constitutional Assembly, or a sub-committee thereof, to elucidate any of our representations should this be necessary.

Sgd) (Rev) AH Jeffree James  
Executive Secretary

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA: ACT 200 1993

Summary of Submissions to the Constitutional Assembly by The Protestant Association of South Africa covering three specific sections.

1. Application Section 7(4)

   "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

   If the underlined statement means involvement in lengthy expensive litigation, it is obvious that the common man is excluded from exercising the rights inherent in this section. We
have asked for direct access to the Constitutional Court with authority vested in the Chairman thereof to decide whether a complaint merits serious consideration or could be regarded as merely frivolous or unreasonable.

2. **Human Dignity Section 10 versus Freedom of Expression Section 15**

"Every person shall have the right to respect for and protection of his or her dignity."

"Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research."

The right inherent in Section 10 appears to us to be meaningless if Section 15 is interpreted to allow absolute freedom of speech and expression to the point of abusing individuals, or groups. The pornographic "industry" is staking a claim to publish explicit hard-core pornography on the basis of such an interpretation. We are contending that such constitutes an assault upon womanhood, as this has been defined by the Canadian Courts, and thus nullifies the protection afforded in Section 10. We have suggested the following amendments:

1) That Section 10 be amended to read

   Every person shall have the right to respect for his or her personal, gender, or group dignity, and protection from any form of abuse or derogation thereof.

2) That a clause, as underlined, be added to Section 15

   Every person shall have the right to freedom of speech and expression . . . . . subject to legislation, existing or to be enacted, guaranteeing the right expressed in Section 10 of this Constitution.

3. **Religious belief and opinion - Paragraph 14**

"Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

"Nothing in this Chapter shall preclude legislation recognising

(a) a system of personal and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system religious law subject to specified procedures."
We raise the question whether sub-clause 3(a) nullifies the rights explicitly stated in the main clause. Regrettably, not all religions, in their family law, allow the right of their adherents to convert to another. We are asking that such a right be entrenched in our Constitution as it is included in the United Nations charter of human rights.

With regard to Section 3(b) we point out that some religions still permit child-marriage, bigamy or polygamy. Is such be legalised side by side with our present laws governing marriage? Apart from those factors, we argue that in a secular state (as distinct from a - secularist, on the one hand, or a theocratic state on the other) clauses which determine distinctive rights on the basis of religious belief have no place. Civil law governing marriage ought to be paramount.

MEMORANDUM 1.

Chapter 3. Fundamental Rights: Application, Section 7 subsection (4)(a). We quote:

"When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

We submit:

That the right to draw attention to any alleged infringement of a threat to any right entrenched in the relative chapter, is seriously limited by the stipulation that any aggrieved party most apply to a competent court of law for appropriate relief. If this is interpreted to mean a lengthy expensive legal process, then the ordinary South African, who is invited to help form the final constitution, will be excluded from any protection it affords. Only wealthy corporations will be in a position to defend their rights or seek an interpretation thereof.

A case in point is the one to which we refer in detail in our Memorandum 2: the question whether explicit pornography constitutes an infringement of the dignity of womanhood. The pornographic industry commands immense financial resources and will have so much to gain by an ultra-liberal interpretation of section 15. Religious and social-welfare bodies which fear that such an ultra-liberal interpretation will lead to the serious lowering of moral standards and an increase in anti-social conduct, possess no such resources.

We suggest, that provision be made for any citizen to make representation direct to the Constitutional Court. We acknowledge that this could open the door to frivolous and unreasonable approaches. Such a situation, we suggest, could be avoided by vesting in the Chairman of The Constitutional Court authority to decide whether a complaint raised merits consideration.

Any person dissatisfied with such a decision may then apply to the courts if he or she is so inclined.
Our Association, at this stage, is vitally interested in the interpretation of specific rights in relation to the spirit of the Constitution.

MEMORANDUM 2

Human Dignity, Section 10, as this is threatened in the case of the current attempts to interpret Section 15 as allowing absolute freedom of expression regardless of its nature or consequences. We quote the relative section:

"Every person shall have the right to respect for and protection of his or her dignity."

Attached to this memorandum, to be considered as an essential part thereof, please find,

1) A copy of our letter addressed to the Minister of Home Affairs, Chief Mongosuthu Butheleze relating to this matter.

2) The reply thereto prepared on behalf of the Minister by the Director of the Publication.

We do not think it is necessary to repeat the case we presented in our letter to the Minister of Home Affairs, which case, we now submit to the Constitutional Assembly. The crucial issues are those referred to by the Director of Publications in paragraphs 6 and 7, page 2 of his letter:

1) That Section 10 of the Constitution whilst guaranteeing respect for and protection of "his or her dignity" lacks clarity as to how this will apply "when material is not forced upon a person".

2) That our submission that, when framing Section 15, the legislators could not have had in mind allowing unrestricted attacks upon the group or personal dignity of South African citizens, under the pretext of allowing freedom of expression, "remains subjective speculation".

If the judgement of the Director of Publications as expressed in his letter is correct, (we are not questioning it, indeed, we appreciate it as a frank appraisal of the situation) then, we suggest, that for all intents and purposes Section 10 is meaningless.

We, therefore, submit the following:

1) That Section 10 be amended to read

Every person shall have the right to respect for his or her personal, gender, or group dignity, and protection from any form of abuse or derogation thereof.

2) That a clause, as underlined, be added to Section 15
Every person shall have the right to freedom of speech and expression subject to legislation, existing or to be enacted, guaranteeing the right expressed in Section 10 of this Constitution.

PORNOGRAPHY - AND THE CONSTITUTIONAL RIGHTS OF SOUTH AFRICAN CITIZENS

We are attaching hereto photostat copies of two press-cuttings: one dealing with the publication of pornographic material generally, and the second relating directly to the banning of an issue of the Hustler magazine by the Directorate of Publications, the subsequent lifting of the ban, pending an appeal, and a statement made by J.T. Publishing, the publishers of the magazine, in reference thereto.

We quote:

"Should Hustler succeed in overturning the directorate's ruling, it could signal a new era in which sexually explicit material will be permitted to be sold without serious restriction."

We submit that this statement is based upon an interpretation of Article 15(1) of the Fundamental Rights (Chapter 3 Constitution of the Republic of South Africa Bill) so absolute in principle, and so wide in its application, as to render ineffective existing legislation defending citizens, as individuals, or as groups, from libel, slander or an attack upon their racial, social, or personal dignity. We do not believe that it was the intention of Parliament, when accepting this constitution, that it should be so interpreted.

We further submit that in relation to the specific matter we raise, the statement constitutes a declaration of intent which, if it succeeds, will not only militate against public interest generally, but will be in direct conflict with Article 10 of our Fundamental Rights which reads:

“Human dignity -

10 Every person shall have the right to respect for and protection of his or her dignity."

Finally, we submit that it is beyond question that pornography, as it has been declared by the Canadian Courts, constitutes an assault upon womanhood. In its least offensive expression, it reduces her to a sex symbol, and in the expression specifically referred to in the publishers declaration of intent, she is degraded to the status of a sexual animal designed for the entertainment of immature or deviant males.

[Editor’s Note: Two articles from The Argus newspaper enclosed - would not scan]

DR. A COETZEE
Director of Publications
PORNOGRAPHY

1. Your letter of 30 June 1994 to Dr M G Buthelezi, M.P. Minister of Home Affairs refers.

2. After the Minister had studied your letter, it was referred to the Directorate of Publications for attention and reply.

3. The Minister, and naturally the Directorate, are fully aware of the fact that the publishers of Hustler magazine have invoked what they consider to be their rights under the Interim Constitution when an edition of the magazine was found to be undesirable in terms of the Publications Act, 1974. They immediately lodged an appeal with the clerk of the Publications Appeal Board and at the same time requested the Chairman, under Section 13(3) of the said Act, to suspend the finding of the Committee until the appeal has been heard. This is normally granted by the Chairman since the appeal, in any event, has to be finalised within seven days. This suspension lead people to wonder why "the ban was suddenly lifted".

4. On the day of the hearing of the appeal (1st July 1994) the legal representatives of J.T. Publishing Co., the publishers of the magazine, argued in limine, that the Publications Appeal Board had no constitutional standing in the matter, just as the Directorate and the Committee of Publications, since freedom of expression was guaranteed by Section 15 of the Constitution and further that Section 33 did not allow any limitation of this freedom to the extent that "the essential content of the right" may be affected. The Publications Appeal Board was consequently requested in terms of Section 38 A to state a question of law to the Supreme Court so that this court, in the absence of the Constitutional Court which has not yet been constituted, could determine whether:

   (a) the Publications Act, 19/4, or alternately sections 1, 8, 9, 13, 14 and 35 thereof was in conflict with the provisions of the Constitution of the Republic of South Africa;

   (b) the procedure adopted by the Committee constituted by the Directorate and which sat on 20 June 1994 was in conflict with Section 24 of the Constitution and consequently invalid in law; and

   (c) whether the decision by the Committee in June 20 1994 was in conflict with the provisions of Section 15 read with Section 33 of the Constitution and consequently invalid in law.

5. Section 98 of the Constitution makes provision for a Constitutional Court which will be the only body to have "Jurisdiction in the Republic over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution". It is obvious therefore that J.T. Publishing requested "the statement of a question of law" to the Supreme Court only because there is, as yet, no Constitutional Court. Whether the Supreme Court will be prepared to assume the role of the higher court, is not clear at this stage, and even if it
would, the outcome is purely a matter of conjecture, as is the hope of the publishers of Hustler in regard to the position of sexually explicit material in future.

6. Over the past few months a number of people have entered the debate: some based their arguments on Section 10 of the Constitution which guarantees every person the right to respect for and the protection of his or her dignity, although it has not been made clear how this will apply when material is not forced on such a person. Others have referred to Section 8 which guarantees personal equality and have brought this in relation to the position of women who are commercially exploited and therefore deprived of equality. This happened in a case that went before the Canadian Supreme Court.

7. All of us interested in the maintenance of proper moral standards, must realise that however strong we feel about the matter and how convinced we might he that a free passage of pornography was not what the legislator had in mind when approving the Constitution, it all remains subjective speculation. In the final instance it will not be us, nor this or that group, that will interpret the Constitution and determine the future role of the Control bodies, but only the Constitutional Court.

8. Let us therefore wait to see what the outcome is going to be and in the meantime accept that should it open the floodgates to undesirable material that is grossly offensive and harmful to the community at large, more will definitely be heard about the matter.

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THE PROTESTANT ASSOCIATION OF SOUTH AFRICA
(REV) AH JEFFREE JAMES

MEMORANDUM 3.

Religion, belief and opinion: Paragraph 14 (1) and (3):

"Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

"Nothing in this Chapter shall preclude legislation recognising -

(a) a system of personal and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system of religious law subject to specified procedures."

The question of paramountcy: whether (3)(a) nullifies in certain specific areas the rights declared in subsection (1)?
We submit that subsection 3 is, in effect, paramount in relation to subsection 1. It means that religious law, once recognised by state legislation, takes precedence in areas deeply affecting our social norms. Regrettably, not all religions in their personal and family law allow, for example, the right of persons to change their religion. Further, child-marriage is still permitted by some as also is bigamy or polygamy. In practice, therefore, it appears to mean that one set of basic principles, expressed in law, or a multiplicity thereof, governing such matters, will apply to certain sections of society, but not to others. Could it mean, for example, that a criminal offence for one section of the community, such as bigamy, will be recognised as acceptable procedure in another, and the deciding factor will be religious belief - a factor which ought not to apply in a secular state in which there is no established religion?

We, therefore, submit that the subsection under reference is far too wide in its implications to have any place in our Constitution.

We also submit, in particular, that subsection (1) ought to be extended to include the right to change one's religion. We understand that such a clause is included in the universal code of human rights laid down by the United Nations.
The Department of Water Affairs and Forestry has a specific interest in the final delimitation of powers and functions between national and provincial institutions of government and secondly, the powers and functions of local government. In commenting on the above issues in connection with the water and forestry functions, the Department has prepared two separate Departmental memoranda on the constitutional allocation of the water and forestry functions. I wish to submit to Theme Committee 3 of the Constitutional Assembly these two documents as official comments from the Department. I also enclose a copy of a white paper entitled "Water Supply and Sanitation Policy' for your information. Further copies are obtainable form my office, should it be required.

In addition to the enclosed comments on the water and forestry functions of the Department, I wish to provide you with the following comments as well.

### WATER

(i) **Functional areas that could be allocated to (a) provinces and (b) local governments for the exercise of exclusive legislative powers.**

In the opinion of the Department the functional field comprising water resource conservation, utilisation, management and development, is indivisible and no aspect of this functional field should be allocated to the exclusive legislative or executive jurisdiction of either the provincial level of government or the local government level.

This functional area manifests itself in two interrelated areas of responsibility requiring management, viz that of quantity and that of quality.

Although certain executive functions such as water distribution and supply within the area of jurisdiction of a local government are susceptible to execution at local government level and should indeed be performed at this level, national government must retain the power for instance to -
* determine the resource to be utilised and developed and the extent of such utilisation and development with regard to a particular resource;

* establish minimum standards for service provision needed to meet constitutional obligations with respect to a healthy environment and to intervene where these are not met;

* determine receiving water quality criteria in relation to effluent and even run-off disposal so as to ensure the maintenance of water quality standards at a utilisable level for other consumers;

* ensure equity in the setting of tariffs for the provision of basic services;

* in pursuance of its mandate, promote the application of such conservation measures (including tariffs) as may be deemed necessary in terms of overall water resource management; and

* impose restrictions on supply and use during periods of scarcity.

Several functional areas currently resorting under provincial jurisdiction such as agriculture, environment, soil conservation, trade and industrial development and urban and rural development could have a direct and intense impact on the water function. Such an impact could manifest itself in various forms such as -

* reducing the run-off to rivers which will affect the availability of the utilisable water in a given area;

* affecting the quality of any water resources in the area; and

* possibly promoting water demand in areas where water resources are extremely limited.

For these reasons, exclusive jurisdiction at national government level is required to enable this level of government to ensure that the exercise at provincial government level of its legislative power in other areas does not stymie, albeit unintentionally, efforts by the national government to ensure access to a basic supply of good quality water to all citizens in the first instance and secondly, to ensure an equitable share to all regions of the country in the sustainable economic utilisation of this scarce national asset.
(ii) **Functional areas that should be allocated to the national government for the exercise of exclusive legislative powers**

Water in all its manifestations in the hydrological cycle is an indivisible resource and for the reasons advanced in the attached memorandum (Annexure A) the exercise of legislative power in a manner which would affect any phase of the hydrological cycle either in relation to quantity or quality or both, should vest exclusively in the national government.

(iii) **Functional areas where there could be concurrent powers at national, provincial and local government levels and the basis for the exercise of concurrent powers by the national government**

A substantial number of the functional areas listed in Schedule 6 to the Interim Constitution have the potential to impact on the availability or the quality of water resources and if the postulate in (ii) above is accepted, it follows that the national government must have concurrent legislative powers on the functional areas in question, always subject to the criteria determined in the present Interim Constitution pertaining to such concurrent powers.

In addition with respect to the provision of basic services by local government, it follows that, if the national government is to be able to meet its constitutional obligations with respect to the establishment and maintenance of essential minimum national standards, it will require concurrent legislative powers.

(iv) **Areas of (ii) above that could be delegated to (a) provincial and (b) local government for execution on behalf of the Department of Water Affairs and Forestry**

Powers, duties and functions vested or imposed in terms of legislation established exclusively at national government level by this Department can and should in many instances be delegated for execution on behalf of this Department to provincial and local governments such as -

* water quality monitoring
* hydrological data collection
* water abstraction control
* waste disposal monitoring
* monitoring of land-use practices impacting on water
* monitoring the water requirements of the environment but such powers have to be delegated, not conferred in the Constitution on such authorities.

(v) **Provision of mechanisms for obtaining provincial and local government inputs in the formulation of national norms and standards as envisaged in section 126(3) of the Constitution**

Liaison forums in the form of bilateral water liaison committees have already been established with the provincial governments. These forums convene on a regular basis and addresses all issues (legislative, executive, policy) pertaining to the water function.

**FORESTRY**

(i) **Functional areas that could be allocated to (a) provincial and (b) local governments for the exercise of exclusive legislative powers**

This functional area has to be dealt with in terms of a subdivision comprising -

* commercial forestry
* conservation of indigenous forests
* social forestry

By virtue of the long term nature of the exploitation of commercial forests and even more so in the case of indigenous forests, the application of a national forestry policy, coordinating both the supply of and demand for forest produce in the market, is essential for economic stability in this sector. In addition, training on a national basis in silviculture is indicated, as well as a national approach to research and disease and pest control. Impact of forestry on water and of the catchment areas require that exclusive jurisdiction over forestry is exercised at national level.

Permits for commercial forestry require a national basis of organisation, otherwise, catchment areas and run-off will not be protected.
All these considerations dictate against the allocation of exclusive legislative powers to provinces or local governments.

In spite of the short term cyclical nature of social forestry (providing biomass over the shortest term possible for firewood and construction material production) the other considerations referred to above finds application and should result in social forestry resorting at national government level as well, with room for delegation which will be dealt with under (iv) hereunder.

(ii) Functional area that should be allocated to the national government for the exercise of exclusive legislative powers

For the reasons advanced in the attached memorandum (Annexure B) the exercise of legislative powers at levels other than the national level, could operate as an uncoordinated and disruptive factor in the field of commercial forestry and the conservation of indigenous forests and should be avoided. Legislative power in respect of the forestry function should vest exclusively in the national government.

Although these considerations are not applicable to social forestry, this sector of the forestry function should, for the auxiliary reasons stated in (i) above be dealt with on the same footing.

(iii) Functional areas where there could be concurrent powers at national, provincial and local government levels and the basis for the exercise of such concurrent powers by the national government

There appears to be very little potential for concurrent legislative powers in the forestry function.

(iv) Areas of (ii) above that could be delegated to (a) provincial and (b) local government for execution on behalf of the Department of Water Affairs and Forestry

Once exclusive legislative powers pertaining to forestry have been exercised and policy in terms thereof has been formulated, the major part of the execution thereof can be delegated to provincial or local government and even to the private sector.

(v) Provision of mechanisms for obtaining provincial and local government inputs in the formulation of national norms and standards as envisaged in section 126(3) of the Constitution
The position set out under this item in respect of the water function, applies mutatis mutandis to the forestry function.

Summing up, the position in respect of the water and forestry functions as I see it remains unchanged from that contained in the current Interim Constitution of the Republic of South Africa and I trust that the these comments and the enclosed memoranda will be of value to you and the Committee. I am submitting this letter and Annexures to Theme Committees 2 and 6 as well.

M. ERASMUS
DIRECTOR-GENERAL: WATER AFFAIRS AND FORESTRY

MEMORANDUM BY THE DEPARTMENT OF WATER AFFAIRS AND FORESTRY ON THE CONSTITUTIONAL ALLOCATION OF THE WATER FUNCTION

INTRODUCTION

The purpose of this memorandum is to reiterate the need for Central Government control over South Africa's water resources.

South Africa's serious water situation

Water management in South Africa, which is a semi-arid region of the world, is becoming increasingly complex. In this country water is an essential scarce resource which is poorly distributed in terms of growing socio-economic requirements. As the population grows, the water which is available is becoming scarcer and its quality is deteriorating. The options for water management are constrained by the lie of the land and by the weather patterns, which are beyond human control. Droughts and floods are common and may strike anywhere unexpectedly. (The issues are elucidated further in the publication Management of the Water Resources of the Republic of South Africa by the Department of Water Affairs and Forestry).

The uneven geographic distribution of the country's water resources is illustrated in the diagram on the next page. Serious conflicts are already escalating among competing users as the demand for water outstrips its natural geographic availability. Conflicts are also
arising from an improved understanding of the needs of the natural environment. The vulnerability of citizens to pollution and the dwindling of supplies accordingly necessitates a substantial degree of centralized control.

South Africa has never recognized the concept of ownership of water, only rights to the beneficial use of water. Since 1912 South African water law has been based on the principle of centralized control. In this respect South Africa has been envied by many other countries of the world which have suffered from the disadvantages of divided water management.

[editor’s note: map of DISTRIBUTION OF AVERAGE ANNUAL RUNOFF is unscannable]

All of these considerations imply an increasing need for territorial reallocation under Central Government control to achieve optimum use of the resource in the overall interest of the nation. Although South Africa is a semi-arid territory, the need for sound water management has unfortunately not yet received the public recognition which the serious situation generated by the country's adverse hydrological circumstances warrants. In fact water, the resource which is most basic to the national well-being, is only gradually coming to be acknowledged as South Africa's most limiting natural resource.

This Department of Water Affairs and Forestry is gratified to note that (in providing for provincial legislative competence over the aspects detailed in Schedule 6, some of which depend on water) the Constitution of South Africa Act 1993 has by implication left the control of water itself as a Central Government function. Nevertheless, to reduce the potential for conflict to escalate, recognition of the adverse impact of South African hydrological conditions on the future of the country justifies a firmer provision. This can be achieved by a formal endorsement of the extraordinary status of water as a vital national asset requiring central management in the final Constitution.

OPTIMIZATION OF WATER USE AND MULTI-JURISDICTIONAL CONFLICT RESOLUTION

Unfortunately the spatial distribution of the country's runoff corresponds poorly with the locations of the new provinces, as illustrated in the diagram on this page and in greater detail on page 7. Therefore, a profound source of indefinite conflict is the inherent limitation of the autonomy of several of the new provinces by their dependence on water received from others. Without Central Government control, some provinces (such as the and Northern Cape) would be extremely vulnerable to pollution and to dwindling of supply
and could be adversely affected by the actions of others sharing the drainage basin in which it is situated. Accordingly, unified water management capable of handling complex interactions according to scientific and humanitarian principles is vital. As the physical occurrence of water in South Africa does not correspond with administrative boundaries which were chosen according to other considerations, sound management must effectively reconcile the occurrence of water with all legitimate needs.

[editor’s note: map of PROVINCIAL BOUNDARIES AND DISTRIBUTION OF AVERAGE ANNUAL RUNOFF is unscannable]

In this respect the government is committed to ensuring that all citizens have access to adequate water and sanitation services. The Central Government, while having a less direct role in their provision, must be able to meet the constitutional obligation to ensure that every South African has "an environment which is not detrimental to his or her health or well-being" and the equality provision in the Constitution. This requires the capacity to establish national policy guidelines, a national water and sanitation development strategy, the formulation of criteria for State subsidies, the setting of minimum services standards as well as monitoring and regulating oil service provision. The onus on the Central Government applies even in the case of Schedule 6 functions which are a provincial competence, since, in terms of the interim constitution "Where it is necessary for the maintenance of essential national standards required for the rendering of services ... the Constitution shall empower the national Government to intervene through legislation or such other steps as may be defined in the Constitution."

In addition to the accomplishment of the urgent community water and sanitation programme, there lies the permanent task of continuing to meet the water needs of all of the new provinces equitably from the slim resources which arise mainly on the south-eastern seaboard of the country. In this respect the water needs of South Africa are growing not only in size but also in complexity. To be able to continue to meet them sustainably, a high degree of ongoing accommodation will have to be facilitated between many role-players as circumstances change. These include neighbour countries, the nine provinces and the various groups of water users, all of whom compete in varying ways for the limited resource.

The type of facilitation required must aim at achieving the greatest national advantage with the least harm at a subsidiary level. For effective allocation of the available water, impartial orchestration by the Central Government will have to lay strong emphasis on the **national optimization** of water use and on **inter-jurisdictional conflict resolution**. These activities require to be underlain by legislation that recognizes the value of dynamic
technical insights as the basis for forms of socio-economic and environmental water apportionment which will have to be widely acknowledged as equitable.

THE CASE FOR ENSHRINING CENTRALIZED CONTROL OVER WATER IN THE CONSTITUTION

Unified water management, through Central Government control over the sharing of South Africa's limiting natural resource, is justified by factors such as the following:

- In South Africa the rainfall, and to a greater extent the runoff, is spread very unevenly across the country, not only geographically but also from season to season. On average over the longer term, most of the runoff is generated in the eastern part of the country.

- In contrast, South Africa's natural resources (such as coal, gold, minerals, precious stones, agricultural land, forestry and conservation areas) on which the present livelihood and future prosperity of the population depends, are distributed widely. Differing amounts of water are needed at the various locations to enable them to be utilized to best advantage. Accordingly, equitable territorial redistribution of whatever water is available in the country at any time is essential. For this purpose several inter basin transfer schemes have already been established, as illustrated in the diagram below.

[editor’s note: map of the INTER BASIN TRANSFERS is unscannable]

- Provinces with international neighbours cannot themselves negotiate meaningfully with them over the joint use of water which has also to be shared elsewhere.

- Downstream provinces should not be subject to harmful levels of pollution determined only by provinces upstream.

- Downstream provinces should not be vulnerable to the dwindling of supply through uncontrolled use upstream, particularly during droughts when the availability is disproportionately reduced along the length of the river. Without expert water management, the jurisdiction furthest downstream (which may even be a neighbouring country) is usually harmed worst, so a complex apportionment methodology needs to be orchestrated centrally to maintain equity under weather variations.
• Conflicts between neighbouring states, between provinces and between water-use sectors require high-level management. This requires scarce technological skills which will not be efficient to duplicate at provincial level.

• Treaties entered into between political entities in an attempt to resolve conflicts are inherently vulnerable to failure through changing partisan interests which may not even be water-related.

• Experience with fragmented water management under the system of homelands and independent states demonstrated that cumbersome negotiations through a system of Joint Permanent Water Commissions were required, which virtually halted water management and planning.

• Integrated catchment and environmental management is becoming essential in South Africa, in line with the rest of the world. However, this comprehensive approach requires long inland drainage basins (such as the Orange River with its tributaries illustrated on the next page) to be managed as entities irrespective of the political boundaries which they cross. It is impractical for provinces to deal individually with the difficulties introduced by South African flow variability and low flow conditions.

• Difficulties arising from new weather distribution patterns which may ensue from anticipated changes to the earth's climate will need to be dealt with at a national level.

• It is also important for water management not to be permitted to fragment at the national level. A move in this direction is the mooted assumption of responsibility for water quality management by the Department of Environment Affairs and for the construction of waterworks by the Department of Public Works.

INTERACTION BETWEEN VARIOUS LEVELS OF GOVERNMENT

The requirement for an appropriate measure of ultimate control over water by the Central Government need not detract from the functioning of other levels of government. At present the distinction between the functions and responsibilities of the Central Government and the Provincial Governments is still in the process of being clearly defined, particularly where they interlink.
Since local government is charged with the responsibility to: "... make provision for all persons residing within its areas of jurisdiction to water, sanitation [and other services] ... providing that such services and amenities are rendered in an environmentally sustainable manner and are financially and physically practicable", Provincial Governments clearly share the responsibility for assuring service provision, specifically through the promotion of effective local government. While Central Government may be responsible for assuring essential functions where local structures are unable to do so, this has to be done in such a way as to support the development of local government to proceed with its own affairs under Provincial supervision. It is of utmost importance that the closest co-operation be maintained between the Central Government and the provinces given their joint interest in the development of the capacity of local government to provide water and sanitation services on an equitable and efficient basis.

[editor’s note: map of the RIVERS, PROVINCIAL BOUNDARIES AND DISTRIBUTION OF AVERAGE ANNUAL RUNOFF is unscannable]

The key to sustainable water and sanitation development is the existence of functional, competent local government. To ensure effective formal communication and liaison between the Department of Water Affairs and Forestry and the provinces, Provincial Water Liaison Committees have been established. Their functions include liaison with the Department, the identification of priorities and critical areas of need, and advising on the implementation of the Reconstruction and Development Programme as it relates to water supply and sanitation. The dilemma facing the Department of Water Affairs and Forestry is that it is unlikely that effective local government will be established in all areas for some time. The moral and political demand for water however requires immediate action by the Department. The attached addendum, being pages 9 to 12 of the Department's White Paper on Water Supply and Sanitation Policy, which was issued at the end of 1994 to elicit public comment, illustrates provisions that are being made to enable the Department to support the development of local government and not to usurp its functions.

IN CONCLUSION

The South African population has outgrown the possibility of making water available to all by traditional methods from local resources. This is well illustrated not only by the urgency with which a national water and sanitation programme needs to be undertaken, but by the fact that the elementary phase of water management that was able to rely entirely on the construction of waterworks has been superseded for some time. For several years the country has had to develop increasingly complex management systems. These have
included the substitution of other factors of production, and the optimization of the joint use of multiple resources to solve water-related problems.

Moving beyond the technological solutions. South African water management is now in the phase of increasing public participation and negotiation, which will intensify and become more controversial as water becomes scarcer. As the national custodian over water, the Minister of Water Affairs and Forestry will Traverse a worsening minefield of conflicts between competing water users and environmentalists. The setting of standards, the placing of limitations on use, the control over the siting of industries and disposal of effluents, all tend to be viewed as violations of rights, inviting resistance. Equitable water apportionment strategies at a national level will have to assess the value of each alternative use of water, and the detriment in not being able to meet it.

During the past decade, sophisticated computerized optimization techniques developed by the Department of Water Affairs and Forestry have heralded a new era in dynamic water apportionment. These techniques require the fine-tuning of the quality as well as the availability of water in entire river systems which interlink several drainage regions in the country. In general, the ongoing need for this high-technology approach implies an adaptive departure from rigid, simplistic allocations towards continuous intelligent optimization and re-accommodation amongst the parties based on technical analyses, for which new legal mechanisms may be required, possibly associated with court and appeal procedures.

As water is vitally important in South Africa, the special activity of centralized water management needs (like the judiciary) to be seen as above reproach and elevated above the influence of inter-governmental politics.

A formal endorsement in the final Constitution of the extraordinary status of South Africa's scarce water resources as a vital national asset requiring central management is therefore proper to secure unfragmented water management in the long-term interest of all South Africans.

ADDENDUM

Extract from White Paper No 1 of 1994, WATER SUPPLY AND SANITATION POLICY, of the Department of Water Affairs and Forestry

[editor’s note: This White Paper can be found on the Web at www.polity.org.za/gnuindex.html under Government Documents]
SUBMISSION FROM KWASIZABANTU MINISTERS'CONFERENCE

The 6th Kwasizabantu Ministers' Conference, held from 6 - 9 March 1995, has just ended. It was attended by a thousand delegates representing a large variety of different denominations and Christian organisations. The Church leaders discussed and agreed upon various points which should be brought to your attention. These points are laid out in the “Document of Concern” (a copy is attached).

The following rights, which the Church leaders insist should be included in the final Constitution, are a summary of the “Document of Concern”:
1. The right of life and protection for children: both before and after birth.
2. The right to the protection of the family and marriage.
3. The right to state-aided schools whose curriculum and activities are in harmony with the common religion, language and culture of the parents of the pupils. The right to private schooling.
4. The right to the maintenance of law and order in society.

The Kwasizabantu Ministers' Conference, will be eagerly watching to see whether the wishes of South Africa’s population are taken into account in the new Constitution. We plead that the many thousands of written submissions against abortion should not be ignored by your committee. The overwhelming resistance against pornography voiced at the hearings of the Task Force on Pornography must be reflected in the Constitution. We would appreciate your faxed reply to the above fax number to acknowledge receipt of our submission. An original copy of this letter and the “Document of Concern” will be sent to you immediately.

Rev  E H Stegen

Document of Concern

KwaSizabantu Ministers’ Conference meeting from 6 to 9 March 1995 notes with concern different trends that threaten the wellbeing of the citizens of the country. This may result in the government of the land becoming increasingly estranged from the people. The thousand delegates at the Conference representing a large variety of different denominations then came up with the following statement.

These expressions of concern are not new. The basis of Christian unity was outlined in the Kwa Sizabantu Affirmation of 1991. We also outlined our views on respect for life, freedom of religion, government, private ownership of property and a return to Biblical morality. In our 1992 Statement and the document 'Christianity and Religious Freedom', supported by almost a quarter of a million signatures, we outlined the basic freedoms needed to freely practice our faith, stated the need for the Triune God to be mentioned in the Constitution and rejected the Interfaith movement.
These documents were submitted to the Multi-Party Negotiating Forum and various political leaders. The submissions were received with promises that they would be acted upon. Most of the promises have not been honoured.

We maintain the stand that the Living and True God (1 Thes 1:9) has ordained two distinct institutions for the good ordering of society - the Church and the State. Although they have separate functions, both are accountable to Him. When the state refuses to accept its accountability to God it becomes autonomous and sets itself up in the place of God. This is not acceptable.

Moreover, God has laid down norms for the good ordering of life. Many of these are based on unchanging moral standards designed to restrain the sin that is latent in the human heart (Mark 7:20-23). We are therefore alarmed when we see strong indications that legislation is being prepared which would inflame rather than restrain man’s latent sin.

We reject secular humanist education for our children. Education is primarily the responsibility of the parents and should be in harmony with the religion, language and culture of the parents. As Christians we reject any compulsory Interfaith Religious Education. We call for Biblical Studies to be included in the school curriculum. The Government must respect the convictions of the parents who may prefer private tuition for their children.

We further maintain that the family is the building block of society. It consists of one man and one woman in a permanent union, and the children that result from that marriage or are adopted into it. It provides a secure environment in which the legitimate sexual needs of the parents are met and in which children are raised. We will resist all efforts which undermine the family. These include:

1. The flood of pornography:
   We warn that moves to urban pornography will inflame sexual passions, especially of the youth, and will inevitably continue the sharp increase in the number of children and women who will be sexually abused, raped and murdered. Pornography and human rights are mutually exclusive. Pornography is an addictive, destructive and exploitative industry. Human rights require the right to decency, the right to life, the right to security and safety and the right to protection from exploitation and abuse. Pornography upon each of these precious freedoms.

2. The distortion of sex:
   The popularising of a sexual promiscuity and perversion like homosexuality will accelerate the spread of HIV/AIDS and other sexually transmitted diseases. These will only be controlled when society returns to the God-given and traditional model of abstinence before marriage and faithfulness in marriage. We therefore reject the inclusion of special protection for homosexuality and other sexual perversions in the Bill of Rights.

3. Value-free sex instruction in schools..
Experience in other countries has shown that sex instruction is not neutral but encourages experimentation and promiscuity, thus placing vulnerable sexually immature adolescents/teenagers at increased risk of sexually transmitted diseases and HIV/AIDS. Moreover the proposed sex education syllabus is biased in favour of the so-called 'Alternative Lifestyles' which are unacceptable to Christians.

4. The abuse of AIDS education:

We are concerned about the nationwide promotion of condoms for prevention of HIV/AIDS and STDs, in view of known condom failure. This is in conflict with the World Health Organisation statement (1991) that “the only safe sex is with one faithful uninfected lifelong partner”.

5. The legalisation of prostitution:

The failure of the authorities to act against prostitution has already led to young women being brought into South Africa from Eastern Europe and as sex slaves. Already young South African women are being abused and degraded in this way. The legalisation of prostitution will accentuate this trend.

6. The legalisation of abortion:

It is not acceptable that unborn babies should be killed in the womb while murderers are not executed. We maintain that anyone who robs a person of his most precious possession, his life, is a murderer.

7. The legalisation of gambling:

Gambling undermines the family in two ways. By implying that wealth is the result of luck, it undermines the work ethic and leads to poverty. We insist that true wealth results from hard work, the application of knowledge, the use of tools and the blessing of God. We warn that the legalisation of gambling will lead to addiction, especially among the disadvantaged section of society, and greatly increase poverty. People will deprive children of food in order to gamble in the vain hope of 'striking it rich' and being able to make it up to them. The resulting strains on the social services and welfare agencies and loss of productivity will cancel out any perceived tax gain by the state.

The values listed above and the threats to them are of great concern to us. Peaceful petitions along the line of the present one have been ignored. We urge the Constitutional Assembly, the Constitutional Court and the Government of National Unity not to ignore these values which are held dear by a majority of South Africans, but to take them seriously. We are loyal, peaceful and law-abiding citizens. Ignoring our peaceful petition will force us to take stronger action.
Comments on the Interim Bill of Rights from a Christian Perspective

A submission by
His People Christian Ministries

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Introduction

The Nature of this Report
This report has been written from a Christian viewpoint, taking into account the way that laws similar to those in the Bill of Rights have been interpreted in other countries. Political leaders may be surprised to see how the original intent of rights written into law
has been ignored in some cases and the meaning distorted in favour of certain special interest groups. Misinterpretation of the meaning of certain rights by overseas courts has resulted in the removal of important rights and freedoms in these countries. This is especially true in the United States. We believe that careful consideration of the Bible in assessing the validity of constitutional rights will greatly benefit our nation. This report is not a comprehensive examination of the Bill of Rights, but seeks primarily to highlight the moral issues in the Bill of Rights.

**Information on His People Christian Ministries**

His People Christian Ministries is a large and rapidly expanding non-racial Christian movement working on and around the campuses and surrounding communities in South Africa, and in some other countries in Africa and Europe. The movement is operating on seven campuses in South Africa and has currently over one and a half thousand people enrolled at its part-time Bible Schools. The churches which have grown out of this ministry, initially consisted of university students, but now include people from all social backgrounds. The ministry seeks to be relevant on social issues, and was host to the 'God and Government: International Symposium for the Biblical Reconstruction of South Africa' in 1992 and 1993.

The positions put forward here are based on the teaching of the Bible and can therefore be seen as representative of the views of the much larger constituency of Christians in South Africa.

**The Teaching of the Bible on Constitutional Rights**

Although the Bible does not specifically refer to constitutional rights, the Mosaic laws and other teachings in Scripture lay a moral foundation and an understanding of the role of government, which are important bases for fundamental rights.

The Bible has specific teaching on a range of moral issues which relate to a Bill of Rights. These are examined briefly, where relevant, in the following sections of this report.

It is recognised amongst constitutional lawyers that all constitutions are based on the mistrust of future political rulers: 'All constitutions are based on mistrust. If we could trust our rulers, our parties, ourselves, we would not need constitutions.". This observation is in accordance with the Bible's teaching that all people are fallible (Rom 3:23). Thus there is a need for checks and balances to protect people from the abuse of political power. While the specific checks and balances may differ from constitution to
constitution, the biblically based motivation remains the same. In most democratic constitutions, this has led for example to the division of power between the legislature, the executive and the judiciary (These three separate aspects of government are all mentioned as being subject to God in Isaiah 33:22). A Bill of Rights is intended to prevent the legislature from passing laws contrary to certain fundamental rights and freedoms, which we understand to originate in the Bible.

The Bible teaches that political rulers in government are servants of God (Romans 1 3:4), and that like everyone else, they must be subject to His law (Deuteronomy 1 7:1 8-20). The idea of a law governing rulers as well as individuals comes from the Bible.

The Relation of Church and State
In 1791, the writers of the American Constitution included in their constitution the statement 'CONGRESS SHALL MAKE NO LAW RESPECTING THE ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF... '. 'Religion', in the language of the time meant 'denomination' in today's language. Thus the law was intended to prevent the government from showing favouritism to a particular form of Christianity, such as the Anglican church in England or the Lutheran church in Germany. The amendment aimed to prevent the state from interfering in Church affairs.

The above mentioned clause was never in any way intended to limit the advancement of Christianity in state institutions or by state employees. The same people who wrote this clause also actively supported Christian education and proclaimed public holidays for the explicit purpose of prayer and fasting. The inaccurate interpretation of this clause by the American Supreme Court has promoted the idea that the state may promote the religion of secular humanism, but not Christianity.

Any clause relating to religion must be worded carefully to avoid such a misinterpretation. We believe that the state should be based on Christian values rather than secular philosophies and ideologies. The Church as an institution is and should remain structurally separate from the state, but the state (including state controlled media, education departments and the Constitutional Court) should recognise and submit to the rule of Almighty God. The Bible is politically relevant, in that it addresses moral issues, which must be considered in law making.

The idea that it is possible to have a religiously neutral state is erroneous. All law is based on moral values, which must in turn be derived from a standard. Since different religions and secular belief systems have conflicting ideas, a religiously neutral state is
impossible. Christianity, with which the overwhelming majority of South Africans align themselves, is tolerant of other religions and thus there is no need to adopt a policy of secularism in order to guarantee the rights of people to worship as they choose to do so. By contrast, explicitly secular (such as China and the USA) or Islamic (such as Saudi Arabia, Mauritania and Iran) states are intolerant of Christian religious rights and freedoms.

The intended meaning of the American first amendment (1791): to protect the Church from interference in its internal affairs, is however relevant to South Africa. In 1862, the Dutch Reformed Church suspended one of its ministers for teaching things contrary to the Scriptures. The suspended minister appealed to the civil courts and was reinstated on the basis of the Church ordinance of 1843. The church's appeal to the privy council in England was rejected and it thus lost the power to exercise discipline over its own members. It is submitted that no laws should be made which allow the civil courts to judge such internal affairs of the church.

The Source of Fundamental Human Rights
To be enforced, every human right must have a corresponding duty. The Bible usually refers to fundamental rights in terms of their corresponding duties. For example, the sixth commandment 'You shall not murder' (Exodus 20:13) is another way of stating 'Every person shall have the right to life'. Such rights, although not always explicitly stated in legal language in the form of human rights, may be derived from commands given by God in the Bible. The corresponding duty of the State is to refrain from acting or passing laws which violate these rights.

Rights which are granted by the state, and which require the state to actively provide something for the people, are of a different nature and should be distinguished from the fundamental God-given rights entrenched in the Constitution. Such rights weaken the Constitution, because the situation may arise when the state is unable to financially guarantee such rights. In the same way, if the state takes away these rights, then the impression may be created that the state has the right to also take away fundamental rights God has given. These 'state granted rights', commonly referred to as 'red rights', should not be included in the Constitution, which is for the protection of the people.

The Subjective Interpretation of Constitutional Rights
For a government to function effectively and protect citizens of a country, the rights entrenched in the Constitution, ought to reflect the teaching of the Bible. We believe that the God of the Bible is inherently good (1 John 1:5) and obedience to his commands will result in prosperity and blessing on the country (Deuteronomy 30:1-6). An equally
important point is that those interpreting the Constitution must do so according to the original intentions of its writers. Certain foreign courts have ignored this principle and brought in changes which would not have resulted from either democratic decision making or objective interpretation of existing laws. These changes are strongly opposed to Christian faith and morality.

In the sections of this report, mention is made of the 'subjective' decision making of foreign Constitutional Courts and the danger of judges making similar decisions in South Africa. In these cases, judges discussed cases in great detail and had hearings from many different parties. The word 'subjective' does not mean that the decisions were random or taken in haste. It means that the judges were able not only to judge the case, but also form the criteria on which the judgement was made. These criteria bore no relation to words in the Constitution as understood by the writers of the Constitution. The criteria were subjective and thus the judicial decisions made were also subjective (see for example the Roe v. Wade under the Right to Life, p9).

In speaking of the American Supreme Court constitutional lawyer, William Stanmeyer, states: 'The reality, even most law professors now grudgingly concede, is that the courts often have more will than judgement, are dangerous to democratic policy making, and are quite willing not only to read the Constitution but also, when it suits them, to read into it their own notions of wise policy'5. Straying from the wording in interpreting the American Constitution is has been well documented by Judge Robert Bork in the book 'The Tempting of America: The Political Seduction of the Law'.

The American experience demonstrates the need to define in very specific terms the rights to be protected and to ensure that these rights are in accordance with the teaching of the Bible. If a 'liberal' interpretation policy was less of a danger today a shorter and more succinct Bill of Rights would be acceptable. The statements in this document regarding the dangers of possible misinterpretation of the Bill of Rights should not in any way be understood to be an assessment of the integrity of the judges chosen to sit on the South African Constitutional Court. The Bill must be written taking into account problems that may only arise in the generations to come.

The Intentions of the Writers of the 1993 South African Constitution
The constitution does, in its preamble, acknowledge God: 'In humble submission to Almighty God, We the people of South Africa declare that: -... 'The constitution ends with the words: 'May God bless our country' in six of the major languages of our country. These statements are important as they express the beliefs of the majority of South Africans; they should remain in the final Bill of Rights. Additional recognition
specifically of the Christian 'Triune God' would help to avoid confusion for those who would seek to interpret 'God' to include Krishna, Allah or the god of another religion.

Since the concept of a Bill of Rights is consistent with a Christian view of government and the nature of human beings, in general we support the approach being taken to the constitution. We do not however agree with all aspects of the Interim Constitution. To aid clarity, the evaluation of certain clauses in the Interim Bill of Rights below are divided into three parts: a discussion of the meaning and possible interpretations of the clause; an assessment of the clause from a Christian perspective; and a rating of the significance the importance of the moral issues relating to the clause. Certain clauses of the Bill of Rights are examined below in the order they appear in the Interim Constitution.

**Clause 8: Equality**

Clause 8(2) 'No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language.'

The clause is aimed at giving a lifestyle of homosexuality/lesbianism constitutional recognition. Possible implications must be deduced from foreign case law. An examination of homosexual rights laws overseas (Canada, America, the Netherlands and Australia), which are usually phrased similarly to the above has shown that such special 'sexual orientation' rights do not simply protect the rights of homosexuals, but are also used to actively promote homosexuality and to discriminate against citizens who do not agree with such behaviour.

For example, in New York State, all schools including Christian institutions are required to have 'anti-discriminatory' instruction materials to convince students to accept or be non-judgemental towards homosexuality, even if parents disapprove of the content. A 'Human Rights Commission' has the power to fine or jail citizens who display 'any form of public prejudice against gays'. A homosexual school is funded at taxpayers' expense, while the Bible is banned at all state schools.

In Minneapolis, the welfare organisation 'Big Brothers' arranges for boys from single-parent families to be taken on outings with men who volunteer to do so. It had a policy of informing the boy's mother of all personal information relating to the volunteer taking the child on an outing. A homosexual volunteer sued the organisation, demanding that his sexual orientation should be kept confidential and that he deserved thousands of
dollars damages; and that the organisation should have 'affirmative action' to recruit homosexual volunteers. He argued that information on 'sexual orientation' could lead to discrimination by the boy's mother. The human rights hearing officer found the welfare organisation guilty of discrimination. On appeal to a district court, the decision was reversed, but thousands of dollars had been wasted on legal fees and rather than risk another court case, the organisation agreed to keep 'sexual orientation' confidential'. Such legal harassment is a common strategy of homosexual activists.

In South Australia an 'Equal Opportunity Tribunal' has the power to award unlimited amounts of money as damages in compensation to homosexuals who claim to have 'hurt feelings'. They list offences such as a hotel manager refusing to give two men a single room with a double bed and an employer refusing to consider a transvestite for a job intended for a woman. 9.

Other similar cases could be cited, but it is clear that the aims of homosexual activists extend much further than simply protecting their personal rights. Such laws infringe on a person's right to act in accordance with his or her conscience.

The Organisation for Lesbian and Gay Action (OLGA), which lobbied for the inclusion of this clause in the Constitution, hopes that this clause will lead, amongst other things, to the following:
- To legalise consenting sodomy;
- To legalise homosexual marriages which will have the same insurance, pension, taxation, medical aid, housing and other social and economic benefits as other married couples;
- To allow homosexuals to adopt children;
- To include pro-homosexual sex education in the school curriculum even if parents object;
- To make teaching that homosexuality is wrong illegal;
- To allow homosexual school teachers to be open about their lifestyle;
- To make speaking against homosexuality in the media illegal;
- To make it illegal to excommunicate an unrepentant homosexual from a church or to exclude homosexuals from the ministry;
- To make it illegal to teach that homosexuality is sinful;
- To have special re-education of health workers, police and judges to encourage them to enforce pro-homosexual laws, and to have 'affirmative action' for homosexuals within the police and judiciary. 10.
Some may say that anything like this is likely to happen in South Africa, but in 1993 the University of Cape Town Students' Representative Council banned a 'His People' pamphlet on homosexuality, which consisted almost exclusively of Bible verses. This event served as an important warning of the consequences of homosexual rights for religious freedom in South Africa.

The clause also serves as an educative basis for the morals of the country, in that disapproval of homosexuality will be equated with racism and other genuinely unfair practices of discrimination mentioned in clause 8(2). It is a common strategy of homosexual organisations to try to include their agenda in legislation aimed at combatting racial and gender discrimination.

The Teaching of the Bible on Homosexuality
The Bible teaches that homosexuality and lesbianism are sins which people voluntarily choose to commit and not 'sexual orientations' that they are born with: Romans 1:25-27 "... Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Man committed indecent acts with other men... " It also teaches that homosexuality does not have to be permanent, but like other sins, can be forgiven and overcome by repentance and faith in Jesus. 1 Carinthians 6:9-11 'Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived. Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God. And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God. ' God loves homosexuals, but cannot accept their sinful behaviour.

Assessment:
The words 'sexual orientation' should be removed from this clause.

Significance
Very high

Clause 9: Life
Every person shall have the right to life.
This clause as it stands is vague and open to subjective interpretation. In South African legal terms, an unborn child has certain legal rights, such as the right to inherit property. Custody of an unborn child may also be determined before birth". The common law of both British and Roman-Dutch origin once protected the right to life of unborn children with severe punishment of abortionists. The South African Abortion and Sterilization Act of 1975, now permits abortion for a variety of reasons.

That the meanings of the words 'person' and 'right to life' are not clarified leaves open a variety of possible interpretations. Interpreted from a biblical perspective, the clause would be read as 'EVERY PERSON INNOCENT OF CAPITAL OFFENCES SHALL HAVE THE RIGHT TO LIFE FROM CONCEPTION TO NATURAL DEATH. ' Secular Humanist judges could equally read it to mean 'EVERY ABLE BODIED PERSON SHALL HAVE THE RIGHT TO LIFE FROM BIRTH UNTIL UNWANTED BY SOCIETY, [euthanasia of the physically frail and elderly ] IRRESPECTIVE OF WHAT CRIMES THEY COMMIT'.

Interpreted in the context of foreign case law, the clause is as it stands is open to subjective interpretation and offers little protection. The crucial issues of abortion, infanticide, the death penalty and euthanasia have not been dealt with, instead leaving this to the Constitutional Court to decide.

In the American Constitution, (1791), the right to life clause stated straightforwardly: 'No PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME... NOR BE DEPRIVED OF LIFE... WITHOUT DUE PROCESS OF LAW' (AMENDMENT V [1791]). The clause explicitly makes allowance for the death penalty, but does not address the issues of abortion and euthanasia specifically. At the time it was written, the clause was understood within the Christian consensus. The consensus is that people are made in the image of God and therefore their lives have value irrespective of whether they are in or out of the womb, healthy or unhealthy, useful or redundant to society, elderly or young; and that this right can not be used to protect criminals from being executed after process of law.

Today, with the increase of secular humanist thinking, the Christian consensus, which protects the vulnerable members of society does not exist in the legal profession. We deem it important to have more explicit wording in the Bill so that interpretation according to secular humanist situational ethics can be prevented. We do not want court judgements such as Roe v. Wade to occur in South Africa.
Regarding the abortion issue, the basic problem with this clause, is that the word person', is not clearly defined. It was argued in the Roe v Wade court case that THE WORD "PERSON" AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN. 12.2 Also the 'right to life' is not defined. Thus the clause has no intrinsic meaning as it stands at present and is left open for interpretation. In a sense, the judge will be in a position to 'play God'. If the Constitutional Court chose to legalise abortion, it would not be possible for parliament to change the decision of the judges, without altering the Constitution, which could be extremely difficult.

If the clause is left unaltered, issues such as the death penalty and abortion will not be decided on the basis of this clause alone, but also on the basis of other clauses in this Bill. In the case of the death penalty, Clause 11 (2), dealing with 'Freedom and Security of the Person', may be of influence. In the case of abortion clause 8(2) which deals with equality may be interpreted to be relevant by a pro-abortion Constitutional Court. Clause 13, which deals with privacy may be similarly used. Arguments, which could be derived from clauses 8(2) and 13 were used by the US Supreme Court in deciding to legalise abortion in that country. Such arguments could not objectively be derived from either the American Constitution or the South African Interim Bill of Rights, but indicate the dangers of subjective interpretation.

It has been pointed out by the US Surgeon General C. Everett Koop that the reasons given by Justice Blackmun of the American Supreme court to legalise abortion (i.e. following the religions of ancient pre-Christian cultures) could equally be used in future to legalise infanticide, which could then lead to the legalisation of euthanasia". Pro-infanticide groups have already attempted to pressurise the courts to legalise infanticide of handicapped children".

The Teaching of the Bible on the Right to Life of the Unborn Child:
The Bible teaches clearly and in many places that the unborn child is a human being in the same sense that a healthy adult is a human being. Clearly, God takes an interest in these children (Psalm 139:13-16 'For you created my inmost being; you knit me together in my mother"s womb. I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. My frame was not hidden from you when I was made in the secret place. When I was woven together in the depths of the earth, your eyes saw my unformed body. All the days ordained for me were written in your book before one of them came to be. ' See also Jeremiah 1:5; Psalm 51:5; Luke 1:41-44. ) All human life is sacred, because people are made in the image of God "Whoever sheds the blood of a man, by man
shall his blood be shed; for in the image of God has God made man. ' Genesis 9:6. This command is repeated in Exodus 20:13 "You shall not murder'.

The Teaching of the Bible on the Death Penalty:

We must also remember that in God's eyes failure to execute murderers is an extremely serious matter. 'Do not accept a ransom for the life of a murderer, who deserves to die. He must surely be put to death... Do not pollute the land where you are. Bloodshed pollutes the land, and atonement cannot be made for the land on which blood has been shed, except by the blood of the one who shed it.' Numbers 35:32-34 In the book of Genesis, we see that the verse, indicating the right to life, is the same verse requiring capital punishment of murderers. The 'right to life' cannot be enforced properly, and given to innocent members of society, without a mechanism to prevent others from violating it. "Whoever sheds the blood of a man, by man shall his blood be shed; for in the image of God has God made man. Genesis 9:6.

The Teaching of the Bible on Euthanasia

Secular humanists try to blur human life issues by substituting different words for the type of murder they wish to legitimise. It should be borne in mind that 'abortion' 'infanticide' and 'euthanasia' are all euphemisms for the killing of innocent people that is, murder. The Bible teaches that assisting suicide is the same crime as murder (2 Samuel 1:6-16).

The Teaching of the Bible on Infanticide

The Old Testament contains numerous condemnations of the practice of infanticide, which at the time was commonly practised among pagan nations (Deuteronomy 1 2:31; 1 8:9-10, Leviticus 1 8:21; 20:2-5; 2 Kings 1 6:3; 2 Chronicles 28:3 etc).

Assessment

The clause should be rephrased to show explicit biblical wording along the following lines: 'Every person, innocent of capital offences, shall have the right to life, from conception to natural death. ' The Constitution could include a schedule (list of) capital offences.
It is suggested that the text could also be phrased along the lines of the proposed American constitutional 'Human Life Amendment':

'SECTION 1 : WITH RESPECT TO THE RIGHT TO LIFE, THE WORD "PERSON" AS USED IN THIS ARTICLE... APPLIES TO ALL HUMAN BEINGS IRRESPECTIVE OF AGE, HEALTH, FUNCTION, OR CONDITION OF DEPENDENCY, INCLUDING THEIR UNBORN OFFSPRING AT EVERY STAGE OF THEIR BIOLOGIC DEVELOPMENT.

SECTION 2: No UNBORN PERSON SHALL BE DEPRIVED OF LIFE BY ANY PERSON; PROVIDED, HOWEVER, THAT NOTHING IN THIS ARTICLE SHALL PROHIBIT A LAW PERMITTING ONLY THOSE MEDICAL PROCEDURES REQUIRED TO PREVENT THE DEATH OF THE MOTHER.

SECTION 3: THE CONGRESS AND THE SEVERAL STATES SHALL HAVE POWER TO ENFORCE THIS ARTICLE BY APPROPRIATE LEGISLATION.'

Two points in regard to the above wording are important: Firstly the words 'TO PREVENT THE DEATH OF THE MOTHER' should be used rather than 'to protect the mothers life', since some overseas' courts have interpreted the word 'life' to apply to the mother's psychological health, physical health, emotional strain, social and employment status etc." That the life of an unborn child can hang in the balance, dependent on a courts perception of the mother's reduced 'quality of life' is unacceptable. Careful thought and clear definition needs to be given to the word 'life'.

Secondly, wide ranging qualifications in the definition of 'person' are needed to prevent an elderly, senile, ill or handicapped person as being considered less than a person, an idea promoted by those in favour of euthanasia.

It should be noted that the above American proposed Amendment does not deal with the issue of the death penalty, which we suggest be entrenched in a subclause. The need for such a sub-clause is also relevant to clause 11 'Freedom and Security of the Person'.

It is our submission that neither the Constitutional Assembly, the Constitutional Court nor Parliament has any right to make the final decision on the above mentioned issues. They simply have the duty to enforce the right to life as given by God in the Bible. These issues are too important to be exclusively handled by a small group of constitutional judges. If the Constitutional Convention is unable to acierre upon wording which reflects the teaching of the Bible, held in high regard by millions of South Africans then a referendum should be held to decide these issues. Our own monitoring of opinion polls
shows that the overwhelming majority of South Africans agree with the Christian viewpoint of respect for innocent human life.

**Significance**
Very Very High

**Clause 1 0: Human Dignity**
*Every person shall have the right to respect for and protection of his or her dignity*

The specific application of this clause is not clear. It seems to have been motivated mainly by abhorrence of the apartheid legacy. The dignity of human beings is derived from the fact that they are all made in the image of God (See Genesis 1:27). The idea that individual rights should never be seen as separate from their corollary obligations (to allow others to exercise their rights) flows from this premise.

There is a danger that this clause could be misinterpreted to outlaw corporal punishment. This would be a problem because the Bible teaches that moderate physical punishment for wrongs should be used as part of a child's education (Proverbs 23:13-14).

**Assessment**
This clause should be clarified to prohibit exploitation of women's (and men's) bodies for commercial gain. The concept of the right to human dignity was used by the Canadian Supreme court to justify limitations on hard-core pornography in that country (see Freedom of Expression'pl 8). The issue of corporal punishment could also be clarified.

**Significance**
Medium

**Clause 1 1 (2): Freedom and Security of the Person**
*No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment*.

**Death Penalty**
At face value this sounds commendable from a Christian point of view, but it must be remembered that recently, the High Court of Zimbabwe set aside the death sentences on the grounds that long periods on death row offend a similar clause in their constitution. Capital punishment could be abolished on grounds of this clause if the Constitutional Court so decides. 8.
Assessment
There is nothing inherently wrong with this clause, except that a humanist Constitutional Court could alter its meaning to outlaw the death penalty. The Constitution therefore needs to explicitly uphold the death penalty elsewhere. (See also clause 9: 'Right to Life', p9).

Significance
Medium

Clause 13: Privacy
'Every person shall have the right to his or her personal privacy which shall include the rights not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'

Although the term 'Right to Privacy' is not actually used in the United States Constitution, it was used as reason for the pro-abortion decision of the American Supreme Court.

The liberal interpretation of the right to privacy was contrived by the Court in Griswold v. Connecticut (1965) and then extended to include abortion in Roe v. Wade. It was argued that 'THE CONSTITUTION DOES NOT EXPLICITLY MENTION ANY RIGHT TO PRIVACY... THE RIGHT TO PRIVACY, WHETHER IT BE FOUND ON THE FOURTEENTH AMENDMENT’S CONCEPT OF PERSONAL LIBERTY AND RESTRICTIONS ON STATE ACTION, AS WE FEEL IT IS, OR AS THE DISTRICT COURT DETERMINED, IN THE NINTH AMENDMENT’S RESERVATION OF RIGHTS TO THE PEOPLE, IS BROAD ENOUGH TO ENCOMPASS A WOMAN’S DECISION WHETHER OR NOT TO TERMINATE HER PREGNANCY... ON THE BASIS OF ELEMENTS SUCH AS THESE, APPELLANT AND SOME AMICI ARGUE THAT THE WOMAN’S RIGHT IS ABSOLUTE AND THAT SHE IS ENTITLED TO TERMINATE HER PREGNANCY AT WHATEVER TIME IN WHATEVER WAY, AND FOR WHATEVER REASON SHE ALONE CHOSES...'. The argument is that the decision to kill an unborn child is a private one that must be made by the child's mother, without the need to gain the consent of representatives of the state, the child's father, or a medical practitioner/psychologist etc. The above clause does not say anything that could be objectively interpreted to relate to abortion. It could nevertheless be used this way by a Constitutional Court as was the case in the United States.

Assessment
The wording must either be altered to explicitly preclude abortion, or else, abortion must be explicitly forbidden elsewhere in the Bill of Rights by defining the word 'person' to include the unborn in the 'Right to Life' (Clause 9, page 9).

Significance

High, but change not necessarily needed in this clause.

Clause 14(2): Religion, Belief and Opinion

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by an appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance at them is free and voluntary.

On the surface, this clause sounds fair and beneficial to Christianity and religious freedom, but the way it is stated leaves it open to harmful abuse by an anti-Christian court.

The Context of Banning of Christianity in American State Schools

It is necessary to examine the issue of religion and education in the context of the serious discrimination against Christianity in American State schools, which resulted from the misinterpretation of the American constitution by the Supreme Court in that country. The above clause seems to have been introduced mainly to prevent South Africa from adopting this strongly anti-Christian stance. While the intent is appreciated, the clause does not serve this purpose adequately.

The American Bill of Rights was drawn up with the explicit intention of entrenching Christian principles and values in American Society. Sadly, the Supreme Court has taken great liberties in interpreting this Bill of Rights, even to the extent of making laws in direct opposition to the original intentions of the Constitution.

Prayer in American Schools Abolished

The American Supreme Court has now interpreted the first amendment it to mean that Christianity may not be promoted in government funded schools. Schools have even been told, for example, not to display the Ten Commandments on the classroom wall and Christian groups are not allowed to meet at schools during lunchtime. Atheism, Greek Philosophy, and some brands of New Age teaching are not regarded as 'religion' and are thus allowed to be promoted. The results of this banning of the Bible was predictable: a drastic increase in violent crime and drug abuse in the USA. Study of the actions and statements of the writers of the United States Constitution shows them to favour Christian Education strongly.

Violation of Religious Freedom in the United States
Recent examples of Christians being discriminated against in the United States include the following: 'TWO HIGH SCHOOL STUDENTS GAVE A FRIEND A FLIER ADVERTISING AN OFF CAMPUS MEETING OF THE FELLOWSHIP OF CHRISTIAN ATHLETES. THE TWO WERE ACCUSED OF POSSESSING CHRISTIAN MATERIAL. ONE STUDENT WAS SUSPENDED, THE OTHER WAS THREATENED WITH EXPULSION... A TEACHER IN COLORADO WAS REPRIMANDED FOR HAVING TWO CHRISTIAN BOOKS IN HIS CLASSROOM LIBRARY OF NEARLY 250 VOLUMES. A FEDERAL CIRCUIT COURT RULED AGAINST THE TEACHER AND THE SUPREME COURT REFUSED TO HEAR THE CASE. ' 21 Christianity has been banned in American State schools since 1963, although a recent court case 'Mergens v. Westside Board of Education 990) has allowed Christian Clubs after hours use of school facilities. The Bill of Rights must be carefully worded to uphold religious freedom in South Africa.

State Interference in Religious Activities
The way that Clause 14(2) has been stated leaves it open to misuse by the Constitutional Court. Legally, the term 'appropriate authority for that purpose' is void. It is submitted that the only appropriate authority to make rules regarding worship in school are the parents and teachers of the children at the school. The Bible teaches that God places the responsibility for the upbringing of children on the child's parents rather than on the state (See Deuteronomy 4:9 & 6:7; Ephesians 6:4; Proverbs 22:6). Where teachers are delegated this authority by parents, they are accountable to the children's parents rather than to the state.

Parents have the right to remove their children from a particular school or to request their child's non-participation in specific activities they disapprove of. If the Constitutional Court were to rule that 'an appropriate authority' is the state education department, then American-type infringements of religious freedoms could result. The inevitable result would then be wealthier parents sending their children to private Christian schools, but those who could not afford to would be at an unfortunate disadvantage.

The words 'state-aided' could be interpreted to include almost all private schools in the country, since many receive state subsidies and these would then be required to submit to this 'appropriate authority'. Explicit Christian schools might then not be able to receive any state money. If this is the case, the fees would be much higher than private schools are at present (they are currently reduced by state subsidies). Effectively, the state would provide funding for 'secular', and possibly 'new age' schools, but not for explicitly Christian schools.

A possible funding system, which would not be permitted under the Interim Constitution is as follows: The education budget is divided by the number of children registered for schools, thus allocating a basic amount to each child. The parents of the children, are allowed to decide which school the child attends, and the school receives the subsidy. As resources permit, parents could then give additional fees to raise the standard of education and improve facilities. Churches could also give money to benefit Christian education in poorer communities.
Inter-Faith Religious Activities
The phrase 'provided that such observances are conducted on an equitable basis' could be interpreted mean that state schools which have minorities of members of non-Christian religions (eg Islam, Hinduism will be compelled to have inter-faith services and that all school functions will have to be either 'inter-faith secular or alternate devotions between different religions. Effectively, this could mean that scho assemblies will have to include readings from the Quran as well as the Bible, and prayers to Allah, Krishn the ancestors as well as to Jesus Christ. While we endorse freedom of religion, we are opposed to tl mixing of religious beliefs. It would not be acceptable if our children were being tempted to participate the activities of other religions (The Bible teaches strongly against the mixing of other religious beliefs wi Christianity - 2 Kings 1 7:34-41).

Secularisation of Compulsory Functions
Although the phrase 'and attendance at them is free and voluntary' sounds reasonable, it could have negative implications nevertheless. If 'religious observances' were interpreted to include all school functions wi prayer or Bible reading, then those functions for which attendance is compulsory such as assemblies, pri: giving etc. would be governed by this clause.

The Constitutional Court could then interpret 'free and voluntary' in one of two ways: Either, compulsory functions would have to be secular, or alternatively, schools would have to make special provision for children whose parents objected to religious activity. This second interpretation would be more acceptable since it is unlikely that many parents would wish their children to be deprived of Christian moral influence.

If 'religious observances'ever were interpreted to include prayers, Bible reading or Christian based moral education taking place in normal classes, then more extreme limitations such as those which are presently effect in America may be imposed. Such an interpretation by the Constitutional Court could possibly arise several generations' time. In America, the Supreme court used a constitutional clause that was intended protect the Church from state interference, and interpreted it many generations later to mean that Christian activities were not allowed in state schools.

The End of Christian State Education
It seems that this clause will also effectively end the Christian centred 'Bible education' in schools and that will be replaced by 'Religious studies'. Limitations may be placed on Christian teachers who share their faith in normal lessons.

Other State Institutions
Similar limitations on Christian activities and forced mixing of religion in other 'state and state-aided institutions', such as universities, hospitals, the prison service and military may also result.
Assessment
In order to address the concerns expressed above, the following modification of the wording of the clause suggested:

Firstly, the words 'State-aided' should be deleted to prevent private Christian schools, which receive state subsidies from having their worship or teaching restricted by a state body.

Secondly, the problematic second part of the wording 'under rules established by an appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance is free and voluntary' should be deleted to prevent either secularisation or mixing of religion from being enforced by the Constitutional Court.

To replace this part of the wording, and to prevent the Clause from then forcing schools to allow unacceptable forms of religious observance, such as Satanism, the following could be added: 'under rules established by a local body in consultation with the community.' Placing authority in the hands of a local body rather than national government would give parents more influence over the rules affecting their children and would allow for more variation in rules between different schools than would rules made by central education authority.

The Clause should thus simply read:

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at State institutions under rules established by a local body in consultation with the community.

Significance
High

Clause 15: Freedom of Expression
(1) Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.
(2) All media financed by or under the control of the State shall be regulated in a manner which ensures the expression of a diversity of opinions.

Freedom Political and Religious Speech
The right to freedom of political speech is one of the requirements of a democracy. As Christians we recognise the need for 'transparent' government and an informed electorate who are able to 'freely make political choices' Clause 21 (1) (c). The rights to state information outlined out in Clauses 23 and 24 serve both to limit abuse of power by civil authorities and to assist citizens and authorities to make informed political decisions. Clause 15 itself puts the emphasis on 'impartiality and the expression of a diversity of opinions.'
opinion' in any state controlled media. The special protection accorded to Clause 15 by Clause 33(1)(bb), limiting legislative intervention, is exclusively for speech relating to 'free and fair political activity'. And as the Interpretation Clause again reminds us the spirit behind Clause 15 is that of an 'open and democratic society based on freedom and equality'.

The motivation behind the framing of the American First Amendment and other similar clauses in international documents was freedom of specifically political and religious expression. In South Africa we are emerging from a dispensation of restricted dissemination of information similar to that which the framers of the American Bill of Rights sought to guard against. Protecting political and religious speech has always been the starting point in interpreting rights to freedom of speech in every national constitution.

Internationally, freedom of expression clauses are not often problematic in the area of political speech. The early American and Canadian jurisprudence developed specifically in regard to political speech and are effective in this regard. The problems arise when the same tests are applied to certain other forms of information and non-political expression.

**Pornography**
The treatment of pornography by many overseas' courts as 'speech' or 'art' (the selling of which is now regarded as a constitutional right) is of great concern to the Christians and the general South African populace. Assuming that the South African Constitutional Court would follow such precedent set in some overseas countries, it seems that the governmental task group on pornography has ignored the opinions of South Africans opposed to pornography in planning the new Publications Control Bill126.

The reasoning behind the establishment of a right to freedom of speech, that is to secure the social good of an informed electorate and to ensure freedom of religious belief, can hardly be applied to pornography. That is essentially where the courts in other countries have erred. The kind of speech and expression protected has been widely defined, but the same justification, which should apply to the limited category of political speech is applied across the board.

In America the precedent case allowing the dissemination of hard-core pornography is *American Booksellers Association v Hudnut 771 F. 2d 323 (7th Cir 1985)*. The case overturned an Indianapoii ordinance which defined pornography as a practice that discriminates against women and was aimed exclusively at hard-core pornography involving mutilation, rape and women enjoying pain or humiliation. The judge, Easterbrook recognised that 'Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women'(at 1129). But, he says, we cannot say that these harms depicted are actual occurring. Thus the harm which is seen, not to mention the harms which it may motivate, are not as great as the harm that will be caused by allowing a statute to limit freedom of 'speech' even in this very circumscribed manner. His justification for this is that 'Governments who want stasis start by restricting speech' and 'Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views.
and reigning institutions. ’ (at 1 1 29). The judge thus uses the justification for open political debate as means to legalise what he himself admits to being a systematic practice of exploitation of women. There an obvious error in the logic of this argument. What social good, worthy of constitutional protection, being promoted by supporting a practice which clearly discriminates against women?

Canadian courts have succeeded in outlawing the most extreme forms of hard-core pornography, but on because in these cases the court could detect a 'reasoned apprehension of harm' (R v Butler [1992] 1 DLR 452). Their decision was based on proportionality reasoning that the harm apprehended by the court greater than the harm of silencing the expression. These cases must however conform with the definition of obscenity in the Criminal Code which leaves much of the pornography trade, including material which is generally regarded as hard core, outside it's ambit, despite the court's open acknowledgment that pornography harms women. Sadly, the freedom of expression has been promoted for its own sake rather than within the limits of other social values and fundamental rights.

The Canadian case of R v Keegstra [1990] 3 SCR 697 included the anti-Semitic views of a history teacher under the definition of speech. The classroom situation is different to the political arena, since a class of school children (a captive audience of impressionable young minds) is not the same as civil society in the process of making political decisions. Our suggestion is that one should not set one standard for speech across the board.

In short the above rulings and the reasoning behind them leave much to be desired. It is clear to us that material which exploits members of a society violates the principle of equality behind our Constitution. It also goes directly against the right to human dignity in Clause 10.

Other forms of expression for which some form of limitation is also needed are public incitement to crime or violence, malicious slander, fraud, hate speech, blasphemy and the desecration of religious symbols. Freedom for freedom's sake should not be the guiding force behind the interpretation of our Bill of Rights.

The same concern seems to have motivated extensions to the basic right to freedom of speech in a number of international documents. An example of such a text is the European Convention on Human Rights which reads:

ARTICLE 10
(1) EVERYONE HAS THE RIGHT TO FREEDOM OF EXPRESSION. THIS RIGHT SHALL INCLUDE FREEDOM TO HOLD OPINIONS AND TO RECEIVE AND IMPART INFORMATION AND IDEAS WITHOUT INTERFERENCE BY PUBLIC AUTHORITY REGARDLESS OF FRONTIERS. THIS ARTICLE SHALL NOT PREVENT STATES FROM REQUIRING THE LICENSING OF BROADCASTING AND CINEMA ENTERPRISES.
(2) THE EXERCISE OF THESE FREEDOMS, SINCE IT CARRIES WITH IT DUTIES AND RESPONSIBILITIES, MAY BE SUBJECT TO SUCH FORMALITIES, CONDITIONS, RESTRICTIONS OR PENALTIES AS ARE PRESCRIBED BY LAW AND ARE NECESSARY IN A DEMOCRATIC SOCIETY, IN THE INTERESTS OF NATIONAL SECURITY, TERRITORIAL INTEGRITY OR PUBLIC SAFETY, FOR THE PREVENTION OF DISORDER OR CRIME, FOR THE PROTECTION OF HEALTH OR MORALS, FOR THE PROTECTION OF THE REPUTATION OR RIGHTS OF OTHERS, FOR PREVENTING THE DISCLOSURE OF INFORMATION RECEIVED IN CONFIDENCE, OR FOR MAINTAINING THE AUTHORITY AND IMPARTIALITY OF THE JUDICIARY.

Something of a similar nature, although not necessarily as detailed, would accord with the spirit of our Constitution and meet a few of the concerns expressed above. The primary function of the second explanatory clause in Article 10 is that it assists the court in differentiating between different types of speech on the basis of the constitutionally protected social good which they will promote. Pornography, for instance, could be limited under 'PREVENTION OF CRIME', 'PROTECTION OF HEALTH AND MORALS', or most feasibly 'FOR THE PROTECTION OF THE RIGHTS OF OTHERS'.

**The Teaching of the Bible on Pornography**

Jesus said: 'You have heard that it was said, 'Do not commit adultery.' (Exodus 20.14) But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart. If your right eye causes you to sin, gouge it out and throw it away. It is better for you to lose one part of your body than for your whole body to be thrown into hell.' Matthew 5:27-29. The point he was making is that evil thoughts are sins in the same way that physical actions are sins. Pornographers profit by encouraging others to sin. Although the law cannot regulate a person's thoughts, it can help people by removing sources of temptation.

Pornography attacks people at two levels: Firstly, the person who buys it has his or her morality undermined and secondly, the people being portrayed (usually women) have their dignity undermined. It is the responsibility of good governments to protect its citizens from these attacks. The dignity of human beings is derived from the fact that they are created in the image of God (Gen 1:27).

The Word of God teaches that sinful thoughts inside a person, if not stopped, will inevitably result in sinful action (James 1:15). In the case of pornography, these sinful actions bring serious harm to society: rape, child abuse, sexual harassment etc.

Even for those who do not personally read pornographic magazines, obscene publications on newsstands or explicit advertising are offensive to innocent passers-by.

**Scientific Research**
The statement ‘... freedom of artistic creativity and scientific research’ has the potential to create serious problems. Although there is no objection to the intent of the clause, anti-Christian interpretation could result in the use of the words 'scientific research' to include ethically unacceptable practices.

In the United States, there is much controversy over President Clinton's decision to legalise experiments on living unborn children. For example removing organs from living unborn children without anaesthetic and testing their response to painful Stimuli. Other similarly unacceptable experiments may be also be legitimised by the above-mentioned phrase. There is therefore a need for laws to delineate the nature of permissible scientific research.

**Assessment**

The inclusion of a right to freedom of speech is welcomed as it assists the Church in its role of preaching the gospel and providing a moral conscience, which we consider vital to the well being of society. Apart from its application for religious freedom, the right found in Clause 15(2) is essentially a right to freedom of political speech which is closely connected to the right to information and 'transparent' government and should be interpreted as such. This motivation should be kept in mind by the legislature in the passing of censorship laws and provision of information to the public.

It is important that Clause 15 reflects the legislature's commitment to free political speech, while not condoning socially harmful forms of expression, which undermine the rights to equality, and human dignity.

Clause 15(2) clearly protects citizens from the government keeping contrary opinions out of the media. Clause 15(1) has a broader application, and should rather differentiate between various types of speech. We suggest that clause 15(1) remains, with the deletion or qualification of the words 'scientific research', and that clause 15(2) becomes clause 15(3). We suggest the insertion of clause 15(2) as follows: 'The exercise of these rights, since they carry with them duties and responsibilities, may be subject to restrictions or penalties as are prescribed by law, in the interests of the prevention of crime, for the protection of health or morals, for the protection of the reputation and rights of others or for maintaining the impartiality of the judiciary.'

**Significance**

Very high

**Clause 32(c): Education**

*Every* person *shall* have the right...

(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.
Clause 32(c) is extremely important to us, since it supports the right to establish explicitly Christian schools (See clause on Religion, Belief and Opinion, pl 5).

**Assessment**

Clause 32(c) is important to maintaining religious freedom and should be retained.

**Significance**

High

**Clause 35: Interpretation**

(1) In interpreting the provisions of this Chapter a court shall promote the values which underlie an open and democratic society based on freedom and equality, shall, where appropriate, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

This last underlined statement is sinister. It could give the Constitutional Court power to choose countries from which to derive interpretation for this Bill of Rights, even if this interpretation is far removed from the intent of the wording of the Bill.

The South African Interim Bill of Rights at present is most closely comparable with the Canadian and German Bills of Rights. Canada seems to have taken a markedly anti-Christian interpretation of the constitution and this case law could be used to influence South African law. The German courts have been more objective in their constitutional interpretation than the North American courts and are thus preferable for comparison, but the language barrier presents difficulties in the use of their case law. Examples of other countries from which interpretation could be drawn are: the Netherlands (strongly anti-Christian); Namibia (no death penalty); Ireland (more favourable to Christian values); New Zealand (abortion on demand). It is possible that the anti-Christian decisions of the American Supreme Court could also gain influence in South Africa through this clause.

**Related To the Above: The Human Rights Commission**

115(2) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 of this constitution or to the norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature...
The words ‘norms of international human rights law’ present a problem because some aspects thereof are contrary to a Biblical standards of ethics. We would strongly support the recognition of a Christian ethic code for the Human Rights Commission.

Assessment
The words 'and may have regard to comparable foreign case law' should be not be included in Clause 35(1) of the Bill. The phrase enables subjective decision making, since the Court can decide which countries should be taken into account. Most Western countries using Bills of Rights have shifted off their Christian foundations; we do not want South Africa to follow their example. Since South Africa is unique in identity and social context, we maintain that it requires the development of its own law stemming from its moral base of its people, the majority of whom accept Christian values.

The Human Rights Commission (Clause 115(2)) should be guided by Christian ethical standards rather than the 'norms of international human rights law'.

Significance
High

The Mistake of a Middle Eastern Politician
The present political situation reminds one strongly of an event which occurred a few thousand years ago in the city of Babylon. The ruler of the Babylonian empire, Darius, was asked by his political advisers to pass new law: "The royal administrators, prefects, satraps, advisers and governors have all agreed that the king should issue an edict and enforce the decree that anyone who prays to any god or man during the next thirty days, except to you, 0 king, shall be thrown into the lion’s den. Now 0 king, issue the decree and [put in writing so that it cannot be altered] in accordance with the laws of the Medes and Persians which cannot be revealed Daniel 6:7-8.

With all of his advisers in agreement with the decree, King Darius was presumably under a lot of pressure to pass the law. Moreover, there did not seem to be all that much wrong with it from his point of view: 'So King Darius put the decree in writing. "Daniel 6:9.

King Darius was unaware of the implications of decreeing the law. If he had been, he would have known that it was opposed to the commands of the God of the Bible (See Exodus 20:3). Darius had no intention of discriminating against believers in the Bible; in fact, he showed particular favour to Daniel, a Jew. 'Now Daniel so distinguished himself among the administrators and the satraps by his exceptional qualities that the king planned to sat him over the whole kingdom. " Daniel 6:3. Far from wanting to undermine Judeo-Christian influence in his country, he was wanting to increase it.
Contrary to the decreed law, Daniel continued to pray and those opposed to him informed the king who was compelled to enforce the law he had passed: 'Then they said to the king, "Daniel, who was one of the exiles from Judah, pays no attention to you, 0 king, or to the decree you put in writing. He still prays three times a day. " When the king heard this he was greatly distressed, he was determined to rescue Daniel and made every effort until sundown to save him. Then the man went as a group to the king and said to him, "Remember, 0 king, that according to the law of the Medes and Persians no decree or edict that the king issues can be changed. ' 

Daniel was unable to obey the law of the king because it contravened the higher law of his God. As result he ignored it and suffered the consequences. The king, when he realised what the implication of the law were, did his best to find legal ways of saving Daniel, but was unsuccessful.

The story of Darius' imprudent decision making is a lesson for South African politicians today. We urge you to recognise that acknowledging and using the value system of the largest religious group South Africa, Christianity, is vital to the well being of the new South Africa.

When the final Constitution has been passed, it will not be easy to change it, even if parliamentarians who passed it wish to do so. Perhaps many political leaders do not understand that the final Constitution can have for the people of South Africa and Christian Church. As with the law in Daniel's day, there are aspects of the Interim Constitution, which are opposed to the teaching of the Bible, which Christians thus cannot support.

Conclusions
The idea that rulers, like citizens, must be subject to a law above themselves is a concept derived from the Bible and forms the basis of constitutional law. We hold that a Bill of Rights for the protection of the nation citizens should be based on the moral teachings of the Word of God. The need for checks and balances, an division of authority in government, is derived from the Christian belief in the sinfulness of human being. The Bible teaches that the state is subject to the authority of God, should rule according to godly (Christian) values, and should not in interfere with the internal affairs of the Church.

The Bill of Rights invests enormous political power in the Constitutional Court; more power indeed that any political party controlling the country. Problems have arisen as a result of the subjective interpretation of foreign constitutions and the failure of the judiciary to acknowledge the Christian consensus. This means that there is a need for more detailed and specific definition of the meanings of the individual rights.
The position of the Bill of Rights on homosexuality is opposed to Christian values and paves the way for many ungodly actions to promote homosexuality. The phrase 'sexual orientation' in clause 8(2) should be deleted. Specific sinful behaviour should not be given constitutional legitimacy.

Foreign case law indicates that this phrase could create serious problems for South African society. The phrase is unacceptable and the above problems cannot be remedied by a qualifying statement or other balancing constitutional clause.

The most important issue in the Bill of Rights, the right to life, has not been given due attention. Crucial issues of abortion, infanticide, the death penalty, euthanasia have been left to the decision of the small group of Constitutional Court judges. They are required to take into account 'comparable foreign case law'(clause 35(1)), which is generally opposed to Christian standards on these issues. It is unacceptable that such important decisions regarding human rights in South Africa should be taken in this way. The Bible, Word of God teaches that abortion, infanticide and assistance to suicide are murder and should not permitted. It also teaches that the death penalty is a necessary part of the civil law, to protect lawabiding citizens. The Bill of Rights should reflect this teaching. If the Constitutional Assembly is unable to agree to this, then these issues should be decided by public referendum.

The 'Right to Human Dignity' could benefit from clarification. The right to 'Freedom and Security of the Person' has no intrinsic problems, but is open to misuse unless clarified either in that clause or elsewhere. The 'Right to Privacy' could create problems on the abortion issue, but these could be remedied under the 'Right to Life'.

On the subject of religion in state institutions such as state schools, hospitals, the prison service etc. Clause 14(2) aims to serve the beneficial purpose of avoiding the American situation where the Bible is banned in state schools. The way the clause is stated nevertheless could give rise to problems, such as mixed religion in school functions or the secularisation of compulsory school activities. The clause could also jeopardise those schools which wish to have the Bible as the sole basis of religious instruction. Funding problems for private Christian schools may also arise. The modification of the subclause as outlined in the assessment would remedy these problems.

The 'Freedom of Expression' clause is welcomed for the purpose of political and religious speech, but does not sufficiently address the potential moral problems that may arise from the publication of obscenities. It is suggested that an additional clarifying subclause should be added similar to that used by the European Convention on Human Rights.

Statements in the Constitution which promote the acceptance of foreign case law, such as in clause 35(1) at section 115(2) are not welcomed from a Christian point of view, as currently in many countries, legal norm are often inconsistent with the norms of Christianity. We suggest that South Africa develop its own la
related to the local context rather than relying heavily on the decisions of overseas courts, especially since Christian beliefs and values are more generally accepted here.

Granted that the Bill of Rights may remain substantially unchanged for many generations, we urge that the issues raised in this report should be studied very carefully and that public consultation be further encouraged to address these moral issues. Decisions relating to the Bill should not be taken in haste.

Notes:


'Are Gay Rights Right?', Roger Magnuson, Muitnomath Press, Portland, 1990 p70

'Are Gay Rights Right?', Roger Magnuson, Muitnomath Press, Portland, 1990 p70

9 Sexual Choice and Equal Opportunities, South Australian Equal Opportunity Commission.


12 Roe v Wade,1 973 Court Judgement section IX


16 Abortion: the crisis in morals and medicine, NM de S Cameron & PF Simons, IVP

17 For example, the Human Sciences Research Council Poll taken in 1992; Readers Digest Poll taken in 1994; and the National Progressive Health Care Network Poll taken in 1994 on abortion.

18 Dodson & Keightley. 'is this a new era for human rights?' Article in Argus, November 29, 1993.


20 Roe v Wade, 1973 section vi 1

12 The Results of Banning Prayer and Bible, Mrs R Grugg, WCTU, Pennsylvania.

23 Education and the Founding Fathers. video produced by Walibuilders. "charisma, march 1993, P60

25 Charisma, September 1993, p33
26, I3utelezi signals end of censorship', The Argus, 9 August 1994, pl and 'Censorship law to be relaxed', The Argus, Wednesday December 7, pl


28 Back to Baai', Dr J. Dobson in Joy, oct/Nov 1993
COMMUNITY DEVELOPMENT TRUST

8 March 1995

PRELIMINARY PROPOSAL BY COMMUNITY DEVELOPMENT TRUST TO THE CONSTITUTIONAL ASSEMBLY

Enclosed please find draft proposals concerning the inclusion within the Constitution, presently being drafted, of tax-deductibility of donations to registered NG0s as an alternative to Government obligations to and administration of funding, for consideration by the Constitutional Assembly.

Your response to these proposals is awaited.

N. JOSEPH KGANAKGA

DRAFT PROPOSALS TO THE CONSTITUTIONAL ASSEMBLY
We submit this preliminary proposal for your kind consideration. We undertake, if so requested, to submit a fuller written memorandum and to make verbal representations to you.

We suggest that it is not the exclusive function or sole duty of the State to provide social and community services. It should be entrenched in the Constitution that people and communities have a right to provide social and community services.

With that right what flows is:

(a) the partial release from the State of the financial obligation to provide the services; and

(b) an equitable method of generating funds into the hands of the communities to do so.

The controls for the orderly performance by communities of these services should be via the mechanism of Non-Government Organisations (NGOs), which structures already exist. Formal registration of NGOs should contain the controls necessary to eliminate abuse. The funding of NGOs should be primarily by the private sector, that is, the communities which they serve. The method of funding should be by way of donations, which should be tax-deductible and, where appropriate, Estate Duty-deductible. If the concept in principle finds favour, then the parameters and mechanisms of the deductibility are issues which can be resolved in due course.
The concept is not unique. Present mechanisms exist in the Income Tax Act and the Estate Duty Act whereby certain donations are Income Tax-deductible and certain bequests and donations are Estate Duty-Deductible. The parameters only need to be expanded. The experience of such countries as the United States of America bears witness to the success of this method of funding. A major source of funding for education, medical and scientific research, charitable work, and arts and culture emanates from the private sector which has the benefit of tax deductibility of such funding.

The merit of this proposal is:

1. Communities would be encouraged to provide their own social and community services.

2. Community and social services would be funded largely by the communities themselves.

3. The State would be largely relieved of the burden of providing the services.

4. The State would be partially relieved of the duty and enormous costs of recovery of tax, and also of the cost from such recovered tax of the administration and provision of the social and community services.
MINORITY GROUPS

The implementation of human and Group rights as recommended by the SA Law Commission will have to be done in an irreproachable manner in any new Constitution.

Minority Groups' rights will have to be guaranteed. Of great importance are the events in Nigeria and many other African states (also elsewhere in the world). It is alleged that only approximately 10% of a country's population are inspired by unitary and similar ideals. As soon as tension exists, the basic division comes to the fore and takes over - the population again divides itself into conflicting groups. The much renowned unity lies in pieces and the whole nation-building process is back where it started. (Compare the present increasing tension between the Xhosas and the Zulus.)

A constitution must originate from the wishes and desires of all that country's inhabitants. It must realise cultural opinions and inherited value systems.

It is clear that the Westminster model and all other European models do not suit Africa.

Just as little as there is a united front between the whites of the country, there is a front amongst the blacks.

The apparent front which was there for the past decades, was based upon a common hatred for the White man because of legal systems which were forced upon blacks. This front will probably crumble when the present system makes place for another system which is acceptable to the majority.

Political independence for the Black man must rather be seen as an independence which frees the Black man from his economic fate. In the states (Africa and the rest of the world) where group interests are not accommodated constitutionally,
disintegration quickly set in. Die Burger of 15 May 1990 summed up this point of view in a main article:

"One of the core facts about South Africa is that a multi-ethnic and multi-cultural society where minorities can easily be disadvantaged if their rights are not protected, actually requires no strong argumentation. What is also true is that such protection dare not boil down to favouring on the basis of race and colour basis. Such an approach is doomed.

Yet it is also so that ethnic, cultural and religious differences in many cases transcend race or skin-colour. The reality of South Africa dawned on us all the stronger. " The main article continues to define minority rights:

"Such rights include amongst others that South Africa must be a legal state where the supreme authority of the law applies, a guaranteed charter of human rights; a parliamentary democracy with I multi-party system and regular elections; a free-market system, an guarantees against dictatorship; property right and private ownership; own schools wit equal state support and representation of minority groups in government organs. There must be no special privileges for a particular group."

Despite cultural difference such as:

First and third world people - each with own tradition an apparently divergent view of a legal system.

Apparently radical differences in regard to State management - it still seems possible arrange a reconciliation between these ideas. What appears to be unsurmountable differences on the surface, seems, after thorough investigation and analysis, to be not really irreconcilable. To me the revolution of increasing expectations in Africa (and presently South Africa) has less to do with political aspirations than with economic aspirations. soon as the latter have effectively been met as a sine qua non, the road to the former will cause unmentionably fewer problems.

The prerequisite is, however, again in the mentioned warning of Die Burger: "There must not be special privileges for a particular group."
Delivered to the Constitutional Public Meeting held on the 25th February 1995 in the Town Hall, Graaf-Reinet by Alderman K. H. de Lange
Twelve Tribes Organization

We’re the hopefully youths of South Africa, especially Afrika children. Willing to have our land prosperity uplifted. Pleading for the FF items be included in our land's constitution:

(1) Doors of learning and culture must be opened;

(2) Freedom of press as well as speech;

(3) Ganja (dagga) must be legal;

(4) Reserved land for Bantu plantation to uplift the falling country’s economy;

(5) African history be taught at school as it is revelation of hidden truth about Afrika.

(6) Repatriation must be freed, Africans to Afrika.

Wishing that our cryings be heard to the House as it’s in the Lord; Jah Rastafari Holy Trinity's spirit be upon your meditations.

HAILLE SELASSIE 1 LIVE

(SGD) ?
As MEC responsible for housing in the Province of the Western Cape, I would like to make a submission to Theme Committee No. 3. I have also taken note of a submission made by the national Minister of Housing in this regard.

When it is decided to have three levels of government, it is imperative to ensure that all three levels can operate as governments and not as an administration performing functions on behalf of any higher level of government.

Although the interim constitution determines housing to be a provincial competency in the first instance, with national to take responsibility for certain exceptional issues, the experience thus far has been that provincial government has been treated as an extension of national government and in practice only delegated powers have been put in place.

This problem stems from a centristic approach and is based on the view that all financial resources for housing, should be allocated and controlled nationally. If money is centrally controlled, obviously, there will be an accountability with the national minister and therefore the institutional arrangements will have to be such that full control can be exercised. The crux of the problem is therefore the way in which money is made available to provinces.

Obviously the central government has to play a decisive role in determining the national priority of housing and therefore the percentage of the budget to be made available for this purpose. This can lead to the determination of the percentage of a provincial budget to be made available for this purpose. It is not necessary for a system whereby allocations are done nationally.

I fully support the principles embodied in section 155 of the interim constitution and believe that application must be such that the bulk of money for a particular functional area becomes available through the fixed percentages of national income as stipulated. Conditional transfers should be the
exception because this method of distribution leads to central accountability and control, nullifying the principles embodied in section 155. There is a need to spell out more clearly the powers and functions of the different levels of government in the final constitution in order to avoid the conflict potential inherent in the application of Section 126 of the interim constitution thus far.

It is not acceptable to me that control of provincial institutions in the housing field, rests with central government with only delegated powers being assigned to the provincial level.

On the other hand, I support the idea that central government should have the power to intervene where the exceptions defined in Section 126 of the interim constitution come into play.

It is dangerous and a waste of money to create a level of government which eventually, due to lack of independent sources of revenue and lack of original powers, is nothing but an administration. There is no justification for a legislature to be in place if this is the case.

In order to further enlighten the committee, I attach a position paper which has been fed into the national process of drafting a housing strategy for the country.

G N MORKEL
MEC FOR HOUSING

POSITION PAPER ON HOUSING AS A PROVINCIAL FUNCTION:
THE RELATIONSHIP BETWEEN CENTRAL AND PROVINCIAL

The legislative framework and its implications:

1.1 The legislative framework

1.1.1 Schedule 6 of the constitution lists housing as a provincial function.
1.1.2 Section 126 empowers a provincial legislature to make laws with regard to the housing function.

1.1.3 A law of a provincial legislature shall prevail over an Act of Parliament except in so far as the Act of Parliament -
(a) deals with a matter that cannot be regulated effectively by provincial legislation;

(b) deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) is necessary to set minimum standards across the nation for rendering of public services;

(d) is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

1.1.4 Section 155 of the Constitution states that a province is entitled to an equitable share of the revenue collected nationally in order for it to provide services and to perform its functions and powers effectively.

1.1.5 It is further stated that this share shall consist of fixed percentages of income tax, VAT and the petrol levy as determined by an Act of Parliament, as well as transfer duty collected nationally on property situated within the province concerned.

1.1.6 In addition conditional or unconditional allocations from national revenue can be made.

1.1.7 The fixed percentages will be determined after taking into account national interest and on recommendations of the Financial and Fiscal Commission.

1.1.8 Specific legislation on housing exists in the form of the "Housing Arrangements Act", (155 of 1993) which have to be read in conjunction with all previous own affairs acts which now also falls under the jurisdiction of the National Minister.

1.1.9 The Housing Arrangements Act mainly provides for the establishment of a juristic person, namely the National Housing Board which has an advisory role vis-à-vis the National Minister and "shall do everything in its power to ensure that the national policy in respect of housing" as determined by the Minister, is executed.
1.1.10 It also provides for regional boards which are not juristic persons, which are extensions of the National Board and which takes its instructions from the National Minister to perform such delegated tasks of the National Board, that he may deem fit.

1.1.11 In the latest amendment to this act it is provided that a Provincial Board may be appointed by the housing MEC. The amendment act also prescribes in broad terms how such a board must be constituted. It remains an extension of the National Board, and is accountable for its actions to the National Minister.

1.1.12 Act 155 of 1993 further provides that the administrative functions of the Regional Board shall be executed by employees of the relevant provincial administration.

1.1.13 It is also provided that the assets of the National Board situated in a province, be administered by a committee consisting of officials in the employ of the provincial administration and as designated by the responsible MEC.

1.2 The implications of existing legislation and the present policy framework

1.2.1 At the outset it must be stated that the National Housing Forum plays a decisive role in the formulation of housing policy and has been playing such a role ever since its inception. Existing legislation was also the result of agreements reached between the national department and the NHF.

1.2.2 The main energy source within the forum, is para-statals such as the Urban Foundation, The Independent Development Trust and The South African Housing Trust.

1.2.3 Up to a late stage provinces had no pro-active involvement and virtually no reactive involvement of real substance. They were later involved in the nine Joint Technical Committees.

1.2.4 Some of the more important principles accepted so far and which have a direct bearing upon the institutional arrangements, are the following:

- The basic allocations of functions to relevant role players to be:
  
  (a) **Government**: To determine goals, policy and strategy and to legislate, regulate, guide and enable.

  (b) **Statutory Board**: To provide an inclusive forum to develop policy and strategy and to allocate resources.

  (c) **Para-statals**: To facilitate delivery in order to "level the playing fields" for developers (which may include provincial housing departments) the statutory board must function independently from such a provincial department.
a board must be a separate transparent body and therefore must have constituencies, and lobbies such as community based organizations, political parties and producing sectors, must have representatives on the board.

in order to have central control, a provincial board cannot be a juristic person and it will be an extension of the national board, executing delegated powers and being accountable to the National Minister.

1.2.5 Looking at the position of provincial executive authorities, the implications of the existing legislation regulating housing can be summarised as follows:

Political office bearers in provincial structures have no real role to play in own right. The only competencies in terms of the existing legislation are to appoint a provincial housing board and an assets committee. However, both bodies are extensions of the national structures and are obliged to take their instructions from there.

The promotion of housing delivery is in the absence of effective political power, effectively in the hands of the Regional Housing Board {RHB}. Whereas the local political accountability rests with the MEC for housing.

The execution of policy and strategy is seen to be the responsibility of the RBB. This creates a lot of tension with the department serving the MEC. The execution of policy and strategy is the line responsibility of such a department supporting the MEC in taking political responsibility.

The RHB is operating under delegated authority from the national minister and the NHB, with no formal accountability to provincial political structures. In this regard, all policy, strategy and even administrative procedures are being prescribed from national level. Even assets within the boundaries of a province are being administered under the control of national level.

1.2.6 It is therefore clear that existing legislation cannot be used to effectively assign the housing function to provinces as allowed for in Schedule 6 of the constitution.

2. Expectations regarding Provincial Government

2.1 Expectations of provincial government is guided by the Constitution, which clearly states housing as a provincial function with only certain exceptions bringing the national level into play.

2.2 The provincial housing Minister is therefore primarily responsible for the promotion and delivery of housing. He can as democratically elected representative, be expected to produce the goods.

2.3 Lack of results will inevitably be laid before his door.

2.4 A functionary can only be made effectively accountable if he/she is in full control of resources and has own legislation to back him/her up.
2.5 It must be accepted that a responsible and capable democratically elected provincial government is as keen to produce housing for the electorate as anybody else, because it can be thrown out, if this is not the case.

2.6 It is not necessary to plead with provincial governments to perform; they will do it, if given the means. Being a government, they should be allowed to determine own priorities.

2.7 It is also not necessary to prescribe from elsewhere, in order to redress past imbalances or to prevent discrimination. The Constitution Act looks after that.

2.8 In short: Provincial Government is expected to govern in own right and not to hide behind big daddy in Pretoria.

3. The collective responsibility

3.1 South Africa however, remains one country and there is a collective responsibility between Central and Provincial.

3.2 In order for the constitution to work effectively, the approach by Central Government should rather be conservative as far as the application of the exceptions in terms of Section 126 of the Constitution is concerned.

3.3 Emphasis should be on enabling in a voluntary fashion and not to dominate and prescribe. The principle of subsidiarity; i.e. just those functions which cannot be executed effectively at Provincial level, to be performed at the higher level, should apply.

3.4 Although we all subscribe to the principle that fragmentation should be stamped out, we should not confuse the unacceptable horizontal fragmentation in terms of the previous Constitution, with the healthy vertical fragmentation built into the new dispensation.

3.5 This collective responsibility inevitably leads us to the importance of clear demarcation of responsibilities and authority.

4. The need for demarcation of responsibilities and clear lines of communication and authority

4.1 No system can work effectively if areas of authority and responsibility overlaps between different institutions in the same environment.

4.2 In this regard, the position of a MEC and through him, his department, must be clearly understood.
4.2.1 The buck in terms of promoting and regulating housing in a particular province must stop with the MEC, because in terms of the Constitution it is his responsibility.

4.2.2 It has already been argued that he should not be able to hide behind Central Government, because he was democratically elected to the legislature and appointed as MEC.

4.2.3 For clarity and effective performance the functions of Central Government, should be restricted to those listed as exceptions where central legislation may prevail i.e.: enabling Provinces to "regulate effectively" ensuring uniform and minimum norms and standards where justified acting where national or interprovincial interests can be jeopardized.

4.2.4 A MEC, in the first instance utilizes his department to assist in execution of his function to promote and to regulate housing in the province.

4.2.5 He may also use other instruments such as a statutory board and para-statals to assist.

4.2.6 Whatever he does, he can never abdicate any of his responsibility to an institution over which he has no control or over which the Provincial Government in a wider sense has no control.

4.2.7 Therefore, any housing board department, para-statal or local authority must in some way be accountable to the MEC. Doing it otherwise, will put the MEC in an invidious position of carrying the political responsibility but not being able to effectively guide and direct.

4.2.8 If more than one instrument is used, clearly a firm demarcation of responsibility is an unquestionable prerequisite.

4.3 A system at national level, prescribing all facets of institutional capacity, prescribing detail of procedural methods, prescribing strategy and prescribing all policy; clearly does not fit into the preferred system.

4.4 For example it cannot be argued that every Province must have a housing board, because not having a board, does not say that a province will automatically not adhere to any norms or standards or that economic unity for example will be threatened.

4.5 The most important facet where overlapping responsibility will create problems, is the control of funds. Duplicating "accountability" between central and provincial for the same funds, necessarily leads to dual control and tension. Therefore the way in which the purse is controlled is crucial to the relationship under discussion.

5. Handling the purse
5.1 As section 155 of the Constitution clearly states that provinces are entitled to an equitable share of the national income and that this *inter alia* consists of fixed percentages of certain national income sources, it becomes clear that the spirit of the Constitution is to enable provinces to mainly determine their own budgets and priorities for the functions entrusted to them.

5.2 The present system of a national budget for housing being divided between the 9 provinces by the National Department has the effect that all funds for housing purposes are being transferred as conditional transfers. This is clearly not in line with the letter and spirit of Section 155 of the Constitution.

5.3 This system also has the effect that the National Minister has a co-"accountability" for the money and hence overlapping of functions with the concomitant tension ensues.

5.4 A system whereby the bulk of the funds are generated through the fixed percentages and appears directly on the Provincial budget, frees the conscience of the National Minister in terms of financial accountability and enables him to focus on his functions in terms of Section 126.

5.5 Money retained at national level, should be targeted at emergencies and big projects of national importance which cannot be accommodated in Provincial budgets.

6. National, Provincial and Local structures: roles and responsibilities

6.1 The function of governing:

6.1.1 The following definition of government at all three levels, is acceptable, provided that in terms of legislation, the content of each of the functions will vary according to the level of government:

"The governmental role of defining and monitoring goals, determining policy, formulating strategy and legislating, regulating, directing and enabling/facilitating the sector in accordance with such goals, strategies and policies."

6.1.2 The responsibility for this function rests with the political functionary and his department.

6.1.3 National level
The legislation determining the content of governance at this level, is the Constitution and more specifically Section 126 thereof. The following functions should be included:

6.1.3.1 Setting and promoting achievement of national housing delivery goals;

6.1.3.2 determining broad national housing policy in respect of:-

- land title and registration systems;
- minimum national norms and standards for housing provision;
- uniform national norms and standards;
- additional fund allocation to provinces;
- fund allocation to national facilitative programmes,
6.1.3.3 adopting or promoting legislation to give effect to national housing policy,

6.1.3.4 establishing an institutional framework at national level.

6.1.3.5 monitoring national performance and accounting to national parliament.

6.1.3.6 overseeing and directing the activities of national statutory advisory and facilitative institutions and accounting to national parliament.

6.1.3.7 negotiating additional funds to be distributed as transfers.

6.1.3.8 accounting to national parliament in general.

6.1.4 Provincial level
Picking up on housing as a Schedule 6 function in the Constitution, the following functions should be executed at provincial level:

6.1.4.1 setting of provincial goals;

6.1.4.2 determining provincial housing policy in respect of minimum housing norms and standards; development priorities and programmes; urban and rural development; land identification and planning; spatial restructuring of cities and towns; procedural matters; the application of national enabling frameworks (including subsidies)

6.1.4.3 determining housing strategy

6.1.4.4 monitoring housing delivery and accounting to the provincial legislature;

6.1.4.5 overseeing and directing the housing activities of provincial statutory advisory and executive bodies and local authorities as well as the activities or provincial facilitative institutions and accounting to the provincial legislature;

6.1.4.6 facilitating housing provision through enabling actions;

6.1.4.7 development entity of last resort provided that this part of the organization be divorced from the rest of the department;

6.1.4.8 liaising and negotiating with the national level in respect of additional funds in the form of transfers; provincial priority status in respect of national facilitative programmes; national housing policy.

6.1.5 Local level
This level will derive its functions from provincial housing legislation and will carry the primary responsibility to ensure that housing is delivered to inhabitants. The following housing functions are supported:

6.1.5.1 setting local housing goals;
6.1.5.2 land identification and designation for housing purposes;
6.1.5.3 safety and health standards regulation;
6.1.5.4 creation and maintenance of a public environment conducive to viable development;
6.1.5.5 mediation of conflict;
6.1.5.6 initiation, promotion and enablement of appropriate housing development;
6.1.5.7 facilitative support of housing delivery agencies;
6.1.5.8 planning, funding and provision of bulk engineering services;
6.1.5.9 provision of community and recreation facilities;
6.1.5.10 welfare housing;
6.1.5.11 land planning;
6.1.5.12 regulation of land use and development.

6.2 In support of the governing function, the following is accepted:

6.2.1 Participatory decision making

6.2.1.1 National level
a statutory board, representative of various sectors in the housing field, is supported to play an advisory role to ensure that structured consultation takes place in the execution of the governing functions.

6.2.1.2 Provincial level
A statutory advisory and decision making body constituted by and accountable to the provincial executive authority consisting of the relevant MEC and his department and being representative of relevant sectors in the housing industry should play a supportive role.

Such a Board will at request or on own initiative advise the executive authority on policy and related matters.

It will be a juristic person also responsible for the management of all assets which previously belonged to the Statutory Boards.
The housing board will have executive responsibility to consider projects for subsidies and funding.

A statutory housing fund must be established to serve as financial conduit to enable a multi-year programme and to fund capacity building, community development and consolidation.

This fund will be financed by way of yearly allocations from the Provincial budget and may be augmented by additional transfers from Central level.

The PHF will be managed and be accounted for by the Director-general or another official duly appointed by him.

6.2.2 Facilitation/enablement

6.2.2.1 National level
It is agreed that the need for intervention at national level to create an enabling environment may require the following:

- national Mortgage Indemnity Scheme;
- National Wholesale Housing Bank, etc.

6.2.2.2 Provincial level
As the primary promotor of housing in the province, the Provincial Government will be responsible for facilitating housing delivery in general. Towards this end the following interventionist actions are supported:

specialised entities acting as intermediaries in the funding of bulk and social land acquisition, infrastructure, development projects from a working capital point of view and end-user financiers where the unavailability or inaccessibility of such finance is inhibitive;

a departmental delivery mechanism structured separate from the rest of the department or

a state regulated corporate delivery institution.

NOTE: Last mentioned two mechanisms to act as developer of last resort.

6.2.2.3 Local level
This level will largely be directed at the delivery process as a developer of last resort at local level. Where such intervention takes place, it must be structured and funded in a way that will enable sustained non-state sector participation.

7. Application in practice
The following practical steps in order to create a framework for an acceptable relationship between the national level and provincial level, is supported:
7.1 That all funds for housing purposes to be expended by provinces be channelled directly through the provincial budgets and that the bulk of such funds be generated via the fixed percentages on national state revenue as stipulated in Section 155 of the constitution.

7.2 That in order to emphasise the original powers of provinces on housing matters as assigned in the constitution and to create an enabling framework for local authorities it be accepted that separate legislation for provincial and central level be created.

7.3 At provincial level the purpose of such an act should be to promote and to regulate housing delivery by enabling local authorities and other developers to provide housing. The act should *inter alia* provide for the following:

The MEC may appoint a provincial housing board to execute functions as stipulated by him.

The MEC may determine the size and constitution of the board so appointed.

The board can be a juristic person and all assets of the NHB falling within the boundaries of a province can be transferred to the board.

Provision can be made for an executive committee to handle day to day administration.

Provision can be made for a provincial fund through which all monies will be channelled to promote housing delivery and to facilitate holistic development of communities.

The relevant accounting officer of the provincial administration should be the accounting officer for all funds channelled for this purpose.

7.4 At national level, the purpose of such an act must be:

to enable provincial government to effectively handle and regulate the promotion of housing delivery in own right; to determine uniform norms and standards which, in terms of the constitution, can be interpreted to be necessary in order to perform the housing function effectively;

to set minimum standards for the rendering of public services as far as it can be construed to be applicable to the housing field in terms of the constitution;

to ensure the maintenance of economic unity, to protect the environment, to promote interprovincial commerce, to protect the common market in respect of the mobility of goods, services, capital or labour and to maintain national security as far as it is applicable on the housing terrain;

to ensure that any provincial law does not materially prejudice the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies as far as it relates to the housing terrain.
7.5 In terms of the purpose of the national act as set out above, it is suggested that any policy ruling in terms of the act be in either one of two formats:

- compulsory format (powers in terms of Section 126 of the Constitution;
- voluntary format (enabling instruments which can be used according to need).
Proposals for a new Juvenile Justice Act have just been submitted for discussion by a drafting group including representatives from NICRO, Lawyers for Human Rights, the Institute of Criminology (UCT) the Community Law Centre (UWC) and the Community Peace Foundation. They are receiving widespread approval from within many branches of state and the NGO sector.

Their implementation would have direct impact on the constitution. And because the principles they embody are derived from both local custom and international instruments they need to be considered by your committee.

I enclose a copy of the proposals and direct your attention to the following points specific to Theme Committee 5:

@CONSULT = Structure of the courts

The proposals suggest an extension of the court structure for juveniles which has been termed a Family Group Conference. This is a development of the ancient and traditional kgotla or inkundla system and the community courts of the 1980s. Details of this system can be found in the proposals at pages 18 and 44.

The rules pertaining to regular courts are extended and developed with regard to juveniles at pages 23–28 and 47–49, and sentencing at pages 30–32 and 51–53.

@CONSULT = Appointment of a judicial officer

The qualifications for the appointment of a judicial officer are dealt with in the proposals in that it is suggested that a new class of officer, a Youth Justice Worker, be created. It is suggested that this person have prosecutorial status. But they would not have to be a lawyer or probation officer, but would be appointed primarily for their community knowledge.

The development of this class of judicial officer would have absolute impact on the judicial structure and needs to be regarded when considering any constitutional embedding of appointment processes so as not to exclude this type of official.

For details of this class of official see the proposals at pages 29, 50 & 51.

@CONSULT = Accountability of the judiciary
The judiciary should be accountable to the people. The mechanism for this is embodied in the juvenile justice proposals and is developed in the following point.

@CONSULT = Popular access to the courts

The proposals suggest a community-based justice system which gives the accused, their families or guardians, community members, the victim and the victim's support group direct access to decision-making through the family group conference. As decisions of this conference are legally binding it must be considered to be part of the justice system.

See details of this in the proposal at pages 18-22 and 44-46

These suggestions should be read in conjunction with the Principles (page 39) and Definitions (page 37)

The new Constitution and Bill of Rights must take into account the special nature of childhood. Please ensure that these important documents are only drafted after a detailed reading of the Beijing Rules and the Convention on the Rights of the Child. If assistance on this is needed please do not hesitate to consult me or any other member of the Juvenile Justice drafting team.

signed

..........................................................................

On this...........day of...............................1995

@PB =

@MDBO"The Executive Director@MDNM"
@MDBO"Constitutional Assembly@MDNM"

@HEAD = Submission to Theme Committee 6
@HEAD = Specialised structures of government
@HEAD = Sub-theme Committee 4
@HEAD = Police

@MDBO"Dr Don Pinnock@MDNM"
@MDBO"For the Institute of Criminology@MDNM"
@MDBO"University of Cape Town@MDNM"

Proposals for a new Juvenile Justice Act have just been submitted for discussion by a drafting group including representatives from NICRO, Lawyers for Human Rights, the Institute of Criminology (UCT) the Community Law Centre (UWC) and
the Community Peace Foundation. They are receiving widespread approval from within many branches of state and the NGO sector.

Their implementation would have direct impact on the constitution. And because the principles they embody are derived from both local custom and international instruments they need to be considered by your committee.

I enclose a copy of the proposals and direct your attention to the following points specific to Theme Committee 6, Sub-theme Committee 4:

@CONSULT = Policing

The juvenile justice proposals suggest an expanded role for police, particularly community police, in the arrest of young people under the age of 18. The proposals allow for wider discretion and an extended power of caution. Details of this can be found in the proposals at pages 8-17 and 41-44.

These suggestions should be read in conjunction with the Principles (page 39) and Definitions (page 37)

The new Constitution and Bill of Rights must take into account the special nature of childhood. Please ensure that these important documents are only drafted after a detailed reading of the Beijing Rules and the Convention on the Rights of the Child. If assistance on this is needed please do not hesitate to consult me or any other member of the Juvenile Justice drafting team.

signed

.................................................................

On this................day of................................1995

@PB =

@MDBO˜MDNM¨
@MDBO˜The Executive Director@MDNM¨
@MDBO˜Constitutional Assembly@MDNM¨
@MDBO˜MDNM¨
@HEAD = Submission to Theme Committee 4
@HEAD = Fundamental Rights

@MDBO˜Dr Don Pinnock@MDNM¨
@MDBO˜For the Institute of Criminology@MDNM¨
@MDBO˜University of Cape Town@MDNM¨

Proposals for a new Juvenile Justice Act have just been submitted for discussion by a drafting group including representatives from NICRO, Lawyers for Human
Rights, the Institute of Criminology (UCT) the Community Law Centre (UWC) and the Community Peace Foundation. They are receiving widespread approval from within many branches of state and the NGO sector.

Their implementation would have direct impact on the constitution. And because the principles they embody are derived from both local custom and international instruments they need to be considered by your committee.

I enclose a copy of the proposals and direct your attention to the following points specific to Theme Committee 4:

@CONSULT = Principles

The proposals are unusual in that they are guided by a set of principles which would be embedded in the Act and would serve as an extension of the Constitutional rights with respect to children in trouble with the law.

These can be found in the proposals at page 39 and a description of them at page 7. They should be read in conjunction with the Definitions on page 37.

The new Constitution and Bill of Rights must take into account the special nature of childhood. Please ensure that these important documents are only drafted after a detailed reading of the Beijing Rules and the Convention on the Rights of the Child. If assistance on this is needed please do not hesitate to consult me or any other member of the Juvenile Justice drafting team.

signed

..........................................................

On this........day of............................1995
Fatima Mayman  
Bo-Kaap Neighbourhood Watch  

8 March 1995  

The above organisation hereby wish to support the Eastern Cape projects of Community Courts.  

It should in fact be implemented in all areas.
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INTRODUCTION

As a human rights organisation our submissions to you are primarily motivated by the following considerations:

1. the need to establish a culture of constitutionalism in the sense that all organs of government are subject to the constitution as the supreme law of the land;

2. the need for a credible and independent judiciary.

3. the need for the effective establishment of a human rights culture

4. the need for an accessible and affordable system of justice;

5. the need for the constitution, and in particular the bill of rights to play a vibrant, integral and relevant role in the lives of all South Africans.

Our submissions are also informed by the constitutional principles as set forth in schedule 6 of the interim constitution.

A STRUCTURE AND RELATIONSHIP OF THE COURTS
1. PRELIMINARY REMARKS

We are in broad agreement with the current structure of the judiciary as contained in chapter 7 of the interim constitution. The concept of a Rechtstaat is a fundamental departure from the past. It seeks to establish, promote and guarantee human rights on a scale unprecedented in our history. It demands government subscription to a value system contained in the Constitution and that exercise of government necessarily should result in a materially just legal system. If this is to be done effectively it calls for special measures and fresh and bold approaches.

2 THE CONSTITUTIONAL COURT

a) Specialist Tribunal

Within this context an independent specialist tribunal is an indispensable requirement. Such a court, staffed by experts, held in high public esteem and who have the credibility, legitimacy and sensitivity to decide important constitutional and human rights issues authoritatively, would in all probability ensure that we move rapidly to a new human rights culture. This is in line with the international trend of having specialist tribunals to adjudicate on issues requiring special expertise and sensitivity. More importantly, none of the ordinary courts has the legitimacy to successfully supervise our transition to constitutionalism. The constitutional court is, therefore, rightly entrusted with the historic task of being the final arbiter of constitutional and fundamental rights' issues and the development of a body of constitutional jurisprudence.
b) **Jurisdiction Of The Constitutional Court**

It is our view that the constitutional court should retain its exclusive jurisdiction in the areas currently provided for in Section 98 of the interim constitution, for the following reasons:

- these are matters of national importance and it is critical, in the context of an emerging democracy, that decisions in regard to such issues are made by a legitimate structure that is not constrained by the baggage of the past.

- if the validity of an Act of Parliament were to be justiciable by the Supreme Court, forum-shopping would be encouraged and a situation could arise where conflicting decisions are given by different divisions of the Supreme Court. Apart from the uncertainty which this would create, such cases would in any event inevitably find its way to the Constitutional Court, because of, ultimately, the overriding importance of national constitutional issues. It is also a costly, dilatory and circumspect manner of settling national constitutional issues which may require speedily and urgent determination.

- it is hardly conceivable that a decision of a particular provincial division of the Supreme Court would be acceptable in "inter-statal" litigation. In other words of what value can a decision of the Eastern Cape Province of the Supreme Court be in relation to a dispute of a constitutional nature between the Eastern Cape Provincial Government and the Kwazulu-Natal Provincial Government?
c) **The Workload Of The Constitutional Court**

There is a real possibility that the Constitutional Court will initially be flooded with cases and that it will therefore, find it very difficult, if not impossible, to deal with constitutional matters expeditiously.

i) **The Appellate Division argument**

In this context the argument has been raised that the Appellate Division should be given Constitutional jurisdiction so as to act as a "sifting" mechanism. This would, so the argument goes, considerably decrease the workload of the Constitutional Court and restore the status of the Appellate Division as an important judicial institution. In our view these arguments have very little merit. It is highly improbable that where parties consider a matter to be of sufficient importance to litigate to the level of the Appellate Division, that they would not then pursue the matter further to the Constitutional Court. Such a conferment of Constitutional jurisdiction on the Appellate Division would therefore merely serve to add another level of appeal.

Apart from the negative cost implications of such an exercise, the undue delay in obtaining a final judgement of the matter would cause considerable injustice to the litigants and interested persons anxious to know their rights.

In view of the past record of the Appellate Division in human rights matters, we do not believe that it has the necessary credibility to decide constitutional cases. The Appellate
Division also has a considerable workload of its own in being the final court of appeal in matters non-constitutional. We do not understand how it can be contended that the dignity of the Appellate Division will be affected. In fact it will be assured,

ii) The Two-panel Constitutional Court

We would submit that consideration should rather be given to the introduction of a two-panel Constitutional Court, as is the case in Germany, with each panel consisting of seven judges. The President of the Court could allocate work to the panels according to certain criteria and he/she would also have the power to constitute a full court in matters of very serious consequence.

iii) Direct Access

We are concerned that inadequate provision is made for direct access to the Constitutional Court. Greater latitude for access to the Constitutional Court by individuals should be permitted not only as a quick remedy to obtain a determination on important constitutional and human rights issues but also to ensure the continued credibility and ownership of the court by the people. We submit that, in this context, specific provision should be made for judicial activism where there is manifest injustice and to enable the court to mero motu inquire into urgent and serious cases of human rights violations. The court should further be empowered to issue appropriate recommendatory and declaratory orders. This would enable the court to intervene in a constructive way so as to ensure that government action, in particular in regard to issues affecting socioeconomic rights, comply with the constitution.
3. THE SUPREME COURT

It must be pointed out that the Supreme Court, as currently constituted, is in need of redress if it is to be representative and serve the interests of the Rechtstaat. Notwithstanding its current judicial make-up we would submit that the Supreme Court be retained in terms of its structure and jurisdiction as envisaged in S 101 of the interim constitution.

It is important if the Constitutional Court is to be effective that it should not be unduly burdened by an excessive workload. Further, and in line with our principle of making the constitution a living document, it is crucial that the constitutional issues be deliberated on at all levels of the judiciary.

4. LOWER COURTS

a) Constitutional Jurisdiction

We are concerned with the lack of constitutional jurisdiction of the lower courts or the "other courts" provided for in S103. It is there that questions of access to justice are most real and pressing. It is our view that limited constitutional jurisdiction should be conferred on these tribunals.

Jurisdiction here should ensure that the lower courts, particularly the magistrate's court, interpret, protect and enforce the constitution. This is no more than the lower courts are expected to do in relation to all other laws. More particularly we would argue that the
magistrate's courts should have jurisdiction to determine disputes relating to alleged or
threatened violations of fundamental human rights and 'disputes relating to the
constitutionality of administrative, executive or legislative acts of local authorities. These
courts are at the coalface of the administration of justice and it would be short-sighted to
exclude them from the development of a human rights culture.

5. SPECIAL COURTS

As a matter of principle the new constitution should make provision for the establishment of special
courts, either on an adhoc or permanent basis, to deal with particular human rights violations where
these are widespread or occur in significant proportions e.g. juvenile courts, maintenance, domestic
violence, sexual offences, gangsterism, etc. Provision should be made for lay participation in these
courts so as to involve members of the community in decisions on issues which have serious
potential to severely undermine the development of a human rights culture and community
solidarity.

6. SINGLE / SPLIT JUDICIARY

It has been argued that the present dual structure of the judiciary is problematic primarily because
people perceive the standard of justice in the lower courts to be inferior. We would concede that
such a perception is quite common and in many cases it is founded in truth.
However, we disagree that such inferior standard is a necessary consequence of a split judiciary. It is more the result of inadequate training, racist attitudes, lack of specialisation, lack of representivity and inadequate methods of appointment of officials in the lower courts.

The system of having lower courts to deal with less serious cases is one that has found favour in the vast majority of countries. We submit that the present structure should be retained but that the lower courts be audited and reviewed as a matter of urgency with a view to the proper training of officials, the elimination of racism and the achievement of representivity.

B. MECHANISMS FOR APPOINTMENT

1. JUDICIAL SERVICE COMMISSION

We are in agreement with the current mechanisms with regard to the appointment of judges to both the Constitutional Court and the Supreme Courts. We are also satisfied with the composition of the Judicial Services Commission. However, we would submit that it is vital to require that the Judicial Services Commission arrive at its recommendations in a fair and transparent manner. This should involve, in our view, public selection hearings and the publication of selection criteria. The recent polemic surrounding recommendations made by the Judicial Services Commission serves to illustrate the dangers of a closed process.
2. MAGISTRATES COMMISSION

The Composition of the Magistrates' Commission should be determined constitutionally along the same lines as the Judicial Services Commission but with a much greater bias in favour of community representation. The reasons are obvious:

a) If the constitutional determination of the composition of the J.S.C. serves to remedy previously defective mechanisms for appointment of judges, than the case for the Magistrates' Commission is an a fortiori one.

b) The Magistracy is in a real sense the public face of the administration of justice and it is therefore vital that this institution has credibility. Such an objective would be well-served by the involvement of community representatives in the appointment process.

In view of the crisis of legitimacy in the magistrates courts it is crucial to entrench in the constitution the following criteria for the appointment of magistrates:

a) representativity with regard to race, gender, culture and language

b) training and experience

c) expertise in particular fields of relevance
By the same reasoning it is of fundamental importance that the constitution should require transparency in the selection process.
ASSOCIATION OF REGIONAL LOCAL GOVERNMENT OF SOUTH AFRICA

1995. 03. 14

SUBMISSION TO THEME COMMITTEE THREE ON REGIONAL LOCAL AND LOCAL GOVERNMENT

With reference to the letter of the President of this Association, of which a copy is attached for easy reference, I enclose herewith a revised Paper Two as well as Paper Three as promised, for your consideration and perusal.

The amendments to Paper Two are as follows:

Page 19: Para 4.14.5: The spelling of 'FISCUS " has been corrected.

Page 21: Para 5.1.4: The words "which are essentially those functions affecting the province as a whole" have been added to the last sentence.

Page 21: Para 5.2. 1: The words 'where such Local Government can perform such functions utilizing its own resources" have been added to the last sentence.

Page 31: Items (c): the words "laws or" have been added.
Page 31: Item (d): This item has been added.

G P L SMITH
DIRECTOR
University of the Western Cape

Community Law Centre

11 March 1995

Re: Submissions: The Interim Constitution and Muslim Personal Law

We enclose undercover hereof a copy of a paper (together with a summary) that was commissioned by the Gender and Law Research Project of the Community Law Centre from Adv. N. Moosa, a Senior Lecturer in the Department of Comparative and Public International Law, University of the Western Cape.

The paper concerns the relationship between the Bill of Rights and any system of Muslim Personal Law which may be recognized by the State in future. The conclusion, of this paper are that any system of religious personal law that is recognized by the State should be unequivocally subject to all the provisions in the Bill of Rights. Thus freedom of religion which is guaranteed in the Bill of Rights is subject to the limitation that religious rules and practices which are giving the force of law do not violate the fundamental rights of other citizens. This is of particular relevance to the fundamental right of women to equal dignity and equality before the law.

The Gender and Law Project has also done further research on the approach adopted by international human rights law to this question. In this context, the limitations clause plays a key role in reconciling the right of freedom of religion with the fundamental human rights of individual members of the religious community. The approach of the Human Rights Committee in supervising States Parties' obligations under the International Covenant on Civil and Political Rights, 1966, is to require the State to protect the maximum scope of free religious practice compatible with the fundamental rights of others (article 18).

Adv. Moosa would be willing to address this question at a hearing of Theme Committee 4 should the Committee wish to have verbal representations on this matter.

Sandy Liebenberg
Gender and Law Research Project
Position of MPL in SA up to present
The first Muslims arrived at the Cape from the Dutch colonies in the East Indies (now Indonesia) and the coastal regions of Southern India from anywhere around 1652 - 1658. Despite having been granted freedom to practise their religion since 1804, Muslims could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently, more than 300 years later. It is, however, anticipated that the rapid changes taking place in SA since the democratic elections of 1994 will rectify this situation expeditiously.

Muslims only constitute an estimated 1.1% of the total population. This figure is approximated at 500,000.

There are various institutive bodies of experts on Islamic law, namely Ulama (religious) bodies located in each of the four erstwhile named provinces (Natal, Transvaal, Western and Eastern Cape). Although their decisions are of a binding nature upon the conscience of Muslims, and while their competence to apply Islamic law is questionable as they do not necessarily have accredited legal training, they also lack the legal power to enforce it. This is due to the non-recognition of MPL.

The previous minority Government enquired into MPL through the SA Law Commission Project 59 on Islamic law marriages and related matters. The present government of national unity has taken this one step further in that the interim Constitution of SA (Act 200 of 1993), which is to be fully implemented by 1999, not only guarantees freedom of religion and belief (S 14 (1)) but also makes provision within the bill of rights that legislation can be provided by the state for the recognition of religious personal law (S 14 (3)(a)) and for the recognition of Muslim marriages (S 14 (3)(b)). However, the government has as yet not given any directive to any official body to investigate the legal recognition and formulation of MPL.
It would appear that the various Islamic bodies, Ulama bodies and relevant organisations has now finally, in the light of the new political setup in South Africa, reached consensus on the recognition of MPL. This process was concluded by the Muslim Personal Law Board being inaugurated on the 14th August 1994 in Durban, South Africa. This Board was founded to initiate the incorporation of MPL into the South African judicial system and to deal with matters relating to its application, interpretation, scope, content, functioning, implementation and administration. Draft bills are in the process of being prepared by members of this board. Some controversy surrounds the founding, representativeness and composition of this Board. While this may highlight the issue of transparency, broader inclusivity and that women's experiences should have consideration in drafting any proposals that affect them, it does not deter from the validity of the Board which emphasises participation by individual organisations.

Why is there a problem?

The big question now is whether MPL is going to be subject to or exempt from the same bill of rights which provided legitimacy for it in the first place? Is the SA constitution going to be supreme (S 4) or is MPL, once recognised, going to be treated as inviolable? Emphasis is placed on the equality clause (S 8). There are varying interpretations in this regard. Problems arise in that this uncertainty has serious implications for Muslim women in the traditional formulation of MPL which accords them an unequal status to that of men. It has to be clarified that while Islamic law and MPL endorses this inequality, Islam and the SA constitution does not. Hence, subjecting MPL to the bill of rights indirectly makes it compatible with Islam. Although freedom of religion and equality between the sexes are both rights guaranteed by the constitution, the bill of rights has failed to address the apparent conflict between these two rights. What is going to be done about new laws in favour of women and covering the areas of oppression within the family but which falls outside the ambit of MPL?

Generally, Muslim women face an awkward dichotomy and duality between their roles as citizens of a nation and as members of a religious community. While commercial and other codes were easily secularized, MPL remains governed by religion. It is as a result of this that NTL conflicts with the constitutions of Muslim majority and minority countries because while the latter guarantee equal rights to all citizens, the former privileges men over and above women in the areas covered by these personal laws resulting in the inequality of the sexes.

In the light of current constitutional developments in South Africa, it seems that local Muslim women will soon have to face and resolve the same problems encountered by Muslim women worldwide if MPL is given due recognition.

The United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) provides equally for religious and women's rights but neither document foresees a potential conflict between the two kinds of rights. Other international measures include the UN convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) of 1980 of which many modern Muslim (e.g. Egypt) and non-Muslim countries (e.g. India) are signatories but have placed reservations on certain of its Articles where it conflicts with MPL.
SA has only very recently become a member of the United Nations and signatory to CEDAW. Although the bill of rights states that a court of law must take cognisance of all international law applicable to the protection of human rights when interpreting it’s provisions, it remains to be seen whether our newly established constitutional court will interpret the bill of rights with regard to CEDAW provisions.

Women in SA should be wary of legislation and reminded that the bill of rights is a "double edged sword whose high sounding language of equality and rights is not always translated into justice." Regard must also be had to the definite conflicts that exist between MPL and substantive SAL and potential conflicts with the constitution.

It remains to be seen whether SA will follow the trend in Muslim countries and sanction the inequalities present in MPL. Although there is evidence in the constitution to the contrary (eg: S 4 (1), S 35 (1) and S 35 (3)), there is more evidence, constitutional and otherwise, to support the view that MPL will be exempt from the bill of rights once it is recognised. There is a limitation clause (S 33 (1)) in the constitution which implies that MPL, once recognised, could limit the bill of rights. Other supporting factors include the following. It appears that if the provisions of the bill of rights is only enforceable against the state (vertically) in SA then it would be very difficult for Muslims to challenge an 'unreformed' MPL. It is clear that potential conflicts between the two fundamental rights of gender equality and religious freedom has not been resolved by the new constitution even though there existed an awareness of these conflicts. Neither has international human rights legislation succeeded in resolving the conflict between women's rights and religious rights.

Recommendations.

In the final analysis, the issue of reform as far as MPL is concerned has been left squarely in the hands of Muslim religious authorities. In SA most of them have no real local legal expertise in this regard and therefore close co-operation between these authorities and the legal profession is essential. International efforts in this regard serve to prove that reforming the law, although partly effective, is not necessarily the complete answer. This, however, does not deter from the validity of some measure of reform and here regard must be had to the effective application of alternate tools to improve the status,of women where reform might not be appropriate. If legislatures and judiciaries have not succeeded in this regard then it may be that gradual social reform within the Muslim community is the only hope for Muslim women who need to become more effective participants in Muslim society and be made aware that while Islamic law and MPL endorses inequality, Islam and gender equality are not necessarily in conflict.

A review of the situation in a number of Muslim states supports the contention that the best option and solution to the application of MPL lies in codifying Islamic law and enacting a comprehensive bill or 'uniform Muslim code' applicable to Muslims. The answer to the SA situation does not lie in adopting a secular uniform civil code. Not only will it be rejected by the Muslim community, but it has failed to really redress the plight of women in countries where it does exist. Much can be learnt from the Indian and Turkish experiences in this regard. The process of reform needs to be set in
motion and addressed in line with the true Qur'anic spirit. It must take place in the context of an evolving SA where regard must be had to its peculiar circumstances.

The relationship between constitutional law and MPL must be very carefully considered. The constitution cannot protect MPL if the necessary justification and legitimation for it is lacking. Although there are arguments to the contrary, it is generally hoped that MPL, once in force, will be subject to and not exempt from the final SA constitution in terms of the provisions of the bill of rights which made provision for its legitimacy in the first place. It is a foregone conclusion that the State has undertaken to guarantee freedom of religion and belief only in so far as it does not violate other fundamental rights of its citizens. Failure on the part of the newly established Muslim Personal Law Board to address and resolve the challenges facing it would result in upholding the status quo of MPL, namely, to continue to exist and function independently of the SA law. At the very least, it should enable Muslim women to theoretically exercise a choice in this regard. In reality however, the vast majority of Muslim women are subjugated by men and male dominated Ulama bodies who continue to regulate their lives along the traditional interpretations of Islamic law. For these women there is no choice. Subjecting MPL to the bill of rights will guarantee that whatever the final outcome of a code of MPL will be, it will provide for equality between the sexes and simultaneously allow for the achievement of this goal to be left in the hands of Muslims. As indicated, an opportunity presents in SA for the implementation of MPL to the advantage of women and it is the duty of the State to ensure this.

______________________________________________________________________________

1. The Qur'an is a religious text considered by Muslims to be the literal word of God. It is a primary source of Islamic law and contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. It is in the areas explicitly referred to by these verses that one finds little or no change in various Muslim countries. The term MPL has been coined by various Muslim countries and jurists because it pertains to, among others, marriage, divorce, inheritance, polygyny, custody and guardianship which falls under the category of family law. Moreover, it is interesting to note that all laws affecting the status of Muslim women have historically been relegated to MPL (private sphere).

2. The Qur'an is separated from the classical formulation of Islamic law or Shari'a by a process of legal development lasting more than two centuries. During this period the Qur'anic norms underwent considerable dilution, often to the detriment of women. It is common for Islamic law, which is the interpretation and application of the primary sources by early Muslims, to be mistaken with Islam itself.

3. The possibility of dual/parallel systems of courts and the fact that it could invariably contradict the concept of equality and the serious constitutional implications this might have for Muslim women who might seek redress to constitutional inequalities originating from
INTRODUCTION

Muslim women face similar status problems in the private and public spheres of life as their non-Muslim (Western) counterparts but, it is alleged that, as members of a religious community, they experience another inequality. This double inequality has resulted in a dichotomy between their roles as citizens of a nation and as members of a religious community. To address this problem, it is necessary to consider how gender issues are dealt with in terms of Islamic law to gain an understanding from a religious perspective. This will facilitate the assessment of the current position of South African Muslim women.

A brief comparative study of the constitutions of some Muslim countries is necessary to highlight firstly, that although modern Muslim governments claim to entrench equality in their constitutions, they rarely uphold these ideals in practice. Secondly, to draw a comparison with the constitutionalisation of Muslim women's rights in South Africa with international experience and how local Muslim women as well as Muslim Personal Law issues can benefit in this regard. Thirdly, to indicate that constitutional rights cannot be guaranteed without the co-operation of religious and customary institutions as permanent solutions are not likely to be found in merely reforming or changing laws. Finally, women, Muslim and otherwise, need "to ask afresh who we [really] are, what we [really] want, and if we are [really] willing to begin to create a new order of things'.

POSITION OF ISLAMIC LAW (MORE SPECIFICALLY MUSLIM PERSONAL LAW) IN SOUTH AFRICA UP TO THE PRESENT

The first Muslims arrived at the Cape from the Dutch colonies in the East Indies (now Indonesia) and the coastal regions of Southern India from anywhere around 1652-1658. Despite having been granted freedom to practise their religion since 1804, Muslims could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently, more than three hundred years later. It is, however, anticipated that


MPL will not be addressed here.
the rapid changes taking place in South Africa since the democratic elections of 1994 will rectify this situation expeditiously.

Data from the Central Statistical Services' reveal that Muslims constitute an estimated 11% of the total South African population (excluding the former TBVC states) compared to the approximately 66.5 % Christians. South African Muslims in general belong to the Sunni school of law and are more or less equally divided between the Hanafi and Shafi'i schools.

A summary of the current position of Muslim Personal Law in South Africa follows. The South African Law Commission, in Project 59 on Islamic marriages and related matters, is presently examining Muslim Personal Law. In its latest progress report, the Commission state that although a start was made on a comparative legal study of South African and Islamic law, the investigation had to be temporarily halted. "The various institutive bodies of experts on Islamic law, namely Ulama (religious) bodies, have responded favourably to a questionnaire issued by this Commission and supported the possible implementation of Muslim Personal Law as part of the South African legal system." These Ulama bodies are located in each of the erstwhile named provinces, namely, the Jamiats of the Natal and Transvaal and the Muslim Judicial Council of the Cape and the Madjlisul Ulama of Port Elizabeth in the Eastern Cape."

Although their decisions are of a binding nature upon the conscience of the Muslims, and while their competence to apply Islamic law is questionnable"; they also lack the legal power to enforce it. This is due to the nonrecognition of Muslim Personal Law. The interim Constitution of the Republic of South Africa," which is to be fully implemented by April 1999,11 not only Guarantees freedom of religion and belief (S 14 (1)) but also makes provision within the bill of rights that legislation can be provided by the state for the recognition of religious personal law (S 14 (3)(a)) and for the recognition of Muslim marriages (S 14 (3)(b)).

Assurances has been obtained from the previous minority government, albeit at commission level only, that the modus operandi of Muslim Personal Law would be determined by Muslims themselves. Hence, the South African Law Commission preferred to leave its implementation to their discretion."The present government of national unity has as yet not given any directive to any official body to investigate various Islamic bodies, Ulama and relevant organisations has now finally, in the light of the new political setup in South Africa, reached consensus on the need for the recognition of Muslim Personal Law." As a result, a Muslim Personal Law Board was inaugurated on the 14th August 1994 in Durban, South Africa. This Board was founded to initiate the incorporation of Muslim Personal Law into the South African judicial system.' Although draft bills are in the process of being prepared to provide interim relief in the areas of marriage and divorce, two main functions face this board: Firstly the, application; who will be responsible for the application of Muslim Personal Law, ordinary courts or special family courts presided over by Muslim judges? [a]nd secondly, interpretation. ""The scope, content, functioning, implementation and administration of Muslim Personal Law will also have to be examined by this Board. Some controversy surrounds the founding, representativeness and composition of this Board. While this may highlight the issue of transparency, broader inclusivity and that women's experiences should have consideration in drafting any proposals that affect them, it does not deter from the validity of the Board which emphasises participation by individual organisations.
It would appear that, whilst almost every major Muslim organisation agree that Muslim Personal Law should be recognised by the civil law, as the new bill of rights proposes, different opinions exist as to whether or not Muslims should be subjected to its provisions. Is the South African constitution going to be supreme (S 4) or is Muslim Personal Law, once recognised, going to be treated as inviolable? Problems arise in that this uncertainty has serious implications for Muslim women in the traditional formulation of Muslim Personal Law which accords them an unequal status to that of men. It has to be clarified that while Islamic law and Muslim Personal Law endorses this inequality, Islam and the South African constitution does not. Hence, subjecting Muslim Personal Law to the bill of rights is not contrary to Islam. Although freedom of religion and equality between the sexes are both rights guaranteed by the constitution, the bill of rights has failed to address the apparent conflict between these two rights. Another question which needs to be addressed is what is going to be done about new laws in favour of women which cover the areas of oppression within the family but which fall outside the ambit of Muslim Personal Law? This is the position up to the present.

III THE RIGHTS OF WOMEN IN ISLAMIC LAW

The legal and even social status of Muslim women must be explained with some reference to Islamic law which evolved in the seventh century of the Christian era (C.E) in the Arabian peninsula and lower Mesopotamia in a predominantly urban environment. During Muhammad's (Peace Be Upon Him) twenty three year period of prophethood, the two primary sources of Islamic law, namely the Qur'an and Sunna developed. The Qur'an, regarded by Muslims as the literal word of God, was revealed to him piecemeal over this period. After his death in 632 C.E, the Qur'an was collected in a book form. It is not considered a lawbook and has approximately eighty verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. It is in the realm explicitly referred to by these verses that one finds little or no change in various Muslim countries. These latter countries were quite prepared to follow secular codes in other areas such as commercial and criminal law. Of the approximately hundred verses dealing with women's issues, only a few are monopolised to explain the 'truly Islamic' status of women. Hence, the varying paradigms resulting from this, is not surprising at all. The Qur'an also dedicates the fourth chapter or sura to women, namely Sura Nisaa (lit.Women) which is a significant feature when viewed in terms of the existing misogynistic and patriarchal seventh century society. The other primary source of Islamic law is called the Sunna. This is the received customs associated with the Prophet embodied after his death in book form called Hadith. Muhammad literally lived out the Qur'an, and the Sunna can therefore aptly be considered his biography.

Islam provided the Arabian community with numerous improvements with regard to the rights of women. It must be remembered that for Islam to have survived the hostile milieu in which it was born, it had to be flexible and adaptable. The Qur'an advocates that change had to be gradual especially with regard to 'replacing' the pre-Islamic paternal and tribal bond with a religious bond of brotherhood and equality.
The laws of the Qur'an were conditioned by the sociohistorical background of their enactment. Modernists Muslim scholars make an important distinction between what is termed normative Qur'anic verses which have a continual relevance from its contextual verses. The latter were revealed as solutions to the problems of individuals or the fledgling community during Muhammad's reign. Thus, it is postulated that, the moral or ethical norms set out in the Qur'an concerning the status of women are of equal, if not greater, importance in comparison with its specific legal rules. The practice of Muslims today, as opposed to the spirit of Islam as contained in its primary sources, discriminates against women. Reasons advanced for this discrimination include the re-emergence of pre-Islamic patriarchy into Islam after the death of the Prophet Muhammad, and the cultural and customary influences during the centuries of Islamic development. It must however, be borne in mind, that the Qur'an is separated from the classical formulation of Islamic law (in accordance with the different schools of jurisprudence) by a process of legal development lasting more than two centuries. During this period the Qur'anic norms underwent considerable dilution, often to the detriment of women. Classical Islamic law is, in reality, really common law and not canonical since it was only codified several centuries after Islam came into existence.

An examination of the historically diverse responses of Muslims regarding Muslim women's rights reveals that, in terms of seventh century Arabia, Islam's changes to women's rights should be considered revolutionary when compared with their 'rights' in Arabia before Islam. These changes do not, however, appear to be that dramatic when viewed in modern times, especially when the status of Muslim women is compared with that of their Western counterparts. It was for this reason that several countries, influenced by, among others, colonialism, reformed Muslim Personal Law via 'paper legislation' or codes of law.

It is evident from the multiple areas that Muslim Personal Law covers, and the fact that these laws fall under the category of family or civil law, that Muslim Personal Law forms part of the private or domestic sphere. In contrast, the Western secular laws adopted by these countries form part of the public sphere. The latter refers to educational, political and economic opportunities and activities and, wherein women's rights of 'near equality', is hardly given effect to. It is also in this area of Muslim Personal Law that various Muslim countries have adopted one of three stances in their quest for reform. Their measures are either restrictive (for example, Egypt and Pakistan), less restrictive (for example, Iran and Iraq), or non-restrictive (for example, Turkey's secular based reform and Tunisia's Islamic based reform). There are some Islamic countries like Saudi Arabia which has made no effort to reform or codify personal laws.

There are various indicators by which the relative improvement in the status of women in Muslim countries can be measured. However, a study of the practical implications of most of these indicators reveals that they merely bring superficial relief to women, contrary to the clear Qur'anic injunctions in this regard. It is contended that personal law reforms in most Muslim countries, especially as it pertains to women's rights, has been minimal and slow, as a close study of the above indicators reveal. These reforms have remained relatively conservative when compared with the liberal adoption of secular commercial and criminal codes. Even where reform has been non-
restrictive, as for example in Turkey, they have remained merely superficial. It appears then that reforming the law is not necessarily the total answer to the plight of women.

The relegation of Muslim Personal Law, which has its origin in the Qur'an, to the private and domestic sphere leads to the inference that discrimination against women is religiously based. It would however, appear that this perception is as a result of patriarchal interpretations of Islam, cultural and customary influences, the refusal of some Muslim countries to reform, illiteracy and ignorance of the law, that the position of Muslim women today is less favourable today when compared and contrary to what early Islam and the Qur'an had imposed on its adherents.

The following description of Egyptian women has implications that can probably be applied to all Muslim women. It refers to the awkward dichotomy and duality of women in their roles as citizens of a nation and members of a religious community. 'In a division that was never precise, the state increasingly came to influence their public roles, leaving to religion the regulation of their private or family roles. The structural contradictions and tensions this created have to this day never been fully resolved' (my emphasis). As indicated, commercial, criminal and penal codes were easily secularized but personal codes remained governed by religion. It is as a result of this that personal law codes conflict with the constitutions of Muslim majority and minority countries because while the constitutions guarantee equal rights to all citizens, the personal law codes privileges men over and above women in the areas covered by these personal laws resulting in the inequality of the sexes.'

The Islamic reaction to the Western challenge concerning the status of women has evoked three varying responses, namely, the modernists, the conservatives and the fundamentalists. The modernist (minority) response has been reformist with the adoption of Western ideals of emancipation. They explain that Islam has established complete equality between the sexes in all spheres (public and private) but that scholars have confused religious and social matters. However, conservatives and fundamentalists (between whom there is not much ideological difference) restrict this equality to religious observances such as belief, prayers, fasting, charity and pilgrimage. Such observances are essentially the basis by which one determines whether or not a person is Muslim and it is this part of Islam which remains practically static and acts as a 'kind of umbrella identity' which unifies people of various cultures. While the conservatives through their 'apologetic-progressive' stance allow for some adaptation, the fundamentalists in contrast, being 'scriptural activists', oppose change. The conservatives and fundamentalists assert that social transactions, like family laws (Muslim Personal Law) for example, can never change with time as the modernists believe it should. Modernists favour change in family laws as the social transactions of one country can never be exactly the same as those of another because of, among other, geographical, cultural and socioeconomic differences. Nevertheless, despite their differences with regard to women's issues, all three ideologies share a common base to their arguments, namely the Qur'an and Hadith. It seems that these reactions have failed to effectively redress the status problem of women and their intolerance of each other has done more harm than good to the cause of women.

Women activists and feminists in Egypt and Pakistan for example, are also classified on the basis of their identification with the ideology of these three groups. Thus, Muslim feminists range from being either modernists, conservatives or fundamentalists and hence their
perception of inequality and the need for reform is dependent on the ideology they follow. These feminists consider themselves as "progressive" but the majority reject the notion that their feminism is 'secular' based as is the case with those who have already abandoned Islamic law in favour of a secular civil code and those who wish to do so. Instead, they argue that their feminist views are within the bounds of Islam. Fundamentalists however, also claim a religious framework for their restricted views." While Western feminists are channelling all their energies in achieving equality in the public sphere, the majority of Muslim feminists are fighting for liberation within the context of religion (private sphere) while the ultimate goal of Muslim radical feminists (for example, Turkish) is to achieve secular equality in both the public and private spheres even if this would mean liberation from religion. Muslim feminists, unlike Western feminists, find themselves in a situation of first having to deal with Muslim Personal Law and its reform before they can deal with other problems of gender inequality encountered in the private and public spheres.

IV CURRENT STATUS OF SOUTH AFRICAN MUSLIM WOMEN

In the light of current constitutional developments regarding the recognition of Muslim Personal Law in South Africa, it seems that local Muslim women will soon have to face and come to terms with the same problems encountered by Muslim women worldwide. The bill of rights as contained in the Constitution must undoubtedly be considered the most important piece of legislation promoting and protecting the rights and position of women. Section 8, also known as the equality clause, demands equal protection and equality before the law for all men and women. However, and as will be outlined below, it does not appear that the position of Muslim women in South Africa will be any different, or better, than that of their international counterparts despite the fact that the South African constitution contains a bill of rights which ought to protect and vouchsafe their rights. The question of whether or not Islamic religious law enjoys a higher status to the bill of rights in terms of its S 35 (3) will also be discussed below. It appears that Muslim Personal Law will have to be reformed before it can be recognised, let alone codified, in so far as it is in conflict with the equality clause and constitutional guidelines in this regard. Moreover, women will have to contend and deal with the fact that there is no guarantee that legal reform, whether constitutional or via statute law, will result in the equality of the sexes. This can be achieved once the problem of reforming Muslim Personal Law is addressed in line with the true Qur'anic spirit. The worst that could happen is to leave the status quo of Muslim Personal Law as it is - unrecognised and therefore uncomplicated.

The government became a signatory' of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a United Nations document that embodies women's rights, in January 1993. CEDAW makes provision for states to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle. It is interesting to note the implications of Chapter 3 of the Constitution (Fundamental Rights), especially in so far as...
the inclusion of CEDAW is provided for in terms of S 35 (1), which states that a court of law must take cognisance of all international law applicable to the protection of human rights when interpreting the provisions of a bill of rights (Chapter 3). It can be argued that because the CEDAW convention addresses and has application to human rights issues, it can be incorporated into our bill of rights irrespective of the fact of ratification of CEDAW by South Africa. The question arises as to whether our constitutional court will interpret the bill of rights with due regard to CEDAW provisions. The idea of a Women's Charter acting as an interpretative document or supplement to the bill of rights did not see fruition in this particular form, in other words, it does not form part of the bill of rights. However, the second working draft adopted by the Women's National Coalition in February 1994 is still intended to be used as a guideline by courts in interpreting the bill of rights. Article 9 of this Charter provides that 'custom, culture and religion shall be subject to the equality clause in the Bill of Rights.' This could effectively be construed to mean that the equality clause will govern all legislation and that therefore there is no scope for varying interpretations by, for example Muslim scholars who maintain that the equality clause will not interfere with or affect Muslim Personal Law.

v CONSTITUTIONALIZATION OF MUSLIM WOMEN'S RIGHTS - A BRIEF COMPARATIVE ANALYSIS OF MUSLIM COUNTRIES.

A study of the historical background of Islamic constitutions will reveal that there is no real certainty as to what constitutes Islamic constitutional law and there appears to be about five different strands of thought in this regard. Some Muslim countries have therefore opted for Western models in this regard. This uncertainty has had dire consequences for Muslim women. Although all modern Islamic governments claim to entrench equality in their constitutions they rarely uphold these ideals in reality. This applies equally to 'reforms' to Muslim Personal Law.

As noted above, Muslim women face the same status problems as Western women but also have to come to terms with the added burden of having to face the awkward dichotomy between their role as citizen of a nation and as members of a religious community. In Muslim countries, women are perceived to be equal in public rights and duties but not in the private sphere of the family which is mainly or only regulated by Muslim Personal Law. However, a closer examination of some of the constitutions and other pertinent legislation in this regard of Muslim countries, reveals that the professed equality in the public sphere is not unqualifiedly accepted. A brief investigation of specific constitutional clauses will serve to clarify this point. This pattern is evident in Egypt, Algeria, Nigeria, India, Pakistan and Malaysia although countries like Indonesia do deviate from it. A brief summary of this pattern follows.

The Egyptian quest for modernization strove to to bring about changes, albeit restrictive, to Muslim Personal Law. The creation of the Civil Code of 1947 was the culmination of their efforts. However, even here the conflict between Muslim Personal Law and the constitution has not been resolved. The 1971 Egyptian constitution, as amended in 1980, provides for equality between the sexes but adds the qualification that the state will insure women's equality with men only in so far as it does not conflict with the Islamic law in this regard."

In Algeria today, Muslim Personal Law is governed by the conservative Family Code of 1984. Here too the conflict continues. Despite the 1989 Algerian constitution guaranteeing the equality of the sexes, the 1984 Family Code, composed of 3 volumes all of which reflects the inequality of the sexes
in the private sphere, is in direct contrast with the legal and constitutional rights of equality pledged in the public realm." A E Mayer sums up the current situation in Algeria as follows: "The stage has been set in Algeria for reconsidering the relationship between constitutional law and shari'a-based law. The questions that occur in this context are relevant also for other Muslim countries where similar inconsistencies between constitutional guarantees of equality and sharia-based personal status rules persist. Will ... Algerian women ... be better able to challenge the discriminatory features of the 1984 law on constitutional grounds? [or] will it turn out that, despite the assurance that the Algerian constitution is the supreme law, the 1984 shari'a-based personal status rules will in practice be treated as inviolable?"

The family laws of the predominantly Muslim Northern Nigeria is regulated by Muslim Personal Law and here too the conflict exists and reforms in this regard appear to be just as cosmetic. Although the 1979 Nigerian constitution prohibits discrimination on the grounds of, among others, sex and religion, "[t]he more common pattern ... appears to be acceptance of Islamic law in family matters, with minimal interference within well-defined boundaries (my emphasis)."

In India, where Muslims constitute a minority, Muslim Personal Law has statutory recognition as a separate code and is now governed by the Muslim Personal Law (Shariat) Application Act of 1937. The negative attitude displayed by conservative Indian Muslims toward the reform of Muslim Personal Law has serious implications for the continued constitutional protection of Muslim Personal Law as it implies that the necessary justification and legitimation for it is lacking. The Indian Muslim Personal Law was already in force as law at the time of the commencement of the constitution, and although clearly inconsistent with it, was construed by the courts to be 'exempted' from constitutional scrutiny on the basis of it not being considered as 'laws in force'. This inconsistency is highlighted in the following clauses. Article 13 (1) of the constitution stipulates that all laws will have to be consistent with the provisions of part III (fundamental rights) of the constitution and would be void to the extent of any inconsistency. Article 14 of the constitution provides that 'the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. Article 15 prohibits discrimination on the grounds of among others, sex and religion." It appears from a critical study of the Indian situation that Muslim Personal Law is 'immunised' to a large degree from state interference and regulation in India. The position of Indian Muslim women is aptly summed up as follows: '...Why has no one done anything about the deplorable situation in which Muslim women find themselves today?"

Pakistan has, apart from two-statutes, no codified Muslim Personal Law." Unlike the position in secular India, Muslims in theocratic Pakistan has made slow but steady progress as far as reforming Muslim Personal Law is concerned. The two statutes referred to above are the Dissolution of Muslim Marriages Act of 1939 and the Muslim Family Laws Ordinance of 1961. Until recently, Muslims in India and Pakistan were governed by the same personal law." As far as the Muslim Family Laws Ordinance of 1961 is concerned, the
1973 constitution provides that the provisions of this ordinance could not be challenged in any court and was included in the First Schedule of Laws and therefore exempt from Article 8 of the Fundamental Rights. This has serious consequences for women, because, even though the Fundamental Rights guarantee equality of citizens and non-discrimination on the basis of sex, the status of women continue to be negatively governed and determined by the above Ordinance. Article 8 provides that laws inconsistent with the Fundamental Rights are void and that the State cannot make any law inconsistent with the Fundamental Rights. However, as indicated above, the provisions of Article 8 do not apply to any laws mentioned in the First Schedule of the constitution as is the case with the Muslim Family Laws Ordinance of 1961. Thus the situation in Pakistan is no different from that in any other Muslim country where there is professed equality in the public sphere which is never really given effect to because of it conflicting with personal laws.

In Malaysia, a federation of thirteen states with a 50% Muslim population, the Federal Constitution makes provision for Muslim Personal Law and empowers the states to make laws with regard to Muslim Personal Law. However, no uniformity has been achieved in this regard since each state has a separate statute dealing with the administration of Muslim Personal Law, most of which do not effect any reform to Islamic law but merely aim to codify it. In this regard it is interesting to note that the conflict and contradictions between personal laws and constitutions apply equally to Malaysia hence upholding the status quo as the Malaysian constitution is based on a Western model and concept of democracy."

Indonesia, with its 90% Muslim population, opted to unify its marriage laws in 1975 for all sections of the population regardless of religion. Changes in its national marriage laws resulted in modifications to Islamic law, but not without resistance by Muslims. To the extent that Islamic law is part of this new marriage law, it is part of the positive law of Indonesia and the state is therefore established as an authority in the administration of such laws and as an arbiter of their legitimacy. In this regard it has succeeded where India has failed."

The United Nations Charter (1945) which is purported to be legally binding on all modern Islamic states and the Universal Declaration of Human Rights (1948) which follows it provides equally for religious and women's rights but neither document foresees a potential conflict between these two kinds of rights. Other international measures include CEDAW (1980) of which many modern Muslim countries, like Egypt for example, and non-Muslim states like India, are signatories but have placed reservations on certain of its Articles where it conflicts with Muslim Personal Law.

In this regard, Article 16 of CEDAW is a typical example as it relates expressly to Muslim Personal Law. 'Whereas the article [16] requires complete equality between men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, Egypt's reservation states that its obligations "must be without prejudice to the Islamic Shari'a provisions. India is also a signatory of CEDAW but has not ratified it and the Indian reservation to CEDAW states that ... with regard to articles 5 (a) [whereby state is to take steps to modify social and cultural patterns of conduct of sexes to
eliminate prejudicial and customary practices which maintain unequal and stereotyped roles between sexes] and 16 (1) [see supra]...the Government of India declares that it shall abide by ... these provisions in conformity with its policy of noninterference in the personal affairs of any Community without its initiative and consent ... [the rationale for this ... rests on India's desire to safeguard the rights of its religious and ethnic minorities. Although Pakistan has as yet not become a signatory of CEDAW, the government has indicated that it intends to sign the document with reservations.

While some Arab (Muslim) signatories to the United Nations report that equality between the sexes have in fact been achieved, this is not true as is evident from the personal as well as public laws and the constitutions of these countries.” It appears as if the United Nations goal of equality between the sexes can never see fruition in Muslim countries as it is inconsistent with Islam as it is practised today and to the detriment of women.

VI THE CONSTITUTIONAL POSITION OF SOUTH AFRICAN MUSLIM WOMEN.

South Africa has only very recently become a member of the United Nations. Even though in the infancy stages of fundamental rights issues, South African women should be wary of legislation in this regard because "...the record of equality litigation in countries as diverse as ... India and the USA, reminds us that a bill of rights is a double-edged sword whose high sounding language of equality and rights is not always translated into justice. In fact [t]he text of the Constitution ... itself ... is ... strewn with clues which are cryptic and equivocal.

As far as the interpretation of Muslim Personal Law is concerned, the equality clause (S 8) as contained in the bill of rights demands for equal protection and equality before the law. In addition, the constitutional guidelines require that legislators must aim to and in fact improve the conditions of the disadvantaged on grounds of, among others, gender, sex, religion and belief. In addressing the issue of constitutionalization of women's rights, several areas have been identified where Muslim Personal Law not only conflicts with South African law as such but where it also conflicts with the gender equality clauses of the bill of rights in the new constitution. This, in effect, would be construed to mean that the latter will have precedence in this regard. Yet, this might not be the case and the possibility exists that the reverse could take place with South Africa following the similar trends of Muslim and non-Muslim countries (like India as indicated above) in this regard, and where all sorts of promises were made to women as part of an election strategy.

Evidence to support such a claim is to be found in the South African constitution itself and is set out as follows. Although S 4 (1)," S 35 (1)" and S 35 (3)' might be construed to the contrary, S 33 (1) "...however, permits any 'law of general application' (which would include customary law" [and by implication Muslim Personal Law once it is recognised] to limit the fundamental rights, provided that the limitation is 'reasonable' and 'justifiable'. Other supporting factors which indicate that South Africa might well follow the trend set in the above countries include the following. It appears that if the provisions of the bill of rights is only enforceable against the state (vertically)' in South Africa then it would be very difficult for Muslims to challenge an 'unreformed' Muslim Personal Law. It is clear that potential conflicts between the two fundamental rights of gender equality and religious
freedom has not been resolved by the new constitution even though there exists an awareness of them. Guaranteeing equality of the sexes and making provision for the recognition of Muslim Personal Law so as not to force Muslims to make a compromise between Islam and the constitution does not amount to a solution.

However, it must be borne in mind that the Muslim community is itself in the process of undergoing and facing a transformation in this regard. A systematic study of Muslim countries in this regard will reveal that neither has international human rights legislation succeeded in resolving the conflict between women's rights and religious rights. In the final analysis, the issue of reform as far as Muslim Personal Law is concerned has been left squarely in the hands of Muslim religious authorities. In South Africa, most of them have no real local legal expertise and therefore close co-operation between these authorities and the legal profession is essential. It is clear that international efforts in this regard have not been very fruitful and serves to prove that reforming the law, although partly effective, is not necessarily the total answer. This, however, does not deter from the validity of some measure of reform and here regard must be had to the effective application of alternate tools to improve the status of women where reform might not be appropriate." If legislatures and judiciaries have not succeeded in this regard then it may be that gradual social reform within the Muslim community is the only hope for Muslim women. It is necessary to highlight that the 'male image' of Islam, which has for so long been unquestionably accepted as the only or proper image, is nothing more than a fiction fuelled by ignorance to give it substance. It must therefore be stressed that although some Muslim Personal Laws and Islamic law are in clear conflict with gender equality, it would be wrong to conclude that Islam and gender equality are necessarily in conflict and regard must be had to the historical background in this regard. It is also submitted that "...as women become effective participants in Muslim society, Islam will be better able to cope with the realities of the twenty-first century (my emphasis).

VII CONCLUSION.

A review of the situation in a number of Muslim states supports the contention that the best option and solution to the application of Muslim Personal Law lies in codifying Islamic law and enacting a comprehensive bill or 'uniform Muslim code' applicable to Muslims. This code should address minor variations in the four major schools of legal thought Jurisprudence as well as considerations of desirability of reform to the present Muslim Personal Law with due regard to the peculiar circumstances existing in South Africa. The answer to the South African situation does not lie in adopting a secular uniform civil code. Not only will it be rejected by the Muslim community, but it has failed to really redress the plight of women in countries where it does exist. Much can be learnt from the Indian and Turkish experiences in this regard.

It would be far too ambitious to expect the process of reform to be set in motion by calling for a reinterpretation of Islam and a rethinking of the Qur'an as suggested by some academics at a conference on 'Islam and Civil Society in South Africa' held at the University of South Africa in August 1994. Instead reform must be addressed in line with the true Qur'anic spirit and must take
place in the context of an evolving South Africa and with the use of equally effective but alternative tools to improve the position of women in cases where it might not be or provide the answer.

The relationship between constitutional law and Muslim Personal Law must be very carefully considered. The constitution cannot protect Muslim Personal Law if the necessary justification and legitimation for it is lacking. Although there are arguments to the contrary, it is generally hoped that Muslim Personal Law, once in force, will be clearly regulated and fall under the scope of the final South African constitution in terms of the provisions of the bill of rights which made provision for its legitimacy in the first place. It is a foregone conclusion that the State has undertaken to guarantee freedom of religion and belief only in so far as it does not violate other fundamental rights of its citizens.

The challenges facing the Muslim Personal Law Board of South Africa have already been successfully addressed, to a certain degree, by several Muslim and non-Muslim countries as a comparative review reveals. Failure on the part of this board to resolve these issues would result in upholding the status quo of Muslim Personal Law, namely, to continue to exist and function independently of the South African law. At the very least, it should enable Muslim women to theoretically exercise a choice in this regard. In reality however, the vast majority of Muslim women are subjugated by men and male dominated Ulama bodies who continue to regulate their lives along the traditional interpretations of Islamic law. For these women there is no choice. Subjecting Muslim Personal Law to the bill of rights will guarantee that whatever the final outcome of a code of Muslim Personal Law will be, it will provide for equality between the sexes and simultaneously allow for the achievement of this goal to be left in the hands of Muslims. An opportunity presents in South Africa for the implementation of Muslim Personal Law to the advantage of women and it is the duty of the State to ensure this.

In conclusion, the following poignant ponderation of a judge seems particularly appropriate in this situation. I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help
2 March 1995

Theme Committee 6

THE CONSTITUTION MAKING PROCESS: FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES

Your undated letter received on 6 December 1994 and Hassen Ebrahim's letter dated 3 February 1995 refer.

Herewith our comments on "Specialised Structures of Government":

1. **The Auditor-General**

The Public Sector Committee (PSC) of SAICA supports the arrangements regarding the Auditor-General and the Office of the Auditor-General as included in the interim Constitution. The most important feature of the interim arrangement is that the Auditor-General has obtained statutory independence.

The arrangement whereby the Auditor-General reports to the Audit Commission is also supported. The functions of the Audit Commission is very similar to that of audit committees and it results in enhancing auditor's independence.

The statutory independence of the Office of the Auditor-General and the establishment of the Audit Commission significantly enhances accountability and transparency, not only of the audit office, but also of the public institutions reported on.
However, it is submitted that, in many cases, parliament does not react or is not seen to be reacting on adverse audit reports issued by the Auditor-General. This perception of non-reaction materially undermines accountability. A mechanism should be established whereby adverse audit reports are followed up and guilty parties brought to be accountable for their deeds.

It is further submitted that, due to the importance of the Office of the Auditor-General in the transparency and accountability process, the Constitution should recognise that the Office needs to be professional and therefore allow the current process of professionalising the Office to be continued.

2. Public Enterprises

The Reporting by Public Entities Act, 1992 is recognised as one of South Africa's most advanced and soundly written items of legislation. The main focus of the Act is to enhance accountability and transparency in public institutions and parastatal enterprises. It promotes sound corporate governance in those institutions and was also addressed in the King Committee Report on Corporate Governance which was issued in November 1994.

The PSC therefore supports the inclusion of public entities in the Constitution and strongly believes that the Constitution would be flawed without the recognition of public entities.

3. Guarantees for Provincial and Local Government loans

The concept of guarantees for Provincial and Local Government loans is acceptable if the process is properly managed. The question arises as to how the guarantees would be allocated and who/which body would ultimately be responsible to manage the debt of those governments.

The PSC is of the view that the proposed guarantees would most likely undermine accountability in Local and Provincial Governments and therefore it is not supported.
4. The Financial and Fiscal Commission

Clearly from para 199.1 (c) the draftsmen anticipate the levying of provincial taxes, etc. From an administrative point of view, the Taxation Committee of SAICA believes that such a possibility should be discouraged.

The full-time staff members are, in terms of the proposals, automatically chairperson and deputy chairperson. The Taxation Committee of SAICA questions whether this is appropriate. In effect, it may well be that certain people are suited to a position in the Secretariat in terms of which they are full-time employees, but the aims of the Commission may well be better served by having its direction set by other members of the Commission.

Please do not hesitate to contact me if you require any further information.

J H DIJKMAN
LEGAL AND ETHICAL DIRECTOR
14 March 1995

Submission to Theme Committee 6 Specialised structures of government
Sub-theme Committee 4
Police

Dr Don Pinnock
For the Institute of Criminology
University of Cape Town

Proposals for a new Juvenile Justice Act have just been submitted for discussion by a drafting group including representatives from NICRO, Lawyers for Human Rights, the Institute of Criminology (UCT) the Community Law Centre (UWC) and the Community Peace Foundation. They are receiving widespread approval from within many branches of state and the NGO sector.

Their implementation would have direct impact on the constitution. And because the principles they embody are derived from both local custom and international instruments they need to be considered by your committee.

I enclose a copy of the proposals and direct your attention to the following points specific to Theme Committee 6, Sub-theme Committee 4.

Policing

The juvenile justice proposals suggest an expanded role for police, particularly community police, in the arrest of young people under the age of 18. The proposals allow for wider discretion and an extended power of caution. Details of this can be found in the proposals at pages 8-17 and 41-44.

These suggestions should be read in conjunction with the Principles (page 39) and Definitions (page 37)

The new Constitution and Bill of Rights must take into account the special nature of childhood. Please ensure that these important documents are only drafted after a detailed reading of the Beijing Rules and the Convention on the Rights of the Child. If assistance on

this is needed please do not hesitate to consult me or any other member of the Juvenile Justice drafting team.
Juvenile Justice for South Africa

proposals for policy and legislative change

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Proposals for policy and legislative changes

0 Juvenile Justice Drafting Consultancy
Published by the members of the Juvenile Justice Drafting Consultancy.
Addm: c/o Institute of Criminology, University of Cape Town, Private
Bag, Rondebosch, 7700 Cape Town.
Printed by Allies Printers, Eisies River, Cape Town.

Cape Town 4 November 1994

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Thanks to
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Judge Yvonne Mokgoro, Ms Bridget Mabandla, Ms Laurel Angus
Ms Charlotte McClain, Ms Shirley Mabusela, Mr Vincent Saldana,
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Mr Jacque de Wet, Judge Albie Sachs, Mr Oscar Makhathini, Mr Prince Maluleke,
The youth advocates at the Community Law Centre, UWC

Cover photograph by Karina Turok
(posed by model)
Design & typesetting by Don Pinnock

Special thanks to Kinderen in de Knel
for funding this publication

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Juvenile Justice for South Africa is a first step towards the legislative creation of a juvenile justice system. At present there is no specific body of legislation which governs the handling of juvenile offenders. Those dealing with young people in conflict with the law have to wade through a number of Acts in order to find the few sections which deal with juvenile offenders, albeit inadequately. These Acts are the Criminal Procedure Act no. 51 of 1977, the Child Care Act no. 74 of 1983 and the Correctional Services Act no. 8 of 1959. For the most part, young people in conflict with the law are dealt with in much the same way as their adult counterparts.

These proposals aim to:
- Emphasise accountability, encouraging the young person to acknowledge and take responsibility for his or her offending behaviour,
- Encourage restorative justice and the resolution of conflict,

Bring young people, their family groups and communities to the centre of the decision making process,
Protect the rights of the young person and the victim, with direct restitution to the victim being a particular feature,
Provide alternatives at every stage of the process - at arrest, pre-trial and at sentencing - so that diversion becomes a central part of the system rather than peripheral to it,
Encourage plans to prevent re-offending,
Provide methods to minimise the need for institutionalisation at any stage of the process,
Be sufficiently flexible and ensure cultural appropriateness.

In addition to providing many effective alternatives for young people, the draft provides for sound structures and procedures for dealing with young people committing serious crime. These cases will generally Proceed through a Juvenile Court structure under the normal rules of evidence and procedure, with certain additional rules built in to meet the particular needs of young people in conflict with the law.

The proposals are set out in the form of a Bill as this was considered by the drafting consultancy to be the most useful and accurate way to present the information. The text consists of a section containing Definitions, followed by a section which contains the Governing Principles. The remainder of the 14 sections set out rules for the handling of any young person who comes into conflict with the criminal law. In the Commentary, the 14 sections are referred to collectively as the text or the draft.

This commentary should be read together with the text. It explains the rationale behind the proposals of the Drafting Consultancy. It also raises questions on issues which are controversial, and which require further discussion by a broader group of people in South African society.

There are some very important departures from the present system which should be noted:

The young person may be cautioned rather than arrested.
The young person is not charged unless the case is going to proceed to court (which would be the case with serious offences or when conflict resolution within the Family Group Conference breaks down). The most common way of handling the offending behaviour of a young person is through a Family Group Conference. It will be unusual to hold a young person in custody either at the pre-trial stage or at sentencing. The guardian of a young person is defined broadly so that street shelter workers, extended family members or other caring adults may take responsibility for the young person.

In the past thousands of young people have awaited trial in abysmal conditions in prisons and police cells in South Africa, often for months at a time. Frequently their parents and guardians have not known of their whereabouts, and they were seldom legally represented. Many have not even enjoyed the assistance of a probation officer. Imprisonment and whipping have been standard sentences handed down by courts - in 1992 alone, some 36 000 young people were sentenced to whipping.

While the courts continue to use retributive punishment, we are constantly reminded through the media that an ever-increasing number of young people are appearing in court for increasingly violent crimes. Many have joined gangs and terrorise the community. It is clear that the numbers grow faster than the services necessary to deal with them. And the present system merely continues to reproduce more of the same, using systems and procedures that neither curb crime nor assist the young person to take responsibility for their actions.
At present the complexity of the criminal justice system ensures that the moment a young offender collides with it, he or she becomes its victim. And victims generally feel self pity, and possibly the need for revenge. Rather than attempt to repair the damage or be accountable, for their offending behaviour, the young person tends to blame the system that pits them against adults who have university degrees and are paid to charge, try and prosecute them.

Young people have always suffered most from apartheid. Millions in South Africa have been poorly fed, insufficiently clothed, indifferently educated and have lived with parents, stressed by poverty, overcrowding, relocation and unemployment. In addition boys, are brought up to believe that macho is best - the more aggressive you are - the higher your chances of status, wealth and success. For these reasons extremely high numbers of young people - especially historically disadvantaged young people, and mostly boys - have chosen or have fallen into methods of coping with their lives, in ways that transgress the law.

In the 1980's hundreds of young people were detained during the states of emergency, causing a national and international outcry. However, young people detained for ordinary crimes were also slipping into the system, largely unnoticed. There was no strategy to ensure that these youngsters were treated humanely and with adherence to just principles. In fact, until then there was no acknowledgement by government departments that children in detention - and the lack of a comprehensive juvenile justice system was a crisis.

In 1992 the campaign Justice for the Children: No Child Should be Caged, initiated by the Community Law Centre, Lawyers for Human Rights and Nicro, raised national and international awareness about young people in trouble with the law. The report called for the creation of a comprehensive juvenile justice system, for humane treatment of young people in conflict with the law, for diversion of minor offences away from the criminal justice system and for systems that humanised rather than brutalised young offenders.

This campaign followed many years of pressure on ministers from non-governmental organisations to respond to the issue, a struggle that was frustrating and unfruitful. Tragically it followed rather than prevented the death of a 13-year-old boy called Neville Snyman. Neville was killed by his cell-mates in a Robertson police cell in October 1992. His crime? He had allegedly broken into a store to steal sweets, cooldrinks and cigarettes. He didn't live to stand trial.

Neville's death forced the realisation that effective and humane methods of dealing with youth in conflict with the law was imperative. South Africa was ready for the debate: it was an idea whose time had come. In August of that year the television programme Agenda had highlighted the plight of young people awaiting trial in detention. The National World Committee on Children in Detention was formed. A paper spelling out the need for a comprehensive juvenile justice system was presented at the International Conference on the Rights of the Child in Cape Town, and the Lawyers for Human Rights Free a Child for Christmas campaign continued to put pressure on state departments and local children in detention committees to find solutions, and effective ways to manage young people in trouble with the law. Nicro and state diversion programmes were started in a number of centres, and seminars, workshops and conferences discussed the crisis and planned local action.

The number of state departments involved, and the fact that no specific department could be found which could be held accountable for young people in conflict with the law, confused the role-players. What was clear, however, was that young people in conflict with the law were not being treated according to internationally acceptable standards. Too many youngsters were being arrested, too many proceeded to court, and the process that these young people were exposed to was doing more to brutalise than to humanise them. In 1993 a drafting committee was convened by Adv. Dullah Omar, then the director of the Community Law Centre and now the Minister of Justice, after the Seminar on Legislative Drafting run by the Community Law Centre, University of the Western Cape. At the seminar the paper Raising Ideas for a Juvenile Justice System was presented by Adv Arm Skelton. It formed the basis of the present document.

To be comprehensive and effective, the new vision needed to encompass ideas for the charging, arresting, diverting, trying and sentencing of young offenders in a system that would spell out the roles of the police, the prosecutors, probation officers and others dealing with young people. It needed to take into account victims' rights. In short it needed to be innovative, inexpensive and creative.
Information gathered by youth advocates and para-legals in the courts and through a number of workshops throughout Southern Africa has guided the proposals. In addition, several skilled juvenile justice specialists from outside South Africa were consulted by the Drafting Consultancy in the process of formulating the present proposals.' Support for a new system has come from President Mandela who called for children to be released from prisons and police cells. And the Reconstruction and Development Programme has included awaiting-trial children in it's brief.

Unilateral restructuring will not work. Throwing money at the problem without completely altering the present policies and practice will simply result in more chaos. Money will be needed, but it must be money well spent. Building new and bigger institutions for children will just exacerbate the problem.

These proposals are firmly based on national and international instruments such as the United Nations Convention on the Rights of the Child, the Beijing Rules, the Organisation of African Unity's Charter on Children, the South African Charter on Children's Rights and Chapter 3 of the Interim Constitution of South Africa. The acceptance of the principles and the tabling of legislation for juvenile justice will go a long way towards supporting the ratification of the UN Convention on the Rights of the Child. To this end, UNICEF has been supportive of this process.

Juvenile Justice for South Africa turns the present system of dealing with young people on its head. The proposals suggest that criminal charges should be a last resort, and that diversion becomes the pivotal method of dealing with young people in conflict with the law. In addition, the holding of a child in a secure facility would become an unusual occurance. At the same time, the proposals ensure that serious offences are dealt with in such a way that the young person is held accountable for his or her actions and is handled by a court governed by appropriate rules. Court overcrowding as a result of hundreds of petty offences will be a thing of the past.

Through it's links with Roman Dutch Law, South Africa has absorbed the notion that knowledge in law only flows in one direction downwards - and that communities can contribute little to the process beyond being a source of evidence. These proposals suggest a way of changing this. They support community involvement in vital areas formerly closed to the people who matter most in the young person's life.

The family group and community is strengthened and decision-making becomes the responsibility of the young person, the family group, the victim, the police officer and anyone else close to the life of the young person or who is affected by the offending behaviour.

There is clearly a need to plan primary prevention of juvenile offending, as was discussed at the Human Sciences Research Council conference in Pretoria in February 1994. These proposals, however, deal with young people already in conflict with the law.

In the spirit of the New South Africa, these proposals will be taken to as many people as possible for consultation and discussion before being written into law by the state legislative drafters. It is also vital that those people who will have to work within the confines of any new law be drawn into discussion. This will not only ensure that the final legislation is workable, but will also mean that everyone will feel a sense of ownership of the new juvenile justice system and will be empowered to transfer the paper rights and protections into living law.

Commentary
Section 1. Definitions

The definition section is self explanatory. Any controversial points arising from the definitions are dealt with later in the commentary.

Section 2. Principles

This section sets out the guiding principles to be followed by any court or any person who exercises any power in terms of the legislation. They were formulated with reference to the United Nations Convention on the Rights of the Child, The Beijing rules, The Organisation of African Unity Charter on the Rights of the Child, The South African Charter of Children's Rights, and Chapter Three of the Interim Constitution of South Africa.

While there are clearly laid out principles in international and national documents, these are not always taken cognizance of by domestic courts. For this reason we have written the principles into the text of the legislation. This may be considered unusual, but has precedents, for example in recent juvenile justice legislation in New Zealand and Australia. It is convenient for practitioners and will increase the likelihood of adherence to the principles. These principles can be found in full in the Proposals section, and involve guidelines on

- The best interests of the young person
- Diversion
- Non-discrimination
- Special protections
- Adequate involvement of the young person
- The presence of people important to the young person
- Appropriate language
- Separation of young people from adults in detention
- Contact with family while in detention
- Appropriate time frames
- Centrality of the family and community
- Accountability
- Appropriate sanctions

Section 3. Alternatives to arrest

3.1 Caution of a young person by a police officer

The Text
Section 3 begins at the point of the incident bringing the young person into conflict with the law. In the past, the police had no options but to arrest once they had encountered a young person suspected of having committed an offence. This section provides alternatives to arrest which obviate the clogging of the juvenile justice system with petty cases, and ensure that as few young people as possible are exposed to the criminal justice system.

Section 3.1(i) gives some discretion to the police officer to issue a caution unless a caution would be "inappropriate having regard to the seriousness of the offence." Section 3.1(ii) allows the police officer to either issue the caution immediately at the scene, or take the young person home and issue the caution in the presence of a parent or guardian.

The type of offences where a caution would be appropriate are trespass, disturbance, or any minor victimless offence.

Discussion

Police officers may require some training in how to distinguish the type of case in which this option is suitable, and this could be built into general police training. The question arises as to whether it is necessary to list in the legislation or elsewhere, the exact offences for which a caution could be used. Although this would help the officer to decide what to do, the disadvantage is that it erodes the discretion given to the officer.

Each case is so dependent on the circumstances that it is difficult to categorise certain offences as petty. Theft, for example is not usually considered to be a petty offence, but picking a stick of sugar cane off farmland, while strictly speaking theft would be an example of the kind of case where the option of a caution would be appropriate.

3.2 Written notice to attend a Referral Meeting

The Text

A Referral Meeting is a process which replaces the immediate charging of the young person on arrival at the police station. The meeting is attended by the young person, his or her parent or guardian, the police officer, and a specialised worker called a Youth Justice Worker, as well as any other relevant person. It is discussed in more detail in the commentary is Section 6. At the Referral Meeting an initial decision is made about how to handle the case.

Section 3.2, the written notice to appear at a Referral Meeting, provides another alternative to arrest. This option is appropriate when the police officer decides that the case is not suitable for a caution, but that the young person, accompanied by their parent or guardian, is likely to turn up for the Referral Meeting.

This is not a major departure from the current system, where, in terms of Section 72 of the Criminal Procedure Act, the police can, in less serious cases, issue a juvenile and parent or guardian with a written notice to appear in court. The difference here is that the young person is not charged first, and the warning is to attend a Referral Meeting instead of court.

Discussion
An important question regards sanctions for failure to attend the Referral Meeting. The written order could possibly warn the young person and parent or guardian that failure to attend the Referral Meeting will lead to an arrest of both the young offender and the parent or guardian.

Another question which may be posed is in what circumstances it would be suitable to use this section. It is suggested that the test should be whether the police officer feels confident that the young person and the parent or guardian will in fact attend the Referral Meeting. In the current system the police already have to make these sorts of decisions when setting police bail or recommending bail to the Prosecutor, so they should not have difficulty interpreting this section.

4. The arrest of a young person
4.1 Grounds for arrest

Section 4.1 sets out the circumstances where a young person can be arrested, but is worded using the negative "shall not arrest a young person" unless the police officer is satisfied that the arrest is necessary in terms of one of six of the listed requirements. The wording is intentional, as it aims to encourage police to use the alternatives to arrest.

The arrest must be necessary:

- to ensure the attendance of the young person at the Referral Meeting, or
- because the parent or guardian cannot be found immediately, or to prevent any further offences, or to prevent tampering with state evidence, or
- to protect the young person from causing damage to himself or herself, or
- because the alleged offence is deemed to be serious in terms of the definition in Section 1.

It is relevant that the six requirements are interspersed with the conjunction "or" not "and", so it is not necessary for all the requirements to be present in any given case.

Notably, the fact that the alleged offence is serious is in itself enough cause for arrest therefore all young people committing serious offences can be arrested in terms of this section. The offences listed as serious in the definitions section are:

- murder
- armed robbery
- robbery resulting in serious injury
- rape or sexual assault
- assault resulting in grievous bodily harm or resulting in serious damage.

This listing differs from the type of list currently found in schedules to the Criminal Procedure Act in that there is emphasis not only on the offence but also on the consequences of the offender's actions. However if the offence is not one of those listed the young person may still be arrested if any of the other grounds listed are present.

Previous perceptions held by young people about the South African police may have discouraged them from voluntarily accompanying a police officer. But as the image of the police changes, this will become less of a problem.

4.2. Advising the young person of his or her rights
The Text
This section sets out the rights which must be explained to the young person upon arrest in language which he or she understands. This means not only in their mother tongue, but also in age-appropriate language. The right (i) to be informed of the nature of the offence and (ii) to remain silent are both fairly straightforward.

Number (iii) gives the young person the right to the presence of his or her parent or guardian during questioning. The full import of this becomes apparent when it is read with section 9.3(ii) which provides that any evidence adduced through questioning which takes place without the presence of a parent or guardian will not be admissible.

Number (iv) gives the young person the right to legal representation. In addition, it provides that if the case goes to court, the young person will be provided with free legal representation.

Discussion

The right to state-provided legal representation may give rise to the question of whether the Legal Aid Board will be able to provide legal representation. It must be remembered that a smaller number of young people will be coming through the courts, so the number requiring legal representation will be lower than in the current system. This right is in keeping with the constitutional right set out in Section 25 of Chapter Three of the Interim Constitution, which provides the right to legal representation at state expense "where substantial injustice would otherwise result." It could be argued that to require a young person to appear before the courts unrepresented may in itself be considered to be a substantial injustice because of the youthfulness of the accused.

It may be thought by some that to provide the young person with access to free legal representation only once the case is going to proceed to court is not sufficient protection of the rights of youthful accused, and that this service should be provided upon arrest. These proposals suggest that the participation of lawyers at the pre-trial stage may be detrimental to the process. The training of lawyers is to advise their clients to make no admissions, and this might be counter-productive to this system which depends largely on the young person's preparedness to acknowledge responsibility for offending behaviour. However, the opportunity is created for lawyers to participate at every stage of the system.

An omission from this section is the warning that "anything you say may be used in evidence against you". Perhaps this should be added, but worded along the following lines: "Any statement you make in the presence of your parent or guardian may be used in evidence against you.

5. Reception Process.

5.1 Duties after arrest

The Text.
The Reception Process and the Referral Meeting should take place as close together as possible. For the purposes of clarity, however, they have been separated. The process of Reception is a new concept. It aims to provide a mechanism to avoid the current crisis of young people being held in custody through a simple failure of the police to contact the parent or guardian. The text provides that when a young person is arrested and brought to the police station, he or she will be handed over to the officer on duty who will contact the Youth Justice Worker. As a team these two people will ensure that all efforts are made to contact the parent or guardian as soon as possible.

The reason this process is necessary is that juveniles dealt with in the present system often fall between the arresting officer and the investigating officer. The Criminal Procedure Act no 51 of 1977, which provides for the arresting officer or the investigating officer has not been effective. Arresting officers say they are unable to contact the parent or guardian of juveniles immediately after arrest as they are too busy with other urgent complaints which need attendance, and the cases are sometimes only received by the investigating officer more than 48 hours after the arrest.

We do not suggest that a special class of police officers is created. This is because there is a danger that when a young person is brought in, there may be no "Special Unit" police officer available. And while specialised units may work well in urban centres, in rural areas the police officer on duty will be the one who has to take the responsibility. The draft therefore takes this into account. There is no reason, however, why special units or liaison officers should not be created where possible in order to improve the service.

The first task the duty officer is required to do after arrest is to contact the Youth Justice Worker whose task it is to oversee cases involving young people in conflict with the law. Once again, in larger centres it is envisaged that a Youth Justice Worker will be on duty, at all times. However, in small rural towns where far fewer young people are arrested (perhaps only one a week,) the Youth Justice Worker would be called in and paid on a case-by-case basis, and it is expected that they could be called in after hours as long as they were paid accordingly. The role of the Youth Justice Worker is described in more detail in Section 11.

The duty officer and the Youth Justice worker, operating together, will ascertain where the young person's parent or guardian is and make the necessary arrangements for them to attend the Referral Meeting which will be arranged as soon as possible within a maximum of 24 hours. The idea of teaming the duty officer and the Youth Justice Worker is to ensure all efforts are made to find the parent or guardian, and also to overcome the difficulty that young people do not always cooperate with the police and do not provide accurate information to enable the police to find their parent or guardian.

It is important to note that in Section 1 "guardian" is defined as "any responsible adult who indicates a willingness to assist, the young person at any stage of the procedure". This means that community members unrelated to the young person, such as street shelter workers, school teachers and clergy may act as guardian.

The major thrust of this section is to get the parent or guardian in attendance whether or not the young person is to be held in custody. It could also be possible for volunteers and non-governmental organisations, as well as civilian members of community policing fora to be involved in the task of family finding.

The Reception Process is followed by the Referral Meeting, which is the initial decision about whether the young person should be referred to the Prosecutor or whether the case can be dealt with in some other way. As stated above, ideally Reception and Referral should happen as closely together as possible, but certain practical difficulties may cause the Referral Meeting to be delayed. The next important question in the process is: where will the child be held?

Discussion

The broad definition of guardian is aimed at allowing all young people, particularly the homeless, to be provided with protection and shelter. It is also in keeping with the African tradition that everyone in the community has a responsibility to care for children or young people. A inherent danger of broadening the definition of guardian is that there is no control on who may come forward as a guardian. The wording "a responsible adult" is an attempt to
address this problem, but the definition may be able to be refined to provide better protection while at the same time not being prejudiced against young people whose parents are not available to assist them.

5.2 Release of the young person or delivery into 24 hour custody

The Text

The overriding principle here is that wherever possible, the young person should be released into the care of his or her parent or guardian. This should be possible in a wide variety of cases, and even in serious cases unless there is reasonable cause to believe that the young person will run away, or interfere with witnesses or evidence.

Young people under the age of 14 years should never enter a prison or police cell. Those young people under 14 who need to be held securely should ideally be held in suitable secure care facilities.

Where there is no parent or guardian to take the young person home, the young person may be held in a care facility until the Referral Meeting and/or until the case is resolved.

The system will rely on a new concept of custodial care: on one end of the scale is open care, where the young person is not locked up or constantly supervised. On the other end there is closed care, where the young person is held in a locked secure care facility. Between these two there may be various degrees of restriction.

For homeless young people who sleep at shelters, the shelter could be considered "home", and the young person would be under the supervision of the street shelter worker acting as a guardian.

The emphasis of Section 5.2 is on de-institutionalisation of young people in the pre-trial phase. The system is loaded so that finding the parent or guardian and releasing the young person to them is the easiest option, and holding the young person in secure care is the most difficult because of the restrictions on the age and type of offence and the requirement set out in 5.2.(iv) that a signed order by a magistrate will be required to hold a young person in secure care. This should mean that police will not hold young people in secure custody unnecessarily, but it is possible to keep serious offenders locked up where this is absolutely necessary.

Discussion

Ale success of this section will depend, to a certain extent, on, the availability of care institutions to provide some secure facilities. It will be necessary to establish small community-based houses that can act as open-care places of safety and to have some secure-care facilities available in each area.

The requirement of a signed order by a magistrate in order to hold young persons in prison during the first 24 hours may seem cumbersome, but will be a necessary precaution. The question of the practicality of this where a young person is
arrested during the night or at the weekend is bound to be raised. However, the situation does not differ greatly from the existing situation where any accused person is entitled to bring a bail application at any time after the arrest.

6. Referral Meeting

The Text

It is important to note that until this point the young person has not yet been charged. The Referral Meeting is a small meeting, happening as soon as possible after the Reception Process, at which it is decided in which way the case should be handled. Wherever possible, the case would be handled by one of the following:

- Referral back to police for a formal caution. A Family Conference.
- Referral to a Children's Court Inquiry if the welfare needs are overwhelmingly needing to be dealt with before the accountability needs, or by
- No action being taken.

Where a case is serious it would be referred directly to the prosecutor. It is envisaged that the majority of cases will end up being handled by a Family Conference.

At the Referral Meeting the young person, his or her parent or guardian, the youth justice worker and a police officer must be present. If the police officer is unable to be present he or she must make available a report of the arrest. Other people could also be involved, but the idea is to keep this part of the process as small and uncomplicated as possible.

Discussion

The participation of the prosecution at this stage is a matter which may be raised. Prosecutorial discretion is an important factor to be considered as it is the central mechanism currently used to decide upon the ultimate handling of any case. The reality is that having a Prosecutor available to be present at every Referral Meeting would be difficult from a practical point of view as the meetings may occur at any time of the day or night.

The young person has not at this stage, been charged and the Prosecutor does not usually become involved until after an accused person has been formally charged. The prosecuting authorities may be concerned that if they are not part of the process cases may slip through which, in their opinion, should be referred to them. While this is an understandable concern, it may be able to be allayed by the fact that all serious cases will automatically be referred to the Prosecutor. In addition, cases going to the Family Conference may still be referred to the Prosecutor at a later stage.

The draft leaves open the possibility for the Prosecutor to attend either the Referral Meeting or the Family Conference as "a person whose presence is necessary or relevant to the case".

However, there is room for debate as to whether the Prosecutor should be included as an essential part of the Referral Meeting, and whether this could be done without causing serious delays.

Another approach would be to give the Youth Justice Worker prosecutorial status. If this person were to fall under the Department of Justice and receive
appropriate training this may be quite possible. It is not being suggested here that a new brand of lawyer or prosecuting attorney be created. Many of the tasks the Youth Justice Worker needs to carry out are closer to functions of a mediator, a specialized social worker or a community worker than to a lawyer. The essential issue is whether the status and confidence which the system places on Prosecutors could not also be placed on the Youth Justice Worker. The reporter” in the Scottish Juvenile Justice system enjoys Prosecutorial status, although he or she is not necessarily a lawyer.

7. Family Group Conference

The text

The Family Group Conference is a consensus decision-making procedure that is set up to deal with the incident which has brought the young person into conflict with the law. Where consensus is not reached, the case is referred to the prosecutor.

The Conference takes place to make decisions about the incident, especially about how the damage can be repaired, and to make plans to prevent re-offending. The process is flexible, thereby allowing for decisions which are suitable to the young person's family, culture and upbringing.

The Youth Justice Worker has the responsibility of setting up the Family Group Conference. The arrangements must be made in consultation with the family, and the conference should happen at a time and place that suits the family. Wherever possible, it would be held within 21 days, or 14 days if the young person is being held in a secure care facility. It is envisaged that the conference will take place in the young person's home or familiar surroundings.

A wide variety of people are entitled to attend the Conference, listed at Section 7.2. It is not necessary for all these people to attend, although the presence of the young person, the parent or guardian, the Youth Justice Worker and a police officer (or other informant regarding details of the alleged offence) will be essential. It is important that as many people possible who are closely linked with the young person's life and those who are affected by the incident should attend. Where possible the victim, or a representative of the victim should attend. Where this occurs, the victim or representative should be briefed carefully beforehand, and should attend voluntarily. The aim is to repair the harm done to the victim and society and to engage in a practical method of restorative justice.

It can be argued that the Family Group Conference is a more challenging way for the young person to deal with offending behaviour than to go to court: they not only have to face the victim, their parent or guardian and the police officer, but are involved in the decisions about sanctions for their behaviour and about ways to repair the damage. This is far tougher than being dealt with by a court where their opinion is not important and other people make the decisions. In addition it encourages the parent or guardian to take responsibility and assist the young person in preventing reoffending.

Section 7.3, the procedure of the Family Group Conference, explains that the Conference may decide on its own procedures within the Principles from Section 1. The Youth Justice Worker explains the available options, the possibility of closed discussions between the young person and any person or people at the Conference, and the fact that decisions will be by consensus.
The functions of the Family Group Conference are set out fully in Section 7.5. Firstly, the Conference must ascertain whether or not the young person acknowledges responsibility for the alleged offending behaviour. If not, the Conference will refer the matter to the Prosecutor.

If it appears that the young person is in need of care, then the matter may be referred to a Children's Court Inquiry, without the need for ascertainment of acknowledgment of responsibility (Section 7.5(ii)). Many young people could be defined 'in need of care', but the Family Conference would be able to deal with many of these circumstances in a supportive way, while assisting the young person to be accountable. In more serious cases, where a guardian is not found, or the child appears to be abused, the case should be referred to a Children's Court Inquiry.

In cases where the young person does acknowledge responsibility for the incident, but differs in the exact details as set out in the arrest report (Section 7.5(iii)), the Family Group Conference may, in certain circumstances, consider this to be an acknowledgement of responsibility, and the matter may proceed in the same way as any other matter where responsibility has been acknowledged.

In cases where there is an unequivocal acknowledgement of responsibility (Section 7.5(iv)), the Family Group Conference may decide whether the case should be referred to the Prosecutor - usually if the case is serious - or whether there is any alternative way of dealing with the matter. Where it is decided that the young person should not be referred to the Prosecutor, the Family Conference may make such decisions and formulate such plans as are necessary and appropriate, in keeping with the principles set out in Section 2. Although the options of outcomes of Family Group Conference's are not limited, the text sets out two options which they may consider:

(a) set appropriate sanctions for the incident, including an apology and/or reparation to the victim and/or community service and/or participation in an appropriate programme, and
(b) make plans to prevent future offending behaviour.

The Conference is prevented from making inappropriate decisions by the protection built into Section 7.3(i) which states that the options available must fall within the framework of the principles set out in Section 2.

A vital aspect of the Family Group Conference option is that the young person must acknowledge responsibility for the offending behaviour. The Conference is empowered to accept acknowledgement of a lesser or different offence in terms of Section 7.5(iii). This is to avoid the unnecessary process of sending the matter to the Prosecutor simply because the young person, for example, acknowledges theft while denying housebreaking. The safeguard is that if the arresting officer or the victim feels that the young person is distorting the truth and not properly acknowledging the offending behaviour, either of them can prevent consensus on the decision that the young person has accepted responsibility, and the matter will then be transferred to the Prosecutor.

The acknowledgement of responsibility occurs during the Family Conference rather than as a prerequisite to it. This is a preferred option because it is more likely that the young person will acknowledge responsibility in this setting than at a police station.

The Family Group Conference may also have cases referred to it by the Juvenile Court. Its functions under these circumstances are set out in Section 7.5 (vii).

If the young person or his or her family fail to comply with the sanction set by the Family Group Conference, the Youth Justice Worker may reconvene a Family Group Conference to discuss the matter, whereupon a new sanction may be decided upon or the matter may, in appropriate circumstances be referred to the Prosecutor.

Discussion
The most important aspect of the Family Group Conference concept is also the one which South African society may have difficulty in getting used to. This is that the family and the people affected by the incident have real decision-making powers. They are not simply there to rubber-stamp ideas and suggestions made by state officials, and for this reason the draft is very careful not to place too many restrictions on their decision-making powers. This also allows for cultural diversity, so that the custom of the family group can be woven into the decision-making process. These factors will, in most cases, give the family and community a real sense of involvement and responsibility.

It may be thought by some that the Family Group Conference will be cumbersome and difficult to organise. It also places a lot of responsibility on the shoulders of the Youth Justice Worker. However, probation officers working in our current system often have to meet with all the members of the family in order to gather information for the probation officers report. The family members often come to court. The Family Group Conference is a way of getting everyone together at one time, and it is not more difficult to assemble than structures and processes within our current system.

Is there is a risk of offering better options to young offenders based on a requirement for them to admit the offence? Coercion to admit responsibility is certainly something which needs to be guarded against. But the advantages which such a system offers far outweigh the dangers.

One concern is how it will be possible to effectively follow up on Family Group Conference decisions. The Youth Justice Worker should ideally handle this. However this type of monitoring would become difficult when he or she has a heavy workload. In urban areas this work should be assigned to another official.

8. Referral to prosecutor

Serious cases as defined in Section 1 will all be referred directly to the Prosecutor. Cases may also be referred from the Referral Meeting, either as the decision of that meeting or if no consensus can be reached.

In addition cases may be referred to the Prosecutor from the Family Group Conference. This could occur in one of three situations, in terms of Section 7.5(i) if the young person does not acknowledge responsibility for the offending behaviour, or in terms of Section 7.5(iv) if the Family Conference decides that there is no other way to deal with the matter, or in terms of Section 7.3(iv) if the Family Conference fails to reach consensus.

The Prosecutor will consider the charge, and has the discretion to withdraw the charges on condition that the young person undergoes a suitable programme such as the Youth Empowerment Scheme, supervised community service or an Outward Bound-type project. This is an important option, particularly for young people who "slip through" the system because of failure of consensus at the Referral Meeting or the Family Group Conference. It is not an entirely new idea for Prosecutors, who have been withdrawing charges on condition that the young person undergoes a diversion programme in some Magisterial districts in South Africa for some time now.

In these proposals, current diversion programmes are simply called programmes because the whole process is one of diversion. It is envisaged that these programmes can be used by the Family Group Conference, by the prosecutor or
by magistrates as sentencing options. They could also possibly be used by communities for young people not committed there by the judicial process.

9. Juvenile Court

The Text

Currently district courts can reconstitute themselves as juvenile courts when dealing with a juvenile accused, and in cities where there are sufficient numbers of juveniles coming through the courts, one court is set aside to deal with juvenile cases.

Although it refers to a "Juvenile Court", this section does not provide for a new court structure. It is envisaged that the current system will continue, as it is the most practical way to deal with differentiation between the urban and rural centres.

However, as juvenile courts in the past have generally failed to effectively protect the rights of the youthful accused, this section aims to provide better protections while retaining the basic structure.

9.1. Jurisdiction

The Text

Section 9.1 deals with jurisdictional issues, and tackles the difficult cases where young people are charged together with adult co-accused. The text suggests that where possible, in such cases, there should be a separation of trials, but if this is not possible the adult should follow the young person to the Juvenile Court. This is a necessary safeguard, as young people are often influenced or coerced by older people to commit crimes. The fact that they then end up being charged together as co-accused should not prevent the young person from having access to the same rights and advantages as other young people who are charged alone or with co-accused who are also under the age of 18.

An important question is what should happen when the seriousness of the offence is such that the ordinary sentencing powers of a district court magistrate would be too limited. Section 9.1 provides that these matters may be transferred to the Regional Court or Supreme Court for trial or sentence. However, the section also requires that these courts adhere to the same rules set for a Juvenile Court when dealing with juvenile offenders. In other words, the age-appropriate protections should be provided to the young offender regardless of the court in which he or she appears.

9.2 Juvenile Court rules

The Text
The Juvenile Court will operate within the common law and statutory rules of evidence and procedure, but Section 9.2 provides for several additional protections.

Firstly, there is a requirement that court personnel should be specially trained. The simplest way to ensure this is for all magistrates and prosecutors to be trained to deal with matters involving young people as part of their Justice Training courses, to participate in ongoing legal education programmes and to attend workshops and seminars.

The second additional protection is the requirement of legal representation, and the only unusual feature of this subsection is that it states that even where parents are able to provide for legal representation but refuse to do so, the young person should be given legal representation.

The third protection that the case should be held in camera already exists in our current law.

The fourth requirement is that all juvenile cases will be given priority status, with cases involving young people in custody being given absolute priority status. This is to ensure that court rolls are organised in such a way that the cases involving young people should be dealt with first if the court is not specifically a Juvenile Court. Those, cases where young people are in custody would be put at the top of the roll.

This subsection also limits the length of time that cases involving young people in custody can take before the commencement of the trial and its finalisation: the trial must commence within 30 days of the arrest and must be completed within 90 days.

The fifth protection provides for the assistance of the young person by the Youth Justice Worker. This should help to provide continuity of services to the young person.

The sixth protection provides that all cases where a young person is convicted must go on automatic review.

Discussion

Several of these additional protections may give rise to debate. The first one relating to specialised training for court personnel should not be too controversial. A question which may be raised is if the presiding officer or any one of the court personnel is untrained, would the court then be improperly constituted? If the legislation were to be interpreted this way, then this subsection might become a stumbling block.

The second protection of legal representation is straightforward enough. A question which always arises here is whether or not the state will be able to meet the requirement. In addition, as the Legal Aid Board is in fact the body which will provide the representation, should the word "State" be replaced with the words "Legal Aid Board"?

The fourth protection regarding the priority status of cases where young people are on trial is important because it is in line with an underlying principle of the proposals, namely that cases involving young people should be handled within appropriate time-frames. More controversial will be the express limitation on the length of time within which a trial involving a young person in custody must commence and be finalised. This provision is important because it offers a very real safeguard against cases involving young people dragging on and on.

People working in the courts will no doubt say that the delays caused by unavailability of witnesses and overcrowded court rolls will make these time frames very difficult to adhere to. Police investigating officers will also probably say
that it places them under unreasonable pressure to investigate their cases if the matter has to be brought to trial within 30 days. The draft does provide for extension of the times in exceptional cases. The way in which this question needs to be debated is to ask: "Is it possible?", because there is no doubt that such a rule would provide tremendous protection for the young person. The Scottish system, for example, has a limitation of 110 days from arrest within which period any criminal trial involving an accused in custody must be completed.

Finally, the requirement in subsection (vi) that all cases where a young person is convicted shall be subject to automatic review is also likely to lead to debate. The South African criminal justice system already has an extensive automatic review system. Most juvenile cases in our current system, however, have escaped the scrutiny of Supreme Court judges because of the types of sentences which juveniles are generally given. If all cases involving a conviction of a juvenile by the Juvenile Court were to go on review, the entire juvenile justice system would constantly come under the scrutiny of the Supreme Court, and this would provide a fine safeguard. The main problem is whether there would be too many cases, and whether delays would render the system unworkable.

There may be other formulations which could be considered, such as automatic review in all cases where the sentence restricts the liberty of the young person.

The standard appeal procedures applying to criminal matters would apply equally to juvenile cases.

9.3. Admissibility of evidence

The Text

This section deals with evidentiary issues, and states that the normal rules of evidence shall apply. Additionally, there are two extra protections. The first is that the fact of previous arrest or diversion of a young person should not be admissible. This is common sense in that we do not, even in the case of adult offenders, ever disclose previous brushes with the law unless there is a conviction. If the fact of previous diversion is admissible, the court will be influenced by this, and one of the main advantages of diversion, namely that the young person avoids a criminal record, would be lost.

The other special protection is that evidence adduced through questioning which takes place in the absence of a parent or guardian is not admissible. This is a mechanism to avoid forced confessions.

Discussion

A question likely to be raised is about the idea of giving young people preferential evidentiary protection above that of their adult counterparts. The answer lies in the principle that young people, due to their youthfulness, require special protections within the law. With regard to confessions, for example, young people are more suggestible, and are more likely to give in to inducements or threats.

With regard to the issue of previous arrests or diversions, it might be argued that the courts need to know whether they are dealing with a "true" first offender, or a young person who has "run out of chances". Social workers and others concerned about the development of the child might want the court to be aware of previous arrests or diversion so that signals about disturbances in the child's development can be tracked. It could be argued that by using the Family Group Conference, previous arrests or diversion will form part of the basis for decision-making because of the group's memory of the child's life. This is more healthy than the court using the same information to increase the severity of sanctions.

9.4. Remand procedure
lie remand procedure is highlighted here. Here is a requirement that an inquiry be held every time a young person appears before the court to ascertain whether there is a need for further custody. If the young person is to be remanded in custody it should be for a period of no more than 14 days. An additional method for shortening the pre-trial period is the awarding of priority status for juvenile cases and absolute priority for those cases involving juveniles in custody.

Age of criminal capacity

The proposals effectively raise the age of criminal capacity to 14 years, and state that only young people of 14 or older can be tried by criminal courts.

However, young people between the ages of seven and 13 are able to be held accountable for their behaviour, by means of caution or Family Group Conference.

In the current South African legal system the doli incapax rule ‘of a rebuttable presumption of lack of capacity in children under the age of 14 years has failed dismally to provide any protection for children coming through the system. The presumption is far too easily rebutted, and very little effort is made to really inquire as to the child's ability to form the intention to commit a crime. Experience indicates, therefore, that meaningful reform requires a departure from the doli capax doctrine.

This section also deals with the problem of what is to be done in cases where the age of a young person is uncertain or is in dispute. In such cases the young person shall be deemed to be the age he or she claims to be until an examination by a district surgeon is carried out.

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The age of criminal capacity is bound to be a controversial topic. The choice of the age of 14 as the age of minimum criminal capacity is prompted by the doli capax division. A survey of minimum age of criminal capacity in other countries indicates 14 to be the most common age. The ages of 12, 13, 15 and 16 also feature.

Britain, and countries following the British legal tradition have 14 years as the minimum age but where children over 10 but below 14 commit grave crimes the age of criminal capacity can be lowered. There seems to be scant logic in saying that children who lack criminal capacity to commit less serious crimes should arbitrarily be imbued with criminal capacity when a more serious offence is carried out by them. It seems that this rule has more to do with the satisfaction of a retributive public than any other consideration. It certainly does not promote the best interests of the child.

In many systems, children under the age of criminal capacity are dealt with by the welfare system. The proposals in this draft, however, have taken an alternative route. Young people under 14 can be held accountable for their actions, but only through caution or Family Group Conference. This follows from the fact that the system envisaged is based on young people taking responsibility for their actions. It is also true that the sooner the family and others connected with the life of the young person become aware of the problems and begin to find solutions, the better the outcome is likely to be.
1. The role of the Youth Justice Worker

The Text

This section sets out the role of the Youth Justice Worker, both during the pre-trial stage and during the trial.

Discussion

What has not been set out in the draft is the exact status of the Youth Justice worker. Questions which will need to be answered include: Who will qualify to be a Youth Justice worker. Under which government department or body will they fall? The Drafting Consultancy suggests that they fall under the Department of Justice and that they be given high status. We further suggest that Youth Justice Workers are drawn from the community which they are likely to serve and that their main skills would be mediation and the ability to communicate effectively with young people. They would not necessarily have to be qualified social workers or lawyers. We envisage that the Youth Justice Workers would fall under a special section of the Department.

In rural and village areas where few young people are arrested, it might be possible to use Youth Justice Workers on a pro-rata basis calling them only when a young person is arrested. This system would ensure that children in urban or rural areas would be offered the same assistance.

12. Sentencing

The Text

Section 12.1 directs the court to have regard to the principles set out in section 12.2 when considering sentencing, and indicates that the relevant age for purposes of sentencing is the age the young person was at the time of the offence.

Section 12.2 sets out seven guiding principles of sentencing, namely proportionality, restorative justice, accountability, family group preservation, time frames appropriate to children, possible need for treatment or counseling and decarceration.

Section 12.3 sets out specific sentencing options. Briefly stated these are caution (with or without conditions), postponement of the passing of sentence, referral to a Family Group Conference for recommendations and plans, participation in one of a number of programmes, correctional supervision or a custodial sentence.
The aim is to allow for a broad range of sentencing options, and to leave the door open to new or different options being created.

Discussion

There may be other suggestions for creative sentencing options which are not included here.

"An appropriate secure-care facility" is open to interpretation. Ideally, there should be special secure-care facilities for youth which are not within prison walls and which are run on a 'cottage system' or surrogate-family system. However, until such institutions are available this could mean the juvenile section of a prison. We recommend that if such a facility were inside a prison, it should be run by personnel in civilian clothes. We further recommend that only a few spaces are made available in these facilities, and that they consist of more smaller facilities rather than fewer large facilities for awaiting trial youth. The text sets out requirements for the treatment of young people in secure care in Section 13.

13. Treatment of young people in secure care facilities

The Text

Section 13 sets out in some detail specific protections for young people who are held in secure-care facilities, both awaiting trial and sentenced. Briefly worded these are:

- suitably groupings according to age, size or level of danger, constant supervision,
  exercise and recreation,
  health protection,
  appropriately trained staff in institutions, protection from assault or abuse,
  appropriate education, counseling,
  humane correction,
  contact with family or supportive network,
  pre-release programmes.

This list of rights is a blend of both civil rights (e.g. humane correction) and social rights (education, health care). Both are necessary for the proper protection of children held in custody. The social rights tend to carry a price tag, but in most cases our institutions already have some of these facilities. It is not a matter of creating completely new services and facilities (although in some underdeveloped areas of the country this will be necessary) but an improvement and rationalisation of existing services and facilities.'
Discussion

It is important that the requirements be achievable, as there is no purpose in having paper rights. For sentenced youth, it may be necessary to have a few well-equipped detention centres (or sections of prisons). This is cost effective, but carries the disadvantage of moving young people some distance from their homes and families.

With regard to awaiting trial youth who may only be held for short periods it may not be possible to embark on long-term education, but they should be kept busy with educational or recreational tasks appropriate to their skills.

14. Record keeping, fingerprinting and protection of identity

14.1 Record-keeping in the pre-trial phase

The Text

This sub-section stipulates that while no record shall be kept of an informal caution given by a police officer, formal cautions given at the police station after the Referral Meeting will be recorded, and police and Youth Justice Workers will have access to these.

A central database will be kept of all children who go through the Family Group Conference, with access limited to Youth Justice Workers and Public Prosecutors.

Fingerprints may only be taken when a young person is charged. This would mean that only those going to the Juvenile Court will have their prints taken.

The aim of section 14.1 is to protect the young person as far as possible while providing those dealing with them sufficient information of previous behaviour to enable them to decide on appropriate handling.

Discussion

Repeat offenders need to be identified, because although they may only commit fairly petty crimes, there is obviously a limit to the number of times they can escape being taken through the criminal justice system. This draft does not give a cut-off point because each young offender and his or her circumstances provide such different profiles that it is difficult to formulate a general rule. There may be a need for guidelines as to when a young person has "run out" of opportunities to avoid the juvenile court. It is questionable as to whether these need be set out
14.2. Record-keeping of convictions by Juvenile Court.

The Text

Records shall be kept of every young person convicted by the Juvenile Court. Such records would fall away at the age of 18 except in the case of murder, armed robbery, rape or violent sexual assault.

Discussion

It is questionable whether any juvenile criminal records should be retained after the age of 18. There is an argument however, that with regard to serious violent crime it is necessary to follow patterns of behaviour, and that society needs the protection of the courts knowing whether or not an adult offender has a long history of serious violent behaviour in order to set effective sentences. This matter is open to debate.

14.3 Protection of the identity of the young person

The Text

This section echoes an existing provision in the Criminal Procedure Act which forbids the publication of information disclosing the identity of an accused under 18 years. It adds an additional section, that this protection should not be used to prevent access to young people for the purpose of rendering assistance, research or analysis.

Discussion

This second subsection was added because under the existing legislation, this clause has often been used to prevent individuals and organisations obtaining access to information when seeking to assist young people and to analyse the situation of young people caught up in the Criminal Justice system.

Conclusion

These proposals intend to stimulate debate and action towards a comprehensive juvenile justice system. Some questions remain as yet unanswered, such as the question of whether the justice and welfare aspects involved should be kept separate or become more integrated. In the past the lack of cohesion between the welfare and justice aspects of the work impacted negatively on the young people who were coming through the system. On the basis of this experience it might seem sensible to blend the justice and welfare aspects. On the other hand, there is a danger of blurring the two, thereby losing the emphasis on accountability, and even on due process protection for the young person.

These proposals present neither a pure welfare nor a pure justice model of juvenile justice. Instead they provide a common sense blend of the two.
If these proposals were to become the basis for law, it would need to be decided whether they would be part of composite legislation on children or young people, whether they would become part of the Criminal Procedure Act or whether they would form a separate piece of legislation.

An idea to be considered is the creation of an independent (but state-funded) body to oversee the running of the system, ensure high standards and regional conformity. This body could approve training and recruitment of staff, ensure that the principles set out in the legislation are adhered to, analyse the way in which the legislation is used by the various role players, and keep track of changing trends. This body might be an entity on its own, or be an arm of a directorate or Commissioner for Children.

 Legislative Proposals

Section 1. Definitions

ALTERNATIVE SENTENCE. Any sentence that does not include whipping or incarceration and adheres to the Principles of the Act.

ARREST. To stop the forward motion or actions of a young person who is endangering other people, property or him or herself using the minimum force required under the circumstances.

CARE FACILITY. Institutions approved by the Department of Welfare to provide care for young people ranging from open care facilities to secure care facilities.

CAUTION. The text refers to three types of caution. The first is an informal caution which is a warning issued by a police officer at the scene of the alleged offending behaviour or in the presence of the parent or guardian. No record is kept of this type of caution.

The second is a formal caution issued at the police station by a police officer above the rank of constable. A record is kept by the police of this type of caution.

The third type of caution is a caution as a sentence handed down by the juvenile court either unconditionally or with conditions set out in section 12.3

CHARGE. A charge is laid only once a decision has been made to refer the matter to a Prosecutor. Prior to that time an incident has been reported, but a charge has not yet been laid.

CHILD CARE ACT. Child Care Act no. 74 of 1983

CHILDREN’S COURT INQUIRY. Inquiry as set out in the Child Care Act no. 74 of 1983.

CLOSED DISCUSSIONS. A discussion in private between the young person one or more of the people present at a Family Group Conference.

CONSENSUS. Agreement by the mutual consent of the participants of a Family Conference.

DUTY OFFICER. The officer on duty at the police station when a young person is brought in by the arresting officer.

FAMILY/FAMILY GROUP. These terms are used interchangeably to describe the people that the young person defines as his or her supportive network. This may mean relatives of the young person or in the case of homeless children, may mean a shelter worker or other people close to the young person's life.

FAMILY GROUP CONFERENCE. A meeting of all or some of the people who form the supportive network of the young person, and all or some of those people affected by the alleged offending behaviour of a young person, which operates according to rules and procedures set out in the text.
GUARDIAN. A guardian is any responsible adult who expresses a bona fide willingness to assist the young person at any stage of the procedures set out in the text.

HUMANE CORRECTION. Behaviour management which adheres to international standards.

UVENILE COURT. A criminal court before which a young person is appearing.

LANGUAGE. Language which a young person understands. This means both the mother-tongue language of the young person as well as language appropriate to the age of the young person.

OPEN CARE FACILITY. An institution provided for the care of awaiting trial young people who are not charged with a serious offence - presently called a place of safety.

PRIORITY STATUS. A case must be given priority on the court roll. Absolute priority status means the case must be given absolute priority on the court roll.

PROGRAMME. An approved programme in which a young person participates as part of their acknowledgment of accountability for their actions. Such a programme may be run by state or non-state bodies.

RECEPTION PROCESS. Reception Process is a process by which an incident involving a young person is reported at a police station. During the Reception Process certain procedures are laid out regarding the handling of the young person by the duty officer and the Youth Justice Worker.

REFERRAL MEETING. This meeting takes place as soon after the Reception Process as possible and is a procedure for making an initial decision about the handling of the reported incident.

SECURE-CARE FACILITY. A locked institution provided for the secure care of either awaiting trial or sentenced young people.

SERIOUS OFFENCE. Murder, armed robbery, robbery resulting in serious injury, rape, sexual assault resulting in grievous bodily harm, arson resulting in serious damage.

YOUNG PERSON. A person who has attained the age of seven but is under the age of 18. Used interchangeably with juvenile, as in Juvenile Court.

YOUTH JUSTICE WORKER. A person employed to carry out the tasks and responsibilities as set out in the text.

Section 2. Principles
Any court or any person who exercises any power conferred by or under this Act shall be guided by the following principles:

1. The best interests of the young person shall be paramount in all actions.  

2. Unless the safety of the community requires otherwise, criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter.  

3. A young person may not be discriminated against, directly or indirectly, on one or more of the following grounds: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.  

4. The vulnerability of young people entitles them to special protection during investigation.  

5. A young person has the right to express an opinion, to be involved in all decisions and to have their opinion taken seriously in any matter or procedure affecting him or her.  

6. A young person has all due process and constitutional rights together with these additional rights:  
   (a) To have present at all decisions affecting them a person or persons important to his or her life, except where that participation would not be in the best interests of the young person.  
   (b) To have matters explained to them in a clear, understandable manner appropriate to their age and in language which they understand.  
   (c) When deprived of liberty, to be separated from adult offenders and suspects and to maintain contact with their family/community.  
   (d) To remain in the community during investigation and while awaiting a final resolution of matters unless it can be demonstrated that they are likely to endanger themselves or others.  
   (e) To periodic reviews of placement.  
   (f) To have procedures dealt with in time frames appropriate to young people.  

7. The family/community is central to the well-being of the young person. Therefore in any decisions consideration should be given to:  
   (a) Ensuring that the family/community is involved in all decisions about the young person and  
   (b) How decisions affecting the young person will affect the family/community.
(c) Strengthening the relationship between the young person and the family/community.
(d) Supporting the family/community so that they can deal with the offending young person themselves. (c) Keeping disruptive intervention into family/community life to a minimum.

8. A young person should be held accountable for his or her actions and should be encouraged to accept responsibility for his or her behaviour.

Accountability

9. In deciding sanctions for a young person:

Appropriate

(a) Age should be a mitigating factor in any decision about sanctions or type of sanctions.
(b) All sanctions should promote the development of the family/community.
(c) A young person should not need to be institutionalised in order to have his or her welfare needs met.
(d) A young person should only be placed in detention in exceptional circumstances.
(c) Where it is considered to be necessary, detention or imprisonment should be used for the shortest possible time, and never longer than the sentence that would be given to an adult committing a similar offence.
(d) Young people in any form of custody should have the narrowest possible restriction placed on their constitutional rights.

10. The victim should have the right to be involved in all decisions about sanctions, and their interests must be considered in any decision.

Cultural sensitivity

11. In all actions, the procedures, penalties and other actions should have respect for the needs, values and beliefs of particular cultural and ethnic groups.

Publicity & records

12. A young person has a right to protection from publicity about his or her offending and from having any records of offenses as a juvenile cited in an adult court or in relation to any application for employment.

Section 3. Alternatives to arrest

3.1 Caution of young person by police officer

(i) The police officer may decide that it is appropriate in a case involving an offence alleged or admitted to having been committed by a young person to issue an immediate caution without effecting an arrest unless a caution would clearly be inappropriate having regard to the seriousness of the offence.

(ii) Having decided that it would be appropriate to warn the young person, the police officer may:

(a) issue the immediate caution at the scene, or
(b) ask the young person to accompany him or her to the young person's home where the caution may be issued in the presence of the parent or guardian.
3.2 Written notice to attend a Referral Meeting

Where the police officer decides that it is not appropriate to issue a caution, the young person will be requested to accompany the officer to the parent or guardian, and a written notice to attend a Referral Meeting at a specified time and place will be handed to the young person and his or her parent or guardian.

4. The arrest of a young person

4.1 Grounds for arrest

4.1 A police officer shall not arrest a young person unless the police officer is satisfied on reasonable grounds that the arrest is necessary:

(i) to ensure the appearance of the young person at the Referral Meeting, or

(ii) because the parent or guardian of the young person cannot be found immediately, or

(iii) to prevent the young person from committing any further offences, or

(iv) to prevent the young person from tampering with evidence or interfering with people who may be called as state witnesses in any case arising from the alleged offence, or

(v) to protect the young person from causing damage to himself or herself or to another person, or

(vi) because the alleged offence is deemed to be serious in terms of the definition in Section 1.

4.2 Advising the young person of his or her rights

At the time the young person is to be arrested, the police officer shall inform the young person in language that he or she understands, of the following:

(i) The nature of the offence in regard to which he or she has been arrested.

(ii) The fact that the young person has a right to remain silent.

(iii) The fact that the young person has a right to the presence of his or her guardian or other responsible adult during questioning.

(iv) The fact that the young person has a right to be assisted by a Youth Justice Worker.

(v) The fact that the young person has a right to a legal representative of his or her choice. If the young person or his or her family are unable to pay for this legal assistance, and if the case should go to court or if the young person is held in secure care, the fact that free legal representation shall be provided.
5. Reception Process

5.1 Duties after arrest

5.1 The arresting officer shall deliver the young person to the duty officer.

(i) The officer on duty shall receive the young person from the arresting officer. The arresting officer shall be required to write a statement setting out the circumstances of the arrest, and hand it to the duty officer.

(ii) The duty officer shall immediately contact the Youth Justice Worker.

(ii) If the parent or guardian of the young person is not yet present, the duty officer assisted by the Youth Justice Worker shall take all reasonable steps to secure the attendance of a parent or guardian without delay.

(iv) The Youth Justice Worker shall make the necessary arrangements for a Referral Meeting to take place as soon as possible or within 24 hours of the arrest.

5.2 Release of young person or delivery into 24 hour care

(i) If the Referral Meeting cannot take place immediately, the young person shall be released into the care of their parent or guardian with a written order requiring them to attend the Referral Meeting at a specified time within 24 hours, where a decision will be taken as to whether the case will be dealt with by

(a) formal police caution,
(b) Family Group Conference,
(c) referral to a Prosecutor for consideration of the charge or charges,
(d) referral to Children's Court Inquiry,
(e) a decision not to take action.

(ii) Where the parent or guardian is not present after all reasonable steps have been taken to assure their attendance, and where the young person does not fall into the category set out at Section 5.2 (iii), the Youth Justice Worker shall make arrangements for the young person to be held for no more than 24 hours at a care facility before being brought to a Referral Meeting for assessment.

(iii) A young person may only be delivered to a secure care facility under the following circumstances:

(a) the young person is over the age of 14,
(b) the act is serious enough to warrant continued detention,
(c) there is prima facie evidence that the young person has committed the offence alleged,
(d) there is reasonable cause to believe that a young person will run away and that he or she will be unavailable for further proceedings, or
(e) there is reasonable cause to believe that the young person will destroy evidence or interfere with witnesses related to the alleged offence.

(iv) If the circumstances listed at Section 5.2 (iii) are present an order may be obtained, signed by a magistrate, authorising the holding of the young person in secure care for no more than 24 hours before the expiry of which time the young person must be brought before a court, and the custody decision reviewed.

6. Referral Meeting

6.1 The Referral Meeting
Every young person who has been arrested must be brought to the Referral Meeting within 24 hours of the arrest. The Referral Meeting will be attended by

(i) the young person,
(ii) the parent or guardian unless all reasonable steps to trace them have failed,

(iii) a youth justice worker,
(iv) the arresting officer or duty officer,
(v) any other person whose presence is necessary or relevant to the meeting.

Where the arresting officer is unable to attend, he or she shall cause a statement to be handed in for consideration at the Referral Meeting.

6.2 Purpose of the Referral Meeting

The purpose of the Referral Meeting will be to determine how the case should be processed. The Referral Meeting may decide to refer the young person to

(i) the police for formal caution,
(ii) a Family Group Conference,
(iii) the Prosecutor for consideration of the charge,
(iv) a Children's Court Inquiry in terms of the Child Care Act

The Referral Meeting may decide that no action needs to be taken.

6.3 Procedure for Referral Meeting

The Youth Justice Worker will co-ordinate the meeting. He or she will also explain the rights of the young person and procedures and options relating to the Referral Meeting.
The arresting officer will provide information regarding the alleged offence, either verbally or in written form.

Decisions will be by consensus. If the parties fail to reach consensus, the matter will be referred to the prosecutor.

7. Family Group Conference

7.1 Convening the Family Group Conference.

(i) If the young person is referred to a Family Group Conference the Youth Justice Worker shall convene such Conference within 21 days of the date of Referral Meeting and within 14 days where the child is held in custody.

(ii) The Youth Justice Worker shall, before convening any Family Group Conference, take all reasonable steps to consult with the young person, the parent or guardian and family and victim with regard to:
(a) the date, time and place at which the Conference should take place,
(b) the people who should attend the Conference,
(c) the procedure to be adopted at the Conference, and as far as is possible should give effect to the wishes of the parent, guardian, family and community having regard to the principles and requirements of the act.

(iii) The Youth Justice Worker shall take all reasonable steps to ensure that all the people whose attendance is required at the Conference are notified of the date, time and place of the Conference.

7.2 People entitled to attend the Family Group Conference

(i) People entitled to attend the Family Group Conference are

(a) the young person,
(h) the parent or guardian,
(c) the Youth Justice Worker,
(d) the arresting officer or other informant regarding details of the alleged offence,
(e) the victim of the alleged offence or a representative of that victim,
(f) other family members, friends or community representatives,
(g) a social worker, if the child is in care,
(h) a legal representative or para-legal,
(i) any other person whose presence is required or is relevant.

(ii) The Youth Justice Worker should ascertain the views of any person who is entitled to attend the Conference, but is unwilling or unable to attend, and shall ensure that these views are made known at the Conference.

7.3 The procedure of the Family Group Conference
The Conference may decide upon its own procedure, allowing for:

(i) Explanation of the rights of the young person and the options available to the Conference within the framework of principles set out in Section 2.

(ii) The ascertainment, after such explanation, whether the young person admits the alleged offence. Where the Conference is satisfied, after careful discussion, that the young person denies the offence alleged, or any other offence related to the incident the Conference shall, after due consideration of the seriousness of the offence and the personal circumstances of the young person (a) refer the matter to the prosecutor for consideration of the charge or charges (b) take no action with regard to the offence, and discuss plans to prevent further conflict of the young person with the law.

(iii) The Young person is entitled to closed discussions with any person or persons present at the Conference, at any time during the Conference.

(iv) Decisions of the Family Group Conference shall be by consensus. Where consensus is not reached, the matter shall be referred to the prosecutor for consideration of the charges.

7.4 Family Group Conference discussions privileged

The discussions which take place at a Family Group Conference are privileged, and cannot be disclosed at any subsequent criminal proceedings.

7.5 Functions of the Family Group Conference

The functions of the Family Group Conference shall be

(i) To ascertain whether or not the young person acknowledges responsibility for the alleged offending behaviour. If he or she does not, the Conference shall refer the matter to the Prosecutor authority for consideration of the charge or charges.

(ii) Where it appears to the Family Group Conference that the young person is in need of care and the Conference decides to refer the matter to a Children's Court Inquiry in terms of the Child Care Act 74 of 1983, the Conference need not ascertain whether or not the young person acknowledges responsibility.

(iii) Where the young person does acknowledge responsibility for the offending behaviour, but differs with the exact details as set out in the statement by the arresting officer, the Family Group Conference may decide to consider the young person's account to be an acknowledgment of responsibility for the offending behaviour and proceed according to the procedure set out at Subsection (iv).

(iv) Where a young person acknowledges responsibility for the offending behaviour, the Family Group Conference may decide whether it can proceed with
the matter or whether the young person should be referred to the Prosecutor for consideration of the charge or charges.

(v) Where the Family Group Conference is of the opinion that the young person should not be referred to the Prosecutor (a) the Family Group Conference may make decisions and formulate such plans as are necessary and appropriate in respect of the young person.
(b) In determining these decisions and plans the Family Group Conference shall have regard for the principles set out in Section 2 of this Act.
(c) Without limiting the options of the Family Group Conference, the Conference may:

(aa) decide on appropriate sanctions for the offending behaviour, including an apology and/or reparation to the victim and/or community service and/or participation in an appropriate programme, and
(bb) make plans to prevent any future offending behaviour by the young person.

(vi) If the matter has been referred to the Family Group Conference by the Juvenile Court at any time after the trial has commenced, the Family Group Conference may make such recommendations, sanctions and plans as set out in Subsection (v) of this Section.

(vii) If the matter has been referred to the Family Group Conference by the Juvenile Court for recommendations at sentencing, the Family Group Conference may make such recommendations and plans as are necessary and these shall be presented by the Youth Justice Worker to the court for consideration by the presiding officer.

(viii) If there is a failure on the part of the young person or his or her family to comply with the sanction set by the Family Group Conference, the Youth Justice Worker may reconvene the Family Group Conference to discuss the matter. The Family Group Conference may decide upon an altered sanction or in appropriate circumstances refer the matter to the Prosecutor.

8. Referral to prosecutor

8.1 A matter involving a young person may be referred to the Prosecutor where:
(i) due to the seriousness of the charge it is decided at the Referral Meeting that the young person shall be charged and the matter referred to the Prosecutor for consideration of the charge or charges, or
(ii) the Family Group Conference decides, in terms of section 7.5(i)(a) that the case should be referred to the Prosecutor, or
(iii) the Family Group Conference decides, in terms of section 7.5(iv) that the case should be referred to the Prosecutor, or
(iv) where the Family Group Conference is unable to reach consensus, in terms of Section 7.3(iv).

8.2 Having considered the charge or charges against the young person the Prosecutor may:
(i) proceed with the charge or charges in the Juvenile Court, or
(ii) withdraw the charges.

8.3 The Prosecutor may decide to withdraw the charge or charges on condition that the young person undergoes a appropriate programme.
9. Juvenile court

9.1 Jurisdiction

(i) If the Prosecutor decides to proceed with the matter, the young person will be required to appear in Juvenile Court.

(ii) Where a young person is a co-accused with an adult offender or offenders, the Prosecutor shall, wherever possible, allow for a separation of trials. Where this is not possible, the adult offender shall appear with the young person in the Juvenile Court.

(iii) If the Prosecutor decides that due to the seriousness of the case, the sentencing jurisdiction of the district court is too limited, the case may be referred to the Regional Court and/or the Supreme Court for trial and/or for sentence.

(iv) A young person appearing before the regional or supreme court shall have the protections set out in section 9.2.

9.2 Juvenile Court rules

The court shall operate within the common law and statutory rules of evidence and criminal procedure with the following additions:

(i) The court personnel shall be specially trained to deal with matters involving young people.

(ii) The young person shall be provided with legal representation. Such representation shall be provided at State expense if the child's parent or guardian are unable or unwilling to pay for the services of a legal representative.

(iii) The court will be held in camera.

(iv) All juvenile cases will be given priority status, with cases where the young person is in custody being given absolute priority status. The trial must commence within 30 days of the arrest, and must be completed within 90 days. This may only be extended in exceptional cases and on application to the Minister of Justice.

(V) A Youth Justice Worker will assist the young person.

(vi) All cases where a young person is convicted shall be subject to automatic review.

9.3 Juvenile Court - admissibility of evidence
The rules of evidence with regard to criminal matters shall apply, with the following additions:

(i) The fact that a young person has previously been arrested or diverted shall not be admissible at any subsequent trial, either during the trial or after conviction.

(ii) Any evidence adduced through questioning of a young person which does not take place in the presence of a parent or guardian will not be admissible.

9.4 Juvenile Court - remand procedure

At the first and all subsequent appearances of a young person before the Juvenile Court the magistrate shall:

(i) Inquire as to the need to hold the young person in custody for any further period of time,

(ii) remand the case for no longer than 14 days at a time if the young person is to remain in custody,

(iii) regard all cases involving a young person as having priority status,

(iv) regard all cases involving a young person who is in custody as having absolute priority status.

10. Age of criminal capacity

(i) Young people of 14 years or older shall be deemed to have criminal capacity, and may be dealt with by the criminal courts if there is no other suitable way of dealing with their cases.

(ii) Young people below the age of 14 years shall not be tried by a criminal court.

(iii) Young people between the ages of seven and 14 can be dealt with by means of a formal police caution, Famfiy Group Conference or, where the young person is in need of care, by referral to a Children's Court Inquiry.

(iv) Where the age of a young person is uncertain or is in dispute, the young person shall be deemed to be the age he or she claims to be until an examination by a district surgeon has been carried out.

The role of the Youth Justice Worker
Each young person dealt with in terms of this legislation will be allocated a Youth Justice Worker at the earliest possible time. The Youth Justice Worker shall, wherever possible, follow through the case to its conclusion. All Youth Justice Worker will at all times act in the best interests of the young person and adhere to the principles in Section 2. Tasks and responsibilities include the following:

11 With regard to Reception and Referral of a young person

(i) The Youth Justice Worker will be notified of the arrest of the young person immediately, and will be available as soon as possible to assist him or her,

(ii) The Youth Justice Worker will ensure that the Referral Meeting takes place as soon as possible after arrest. Where delay is unavoidable the Youth Justice Worker will set the time and venue of the Referral Meeting and issue the notice for the young person, parent, guardian and other people whose presence is necessary or relevant to the meeting to attend such meeting,

(iii) The Youth Justice Worker will ensure that the Referral Meeting takes place at the time and venue specified,

(iv) The Youth Justice Worker will coordinate the Referral Meeting and will explain to the young person his or her rights and responsibilities in relation to the alleged offence. This will include an explanation of the procedure and purpose of the Referral Meeting as well as the various options open to the young person,

(v) The Youth Justice Worker will ensure that all people present at the Referral Meeting have an equal opportunity to express their views,

(vi) The Youth Justice Worker must arrange the appropriate Referral Meeting process,

(vii) The Youth Justice Worker must cause a record to be kept of the decision made at the Referral Meeting.

11.2 With regard to the Family Group Conference

(i) The Youth Justice Worker shall convene the Family Group Conference in accordance with the rules set out in Section 7.1,

(ii) The Youth Justice Worker shall assist the Family Group Conference to decide upon the procedure it is going to follow, in accordance with the guidelines set out in Section 7.3,

(iii) The Youth Justice Worker shall ensure that all people present at the Family Group Conference have an equal opportunity to express their views,
(iv) The Youth Justice Worker shall guide the Family Group Conference with regard to its functions in terms of Section 7.5,

(v) The Youth Justice Worker shall prevent the Family Group Conference from making decisions or plans which conflict with the principles set out in Section 2,

(vi) In cases where the Family Group Conference decides to refer the matter to the Prosecutor for consideration of the charges or to the Children's Court for a Children's Court inquiry, the Youth Justice Worker shall ensure that the referral reaches the Prosecutor or the Children's Court

(vii) in cases where there is a failure by the young person or his or her family to comply with the sanction, the Youth Justice Worker shall reconvene a Family Group Conference in term of Section 7.5(Viii).

1.3 With regard to the trial

(i) The Youth Justice Worker shall follow the progress of the case in order to support and protect the young person by ensuring that the court is adhering to the set time periods and remand requirements,

(ii) The Youth Justice Worker shall begin to gather information for a pre-sentence report from his or her first contact with the young person, with a view to obviating delays at the sentencing stage should the young person be convicted,

(iii) The Youth Justice Worker shall prepare and present, to the court a pre-sentence report in respect of every young person who is convicted of an offence.

12. Sentencing

12.1 Setting an appropriate sentence

12.1 When a young person has been convicted of an offence in the Juvenile Court the magistrate shall, having regard to the guiding principles and after due consideration of all the available alternatives, set an appropriate sentence.

12.2 Guiding principles of juvenile sentencing:

(1) Proportionality: The sentence should be in proportion to the circumstances of both the offender and the offence.

(li) Restorative justice: Sentencing should be framed within the notion of restorative justice which embodies the restoration of harmony between the young person, the victim and society.
(iii) Accountability: The young person should be encouraged to take responsibility for the offence and be actively involved in deciding on an appropriate sentence, assisted by the Youth Justice Worker where necessary.

(iv) Family preservation: The sentence should reflect the need to keep the young person within the family group wherever possible.

(v) Time frames: Sentencing time frames should be appropriate to the age and the perception of the time scale of the young person.

(vi) De-carceration: Young people should only be incarcerated in exceptional circumstances.

### 12.3 Sentencing options

(i) Caution

Upon conviction, the court may caution the young person:

(a) unconditionally, or
(b) with supervision for specified period, or
(c) with condition of attendance at a centre for treatment counselling or other programme, or
(d) with the requirement of a plan of action to be submitted to the court by the young person, assisted where necessary by the Youth Justice Worker and parent or guardian.

(ii) Postponed sentence

(a) Upon conviction of a young person, the court may postpone the passing of sentence unconditionally for a specified period no longer than two years.
(b) If the young person is convicted of any further offence during the set period, he or she will be called before the court to be sentenced on the offence for which the passing of sentence was postponed.
(c) If the young person is not called before the court before the expiration of the period, the young person shall be deemed to have been cautioned unconditionally.

(iii) Referral back to Family Group Conference for recommendations and plans

The court may refer the child, under supervision of the Youth Justice Worker, back to the Family Group Conference for appropriate recommendations and plans.

(iv) Sentencing programmes under supervision

The court may direct the Youth Justice worker to ensure that the young person participates in one of the following sentencing programmes:

(a) restitution or compensation,
(b) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation,
(c) community service,
(d) submission to instruction or treatment,
(e) submission to supervision or control,
(f) the compulsory attendance or residence at some specified centre for a specified purpose,
(g) good conduct,
(h) any other programme.

(v) Correctional supervision

The court may, in respect of serious offences, impose a sentence of correctional supervision in terms of Section 276(1) of the Criminal Procedure Act no 51 of 1977.

(vi) Secure-care facility

The court may, in respect of serious offences or repetitive offenders, order that he or she be sent to an appropriate secure care facility for an appropriate period. A sentence of death or incarceration for life may not be passed upon a person who is under the age of 18 years at the time of the commission of the offence.

(vii) The court may, in respect of serious and repetitive offences impose a sentence of imprisonment or a wholly or partially suspended prison term.

13. Treatment of young people in secure-care facility

13.1 Protections

13.1 Young people in secure care, those awaiting trial, pending trial and those who are sentenced, shall be afforded the following protection:

(i) Shall never be mixed with adult prisoners or other youths aged 18 or over, and shall be suitably grouped according to gender, age, or size, or level of danger,

(ii) Constant supervision,

(iii) Sufficient opportunity and equipment for daily large muscle exercise and access to adequate open air facilities, and recreational facilities,

(iv) Health protection facilities including adequate nutrition, and medication where necessary. Young people with disability shall be appropriately cared for,

(v) Staff of institutions where young people are in secure care must be appropriately trained to manage the young people in their care,
(vi) Staff of institutions for secure care must take reasonable steps to protect young people from assault and sexual assault,

(vii) Appropriate education shall be provided to all young people in custody, from literacy training to matric level. Young people with learning disabilities should be appropriately cared for. There should be an emphasis on job skills and life-skills training to equip the young person to reintegrate into society upon release,

(viii) Counseling services will be available for all young people in secure-care facilities,

(ix) Correction of young people in custody shall be humane and in keeping with the relevant regulations,

(x) Transport costs to allow for monthly contact visits from members of the young person's family group or supportive network must be provided,

(xi) Pre-release programmes must be provided to all young people in custody.

14. Record-keeping, fingerprinting and protection of identity

14.1 Record-keeping in the pre-trial phase

(i) No record shall be kept of a caution given by the police officer in terms of section 3.1.
(ii) A record shall be kept of a formal caution by police officer. The police service and the Youth Justice Worker shall have access to these records.
(iii) National computer records shall be kept of all Family Group Conferences. Access shall be restricted to Youth Justice Workers.
(iv) A record shall be kept of young people who participate in authorised pre-trial programmes. The records should be held in a data base with access restricted to Youth Justice Workers and the Prosecutor.
(v) Records of pre-trial diversion shall not be disclosed to the Juvenile Court at any subsequent trial.
(vi) Fingerprints may only be taken when a young person is charged with an offence.
(vii) Access to records required for study or analysis may be extended to other people by the Youth Justice Worker, the police or the Prosecutor.

14.2 Record-keeping of convictions by Juvenile Court

(i) A record shall be kept of every young person convicted by the Juvenile Court.
(ii) The records shall be linked to fingerprints, and shall be held in the central South African Criminal Bureau data base.
The criminal record shall be expunged upon the date that the young person turns 18, except in cases of murder, armed robbery, rape or violent sexual assault.

14.3 Protection of identity of the young person

(i) No person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused who is under the age of 18.

(ii) This protection set out in Subsection (i) shall not be used to prevent people or agencies who are seeking access to children in order to offer assistance to them from doing so. It may also not be used to prevent access to information for the purpose of study or analysis.

THESE proposals are a first step towards the legislative creation of a juvenile justice system for South Africa which works. They have come about because of the unsatisfactory way in which young people in conflict with the law have been handled under apartheid.

The proposals provide answers to this problem in a new and innovative way. They suggest a system which will:

- Protect the rights of the young person and the victim, with direct restitution to the victim being a particular feature
- Emphasise accountability, encouraging the young person to acknowledge and take responsibility for their offending behaviour
- Encourage restorative justice and the resolution of conflict
- Bring young people, their family groups and communities to the centre of the decision-making process
- Provide alternatives at every stage of the process - at arrest, pre-trial and at sentencing - so that diversion becomes a central part of the system
- Encourage plans to prevent re-offending
- Provide methods to minimise the need for institutionalisation at any stage of the process
- Be sufficiently flexible and ensure cultural appropriateness
Keep most young offenders out of jail
We the National Hindu Youth Federation, wish to submit the following:

1) Every person has the right to freedom of conscience, religion and thought, belief and opinion. As a secular state, SA needs to be more transparent in the new Constitution. The state should not identify with or favour any particular religious tradition.

2) Every person shall have the right to profess, practice and propagate the religion of one’s choice; there should be respect and equality of all religions, in our instance Hinduism. There shall be freedom of worship at home (with no restrictions to any locality).

3) Hindu Personal and Customary Laws to be recognised: Hindu marriages is to be recognised as Law, whereby priests are regarded as Marriage Officers (instead of the couple marrying at a traditional ceremony AND at the court as is the case).

4) Cremation and Burial Rights: the need for sufficient facilities to be available throughout the country such as crematoriums and prayer halls and the need to disperse with the ashes according to religious tradition without subjugation.

5) Recognition of Hindu Festivals: If SA is secular, then religious freedom must be guaranteed at all levels—due leave must be given to scholars, teachers and other employees, for example the festival of Deepavali. Employees should be given leave with pay.

6) Media coverage: Equitable coverage by media to all religious groups. Sensitivity must be accorded. Tolerance and respect for all religions to be shown. There should be tolerance and respect for all religions.

7) Religious Education at educational institutions. State funding should be given towards this and it should be incorporated in the school curriculum.

8) Religious communities have the right to acquire or hold property.
It should be noted that the input from the Hindu Community has been put forward in the WCRP Draft Declaration on religious Rights and Responsibilities - 1 993.

P.G. Hurdeen
For Education and Research Unit (NHYF - SA)
Maritzburg Christian Play Centre

26 April 1995

RE: PROPOSED DECLARATION OF SOUTH AFRICA AS A SECULAR STATE

My staff and I strongly object to the proposal that in the New Constitution South Africa be declared a Secular State. The ramifications of such a decision would be too ghastly to contemplate as the removal of the freedom to practise one's religion anywhere and anytime one chooses is to deny the most fundamental of all rights attributable to mankind. It is the fear of God and the acknowledgement of a higher Authority that keeps some vestige of order in society and must be permitted in public life and in the civil service. Where man has dared to usurp the position of God and disregard His righteous laws, society has degenerated into a lusting, violent and greedy, power hungry satiation of the fleshy arrogance that is symbolised by all that man of every culture calls Evil.

Those who disregard history are doomed to repeat it. Let this not be the lot of our nation which was founded on the very principle that disregarding God's principles is to court destruction - to comply with His righteous Law is to find His favour and prosperity. Misguided diplomats and self-righteous politicians must not be permitted to bring a curse on our nation simply because of their arrogance (at best) and proud flush of new-found power (at worst).

May the mighty hand of God be over our government to bring the necessary Wisdom, that Truth would prevail, and not the deceitful work of the arch enemy, that wily serpent who so readily beguiles unregenerate man and woman. All humankind must give account for their actions, both in the present circumstances and before the Judge of all. Therefore, may our Constitution writers, lawyers and God-fearing citizens be cautioned.

Let God Almighty be the First and Last Authority in our land and our government. Let His name be honoured in our New Constitution.

MRS W. M. FATH
(Principal)
GUBA FARMS SANCO BRANCH

11 March 1995

We as the residents of Guba Farms, very much concerned about the law of South Africa which does not allow young children to be confined in jail.

Here at Guba Farms there are two counts of killings which have been committed by young children.

There is nothing which have been done to punish then, others are watching is going to be done about them.

To us it seems as if this proceedings is encouraging them to kill.

Therefore we are appealing to you to do something which will avoid this proceedings.

There must be removed from the society where they have committed crime and sent to reformatory schools.

In order to avoid breaking the heart of mourners because that will cause the mourners to pay vengeance.

For more information you can ask the clerk of the court or police station.

We hope that you will take into consideration this matter.

MLINDI FALENI

/Publicity secretary)
PROVINCIAL RESPONSIBILITIES: ROAD TRAFFIC ACT

In terms of Schedule 6 of the Constitution, road traffic regulation is a function on which provincial legislatures are competent to pass legislation. Parliament can also pass certain road traffic legislation nationally in terms of Section 126(3) of the Constitution.

Prior to 1989 when road traffic regulations was handled in terms of the four Provincial Road Traffic Ordinances it had resulted in many problems and confusion amongst the public, as there were different provincial requirements and interpretations on such matters as roadworthy tests, the compulsory wearing of seat belts, load limitations, seating capacity of passenger vehicles, vehicle length, fitness of drivers, etc. These factors also hampered crossborder traffic between the provinces at that time.

After widespread consultation and much effort the Road Traffic Act (No. 29 of 1989) was passed. The purpose of the Act was to

"consolidate and amend the laws relating to the registration and licensing of motor vehicles and other vehicles and the drivers thereof, and the regulation of traffic on public roads; and to provide for certain requirements of fitness; and for matters incidental thereto."

The return now to Provincial systems could negate all the past efforts towards uniform national standards. The fact that there are now nine provinces instead of four will accentuate any differences in road traffic regulation. Furthermore, the South African economy cannot afford to have nine different provincial standards for road traffic regulations. (Regional regulations will at times conflict with national interests.) Decentralised regulation could also adversely affect cross-border traffic flow, bring about non-standardisation of vehicle manufacture, lead to a decrease in vehicle safety standards and result in conflicting enforcement methods.

This Association does not object to the enforcement and application aspects of the Road Traffic Act (1989) being assigned to the provincial governments provided agreement is reached between the Department of Transport and the respective provinces on exactly which regulatory aspects (such as registration numbers and licence fees) can change independently without affecting the uniformity of the Road Traffic Act. There must be consistency and/or uniformity as regards road traffic regulations. It is imperative to maintain uniform norms and standards throughout South Africa.

In essence national standards should be universally applicable and enforceable throughout South Africa so as to facilitate cross-border travel between provinces, improve mobility, enhance safety and promote trade.

National standards are vital for this country so as to also simplify training, facilitate uniform roadworthy testing and develop a better understanding by the public of the rules/regulations.
The Department of Transport will therefore have an important role to play regarding the coordination of road traffic matters, the setting of minimum standards and the maintenance of a high degree of uniformity, when road traffic regulation is decentralised.

SABOA therefore opposes any relaxation of national standards but supports the controlled devolution of certain aspects of road traffic legislation (as set out above), i.e. provincial road traffic legislation should only cover those issues which need not be uniform nationally.

PROF J WALTERS
Chief Executive Officer
The South African Institute of Town and Regional Planners

9 March 1995

CHAPTER 10, SECTION 176(b): CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

On behalf of the Institute of Town and Regional Planners I wish to record our serious reservations about the negative impact that Section 176(b) of the Constitution would have on the effectiveness of decision making in town planning and development. This viewpoint reiterates the sentiments expressed by my predecessor in his letter of 20 January 1994. A copy is attached for your convenience.

Basically Section 176(b) requires that all town planning decisions of transitional councils be approved by a majority of council members.

My Institute represents a large body of professional Town and Regional Planners, the majority of whom are registered in terms of the Town and Regional Planning Act, 1984 (Act 19 of 1984). A significant portion of all applications to obtain land development rights for communities and clients which are lodged with town and city councils, are processed by these Town and Regional Planners.

Town and Regional Planners, as officials of town and city councils, are normally responsible for evaluating these applications in accordance with the policy guidelines set out by the councils. So many applications are received by councils of large towns and cities that it is practically impossible for all such applications to be presented to the full council, or even to a committee appointed by council for this purpose, as prescribed in the Constitution.

For this reason, certain councils are currently acting in contravention of the Constitution for they ignore the provisions of Section 176(b) by entrusting to officials certain routine applications which fall within the policy guidelines of the council concerned.

Consistent application of this Section would involve delays as well as having cost implications for development, by retarding the acquisition of land rights and therefore also retarding development. Delays in the delivery of development projects, will inevitably also delay implementation of the Reconstruction and Development Programme.

It has often been said that the town planning process is too cumbersome for the ordinary person in the street. The statutory requirement entailed in Section 176(b) further complicates this process and unnecessarily lengthens the time for decisions, of a routine nature, to be taken.

It is almost inevitable that the Town and Regional Planning profession would be held responsible for such delays and complexity.

Furthermore, the approach as set out in Section 176(b) contradicts the goals of the Development Facilitation Bill which, when it is passed into law, will set out as a primary objective to "... introduce extraordinary measures to facilitate and expedite the implementation of reconstruction and development programmes and
projects in relation to land... " The requirements of good administration demand that the Constitution should not appear as a vehicle for opposing other legislation.

This section of the Constitution needs to be amended in such a way that it provides for local authorities to delegate decision making in town planning to officials, in cases where policy is clear cut and where expediency demands such a measure.

In order to obviate the possibility of unprofessional conduct on the part of officials, a clause could be inserted in the Constitution that such officials would be required to be registered as Town and Regional Planners in terms of the Town and Regional Planning Act 1984 (Act 19 of 1984). Such a provision would not be strange to South African practice, since most professional bodies are entrusted in law with the performance of certain defined activities.

Since this issue is of paramount importance to both the profession, and the future development of South Africa, I respectfully urge the Constitutional Assembly to reconsider the implications of Section 176(b) of the Constitution.

DR PIET CLAASSEN
PRESIDENT: SAITRP
CAPE BAR COUNCIL

8 March 1995

RE: PUBLIC HEARINGS ON THE PUBLIC PROTECTOR SUB-THEME 6.3
COMMITTEE - PUBLIC PROTECTOR


Enclosed herewith please find the written submissions on behalf of the General Council of the Bar prepared by advocates Mitchell SC, Gordon-Turner and Young.

A P Blignault
Chairman
Cape Bar Council

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 6 - SPECIALISED STRUCTURES OF GOVERNMENT
SUB-THEME COMMITTEE 63 - PUBLIC PROTECTOR

WRITTEN SUBMISSIONS ON BEHALF OF
THE GENERAL COUNCIL OF THE BAR

THE OFFICE OF PUBLIC PROTECTOR \ OMBUDSMAN : WRITTEN SUBMISSIONS TO
SUB-THEME COMMITTEE 6.3 FILED ON BEHALF OF THE GENERAL COUNCIL OF THE BAR

1. INTRODUCTION:

Pursuant to the invitation from the Executive Director of the Constitutional Assembly, the following written submissions are made on behalf of the General Council of the Bar in relation to the questions posed in the report relating to the Public Protector/Ombudsman which has been circulated by the Sub-theme Committee.

GENERAL:

2.1 For reasons which appear hereunder we intend, in this submission, to refer to the office concerned as the office of Ombudsman.

2.2 We are of the opinion that there exists a need for the perpetuation of the office of Ombudsman in South Africa. It is an office which has been introduced in many countries to redress injustices as between the citizen and the public administration and undoubtedly serves a useful function in this regard. The office was initially
introduced in Sweden and was adopted in other European countries as also in New Zealand. Various African countries, such as Tanzania, Zambia and Zimbabwe have also introduced the office. It is not always possible for an aggrieved citizen to obtain adequate redress through the courts of law, either because the complaint concerned is not susceptible of being dealt with through the ordinary judicial process, or because the citizen concerned is not able to embark upon a potentially costly process of litigation.

2.3 The office of Ombudsman in the various jurisdictions reveals the following broad common characteristics:

2.3.1 The Ombudsman is appointed by the legislature but functions independently thereof;

2.3.2 The Ombudsman has extensive rights of access to official records;

2.3.3 The Ombudsman is able to comment on any actions taken by public officials of the executive, either of his own accord or upon a complaint made to him;

2.3.4 The Ombudsman should endeavour to make clear findings, understandable by both the officials whose conduct is investigated and by the citizens filing a complaint.

2.4 The need for a mechanism to deal with complaints of this nature has been recognised in South Africa for some years. Act No. 118 of 1979 created the office of Advocate General to perform this task, the name of the office being changed by Act 104 of 1991 to that of Ombudsman. Although initially instituted purely to deal with the misappropriation of public monies as defined in the Act (probably prompted by the Information Scandal), the powers of the Ombudsman were extended by Act 104 of 1991 to enable the Ombudsman to investigate complaints that the State or public were being prejudiced by mal-administration in connection with the affairs of State.

2.5 The continuing need for an office of this nature is recognised in Sections 110 and following of the Constitution, where provision is made for the institution of an office to be known as the Public Protector.

2.6 We support the continued existence of an office of this nature.

2.7 We proceed to deal with the questions raised in the report in the order in which they appear.

3. CONSTITUTIONAL ENTRENCHMENT:

3.1 We are of the opinion that the principle that there should be an Ombudsman to deal with complaints relating to the public administration should be entrenched in the Constitution.
3.2 We consider that it may be appropriate, however, for the details relating to the appointment of an Ombudsman, the powers and functioning of his office, to be regulated by way of ordinary legislation.

3.3 We consider that this would enable the legislation to be amended more conveniently to meet changing needs of the office and of society without the necessity of making frequent amendments to the Constitution.

4. **THE TITLE OF THE OFFICE:**

4.1 We are of the opinion that the title Ombudsman should be retained in respect of the office.

4.2 While it may well be that persons particularly concerned at the sexist connotation of the word could be offended, we are of the opinion that the term is well understood and ought to be retained. It is a term which is in common usage in a number of other countries where it has an accepted content and in respect of which jurisdictions there is a body of learning which could usefully be applied in this country. It may be noted that in the United Kingdom, although the title of the holder of the office is the Parliamentary Commissioner, the statute is entitled "The Parliamentary Commissioner (Ombudsman) Act.

4.3 We consider that the term Public Protector may well be inappropriate, as it has connotations which imply that the holder of the office will enter the arena on behalf of the aggrieved citizen as his champion or representative. As more fully set out hereunder, we do not see this to be a function of the Ombudsman, whose role would be more that of mediator than of a protector.

5. **QUALIFICATIONS FOR APPOINTMENT AS OMBUDSMAN:**

5.1 We consider that the qualifications for appointment as Ombudsman ought to be those set forth in Section 110(4) of the Constitution.

5.2 The qualifications concerned are governed by the overriding requirement that the holder of the office should be a fit and proper person. The provisions of sub-section (c) expand the source of candidates for the office beyond persons primarily qualified in the legal field. While we are of the view that persons holding legal qualifications would, primarily, be persons suitable to hold the office of Ombudsman, we accept that there is a wider category of persons who may be equally competent.

5.3 We consider that persons with legal qualifications would, however, be pre-eminently suitable to the post. The holder of the office will be required to exercise impartial investigative skills and to examine persons in the course of an investigation in order to arrive at a conclusion. The training and experience of lawyers does, we believe, suit them to this sort of work. In
addition, the Ombudsman would be required to take impartial decisions in balancing the interests of the administration and the individual. Again, we perceive the training of lawyers to make them pre-eminently suitable to carry out this function.

5.4 We do not perceive that qualifications in areas such as sociology, social work or psychology would necessarily be suited to the office.

5.5 However, we recognise that the Ombudsman may well find it necessary to obtain advice and/or assistance from persons having skills in other fields in order to perform his functions properly. For this reason, we would recommend that provision be made in the legislation for the Ombudsman to co-opt persons having skills relevant to the issue under investigation to assist him in conducting a particular enquiry.

6. **THE TENURE OF OFFICE OF THE OMBUDSMAN:**

6.1 It is recognised that there is a strong need for the office of Ombudsman not only to be but also to be perceived as being entirely independent of the public administration. A failure to achieve this object could well serve to emasculate the office. Aggrieved citizens must be assured that a complaint made to the Ombudsman will be dealt with independently of the administration against which the complaint is directed.

6.2 We would accordingly support the proposition that the tenure of office of the Ombudsman should be assured for a substantial period of time and be subject to early termination only with the consent of both the State President and of Parliament.

6.3 Ideally, the period of appointment should be until a specified retirement age or, alternatively, for a fixed period of not less than 7 years. If a fixed term of office should be settled upon, it is our opinion that the incumbent should not be eligible for reappointment so as to avoid any possible perception that the incumbent might be motivated not to uphold strenuously the rights of the citizen against the administration in order to be re-appointed.

7. **COMPLAINT-DRIVEN OR INITIATIVE-DRIVEN?:**

7.1 We are of the opinion that the Ombudsman should be empowered to investigate matters both upon the receipt of a complaint and on his own initiative. To limit the jurisdiction of the Ombudsman to complaints received from the public would, we believe, unduly curtail his activities. It may well be that persons aggrieved by the actions of the administration would be reluctant to file a formal complaint by reason of
a fear of victimisation. It is certainly possible that the existence of such victimisation might come to the attention of the Ombudsman as a result of circumstances other than a formal complaint. The Ombudsman should be entitled to institute his own investigation in such circumstances.

7.2 Consideration should also be given, in our submission, to making provision for persons other than the aggrieved citizen concerned to refer matters to the Ombudsman. Consideration might be given to the system adopted in the United Kingdom, where complaints may be referred to the Ombudsman by Members of Parliament. In Scotland it was found that a large sector of the population experience difficulty in formulating complaints in writing and were accordingly discouraged from making complaints to the Ombudsman. The same considerations apply, in our opinion, in South Africa. For this reason, too, we consider that the requirement that complaints should be made on affidavit or solemn declaration should be dispensed with. It is a provision which, we believe, tends to discourage complaints which may be fully justified.

7.3 We consider therefore that any legislation should make provision for complaints to be made to the Ombudsman not only by the citizen concerned but also by a Member of Parliament (or, for that matter, any other responsible citizen) acting on behalf of the aggrieved party.

8. **THE POWERS OF THE OMBUDSMAN:**

8.1 We consider that the Ombudsman should be given powers to investigate and report on any complaint received or any matter which he elects to investigate on his own initiative.

8.2 We do not consider that the Ombudsman should be given the power to take direct action in a court of law in relation to any complaint received or investigation made on his own initiative. He should, however, be given the power to refer the matter to the appropriate authorities. If the matter concerned appears to involve any criminal activity, he should be empowered to refer the complaint to the Attorney General for investigation and, if deemed appropriate, prosecution. If the matter relates more properly to a civil complaint, the Ombudsman should have the power to refer the matter to the Legal Aid Board with a recommendation that the aggrieved citizen be given legal assistance to prosecute his or her rights in a court of law.

8.3 In addition to these powers, the Ombudsman should be entitled (on completion of his investigation) to refer the matter to the department of State concerned with a recommendation as to the action which should be taken. In this regard, we would recommend that the Ombudsman be entitled to require the department concerned, should it not take such action, to publish the reasons why it declines to follow the recommendation. This would, we believe, add to the
requirement that the public administration be conducted in a transparent fashion and for it to be accountable to the citizens of the country. It has been found in other countries (notably New Zealand) that the publicity attendant upon the investigation, the result of which must be tabled in Parliament, is the most effective means of ensuring that the recommendation of the Ombudsman is followed.

8.4 We consider that the power to search and obtain documents should be given to the Ombudsman, so that offending members of the administration would not be able to conceal potential wrongdoing from his gaze.

8.5 The Ombudsman should further have the power to refer complaints which more properly fall within the ambit of the powers of the Commission on Human Rights or the Gender Commission to such authorities for investigation and for action by them.

8.6 We further consider that it is important to make provision in the legislation for the protection of persons who make complaints to the Ombudsman lest they be discouraged from making such complaints by fear of victimisation. We have in mind in this regard, for example, the possibility that prisoners may wish to make a complaint against their treatment by members of the Department of Correctional Services. It may well be that such prisoners may be reluctant to make a complaint if they fear that their identity will be disclosed and that they will be further victimised.

9. INVESTIGATION OF PUBLIC SECTOR AND/OR PRIVATE SECTOR:

9.1 We consider that the office of the Ombudsman should be entitled to investigate only matters relating to the unfair treatment of citizens by the public sector.

9.2 In our opinion, it would be inadvisable to extend the powers of the Ombudsman to the private sector. Sufficient mechanisms exist to deal with abuses within the private sector. In this regard, we have in mind the Labour Relations legislation which deals with complaints as between employees and their employers. We also have in mind the powers vested in the Competitions Board to deal with the formation of cartels which might be oppressive of the rights of the individual.

9.3 It is generally accepted in other jurisdictions that the function of the Ombudsman should be to create a means of redressing grievances of citizens against the public administration rather than the private sector.

10. THE OMBUDSMAN AND THE COURTS:

10.1 We are of the opinion that the Ombudsman should not be vested with the power to supervise the judicial system *per se*. The checks and balances within
the judicial system provided for by way of the rights of appeal and review are, in our opinion, sufficient to deal with injustices emanating from the administration of justice within our courts.

10.2 The Ombudsman would, however, be entitled to deal with mal-administration on an administrative level within the Department of Justice. This department would be treated, insofar as its administrative actions impinged upon the citizens, as any other State department.

11. NATIONAL/PROVINCIAL OMBUDSMAN:

11.1 It is submitted that the creation of both a national and provincial office of Ombudsman would result in an increase in the bureaucracy and a concomitant increase in public expenditure which is not warranted.

11.2 The creation of 9 provincial Ombudsmen and a national office would simply multiply personnel and costs without in our opinion, achieving any substantial efficiency in the administration of the office. Indeed, in our opinion, the creation of such offices may well lead to anomalies and confusion. One can well envisage a situation where a provincial Ombudsman may take a particular view of a perceived injustice at provincial level which would not be shared by the national Ombudsman who would (presumably) have a concurrent jurisdiction. This would be the case particularly in situations where both national and provincial legislation apply to a particular field.

11.3 We see no reason why the national Ombudsman should not be empowered to investigate mal-administration within the provincial government administration as well as within the national government administration.

11.4 It may well transpire that a single Ombudsman would be unable to cope with the volume of complaints. We would therefore propose that consideration be given to empowering the Ombudsman to co-opt deputies whose offices would be situated within the different provinces where such deputies would be empowered to receive and investigate complaints and refer the results of such investigations to the national Ombudsman who would adopt or modify such recommendations and institute such action thereon as may be appropriate and within his power.

12. THE OVERLAPPING BETWEEN THE OFFICE OF OMBUDSMAN AND OTHER SPECIALISED STRUCTURES OF GOVERNMENT:

12.1 We recognise that the office of Ombudsman may well overlap with other structures of government such as the Human Rights Commission and the Gender Commission. For this reason we have proposed, in paragraph 8.5 above, that the Ombudsman should be empowered to refer complaints which
fall within the jurisdiction of such other structures to the structure concerned for investigation and action.

12.2 We would envisage that if such other government structure is unwilling or unable to take appropriate action, then the matter may again be taken up by the Ombudsman.

12.3 It is noted in particular that the Human Rights Commission is empowered, in terms of the provisions of Section 116(3) of the Constitution, to make funds available for litigation in relation to human rights violations. This is a power which we do not consider should be vested in the Ombudsman. It is for this reason that it would be appropriate to empower the Ombudsman to refer complaints falling within the jurisdiction of the Human Rights Commission to that commission for action. The alternative would be to provide a funding for the Ombudsman to institute such legal proceedings. We do not consider this to be advisable, as it will overlap not only with the powers of the Human Rights Commission but also with the functions of the Legal Aid Board.

13. GENERAL AND SUPPLEMENTARY..

13.1 We consider that specific provision should be made in any legislation for the Ombudsman to publicise the existence and powers of his office. The usefulness of the office is severely diminished if few people know of its existence and functioning.

13.2 We consider that provision should be made in the legislation for the power to publicise the office through the media to ensure that all citizens become aware of the existence of the office and their rights to address complaints either directly or through their Members of Parliament to the Ombudsman for investigation.

DEREK MITCHELL
FIONA J GORDON-TURNER
W F YOUNG

8 March 1995

APPENDIX: SOURCES CONSULTED


Kachelhoffer, Die Ombudsman, 'n Nuwe Konstitusionele Ontwikkeling, 1967 @dskrif vir Hedendaagse Romeins-Hollandse Reg, 339;


Dlamini, An Ombudsman for South Africa, 1993 De Rebus 71;

THE CHRISTIAN EDUCATION FORUM

1995-03-15

The Christian Education Forum, representing at least 80 Christian denominations and organisations with a membership of more than 10 million people, present to you a memorandum on the teaching of Religion that should be considered when drafting the new constitution for the RSA. The memorandum (Addendum A) has been submitted to Prof. Bengu, Minister of Education.

Enclosed a list of supporters of this document (Addendum B).

CHAIRMAN: THE CHRISTIAN EDUCATION FORUM

TEACHING OF RELIGION

1. This document has been drafted by an elected committee which represents at least 80 Christian denominations and organisations. A complete list of supporters of this document will be submitted at the time of an interview with the Minister.

2. On behalf of all the Christian bodies involved, the committee wishes to submit the following to the Government:

2.1 Definitions of religion
2.1.1 General definitions of religion

Religion is generally understood to be the universal human quest for the ULTIMATE TRUTH/ULTIMATE BEING, as embodied in a Supreme Being.

"The whole nature of man has been formed for religion, and is engaged and exercised in religion". (Consolidated Encyclopaedia, Vol. VIII).

2.1.2 Definition of the Christian religion
For Christians, religion is the expression of man's response by faith to the revelation of a Triune, Living God, Father, Son and Holy Spirit, who created and is still governing the universe.

This faith is based on God's revelation in the Holy Bible as the infallible Word of God and is the authoritative norm for daily life and conduct.

2.2 Christian religion and education

2.2.1 Christian education is the disclosure and the development of children through the teaching of Biblical norms and principles as they apply to all aspects of life, with the aim of attaining Christian maturity.

2.2.2 Religion is the most fundamental and comprehensive motivational force of God in the lives of individuals, families, particular communities and of large societies. It provides its adherents with a world view, and values and norms which issue in morality.

2.2.3 An education system should provide for the spiritual, intellectual, mental, physical, and social needs of learners.

The education of learners in their totality includes (inter alia) education in religion, for which a national education policy needs to make provision.

2.2.4 Although parents and religious institutions carry the primary responsibility for this, the State also carries a responsibility to make provision for religious education.

2.2.5 As South Africa is both a multi-cultural and a multi-religious society, the curriculum should make provision for options in terms of religious education.

2.3 The Christian Religion in terms of Education

2.3.1 We, as Christians, support the principle of religious freedom but not religious equality.

2.3.2 As Christians, we acknowledge that the diversity of religions, and their numbers in South Africa should be considered in planning an education policy. The fact that Christians are vastly in the majority should also be taken into account.
2.3.3 As Christians, we maintain that the parent community of a particular school should decide about religious education and the ethos of that school. The syllabuses of all school subjects should comply with the ethos of that school.

Provision should be made for minorities.

2.3.4 As Christians, we reject the idea of a compulsory, neutral, multi-faith religious education for our children.

2.3.5 As Christians, we call for two subjects to be included in the school curriculum; that is, Religious Education and Biblical Studies. Religious Education should be adapted to the ethos of the school. Biblical Studies should be optional as an examination subject.

2.3.6 As Christians, we maintain that no child should be subject to any religious education against the wish of his/her parents.

2.3.7 As Christians, we request the Government to make provision for including Christian Religious Education and Biblical Studies as optional subjects in the training of teachers.

2.3.8 As Christians, we request the Government to make sufficient provision for Christian oriented colleges of education.

2.3.9 Core syllabuses and adapted syllabuses for the two subjects under discussion (parr 2.3.5, 2.3.7) should be drafted in collaboration with acknowledged Christian Churches.

2.3.10 Finally, as Christians, we wish to state that we accept our duty bound responsibility to pray for the Government, "that we may live a quiet and peaceful life with all reverence towards God and with proper conduct" (Good News Bible, 1 Timothy 2:2).

DENOMINATIONS AND ORGANISATIONS SUPPORTING THE DOCUMENT "TEACHING OF RELIGION"

1. The Uniting Reformed Church in Southern Africa
2. Reformed Independent Churches in Africa (RICA)
3. Rhema
4. Apostolic Faith Mission
5. United Christian Action
6. Immanuel Apostolic Church
7. Full Gospel Church of God
8. Dutch Reformed Church in S A
9. Reformed Church in S A
10. Nederduitsch Hervormde Kerk in S A
11. Suider Afrikaanse Bond van Gereformeerde Kerke
12. Timothy Training Institute
13. Evangelical Lutheran Church in Southern Africa (Natal-Transvaal)

Memorandum: See Annexure 0

NATIONAL CHRISTIAN EDUCATION FORUM

Name of organisation
1. Afrikaanse Evangeliese Bond
2. Baptist Union
3. Die Afrikaanse Christen
4. Association of Christian Education
5. African Enterprise
6. Bethel Group of Ministries
7. Centre for Reformed and Contemporary Studies
8. Christian Literature Centre
9. Christian Education South Africa
10. Christians for Truth
11. Campus Crusade for Christ
12. Dibukeng Christian Book sellers
13. Dorothea Mission
14. End Time World
15. Frontline Fellowship
16. The Gideons in South Africa
17. Gospel Defend League
18. Gospel Preachers Team
19. Hatfield Christian Schools
20. Interdenominational Fellowship
22. Liberty Christian Fellowship
23. Lighthouse
24. Mothers who care
25. Operation Mobilisation
26. Scripture Union
27. Students Christian Movement Natal
28. South African Christian Students
29. Saltshakers
30. Signpost
31. Scripture Gift Mission
32. Student Union for Christian Action
33. Students Christian Movement
34. Students Christian Movement in of Education
35. School of Tomorrow (CAE) Shayaandima Venda
36. Teachers Christian Fellowships
37. Theocentric Christian Education
38. Teachers Christian Fellowship
39. United Christian Action
40. Vereniging vir Christenstudente
41. Vulusame 0...
42. World Advertising Jesus Project
43. Walk though the Bible
44. Wederkoms en Wereldgebeure
45. Youth for Christ
47. Teachers Hospitals and Students Christian Fellowship (thasc)
48. Foundation for Christ Centred Education
49. Teachers Christian Fellowship
50. SCA
51. Thasc Fellowship Natal
52. African Youth Evangelism
53. Educators for Life
54. South African Communication Services
55. Fountain of Life Ministries
56. Operation South Africa
57. Irene Animal Production Institute
58. Edulife
59. Ligstryders
60. Teachers Christian Fellowship
61. Students Christian Movement at Colleges of Education
62. Vista University
Monte Vista Presbyterian and Reformed Church

8.3.95

I write on behalf of the above congregation.

We believe that the perverted lifestyles of homosexuals and lesbians must not be made respectable through legislation. Aspects such as marriage, adoption of children, and foster care of children must be closed to homosexual and lesbians.

Homosexuality and Lesbianism are alien to the indigenous culture of Southern Africa. The Bible is clear that this perverted lifestyle is not accepted by Almighty God. The Koran find homosexuality an abomination. As Christianity is the claimed religion of the vast majority of South Africans we believe that their convictions be upheld in the constitution.

Character of Democratic State.

I write on behalf of the above congregation.
We believe that all South Africans are deeply concerned by the reports of corruption by those entrusted with Public Office. Every precaution needs to be taken to prevent, or make corruption more difficult.

A requirement for holding or standing as a candidate for Public Office ought to be the following;

A full and comprehensive financial statement, listing all assets, sources of income, directorships, partnerships and shares in companies of the candidate and spouse be lodged with the Auditor General. Thereafter every two years an audit by the Auditor General shall be done to determine whether enrichment must been furthered by legal means or otherwise.

Failure to declare assets or income must carry heavy penalties.

SOCIETY for the ADVANCEMENT of INDEPENDENT LIVING

10 March 1995

THE NEEDS OF PEOPLE WITH A MENTAL HANDICAP

This Society is composed of mildly mentally handicapped adults and their parents. Our handicapped members live either with their parents or independently within the general community and our objectives are to promote independence for those with a mental handicap and to set up support systems to help them.

People with a mental handicap find it difficult to assert themselves or to speak rationally about their needs and feelings, and are therefore the most vulnerable of our citizens to exploitation discrimination and deprivation especially in the area of human rights. People often believe that those with a mental handicap are not in need of basic human rights such as education employment and personal freedom.

We believe that, where possible, people with a mental handicap should live as part of the general community with opportunities for education, employment and social interaction with others so as to develop to full potential. In this way, many will be able to contribute meaningfully to society and will be less of a burden on the State.

There is great concerns not only among our members but among all those involved in the field of mental handicap that the needs of our handicapped people should be properly addressed in the new Constitution of South Africa. Those with a mental handicap must be some of the least privileged in our society, and those attempting to live independently are greatly at risk because they cannot adequately protect themselves.

We therefore seriously request you to take note of our concern and to write INTO THE CONSTITUTION A CLAUSE DEFINING PEOPLE WITH A MENTAL HANDICAP AS A MINORITY GROUP ENTITLED TO SPECIAL RIGHTS AND PROTECTION. We understand that other submissions have been made suggesting a Charter of Rights and drawing your attention to special provisions in other countries. We support these and urge you to treat these requests and recommendations with sympathy and understanding so that South Africa's Constitution will give those disadvantaged by mental handicap a better deal in life than they have had in the past.

S R PRYOR
Chairman
NEHAWU SUBMISSIONS TO PUBLIC ADMINISTRATION & THE CONSTITUTION.

Your invitation letter dated 23 February 1995 refers.

Find attached hereto, our submissions as requested. We have divided our submission into two parts, the specific response to questions asked through the subcommittee report, and our policy framework on the subject. We hope the theme committee members will manage to go through both documents.

Secondly, we need clarity regarding the process. How does the four subcommittees link and relate to each, mainly as we believe the issues being dealt with are inter-related and also because through our Federation we want to make a submission which covers all the four areas, that is Gender, Finances, Security apparatus & Public Administration.

Lastly, be advised that our delegation will be made up of the following: Cdes Lulamile Sotaka (1st Vice-President), Neal Thobejane (General Secretary), Isaac Ngqame (Co-ordinator) & Shereen Samuel (Regional Secretary)

NEAL THOBEJANE
GENERAL SECRETARY

SPECIFIC RECOMMENDATIONS
ON QUESTIONS RAISED BY THE THEME COMMITTEE.

Questions

1.1 It will be essential for the Public Service to be covered by the constitutional provisions in the final constitution because of its unique nature and the significant role it plays in society.

It might be necessary to incorporate only broad principles in the constitution and leave finer detail for subsidiary legislation because of the difficulties which might be encountered when changes are to be made. The following can form part of the principles.
* promote collective and co-operative values
* A responsive and service-oriented Public Service
* Promote and uphold democratic practices and a culture of human rights
* Be a developmental agent in society
* Contribute to a strong and viable economy.

Role of the Public Service
* Career oriented
* Efficient, effective and responsive in terms of service delivery
* Loyal in its services to public and partisan to the policies of the elected government of the day
* Accountable to the Public and Parliament

2.1 The Public Service consists of those functions and activities which render basic services to communities and society at large. The Public servants in national and provincial governments and includes the police, the army and local government.

2.2 There are a number of mechanisms to ensure that the code will be effective. Code of Conduct, which will enjoy the support of the majority of Public Servants and this would go a long way to achieve accountability. There are also other mechanisms in the constitution and labour legislation, the Public Projector, the Public Service Commission and the labour appeals court. A massive education campaign is also necessary. We have just emerged from an oppressive and suppressive and corrupt system, a system the majority thought to destroy so a certain culture and practices developed and it is difficult to make that transformation. However we must strive to develop and nurture a culture of Human rights, a work ethic among Public Servants.

2.4 The RDP states that "a defined quota of all new employees should come from groups that were disadvantaged on the basis of race and gender, and all employees should be given access to appropriate training and support systems. This should be evaluated each year to determine the progress made and identify problems which arise. By the turn of the century the personnel composition must have changed to reflect the national distribution of race and gender. Such progress will enhance the full utilisation of the country's labour power and productivity."

2.5 Apartheid policies and practices resulted in skewed distribution of the recourses in favour of whites. The programme of affirmative action must address all these imbalances and redistribution of resources be in favour of previously disadvantaged groups/communities. The programme must result in a deracialisation of these institutions in line with the principles of democracy.
2.6 The current labour relations systems are not conducive to good and sound labour relations. The current management style and practices are inappropriate for a democratic public service, the current managers were trained to believe that trade unions must not be accommodated at the workplace because they are disruptive and mislead workers and that they are not a democratic voice of the workers.

2.7 The Public managers are responsible for effective implementation of government policies and mechanisms to assess and evaluate productivity of the Public Servants must be devised. There must be annual assessment of all the staff in the public service. Random surveys can be done amongst the communities. There must also be recourse for members of the communities if they believe their rights have been violated.

2.8 There are a number of mechanisms that public employees can have a recourse to, the 'current mechanism in the Public Service Labour Relations Act including labour appeals court, they can also make use of the Public protector once it is established. They can also make use of the Constitutional court.

3. The Public Servants have a right to be consulted by the government on matters of policy. This is not to say government must negotiate policy with Public Servants. Proper and democratic structures must be established where the government will consult with unions. The proposed Public Sector Forum and NEDLAC will fulfill this requirement, it might be a good exercise for political office bearers to ensure that they are working with people who share a common perspective with them on various issues.

3.1 There needs to be a clear division of functions and powers between the Public Service commission and the Ministry for Administration. At the moment there is no clear distinction in terms of powers and functions and the PSC abuse this by passing regulations without first submitting them to parliament, to this end administration must shift to the department.

3.2 Yes, this must take into account the fact that these individuals have less job security and benefits than other Public Servants

4.1 The Public Service Commission must perform the following functions:
- Monitor the implementation of policies on the achievement of a representative Public Service
- Monitor democratisation of the Public Service
- Monitor the efficiency and effectiveness of the Public Service
- Investigate and monitor the adherence to standards laid down in the code of conduct of the Public service
- Monitor that equity is the Public Service is ensured
- Report regularly (quarterly) to parliament through the Presidents Office
4.2 Functions of the proposed department of Public Service and Administration

- Oversight of the organisation and administration of government departments to maximise efficiency and effectiveness in the Public Service
- Setting out standardised personnel practices and human resource management activity including the recommendation of appropriate remuneration and conditions of service in the public service and wage bargaining.
- Coordination and implementation of training and human resources development in the Public Service
- Administration of grants, contracts and co-operation agreements in respect of personnel issues
- Ensuring equity in employment, training and promotion

4.4 The labour appeal court, the human rights commission and the constitutional court should fulfil this role.

4.5 Department of Public Service and Administration must conduct negotiation on behalf of the state as an employer and the Cabinet must issue a mandate.

4.6 It is not clear at all what the Provincial Service Commissions are doing or will do in future. The conditions of service are determined centrally.

4.7 The Public Service Forum would be an appropriate structure for consultation on those issues, because these issues do not only concern the government and trade unions, there are other stakeholders, like political organisations, universities and so on.

5.1 This can be incorporated as one of the objectives of Public Administration, in the constitution.

A POLICY FRAMEWORK

NEHAWU'S SUBMISSIONS TO THE SUBTHEME 6.1 OF THE CONSTITUTIONAL ASSEMBLY.

6/3/95 CAPE TOWN
Executive Summary

The Reconstruction and Development Programme which has been developed by the African National Congress and adopted by the Government of National Unity as an all encompassing programme also impacts on the Public Service.

The public service is defined as national, provincial and local public servants. It also includes the uniformed police and civilians in the police force and civilian employees in the defence force.

This document is an attempt to progressively operationalise the RDP in relation to the Public Service. It seeks to provide a policy framework for the transformation of the Public Service within the next five years.

The document focuses on:

* measures to improve efficiency in carrying out national policies;
* measures to enhance accountability and transparency and ensure administrative justice;
* achieving respresentivity through affirmative action;
* capacity building: training and retraining;
* democratising labour relations;
* legislative and financial implications.

1. Problem Identification

The Government of National Unity has inherited a public service that cannot easily, efficiently and effectively regear to fulfil new policies, remains seriously unrepresentative of the South African population and remains authoritarian, hierarchical and secretive.

The RDP White paper directs that "The problem of disparity and the need for Affirmative Action must be dealt with urgently and holistically. The existing renumeration and personnel systems must be revised and modernised in to simple systems, particularly simplified grading and renumeration systems, which allow for career paths and life time training". These challenge obviously need decision-makers who have the vision and political will to improve the quality of life for the lowest categories of public servants.
1.1 Lack of Accountability and Transparency

The overriding mission of the public service should be to carry out the policies of the government of the day. Under apartheid, that mission became diluted by other aims: protecting jobs for some sections of the population; maintaining services and power for the privileged; and ensuring secrecy.

In the absence of a democratic system, accountability was limited to bureaucratic accountability. Employees are held accountable to adherence to rules, as opposed to outcomes in the interests of efficiency and effectiveness. Hierarchical, authoritarian and ultimately inefficient and ineffective management systems resulted. Where policies shifted or inappropriate procedures emerged, rigid rules often prevented change. To modify budgetary allocations, restructure a department or create and fill new positions could take months, if not years.

Most programmes did not contain clear targets. As a result, monitoring performance became virtually impossible.

Decision making took place largely in secret, making consultation with stakeholders virtually impossible. Draconian secrecy laws threatened severe punishment for releasing any information, however trivial. They even shifted the burden of proof, making public servants suspected of disloyalty provide evidence of their innocence.

Departments often effectively by-passed Parliament. For instance, they would incorporate crucial policy changes, not in legislation, but in subsidiary regulations that Parliament did not examine.

For the majority of South Africans, administrative justice did not exist. The administration did not establish clear and public routes of appeal, and most South Africans had no recourse to elected representatives.

Coupled with the widespread illegitimacy of the state, this situation led to widespread inefficiencies, mismanagement and misappropriation of funds.

1.2 Poor and Outdated Management

The lack of accountability combined with discriminatory hiring and promotion practices to undermine the efficiency of management. Centralised power in the hands of senior management and top down planning has resulted in layers of middle management who lack the discretionary power to manage in the operational sense, and rather administer rules.

The establishment of disparate jurisdictions in the name of apartheid aggravated inefficiency. Apartheid led to over staffing of administrative departments, which typically employed mostly whites, and under staffing in the service departments, particularly when they served black communities. For example, Johannesburg Municipality employs 20,000
workers for a population of 1 million while Soweto employs 4,000 for a population of 3 million.

Discriminatory personnel policies installed under qualified people in some high-level positions. They distorted incentives for all public servants, since some people enjoyed a guarantee of promotion irrespective of qualifications or performance, while others had virtually no prospects of advancement. Thus, four fifths of workers in the lowest grades remained at the bottom notch, even though the only requirement for promotion was two years continuous service,

Management training remained outdated, underfunded and inappropriate. Few managers received a course in modem personnel administration.

Management information systems were thoroughly inadequate. Departments did not share information with each other, while the centre lacked information on the "homelands". Even the Census and other key statistics proved faulty, above all because they did not adequately cover the black community. The Public Service Commission (PSC) lacked comprehensive information on employment, pay and training programmes. The lack of information system undermined transparency.

1.3 Lack of Representativeness

Some 40% of the 1,2 million people employed in the public service are white. The top managerial positions are overwhelmingly filled by white men, who constitute only about 7% of the adult population.

* Approximately 85% of personnel in the management echelon are white men. Only about 10% are African men, and a further 2,5% are Coloured and Indian. African and Indian women together make up less than 1% of management, while white women represent 2%. Less than ten black women have top-level executive positions.

* At professional and clerical level, women are better represented. However, gross inequalities persist. Africans make up less than 10%, with whites and Coloureds sharing the remaining positions more or less equally.

* In contrast, Africans have half the jobs at the lower level. Thus, most African women, employed primarily as cleaners and cooks, remain relegated to the lowest notch of the lower grades. Whites, who occupy just over a third of the lower-level positions, tend to be in the higher grades and notches.

1.3 Poor Wages, Benefits and Labour Relations
Low wages contribute to low productivity and poor-quality service. The public service is characterised by unusually high pay differentials with depressed pay in the low-level positions where black people, and especially black women, are concentrated. The ratio in cash income between the best and worst paid public servants comes to around 25, compared to between 8 and 13 in the U.S., Germany, Canada and India. If one takes into account benefits, the ratio between the highest and the lowest is 38 to 1.

Poorly paid workers are concentrated in the service department of health, education and the police.

Benefits are even more unequal than pay. Officials receive substantially higher benefits than lower-level employees. Historically, too, women public servants received far worse than men, for example in terms of housing and pensions.

The shift from pay-as-you-go to fully funded pensions costs billions of rand every year. It squeezes government spending both on poorly paid workers and to extend services in order to maintain disproportionate pension benefits for a minority of public servants.

Historically, the bureaucracy of the Public Service Commission has never developed a clear personnel strategy. As a result, it did not ensure managers received adequate training in personnel management; employed unskilled representatives to negotiate with workers; could not budget adequately for a changing public service, and did not have a co-ordinated programme to enhance training in ways that would improve service and efficiency.

Lower-level public servants, most of whom are black, lack training and career opportunities. Their job descriptions provide virtually no prospect for promotion. Job descriptions for even relatively complex work, such as gardening, deny the need for skills or experience, making further training and promotion almost impossible.

Basic trade union rights and collective bargaining for all workers came only as a result of fierce struggles waged by progressive trade union. But the bargaining chamber permits management associations to negotiate as workers, while the lack of a broadly accepted personnel strategy leads to unnecessary conflict.

2. Mission Statement

The Transformation of the South Public Service is enshrined in the Constitution which states that:
There shall be an efficient, non-partisan, career oriented public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members shall be regulated by law. (Section 212(2)(b) and Principle XXX of Annexure 4)

The Reconstruction and Development Programme provides the following guidelines in relation to the Public Sector:

2.1 Democratisation

The RDP calls for the democratisation in both the public and private sector that goes beyond the right to vote. This requires a comprehensive approach for the development of democratic, efficient, effective and accountable Public Service.

2.2 Public Sector Transformation

The RDP stresses the need to make the public sector:

Efficient and effective in implementing national policies, and especially in meeting the needs of the poor majority;

more accountable, open and consultative, and

representative in terms of race and gender, with more appropriate pay, benefits and training structures.

2.3 Achieving Representativeness through Affirmative Action The RDP hold: "A defined quota of all new employees should come from groups that were disadvantaged on the basis of race and gender, and all employees should be given access to appropriate training and support systems. This should be evaluated each year to determine the progress made and identify problems which arise. By the turn of the century, the personnel composition of the public sector, including parastatals, must have changed to reflect the national distribution of race and gender. Such progress will enhance the full utilisation of the country's labour power and productivity." (Paragraph 5.9.1, p.125)
"Within two years of the implementation of the programme, recruitment and training (in the public service) should reflect South African society in terms of race and gender."
(Paragraph 5.10.3, p.127)

3. Establishing efficient and effective management

31. Mission statement and Code of Conduct

The public service will adopt a mission statement that defined its role, first and foremost, as carrying out the policies of the government of the day. In that context, a new code of conduct will engage public servants to improve the quality of service to the greatest possible extent.

3.2 Restructuring the Department of Public Services and Administration and the Public Service Commission

Overall management of the public service rests with the PSC and the Public Service Department under the Minister of the Public Service and Administration. These institutions must become more efficient in ensuring the reorganisation of the public service to serve the new tiers of government as well as supporting reconstruction and development.

To that end, the administrative functions should shift to the Department, leaving the PSC free to pursue the ombuds role foreseen in the Constitution.

That means that the bulk of the management staff in the PSC Secretariat would fall under the Department.

In this context, the public service management must become far more efficient and effective in ensuring that the service carries out government policies.

3.2.1 Functions of the Public Service Commission

The functions of the PSC will be as follows:

* Monitor the implementation of policies on the achievement of a representative public service.

* Monitor the democratisation of the public service.

* Monitor the efficiency and effectiveness of the public service.
* Investigate and monitor adherence to standards laid down in the Code of Conduct of the public service.

* Monitor that equality in the public service is ensured.

* Report regularly (quarterly) to parliament through the President's Office.

### 3.2.2 Functions of the proposed Department of Public Services and Administration

The functions of a new department will be as follows:

- Oversight of the organisation and administration of government departments to maximise efficiency and effectiveness in the public service.

- Oversight and co-ordination of the rationalisation and restructuring of the public service,

- Setting out of standardised personnel practices and human resource management activity, including the recommendation of appropriate remuneration and conditions of service in the public service and wage bargaining.

- Co-ordination and implementation of training and human resource development in the public service.

- Administration of grants, contracts and co-operation agreements in respect of personnel issues.

0 Ensuring equity in employment, training and promotion.

### 3.2.3 Relationship between provincial and national PSC Department

There needs to be a clear division of labour between the national PSC and Department and the provincial PSC and departments along the following lines:

* Remuneration and conditions of employment will be set at a national level. These will represent minimum standards and provinces may only make them more stringent, not relax them.

* The national PSC will establish policies and targets only after appropriate consultation with the provinces.

* The national PSC must take responsibility for ensuring that revenue sharing between provinces takes due account of personnel needs.
3.3 Ensuring a more efficient and accountable public service

First and foremost, the Department must develop more efficient procedures for restructuring departments to carry out new policies, and for hiring and promoting new personnel.

The Department must assist all public service agencies to develop appropriate performance targets as well as monitoring and reporting mechanisms.

To indicate the efficient use of personnel as well as to facilitate wage bargaining, figures should be provided on remuneration of employees that:

- Distinguish management from other personnel costs.
- Distinguish administrative personnel from other personnel costs.
- Provide a basis for comparing services and efficiency by department and province.

3.3.2 Ensuring administrative justice

The Interim Constitution requires, as part of the right to administrative justice, that the public service provide written reasons to individuals adversely affected by decisions. Meeting that requirement will necessitate the development of appropriate appeals structures. Moreover, the organisation and budget for the office of the public protector must be made adequate to the tasks foreseen in the Constitution.

3.3.3 Freedom of Information

Current legislation on secrecy must be reviewed as soon as possible to ensure it is Constitutional. The Freedom of Information Act will ensure that citizens have access to information except where it would threaten national security or personal privacy, or where dissemination would prove excessively costly.

In addition, the public service must develop a more pro-active information policy. That requires a coherent management information system as well as the establishment of channels for consultation on major policy issues.

4. Training and Retraining

The public service requires extensive capacity building in order to improve services and overcome gross imbalances in race and gender. That will require the installation of appropriate training and retraining programmes, with adequate institutional and budgetary support.
The training programme will need to target all levels of the public service as well as potential new entrants. Training for service providers (such as the police, health and education workers) needs as much attention as management training.

4.1 Upgrading Management

For management training, a training programme should lay out course options, who would be eligible, selection procedures, leave requirements, links to promotion, and costs. Management training should place far greater emphasis on performance assessment and personnel management. Training programmes for management will include:

- Entry placements of university and technikon graduates in the Public Service, on probation.
- In service training and enrichment programmes.
- Educational leave for graduate studies for public servants after completing a certain period within the Service.
- Accelerated training for people entering key positions in the civil service, possibly in partnerships with training providers outside of government.
- Access to foreign training opportunities.

4.2 Non-Management Training

Training for workers must be linked to the reorganisation of grading. Training should clearly support the development of career paths. For lower-level workers, that requires above all the rewriting of job descriptions (Personal Administration Standards) to recognise the need for skills, specify the requisite training and education or experiential qualifications, and permit individual development. Training should link to the South African Qualifications Authority (SAQA), permitting the recognition of informal skills and experience.

To ensure workers have adequate access to training, programmes should include in-service and part-time training options. Where necessary, adult basic education should form part of the training programme.

Departments involved in the provision of infrastructure should set up large scale apprenticeship schemes.
5. **Democratising Labour Relations**

The democratisation of labour relations requires:

- Development of non-discriminatory hiring, training and career prospects for all workers.

- Adequate and equitable pay and conditions for all public servants.

- Participatory and open management.

- Centralised collective bargaining, with more constructive negotiating structures and practices.

### 5.1 Minimum Wages and Equitable Pay and Employment Conditions

- The PSC will ensure an adequate minimum wage and equal pay for work of equal value at all levels of the public service as soon as possible. To ensure fiscal sustainability, it will compress pay scales.

- In line with international norms, the government will set a target of a ratio of 10 from top to bottom in the public service by 1999.

- Compression in salary scales and benefits will be by substantial raises at the bottom, from the current low base, and restraint at the top. Increases will be linked to training and rising productivity.

- Career paths will be developed for all public servants, in negotiation with their representatives, linked to widespread training.

- At the same time, the number of grades will be reduced, supporting an approach based on competency-based evaluation and multi-skilling.

- There will be uniform standards and conditions of service across the country. This will require the rewriting of the Public Service Act, staff rode and other relevant regulations.

### 5.2 Labour Relations and the Public Sector Bargaining Forum

The Public Sector Labour Relations Act (PSLRA) will be repealed and a single Labour Relation Act will cover all workers. It is anticipated that this new
legislation will substantially revise and improve strike procedures, including the definition of essential services and dispute resolution.

The repeal of the PSLRA has implications for the present Public Service Bargaining Council. A new bargaining forum will be established whose constitution will stipulate.

- Representation by union/staff association with significant constituencies.
- Workers who represent the employer at any level must not be allowed to represent unions. They can join trade unions but not represent those unions.

Full time shop stewards should be provided for and there should be paid time off for education and training of shop stewards and for them to perform their union/staff association duties.

The present conditions indicate that there should be a separation of wage negotiation and matters with regard to policy formulation.

5.2.1 Pension Funds

Pension funds within the public sector require rationalisation with the full participation of pension fund holders. Pension funds will be jointly controlled by unions and management.

In negotiation with representatives of major stakeholders, the government will try to move toward a sound pay-as-you-go pension scheme for public servants.

6. Legislative and Financial Implications

6.1 Legislative Implications

This section lists the areas of law and regulations that will have to change to permit the proposed policies.

6.1.1 Administrative Law

The following will need to be changed

* Freedom of Information act(s) which lay down narrow criteria for declining to provide information.
* Procedures to ensure accountability, including increased penalties for deceiving Parliament or to Ministers.
* An effective public protector.
* Clear criteria and appeals procedures of all major decisions.

Procedures for developing performance criteria and appropriate review mechanisms.

6.1.2 The Legal Framework for Employment

The Public Service Act and Public Service Commission Act as well as subsidiary legislation such as the Staff Code will be redrafted in accordance with the principles stated in the Interim Constitution and to give effect to the proposals in this document.

6.1.3 Roles of the Public Service Commission and Public Service Act will be amended to establish a new department and its roles and functions in line with the functions listed at 3.2.1 and 3.2.2-

6.1.4 Labour Relations

The following changes will occur:

The Public Sector LRA will be repealed.

The draft Police Bill will not include collective bargaining arrangements.

The proposed single Labour Relations Bill attempts to introduce a coherent and efficient bargaining frame.

6.1.5 Other legislations

Legislative effect may need to be given a number of policy proposals including the establishment of the Public Sector Forum, public sector pensions and equalisation of benefits in terms of race and gender.

6.2 Financial Implications

Financial implications relate to:

- Providing resources for effective consultation processes
· Establishing appeals procedures, including adequate funding for the Put' Protector

· Adequate minimum wages and reduction of the wage gap, equalising pay and benefits for men and women, and improving and extending training.

Finances for these processes will derive from redirection of resources from undesirable programmes and increases in efficiency, and productivity rather than from cuts in services to the poor or impacting negatively on progress towards RDP targets.

Individual departments must be prepared to effect radical changes in their budgets, even quite late in the budget cycle. Departments could get assistance from the Department of State Expenditure, the relevant Parliamentary committees and from consultative processes.

Maintaining national conditions of service has important implications for fiscal flows between tiers of government. The Financial Fiscal Commission (FFC) will need to devise systems of revenue sharing which take into account the implications for public service restructuring.
INTRODUCTION

The Government and the Public Service cannot be detached from one another. The Public Service is the functional instrument of Government and as such the Public Service is always aligned to the policies, decisions and ideologies of Government. The conclusion is drawn from the First Report of the Subtheme Committee 6.1 on Public Administration that the committee extended its activities to include more than the mere essential contents of the future Constitution.

The standpoints of the PSA on the contents of the Constitution as far as the Public Service is concerned, are the following:-

- The Constitution should only lay down the broad structure and framework for the Public Service while other aspects concerning the Public Service should be left to the Government so as to promote flexibility and adaptability.

- The Constitution should also arrange the wider matters concerning officials without allowing the constitution to take the place of employment laws.

QUESTION (1.1)

Should the Public Service be regulated by way of constitutional provision? If so, what should the content and form of the constitutional provision be?

Comment

The structures of the State consist of the Legislative, Executive and Legal authority. The Public Service is an inextricable part of the Executive authority and therefore vitally important to the Government. It is apt that the Constitution, as supreme law also reflects the Public Service. The contents of the Constitution concerning the Public Service should also clarify the broad framework and principles thereof so as to give the Government a large degree of flexibility in respect of the ability of the Public Service to adapt to changeable circumstances.
The ideal instrument to arrange details in the Public Service, would be other relevant legislation such as the Public Service Act. This would obviate regular and unnecessary amendment of the Constitution - something that could be an arduous task.

**Suggestion**

The constitutional arrangement in respect of the Public Service should address the following.

- A broad definition of the Public Service.
  - The broad structure of the public service, i.e. an administration for the Government at the central level and an administration for each of the Provincial Governments.
- The objective requirements for the public service such as to be professional, career-orientated, non-partisan, loyal, efficient, effective, responsive, representative, accountable etc.
- The Public Service Commission and its broad powers and functions.
- The measure of political control over the public service and the Public Service Commission.
- Transitional arrangements if such arrangements should be necessary.

**THE ROLE OF THE PUBLIC SERVICE**

**QUESTION (2.1)**

How is the Public Service to be defined and which institutions of Government should be incorporated in the definition? For example, should the army, police, health, education, local government and parastatals as well as administrative personnel in the judiciary be covered in the definition?

**Comment**

The ambit of the public service cannot be extended beyond the following.

- The functions must be of a governmental nature.
- The functions are maintained with government funds.
- Control is exercised by the Government.
If the above approach is applied, the Public Service comprises of all functions that are under the control of the President, Deputy President, a Minister or a member of the Executive Council of a province.

Local governments, parastatals and other public institutions which do not comply with the above elements should be excluded from the ambit of the public service. The public service can appropriately and in greater detail be defined in the Public Service Act, which arrangement will promote flexibility in accordance with development and changing circumstances.

**QUESTION (2.2)**

What should be the guiding values and principles for the Public Service?

**Comment**

The guiding values of the public service are appropriately outlined in section 212 of the Constitution and should be included in the new constitution.

**QUESTION (2.3)**

What should be appropriate, speedy and effective mechanisms for ensuring accountability of public servants for their actions or inactions?'

**Comment**

The following practices regarding accountability should be retained:-

- The political head should be accountable to the public and Parliament for the actions or inactions of public servants employed in a Governmental function under his/her political control.
- The head of department is accountable to his/her appropriate political head.
- Public servants are accountable to their head of department.
- The Public Service Commission in collaboration with heads of departments must, if necessary, be assigned the responsibility to issue measures which will promote efficacy and efficiency in the public service.

With regard to public servants it must be borne in mind that they are merely employees who, in the employer/employee relationship, are accountable to their employer which is Government and for which purpose a number of actions can be taken such as disciplinary or misconduct procedure and in which procedure suspension is included. Investigations/inspections by the Public Protector/Auditor-General are also conducted. Only Government should be accountable to the public for the conduct of its workers since the latter are
only involved in executing whatever the employer prescribes. Therefore the head of department must take full responsibility for his/her officials and must be accountable to the political head for official's action or inaction.

QUESTION (2.4)

How should the concept of a representative Public Service be defined and what affirmative mechanisms and procedures will assist in achieving such representativity?

Comment

The existing provisions in the Constitution, i.e. section 8(3)(a) and 212(2)(b), (4) and (5), provides Government as employer with the proper authority to promote a public service which is broadly representative.

As regards the measures and devices to be implemented to achieve the mentioned constitutional objectives, it is suggested that It be regarded as a normal personnel practice to be implemented in terms of the Public Service Act in which regard the Public Service Commission, in collaboration the Minister for the Public Service and Administration, must oversee the process.

Suggestion

That sections 212(2)(b), (4) and (5) of the Constitution be included in the new constitution.

QUESTION (2.5)

Does representativity entail both deracialisation as well as transformation of state institutions?

Comments

The deracialisation of state institutions will depend on the devices and measures to be implemented in order to achieve representativity whilst the transformation of institutions will be determined by the functionality of political policies. If the execution of the RDP is also internalised as part of the functions of the public service, further transformation may possibly occur.

QUESTION (2.6)

Should the public and public service employees be entitled to participate in formulating policy on public services and should public service managers be responsible for creating the mechanisms for such participation?

Put differently, should there be a duty on public service managers to consult employees and the public in relation to the provision of public service?
The rendering of public service is determined by the decisions and policies of Government which are reflected in legislation.

It is Government which represents the public and which, through its own political structures, should determine the needs and requirements of the public. For the provision of new or additional public service and - in respect of such needs and requirements - the involvement of the managers in the public service is suggested.

The envisaged new LRA also provides for employee participation in some of the employer prerogatives and it is possible that in future labour will be involved in suggesting the provision of new or additional public service.

QUESTION (2.7)

Should there be an obligation on public managers to monitor and evaluate the implementation of public policy and what would be the appropriate mechanisms?

Comment

From the comments above it can be deduced that Government represents public policy and that managers in the public service are limited to the implementation of such policies as are laid down by legislation.

Public Service managers must therefore concern themselves with the implementation of State functions and in which respect they must inter alia account for the following:

- All matters pertaining to the implementation of the approved public policy i.e.
  - monitor and evaluate the implementation process which includes budgeting and control; and
  - evaluation of the functional efficacy of the process

- Accountability to the political head and report to Parliament about the progress, functional efficacy of the policy and financial viability etc.

QUESTION (2.8)

What forms of review and redress should the public/public employees have in relation to dissatisfaction with service delivery?

Comment
It is deduced that the question relates to dissatisfaction about a state function which is regarded as insufficient/inappropriate or about which dissatisfaction with services rendered exists and which may include conduct by public servants. With regard to public servants, the review or redress in question refers to mismanagement of the function or the conduct of the public.

It cannot be expected that an aggrieved member of public or a public servant should rely on a redress or a review from the Governmental institution which is in default. An impartial external body which is empowered to expeditiously investigate serious grievances and to grant the appropriate relief is required. Such an institution will have to work in close collaboration with the appropriate political head and manager in the public service to remedy poor performance or inappropriate services.

POLITICS AND ADMINISTRATION

QUESTION (3.1)

Should there be a separation of power between policy-making and administration?

Comment

Policy-making in respect of a governmental function is the responsibility of the political head who is in political control of such a function. In policy-making it is regarded appropriate for Ministers to make use of the knowledge and advice of his/her expert public administrators. Such interaction between political policy-making and administration is, however, dependent on mutual trust and a sound relationship in which the political head gives the policy guidance for administration to follow and to implement. It is in the interest of Government to continue with the legislative, judicial and executive structures as separate branches of Government. The division of policy-making and Administration is not regarded as absolute. A measure of interaction should be allowed as long as it is always clearly understood that the two functions are separate and not integrated.

QUESTION (3.2)

Should provision be made for limited political appointments in the South African Public Service? If so what should be the procedure and criteria for such appointments?

Comment

The final decision for the appointment of a head of department and other members of the managerial echelon rests with the relevant Minister and the Cabinet. The same approach applies to the appointment of managers in the administration of provincial governments. Any other form of political appointments in public administration cannot be supported. However, limited political
appointments for Ministers and other political office bearers of personal supportive administrative staff and of advisers can be considered. If such personnel are appointed in terms of the Public Service Act the same entrance requirements and terms and conditions of employment as for public servants should be applied. Otherwise contractual appointments should be arranged.

A national code of conduct for advisers should be prepared in which their responsibilities and duties are defined. Advisers should not replace heads of departments or cause a break-down in communication between the responsible political head and the head of department. Neither should an adviser act as communicator between the political head and the head of department.

**THE PUBLIC SERVICE COMMISSION**

**QUESTION (4.1)**

Should an institution such as the Public Protector be embodied in the final text of the constitution? Is there a need for another body, such as the Public Service Commission, that acts exclusively as ombudsman regarding aspects relating to the Public Service? If so, what should be its role, particularly in relation to appointments, promotions, human resource development and performance evaluation of departments and employees? How should it be composed? By whom should it be appointed and what are the appropriate mechanisms for public accountability? Should any provisions for the above be made in the Constitution?

**Comment**

The Public Service Commission, as central personnel authority, should be retained and the future constitution should include the provisions regarding the establishment, composition, functions and powers of the Commission as contained in sections 209 to 211 of the present Constitution. It is not possible to promote uniformity in personnel and state administration without this Commission of Parliament. For a total policy framework for the public service composed of departments and provincial administrations which employ 1,2 million workers, the Public Service Commission is indispensable.

The following in respect of the Commission should be retained.-

- The appointment of the members of the Commission by the President.
- The Commission as Commission of Parliament.
- The independence of the Commission.
- The broad functions of the Commission.
- Its accountability to Parliament.
It is questionable whether the new Constitution should also provide for the continuation of provincial service commissions.

**QUESTION** (4.2)

What should be the respective roles and responsibilities of the Minister for the Public Service and the Commission? What, if any, should be the relationship between the Minister and the Commission?

**Comment**

The Commission should at all times remain a Commission of Parliament and should retain its impartiality. Where necessary, the Commission must work in close coordination with the Minister from day to day. The *status quo* with regard to the existing statutory relationship between the two parties should be retained.

**QUESTION** (4.3)

Should the Public Service Commission be accountable to a Select Committee on the Public Service?

**Comment**

The Public Service Commission must remain accountable to Parliament and should reply to a Committee appointed by Parliament for such a purpose.

**QUESTION** (4.4)

Should the Public Service Commission act as a body of appeal for public servants or should this role be entrusted to an independent agency?

**Comment**

In terms of the Public Service Act the Public Service Commission is empowered to consider grievances of public servants and to make recommendations thereon. This form of appeal is subject to a complicated and protracted process and for this reason the prescribed long channel of communication must be followed.

The disputes and grievances of public servants can be categorized as follows:-

- Individual grievances or disputes of right arising from the employer/employee relationship and in respect of which the Commission is or is not implicated.
Individual grievances or disputes that can be related to the management of a department or administration and about which the Commission lacks the statutory authority to make a binding decision.

In the latter case the competence of the Commission limits its power as an appropriate appeal authority while it should be clear that the Commission can never be the appropriate appeal authority if a grievance arises from a decision of the Commission.

Consequently it is suggested that the Commission should retain its competency to consider appropriate cases referred to it on the request of public servants.

For all other instances of grievances, recourse in terms of the Public Service Labour Relations Act should be maintained.

**QUESTION (4.5)**

Who should represent the State as employer in the bargaining process and who mandates these representatives of the State as employer?

**Comment**

For the purpose of mandates in the bargaining process, the various levels of authority to make final and binding decisions about matters of mutual concern must be understood:-

**Central level**

- The final decision-making about especially transverse matters such as pension provisioning, general salary adjustments etc. rests with either the Cabinet or the Public Service Commission or a specific department and in which case the decision of such relevant authority is binding on all departments and public servants.

**Departmental and Provinicial level**

- At this level the final decision-making about matters of mutual concern such as hours of attendance, overtime, privatization, location of workplace etc., rests with the employing department or administration. Such decisions are taken to the exclusion of all other departments/administrations and their employees.

For purposes of collective bargaining it is immaterial to employee organisations who represents the State as employer. Provided representatives are mandated by the proper level of authority.
However, it is advisable that at all levels of collective bargaining knowledgeable persons with regard to the terms and conditions of employment, labour relations and public service financing should be included in the team of representatives of the State. From the explanation above it should also be clear that for purposes of collective bargaining in the public service, appropriate bargaining structures at the following levels of Governmental decision-making are necessary and in respect of which employer representation is needed:–

· Central level.

· Departmental level - a collective bargaining chamber for each department.

· Provincial level - a collective bargaining chamber for each provincial administration.

**QUESTION (4.6)**

Should there be Provincial Service Commissions?

**Comment**

It is doubted whether a need for the existence of Provincial Service Commissions was ever established, Provision for these Commissions should rather not be made in the Constitution and it should be left to the Government and the Legislator to consider and determine the future of the mentioned Commissions.

**QUESTION (4.7)**

How should norms and standards of public administration be developed and what, if any, should be the instruments of delegation from national to provincial governments?

**Comment**

In order to prevent diversity and for purposes of consistency, the Public Service Commission should be empowered to determine norms and standards to be applied nationally in state administration.

The statutory mechanisms to be applied are the Public Service Act, the Public Service Regulations, Public Service Staff Code, PSC-circulars and minutes etc., and where necessary the instruments of delegation should be applied.

**THE PUBLIC SERVICE AS AN AGENT OF DEVELOPMENT**
QUESTION (5. 1)

Should the public service act as an agent for development? If so, how can the Constitution be an enabling framework for such action or should this matter be dealt with elsewhere?

Comment

The public service as part of the executive authority can be regarded as one of the best agents to promote the envisaged development. For this specific purpose the public service is indeed able and willing to make the necessary contribution. What is required is the policy and leadership from the political heads. However, even the nature, form and measure of development are aspects which are under continuous change. For purposes of the envisaged development, its policy, enabling devices and framework should rather be left to Government.
Christians for Truth
9 March 1995

On behalf of Christians for Truth, an association of 65,000 members, I would like to suggest the following recommendations for the New constitution:

1. The name “God Almighty” should not be removed from the preamble.

2. South Africa must not be termed a secular state.

3. Abortion should not be legalised. A special clause under “Right to Life” should be inserted which states that the unborn baby is a person and deserves protection.

4. Protection for women and children should include an anti-pornography clause.

5. Sexual orientation should not be included in the anti-discrimination section.

Rev. Kjell Olsen
10 March 1995

The comments which follow represent the opinions of staff members of Associated Magazines representing Femina, Cosmopolitan and House and Leisure magazines. Names attached.

JUDICIAL AND LEGAL SYSTEM (Theme Committee 5)

1 Only the Constitutional Court should have constitutional jurisdiction.

2 The legal system is too expensive for ordinary people to benefit from it and it takes too long for cases to come to court. We need a new system at a higher level than the Small Claims Court to speed up the process and make it cheaper and more accessible.

3 Judges should definitely not be nominated by the Government. It should be a judicial appointment based on their technical ability and professional probity. Their past records should be taken into account, and hearings should be public, other interest groups could thereby participate.

4 A judicial officer should have an LLB, no political affiliations, no ties to any companies, and a track record of complete impartiality.

5 The judiciary should account to the government for the efficiency of its functioning. Its judgements should be accountable to a body appointed by the people and the Bar Association.

6 See response to 2.

SPECIALISED STRUCTURES OF GOVERNMENT (Theme Committee 6)

Sub-theme Committee 1
The functions of the Public Service Commission should be provided for in the new constitution but in the form of very broad outlines. It really needs a separate act. It does need to be re-constituted to limit its powers.

Sub-theme Committee 2
We need a body like the Tender Board to ensure fair and open dealings and as in the case of the Tender Board, labour, business, government and technical experts should all be equally represented. The government should not be able to make non-negotiated changes to the tax structure, or ad hoc price hikes to petrol prices etc, without proper consultation with the electorate or the body chosen by the electorate to represent their interests.

Sub-theme Committee 3
We do need a Public Protector/Ombudsperson or persons in South Africa and this person should be a judge or ex-judge. There should be one or more in every province with sufficient properly trained staff to ensure that no complaint goes unheard or unattended.

The Public Protectors Office should have access to any and all information regarding Government actions and everyone in government should be required to respond in full to any query coming from
this quarter. The Public Protectors Office should be accessible to any member of the public and the Public Protector (PP) should be responsible to the public and not the government. The PP should be appointed by the public from lists compiled by a body representing the public. The PP should not report to any Minister. The PP should have the right to require space or time from national and local media to publish findings. The PP should have the right to subpoena anyone including members of the government or the police or SANDF.

Sub-theme Committee 4
Police provisions dealing with the police. The police force should be apolitical and an instrument of protection for the people and their property and rights and not the State.

Theme Committee 1

Character of Democratic State

1 The Constitution should guarantee equality to all before the law including the aged and infants after birth. Laws governing acceptable behaviour will override equality for those who break them i.e. paedophiles etc.

· We are one sovereign state but we should devolute power away from central government to build up provincial and local government into valid, viable, accessible political instruments of the people in the provinces.

Theme Committee 4

Fundamental Rights

I NATURE OF BILL OF RIGHTS AND APPLICATION

1.1 All the rights which are incorporated in the booklet published by the Human Rights Commission should be guaranteed in the Constitution

1.2 The State should not have the right to limit these rights. The Constitution is the safeguard of the rights of the individual against the State.

1.3 The Bill of Rights should impose duties on the State alone.

1.4 The Bill of Rights should apply to common law, religious rules and rights, customs and customary law.

· EQUALITY

2.1 The Constitution should guarantee equality for all before the law.

2.2 No-one should be discriminated against on grounds of race, gender, sexual orientation (provided this does not infringe the rights of other people i.e. paedophiles etc), or age.
2.3 Issues such as affirmative action, economic advancement of disadvantaged people should be dealt with elsewhere. This needs a separate governmental programme like the RDP. It has no place in a Constitution which already guarantees equality for all.

3 HUMAN DIGNITY

3.1 The State and other institutions should be compelled to respect human dignity.

4 RIGHT TO LIFE

4.1 Every person should have the right to life as a fundamental right.
4.2 We are against capital punishment, in favour of choice over abortion and euthanasia.

· PRIVACY

5.1 The State should not have the right to infringe the privacy of the individual.
5.2 Not even in the prevention and combating of crime, intelligence operations and state security. If the State can convince the Attorney General that there are sufficient grounds then the AS can grant permission.

JANE RAPHAELY
Editor & Publisher
Cosmopolitan, Femina & House and Leisure
South African Council for Town and Regional Planners

9 MARCH 1995

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993: CHAPTER 10, SECTION 176 (b)

I am writing in pursuance of this Council's letter dated 20 January 1994, concerning the above. A copy is attached for your reference.

Since the Council for Town and Regional Planners did not receive any response to the original proposals submitted for consideration for inclusion in the interim Constitution, I wish to elaborate further on the difficulties arising from the implications of this section in the light of practical examples.

As you are probably aware, matters on town planning decisions, for example township establishments, can take up to five years to finalise. The profession is of the opinion that the process as prescribed in the Constitution is already causing an unnecessary delay in delivering housing and other services to the community at large. This section in the Constitution will not expedite matters, but rather hamper an already lengthy process.

An analysis of recent statistics relating to town planning applications, that were considered by two city councils, reveals the following:

- In Pretoria some 3 488 applications were received during 1994 (see attached table).

- In Johannesburg some 1 662 applications were received in the same period. These were only rezonings and consent uses. Statistics on applications in other categories were not available.

Enquiries have revealed that not all of these applications are dealt with by the full council or by a specific committee set up for this purpose in each city. The conclusion can be drawn that a large amount of applications are dealt with at official level. The burden of entrusting all these applications to council or committee is obvious too great to expect the application of the law in terms of the constitution.

As indicated in our previous correspondence, the effect of the provision would be to incur significant costs, as well as delays. These costs are especially of an administrative nature where each application would be processed, duplicated, motivated and submitted either to the full council or to a special committee which has been appointed for this purpose. The committee clerks would be burdened with the obligation of duplicating documents and diagrams, which are usually in full colour, for the several council members involved. The resolutions would then be taken and duplicated for the council or committee for later ratification. Professional expertise would also be necessary to advise councils or committees on the potential effect of an application. In this process considerable time delays will be incurred which will reflect on costs, specialised manpower and scarce
resources. This will impact on the speed of delivery of the projects especially in terms of the Reconstruction and Development Programme. Furthermore, the highly bureaucratic approach would contradict the laudable goals of the Development Facilitation Bill which sets out to " ...introduce extraordinary measures to facilitate and expedite the implementation of reconstruction and development programmes and projects in relation to land ...."

It is therefore strongly suggested that the previous proposals be reconsidered by the Constitutional Assembly. Furthermore, it is proposed that this section include a provision that will allow Councils to delegate certain defined matters to appropriate officials. The suggested wording for the amended section 176(b) could possibly read as follows:

(b) policy on town planning shall be decided by a resolution of the council adopted by at least a majority of all its members: Provided that a council may delegate the power to make decisions on matters of policy pertaining to town planning to the executive committee or to a committee appointed for this purpose: Provided further that section 177 shall apply mutatis mutandis to the appointment and functioning of a committee appointed for this purpose: ; and provided further that matters of a routine nature which are in accordance with the approved policy guidelines may be approved by a delegated official who is registered as a town and regional planner in terms of the Town and Regional Planners Act, 1984 (Act No 19 of 1984)-

In view of the fact that this is an urgent and important matter, I would request that an appropriate oral submission be made to your Assembly to illustrate these concerns.

PROF JOHN MULLER
PRESIDENT

20 January 1994

DRAFT CONSTITUTION : CHAPTER 10 : SECTION 176

The provisions of Section 176 of the draft Constitution of the Republic, of South Africa, in particular those of subsection 176(b), taking into account the provisions in Section 177, have just come to the attention of this Council.

While the background and spirit of the proposed legislation is fully appreciated it is with some considerable concern that this Council notes the following important and serious consequences of this proposed legislation.

In any, and particularly in large local authorities, the number of town planning decisions to be considered is enormous. In a city such as Johannesburg, the town planning matters requiring the local authority’s decision probably well exceed 1 000 per annum and may, depending on definition, total about 2 000 per annum.
For a local authority or its delegated committee to consider and decide such a large number of town planning matters present, certainly, a virtual logistical impossibility. To be practical it is the unreserved view of this Council that provision needs to be made for decisions on certain and defined, town planning matters, to be delegated. It is therefore submitted that provision, subject to defined limitations, needs to be made in the above draft legislation for certain town planning matters to be delegated to appropriate officials.

It should be borne in mind that any such delegation as suggested would only be made by the local authority itself in terms of the provisions of the proposed legislation and therefore would not be an unlimited abdication of power of authority.

It should be pointed out that a large proportion of local authority town planning decisions have to do with residential land use and the proposals for more effective use of land for housing purposes. If these decisions concerning housing density, subdivision of land and increased housing provision are restricted by a lack of delegated powers and consequent administrative delays, the interests of the country will not be well served. In addition, there will be significant cost consequences of delays and the need for increased use of manpower resources.

Time does not allow any detailed explanation of the facts related to this issue but the letter dated 13 December 1993, under reference KI/4/137/2, addressed to you by the Institute of Town Clerks of South Africa vividly illustrates the concerns.

This Council would implore all concerned to reconsider the draft legislation seriously. It can only be recommended that provision must be made, subject to appropriate criteria, for the delegation of certain town planning decisions to more than the limited bodies referred to in Section 176(b) of the draft Constitution.

Should you require any further information of a more detailed explanation of the above, please do not hesitate to contact this office.

F C GIUDICI (MRS)
REGISTRAR

cc Institute of Town Clerks of South Africa.

CITY OF CAPE TOWN
CITY PLANNER’S DEPARTMENT

SECTION 176 (b) OF THE CONSTITUTION

At present, following on the loss of delegated powers, the number of items that is now additionally dealt with by the relevant Standing Committee, each month, is as follows:
-Departures: 150 out of 450 building plans submitted

-Removals of Restrictions and Subdivisions: 44 out of 50 applications

It should be noted that everyone of the above applications is, as a matter of course, advertised to surrounding property owners and the community in general.

From January to December, 1994 of 336 application 70 went to full Council and 266 were delegated to the Town Planning Committee; 34 of these were either Removals of Restrictions or Subdivisions; 135 were departures; and 97 were rezonings.

P. DE TOLLY

DEPUTY CITY PLANNER
ANC - Athlone North Branch

RE: THEME COMMITTEE 3: RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

First of all the final constitution should list both national and provincial powers. They should not be separate.

Secondly, the struggle for liberation was for a united South Africa with the President as the sovereign head of state with executive powers.

Provincial Government should not be autonomous, but have limited powers, especially where education, and local Government are concerned. The Premier should be accountable to the President and the people, thus giving the President the right to discipline any member of Parliament or MPL, when they fail to carry out Government policy, even if it means firing them.

All provincial Government policies should be passed by the Central Government.

BRIAN PRETORIUS

(BRANCH SECRETARY)
SUBSECTION 176(b) OF THE INTERIM CONSTITUTION AND ITS IMPLICATIONS FOR URBAN PLANNING

Correspondence to Minister Roolf Meyer and myself dated 6 October 1994 from the City Planner of the City of Cape Town regarding the implications which subsection 176(b) of the Constitution, 1993 would have on the approval of town planning applications, has reference. A copy of this letter is attached for your convenience.

I agree with the view of the City Planner that planning decisions should be taken as efficiently and quickly as possible, without forfeiting community involvement. Local authorities have historically been entrusted to delegate town planning decisions to officials in the interest of expediency. This delegation has been performed with responsibility and the necessary accountability in the light of the appeal mechanisms provided for in the legislation.

You are aware of the Development Facilitation Bill, which is currently being considered for submission to Parliament in the near future. This Bill has as its main principle to "...introduce extraordinary measures to facilitate and expedite the implementation of reconstruction and development programmes and projects in relation to land......
Given the desirability to speed up processes for the delivery of projects under the Reconstruction and Development Programme, it would appear that the provisions of Section 176(b) are contradictory to the aims of reconstruction and development. I am, therefore, convinced that it would be in the interest of effective and good town planning to remove the obstacle contained in subsection 176(b) of the Constitution and support the City Planner in this regard.

Under these circumstances, I would urge the Constitutional Assembly to seriously reconsider the provisions of section 176(b) and amend or delete it accordingly.

DEREK HANEKOM

CITY PLANNER. CITY OF CAPE TOWN

STADSBEPLEANNER. STAD KAAPSTAD

06 October 1994

SECTION 176(b) OF THE INTERIM CONSTITUTION
I would like to draw your attention to sub-section 176(b) of the Interim Constitution and its implications for the planning and management of towns and cities.

Prior to the elections in April of this year my department made a submission to the Transitional Executive Council’s Sub-Council on Regional and Local Government and Traditional Authorities (dated 1994-01-31 and attached). In this Submission we pointed out that subsection 176(b) as it stood, and indeed as it still stands, will have a very negative effect on the process of approving town planning applications through effectively prohibiting the delegation of such powers to officials.

Verbal communication between members of the Sub-Council and my staff indicated that there was agreement on the TEC that the section should be amended. The TEC in fact requested Mr Berrisford of my staff to draft an amendment for submission to parliament after the elections. To date the sub-section has not been amended. As the subsection will only apply to elected local authorities, i.e. after the local elections of next year, there is still some time, Nevertheless my department is anxious that this legislative obstruction to efficient and expeditious planning, and indeed to the successful implementation of the Reconstruction and Development Programme, be removed as swiftly as possible.

CITY PLANNER
On behalf of the Cape Town City Council I would like to request, as a matter of the utmost urgency, clarification as to the interpretation of section 176(b) of the Interim Constitution.

The section effectively prohibits the delegation to the City Planner and his or her officials of all decision-making "pertaining to town planning". Section 58 of the Municipal Ordinance (Cape), 20 of 1974 allows for the delegation by a local authority of powers to Officials. In terms of this provision the Cape Town City Council's Standing Orders delegate a great number of minor town planning powers --- to the City Planner (see sections 59A and 65 of the Standing Orders - attached).

In terms of subsection 58(3) of the Municipal Ordinance "any person who feels aggrieved by a
decision of any employee under a delegation" is entitled to appeal that decision to the council. Thus at no point does delegation diminish the accountability of the Council. It is however essential for efficient administration and the timeous handling of applications.

The administrative implications of section 176 are vast - every power delegated under the Standing Orders to the City Planner will now have to be exercised by the Town Planning Committee. Where Town Planning Committee is unable to resolve the issue with a two thirds majority (see section 176(b) in relation to section 177) the matter will have to be decided by the full council.

In terms of section 4 of the Interim Constitution ("Supremacy of the Constitution") section 58 of the Municipal Ordinance will be "of no force and effect" in so far as it refers to "matters pertaining to town planning". This will effectively bring the town planning process in large cities to a standstill. The council or its town planning committee will be swamped with the volume of minor applications for decisions currently taken by officials.

Not only will critically important projects of urban restructuring and development be stalled but the person in the street making a town planning application, for instance for permission to operate a business from home, will also be subject to inordinately long delays.

For many years the Cape Town City Council has been striving to maximise the devolution of minor decision-making to officials. This is for two reasons: firstly it allows
sufficient time to the political decision makers to deal with the major issues facing the city and, secondly, it makes for speedy and efficient handling of applications from the public.

Section 176(b) as it currently stands will create a planning system that is, by world standards, extraordinarily cumbersome and slow.

I therefore urgently request that the Transitional Executive Council review section 176(b) to clarify its implications for the planning and management of our cities. In the event of the interpretation of the section proposed in this letter being correct the Transitional Executive Council is requested to investigate, with the utmost urgency, opportunities for amending the legislation as soon as possible.

CITY PLANNER
THE ISLAMIC JIHAD
INTERNATIONAL

Re: Muslim Personal Law

We would like to bring to light on 1.1 to 1.4 as stipulated in the newspaper.

Our organisation was not informed by the various Muslim organizations who are involved in the drafting of Muslim Personal Law namely the Muslim Youth Movement and the Muslim Judicial Council and also the Jamiat Ul Ulama.

We therefore understand that the various organisations has not taken a mandate from the Muslim population. It in the decision of a few individual organisations who have in the past allowed the apartheid regime to oppress our religious and customary rights.

We can submit cases where Muslim marriages were dissolved and matters were referred to the courts of the country. The father had no right on his children but had to pay maintenance. There are many fathers that did not have access to their children, with the result the father had to lose his children. The women abused this situation as the regime showed no respect for any human religion. Islamic law has certain priorities with regard to certain conditions when a marriage is dissolved. As the father is the bread winner and the head of the family he gains custody of the children when they are seven years and older, thus avoiding maintenance courts.

We therefore suggest that the state should have no right in any individual religion or customary law. The matter should be referred to religious organisations. As Muslims we have our own jurist who can attend to the needs of the Muslim population. It would therefore save the state considerable amount of money and time, We pray that in the light of reconciliation the state accede to our request.
THE CONSTITUTION AND THE ENVIRONMENT

We, the undersigned, being fully appointed Rangers, or probationers awaiting appointment to the Honorary Rangers of the National Parks Board, would like the following clauses to be included in the Constitution of South Africa.

The Environment

Current and future generations have the right to a sustainable environment which is conducive to health and well-being, where pollution and waste generation are minimised and where environmental considerations are taken account of in land-use decisions. All persons including the state and its organs have the duty to ensure the achievement of this right.

Provincial Legislative Authority

Legislative competence of provinces
A provincial legislature shall have concurrent competence with Parliament to make laws with regard to the environment subject to an Act of Parliament which shall prevail over a provincial law inconsistent therewith and subject to international treaties.

A provincial legislature shall have concurrent competence with Parliament to make laws with regard to nature conservation, excluding national parks, national botanical gardens and marine resources, and subject to an Act of Parliament which shall prevail over a provincial law inconsistent therewith and subject to international treaties.

ACCOMPANIED BY 15 SIGNATURES OF RANGERS
AND 14 OTHER SIGNATURES
LABOUR RELATED ISSUES

Question: Should local government be included in a broader definition of the Public Service or Public Sector?

- All three tiers of government have two basic functions:
  
  (a) Governing function;
  (b) Employer function or labour related function.

- The relevant issue is the identification of the employer of local government employees.

- In terms of the constitution local authorities are autonomous statutory institutions responsible for their own employees. This fact implies that no other authority can accept responsibility for employees of autonomous authorities or organisations.

- Therefore, the Public Service Commission has no role to play pertaining to local government employees.

- Local government is rendering a public service in the public sector but is not part of the organisation referred to as the PUBLIC SERVICE.

- It is acceptable to have linkage systems with the other tiers of government on matters such as salaries and conditions of service in order to enhance fiscal control in the R.S.A.
To implement co-ordination and linkage systems it is necessary to formalise relationships on the employer side in the whole public sector through the creation of an employer federation involving the employer in the public service, the employer in the province, the employer in local government and the employers of para statal bodies.

Such a body or federation would improve co-ordination between the different tiers of government concerning labour relationship matters as a whole and ensure public sector input in bodies such as NEDLAC and even the international Labour Organisation.

A common set of values and principles are acceptable. This should be applicable in the entire public sector. The following values are presented as an example:

We are committed to:

1. Transparent and ethical behaviour
2. A participative and inclusive approach, in terms of which all role-players accept reciprocal responsibilities.
3. Accountability to the people we serve, as well as to other stakeholders
4. Promoting accessibility
5. Redressing imbalances of the past and ameliorating the conditions of the disadvantaged
6. The empowerment of our employees and the community
7. Being environmentally sensitive
8. Being creative and pro-active in the fulfilment of our mission
9. Free and open relationships with other governments - locally, provincially, nationally and internationally
10. A peaceful and secure environment
11. Effective and efficient administration
12. Affordable and sustainable service delivery.

CONSTITUTIONAL ISSUES

Local government should be dynamic, autonomous and democratically elected in order to facilitate
development, execute the RDP and deliver effective and efficient services which will ensure an
uplift the quality of life and the standard of living of the people it serves.

The Constitutional Principles state that there shall be local government and that the Constitution sha
provide for a framework of local government powers, functions and structures.

Autonomy should constitutionalised

Criteria for selection of constitutional aspects:
- No vagueness
- Conflict issues should clearly be dealt with
- Entrenchment of local government as a form of local government
- No stipulation in the Constitution should contradict democracy
- Aspects essential to determine the nature and status of local government
- Principal aspects rather than detail aspects
- Should be national common denominator for all local governments
- Address issues that are so basic as to warrant special Constitutional protection

Issues relating to categorisation

- Categories - metropolitan/urban/rural
- Traditional leaders - advisory, non-wating consulted
- Revenue generating capabilities direct seat on financial and fiscal
  commission
- Equitable access to funding
- Level of autonomy
- Statics of local government

Issues relating to autonomy
- Autonomy
- Financial autonomy
- Human resources management autonomy
- Exclusive competency of local authority
- Core responsibilities on functions.

Local government shall have exclusive authority over those functions and powers assigned to it by the provincial legislator, in consultation with local government and no Parliament or provincial legislature shall encroach on the powers, functions and structure of local government to such an extent as to compromise the fundamental status purpose and character of local government.

Powers and Functions of Local Government

- The powers, functions and structures by local government shall be determined by law of provincial legislature, and functions must be allocated according to the principle that functions must be located at the most appropriate level of government, as close as possible to the electorate considering the capacity to perform exists, provided that these powers should not be substantially less than, or inferior to, current powers of local government.

- A local government shall be assigned such powers and functions as may be necessary to provide services for maintenance and promotion of the well-being of all persons within its area of jurisdiction.

- A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to, or at least include, town/rural planning, water, sanitation, electricity, primary health care, public protection services, refuse and waste removal, recreation amenities and cemeteries within a safe and healthy environment provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.

MUNISIPAL WERKGEWERSORGANISASIE
MUNICIPAL EMPLOYERS' ORGANISATION

MEMORANDUM
1. All three tiers of Government have two basic functions - 

   (a) A Governing function:

   (b) Employer Function or Labour related function.

2. This MEMO deals with the employer function

All three tiers of Government share the following:

i. The democratically elected functionaries, (politicians) are accountable to the public;

ii. The employees may be blameworthy but not directly accountable to public. Th executive or employees are accountable to elected politicians in their capacity a employers;

iii. The employer in all three tiers of Government should appreciate the necessity of a health and correct relationship between the employer and the Management Executive, (Direct Generals, Directors, Town Clerks and other Chief Executive Officers);

iv. The principle of being a role player or decision maker in spite of vested interest must constantly be kept in mind especially with a view to accountability;

v. The advisory role to the executive must be separate from an independent body such as th role of the Public Service Commission or an Employers' Organisation. (as opposed to an employee association);

vi. The clear distinction between employer and employee on the one hand and employ contractor representative (Public Service Commission or Employer Organisation) on th other hand must be drawn;

vii. The fact that a correct relationship is necessary between employers in the public sector i equally as necessary as the relationship that exist between employees and Trade Union through Federations. It is fundamental that this be realised;

Equally the differences in the components of the public sector namely
(i) the employer in the public service;

(ii) the employer in the Provinces, even the employer in the para statal bodies; and

(iii) the employer in Local Authority must be realised and recognised.

If not then obviously local authority and para-statals will cease to exist and become the direct responsibility of Central Government.

Bearing the above in mind, oversight mechanisms and linkage systems are necessary to found and strengthen relationships on the employers' side in the whole public sector.

To this end the creation of an employer federation in the public sector would serve the purpose.

Such a body would serve to improve labour relationships as a whole and ensure public service input in bodies such as NEDLAC and even the International Labour Organisations.

Although local authority caters at present for approximately 230,000 job opportunities, it does together with the rest of the public sector offer more job opportunities than the private sector. This fact further necessitates, even compels, from an economic point of view, co-operation and a link between local authorities as individual employer jointly and the second and first tier employers.

Pre-planning on all labour related matters in the public sector would not only encourage the principle of transparency and accountability but should also have a positive effect on devolvement of power: functions or sources of income.

In conclusion emphasis is placed on the danger of the employer in the public sector delegating or assigning powers to employees on the basis of abandoning responsibility and even accountability.

To this end it is imperative for Central Government to determine the role of the Public Service Commission either as -

(1) permanent civil servants (more or less the present position) or

(2) alternatively separate conditions in the form of an employers' organisation for first and second tier Government, and further to co-operate with local authority and even para statals in federation, to ensure the necessary linkage and joint oversight function.
A.J. VAN SCHALKWYK

FEDERATION OF EMPLOYERS’ ORGANISATION
15 November 1994

PROMOTION OF NATIONAL UNITY AND RECONCILIATION BILL 1994
YOUR 3/15/14 DATED 1994-10-26

1. Section 5 of the Bill provides that any book, document, file, object or writing which contains any information relevant to the Commission's functions, may be seized.

2. In terms of section 6 and 7 any person or premises may be searched by employees of the Commission for the purpose of seizing any article referred to in section 5.

3. Section 22(1) provides that if the Committee on Amnesty refuses an application for amnesty, the information contained in the applicant's application, the evidence given before the Committee, and any document or other material that may have come into the possession of the Committee shall not be used in evidence against such person before any court or tribunal.

4. This is unacceptable, since it may well make a future prosecution, in a case where amnesty has been refused, impossible. The article confiscated may well be an important part of the evidence against this person. The person may even be able to manipulate the process so as to escape a conviction.

5. The question also arises whether an article referred to in section 5 may be, seized where it is an important exhibit in a criminal trial, and the accused has already been charged with, or is standing trial upon a charge referred to in section 21(4), and such article is in the possession of the attorney-general (or his delegate), the police or in possession of the court before which the accused is standing trial. If such an article may indeed be seized, and the Committee thereafter refuses an application for amnesty, the State's case may be severely hampered, or even jeopardised.

6. It would therefore appear that if a definite line is not drawn between the powers of the Commission on the one hand and the powers of the courts, attorneys-general and the police on the other hand, confusion seems unavoidable. Such a situation is not only unacceptable but would certainly be detrimental to the sound administration of justice.
1. The definition of "Gross violation of human rights" (Section 1) may be too narrow, in that,

   (a) it does not include a conspiracy or incitement;

   (b) it does not appear to cover cases of damage to property only. Persons may have been 
       very seriously affected by having their property (e.g home) destroyed without being in 
       bodily danger. Perpetrators would not be able to claim indemnity, and victims would not 
       be able to claim compensation (see section 27).

2. Section 21(5)(b) provides that the criminal and civil liability of any other person which 
   depends on the liability of a person who is indemnified shall also be extinguished. I do not know 
   exactly what is envisaged by this provision, but it is at least arguable that in its 
   present form it would exempt from, liability an accomplice, but not a co-perpetrator, See S v 
   Khoya 1982 (3) SA 1019A at 1031-2. The reason for the distinction is that the 
   liability of an accomplice depends on the guilt of the principal offender, whereas that of a co- 
   perpertrator does not. If it is intended that a co-perpetrator should also be automatically 
   indemnified then, arguably, the provision does not go far enough. The other problem I have 
   with the present provision is that it automatically indemnifies an accomplice, even if his motive is 
   personal gain or malice. This appears to conflict with the intention set out in section 1(1)(i)(aa) 
   and (bb).

   In this situation I am thinking for example of a person with a motive of personal gain or malice 
   who procures a person who is idealistically motivated to commit a political crime. It seems wrong 
   that the first person should benefit in this situation.

L J ROBERTS
ATTORNEY-GENERAL: EASTERN CAPE
Islamic Council of South Africa  
(Incorporating Muslim Organizations of South Africa)

SUBMISSION - THEME COMMITTEE 5

Attached document:

A REPORT
TO THE
HUMAN SCIENCES RESEARCH COUNCIL

ON

MUSLIM PERSONAL LAW

FOR

SOUTH AFRICA

BY

A.B. MAHOMED,
ADVOCATE OF THE SUPREME COURT
OF SOUTH AFRICA

TERM OF REFERENCE
The assignment of the Human Sciences Research Council requests a report on:-

(a) The Muslim Legal System.
(b) The nature and extent of its difference with the Legal System of South Africa.
(c) The nature and extent of its retention by the Muslim Community of South Africa.
(d) Recommendation as to the nature and extent of its application and enforcement,

SECTION FOR POLITICAL SCIENCE RESEARCH:
REFERENCE NO. 3/10/121

RESEARCH PROJECT - LEGAL SYSTEM - MUSLIM LAW
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[EDITOR’S NOTE: This dissertation has not been scanned into the database. A copy of the document may be viewed at the Constitutional Assembly’s Resource Centre, Regis House, Adderley Street, Cape Town]
THE ORGANISATION OF THE UNEMPLOYED PERSONS

The organisation wish to contribute into the formation of a new and lasting constitution presently being prepared by Constitutional Committee.

A. 1. The Constitution should create conditions of enhancing investors and conditions of securing their business commitments in our country.

2. The constitution should ensure that the government has abundant and wide resources of taxes from private sectors throughout the country.

3. The constitution should consider democratic employment situation, i.e. the majority of unemployed citizens of the entire country. And, in this case, the organisation stands for this majority; therefore its word is for the majority (unemployed) over the minority (employed).

B. Therefore we propose that the constitution should have an act prohibiting strikes in the private sectors' business, more so industrial undertakings. Instead of strikes, or in their place, the government should introduce "production protection act" entailing, among others, "involvement" or deployment of soldiers, police, etc. in the keeping on production while strikers were locked in negotiations with their employers.

C. 1. Introduction (or a mere talk) of this act will cause our country to see "influx" of investors into this country which no other country in Africa had ever imagined, saying nothing about seeing.

2. The government will have more people to pay taxes, more property to be taxed, etc.

3. Crime will decrease as many desperate criminals will be employed.

4. Numerous school-leavers after Std 10 will get employed immediately.
5. Political stability alongside with economic stability will grown our country "King" of African countries.

6. The victims of the past strikes, most of them instigated for other gains rather than workers' benefits, will be back in the employments to relieve their families - even to re-unite those which separated thereby.

D. Fulfilment of the major promise before elections by black leaders, that employment would be available in aplenty, can be a reality overnight if the government denounces strikes with immediate effect.

W.Z. Diko
IRENE HERBS

SOLE IMPORTERS, EXPORTERS & DISTRIBUTORS : IRENE HERBALINE

12 April 1995

Theme Committee IV

ENTRENCHED BILL OF RIGHTS

We have been selling our ointment for +/- 18 years to tens of thousands of people all with success. We sold our product with a money back guarantee and not once was it necessary for us to refund any money to anybody! Our product is made from pure herbs, and we have 14 books (from all over the world) which confirms that our herbs work for the ailments we claim.

Last year the Medicines Control Council sent 5 Narcotics Police, to our office, took all our stocks and told us to close down. 67 people lost their jobs - and till today not one has find another job. When I phoned the Medicines Control Council they told me that we must come and register our products with them. When I asked them for advice what I must do with the 67 people that lost their jobs, she answered - they don't care, because they are only there to look after Chemists.

I went to see the Medicines Control Council and a Mr v.d. Westhuizen told me that I cannot register my products with them because I am NOT A CHEMIST. He furthermore told me that I must employ a chemist and that I could wait up to 15 years before it is registered. In other words I must pay a chemist his salary for 15 years without doing any work except to register my product. Once the product is registered we will have to charge the public R184 per tin just to recover our losses for 15 years. It now sells for R49.95.

Therefore this is a no-go situation. We then decided to emigrate to another country (we export thousands of tins) but my staff of 67 consists of 62 Black people and 5 White people, and the black staff is not willing to do so.

I hereby appeal to you to change the Medicines Control Council staff and the existing laws that would lead from abusive regulations to responsible liberation of the natural means to true health (at a fraction of the prices that chemists charge for their products).

The Organisation of Free Trade and the Lawyers for Human Rights agree with me. Pure Herbal Medicines should NOT be controlled by the all white Medicines Control Council! Please change this.

Thanking you in anticipation,
(Signed)

P.S. It was a white chemist who complained to the Medicines Control Council.

IRENE Herbaline - The wonder herbs product that stops pain, itching, or bleeding within seconds and heals 30 ailments.
FREE MARKET FOUNDATION

6. Amendments to constitution

Should a constitution be difficult to amend?

Since a constitution is, in essence, a list of don’ts for government, those who draft constitutions usually try to make them very difficult to amend. But societies constantly change and evolve.

Perceptions of the role of the state also change over time, and rigid constitutions are often either cast aside or interpreted in expedient ways.

France, for example, in 130 years, had 12 rigid constitutions which purported to embody immutable laws. They all proved ineffective. The French courts have historically been unwilling to declare any law unconstitutional no matter how flagrant the violation.

The men who drafted the American constitution in 1787 were also determined to prevent it from being easily changed. Consequently, an amendment must be proposed by two-thirds of the members in both the Congress and the Senate, or by two-thirds of the states. Then a constitutional convention must be called and the proposed change ratified by three-quarters of the state legislatures. Accordingly amendments to the written document are very rare. As a result, the interpretation of the constitution has changed greatly in the last two centuries.

Who should have the final say on the constitution?

In the USA the people are theoretically sovereign and entitled to amend the constitution, but the process is so difficult that it seldom occurs. In reality Congress and the Supreme Court have the final say.

Switzerland is the only country in which the people are genuinely sovereign. They approve or veto constitutional amendments proposed by the legislature, and make their own proposals to amend the constitution. This has ensured that the Swiss people have more participation in the development of their constitution than any other nation on earth.

Of the 216 amendments to the Swiss constitution proposed between 1874 and 1985, 111 were accepted by the voters and 105 were rejected. Of the 111 which were approved, eight were popular initiatives and 14 were counter-projects (moderate variations on popular initiatives put together by parliament). The remaining 89 amendments were proposed by the national legislature. In this way the Swiss have developed a constitution which suits their special needs and enjoys popular support.

The consequences of empowering the people to decide on amendments to the constitution are, first, that there have been many amendments (one a year on average); secondly, that the constitution has evolved to reflect changes which occur in society over time; and, thirdly, that the
Swiss federal governments jurisdiction has increased gradually over the years, but not dramatically nor without the approval of the people, as has happened elsewhere.

**Who should have the power to amend the South African constitution and how?**

We propose that the right of the people to vote directly on amendments to the constitution, and to make popular proposals for amendments, should be entrenched in our bill of rights.

Should parliament wish to pass a law concerning a matter outside its jurisdiction as defined in the constitution, or to change the constitution in any other way, a constitutional amendment would be required.

Attempts to amend the constitution would probably be fairly common. An amendment could be proposed by the National Assembly, the Senate, the Cabinet, or the public. (Popular initiatives for constitutional changes would require an initial petition with a minimum number of signatures - say 200 000).

Amendments of specially entrenched clauses, such as those protecting basic human rights, would require a two-thirds majority nationally and unanimous approval by the provinces, in other words, any one province would have the right of veto. The amendment of an ordinary constitutional provision would be subject to approval by a simple majority of the people in a national referendum, in addition to approval by a majority of the provincial legislatures.

This would mean that any proposed extension of the state's authority would be subject to the scrutiny, debate and approval of the people.
Theme Committee Four

Section One

Submission on: Constitutional principle II

Submitted by: The Free Market Foundation of Southern Africa

SUMMARY

In England the ordinary law respects individual liberty and upholds freedom of religion, speech, association and so on. In many other countries a bill of rights is entrenched in the constitution in an attempt to safeguard these rights.

In a traditional bill of rights, such as that of the USA or the French Declaration of the Rights of Man, common law freedoms are listed which can be enjoyed by all people simultaneously. These are genuine liberties or freedoms (or first-generation rights).

Some South Africans argue that these rights are not sufficient for this country because they don't provide people with the wherewithal to exercise them, nor do they reverse the damage done by apartheid. Therefore there should be a second category of rights ensuring that all people have a house, job, education and so on, so that they can take advantage of basic freedoms. These are entitlements or privileges (or second-generation rights). They purport to impose on the government an obligation to confer benefits on some groups at the expense of others. In other words, they can only be granted by invading the liberties or freedoms of other persons, usually by raising taxes to provide the privileges concerned to the classes benefiting.

We propose that a bill of rights be restricted to genuinely enforceable or justiciable common-law freedoms and liberties. Second-generation rights such as the right to a house or a job cannot be enforced against the government through the courts in the same way.

Inserting unenforceable second-generation rights in the bill of rights will have the undesirable result of undermining the enforceability of first-generation rights, such as the right not to be detained without trial.

For this reason the task of reversing past wrongs should be undertaken in the political sphere.

CONSTITUTIONAL PRINCIPLE II

Protecting human rights

Bills or declarations of rights are drawn up and entrenched in constitutions in an effort to protect individuals by ensuring that the state will not abuse the people.
The question of which rights should be included in a bill of rights has become a contentious one amongst South Africans for the following reasons:

The common law does not envisage a certain type of society and draw up a body of laws intended to bring it about, as governments often do. Rather it assumes, and aims to protect from government violation, inherent common-law or fundamental freedoms which can be enjoyed by all people simultaneously.

For example, it is possible for any individual, regardless of race, gender or other distinguishing factors, to enter contracts; to earn income; to buy movable and immovable property from a willing seller and do whatever he wishes with it; to move freely through the public domain; to speak or write on any matter as long as he does not commit libel or slander; to be tried in an impartial court if accused of a wrong-doing; and to vote for the political representative of his choice - without impinging on the right of any other person to the same freedoms.

These are the freedoms which we believe should form the basis of a South African bill of rights.

But some legal theoreticians and political commentators see a bill of rights very differently. They make the following observation: the fact that all people are guaranteed the right to move anywhere, live anywhere, enter employment and own property does not ensure that they will have the money or the skills necessary to exercise these rights. Therefore, they believe, the task of a bill of rights should be not only to protect an individual's freedom to clothe, feed, house and educate himself and his family, but also to ensure, through the intervention of the state, that he is able to exercise these freedoms.

Thus their bill of rights would incorporate, over and above the common law rights already mentioned, a second class of rights. These would include the right to a job, a house and an education, and further yet, the right to a four-day week, a paid annual holiday, maternity benefits for women, and indeed to a generally peaceful, clean, pleasant and civilised standard of living.

Those who advance this argument call common-law freedoms first generation rights, and this second class of rights second and third generation rights. (Second generation rights include such things as food, housing and health care, while third generation rights include peace, a clean environment, leisure and so on.)

In South Africa, it is argued, the entire weight of apartheid legislation has violated the common law rights of the majority of people on the basis of skin colour. This has indirectly conferred privileges on the white minority by leaving them free to accumulate wealth and skills, while restricting the freedom of blacks to do the same. Most blacks have been condemned by the system to extreme poverty, and actively precluded from acquiring skills.

As a result, the argument continues, first generation rights are no longer enough in South Africa. To say that all people should be free to live as they choose, when one section of the population has all the means to take advantage of this freedom, and the other has none, is a bad joke. Indeed, first generation rights on their own would entrench the present inequalities, as whites would use their wealth and education to hold on to the privileges they currently enjoy, while blacks would have no means of achieving equality. Therefore something must be done to redress past injustices and to set the record to rights.

One proponent of this view argues that the "true potential" of a bill of rights is "as a major instrument of ensuring a rapid, orderly and irreversible elimination of the great inequalities and injustices left behind by apartheid." (Towards a Bill of Rights in a Democratic South Africa
draft discussion paper, March, 1988.) On these grounds he argues that

The fundamental constitutional problem, however, is not to set one generation of rights against another, but to harmonise [them]... The web of rights is unbroken in fabric, simultaneous in operation and all-extensive in character... [what we want in South Africa] is the progressive, rapid and simultaneous achievement of all the rights as formulated in the three generations.

At first glance this seems an attractive idea; in truth, however, it is impossible to achieve because first generation rights are inherently irreconcilable with second and third generation rights. That the writer is aware of this is clear from his following observation:

... if certain major social goals are set out in the document [i.e. the bill of rights], and public and private entities are placed under a legal duty to work towards their realisation... [then] the Second Generation of rights lend themselves more to treatment of this kind than the justiciable First Generation kind.

He proposes that a bill of rights achieve equality in South Africa through a programme of "massive affirmative action" by which the state will ensure that blacks, as the victims of apartheid, have housing, work, education, health and leisure, "to mention but a few".

This commentator seems to believe that these second-generation rights should not be enforceable by private citizens against the government, i.e. should not be justiciable in the ordinary way through the courts. He states that the interpretation of such a bill should not be the task of "...a body of highly trained and elderly judges, applying traditional legal wisdom in what is considered a neutral and objective manner [since] ... it is unthinkable that the power to control the process of affirmative action should be left to those who are basically hostile to it". Instead he proposes that a number of government commissions monitor the implementation of the bill:

A carefully chosen Public Service commission with a wide brief, high technical competence and general answerability to Parliament...[should] supervise affirmative action in the public service itself. Similarly, a Social and Economic rights commission could supervise the application of affirmative action to areas of social and economic life.

**Inequality before the law**

Under a bill of universal rights all people, regardless of gender, race, or other distinguishing factors, would be equal in the eyes of the law. The theoretician quoted above does not subscribe to this principle:

...if the law in its majesty were to give equal protection to a family of ten occupying a two-roomed shanty and a family of two living in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa... from a general juridical and citizenship point of view the whites as whites will disappear from South Africa, as will the blacks. As far as the law is concerned (outside the special area of corrective action already dealt with), there will no longer be whites or blacks, only South Africans. [Our emphasis.]

**Group rights**
There are other more easily identified groups which the writer believes should also benefit from affirmative action. They are:

... children, the aged, handicapped persons and victims of apartheid persecution [presumably non-black victims since blacks are included in the previous general group] ... as well as workers, women and so on ... In none of these cases would the question of race or ethnicity enter. Group rights will exist, but they will be the rights of workers, women and so on, not of racial groups.

Group rights as defined here are rights conferred on some by the state, as distinct from rights conferred on all by the common law. State-provided group rights should not be confused with justiciable rights which are protected as a natural consequence of individual rights.

For example, if the law guarantees freedom of religion, movement and association and the right to own property to individuals, then groups of Christians or Buddhists can gather together and worship in their own way, and Muslims and Jews can run private schools for their children. These are group rights in the sense that they flow from the exercise by numbers of individuals of the common law right of all individuals to association. Thus the constitutional entrenchment of group rights that are corollaries of individual rights is an unnecessary duplication of rights which are already protected.

However, to require that the state provide Afrikaans schools for Afrikaners, or recreation facilities for workers, is to demand that certain groups of people, on the grounds of race, language, gender, religion, job description or other identifying features, be entitled to certain benefits not allowed to others, but provided at the expense of others.

Once this concept of group rights is accepted (and it is common to many of the world's political systems), the question boils down to which groups should benefit and which not And the answer to that question is usually that the group on which the ruling party depends for the maintenance of its power is the one that gets the group rights.

A bill of state duties

The theoretician referred to above correctly observes that the US Bill of Rights and the French Declaration of the Rights of Man were intended to be "a fetter on the State in relation to the citizen". The US Declaration of Independence states:

We hold these Truths to be self-evident, that all Men were created equal, that they are endowed by their Creator with certain Inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness - That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it..

The purpose of the kind of bill of rights which this theoretician proposes is not to limit the state, but to list activities that the state must undertake. In doing so it becomes a bill of state duties.

Reversing past wrongs
All fair-minded South Africans agree that the inequalities and injustices which have resulted from apartheid should be eliminated as quickly as possible. The question is not whether they should be eradicated but how this might best be achieved.

There is no developed society in which people are entirely free from intervention by the state, because government, by its nature, wields coercive powers not allowed to any other group. Without them government would be no more than a voluntary association. But the extent of freedom and prosperity experienced by the population in any country depends directly on the degree of respect for first generation rights. Where common law rights are upheld, societies are rich and free.

We propose that a bill of rights be restricted to genuinely enforceable or justiciable common-law freedoms and liberties. Second-generation rights such as the right to a house or a job cannot be enforced against the government through the courts in the same way.

In countries with second-generation rights in their constitutions, those rights are not enforced where it is impracticable to do so. The consequence is that the same criteria of impracticability is also applied to first-generation rights with the result that the courts are prepared to uphold government violations of first-generation rights on the ground that protecting those rights would be impracticable.

Inserting unenforceable second-generation rights in the bill of rights has the undesirable result of undermining the enforceability of first-generation rights, such as the right not to be detained without trial.

For this reason the task of reversing past wrongs should be undertaken in the political sphere and the bill of rights restricted to upholding genuine liberties and freedoms.
DEMOCRATIC PARTY (DP)

12 May 1995

I have pleasure in enclosing, for urgent submission to the appropriate Theme Committees of the Constitutional Assembly a paper on the powers of the provinces under the final Constitution prepared by me, on behalf of the Democratic Party in Gauteng.

As you will appreciate these submissions are not made on behalf of the Democratic Party as a whole, but represent a particular provincial perspective. In view of the fact that our proposals have taken account of the work which the Commission for Provincial Government has made on the subject, I intend submitting a copy of this paper to them.

The proposals may be released to the media and other interested parties. I will be available to give evidence to the appropriate Theme Committee if required.

P S G LEON, MPL
LEADER: DEMOCRATIC PARTY
GAUTENG LEGISLATURE

A SUBMISSION BY THE DEMOCRATIC PARTY
GAUTENG PROVINCE, TO
THE CONSTITUTIONAL ASSEMBLY

Prepared by Peter Leon, MPL,
DP Spokesperson on Constitutional Matters
Gauteng Province

1. Introduction

1.1 The Democratic Party in Gauteng makes these submissions to the Constitutional Assembly on the powers of the provinces under the final Constitution. We have, in making these submissions, had regard to some of the issues raised by the Commission on Provincial Government in its various discussion documents on provincial powers, which in addition to being of a generally high calibre, are also most thought-provoking.

1.2 No submission on this complex subject can be made without having regard to the Constitutional Principles. As is well known, in terms of section 71 of the 1993 Constitution, the Constitutional Principles enshrined in schedule 4 must not only be incorporated in the final Constitution but the Constitutional Court must certify, in terms of section 71(2) of the 1983 Constitution, that the final Constitution in fact complies with all these principles. In this regard, Constitutional Principles XVIII, XIX, XX, XXI, XXII, XXIII, XXV, XXVI and XXVII are of considerable importance. These principles are not negotiable, a fact which many commentators,
including some of the early submissions by the African National Congress on provincial powers, do not altogether appear, with respect, to have appreciated.

1.3 The legislative competence of the provinces contained in Constitutional Principle XVIII(2) states that the powers of the provinces "shall not be substantially less than or substantially inferior to those provided for in this Constitution". This principle is overriding in any discussion of the competence of provincial legislatures. Likewise, Constitutional Principle XIX provides that the powers and functions at national and provincial levels "shall include exclusive and concurrent powers as well as the power to perform functions for other levels of Government on an agency or delegation basis." Constitutional Principle XX requires that each level of Government shall have appropriate legislative and executive powers to enable it to function effectively, with the allocation of powers made on the basis of financial viability and effective public administration, which combine national unity, legitimate provincial autonomy and cultural diversity. In our submission, the final Constitution should, at the very least, provide for:

1.3.1 the retention of all provincial competencies currently contained in schedule 6 of the 1993 Constitution:

1.3.2 a combination of exclusive legislative powers, legislative concurrency, and, possibly, subsidiary. In our view, this would mean selecting some key delivery powers from schedule 6, such as non-tertiary education, health, housing and local government which the provinces should exercise exclusively, while stating that other powers such as agriculture, police, road traffic regulation and roads should be exercised concurrently;

1.3.3 the addition of further powers to schedule 6 on a concurrent basis. Powers which could be added on this basis should include provincial economic affairs, finance, justice, correctional services, water affairs and forestry;

1.3.4 in respect of those powers which are not allocated to the provinces, the provinces should have residual powers in relation to non-schedule 6 competencies. In this regard we draw attention to the fact that the whole issue of residual powers appears to be open under Constitutional Principle XXI(8);

1.3.5 in view of the asymmetric view developed in these submissions, there is a strong argument that the provinces should not necessarily have the same legislative competence. There is likewise an argument that the provinces should be able to choose, particularly on capacity grounds, which powers they wish to exercise.
1.4 As far as the override is concerned (section 126(3) of the 1993 Constitution) despite the February 1994 amendments to the Constitution, this remains so broad and sweeping that few provincial Acts will in fact be able to trump an Act of Parliament. In view of Constitutional Principles XIX, XX and XXI, while an override will always be necessary where legislative competence is shared at national and provincial levels, such override should be qualified in the final Constitution. While Constitutional Principle XXI is relevant in this context, we draw attention to the fact that in terms of Constitutional Principles XIX and XXI(6), provincial governments have the right to exclusive and concurrent powers. In our view, where exclusive powers vest in a province, these will be incompatible with the override.

2. Pro vincial Constitution

2.1 Constitutional Principle XVIII(2) requires the final Constitution to enable a provincial legislature to adopt a constitution for that particular province. On this principle, the provisions of section 160 of the 1993 Constitution, as amended by Act 2 of 1994, should apply to the final Constitution, in that this Constitution should continue to allow a provincial constitution to make provision for legislative and executive structures and procedures which differ from the Constitution itself.

2.2 Except where dealing with matters which, constitutionally, require to be managed at a national level, the national Constitution should not be prescriptive about the form of provincial constitutions, but merely contain a framework for provincial constitutions. Likewise, the national Constitution should not attempt to provide a model provincial constitution for the provinces which is one of the weaknesses with the 1993 Constitution currently. In our view, the final Constitution should actually compel each province to enact its own Constitution.

2.3 Until the final Constitution is adopted, some of this will be theoretical in respect of those ANC controlled provinces which have deliberately not adopted provincial constitutions. Nonetheless, the principles which underlie Constitutional Principle XVIII(2) should be incorporated in the final Constitution.

3. The independence of provincial legislatures

3.1 Although the separation of powers (in Montesquieu's words, the Trius Politica) is enshrined in Constitutional Principle VI, the 1993 Constitution, being a mixture of Westminster and Washington, does not altogether achieve this. Clearly the final Constitution should ensure that the checks and balances between the three arms of Government, at first and second tiers, should ensure accountability, representativeness and openness. In relation to the provincial legislatures, the question is how does one ensure that such legislatures operate independently of the executive as well as effectively as legislatures? This seems to be insufficiently and inadequately dealt with in the 1993 Constitution. These comments, likewise, apply to Parliament in relation to the Government of National Unity.
3.2 The starting point is that the separation of powers, at a formal theoretical level, is very difficult to achieve in legislatures such as the Northern Cape, the Eastern Transvaal and the Free State which have legislatures of only 30 members and executives which represent some 40% of that figure. It follows that the final Constitution should specifically make provision for an asymmetrical approach to the provinces, such that the executive and legislative structures of the provinces are not prescribed under the Constitution itself, but under provincial constitutions which the provinces must, rather than may, adopt. In smaller provinces, the executive will clearly dominate the legislature for reasons of sheer arithmetic, while in larger provinces this will occur with greater difficulty.

3.3 While it may not be necessary to constitutionalise the independence of the legislature in relation to the power to legislate, provided that each legislature has, constitutionally, a wide rule-making power (e.g. whether the legislature can reject Bills introduced by the executive, exercise oversight over the executive or introduce legislation itself), there is a strong case for providing that provincial legislatures should continue to enjoy the powers that Parliament has under sections 58(1) and (2) of the 1993 Constitution.

3.4 What is deficient in the present system is the existence of a primitive list system of proportional representation. This undermines the accountability of public representatives. In the new Constitution, we should either enshrine a system of multi-member constituencies elected on a PR basis or a mixture (possibly based on the new Italian model or constituencies which are directly elected and party lists which are elected on the basis of PR.

3.5 It goes without saying that the retention of section 133(1)(b) of the 1993 Constitution which prevents members of a provincial legislature from crossing the floor, and makes then at all times subject to the Party Whip, being plainly undemocratic, should be scrapped.

3.6 In our view, there is a case for requiring provincial elections to be held on a different day from national elections and it may even be arguable that provincial legislators should serve a shorter term (say of four years).

3.7 It is clearly undesirable that the staff of provincial legislatures fall under the public service commission. In our view they should be employed by the legislature itself - a practice which has to some extent been followed in the Gauteng Province.

4. Provincial executives

4.1 The Constitution itself should not be unnecessarily prescriptive about the composition and powers of the provincial executive, as this is an issue which should be dealt with in the provincial constitution. While the constitution should certainly prevent provinces from establishing undemocratic institutions, it should encourage provincial differentiation or asymmetry. There clearly is no reason for KwaZulu-
Natal to have to same number of MECs as the Eastern Transvaal, when there is a
greater need in the former province to have a substantially resource executive.
Likewise, we should now formalise the fact that executive councils have become
known as "cabinets" and MECs as "ministers". This is the Canadian approach,
which could safely be emulated.

4.2 There is certainly an argument that the size of provincial executives should not be
permitted to expand at a rate as to become a burden on the Treasury. While we
should support provincial asymmetry in the composition of the executive, the
answer may be to require the permission of the President, in consultation with the
Minister of Finance, if the executive of a province expands beyond a certain size.

4.3 A further possibility would be to provide that, in the case of the Premier, as in the
very arguable case in relation to the President, he or she should be directly elected.
Although we should not emulate the US system of a non-accountable executive,
we should, both at provincial and national level, specifically permit the President
and the Premier to appoint a cabinet which is bipartisan, i.e. not necessarily
representative of the governing party. This will answer the unsustainable call by the
National Party for the extension of the GNU. Consistent with this principle, the
tenure of office, responsibilities, powers and functions of Premiers and executive
councils should be regulated by provincial Constitutions and not by the final
Constitution, which should do no more than provide a framework for these
matters.

4.4 The retention of a government of provincial unity beyond 1999, is not supportable
for the same reasons that the Government of National Unity is not desirable beyond
1999. Our suggestion about a bipartisan cabinet at national and provincial levels
will, we believe, meet the national unity argument, without providing for an
enforced and artificial coalition Government.

5. Financial and fiscal matters

5.1 Although Constitutional Principle XXV states that both the National Government
and provincial Government "shall have fiscal powers and functions which will be
defined in the Constitution", Constitutional Principles XXVI and XXVII make it
clear that a province's revenue base is primarily determined by national allocations,
on an equitable basis, made after recommendations by the Financial and Fiscal
Commission. In other words, while the detail is obviously not spelt out in these
Constitutional Principles, the fiscal competence of the provinces remains limited
and conceptually similar to that contained in section 155, 156 and 158 of the 1993
Constitution.

5.2 Nonetheless, Constitutional Principle XXI(1) seems to imply that where a province
is responsible for rendering services, it must be constitutionally empowered to do
so. This, together with the provisions of the other Constitutional Principles, means
that provinces must have adequate levels of revenue to discharge their functions.
The budgetary experience of Gauteng and the other provinces with relatively high levels of GGP in the 1995/6 fiscal year, indicates otherwise.

5.3 The Constitutional Principles do not deal either with the fiscal powers or the borrowing powers of the provinces. While the Constitutional Principles make the provinces' revenue sources both concurrent and dependent, we submit that the provinces should have some level of fiscal independence, such that they are allocated certain exclusive revenue powers, beyond the nebulous provisions of section 156(1B) of the 1993 Constitution (principally gambling revenues).

5.4 In view of the redistributive nature of the allocation of revenues to the provinces under the 1995/6 Budget, we believe that:

5.4.1 a percentage of Value Added Tax or other sales tax raised in the province should be allocated to that province;

5.4.2 a percentage of the national fuel levy collected in a province should be allocated to that province;

5.4.3 provinces should be permitted to raise short term digging finance, subject to the reasonable consent of the Financial and Fiscal Commission, but without the necessity of an Act of Parliament. Likewise the final Constitution should provide specifically, in addition to the notion of equity enshrined in the Constitutional Principles, that:

5.4.3.1 any system of revenue allocations to the provinces be rational, predictable and accountable;

5.4.3.2 the provinces be entitled to enter into aid and trade agreements with foreign governments;

5.4.3.3 fiscal disputes between provinces and the national government be resolved through the Constitutional Court.

6. The Senate

6.1 While the Senate is not dealt with in the Constitutional Principles (and the relevance of the present Senate is questionable), there clearly is a need, in the final Constitution, for providing for a more powerful Senate which is not simply representative of provincial interests, but constitutionally required to interact with the provinces on a meaningful basis.

6.2 With this in mind, we submit that:

6.2.1 the Senate should be retained, both as a House of review and as a body which is representative of provincial interests;
6.2.2 the principle of equal representation for each province in the Senate should be retained;

6.2.3 the Senate should be directly elected on a list system, which is not constituency based, but which is subject to a genuine residential qualification (e.g. that the candidate must have lived in the province in question for the preceding twelve months);

6.2.4 In view of our suggestions in 6.2.3, we do not support the Bundesrat model for the Senate, but something in between. The Constitution should make provision for committees of the Senate to consult formally with provincial legislatures on all matters affecting the provinces. Although the rules of the Senate and the various provincial legislatures would have to provide the mechanism for this, the principle should be contained in the Constitution;

6.2.5 consideration should be given to requiring a two-thirds majority of the Senate for any amendment to the final Constitution affecting the powers of provinces as opposed to the limited provisions of the 1993 Constitution.

7. Conclusion

The Constitutional Principles create a legitimate framework to expand on the powers of the provinces under the final Constitution. Although the Principles are restrictive in relation to the provinces’ financial and fiscal powers, in other matters such as the provinces’ legislative and executive powers, the Principles enable us to improve on the 1993 Constitution without violating the present constitutional model. By removing many of the procedural features of the 1993 Constitution in the final Constitution and by simultaneously requiring each province to enact its own Constitution while enlarging upon the powers of the Senate, the Democratic Party would, if these suggestions are implemented, but forward a unique model of provincial government for our multi-cultural society.
Dear Sir Madam

RE: PORNOGRAPHIC MAGAZINES, SHOPS AND SEX MATERIAL AND AIDS

As a citizen of the new South Africa and a mother of 4 children ages 14, 13, 8 and 5 I object in the strongest possible terms to the legislation of pornographic magazines, shops and sex material and aids. Not only is this literature, material etc an infringement of women's rights, but it debases them into sex objects. I respect other people's freedom of expression, as long as it does not violate my own family's freedom. We (78% of RSA) Christians, have a right to bring up our children in a morally upright environment and to protect family values which are undermined by this literature and material. One cannot go into a shop, with children or walk in the street or switch on television without being bombarded with sexual information that influences oneself and one's children and in total rebellion of one's christian beliefs. The tendency towards immorality has contributed to the disintegration of previous nations in history. The time has come to listen to the silent majority, the ones whose literature is biblically based.

We urge you to re-introduce standards of moral decency which will contribute to the building of a God fearing nation.

Yours faithfully

(SGD) SHARRON PARYON
Ms Chairperson, as a representative of a recognised employee organisation within the South African Police Service, I wish to thank you for the opportunity to present this paper at this workshop.

The Public Servants Association of South Africa (PSA) is in existence since 1920 and was the only recognised employee organisation within the Public Service for many years. At this stage it represents approximately 103 000 members within the Public Service, which includes the South African Police Service.

The PSA has endeavoured for many years for the introduction of a formal system of labour relations and collective bargaining for the Public Service which eventually became a reality in 1993 with the introduction of the Public Service Labour Relations Act, 1993. The PSA and all the employer organisations active within the Public Service were directly involved in establishing this Act, which, for the first time provided for effective collective bargaining and the protection of the rights and interests of public servants. Unfortunately the SAP authorities decided not to include the SAP in that Act, but rather to introduce its own labour regulations. The PSA is of the opinion that this decision was a mistake, which resulted in the fact that the employee organisations within the South African Police Service are presently not able to negotiate on behalf of its members with the State as employer on important matters such as salaries and conditions of service, which are determined by the Public Service Commission. Employees of the South African Police Service also do not have the same level of protection with regards to their rights as the employees of the rest of the Public Service.

The PSA regards it as imperative that any negotiations on matters of mutual concern should take place between the employee organisations and the relevant employer who has the capacity to take a final decision on the matter concerned. For this reason the PSA believes that, as a short term solution, the Public Service Labour Relations Act, 1994 should be amended without delay to include employees of the South African Police Service and that the proposed new Labour Relations Act also be made applicable to employees of the South African Police Service.

On the longer term and more specifically with a view to the new Constitution, the PSA is of the opinion that all employees in the employment of the State as employer, whose remuneration and conditions of service are paid by funds obtained from tax payers and voted by Parliament, should still be included in the Public Service. All such employees should then also be allowed to negotiate collectively through the employee organisations within the same negotiation structure for the improvement of their remuneration and conditions of service.

At this stage public servants throughout the Public Service, including the South African Police Service, experience serious back-logs in remuneration compared to comparable
personnel in the private sector. The fact that such a back-log exists, cannot be attributed to the Public Service Commission alone, but rather to the fact that the economy of South Africa was in a poor state for the past number of years and that insufficient funds could be made available by the State as employer to substantially improve the remuneration and other conditions of service of all public servants. The PSA is convinced that the solution to this problem would not be to determine in the new Constitution that the South African Police Service should not form part of the Public Service for purposes of determining remuneration and other conditions of service or that the Public Service Commission should not be involved in the process of determining such remuneration and conditions of service. This will only create disparities and dissatisfaction within the Public Service as a whole, as well as within the South African Police Service. In terms of the present policy of civilianisation the line function should be performed by functional police officials, whilst the other functions should be performed by civilians, 'M other words, public servants. If this policy is indeed implemented, the South African Police Service will still have two categories of public servants, each with completely different conditions of service as well as completely different labour relations mechanisms.

The PSA accepts that the working conditions of functional members of the South African Police Service are unique and that they should be compensated fairly for the unique services which they render and for the dangers involved in the performance of these services. The same argument, however, applies to many occupational classes within the Public Service where such employees also perform their unique services in unique situations. Their uniqueness may not be based on the dangers involved in performing their tasks, but they are nevertheless still unique.

The PSA is in favour of the payment of market related remuneration to all public servants in terms of which any particular group of public servants, such as the employees of the South African Police Service, can be compensated fairly for the rendering of their services as well as for the unique circumstances in their working conditions. Such a policy is indeed in place within the Public Service, but as was pointed out previously, the insufficient funds that was made available by the State as employer for the improvement of remuneration and conditions of service, was the direct result that this policy did not have the desired results.

The PSA therefore proposes that provision be made in the new Constitution that all employees in the employment of the State as employer, whose remuneration and conditions of service are paid by funds voted by Parliament should remain within the Public Service and that all employees should be allowed to negotiate collectively through their employee organisations within the same negotiation structure for the improvement of
their remuneration and conditions of service. Such a structure should include acceptable and effective dispute resolution mechanisms as well as effective measures for the protection of employee rights.

I thank you.

Manie Maritz

For the General Manager

20 March 1995
I believe the DEATH PENALTY should be part of our Constitution, for such serious crimes as RAPE, MURDER (WITHOUT EXTENUATING CIRCUMSTANCES), and DEALING IN DRUGS.

TOTAL SIGNATURES: 332

If it is our belief that the New Constitution should speak out against abortion and you wish to support this petition, sign this please.

TOTAL SIGNATURES: 252
Association of Credit Bureaus

24 April 1995

THEME COMMITTEE 4 - FUNDAMENTAL RIGHTS
RIGHT TO PRIVACY

We understand that privacy has already been dealt with in general by the Theme Committee.

This Association seems to have missed the advertisement calling for public submissions (other than that dealing with access to information).

Credit bureaus play a vital role in the economy and the living standards of the ordinary citizen and in doing so are inevitably involved in the issue of personal privacy.

We therefore trust the Theme Committee will, despite the apparent delay in submission, take the enclosed paper into account in their deliberations on the topic of fundamental rights to privacy.

N C R HAARHOFF
PRESIDENT

FUNDAMENTAL RIGHTS TO PRIVACY - THE POSITION OF THE CREDIT BUREAU INDUSTRY

1. Are Credit Bureaus necessary?
South Africa's economy is largely dependent on the level of consumer spending. This fact is often quoted by economists, and future growth rates are estimated using consumer confidence, that is whether they are prepared to spend or not, as one of the major yardsticks.

The use of credit not only affects the overall economy, it also directly affects the individuals standard of living. The vast majority of South Africans who own TVs, furniture, cars etc bought them on a credit basis. Whilst they could have saved to buy these items they would have had to delay the purchases for a few years but experience has shown that the money is used for other purposes and the desired goods are often not acquired.

The present outcry against credit bureaus by the emerging population, ignoring the merits thereof, is because this group urgently wants credit facilities to improve their living standards, something the first world component has been doing for decades.

It can therefore be safely stated that virtually everyone in South Africa is in favour of credit.

It can just as safely be stated that without credit bureaus, credit would not be available to the masses and would be restricted to the wealthy classes who have collateral.

2. How is credit bureau information used?

Credit bureaus record information relating only to a person's credit purchasing history.

Bureaus are not in existence to deny people credit. Their primary function is to assist people to gain access to the credit they desire. As only 20% of credit records contain something adverse it means 80% of the population who use credit are positively advantaged through their credit record.

Credit grantors want to grant credit, it is their business. They check a person's bureau record to help establish how much credit can be made available, not to find a reason to decline it.
It is, therefore, a total misconception that credit bureaus are only there in a negative role. In terms of volume of items noted on all credit records probably four times more positive information is recorded than negative.

3. Privacy should not be expected

Credit is certainly not a right. It is clearly a privilege granted at the entire discretion of the party who is at risk.

A person who takes a decision to make use of credit facilities must therefore accept that there will be inevitable consequences of such a decision. One of these will be the right of the credit grantor to satisfy itself that the person is creditworthy - which will entail checking the person's credit record at a credit bureau (amongst other things).

Similarly, a person applying for a job must accept the right of the employer to check the person's performance with previous employers. And enquiries are also made by insurance and assurance companies etc into an applicant's previous dealings in the particular industry. Whenever risk is involved the risk-taker must have the right to minimise it.

It should be made quite clear that credit bureaus do not hold records on people who do not make use of credit. A credit bureau record commences only from the day the person takes the decision to open an account, not before. People who do not use credit are therefore guaranteed privacy in this regard.

Credit bureaus are, in fact, very sensitive to the issue of privacy. Information is only provided to parties who warrant their bona fide business interest. Individuals are at liberty to inspect their credit records and dispute entries or file statements on the reasons for defaults etc. These and other matters are enforced by a code of conduct drawn up at the request of bureaus by the Business Practices Committee specifically to protect the rights of the consumer.

4. The consequences of credit bureaus were closed down
As stated above credit bureaus play an integral role in the economy of the country as well as in the living standards of the individual.

Without credit bureaus, credit would either be severely restricted or bad debts would rise to unprecedented heights.

If credit grantors, because of the lack of suitable information, reduced the amount of credit granted it would impact most heavily on the emerging population. Only those with collateral would retain easy access to credit and the aspirations of the disadvantaged in our country would be severely impaired. In addition our economy, which is substantially driven by consumer demand, would suffer accordingly.

On the other hand, if credit grantors did not reduce their lending, bad debt figures would soar. In 1994 over R2 billion of bad debt reached our courts, despite a sophisticated credit bureau system. There is no knowing what this could rise to in the absence of credit bureaus. The important point is all bad debt losses are built into the prices consumers pay, and the effect is that the 80% of the population who honour their debts end up paying for the misdemeanours of the minority.

5. What happens in other countries?

The use of consumer credit is most widespread in America and Britain. (As an aside it should be pointed out that in developing countries the more successful economies are found where consumer credit is fairly readily available. Eg. Namibia, Botswana and Zimbabwe have credit bureaus, Zambia, Tanzania and Zaire do not.)

In the US, the preamble to the Fair Credit Reporting Act states that Congress found that the banking system is dependent on credit reporting and that credit bureaus have a vital role to play in consumer credit. Credit bureaus are therefore openly accepted by the public, and the Act regulates their operations. In the UK credit bureaus are regulated under the Consumer Credit Act 1974, primarily under Sections 157 to 160. The Data Protection Act 1984, which is in effect a privacy law, accepts the role of credit bureaus and merely specifies the access consumers must have to their personal credit records (in Section 21). It is fairly standard practice in Britain for credit grantors to inform credit seekers that their credit record will be checked.
Both the USA and UK are extremely sensitive to privacy issues and South Africa will no doubt look to them when formulating its own privacy policy. In both countries credit bureaus are an integral part of their economies and there is no suggestion that bureau activities are considered undesirable or an unacceptable invasion of privacy.

It may be felt that South Africa also needs a specific credit bureau regulatory Act, but this is a decision for the legislature.

6. Conclusions

Credit bureaus are in the public interest. They boost the economy and the well-being of the population.

Credit bureaus in South Africa operate largely on the same basis as in other countries - where they are openly accepted.

Credit bureaus are responsible institutions which are keenly aware of the sensitive nature of their activities and which go out of their way to protect the individuals privacy as far as it is possible - taking the nature of credit into consideration.

Credit bureaus are not popular amongst a small percentage of the population - not because they do anything irregular or illegal but because that portion of the population have unfavourable credit records. On the other hand the large majority receive speedy access to the credit they deserve because of the existence of credit bureaus.

Credit bureaus support the fundamental right to privacy of the individual. However, an individual seeking credit (or a job or insurance etc) tacitly relinquishes that right insofar as the right applies in that specific area. If this were not so the individual would be unable to get credit (or a job etc) and the laudable effort to protect his or her rights to privacy would prejudice him or her far in excess of any injury suffered through the narrow sacrifice of such right.
Consequently, the drafters of the new South African constitution would do the country a
disservice should they include provisions which inhibit the credit industry’s vast contribution
to the economy of the Republic and to the well-being of its citizens.

N C R HAARHOFF
PRESIDENT

On behalf of all the major credit bureaus in South Africa excluding the Joint Banks Credit
Bureau.
1. INTRODUCTION

The right to freedom of expression is included in the Bill of Rights contained in Chapter 3 of the Interim Constitution. Section 15 reads as follows:

(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

This submission will consider if and in what form the right to freedom of expression should be protected in the Final Constitution for South Africa which is to be drafted by the Constitutional Assembly.

It will be submitted that the right to freedom of expression is essential and one of the cornerstones of a democratic society and therefore without any doubt should be included in the Final Constitution.

It will furthermore be submitted that although the existing Section 15 in many ways provides for a high level of protection of the right, certain amendments should be made for the Final Constitution in order to provide the most satisfactory protection of this most important right, and a protection which corresponds more fully with international human rights standards to which South Africa wishes to adhere.

2. SHOULD THE RIGHT TO FREEDOM OF EXPRESSION BE ENTRENCHED IN THE FINAL CONSTITUTION?

Freedom of expression has been internationally recognised as one of the cornerstones of a democratic society. All major international human rights instruments as all major national Bills of Rights in various countries contain provisions for this right(1).

Freedom of expression is not the property of any political system or ideology. It is, as outlined above, a universal human right, defined and guaranteed in international law. As an international human right, freedom of expression means that every individual has the right to
hold opinions and to express them without fear and it includes the right of everyone ‘to seek, receive and impart information and ideas of all kinds through any medium of choice, regardless of national frontiers or state boundaries.’ Freedom of expression therefore entails press freedom and freedom of all media as one of its principal guarantees. Censorship is any interference with the individual or means of communication that denies these basic rights freedoms or arbitrarily encroaches upon them (2).

(1) See inter alia Article 19 of the Universal Declaration on Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 10 on the European Convention on Human Rights; Article 9 of the African Charter on Human and Peoples’ Rights; Article 13 of the Inter-American Convention on Human Rights; Section 2 of the Canadian Charter on Fundamental Rights; the First Amendment of the Constitution of the United States of America.


Courts around the world have further entrenched the right by interpreting it as deserving particular protection. In Palco v Connecticut 302 US326-7 Cardozo J said:

“(Freedom of thought and speech) is the matrix, the indispensable condition, of nearly every other form of freedom.”

The European Court of Human Rights has repeatedly expressed similar views, mainly that

“(Freedom of expression ..... constitutes one of the essential foundations of a democratic society and one of the basic conditions for progress ... it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”(3)

In recent South African jurisprudence, following the introduction of the Bill of Rights in the Interim Constitution, the importance of the right to freedom of expression has been described as follows:

“The history of liberty shows that the currency of every society is to be found in the marketplace of ideas where, restraint, individuals exchange the most sacred of all their commodities. If the market is sometimes corrupt or abused or appears to serve the interests of the wicked and unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature.
In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of freedom of speech. It is freedom upon which all other depend; it is the freedom without which the others would not long endure.(4)

With particular reference to freedom of the press it has been said that

“(t)he role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it rely occur and to expose the perpetrators, The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.(5)

Based on the convincing theory and the impressive precedents which all point towards a strong protection of the right to freedom of expression and to freedom of the press it is argued that this right must be firmly entrenched in the Final Constitution.

(3) Handyside v UK judgment of 7 December 1976, series A no. 24, para. 49. See also inter alia Lingens v Austria. Judgment of 8 July 1986, Series A no.103 at para. 41, and Jerslid v Denmark, Judgment of 23 September, series A no. 298.
(4) Mandela v Falati 1994 (4) BCLR 1 (W) at D-F.
(5) Government of the Republic of SA v ‘Sunday Times’ Newspaper and Another 1995 (2) SA 221 (T) at 227I.

3. COMMENTS ON THE EXISTING CONSTITUTIONAL CLAUSE ON FREEDOM OF EXPRESSION

It is submitted that the present Section 15 guaranteeing the right to freedom of expression for the most part provides a reasonably satisfactory protection of the right.

Indeed, in some respects Section 15 offers a more explicit guarantee than international and comparative provisions, for instance by explicitly including freedom of the press. This is to be welcomed and it is submitted that this explicit guarantee of freedom of the press should be included in the freedom of expression clause in the Final Constitution.

The most noticeable exception from the rights listed in s 15(1) is to right to 'seek, receive and impart information and ideas regardless of frontiers', as guaranteed in the International Covenant on Civil and Political Rights(6). Even if the right to freedom of expression is
assumed by the drafters, of the section to include 'the right to gather information preparatory to its expression' (7) it is not clear from the section itself that this right is included. Without a guarantee of the right to impart information the right to freedom of expression right can be seriously restricted(8). It is therefore submitted that a freedom of expression clause in the Final Constitution should include 'the right to seek, receive and impart information and ideas regardless of frontiers' in order to provide a more comprehensive protection of the right.

The present wording of the section puts the onus in the first instance on the person alleging that his or her right under Section 15 has been violated to prove it. In the United Stares the wording of the First Amendment to the American Constitution provides that

   “Congress shall make no law ... abridging the freedom of speech , or of the press ...”

This formulation puts the onus on the state to avoid infringing the right to freedom of expression. This, of course, does not mean that the right cannot be limited in certain instances in the public interest, but by shifting the onus the right to freedom of expression may by further entrenched. It is therefore submitted that provision for such shifting of onus should be incorporated in the freedom of expression clause in the Final Constitution.

Section 15(2) of the Interim Constitution provides that all media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion. Given South Africa's recent history of powerful state controlled media being used as government mouth pieces and propaganda units serving the government in power it is understandable that the clause was drafted the way it is. however, even with the guarantee of impartiality and the expression of a diversity of opinion there is no guarantee against government interference of stories which for example expose government abuse of power without a guarantee of independence.

(6) Signed by the South African President Mandela in 1994.  A process leading to rectification of the Covenant by South Africa has subsequently been embarked upon.
(7) Technical Committee on Fundamental Rights During the Transition Fourth Progress Report - 3 June 1993.
(8) Lene Johannessen op cit note 2.

Secondly, to tie broadcasters to a diversity of opinion may carry with it the threat of editorial interference, if the independence of the media in question is not guaranteed.

On this basis it is submitted that the clause on freedom of expression should provide independence as well as impartiality and diversity of opinion. That way the concerns arising
front the experiences of the past will be met without threatening some basic principles of
media freedom.

In March 1994 the Independent Broadcasting Authority Act(9) came into force. This act
revolutionised the regulation of broadcasting in South Africa by removing from the hands of
the South African government the authority to regulate broadcasting services, and has
entrusted such authority to an independent regulatory agency, the Independent Broadcasting
Authority(10). Other countries have also made provisions for a regulatory body to regulate
and administer the broadcasting and telecommunications spectrum(11).

Such bodies have been the subject of various challenges alleging that such a body infringes on
the right to freedom of expression and freedom of the press. It is very likely that
constitutional challenges will be brought against the Independent Broadcasting Authority on
that basis.

The European Convention on Human Rights expressly provides, in the section which
guarantees for the right to freedom of expression that “(t)his article shall not prevent States
from requiring the licensing of broadcasting, television or cinema enterprises”.

It is submitted that, like the European Convention on Human Rights, it might be useful to
clarify that the mere existence of a regulatory body like the Independent Broadcasting
Authority does not in itself violate the rights set out in the clause guaranteeing freedom of
expression and freedom of the press(12).

During the time the Interim Constitution has been in force, Section 15 has been introduced or
tried to be, introduced in various defamation cases. One major obstacle in applying the
Constitution in defamation cases is the fact that the issue of whether the Constitution applies
vertically (that is only to litigation between an individual and organs of the state) or
horizontally (application extended to litigation between private individuals or entities) is as yet
undecided by the Constitutional Court. (It is expected that the Constitutional Court will make
a decision on this issue some time later this year which will solve this question with regards to
the interim Constitution. The question, however, still remains open with regard to the final
constitution.)

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(9) Act 153 of 1993
(10) See Wend Wendland ‘Tightroping Freedom of Expression and Broadcasting
      Regulation: The New Bill of Rights and the Independent Broadcasting Authority Act,
(11) See for an analysis of the United States Federal Communications Commission and a
      comparison with the South African Independent Broadcasting Authority, Wend
      Wendland op cit note 13.
This does not imply that certain actions or decisions taken by the Independent Broadcasting Authority can not be the subject of constitutional challenges. It would only serve to clarify the constitutional position of the Independent Broadcasting Authority as such.

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Without going into the whole debate on whether the Final Constitution is to apply verticality versus horizontally (I assume that this issue is being discussed and decided at some other time) it is submitted that it is imperative that the clause on freedom of expression makes express provision for horizontal application in the area of defamation. Defamation actions can be potentially very damaging for the exercise of a right to freedom of expression and it is submitted that the risk of leaving this area outside of constitutional application would seriously limit the practical value of the clause.

4. DRAFT PROPOSAL.

Based on the analysis above it is submitted that a constitutional clause on freedom of expression should read as follows:

(1) Every person shall have the right to freedom of speech and expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and it shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research. No law restricting this right shall be valid.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures independence, impartiality and diversity of opinion.

(3) This section shall not prevent the regulation and administration of the broadcasting, and telecommunications spectrum in the public interest.

Like any other clause in the Bill of Rights this section would be subject to the limitation clause.

Lene Johannessen
Media Project
Centre for Applied Legal Studies

May 1995
Introduction

At the outset the FXI welcomes the fact that the country now has a constitution that makes provision for freedom of expression and access to official information. We think that their inclusion in the Bill of Fundamental Human Rights is of vital importance given the history of censorship, state secrecy and corruption that marked the apartheid era. Such provision will help to prevent such terrible abuses of state power in the future.

However, it is very likely that unless these clauses are very carefully and analytically drafted, they may be put to uses the drafters never envisaged. Our submission flows from our experience thus far of the existing clauses in the Interim Constitution, and the strengths and weaknesses inherent in them.

1. Freedom of expression clause (section 15).

At present, the clause reads: ' (1) Everyone shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.’

Regarding section 1, apart from the fact that it is not the most poetically written clause in international law, we fully endorse its content.

Regarding section 2, the FXI is concerned about several phrases.

1. The inclusion of the phrase 'under control of the state' is extremely problematic. The FXI, through its predecessor organisations, the Campaign for Open Media and the Campaign for Independent Broadcasting, were instrumental in campaigning for the political independence of the public broadcaster. This resulted in the appointment of a new SABC - Board independent of political control through an independent selection process, and the formation of the Independent Broadcasting Authority, and - for a period of time at least - the Independent Media Commission.

The fundamental principles underlying these activities is that the regulation of broadcasting in general, and the control of the public broadcaster in particular, should inhere in a politically independent body, and should not be subject to party political or governmental interference. The
fact that the Government may be funding the public broadcaster to a certain extent does not give it the right to exercise control over the activities of the broadcaster.

Hence, we find it very problematic and insensitive to recent developments that Section 15 refers to media '....under control of the State', especially given that the electronic media are now regulated by the IBA. We suggest that this clause be removed.

Furthermore, we feel that Section 15 (2) should be broadened to enshrine the principle of the independence of the media from State or party political control. Publications produced by the State, and that are specifically geared towards the dissemination of information about the activities of the State or any of its organs - for example, publications like Constitution Talk and RDP News - clearly fall into a different category. These are not the sort of publications we are referring to when we call for independent control of state-funded media: rather - we have in mind the South African Broadcasting Corporation (SABC) and the various regional broadcasters, and any media that may be financed by the media diversity trust - referred to in the Reconstruction and Development Programme - when it is finally set up and begins disbursing State funds. In drafting the new clause, a formulation will have to be found that acknowledges this distinction. Also, if it is deemed necessary to mention impartiality, it may be important to restrict this provision to news and current affairs programmes.

Events over the last year have demonstrated that the independence of the public broadcaster can be compromised by the State and political parties. For example, in July, the North-West Government took over the administrative control of the Bophuthatswana Broadcasting Corporation (BBC) by virtue of a proclamation approved by President Mandela and his cabinet, and approved the appointment of a 'temporary' Director-General, Mr Solly Kotane. In the same month, the Inkatha Freedom Party pressurised CCV television to withdraw the made-for-television series "The Line", a fictional drama based on contemporary events. CCV management initially complied, then changed their minds after a huge public outcry, and showed the series in its entirety. Those events demonstrate that the independence of the public broadcaster is still a key area of concern; the clause on the independence of the public broadcaster would make it unconstitutional for central and regional governments, or any poitical party, to behave in this fashion.

The FXI also has serious reservations about the provision that '...ensures impartiality and a diversity of opinion.' It is possible that this clause could be interpreted in ways that curtail, rather than enable, freedom of expression, and may lend to undue interference in the editorial independence of the media. With reference to "The Line" again ' which was cited by the IFP for a pro-ANC bias, had the matter proceeded to the level of constitutional litigation, the SABC may in terms of this clause, have found it difficult to justify screening the programme in the absence of a programme with an overtly IFP viewpoint to balance out the picture, in other words, this clause could lead to the public broadcaster practising self-censorship, or outside parties with grievances about perceived biases in particular programmes pursuing the matter into the courts, and interfering in the broadcaster's editorial decisions.

A key problem with the freedom of expression clause is the ways it may be limited in certain circumstances. The limitations clause still has to be interpreted through Constitutional litigation, so
it is unclear what circumstances may be considered 'reasonable and.... justifiable in an open and
democratic society based on freedom and equality...' In view of our concern, we will be drafting a
further submission on the limitations, and suspension clauses when Theme Committee 4 advertises
for them.

Access to Official Information:

Section 23 of the Interim Constitution reads: "Every person shall have the right of access to
information held by the state or any of its organs at any level of government in so far as such
information is required for the exercise or protection of any of his or her rights.'

The FXI holds the firm view that this clause is deficient because it only recognises a need to know,
and not a right to know. It must be amended to ensure a straightforward right of the public to have
access to official information.

The State is the custodian of all information on behalf of the public. The public's money is used to
accumulate and process information, and therefore the information belongs to the public. We
cannot agree that citizens may only have access to information if they can show they need the
information to protect one of their other rights in the Bill of Rights. Why should this right be
conditional? The presupposition underlying conditionality is that the public are not automatically
entitled to information held by the State. Our point of departure is exactly the opposite -- that the
public are automatically entitled to information held by the State and therefore do not have to
provide reasons.

A government task group has been appointed to draft an Open Democracy Act, which will include
a Freedom of Information Act. The FXI has attended seminars arranged by the Task Group and
has also participated in public debates with members of the task group about this Act.
There is agreement within the Task Group as well as with civil society organisations such as ours
that the Act will be written on the principle that the public has an automatic right to information,
and that the public does not have to provide reasons when requesting information. The Act will
define certain exempted categories of information, and these are presently being studied. The
exempted categories include issues such as privacy and national security.

There are many practical reasons why the clause in Chapter 3 should be drafted in such a way so as
not to hinder automatic access to official information. These include that citizens will be obstructed
by bureaucrats when seeking information who will subjectively decide whether citizens have a right
to the information. Such decisions will be contested in the Constitutional Court or in other courts
of the land. This will lead to lengthy delays in the release of information. This will be costly, and
may lead to bad publicity for the State. Information held by the State can be of enormous value to
entrepreneurs and researchers -- statistics to decide whether it is feasible to open up a business in a
particular part of the country, information to determine trends in health services to enable
researcher to propose policy, etc. Therefore the objective should be to provide unhindered access.

In addition, the constitution binds the Government to openness and transparency and this value
should also find expression in the clause on access to official information.
As stated in our initial letter to Theme Committee 4, we would like to make a formal request for an oral hearing to elaborate on these points, which have been kept to the bare minimum for the purpose of the written submission.
EQUI-POISE SERVICES

H C D VAN NIEKERK

CENTRAL PREMISE

The ultimate quest is the human struggle for equilibrium / order. The constant striving to attain and maintain balance. It is a natural and physiological law as well as the key objective of the judicial system. Thus the judicial system has to necessarily be restored to the hearts of ONE nation.

THE JUDICIAL SYSTEM HAS TO BE RESTORED INTO THE HEARTS OF ONE NATION

Currently the judicial system is tainted by past associations. Irrespective of creed, colour and race the public has little or no respect for the South African judicial system. Attitudes are reflected in the nature and rate of crime. The only way to restore respect is through selective and effective change.

The validity of this document lies in the recognition of the importance of change and the effects thereof on South Africa as a whole.

Random change cause chaos and disorder. It is vital for any organisation who intends to implement change for reconstructive and developmental processes to be conscious of the effects of change and the necessary tools available to introduce and regulate change.

All the information is based on depth research and content analyses of the South African fundamentals and dynamics.

Effective change requires an in-depth look at the genesis of customary laws. This information has to be considered in view of it's relevance to The New Constitution’s objectives.

To ensure relevance the present government cannot afford to merely react to the changes that have set reform into motion. Every single element of a system is affected and has to contribute to the whole.

Every department has to initiate change to fore part of the future. Cutting paths into the unknown, using old rules when they work and creating new rules when they don't.

President Mandela has been criticised by the American press for failing to actively promote and continue the process of change that has been initiated by Mr de Klerk.

Mostly every organisation is aware of the importance of change however they do not know when or what and how to change. Longfellow summarises the process of change by saying: 'Great is the art of beginnings but greater the art of ending '. 
It is easier to start something than to maintain or end it. The present government has to cope with problems from the past as well as those looming ahead. Introducing and managing change is complex and many variables determine the outcome.

This document endeavours to isolate some of the problems relating to introducing, managing and regulating change.

TRADITIONAL AUTHORITIES, CUSTOMARY LAW AND PRACTICES

TRADITION, TRADITIONAL LEADERS AND CUSTOMARY LAWS MUST BE ANALYSED IN VIEW OF IT'S CONTRIBUTION TO THE JUDICIAL SYSTEM AND RELEVANCE TO PRESENT CONSTITUTIONAL OBJECTIVES AND FUTURE PROBABILITIES.

An effective judicial system depends on whether it reflects the country within which it operates. An effective judicial system plays a fundamental role in constructive development.

No-one needs to emphasise the significant changes that has altered the fabric of our society. Yet everyone pays lip-service to the effects of change. Unless these effects are identified and recognised nothing will succeed because it will not reflect reality, ie it will have no relevance.'

Any renewal necessitate intense appraisal of fundamentals and dynamics. This means a return to grass root levels to uncover the genesis of law and its subsequent formation throughout the course of South African history.

Judicial objectives are normally derived from precedent ie tradition. Tradition implies a fixed framework that is passed from one generation to the next. Tradition itself refers to preserving practices from the past. In fact the word law is derived from an old Anglo Saxon word meaning 'that which is fixed'.

Setting clear objectives are essential to the successful implementation of change. Tradition does have value for example the following definition of law from the Roman Times are still relevant today. Ulpian the great Roman lawyer defined justice as the constant and perpetual wish to render everyone his due. Tradition has a further role to play because it offers stability zones and acts as stress buffers during high transition.

TRADITIONAL LEADERS HAVE A ROLE TO PLAY IF THEY ARE ABLE TO DISASSOCIATE THEMSELVES FROM PAST PRACTICES AND RE-ORIENTATE THEMSELVES TO FUTURE OBJECTIVES.

PUBLIC PERCEPTION OF JUDICIAL POWER
THE POWER OF ASSOCIATION

The following example illustrates the power of association. Research has shown that Europeans actively dislike TIME magazine due to the connotations of its name and the brevity of style. Europeans actively resist the increasing pace of life. Time Magazine reflects the speed of American life and to Europeans this represents a threat to their value system - investment in heritage, tradition and establishment.

PROBLEM

South Africans associate the present judicial system with the past regime of authoritarianism, exclusiveness and injustice. A large disparity exists between what the law promises (justice) and what it actually delivers. At present the judicial system need to view and review its position and develop strategies to deflect the negative association with the past and incorporate visionary objectives and methods to reflect the nation's changing needs.

SOLUTION

By devising and implementing sensible strategies to deliver sufficient hope, effective communications, internal and external campaigns. The public's perceptions and attitudes have to be addressed and changed. Once opinion improves the judicial system has a better chance of succeeding in creating and maintaining order. The law can thus be restored to the hearts of One Nation!

DISORIENTATION

Since the core objectives are renewal, rapid change and exposure to novelty is markedly increased. Rapid change cause disorientation, irrational behaviour and impulsive decision-making. Change has to be managed and regulated.

Research of staff's initial resistance to office automation suggest that there is a growing need to introduce change strategically. Staff reacted to the new technology with stay-always, resignation or blocking any advances companies made toward automation. Companies could not understand staff reticence and obviously not afford it either!

THE EFFECTS OF DIVERSIFICATION ON THE JUDICIAL SYSTEM

PROBLEM

The judicial system has to take the following global changes into account. Furthermore technological acceleration offers more choice and freedom. This leads to greater diversification to pursue individual goals. Increasing diversification of values and customs, the
fragmentation of consensus, social order and bonds such as legal and moral are seen throughout the world.

SOLUTION

Clear objectives and definitions of values that protect individual rights. Ironing out of any inconsistencies. Promises have to be delivered to restore confidence and trust. Increasing integration of the variables, based on strategic decisions and interpersonal efforts will help to prevent diversification from fragmenting the judicial system.

DECENTRALISATION

We are moving from hierarchical structures to vertical powersharing and networks of active participation. Regional participation is gaining momentum and thus has an important role to play in South African development. Powersharing implies sharing with anyone irrespective of race or gender. Yes women have a significant and valuable contribution to take in reforming the judicial system. Research shows that the psychology of women is more inclined to flexibility thus women have valuable attributes to offer during transition and rapid change.

SOUTH AFRICA

NATIONAL IDENTITY

The time has come for South Africans to recognise their unique and distinct identity. It's time to express our national identity and differentiate ourselves from other countries.

For the first time we are one - ONE nation and feelings of pride are arising in the hearts of the population. Patriotism has to be actively encouraged and promoted.

In the past South Africans drew comparisons between themselves and other nations. A mindset of 'overseas is best' and 'others superior' is shifting. Fortunately we are losing our national inferiority complex and beginning to realise our talents and abilities.

International connections and trade are in fact reinforcing our relatively advanced standing in the world. In fact South Africa serves as a testing ground in leading international research projects. One such study being the interaction between homogeneous population groups.

What makes South Africa so unique? Amongst other factors the bold initiative that ex-president De Klerk took in changing South Africa forever. At our negotiation tables parties were represented by both male and female delegates.
International Research shows that when racial discrimination is addressed gender issues follow some years down the line. In South Africa the two run concurrently.

Most important seems to be our aptitude to derive the foremost from other countries’ experience.

South Africa has always been a dynamic nation, change has always been inherent to our society. European countries in sharp contrast invest in heritage and tradition. South Africa as a growing nation has always been exposed to variables and as a consequence are more able to adjust to rapid change.

'The general rate of change in a person’s life is one of the most important environmental factors of all'.

Change is transforming global perception. The entry to the information era is characterised by shockingly rapid change. Change in one part affects every other part. It is a process that is made up of beginnings and endings. Change is life itself, the impetus for evolution. Change is not easy for anyone, company, government or country.

Whilst change is essential to future progress and advancement it can also he overwhelming. Rampant change, change without a pattern can lead to a loss of control. Obsolescence is a threat facing everyone. This is not likely to decrease. In fact the rate of change is increasing at breathtaking speed, constantly fuelled by technological development inspired by ever-expanding systems of information.

The following example illustrates the rate of technological development and the increasing pace of life. In 1750 it took a Swiss mathematician two years to do a calculation. In 1945 the first fully electronic computer took two days. In 1986 it took 2 seconds to do the same calculation. Today we work with nanoseconds, a billionth of a second.

The massive injection of speed forces the world to cope at a progressively faster rate. The faster the rate of change, the shorter the lifespan of products, services, companies and people. No wonder change is met with resistance. It poses a threat!

Yesterday seems more comfortable because problems are familiar. Our orientation has always been geared toward the past. International research centres show that re-orientation is essential to future survival. To ensure viability we have to orientate ourselves - toward the future,

In the wake of tumultuous change old adages of 'do or die' and 'the strongest and fittest survive' become frighteningly real. Research also indicates limits to human adaptability. Evidence of adaptational breakdown and information-overload is seen everywhere. People complain of not having enough time, excessive fatigue, disorientation, insecurity has become a way of life! Significant to every industry is the changes in the decision-making process.

Alvin Tofler will probably identify South Africans in the throes of both culture and future shock. We can no longer afford to pay lip-service to the impact that change has on our lives. Mostly
everyone realise they have to do something but, do not know what to do, when or how. Timing is as important as content, as is direction.

As Meyer Kahn said; 'South Africans don't need vision they need double-vision'.
To ensure relevance companies, organisations, governments and individuals cannot afford to merely react to change. Everyone has to take initiative to form part of change. Cutting paths into the unknown, using old rules when they work and creating new rules when they don't.

An in-depth understanding of the implications of change will offer solutions to new problems. One of the most important assets for the next five years is change management. Constant monitoring, manoeuvring, steering, adjusting and balancing are some of the coping mechanisms whilst implementing and experiencing change. Strategic approaches are essential for all actions and purposes.'

PROBLEMS

The risk of obsolescence.
The direction and rapid rate of change.
Increasing complexity due to technological development and specialisation.
Effects of change on market fundamentals and dynamics.
Changes in public and consumer profiles, especially the decision-making process.
Overchoice due to increasing diversification.
Fragmentation of bonds such as legal and value systems.
Information-overload due to the increase of mass media.
Ineffective communications due to lack of identifying the public's changing needs.
South Africa's diffuse national identity.
First, second and third-world reality.
Conceptual deficiency.
High levels of disparity.
Preventing entrophy from setting in.

STRATEGIC SOLUTIONS

# In-depth research and content analyses.
# Strategic planning and alignment
# Constant environmental and market monitoring.
# Accurate positioning
# Change management
# Clear objectives and long-terse planning
# Future orientation
Dynamic relations
Flexibility
Brand investment
Differentiation
Purposive communications
Cause-related and internal campaigns
Intense appraisal
1. INTRODUCTION

The present section 30 provides a useful starting point for the introduction of children's rights in a constitutional framework. However, the provisions as currently worded do not properly achieve the goal apparently envisaged by the original drafters, and, in addition, a number of aspects of the clause are worthy of revisitation. The international instruments on children's rights, and in particular the UN Convention on the Rights of the Child (1989) serve as a backdrop to the ensuing discussion. South Africa is currently a signatory to this Convention, and the intention of the Government is to ratify the Convention in the near future.

2. THE 'BEST INTERESTS' PRINCIPLE

As section 30(3) is now worded, it is unclear whether the "best interest" principle applies as widely as the drafters possibly intended. This subsection could be read as referring only to the rights enumerated in section 30. The phrase "for the purpose of this section" could be taken to govern the words "in all matters concerning such child his or her best interest shall be paramount". If the provision is read restrictively in this way, then a broad range of civil and political rights in Chapter 3 will not be tested against the "best interest" principle. By way of comparison, Article 3 of the UN Convention applies the "best interest" principle to ALL actions concerning children "whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies".
While it is true that the Convention states the "best interest" principle to be "a primary consideration", we feel that the current use of the word "paramount" is more appropriate. One reason is the especial vulnerability of children in the South African context. Another is the fact that the South African courts have successfully used the paramountcy principle as part of the common law. Although the word "paramount" may well connote a higher standard than the word "primary", the South African case law illustrates that a "paramount consideration" does not mean the only or sole consideration. The word "paramount" reflects the prominence that should be placed upon children's interests.

Given the ambiguity of the present wording in section 30, and given the fact that the "best interest’ principle should inform the protection and promotion of children's rights in all spheres, it is in our opinion necessary to redraft and reposition section 30(3).

Recommendation

NEW SECTION 30(1): " In all matters concerning children, including but not limited to the interpretation and application of the provisions of this Chapter, the best interests of the child shall be the paramount consideration. "

3. PROTECTION OF CHILDREN AGAINST DISCRIMINATION

As currently worded, neither section 8 nor section 30 adequately protect children against discrimination. A child may suffer discrimination either on account of his or her personal characteristics or status, or on account of the personal characteristics or status of his or her parents or legal guardians. The Convention on the Rights of the Child contains a wide provision protecting children against both forms of discrimination. Section 8 currently contains no explicit reference to discrimination against a child resulting from a parent's or legal guardian's characteristics or status. (For example, a child born out of wedlock is vulnerable to discrimination on account of his or her parent's marital status, not by virtue of any personal characteristic.) And, despite the fact the the
UN Committee on the Rights of the Child has identified protection against discrimination as being central to children's rights, section 30 contains no explicit non-discrimination provisions.

Recommendation

NEW SECTION 30(2): "No child shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: such child's or his or her parent's or legal guardian's race, colour, gender, sex, sexual orientation, language, religion, conscience, belief, culture, political or other opinion, national, ethnic or social origin, age, disability, birth, marital or other status."

To tie up with the above proposal, section 8(2) should also be redrafted to include an explicit reference to non-discrimination on the grounds of birth, marital or other status. Note that this would not obviate the need to protect children independently from discrimination on account of characteristics attaching to their parents or legal guardians - in our opinion, this need cannot be met in the context of a general non-discrimination clause such as the present section 8(2).

4. THE RIGHT OF THE CHILD TO PARTICIPATE IN DECISIONS AFFECTING HIM OR HER.

In the guidelines on reports by State Parties (to the UN Convention) to the Committee on the Rights of the Child, the importance of Article 12 of the Convention has been stressed. It is one of the four key aspects (along with non-discrimination, the "best interest" principle and the right to life) pertaining to the implementation of the Convention and about which states are required to furnish reports. The principle of the child's right to participate, with due regard to the age and maturity of the child, should be included in the new clause protecting children's rights in the final Constitution.

Recommendation
NEW SECTION 30(3): "Every child shall have the right to express his or her views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child and the nature of the matter under consideration."

5. PERSONALITY RIGHTS

Reworking of the section 30(1)(a), which currently deals with personality rights, proceeds from the stance that a child's identity and citizenship rights often depend on birth in a particular country, and proof of that birth to enable a child to rely on the rights established. To that end, Article 7 of the Convention on the Rights of the Child stresses the importance of registration of birth for the purposes of acquiring nationality.

Recommendation

NEW SECTION 30(4)(a): "Every child shall have the right to registration after birth, the right from birth to a name and the right to acquire a nationality."

6. THE RIGHT TO FAMILY LIFE

The right to parental care (currently section 30(1) (b)) enshrines a narrow conception of family life which does not reflect the realities of extended family and care networks in South Africa. The Convention on the Rights of the Child, on the other hand, is sensitive to the plurality of customary family arrangements that are to be found in society, referring to: " ... the rights and duties of parents, or where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child..." (Article 5). The constitution should also provide for those children not in the care of families, such as children in shelters and in children's homes. (The Convention on the Rights of the Child envisages special care for parentless children in Article 20).

Recommendation
NEW SECTION 30(4)(b): "Every child shall have the right to family care, or, when temporarily or permanently deprived of a family environment, to appropriate alternative care."

7. PROTECTION OF CHILDREN'S SOCIO-ECONOMIC RIGHTS.
7.1 THE RIGHTS PRESENTLY ENSHRINED IN SECTION 30(1)(c)

With reference to the Convention on the Rights of the Child, section 30(1)(c) of the Interim Constitution should be redrafted to provide a better framework for children's development rights and for the safety and protection of children. The word "security", both in its placement within the present section 30(1)(c) and in its meaning, is somewhat ambiguous. It could refer to physical security, in the sense of protection against invasions of physical or mental integrity, or, alternatively, to social security in the form of welfare benefits (cf the reference to social security in Article 26 (1) of the Convention on the Rights of the Child). Our preference is to use the word security in its latter meaning. The present reference to the right to social services would be improved by an explicit reference to social security. (If the above interpretation of the word security" in section 30(1)(c) is correct, such reference will not create an additional right, merely an improvement in the formulation of the section.) These rights, along with the right to health and nutrition, can usefully be grouped in one subsection. Further, the Convention adopts a broad approach to the question of health, and refers to both physical and mental health. This should be reflected in the final Constitutional provision too.

Recommendation

NEW SECTION 30(4)(c): "Every child shall have the right to the highest attainable standard of physical and mental health, including but not limited to basic nutrition, basic health, social services and social security."

7.2 THE RIGHTS PRESENTLY ENSHRINED IN SECTION 30(1)(d)
Section 30(1)(d) is fairly weak, inter alia because it is negatively phrased. Article 19 of the Convention is in our opinion preferable. It provides for protection of children against "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse." Protection against neglect and abuse (currently section 30(1)(d) of the Interim Constitution) raises the issue of the child's right to physical integrity, which is not explicitly part of the interim Constitution. But the current reference to the right of the child to "security" (section 30(1)(c)) falls logically within the framework of protection of the child's right to physical integrity (see the first possible meaning of the word "security" as discussed above). Therefore, we recommend (based on Articles 19 and 27 of the Convention) that changes be made to the final formulation in order adequately to capture the protective rights that should be accorded children.

Recommendation
NEW SECTION 30(4)(d): "Every child shall have the right to physical and mental integrity, to safety, and to protection against all forms of neglect and abuse.

8. PROTECTION FOR CHILDREN SUBJECTED TO CHILD LABOUR

In line with the explanation above concerning the broad application of the concept "health" in the Convention, it is suggested that the clause which affords the child protection against exploitative labour practices be amended to reflect the view that both physical and mental health are relevant factors where the child is concerned.

Recommendation
NEW SECTION 30(4)(e): "Every child shall have the right not to be subject to exploitative labour practices nor be required or permitted to perform work which is hazardous or harmful to his or her education, physical or mental health or well-being."
9. RIGHTS FOR DISABLED CHILDREN

Disabled children warrant special mention in the Convention (Article 23), and the rights to be accorded disabled children should be reflected in the final Constitution as well. Disabled children should have the right to lead a full and decent life, in conditions which ensure dignity and facilitate the child's active participation in the community. To this end, the special needs of the disabled child need to be articulated in the section dealing with children's rights.

Recommendation

NEW SECTION 30(4)(f): "A disabled child shall have the right to special care, including but not limited to education, training, health care services, rehabilitation and social integration."

10. DUE PROCESS RIGHTS AND SPECIAL PROTECTIONS FOR CHILDREN IN DETENTION.

The current section dealing with 'extra' rights for detained children (section 30(2)) gives children (in addition to the rights accorded all persons in terms of section 25) "the right to be detained under conditions and to be treated in a manner that takes account of his or her age." This provision fails to encapsulate the essence of the most important international standards in respect of juvenile justice and children deprived of their liberty. One example is the failure to include the important principle, which is part of South African prison law, that child detainees should be separated from adults. Another example is the protection of the privacy of child defendants (our law provides that court proceedings should be held behind closed doors, names and identities of juvenile defendants should not be released and so forth); this principle is designed to minimize the risk of children being labelled and stigmatized as criminals at an early age.

Therefore, a comprehensive rewording of section 30(2) is called for, to ensure that child defendants in criminal cases are sufficiently protected. Articles 37 and 40 of the Convention, as well as the UN Standard Minimum Rules for the Treatment of Juveniles Deprived of Their Liberty and the so-
called "Beijing Rules" dealing with Juvenile Justice, are indicative of the protections that can be accorded to detained and arrested juveniles. They have therefore been used as background in the following recommendation.

Recommendation

NEW SECTION 30(5)(1): "Every child deprived of his or her liberty shall, in addition to the rights which he or she has in terms of section 25, have the right:

(I) to be detained only as a measure of last resort and the shortest appropriate period of time;
(ii) to be treated with humanity and respect;
(iii) to be treated in a manner which takes account of the needs of a person of his or her age;
(iv) to be separated from adults;
(v) to maintain contact with his or her family or alternative caregiver;
(vi) to prompt access to legal or other appropriate assistance;
(vii) to be informed promptly of the reasons for his or her deprivation of liberty in a language and manner the child understands, and,
(viii) where in the best interests of the child, to have parents or care-givers informed of the child's deprivation of liberty and to be released into their recognizance.

NEW SECTION 30(5)(2): "Every child alleged as or accused of having infringed the penal law shall, in addition to the rights which he or she has in terms of section 25, have the right:

(i) to have his or her privacy respected at all stages of the proceedings;
(11) not to be compelled to give testimony or confess guilt;
(111) to have the matter determined by a competent, independent and impartial authority or judicial body without delay,

I 1. APPLICATION OF THE SECTION TO CHILDREN UNDER THE AGE OF EIGHTEEN
The Interim Constitution provides that the section on children's rights should apply to all children under the age of eighteen years. This accords with the international view concerning the field of application of children's rights. The subsection should therefore be retained.

Recommendation

NEW SECTION 30(6): "For the purposes of this section a child shall mean a person under the age of 18 years.

12. LIMITATION OF THE RIGHTS CONTAINED IN THE CHILDREN'S RIGHTS CLAUSE

Consideration should be given to the maximum protection of children's rights in the final Constitution. Therefore, insofar as a limitation clause which creates different "levels of scrutiny" might be considered for inclusion in the final Constitution, as many of the rights enumerated in the above suggestions as possible should qualify for the greatest possible protection accorded fundamental rights. Thus, any limitation of such rights should, as far as possible, be subject to the strictest level of scrutiny.

THE ABOVE PROPOSAL WAS PREPARED BY AN AD HOC WORKING GROUP ON CHILDREN'S RIGHTS CONVENED BY THE CHILDREN'S RIGHTS PROJECT, COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE.

MAY 1995

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The Botanical Society of South Africa

THEME COMMITTEE NO. 4 - FUNDAMENTAL RIGHTS WORK PROGRAMME (TC4)
NUMBER 16 - ENVIRONMENT

SUBMISSION OF THE BOTANICAL SOCIETY OF SOUTH AFRICA
MARCH 1995

The Botanical Society of South Africa is one of the largest environmental non-governmental organisations in South Africa with nearly 22 000 members, and has a long history of involvement in environmental issues.

THE BOTANICAL SOCIETY OF SOUTH AFRICA'S MISSION:

Mindful of the role of the people of South Africa as custodians of the world's richest floral heritage, it is our mission to win the hearts minds and material support of individuals and organisations wherever they may be for the conservation, cultivation, study and wise use of the indigenous flora of southern Africa.

The world's richest flora which South Africa is privileged to call its own, provides enjoyment, employment and economic benefit to many of our people by way of different activities, some of which are listed below:

- **tourism** and its related industries - very important in generating foreign income and jobs
- **nature conservation** - research and management which enables the maintenance of natural areas which provide people with opportunities for environmental education, and to experience a "wilderness" experience first hand
- the **wildflower industry** - important in generating foreign revenue (as well as creating many jobs)
- the **horticulture industry** - this is becoming increasingly popular both locally and overseas
- the **rooibos, honeybush tea and buchu** industries - important in generating foreign income as well as providing many jobs to rural people
- the **thatching industry** - an important industry providing many jobs, mainly in rural areas
- the **traditional medicine industry** - very important for the health of millions of South Africans
- the **indigenous craft industry** - this is important for the maintenance of cultural traditions, as well as a source of income and the promotion of ecotourism
- **clearing of invasive** alien vegetation which threatens the indigenous flora and may be formal (employees of custodians of natural areas) or informal (woodcutters for the firewood industry etc. and creates a number of jobs
Bearing the above in mind, the Botanical, Society of South Africa believes that the following should be considered as a fundamental right:

EVERY PERSON HAS A RIGHT TO UTILIZE THE INDIGENOUS BOTANICAL RESOURCES OF SOUTH AFRICA IN A SUSTAINABLE WAY WHICH DOES NOT COMPROMISE THE PRESENT OR FUTURE EXISTENCE OF OUR-RICH NATURAL HERITAGE.

DIRECTIVE PRINCIPLE 1 - SUSTAINABLE UTILIZATION OF THE NATURAL ENVIRONMENT
1.1 All persons, including the State, shall bear a responsibility to present and future generations in their utilization of the natural environment, particularly with respect to indigenous vegetation.

1.2 In order to secure this principle, any persons, including the State, who are using the natural environment shall do so with reasonable regard for the need to:

    maintain and conserve biological diversity and in particular plant genetic resources, which are or may become important in fields such as medicine and horticulture utilize resources on a sustainable basis protect ecosystems, ecological processes and special habitats such as sensitive and rare vegetation including vegetation associated with wetlands minimize ecological and environmental damage

DIRECTIVE PRINCIPLE 2 - INVASIVE ALIEN VEGETATION
2.1 The State and private owners of natural vegetation, shall bear a responsibility to present and future generations to reduce the threat that invasive alien vegetation has on the natural environment, particularly the indigenous vegetation.

2.1 In order to secure this principle, any persons, including the State, who are utilizing the natural environment shall do so with reasonable regard for the need to:

    * remove alien invasive plants from natural areas, with ecologically sensitive areas being a priority
    * promote, where applicable, the use of biological control for the long term control of invasive alien plants
    * link, where possible, the removal of invasive alien plants to job creation schemes in terms of the Reconstruction and Development Programme

DIRECTIVE PRINCIPLE 3 - WATER AND THE ENVIRONMENT
3.1 All persons, including the State, shall bear a responsibility to present and future generations to utilize water resources, which originate in the natural environment, in a sustainable way.

3.2 In order to secure this principle, any persons, including the State, who are utilizing the natural environment for the provision of water shall do so with reasonable regard for the need to:
· maintain the biological diversity and indigenous character of natural environments from which water is obtained
· remove alien vegetation in catchment areas and thus increase the amount of water originating in these areas
· manage catchment areas of rivers in their entirety from source to the sea
· ensure that river systems are given adequate protection and that selected rivers are conserved as whole systems
· plan for the efficient provision of water on a regional basis, so that natural systems are least compromised

**DIRECTIVE PRINCIPLE 4 - ENVIRONMENTAL EDUCATION AND INFORMATION**

*The State has a responsibility to present and future generations to introduce and promote environmental education and maximise the dissemination of information concerning the natural environment, particularly with regard to indigenous vegetation.*

(The Botanical Society of South Africa was a participant at the workshop which led to the document entitled: *Environmental Rights and Duties in the New South African Constitution*, organised by the Habitat Council, Cape Environmental Trust and the Environmental Law Association of South Africa. This document has been submitted to the constitutional assembly and the Botanical Society would like to give this document its support, although we do acknowledge that not all environmental NGO's were represented at the workshops).
10 March 1995

PRESENTATION : LANGUAGE POLICY

Attached hereto please find a presentation entitled, "Language Entitlement in a democratic South Africa", for the attention of theme committees concerned. With the presentation offering principles, we are not necessarily submitting concrete proposals and would therefore, if possible, like to offer further input.

Thank you for the opportunity to do a presentation. We trust that your negotiation process will be successful.

DR L T DU PLESSIS
COORDINATOR

LANGUAGE ENTITLEMENT IN A DEMOCRATIC SOUTH AFRICA

The aim of this presentation is to contribute to the constitutional planning of the South African language system in order to allow for the empowerment and equal rights of all South Africans.

1. Principles in context

A well-planned approach to language entitlement presupposes a number of open and clear principles as a point of departure.

Historic sensitivity to the South African post-apartheid situation urges attention to the principles and fundamental rights agreed upon in the interim constitution.

Of particular importance to the language policy are three fundamental rights in the interim constitution:

- the right to respect for and protection of human dignity
- the right to freedom of speech and expression
- the right to a free choice of language

Of essential importance is the hidden constitutional principle XI, which guarantees the acknowledgement, protection and promotion of language diversity.
The first part of the interim constitution provides for equal rights of the eleven official languages, the purpose being to ensure the fair development and promotion of these languages, equal rights in this context meaning:

that existing and historically developed language rights should not be reduced (in particular Afrikaans and English) that the rights of historically under-privileged indigenous languages should be extended.

The constitution furthermore stipulates six principles in terms of which language policy should be determined:

all official South African languages should be developed and promoted, the purpose being equal usage and enjoyment language rights and language status limited to certain regions should be extended geographically

exploitation, oppression or demarcation by means of a language should be controlled

multi-lingualism should be promoted and interpreting and translation services should be supplied respect should be nurtured for South Africa’s non-official languages, the appropriate usage of which should be promoted

existing language rights and language status should not be narrowed.

The interim constitution's challenge to South Africa's legislators is clear: let many tongues make music together. A constitutional system in favour of multi-lingualism most certainly does not imply a veritable Babel of tongues, but much rather paves the way for a copious choir of voices, each in their own unique way giving expression to the dreams of all South Africans. Language entitlement leads to harmony according to law amongst the various language groups within our unitary state. By affording all significant language communities equal rights, our government of national unity would be offering clear signs of mutual dedication to the principle of entitlement in the new democratic system. Clear (language) entitlement to all communities concerned is the first essential requisite for the building of one political community - one South African nation.

2. Determining factors

The process of language policy formulation therefore takes place within a historic situation bounded by the clauses of the negotiated interim constitution and the directional RDP. Three factors constitute the political arena of language policy formulation:

language orientations
broad political paradigms
language policy models

The antiphony between language orientations and political paradigms generates the possible language policy models within a given historic state of affairs.
2.1 Language orientations

Two sets of attitudes towards language form the matrix of language orientations in South Africa. On the one hand people choose an apprehension of language diversity either to be a problem or a right.

On the other hand they maintain either a sentimental or an instrumental attitude towards language.

Four possible language orientations are determined by the overlapping of these two sets of attitudes:

**Problem:**

Instrumental -

Multi-lingualism causes communication problems; unilingual assimilation is the instrument for nation building.

Sentimental -

Multi-lingualism causes communication problems; language apartheid offers language identity.

**Right:**

Instrumental

Language is an instrument bringing about empowerment; unilingual assimilation/multi-lingualism offers access to empowerment.

Sentimental -

Language identity is a right; language apartheid/multi-lingualism prevents otherwise unavoidable clashes amongst language communities.

2.2 Political paradigms

Current South African politics is structured by three broad paradigms: the populists, the people's nationalists and the liberals, the first two of which emphasise collectivism: populists emphasise the masses of citizenry while people's nationalists emphasise the ethnic community. Similar to all collective orientated political approaches these two paradigms would lap up individual citizens and
the large variety of non-government relationships between people; whether it is the government as such or the ethnic-bounded nation state. The liberal paradigm, however, emphasises the individual as the only exponent of rights. Liberal individualism comprehends the fundamental relationship-orientated nature of the human being with difficulty, finding no sense in rights or responsibilities rooted in the variety of inter-personal relationships.

The three political paradigms concerned make conditions which are also related to language policy: conditions which undermine a comprehensive political entitlement. Populist collectivism would link all rights and responsibilities to the political relationship between the government and citizenry: everything is political, with the state knowing no limits. People's nationalist collectivism would link all rights and responsibilities to the ethnic relationship between compatriots: no common factors - including those of the political community - could overcome national boundaries, and all other inter-personal relationships are traced back to the ethnic. The church is the people's church, the state is the state of the people, language is the language of the people, the family is ethnically endogamous. Liberal individualism, on the other hand, negates any political legitimacy around individual interests. Inter-personal relationships should have no expectations which affect the freedom of the individual.

2.3 Language policy models

Language orientations and political paradigms overlap, generating a number of language policy models.

(a) Populists, almost without exception, maintain an instrumental problem orientation: citizenry's uniform interests could only be served by eliminating the problem of multi-lingualism. Nation building necessitates unilingualism. The continuous language policy is one of unilingual assimilation.

(b) People's nationalists always maintain a sentimental language orientation; occasionally problem orientated, at times legal orientated. In all instances the continuous language policy is one of unilingual language apartheid within nation state boundaries, with at the best emphasis on multi-lingualism outside in the South African unitary state.

(c) Liberals normally maintain an instrumental legal orientation towards language: individual rights require language to be an access instrument to individual empowerment. Whilst this overlapping might as well support a policy of multi-lingualism, it seems to lead in most instances to a unilingual assimilation policy.

Until recently existing language policy models were, therefore, those of unilingual language assimilation or unilingual language apartheid.

3. Innovative Perspective
The momentum of openness in South Africa in recent years has enabled us to build past the dyed-in-the-wool arguments of the past. The interim policy of eleven languages has succeeded in moving past both a unilingual assimilation policy as well as a unilingual apartheid policy. It remains however fragile and bottomless; insofar as both language orientation and political paradigm are concerned, innovative perspectives are required to consolidate a permanent policy of multi-lingualism.

In view of the fact that both instrumental and sentimental attitudes are of value, language policy should clearly not be narrowed to one of these only. Language is not only a warm feeling, and certainly not only a tool. To access the true value of a language attention should be paid to the (indeed instrumental) foundation of the moulding power of communication inherent to all language usage: people create a language and create with language. What we create with language is of significance: language is the birth canal between people. Language empowers all relationships between people: it creates social relations. Language is the gate-way to all redevelopment. Starting with our most intimate relationships - the family and marriage - language opens up all the possibilities of our human society. No wonder language is something which we set our heart upon - it is of great sentimental value.

Should language therefore surpass both instrumental as well as sentimental arguments, and should language be characterised by the power of significance which it affords us, it should be possible to adopt an innovative language orientation - language as a resource in all inter-personal relations. If language is to be a source empowering us in all our relationships, enabling us to articulate even our strongest convictions, it is essential to move past both apartheid unilingualism and assimilative unilingualism. Unilingualism - both privately and in the political community - depowers and narrows our significance. Unilingualism silences us.

The historic course of the twentieth century is slowly but certainly unveiling the ineffectiveness of (populist and people's nationalist) collectivism and (liberal) individualism. The sense of being cannot be resolved in some or other common totality (either nation or state). Neither can people be fully understood as unencumbered individuals. The human being is relationship orientated - but no single inter-personal relationship could encompass humanity as a whole.

Human society is structured by two sets of variations: conviction variations and relationship variations. Public entitlement requires the state to acknowledge both. Conviction variations demand that respect for all citizenry's freedom of religion and conscience should be encompassed by all legislation and government action. Relationship variations demand that the state should nurture the unique qualities of various inter-personal relationships. The family is not a business, the church is not a nation, a language community not a school. This obvious truth demands, however, exceptional policy sensitivity in order to create true harmony between the various and divergent interests of citizens in these relationships. Legislation should within this copious variety of relationships always take into account and evaluate the various responsibilities and rights of citizens.

Neither a collective nor an individual paradigm could offer true insight into the political consequences of conviction and relationship variations. The innovative perspective of normative
pluralism would be required for this. National solidarity within a national unitary state could only be guaranteed by a perspective which properly evaluates the positive possibilities of these variations whilst also taking into account the centrifugal dangers thereof. Language diversity is one relationship variation which should be cautiously assessed within the process of policy formulation.

The overlapping of resource orientation, language and a pluralistic political paradigm offers justification for a fair multi-lingual policy. In view of the fact that language is the tool realising all inter-personal relationships and that the community's variety of relations demands from the state the creation of fair harmony, language policy should offer empowerment. The state's task is not to enforce any language upon its citizenry. In the interest of public entitlement the state's only task is to offer equal rights to existing language communities. In the interest of national solidarity the state may however encourage further multi-lingualism. South Africa's language diversity is a cultural wealth to be cultivated should we wish to develop our true national potential. Reality is denied by unilingualism - and reality carries its own penalty time and again.

4. Proposals

Fundamental pluralism, resource orientation towards language and historic sensitivity towards the political state of affairs demand a nuanced multi-lingual policy in a democratic South Africa. We propose that:

the acknowledgement of human dignity and of existing conviction and relationship variations should be given expression to in the constitutional acknowledgement of language diversity as a positive and empowering reality.

equal rights to significant language communities demands a continuous official eleven-language policy on national level, and appropriate multi-lingualism on provincial and local government levels. All South Africans have the right to hear their own language and to be heard in their own language in public.

equal rights to language communities demands developmental action from the government to promote the language interests of under-privileged language communities.

public and personal multi-lingualism should be nurtured and guaranteed by the provision of appropriate interpreting and translation services on all government levels as well as by an education policy encouraging and realising multi-lingualism.

The innovative eleven-language policy of a democratic South Africa is not only a pragmatic compromise, but points to the promise of national solidarity which should not be narrowed by monochrome assimilation politics or be shattered by divisional apartheid politics. It paves the way for a conciliatory South African nation where a hundred harmonies could sound together.
Theo du Plessis and Gideon Strauss
Language Facilitating Programme, University of the Orange Free State
COMMUNITY DISPUTE RESOLUTION TRUST
WESTERN CAPE REGIONAL OFFICE

I refer to the above and our telephone conversation on 24 March.

Please find enclosed a copy of our submission originally forwarded to the Constitutional Assembly per facsimile.

I trust the above is in order.

A.J.D. TWIGG
Regional Director

"A Community-Driven Mediation Tier to the Administration of Justice
A Submission to the Constitutional Assembly Theme Committee V by
COMMUNITY DISPUTE RESOLUTION TRUST
CONTENTS

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1. INTRODUCTION

The South African legal system has historically been used as one of the means of maintaining an undemocratic state. As a result, previous states have had little genuine commitment to the creation of a legal order that is able to respond appropriately to a myriad of disputes. This has rendered the legal system inaccessible and peripheral for the majority of South Africans and created a crisis of legitimacy for previous legal orders.

The resolution of this crisis, however, requires more than the establishment of a democratic political order. This fact appears to have been recognised by the parties to the multi-party negotiations in the drafting of constitutional principle V and the wording of section 22 of the interim constitution. The wording of the principle and section suggest the construction of a legal order premised on a commitment to the needs of not only the state and the ruling elite, but all South Africans.

This submission seeks to address itself to this commitment in two ways. First, by motivating a proposal for the establishment of a new tier to the administration of justice, premised on mediated, as opposed to adjudicated, conclusions to disputes as well as maximum community involvement in the dispute resolution process. Second, by making some suggestions for reforming aspects of the present tiers.

2. A CRITIQUE TO THE PRESENT TIERS OF THE ADMINISTRATION OF JUSTICE

It is important to situate this proposal for a new tier to the administration of justice within a brief critique of the present tiers, namely the Supreme and Magistrates Courts.

Expensive and time consuming
Resolving disputes through these mechanisms is expensive and time consuming for all parties to the dispute, including the state. Among the factors contributing to this are the protracted technical procedures which the dispute mechanism follows, which require the intervention of highly trained professionals to manage the process and a vast administrative structure to support it.

The costs attendant on litigation are likely to increase significantly with the expansion of legal assistance to a greater number of defendants in criminal cases and the new possibility of constitutional review.

Alienating and intimidating process
In addition to the cost of litigation, the process is often alienating and intimidating for the parties in dispute not least because the resolution of their conflict is surrendered to third parties and managed by specialised and highly technical procedures that are difficult to understand.

Remote and unresponsive structures
As a result, the courts are generally perceived as remote and unresponsive structures, operating by way of rigid procedures with no possibility for interaction with the communities in which they are based.
The cumulative effect of the above serves to curtail access to justice by creating perceptions of an unaccountable and inaccessible system.

**The effectiveness and appropriateness of adjudication**
Further, adjudicative processes are certainly not the most effective nor appropriate way of dealing with all disputes, nor in fact the only way.

The system of adjudication in criminal matters is aimed purely at determining guilt and punishing the offender. This process does not address the needs of the victim, either emotionally or in relation to restorative justice.

In addition, criminal and civil disputes between individuals in the South African context often contain deeper elements reflecting racial and political divisions. These divisions will not be healed through a rigid legal process of determining guilt and blame or which of the parties to a dispute are right or wrong in their assertions regarding their legal rights.

**Decisions about who is right or wrong do not necessarily resolve disputes.**
Disputes are usually multi-faceted and not always reducible to a question of legal rights. A judicial decision therefore only addresses certain fin-limited aspects of a particular dispute in that it only provides a framework for resolving disputes. Judicial decisions are not in and of themselves sufficient to resolve the dispute in its totality. In fact, litigation may be used as one step in the intensification of a dispute, rather than its resolution. Resolving disputes often requires creative trade-offs or problem-solving approaches, something the present tiers of the administration of justice are ill equipped to provide.

**Conclusion**
The above critique suggests there is a need for a tier of dispute resolution that is "user friendly" in its dispute mechanism procedures, keeps greater control of the process in the disputant's hands, is speedier, costs less to use and is able to provide an environment more conducive to pursuing problem-solving approaches to disputes.

The only way to provide such a tier that will avoid the above criticisms is to accept the need for a paradigm shift; a shift away from adjudication and to mediation as the organising principle for dispute resolution mechanisms in this new tier.

3. **THE PROPOSED NEW TIER TO THE ADMINISTRATION OF JUSTICE**

**Central tenents**
The two central tenents that distinguish mediation as a dispute resolution process from other processes are that the process is entirely voluntary and that no-one other than the parties to the dispute are able to make binding decisions, and then only by mutual agreement.

**Jurisdictional limits**
The above tenents suggest that the question as to the jurisdictional limits of this tier can be decided in accordance with a range of criteria other than those used for determining the jurisdictional limits of the
other tiers. The power to resolve any dispute within the framework of this new tier rests solely in the hands of the disputants themselves. There is accordingly no power that is placed in the hands of third parties that needs to be regulated and controlled.

In addition, as the procedures are simple there is no need to regulate a standard of control to determine the appropriate dispute resolution forum. The central jurisdictional question for a mediated process is one that seeks to establish whether the process is appropriate. The answer to this question can be arrived at by deciding whether the parties are prepared to submit to mediation, whether the nature of the dispute lends itself to mediation and in criminal matters the extent to which the state is prepared to surrender its interest in the dispute and on what terms.

It follows, if only in theory, that the jurisdiction of these forums is limited in the main by the disputants themselves.

**The model in broad outline**

The new tier would be made up of various dispute resolution forums based in public venues that are immediately accessible to the communities desiring such a service. Each individual forum would be serviced by a support staff, the size of which would be determined by the volume of work but would include at least one person who would administer the intake process, make any determination regarding the appropriateness of mediation, Facilitate the assignment of a mediator to the dispute and arrange the time and venue for the mediation in consultation with the disputants. The mediator would be chosen by this person from a panel of trained mediators drawn from the community serviced by the forum. The administrative staff would also be appointed on the same basis.

This structure would be replicated in any community that desired the establishment of such a forum and these forums would then be supported by regional or sub-regional structures depending on their number, which would be responsible for co-ordinating the ongoing training of the various panels of mediators as well as co-ordinating the administrative work of the various forums it was responsible for and servicing the needs of those forums' administrative structures.

The forums would primarily be accountable, with regard to the delivery of the service, to a community structure. This could be an appropriate committee forming part of a local authority or an independent committee consisting of specially elected community representatives.

The guiding principles in determining the appropriate organisation of administrative structures as well as structures of accountability would be maximum community involvement and accountability within cost effective constraints.

**Relationship with other tiers**

As was mentioned above, this proposed tier would stand in a complimentary relationship with the other tiers. For instance, criminal matters could be referred out of the other tiers to this tier for their resolution and vice versa for the enforcement of mediated conclusions to disputes. Legislation would need to be drafted to formalise this relationship and facilitate the healthy coexistence of the various tiers.
The model distinguished from community courts

The above model is distinguishable from community courts in only one important respect, namely that these forums are not courts. No third party is able to impose on the disputants, a conclusion to the dispute. There is, in other words, no adjudicative power vested in these forums and hence the use of the term forum (for want of a better term) to describe these structures. The forums are accordingly less open to the abuses of fundamental rights that have, from time to time, emerged from community court structures.

The fundamental purpose of both community courts and this proposal are however identical in that both seek to provide mechanisms for the delivery of community driven dispute resolution.

4. POSSIBLE WAYS FORWARD TO IMPLEMENTING THE PROPOSALS

The next step

There has been very little public debate about, and then only very recently, with regard to the issues raised in this submission. Yet, what debate there has been suggests both nascent contention as well as unanimity. In so far as areas of agreement are concerned, there seems to be sufficient consensus among a broad sector of government, community based and non-governmental organisations for need to develop a response to the need for community driven dispute resolution structures, if only because of the political reality of their considerable existence albeit in a particular form. The principle area of contention at present is the nature and form such a response should take.

A well organised and broadly inclusive public debate is of crucial importance to sustaining this project and arriving at a point at which legislation acceptable to all parties with an interest in the administration of justice, can be drafted. The debate should take the form of a workshop at which detailed proposals are presented by the various parties interested in this project with an emphasis in the workshop's structure on providing opportunities to debate the merits of the various proposals.

A map to the next step

The most appropriate forum for this debate would be the National Legal Forum. However it appears that its purpose has been truncated into the deliberations of this Committee and therefore the responsibility for initiating such a debate would appear to lie with yourselves.

If this committee accepts that such a debate is necessary the logical next question is when can and should it take place. The answer to this perhaps lies in a determination by the committee of whether, on the strength of the oral and written submissions placed before it, the committee feels there is sufficient consensus of basic principles to enable it to win support for the project by including a commitment to it in broad outline in the Final Constitution. If there is, and perhaps this consideration will be appropriate for a number of other issues presently before the committee, the debate regarding the details of this project and possibly many others could be facilitated by a revived National Legal Forum that would run after the adoption of the new constitution. If there is not sufficient consensus and the committee feels it requires further submissions and debate, the initiation of such further processes would lie with the committee. Obviously if the committee has no regard for the project the initiative of attempting to convince yourselves remains with those role players who believe it should.
5. REFORM TO THE PRESENT TIERS TO THE ADMINISTRATION OF JUSTICE

"Court - community forums"
In addition to reforming elements of the other tiers of the administration of justice, the establishment of
"court-community forums" performing a similar liaison function as police community forums would
facilitate an increased user friendly environment within which the courts could operate.

These forums would provide community leaders and residents with regular opportunities to voice their
grievances regarding judicial administrative procedures, the treatment of particular cases or the
behaviour of particular officials. It would in turn, also give the justice officials an opportunity to
educate the public about the law and its procedures as well as providing them with an opportunity to
explain the basis of their actions where necessary.

Such contact would foster a perception of accountability and transparency within the community in
which each court is based as well as significantly improve the legitimacy of such structures in the eyes of
communities that have been marginalised historically. The courts would also be assisted by the
feedback of these forums in making themselves more accessible and in securing greater willingness on
the part of communities to co-operate in court proceedings.

6. IMPLICATIONS FOR THE CONSTITUTIONAL DRAFTING PROCESS

It will be assumed for the purposes of this section that this Committee wants to create space in the final
constitution for the possible establishment of forums along the lines of this proposal.

Suggested amendment to Section 22 of Act 200/93
The deletion of the word "court" in the heading to the section and the substitution therefor of the words
"justice".

The motivation behind this proposed amendment is to ensure that the proposed dispute resolution
forums are not regarded as being of an inferior status to the courts. The status they are given has
important consequences for their effectiveness. It is proposed that they should be viewed together, with
the existing courts, as one of a number of options for the appropriate resolution of disputes. The
distinction between them and the courts would then be simply on the basis of the form of the dispute
resolution technique used and the criteria for determining the appropriate mechanism for resolution of
different disputes.

Suggested amendment to Section 103 of Act 200/93
The deletion of the word "courts" and the substitution therefor of the word "dispute resolution
structures".

The motivation for this amendment relates to the question of the status of the proposed forums.

Suggested amendment to Section 103(1) of Act 200/93
The addition of the words "and dispute resolution forums" after the words "other courts" and before the words" shall be" in line 25.

The remainder of the section would not need to be altered because the forums would not have the capacity to make any determination of questions of law. Should this be a necessary antecedent before going to mediation, the appropriate court would need to be approached to rule on same. Perhaps an amendment, in the form of a new sub-section would need to be added to spell the point out, either in the final constitution or in subsequent legislation establishing such forums.

Annexure "A"

ORGANISATIONAL RESUME

INTRODUCTION

The Community Dispute Resolution Trust is an NGO that assists communities to develop their ability to manage disputes between individuals through training in dispute resolution skills as well as assisting communities establish dispute resolution structures.

Through the introduction of mediation skills and structures, the Trust aims to play a part together with communities in reshaping the South African legal system to meet the need for community driven dispute resolution structures.

Background

CDRT was founded within a context of addressing and harnessing the energies of communities in their endeavour to take responsibility for filling the gap created as a result of the apartheid legal orders failure to provide adequate structures for the resolution of their disputes.

The idea for the establishment of CDRT was developed jointly by National Association of Democratic Lawyers (NADEL) and the University of the Witwatersrand's Centre for Applied Legal Studies (CALS), in 1991.

Initially the project took the form of a resource base called Community Dispute Resolution Resource Committee (CDRRRC). This committee was later constituted into a full project of CALS and in 1994 CDRT set itself up as fully constituted Trust, separate from the University. This was necessary as CDRT needed to set up offices outside the geographical jurisdiction of the university. CDRT continues to maintain strong ties with CALS and NADEL through its Trustees who are Lavery Modise, Dennis Davis, Edwin Molahlehi, Laurel Angus and Edwin Cameron.

CDRT TODAY

CDRT presently consists of offices in Johannesburg, Cape Town and Durban and Justice Centres in Alexandra, Hillbrow, Duduza, Kwa-Thema (Springs), Roodepoort, Kokstad, Potchefstroom, Orlando and Mdantsane (East London).

Apart from the establishment of Justice Centres, CDRT's work encompasses school mediation, research, training and a special projects desk that continuously assesses further possibilities for work in sectors such as the prisons,
police, hostels and broadly in the area of development initiatives where communities and /or organisations anticipate requiring capacity to manage conflict that arises as their development initiatives are put in place.

THE JUSTICE CENTRES

Justice Centres are established in communities in response to requests for such structures from communities themselves. These Centres are established after training members of community organisations in mediation skills and after CDRT has performed an assessment of the extent to which such skills have been utilised by the community in question.

How do Justice Centres work?
Justice Centres are staffed by members of the community which the Centre services. The community and its various organisation identify persons who are to be trained to constitute the Centre's Panel of mediators. Out of this training process one person is identified as the Registrar (Intake Person).

The Registrar oversees the administration of the Centre, decides whether a dispute referred to the Centre should be dealt with by the Centre or referred to other agencies and generally arranges any mediation that is to take place including the appointment of the mediator from the Centre's panel of mediators.

What do Justice Centres do?
Justice Centres provide their communities with a range of dispute resolution services. Their main function is to assist individuals from the community to peacefully resolve disputes with one another. This is usually done through the assistance of a trained mediator from the community. The Justice Centres also assist with basic legal advice and refer those cases they are not able to deal with to the relevant organisations.

Why use mediation?
Mediation has proved to be an effective way of resolving a wide range of disputes, from fights between friends, fan-family members and neighbours to those between employers and employees and consumers and service providers.

The effectiveness of mediation lies in the fact that the parties voluntarily and through the intervention of skilled third parties (mediators), resolve their disputes themselves. In other words, no-one imposes a decision on them.

RESEARCH AND TRAINING

CDRT performs on-going research in a number of areas within the discipline of conflict resolution.

The work of the various justice centres is well recorded and documented allowing for continual assessment of their work. An example, obtainable from our Cape Town office, includes CALLS Working Paper 21, 1994 -Idormal Justice: The Alexandra Justice Centre and the Future of Interpersonal Dispute Resolution by Hugo van der Merwe and Mpumie Mbebe.
Our research unit also researches developments more broadly in the discipline of conflict resolution. The results of this research are fed back into the justice centres by way of ongoing training for their mediators as well as into our training of other NGOs and is documented from time to time in various forms. The results of our research is also disseminated generally into our network with other organisations by way of our quarterly newsletter, Mediation Update.
A REPORT PREPARED BY MEMBERS OF THE WESTERN CAPE FORUM FOR MENTAL HANDICAP

Introduction
Terminology
Facts and Figures
Needs and Proposals
1. Subsidisation
2. Assessment
3. Early intervention/pre-school provision
4. Increased provision for “trainable” children
5. Provision for children with mild mental handicap
6. Provision for the Special Care Child
7. Staff Training
8. Specialist Services
9. Residential Care

ANNEXURES
1. Contributors
2. Training Centres and Schools for specialised Education in the Western Cape
3. Classification of children in need of specialised education
4. Paper outlining EARS programme

MENTAL HANDICAP

INTRODUCTION
The Western Cape Forum is a network of service-providers in the field of mental handicap. Its membership includes most of the schools, formerly known as Training Centres, which offer "specialised" education, as well as the "Special Care" centres which cater for the child with a profound handicap and in need of more intensive care and training.

In an attempt to inform and to clarify the needs and issues pertaining to the education of the child with a mental disability, the following report has been compiled by a number of practitioners and experts in this field of provision.

TERMINOLOGY
Sensitivity and vigilance with regard to terminology are vital if stigmatisation and labelling are to be avoided. It is now generally agreed that in all references to disability the child or person comes first, i.e. we speak of "the child with mental handicap".

Reference to degree of mental handicap should be used for assessment and placement purposes only, and avoided in general usage where possible.
We would encourage similar usage in future departmental terminology.

**FACTS AND FIGURES INDICATING EXTENT OF NEED**

It is estimated that, due to mental handicap:

<table>
<thead>
<tr>
<th>Description</th>
<th>Percentage or Count</th>
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<tr>
<td>2.5% of the school-aged population will require a special/adaptation class;</td>
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<tr>
<td>3 per 1000 will require specialised education in a school for specialised education/training centre;</td>
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</tr>
<tr>
<td>and 1 per 1000 will require care and training in a special care centre.</td>
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With a school-aged population of 1 000 0000, this translates into:

- 25000 needing special/adaptation class
- 3000 needing specialised-education (more if an IQ range of 30-60 is used) and
- 1000 needing special care

A breakdown of figures for the Province shows that there are approximately:

- 3 450 in need of a "specialised education" placement (school for specialised education/training centre) and
- 1-150 in need of a "special care" placement.

Current placements and shortfall:

**Schools for Specialised Education/Training centres:**
Metropole: 1800 670 shortfall
Rest of Province 535 445 shortfall

**Special Care Centres:**
Metropole: 350 (in subsidised centres) - 475 shortfall
Rest of Province: 75 (in subsidised centres) - 245 shortfall

In the Metropole this shortfall exists largely in the Xhosa-speaking communities, whilst in the rest of the Province it is more widely distributed.

Children with mental handicap need and have a right to specialised education.

**NEEDS AND PROPOSALS**

1. **Subsidisation**

   This should be on a par with mainstream education, in line with the Government’s policy of ten years free and compulsory education. It must be noted, however, that small classes are essential for this type of child, and that transport is frequently a pro-requisite which requires further subsidisation.
2. Assessment

Comprehensive services with regard to detection and assessment at as early an age as possible are of great importance. Educational psychology services and school clinics are particularly inadequate for Xhosa-speaking communities. This is of particular detriment to the child with mild mental handicap who may experience repeated failure due to lack of such services.

Children who have already received some basic training and socialisation skills in a training centre/school for specialised education could move into a mainstream unit, furthering their integration into the community and freeing place for another child.

Mainstreaming would not be a suitable option for all children with mental handicap.

Sharing and extending existing facilities: Existing training centres/schools for specialised education could (and in some cases are starting to) become resource centres to areas without specialised facilities. This is along the lines of the E.A.R.S. model, successfully used elsewhere in Africa (see attached document).

It must be recognised that some extra finance could be necessary to enable existing establishments, to undertake this type of outreach.

Curriculum Renewal: A specialised education curriculum needs to be flexible and adaptable. Equipping the child with basic life skills and assisting him or her to reach their full potential in society must be the main objective.

Pre-vocational training/guidance: Children (young adults) with mental handicap should spend years 18-21 in a "pre-vocational" guidance/experiential setting, at a specialised school or centre, to equip them for life.

This is an important phase of their education which needs to be addressed creatively in areas with no existing provision.

Continued Education: continued education programmes should be provided in the above phase as well as in protective workshops, groups homes, day centres for adults, as the person with mental handicap continues to learn through these adult years.

3. Early intervention/pre-school provision

For a child with mental handicap early intervention is highly desirable and can largely influence the ultimate development of the child's full potential.
Some training centres/schools for specialised education already provide pre-school-age classes, but most to not. This needs to be addressed.

More support/subsidisation should be made available to community-based services.

Regular educare centres should be enabled and encouraged to accommodate children with a mental handicap wherever possible.

With early recording and available statistics, it should be possible to project future needs.

4. **Increased provision for "trainable" children**

In the light of the vast costs involved in building further specialised schools, the need is to address the shortfall in terms of existing provision, creatively. Alternative models should be considered alongside the existing model of provision.

Full utilization: Some centres and schools are not fully utilized. In most cases this is due to insufficient staff or transport which could be addressed.

Partial mainstreaming: special classrooms could be set aside on the premises of mainstream schools to cater for children in need of specialised education.

Appropriately qualified teachers and support staff would be needed for these pupils. Other facilities would be shared, avoiding costly duplication and encouraging integration of the child with a disability into the community.

For this to be successfully implemented, sensitivity and commitment would have to be fostered in the entire staff and parent body.

This model could be particularly appropriate where no specialised facilities exist (Xhosa-speaking communities, new housing developments such as Delft and Blue Downs, and rural areas), as well as providing an alternative option to parents in serviced areas.

5. **Provision for children with mild mental handicap**

Special-adaptation classes should be established in areas where they do not exist, and extended where not sufficient.

Appropriately-trained staff are essential to these classes, as is an overall staff commitment to the sensitive integration of these pupils.
Appropriately-staffed school clinics with remedial support should be set up where they do not exist (with enough Xhosa-speaking staff members in those serving Xhosa-speaking communities).

6. **Provision for the Special Care Child**

Special Care Centres need to be increased, and where possible extended, to meet the shortfall in provision. These must be properly subsidised, and their staff placed on a proper remuneration scale.

Education Department Responsibility: Ideally this provision will also fall under the Education Department as these children have the same basic right to "such education, training... and guidance as will enable them to develop their ability and potential to the fullest extent" (U.N. General Assembly 1971).

A separate report has been compiled with regard to this particular area of provision.

7. **Staff Training**

New models of staff training and recognised qualification are needed to accommodate people who have practical experience but little formal training.

Appropriate courses need to be created which are accessible to people who have not had the advantage of extended academic education.

Existing class assistants with more than 5 years experience should be able to obtain (through in-service training) a recognised qualification leading to an adjusted salary. Accreditation and bursaries need to be made available.

Curricula designed specifically for the field need to be developed and implemented. Ordinary teacher-training does not equip the student for this specialised type of education. (Forum members are currently engaged with Proteaville Technical college in developing such a curriculum).

8. **Specialist Services**

Relevant therapies (physiotherapy, speech, occupational therapy) and support services (social work, psychological services) should be sufficient to meet all needs.

9. **Residential Care**
Small groups of children/adults with a handicap may require more specific needs to be met. For example, those with physical disabilities or autism may need residential/hostel accommodation.

ANNEXURE 1
The following individuals and schools have made specific contributions to this report:

Professor Chris Molteno  Professor of Mental Handicap, UCT
Mrs Ekin Kench  Cape Mental Health Society
                Project Co-ordinator, Special Care & Training Services
Mrs Rosemary de Waal  Western Cape Forum for Mental Handicap
Mrs Caroline Taylor
Bel Porto School for Specialised Education
Glendale School for Specialised Education
Filia Training Centre
Oasis Training Centre
Molenbeek School
Ocean View Training centre
Elim Home Training Centre
Nompumelelo School
Alpha School for Autistic children

ANNEXURE 3
Classification of children in need of Specialised Education:

"In spite of certain dissatisfaction with the IQ orientated classification system, it remains the most commonly used in practice" Grover, 1989.

The following classification applies in South Africa:

<table>
<thead>
<tr>
<th>IQ Range</th>
<th>Grade</th>
<th>Category</th>
<th>Placement</th>
</tr>
</thead>
<tbody>
<tr>
<td>50-75</td>
<td>mild</td>
<td>a) educable</td>
<td>a) Special/Adaptation classes and Special secondary schools</td>
</tr>
<tr>
<td>35-49</td>
<td>moderate *</td>
<td>b) trainable</td>
<td>b) School for Specialised Education/Training Centre</td>
</tr>
<tr>
<td>20-34</td>
<td>Severe **</td>
<td>(b) or (c)</td>
<td>(b) or (c)</td>
</tr>
</tbody>
</table>
* The Department of Education has recently raised the upper level of admission to a school for specialised education/training centre to IQ 60

** Within the severe grade, IQ 30 is usually taken as the but-off point for admission to a school for specialised education/training centre.

ANNEXURE 2

TRAINING CENTRES AND SCHOOLS FOR SPECIALISED EDUCATION IN THE WESTERN CAPE PROVINCE

<table>
<thead>
<tr>
<th>Centre Name</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alpha school for Autistic Children</td>
<td>Retreat</td>
</tr>
<tr>
<td>Kairos Training Centre</td>
<td>Oudtshoorn</td>
</tr>
<tr>
<td>Alta du Toit Centre</td>
<td>Bellville</td>
</tr>
<tr>
<td>Karitas Training Centre</td>
<td>Vredenburg</td>
</tr>
<tr>
<td>Beacon Training centre</td>
<td>Khayelitsha Training Group (Cape Mental Health Soc.)</td>
</tr>
<tr>
<td>Mitchells Plain</td>
<td></td>
</tr>
<tr>
<td>Blouvlei Training Centre</td>
<td>Retreat</td>
</tr>
<tr>
<td>Lentegeur Training Centre</td>
<td>Mitchells Plain</td>
</tr>
<tr>
<td>Bel Porto School</td>
<td>Mary Harding Centre</td>
</tr>
<tr>
<td>Claremont</td>
<td>Athlone</td>
</tr>
<tr>
<td>Camphill School (private)</td>
<td>Holenbeek School</td>
</tr>
<tr>
<td>Hermanus</td>
<td>Maitland</td>
</tr>
<tr>
<td>Dawn Training Centre</td>
<td>Nompumelalo School</td>
</tr>
<tr>
<td>Atlantis</td>
<td>Guguletu</td>
</tr>
<tr>
<td>Dorothea Training centre</td>
<td>Oasis Training centre</td>
</tr>
<tr>
<td>Stellenbosch</td>
<td>Belhar</td>
</tr>
<tr>
<td>Eden Training Centre</td>
<td>Ocean View Training Centre</td>
</tr>
<tr>
<td>Worcester</td>
<td>Ocean View</td>
</tr>
<tr>
<td>Elim Home Training Centre</td>
<td>Paarl Training Centre</td>
</tr>
<tr>
<td>Elim</td>
<td>Paarl East</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Eljada Training centre</td>
<td>Rusthof Training Centre</td>
</tr>
<tr>
<td>Oudtshoorn</td>
<td>Somerset West</td>
</tr>
<tr>
<td>Filia Training Centre</td>
<td>Vera School for Autistic Children</td>
</tr>
<tr>
<td>Bridgetown</td>
<td>Rondebosch East</td>
</tr>
<tr>
<td>Glendale School</td>
<td></td>
</tr>
<tr>
<td>Heathfield</td>
<td></td>
</tr>
</tbody>
</table>
WHITE PAPER FOR WELFARE: CHRONIC ILLNESS IN CHILDREN

Introduction
Chronic disease in childhood is a disability which acts like a handicapped disorder, limiting growth and development especially some diseases where the treatment has long term effects (e.g. secondary cancers, physical and other changes with long-term steroids etc). There are implications and restrictions in respect of long term care and quality of life. The chronic disease fundamentally affects the lives of parents and children, including siblings and activities are often restricted.

There may be acute phases and repeated hospital admissions, visits and treatment. As a result delayed puberty, stunted growth, physical disfigurement may occur such as hair loss [acute leukaemia], use of assistive devices [insulin syringes, blood glucose, monitors or wearing of callipers]. Interruptions in schooling may occur and teachers often do not understand the disease, do not want the child in the class or even refer for special schooling when the child should/could remain in mainstream education. Educational retardation may occur from the disease or treatment [e.g. radio therapy to brain]. In the case of children with various forms of epilepsy, teachers do not recognise or understand concentration disorders such as "absences only". Children with tonic-clonic forms may be put out of a mainstream school, transferred to special schools which incurs serious transport problems particularly for impoverished families and the child may therefore discontinue formal education altogether.
Summary of some chronic diseases

Children with chronic diseases may look like "normal" children but their lives may be severely affected by long term prospects of a potentially fatal disease, increasing debility and morbidity. Some chronic diseases are:

- asthma; aplastic anaemia
- cancer
- cardiac abnormality/disease
- chronic renal disease
- coeliac disease
- cystic fibrosis
- diabetes mellitus
- eczema
- epilepsy
- haemophilia
- leukaemia/other cancers
- muscular dystrophy
- phenyketonuria
- rheumatoid arthritis
- sickle cell disease
- tuberculous meningitis

Effects on life-style

There may be limited social interaction with peers and limitation of activities. The attitude of adults and children may be counter productive particularly in school with rejection/ridicule by peers and teachers who do not understand the disease or treatment. The child may become institutionalised for years, in cases needing ongoing treatment, particularly with unsatisfactory home circumstances or a distance from treatment centres [e.g. childhood cancers]. Conversely, parents may be overprotective and normal development be affected.

Inadequate treatment or late diagnosis/misdiagnosis at local level means that children may not receive treatment or do so at an advanced stage of the disease. This is particularly so with impoverished families unable to afford the minimum fee in public sector health services.

Adolescence

Chronic disease differentiates children from their peers at a time when peer group relationships are very important. Instability in the disease state often occurs with puberty or growth spurts. The educational standard achieved is frequently affected, with resultant effect on access to higher education, training and employment prospects. Difficulty in getting employment, permanent employment, medical aid or insurance becomes a problem even when medically considered cured, in remission [cancer] or controlled. Social acceptability may be affected by the disease or treatment.
effects including awareness of later effects and marriageability. In addition there are the risks of exacerbation of the disease, late complications from treatment or death.

**Conclusion**

The difficulties of coping with a child with a chronic disease creates economic and psychological stress for the family. Adequate and accessible treatment facilities and social assistance are essential in controlling the effects of chronic diseases and enabling families to play an effective role that contributes positively to the well-being of the child while minimising the burden on the state.
INTRODUCTION AND BACKGROUND TO DICAG AND CHILDREN WITH DISABILITIES.

DICAG is an organisation of parents of children with disabilities, in an affiliate of Disabled People South Africa, and functions as a non-racial, national organisation.

The focus is mainly on disabled children in difficult circumstances, as a result of past racial oppression, environmental location, and/or severity of disability.

DICAG’s commitment is towards the promotion and protection of the rights of children with physical, intellectual, psychiatric, genetic and sensory disabilities.

The specific reference is to the prevention, rehabilitation, social integration and equalisation of opportunities through the mobilisation and empowerment of parents, guardians and children.

Our ultimate aim is to safeguard the survival, protection and development of children with disabilities.

Parents and children (those who could represent themselves) have the following to say:

(a) THE RIGHT TO SURVIVAL:

In order to protect the survival of their children with disabilities, parents have initiated their own day-care facilities within their respective communities, due to the critical need within their communities. Day-care facilities comprises of multiple disabled children, and different disabilities as well.

There exist a varied age range within these centres, 0 - 32 years. The reason for the varied age ranges, are due to the following:

(a) No facilities for children with multiple disabilities.

(b) Waiting lists for special schools are often long, resulting in children being too old for acceptance when they finally secure a place.

(c) Children with learning disabilities are being dismissed from mainstream schools, after reaching the age of 14 years, having spent most of their years in Sub B or Standard 1, due to lack of remedial teachers.

(d) Transport of special schools are unwilling to enter townships, thus preventing the child from receiving appropriate services and education.
(e) Day-care facilities for "normal" children refuse to accept children with disabilities, due to ignorance of disability, lack of support structures, and training programmes on Early Childhood Development, that are inclusive of disabilities.

(f) Mainstream schools are refusing to allow children with physical disabilities into their schools, claiming that the cost of making the school accessible are exorbitant.

(g) Due to their disabilities, the children are often referred to the health and welfare departments, in the mistaken belief that these children cannot be educated, nor developed.

(h) Generally, the lack of awareness in the communities concerning disability, are the main reason for the marginalisation of children with disabilities in the mainstream of society, thus threatening their right to survival.

Presently, these centres do not receive any assistance with regard to services in education, health, social and welfare services. In most cases, children do not receive single care grants, or disability grants, neither do the centres receive subsidy from state.

The present requirements for subsidy present obstacles for the development and survival of the child, as state requires that:

- children must be profoundly handicapped.

- applications for day-care subsidies require that children must be from the age of 0 - 6 years, where as the centres of disabled children have multiple disabilities, and the age range are usually from 0-35 years, due to the critical need within the communities.

- parent initiatives are required to have clear structures, and specific requirements for buildings.

- children under the age of 18 years, with physical disabilities, are excluded from receiving a grant.

Poor services regarding health care, are evident within rural areas, and life threatening to children with disabilities. Disabled children has the right to basic health care, that also incorporates sufficient physic and occupational therapists.

The present feeding scheme to school children in primary schools, does not extend to the child within the informal day-care centre for children with disabilities. This, despite the fact that poverty are ranking high within the rural communities of our country.

Within our country, DICAG has accessed thus far a total of 78 such groups, and a total of 38 has informal day-care centres. The minimum children per centre is 25, and the maximum a number of 112, with waiting lists that totals 50 or more per centre.
Services are voluntary and are mainly given by parents themselves. Running costs are dependable on donations from the private business sector and the community.

Structures range from derelict shacks and buildings, to houses, community halls and libraries.

Within rural areas especially, there are not enough social services to assist with applications for grants of children and subsidies for the centres.

Currently, children with severe mental disabilities only, are receiving a grant. Parents have challenged social services about the right of all children with disabilities to receive a grant. The responses are basically that "It is not the responsibility of social services to find the irresponsible fathers. Couples only can apply for grants. There is no money for grants. Children must be 15 years old before they can receive a grant, etc."

Mothers have been abandoned by the fathers as soon as their children have been diagnosed as disabled. This in turns denies the child the right to a family life, and to the mainstream of society.

Cultural and society pressures, forces the mother to hide the children within their homes. Attention and care are given to the able-bodied children, and the family often pretends that the disabled child do not exists.

THE RIGHT TO PROTECTION:

Presently, the abuse of children with disabilities, are slowly being revealed by parents, The targets for abuse, are children with the following disabilities:

(a) Hearing impaired children.

(b) Visually impaired and blind children,

(c) Children with severe multiple disabilities.

(d) Severely mentally disabled children.

Most at the children effected, are females, and they often end up with unwanted pregnancies, that they have no comprehension of in the first place. Usually the age range are the 6 to 14 year old who are mostly targeted.

Within the special schools, the problem has been highlighted by the children and the parents. Teachers, who has no empathy for disability, or the understanding, are also contributing a great deal of physical and verbal abuse to the children.
Family members themselves are often the perpetrators, thus denying the child any protection, since the mothers are scared to report the abuse, or in some instances, are participants as well.

Children are also neglected by the very family who should be protecting them. Children with disabilities are abandoned, or totally neglected within the household, given food and water only.

Poverty, unemployment, poor housing, and ignorance are all factors that contribute to the abuse and neglect of children with disabilities.

**THE RIGHT TO DEVELOPMENT:**

This right should be inclusive of the following factors:

- Early Childhood Education.
- Equality of Opportunities.
- Participation in Society.
- Preparation for Adult life.
- Parental Involvement.

Early Childhood Education, should be extended to the young child with disabilities. The absence of stimulation in infancy is a major source of disadvantage and retarded development.

Within our country, the need for ECE of children with disabilities is critical, and therefore it is essential that government structures acknowledge the initiatives of the parents, and support it with financial assistance.

Parents, and the extended families, are the principle, and in most cases the only source of structured stimulation that the children receives.

Community involvement is also paramount in the development of the infant, and programmes need to be implemented to assist the parent in this stimulation.

Children with disability should be treated with the same equality as that of the “normal child”. Appropriate support systems need to be placed within society to create an enabling environment in order for the disabled child to reach his/her full potential, and enhancing their development.

The complex transition from school to adult life should be appreciated, through the development of policies to support young people with disabilities through the process.

Present special schools, need to ensure that specific steps are being taken in preparation for adult life.
It requires that a broad set of goals be determined, that includes vocational, independent living and the adult statute. This in turn requires that assessments needs to be done towards the end of schooling, and the provision of relevant information regarding employment and independent living.

Service provision of different agencies in the field of disability should ensure that this process is coherent, and that continuity of their interaction prevails.

THE RIGHT TO RECREATION:

Recreation and sport, being the only form of active expression in competing, and at times venting frustration, for the disabled person, is sadly a luxury that is often attached to special schools and hospitals that specialise in spinal cord injury.

Facilities in recreation for disabled children, are non-existent within the townships and rural areas of our country.

The young disabled person are often taught the game of basketball an part of their rehabilitation, within these institutions, but once back into their respective communities, they cannot continue with the programme.

Creating sports facilities and programmes, should be extended to the communities and involve organisations with expertise, The involvement of the department of sport and recreation, parents, communities and children with disabilities are important in the planning for guidance and input.

RECOMMENDATIONS:

In order to ensure that the rights of children with disabilities are adequately protected, state should adhere to the following:

1. Present structures and the initiatives of parents should he upgraded and acknowledged by state through subsidy in order to provide appropriate facilities for the children.

2. Existing Early Childhood Educational facilities for able-bodied children, should be inclusive or the disabled child, with the proper support structures, and the inclusion of parents as assistance and support staff.

3. Training centres in educare should expend their training curriculum to be inclusive of disabilities.

4. Legislation must involve the National Education Department wore effectively in special education and Early Childhood Education, and the budget an education should reflect the need.
5. Provincial Education departments must include the provision for appropriate assistive devices for the different disabilities in order to enhance the education of children with disabilities, and it should be inclusive in the subsidy provision of centres and other educational institutions.

6. All children, irrespective of their disability, should be provided with a grant to provide them the necessary right to survival, health and security.

7. Parent involvement is essential in the development and growth of the child, therefore it is essential that a partnership be formed between professionals, state and parents to ensure this development.

8. Programmes involving the parents, their education on their disabled child, should be formalised and implemented. Parents who are informed parents, are cost effective in the long run, they share skills with each other, as opposed to professionals who’s services are expensive, and not readily available.

9. The diversity of pupils with disabilities, and their educational requirements, together with their diverse cultural backgrounds. This requires an investigation as to what exactly is available nationally with regard to education. It would then be necessary to capitalise on those resources, in order to respond to individual needs.

10. National and Provincial government should legislate that schools should provide clear policies affirming the importance and assurance that all children are valued equally. It should be in the form of a written statement and consciously adopted by all staff.

11. The most important factor to take into consideration by the National and Provincial governments, is the need to change attitudes of governmental officials in the different line functions of service provision, professionals, service providers, training agencies, community organisations and society at large, in order to address and broaden the services for children with special needs effectively and successfully.

12. Programmes in empowerment and assertiveness for parents of disabled children, of disabled youths, should form part of the rehabilitation programme that should include the extended families. Rural areas within our country have the largest amount of illiterate parents, which handicaps them to contribute to the cognitive approach to the enhancement of life for their disabled children.

13. Departments of health and welfare, in their rehabilitation programmes, should place more emphasis on the developmental side of the child, to ensure effective mainstreaming into society.

14. State should ensure that the child with disabilities are protected against abuse, through the legislation of human rights, and the implementation of protective policies.
In addressing the nights of children with disabilities, the importance of all role players concerned with the enhancement of life for such a child cannot be overly emphasised.

The need for the Professionals and state to work with the parent and child, and not for them, needs to be addressed seriously.

It is to this end that DICAG has endeavoured to mobilise and empower parents of children with disabilities to lobby for the protection of their rights and integration into society.

Children has a basic right to exist within our communities, more so children with disabilities, therefor the provision for equalisation of opportunities should be entrenched in the constitution, as has been adopted and advised by the United Nations.

COMPILED BY:

WACHEILA GAIT
NATIONAL PROJECTS CO-ORDINATOR
AND PARENTS OF CHILDREN WITH DISABILITIES OF DICAG.
Greetings in Jesus’ Name

We wish to make use of this opportunity to bring to your attention that we as the above-mentioned Church/Society support the idea that South Africa and all its peoples should have a new constitution.

The success of any constitution rests on the Christian principles and values built into such a constitution.

We therefore ask that attention once more be given to the following: Pornography, abortion, gambling, etc., and that stricter legislation should be introduced to control it. We believe and trust that the Almighty will grant you the necessary wisdom and strength to carry out responsibly and in love the difficult task entrusted to you.

D. November
THE CRITICAL CARE SOCIETY OF SOUTHERN AFRICA

FUNDAMENTAL RIGHTS TO LIFE

We as members of the Critical Care Society of Southern Africa have heard that withdrawal of life support will soon be discussed by the Constitutional Assembly. We would therefore like to state our concern and continued involvement with the ethical problems involved in care of the critically ill.

Enclosed please find the statement (prepared by Dr D Burrows, one of our council members) which the council of the Critical Care Society would like to submit as a contribution to support the Constitutional Assembly’s difficult task.

Please be assured of our willingness to participate in any discussion, consultation or to provide literature on this important matter.

Critical care is a multi-disciplinary field concerned with patients who have sustained, or are at risk of sustaining, acutely life-threatening single or multiple organ systems failure due to disease or injury. Critical care seeks to provide with compassion and dedication, care appropriate for the needs of these patients through immediate and continuous observation and intervention so as to restore health and prevent complications.

Dr. J.P. Pretorius MBChB MMed (Chir)(CRITICAL CARE)
PRINCIPAL SPECIALIST AND
HEAD: SURGICAL INTENSIVE CARE UNIT
H F VERWOERD HOSPITAL
PRESIDENT
CRITICAL CARE SOCIETY OF SOUTHERN AFRICA
THE CRITICAL CARE SOCIETY OF SOUTHERN AFRICA

STATEMENT OF PHILOSOPHY

The Critical Care society is cognisant of the vision of a "health system in which all critically ill and injured persons who choose to receive care and for whom care is appropriate will obtain care that maximises the likelihood of desired outcomes for individuals and society, is consistent with emerging knowledge and occurs in a humane and respectful manner."

The society recognises the two objectives of medicine as being on the one hand the necessity to recognise the sanctity of life and therefore the need to strive to save life while on the other hand the need to relieve suffering. The society recognises the severe conflict of interest that occurs when the need to relieve suffering must inevitably mean the death of the patient.

In this regard the society realises that when the time and manner of death has come substantially within the control of medical science, there is a profound wish on the part of all of us to be protected from decisions that make death too easy and quick as well as decisions that make death too agonising and prolonged. Yet it has to be recognised by all that such a "golden mean" defies ready definition, both in theory and practical application in individual cases.

The society understands and is aware that resources can never be sufficient to meet the theory that every person alive is of infinite value and that legislation to that effect is quite impractical. It is our contention that we are the "advocates of our patients" and not the “guardians of society coffers”. However, even were resources sufficient for all our needs it would still be the case that we cannot forever postpone the moment of death and we should not do an merely as an end in itself. To try to save life under these circumstances amounts to nothing more than a postponement of death which, an a consequence merely denies individuals any little dignity that in left to them and often serves no more purpose then an emollient to the consciences to those who are left.

Therefore using our specialised training and specialised techniques placed at our disposal by society we will continue to strive to save life in order to give the individual patient a quality of life which he or she, and only he or she, can appreciate and enjoy.

It remains explicit, however, that individual autonomy in respect of the wishes of the informed patient is supreme to any duty we may have as doctors and nurses.

DR. R. BURROWS
MB BCh FCA(SA)(CRITICAL CARE)
PRINCIPAL SPECIALIST AND
HEAD: INTENSIVE CARE
ADDINGTON HOSPITAL
PRESIDENT-ELECT
CRITICAL CARE SOCIETY OF
SOUTHERN AFRICA

DR J P PRETORIUS
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PRESIDENT
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SOUTHERN AFRICA
SUBMISSION TO THEME COMMITTEE 4
INCLUSION OF A RIGHT OF ACCESS TO INFORMATION
IN THE FINAL SOUTH AFRICAN CONSTITUTION

1. INTRODUCTION

South Africa is one of the very few countries in the world which provides for a free-standing, albeit not absolute, right of access to information at the constitutional level. Section 23 of the Interim Constitution reads as follows:

> Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Constitutional Principle IX of the Interim Constitution furthermore supports the notion of freedom of information, and we would argue compels its entrenchment in a broader form than what Section 23 provides.

It will be argued in this submission that it is of great importance for the development of the South African democracy that a right of access to information be included also in the Final Constitution to be drafted by the Constitutional Assembly.

Section 23 as it presently stands, however unique it is, provides an inadequate right to access to information and therefore ought to be amended in the Final Constitution. The following submission will outline some of the rationales for a more comprehensive right of access to information and how such rationales are inadequately reflected in the existing constitutional provision. Based on the outline of rationales and the critique of the existing clause the submission will provide a proposal for a clause guaranteeing the right of access to information in a way which adequately reflects the rationales.

2. RATIONALES FOR A RIGHT OF ACCESS TO INFORMATION

At least four separate rationales support a right of access to information.

First, access to information is part of the human rights culture that South Africa wishes to build. Most international human rights instruments see the right of access to information as a corollary to the right to freedom of expression. The importance of access to information (or freedom of information as the term most often is in international instruments) has been recognized by the General Assembly of the United Nations which stated unequivocally just after its inception that
“Freedom of information is a fundamental right and it is the touchstone of all the freedoms to which the United Nations is consecrated”.

Another human right, the right to privacy, supports the particular aspect of the right to access to information which provides individuals with a right of access to information about themselves held by the government. With the particular history of South Africa, where organs of state held a wide range of information about individuals without those individuals having a right of access to such information, this particular aspect is important.

More specifically in a South African human rights context, the vision of 'an open and democratic society based on freedom and equality is central to the Interim Constitution because the courts are instructed to interpret the Bill of Rights (Chapter 3 of the Constitution) so as to promote the values which underlie such a society and they may not recognise a limitation on any of the Bill's rights unless it is justifiable in such a society.

The word 'open' in this formulation is unusual and conspicuous. Its presence contrasts, for instance, with its absence in the corresponding formulation in Section 1 of the Canadian Charter of Rights and Freedoms, which was an important drafting models for the limitation clause (s 33) of the Interim Constitution. This suggest that our constitution makers attached great importance to the value of openness.'

A second rationale is less rights-regarding and more democratic in spirit. The importance of access to information according to this rationale lies in its effect on ordinary citizens and their participation in government. Allowing citizens to obtain information is essential for full democratic participation in society, and passing legislation on access to information opens a dialogue between the government and the people. Without full information, the citizen cannot criticize policy. Without a voice and the right to put forward views, the citizen cannot contribute to political and social change.

Indeed, the free flow of information support not only a representative form of democracy but also a participatory form of democracy, as knowledge enables the electorate to interact in the decisions-making process. People must be able to engage in public contestations of ideas, offer alternatives to proposed and official policies, and influence decisions that affect them. The government needs to be responsive to its citizens. Once it is conceded that a vital aspect of democracy is this right of active participation by citizens both at elections and in-between them, it must be conceded as a logical necessity that participants need access to information to make their participation effective and worthwhile.

Linked to participation is accountability, another democratic rationale for access to information. In a responsible democracy the sovereign body is the people and it is to the people that the governors must justify the decisions taken on their behalf. Constitutional Principle IX of the Interim Constitution emphasizes the importance of accountability:

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government,
The adequate flow of information about government is itself a form of justification - letting people affected by government decisions know the bases for the decisions. Enhancing accountability, a right of access to information means that a citizen will be in a position, if he or she so chooses, to know what the government is doing and why. It gives any individual or group in society the opportunity to acquire information about government.

Underlying both the participation and the accountability rationales is a recognition that the South African state includes an essentially authoritarian bureaucracy largely (but not exclusively) averse to change. These features will be difficult to alter but are crucial subject to a thoroughgoing reform of the administrative process if we are really to outgrow apartheid traditions. A right of access to information thus aims to bring to the bureaucracy at least a degree of the public access and transparency that has been brought to the legislative process by the election of 27 April 1994.

Another rationale, improved process, is really the result of the two last rationales - by encouraging participation and strengthening accountability, access to information encourages better administrative decisions.

The final rationale is the rule of access to information in development. As the Reconstruction and Development Programme: Policy Framework states, "Open debate and transparency in government and society are crucial elements of reconstruction and development. This requires an information policy which guarantees active exchange of information and opinion among all members of society. Without the free flow of accurate and comprehensive information, the RDP will lack the mass input necessary for its success."

A right of access to information facilitates a reconstruction and development programme in at least two ways. First, by allowing organizations and individuals outside the government to tap into information held by the government, such a right can encourage the community-based initiatives that are necessary to drive the programme and ensure its longevity. Secondly, access to information ensures that governmental action is taken on the basis of the best possible information. Legislation on access to information ensures that the information the government uses is genuine and accurate, since it has been shared with organizations and individuals outside the government."

Indeed, in order to contribute fully to the, Reconstruction and Development Programme, access to information should be recognized to cover not only information about government but also information held by the government. In other words, the right of access to information has not only a civil and political dimension but also a socio-economic dimension. This means recognizing that governments control vast amounts of what might be termed developmental information: information the use of which can facilitate development. The right of access to this information should be regulated in line with the RDP, with a view towards enhancing its ability to encourage development.

3. **SECTION 23 OF THE INTERIM CONSTITUTION**
As outlined in the introduction a limited recognition of the above rationales resulted in a constitutionally entrenched right of (limited) access to information in Section 23 of the interim Constitution. The ambit of this section is all information held by the state or its organs at any level of government, to the extent that such information is required for the exercise or protection one's rights. As this section presently stands, the scope of this section is undoubtedly vertical in that it expressly applies to only the state and any of its organs and not to private bodies.

It is submitted that Section 23 in its present form is seriously flawed. By limiting the right to apply only when "required" for the exercise or protection of one’s rights it puts the onus on a requester to justify the need for such information. In other words, the Section does not provide for a Right to Know, but merely for a Need to Know. This does not comply with the rationales outlined above and it leaves a much too wide scope for civil servants unwilling to disclose information to refuse and/or delay disclosure.

The present formulation of Section 23 furthermore subjects this fundamental right to a double limitation, since the right is subject not only to the proviso of "required for the exercise or protection" of one's right but also to the general limitation clause in Section 33. It is submitted that the right of access should be subject only to the same limitations as any other of the fundamental rights in Chapter 3 of the Interim Constitution and that any legitimate reasons for non-disclosure of information can be justified under Section 33.

It is furthermore submitted that the scope of Section 23 should not be exclusively vertical. It is suggested that in order to fully reflect the rationales for access to information the ambit of Section 23 should cover information held by all bodies, exercising public power and not only organs of state. State organs at any level would still be the primary target of the section but it would make it possible to get access to certain information held non-statutory bodies, to the extent that such information can be seen to relate to the exercise of any public power. Covering a subject treated to some degree in foreign jurisdictions, the obligation to release information would apply to a limited degree to institutions such as trade unions or private companies where they exercise public power.

Finally, we want to stress that even though a process is underway to draft legislation on access to information this does not diminish the importance of having this right protected at constitutional level. We firmly support the notion of access to information legislation, and welcome the initiative taken by Executive Deputy President Thabo Mbeki to appoint a task group, chaired by his legal advisor advocate Mojanku Gumbi, to draft such legislation. However, by including the right in its Final Constitution, South Africa's commitment to "an open and democratic society based on freedom and equality" will have a much better foundation to become a reality.

4. DRAFT PROPOSAL

Based on the analysis above it is submitted that a constitutional clause on access to information should read as follows:
(1) Every person shall have the right of access to all information held by any organ of state.
(2) Every person shall also have the right of access to information held by any other body in the extent that information held by such bodies relate to the exercise of public power.

In the alternative, in case the notion of a limited horizontal application of the clause is found to be unacceptable we submit that the clause at least be drafted in a way which provides for an unqualified right (although of course still subject to the limitation clause. In that case we propose that the clause should read as follows:

Every person shall have the right of access to all information held by any organ of the state.

It is submitted that the section should continue to fall within the limitations category of “necessary” (if free and fair political activity) and "reasonable" (if not).

Lene Johannessen and Jonathan Klaaren
24 April 1995

We the National Committee of the Union, including the members as the whole, we want to make amendments to the following issues.

1. FREEDOM OF ASSOCIATION
2. THE DEATH SENTENCE

FREEDOM OF ASSOCIATION
(1) These rights have been abused by those who have money here in this country for a long period, even now this is an ongoing process.

(2) The article clerks of the attorneys are not allowed to join any organisations without consulting their principals and their provincial law societies first.

(3) Should any article clerk found taking a part in any organisation without consulting those people he/she will be disqualified by those people and he will never be allowed to be an attorney for the rest of his life.

(4) Furthermore we want all these law societies to be transformed in a democratic societies because even if you can be a professional assistant of the Attorneys for a period of ten years you will not be allowed to be a member of the National Committee of the council of the provincial law society concern.

(5) Their reasons they knew that the professional assistants of the attorneys are going to be sympathetic to the employees, because themselves are the employees of the attorneys. These are some of the reasons why others are afraid of joining their trade union. The lawyers are the people who are practising law daily but their, employees have no beneficiaries whatsoever.

THE DEATH SENTENCE
(1) We want the death sentence to be implemented at least for a period of ten years from now.

(2) Criminals are taking the advantages because they knew that they are going to prison and thereafter they are coming back again into the society.

(3) We reached this agreement because once you have a conflict with someone he/she thinks that the best solution is to kill you. Once there is a real democracy in this country is then we can say, the death sentence must not be applied.

We want these facts being taken into consideration to the new constitution of this country.
Yours faithfully

Mr B Myekeni

the chairperson
typed and signed in the absence of Mr B.M.M.
25 April 1995

We would be very interested in receiving the following report-backs on the constitutional process:

1. Theme Committee 2 - Structure of Government: Separation of Powers (Block 1)

2. Theme Committee 1 - Character of the State

3. Theme Committee 3 - Relationship between levels of Government: The nature and status of the provincial and local systems of government (Block 1).

Please could you let us have copies and address these for the attention of the Chief Librarian.

We would also appreciate it if you could put us on a mailing list to receive future report-backs.

Ellen Potter (Mrs)
CHIEF LIBRARIAN
TRANSVAAL WOMEN'S AGRICULTURAL UNION

April 1995

On behalf of the TWAU Pretoria South region with a membership of 387 members, we are sending a broad submission with regard to the death penalty which under no circumstances must be abolished.

Our region's members feel that the following matters should also receive attention in the new constitution.

1. Abortion - Is murder and must be most strongly condemned. Who must pay for all the medical costs the person who requests it or the taxpayer.

2. Rape - Much heavier sentences must be given, especially when a rapist suffers from AIDS he exacts the death sentence on the victim.

3. Pollution - Stronger guidelines and penalties must be imposed on companies and individuals who pollute our country.

4. Health - More publicity must be given to population control. Our country will by the year 2000 no longer be able to provide for its water and nutritional requirements.

5. Education - The word "Demand" must now be scrapped and free services, free houses, free telephones etc must make way for hard work and each must pay for what he or she receives.

When the youth are caught committing a crime they must not be let off scot free because they are children a 10 or 12 year old can already commit murder. They must be punished so that they can rehabilitate otherwise they will repeat their crime and become habitual criminals.

If our organisation can be of further help we shall readily help to make the new South Africa a better and safer country for all to live in.

MOREEN SNYMAN
REGIONAL CHAIRWOMAN

DEATH SENTENCE
RELIgIOUS SENTIMENTS

As has already been pointed out religious arguments are not per se directly relevant to the determination of the Constitutionality of the death sentence. If it however should however, relate to the opinion and legal mores of a substantive section of the South African community, it might indirectly be of relevance (albeit of limited relevance).
The standing committee on capital punishment of the Methodist Church of Southern Africa, professing to represent in excess of 2 million South Africans, strongly condemn the death penalty in a short written statement submitted to the Court.

It is submitted that the sentiments of the Methodist Standing Committee has not been shown to be necessarily the same as those of its 2 million members, and neither is it clear whether the two million members have approved or even know about this submission.

It furthermore cannot be said to be indicative of Christianity as a whole, and the following passage by Rus Walton (Biblical Solutions Contemporary Problems, Wolgemuth & Hyatt, Brendtwood, 1990, pp 38 - 41) is indicative of the contrary viewpoint:

"For those who would obey the Lord God, capital punishment is not a matter of choice or opinion poll or even court decree. It is God's requirement; it stands as a Biblical principle."

God established the death penalty for wilful murder: 'Whosoever sheddeth man's blood, by man shall his blood be shed: for in the image of God made He man' (Genesis 9:6). Thus, capital punishment was ordained - not just for Noah or Noah's time, but 'for perpetual generations' (Genesis 9:12).

Capital punishment and the manner in which it was to be applied is detailed and reaffirmed many times in the Scriptures (Exodus 21:12-15; Leviticus 24:17-23; Numbers 35:9-34; Deuteronomy 21:1-9, etc). Some of these sentences may seem harsh, yet it is clear that if they had been continued many of the ills that plague society today would never have arisen. In His perfect justice, the Lord God provided for protection of the lawful from the lawless. In Acts 25:10-12, the Apostle Paul makes it clear that he recognizes the continuing validity of the death penalty: 'For if I be an offender, or have committed anything worthy of death, I refuse not to die.'

Importantly, in its application of justice, the Bible carefully and clearly delineates between the crime of wilful homicide (premeditated murder) and accidental death (manslaughter). God's Word also declares that causing the death of an unborn child (miscarriage or abortion) is murder (Exodus 21:22, 23).

Capital punishment is not to be used for personal revenge; it is a matter of retribution to be exercised as a requirement from the Lord God. God instructs us that (1) the person who wilfully takes another's life must pay for that act by forfeiting his own; (2) the death penalty is not to be exercised by an individual or group but by the properly constituted civil authorities; and (3) this must be
done to uphold the sacredness (sanctity) of human life ('in the image of God created He man').

When the Lord God established capital punishment, He also ordained the institution to enforce it (to bear the sword). That institution is civil government - the corporate body politic (Genesis 9:5). The Apostle Paul refers to this power to protect the innocent and to punish the lawbreaker in Romans 13:4: '(the magistrate) beareth not the sword in vain; for he is the minister of God, a revenger to execute wrath upon him who does evil.'

The foundation (basis) of civil government is power (implied or applied) bestowed upon it by the citizenry. When that power is abused or not used, government is weakened and eventually overturned. When that occurs, the individual, the family, the home, and most if not all lawful aspects of society are imperiled. Capital punishment is essential for the protection of the innocent and the maintenance of a safe and peaceful society. It is part of God's grace, one of His provisions for the protection of His creation, man.

Some Christians insist that capital punishment violates God's Sixth Commandment: 'Thou shalt not kill' (Exodus 20:13). In fact, that admonition is directly tied to the penalty for murder. As Rev. David E Goodrum points out the word translated 'kill' - when considered in its original meaning and in its usage throughout the Bible - clearly means 'murder'. Properly translated, it reads 'Thou shalt not murder.' Further, as Goodrum emphasizes, God Himself gives instructions that violators are to be killed for certain crimes and under certain conditions (Exodus 21:12; Leviticus 24:17, etc.).

In the early days of this republic (i.e. the USA), our judicial laws were based upon the Word of God. In A Course of Legal Study - a popular law textbook published in 1836 - this sentiment is expressed: 'The purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every Christian nation. The Christian religion is part of the law of the land, and, as such, should certainly receive no inconsiderable portion of the lawyer's attention. In vain do we look among the writings of ancient philosophers for a system of moral law comparable with that of the Old and New Testament.'

In a brilliant thesis on capital punishment Dr. Francis Nigel Lee explains that it is the duty of civil authorities ('ministers of God to the people for good') to see to it that all murderers receive the death penalty. 'For, the lips of a ruler are to speak the Word of God; and his mouth should not betray justice' (Proverbs 16:10). Judges are rulers who are to 'detest wrongdoing'; for a government is
'strengthened through righteousness' (Proverbs 16:12-15). 'When a ruler executes judgment, he scatters away all evil' (Proverbs 20:8).

Dr. Lee emphasizes, 'It is the same after Calvary!' For 'governors ... are sent ... to punish those who do wrong' (1 Peter 2:14). Accordingly, 'anyone who kills with the sword, must himself be killed by the sword' (Revelation 13:10).

Corrupt government, unrighteous judges, justice denied and not enforced these incur the wrath of God and should incur the censure of godly Christians. 'Why do you show Me iniquity, and cause Me to behold grievance? For spoiling and violence are before Me: and those there are that raise up strife and contention. Therefore the Law is slacked, and judgment does never go forth: for the wicked do compass about the righteous: therefore wrong judgment proceeds' (Habakkuk 1:3, 4).

It is small wonder our nation's justice system has deteriorated! When God's Word is put on the back shelf, the law of man ignore the Laws of the Lord God - and the people suffer.

The Bible tells us that murder pollutes the land, and that the only way to cleanse the land is capital punishment (Numbers 35:33-34). The Bible also instructs us that those nations that fail to enforce capital punishment will be harshly judged (Jeremiah 2:34-37; Hosea 1:4; 4:1-5). By obeying the Lord God and enforcing the death penalty for capital crimes, the nation cleanses itself of the guilt of innocent blood; conversely, the nation that refuses to obey God and avenge the taking of innocent human life must share the guilt of the murderer (Deuteronomy 21:7-8).

God's Word sets forth certain definite rules so that this ultimate exercise of civil power - the death penalty - will not be abused: (1) capital punishment is to be enforced judiciously, impartially, and only after full and proper (and swift) legal proceedings; (2) testimony in such cases must be corroborated by at least two witnesses and should a witness give false testimony (perjury), thus to jeopardize the accused improperly, that witness shall be subject to the penalty attached to the crime under consideration; and (3) capital punishment is not to be enforced in a spirit of maliciousness or revenge (that is forbidden - Matthew 5:38-44), but used only as God directed.

Thus, we may keep His commandments and statutes so that 'it may go well with thee' (Deuteronomy 19:14; Numbers 35:31-34; see also: Proverbs 18:5; 19:19; 21:11, 15; 28:17; 19:4)."
It is known that other church bodies in South Africa has formally adopted a retentionist viewpoint.

In conclusion, it is essential that the realities of crime in South Africa be taken cognisance of.

Although it is accepted that the deterrent value of the death penalty is subject to a divergence of opinion, it would, with all due respect, be foolhardy to suggest that it has no deterrent value. Even though it is extremely difficult if not impossible, to ascertain the number of persons who would have committed a murder had it not been for the existence of the death penalty, Stephen Layson of the University of North Caroline has concluded that for every execution 18 murders are prevented in the United States due to its deterrent value (Rapport, 5 June 1993). Although his study may be subject to criticism it is equally unlikely to conclusively prove it incorrect. At the very least it can be argued that the death penalty serves not only to render an offender permanently incapable of repeating a specific crime or any other crime but it must be accepted that any rational person would at least consider the consequences of his deeds and the question whether the price he may have to pay is not too dear. The South African Police is of the opinion that the deterrent value of the death penalty cannot be underestimated and that practical experience in law enforcement and contact with criminals reveals exactly the opposite.

Notwithstanding an alarming increase in the incidence of serious crime, an increase in brutality and an absolute disregard for other's lives and dignity has in recent years been perceived. The use of maximum force against frail and elderly persons, the rape of a woman during the robbery of a restaurant in the presence of its patrons are realities of South Africa African life. How secure can a community be when an incapacitated rape victim is raped by a gang of would be good Samaritans? Where the existence of serial murders and mass murders were previously relatively unknown in our criminal history, these crimes have unfortunately now become a trade mark of South African society. The Boipatong, St. James Cathedral and Strydom Square massacres, the Cleveland murderer and Station Strangler, to name but a few, are scars which our society will bear forever.

Experience has further revealed a new and unsettling trend in the spate of armed robberies scourging the country. Where robbers in the past only made use of arms and violence in order to overcome resistance, the latest trend for all practical purposes presupposes the indiscriminate use of violence, irrespective the necessity thereof. It would seem that it is no longer merely the threat of violence which is the means to an end but rather the use of violence itself. The taxi conflict in the Republic has also taken its toll and resulted in 52 deaths and 91 injuries in the period January 1994 to June 1994. A substantial increase in the taxi conflict in the period July 1994 to December 1994 resulted in the death of a further 144 persons and 246 injuries.

Reports obtained from investigating officers have indicated that the moratorium on the death penalty has in a number of cases had a direct bearing on the crime at hand. Suspects have on
occasion intimated that this "reassurance" has led to maximum violence being used without regard to the consequences. The use of sophisticated weapons of war including automatic assault rifles, handgranades and limpet mines are indicative of the criminal's indifference to the lives of others.

Violence in our prisons is a further factor with which the authorities have to contend and the murder of fellow in-mates a reality. What motivation exists for a prisoner to refrain from murdering a fellow inmate or a warder (for that matter) when he is already serving a life term.

Has life in South African society become "cheap" or is the reason to be found elsewhere? Surely in a rational society the first question cannot be answered in the affirmative and accordingly the answer should be sought elsewhere. One answer in the opinion of the South African Police is to be found in the fact that the death penalty, although imposed, is no longer carried into execution and that law enforcement and the administration of justice are accordingly brought into disrepute. The unwarranted slaying of police officials, men and women, in the preceding years are testimony to the contempt and total disregard with which the criminal regards not only the administration of justice and law enforcement but also the rights of law abiding citizens. When "war" has been declared against those charged with the safety and security of the public, anarchy is destined to follow. For how long can this be allowed to continue? Idle words of condemnation are no solution and stringent penalties for the perpetrators of such reprehensible acts are imperative.

The Constitution of the Republic of South Africa, being the supreme law of the country, cannot be interpreted without due cognisance being taken of the values of society at large. It is submitted that the Honourable Court must, must when ascertaining what limitations are reasonable and justifiable in an open and democratic society based on freedom and equality, not only reflect on foreign democracies enhancing the same values but must consider, and in fact give preference, to local values.

The danger of unnecessarily doctrines associated with foreign constitutions has already been pointed out by the honourable Mr Justice Froneman in Oozeleni v Minister of Law and Order and Another (1994 (3) SA 624 (ECD) 633F-G).

In recent times there tends to be strong support for the retention of the death penalty in South Africa. (Compare: Herald, 28 March 1990, p6; The Pretoria News, 27 March 1993, pl; The Natal Witness, 8 March 1991; Sowetan, 13 October 1984, p8; Sowetan, 11 March 1991, p7 and Du Preez, Ladikos and Neser, "n Prinsipiele beoordeling van die doodstraf as strafvorm deur 'n groep kriminologie studente" 1992 (1) SACJ p. 32). The ever increasing threat and fear of crime has given rise to urgent calls for increased penalties. This should be seen as a manifestation of the values which our society cherishes, namely to live in a safe and crime-free society. These values are certainly not in contradiction with values enhanced by other free and democratic societies and although the death penalty is not in use by all, the South African situation is such that the death penalty is the only means by which this value can be
guaranteed. The experience of the South African Police is that there is an ever increasing demand from all levels of society for the retention of the death penalty (as well as for the execution thereof), especially in cases where the murder of police officials, robbery with aggravating circumstances and other shocking, premeditated murderous attacks on innocent people, which have become part of the South Africa way of life, are involved.

South Africa is a crime-smitten country and it is therefore not surprising that cries of despair from an outraged community have manifested in retribution being sought outside the parameters of the law. Suspects are known to have been murdered by relatives whilst released on bail. (in one case, a suspect who had escaped from custody was murdered by relatives and members of the community on his return to a certain village). This outrage has even manifested itself within our courts and presiding officers are from time to time compelled to warn family members and members of the public, to refrain from taking the law into their own hands.

The existence of unofficial "court" structures and vigilante groups, meting out harsh and often brutal punishment, are indicative of the fact (or at the very least the perception) that our courts are too lenient. Why was a suspect who had killed an eight month old girl not handed over to the authorities and was it necessary for him to be rescued by the investigating officer? (S v M 1994(2) SACR 24(A)). Why was it necessary for the police to rescue 4 women, accused of killing a man by witchcraft, from execution by a people's court? (Natal Witness, 30 July 1991).

It must be accepted that, for as long as a community is of the opinion that justice is not being done and that the authorities are not doing everything in their power to see justice done and to protect them to the fullest, fear and indignation will result in communities taking the law into their own hands.

For example, during the period July 1994 to December 1994 six suspects were murdered in the Soweto region. Two similar cases have been reported in the same region during January 1995. Although these matters are still under investigation, a strong possibility exists that these could be retributive acts.

During October 1994 a community was up in arms against the presence of a person, branded a criminal, within their society. When this person appeared in court, threats were made that, should he be released on bail, the matter would be taken into their own hands. During the bail proceedings, community leaders gave evidence in opposition of bail. Upon his release on bail an unrest situation ensued and the suspect's homes and business were burnt to the ground. The suspect's son, who was alleged to be involved in criminal activities, was later murdered.

It has on occasions been necessary to call in the assistance of police reinforcements when it was believed that harm may come to suspects appearing in court. Threats by members of the public to kill suspects should they be released are not unknown to the South African Police.
In one case the police were informed that the community had established a so-called "hit-squad" and a "reward" of R20 000-00 had been offered to kill the suspects.

It is submitted that retributive acts by individuals and the community can only be quelled once the authorities have adopted a clear and unambiguous "no nonsense" approach to serious crime. In this regard the retention of the death penalty is of the utmost importance as it remains the most effective crime deterrent measure and leaves no doubt in the minds of criminals and law abiding citizens as to the high premium placed on people's lives, dignity and well being in general.
LESSONS FROM POPULAR POLICING SYSTEMS: THE ANSWER TO AN ACCOUNTABLE AND EFFECTIVE COMMUNITY POLICING SYSTEM?

Paper delivered by
Mbali Mncadi
Community Peace Foundation

at a workshop organised by the
Theme Committee 6.4 of the Constitutional Assembly

entitled
The South African Police Services and the Constitution.

Held at the

on the
20 March 1995

INTRODUCTION.

In November 1993, the Interim constitution of South Africa was enacted. What is noteworthy for policing is that it featured for the first time, a provision for a structure in which the community would participate in local policing. This has implications for the possibility of a major shift of paradigm as relates to the policing of communities.

Implicit in the constitution is that it established a new measurement to evaluate policing. Policing becomes accountable and efficient when communities are engaged in meaningful participation. It moves from a service which in the past took its reference primarily from the dictates of the party of the day - to a service that takes its cue primarily from principles as set out in the constitution and
the laws of the land. Secondly, from the needs of the people living within the jurisdiction of the respective police stations (section 221 of the Constitution Act 1993)1*

Understanding Community Policing

Various definitions have been put forward for the understanding of community policing. Notably there are two ways of dealing with this. One path towards perceptions of policing loads from the “constructs” method characterised by relating to the constructs of community and policing (Singh.1994. Scharf.1989). There is general agreement to the fact that constructs of these concepts are globally problematic and laden with obstructions. This is not made easier by the fact that the tendency has been to relate policing to the formal institutions that perform these tasks. In South Africa this is further compounded by the fact that this institution has been characterised by a past of segregated services, racial inequalities in the deployment and distribution of formal resources and the marginalisation of disadvantaged communities.

The other path proceeds from the objectives of policing. It examines what the product of policing should be and then relates these to the functions of available structures within those locales. The purpose/objectives of community policing are the provision of comprehensive safety. This is safety that takes into consideration the several interests and needs of people in society (Holtzman. 1994). It is also in

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this way that we have come to appreciate that there are number of active agents for safety and security at work in communities. To this end, informal policing structures have played an essential role in the South African reality.

Safety and security have been defined elsewhere as the physical and psychological twins for the protection of individuals (Mncadi. 1994). They represent objects which are a relative gauge for anxiety minimised societies. These relate to a variety of situations that create dangerous environments. Infrastructures underdevelopment; poor sanitation and unemployment have been some of the instances identified as root causes giving rise to these hazards. These are basically development issues. As dangers they usually translate into sickness, crime, injury and even death.

Appropriate interventions can be taken to deal with these conditions as they are brought to bear. Layers of activity which issue the objectives therefore would be primarily, to avoid unsafe conditions. Following on this would be the capacity to react through appropriate intervention to situations which present themselves as a hazard for safety. The ideal plane for safety is where both elements of activity have achieved a level that enables the control of
safety. It is in pooling community/state assets and specialities that the several aspects of
dangers in society can be effectively controlled.

In all the multiple causes for unsafety listed above, the aspect which is often directly related to
policing is crime. However, safety and security involve more issues than would be found in the
activity of policing. The police services constitute one aspect of the expertise that perform
policing tasks. This is in essence represented by Nina (1994. p2) as:

\[ \text{Safety} \to \text{Policing} \to \text{Police} \]

Communities in this instance shall refer to the totality of residents and their institutions in a
therefore be viewed in the light of all the initiatives undertaken to maximise safety and security
of individuals within communities.

Two central issues which should be borne in mind when relating

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community policing to the constitution are:

Firstly, that we seek to ensure a policing system which shall be accountable to communities
and which would effectively deliver safer and more secure environments. This raises
questions as to the extent of community participation and the placement of responsibility for
the issuance of safety.

Secondly, that there is the need to assess the extent to which technical enablements can on
their own deliver a transformed system that virtually and actually empowers communities.

FRAMEWORK FOR COMMUNITY POLICING

1. The context of community responsibility for policing and popular policing

Much has been written on the emergence and operation of informal policing structures. These are
also referred to as popular policing structures. It is interesting to note that the practises of these
structures particularly in the rural areas are based on philosophies of broad consultation and direct
participation which operated prior to the establishment of the police services. These formations are
essentially community initiatives which perform the task of establishing order within localities in
response to the needs at a given time. Forms of these structures include street committees,
neighbourhood watches, self protection/defence units, marshals, anti-crime committees, makgotla,
imbizo and others.

The activities of these structures were promised on creative interventions of various forms.
Paramount amongst these is that they provided protective services and ordering within
disadvantaged communities that had few other options for the administration of problems affecting
the safety of residents. The development of this phenomenon comes within the context of the absence of visible policing by formal structure in the past.

The interventions that these structures engage in are at three levels. These feature firstly, the primary level at which preventative measures are taken. To this end harmony is protected by solving conflict problems between individuals before they develop into major crises. To this end street committees, local peace committees and other structures have been instrumental in resolving problems between disputants.

The secondary level features responses to crises. Lastly, there are actions taken at the tertiary level which feature the control of safety through networking using their specialised capacities. Examples are the way in which community organisations plan and administer major events such as rallies. Marshals get involved in public order policing and crowd control, while other civic bodies would have appealed to the first aid and medical facilities to attend to any injuries and distress problems.

Popular structures work at different capacities depending in different areas. The major advantage that popular structures have in this regard is that they have available to them a dynamic base for solving problems that cuts across the variety of sectors dealing with safety problems. The attributes of the approach used are that they:

- Consult with a variety of sectors or through mass meetings. This ensures that their activities are in line with the needs of those affected. It establishes accountability to the people they serve.
- Consultation also ensures that people participate in decisionmaking on issues affecting them. Often participation is open to all members of the public. This can be practically arranged for sectional areas of a larger community.
- Plan jointly and allocate tasks to those affected.

This enables them to handle problems in a holistic manner - tackling the various aspects and angles. In Bonteheuwel for example the neighbourhood watch relates to the health, unemployment and education sectors of the Community Safety Forum.

2. Policy based on the principle of participation

If the goals of community policing are safety and effectiveness, then formal structures could learn a lot from community practises. The policy underpinning present day community policing in South Africa could well have been inspired by the practices of marginalised communities. These are those communities whose collective Interest has in the past been treated as insignificant and thus relegated to the margins.
In his policy document the Minister (pl4) alludes the necessity for the interface of the formal and informal policing structures.

"Local station commanders must interact with, and accommodate informal policing systems... they add to the problem-solving capacity of the community. In many rural communities, informal policing has contributed to stability. There must be clear regulation of both systems. Informal policing and justice mechanisms must be subjected to the same requirement of accountability, transparency and fairness as the formal Police Service."

It should be added that the urban situation of informal policing has been as effective. The Guguletu example springs readily to mind in this regard.

3. The Constitution and policing.

The purpose of constitutions is to lay the basis/foundation/ for relations between and amongst various institutions and individuals. In the interim constitution section 221 relates to policing at the local level.

Section 221: Local/ Community Policing

Basic rules for community policing are governed by this section which provides for the establishment of community police forums at the police station level. These are to be composed of members from both the police services and communities. Wisely, both the constitution and the police bill adopt an inclusive approach in that there is no stipulation made on the proportions of representation of both groups. This allows for the local dynamics as being better placed to determine the quantum of participation.

However as to whether this is sufficient allowance for community participation and decisionmaking on the safety of communities is in question. This has to be examined against the practical experiences of community bodies and members in their relations with the police. The fact is that a significant number of communities face resistance from the services in their daily tasks of safety provision.

It would seem that the answer to this dilemma would be to give constitutional recognition to the informal systems.
COMMUNITY / POLICE RELATIONS

The movement towards community/police relations is one established notably through the Peace Accord. The environment within which the ideal of relations between police and communities can work best would be one that is harmonious. However, the reality of our situation is one of past hostilities between disadvantaged communities (which constitute the majority of clients for safety services) and state structures in general - the police services in particular. Implications are that to transform this state of affairs shall have to depend on a gradual negotiated understanding between communities and the police.

Studies conducted under the auspices of the Community Peace Foundation on the attitudinal perceptions between communities and the police in community policing confirm this. The first study was conducted before the elections by Zelda Holtzman. The other 18 recent research which was done by Roots Marketing and Research Company in December 1994. What is significant is that both research studies revealed that the majority of members of the force view community policing as a partnership in which the service derives information for investigation purposes from civilians!

Part of the tensions between formal structures and informal structures are predicated upon uncertainty in roles and the coexistence of the two forms of policing. Police anxiety (where it exists) is based on suspicions that these structures may encroach the professional turf and take over duties of members of the service such that they are rendered redundant n the other hand, informal structures feel resentment at lack of meaningful consultation by members of the service. Their abilities are constantly undermined or ignored whereas they have provided a community service at a time when the formal sector was either unable or unwilling to do so. This they feel serves to continue the marginalisation of the very communities to which the services are supposed to be accountable.

It is important that negative competition between these structures is minimised since their respective attributes could supplement rather than stifle a comprehensive form safety provision. The combined abilities have the potential of offering communities with a dynamic network of safety resource (Holtzman & Nina: Work In Progress).

One effective way of dealing with this is through network training in community policing. This empowers community and state structures to interface with each other. Guguletu presents an example of this. After the Community Peace Foundation conducted training for street committees
which included these aspects in 1993, these structures began relating to the police services, magistrate's courts and the Ikapa Town council in problem solving.

Presently the Guguletu Interim Community Police Forum is conducting workshops aimed at understanding their roles and delimiting functions. These are facilitated by IMSSA. At these workshops the component parts ie community and police are involved. Roles are being negotiated. Similar activities in this regard are being conducted in other parts of the country.

There can be little success in bridging the gap between communities and the police services, unless the police at local stations are ready to concede that members of the community are best placed to:
- Identify the priorities they have as regards their safety. To that end therefore police are accountable to the community in terms of dealing with those issues prioritised by the community.
- Understand and have the skills to deal with the dynamics at play in given situations. They should be allowed the space to use their broad base of resources to do so.

7

CONCLUSION

The general mandate of Theme Committee 6.4 of the Constitutional Assembly is to encourage participation of as many affected parties as is practicable in issues of the performance of the security services in the national interest (Constitutional Assembly brochure.1995).

This is done in the hope that the transformation of these bodies can be achieved to reflect a way of life as yet unprecticed in what had become the mainstream of South African life. One that strenuously attempts to improve the quality of life of people by giving the best protection that the country can.

More effort should be put into demarginalising informal systems for policing. Constitutional recognition of the existence of informal policing bodies could contribute to creating a worthy respect for informal organs. This would provide the first step to smooth the way for community/police relations. To that end it is suggested that section 221 should include the provision that local initiatives founded in the community for the provision of safety and security shall be a component of local policing.

Issues of criteria could be dealt with through consultation with community bodies engaged in these activities. It can be mentioned here that this is more likely to be a function performed by a representative range of localised structures at the provincial level.

Having said that, it should be stated that constitutions are not of themselves sufficient guarantors for transformed policing systems. The whole concept of community/police relations is relatively
new terrain. A lot shall depend on negotiated roles between community structures and the police to suit the dynamics of localities. This is a process in which the Guguletu Interim Community Police Forum is currently undergoing.

This can be greatly assisted by training for both police and communities to de-attitudinalise past hostilities.

8

LEGISLATION

Constitution of the Republic of South Africa Act 200 1 1993
(aka the interim constitution).

GOVERNMENT DOCUMENT


REFERENCES


Towards Democratic Policing. University of the Western Cape. Belville

Scharf W. 1989: “Community Policing in South Africa” In Bennet T W,


PIETERMARITZBURG REGION

LAWYERS FOR HUMAN RIGHTS

THEME COMMITTEE NUMBER 4

Herewith please find a submission from Lawyers for Human Rights, Pietermaritzburg.

Attached thereto are endorsements of the Lawyers for Human Rights submission from the following:

- AIDS TRAINING, INFORMATION AND COUNSELLING CENTRE PIETERMARITZBURG
- AIDS TRAINING AND INFORMATION CENTRE - DURBAN
- AIDS TRAINING, INFORMATION AND COUNSELLING CENTRE EMPANGENI
- CHILD AND FAMILY WELFARE SOCIETY - PINETOWN-HIGHWAY
- CITY COUNCIL OF THE CITY OF DURBAN
- COMMUNITY LAW CENTRE
- DEMOCRATIC PARTY
- FAMILY AND MARRIAGE SOCIETY OF SOUTH AFRICA PIETERMARITZBURG
- LIFELINE - PIETERMARITZBURG
- NATIONAL PROGRESSIVE PRIMARY HEALTH CARE NETWORK
- PIETERMARITZBURG ADVICE OFFICE
- RAPE CRISIS - PIETERMARITZBURG

LAWYERS FOR HUMAN RIGHTS

29 April 1995
1. PURPOSE OF THE SUBMISSION

Lawyers for Human Rights, Pietermaritzburg, acting in the interests of human rights in South Africa, makes the following submission to the Constitutional Assembly in order that the provision relating to sexual orientation within section 8(2) of Chapter 3 (Fundamental Rights) of the Interim Constitution be retained.

2. ARGUMENT

2.1 The purpose of law in South Africa should be to protect the rights and freedoms of all persons.

2.2 South African law has a history of being coercive with regard to human relationships. The Immorality Act of 1957 legalised attitudes of intolerance in South Africa. In an open and democratic society there should be no room for intolerance. The struggle for tolerance in South Africa has a broad foundation encompassing, alongside race, the full recognition of sexual orientation as a human right.

2.3 Based on the principle of equality, all rights and freedoms should be guaranteed to all human beings. With the exception of the exploitation of power relationships, there is no justifiable reason for state intrusion into private non-reproductive consensual adult relations. The autonomous right to privacy with regard to sexual orientation should be protected as a fundamental human right.

2.4 Arguments against sexual orientation have foundation in religious doctrine and moral theories. The law should not legislate on morality because any prescription by law leads to a limitation on the extent of freedoms. Sexual orientation is ineradicable, therefore the law should not limit liberties with regard to sexual orientation.

2.5 Schedule 4, paragraph iii, of the Constitution Act 200 of 1993, states that:
"The Constitution small prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity."
Accordingly to fail to protect the fundamental human right of sexual orientation, the underlying values inherent within the Final Constitution will be threatened, and the whole Constitution weakened as a consequence. Therefore it is imperative that the sexual orientation clause be enshrined within the final constitution.

3. SUBMISSION
Lawyers for Human Rights submits that section 8(2) of Chapter 3 of the Interim Constitution be retained in full. This section reads:

“No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”

Signed on behalf of Lawyers for Human Rights,
Pietermaritzburg

ATICC
AIDS Training, Information and Counselling Centre

13 April 1995

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY: SEXUAL ORIENTATION CLAUSE

The AIDS Training, Information and Counselling Centres (ATIC) are an integral part of the National AIDS Programme of South Africa. The KwaZulu-Natal province has the highest prevalence of HIV in the country and current numbers of people with AIDS are escalating at an alarming rate.

In order to curb the spread of the HIV epidemic, homosexual, bisexual and heterosexual people need to be educated to practice safer sex. In order to do this effectively, a climate of acceptance and non-discrimination, regardless of sexual orientation, is imperative.

The ATICs in KwaZulu-Natal therefore fully endorse the enclosed submission.

G. D. Wood (Clinical Psychologist)
on behalf of: Durban AIDS Training and Information Centre
Pietermaritzburg AIDS Training, Information and Counselling Centre Empangeni AIDS Training, Information and Counselling Centre.

CITY COUNCIL OF THE CITY OF DURBAN
I totally and absolutely align myself with the submissions made by Lawyers for Human Rights regarding the draughting of the final Constitution for South Africa.

My endorsement applies particularly to the retention of the sexual orientation clause, section 8(2) of the interim Constitution.

C. M. LOWE
City Councillor
City of Durban

COMMUNITY LAW CENTRE

20 April 1995

ENDORSEMENT OF LHR SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY AND PROVINCIAL GOVERNMENT

Your letter dated 11 April 1995, refers.

The Community Law Centre (CLC) wish to place on record that we endorse your submission to the Constitutional Assembly and Provinicial Government that the final and KwaZulu / Natal provincial constitutions should protect the right to non-discrimination on the basis of sexual orientation.

Greg Moran
Training Co-ordinator

cc: Bongani Khumalo, Acting Director

Democratic Party

20 April 1995
We totally and absolutely align ourselves with the submissions made by Lawyers for Human Rights regarding the draughting of the final Constitution for South Africa.

Our endorsement applies particularly to the retention of the sexual orientation clause, section 8(2) of the interim Constitution.

C. M. LOWE
Democratic Party Caucus Leader
Durban Transitional Metropolitan Council

FAMSA

19 April 1995

FAMSA Pietermaritzburg hereby endorses its support for the submission drafted by Lawyers for Human Rights, Pietermaritzburg, on the sexual orientation clause within the Interim Constitution.

J Bell
DIRECTOR.

LIFE LINE- PIETERMARITZBURG

24 April 1995

We wish to endorse the submission by lawyers for Human Rights.

It is our belief that tolerance for all groups should be entrenched on the constitution and that the right to choose one's sexual orientation is a fundamental human right.
We are extremely happy to endorse the submission which you are placing before the Constitutional Assembly and the Kwazulu-Natal Provincial Legislature.

We believe that it is imperative that the sexual orientation clause should be retained in the constitution.

MICHAEL VVORSNIP
SENIOR NATIONAL CO-ORDINATOR

PIETERMARITZBURG
ADVICE OFFICE

The Pietermaritzburg Advice Office endorses the submission by Lawyers for Human Rights on the retention of the sexual orientation clause as contained in Section 8 (2) of the Interim Constitution.
A.P. PADARATH
Co-ordinator

PINETOWN - HIGHWAY

CHILD & FAMILY WELFARE SOCIETY - KINDERSORGVERENIGING

18th April, 1995

This agency unreservedly endorses the retention of Section 8(2) of the interim Constitution. We believe that sexual orientation is a fundamental human right which must be enshrined in the Constitution.

We support the Lawyers for Human Rights endeavour to ensure this clause remains in the constitution.

MRS PRISCILLA MCKAY
DIRECTOR

RAPE CRISIS
PIETERMARITZBURG

April 19, 1995

Rape Crisis, Pietermaritzburg, fully endorses the abovementioned submission by Lawyers for Human Rights regarding the final Constitution of South Africa.

We strongly feel that the sexual orientation clause be kept in the Constitution.
The PUBLIC SERVICE LEAGUE OF SOUTH AFRICA (PSL) wishes to thank the Subtheme Committee 6.1 for the opportunity to comment on its first report. The comments are made in the order the questions were put.

1.1 The constitution, as supreme law should reflect the Public Service. The constitution should spell out the broad framework and principles of the Public Service. This will give the Government a large degree of flexibility in respect of the ability of the Public Service to adapt to changing circumstances.

The detail of the Public Service should be in a separate Act of Parliament. The presence of such an act would obviate unnecessary delay in bringing about amendments to the Public Service.

2.1 The Public Service should consist of officers employed by Central Government to perform functions of a Governmental nature and over which the Government can exercise control.

2.2 The Public Service should execute the policy of Parliament as laid down in its statutes. These statutes should reflect the desires of the community.

2.3 The present status quo should be maintained, viz. that:

(a) the Minister should be accountable to the public and Parliament for the actions or inactions of the Public Servants employed under his control,
(b) The head of a department is accountable to his Minister; and
(c) the public servant are accountable to their heads of department.
2.4 The present Constitution provides for the Government as employer with the proper authority to promote a public service which is broadly representative. These provisions should be kept in a new Constitution.

2.5 The public service should be representative of the public at large. This representivity could be achieved through the deracialisation of state institutions.

2.6 It is the duty of the politician (as representative of the public) to consult with the public. Public Service managers can become involved by doing the necessary research and drafting of proposals. This should, however, not be part of the Constitution.

2.7 Public Service Managers must concern themselves with the implementation of public policy. Assessments of all staff must be done at regular intervals to evaluate whether they implement public policy.

2.8 There should be an independent office to deal with grievances, the public and public servants. This office should have the power to make binding decisions.

3.1 The functions of policy-making and administration should be separate and not integrated, although a measure of interaction should be allowed.

3.2 Limited political appointments for Ministers and other political office bearers of personal supportive administrative staff and of advisers is supported. However, if these officers are appointed in terms of the Public Service Act, they should be subjected to the same entrance requirements and terms and conditions of employment as for other public servants.

4.1 The Public Service commission should be retained. Provision for such a body must be made in the Constitution. It should promote uniformity in personnel and state administration. The present status quo of the Public Service Commission should be maintained.
4.2 The Public Service Commission must retain its impartiality. It should however, work in close co-ordination with the Minister. The present relationship between the Ministry and the Commission should be retained.

4.3 The Public Service Commission must remain accountable to Parliament. If Parliament appoints a Select Committee to deal with matters of the Public Service Commission, the Public Service Commission should reply to that Select Committee.

4.4 If a public servant requests that his case should be referred to the Public Servants Commission, his request must be acceded to. In other cases, recourse in terms of the Public Service Labour Relations Act, should be maintained.

4.5 It should not be the concern of employee organisations as to who should represent the State in the bargaining process. Their only concern should be that those representatives are mandated to act on behalf of the State. The issuing of mandates depends on the matters under discussion.

4.6 The existence of Provincial Service Commissions cannot be supported. It is, however, suggested that the membership of the Public Service commission be increased to perhaps 7 people. Further that an office of the Public Service Commission be established in every province. These provincial offices should have limited delegated powers.

4.7 The Public Service Commission should be the only body to determine norms and standards for the Public Service. Delegation can be applied by means of the Public Service Act, its Regulations, Staff Code and Circulars.

5.1 The Public Service can be a good agent to promote the envisaged development. The Government should establish the policy and framework of the envisaged development.
The ministers, preachers, evangelists and other Christian leaders, who gathered together at the KwaSizabantu Ministers' Conference from 6 to 9 March '95, extend their fraternal greetings to Christ's body.

Meeting around the theme of “Pressing On Towards the Goal” (Phil 3: 14), it was concluded that a cause of great concern is the slackness of ministers (Jer 48:10) who do not stand in the gap (Ezek 22:30). Since our pulpits seem to be barren and our lives lack holiness we do not effectively wield the sword, the Bible, which God has given us. All the conference speakers concurred that sin in its various forms is rampant in the church. Lukewarmness has caused a spiritual paralysis rendering the churches witness ineffective. We are desperately in need of a God-given revival but without a return to Biblical standards and reformation in the church we cannot expect to see a move of God in our churches and land.

To the Christians of South Africa we say there are forces at work in our country which are determined to overthrow every God-given norm, as can be seen from the moral erosion. Those who are promoting these destructive policies believe they can do so because they anticipate that there will be no opposition from the Christians whom they apparently regard as irrelevant and divided.

For this reason, as Christians we must identify the essential values we hold dear and unite to uphold them. These values are:

1. God exists and He has spoken in a way which is understandable to people.

2. God has revealed Himself in a unique way through His Son the Lord Jesus Christ, the second Person of the Trinity.

3. God has preserved His revelation for us in the Bible, His infallible Word.

4. Although God made man perfect, he rebelled and fell into sin. Sin resides in the heart of man.

5. The solution to sin is repentance and faith in the atoning death of Christ.

6. The sin of those who will not bow the knee to the Lord Jesus must be restrained by God's law (1 Tim 1:8-11).

We fear that, far from restraining sin, it will be inflamed by certain developments taking place in South Africa. For this reason, we have written to the Government of National Unity urging our
leaders not to undermine the morals of our co. Please pray with us that our petition will meet with a favourable response.

However, should our peaceful petition fall on deaf ears, it will be necessary to take some form of action to convince the authorities that we are serious. This may, for example, take the form of a mass gathering at Parliament.

In addition, we need to be alert to the possible opening of sex shops in our area. These will bring prostitutes and drug peddlers with them while crime will increase sharply.

More and more pornography, promiscuity and violence is being shown on TV. We urge Christians to exercise great caution with what they and their children watch. Some Christians have even been led to get rid of their TV sets.

The drinking of alcohol gravely concerns us. We must continue to warn our people about this danger and consider ways of reducing the sale of strong drink in our area.

We would like to warn Christians that there is a rise in satanism and the occult. Our church members must be informed about these dangers. We must also be aware of the spiritual consequences of incorporating traditional healers and other alternative medicines into our health care system.

The planned local government elections provide us with an excellent opportunity to identify like minded people in our wards. By working together with them, we can ensure that candidates sympathetic to the Biblical views, outlined in our statement to the Government which is attached, are elected to represent us in our local town or city councils. Accordingly we urge all Christians to register as a matter of urgency for the local government elections.

Above all, we must not neglect our prime task of proclaiming the glorious Gospel of our Lord Jesus Christ that souls may be saved and Christians may be discipled in the faith.

**Document of Concern**

The Kwa Sizabantu Ministers' Conference meeting from 6 to 9 March 1995 notes with concern different trends that threaten the wellbeing of the citizens of the country. This may result in the government of the land becoming increasingly estranged from the people. The thousand delegates at the Conference representing a large variety of different denominations then came up with the following statement. . . . .

These expressions of concern are not new. The basis of Christian unity was outlined in the Kwa Sizabantu Affirmation of 1991. We also outlined our views on respect for life, freedom of religion,
government, private ownership of property and a return to Biblical morality. In our 1992 Statement and the document 'Christianity and Religious Freedom', supported by almost a quarter of a million signatures, we outlined the basic freedoms needed to freely practice our faith, stated the need for the Triune God to be mentioned in the Constitution and rejected the Interfaith movement. These documents were submitted to the Multi-Party Negotiating Forum and political leaders. The submissions were received with promises that they would be acted upon. Most of these promises have not been honoured.

We maintain the stand that the Living and True God (1 Thes 1:9) has ordained two distinct institutions for the good ordering of society - the Church and the State. Although they have separate functions, both are accountable to Him. When the state refuses to accept its accountability to God, it becomes autonomous and sets itself up in the place of God. This is not acceptable.

Moreover, God has laid down norms for the good ordering of society. Many of these are based on unchanging moral standards designed to restrain the sin that is latent in the human heart (Mark 7:20-23). We are therefore alarmed when we see strong indications that legislation is being prepared which would inflame rather than restrain man’s latent sin.

We reject secular humanist education for our children. Education is primarily the responsibility of the parents and should be in harmony with the religion, language and culture of the parents. As Christians we reject any compulsory Interfaith Religious Education. We can for Biblical Studies to be included in the school curriculum. The Government must respect the convictions of the parents who may prefer private tuition for their children.

We further maintain that the family is the building block of society. It consists of one man and one woman in a permanent union, and the children that result from that marriage or are adopted into it. It provides a secure environment in which the legitimate sexual needs of the parents are met and in which children are raised. We will resist all efforts which undermine the family. These include:

1. The flood of pornography:
We warn that moves to unban pornography will inflame sexual passions, especially of the youth, and will inevitably continue the sharp increase in the number of children and women who will be sexually abused, raped and murdered. Pornography and human rights are mutually exclusive. Pornography is an addictive, destructive and exploitative industry. Human rights require the right to decency, the right to life, the right to security and safety and the right to protection from exploitation and abuse. Pornography infringes upon each of these precious freedoms.

2. The distortion of sex:
The popularising of sexual promiscuity and perversion like homosexuality will accelerate the spread of HIV/AIDS and other sexually transmitted diseases. These will only be controlled when society returns to the God-given and traditional model of abstinence before marriage and faithfulness in marriage. We therefore reject the inclusion of special protection for homosexuality and other sexual perversions in the Bill of Rights.

3. Value-free sex instruction in schools:
Experience in other countries has shown that sex instruction is not neutral but encourages experimentation and promiscuity, thus placing vulnerable sexually immature adolescents/teenagers at increased risk of sexually transmitted diseases and HIV/AIDS. Moreover the proposed sex education syllabus is biased in favour of the so-called “Alternative Lifestyles” which are unacceptable to Christians.

4. **The abuse of AIDS education:**
We are concerned about the nationwide promotion of condoms for prevention of HIV/AIDS and STDs, in view of known condom failure. This is in conflict with the World Health Organisation statement (1991) that “the only safe sex is with one faithful uninfected lifelong partner”.

5. **The legalisation of prostitution:**
The failure of the authorities to act against prostitution has already led to young women being brought into South Africa from Eastern Europe and Asia as sex slaves. Already young South African women are being abused and degraded in this way. The legalisation of prostitution will accentuate this trend.

6. **The legalisation of abortion:**
It is not acceptable that unborn babies should be killed in the womb while murderers are not executed. We maintain that anyone who robs a person of his most precious possession, his life, is a murderer.

7. **The legalisation of gambling:**
Gambling undermines the family in two ways. By implying that wealth is the result of luck, it undermines the work ethic and leads to poverty. We insist that true wealth results from hard work, the application of knowledge, the use of tools and the blessing of God. We warn that the legalisation of gambling will lead to addiction, especially among the disadvantaged section of society, and greatly increase poverty. People will deprive children of food in order to gamble in the vain hope of “striking it rich” and being able to make it up to them. The resulting strains on the social services and welfare agencies and loss of productivity will cancel out any perceived tax gain by the state.

The values listed above and the threats to them are of great concern to us. Peaceful petitions along the line of the present one have been ignored. We urge the Constitutional Assembly, the Constitutional Court and the Government of National Unity not to ignore these values which are held dear by a majority of South Africans, but to take them seriously. We are loyal, peaceful and law-abiding citizens. Ignoring our peaceful petition will force us to take stronger action.
24 April 1995

The students of the Parel Vallei Students Christian Association wish to advise you of our feelings regarding the writing of the new constitution for South Africa:

1. Freedom of religion was promised before the elections in 1994 and must be kept in the new constitution.

2. We as christians strongly oppose the fact that South Africa is to become a secular state.

3. Religion/christianity cannot be separated from public life. It is important for ministers to visit schools to spread the gospel.

4. The wording "God Almighty" must be included in the new constitution. A nation that rejects God as Soverign Lord will be rejected by Him. This is His nation we cannot allow that to happen.

May you draw closer to Him as you prayerfully consider our requests. Remember if God is for us who could be against us.

S C A CHAIRMAN
C.C. The A.C.D. Party
Mr. R. Meyer.

80 signatures
Proposal

That the theme committee should recognise children's fundamental human right to physical integrity and should ensure that the Constitution expressly provides children with "a right of protection from all forms of physical or mental violence". (This reflects the protection guaranteed by Article 19 of the UN Convention of the Rights of the Child)

The Interim Constitution

Section 10 of the Interim Constitution provides that: "every person shall have the right to respect for and protection of his or her dignity";

Section 11 gives the right to "security of the person" and the right "not to be subject to cruel, inhuman or degrading treatment or punishment".

While both these sections apply to all South African citizens, including children, the interim constitution also, under the special section dedicated to children (section 30) provides that: "Every child shall have the right ... to security..." (30(1)(c) and the right "not to be subject to neglect or abuse" (30(1)(d).

Why these provisions under the Interim Constitution are not sufficient to protect children

Children, because of their physical, emotional and financial dependency, are particularly vulnerable members of society who are entitled to special measures of protection,

Their dependency also means that children are sometimes subject to forms of coercion which violate their human rights. These violations are often unrecognised as such, or defended as within the rights of parents, communities or institutions - children being seen as the property of others rather than individuals in their own right. This is why the Constitution must take particular care in the designation of rights for children.

Section 8 of the Interim Constitution provides for a right not to be discriminated against on the ground of age, but the Interim Constitution fails to protect children from being discriminated against in this fundamental human right of physical integrity. Moreover, because current judicial, educational and institutional regulations provide that boys may be corporally punished whereas girls may not, male children are not being protected against discrimination on the grounds of gender.

Without specific Constitutional protection against all forms of physical violence to children, provincial legislatures (under section 126), or individual schools (under section 247), or particular
religions (under section 14) might all successfully claim a constitutional right to beat children in schools under the Constitution, for example against a proposal by the National Parliament to legislate against school corporal punishment.

The Constitutional Court is currently (March 1995) being asked to consider whether the judicial whipping of juveniles is constitutional. The fact that this outdated and colonial practice, condemned by international human rights law, is not clearly unconstitutional demonstrates the lack of clarity of the interim constitution. Even if this appeal to the Court succeeds, the legal point under consideration is a narrow one restricted only to whipping as a sentence of the courts. It is most unlikely to affect other physical punishment of children.

The constitution and the UN Convention on the Rights of the Child

The President indicated on February 17 that South Africa will ratify the UN Convention on the Rights of the Child during this session of Parliament. Nearly 90 per cent of the world's countries have already ratified the Convention, more than any other international treaty or charter - signifying the importance of children to global progress and the universality of the rights within the Convention.

Whether or not Parliament decides under section 231 of the interim Constitution to make the Convention binding in national law (as is the case in some other countries) it is obviously important that the Constitution and the Convention are compatible. While the Constitution is of course the supreme body of law within South Africa, a national constitution cannot be used to justify a breach of international law.

The Convention is clear on children's rights to physical and personal integrity. Article 19 requires protection from 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child'. Article 2 insists that all rights must be provided without discrimination to all children - so that punishments or treatments involving physical violence cannot be justified on grounds of culture, religion or tradition. Article 37 prohibits all cruel, inhuman or degrading treatment and Article 28.2 insists that school discipline is administered 'in a manner consistent with the child's human dignity and in conformity... with the Convention', including of course conformity with Article 19.

The UN Committee on the Rights of the Child (the elected expert committee responsible for monitoring implementation) has emphasised during its consideration of initial reports from ratifying countries that physical punishment, in the home and in institutions, is not compatible with full implementation of the Convention. The Official Report of the Committee's fourth session indicated that the Committee recognised the importance of the question of corporal punishment in improving the system of promotion and protection of the rights of the child. Article 19 was 'intended to prompt those in authority in each country to find the most effective way in their own societies to break cycles of violence that were often perpetuated from generation to generation under the cover of tradition and custom’. In a General Discussion in October 1994 on children's rights within
the family the Committee re-emphasised children's rights to physical integrity and rejected attempts in some countries to draw a line between acceptable chastisement and abuse.

Most recently, in its 'concluding observations' on the initial report of the United Kingdom, the Committee stated: The committee is also of the opinion that additional efforts are required to overcome the problem of violence in society. The Committee recommends that the physical punishment of children in families be prohibited in the light of the provisions laid down in Articles 3 and 19 of the Convention. The Committee recommends that the provisions of Articles 19, 28, 29 and 37 taken together with the principle of the best interests of the child require that public educational camps be launched to emphasise the child's right to physical integrity. Such measures would assist in creating a climate of opinion so as to change societal attitudes in the nonacceptance of the use of physical punishment in the family and to the acceptance of the legal prohibition of the physical punishment of children'.

The Human Rights Committee and the International Covenant on Civil and Political Rights

South Africa has also signed (on October 3 1994) and is committed to ratifying the International Covenant on Civil and Political Rights, Article 7 of which guarantees protection from 'cruel, inhuman or degrading treatment or punishment'. The Human Rights Committee, which oversees implementation of the Covenant, stated in its 1992 report: 'The prohibition in Article 7 relates not only to acts that cause physical but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must also extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasise in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions'.

Other international instruments

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Prevention of Juvenile Delinquency all support prohibition of corporal punishment. The African Charter on the Rights and Welfare of the Child, adopted at the 1990 Summit of the Organisation on African Unity, provides that states must 'take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment' etc.

While it has no formal status, the Committee should also note that the South African Children's Charter, adopted at the Children's Summit in 1992, advocates that: "All children have the right to freedom from corporal punishment at school, from the police and in prisons and at home".

Additional arguments in favour of giving children a constitutional right to physical integrity
As this issue concerns a fundamental human right, pragmatic arguments in favour children's right to physical integrity are technically irrelevant. The Committee’s attention should nonetheless be drawn to the following points:

* Research has continually demonstrated the links between physical punishment of children and the growth of violent attitudes and violence in later life, and the escalation of physical punishment to more serious forms of assault and abuse. South Africa is particularly concerned about reducing levels of violence in society. A constitution which condones the use of violence as a method of solving conflict, violence which is used by a stronger person against a smaller and weaker one, is not transmitting the right message to its citizens.

* Physical punishment and deliberate humiliation of children is very common in most societies and communities in all countries and continents. As a tradition it is not 'owned' by any particular group, though historically and geographically its use has tended to follow enslavement, colonisation, military occupation and religious sects (though its use is not doctrinal in any of the world's main religions.) There is some anthropological research to suggest that the use of physical punishment in child-rearing is rare in some small-scale, hunter-gatherer societies, now rapidly vanishing under urbanisation. Because most people's parents, elders and teachers have used physical punishment, or they use it themselves, this often becomes a very personal issue where it is felt that individuals are being blamed for acting in accordance with the prevailing culture. This is not the case, but it emphasises the need for a top-down reform. Evidence from many other countries shows that legal change banning corporal punishment, accompanied by education, quickly brings changes in public attitudes.

* While the physical punishment of children is often the product of stress invoked by lack of resources, or poor management and training of staff, the use of physical punishment does not reduce stress - quite the reverse. Although more resources are needed children's constitutional rights to protection should not wait until these resources are found, any more than women's rights to protection from domestic violence had to await improvements to social conditions. Where children are protected from physical punishment in other countries they have not become undisciplined, nor has adult authority collapsed.

Support for this proposal within South Africa

The Advisory Panel to the Goldstone Commission Inquiry into Children and Violence (1994) recommended that all physical punishment of children should be prohibited, quoting the UN Convention. The Second African Conference on Child Abuse and Neglect, which brought together over 600 participants from 14 African countries unanimously adopted a resolution to support moves to end all physical punishment of children in South Africa through education and legal reform.

**EPOCH - SOUTH AFRICA** was formed in February 1995 as an open alliance of organisations and individuals sharing the aim of ending all physical punishment and deliberate humiliation of
children in South Africa through education and legal reform. The campaign is cross-cultural, multi-disciplinary and national, and linked to similar campaigns in other African countries and worldwide.

Among the first member-organisations of the Alliance are:
The Child Health Unit in the Department of Paediatrics and Child Health, University of Cape Town (where EPOCH - SOUTH AFRICA is based);
The Child Welfare Society;
Centre for Early Childhood Development;
National Association of Child Care Workers,
The Parent Centre,
Practical Ministries - Christian Development Agency for Social Action;
RAPCAN - Resources Aimed at Prevention of Child Abuse and Neglect.
12 May 1995
CHILDREN AND THE CONSTITUTION

THE CHILDREN’S RESOURCE CENTRE

INTRODUCTION

The deafening silence on the part of the interim constitution with regard to the rights of children has prompted the Children’s' Resource Centre to submit the following proposals with regard to children’s rights. Before addressing ourselves to the actual proposals we shall seek to locate the submission within a broader historical context as well as look at some international precedents we believe are of relevance to these proposals. Furthermore we shall briefly explain the work of the Children’s Resource Centre and our involvement with children and children's groups.

HISTORICAL PERSPECTIVE

The idea that the State actively intervene in securing the wellbeing of children is by no means a novel one in this country. In the wake of the Great Depression and the coming to (shared) power one of the highest priorities of the National Party in government of the time was (from 1934) the promotion of the wellbeing of all 'white' children. Indeed one may well speak of the 'adoption' of all children by the government insofar as they were provided with free medical care, free and compulsory education a wide-ranging social service network, schoolfeeding schemes and the like. For as long as their parents were not able to provide these very basic needs the State assumed the responsibility of providing in all the basic needs of these children. in fact this programme even ventured into the field of cultural activities (Voortrekkers), the promotion of physical wellbeing(Sport) and strove towards the general upliftment of all children.

Although not constitutionally enshrined it is clear from the historical evidence that the great strides made in the 'upliftment' of white children were only possible through government intervention at the highest level. One would also not anticipate that the architects of Apartheid would have been so crass as to enshrine constitutional inequality amongst children!

The situation affecting the majority of this country's children is at present so grave, that we believe that it is only through government intervention supported through a constitutional commitment to the rights of children that the requisite steps can be taken to rectify these problems.

The growing tide of childhood vagrancy, childhood charity, child sexual Abuses drug abuse will not be stemmed unless very serious pro-active steps are taken at this crucial time in our country's history. The daily lamentations about the unproductivity of our workforce will grow into a deafening chorus unless we commit ourselves in a most serious way to rectifying the, problem through providing the space into which future generations can explode their creative talent and ingenuity. At the hub of this lies, we believe, the Constitutional commitment to the Rights of Children. However we believe that this commitment will remain largely a dead letter unless it also
given practical expression and that Constitutional means need to be sought for making these rights a practical reality. As stated above we have a legacy of governmental intervention to protect the interests of millions of children at a time when these were most threatened. Let us draw upon that legacy and again protect our children’s interests ‘...from the cradle to the grave....’

INTERNATIONAL PERSPECTIVES
While this submission in no way seeks to promote one form of societal organisation over another it will attempt to provide a comparison of the approach to the issue of children's rights found in different Constitutions from around the world. In reviewing the constitutions of a number of liberal democracies, e.g. Australia, Canada, Sweden, Austria we found these to be largely silent on the issue of children’s rights. These constitutions were concerned mainly with custodial status and the child’s position within the Law, but no actual reference was to be found with regard to the actual rights of children, with a few notable exceptions: the outlawing of corporal punishment in the Swedish Constitution and the commitment to children’s rights in the Canadian constitution.

In contrast, the Cuban Constitution of 1982 devotes several articles to specifically delineate the rights of children e.g. .

I

Article 8b
.... that no child be left without schooling, food and clothing;

Article 8c
.....

Article 36,
... All children have the same rights, regardless of being, born in or out of wedlock
Distinctions regarding a child's filiation are abolished

Article 37
...... The parents have a duty to provide nourishment for their children. to help them to defend their legitimate interests and in the realisation of their aspirations; and to contribute actively to their education and in their development as useful, well-prepared citizens ...

The Angolan Constitution similarly protects the right of the child to a name and nationality, protects children from economic exploitation and abolishes child slavery and sets a minimum age (fourteen) for employment. See article XXI of the Angolan Constitution. Other African Constitutions which specifically deal with children's rights include the Tanzanian constitution which deals with similar concerns as the Angolan Constitution.
As stated supra this submission is not concerned with the merits of one form of constitution writing over another, e.g. a programmatic or a technical constitution. Our main concern is whether the constitution can specifically and unequivocally guarantee certain fundamental children's rights to ensure the optimisation of the development of the children of this country. The Cuban Constitution is by far the most far-reaching insofar as the specifically addressing, the question of children's right. It is of note that the Cuban society has gone furthest in eliminating childhood vagrancy, providing free schooling and health care for children and alienating the problems of crime and drug abuse.

We have already stated that it is not our contention that by enshrining principles in the Constitution all of the problems regarding children will be solved. However, it is our belief that if these ideals are highlighted in then Constitution and we provide Constitutional muscle to the implementation of these ideals we will be going a long way forward for our children.

IMPLEMENTING THE CONSTITUTION FOR CHILDREN

For the overwhelming majority of the people of this country the Constitution and the Constitution-making process remains a mystery. Despite efforts on the part of the present constitution-making body to remedy this situation the above will remain true unless even more far reaching step are taking to popularise the process even more. If ignorance around the constitution is generalised in our population, it is exponentially worse amongst our children who have again been excluded from a process about which they have not been informed and which remains alien to them. Only a Herculean effort on the part of both governmental and non-governmental organizations can remedy this situation.

Furthermore if the Constitution remains couched in language which remains alien to children they will again be excluded. Indeed it is our contention that where reference is made to children in the constitution it has to be written in such a way that it quite literally comprehensible to a Children must not only be made aware of their rights, but need to know that they have recourse to the law to implement these rights. They need to be armed of the procedures to be followed if they want to have these rights implemented.

We realise that curriculum development is not the province of the Constitution-making body, but as a manor of educational policy we wish to urge that ways and means have to be found of taking this constitution into every school. We need to ensure that every child is conversant with those clauses in the constitution affecting him or her. The Constitution-making body also needs to take the requisite steps to popularise the Constitution

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WHAT IS THE CHILDREN’S RESOURCE CENTRE?

The Children's resource centre was founded in 1984 as part of the broader Children's Movement. At present it serves approximately fifty children’s groups scattered around the Cape Peninsula.

These groups are base predominantly in the working class areas of the Cape, namely Gugulethu, Elsie River, Oceanview, Khayelitsha, etc.

Activities within the groups include toymaking, puppetry, cultural activities. Children are encouraged to form co-ordinating structures and each group has a chairperson, a secretary, treasurer, etc. Each group is then in turn represented on the Children's Council. Through this process children are educated in meeting procedure, minute-taking and this council guides the activities of the centre. Each children's group is co-ordinated by one or more adult co-ordinator. These people are mainly community-based workers unemployed and youth with an interest in children and work on a voluntary basis. The co-ordinator council in turn determines policy for the centre and the executive committee of the CRC is elected from the ranks of the Co-ordinator.

Co-ordinator attend various training programmes dealing with issues such as child safety, child abuse, gardening, children’s health, etc.

At present the Resource Centre is also running a Health Programme which is co-ordinated by a medical doctor, the main components of this programme are co-ordinators training, the training of children through the child to child programme, a clinic for our members, and a health screening programme.

The Centre has made representations to the Independent Broadcasting Association for a broadcasting licence for a children’s radio station, and are waiting a reply. The resource centre also produces a newspaper, Izwi Labantwana, whose articles and features are written predominantly by the children.

The Children's Resource Centre works closely with various organisations dealing with children and in particular with organisations who share our vision around the importance of developing and sustaining community-based children’s groups. In this regard we co-operate most closely with the Trust for Christian Outreach and Education who also coordinate children's Group on a national level and are thus able to provide the resource CENTRE with a national outlet for its programme.
Much of the work at present being undertaken by organisations such as ours on lamentably smaller scale we believe, is ultimately the state’s responsibility. Gardening programmes, the provision of free and compulsory education, free health care, fitness programmes, special training and adequate provision for disabled children are all areas where urgent state intervention is vital. By creating a constitutional framework within which this work can be undertaken we shall be going a long way towards making such a programme viable.

DRAFT SUBMISSIONS TO THE CONSTITUTION

1. All children shall have the right to adequate shelter and clothing and the State, commits itself to the creation of community-based shelter where this cannot be provided for by the parents of that child.

2. All children have the right to a healthy diet and where this cannot be provided for in the home environment, one meal a day will be provided for by the State. All children have the right to clean water, sanitation and a clean living environment.

3. All children have the right to free and equal non-sexist, non-racial and compulsory education for twelve years within one department. This will be provided for by the state. The State will set aside funds to cater for the education and training needs of disabled children and of the full integration into society.

4. All children up to the age of twelve years will have the right to free medical care. This includes the right of pregnant mothers to free medical care. All children have the right to be protected from harmful substances such as cigarettes, drugs or alcohol. Anyone found guilty of encouraging or soliciting the use of these substances by a child is guilty of a criminal offence.

5. All children have the right to a name and nationality as soon as they are born and all children within South African territory will automatically attain the rights accruing to any South African child, without prejudice to any other citizenship rights he or she may enjoy in another country.

6. No child of schoolgoing age -before Matric- shall be made to work and all children are exempt from child labour and economic exploitation. All children shall be protected from hard labour including farm, domestic and manual labour. All children have the right to be protected from prostitution and sexual exploitation. All children have the right to be protected from slavery and from the Inheritance of labour from their parent or family. 'Labour' in this instance shall exclude extra-mural educational activities such as gardening as long as children's labour is not exploited for profit.
7. All children have the right to be protected from all types of violence, including physical, emotional, verbal, psychological, sexual, State, political, gang, domestic, school, township and community, street, self-destructive and all forms of violence. Corporal punishment is illegal, whether in the school, the home, police station or prison. Anyone found guilty of any form of violence against children is criminally liable and will be found guilty of either common or aggravated assault.

8. The Constitution shall lay down guidelines on how the rights of children are to be protected. (See section relating to the role of the Office of the Child Protector)

9. The Constitution shall lay down guidelines as to how legislation is to be passed in the Regional Parliaments with respect to Children's Rights.

10. The Constitution shall lay down guidelines regarding the arrest and trial procedures relating to children. Children are to be protected from incarceration together with adults, in whatever form, be it in police cells, detention or in prison. The Constitution will create the mechanism for separate trial procedures for children, for adequate legal representation for all children and that children have a hearing in any matters affecting their futures.

ROLE OF THE CHILD PROTECTOR

1. The President of the Republic is the Supreme Protector of all children within the South African territory.

2. Under the Constitution the Legislative Authority shall create an Office of the Child Protector which has the authority to create an overall department responsible for the protection of children's fundamental rights. The role of this department would be to create subsidiary structures within each of the nine regions to monitor that the fundamental rights of all children are observed as outlined above.

3. The Office of the Child Protector will have access to such funds as it requires to create the infrastructure to ensure the implementation of children's rights is brought into being and an annual budget to ensure its smooth functioning.

4. The president shall at his/her discretion create the office of an Ombudsman whose role it shall be to monitor that the fundamental Rights of Children are implemented throughout the territory of South Africa.
INTRODUCTION

These representations are submitted pursuant to the invitation from the Constitutional Assembly National Sector Public Hearings to examine Children's Rights within the following broad themes:

i) the right to survival
ii) the right to protection
iii) the right to development

1. THE RIGHT TO SURVIVAL

1.1 Health Care

We believe that every child has the right
to life
to the highest possible standard of health care, preventative health care and medical services if only to reduce the high rate of and ultimately to eliminate infant mortality and disease,
to health education, to clean water and proper sanitation,
to basic nutrition,
to shelter.

1.2 Healthy Environment

A healthy environment is the one which is
not detrimental to the child's health or well-being,
free from illegal drug use,
conducive to the child's maximum development.
1.3 Social Security and Family life

Every child shall have the right to

- an identity - a name and nationality from birth,
- be protected from degrading labels such as “illegitimate”,
- maintain contact with both parents subject to the child's best interest,
- parental care and social responsibilities,
- where the child is born to an unmarried mother, the state to ensure that the child is not deprived from inheriting from it's natural father,
- where the parents are unable to, the state to provide the required maintenance and relevant social assistance, without discrimination,
- where the child is without parents or a family, the state to provide alternative placements and social assistance to serve the child's best interest and to ensure the child's survival and maximum development.

2. THE RIGHT TO PROTECTION

2.1 Equality and Minority

A child shall be every person under the age of eighteen (18) years.

Every child has the right to equality before the law and to equal protection by the law.

Every child has the right to protection against unfair discrimination directly or indirectly based on race, colour, class, gender, beliefs and parents' marital status. Programmes aimed at addressing inequalities among the historically disadvantaged shall not be considered discriminatory.

2.2 Freedom and Security

Every child has the right to the security, comfort and privacy of her/his family home without unlawful interference,

Every child who is suspected of having committed a criminal offence has a right to:
not to be detained in prison,
be advised in a language she/he best understands, of his rights to legal representation of her/his families choice,
be questioned in the presence of her/his parents or legal representative,
a prompt and fair trial in camera.

A child who is found guilty of an offence has the right to:
not to be sentenced to life imprisonment without the possibility of release,
not to be subjected to torture or other inhumane or degrading form of punishment,
not to be detained with adult offenders,
protection of her/his identity.

A child who is sentenced to a secure care place has the right to
maintain contact with her/his family,
health protection facilities and nutrition,
appropriate education and training,
correction and rehabilitation for reintegration into society, protection of her/his identity.

A child shall not be involved in any activities of war.

2.3 Freedom from abuse
The state has a duty to protect every child from:
abuse and neglect by parents and family members,
sexual abuse by parents and family members,
sexual abuse and exploitation by any person,
sexual trade, trade in narcotics and the sale of children,
slavery and child labour,
exploitative labour practices,
violece and conflict situations,
any form of abuse, neglect and exploitation.

3. THE RIGHT TO DEVELOPMENT

3.1 Education

Every child has the right to:

free and compulsory primary education (first ten years) to expand early childhood development activities,

secondary and higher education to enable and encourage the child to develop her/his full potential,

not to be subjected to state controlled programmes that negate the spirit of the Constitution, but programmes and syllabi that will undo the prejudices of the apartheid era and prepare the child for the future society with respect for basic human rights and tolerance.

3.2 Language and Culture

Every child has the right to

learn the language of her/his family's choice, subject to the provisions of the Constitution,

earn and freely participate in the cultural life of her/his community,
enjoy the arts and share in and contribute towards scientific advancement and the benefit thereof.

3.3 Religion and Belief

A child has the right to learn and practice the religious beliefs of her/his community.

3.3 Leisure and Recreation

Every child has the right to rest and leisure and to play and participate in cultural and artistic activities.

GENERAL

4. The problems experienced by children are not examined in this paper nor motivation for the need for the protection of children's rights. This has already been done by several organizations nationally and internationally who produced a number of papers and reports eg Children and Women in South Africa, 1993, The State of South Africa's Children: An Agenda for Action both by the National Children's Rights Committee; A Call for Commitment to Children by the National Children's Rights Committee and The National Programme of Action also by the NCRC who are a party to the organisation of this Public Hearing.

5. The need for improved protection of children's rights is also evidenced by

The Presidents comments in his inaugural address of 10 May 1994 regarding the rights of the children,

The President Mandela's Street Children Programme,

The President Mandela's Children's Fund,

The signing of the Convention of the Children's Rights by Nelson Mandela and F W de Klerk.
6. The purpose is to emphasise the already fully canvassed need for the protection of the rights of the children, with the aim of influencing sensitivity towards these rights in the New Constitution:

6.1 Some of the rights of the child are already entrenched in the Interim Constitution, Number 200 of 1993; However specific provisions should be made in legislations for the promotion and protection of children's rights.

6.2 Such Legislation will have to come from several different Departments, such as the Department of Safety and Security, of Health and Social Welfare, Justice, National Education and Correctional Services, Population and Development, who operate independently from one another have different sets of priorities and different emphasis of the same issues.

6.3 The result will be splitting of offices, duplication, inefficiency, lack of coordination and a waste of time. We draw an example from what we have seen recently when juveniles were released from detention.

6.4 In this way even if all the rights of the children canvassed for where to be entrenched in the Constitution, such lack of coordination would reduce them to paper rights.

6.5 The budgets of most departments are insensitive to the needs of the children.

CONCLUSION:

7. That a National Structure, eg Children's Rights Ombudsman be created and entrenched in the Constitution in the same way as the Human Rights Commission and other special interest bodies,

ALTERNATIVELY, That a permanent position be created within the Commission on Gender Equality to:

coordinate children' interests and rights across various departments,

sensitise legislation across the various departments to the rights of the children,

monitor the implementation of decisions and administrative changes,
sensitise government officials to the needs of the children,

influence the national budget.

create and monitor programmes to rehabilitate children who were affected by violence,

create and monitor programmes to look after the needs of street children, to redress historical inequalities,

protect the needs of physically and mentally disabled children.

DATED AT PRETORIA ON THIS THE 12TH DAY OF MAY 1995
PARENTS FOR CHILDREN WITH SPECIAL EDUCATIONAL NEEDS - WESTERN CAPE

PREAMBLE

PACSEN, or Parents for Children with Special Educational Needs, is an association formed by parents in the Western Cape in November 1994, in order to promote and facilitate parent and community involvement in the education and wellbeing of children with special needs. Our membership is currently approximately 300 families, and includes a broad spectrum of parents drawn from all communities within our region. As parents we are concerned with the right of our children to receive appropriate and lifelong education, and wish to register our support for documents such as the Disability Rights Charter of South Africa which call for this, but we have decided to focus in our submission to the Constitutional Assembly on the rights of parents in education of their children, and in special education in particular, as this is an issue that appears to be largely unexplored in the debate on human rights in this country.

BACKGROUND

It is an historical legacy in all departments of education in this country that parents have been marginalised by the education authorities and also by school staff. The mindset was "give us your child to educate, let us get on with the job as we see fit, and don't interfere". The result is that parents feel powerless and inadequate, and this contributes to an apathy among parents which is proving hard to overcome. Teachers are victims of this same tradition of non-interference, and often become hostile or feel threatened by a parent who tries to assert his or her rights. Many parents refrain from disagreeing with school officials because of a very real fear that their child will be victimised. Both teachers and parents need to be brought to the view that they are partners in each child's education, and that this partnership can only benefit the child.

In Special Education the disempowerment of parents is even more marked. Having to deal with not just a class teacher or school principal, but often a whole team of specialists - doctors, psychologists, therapists etc. can be extremely intimidating for even the highly educated parent. Many of these specialists use technical medical terminology, and often cannot explain themselves clearly in "lay" terms, even when the parent summons up the courage to ask! In many instances specialists make decisions about the child without even consulting the parent, and are surprised when a hostile confrontation ensues. The parent is blamed for being uncooperative. Many parents complain that due to lack of communication teachers are "out of touch emotionally" with parents of children with special needs.

We concede that not all parents are as willing to accept their responsibilities regarding their children's education as they should be. In Special Education many parents are positively ashamed of their children's disabilities and attempt to deny or hide away from the reality. (This of course stems from a negative attitude to disabled people in our society in general, and our association intends to play its part in addressing this problem.) Therefore, while we intend to campaign for legislation that protects parents' rights regarding their children's education, we are also aware that such legislation should include a detailing of our responsibilities.
THERE ARE NO RIGHTS WITHOUT RESPONSIBILITIES

Parents' rights (with regard to special education in particular) that we wish to see entrenched are:

1. The right to information enabling us to fully understand the nature of our child's disability.

2. The right to place our child in a school that is appropriate to his or her particular needs. (i.e. parents want to have the choice of mainstream school, special class or unit, special school or institution or any other options, in consultation with ESS personnel).

3. The right to be included in all decisions affecting our child.

4. The right of access to all information about our child eg. school reports, assessments, hospital records, health reports.

5. The right to attend assessments of our child and/or receive a copy of the assessment report.

6. The right to have the information in that report properly explained and discussed by the specialists) concerned.

7. The right to attend meetings regarding our child's progress or future placement, having been given sufficient notice of such a meeting to ensure its convenience to all parties, and to bring an advocate (i.e. one who pleads the cause of another”) to such a meeting if so desired.

8. The right to disagree with school officials, with properly constituted channels set up within the relevant education department to deal with such disagreements - a process involving independent evaluations, mediation, a special education hearing etc. This is obviously a very complex legal area that would have to be carefully researched.

9. The right to receive a manual that clearly outlines the structuring of special education facilities and the options available regarding placement and treatment of our child (including a directory of available facilities and support organisations). This manual should also inform parents of their rights and responsibilities.

10. The right to participate in decision-making at all levels i.e. to be represented on national, provincial and district management structures as well as school governing bodies.

Some suggested responsibilities of the parent:

1. To enrol our child at an appropriate school when he or she is school ready.

2. To ensure that our child attends school regularly.
3. To see that the child receives nutrition, health care, clothing, shelter and time to study so that he or she is physically capable of learning to the best of his or her ability. (We appreciate that for many parents the provision of even basic necessities is a struggle and realise that in such cases closer involvement of health and welfare services etc would be needed to achieve this.)

4. To provide a home environment free of physical and emotional abuse.

5. To protect the child's rights regarding his or her education, and ensure that our child is educated in a safe environment where there is a culture of joy in learning and mutual respect.

6. To provide educational authorities with required information about our child's medical history, immunisation etc. Information required must however be restricted and protected by legislation, so that the child's right to privacy is not violated.

7. Where an undertaking to pay certain fees has been entered into, a responsibility to meet that commitment or give notice of an inability to do so. (we refer to page 56.33 of the Draft White Paper on Education and Training, September 1994)

CONCLUSION

It cannot be stressed forcefully enough that of all the parties concerned in the education of children with special needs, it is the parents on whom the ultimate responsibility for these children rests. For us these issues are completely real. The problems are immense, inescapable and lifelong. We need legal rights and equal partnership in all decision making to enable us to be effective and responsible parents to our children, and for our children to receive the education that they deserve.

MICHELE BELKNAP (MRS)
CHAIRPERSON
PARENTS FOR CHILDREN WITH SPECIAL EDUCATIONAL NEEDS

REFERENCES:

THE PARENTS' CHARTER - YOU AND YOUR CHILD'S EDUCATION
DEPT OF EDUCATION & SCIENCE U.K. 1991

SPECIAL EDUCATIONAL NEEDS - A GUIDE FOR PARENTS
DEPT OF EDUCATION & SCIENCE U.K. 1994

THE PARENTS' ACCESS GUIDE TO EDUCATION NEW ZEALAND
THE RIGHT TO SPECIAL EDUCATION IN PENNSYLVANIA - A GUIDE FOR PARENTS

THE EDUCATION LAW CENTER/PA U.S.A. 1991

THE SALAMANCA STATEMENT & FRAMEWORK FOR ACTION ON SPECIAL NEEDS EDUCATION UNESCO SPAIN 1994
2 May 1995

Submission about proposed Constitution: Theme Committee 4: Basic Rights (Human Rights)

It appears as if the new constitution will only be able to correct certain shortcomings in the current judicial system if the chapter about basic rights (human rights) contains the necessary provisions. Will you please measure the chapter on basic rights against the following real problem and rewrite it if necessary.

Problem

The problem is that the legal profession (judges, lawyers) are apparently not able to adapt the common law (unwritten law) to changed circumstances. In this case the changed circumstance is inflation. (Drop in the value of money.) The following actual case illustrates the problem.

The rules of a certain pension fund according to which benefits are paid to early retirees were drawn up many years ago, before inflation made its appearance. The Trustees of the fund deliberately fail to amend the rules, because it is to the advantage of a certain group of members among which they themselves count.

In 1981, after contributing to the fund for 27 years, Mr A retired from the service concerned. Against his will he was then removed from the fund and received an amount from the fund equal to only about 0,6% of the actual real value of his own contributions to the fund (no interest and of course nothing in regard to the so-called employees' contribution to the fund).

The fund regards the matter as final. The statutory boards that have apparently been established to look after individual rights in the pension industry shrug their shoulders. According to them they have no power to act. Only the Courts of Law remain, but legal advisors doubt whether the law courts themselves have such powers. The reason is that the legal profession apparently regards the common law (unwritten Law) as something immutable which cannot be adapted to changed circumstances.

We now have the unacceptable situation that while the depreciation of the value of money has for 25 years been taken into account in the building and construction industry (where contracts usually stretch over only a few years), it is not recognised in the pensions industry, where inflation has, over a lifetime, had a destructive effect on people's savings.

Correction necessary in Constitution

1. What is needed, is that the common law be adapted to changed economic circumstances. One would think that this is the normal duty of the legal profession, but as the industry apparently does
not regard it in this light, they must probably receive an instruction in terms of the constitution that the common law must be adapted to take into account the decrease in value of money.

2. It is undoubtedly a basic fight (human right) that one's pension money (one's savings, one's property) should be protected against people who wish to take it, whether taken through violence or by the pension fund itself with the help of outdated and inappropriate rules. However, if there is any doubt, the constitution must please confirm that fair treatment a pension fund is a basic human right.

A J VAN SCHALKWYK
The Association of Law Societies of the RSA

SUBMISSION BY THE ASSOCIATION OF LAW SOCIETIES OF SOUTH AFRICA ON SECTION 28 AND OTHER PROPERTY CLAUSES CONTAINED IN SOUTH AFRICA’S INTERIM CONSTITUTION

1 The Association of Law Societies is a representative body of attorneys in South Africa. Through the provincial Law Societies, which constitute its membership, it has some 13 000 members (comprising attorneys and candidate attorneys).

2 The Association of Law Societies is strongly in favour of retaining protection for rights in property in the Chapter on Fundamental Rights to be contained in the new Constitution.

3 Section 28 of the Interim Constitution reads as follows:

"Property
28 (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

4 An overwhelming majority of constitutions and bills of rights in operation all over the world contain provisions for the protection of rights in property. These include the constitutions or bills of rights of Belgium, Botswana, Brasilia, Chile, France, Germany, Italy, Japan, Kenya, Malaysia, Namibia, Nigeria, Sierra Leone, USA and Zambia. This illustrates the importance which is being attached to the protection of property rights in other democracies elsewhere in the world including many democracies in Africa).
Notable exceptions where property rights are not protected, or where previous protections were abolished, are India, Zimbabwe and Canada.

5.1 In India and Zimbabwe the protection of property rights previously contained in the constitution has, through amendments to the constitution, been watered down. This was done by reason of peculiar political circumstances existing in those countries, and in the case of India, the interpretation given the property rights clauses by its Courts. The constitutional changes which reduced or abolished the property rights have come in for severe criticism in those countries.

5.2 In Canada, the Canadian Charter of 1982 contains no protection for property rights. This was done because it was considered that sufficient other laws and legal traditions exist which would protect Canadian citizens from intrusions into their property rights. Despite the omission, the debate for the protection of property rights in Canada still continues, and the Canadian Charter of 1982 may well be amended at some future date to include the protection of property rights.

6 The protection of property rights in the constitution of any country, particularly a developing country, is very important for the following reasons:

6.1 A country must signal to the rest of the world that it is a safe place for the investment of capital. The ghost of possible nationalisation is always at the back of the minds of prospective national and international investors;

6.2 The strengthening of title to land is important for all citizens. The feeling of security given to property owners by constitutional protection should not be under-estimated. This is particularly important in South Africa for the many millions of new house owners who will benefit by the RDP-programmes;

6.3 Protection of property rights does not imply the entrenchment of absolute rights. Every nation has the responsibility of determining the extent and limits of ownership and to balance these with prevailing social interests. A well-drafted property clause in the Constitution can provide the moral framework within which the values of social democracy can impact on property rights.

7 When a nation gets involved in writing a constitution, it must be decided right at the outset which direction is to be taken: the direction of protecting rights in property or the direction of no protection. Once direction has been taken, it is very difficult, almost impossible, for a nation to revert to another direction. In South Africa, in the Interim Constitution, the direction of protection of property rights has been taken. This happened after many weeks of argument at Kempton Park. It would be inadvisable to change direction now.

8 Fears have been expressed that a property clause in the constitution could obstruct land restitution and the re-distribution of land amongst the citizens of South Africa. Such a fear is unfounded. The restitution of land rights is adequately protected in sections 121, 122 and 123 of the Interim Constitution. Expropriation for re-distribution of land will be permissible, because it has been held to be a public purpose in mar
jurisdictions, particularly the United States of America. See, for example, the well known decision of Hawaii Housing Authority v Midkiff, 467 US 229 (1984). It is important, however, that such expropriation takes place against payment of compensation which is just and equitable. Fair treatment of land-owners from whom property is taken for purposes of redistribution is necessary in the spirit of reconciliation prevailing in our country. Inadequate compensation (which contains an element of confiscation) will undermine the confidence of expropriated land-owners in the future of their country and could impact negatively on their contributions in building up the country.

Concern has been expressed over the requirement that all expropriations must be for "public purposes" on the basis that this could restrict expropriation for social purposes, particularly the re-allocation of land. The term "public purposes" is wider than "public interest", because "public interest" can be understood as importing the requirement that the public must benefit, which could allow attacks on the validity of expropriators on the basis that the public does not benefit

It is accepted by the Association of Law Societies that the right to property carries with it the responsibility to conform with social needs. The provision in the Interim Constitution that "no deprivation of any rights in property shall be permitted otherwise than in accordance with the law", will not restrict the development of the country or the ability of government to regulate the use of land. On the contrary, it will establish a legislative foundation upon which the Government can build principles and social values to harmonise collective and individual interests in property.

In cases where the deprivation of rights in property does not constitute an expropriation, the Interim Constitution does not provide for any compensation, and no compensation need to be paid to the deprived person, unless the law in terms whereof the deprivation takes place, makes provision for the payment of compensation. Only in cases where the deprivation constitutes an expropriation, will compensation be payable. A deprivation which constitutes an expropriation differs from a deprivation which does not constitute an expropriation in that in the former case, rights pass to the depriver (expropriator, whilst in the latter case no rights pass : the deprivation takes place in the course of regulating the use of property in the interests of the community (for example, through zoning regulations). Any dispute on whether or not deprivation constitutes an expropriation, should be justiciable in a Court of Law.

Consideration should be given to some textual amendments to the existing section 28(3) of the Interim Constitution. These are the following:

The distinction between a deprivation of rights in property which does not constitute an expropriation and a deprivation which does constitute an expropriation, and the provision that compensation is payable in respect of the latter only, should be stated with greater clarity. The first portion of sectio
28(3) of the Interim Constitution is somewhat ambiguous, and has been interpreted in different ways by various lawyers.

12.2 Section 28(3) contains norms for the determination of "just and equitable" compensation. This will give substance to a possible interpretation of section 28(3) that such norms are exclusive, and that no further norms may be prescribed in a law dealing with expropriation. Section 12(5) of the Expropriation Act of 1976 contains very important compensation rules which should not be allowed to disappear or become unconstitutional. These rules include the following:

- the special suitability or usefulness of the property for which it is required by the expropriating authority shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market;

- if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;

- any enhancement or depreciation, before or after the date on which the notice of expropriation was issued, the value of a property in question, which may be due to the scheme in connection with which the property was expropriated, shall not be taken into account;

- account shall be taken of any benefit which will ensue to a claimant in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated.

These rules have been interpreted and applied in many Court decisions. Should they cease to apply, the compensation claimable without them could well be excessive. To rely only on the provision that compensation must be "just and equitable" to avoid excessive payments, would undo the benefit of existing Court decisions and promote uncertainty.

12.3 One of the norms to be taken into account in determining compensation, is "the interests of those affected". It is questionable what influence the "interests of those affected" can have on the payment of compensation; it is also uncertain to whom the words "those affected" refer. This particular norm can best be omitted.

12.4 Another norm for determining compensation for expropriated rights in property is "the value of the investments in it by those affected". Not only investments in "rights to property" (which includes acquisition costs), but also investments in the property itself (physical improvements) ought to be taken into account.
12.5 Provision that payment of compensation shall be made "within such period as may be determined by a Court of Law", could invalidate an existing provision in the Expropriation Act of 1976 that an expropriator is obliged to pay 80% of its compensation offer as a pre-payment on account until the final amount due is determined by agreement or by the Court (section 11), because at the time when such 80% payment has to be made, there will be no Court Order in existence. This difficulty will be overcome if the Constitution requires "prompt" payment.

13 It would be better to provide in section 28(3) that expropriations may take place only in terms of a law which will have to comply with certain minimum requirements, rather than to include legal provisions applicable to the implementation of expropriations in the constitution. Such provisions do not belong in a constitution. The constitutions and bills of rights of most other countries do not contain implementation provisions, but provide that expropriation laws must comply with certain norms.

14 It can be argued that the deprivation of property in certain circumstances, such as by way of penalty, forfeiture for the breach of any law after conviction of a criminal offence, in consequence of any law relating to prescription, or in the execution of judgements or orders of Courts of Law, could fall foul of section 28 of the Interim Constitution. Although the validity of such laws may be protected by the limitation clause in section 33 of the Interim Constitution, it might be better to include a specific provision that such deprivations are not unconstitutional.

15 Restitution of land rights is dealt with in sections 121 to 123 of the Interim Constitution.

15.1 Section 123(2) of the Interim Constitution provides that compensation for expropriation for the restitution of land rights shall be calculated in the manner provided for in section 28(3). Because section 28(3) does not contain all the norms for the determination of compensation, it might be better to stipulate that compensation shall be payable in terms of an expropriation law complying with certain requirements to be contained in section 28(3).

15.2 Because the process of restoring land rights will be of limited duration, the Constitution should contain a provision that after a given period of time, the provisions of sections 121 to 123 shall lapse.

16 The Interim Constitution does not seem to contain any protection for the right to inherit. The right to inherit should be a fundamental right protected under the Constitution.

17 For the convenience of the Theme Committee, the following annexures are appended to this Submission:

17.1 a schedule containing the limitations in nineteen constitutions operative elsewhere in the world on the purpose for which property may be expropriated (Annexure "A");
17.2 a schedule containing the norms for the determination of compensation prescribed in twenty constitutions operative elsewhere in the world (Annexure "B");

17.3 a draft formulation for an amended section 28(3) (Annexure "C");

12 May 1995

**ANNEXURE "A"**

**PURPOSES FOR WHICH PROPERTY MAY BE EXPROPRIATED**

<table>
<thead>
<tr>
<th>No.</th>
<th>Country</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Belgium</td>
<td>&quot;public interest&quot;</td>
</tr>
<tr>
<td>2</td>
<td>Botswana</td>
<td>&quot;necessary of expedient in the interests of defence, public order, public morality, public health, town and country planning, land settlement or for utilisation for a purpose beneficial to the community&quot;</td>
</tr>
<tr>
<td>3</td>
<td>Brasilia</td>
<td>&quot;public use or need, or for social interest&quot;</td>
</tr>
<tr>
<td>4</td>
<td>Chile</td>
<td>&quot;public benefit or the national interest&quot;</td>
</tr>
<tr>
<td>5</td>
<td>France</td>
<td>&quot;public purpose&quot;</td>
</tr>
<tr>
<td>6</td>
<td>Germany</td>
<td>&quot;in the public weal&quot;</td>
</tr>
<tr>
<td>7</td>
<td>India</td>
<td></td>
</tr>
</tbody>
</table>
(now amended) "public purposes"

8 Italy “general interest”

9 Japan "public use"

10 Kenya "necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation so as to promote the public benefit"

11 Malaysia No limitation

12 Namibia "public interest"

13 Nigeria No limitation

14 Romania "works of public utility"

15 Sierra Leone “necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation so as to promote the public benefit or the public welfare of citizens of Sierra Leone”

16 South Africa (Expropriation Act) "public purposes"
17 USA  "public use"

18 Zambia  No limitation

19 Zimbabwe
(now amended)  “necessary in the interests of defence, public

safety, public order, public morality, public

health, town and country planning or the

utilisation for a purpose beneficial to the public generally or to any section therefor in the case

of land that is under-utilised, the settlement of

land for agricultural purposes”

ANNEXURE “B”

<table>
<thead>
<tr>
<th>COMPENSATION NORM</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1  Australia</td>
<td>law must prescribe &quot;just terms&quot;</td>
</tr>
<tr>
<td>2  Belgium</td>
<td>&quot;just compensation&quot;</td>
</tr>
<tr>
<td>3  Botswana</td>
<td>&quot;adequate compensation”</td>
</tr>
<tr>
<td>4  Brasilia</td>
<td>&quot;just compensation&quot;</td>
</tr>
<tr>
<td>5  Chile</td>
<td>&quot;indemnification for patrimonial harm&quot;</td>
</tr>
</tbody>
</table>
6 France "fair and previous indemnity"

7 Germany “compensation shall be determined by establishing an equitable balance between the public interest and the interest of those affected"

8 India (now amended) "either fix the amount of the compensation or specify the principles on which, and the manner in which, the compensation is to be determined"

9 Italy "compensation"

10 Japan "just compensation"

11 Kenya "full compensation"

12 Malaysia "adequate compensation"

13 Namibia "just compensation"

14 Nigeria “compensation” without further description

15 Romania "adequate compensation"
ANNEXURE "C"

DRAFT AMENDED SECTION 28(3)

28(3) No law shall provide for the expropriation of property or any rights in property unless, in terms of such law:

(a) such expropriation is permissible for public purposes only

(b) provision is made for the prompt payment of compensation which is just and equitable, taking into account all factors which such law may prescribe, including but not limited to -

(i) the market value of the property;

(ii) the history of the acquisition of the right in the property;

(iii) the amount invested in the acquisition of the right in the property and in the property;

(iv) the use to which the property is being put, and

(v) the financial loss caused by the expropriation;
(c) a right of access to a Court of Law is secured to any persons having an interest in or right over the property, for the determination of the amount of any compensation to which he or she is entitled, and the period within which such compensation must be paid.
10 March, 1995

UNITED CHRISTIAN ACTION

re: Theme Committee 1 - South Africa shall be a secular state

It has come to my attention that in its Supplementary Report dated 28 February 1995, Theme Committee 1 dealt with "South Africa shall be a secular state", under the heading 111) CONTENTIOUS POINTS: H).

I would be grateful if you would draw the attention of Theme Committee 1 to our position on the following matters.

1. Should there be references to deity in the constitution?

Given that South Africa is now a democracy in which the will of the majority prevails, and given that nearly 80 percent of South Africans profess the Christian faith, as opposed to less than five percent who profess the Islamic, Jewish, Hindu, Bahai and Buddhist religions combined, we insist that the Triune God be mentioned in the Constitution.

I would draw the attention of the Committee to the 1992 document "CHRISTIANITY AND RELIGIOUS FREEDOM". It carried the following statement: "We require that those who will formulate the new laws of the land will acknowledge the Triune God in the Constitution of our country".

This document, supported by more than 230,000 signatures, was submitted to the Multi-Party Negotiating Forum, the then State President and to a number of other political leaders. The signatories were assured that their concerns would be carefully considered and acted upon. Many of our requests, including the one just mentioned, have been ignored.

There has been no similar expression of mass support for the removal of God from the Constitution or for South Africa to be made a secular state. The impression is growing in Christian circles that the views of a tiny elite of "experts" is being imposed on the majority against its wishes.

Given that there are some 40 countries that are officially Islamic states, because the majority of their populations adhere to the Muslim religion, we see no reason why South Africa should not
officially be a Christian state. We maintain that God has ordained two distinct institution for the
good ordering of society - the Church and the State. Both are accountable to Him, although the
functions they exercise are separate. We fear that if God is not mentioned in the Constitution and
the State refuses to acknowledge its accountability to a Higher Power, it will become autonomous
and set itself up in the place of God.

In contrast to the situation in Islamic countries, where Christians are heavily restricted and
persecuted, the recognition of South Africa as a Christian country would in no way infringe on the
freedom of religion. Christians recognise that God has given people free wills. They can choose to
obey Him or to rebel against Him. Therefore Christians cannot over-ride the free will God has
given to people. They cannot force people to become Christians.

2. Should the State allow religious observances in its institutions?

In terms of a long standing tradition, Christian meetings have been allowed in State buildings, such
as schools outside of school hours, provided certain simple conditions are met. There is no conflict
between this custom and the principle of separation of the functions of the Church and the State.
There is also no reason why this practice should not be extended to non-Christian religious groups
if it has not already been done.

3. Would religious office-bearers be barred from holding offices of State?

There are some positions in both Christian and government service which occupy people
fully. No-one is able to hold two such positions at the same time.

There are however many offices in the Christian Church which are part-time positions. In many
denominations, elders, deacons, circuit stewards and lay preachers have ordinary jobs. Some of
those holding these offices are civil servants in national, regional and local government. In
addition, all lay Christians are called to be witnesses to the Lord Jesus Christ at all times and under
all circumstances.

Should South Africa become a secular State and the Constitution be interpreted in such a way as to
prevent Christians in the employ of the State holding part-time Christian offices, or to forbid
Christians to speak to their colleagues of their faith, Christians would see this as a direct attack on
their faith.
It would be wise for the members of Theme Committee, and of the Constitutional Assembly, to take the sensitivity of Christians into consideration. They must bear in mind that, in the old South Africa, the majority felt they were discriminated against because of the colour of their skin. They therefore felt obliged to take action to change their situation. The Constitutional Assembly must not create a situation where the majority feel discriminated against because of their faith.

If Christians should come to believe the government was unsympathetic to the values they hold dear, even hostile to them, they may feel they are being forced to take action to change this discrimination. Such a situation should be avoided at all costs.

Do assure the members of Theme Committee 1 and of the Constitutional Assembly of our prayers that God will guide them to write a Constitution that will bring harmony, peace and prosperity to the people of South Africa.

Edward P Cain
President
SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

13/03/95

RE: ANIMAL WELFARE

We, as the Vereeniging and Districts S.P.C.A., feel that the following points should be realized by the Constitutional Court of Southern Africa and that consideration should be made therefore when legislation is drafted concerning animal welfare.

1. Nationally, thousands of unwanted pets are annually euthenazed for one reason: pet owners do not have their animals sterilized. We feel that the pet population explosion should be recognised as a serious matter and accommodation should be made for compulsory sterilization.

2. Nationally, thousands of animals are presently being subjected to abuse and neglect. Our Society feels that current legislation and penalties imposed, are not as powerful as offenders of the Animal Protection Act. There would seem to be no deterrent! Legislation and penalties should be reviewed in consideration of circumstances prevailing at the given time.

3. As addressed in paragraph 2, current legislation is not as powerful as offenders of the act in question. Registered S.P.C.A. inspectors would appear to have legal standing, however, little regard is paid to this. We feel that this should be considered when animal welfare legislation is reviewed.

4. Our final request to the Constitutional Assembly, should be acknowledged as a plea. Many Animal Welfare Societies perform a vital service to their respective communities, by serving their citizens and Municipalities - for very little recognition. If these Societies were to cease, the results would be disastrous - from a cruelty and health point of view. Our country's economic situation has hit Animal Welfare Organisations quite severely and many are battling to remain functional.

We understand that a tidy monetary sum is annually collected by Municipalities in the form of Dog Tax. However, Dog Tax is not utilized to address Animal Welfare, whereas Television Tax is utilized to address Television expenditure, etc.

As regular citizens, at grass root level, we realize that Municipalities have other expenses to satisfy their respective public needs. However, we do feel that money received should be ploughed back into the reason that it was initially paid. Could a set percentage of Dog Tax not be allocated to individual Societies to assist in their plight to serve those citizens who cannot speak for themselves?

I believe Socrates once said that a Nation that could no longer look after it's aged infirm and animals, was no longer a civilization!
Mrs Jean B. Poley
MANAGERESS
20 March 1995
ARYA PRATINIDHI SABHA

Enclosed please find a submission to your Theme Committee from the above organisation with the support of the South African Hindu Maha Sabha.

Attached is the main submission which is prefaced by a preamble and followed by one Annexure which is memorandum which locates and motivates the specific recommendations made to the theme committee. The second Annexure includes letters of support and comment from the Institute of Indian Languages and The Hindi Shiksha Sangh of South Africa.

I will be available for any further elaboration and comment should your committee require it

Dr. B. Rambilass
Deputy President

PREAMBLE

The Arya Pratinidhi Sabha of South Africa is an affiliate of the South African Hindu Maha Sabha, which is the parent body of all Hindu organisations in the Republic of South Africa. While this submission is being presented by the Arya Pratinidhi Sabha, it carries the full support of the Hindu Maha Sabha. The Hindu Maha Sabha wishes it to be recorded that this document presents legitimate concerns of the Hindu community in South Africa and that the issues raised must be incorporated in the new constitution.

We adhere to the principles of Hinduism which forms the basis of the proposals made in this document.

We subscribe to the recognition of all religions and the protection of the rights of minority communities as enshrined in the CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT NO 200,1993.

This document aims to spell out the needs and concerns of the Hindu Community so that these may be catered for in the Constitution in a practical and meaningful way within a democratic society. Submissions are made through this document to theme committee 4 on items 6, 7, 14, 26, 29 and 30. Attached is a memorandum which locates in context the specific recommendations made to the theme committee.

The Chairperson of the Committee responsible for drafting this document is and he may be contacted for any further elaboration and information:

Dr. B Rambilass

Lecturer - Department of Indian Languages
University of Durban Westville

LIFE

Abortion

We propose that:
  a. Abortion be regulated only in the circumstances as provided for in the Abortion and Sterilization Act 2 of 1975.

RELIGION, BELIEF AND OPINION

1. Religious Holidays

We propose that:
  a. Diwali be officially recognised as a holiday for Hindus.
  b. The date of Diwali will be declared by the South African Hindu Maha Sabha at the end of each preceding year, and the relevant Government Departments will be advised of the date.
  c. i All Hindu employees be granted the Diwali Holiday as a fully paid holiday.
     ii Hindu employees should not be required to compensate for time away from work as a result of observing the Diwali Holiday.
     iii Hindu employees should not be prejudiced in any way for observing the Diwali Holiday.
  d. i All Hindu students at all Educational Institutions be exempt from attending the institution on the Diwali Holiday.
     ii No tests or examinations must be set on the Diwali Holiday.
     iii Hindu students observing the Diwali Holiday should not be prejudiced in any way by their absence from the Educational Institution.

2 Cremation

We propose that:
  a. Government provide facilities for cremation by:
     i making provision for the building of these facilities,
     or
     ii upon application, subsidising the construction of such facilities initiated by the community, or private individuals.

3 Alternative medicine

We propose that:
a. The ancient Indian system of Medicine known as Ayurvedic medicine be officially recognised.

b. The AYURVEDA be adopted as the definitive text and manual on Ayurvedic Medicine.

c. The existing forum for Ayurvedic Medicine:
   i be recognised and granted official authority to register and monitor Ayurvedic Practitioners.
   ii appoint local experts in this field.

The inclusion of Ayurveda in this document is to endorse the need for the recognition of Ayurveda as a system of medicine in its own right.

CONCLUSION

Where within democratic structures it is not feasible for the Indian Minority Group to be catered for on a national level with regards to the propagation of Hinduism and, Indian culture and language, we propose that funding be made available for community based initiatives that address these issues, within that democratic society.

LANGUAGE AND CULTURE

1. Religious Education

We propose that:
   a. Hindu Religious Education be offered at schools.

   i(a) Time should be allocated on the schools time-table for such education, or
   i(b) Religious education should be conducted immediately after school hours and that it be supervised by the Principal of the school.
   ii These classes should be open to all pupils.
   iii There must be tests and examinations based on a set syllabus.
   iv The syllabus must be aimed at equipping the student with a good knowledge of scripture, basic tenets and principles of Hinduism.

2 Indian Languages

For the purposes of this document Indian languages will comprise:

   i Sanskrit
   ii Gujarati
   iii Hindi
   iv Tamil
   v Telugu
We propose that:

a. Indian languages be taught at schools.

b. All languages enjoy equal status and recognition in terms of syllabus and curriculum.

c. i. Up to Standard One level any two languages be studied.
   ii. From Standard 2 - Standard 7 a three language formula should apply: 2 official languages and a third chosen from a list of the Indian/Eastern Languages or other Foreign Languages.
   iii. From Standard 8 - Standard 10 one official language and one other language be studied: an option must exist to elect an Indian language as this other language.

d. Where economically viable units are possible, a class in this language must be conducted.

e. Where economically viable units are not possible, government funding must be made available to subsidise this education by bodies which enjoy credibility.

f. The Institute of Indian Languages, or any such recognised body, will serve to facilitate the general administration of the Indian Languages in conjunction with the relevant Government Department.

3 Indian History

We propose that:

a. The contributions made by Indians to the social, political and economic development of South Africa be recognised by inclusion in the general history syllabus at all schools.

4 Indian Music and Dance

For the purposes of this document Indian music and dance will comprise of the following categories:

i. vocal
   ii. sitar
   iii. harmonium
   iv. tabla
   v. mridangam
   vi. Bharata Natyam
   vii. Kathak

We propose that:
a. i Indian Music and Dance be a component of the general music syllabus taught in school.
   ii This syllabus must include basic principles and history of Indian Music and Dance.
   iii Where economically viable units exist:

   (a) Classes in Indian Musical Instruments must be conducted in accordance with a structured syllabus.
   (b) Examinations must be conducted in this respect.

b Where sufficient interests exist within a community.

i The Department of Education and Culture make funds available to community based organisations for the teaching of Indian Music and Dance.
ii Qualified teachers be engaged to conduct these classes.

4 Television

We propose that:
a. The time allocated for Indian programmes on television be increased by South African Broadcasting Corporation.

b. Programmes must feature:
   i semi-classical and classical Indian dance and music
   ii classical and contemporary Indian theatre
   iii Documentaries on Indian Society, History, Economy, Politics, and Arts and Crafts
   iv Indian Contemporary issues

c. Private enterprise in the form of commercial television channels or purchase of viewing time should be allowed provided they feature programmes as stated in (b) above.

d. At least sixty (60) percent of these programmes should be presented in the Indian languages with English sub-titles.

5 Radio

We propose that.
a. The time allocated for Indian programmes on radio be retained by South African Broadcasting Corporation.

b. Programmes must feature:
   i semi-classical and classical Indian music
   ii classical and contemporary Indian theatre
   iii Documentaries on Indian Society, History, Economy, Politics, and Arts and Crafts
iv Indian Contemporary issues

c. Private enterprise in the form of commercial radio stations or purchase of air time should be allowed provided they feature programmes as stated in (b) above.

d. At least sixty (60) percent of these programmes should be presented in the Indian languages.

CONCLUSION
Where within democratic structures it is not feasible for the Indian Minority Group to be catered for on a national level with regards to the propagation of Hinduism and, Indian culture and language, we propose that funding be made available for community based initiatives that address these issues, within that democratic society.

EDUCATION

1 Religious Education

We propose that:
   a. Hindu Religious Education be offered at schools.
       i (a) Time be allocated on the school time-table for such education,
            or
       i (b) Religious education be conducted immediately after school hours and that it be supervised by the Principal of the school.
       ii These classes be open to all pupils.
       iii Tests and examinations based on a structured syllabus be set.
       iv The syllabus be aimed at equipping the student with a good knowledge of scripture, basic tenets and principles of Hinduism.

2 Indian Languages

For the purposes of this document Indian languages will comprise:
   i Sanskrit
   ii Gujarati
   iii Hindi
   iv Tamil
   v Telugu

We propose that:
   a. Indian languages be taught at schools.

   b. All languages enjoy equal status and recognition in terms of syllabus and curriculum.
c. i. Up to Standard One level any two languages be studied.
    ii. From Standard Two - Standard Seven a three language formula should apply: two official languages and a third chosen from a list of the Indian/Eastern Languages or other Foreign Languages.
    iii. From Standard Eight - Standard Ten one official language and one other language be studied: an option must exist to elect an Indian language as this other language.

d. Where economically viable units are possible, a class in this language must be conducted.

e. Where economically viable units are not possible, government funding must be made available to subsidise this education by bodies which enjoy credibility.

f. The Institute of Indian Languages, or any such recognised body, will serve to facilitate the general administration of the Indian Languages in conjunction with the relevant Government Department.

3 Indian History

We propose that:
   a. The contributions made by Indians to the social, political and economic development of South Africa be recognised by inclusion in the general history syllabus at all schools.

4 Indian Music and Dance

For the purposes of this document Indian music and dance will comprise of the following categories:
   i. vocal
   ii. sitar
   iii. harmonium
   iv. tabla
   v. mridangam
   vi. Bharata Natyam
   vii. Kathak

We propose that:
   a. i. Indian Music and Dance be a component of the general music syllabus taught at school.
      ii. This syllabus must include basic principles and history of Indian Music and Dance.
      iii. Where economically viable units exist:
           (a) Classes in Indian Musical Instruments must be conducted in accordance with a structured syllabus.
           (b) Examinations must be conducted in this respect.
b Where sufficient interests exist within a community:
   i The Department of Education and Culture make funds available to community based
      organisations for the teaching of Indian Music and Dance.
   ii Qualified teachers be engaged to conduct these classes.

CONCLUSION

Where within democratic structures it is not feasible for the Indian Minority Group to be
 catered for on a national level with regards to the propagation of Hinduism and, Indian
 Culture and Language, we propose that funding be made available for community based
 initiatives that address these issues, within that democratic society.

CUSTOMARY AND TRADITIONAL LAW

Recognition of Hindu Priests

We propose that:
   a. The authority of Hindu Priests be recognised as marriage officers.
   b. Established priest academies be recognised by the relevant Government
      Departments.
   c. Recognised Priest Academies will
      i initiate
      ii ordain
      iii certify
      such priests.
   d. Women priests be unreservedly recognised.
   e. Hindu marriage ceremonies performed by the aforesaid priests enjoy legal recognition.

GROUP AND MINORITY RIGHTS

1 Religious Holidays

We propose that :
   a. Diwali be officially recognised as a holiday for Hindus.
b. The date of Diwali will be declared by the Hindu Maha Sabha at the end of each preceding year, and the relevant Government Departments will be advised of the date.

c.i All Hindu employees be granted the Diwali Holiday as a fully paid holiday.  
ii Hindu employees should not be required to compensate for time away from work as a result of observing the Diwali Holiday.  
iii Hindu employees should not be prejudiced in any way for observing the Diwali Holiday.

d.i All Hindu students at all Educational Institutions be exempt from attending the institution on the Diwali Holiday.  
ii No tests or examinations must be set on the Diwali Holiday.  
iii Hindu students observing the Diwali Holiday should not be prejudiced in any way by their absence from the Educational Institution.

Annexure 1

MEMORANDUM

RELIGION - HINDUISM

The recognition of all religions and the rights of minority communities has been enshrined in the Bill of Rights and the Freedom Charter. Working on this premise, this document aims to spell out what the needs and concerns of the Hindu community are so that these may be catered for in the Constitution in a practical and meaningful way.

Recognition of Hindu Priests, Weddings and other Ceremonies

The Government will recognise the authority of Hindu priests to perform marriage and other ceremonies. Properly qualified Hindu priests will also act as marriage officers. The Hindu wedding ceremony will enjoy legal recognition.

The Hindu priest will be eligible for such recognition by fulfilling requirements laid down by duly recognised Priest Academy/ies. Such a priest will be ordained, initiated and given a certificate by such an Academy. While an individual Academy may exercise its right to ordain either male or female priests, the Hindu Maha Sabha recognises unreservedly the rights of women to qualify and serve as Hindu priests.

The responsibility of recognition of Priest Academies and the priests must rest finally in the hands of the relevant government department. The process of recognition will be facilitated by the Hindu Maha Sabha or a suitably constituted forum that addresses the qualifications and other criteria pertaining to credentials and accreditation of priests.
Religious Education

Considering the sensitivities of certain religious groupings regarding the exposure of their children to the teaching of religions other than their own, we offer the following approach for the teaching of religion:

Religious Education ought to be conducted immediately after school hours and supervised by the principal of the school. The principal will ensure that the class aims to educate rather than indoctrinate the pupils. These classes must be open to all pupils. There must be tests and examinations based on a syllabus which is aimed at equipping the student with a good knowledge of scripture, basic tenets and principles of the religion.

Religious Holidays

While Hindus do have several religious observances, we ask that Diwali be recognised as the main celebration of the Hindus. The date for the celebration varies each year, falling in the latter fortnight of October or the first fortnight of November. This date will be declared by the South African Hindu Maha Sabha before the beginning of the year and submitted to the relevant government departments. If the Government cannot see its way clear in declaring Diwali a public holiday and since Diwali is the only Hindu holiday we request official recognition for, then we propose the following:

* Schools, Colleges, Universities will not set any examinations, tests or other such important work where, by absence from school the Hindu student will be affected.

* Hindu workers be given the day off with full pay. Employers or senior management should not begrudge Hindus this holiday and there should be no discrimination or intimidation in granting it.

* While we agree with the principle of condoned absence we do not agree that the time lost be covered particularly in the case of workers. The argument that Hindus (or any other minority group) will have an extra day in the year as a holiday can be easily countered by the fact that the entire calendar is drawn in line with a Western Christian ethos and the granting of just one day should be viewed in the spirit of promoting a recognition of the needs of minority communities. Any minority community will never, for obvious reasons, be able to celebrate its main religious festival the way that Christmas is. Diwali fails at about the time when exams are being written, Hindu workers do not get a Diwali bonus nor are there any forms of concession to accommodate this celebration. We are not even asking that the year's calendar be changed to suit the Hindus. All we state is that for the advantages that the Christians enjoy in terms of national recognition of their holidays, they ought to be considerate enough in granting without any reluctance this request by Hindus for the celebration of Diwali.

In the case of students we trust that teachers will help pupils in catching up with the work as is the case when a child, for good reasons, is absent from school for a day.

Euthanasia, Abortion, and other contemporary issues
Most of these contemporary issues are a result of the complex nature of our so-called modern style of living. The standpoint of religion in these matters is very clear, it is the non-conformist attitude of the present generations, often, an open defiance of the morals and virtues that religions advocate, that has led to the situation that prevails. It is very difficult to ask of religion to make a stand on an issue that results out of a violation of religious principles. Pre-marital sex is not approved of by any religion. Illicit sex cannot be condoned and the free sanctioning of abortion will only help encourage promiscuity. The right to life is sacred and it rests on every individual to make sure this right is in no way violated. Irresponsible behaviour cannot be indulged in and then appeal to be condoned by religion. Religion should not be abused by those who wish to manipulate it so that it becomes convenient for them to indulge freely in their passions. Often the castigating demands made on Religion to take a stand reflects the dilemma of conscience of the proponents of these issues. If Religion were to succumb to the whims of promiscuity then it will lose its worth as an institution that restrains the individual in the urge and temptation to sin; it will no longer place the burden of guilt on the conscience when a person commits or intends to commit any act of sin.

In South Africa, because of the injustice and poverty that we have suffered, it becomes necessary to use certain curative means to alleviate some existing problems e.g. pregnancy through rape. The solution does not lie in freely sanctioning abortion. The answer does lie however in a rigorous and immediate plan by the government to eliminate the inequities of poverty and injustice and stabilise communities where social structures have broken down. While there is no doubt that apartheid must take most of the responsibility for a number of the ills rampant in our society, we must not make politics a convenient excuse for making abortion, homosexuality etc. a part of the new South African morality. The role of religion will always be to protect society and it will therefore not condone the sanctioning of any ethics that will destroy the very fabric of a cultured society.

IN INDIAN LANGUAGES

For the purposes of this document Indian Languages will comprise:

Sanskrit      Gujarati     Hindi Tamil Telegu

Given the number of speakers of each or size of the communities whose cultural interests they serve, the implementation of each of these languages as an official language will prove difficult. It is sufficient that the government recognises the right of a minority to study its language at school provided the numbers taking the language make it economically feasible. Presently the Education Department is looking into the number that will determine the viability of offering the language on the school time table.

Where there are sufficient numbers to warrant the teaching of the language as
part of the class time table there are no problems.

Our concern is about those students who wish to study an Indian language but do not make up the required number. In such a case we propose that the respective language organisation e.g. Hindi Shiksha Sangh, find a teacher who will conduct the classes immediately after school hours. The students attending such classes will write the examinations and complete the syllabus set for the standard the pupil is in. These examinations will be recognised by the Education Department and the results will be reflected in the student's class report. The principal of the school will ensure that a suitably qualified teacher is employed and that the classes are properly conducted.

The Institute of Indian Languages, or any such recognised body e.g. the Department of Indian Languages at UDW, will serve to facilitate the general administration of the Indian Languages.

The Indian languages inevitably serve the cultural interests of the language groups and, in terms of community involvement as advocated in the new system of education, it will be appropriate to involve community structures that enjoy credibility in promoting these languages.

Another option could be the offering of an Indian Languages in a particular school rather than all schools in the area. Parents wanting their children to study that language could then enroll the child at that particular school. The problem of numbers and viability could thus easily be overcome.

The government allow for grants or subsidies to those bodies which enjoy credibility so that their services may be procured in effecting a proper implementation of the Indian Languages as part of the Education system of the country.

In terms of the languages studied at school we approve of:

* Up to Std 1 - Any two languages

* From Std 2 to Std 7 - A three language formula - 2 official languages and a third chosen from Eastern Languages (or Foreign Languages). All languages to enjoy equal status and recognition.

* From Std 8 - 1 0 - An official language and one other language

Under this scheme an individual or a community is in no way deprived, at any level, of doing the language that it favours. Presuming that most or all students will opt for English at every grade, this scheme allows a student to do e.g. Zulu or Hindi at every level also. At the Junior Primary level it allows for a child that may not be able to speak English to receive instruction in the mother tongue. From Std 2 - Std 7 students will have to take a third language. This can be a second African language, a cultural, foreign or classical language. For Indian students wishing to do English and a regional African language, the third language will allow for an Indian language. At the higher secondary level the student will want to choose career orientated subjects and offers the student the
choice of doing the language the student is most fluent in. A student should be allowed, if he so chooses, to do more than two languages at the Senior Secondary level. No student is disadvantaged in this scheme. This scheme can serve the language needs of all South African communities. Since all languages will enjoy the same status and recognition, the terms first, second and third language may even be used to indicate the student's proficiency or preference of the language.

CULTURE

Education

Presently the Department of Education and Culture employs tutors who conduct classes at schools and community centres. Enrolment is voluntary. This service is greatly appreciated and must be continued and promoted. In music and dance, tuition should be offered in:

* vocal
* sitar
* harmonium
* tabla
* mridangam

(These cater adequately for the basic needs of the South African Indian. Any other specialised forms of dance or music may be arranged by the community and upon proving the demand for such forms, an application could be made for government support.)

It will be the responsibility of the community to ensure the classes running in their locality have the required numbers to make the classes viable. A nominal fee should be paid by adults.

At primary and high schools, where numbers warrant it, these classes should be conducted for students immediately after school hours. This will enable the principal to oversee such classes.

Indian Music should be a component of the general music syllabus taught in school. As part of an education on World Music, pupils should learn the basic principles and history of Indian Music and Dance.

Television

Private enterprise in the form of commercial television channels or purchase of viewing time should not be prevented as long as they are promoting Indian culture.

This should not in any way influence the time allocated or the service presently being provided for Indian viewers by the SABC. The SABC should increase the time allocated for Indian programmes and slot these in on channels where time can be made available.
Unfortunately programmes tend to pander mainly to a popular mass appeal and we find therefore an undesirable predominance of a "filmy" culture being propagated by the media. There are several creative and equally popular programmes that present a more sober version of Indian culture. Programmes must feature semi-classical and classical dance and music, Indian theatre - classical and modern, and documentaries on Indian Society, History, Politics, Arts and Crafts and Contemporary Issues. Programmes should show the contribution of Indians to modern day Science, Economy, Politics etc. In order to promote a serious understanding of Indian Culture, at least 60% of these programmes should be presented in the Indian Languages with subtitles in English so that those who do not speak an Indian language are not deprived of the information provided.

Radio

The principles laid down for television will also, in the main, apply to radio. It is amazing that the better part of the day's radio programme is spent on reading out and receiving phone-in recipes and listeners phoning in to engage in an exchange of household goods and other such items; all, of course, done in a typical South African Indian English.

The only commendable initiative by way of promoting Indian culture in its true sense is the song-writing competition, where songs are composed and performed in the Indian Languages. There is enough local expertise for the judging of such talent and the entries were very good. It speaks volumes for the potential Radio has to develop local talent and culture.

Again at least 60% of the announcing should be done in the Indian Languages. Material for broadcasting is abundantly available not only from India but also from countries such as Mauritius where the programmes are more suitable because of the similarities in the development and complexities of the culture of the Indentured Indian.

Where, both for Radio and Television, it may be considered necessary to get expertise from outside, it is important that such efforts be aimed at training local talent and encouraging local expertise. Contracts should not be for more than three years and only those experts prepared to train local talent be brought out on such contracts.

ALTERNATIVE MEDICINE

It is important for us to beware of the euro-centric colonial mentality that often makes us lose sight of traditional systems which have a value and merit of their own. Because we have become so much a part of the modern technocratic world we tend to defend and protect it to the extent of a disavowal of our invaluable and timeless traditions.

Traditional African herbal medicine shares an affinity with the Indian Ayurvedic medicine. While African herbal potions and cures have relied on an oral tradition for their transmission, the Ayurveda is a text and manual on the ancient Indian System of Medicine. It is a holistic approach
to life and does not treat an ailment in isolation. An exchange in traditional African and Indian herbal remedies will prove to be an exciting challenge for Medicine in South Africa.

A forum has already been created to monitor the practice of Ayurveda in South Africa and to safeguard against the abuse of this form of medicine by practitioners of dubious merit. We trust that this field is being adequately catered for by those who have the necessary expertise locally.

The inclusion of Ayurveda in this document is to endorse the need for the recognition of Ayurveda as a system of medicine in its own right.

Annexure 2

Letters of support and comment

INSTITUTE OF INDIAN LANGUAGES

Incorporating: *Arabic *Gujarat *Hindi *Sanskrit *Tamil *Telugu *Urdu

SUBMISSION IN RESPECT OF INDIAN LANGUAGES AND ARABIC FOR INCLUSION IN THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Theme Committee 4: No 26 Education
& Theme Committee 4: No 14 Language and Culture

The Institute of Indian Languages supports the proposals of the Arya Pratinidhi Sabha of South Africa and the Hindu Maha Sabha of South Africa in respect of Indian Languages.

However, the Institute respectfully requests that Arabic and Urdu be included in the list of languages listed in the said proposal.

A further request is that, in keeping with current practice in certain government departments, the word "Indian" be replaced by the word "Eastern". Alternatively the expression "Indian Languages and Arabic" be used.

Dr R. Henra
Chairperson

Reference is made herewith to the submissions of the Arya Pratinidhi Sabha of South Africa and the Hindu Maha Sabha of South Africa in respect of the following:
1. Theme Committee 4: No 6 Life
2. Theme Committee 4: No 7 Religion, Belief and Opinion
3. Theme Committee 4: No 14 Language and Culture
4. Theme Committee 4: No 26 Education
5. Theme Committee 4: No 29 Customary and Traditional Law
6. Theme Committee 4: No 30 Group and Minority Rights
7. Theme Committee 5: No 5 Traditional Authorities and Customary Law

The Hindi Shiksha Sangh of South Africa fully supports the proposals in these documents and respectfully requests that they be considered for inclusion in the constitution of the Republic of South Africa.

Dr R. Hemraj
President

18 March 1995
3 May 1995

SUBMISSION FOR INCORPORATION IN NEW SOUTH AFRICAN CONSTITUTION

I forward herewith a submission that seeks the incorporation of provisions in the new South African Constitution to Provide for:

(a) The wise management of the Country's natural resources of soil, water and vegetation;

(b) The sustainable utilisation and development of the environment.

The National Veld Trust believes it is of fundamental importance that its submission be incorporated in the new Constitution in the interest of ensuring the conservation of our priceless heritage of soil, water and vegetation for the benefit of both present and future generations.

I have no doubt you will ensure that the matter is accorded the level of consideration it rightfully deserves.

Kindly acknowledge receipt.

Yours faithfully

CONSTITUTION TO PROVIDE FOR:-

(a) The wise management of the Country's Natural Resources of soil, water and vegetation;

(b) The Sustainable Utilisation and Development of the Environment.

FUNDAMENTAL RIGHTS:

All Citizens have the right to an environment, free of man-induced degradation and pollution and to reasonable and equitable access to the Country's natural resources of soil, water and vegetation.

DIRECTIVE PRINCIPLES:

1. The State and all its citizens shall ensure that the country's natural resources of soil, water and vegetation are managed in a manner which:

   respects land capability; protects life support systems of the natural environment;
promotes sustainability; benefits both present and future generations; protects and maintains biodiversity; promotes the quality of life;

2. The State shall actively promote the implementation of policy guidelines to ensure effective conservation and sustainable utilisation of the Country's Natural Resources of soil, water and vegetation.
TRINITY ACADEMY
The Theological College of Holy Trinity Church
Pietermaritzburg

Please give this your prayerful consideration

Against Pornography

We, the undersigned, totally oppose the sale of pornographic material in South Africa and call for legalisation banning all forms of pornography to be written into the new constitution.

[74 signatures]

Against Legalised Abortion

We, the undersigned, totally oppose the legalisation of abortion on demand, and hereby reject it’s inclusion in the new constitution.

[37 signatures]

REV. WARWICK COLE-EDWARDES
re: **THE PROPOSED LABOUR BILL**

In the present period of world-wide economic decline of the capitalist system as a whole, the bosses increase their profits mainly by attacking workers. They cut real wages, increase the work-load, retrench masses of workers, promote casualization of workers etc. In order to defend their living standards workers must either fight or perish. Because of this, there can never be any partnership between bosses and workers. Workers fight back, not because of a "minority" or “anarchists" but because there is no other way under the capitalist system. In this class struggle the capitalist have on their side extensive resources and the state with all its forces (police, army, courts, prisons, parliament). The worker on the other hand has nothing except united action, the most powerful of which is the STRIKE! By wanting to limit strikes and giving bosses the right to lockout, the proposed Bill strengthens the bosses at the expense of the working class.

**THE INTERIM CONSTITUTION**

In order to prevent a revolution in South Africa the Imperialists promoted the political negotiations. In a deal behind the backs of the masses a new constitution was drawn up that largely protects Imperialist interests. Among the key points that will act against workers interest will be the protection of private property clause and the lockout clause.

For many years the monopolies and other companies have made huge profits under the Apartheid system. Most of the land, mines, banks, factories, farms are under their control. Most workers are still paid starvation wages and there are still more than 9 million unemployed in the country. The private property clause essentially protects the interests of the bosses and guarantees that they can continue to exploit workers. All court rulings and arbitrations will be based on this anti-worker clause- no matter how well trained the shop stewards, organizers or lawyers are it will be easier for bosses to attack workers rights, to retrench, dismiss and victimize workers.

**GOVERNMENT OF NATIONAL UNITY**

By proposing this Bill the GNU is carrying forward the work of the previous Apartheid government, i.e. it is acting in the interest on the Imperialist [the so-called investors]. The Apartheid government tried to crush the workers - and failed! If the Bill becomes law the GNU would in effect be assisting to crush the trade union movement and trying to co-opt those they cannot crush to act against the working class and to take joint responsibility for the crisis of capitalism.

**PROPOSALS**

We propose that all anti-worker clauses and principles in the constitution be scrapped. In particular we propose that the private property clause be scrapped. By this we mean that the protection of bourgeois private property be scrapped is ownership and control of the mines, banks, factories and large-scale capitalist farms- not houses and small and communal holdings.
Further we propose that the lockout clause be scrapped from the constitution and any applicable legislation.

In place of the above, we propose that the Draft Workers Charter report of COSATU be enshrined in the constitution and that it be used as the basis for labour legislation.

All tripartite structures (government-bosses-union) must be disbanded and the trade unions should be independent from the state and the bosses.

There should be thorough and consistent workers' democracy in the trade unions and at all levels of society.

WORKERS INTERNATIONAL TO REBUILD THE 4TH INTERNATIONAL
Do we still need traditional leaders and traditional laws?

With reference to your advertisement in Rapport we as a discussion group have discussed your questions and have come to the following conclusion:-

1. Traditional leaders should play a role only through local governments if they have been elected thereto.

2. Traditional leaders should play a role only in Local Government and not in Provincial or National Government.

3. Qualification for the position of traditional leaders must be determined by right of birth and subsequent election to local government.

4. Women must play the same role as men in traditional institutions.

5. Customary law practices/laws which must be allowed? We are uncertain and cannot give an opinion on this. We do, however, feel that it must not be stipulated in the statute-book.

6. Traditional leaders should have no judicial power, i.e. no Bundu courts.

Afrikanerbond
Boksburg Staan Sterk Branch
THEME COMMITTEE SIX SPECIALISED STRUCTURES OF GOVERNMENT

Financial Institutions and Public Enterprises Reserve Bank independence and impartiality:

We understand that it is accepted that the independence of the central bank is a prerequisite for sound monetary policy. We welcome this important step.

Press reports have created the impression that no major changes are to be made to the clauses dealing with the Reserve Bank as they stand in the Interim Constitution. It is apparently believed that the existing interim constitution clause secures the independence of the Reserve Bank from control by the government of the day.

This view is mistaken. The interim constitution's clause places the Reserve Bank under the control of whatever laws Parliament may choose to pass from time to time.

The interim constitution states that the Reserve Bank, established and "regulated by an Act of Parliament", shall be the central bank (section 195). The Reserve Bank shall exercise its powers independently, "subject only to an Act of Parliament" (section 196(2)). The powers of the Reserve Bank shall be those customarily exercised by central banks and "shall be determined by an Act of Parliament" and be exercised "subject to such conditions as may be prescribed by or under such Act".

Although the interim constitution suggests that the Reserve Bank shall function "independently", it is clear that the Bank is subject to control by Parliament, and hence by the government of the day.

In contrast, the interim constitution guarantees the independence of the Public Protector and Auditor-General from parliamentary control. The constitution entrenches unambiguously the independence and impartiality of the Public Protector and Auditor-General (in sections 111 and 192). These provisions do not state that the Public Protector and Auditor-General shall be subject to Acts of Parliament. On the contrary, they state that no organ of state shall interfere with the Public Protector and Auditor-General in the exercise of their powers.
To establish the independence of the Bank, the Reserve Bank clauses of the interim constitution must be altered to bring them into line with the clauses dealing with the Public Protector and Auditor-General, as follows:

(1) The Reserve Bank shall be independent and shall exercise and perform its powers and functions subject only to this Constitution.

(2) No organ of state shall interfere with the Reserve Bank in the exercise of its powers.

We would like to give evidence to your Theme Committee in this regard.

Leon Louw
Executive Director
THE AGENCY RESPONSIBLE FOR THE CONDUCT OF FUTURE ELECTIONS

1. LEGAL FRAMEWORK

It is imperative to keep the present legal framework in mind when considering the matter of the agency responsible for the conduct of future elections. There is presently a constitutional vacuum and the timescale within which the matter can be addressed is important.

1.1 Independent Electoral Commission Act and Electoral Act

Both the Independent Electoral Commission Act, 1993, and the Electoral Act, 1993, were aimed only at the elections of April 1994 and possible resulting referenda (which did not eventuate) on provincial boundaries in terms of so-called affected areas. This means that presently there is no legal framework for conducting an election nor is there any agency legally responsible for elections at the national or provincial level. This is a serious matter, particularly since referenda fall in this category too. The potential constitutional vacuum apart, there are everyday practical problems such as the registration of new political parties at the national or provincial level which cannot be dealt with.

1.2 Interim Constitution

The Constitution of the Republic of South Africa, 1993, deals with the system for the election of the National Assembly and Provincial Legislatures as well as citizenship and the franchise. Although Schedule 2 refers consequentially to the Independent Electoral Commission, the establishment of the IEC, its duties, powers and so on were not constitutionally provided for but catered for in the separate Act already referred to.

There is no doubt that the electoral system has to be regulated by the Constitution. The agency responsible for administering elections, regardless of the system which applies, need, however, not necessarily be provided for constitutionally. There in fact seems little point in doing this if this function is to be assigned to a Department of State. If, however, it is decided that electoral administration should be independent of political control, then it might be sensible to provide for this principle (in the form of the establishment of an independent electoral commission) in the new Constitution. Details could still be spelt out in a separate Act but, if the independence of
electoral administration is to be enshrined, the method of appointment of members of an electoral commission and their security of tenure as well as the commission's funding and its overall objectives and responsibilities could be spelt out in the new Constitution. It follows that the concern to which such commission would report, namely parliament (possibly in the format of a multi-party standing committee) rather than a Department/Minister of State, would also be specified constitutionally.

The extent to which the agency responsible for the administration of elections needs to be described in the new Constitution therefore by and large depends on which of the two principles mentioned above such agency is based on. The broad options available are spelt out in greater detail in paragraph 2.

1.3 Constitutional principles

The principles for a new Constitution (Schedule 4) determine that there shall be a multi-party democracy, regular elections, universal adult suffrage, a common voters' roll (which may imply undivided, as opposed to group, representation rather than a physical list as such) and, in general, proportional representation. In view of the latter principle, it follows that, for example, should there be a partial constituency system, the unequal effects of which would be balanced out by seats allocated to restore overall proportionality, the demarcation of constituencies (which in most if not all countries is done by a commission or body outside of Government) would be far less contentious than it would be under a purely first-past-the-post system and could therefore be left to an electoral commission, if the latter option is decided upon. If, on the other hand, Government is to administer elections, one may have to consider providing constitutionally for the establishment of a demarcation commission.

2. OPTIONS REGARDING THE AGENCY RESPONSIBLE FOR ELECTIONS

The essential question which needs to be resolved is whether there should be political responsibility for and control of the electoral process or whether the electoral process should be administered independently of the government of the day with the electoral agency accounting directly to Parliament for its activities. In terms of potential models it is of course possible to combine certain elements of each. Three options will now be discussed in terms of their characteristics, basic organisational structures and possible advantages and disadvantages.

2.1 Option 1

A Department of State (such as the Department of Home Affairs) or Bureau or Office attached or linked to such Department.

2.1.1 This ensures political control of and responsibility for the electoral process.
2.1.2 It follows that if the national government controls its own election, then provincial
governments and local authorities should also be entitled to do the same without
being overseen to any greater extent.

2.1.3 It is possible that this could again create the perception of biased electoral
administration.

2.1.4 No Department of State has the capacity at national or provincial and district level
to administer elections with its present resources. Such capacity would thus have to
be created at the levels indicated. It would, however, be impossible, from a financial
perspective, to create adequate new structures at a local level, within the ambit of
the central government, to administer elections. Loose, temporary structures may
be a solution as far as the actual conduct of an election is concerned but this would
not allow drawing up and, particularly, constant maintenance of voters' rolls (which
generally seems to be insisted upon by all political parties as well as the Government
of National Unity). The present structures of the Department of Home Affairs, for
example, could in the past deal with the then ± 5 million white, coloured and asian
voters but could not conceivably deal with the now enlarged electorate of more than
23 million given their complexity and often very difficult geographic location.

2.1.5 There seems to be fairly common acceptance that the most efficient and cost-
effective way of solving the problem set out in the previous paragraph would be for
local authorities to be responsible for the conduct of all kinds of elections, and to
therefore have permanent electoral structures.

2.1.6 Consideration could be given to regional and district offices of the Department of
Home Affairs linking directly with local authorities without the intervention or
involvement of provincial authorities. This would, however, require the creation of
additional infrastructure at regional and district level in the Department of Home
Affairs and it would thus be more cost-effective to allocate the co-ordinating role
at this level to existing provincial administrations (as opposed to provincial
governments).

2.2 Option 2

A Department of State to conduct elections with an (independent) electoral commission to oversee
its preparations and to monitor the conduct of elections, adjudicate on disputes and, lastly, certify
an election as free and fair.

2.2.1 This would essentially still ensure political control of the electoral process.

2.2.2 The administrative machinery for this option would be the same as for option 1.
2.2.3 The purpose of the electoral commission would be to redress the shortcomings of option 1. In short this means that the political control at central level would be checked for possible abuse.

2.3 Option 3

A statutory commission separate from government but using government support services where necessary.

2.3.1 There would be a small commission with staff to centrally plan, organise and co-ordinate the conduct of elections. The conduct of elections would be vested in provincial administrations and local authority administrations as the (electoral) agents of the commission. (The size and scope of the IEC was unique to the transitional nature of the 1994 elections and the then non-acceptability of government structures at any level.) Provincial administrations would principally play a logistical co-ordinating role but there could be a role for a provincial advisory committee, with representation for each province, to advise the commission on policy matters.

2.3.2 Monitoring, under this option, is principally seen as a function of political parties (with recourse principally to the judicial system as well as a Party National Liaison Committee).

2.3.3 Adjudication is seen as the function of the courts, although it would perhaps be necessary to consider the establishment of electoral courts in order to ensure speedy and affordable access to the judicial process.

2.3.4 The electoral commission would be independent of political control and directly responsible to Parliament. To ensure such aim it would be necessary for -

* Commissioners should be appointed on a non-political basis, in the true sense of the term, perhaps from a list of nominations submitted to the executive by the Constitutional Court or another politically unattached body such as the Judicial Service Commission.

* The period of tenure of commissioners should exceed that of a Parliament (six years and five years respectively, as an example).

* There should be security of tenure for commissioners. The provisions of the present Independent Electoral Commission Act, 1993, are regarded as adequate in this respect.
An electoral commission should not be in a position where it could effectively be killed off by starving it of money. The provisions in the present Independent Electoral Commission Act, 1993, in this respect, where the Commission could at its own discretion determine its requirements which the fiscus was then obliged to meet are, however, too unrestricted and a more balanced legal arrangement would have to apply.

These requirements would obviously also apply to the commission under option 2.

3. SUMMARY AND EVALUATION OF THE OPTIONS

All three options have local authority administration as the executive leg of an electoral administration. They all equally provide for provincial administrations to play a logistical co-ordinating role in a regional context. In all these options local authority administrations would further be responsible for drawing up local voters' rolls and maintaining them, which would require permanent electoral structures at local level. Such local voters' rolls would be centrally combined (to prevent illegal duplications) to form provincial and national voters' rolls, since it seems to be commonly accepted that future elections should be based on voters' rolls. In view of the fact that local authorities would thus also be performing functions on behalf of the provincial and national governments, some form of subsidisation is probably implied.

The differences between the three options can be summarised in this way:

<table>
<thead>
<tr>
<th></th>
<th><strong>Option 1</strong></th>
<th><strong>Option 2</strong></th>
<th><strong>Option 3</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Home Affairs)</td>
<td>(Home Affairs and supervising commission)</td>
<td>(Electoral commission)</td>
</tr>
<tr>
<td>1. Political control</td>
<td>Political control supervised for abuse</td>
<td>Independent of the political process</td>
<td></td>
</tr>
<tr>
<td>2. Could control national elections only</td>
<td>Could control National elections only</td>
<td>Would control National and Provincial elections. Could also control or co-ordinate local elections</td>
<td></td>
</tr>
<tr>
<td>3. Provinces might have to duplicate electoral administrations for provincial elections</td>
<td>Provinces might have to duplicate electoral administrations for provincial elections</td>
<td>Less provincial infrastructure would be required but policy input maintained</td>
<td></td>
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</tbody>
</table>
4. Possible diverse provincial electoral legislation and programmes in respect of voter education, training of officials etc.

NOTE:

Although it follows logically that if national elections were to be conducted under the political control of the national government itself, the same principle would apply for elections at other levels of Government, this is obviously not obligatory. Should it be agreed that all elections should be conducted under the political control of the central government, points 2, 3 and 4 in the above comparison would obviously fall away.

4. **FINANCIAL IMPLICATIONS**

4.1 It is generally agreed that the cost of running elections has become a universal problem. It would seem that the best way to contain rising costs would be:

* to utilise existing structures to the greatest possible extent;

* to create permanent structures to avoid retraining and re-equipment with every election;

* to standardise to the greatest possible extent; and

* to avoid loose temporary structures and appointments as far as possible in at least any position of authority, in order to ensure accountability.

4.2 On the face of it there seems, from a financial point of view, to be very little to choose between the three options presented. Option 1 would probably be a slightly cheaper proposition than options 2 or 3. The long-term savings which could stem from the standardisation inherent in option 3 should, however, also be kept in mind, although, given the total cost of elections, the difference would probably be so marginal that it should not be a prime consideration. Particular care should be taken not to equate the cost of the 1994 elections, with their unique circumstances, structures, aims and particularly their impossibly tight time schedules (which inevitably led to a lack of structures for control and situations
which could only be managed with financial overspill), with that of a possible commission in options 2 and 3.

5. TRENDS

5.1 Interim Constitution

It may be argued that the emphasis which the present Constitution places on fundamental rights and freedoms as well as transparency in governance would, at least morally, require such trend to continue in the field of electoral administration too, so that it is not again, as in the past, subject to political control. This should, however, not preclude the consideration of any practicable alternatives.

5.2 Independent electoral commissions

There are very few established democracies where elections are not administered by the State. The member states of the European Union are examples in this regard. It is, however, increasingly the trend to have independent electoral agencies in those countries in transition to democracy or where democracy has not yet stood the test of time to become a culture in itself. Such trend perhaps best manifests itself in the Commonwealth, where even established democracies such as Canada, Australia and India have established electoral commissions. It should however, once again, not be imperative merely to follow trends but equally to consider practical requirements.

6. TIME-SCALES

It is important to deal with the constitutional vacuum which presently exists regarding electoral administration as soon as possible. This does not in a practical sense apply as much to a new Electoral Act, which can only follow a new Constitution which determines the electoral system, as it does to an agency which will administer whatever system may be decided upon. If, for instance, it is decided in future to use voters' rolls, it is important that an agency be in place by the time of the local government elections in order to combine and maintain the rolls after these elections. It is therefore regarded as very important that the principle involved be decided upon as soon as possible. If this is done the Government could be approached to consider enabling legislation which could then later be confirmed by constitutional provisions. Several hundred million Rand could be wasted if the present efforts are allowed to lapse and if a new registration of voters has to be carried out later. Should this be allowed to happen, there would probably be strong reactions from political parties and the public alike.
MEMORANDUM TO THE LEGISLATIVE ASSEMBLY

REGARDING THE ENVIRONMENT

It is important that conservationist ethics be established in the country via the educational system in order to support policy to this effect. Policy statement is defined positively since each individual from birth has the right to live in an environment which complies with certain minimum standards in respect of the exploitation of the environment and the conservation thereof.

In order to implement such policy in a co-ordinated manner in all the provinces, environment conservation should be a central government function, with the delegation of certain executive powers to the respective provinces.

After environment conservation is entrenched in the future constitutional dispensation, the central government must fulfil the role of protector to ensure that the provinces formulate and implement a sound and self-supporting environment policy. Adequate and effective protection measures must be entrenched in the Constitution to ensure that no South African citizen over-exploits the environment to the detriment of other citizens.

From an environment conservation and agricultural point of view it will be catastrophic for agricultural resources if large numbers of people are settled on land which is not suitable to support them. This will give rise to poverty and the over-exploitation of the environment resulting in the degradation thereof, which in turn would be contrary to the policy statement.

To make the policy statement legitimate so that it is accepted and supported by all, a transparent approach must be followed at all times with the full participation of all South Africans.

A logical policy statement on the environment which should be included in the Constitution of the RSA would be: "The environment is regarded as a national asset which each individual may exploit judiciously, but such exploitation must always take place with a view to the maintenance and development thereof so that it can be preserved for future generations and offer each individual a clear aid pollution-free environment which is not detrimental to his/her health or welfare.”
South African National Defence Union (SANDU)

10 MARCH 1995

RE. PROPOSALS FOR AMENDMENT OF DEFENCE ACT

Although we are not yet acknowledged as a union by the SANDF, we would like to submit specific inputs at this stage concerning the uniformed member's fundamental rights and freedom of association as foreseen in the Constitution of South Africa. We are quite sure that we shall eventually be acknowledged, and as soon as this happens we shall, at that stage, and in the form of conversation, submit inputs on the current Defence Act or any legislation draft.

Our proposals are:

1) Section 126(B) of the Defence Act deprives soldiers of their right to freedom of association and of reasonable labour practices, which includes the right to belong to a union or an organisation of employees of his/her choice. This Section is in direct conflict with the regulations of the Constitution. In our opinion, soldiers must -like all the citizens of this country- be able to exercise the rights contained in the Constitution. This includes the right to belong to a union. Unions within the framework of a defence system are internationally known and acknowledged; they play an effective role in countries such as Canada, Denmark, Sweden, France, Germany, the Netherlands and Australia. No previous investigations of these unions could indicate that a defence union has any negative influence on the morale, the discipline, or on the operational effectivity of a country's defence forces.

On the contrary, research has, rather, shown that a union can generate effective contributions, which can be of benefit to both the employees and the employer. Our proposal is therefore that that those passages that forbid any uniformed member, or that place restrictions on membership of a union or of an association of employees of his choice, should be scrapped.

2) Section 126(C) was moreover included to make provision for specific labour regulations and procedures concerning labour matters in the South African National Defence Force. This section must be scrapped and replaced with complete labour rules and principles.

Once more, we wish to emphasize that a modified Defence Act in its entirety be made available for comment before such an Act is tabled.
COR VAN NIEKERK

CHIEF EXECUTIVE OFFICER: SANDU
THE APOSTOLIC CHURCH (Apostle Unity)

To: Mr Cyril Ramaphosa

I greet you in peace.

An astounding letter reached my office this morning, wherein we were informed by a group known as "Constitutional Awareness Campaign Co-ordinators", headed by Jo-Ann Downs and Trish Jelbert. From their letter I quote the first six paragraphs:

"The A.N.C. has submitted a proposal that in the New Constitution South Africa should become a SECULAR STATE. They have further said that STATE and RELIGION should be separate (as opposed to the Christian position that the CHURCH AS AN INSTITUTION should be separate - which is entirely another matter). Very serious implications flow from this:

1. Anyone who is a Christian leader would not be able to hold public office in any state institution (including schools, hospitals, etc.) Even Home Cell leaders and prayer group leaders would be included.

2. No Christian services could be held on any state land or building (including schools, hospitals, etc.)

3. No Christian prayer would be allowed in any state institution or one funded fully or partially by the State (Christian schools would be included in this as they receive State funding on buildings).

This applies equally to ALL OTHER RELIGIONS too. All religious freedom will be attacked. The only Party that has spoken out against this is the African Christian Democratic Party (A. C. D. P.)

Unless all God-fearing people write protesting about this, the A.N.C. submission will be passed and the very words GOD ALMIGHTY will be removed from the New Constitution."

Sir, firstly I would pose the question to you; are their allegations factual? If not, then obviously my letter will not apply; on the other hand, should it be factual, I wish to express my strongest dissatisfaction at even the very thought of prayers not being allowed on state ground and obviously the words GOD ALMIGHTY being removed from our New Constitution.

Our President has never suggested or even hinted in any of his public appearances, which I closely follow, any such drastic steps, and might I add, neither have you sir.
At our Easter Festival, wherein our National Choir presents a yearly concert of choir music on the Saturday night preceding Easter Sunday this year, our program was opened with Nkosi Sikeleli Afrika, rended in Afrikaans of which I quote the following words by the author Enoch Sontonga:

"Seen ons Here God, seen Afrika,
Laat sy mag tot in die hemel reik
Hoor ons as ons in gebede vra,
Seen ons in Afrika, kinders van Afrika.

Daal neer o Gees, Heilige Gees, Daal neer o Gees, Heilige Gees,
Kom woon in ons, Lei ons 0 Heilige Gees.

Hou U hand o Heer oor Afrika,
Lei ons tot by eenheid en begrip
Hoor ons as ons U om vrede vra,
Seen ons in Afrika, kinders van Afrika.

Seen ons Here God seen Afrika,
Neem dan nou die boosheid van ons weg
Maak ons van ons sonde ewig vry,
Seen ons in Afrika, kinders van Afrika."

Surely this beautiful National Anthem containing the words GOD and HIS HOLY SPIRIT throughout, for this reason I find it very hard that you sir, and our President, the best Statesmen this country has ever seen, would allow laws to be passed against freedom of religion.

We are told by Apostle Paul in I Timothy 2:1 & 2 to pray "for kings, and for all that are in authority; that we may lead a quiet and peaceable life in all godliness and honesty."

Sir, we have always been termed as a church group in this country, under the old dispensation as a sect. The reason being that we were not part of the three Afrikaans Sister churches. We know about discrimination, even against our children at school you were looked down upon if you bore the name Apostolic. However, we never deviated for one moment from our teaching and our way of Worshipping God by Christ Jesus through the Holy Spirit.

WE NEVER EVER PRACTICED APARTHEID IN THIS CHURCH, WHICH WAS ESTABLISHED IN 1893, DERIVING PROM SCOTLAND!
Finally, although I have never had the privilege of meeting any past Heads of State of our country, although always having wanted to inform them of our standing, we were always denied or shunned away.

I do hope that I shall one day have the privilege of shaking your hand or that of our most esteemed President.

I greet you in the peace of brotherhood and in the name of Christ Jesus our Lord.

J Philippus Erasmus
Administrator
Re. Concept proposals for weapon Control

After mutual discussion among interested parties in my community I was asked to submit the following for consideration in this regard:

1. It is assumed that the purpose of this legislation is to combat crime. In that case further stricter licence requirements will probably have only a negative influence on the crime figure since very few crimes are committed by legal owners with their own firearms.

Stricter legislation will benefit only the criminals, since they in any case do not care about licence requirements. Furthermore, it will favour the criminals in so far as it eliminates the ability of law-abiding citizens to defend themselves.

It has been found in many American states that the cities with the strictest weapon control have the largest crime figure, for example New York. On the other hand, cities where strict legislation has been abolished had a drastic decrease in the crime figure. A strictly scientific study of the relation between the strictness of legislation and the crime figure in various American states will support my argument that strict firearm legislation will only favour the criminals.

The RSA already has much stricter weapon legislation than many other countries with a low crime figure, so that stricter legislation will make no difference to this.

The answer to the use of firearms in robberies etc. lies in the imposition of extremely strict penalties in cases where weapons are used for this purpose. The high crime figure must be attributed to sympathetic courts and not to licensed weapons.

2. A further purpose of this legislation is probably to prevent that weapons fall in the hands of criminals by limiting private possession. This restriction will in no way limit the availability of weapons to criminals, since an unlicensed AK47 is available cheaper on the black market than it is for an ordinary citizen legally to obtain any firearm. In any case, ordinary citizens do not obtain automatic firearms legally as in the case of AK47's.

The criminals are therefore already better armed with unlicensed firearms from the black market than the ordinary citizens. Theft of unlicensed firearms therefore does not play such a large role as the supporters of disarmament want us to believe. Total prohibition of the private possession of firearms will therefore not cut off the supply of firearms to criminals. The supporters of total disarmament therefore promote the case of criminals.
3. Much fuss is usually made of the use of firearms in family murders - these are, however, passion crimes and any weapon which is available, is used. If firearms are not available, a knife, axe or even a log of wood will be used. The person who believes that this kind of tragedy will be eliminated by banning firearms makes a big mistake, since in the ordinary home there are various other weapons which can be used.

4. Too much emphasis is placed on firearms as instrument with which citizens can be killed. Fact is, however, that there are many other death instruments which make a larger contribution to loss of life than firearms. Is it also proposed to ban these? The list in order of deadliness is as follows:

1. Knives and other sharp objects
2. Motorcars and other vehicles
3. Industrial accidents
4. Firearms

5. It is proposed that the present legislation is sufficient but that the following be added:

5.1 That prospective firearm owners give proof of knowledge of the use of firearms and possess a safe.

5.2 That a distinction be made between weapons for hunting (therefore rifles) and hand weapons. Hunting weapons are too large and clumsy and are seldom used for crime.

5.3 Owners be compelled to keep firearms in a safe or to carry these on them.

6. It is proposed that other legislation be amended to:

6.1 institute heavy compulsory penalties without bail for crimes in which any weapon is involved

6.2 ban inflammatory meetings

6.3 clamp down on leaders who hold inflammatory speeches.

7. To conclude:

7.1 The total banning of the possession of firearms by law-abiding citizens will favour only criminals and leave citizens at the mercy of criminals. The security services cannot always be everywhere.
7.2 Total removal of firearms from the hands of law-abiding citizens will in no way cut off the source of firearms to criminals. They can in any case obtain better firearms cheaply on the black market. The many wars in Africa have caused that a large variety of weapons are available on the black market.

7.3 Restrictions on the possession of firearms restrict only law-abiding citizens and not criminals.

NJH GROBBELAAR
CONSUMER PRODUCT DEVELOPMENT
AD HOC COMMITTEE FOR THE CAMPAIGN ON SOCIAL AND ECONOMIC RIGHTS

16 May, 1995

Please find enclosed a copy of our submission on Social and Economic Rights with accompanying organisational endorsements.

The Ad Hoc Committee which represents organisations who have endorsed this submission would like to request an oral hearing to speak to the content and arguments as outlined in our document. Although we realise that this may add a further load to the work of Theme Committee 4 members, we are of the strong opinion that an important and complex issue such as this merits such a hearing.

We would appreciate it if you could get back to us as soon as possible concerning our request. The contact person is myself, Josette Cole, at 47-8176 (telephone/fax).

I look forward to hearing from you at your earliest convenience.

JOSETTE COLE
ON BEHALF OF THE AD HOC COMMITTEE FOR SOCIAL AND ECONOMIC RIGHTS

The Submission was endorsed by the following organisations:

Urban Sector Network
National Land Committee
People’s Dialogue
LHR - Stellenbosch
South African Health and Social Services Organisation - SAHSSO
Nadel Western Cape
ANC Health Dept Western Cape
PPHC Western Cape
Homeless People’s Federation
CALS (Gender Project)
CALS (Land Project)

SUBMISSION BY THE
AD-HOC COMMITTEE FOR THE CAMPAIGN FOR SOCIAL AND ECONOMIC RIGHTS (MEMBERS TO BE NAMED)
TO THE THEME COMMITTEE ON FUNDAMENTAL RIGHTS

SOCIAL AND ECONOMIC RIGHTS IN THE CONSTITUTION

1. Should social and economic rights be included in the final constitution as fundamental rights or as directive principles of state policy?
1.1 Social and economic rights are internationally regarded as fundamental human rights, and not simply as matters of policy or aspirations. Examples of this are the International Covenant on Economic, Social and Cultural Rights; the European Social Charter; and the Protocol of San Salvador to the American Convention on Human Rights. They are protected and enforced under international law, through various tribunals and supervisory bodies.

1.2 The struggle for democracy in South Africa was not limited to claims for political rights. It included claims for social and economic rights such as land, housing and education. As such, social and economic rights were always recognised as human rights. To deny the acceptance of these rights as full human rights in the final constitution means that the text will not reflect the aspirations and values of the majority of the population.

1.3 It is most disadvantaged groups in society who have been most deprived of social and economic rights and who are most in need of enforceable rights. To exclude social and economic rights, or to limit them to a set of interpretative guidelines such as a list of directives of state policy, will undermine the rights claims of these groups.

1.4 Moreover, the entrenchment of enforceable social and economic rights in the constitution will enhance the democratic participation of the most disadvantaged groups in society by granting both political and legal avenues to claim their rights. If social and economic rights are not recognised and enforceable in the constitution, these groups will effectively be denied full participation in the new society.

1.5 In the era of constitutional democracy, the language of human rights, as elaborated over time by the courts, will play an influential role in informing political discussions and priorities. To exclude social and economic rights from this language will effectively exclude the claims of the most disadvantaged from full consideration in the construction of the new democratic order.

2. Should social and economic rights be enforced by the courts or by an alternative body or mechanism?

It is neither possible nor desirable to try to distinguish "social and economic" rights from other rights which are enforceable by the courts, or to create a separate institution for enforcement of these rights. Social rights should be fully integrated with other fundamental rights and enforced by the courts, for the following reasons:

2.1 Social and economic rights and civil and political rights are recognised in international law to be interdependent and indivisible. Establishing a separate enforcement mechanism would require the courts to categorise
claims in a simplistic fashion as belonging to one type of rights claim or another. Treating the two types of rights as mutually exclusive rather than as interdependent would weaken all fundamental rights.

2.2 A separate enforcement mechanism for social rights would be likely to remove from the courts many issues which are currently within their jurisdiction. The right to housing, for example, includes protection from unlawful or arbitrary eviction, protection from discrimination in access to land and services, enforcement of maintenance standards, and other components presently within the jurisdiction of the courts. Excluding these types of issues from the courts would weaken the enforcement of rights already recognised as justiciable.

2.3 It is not possible to distinguish different rights on the basis of different sorts of remedies. Most rights claims are "hybrid", in the sense that they have both positive and negative aspects. Most "civil" rights claims have budgetary implications. To exclude any claim with budgetary implications from courts would send a message to the courts to adopt an extremely narrow, negative and formalistic approach to fundamental rights. The courts would be unable to deal with many of the most important civil and political rights claims of disadvantaged persons. They would be unable to determine, for example, whether the right to counsel requires the provision of legal aid, whether sex equality for women requires adequate maternity benefit provisions or whether the right to vote requires the provision of accessible polling stations.

2.4 It is similarly inappropriate to try to distinguish two types of rights on the basis of whether an infringement is subject to immediate relief or whether the right must be progressively realized. Many aspects of social and economic rights claims require immediate relief. Those who are threatened with being deprived of their land, who have no access to water, who are deprived of social security or whose children are deprived of basic health care may require an immediate remedy as well as more long term programmatic change. If separate enforcement procedures were instituted on the basis of this distinction in remedy, it would be unclear in many circumstances which forum was appropriate.

2.5 Many aspects of the right to housing, health and social security which are not presently subject to immediate relief will hopefully become basic entitlements of all South Africans in years to come. To constitutionalise such rights as being subject only to "progressive realization" would freeze and entrench the status quo. It seems preferable to allow the courts to determine the appropriate remedy, considering the situation at the time of the claim, rather than predetermining which type of remedy is appropriate.

2.6 Many aspects of the right to housing, health and social security which are not presently subject to immediate relief will hopefully become basic
entitlements of all South Africans in years to come. To constitutionalise such rights as being subject only to "progressive realization" would freeze and entrench the status quo. It seems preferable to allow the courts to determine the appropriate remedy, considering the situation at the time of the claim, rather than predetermining which type of remedy is appropriate.

3. Does the entrenchment of social and economic rights in the constitution mean that a person can sue the government for, for example, the immediate provision of a house?

3.1 Social and economic rights do not have as their only or primary remedy the provision of a commodity on demand. Rather, they require the creation of an environment and processes which enable individuals and communities to realise these rights. While access to adequate housing for all is clearly not subject to immediate relief at present, there are many aspects of the right to housing which enable individuals and communities to fulfil the rights to housing, such as security of tenure and equitable access to land, services, building materials, credit and facilities. Over time, the right to housing may allow individual claims for access to housing by those who are in need, as the statutory framework is elaborated and the capacity of the state develops.

3.2 There is no real basis for the fear that courts will overstep the bounds of their judicial authority. There is no danger at this point in time, or in the foreseeable future, that if a plaintiff asserted a right to adequate housing, a court would order the state to build that plaintiff a house. The experience in jurisdiction that recognise some social and economic rights has been that courts have shown very wide deference to legislative bodies where these rights are implicated.

3.3 The concern that entrenchment of social and economic rights as fundamental constitutional rights will generate false expectations is not well founded. The experience of people working with poor communities, both here and in other jurisdictions, has been that these communities realise that the constitutional entrenchment of social and economic rights will not necessarily translate into the immediate provision of material goods. In the same way, they are aware that the current protection in the interim constitution of rights to equality, privacy and dignity does not mean the imminent, let alone immediate, transformation and improvement of their lives. Social and economic rights are viewed, like all other rights, as tools of empowerment to challenge barriers that prevent them from fully and equally participating in the social and political order.

4. Are the courts able to order the types of remedies required?

4.1 The range of remedies available to the courts means that they will not be placed in a position where they will have to design legislative social
programmes or interfere with resource allocation, in order to give appropriate effect to social and economic rights.

4.2 An examination of the range of remedies available to courts generally and in the constitution in particular reveals that there is sufficient flexibility of remedies to deal with social and economic rights claims. For example, where positive action is required, a court may choose to issue a declaration of rights, or to refer the matter to Parliament for appropriate action.

4.3 In many cases, the court will be able to grant immediate relief. Two examples concerning the right to adequate housing may be given:

4.3.1 In a recent review of the Dominican Republic's compliance with the right to adequate housing under the International Covenant on Economic, Social and Cultural Rights, the recommendations of the UN Committee on Economic, Social and Cultural Rights to the government of the Dominican Republic included the following:

- 4.3.1.1 the identification of specific households in extremely precarious positions for whom immediate remedies were required from the government; and
- 4.3.1.2 the identification of areas in respect of which a longer term legislative initiative was necessary.

4.3.2 Similarly in South Africa, even within the limits of the Group Areas Act, in the case of S v Govender the Supreme Court declared that the availability of alternative accommodation should be taken into account before eviction was ordered.

4.4 However, it is clear that not all aspects of social and economic rights are currently justiciable by the courts (and particularly as justiciability is traditionally understood). The extent of justiciability will doubtless change over time as the minimum threshold of rights granted through legislation shifts upward. In the meanwhile, rights claimants in this position will not be left without a remedy. They will be able to approach the Human Rights Commission in the following sorts of situations:

4.4.1 where a matter requires the sort of investigation that the courts are not able to carry out;

4.4.2 where particular or urgent recommendations on legislation or policy guidelines need to be made to Parliament or the government;
4.4.3 where indicators or timetables need to be developed to measure governmental compliance with certain rights; or

4.4.4 where monitoring of compliance is required.

5. In the light of this analysis, the following basic structure and key provisions are proposed.

**PROPOSED CONSTITUTIONAL PROVISIONS WITHIN THE FRAMEWORK OF THE INTERIM CONSTITUTION**

**AMENDMENT OF EXISTING PROVISIONS**

7(1) This Chapter shall bind all legislative and executive organs at all levels of government, all of which shall be under a duty to respect, protect, promote and fulfill all rights contained in this Chapter.

8(1) Every person shall have the right to equality before the law and to equal protection and benefit of the law.

8(2) No person shall be discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, social or economic status, disability, religion, conscience, belief, culture or language.

8(3)(a) The right to equality before the law and to equal protection and benefit of the law includes measures designed to achieve the adequate protection and advancement of disadvantaged persons or groups or categories of persons in order to enable their full and equal enjoyment of all rights and freedoms.

35(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality consistent with the fundamental value of alleviating and eliminating disadvantage and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

35(4) In interpreting the provisions of this Chapter a court of law shall recognize the interdependence and interaction of the rights in this Chapter in such a manner as to promote the values referred to in section 35(1).
We, the Pastor, Elders, Deacons and Members of the Somerset West Baptist Church wish to bring the following points to the attention of your committee.

Our primary concern is that our constitution will defend and protect the rights of the ordinary citizens of our land to pursue their God-given vocations in whatever work they find to do, to bring up their families in a healthy environment, to practise their religion and to live in freedom from fear and oppression. We are convinced that if our constitution is to succeed in promoting the well-being of all who live in our land it must effectively guarantee and protect the absolute rights of all our citizens, particularly relating to the well-being of the basic family unit as the foundation of society. Furthermore, the fundamental rights of women and children should be protected and unequivocally safeguarded, and in no way compromised by any qualifications such as, for example, are implied in Para. 14(3) (a) of the present Interim Constitution. With these principles in mind we make the following submissions for the consideration of your committee.

**THE FAMILY**

The family is the basic building block of society. Healthy family life makes for healthy social life. The breakdown of normal family life will lead to the deterioration of the whole fabric of society. A good constitution must serve to defend and protect families from the many destructive forces arraigned against them.

**WOMEN**

Women have a right to freedom, dignity and equality. Our constitution must not countenance those forces that work to reduce women to being simply the objects of male prurience.

**CHILDREN**

Every child has a right, as far as possible, to a normal upbringing in a healthy, sound family environment. This right must be defended by our constitution, which must not therefore allow the adoption of children by homosexuals. Such an action would seriously disadvantage such children as to their integration into society when they are grown up. We do not wish to deny homosexuals their normal rights in society, but we must state with clarity our conviction that homosexual acts are immoral of themselves and are not conducive to the welfare and true progress of society as a whole.

We believe, furthermore, that unborn children also have a right to life, and we urge that no relaxation be made in respect to the lay on abortion without very serious consideration of the ethical principles involved.
RELIGION

Religious freedom, the right to worship God according to the dictates of our conscience and the right to freely propagate our deepest convictions and beliefs, is fundamental to all freedom of conscience, speech and action. The freedom we desire for ourselves, we freely grant to all people of all religious convictions. Religious freedom includes the right to change our religious affiliations.

CONCLUSION

As Christians we see it as our duty to do all in our power, with the help of God, to promote the welfare and best interests of our country and all its people. We encourage our church and all people to love God and their neighbours, to respect legitimate authorities and the law of the land and to work hard that they may not only provide for themselves and their families but also assist the needy. Such God-fearing, law-abiding, loving citizens are, we believe, the key to a happy and just society.

The Somerset West Baptist Church
UNIVERSITY OF CAPE TOWN
Institute of Marine Law

11 May 1995

For the attention of Steering Committee Number 1

I am enclosing herewith some suggested constitutional provisions on

(1) the status of international treaties;

(2) the use of the National Defence Force in law enforcement, beyond the borders of
  the Republic; and

(3) the definition of the 'National Territory'.

All of these topics are international law related and I am enclosing two articles which
provide background discussion and comment in relation to the existing situation and the
suggestions. The two articles have been submitted to a legal journal for publication, but in
view of the urgency of the drafting procedures I thought it would be appropriate to let the
Steering Committee have them well in advance of publication.

Professor DJ Devine
Director

27 June 1995

I am following up my letter of 11th May 1995 with some Additional suggestions for the
new Constitution on the use of force, self-defence, aggression and the National Defence
Force (in effect the provisions of s227(1)(a) and (2)(e) of the Present Constitution).

The topic is also international law related and I am enclosing an article which provides
background discussion and comment. The suggestions for the new constitution are
contained in the last section. I shall probably proceed to publication of this article but in
view of the urgency of the drafting procedures I thought it would be appropriate to let you
have a copy in advance.

Professor J Devine
Director
SOME PROBLEMS RELATING TO TREATIES IN THE INTERIM SOUTH AFRICAN CONSTITUTION AND SOME SUGGESTIONS FOR THE DEFINITIVE CONSTITUTION

DJ Devine*

Introduction

The Republic of South Africa Constitution Act 1993¹ came into force for all purposes relevant to this paper on 27th April 1994.² It attempts to regulate the circumstances in which the Republic is bound by treaties at the international level and in which treaties become part of South African municipal law. Two sections in the Constitution are relevant and it is worth quoting them at the outset.

Section 82(1)(i) provides

`82 (1) The President shall be competent to exercise and perform the following powers and functions, namely-

(i) to negotiate and sign international agreements'.

Section 231 provides in its first three subsections

`(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.

(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of section 82(1)(i).

(3) Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.'

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¹ BA LLB (NUI) LLB (UNISA) LLD (Cape Town), Professor of Law, Director, Institute of Marine Law, University of Cape Town.
² Act 200 of 1993 (hereinafter the 'Interim Constitution').
³ Ibid s251(1).
While these provisions go a considerable way towards regulating the above questions, they are not entirely satisfactory. In the first place, they lack clarity in some respects. In the second place they are not comprehensive in that they simply do not regulate certain problems. It is the purpose of this paper to highlight the defects in the provisions in the hope that they will receive appropriate treatment when the definitive constitution is being drafted. Problems come to the surface when the following questions are addressed: continuation of treaties; signature of treaties; authorization of ratification of treaties; ratification of treaties; incorporation or translation of treaties into municipal law; constitutionality of treaties. The present paper will broach these topics in the order just mentioned.

In discussing the various problems it is desirable, at the outset to make a fundamental distinction between what I would like to call `new' treaties and `old' treaties.

`New' treaties and `old' treaties

By `new' treaties I mean those treaties which have been negotiated and signed by the President under the provisions of the Constitution. In effect these treaties would have had to be negotiated and signed since the 27th April 1994 when the Constitution came into force. All other treaties I would term `old' treaties. They would include the following examples.

(i) Treaties to which South Africa became a party before 27th April 1994

This would have taken place by ratification or accession. The treaties in question would have entered into force before the 27th April 1994 eg South Africa ratified the four Geneva Conventions on the Law of the Sea 1958 on the 9th day of April 1963. The Conventions came into force on different dates between 1964 and 1966.

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3 For a description of the negotiating process leading to the adoption of the Constitution and the reasons why s231 is `certainly not flawless' see M Olivier `The status of international law in South African municipal law: section 231 of the 1993 Constitution' (1993-1994) 19 SAYIL 1 at 2-4.

4 A Constitutional Assembly has been established. Ibid s68(1). It shall pass a new constitutional text within two years from the date of the first sitting of the National Assembly ie by May 1996. Ibid s73(1).

5 Ibid s82(1)(i).


7 The Convention on the Continental Shelf 1958, the Convention on the Territorial Sea and the Contiguous Zone 1958, the Convention on the High Seas 1958 and
(ii) **Treaties adopted before 27th April 1994 but to which South Africa becomes a party after that date**

The Law of the Sea Convention (LOS C) was adopted in 1982. South Africa signed it in December 1984 but as yet has not ratified it.\(^8\) The World Trade Agreement 1994 (WTO) was signed by South Africa on 14 April 1994. Neither LOSC nor WTO were negotiated and signed by the President under s82(1)(i) of the Constitution.\(^9\)

(iii) **Treaties adopted after 27th April to which South Africa becomes a party (naturally also after that date) but which have not been negotiated by the President eg the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea 1982 adopted on 28th July 1994. Though the President has signed this Agreement, it was not negotiated by him under s82(1)(i).\(^10\)**

The net position is that to be a `new' treaty, the instrument must be both signed and negotiated by the President since 27th April 1994. The two conditions are cumulative. Thus if in future treaties should be adopted at the international level but South Africa has not participated in negotiating them prior to adoption they will be `old' treaties. The fact that the President signs the treaty after adoption and that it is later ratified by South Africa will not, it is submitted, alter its status as an `old' treaty.\(^11\)

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\(^8\) South Africa signed LOSC on 5th December 1984. 24 (1985) *ILM* 268.

\(^9\) G Eisenberg `The GATT and WTO Agreements: comments on their legal applicability to the Republic of South Africa' (1993-1994) 19 *AYIL* 127 at 135.


Since signature is an essential ingredient of a `new' treaty, it is necessary to have some clarity on the concept. In international law the signature of a treaty does not normally signify that the signatory becomes a party to that treaty.\(^\text{12}\) A state normally becomes a party to a treaty by depositing an instrument of ratification or accession.\(^\text{13}\) The meaning of signature in the context of s82(1)(i) of the Constitution would seem to correspond with the international law usage. It would appear to be quite clear that South Africa will not become a party to a treaty when the President signs it. It will only become a party by ratification or accession and for these to occur Parliament must agree in terms of s231(2). Further, Parliamentary agreement can only be given to ratification or accession if the treaty has already been signed by the President. This denotes a clear dichotomy between signature on the one hand and ratification/accession on the other hand which accords with international usage.

International law terminology leads to confusion in that while ratification or accession of a treaty will result in a state becoming a party to that treaty, it may also be that signature may occasionally have this effect.\(^\text{14}\) The individual treaty will usually stipulate what kind of juridical act is necessary to make a state a party to a treaty.\(^\text{15}\) The Vienna Convention on the Law of Treaties makes this clear. Article 11 provides:

`The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'

Article 12 goes on to stipulate the circumstances in which consent to be bound may be expressed by signature. Because different acts may have different effects in international law it is suggested that terms such as ratification and accession should be avoided when the definitive constitution is being established. The important constitutional point for South Africa is that the state should not become a party to international treaties without the agreement of Parliament (or as I shall later suggest perhaps one house of parliament namely the National Assembly). What is therefore required is parliamentary intervention

\(^{12}\) For the special circumstances in which signature renders a state a party to a treaty see Vienna Convention on the Law of Treaties 1969 art 12(1).

\(^{13}\) Vienna Convention [n12 supra] arts 15, 16.

\(^{14}\) N Botha `International law and the South African Interim Constitution'(1994) 9

\(^{15}\) SAPL 245 says that the problem of treaties entering into effect on signature is not dealt with by the Constitution.

\(^{16}\) See the complex provisions here of the Agreement [n11 supra] arts 4, 5 and 7.
before the President performs any juridical act whereby South Africa becomes a party to a treaty. If signature (exceptionally) has this effect under a particular international agreement then parliamentary agreement should precede the President’s signature.

There is one further category of treaties which does not fit easily either into the category of `new' treaties or `old' treaties. These I would call `derivative' treaties. The phenomenon is as follows. A treaty is adopted, ratified by a number of states and comes into operation. It contains provisions for the adoption of further measures. These become binding on the states parties to the treaty unless they indicate that they are not to be bound by the further measures. Juridically the adoption of further measures here is equivalent to the adoption of a supplementary treaty. The latter becomes binding on parties unless they react to it. In other words, the essential phenomenon here is that the supplementary treaty is in effect `ratified' by inaction. The reason why is found in the provisions of the original treaty. For this reason I call the supplementary treaty a `derivative' treaty. The content is found in the supplementary treaty itself but the source of obligation is found in the original treaty. The Convention on the Conservation of Antarctic Marine Living Resources 1980 (hereinafter CAMLR) is an example. Under its Article IX(1)(f) conservation measures may be adopted. In principle these become binding on states parties under art IX(6) unless they notify within 90 days that they are unable to accept the measures. Such conservation measures could be adopted and become binding on South Africa after 27th April 1994.16 To this extent they would exhibit the characteristics of a `new' treaty. Since however the binding force of the measures comes from ratification of a 1980 treaty, they would appear to exhibit the characteristics of an `old' treaty. Again since these new measures will not have been signed by the President in terms of s82(1)(i) (though they might have been negotiated in terms of that section) they again appear to be an `old' treaty. I would incline to the view that they are `old' treaties while admitting that they exhibit special characteristics. It is for this reason that I have given them the special term `derivative' treaties (a new treaty based on an old one).

Continuation of treaties
The relevant provision here is s231(1). Under it South Africa succeeds to `all rights and obligations' under previous treaties. Thus any `old' treaty to which South Africa was a

16 South Africa is a party to CAMLR. See RF Fuggle & MA Rabie Environmental Management in South Africa (1992) 180.
party and which was in force before the 27th April 1994, continues to bind South Africa fully. Two further questions may be posed.

(i) What was the effect of s231(1) on the 27th April 1994? The actual words of s231(1) do not mention the Republic being a party to existing treaties but the Republic having ‘rights and obligations under international agreements’. Normally of course such rights and obligations will exist because a state has become a party to a treaty. However it is possible for a treaty to have a minimal application to states which are not parties to it but which have signed the treaty.17 The treaty will have the same minimal application to ratifying states pending its entry into force.18 The minimal application consists in an obligation on the part of the signatory or prior ratifier not to take action which would defeat the objects or purposes of the treaty. Other signatories or prior ratifiers would have rights correlating to these obligations. Minimal rights and obligations would therefore be reciprocal. It is submitted that s231(1) confirms such rights and obligations where South Africa has signed treaties in the past without becoming a party to them eg LOSC signed on 5th December 1984.19 The confirmation operates at the level of international law and not municipal law. For such rights and obligations to be part of South African law it is submitted (that as with past treaties to which South Africa is a party) legislative translation would be necessary. Another right which flows from South Africa’s signature of LOSC in 1984 is the right to ratify that Convention (as opposed to acceding to it.)20

(ii) What will the position be when the treaty eventually comes into force? Will s231(1) ensure that it then binds South Africa fully? It is submitted that s231(1) will have this effect. The section does not talk about the treaty devolving on South Africa but about ‘rights and obligations’ under the treaty so devolving. As pointed out above, upon ratification before entry into force, certain minimal rights and obligations do inhere in the ratifier. These mature automatically into full rights and obligations under the treaty when it comes into force.

17 Vienna Convention [n16 supra] art 25(a).
18 Ibid, art 25(b).
19 See (1985) 24 ILM 268.
20 LOSC, art 306.
It should be noted that Parliament retains power to provide that an existing treaty does not bind the Republic. It is submitted that it must do this by a legislative act ie by "Act of Parliament." The principle of parliamentary sovereignty over existing treaties is therefore enshrined constitutionally. This of course cannot mean that as a matter of international law Parliament is entitled to cancel existing treaties.

In relation to the continuation of treaties, there is one problem which is unique to South Africa. South Africa in the past concluded a large number of agreements with the so-called TBVC states. These purported to be international treaties. The TBVC states were reincorporated into South Africa on the 27th April 1994. On normal principles therefore all such treaties would terminate automatically on that date with the demise of one of the parties to what were bilateral agreements.

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21 S231(1) is technically not a succession provision. Parties at the Negotiating Council felt that Parliament should have the right to review existing treaties. See Olivier [n3 supra] 4. Botha [n14 supra] 253 says however that s231(1) is a typical succession provision - the so-called `provisional succession' but he points out that the new South Africa is not a new state. There has only been a change of government - though it has been fundamental.

22 Botha [n14 supra] 253 says that s231(1) holds the potential for international conflict. It arrogates the power to Parliament to terminate treaties unilaterally. This would be a material breach of the treaty. He makes the interesting suggestion that it should be scrapped. Olivier [n3 supra] 4-5 is of the view that Parliament would have to observe the provisions of the Vienna Convention before terminating a treaty under s231(1) because the Vienna Convention is international customary law and therefore part of South African law under s231(4). In my view it is clear that Parliament would have to observe the Vienna Convention as a matter of international law. It is not quite so clear however whether Parliament would have to do so as a matter of municipal (constitutional) law. There is no provision written into s231(1) to this effect. When one looks at s231(4) one finds that international customary law is subjected to legislation. Hence an Act of Parliament (at variance with the Vienna Convention), providing that an existing treaty is no longer binding, would be constitutionally valid.1.

23 Transkei, Bophuthatswana, Venda, Ciskei. The treaties in question dealt with all kinds of matters of common concern eg agriculture, aviation, broadcasting, industrial property, double taxation, customs etc etc.

24 Constitution [n1 supra] s1(2). For a general discussion of such incorporation in the context of Bophuthatswana (which presented special problems), see A Cilliers "Reincorporation of Bophuthatswana and certain other states into the Republic of South Africa' (1993-1994) 19 SAYIL 93 et seqq.

These treaties were `old' treaties in that they were in force for South Africa before the 27th April 1994 but it is submitted that s231(1) does not continue them. The simple reason is that they lost their character as treaties on 27th April 1994 with the merger of the TBVC parties into South Africa. Thus they cannot continue as treaties after the date in question.26 If South Africa should continue to implement the content of the former treaties after 27th April it does so unilaterally. It does so in its own internal system and as a matter of discretion. There can be no possible international obligations on it to implement such content. To put it another way, the content of the former TBVC treaties exited entirely from the domain of international law and international relations on 27 April and became purely a matter of national concern.27

Signature of treaties
As we have seen the state will not in general become a party to a treaty when it is signed by the President though it will incur some minimal and provisional obligations under it.28 Section 82(1)(i) authorizes the President to negotiate and sign treaties. It does not contain any limitations or restrictions. The President is therefore at liberty to sign all treaties both `old' and `new'. He is entitled to sign a treaty whether he has negotiated it or not. It is submitted here that the powers of signature and negotiation are separate and exercisable independently of each other. It is also apparent that the President may sign a treaty (or negotiate it) quite independently of any other organ of state such as Parliament. The powers bestowed by s82(1)(i) are not tied to any other provisions.

Authorization of ratification of treaties
Ratification or accession as pointed out above, are the processes whereby the state normally becomes a party to a treaty in international law.

`New treaties'

It is clear that there can be no question of ratification of such treaties unless Parliament `agrees' to such ratification in terms of s231(2). Though the matter is not altogether free

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26 TBVC agreements are not covered by s231(1). Olivier [n3 supra] 5.
27 Olivier [n3 supra] 6 comes to the interesting conclusion that the TBVC agreements continue to bind the state (presumably in municipal law). She bases this on the phrase `Republic within the meaning of the previous Constitution' in s231(1).
28 Vienna Convention [n12 supra] art 25(1).
from doubt, it is submitted that resolutions passed by both houses of Parliament would constitute the necessary agreement on the part of Parliament.\textsuperscript{29} It is also clear that such authorization by Parliament is only necessary where the treaty has been negotiated and signed by the President under s82(1)(i) ie the treaty is a 'new' treaty.

An important question may be posed here. If the government concludes an executive agreement with another state, will this be binding on the Republic in the absence of Parliamentary agreement?\textsuperscript{30} It is often argued that it is desirable to exempt routine executive agreements with other states from the cumbersome ratification procedures which are required for more important conventions. Erasmus says

`One of the most salient aspects of modern inter-state practice is how the use of informal, direct, executive agreements has increased. The reason for this is that the formal treaty-making procedure is a lengthy and cumbersome one which involves protracted procedures of negotiation, signature, legislative approval etc. This is inappropriate for those agreements of a technical nature or with a limited scope. Modern needs require that such agreements should be concluded and implemented in an expeditious fashion. The result has been a great increase in what is termed executive agreements (also called 'agreements in simplified form').\textsuperscript{31}

Desirable as such an exemption may be, it is submitted that it does not exist in South Africa and that an executive agreement like any other treaty or convention must receive the agreement of Parliament under s231(2) if it is to be binding.\textsuperscript{32} There are two reasons

\begin{itemize}
\item \textsuperscript{29} See J Dugard \textit{International Law: A South African Perspective} (1994) 343.
\item \textsuperscript{30} For a discussion of the problem of executive agreements (also called \textit{pro forma} agreements see Olivier [n3 \textit{supra}] 7-8.
\item \textsuperscript{31} G Erasmus `The Namibian Constitution and the application of international law' (1989-1990) 15 \textit{SAYIL} 81 at 107. In the US Executive agreements outnumber ordinary treaties by far. Ibid. Erasmus considers the binding executive agreement to be compatible with the Namibian Constitution. He bases his view primarily on art 32(1) of that Constitution. Ibid 108. Erasmus' views here were contested by A Mtopa `The Namibian Constitution and the application of international law: a comment' (1990-1991) 16 \textit{SAYIL} 104 \textit{et seqq}. For a further rebuttal see G Erasmus `The status of executive agreements in terms of the Namibian Constitution - a response to Dr Mtopa' (1991-1992) 17 \textit{SAYIL} 149 \textit{et seqq}.
\item \textsuperscript{32} See contra Olivier [n3 \textit{supra}] 8 who considers that executive agreements do not require Parliamentary agreement because they do not require ratification or accession to bring them into force at the international level. The problem here is that some very important multilateral conventions may not require ratification or accession to bring them into force. See arts 4, 5 and 7 of the Agreement [n11
\end{itemize}
for this. In the first place an executive agreement with another state is as much an international agreement as the most solemn multilateral convention which the Republic might accede to or ratify. In the second place, s231 makes no distinction between different kinds of international agreements. Hence the procedures contained in the section apply to all international agreements including executive agreements. This may very well be a defect in s231 which requires attention when the definitive constitution is established.

`Old' Treaties
Section 231(2) does not apply to `old' treaties because they have not been negotiated and signed under s82(1)(i). Hence there is no requirement that Parliament must agree to the ratification of such treaties. Nor is there any such requirement should the treaty in question have been merely an executive agreement. In fact such an executive agreement concluded before the 27th April 1994 would in any event be binding on the Republic by virtue of the 'continuation' provisions of s231(1) of the Constitution.

supra]. Yet these are the kinds of conventions with which Parliament should be involved. The problem in fact underlies the necessity of getting away from terms such as `ratification' and `accession' when drafting the definitive constitution. Olivier [n3 supra] 8-9 also draws attention to the problem of municipal implementation where signature alone brings a convention into force at the international level.

Such an agreement clearly falls within the definition of a treaty in art 1(a) of the Vienna Convention [n12 supra]. See too Erasmus [n31 supra - (15) SAYIL] 101. Even an oral agreement is a treaty but the provisions of the Vienna Convention do not apply to such treaties. Ibid 101-2.

Olivier [n3 supra] 9 suggests that the solution is that the President gives his consent in terms of s82 so that Parliament can act under s231(2). The problem here is that there is no provision in s82(1) for the President to `give consent'. Olivier also submits that where negotiation and signature by the President are impossible, then only Parliament has to consent eg to accession.

See discussion by Eisenberg [n 9 supra] 135 on the possible ratification of WTO by South Africa. He points out that WTO was signed on 14th April 1994 but ratification was held over until the power of ratification was removed to Parliament. Parliament's competence to ratify however only applies to agreements negotiated and signed in terms of s82(1)(i) and this agreement was not signed under it.

Thus for example the Agreement concluded between South Africa and Namibia by an Exchange of letters on 22nd March 1991 was an executive agreement and binds the Republic. See Agreement on Mutual Assistance and Preventing Illegal fishing between South Africa and Namibia 1991 in N1130 GG13239 of 24 May 1991.
`Derivative' Treaties
There is one fundamental reason why s231(2) will not apply to these treaties. Ratification of such treaties does not take place unless one regards failure to lodge an objection to the treaty within a certain time as `ratification'.37 The latter however would be a very artificial construction. The fact is that such treaties bind the state in the event of its inaction. A ratification process does not take place. Hence it is impossible for Parliament to agree to a non-existent ratification. Apart from this, it is also submitted that s231(2) does not apply because the treaties will not have been signed (though they might have been negotiated) by the President in terms of s82(1)(i). Hence there is no requirement that Parliament must agree to their ratification. Finally, it is submitted that the treaties in question fall within the ambit of s231(1) dealing with continuation and that this possibility excludes the application of s231(2) to them.

Ratification of treaties
Ratification of (or accession to) a treaty will take place by the deposit by the executive of an Instrument of Ratification (or Accession) with the depository of the treaty.38

`New' treaties
As seen above a `new' treaty can only be ratified if there has been parliamentary authorization in the form of the agreement of Parliament in terms of s231(1). There is however nothing in the Interim Constitution to indicate how the ratification, once authorized, is to be effected. All that s231(2) says is that Parliament shall be competent to agree to ratification or accession. It does not say what organ of state actually is to ratify or accede. Section 231(3) then says that where Parliament agrees to accession or


As pointed out Conservation Measures adopted under art IX(1)(f) of CAMLR [n16 supra] are examples. A binding resolution by the Security Council under Chapter VII of the Charter would not be an example here as it is binding on the member state regardless of its action or inaction. For a discussion of the domestic implementation of such resolutions in South Africa see Dugard [n29 supra] 344. Vienna Convention [n12 supra] art 11; Schwarzenberger & Brown [n25 supra] 126.
ratification under s231(2) the agreement shall be binding on the Republic. This seems to indicate that Parliament itself actually ratifies or accedes to conventions in international law.\(^{39}\) This however is neither practical nor desirable should it even be possible! International Conventions will invariably provide that the way in which consent to becoming a party is exhibited is by the deposit of a formal instrument of ratification or accession with the depository.\(^{40}\) It will inevitably not be possible to substitute a resolution by Parliament for this formal requirement.\(^{41}\) These are defects and lacunae in the Constitution and it is suggested that they should receive attention when the final constitution is being drafted. There should be a provision in the latter giving the President the power to ratify treaties to whose ratification there has been parliamentary agreement. It is also suggested that the requirement of s231(2) that Parliament ie both the National Assembly and the Senate, agree to ratification is too onerous. It should be sufficient if the more influential house agrees to ratification and the final constitution should reflect this change. Since the agreement of one house only would be required, it is obvious that the act of agreement could not be a legislative one. This would clarify the present ambiguity in s231(2) as to whether or not a legislative act on the part of Parliament is necessary for the purpose of agreeing to ratification of a treaty.

The question then may be posed as to how a "new" treaty may be ratified under the present dispensation. It would appear that Parliament is not the organ to ratify since s231(2) only gives it the function of agreeing to ratification.\(^{42}\) There being a lacuna as to who should ratify it is submitted that one should fall back on the pre-existing law in operation before 27th April 1994 to fill this gap. Reliance on such law can be justified by s229 of the Constitution which provides

`Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority'.

\(^{39}\) Dugard [n29 supra] 242-3 is apparently led to this conclusion too by the wording of the provisions.

\(^{40}\) The Vienna Convention [n12 supra] arts 82, 83 is a prime example of this.

\(^{41}\) Quaere: would it be possible to regard parliamentary 'ratification' of a treaty as a unilateral declaration by the state that it undertakes the obligations in the treaty. On unilateral declarations see Schwarzenberger & Brown [n25 supra] 140-1.

\(^{42}\) Sed contra Dugard [n29 supra] 342-3.
The legal provisions relating to ratification would continue in force because there is nothing in the Constitution to override them. Nor are they repealed or amended by any other law. Under the pre-existing law, the President had the prerogative to ratify treaties on behalf of the Republic. That prerogative continues but is now limited of course by s231(2) in that it can only be exercised where Parliament has ‘agreed’ to the ratification. It is also submitted that the President is not obliged to ratify a treaty even if Parliament has agreed to its ratification in terms of s231(2). Since the President should ratify in the exercise of his prerogative it follows that such exercise is discretionary. Further, there is nothing in s231(2) or in any other provision in the Constitution to indicate that there is any obligation to proceed to ratification after obtaining the agreement of Parliament.

To conclude, the process of ratification, it is submitted, depends on the will of both Parliament and the Executive. There would however appear to be one way in which Parliament could make it obligatory for the President to ratify a treaty. Parliament could pass legislation obliging the President to ratify a treaty. Such legislation would remove the discretionary prerogative of the President and convert it into an obligation. While this is possible under the existing constitution, it is submitted that it is not desirable. Both Parliament and the Executive should be involved in the ratification of treaties but neither should be in a position to force ratification over the head of the other. Thus the President should have to seek Parliamentary agreement and Parliament should not be able to override the President’s discretion to ratify by legislation obliging him to do so. The definitive constitution should address this problem by restoring the balance between the Executive and Parliament. The following device would, it is submitted, solve the problem and make the necessary changes. The President should be allotted the constitutional function of ratifying or acceding to treaties in the same way as he already has the constitutional function of negotiating and signing treaties. If the constitutional function of ratification is given to the President, it would be entrenched against interference by parliamentary legislation. Any legislative attempt by Parliament to oblige the President to ratify or to fetter his discretion to ratify would simply be unconstitutional and pro non

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43 See Olivier [n3 supra] 6, 8.
45 Dugard correctly draws attention to the provisions of s231(3) that a treaty which has had the agreement of Parliament is binding on the Republic. Ibid. Such a process would however simply appear to dispense with international ratification and may thus very well be a juridical impossibility in international law.
46 S82(i)(i).
scripto. The simple solution then is to elevate the present presidential prerogative into a constitutional right or prerogative.

Before finalizing the topic of ratification of `new' treaties we must discuss the conclusion of executive agreements. As pointed out it would appear to be desirable in principle to allow the executive to conclude such agreements without the necessity of getting the agreement of Parliament. In order to achieve this and at the same time to avoid too much complexity in the new constitution it is suggested that the following points might be considered. (i) Uncertainties about what international agreements are self-executing and what are not should be avoided.47 (ii) The term `executive agreement' itself could lead to difficulties in interpretation and should preferably be avoided. As virtually all executive agreements will be bilateral in character it is suggested that `bilateral' treaties should simply be exempted from parliamentary agreement. (iii) The President should be given the constitutional power to conclude bilateral treaties binding on the Republic without parliamentary approval.48 (iv) Such bilateral agreements would however only be incorporated into municipal South African law in the same way as any other international agreement. This would ensure that the bilateral agreements in question did not interfere with rights without parliamentary intervention. (v) An additional precaution could be a provision requiring the laying of such bilateral agreements before the National Assembly within a certain period after the conclusion of the agreement. The Assembly would then have the opportunity to debate it.

The net effect would be to give the President the power to bind the Republic in international law to a bilateral agreement without parliamentary agreement. For the incorporation of such bilateral executive agreements into municipal South African law parliamentary intervention would be required.

`Old' Treaties

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47 For a discussion of such difficulties see Erasmus [n31 supra - (15) SAIIL] 104-7.
48 If the agreement is multilateral it will probably be of greater importance so that parliamentary agreement to its ratification by the President can be said to be more appropriate.
The position is simple here. There is no provision in the Constitution governing ratification of treaties. Hence the pre-existing law governs ratification.\textsuperscript{49} The President ratifies such treaties in the exercise of his prerogative.\textsuperscript{50} In contrast however to the position of `new' treaties, there are no limitations on the exercise of the prerogative where `old' treaties are concerned. The reason is that the prerogative to ratify is only limited by s231(2) and that section only applies to `new' treaties ie those negotiated and signed in terms of s82(1)(i).

The net position therefore is that the Executive need not seek the agreement of Parliament under s231(2) in order to ratify an `old' treaty. It is submitted however that this position is unsatisfactory.\textsuperscript{51} There is no logical reason for distinguishing between `old' and `new' treaties. Both should be treated in the same way and the same procedures should govern ratification. It is submitted that the definitive constitution should resolve this problem by stipulating that the President may ratify any treaty with the agreement of the more influential house of Parliament - in all probability the National Assembly.

`Derivative' treaties
As pointed out above, such treaties will not be ratified. They bind the state in the event of its inaction by failure to lodge an objection within a certain time. Hence the question of ratification does not arise here.

Incorporation/translation of treaties into municipal law
`New' treaties
Section 231(3) provides that treaties can only become part of South African municipal law on three conditions.

(i) Parliament must have agreed to ratification in terms of s231(2); (ii) the treaty must not be inconsistent with the Constitution; (iii) Parliament must `expressly so provide' ie

\textsuperscript{49} See Olivier [n3 supra] 8 who considers that ordinary rules of international law apply to ratification and accession of pre-1994 treaties to which South Africa is not yet a party.

\textsuperscript{50} Since the Constitution Act 110 of 1983 is repealed by the Constitution it follows that the President's power to ratify treaties cannot be based on s6(3)(e) of that Act. In the circumstances and in order to fill the lacuna it is submitted that the President's power to ratify must be based on common law prerogatives.

\textsuperscript{51} Olivier [n3 supra] 9 suggests that it would be better if the words `negotiated and signed in terms of s82' did not appear in s231(2).
that the treaty is to be part of municipal law.\textsuperscript{52} There would appear to be three problems with s231(3) as presently drafted. (i) There should have been a fourth condition for incorporation namely that the treaty has actually been ratified.\textsuperscript{53} It is difficult to imagine that where the executive has not proceeded to ratification, that a treaty (not binding on South Africa in international law) should be incorporated into South African municipal law. When the new constitution is being drafted this problem should be addressed. It is submitted that the new constitution should be so drafted that only a treaty which has actually been ratified by the executive (after Assembly agreement\textsuperscript{55}) may be incorporated into South African law. Attention here should again be drawn to the point previously made namely, that the agreement of Parliament in terms of s231(2) to ratification of a treaty, though it is a pre-condition for ratification, does not \underline{oblige} the President to ratify. Ratification remains a matter of discretion.

(ii) The expression that Parliament must `provide' that the treaty is part of municipal law lacks clarity.\textsuperscript{55} It is already the subject matter of diverse interpretations. It could mean that resolutions of both houses of Parliament would be sufficient.\textsuperscript{56} On the other

\textsuperscript{52} N Botha ‘Interpreting a treaty endorsed under the 1993 Constitution’ (1993-1994) 19 \textit{SAYIL} 148 at 152-6 deals with the general question of the interpretation of treaties which are part of South African law under s231(3) and in particular the importance of international law rules of interpretation such as those in arts 31 and 32 of the Vienna Convention.

\textsuperscript{53} The thesis of Dugard [n29 supra] 342-3 that the provision in s231(3) that the agreement `shall be binding on the Republic' amounts to parliamentary ratification would meet this problem. As pointed out however the idea of parliamentary ratification at the international level is somewhat incongruous, impractical and probably legally impossible in most cases!

\textsuperscript{54} Bilateral executive agreements would be an exception and as pointed out, would not require Assembly agreement.

\textsuperscript{55} Olivier [n3 supra] 9 says the Constitution does not indicate how Parliament should express approval for the incorporation into municipal law under s231(3) Maluwa discusses diverse interpretations of the subsection. See T Maluwa ‘International human rights norms and the South African Interim Constitution 1993’ (1993-1994) 19 \textit{SAYIL} 14 at 35-6. Botha [n52 supra] 151 says how Parliament is to `so provide' under s231(3) is uncertain. At [n14 supra] 255 he states that the words `expressly so provided' in s231(3) are uncertain. For drafting history see \textit{ibid} at note 59. See too Dugard [n29 supra] 343 and Botha [n14 supra] 256. The insertion of the provision was a last minute `polishing' or `tidying up' process by the draftsmen.

\textsuperscript{56} Dugard [n29 supra] 343 is of the view that an additional resolution to this effect would be sufficient.
hand, it could mean that legislation by Parliament is necessary to incorporate treaties into municipal law. It is submitted that the latter is the probable position for the following reasons.

(a) The expressions used in s231 in relation to Parliamentary intervention in treaties differ considerably. When s231(2) talks about the ratification of treaties at the international level it requires Parliament to `agree' to such ratification. When however s231(3) talks about treaties becoming part of South African law, it requires Parliament to `provide' for this. It would appear therefore that the Constitution envisages different procedures involving Parliament depending on whether Parliament is dealing with international ratification or domestic implementation. A simple compromise would be to interpret `agreement' as constituting something less than legislation eg resolutions and to interpret `provision' as requiring legislation. The latter phrase would also prima facie denote legislative activity on the part of Parliament.57

(b) A comparison of s231(3) and s231(4) shows one fundamental difference between them. Section 231(4), dealing with the incorporation of international customary law, provides that there are two instances where it will not take place: conflict with the Constitution; conflict with an Act of Parliament. When s231(3) (dealing with the incorporation of treaties) is examined there is only one instance where incorporation will not take place: conflict with the Constitution. One may therefore ask why `conflict with an Act of Parliament' has been omitted as a ground for exclusion. The answer would appear to be that such a conflict is in fact impossible for the simple reason that if a treaty is to be part of municipal law it must be incorporated by parliamentary legislation. Ergo parliamentary legislation is necessary to incorporate treaties.

(c) If a treaty could be incorporated by mere resolution it would prevail over conflicting Acts of Parliament. The only case of non-incorporation is specified to be that of `inconsistency with the Constitution'. Hence incorporated treaties would be superior to legislation (whether antecedent or subsequent). They would occupy a place sui generis in the hierarchy of norms just after the Constitution itself. This however would be contrary to the entire ethos of s231 which clearly contemplates that there will be parliamentary

57 Sed contra Maluwa [n55 supra] 36 who criticizes the argument based on the word `provides' alone. Botha [n52 supra] 151 agrees with Maluwa. Legislation is not necessary under s231(3).
primacy over all kinds of international law at the municipal level. Here one may also refer to s231(1) which contemplates parliamentary primacy over previous treaties and s231(4) which contemplates the same over international customary law. The likelihood is that s231(3) should also be interpreted in a manner which is consistent with this general standpoint.\footnote{Systematic, contextual and teleological interpretation could support this conclusion. Systematic interpretation can be invoked to distinguish provisions from each other and also to reveal the connection between them. On these methods of interpreting the Constitution see L du Plessis and H Corder Understanding South Africa's Transitional Bill of Rights (1994) 73-4, 76-7.} \textit{Ergo} again parliamentary legislation is necessary to incorporate treaties.

Since the expression in s231(3) that Parliament should `expressly so provide(s)' is unclear and gives rise to interpretative difficulties, the definitive constitution should clarify the matter. This it could do by stipulating that `Acts of Parliament' should make provision rather than `Parliament' itself.

(iii) The treaty, if it is to be incorporated, must not be `inconsistent with this Constitution'. This provision also presents interpretative problems. These are however important enough to merit separate treatment in the next section of this paper on `Constitutionality of treaties'.

`Old treaties'\footnote{Botha \cite{n52 supra} 148-50 discusses the interpretation of `old' treaties.}  
These are not governed by the incorporation procedure in article 231(3) because that subsection only applies to treaties to whose ratification Parliament has agreed in terms of s231(2).\footnote{Botha \cite{n14 supra} 256 says there is a distinction between pre- Constitution and post- Constitution treaties. Maluwa \cite{n55 supra} 36 points out that s231(3) applies only to treaties concluded after 27th April 1994. He agrees with the suggestion of Dugard \cite{n29 supra} 343-4 that Parliament should ratify certain treaties to which South Africa was a party before 27th April 1994 so that they can more easily be part of South African law.} Parliament however can only agree to the ratification of `new' treaties under s231(2). The conclusion is that there are no constitutional provisions governing the incorporation of `old' treaties into municipal law. That being so the incorporation, it is submitted, should be governed by the previously operative law.\footnote{Eisenberg \cite{n9 supra} 136 discussing the incorporation of WTO in South African law says s231(3) preserves the rule of statutory transformation originally adopted from English practice.} Such a solution would
also receive support from s229 of the Constitution which provides that laws in force continue subject to the Constitution. This means that an 'old' treaty should be translated into South African law by an Act of Parliament in accordance with the principles laid down in the Pan American case.\footnote{62}

Constitutionality of treaties

`New' treaties

Section 231(3) provides that treaties will not be part of South African law if they are inconsistent with the Constitution. This gives rise to interpretative problems. One would normally expect that a treaty would only fail to qualify as South African law in so far as it is inconsistent with the Constitution. On the other hand, it could be argued from the terms of s231(3) that if a single provision in a treaty conflicted with the Constitution, the entire treaty would fail to qualify as South African law - even though the vast majority of the provisions are entirely constitutional. The constitutional parts of the treaty would in effect be 'infected' by the unconstitutional parts\footnote{63} I shall call this the problem of `infection' and three observations may be made on it. (i) If a legislative act on the part of Parliament is necessary to incorporate a treaty into South African law, the problem ceases to exist. The reason is that the treaty will then have the status of an Act of Parliament. Since an Act of Parliament will be void in terms of s4(1) only to the extent to which it is inconsistent with the Constitution, the same will be the position for a treaty sanctioned by an Act of Parliament.\footnote{64} (ii) If, on the other hand, a mere resolution by both houses of Parliament is sufficient to incorporate treaties into municipal law under s231(3) it follows that a treaty which is in any way unconstitutional will fail altogether to become part of South African law. Even subsequent parliamentary legislation approving it may not be capable of salvaging the constitutional parts of it.\footnote{65} The doctrine of infection will apply. (iii) It is submitted that this possible problem of `infection' should be eliminated when the definitive constitution is being drafted. A treaty should fail only in so far as it is inconsistent with

\footnote{62} Pan American World Airways Incorporation v SA Fire & Accident Insurance Co Ltd 1965 (3) SA 150 (AD). For discussion see Dugard [n29 supra] 51-7. Maluwa [n55 supra] 36 says that a legislative act would incorporate these into municipal law.

\footnote{63} S232(3) of the Constitution could probably not be used to save the `constitutional' parts of the Treaty since that subsection would appear to apply only to `laws'.

\footnote{64} S232(3) could also be used here to bolster the saving of the `constitutional' parts of the treaty.

\footnote{65} Nor will it be possible to use s232(3) to salvage it. See comments at n63 supra.
the Constitution. A principle of `severability' should apply under which those parts of the treaty which do not conflict with the constitution and which are clearly severable from the unconstitutional parts, would be capable of becoming South African law despite the existence of some unconstitutional provisions in the same instrument.

`Old' treaties
Since these have to be translated into South African law by Act of Parliament in accordance with the Pan American principle, it follows that it would be possible here to test the implementing Act for constitutionality. The principle of severability would apply as laid down in s4(1) of the Constitution. The Act would only be void to the extent of inconsistency with the Constitution.  

CONCLUSIONS
The following relevant texts are suggested to the Constitutional Assembly for possible inclusion in the definitive constitution.
(i) Instead of the present s82(1)(i) include

sX (1)(a)(b)(c)... The President shall be competent to exercise and perform the following powers and functions, namely -

(a) to negotiate international agreements;
(b) to sign international agreements where such signature does not result in the Republic becoming a party to such agreement;
(c) to perform any act whereby the Republic becomes a party to an international agreement provided that the National Assembly agrees in terms of sY(2);
(d) to conclude bilateral international agreements.

The first and second of the suggested powers above are already contained in s82(1)(i) of the Interim Constitution. It is suggested however that the powers of negotiation and signature should be provided for separately so as to make it absolutely clear that the exercise of either power is totally independent of the exercise of the other power. This would mean that if the President is favourably disposed to a particular international agreement he is entitled to sign even though the Republic may have taken no part in negotiating it. Conversely the President would be entitled to negotiate an international agreement but if in the end that agreement was not considered to be satisfactory, he would

66 S231(3) could also be used here to save the `constitutional' parts of the treaty.
be absolutely entitled to decline to sign it. These powers would be exercisable independently of other state organs.

It should be noted that the power of signature would be limited to those cases (in effect the vast majority of cases) where signature does not indicate final consent to be bound by the treaty.

The Interim Constitution contains however no provision allowing the President to ratify or accede to treaties where the National Assembly agrees. This lacuna is now filled by the third power suggested above. The power is so couched that the President would be competent to ratify or accede to conventions with the agreement of the National Assembly but would not be obliged to do so.\textsuperscript{67} Appropriate cross references are made in both sections X and Y.

It should be noted that sX(c) carefully avoids the terms `ratification' and `accession' used previously. Reference is made simply to a juridical act whereby the Republic becomes a party to a treaty. Whether this act is ratification, accession, signature or any other expression of final consent, the agreement of the National Assembly would be necessary.

The third power is also expressed to be exercisable where the National Assembly `agrees' (not `has agreed'). this would introduce flexibility in that it would be possible for the President to ratify a Convention provisionally and on condition that Assembly agreement is obtained. When such agreement is forthcoming the Republic would automatically become a party to the treaty. The point is that Assembly agreement might precede or follow ratification but the Republic would only become a party to the treaty when the Assembly has agreed.

\textsuperscript{67} It might be asked whether (i) the National Assembly could withdraw its consent to ratification before the President ratified and (ii) whether the Presidential power to ratify could be nullified by subsequent parliamentary legislation? The answer to these questions, it is submitted, should be negative. The giving of Assembly consent under sY(2) should vest a constitutional power to ratify a particular treaty in the President. Any subsequent interference by other state organs would therefore be unconstitutional. It would also be undesirable in that it would upset a rather delicate balance between executive and parliament in the conduct of foreign relations. It would also amount to 'chopping and changing', an undesirable state of affairs where relations with other states are concerned.
The fourth power gives the President the right to conclude bilateral international agreements which in terms of sX(4) will be binding on the Republic. Assembly agreement is not necessary. SY(5) however ensures that no international agreement of any kind will be part of South African municipal law without complying with that subsection which brings Parliament (not merely the Assembly) into the game.

(ii) Instead of the present s231(2) include

sY(2) ... The National Assembly shall, subject to this Constitution, be competent to agree to the performance of any act whereby the Republic becomes a party to any international agreement.

(iii) Instead of the present s231(3) include

sY(3)... Where the National Assembly agrees to the performance of an act whereby the Republic becomes a party to an international agreement under subsection (2) and where such act has been duly performed in terms of section X(1)(c) such international agreement shall be binding on the Republic.

sY(4)... A bilateral international agreement concluded in terms of section X(1)(d) shall be binding on the Republic and shall be laid before the National Assembly within a period of fourteen days after such conclusion or at the beginning of the next parliamentary session following such conclusion should parliament not be in session when such period of fourteen days expires.

sY(5)... An international agreement binding on the Republic under subsection (3) or (4) shall form part of the law of the Republic

[provided that an Act of Parliament expressly so provides and insofar as such agreement is not inconsistent with this Constitution];

[unless inconsistent with this Constitution or an Act of Parliament];

[unless otherwise provided by an express provision in an Act of Parliament or insofar as such agreement is inconsistent with this Constitution].

It will be noted that alternative texts are presented in sY(5). In choosing which of the texts to adopt, the Constitutional Assembly will have to make a policy decision. The implications of different choices would be as follows.
First-mentioned solution: a decision in favour of this solution would mean the maintenance of the pre-1994 situation. Treaties would only be part of South African law if translated by Act of Parliament. The latter would of course be subject to constitutional testing.

Second-mentioned solution: a decision here would equate treaties and international customary law. Incorporation would take place unless the treaty conflicted with an Act of Parliament or the Constitution. Both parliamentary and constitutional primacy over treaties would be maintained.

Third-mentioned solution: a decision in favour of this solution would give treaties a special constitutional status *sui generis*. They would be part of South African law and would even override conflicting Acts of Parliament, whether antecedent or subsequent. Parliament would however retain ultimate control over such treaties in that it would always be in a position to legislate expressly so as to exclude them from South African law.

All the above suggested provisions are drafted in such a way that there is no longer any distinction between ‘old’ and ‘new’ treaties. The President has power to sign, ratify or accede to ‘old’ treaties as much as ‘new’ treaties under sX(b) and (c). The Assembly has power to agree to ratification of or accession to ‘old’ treaties as much as to ‘new’ treaties under sY(2).

Provision is made in sX(1)(d) for executive agreement. The concept is confined to bilateral agreements. The existing s231(1) and s231(4) would remain unchanged. The former would be sY(1) and the latter sY(6).

The inclusion of the above would remove the uncertainties in the present provisions. It would streamline the process of negotiating, signing, approving, ratifying and finally incorporating treaties into South African law. It would also treat all treaties to which South Africa becomes a party uniformly.

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68 The suggestion of Botha [n14 supra] 253 that s231(1) could actually be scrapped is an interesting one which the Constitutional Assembly should consider.
THE NATIONAL DEFENCE FORCE: INTERNATIONAL OPERATIONS:
AGGRESSION; SELF DEFENCE; USE OF FORCE; CONDUCT IN HOSTILITIES
UNDER THE INTERIM CONSTITUTION

There are four particular provisions in the Constitution which envisage the use of the National Defence Force (NDF) in an international scenario. It is the purpose of this note to examine these provisions and to see whether they are satisfactory. In so far as they are satisfactory they should be retained in the final constitution. In so far as they are defective, submissions will be made as to how the final constitution might be drafted so as to remove the problems.

(1)  **S227(1)(a)**

This provides that the NDF may be employed `for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity'.

Defence of the Republic could of course be in relation to the conduct of other states against the Republic. Hence there is certainly an international dimension here. In fact the international dimension is probably the primary focus of s227(1)(a). If territorial integrity and sovereignty are under attack it will be most likely that the attack comes from another state or states. There are two observations which may be made on the employment of the NDF here.

(a) The NDF must be employed for **defensive purposes** only. Not only does this clearly emerge from the provisions of s227(i)(a) itself but a contextual approach would strongly support such a thesis. Thus s227(2)(a)(ii) and (iii) emphasize the defensive role of the NDF by providing that it shall exercise its powers by `providing for the defence of the Republic' and `ensuring the protection of the inhabitants of the Republic'. So too does s227(2)(d) which provides that the NDF shall `not breach international customary law relating to aggression'. This implies that the NDF shall act in self-defence and not aggressively. S227(2)(f) emphasizes that the NDF shall `be primarily defensive in the exercise or performance of its powers and functions'. Again, the whole concept of the NDF becomes apparent. Finally s231(4) provides that international customary law is part of South African law. The prohibition on the aggressive use of force is regarded as a
peremptory norm of international customary law and this lends further support to the thesis of a defensive SANDF.69

(b) The employment of the NDF is not geographically restricted. As long as the conditions for self-defence are fulfilled, the NDF may take action. The NDF would in effect be relying on the inherent right of self-defence confirmed in art 51 of the Charter of the United Nations (UN). Thus action by way of self-defence could obviously be carried out in South Africa itself but in appropriate circumstances it could also be taken beyond the confines of the Republic.

(c) The employment of the NDF must be squarely within the international law right of self-defence confirmed by art 51 of the UN Charter. Thus the action taken must be necessary to repel the aggression against the Republic. It must also be proportionate to that aggression.

It is submitted that s227(1)(a) is satisfactory in that it allows the deployment of the NDF both inside and outside the Republic in the exercise of self-defence under the UN Charter. As such it should be left in its present form in the final constitution.

(2) **S227(1)(b)**

This provides for the use of the NDF `for service in compliance with the international obligations of the Republic with regard to international bodies and other states'.

It would appear that there are severe limitations in this provision, the effect of which would almost render it ineffective as a basis for employing the SANDF in operations outside the Republic. The SANDF can only be employed under the provisions of s227(1)(b) to carry out the international obligations of the Republic. These would be obligations owing either to international organisations or to other states. Hence if there is no international obligation to participate in a certain activity but only a facility or option to

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69 See too CJ Botha `Leashing the dogs of war: the South African National Defence Force under the new constitution' (1993-1994) 19 SAYIL 137 who points out (at 139) that the constitution contains no reference to the common law prerogative to declare war. It must be inferred from the change in terminology from the power `to declare war' to the power `to declare a state of national defence' that the substantive character of the power is changed and the emphasis falls on defensive rather than offensive military action.
do so, it is submitted that the SANDF cannot be employed to take part in that activity. In fact the utility of s227(1)(b) may be questioned on this ground. When the Security Council of the United Nations mounts a peacekeeping exercise under Chapter VII of the Charter it cannot generally oblige any member state to participate actively by sending forces. If an obligation is to exist here, an agreement would have to be concluded between the member state and the Security Council.70 The Republic therefore cannot have any obligation to participate actively in UN peacekeeping exercises. In such circumstances s227(1)(b) actually loses its raison d'etre. It should therefore be reformulated.

I would suggest the following reformulation. The NDF may be employed 'for service within the framework of international organizations or in co-operation with other states'. There should be no reference to 'international obligations' as this would unduly restrict opportunities to cooperate with international organizations and other states.71

(3) S227(2)(d)
This provides that the NDF shall 'not breach international customary law binding on the Republic relating to aggression'.

The principal international law provision of relevance here is art 2(4) of the UN Charter (which has for long been declaratory of ICL). This prohibits the use of force or the threat to use force against the territorial integrity or political independence of another state or in any way inconsistent with the objectives of the UN Charter.

Force however may be used by way of exception (i) in self-defence against armed attack72 or (ii) when authorized by the Security Council (SC) of the UN under Ch VII of the Charter.

Section 227(2)(d) raises difficult problems. For example, the President (or the Government) might order the NDF to invade or attack another state or carry out a limited operation in it. It might be quite clear that the operation ordered is contrary to art 2(4), that the case is not one of self-defence and that there is no authorization from the SC. It

70 Charter of the United Nations arts 43, 45.
71 It is interesting to note here that legislation was introduced into the US Congress, the effect of which would be to restrict US involvement in UN peacekeeping activities! See ASIL Newsletter March-May 1995, 8-9.
72 Charter of the United Nations art 51.
would therefore appear that the order is unconstitutional and illegal. If the armed forces carry it out they too act contrary to international law - and also contrary to the constitution (s227(2)(d)). Here it may be noted that at Nuremberg, trials were conducted for waging illegal war. Note too that superior orders will not constitute a defence where the order is manifestly illegal. The inevitable question is of course whether in such a clear case the armed forces should refuse to carry out the illegal order! It may very well be that they should. This presents a dilemma.

The NDF must `exercise its powers and perform its functions under the directions of the government of the Republic'. It is submitted that the `directions' here should be lawful directions and a direction to the armed forces to carry out aggressive action would not be lawful as it would conflict with s227(2)(d). It would amount to ordering the NDF to do what the Constitution prohibited the NDF from doing. The dilemma in this case basically arises from the fact that the prohibition on the aggressive use of force is one which in international law applies primarily to governments and only incidentally to armed forces. The decision to use aggressive force is a policy decision taken by governments rather than an operational decision taken by armed forces. It is therefore somewhat beside the point to address the prohibition to the armed forces and not to the government which would be responsible for employing them in this way as a matter of policy. It is also somewhat unfair to place armed forces in a position where they may have to query directions given to them by the government. My suggestion would be to lift s227(2)(d) entirely out of the s227(2) (which essentially deals with the operational conduct of the NDF) and to place it among those provisions dealing with the employment of the NDF (which appear earlier in s227). As the provision is couched negatively it would not fit easily into the existing s227(1) (which lists the positive ways in which the NDF may be employed). I would therefore suggest a new ss(2) with the existing ss(2) becoming ss(3).

ss(2) `The National Defence Force may not be employed to break international customary law binding on the Republic relating to aggression'.

Finally it may be noted that s226(7) provides that a member of the NDF is entitled to refuse to execute an order if it would constitute an offence or would breach international

73 It would also appear clear that in the South African context the principle of constitutional control of the military is very clearly spelt out in the constitution. In terms of s84(4)(a) the President is the Commander-in-Chief of the NDF. See too Botha (n2) 137, 139.
law on armed conflict binding on the Republic. While it is possible that this provision might apply to members of the armed forces who receive unlawful orders from the political level, it is not entirely clear that this is so. Refusal to carry out an illegal order would seem to be legitimate in the field of the ius in bello when the NDF is carrying out operations involving the use of force against other states. It is not so clear however that the provision authorizing refusal applies also to policy decisions which infringe the international law relating to aggression. In my view the right to refuse should apply in this case too and s226(7) could put the matter beyond doubt if it were reformulated as follows.

S226(7) `A member of the National Defence Force shall be obliged to comply with all lawful orders, but shall be entitled to refuse to execute any order if the execution of such order would constitute an offence or would breach international law binding on the Republic in armed conflict or relating to aggression'.

The addition of the underlined words would make it quite clear that the right to refuse would apply in the case of the two different kinds of international law norms mentioned in s227(2)(d) and (e) and not merely to those mentioned in the latter. S226(7) as presently formulated leaves it open to doubt whether the right to refuse applies in the case of the norms mentioned in s227(2)(d).

(4) S227(2)(e)
This provides that the NDF in armed conflict will comply with obligations under ICL and treaties binding on the Republic. If therefore the Republic is involved in hostilities (whether aggressively or defensively) the conduct of the NDF in those hostilities should be in accordance with international law. Essentially this would mean two things.

(a) Observance of the humanitarian laws of war
The NDF should observe these laws. The rules exist at the international level. Now by virtue of s227(2)(e) they are also South African law. Disregard of them would be a war crime for which there would be individual responsibility.

(b) Observance of the principle of self-defence

74 For further discussion of the two kinds of rules see section (4) of this note immediately infra.
The traditional laws of war are comprised of two main categories (i) the humanitarian laws of war and (ii) the rules governing the necessities of war. The latter are rules designed to give belligerent states the opportunity to overcome the enemy eg armed forces, military craft and warships of the enemy may be attached without warning and destroyed. The entire law of war must however now be considered in the light of art 2(4) of the UN Charter prohibiting the aggressive use of force. In the aftermath of article 2(4) it appears clear that the humanitarian laws war continue to apply in hostile situations. They do not contravene art 2(4) as they comprise generally what are called *tempermenta* - they impose restrictions on belligerent conduct in the interests of humanity and civilization. It is not so for the rules governing the necessities of war. These rules authorize belligerents to take positive action aimed at overcoming an enemy. In principle therefore they will usually go beyond the bounds of self-defence. It is for this reason that reliance on them in hostile situations may no longer be in accordance with international law. It follows that if reliance on a traditional rule of war is to be legal, it must be possible to bring the conduct of the state relying on it within the ambit of the principle of self-defence. The principle of self-defence has of course its own requirements which must be observed, such as that the action must be necessary to counter the attack and the principle of proportionality must be observed.

In my view s227(2)(e) is entirely appropriate and should remain in the final constitution. It does not deal with policy decisions but with how the NDF carries out operations when using force against other states.

ICL is also in general part of South African law (s231(4)). The humanitarian rules of war would be part of ICL and so they are also part of South African law under s231(4). However, s231(4) provides that ICL is not part of South African law if it is inconsistent with an Act of Parliament. Parliament can therefore legislate so as to exclude rules of ICL from South African law. The legislation however must obviously not conflict with the constitution. In my view, if Parliament enacted legislation excluding the international humanitarian laws of war from South African law, this would be unconstitutional. It would conflict with s227(2)(e) which says that these rules are binding on the NDF. Hence the humanitarian laws of war enjoy a special status which most other rules of ICL do not enjoy in South African law. Parliament may not remove them.

(4) **Suggested provisions for the new constitution**
S226(7) "A member of the National Defence Force shall be obliged to comply with all lawful orders, but shall be entitled to refuse to execute any order if the execution of such order would constitute an offence or would breach international law binding on the Republic in armed conflict or relating to aggression'. (Reference to aggression added)

'S227(1) The National Defence Force may, subject to this Constitution, be employed -

(a) for service in the Republic, for the protection of its sovereignty and territorial integrity; [unchanged]

(b) for service within the framework of international organizations or in co-operation with other states; [substantially changed]

..........

(2) The National Defence Force may not be employed to break international customary law binding on the Republic relating to aggression. [removes paragraph (d) from old ss227(2) and includes it as a new ss227(2)].

(3) The National Defence force shall - ....

(e) in armed conflict comply with its obligations under international customary law and treaties binding on the Republic;' [old s227(2)(e) unchanged but becomes new s227(3)(e)]

Some territorial and extraterritorial problems flowing from the Interim Constitution of South Africa

The Republic of South Africa Constitution 1993\(^75\) came into force mainly on 27th April 1994.\(^76\) It is called the Interim Constitution and a definitive constitution will be drafted in the next few years and adopted.\(^77\) The Interim Constitution contains many defects which should receive attention when the final constitution is being drafted. It is the purpose of this paper to highlight three problems of a territorial

\(^75\) Republic of South Africa Constitution Act 200 of 1993 (as amended).
\(^76\) Ibid s251.
\(^77\) Ibid ss68(2), 73(1). The entire procedure for adopting the new Constitution is contained in Chapter 5 of the existing Constitution which comprises ss68-74 inclusive.
or extraterritorial nature which could well benefit from such attention. They are
(1) the status of internal waters and territorial waters; (2) the status of the Prince Edward Islands; and (3) the status of the South African National Force (SANDF)
as a law enforcement agency in offshore areas.

Status of internal waters and territorial waters

The question is whether such waters are part of the national territory or not. Before 27th
April 1994 there was controversy about this question. The Constitution now
defines the national territory. It defines it by saying that it includes a number of
magisterial districts which are listed. Magisterial districts terminate at the coast.
The conclusion therefore is that offshore maritime zones in the new South Africa
are not part of the national territory. I would make 3 observations on this state of
affairs.

(a) Though internal waters and territorial waters are not part of the national territory,
the law of South Africa nevertheless applies in them. This is the result of the Maritime
Zones Act 1994 (MZA) which came into force on 11th November 1994. So there
should not be practical problems here.

(b) International law clearly allows South Africa to treat internal waters and territorial
waters as part of the national territory. It would therefore be entirely logical for the

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79 Art 1(2) read with Schedule 1, Part I.

80 In Schedule 1, Part I.


82 15 of 1994, ss3(2), 4(2).


definitive constitution to have a provision to this effect. I would urge this course of action on the drafters of that final constitution.\textsuperscript{85}

(c) Under MZA South Africa also has a 24nm contiguous zone\textsuperscript{86}, a 24nm maritime cultural zone\textsuperscript{87}, a 200nm exclusive economic zone\textsuperscript{88} and a continental shelf which extends even beyond that.\textsuperscript{89} None of these zones forms part of the national territory and indeed international law would in any event require such non-territorial status for zones beyond the 12nm territorial waters.\textsuperscript{90}

\textit{Status of the Prince Edward Islands}

These Islands were annexed by South Africa in 1948 and formed part of the national territory.\textsuperscript{91} They are deemed to be situated within the magisterial district of Cape Town.\textsuperscript{92} The question is whether the Constitution in any way changes this position. The legislation annexing the Islands does not say that the islands are part of the magisterial district of Cape Town. It says that they are `deemed' to be situated within it. It could therefore be argued that the Islands have been assimilated to the District but they are not actually part of it. If, however, they do not actually form part of a magisterial district they will not be part of the national territory as defined by the Constitution.\textsuperscript{93} It should be noted that Antarctica is also `deemed' to be situated in a magisterial district (Pretoria).\textsuperscript{94} One would scarcely argue from this that Antarctica is part of the national territory!

Against this one could argue that the 1948 Annexing legislation definitely made the Islands part of South Africa.\textsuperscript{95} One could then argue that section 229 of the Constitution continues this position. Against this it could be argued that section 229 cannot continue the application of any law which is in conflict with the constitution itself. In fact the section says as much when it provides that

\textsuperscript{85} I urged this course on the drafters of the present Interim Constitution but it was not to materialise. See DJ Devine `Suggestions for the incorporation of some international law-related provisions into a new South African Constitution' (1991) 6 \textit{SAPL} 216 at 223.

\textsuperscript{86} S 5.

\textsuperscript{87} S 6.

\textsuperscript{88} S 7.

\textsuperscript{89} S 8.

\textsuperscript{90} See discussions relating to coastal state rights and legal status in Churchill and Lowe [n10 supra] at 116-118, 130, 136-137.

\textsuperscript{91} Prince Edward Islands Act 43 of 1948 s1(1).

\textsuperscript{92} Ibid s1(2).

\textsuperscript{93} S 1(2) read with Schedule 1, Part I.

\textsuperscript{94} South African Citizens in Antarctica Act 55 of 1962 s2(2).

\textsuperscript{95} Act 43 of 1948, Preamble, s1(1).
Subject to this constitution, all laws which immediately before the commencement of this Constitution, were in force ... shall continue in force ...

If the 1948 Annexing Act incorporates the Prince Edward Islands into the national territory but the Constitution excludes them, it may very well be that the former provision is unconstitutional and became void on 27th April 1994.96

The net point however is that there is now some uncertainty about the status of the Islands. This uncertainty should be clarified in the definitive constitution.

The question may also be asked whether the law of South Africa applies on the Islands and in the territorial waters surrounding them. The Islands are `deemed' to be situated in the Magisterial District of Cape Town.97 From this it would seem to follow that the legal regime applicable in the Magisterial District of Cape Town applies also on the Islands. Hence it is submitted South African law applies on the Islands. The South African law which applies to the Islands includes of course the Maritime Zones Act 1994.98 That Act in turn would have the effect of creating territorial waters 12nm in extent off the Islands.99 In the result there is no legal vacuum even should the Islands not form part of the national territory. It is suggested however that any possible lingering doubts over the status of the Prince Edward islands should be removed by the definitive constitution. A provision affirming their status as part of the national territory should be included.

Status of the SANDF in extraterritorial law enforcement100

As stated above the law of South Africa applies in its totality to the internal waters and territorial waters of the Republic.101 Much South African legislation applies beyond the territorial waters eg laws relating to natural resources apply in the 200nm exclusive economic zone (EEZ)102 and laws relating to the natural resources of the continental shelf apply to the shelf situated even beyond 200nm.103 Enforcement measures relating to customs, immigration, fiscal and sanitary laws may be taken in the 24nm contiguous

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96 Constitution [n1 supra] s4(1).
97 Act 43 of 1948 s1(2).
99 Ibid s4(1).
100 For a general discussion of the constitutional position of the SANDF see CJ Botha 'Leashing the dogs of war: the South African National Defence Force under the new Constitution' (1993-1994) 19 SAYIL 137 et seq.
101 MZA ss3(2), 4(2). It also applies to installations in the EEZ and on or above the continental shelf and to 500 metre `safety zones' around certain fixed installations in these areas. Ibid s9(1).
102 Ibid s7(2). Thus for example the Sea Fishery Act 12 of 1988 and the Minerals Act 50 of 1991 would apply in the EEZ.
103 MZA s8(3). Thus the Minerals Act 50 of 1991 would apply in the area.
zone. If, as has been suggested, the offence of piracy is put on the South African statute book this offence will be capable of being committed in maritime areas outside the territorial waters. All these laws applicable in various maritime areas require and will require enforcement. In addition there is the question of cooperating with other states in maritime enforcement measures. This could take place even in foreign territorial waters.

It is of course a matter of policy to decide which agency should enforce any particular law on behalf of the state or should cooperate with foreign states in law enforcement. There is however one agency whose participation in offshore law enforcement may often be desirable and sometimes essential. That agency is the South African Navy. It should therefore in principle be legally possible at all times to involve the Navy in law enforcement. The case for such a proposition becomes stronger in the more offshore maritime zones beyond territorial waters. The Navy would have the physical capacity to mount operations far from the coast at say 200nm. It would be equipped to follow fugitive offenders by way of hot pursuit to areas which might be far beyond the 200nm EEZ.

Any legal obstacle to naval involvement should be removed. In this respect it is necessary to see whether there are any constitutional impediments to such involvement, and if so to suggest how they might be removed.

The question remains as to who may police the law generally. In this respect it is convenient to comment first on the position of the South African Police Service and then on the South African Navy.

The police have general powers inter alia to prevent crime and investigate any offence. It is clear from this that the police would be entitled to enforce all South African laws in

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104 MZA s5(2).
105 Thus for example South African criminal law applies on board South African ships on the high seas. Merchant Shipping Act 57 of 1951 (hereinafter MSA) s327(1).
107 Such cooperation is envisaged in terms of the Agreement on Mutual Assistance and Preventing Illegal Fishing between South Africa and Namibia 1991. Published in R1130 Government Gazette No 13239, 24 May 1991.
108 It is for example difficult to imagine any other enforcement agency where crimes of piracy on the high seas are concerned or in relation to cooperation with foreign states in law enforcement in foreign waters.
109 Constitution [n1 supra] s215. See too s5 of the Police Act 7 of 1958 which provides that the functions of the Police inter alia include the investigation of any offence or alleged offence and the prevention of crime (emphasis added).
the 12nm territorial waters, on installations situated in the EEZ and on or above the continental shelf and in the 500 metre safety areas around fixed installations in the latter two zones. The police would also be able to enforce specific laws applying in other zones eg customs and immigration laws in the contiguous zone resource laws in the EEZ and on or above the continental shelf. Under s215 of the Constitution they would appear to be given an 'umbrella' jurisdiction in relation to all types of offences existing under South African law. These general police powers do not of course exclude the specific powers given to other agencies eg the powers given to sea fishery control officers by the Sea Fisheries Act 1988. The police powers are concurrent to these.

The law enforcement powers of the Navy are limited. Naval officers are Peace Officers under the Criminal Procedure Act within the 12nm territorial waters. As such they can effect arrests for arrestable offences under the Act in the area in question. They may also act as salvage officers in certain circumstances again in territorial waters. In limited circumstances they can exercise customs powers in the 24nm contiguous zone with the concurrence of the Commissioner of Customs and Excise, which concurrence may be expressed after the performance of the function. Apart from the above powers, the status of a naval officer in relation to law enforcement is that of a private citizen. This means that in general the navy can only be used to assist those agencies which have law enforcement powers. Thus if it is wished to arrest an illegal fisher in the EEZ this must normally be done by a sea fishery control officer (who may be assisted physically by the Navy in the performance of the arrest).

It is a matter of policy to decide whether the Navy should or should not also be an 'umbrella' agency for the enforcement of all laws in maritime areas. The Constitution, it is submitted, would not prevent the vesting of enforcement powers in the Navy. While s215 does allot such powers to the police, it does not in any way indicate that these powers are to be exclusive to the police.

There may however be some constitutional obstacles to the employment of the Navy in law enforcement. Section 227(1) deals with the functions of the SANDF and says that it may be employed 'for service in the upholding of law and order in the Republic...'. Maritime areas beyond the 12nm territorial waters would not be `in the Republic'. The question must therefore be posed whether the SANDF may be employed in enforcing laws beyond the territorial waters. If the SANDF cannot be employed in this way there is a

10 MZA ss1, 9(1).
11 MZA s5(2); see too Constitution s218(1)(j).
12 MZA ss7(2), 8(3)(a).
13 Act 12 of 1988 s53.
14 Act 51 of 1977 ss40, 44, 45, 334.
15 MSA s298.
16 Customs and Excise Act 91 of 1964 s1 - definition of `officer'.
17 Criminal Procedure Act 51 of 1977 s42.
18 S 227(1)(e).
defect in the present constitutional dispensation which should be remedied in the drafting of the final constitution.

It may be asked whether the provisions of s227(1)(b) would help in solving the potential problem here - at least partially. The National Defence Force may be employed

'(b) for service in compliance with the international obligations of the Republic with regard to international bodies and other states'.

This provision obviously envisages participation by the SANDF in peace-keeping operations by United Nations organs, primarily the Security Council. The provision is however wider than this in that it envisages not only action within a framework wider than that of international organisations but also action carried out with other states. Hence cooperation with other states in upholding law and order could be within the ambit of s227(1)(b) and the SANDF could be used for that purpose. It would appear however that there are severe limitations inherent in s227(1)(b) the effect of which would almost render it ineffective as a basis for employing the SANDF in law enforcement outside the Republic.

(i)  'Obligation' - The SANDF can only be employed under the provisions of s227(1)(b) to carry out the international obligations of the Republic.\(^{119}\) Hence if there is no international obligation to participate in a certain activity but only a facility or option to do so, it is submitted that the SANDF cannot be employed to take part in that activity.\(^{120}\)

(ii)  'Parliament' - Even if the SANDF should be employed pursuant to an international obligation of the Republic, Parliament may by resolution terminate the deployment.\(^{121}\)

(iii)  Unilateral extraterritorial enforcement - Section 227(1)(b) can provide no basis whatsoever for this as it only envisages activities carried out pursuant to obligations owed to other states and international organisations.

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\(^{119}\) These would be obligations owing either to international organisations or to other states.

\(^{120}\) In fact the utility of s227(1)(b) may be questioned on this ground. When the Security Council of the United Nations mounts a peacekeeping exercise under Chapter VII of the Charter it cannot generally oblige any member state to participate actively by sending forces. If an obligation is to exist here, an agreement would have to be concluded between the member state and the Security Council. Charter of the United Nations arts 43, 45. The Republic therefore cannot have any obligation to participate actively in UN peacekeeping exercises. In such circumstances s227(1)(b) actually loses its *raison d'être*. It should therefore be completely reformulated but this is a topic for yet another paper. Constitution [n1 supra] s228(5). See too Botha [n26 supra] 142.
Because of the many defects in s227(1)(b) one is therefore thrown back again on s227(1)(e) for a possible legal basis to support the deployment of the SANDF in law enforcement. As pointed out however this provision also appears to be fundamentally flawed in that it would appear to provide only for the employment of the SANDF within the Republic so that extraterritorial enforcement would seem to be unauthorised.\textsuperscript{122}

In the light of the above it is therefore suggested that the final constitution should contain an additional provision which could be inserted after the provision on law enforcement in the Republic (at present s227(1)(e)).

\begin{quote}
'(1) The National Defence Force may, subject to this Constitution be employed -

\begin{itemize}
  \item for service in the upholding of law and order in areas beyond the borders of the Republic
  \item for cooperation with the authorities of any foreign state in upholding law and order in any maritime area.'
\end{itemize}
\end{quote}

The first of the above provisions would remove any obstacles to law enforcement at sea in areas beyond 12nm from the South African baseline.\textsuperscript{123} It would be possible to employ the Navy to effect arrests in the outer reaches of the EEZ for zone-related offences. It would also be possible to employ them to apprehend pirates anywhere on the high seas\textsuperscript{124} and to carry out the hot-pursuit of foreign vessels in similar areas.

The second of the above provisions would enable the Navy to cooperate with foreign powers in law enforcement at sea. The law in question might be either that of South Africa or that of the foreign power in question. The cooperation could take place in any maritime area including the territorial waters of the states in question. It would thus be possible, for example, for the Navy to assist the Namibian authorities in the arrest of illegal fishers in the Namibian territorial seas or EEZ, thus giving effect to the 1991 Cooperation Agreement between South Africa and Namibia.\textsuperscript{125}

\textsuperscript{122} Another destabilising factor is that Parliament may by resolution terminate any deployment of the SANDF under s227(1)(e). Constitution [n1 supra] s228(5). See too Botha [n26 supra] 142. The negative effects here could be restricted however because Parliament's powers would appear to be territorially confined since s227(1)(e) itself is so confined!

\textsuperscript{123} MZA s2.

\textsuperscript{124} Legislation should be adopted making piracy iure gentium an offence in South African law. See suggestions in DJ Devine [n32 supra] 290-1, 292. See too Report [n32 supra] at 43, 44.

\textsuperscript{125} Agreement [n32 supra].
If the above provisions were included in the definitive constitution this would remove the difficulties inherent in s227(1)(e) of the present Constitution, which would seem to throw doubt over the legality of employing the Navy to carry out extraterritorial maritime legal operations. It would however appear to be eminently desirable to be able to employ the Navy in this way. It is therefore strongly urged that provisions such as the above should be included in the definitive constitution.\textsuperscript{126}

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SUGGESTED CONSTITUTIONAL PROVISIONS ON THE STATUS OF INTERNATIONAL TREATIES

(i) Instead of s82(1)(i) of the Interim Constitution the following is suggested.

`Powers and functions of President`

X(1) The President shall be competent to exercise and perform the following powers and functions, namely -

(a) ........................................

........................................

(w) to negotiate international agreements;

(x) to sign international agreements where such signature does not result in the Republic becoming a party to such agreement;

(y) to perform any act whereby the Republic becomes a party to an international agreement provided that the National Assembly agrees in terms of sY(2);

(z) to conclude bilateral international agreements.

Instead of s231(2) and (3) of the Interim Constitution the following is suggested.

\textsuperscript{126} As pointed out in n46 supra an overhaul of s221(1)(b) would also appear to be essential. S 221(b) as it exists is almost totally ineffective.
`Continuation of international agreements and status of international law

SY (1) ..........................................

(2) The National Assembly shall, subject to this Constitution, be competent to agree to the performance of any act whereby the Republic becomes a party to any international agreement.

(3) Where the National Assembly agrees to the performance of an act whereby the Republic becomes a party to an international agreement under subsection (2) and where such act has been duly performed in terms of section X(1)(y) such international agreement shall be binding on the Republic.

(4) A bilateral international agreement concluded in terms of section X(1)(z) shall be binding on the Republic and shall be laid before the National Assembly within a period of fourteen days after such conclusion or at the beginning of the next parliamentary session following such conclusion should parliament not be in session when such period of fourteen days expires.

(5) An international agreement binding on the Republic under subsection (3) or (4) shall form part of the law of the Republic

[provided that an Act of Parliament expressly so provides and insofar as such agreement is not inconsistent with this Constitution];

[unless inconsistent with this Constitution or an Act of Parliament];

[unless otherwise provided by an express provision in an Act of Parliament or insofar as such agreement is inconsistent with this Constitution].

(6) .............................................'
Note: The texts in the present s231(1) and (4) would become sY(1) and (6) respectively in the new dispensation.

Note: Three alternatives are presented in SY(5). A policy decision would have to be made here. For the implications of the potential policy decisions see enclosed paper.

'Some problems relating to treaties in the interim South African Constitution and some suggestions for the definitive constitution' particularly at pp30-31.

For background discussion in general see above paper and in particular pp27-31.
SUGGESTED CONSTITUTIONAL PROVISIONS ON THE USE OF THE
NATIONAL DEFENCE FORCE IN LAW ENFORCEMENT BEYOND THE
BORDERS OF THE REPUBLIC

The following is suggested as a new provision just after s227(1)(e) of the Interim
Constitution.

`Functions of National Defence Force`

(1) The National Defence Force may, subject to this
Constitution be employed -

(a) ........................................
........................................

(x) for service in the upholding of law and order in areas
beyond the borders of the Republic;

(y) for cooperation with the authorities of any foreign state in
upholding law and order in any maritime area;

........................................`.

For background discussion see enclosed paper `Some territorial and extraterritorial
problems flowing from the Interim Constitution of South Africa' pp4-9 but
particularly pp8-9.
SUGGESTED CONSTITUTIONAL PROVISION ON DEFINITION OF THE NATIONAL TERRITORY

Instead of s1(2) of the Interim Constitution the following is suggested.

`The national territory`

X. The national territory of the Republic shall comprise the following areas:

(1) the national territory of the Republic in terms of subsection 2 of section 1 of the Constitution of the Republic of South Africa Act 200 of 1993;

(2) the Prince Edward Islands; and

(3) 'internal waters and territorial waters as defined by law from time to time.'

For background discussion see enclosed paper `Some territorial and extraterritorial problems flowing from the interim Constitution of South Africa' and in particular the sections on `Status of internal waters and territorial waters' (pp1-2) and `Status of the Prince Edward Islands' (pp2-4).
SUBMISSION BY HIS MAJESTY KING MAKHOSENKE II ON BEHALF OF THE MANALA TRIBAL AUTHORITY

As the above matter refers, receive herewith our submission for the consideration of the Constitutional Assembly.

His Majesty King Makhosoke II will attend the public hearing on the 12/5/1995 to represent the Tribal Authority.

The constitution of South Africa, provides for the continued recognition of Traditional Authorities and leadership.

The constitution further provides for the Regulation of Traditional leadership and indigenous law: in chapter 11

Before delving too deep into this unknown concept of leadership and authority among many of our countrymen, we should examine what is actually meant by the phrases Traditional Authority and Traditional leader.

The Tribe

As a social grouping, resides within a demarcated area, with its own language and culture as a unifying organisation. Therefore a tribe should ordinarily have a leader, a Traditional leader furthermore tribesmen have a common ancestor. Therefore a tribal leader in the South African context still has a great deal of legitimacy. More than 19 million of our countrymen shall remain loyal to this institution.

Most of the so-called Tribal lands are situated in the former self governing or territory areas of the Eastern Cape, Natal, Northern Transvaal, North West, Eastern Transvaal and the Free State.

The rest are to be; found in the rural areas, incidentally too the majority of our voters in the country reside in these areas. Many of the tribes, retained their indigenous authority system, despite the onslaught of the cultural changes to which they have been subjected, and despite the fact that they were subjected in most cases to strict controls.

Tribal Authorities are established through inherited leadership. The survival of this institution throughout die ages is in itself an indication of the support the institution has among its followers.
3  The Traditional System

This indigenous authority system has a political, administrative and social components. The political administrative component, has a central decision making machine of the tribal government, which delegates some of its powers and functions to the heads of smaller administrative units (Headmen).

The tribal leader is the senior most member of the tribal government. He holds a hereditary position, and had to undergo extensive training before being inaugurated as traditional leader for administrative purposes, the total tribal areas divided into a of smaller units, which are geographically demarcated. The traditional leader would therefore appoint headmen who would administer these areas on his behalf.

4. Legal Historical Facts

The Black Authorities Act of 1951 was promulgated in order to regulate the appointment of Chiefs for various tribes. This act and many others which followed, strongly regulated the lives of Traditional leaders and their communities.

The 1951 legislation and other subsequent legislation like Government notice 939 of 1953 and the legislation regarding the establishment of Regions, ultimately led to the Homeland Policy. The lose communities of the Homelands, use the Tribal Authorities. Before the establishment of the Homeland system the traditional leader was expected to perform amongst others the following functions:

- **Tribal leader - At all invitation ceremonies**
  - Be the highest political Authority. His approval was necessary for all administrative matters, and he alone could call a tribal meeting.
  - In economic matters, he was the holder of all the land. Responsible also for the division of the land held in trust by him for the tribe.
  - He also represented the community as an ex official in legislative matters.
  - Maintained law and order and many of the functions. However, in executing all the above authority, he became in many cases less popular, as he was seen as a co-oppressor by the community. In some cases he was regarded as a lackey of the government.

5. Erosion of the Chief's legitimacy

The establishment of the Homeland system brought with it, the emasculation of the authority (Executive) of the Traditional leader.
His sovereignty over the land was removed and transferred from the chief to the government. The Tribal Authorities were limited in their powers of the allocation of Ant As holder of the land, they were regarded as agents of the government appointees, paid to implement government's policies.

Even though a big number of our rural communities continued to recognise this institution, that exposed to them the norms and values of traditional society. It was now obvious that the chiefs were now manipulated to serve the interests of the rulers and government, much for the resentment of many observers.

In many homelands, chiefs became heavily involved in matters of governing the homelands and neglected their own hereditary positions. This position in many areas and the object poverty led many of the communities to believe that the chiefs were, responsible for their misery.

However, this institution of Traditional leadership, forms part of the existing social institutions, and has an impact on the lives and activities of the rural people at local level.

6. Summary

With more than 68% of our community among the Africans functionally illiterate, the majority of those are resident within areas of jurisdiction of the chiefs. It is therefore unavoidable that many of these communities still cling to the African cultural way of life.

Therefore the first step towards the democratisation of this institution is to cleanse it of all negative attributes that apartheid cast upon it. This will remove the cause for viewing chiefs with suspicion and hostility and restore the institution to the legitimacy it previously held.

7. Chapter 11

Many rural communities of South Africa, still accept and support the system of Traditional Authorities.

Traditional Authorities, should therefore continue to exist and exercise powers and functions in terms of indigenous law and as regulated by enabling legislation for all levels of government i.e,

-Local government
-Provincial Government - National Government.

The provisions of Chapter I I should be kept in the final constitution of this country.

Many of the" institutions have remained intact, and have been responsible for stability and harmony in many tribal areas. In some neighbouring countries like Swaziland, Lesotho, and Botswana, and
the recognition of this institution contributed to the harmonious governments. However, in Mozambique, Angola, and Zimbabwe as well as Rwanda, Uganda and many other Africa countries, it was the dissolution of this institution, which led to the anarchy and bloodshed.

SUMMARY AND SUGGESTIONS

Traditional Courts and Customary Law Practices efforts to replace indigenous authorities by representative Local Governments in Africa has failed, and there is an increasing tendency to reinstate indigenous authorities for the purposes of decentralised Local Government all over the continent.

In the case of Tribal Courts and Customary Law provisions for the continued existence of the Chief's Court should be provided for, consisting of the Chief or his appointed person as a presiding officer, and at least 3 Court Councillors. These are appointed by the Tribal Authority in consultation with the Chief. The Headman of the settlement where the dispute originated, must be present at hearings in the Chief's Court.

Remuneration of members of this Court of first recourse must be determined by the department of Justice. The Chief's Court and a Court of first recourse will act as both an appeal court and a court of first instance regulated by the department of Justice.

In accordance with the present de facto situation, provision is made for the Headman of a settlement to act as a presiding officer in all disputes arising within the settlement and recognised by the Chief.

He may either be appointed by the Chief and the Tribal Authority or be elected by members of the settlement and duly recognised by the Chief.

In his capacity as presiding officer of a settlement court, he acts in consultation with at least 3 Court Councillors appointed by himself.

Both the Headman and his Court should be remunerated by the department of Justice in a way deemed fit by the department.

The Chiefs Court is of primary importance because it seeks restitution rather than punishment.

THE ROLE OF TRADITIONAL LEADERSHIP

1 Traditional leaders should be represented. The present interim arrangement of the Provincial House of Traditional leaders, and the National Council of Traditional leaders, should be improved and introduced in the new constitution.
2. This component of representation, should be restricted to issues dealing or voting to tradition and customary matters. Not to be full members of Parliament as this would compromise their nihility.

3. At local level, Traditional Authority, should be empowered to render the necessary services to the community.
23 May 1995

Submission by the GunFree South Africa.

Enclosed please find our submission on the question of whether a clause guaranteeing the right to bear weapons should be included in the new Constitution.

Gunfree South Africa is strongly opposed to any such inclusion and we believe that the majority of South Africans would support us in this contention.

We request the opportunity to discuss this submission orally with the Theme Committee

WHY THE NEW CONSTITUTION SHOULD EXCLUDE ANY REFERENCE TO THE RIGHT TO BEAR WEAPONS

SUBMISSION TO THEME COMMITTEE 6
(SUB-COMMITTEE ON SECURITY APPARATUS)

by

The Gunfree South Africa Movement

Gunfree South Africa notes that at least one submission to the Constitutional Assembly has requested the insertion of a clause in the new Constitution which would guarantee to civilians the right to bear weapons. Such a right would obviously include firearms.

Gunfree South Africa urges the Assembly on no account to accede to this request Our reasons are as follows:

1. Private ownership of a Firearm or the 'bearing of arms' or weapons has never been recognised as a fundamental right in South Africa.

Owning and carrying dangerous weapons has always been a privilege circumscribed by law. In respect of firearms it has been subject to the issuing of a licence requiring that the need for that firearm be established. This implies that such a licence can also be withheld. The fact that the implementation of this principle was distorted by Apartheid and licenses were granted only to white people until five years ago, does not invalidate this principle Gunfree South Africa favours far more stringent testing of applicants.

2. This is the practice in most democracies.
Western democracies do not recognise this right in their Constitutions. The prominent exception is the United States of America, where the Second Amendment to the Constitution reads: 'A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed'. The interpretation of that clause is the subject of ongoing and heated debate between the gun lobby and the safety from guns movement. While the National Rifle Association contends that it grants rights to every individual to own a firearm, others argue that this clause refers only to the right of states to raise armed militia

What is not debatable is that this clause in the US Constitution has been used repeatedly by the gun lobby to block many attempts at gun-control legislation in the USA.

3. The inclusion of such a clause in South Africa's Constitution would prejudice an important debate only recently launched in our country.

The question of the link between the proliferation of firearms and the high level of criminal violence is a crucial one. Gunfree South Africa contends that violence will not be reduced without drastically reducing the number of firearms in circulation in our society. Gunfree South Africa wishes to see the elimination of some firearms altogether. The gun lobby take a different view. It would be wrong to enshrine in our Constitution an idea which is now only beginning to be properly discussed in our country.

4. The inclusion of such a clause would reduce the flexibility of Parliament in dealing with the issue of firearms.

Death and wounding by firearms is the fastest-growing form of violence in South Africa, and Parliament must be free to legislate appropriate ways of controlling the proliferation of firearms. Any Constitutional clause guaranteeing the 'right to bear arms' (or 'weapons') could be used to obstruct such legislation, no matter how appropriate and necessary. Even if the vast majority of South Africans desired stricter control, such a clause would shift the onus of proving the necessity for such legislation onto Parliament. Gunfree South Africa believes that if the democratic will of the people is to reduce or eliminate private firearm ownership, that will should prevail without being obstructed by any Constitutional provision.

5. Such a clause could legalist all unlicensed firearms in South Africa and any type of weapon.

Owners of unlicensed firearms who at present at least have to conceal such ownership and hide their weapons, could claim Constitutional protection under such a clause, making any attempt to reduce this vast category of weaponry null and void. In addition, the right to bear weapons could mean that civilians would claim the right to possess a variety of inappropriate weapons. The successful attempt by President Clinton to ban the ownership of certain kinds of automatic assault weapons, is about to be reversed by the new Republican Congress on these very grounds.

6. The 'right to bear weapons' would encourage informal armies.
The Oklahoma City bombing has revealed the existence of significant numbers of civilians, linked to extremist paramilitary groups in the United States, who not only espouse armed action against the State, but have armed themselves heavily. South Africa experienced a similar phenomenon when armed AWB members invaded Mmabatho and used their licensed guns to try and prop up an undemocratic regime there. Also, the creation of armed SDU and SPU units on the East Rand has left us with serious problems of violent crime and attempts to disarm them have failed. It is our firm view that in a democracy, where the instruments of the State are accountable to the people, informal armies must be disarmed and disbanded. Nothing in the Constitution should give any loop-hole to such groups.

7. Nothing must limit the search for non-violent alternatives or accelerate our domestic arms race.

Gunfree South Africa contends that the ready availability of firearms and the trust in them for security, limits the imaginative search for other, non-violent techniques which can assist in providing the safety and security of our citizens. Already this country is far too heavily armed, with thousands of licensed weapons falling into criminal hands each year. Our Constitution-makers are urged to avoid any suggestion that the proliferation of arms in civilian hands is acceptable. To endorse the ownership of a firearm or other dangerous weapon as a 'Constitutional right' would send the wrong message to the people of South Africa.

8. The right to be safe from the threat of death by firearm far outweighs any spurious 'right' to own one.

At this time, roughly eighty, per cent of South Africans are still unarmed - a vast majority. Gunfree South Africa contends that most of these unarmed people are more concerned with the disarming of those who terrorise our society than with the right to possess a weapon themselves. The priority of our new South Africa, rather than entrenching weapons possession for the armed minority, should be that of securing safety from guns for that majority..

Submitted on behalf of Gunfree South Africa
by
Bishop Peter Storey (Chairperson)
Ms Adelle Kirsten (National Co-ordinator)
I am honored to have been invited to speak today in front of this committee of South Africa's Constitutional Assembly on this important topic. The structure of election administration and the placing of the administrative body within the government are issues that will form the core of South Africa's electoral system and will resonate through the whole of democracy in this country.

For the past four years, I have served as the Director of Programs for Africa and the Near East at the International Foundation of Electoral Systems or 'IFES.' IFES is a private, non-profit foundation based in Washington, dedicated to providing assistance in monitoring, supporting and strengthening the mechanics of the election process in emerging and established democracies. Since our founding in 1987, we have worked in over 70 countries around the world. In my capacity as director of IFES programs in Africa and the Near East, I have overseen our activities in nearly 30 countries. Our programs include election monitoring and civic education, but are mostly focused on technical assistance to electoral authorities in their task of election administration. More often than not, our partners are electoral commissions or government ministries and our assistance draws on our wide international experience in the realm of election administration. We come to that assistance activity with no preconceived ideas about how a country's electoral system must be structured nor how elections must be run. Our only standard is the international standard of elections that are free and fair and an accurate expression of the will of the people in choosing representatives and leaders in their government.

In IFES' work in Africa and around the world, we have interacted with a wide variety of electoral authorities. The types of electoral structures are almost as varied as the countries themselves. For the most part, they fall into two general types: election administration placed within a government ministry, usually the Interior Ministry or the Home Affairs Ministry; and election administration as the responsibility of an electoral commission. Within this second type, electoral commissions are usually labelled as 'independent,' meaning that they operate with some level of autonomy from other executive structures of the government. Sometimes commissions are permanent and sometimes they are temporary, created anew each time there is an election. In some places, the commission is effectively a single person, a commissioner of elections or a chief electoral officer.
I have appended to this paper a table briefly describing the electoral administrative bodies in a number of countries. It illustrates the fact that no two countries give exactly the same attributes and duties to their election authorities. Many of the details in the variation between types of election commissions or electoral bureaus in ministries are unimportant, or are at least not material for consideration at the constitutional level. Other details of structure and duty are important, and I will touch on them in this paper. My presentation today will address, first and foremost, the general question that you as members of the Constitutional Assembly are now posing for yourself: Should electoral authority be given to the Home Affairs Ministry, as has been the practice in South Africa prior to 1994, or should election administration be the responsibility of an independent election commission?

I believe it is helpful, in answering this question, to first answer a few more basic questions.

What role does election administration play in a democracy?

What are the conditions in which election administration takes place?

What are the requirements of good election administration?

First, what role do elections and election administration play in a democracy?

It is self-evident that elections do not create democracy, yet a country can hardly be called democratic without periodic elections. Elections do not equal democracy but they are at the core of democracy. Democracy depends on elections, but democratic elections also are dependent on democracy, most particularly a democratic culture. One of the lessons that I, and my Foundation, have learned over the years in our work in Africa and elsewhere is that good elections cannot take place in a non-democratic setting. This is one reason why transitional elections, taking place at the beginning of the democratization process, are so problematic. Good elections require a democratic setting and culture because democratic elections and election administration must themselves be democratic.

What do I mean when I say that elections in a democratic must be democratic? I mean that elections and election administration must exhibit the same characteristics as a mature democracy. I would propose that some of these characteristics--the characteristics of a democracy but also of democratic election administration--are the following:

- predictable: ruled by law commonly understood and universally applied;

- protected by the checks and balances of law and political culture from manipulation that would subvert the free expression of the popular will;

- transparent: open to public view and scrutiny;

- exhibiting an overriding concern for the greater public good, as opposed to the good of special interests;

- able to balance the demands of the public at large with the imperative of respecting the demands and rights of individuals, of the marginalized, of the disadvantaged;
When deciding the question of what type of body should organize elections, I believe it is necessary to first examine the above characteristics of election administration in a democracy. What type of electoral structure will be most conducive to creating and institutionalizing those characteristics? I believe that it is possible, in principle, for both a government ministry and an independent electoral commission to carry out elections in a democratic fashion. In the South African context, however, one type of structure or the other might be more conducive in producing those characteristics.

Let's move on to the second question. What are the general and universal conditions in which election administration takes place? What are the demands that elections, by their nature, put on election administrators?

Elections are both national and local events. They require a centralized effort that is able to reach into every nook and cranny of a country.

Elections, particularly in a parliamentary democracy, are unpredictable. General elections can be called anytime, with little notice. By-elections are also often necessary at unpredictable times.

Elections are high pressure events. Once an election date is set, election administration is nothing but meeting a series of deadlines. The political penalties of not meeting those deadlines is high, both for election administrators and for the government.

Elections are high stakes events. The credibility of elections is tied to national stability. The winning and losing of elections is tied to personal and party power. The competitors in an election have a strong interest in applying pressure on election administrators to bend the rules in their direction.

Elections are high budget events. The administration of elections requires that a lot of money be spent quickly and in a very decentralized manner. Good election administration requires the capacity to spend money economically, efficiently and without fraud.

Elections are periodic events. National elections usually take place at widely spaced intervals. Election administration at the time of elections requires an enormous short-term staff. It requires the ability to downsize efficiently between elections to the point where the election authority is appropriately staffed for its between-election tasks.

Election administration is much more public-oriented than many other government functions. It touches--and must reach--all voting-age citizens. The nature of its job also requires that the
election authority interact on a daily, productive and open basis with groupings within society, particularly with political parties and other non-governmental organisations.

Election administration is specialized. There is no other government function that is quite like preparing for elections, except maybe preparing for war. It requires the mobilization of tens of thousands of people on a precise and unforgiving timetable. It also requires moving a myriad of forms and other supplies and equipment to thousands of different locations. Boundary demarcation and voter registration, often additional duties of the election authority, are also specialized, technical tasks.

This listing of characteristic demands that elections, by their nature, put on election administrators, may or may not lead you, or the constitutional framers of any nation, to conclude that the organization and supervision of elections is better conducted by a government ministry or an independent commission. It leads me to conclude that, at the very least, the election administrative body must be flexible, politically skilled yet shielded from political influence, and professionalized.

Turning to our third question will at last begin to point us toward a conclusion to the overriding question regarding election administration by ministry or by commission. This third and final question was: What are the requirements of good election administration?

I believe that the primary requirements of good election administration can be summed up in three words: competence, independence and impartiality.

An impartial election administration is one that does not care who wins or loses the elections it is administering. Its interest is in establishing a level playing field on which candidates and parties will compete, in giving all voters sufficient information so that they can cast their vote in a reasonably informed manner, and in adding up votes and declaring winners without prejudice.

An independent electoral authority is one that is structured so that it is not under the influence, or appears to be under the influence, of individuals, groups or institutions that have an interest in the outcome of the election. In addition, it is structured so that it is protected from the influence if it is applied.

A competent election administration has many of the characteristics that have already been noted above. It has the ability to mobilize thousands of temporary staff (who are competent, impartial and independent). It is flexible, efficient, effective. It is politically skilled (but not politically influenced). It gets the job done, on budget and on time.

I would add a fourth requirement of good election administration that, while hard to measure, is the overriding requirement in a country like South Africa that is undergoing a radical transformation of its government and its political culture through a broadening of its democracy. This requirement for election administration is the appearance of impartiality, independence and competence. Election administrators can achieve this appearance—can win the public's trust—through actions that exhibit independence, impartiality and competence. But it is often essential, especially in transitional situations where the level of trust is low, to win the trust because of who the election
administrators are, how they are chosen, and their proximity (or lack thereof) to those who might unduly influence them.

These requirements of good election administration, impartiality, independence and competence, both in fact and in appearance, strongly point, I believe, a country such as South Africa toward entrusting its election organising responsibilities to an independent electoral commission rather than to a government department within a ministry. In my opinion, in South Africa and in most other countries where radical changes are taking place and where the public's level of trust in the capacity of government ministries to meet the requirements of impartiality, independence and competence is low, an independent electoral commission is the preferred structure for organizing and supervising elections.

I believe that these requirements might also give guidance to this committee on some of the general characteristics of an electoral commission appropriate to the South African context.

Recognition of the need for impartiality and the appearance of impartiality may lead you to some conclusions on the membership of the electoral commission. The membership as a whole must be impartial and be seen as being impartial, that is, they must be seen to have no interest in who wins or loses the elections that they are administering. Many countries meet this requirement by placing individuals on the commission who have a public reputation for integrity and nonpartisan behavior. Other countries achieve an impartial whole by balancing the partisan parts, that is, the political affiliations of the members of the commission. If the commission is made up of representatives of political parties, it should, as a whole, act in a disinterested manner regarding the outcomes of elections.

The requirement of independence has implications for, among other things, the mechanisms established for hiring and finding members of the commission. Countries use a variety of methods to insure that commission members are not beholden to the president, the government or any other political player for getting their position or holding on to it. One method of insuring that a broad range of political voices has input into the selection of commissioners is requiring that they be approved by a supermajority of the parliament. Other countries specify that political parties can be represented on the commission in the same proportion that they are represented in parliament. Equally important is protection of the commissioners from arbitrary dismissal. Specific and very limited grounds for firing should be included in the constitutional and statutory articles that establish the commission.

The requirement of competency also gives some guidance on other preferred characteristics of an independent commission. We have noted that election administration is a specialized and technical task. That should lead constitutional framers to conclude that a permanent commission should be established, as opposed to a temporary one. It might also lead to some conclusions regarding the size of the commission. A commission that is too large (often made that way in an attempt to incorporate representatives of all possible political actors) is often not a very efficient administrative body. The technical nature of election administration will require also that the commission be provided with a permanent and professionalized secretariat, hired and controlled by the commission itself.
There are many other details that must be specified regarding the establishment of an electoral commission, but these details belong to the drafters of the electoral law or other statutes. The points made above, I believe, touch on most of the questions that are of relevance for the drafters of the constitution, where only the broad framework of an electoral commission will be specified. I hope that these general remarks have been of interest and will prove to be of use as you and the Constitutional Assembly as a whole reach conclusions on the mechanism by which elections will be organized and supervised in South Africa.

[Editors note: Attached tables unable to be scanned into the database. The tables detail the Electoral Commissions of 22 different countries and 1 U.S. state: Types and Functions. The tables describe the Elections Administrator, its size and functions and how chosen.]
SOUTHERN AFRICAN VEXILLOLOGICAL ASSOCIATION

19 MAY 1995

re: NATIONAL FLAG AND ARMS FOR THE REPUBLIC OF SOUTH AFRICA

Vexillology is the study of flags - their symbolism and meaning, SAVA participated in the process leading up to the design of the new national flag and assisted with the evaluation of the designs sent in by members of the public in October 1993.

While it is understood that the new national flag is an interim symbol pending the finalisation of the new Constitution, I wish to put on record the feeling of the members of the Management Committee of the Association. It is recommended that the current national flag be retained as it has the support of the majority of the population and has had a significant unifying effect on the nation. While there was some initial resistance to the new flag in some quarters of the population following its adoption, this has largely been overcome. Many of those now feel that the flag has "grown on them" and accept it as the country's national symbol. The recent Star/MMR poll which found that over 82% of respondents favoured keeping the flag is evidence of this. Furthermore, the new flag is now also commonly identified with post-apartheid South Africa abroad.

While the flag is a reflection of the "now" South Africa, the coat-of-arms is not. The Arms are a reflection of the joining of the four territories which made up the Union of South Africa and do not represent the current reality. Consequently, just as the former national flag was a representation of a particular political era in the country, so too are the Arms. It is suggested therefore that the Arms be changed to reflect the new political dispensation in the Country.

On behalf of the Association and its members, I thank you for the opportunity to put forward our views and wish you well in your task of drawing up a final Constitution for our country.

BRUCE BERRY
SECRETARY/TREASURER
A.G.S OF S.A

PINKSTERLIGHUIS

22 May 1995

RE. LEGISLATION: ABORTION AND PORNOGRAPHY

We herewith strongly object to the legalising of abortion and pornography.

As congregation we make a serious appeal to you not to carry through the above-mentioned laws.

Pastor P. J. Putter, Church Council and Congregation
Jam’Iatul Ulama (Natal)

19 May 1995

**Freedom of Language and Culture**

On behalf of the Muslim Community, we propose the following:

1. The introduction and promotion of the Arabic Language at school and tertiary education.
2. Affording suitable Arabic books/literature at municipal and university libraries.
3. Allowing Muslims to practice their Faith (Islamic culture) entirely.
4. Giving preference (for Muslims) to the Islamic Faith/culture in the recognition of Muslim Personal Law.
5. To recognise and respect the Islamic culture and Arabic language.

Thank you and God bless

Ahmed Kathrada
Relations Officer
22 May 1995

Dear Ms Meyer

I refer to my telephonic discussion with you when we discussed the possibility of this Board presenting either oral or written submissions in regard to the question of religious observance in public schools.

In view of the many developments in education we as a Board have prepared a memorandum dealing with various issues which relate to our schools. I am attaching a copy thereof.

The only paragraph which deals with religious observance in State schools is paragraph 6 on page 9. As you will see what we have to say on the topic is very short and to the point. If it is felt necessary for us to expand on that point or to present any oral submissions would you please advise.

I thank you most sincerely for the courtesy you have shown toward us.

JEFFREY M BORTZ
CHAIRMAN

MEMORANDUM ON THE WHITE PAPER ON EDUCATION AND TRAINING, THE RIGHTS OF JEWISH DAYS SCHOOLS IN THE CONTEXT OF THE CONSTITUTION AND RELIGIOUS OBSERVANCE IN SCHOOLS

1 Introduction
1.1 This memorandum is presented by the South African Board of Jewish Education ("the Board") following upon the White Paper on Education and Training published by the Department of Education in Government Gazette No. 1 631 2 of 15 March 1995.

1.2 It is intended to deal with -

1.2.1 the White Paper;

1.2.2 the rights of Jewish education in the context of the White Paper and of the Constitution;

1.2.3 the issue of religious observance at schools; and

1.2.4 other related issues.

2 Background:

2.1 The Board is the controlling body of the King David Schools in Johannesburg and has affiliated to it various Jewish Day Schools throughout South Africa being -

2.1.1 Torah Academy, Johannesburg;

2.1.2 Shaarei Torah School, Johannesburg;

2.1.3 Yeshiva College, Johannesburg;

2.1.4 Carmel Schools, Durban;

2.1.5 Herzlia Schools, Cape Town;

2.1.6 Theodor Herzl Schools, Port Elizabeth.

2.2 The King David Schools in Johannesburg and the various schools which are affiliated to the Board as referred to above are all community schools rather than private schools in the accepted sense of the latter term. All the schools concerned are registered as private schools in accordance with the Private Schools Act 1986 but were all established and are maintained for the specific purpose of advancing the Jewish education requirements of the Jewish community in South Africa, and are therefore community schools in this sense.
2.3 There is a difference in the intensity of Jewish programmes offered at the various schools referred to in paragraph 2.1. In this regard:

2.3.1 The Torah Academy, Shaarei Torah Schools and the Yeshiva College in Johannesburg offer intensive Judaic programmes.

2.3.2 The remaining schools have very significant and meaningful Judaic programmes woven into their curricula which are less intensive than the schools referred to in paragraph 2.3.1.

2.4 Whatever differences might exist in the Jewish education content of the curricula at the various schools referred to above:

2.4.1 those schools retain their special characteristics because of the Jewish education content of their curricula and the inculcation of Jewish values;

2.4.2 the fundamental agendas of all these schools are identical, namely, that of perpetuating Jewish continuity, advancing Jewish education and cultivating a commitment to Judaism.

It is our obligation and mandate to ensure that these characteristics are not disturbed and that the fundamental agenda is adhered to since our schools are an extension and integral part of the religious and communal life of our respective communities.

2.5 The religious observances and practices of the Jewish community are maintained through various units and institutions. In common with all communities, the fundamental unit in Jewish life is the family. The synagogue is also of central importance bringing together as it does the various family units and acting as a focal point for Jewish life. Jewish education has always been essential in the continuity of Jewish life - through the ages, Jewish communities have regarded educating the youth in the traditions, laws and practices and ethics of Judaism as a prime obligation and to this end have, in ordering the priorities necessary for the advancement of their communal life, regarded the creation of a Jewish school as being of prime importance. Accordingly and viewed against this background, the Jewish day school is not simply a learning institution established for the purpose of secular studies - the Jewish day school is an integral part of Jewish life as important as the family unit and the synagogue.

The fundamental purpose and agenda of the Jewish day school has been referred to above.
2.6 Notwithstanding the basic purpose of our schools, they have through the years developed secular programmes of quality and have achieved consistently fine results in secular subjects. The graduates of all the schools referred to in this memorandum have in numerous ways gone on to make meaningful and positive contribution to the welfare and advancement of South Africa.

3 The White Paper of Education and Training

3.1 The White Paper addresses fundamental and wide-ranging issues in regard to past inequalities in education in South Africa and sets out a framework for remedying these inequalities and for the future administration of education in this country within the framework of reconstruction and development in South Africa. As is stated in the White Paper as part of the opening message from the Minister of Education, Professor S M E Bengu

"The national project of reconstruction and development compels everyone in education and training to accept the challenge of creating a system which cultivates and liberates the talents of all our people without exception."

Moreover, at page 19 of the White Paper it is stated that -

"it is now the joint responsibility of all South Africans who have a stake in the education and training system to help build a just, equitable, and high quality system for all the citizens, with a common culture of disciplined commitment to learning and teaching. In this task the best expertise and experience from the old ethnic departments will be indispensable, just as all inefficient and reactionary administrative and professional practices from the past dispensations must be jettisoned."

3.2 There is nothing in the White Paper which in principle can be regarded as unacceptable to independent schools. By independent schools is meant private schools as defined in the Private Schools Act 1986 and including communal schools established by various communities in South Africa for the advancement of the religions and cultures of the communities concerned such as the schools which this Board represents and which have been referred to above. The term "independent schools" is used in that sense throughout this memorandum. Many independent schools have for some years been endeavouring in various ways and through a variety of programmes to assist in addressing the issues referred to in the White Paper.

3.3 We, in common with many other independent schools, welcome the establishment of a single national Education Department. This is a step we have advocated for many years as being in the best interests of education in this country. Different
education departments created inequalities and different criteria which militated against sound educational advancement.

3.4 The White Paper in paragraph 8 on page 21 thereof states the following -

"The state's resources must be deployed according to the principle of equity, so that they are used to provide essentially the same quality of learning opportunities for all citizens. This is an inescapable duty upon government, in the light of this country's history and its legacy of inequality, and it is a constitutional requirement."

This statement of principle is acceptable. Extending this statement to the issue of the state subsidies of private schools (which is dealt with briefly in part 5 of the White Paper at page 71) we are of the view that there should exist a standard basis per capita allocation for all schools, public and private, based on a formula to be agreed with national and/or provincial governments.

4 The role and subsidisation of independent schools:

4.1 Regarding the role of independent schools and their right to function in a new education system, it is stated in the White Paper at page 21 under paragraph 3 as follows -

"Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the state authorities with respect to the form that education should take and to take part in its governance. Parents have an inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the state or not, subject to reasonable safeguards which may be required by law. The parents' right to choose includes choice of the language, cultural or religious basis of the child's education, with due regard for the rights of others and the rights of choice of the growing child."

4.2 The present position regarding private/independent schools is referred to in the White Paper at page 68 under paragraph 15 where it is stated that -

"Private schools accounted for less than four per cent of schools and enrolments in the former House of Assembly, and no more than one to two per cent elsewhere."

4.3 The national Director of the Independent Schools Council, Mr Mark Henning in his book "The Case for Private Schools", First Edition 1993, at page 4 thereof, correctly points out that -
"The private school sector in South Africa is very small, catering for perhaps 1% of the school population. It is likely to shrink below this as disposable incomes decrease and political change occurs".

4.4 Whilst the White Paper recognises the right of independent schools to exist, there are few references to or proposals in that document regarding the future role of independent schools. Mark Henning in the work referred to argues the case for the existence of private schools on various bases. We associate ourselves with those arguments.

4.5 Independent schools have for many decades played an important and constructive role in education in South Africa and their graduates have contributed much toward the social and economic development of this country. Many of this country's leaders past and present have sought and continue to seek independent schooling as an option for their children.

4.6 Notwithstanding that independent schools are a small category within the general education framework in South Africa, the constituents of those schools being the parents, teachers and pupils concerned have a right to certainty regarding the future subsidisation of independent schools. In this regard the White Paper at page 71 under the heading "Finance" at sub-paragraph (d) states -

"The question of the eligibility of independent schools for state subsidies must be determined using clear and equitable criteria based on the public interest, and the observance of constitutional guarantees."

There has been much uncertainty and conflicting statements on the issue of state subsidies for independent schools. In the same way that careful and proper planning needs to be undertaken in regard to education in South Africa generally, independent schools needs to know and understand in clear terms the niche they will be entitled to occupy in the general education framework in this country since they too need to plan for their future.

4.7 This Board, in common with other organisations representing independent schools, takes the view that independent schools must and can continue to play an important role in education in South Africa and in the future welfare and advancement of this country. We further take the view that independent schools established on a proper basis in accordance with accepted educational criteria are entitled to state and/or provincial subsidies. Against this background, we welcome the establishment of the National Review Committee and trust that that Committee will for the present create the forum for the purpose of a dialogue between the independent school organisations and national/provincial governments on the important issues of the role of the independent school and the subsidisation thereof.
4.8 There should in fact be ongoing dialogue between independent school organisations and national and provincial governments. Provision should be made either by legislation or by practice for a negotiating forum to facilitate an ongoing dialogue on issues which relate to private/independent schools in their various forms. The now defunct Joint Liaison Committee was such a forum - albeit that it functioned in an entirely different milieu, it was a medium through which discussions of integrity could be held and a similar mechanism should now be established.

5 Education upliftment programmes:

5.1 The White Paper at page 34 deals with the topic of partnerships for human resource development.

5.2 Under chapter 5, various programmes which are considered essential to the advancement of education in South Africa are referred to these are, inter alia, curriculum development, teacher training, and early childhood development.

5.3 At page 35 of the White Paper in paragraph 92, it is recognised that in their different ways, various bodies including independent schools represent essential interest and sources of advice in regard to the matters dealt with in chapter 5.

5.4 This Board remains willing to offer guidance and advice in regard to those development initiatives outlined in chapter 5 of the White Paper. In addition to existing successful programmes, areas in which our schools are able to constructively contribute toward those initiatives are, for example, teacher training and adult basic education, early childhood development and curriculum development. In addition, our schools are able to offer constructive guidance in the important area of school management.

6 Religious observances in schools:

6.1 The Constitution of the Republic of South Africa guarantees, inter alia, religious freedom.

6.2 Moreover, the Constitution in section 32(c) provides that every person has the right to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

6.3 We take the view that schools established to advance the religious and/or cultural practices of the communities they form part of such as the Jewish day schools
referred to in this memorandum must be entitled to require pupils who attend such schools to participate fully in the religious practices and religious classes stipulated by such school.

6.4 A suggestion to the contrary in the Gauteng Education Bill under the heading of "Freedom of Conscience" would not be acceptable to schools such as those which are referred to in this memorandum. Pupils enrolled at our schools from the communities which those schools are established to serve must identify with the religious ethos of such schools and this entails obligatory participation in the religious practices and religious classes of such schools.

6.5 Regarding learners at state or state-aided schools, this Board takes the view that as an organisation established to advance Jewish education, it should have the right to present programmes at state or state-aided schools intended to enhance the Jewish education of Jewish pupils at such schools. The pupils concerned should have the right to elect whether or not to participate in such programmes.

7 Conclusion:

This memorandum is submitted against the background of this Board and its various affiliated bodies welcoming the changes heralded in the draft White Paper and the willingness of this Board as expressed in existing programmes to contribute its resources toward education improvement in South Africa. We appreciate the opportunity given to us to participate in the important discussions regarding the upliftment of education in this country.

JEFFREY M BORTZ
CHAIRMAN
SOUTH AFRICAN BOARD OF JEWISH EDUCATION

Date: 19 May 1995
OFFICIAL LANGUAGE IN SOUTH AFRICA

Advertisement in "Die Burger" of 16 May 1995 (p. 7) refers. The deaf in South Africa can master mainly Afrikaans or English only because these are the only languages offered at schools for the deaf. However, most deaf people regard sign language as their first language because they can communicate normally by means of sign language.

In South Africa there are an estimated 1 600 000 deaf people who regard sign language as first language. In addition to this most family members, friends and professional staff in deaf care use sign language when they communicate with the deaf. In the USA "American Sign Language" is accepted as official language and the deaf have a much higher status than in South Africa. There are, for example 6000 deaf students at universities in California, while there are no resources available for the deaf at South African universities.

On behalf of the deaf in the Western Cape I strongly recommend that SA Sign Language be acknowledged and accepted as official language. I also refer the matter to my Head Office in Johannesburg for an official recommendation. We would also like to talk to you about other needs of the deaf which might be contained in the new Constitution.

I. J. Pienaar
PROVINCIAL DIRECTOR, WESTERN CAPE
JAMIATUL ULAMA (NATAL)
(Council of Muslim theologians)
DURBAN

19 May 1995

Submission on the Official language/s

It will indeed be impractical to have all eleven languages officiated. Now that South Africa has consolidated into a unitary state where, all the citizens of our country wish to be recognized as South Africans, hence, let there be one official language. Our choice is English.

Thank you and God Bless.

Ahmed Kathrada
Relations Officer
THE BUDDHIST INSTITUTE OF SOUTH AFIRCA

31 May 1995

PUBLIC HEARING: RELIGION

I represented the Buddhist Institute of South Africa at the Constitutional Assembly National Sector Public Hearing session in respect of the role of religions in South Africa on Friday 26 May 1995. I confirm that I made the following contributions at this conference:

1. PREAMBLE TO THE CONSTITUTION

The present Preamble to the Constitution "In humble submission to almighty God" represents a majority view that excludes very significant minorities, such as the Buddhists, Jains, Vedantists, Taoists, etc., as well as those who for non-religious reasons, feel uncomfortable with such a strictly and exclusive theistic form of address. The stated intention to separate religion and the state is in fact nullified in this type of preamble.

Suggestions to re-word the preamble to satisfy so many diverse religions, ideologies and philosophical persuasions has not proved successful. I have therefore suggested that, instead of a Preamble, 2 minutes of silence be granted to all participants on all occasions where otherwise the preamble would be invoked. This, surely, is the most democratic gesture one can make, as each person is then able to address the transcendent, the significant other or meaningful ideal in his or her own way. This would be a most enlightened, dignified and elegant way to give meaning to all important state occasions.

2. NATIONAL ANTHEM

Both National Anthems suffer from the same theistic prejudice as has been analysed in the remarks about the Preamble. A National Anthem is, however, even more important to religiously defuse or universalise, as it is more often employed by the general public. It is my view that to have two National Anthems side by side, both with a distinctly nationalistic flavour and ideologically tainted history is not only clumsy - it is divisive as well - in addition to being biased in favour of a theistic world view.

I therefore suggest that an altogether new Anthem be created which truly represents the new South Africa - much as the new flag is, which also replaces previous flags belonging to opposing camps in the "old" South Africa.
3. **RELIGIOUS OFFICERS**

I have suggested that the right to conduct and legally register marriages and other such rights that have previously been granted only to Christian ministers of religion be now made available to nominated office bearers in other religions as well. Alternatively, this right should be left only to magistrates or similar state appointed officials.

4. **RELIGIOUS HOLIDAYS**

I suggest that followers of a particular religion be given the opportunity to celebrate one holy day per year of their choice, as a paid holiday. In such a case they forfeit any other day(s) members of other religions may have chosen as their holy days i.e. a Buddhist would take off on the Full Moon of May but not on Good Friday which Christians celebrate, etc.

I hope these suggestions are useful. I am available for any further advice on these issues, especially in so far as they affect the Buddhist Community in this country.

LOUIS H VAN LOON
CHAIRMAN: THE BUDDHIST INSTITUTE OF SOUTH AFRICA
UNIVERSITY OF FORT HARE
FACULTY OF LAW

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

I recently attended the University of Fort Hare graduation ceremony on 5 May 1995 and was privileged to listen to the opening speech of Mr Ibrahima Fall, the Assistant Secretary-General for Human Rights of the United Nations.

After the graduation I obtained Mr Fall's permission to forward a copy of his speech to you and I recommend it to you especially paragraphs 13 to 31, where he deals with, inter alia, the relationship between democracy, development and decentralisation.

John Robertson
Head of Department
Constitutional and Public International Law

OPENING SPEECH OF MR. IBRAHIMA FALL, ASSISTANT SECRETARY-GENERAL FOR HUMAN RIGHTS TO THE UNITED NATIONS AT THE 1995 GRADUATION CEREMONY OF THE UNIVERSITY OF FORT HARE, SOUTH AFRICA

5-6 MAY 1995

"Honourable Chancellor,
Mr Vice Chancellor,
Visiting Vice Chancellors,
Members of the University Council,
Members of the Senate and Heads of Departments,
Members of the Student Representative Council,
Distinguished Guests,
Ladies and Gentlemen,
Dear Students
1. In my triple capacity as a son of Africa, as an University Professor and as a former Dean of Faculty of Law and Economics, I am particularly honoured by the decision of the renowned University of Fort Hare to confer upon me the Diploma of Doctors Honoris Causa.

2. I also wish to express, in all simplicity and sincerity, my profound gratitude to the teaching corps of the Faculty of Law and to the entire teaching staff of the University of Fort Hare for this great honour. My thanks go particularly to the Dean Du Plessis for the kind words he has spoken about me, and for his touching eulogical presentation addressed to my person, my qualifications and my work. Allow me, in return, to assure you that, I will spare no efforts to justify the confidence you have placed upon me, and to try to follow in the footsteps of my famous predecessors, former students and the faculty of this University, a whole galaxy of famous sons and daughters of Africa to whom it is my pleasure to pay tribute here, in the name of the late Chancellor Oliver Tambo, whose memory I greatly value, a friend and a brother, whom I came to meet, to respect and to admire by working closely with him for many years, during the meetings of the OAU and of the Non-Aligned Movement, while I was serving as the Minister of Foreign Affairs of my own country, Senegal.

3. I am fully confident that, through my modest person, this ceremony is intended to honour the United Nations, where I am the Assistant Secretary-General for Human Rights. Thus, I am particularly happy to bring to you the message of greetings and congratulations of the Secretary-General of the United Nations, Mr. Boutros Boutros-Ghali, that dignified son of our Continent who presides over the destiny of that Organization with devotion, competence and an efficiency that is the pride of all Africans.

Ladies and Gentlemen,

4. University and academic traditions, to which I am linked through a long career as a professor for twenty six years, bowed down by the honour of receiving the diploma of the doctors honoris causa, give me the pleasant duty of availing myself of the opportunity in the speech of thanks, to dwell in general terms on the outline of an imaginary doctorate to be defended. Faithful to this tradition, I will not actually dwell on this but have chosen to briefly present the relationship between democracy and development from the point of view of human rights.

5. Before proceeding further, it is perhaps necessary to avoid any ambiguity. Our intention is not to engage in a theoretical discussion of democracy and development, two general concepts to which different disciplines in the social sciences and different schools of thought within each of those disciplines attach differing meaning, substance and scope.
6. Nor is it our intention to embark on a highly speculative debate about whether the ties between democracy and development are of an historical - and hence diachronic - type or indeed a simultaneous - and hence synchronic - kind.

7. Deliberately looking at things from a practical standpoint, we would like, more modestly, to examine ways and means of making sure that development - the profound aspiration of the African peoples faced by the terrible realities of the under-development - becomes the central dimension of the broad-ranging democratic process under-way on the African continent.

8. In this regard, development should be viewed in holistic terms and taken to mean an overall process for the continuous promotion and improvement of the well-being of every man and woman, every people and nations, from all angles. It concerns, in short, a process of humanity in its entirety, and it covers all aspects of human rights and freedoms.

9. Democracy, for its part, viewed as a system based on freedom, equality and solidarity of all, is a system in which every person, every people enjoys and exercises all human rights within the law.

10. In this sense, democracy obviously cannot be confined to such civil and political rights as the right to life, equality, dignity and justice; freedom of conscience and religion, thought and expression, assembly and association, free movement, access to public service and public office, free participation in political life, and so on. Democracy also encompasses economic, social and cultural rights, such as the right to work, to education, to health, to own property, to self-determination and freedom to dispose of economic resources, to peace and solidarity in their individual and collective dimensions, both national and international.

11. In the light of such conceptual approach of democracy and development, it seems that one best definition of the relationship between democracy and development might well be a human right definition. It is the one that is at the heart of the 1986 Declaration on the Right to Development. According to that Declaration, the right to development is as "an inalienable human right by virtue of which every human person and all persons are entitled to participate in and contribute to economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (art. 1).

12. Participation is of particular importance, for it is true that not only democracy and development, but also democracy for development, if they are to be viable, must be founded on the free, active and complete participation of peoples in determining and achieving their own destiny.
13. Whether they have been based on private enterprise and economic efficiency and aimed solely at economic growth or financial equilibrium, or whether they have been guided by State interventionism and economic collectivism, most development strategies in Africa have met with failure, and even when they have been marked by initial success, they have rapidly produced serious crises, the care of which is usually caused by massive violations of human rights.

14. While the factors that go to explain this situation are many and varied, one of the fundamental reasons is of the absence of participation by the population in devising and managing national political and economic development strategies.

15. Yet the idea of the citizen and the people playing a part in determining their own political, economic and social future is not new to Africa. It is at the core of many pre-colonial political and social systems and was also one of the principal demands by the continent's political leaders while waging the struggle against colonialism and racism.

16. However, experience was soon to show that popular participation, as practised by Government leaders, became devoid of substance, namely, it was not free, active and complete.

17. In this connection, the conclusions reached by the 1990 Arusha Conference are clear: the political systems and the economic strategies implemented in Africa for close on 30 years have greatly contributed to the unprecedented economic, human, juridical, political and social crisis, and the root causes of the crisis lies in, among other things, over-centralization of power and impediments to the effective participation of the majority of the people in social, political and economic development.

18. As a result, the participants in the Arusha Conference insisted on the need for political mechanisms, to accommodate the rights to freedom of opinion, toleration of differences, acceptance of consensus, promotion of decentralization and ensuring of democracy and effective participation by the people in political, social and economic life, and this, according to the same participants can be ensured only with the protection of the fundamental human rights.

19. Today, with the new democratization and the emergence of many grass-roots voluntary organisations, whose action is based on associating the population in development, popular participation can play a positive role in the two-fold process of democracy and development.
20. Perhaps a factor of revival is that participation must be at all levels of society. Political and economic decisions must be taken with the participation of everybody, at all levels. All too often, Governments, even democratically elected Governments, work out national socio-economic plans and programmes without active and effective participation of their citizens, and often under foreign pressure.

21. The human rights dimension to democracy and development means not only participation in the decision-making process but also participation in its benefits. All sectors of society must benefit, on an equal footing among all citizens.

22. To ensure that governants are respectful of the democratic principle of popular participation, human rights education is a key element. All citizens, including the most disadvantaged, should know that their rights are and be able to claim them, what their duties are and fulfil them. With education, all citizens should be able to form groups and associations to defend their rights and interests, at all levels of society, not only through political parties but also by occupational, social, cultural and religious associations, as well as through sectoral interests like housing, employment, security, access to drinking water, electricity, and so on. As a consequence, for an individual who knows his rights, knows that he can defend himself or be defended, the feeling of alienation, resignation and dependence, which is so harmful to economic, social and political progress may give way to a resolute and active commitment to the protection of these rights.

23. In this regard, it is important to recognize the actions of many lawyers and non-governmental organizations working to defend human rights, as well as their actions in support of peoples in the process of democratization.

24. Another positive illustration of the human rights dimension of the relationship between democracy and development is to be found in the judiciary. We all know how an impartial judicial system, based on the rule of law, can have a positive impact on economic development. Programmes for free legal aid to protect the property, freedom and dignity of individuals should therefore be implemented. Such aid goes beyond defence in criminal cases: it uses the law and legal proceedings to end or overturn unjust laws and practices.

25. If it is to be voluntary and responsible, participation must be mindful participation. This means that the citizen stands in need of information. The experience of some countries, shows that concensus planning and implementation of a broad ranging and ambitious national policy for literacy campaigns in the national languages, using all available human resources, can have a positive effect in combating illiteracy and ignorance and in creating conditions whereby the
population themselves can take over their own political, economic, social and cultural destiny in general, and in defending their fundamental freedoms and rights in particular.

26. It is a task which lies first of all with the public authorities, but also with the intellectual elite, the political parties, young people who have received an education, trade unions, grassroots organizations, and structure representing the decentralized grass-roots communities.

27. Respect for freedom of expression in general, for freedom of the press in particular, is a crucial dimension of human rights as a factor in democracy and development.

28. The same is true of non-discrimination.

29. Today, more than ever, Africa is faced with serious internal armed conflicts, often ethnic, regional or religious.

30. The causes, outbreak and development of many of these conflicts are tied in with human rights violations, and they constitute a threat to stability, to democracy and to the promotion of the economic and social development of peoples. The roots of these conflicts lie in State policies of discrimination and marginalization of minorities from the conduct of political affairs at the national level and from equality of opportunity and from socio-economic advancement. Arrests, arbitrary detentions, disappearance, tortures, murders and assassinations compound the bitterness and the resistance of the opponents and creates a vicious cycle of terrible violence and devastation.

31. We are not naive enough to think that it is easy to solve such conflicts. The fact remains that where a policy of democratic popular participation has enabled the population, including cultural and religious minorities, to participate freely to decisions on their own destiny, locally and regionally and where the public authorities have avoided all discrimination or marginalization, and also where such democratic principles of Government have been reintroduced, the chances of peace and stability, and therefore development, have been markedly improved.

THE RIGHT TO PARTICIPATE AS THE PRINCIPAL FOUNDING OF THE NEW INTERNATIONAL ORDER

Ladies and gentlemen,

32. The problem of the relationship between democracy and development as seen from the point of view of human rights goes far beyond the internal framework of the State; it also forms the basis for contemporary international relations.
33. Both in political terms and in economic and financial terms, the world is characterized by deep-rooted inequality between a small number of States and groups of States, primarily in the North, whose political and economic weight is constantly increasing; and a large number of States and groups of States of the south, whose role position in the conduct of International relations are becoming less and less significant.

34. This domination is exercised through institutions, systems, structures, procedures, mechanisms and policies with little respect for the individual and collective rights of peoples and nations. Rights as fundamental as equality - including the sovereign equality of States, self-determination, free and equal participation in the conduct of international affairs, permanent sovereignty, the right to development and solidarity, the principles of justice and equity and the basic democratic principles of majority rule are regularly circumvented, if not deliberately disregarded in multilateral international forums, as well as in bilateral relations and give way to the imposition of views, decisions and actions which are in keeping with the interests of the only dominant minority and are seriously prejudicial to the interests of the overwhelming majority of peoples and States.

35. This situation is incompatible with the principles and legal standards that form the basis of international legality and with the mandate entrusted to the United Nations; And changing this situation, should be the concern of all those who wish to work for the triumph of democracy and the promotion of international development.

36. When they decided that one of the objectives of the United Nations would be to promote better standards of life in larger freedom, the founding fathers of the San Francisco Charter clearly saw that there were close links between development and democracy and paved the way for a comprehensive human development strategy.

37. The outbreak and worsening of the cold war and the political-ideological and economic split of the world into two antagonistic systems had the effect, with the exception of the process of political decolonization, of pushing democracy and development, and especially human rights, their common denominator, into the background, far behind the ideologies, and of having them looked through the prism of distorting ideologies.

38. Very fortunately, today, with the end of bipolarity and in the context of an integrated comprehensive strategy in which the concept of development and democracy plays a key role side by side with the Maintenance of international peace and security and the promotion of the world environment, a new awareness has been created.
39. This overriding need to democratize international institutions is appearing with greater clarity each day. In his first report on the work of the Organization to the General Assembly, the Secretary-General, Boutros Boutros-Ghali, wrote: "The current international situation requires an organization capable of dealing comprehensively with the economic, social, environmental and political dimensions of human development, this requires the full application of the principles of democracy within the family of nations and within our organization."

40. In our view, this is the context in which we must analyze the prospects opened up by the organization of the World Conference on Human Rights in 1993, one of whose major themes was the link between human rights, democracy and development; The International Conference on Population and Development in 1994, the World Social Summit in Copenhagen in 1995, and the World Conference on Women which will take place shortly in Beijing.

41. It is obvious, that, if it is to work, this United Nations strategy development and democracy must bring about far-reaching changes in international, political and economic relations, whose present structuring is a serious two-pronged threat to democracy and the harmonious development of the peoples and States of the world.

42. The human rights approach to development is based, as I have already mentioned, on the principle that human rights are interdependent and that progress must be sought in all areas simultaneously. Nowhere is this interdependence so clearly demonstrated than in the studies carried out on extreme poverty and human rights. For phenomenon of extreme poverty is rooted in the basic denial of the human dignity postulated by the Universal Declaration of Human Rights.

43. Extreme poverty and marginalization have not only economic dimensions. They are also one of the tangible realities of international economic and political relations, and particularly affect North/South relations.

44. Africa is particularly concerned in this regard. It must be recognized that most Africans are poorer today than when their countries achieved independence. Africa has more than 30 out of the 47 countries in the world defined by the United Nations as being least developed. Africa is the only developing region in the world where poverty will increase by the end of the century if current economic trends are not reversed. Africa is also the only region where total debt equals or accedes economic output. These are very harsh realities indeed, especially if we look beyond cold figures and think about the millions of human beings whose fundamental rights, the basic rights to food, housing, education and quite simply a life of dignity are being affected daily. I am thinking of the African children whose lives are stunted or cut short as a result of the lack of food and whose
intellectual and spiritual development will be seriously jeopardized by the lack of education. The tragedy is that the situation may continue to get worse.

45. However, as Mr. Butros Butros- Ghali, Secretary-General of the United Nations, so rightly pointed out in his report on the work of the Organization to the forty-seventh regular session of the General Assembly: since poverty, economic helplessness, political rejection and social alienation will contribute little to democracy. It is illusory to believe that without development, there can be any long-term enjoyment of human rights and democracy.

46. The Secretary-General also said: "The freshly witnessed momentum for political pluralism in Africa can hardly withstand a continuing assault by desertification, famine and deprivation. Poverty is infertile soil for democracy".

47. Commitment to the triumph of democracy and the promotion of development at the international level depended primarily on demanding respect for individual and collective human rights.

48. This too is a struggle that must be waged through popular participation.

49. The first aim is the promotion and strengthening of ties of cooperation and solidarity among active groups of citizens with the same aspirations and motivations for democracy and development at the international level. Such action should be based on grass-roots communities, social and cultural groups, non-governmental organizations sectoral associations and groups of young people, women and professionals and local communities.

50. In and between South and North, such groups of citizens harmonize and coordinate their action on behalf of democracy and development in the world, by focusing on problems such as debt, deterioration of the terms of trade, poverty, humanitarian assistance and the democratization of international political, economic and financial institutions. There may be a variety of possible structures for cooperation, harmonisation and coordination, but they should be designed to implement active partnership strategies.

51. The intensification and strengthening of cooperation and solidarity among peoples and developing countries should also be given priority as a way of helping to bring about democracy and promoting development at the international level.
52. In this connection, the reinvigoration of Non-Aligned Movement and the Group of 77, and the strengthening of the role and effectiveness of the G. 15 are structural prerequisites of primary importance.

53. These efforts must also take account of the current trend towards structuring within economic groupings such as the European Community, the North American Free Trade Agreement and the Economic Community of the Pacific.

54. Africa, for its part, has just implemented the Abuja Treaty setting in motion a process for the establishment of a Pan-African Community is to take during a 34-four year transitional period.

55. There is cause for alarm at the sorry state of inter-African economic exchanges and the lack of any real commitment for its economic integration by the continent's leaders and their elites.

56. One of the factors that may create conditions for the viable integration of the economies of the African counties is popular participation. Experience shows that, since independence, the African elites and leaders have deliberately kept the people away from economic cooperation and integration initiatives and have locked themselves up into processes of consultation where their own lack of genuine determination has been equalled only by their propensity to make impassioned statements and proclamations.

57. In this connection, elites, political parties, trade unions, the press, young persons, students, the peoples of neighbouring countries, economic agents, women, non-governmental and other voluntary organizations, universities and advanced vocational training schools could, all, play an active and important role within their spheres of competence and in their own fields of activity, in this process of participation for democratic economic integration.

CONCLUSION

58. That there can be no development without democracy has been more than amply demonstrated by Africa in the past three decades.

59. The far-reaching movement towards democratization now taking place in Africa carries with it both political and socio-economic hopes and expectations that are deeply rooted in the collective mentality of peoples, especially the most deprived.

60. We must take care to ensure that the conditions for the unfolding of this democratic process do not put an end to an experiment that has already been greatly weakened by many threats, in the
context of which one must include the dangers of heterodoxic change in the form of injustice, arbitrariness, authoritarianism, disguised dictatorship, marginalization and inequalities, on one hand; and on the other, the problems of ethnicism, regionalism, tribalism, iridentism and government decay.

61. It is therefore, important for a democratic culture to be rooted in both the mentality and in the conduct of the governed and the governing. Respect for human rights, in all their socio-political and socio-economic dimensions, can and must constitute the basis on which to build lasting guarantees of democracy. Only the same respect can also lay the foundations for economic development in social justice and solidarity.

62. This enormous task of promoting democracy for development is obviously a collective effort that involves all components of society within each State and within the international community.

63. By making the human person the central subject of development, ranking free and active participation as a fundamental principle of the promotion of democracy and development and making everyone's duty of active solidarity a constant reality, it will be possible to take up all the challenges that lay on the road to the creation of a united world standing in democracy and development.

64. In view of its age old traditions, Africa should be able to move ahead with hope on the road to democracy and development through free and active popular participation. Traditional ways of life in Africa have always made room for discussion and efforts to achieve consensus. This tradition of participation is still deeply rooted in African social life, in which dialogue and consultation constitute strong foundations on which to build genuinely democratic societies and to promote sustainable and lasting development.

I thank you and I congratulate you, new graduated students, together with your faculty and relatives, and I wish you every success in your new professional and social life."
MUSLIM ASSEMBLY
10 April 1995

The Executive Committee of the Muslim Assembly have resolved that the memorandum annexed hereto be considered by the Constitutional Committee in regard to the need for the retention of Section 14.1, 14.2, 14.3, and the amplification of Section 14 by the insertion of a further clause namely 14.4 incorporated in the memorandum drafted and prepared by advocate Sheriff Mohammed for and on behalf of the Muslim Assembly.

MOOSA VALLIE ISMAIL
[EXECUTIVE DIRECTOR]

RE: FURTHER AMENDMENT TO SECTION 14.3 OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993

Our organization for reasons set out in the memorandum enclosed herewith, demand that Section 14.1 and 14.2 be retained and that 14.3 be amended.

URGENT STEPS TO BE TAKEN FOR THE RECOGNITION AND IMPLEMENTATION OF ISLAMIC PERSONAL AND FAMILY LAW

AND
THE CREATION OF ISLAMIC (SHARIA) COURTS

AND

THE RETENTION OF SECTION 14.1, 14.2 AND 14.3
(SUBJECT TO FURTHER AMENDMENTS)
OF THE CONSTITUTION OF THE REPUBLIC
OF SOUTH AFRICA, 1993 ACT 200 OF 1993,
AS AMENDED BY ACT 2 OF 1994
AND ACT 13 OF 1994

A. INTRODUCTION

(a) The Right of Muslims to regulate their lives in terms of their own legal system

In many states in Africa and Asia, for practical reasons the customary laws of inhabitants are recognised, as most of the indigenous African peoples were not accustomed to the western imported culture which were alien to them, as they could not adapt themselves to the norms and values of westernised laws. The colonial powers, in any event, did not have the necessary finances to impose their legal systems on the local inhabitants. Anthropologists and certain legal jurists realise that Customary Law must be permanently recognised as such laws form part of the particular community's culture. It would seem that there is an ever increasing realisation by governments and jurists throughout the world that in a culturally heterogenous community the culture of every group including their legal systems must be recognised.
(b) It was during the time of the Colonialist that, in many Muslim countries, Islamic Law was tampered with beyond recognition, confining the Sharia to the domain of Private Law, whilst ignoring other facets of Islamic Law such as International, Constitutional, Criminal and Commercial Law. The United Nations Commission for Human Rights issued a Draft Declaration on the rights of indigenous people, which declared that minority groups in a state possess the following rights:

"The collective right to exist as distinct peoples ... The right to promote their cultural Identity and traditions ... The right to develop and promote their own languages ... and to use them for administrative, juridical, cultural and other purposes ... The right of children to have access to education in their own languages ... and to establish their own educational systems and Institutions:

(E/CN. 4 Sub. 2/1989/33).

(c) The situation where legal systems clash

In South Africa certain tribes such as the Xhosas, Pondo, Venda and Zulus have their own legal systems which have been legally recognised by the Nationalist Government and its predecessors, as early as the 18th Century and were given powers by the creation of courts which were specially constituted to give effect to the customary laws of such tribes. The concept of legal pluralism, inevitably results in a conflict of legal systems thus necessitating a set of rules in order to regulate the conflict.

(d) From an Islamic perspective the rights of Muslims to practice their own Islamic Legal System is a fundamental right and not a privilege and
ought to be recognised by the incorporating of such rights in a Bill of Rights and Constitution. In a separate Act perhaps to be called an Islamic Administration Act, rules can be laid down as to what is to happen if the general law of the land, including customary laws and religious laws of other groups and tribes come into conflict with the Islamic Legal System. In this manner the ruling government will be recognising the Islamic Legal System of the Muslims by allowing Muslims to adjudicate Islamic Personal and Family Law in Islamic Courts which must be built and financed from government taxes.

(e) **The Right of Muslims to choose the Legal System that must regulate their private lives**

Muslims must accept that the unqualified recognition of Islamic Law will lead to conflict with other legal systems which will lead to chaos in the land. There is the general law of the country that caters mainly for the aspirations of the Whites and so-called Coloureds with their western orientated culture and legal system. The Legal System is based chiefly on the Roman Dutch Law, English Law and some remnants of the laws stemming from the Roman Empire which are still presently engrafted on our legal system, apart from statutes, ordinances, regulations and case law. The South African Legal System is presently a hybrid one.

(f) **The South African Legal System and the accommodation and application of African Customary Law**

The South African Legal System has accommodated in certain respects the particular legal system of the other African cultural groups (presently Muslims being excluded). South African legislation recognises African Law and
customs in certain respects. See Black Administration Act 38 of 1927 - Section 12(1) gives the Minister the power to appoint a Black Chief or Headman to determine civil claims arising out of Black Law and customs and brought before him by Black against Black residing within the area of jurisdiction. South African Law also recognises the customary marriages of the aforesaid African tribes for the purposes of pensions, taxes, maintenance, housing and the delictual claims in respect of the unlawful death of a breadwinner. In terms of Section 1 1 (1) of the Black Administration Act 1927, the South African Government catered for African Customary Law by providing the following:

"Notwithstanding the provisions of any other law, it shall be in the discretion of Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black Law applying to such customs except in so far as it shall have been repealed or modified: provided that such Black Law shall not be opposed to the principles of public policy or natural justice: provided further that it shall not be unlawful for any Court to declare that the custom of Lobolo or Bogadi or other similar custom is repugnant to such principles".

(g) **Discrimination against Muslims in South Africa**

A Muslim wife, were she to contract a marriage with her husband only in terms of Islamic canon law and were her husband subsequently to die in an accident involving an insured motor vehicle whose driver was clearly negligent, would in these circumstances be denied the right to institute a third party claim, for loss of support, against the authorised insurers of the aforesaid vehicle. She has also been denied the right on the dissolution of the marriage contracted by
Islamic Law or even during the subsistence thereof to legally claim maintenance from her husband and has to go through the humiliation of seeking redress in a secular court in order to pursue a maintenance claim for the children. If a Muslim gets married in terms of South African Law, the proprietary consequence on the dissolution of such union is that both spouses must share equally in the joint estate, whilst in terms of Islamic Law, the parties are deemed to be married out of community of property. According to South African Law, Muslim marriages are regarded as inherently polygamous and contrary to public policy. This is clear discrimination and arrogance on the part of the authorities in not recognising Muslim marriages for the truth of the matter is that monogamy is the ideal in Islam and polygamy the exception. Muslim adult males can only, in terms of Islamic Law, take a second wife on certain recognised grounds. In any event the Islamic system is more just and equitable as a man is liable to maintain his wives and children born out of the relationship with such wives. Furthermore, children born out of such unions are stigmatised as being illegitimate. In the western system a man may not take a second wife and children born from a second wife are deemed to be "bastards" with the consequent disadvantages flowing from such conduct. It is clear that the former South African Government was either prejudiced against the Muslims or was totally ignorant about the principles and procedure of Islamic Law more in particular personal and family law, by not recognizing certain facets of the Islamic Legal System. After all Muslims regard Divine Law as having superior force to man made laws.

See the following verses from the Quran:

"Discretion lies only with God"

Livestock 6: 57
"Surely creation and authority belong to Him"
The Heights 7: 54

"No believing man nor any believing woman should exercise any choice in their affair once God and His Messenger have decided upon some matter. Anyone who disobeys God and His Messenger has wandered off into manifest error."
The Confederates 33: 36

"David we have placed you as an overlord on Earth, so judge among men correctly and do not follow any whims which will lead you away from God's path."
(The Letter) Sad 38: 26

"Heed God and obey me; do not obey the order of extravagant people who corrupt (things) on earth and never reform."
Poets 26: 150-152

"So judge among them according to what God has sent down, do not follow their whims."
The Table 5: 49

(h) **As regards Custodian Rights of the parties to a marriage contracted in terms of Islamic Law**

In the event of a divorce, or estrangement between the parties to a marriage solemnised in terms of Islamic Law, the father of a child has been deprived of custodian rights and is precluded from claiming any custodian rights or rights of reasonable access to such child in terms of South African Law. The
Supreme Court has consistently followed certain principles emanating from Roman Dutch Law, which regards such a child as illegitimate on the principle that "een moeder maak geen bastard nie". The result is that were the mother to decide to change the religion of the young child, or has seriously neglected her child, the father has no legal remedy, even if he can prove that it is in the paramount interest of the child that he be awarded custody of the child. Despite having complied with the formalities of Islamic Canon Law, as such union had been duly witnessed and celebrated in the eyes of the public, nevertheless such a father is regarded in the eyes of the Secular Law, as a stranger viz a viz his child. This is a situation which can no longer be tolerated and South African Muslims insist that all matters relating to Muslim Family and Personal Law be adjudicated in properly constituted Islamic Courts. The only remedy open to such a parent is to endeavour to have such child declared a child in need of care and then like any outsider attempt to legally adopt such child. The danger however exist that even if the child's mother is declared not a fit and proper person, she can still defeat her husband's custodian rights by stating that her own mother or aunt or sister has assumed the responsibility of looking after such child, as a parentis in loco. It is ironic that the mother of the child in terms of South Africa law is precluded from claiming maintenance from the child's paternal grandfather.

See: Moutan v Joosub 1930 AD p61 at p70 in which Wessels, J A analyzed a number of Roman Dutch texts and concluded that Roman Dutch Law did not place any duty on the paternal grandfather to maintain his son's illegitimate child.
As stated earlier such a child is in terms of Islamic Shari'ah legitimate because the parents have validly entered into a marriage ceremony in terms of Islamic Law.

**AS REGARDS THE PROPRIETARY CONSEQUENCES OF A MARRIAGE CONCLUDED AND TERMINATED IN TERMS OF MUSLIM LAW:**

As regards the proprietary consequences of a marriage contracted in terms of Islamic Law, a Muslim woman cannot enforce such consequences in a Secular Court. In the case of Ismail v Ismail 1983 (1)SA 1006 (A) the facts were as follows:

"The parties marriage were celebrated and terminated according to the tenets and customs of the Muslim faith. The Appellant (Plaintiff) claimed payment and arrear maintenance as well as maintenance for a specified period after termination of the marriage, delivery of a deferred dowry, and delivery or payment of the value of two sets of jewelry which the Respondent had given to her, but which she had returned to him for safe keeping."

Trengove J A, after dismissing the appeal said the following:

"Having considered the arguments presented on Plaintiff's behalf, I have come to the conclusion that we would not be justified in deviating from the long line of decisions in which our courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart. The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would,
undoubtedly, tend to prejudice or undermine the status of marriage as we
know it; and from a purely practical point of view it would, in my view,
also be unwise to accord recognition to polygamous unions for the simple
reason that all our marriage and family laws - and to some extent also our
law of succession - are primarily designed for a monogamous relationship
... Furthermore, in view of the growing trend in favour of the recognition
of complete equality between marriage partners, the recognition of
polygamous unions solemnized under the tenets of the Muslim faith may
even be regarded as a retrograde step; ex facie the pleadings, a Muslim
wife does not participate in the marriage ceremony; and while her
husband has the right to terminate their marriage unilaterally by simply
issuing three 'talaaq' without having to show good cause, the wife can
obtain an annulment of the marriage only if she can satisfy the Moulana
(a high-ranking ecclesiastical office-bearer of the Muslim creed) that her
husband has been guilty of misconduct. While this may be consistent
with the tenets of the Muslim faith, it is entirely foreign to our notion of a
conjugal relationship. I also mention, in passing, that it seems unlikely
that the non-recognition of polygamous unions will cause any real
hardship to the members of the Muslim community, except, perhaps, in
isolated instances. According to the pleading's, only about 2% of all
Muslim males in South Africa have more than one wife. This means that
approximately 98% of all Muslim males have either contracted valid civil
marriages or de facto monogamous unions. And, in the case of the latter
the parties have, for many years, had the right to convert their de facto
monogamous unions into de jure monogamous unions. They had the
option of doing so under the Indians Relief Act 22 of 1914 (which was
repealed by the General Law Amendment 57 of 1957) and they can still
do so by entering into valid civil marriages under Act 25 of 1961. In the
result, I have come to the conclusion that the polygamous union between
the parties in the Instant case must be regarded as void on the grounds of public policy."

From the aforesaid judgment it's clear that the learned judge is applying principles of Roman Dutch Law upon the legal system, regulating the lives of Muslims. It appears further from the judgment that the learned judge seems to have been misinformed as regards the criteria to be applied before a husband and a wife can obtain a decree of divorce in terms of Islamic Law.

As stated earlier, monogamy is the ideal in Islam and polygamy is the exception, and that a man can enter into a second, third, or fourth marriage only in certain recognised instances. Islamic Law does not permit a husband to unilaterally divorce his wife by simply issuing three "talaaqs". As the judge said "without having to show good cause". In terms of Islamic Law, a husband cannot simply divorce his wife according to his whims and fancy.

The misconception some people regarding Islamic Law, and more particularly, Islamic Personal and Family law, must be eradicated. The time is ripe for the legitimate aspirations of Muslims of South Africa to be satisfied by the recognition of Islamic Personal and Family Law; and the creation of the means for its implementation.

(i) Certain aspects of the Law of Succession pertaining to Muslims in South Africa

The laws of inheritance also prejudicially affect Muslims in South Africa. Muslim marriages are not recognised unless the Sheik/imam had been appointed as a marriage officer in terms of the Marriage Act. Hence the Supreme Court had to come to the rescue of a child who could not inherit
because his/her father had died without a will. Our courts sought refuge in canon law in order to ameliorate the harsh consequences that would have ensued, as such a child would have been deprived of his/her lawful right to inherit from his father's estate.

In the case of Moola & Other v Aulsbrook NO & Others 1983 (1) SA (N) Judge Friedman J, held that it was never the intention of the parties to a marriage solemnised by a Sheik/Imam in terms of canon law to procreate illegitimate children. At Page 693 paragraphs G-H the learned judge said the following:

"The concept of a putative marriage was one which to my mind, originated not only as a device to mitigate the harshness and annulment to an Innocent spouse but also, and more particularly, to mitigate the harshness of that annulment to children born of the union. Until the union is Invalid, it is their Intention, in procreating children, to procreate legitimate children; or where only one of the parties is Ignorant of the defect in the union, that at any rate is his or her Intention. The concept of putative marriage is designed to preserve that intention and to permit the children who, after all, were entirely innocent in the matter, to benefit from It."

See also Ex Part Azar 1932 OPD 107, The Supreme Court held that children of a marriage contracted by the Archimandrite of the Greek Orthodox Church, not being a duly appointed marriage officer, was legitimate upon the basis that they were children of a putative marriage.

See also Ex Part L 1947 (3) SA 50 (C), it was held that a marriage solemnised by a Rabbi presiding at the particular synagogue and being a marriage officer
was a putative marriage and the children stemming from the marriage were therefore legitimate.

It is thus clear that canon law has been engrafted into our legal system. In this regard I quote from a judgment by Judge Friedman J in the case of Moola & Others v Aulsebrook No & Others supra p691:

"The requirements that the union must have been contracted 'palam et solemniter' or 'rite et soiemniter secundum morem patriae' is more easily understood when one appreciates the background against which the concept of putative marriages developed. As I have said, the concept was a product of canon law. Consequently it applied only to unions contracted 'In facie ecciesiae with all due solemnities and after publication of banns'. The canon law had no application to what it regarded as clandestine marriages. In these circumstances, by its very nature, the concept of a putative marriage could only apply to those unions which, although formally correct, were invalid by reason of a defect of capacity, eg. marriages within the prohibited degree, bigamous marriages, etc. Once, however, the canon law principle was taken over by the courts of Holland as part of the legal system of Holland and, more particularly, once the principle is accepted as being part of the law."

Accordingly, the concept of a putative marriage was designed to mitigate the devastating consequences that would have resulted if an heir were to be denied the right to inherit from his or her father's estate where the father has died intestate on the basis that such a child had been born illegitimate.

(j) Statutes affecting Muslim Personal Law
The following are some of the statutes that need urgent scrutiny and review as some of these statutes impinge upon Islamic Personal and Family Law:

**Intestate Succession Act No 81 of 1987;**

**Criminal Procedure Act No 51 of 1977;**

**The Divorce Act 70 of 1979;**

**Maintenance Act 23 of 1963;**

**Matrimonial Affairs Act 37 of 1953;**

**The Child Care Act 74 of 1983;**

**Adoption of Children Act 25 of 1923;**

**Succession Act 130 of 1934;**

**Multi-Lateral Motor Vehicle Accidents Act of 1969;**

**Republic of South Africa Constitutional Act 1961;**

**Will Act 7 of 1953;**

**Matrimonial Property Act no 88 of 1984.**

(k) **Legal contracts concluded between Muslims**

Muslims ought to be given the right to exercise a choice as to whether contractual and delictual disputes ought to be determined in Islamic Courts. In this regard Muslims can insert a clause in a contractual agreement that in the event of a breach of any terms of a contract that the dispute be resolved before an Islamic Court, or by consent of the parties the dispute be referred to an Islamic Court of Arbitration, as the Islamic System has its own rules of evidence and procedure.

(l) **The Implementation of Islamic Penal Law:**
A Muslim ought to be given a choice whether to be tried by a secular or Islamic court, in regard to certain criminal offenses. The parties affected must naturally be Muslims and will have to consent to the jurisdiction of a Sharia Court, and as in a civil dispute must be given the right to appeal to a superior court, consisting of Islamic judges and thereafter to the Supreme Court.

We annex an article by Kerr SC, entitled "Recognition and Application of Systems of Law in a Charter of Fundamental Rights.

It is our prayer that with wisdom, courage and the determination to achieve the above objective, and with the backing of the majority of Muslims, in this country, that the aforesaid proposal and demands be seriously considered by the constitutional committees engaged in the drafting of the final constitution and to achieve that objective the provision of 14.1, 14.2 and 14.3 in the interim constitution be retained in the final constitution, subject to Section 14 being amended further with proposed amendment set out hereunder:

"14.4 Every person shall have the right to the recognition and application of systems of law in accordance with the following provisions:

(a) South African Law, including its rules on conflicts of law, shall be the general law.

(b) The law of religious groups including tribunals shall be recognised and applied in accordance with choice of law rules relating thereto.

(c) Judicial notice shall be taken of the systems of law referred to in sub-sections (a) and (b) above."
(d) All legal disputes, other than those settled out of court, shall be settled by a court of law, whether in the first instance or on appeal or review.”

B. CONCLUSION

We accordingly demand:

(a) That the right of Muslims in certain spheres to practise and implement Islamic Personal and Family Law be entrenched in the final constitution.

(b) That a Commission of Islamic experts be appointed at state expense in order to investigate and recommend how best the aforesaid legitimate proposals can be implemented.

(c) We annex a document entitled "Muslim Personal Law in South Africa. A Brief History."

May the Master of the Day of Judgment guide and protect all the inhabitants of this land who are trying to tread in the path of righteousness.

PREPARED BY ADVOCATE SHERIFF, MOHAMED

Muslim Personal Law (MPL) in South Africa:

A Brief History

1652-1795

Limited recognition of Muslim family law and succession under the Commander's Court of Dutch East India Company.

1807

Taun Guru's son teaches Muslim Law (fiqh) in the Cape. 1906
Mahatma Gandhi initiates passive resistance campaign amongst Indians in Natal against government's attitude towards customary Indian marriages -Hindu and Muslim.

1907

J de V Roos writes on Muslim Personal Law in the context of South African Law. 1942

Shaykh Abd al-Rahim ibn Muhammad al-Iraqi, early South African writer who probed into marriage and divorce issues.

-+1977

Application by the Institute of Islamic Shari'ah Studies in Cape Town to the late Prime Minister BJ Vorster to recognise Muslim family law.

- + 1980's

Parliamentary move to promulgate legislation affecting Muslim family law. This was an attempt to propose a private members' bill by Mr PT Poovalingham MP (House of Delegates).

1984

Human Science Research Council Section for Political Science Research, Research Project - Muslim Law, Ref. no 3/10/121. Submissions were made by Advocate AB Mohamed of the Islamic Council of South Africa, presently President De Klerk's advisor on Muslim affairs.

1987

South African Law Commission solicited public opinion on MPL and forms an MPL Committee, consisting of the Muslim Judicial Council, Jamiat Ulama of Transvaal and Natal.

1988

Rand Afrikaans University Conference on MPL.

1992

Council of Muslim Theologians in South Africa (Jamiat: Transvaal & Natal) and Dr RAM Saloojee of Islamic Council of South Africa submit memoranda to Codesa 2 on basic needs of the Muslim community.
1993

Muslim Personal Law and Gender symposium held in Cape Town. 1994 University of South Africa plans international conference on Islam and Civil Society in South Africa: 300 Years. Leading South African constitutional and MPL scholars to address the conference.

1993

Personal Law in South Africa, a brief history by Advocate Sheriff Mohamed and Sulaiman Bayat despatched to Mr Theuns Eloff, Head of Administration: Multi Party Negotiations Council, World Trade Centre, Kempton Park.
RE: Discrimination on the basis of sexual orientation.

For decades now, the main stream church groupings used the Holy Bible as a motivational tool to justify their discrimination against homosexual people. The time has now arrived for us to revisit the Bible and look at it from a compassionate perspective. To establish the real truth of the Bible, it is necessary to compare the original Scriptures with the translated versions.

Sodom and Gomorrah

Perhaps one of the most unfortunate developments of the English language is the use of the word sodomy to describe anal penetration and/or male homosexuality. The mere fact of this linguistic development several millennia after the events described in the Genesis account of the destruction of Sodom, has sealed in the minds of many English speaking people that Sodom was destroyed because of male homosexuality. Theologians have been guilty for centuries of playing upon this unfortunate misunderstanding to condemn those who found their sexual orientation to be homosexual.

Our narrative really begins back in Genesis 18 when, as recorded in verses 1 and 2, Jehovah and two others appeared to Abraham in Mamre. They had a two-fold message for Abraham. First they told him that he and his wife, Sarah, would parent a son, in spite of their old age. Secondly they told him in verses 20-21 that they were going to investigate the report of great wickedness in Sodom and Gomorrah. We see that Abraham understood this to mean that they were about to destroy these cities, for he pleaded intercession to spare them for the sake of any righteous people living there. In verses 23-33 we find that Abraham bargained with Jehovah, and won a promise that if as many as 10 righteous people could be found there, Sodom would be spared. (Of course we recognize Abraham's vested interest in Sodom, since his nephew Lot lived there.)

Now according to verse 22, Jehovah stayed to talk with Abraham, while the other men proceeded toward Sodom. The two who arrived in Sodom are variously described as angels (19: 1) and men (19:5). In 18:2, Jehovah and the two angels are described as men. This is not really anything unusual in the Bible, since we frequently read of angels, and even Jehovah, taking human form to interact with human beings. (Cf Genesis 3:8. Judges 13:15-16) So we read of these two angels in human form arriving in Sodom, and being offered hospitality by Lot (19:3).

At this point it is very important for us to understand the law of hospitality which has been prevalent throughout ancient history. A story which is strikingly similar to the account of the angels' visit to Sodom is told by Ovid in his Metamorphosis (8:625 ff) about visiting gods being hosted by a resident in a city which otherwise refused them hospitality, and being saved from the city's destruction.
We must remember that our modern hotel business was not thriving in those days, and a traveller was dependent on the hospitality of those he met enroute. Even in this same story we find Abraham’s example of hospitality to these same angelic men in Mamre (Genesis 18:1-5).

We even read of God's command to deny access to Hebrew worship to the Ammonites and Moabites for ten generations, because of their lack of hospitality to the wondering Israelites (Deuteronomy 23:3-4).

This same law of hospitality is found in various examples throughout the Bible. Perhaps one of the greatest Old Testament examples is that of Rahab, who in Joshua 2, risked her life to protect her guests, the spies who where sent to peruse Jericho. Even as late as the New Testament, the disciples were told not to waste their time in any place which did not receive them and treat them with the laws of hospitality. In fact these cities are compared with Sodom in their sin of not providing hospitality (Luke 10: 10-13).

Now with reference to our narrative in Genesis, we read that Lot offered these two visitors his hospitality. Along with that hospitality was implied security and protection. Therefore when the men of Sodom came knocking at Lot's door, seeking to do harm to these visitors, it was imperative for Lot to provide them with protection.

Much has been said about one Hebrew word found in this passage. This is the Hebrew word yada’. It’s basic meaning as a verb is "to know. "However, since Hebrew is a verbal language, they have a rich variety of verbs which English does not have. Whereas in English we have several shades of meaning for any one verb, Hebrew has different verbs to express those shades of meaning. For example, where we translate a verb meaning "to know," the Hebrew has a variety of verbs as follows:
- bin: to consider
- yada’: to know thoroughly
- nakar: to discern
- sakal: to understand and act upon
- shama’: to hear with understanding
- raah: to see with understanding
- sakan: to become acquainted with

This verb yada’ is sometimes used in the sexual sense. In other words, to thoroughly know a person, is to sexually know them as well. We read in Genesis 4: 1, that "Adam yada’ Eve his wife; and she conceived, and bore Cain," [King James Version (KJV)]. It is therefore obvious that in Genesis 19:5, the men of Sodom wanted to sexually know the visitors (who were obviously unwilling), because the Hebrew word yada’ is used in this verse. Further more, invoking the law of hospitality, Lot offered his two daughters to them who are described as never having yada’ a man (19:8). When the same word is used twice in the same passage, we have no choice but to understand it in the same way. Since Lot was obviously offering his daughters for sexual use (yada’) or rape, then we must believe the intent of the men of Sodom was to sexually use (yada’) or rape the visitors. What greater violation of the law of hospitality can exist, than to rape your guests?
This was the so-called "straw that broke the camel's back," proving the already reported sinfulness of Sodom and Gomorrah, and the angelic messengers warned Lot to flee the coming destruction of the cities. Ten righteous people had not been found.

Now of course there are those who would lift the nineteenth chapter out of context and try to prove that God destroyed Sodom and Gomorrah because of their rampant homosexuality. But we can see from the context that well before their destruction, and this attempted rape, that God had pronounced their judgement to Abraham.

The best commentary on Scripture, is Scripture itself. We now turn to other Scriptures to find the commentary on the destruction of Sodom. Probably the clearest analogy in the new Testament is found in Luke 10: 10- 13, where the disciples are told that the judgement on those cities which do not show them hospitality will be more severe than that of Sodom and Gomorrah. But we also have comments in many other places in the Bible. Another good example is Ezekiel 16:48-50 where the sins leading to Sodom's destruction are listed as follows:

- Pride
- Plenty
- Laziness
- Uncaring for Poor and Needy
- Haughty
- Committed Abominations Before God

No where in this list do we find reference to homosexuality. But in comparing this list and the comment in Luke with the narrative in Genesis 18-19, we do see each of the above descriptions as a good commentary on the way of life there which was so displeasing to God.

There are those who try to see in the word "abomination" a reference to homosexual activity. However a brief word study will show us quite otherwise. This Hebrew word, to'ebah is found frequently in the Old Testament. If one were to read it in the context of every place it occurs, one would find it is always connected with or synonymous with idolatry. After all, the very first commandment is to have no other gods before Jehovah. Probably one of the clearest definitions of this word to'ebah is found in Deuteronomy 7:25-26 where we see that the abomination is the idol used in false worship. However, the word "abomination" does occasionally have a broader use: to indicate anything to do with false worship (Proverbs 12:27). Obviously, the people of Sodom were involved in false worship practices in order to degenerate to the level of sinfulness they exhibited at the time of the angelic visit.

Of all the places in the Bible that refers to the sins of Sodom perhaps the one that is most misused is Jude 7, where we read that Sodom and Gomorrah suffered the vengeance of eternal fire because they were "going after strange flesh."

For any accurate understanding of a particular portion of Scripture, it must be read in its entire context. This is a good example of the violation of this presupposition. Although trite, the saying is true that states, "A text out of context is a pretext." As is true with statistics, so anything can be proven with Scripture taken out of context.
For a ridiculous example, let us put the following verses together:

Matthew 27:5: "(Judas) went and hanged himself"
John 13:15: "I have given you an example, that ye should do as I have done."

Admittedly, no one would be foolish enough to claim on this basis that we are all expected to hang ourselves. But is it not just as foolish to claim dogmatically on the basis of Jude 7 that since “going after strange flesh” means homosexuality, that this is the reason for Sodom’s destruction?

First of all, what is so strange in the flesh of another human being constructed sexually the same as one’s self? But, more importantly, what is the meaning of the first part of verse 7: "Even as Sodom and Gomorrah, and the cities about them in like manner?" Obviously the two phrases in italics are referring back to a previous verse. So let us look at verse 6. Here we read of angels who left their own habitation being punished. Then verse seven tells us that the people in Sodom and Gomorrah were acting in like manner to the angels when they were "going after strange flesh." If then, we can learn what the angels did that the people of Sodom and Gomorrah also did, we can understand the phrase "going after strange flesh," and why it may be so detested by God that both the angels and the humans should be so severely punished.

For our understanding of the sin of these angels, let us look back to Genesis 6. Here we read of a time when the "sons of God" cohabited with the "daughters of humans" resulting in a strange progeny called in Hebrew nephilim, a rare word indicating something weird or strange. Immediately after this event God sent the flood to destroy all humanity except Noah and his family.

Now of course, the question is who were the "sons of God" and why was it so wrong for them to cohabit with the daughters of humans"? For an understanding of the phrase, "sons of God," we need to look at Job 1:6. Here we see that Satan was before God as one of the "sons of God." Now we know that Satan is a fallen angel, so we would understand the "sons of God" to be other angels. We again get this same understanding from Job 38:7. If we therefore conclude that the Hebrew phrase "sons of God" refers to angels, we see that what happened in Genesis 6 is a cohabitation between angelic "flesh and human "flesh." This event was the "last straw" before the flood, and according to Jude 6, before the punishment of the angels involved.

Jude 7 then tells us that the sins of Sodom and Gomorrah were in like manner. Remembering that the two visitors to Lot were angels, we see humans committing the same sin of attempting cohabitation with angels, or "going after strange flesh," resulting in the same consequences as Genesis 6: destruction. Again, we are not reading of homosexuality, but the mixing of two distinct orders of creation.

We read of a situation occurring in Judges 19 that some have compared to Genesis 19, the story of Sodom. Here, however, are several differences. First of all, the male house guest, not an angel. Secondly, the people of Gibeah accepted the woman in place of the Levite man, and raped her until she died. Again, we are not reading of homosexuality in this passage, but of rape. The men wanted to rape the Levite, but were satisfied by raping his concubine. Again, the city of Gibeah was destroyed (Judges 20:38-44), but not for homosexuality, but for rape (heterosexual at that) and violation of the law of hospitality.
There is one other passage we should consider: Genesis 34. Here we read of the rape of Jacob's daughter Dinah by Shechem the Hivite. As a result of this heterosexual rape, Shechem's home town was destroyed. Yet in spite of this destruction, we hear no one condemning heterosexuality on the basis of this passage, but rather a condemnation of rape. So also is the case of Sodom. If we consider one of the many sins of Sodom for which they were destroyed, an attempted rape of men (who were really angels), then the condemnation should fall squarely on rape, not homosexuality.

**Levitical Law**

There are two verses in Leviticus which we often hear quoted in polemics against gay and lesbian Christians: "Thou shalt not lie with mankind, as with womankind, it is abomination." 18:22 KJV. "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their death shall be upon them," 20:13 KJV.

In both verses we read the word "abomination" in connection with the proscribed activity. Now on page three we indicated that abomination is integrally related to idolatry. In what way then, is this activity connected with idolatry? Again the context can help us.

In both chapters we find this activity in a list of proscribed activities, but all in some way related to the worship of Molech (18:22; 20:2). We must remember that the Levitical law was given to the people of Israel as they were travelling through hostile territory where the inhabitants were all idolaters. The major god of these desert peoples was Molech, a fire god.

The major thrust of God's instructions to Israel is summed up well in Leviticus 18:3: "After the doings of the land Egypt, wherein ye dwelt, shall ye not do; and after the doings of Canaan, to which I bring you, shall ye not do; neither shall ye walk in their ordinances," KJV.

God intended the chosen race to be a "peculiar people," untainted by the practices of the surrounding nations. Anything which could possibly identify the people of Israel with the surrounding people and their practices was to be scrupulously avoided. For this reason we read of several peculiar prohibitions in Leviticus. All of these practices were part of the heathen worship of Molech: Bestiality (18:23)

- Child Sacrifice (20:2)
- Idolatry (19:4)
- Beard Trimming (19:27)
- Tattooing (19:28)
- Wizardry (20:6)
- Menstrual Intercourse (20:18)

Any violation of these prescriptions would tend to identify the Israelites with the worshippers of Molech and make them appear to be idolaters (committing abomination). So God made these part of the legal code of Israel.
In addition, the Hebrew theology of women was based on their understanding of the creation of men and women. Since the Hebrews believed that men were created in the image of God, the earthly likenesses of God must be treated with the same awe and respect as one would treat God. However, since they believed women were created in the image of men, they were one more step removed from God, and not deserving of the same respect. As a result the place of women was under men, and completely dominated and used by men for their own purposes. Women were used sexually at the whim of their husbands, and not free to determine their own destiny. If a man were to treat another man in the same manner as he was free to treat women, that would be degrading the "image of God" to a mere human possession, as women were. This would be a direct affront to God and God's image, the man. So to "lie with a man as with a woman" was a blasphemous action degrading God to a mere possession. (Of course Paul attempted to correct the Hebrew theology of women, viz. Galatians 3:28.)

We know that the purpose of the law was two-fold: to keep the Israelites pure and undefiled among heathen nations and to teach them the impossibility of being perfect and the need for a perfect sacrifice to atone for imperfection. When Christ, that perfect sacrifice came, the law had completed its purpose and its usefulness was cancelled.

The early church struggled with the problems of legalism: how much of the law need Christians live up to? Paul addressed the question quite forcefully in his Epistle to the Galatians. Since the perfect sacrifice has freed us from condemnation of the law, we are no longer under the law's demands (3:23-25). We who are of the faith are not to associate any longer with the teachings of the law (4:30-31). In fact, if we attempt to live up to the law, we as much as call Christ foolish in that he died for nothing (2:21).

It is certainly very dangerous to start trying to pick a few laws that are still binding, and agree that all others are nullified. There are very few Christians today who would impose on us the laws forbidding certain foods, trimming beards, or even having intercourse with one's wife during menstruation. Yet somehow, one particular law is selected to bind lesbian and gay Christians. Is this really consistent hermeneutics? Christ gave us two laws to live by: Matthew 22:37-40.

Love God
Love your neighbours as yourself

If we live up to these laws of Christ, we are to separate ourselves from all other laws and those who would impose them on us (Galatians 4:30-31; 3:23-25).

**Gedeshim**

One of the errors of the translators of the King James Version (KJV) has been corrected by later translators in many of our more modern versions. However, much damage has been done by those who use only the KJV by applying certain passages of the Old Testament to gays and Lesbians.

The Hebrew word **gadesh** (plural: **gedeshim**) was translated in the KJV as sodomite(s). This is a very unfortunate translation especially since it is a noun form of the root verb which means "to be holy." A better translation of the word would be priest. But since the normal Hebrew word for
priest is gadosh, a distinction needs to be made between gadesh and gadosh. The distinction in the Hebrew mind was that a gadosh served Jehovah God, and a gadesh served some pagan deity.

By looking closely at the six passages of the Old Testament where gadesh is found (Deuteronomy 23:17, 1 Kings 14:24, 1 Kings 15:12, 1 Kings 22:46, 2 Kings 23:7, Job 36:14), we soon see that in each case these gedeshim were priests who served in fertility cults. They in essence were assigned to the temples of the various fertility deities to receive the sexual sacrifice of their worshippers. Thus some of our more modern translators have used the more appropriate term “cult prostitute.”

Naturally, Jehovah would prohibit the men and women of Israel from serving in these capacities (Deuteronomy 23:17), and ordered them eliminated from the land. However, this certainly has little or no relevance to a homosexual person, especially a gay or lesbian Christian.

As we move into New Testament times, we still encounter fertility cults such as Diana (Artemis) of Ephesus (Acts 19). Many of Paul's converts had been involved in the worship of these false gods, and he writes to the Corinthians to specifically tell them to forsake the practices they had acquired in that worship. Even though Christian liberty allows a great deal of freedom, it still does not allow us to serve as facilitators of the worship of these false gods. In chapter 6 of I Corinthians, he gives a list of descripterms that would apply to the gedeshim of Corinth, as well as to many of the worshippers of these false gods.

One of those terms he uses is the Greek word arsenokoites. This term has caused problems for translators for centuries. Paul seems to have been the first person to use this term in writing. John Boswell, in his book Christianity, Social Tolerance, and Homosexuality, does a good word study on this subject. But the conclusion he reaches is that the arsenokoites is a male prostitute who took the active role in sexual encounters. Obviously this Greek word could easily have been Paul's equivalent for the Hebrew gadesh.

Many translators over the years have tried to make arsenokoites equivalent to arrenokoites, which generally refers to homosexual men, and so most English translators use some form of homosexual activity to translate arsenokoites. This does seem strange however, when one of the sources quoted in Greek lexicons for determining the meaning of this word is a passage in Jejunter of the sixth century. The context there is "men are even playing the part of an arsenokoites with their own wives," - hardly a homosexual reference.

Understanding arsenokoites to be equivalent to gadesh, we find much more meaning in Paul's letter to Corinth (1 Corinthians 6:9) and Timothy (1 Timothy 1: 10). (Timothy was the bishop of Ephesus.) Those who facilitate the worship of false gods are not fit for the kingdom of God.

Paul and Homosexuality

We have already looked at one of the words Paul used which has been mistranslated: arsenokoites. A brief comment would be in order as to a second such word: malakoi. This Greek adjective is
also found in the list of types of characteristics which render one unfit for the kingdom of God in I Corinthians 6:9.

Although malakoi is translated "effeminate" or "catamite" by many English versions, this Greek adjective is found frequently in Greek literature, and rarely connotes any sexual meaning. In fact, it is properly translated the other three times it occurs in the New Testament: twice in Matthew 11:8, and once in Luke 7:25. It basically means "soft." But when applied to people it usually means "gutless." Someone who will not stand up for what is right is certainly not fit for the kingdom of God. Viz. Luke 7:62. This understanding of malakoi certainly fits better with Pauline theology than any homosexual meaning. Paul was continually urging his converts to stand for the truth no matter what the cost. (Philippians 1: 19-30).

Perhaps the most often quoted Pauline passage on this subject is Romans 1:26-27. However, a quick glance at the first phrase of verse 26 ("For this cause") tells us immediately that any reference to these two verses is inadequate without looking at its entire context. the whole first chapter.

What is the point of the first chapter? Paul is warning that many people become guilty of worshipping the creature more than the Creator (verse 25). Anything which is loved more than God becomes an idol; and the love for that idol is an unnatural love called lust. Lust brings its own natural results, and God turns the idolaters over to their own lusts and their natural consequences.

There are three examples of lust given in Romans 1. First there is a lust for the idol of wisdom. The natural result of that lust is foolishness (verse 22). Secondly, some women allow sex to become their god. When God turns them over to their lust (vile affections), the natural result is the perverting of their natural love for sex into something unnatural (verse 26). Paul does not specify what that unnatural sexual conduct is. For different people it could be different things. But whatever it is, it is something not natural for those persons because sex is their god.

Thirdly, Paul says that some men allow sex to become their god. Again the same thing happens. They will abandon what is natural for them and turn to unnatural sexual activities to satisfy their lust for their god, sex (verse 27).

Especially for Christian lesbians and gays, this passage should not apply. For to a Christian, God is first in our lives, and all other desires fall into second place. Therefore sex is not a god, and we do not fall under the condemnation described in Romans 1.

However, in this verse Paul describes men as naturally preferring women. For men whose natural preference is women, the result of making sex a god could very well be turning from women to lusting after other men. Note the word "lust" - not love. It is interesting also to note that these men must katergazomai the act of sex with other men. The Greek word ergazomai alone means to work or accomplish. But when the preposition kat is put with it, the extreme energy required to accomplish that deed is referred to. This would indicate a violation of the natural tendencies of that man who has sex with another man. Could the act of rape be indicated by selecting this
particular verb> At any rate, for a gay man, whose natural preference is for other men, it certainly would not require katergazomai to accomplish a sexual act with another man.

But of course there are those who would say that anything unnatural is out of God's will for us, and so since Paul labels opposite sex preference as natural, those who would prefer the same sex are not in God's will, and cannot receive God's blessings. This is certainly an unfortunate understanding of Paul's use of the term "natural."

From this same understanding of Paul's use of the term "natural," there are many churches who would condemn a man whose hair is too long, based on I Corinthians 11: 14. However, why is it then that God gives exceptional blessings to men who take the Nazirite vow which includes the promise of never cutting their hair? Perhaps the most famous of those who were blessed by God for not cutting his hair was Samson. When his vow was violated by the cutting of his hair, he lost that special blessing of strength God had given him (Judges 13-16).

This then cannot be the meaning Paul attaches to the word "natural." What then does he mean when he use the word? Simply put, the word "natural" means that which is customarily observed. (Cp. Romans 11:24) Certainly in Paul's day as well as our own the commonly observed preference of people is for the opposite sex. But that does not mean that the 14% of people who prefer the same sex are any less blessed of God.

One other interesting note is found in the greetings Paul sends at the end of the book Romans. If Paul were so hostile to homosexual men and women, why would he send greetings to one who was notoriously gay? Yet we find in Romans 16: 11 greetings to the household of Narcissus, who was Nero's famous lover at the time. In fact, many early church historians like Dionysius claim that Narcissus was the one who successfully interceded with Nero for Paul, and got him acquitted after his first arrest.

It is rather difficult to picture Paul as being the anti-gay and lesbian person that many people claim he was. And as we have seen, there is nothing in his writings that would indicate to the contrary.

Christ and Homosexuality

If Christ is the centre of Christianity, then of course anything he said on the subject would be definite. However, search as we may, we can find not one word on the subject from His lips anywhere in the Gospels.

There are some who look at His statements in Matthew 19 as pertaining to the subject. When the Pharisees asked Him for His teaching about divorce, He made the comment that from the beginning God did not intend for divorce. It is from this passage that the familiar statements in our popular wedding ceremonies are taken: "For this cause shall a man leave father and mother and shall cleave to his wife, and they two shall be one flesh. Wherefore, they are no more two, but one flesh. What, therefore, God hath joined together, let no one put asunder."
What some call the argument from natural order of creation goes like this. Since God intended from the beginning that a woman should be with a man, homosexuality is not in God's plan for humanity. After all, "God did not create Adam and Steve, but Adam and Eve." Therefore, one can only be truly in God's will if married heterosexually.

Of course, we immediately wonder how Christ could be in God's will, then, if He was not married. And we wonder why Paul would be so bold as to recommend the single state over God's will of marriage (1 Corinthians 7:7-9).

But we are not the only ones with such a question. We find in this same chapter (Matthew 19:10) that the disciples said then they could not understand why anyone would want to get married. So Jesus replied with a rather unusual statement in verses 11-12. This plan for marriage with no divorce is not meant for everyone, but just for those to whom it implies: those who do get married.

He then gives a curious statement as to who some of those are for whom it is not intended: eunuchs who were born eunuchs, eunuchs who were made that way in life, and those who chose to be eunuchs for the kingdom of heaven's sake. Who then are these eunuchs?

Most people think of eunuchs as only castrated males. However, neither the Greek of the New Testament nor the Hebrew of the Old Testament would support this idea. The Greek word used in Matthew 19 is eunouchos, which is a masculine noun referring to men who are in the state of eunouchia, a noun which means the state of being unmarried. That one need not be castrated to be a eunouchos is denoted by the use of that word in the Wisdom of Solomon 3:14, where it talks of eunuchs masturbating. In the Old Testament we read of a man who was married, yet called a eunuch. Potiphar was described in Genesis 39 as a saris (Hebrew word translated elsewhere as eunuch). Here the word chamberlain is used to translate saris, because he was married (but without children). Apparently he was impotent, and it was for this reason that his wife tried to seduce Joseph.

In ancient cultures, the greatest curse upon a family was to be without heirs. Anyone not producing an heir was called a saris (eunuch). The feminine equivalent of the male saris is sarisa'. Although the only eunuchs referred to in the Old Testament were male, there were most certainly female eunuchs because the feminine form of the word is found in the Talmud.

So now if we properly understand Christ to be talking in Matthew 19 of people who are either incapable of having children or for some reason do not have children, either due to circumstances of life or for religious choice, then no eunuch is under this teaching of marriage. No matter what philosophical or psychological explanations are used, it is obvious that most gay men and women do not have children, and are therefore not included in the specialized instructions given to married people in Matthew 19.

There is also an interesting passage in Isaiah 56:3-5. Here we are told that eunuchs (both male and female) who hold fast to God's covenant will receive an inheritance in heaven better than the inheritance of those who are called the sons and daughters of God. This is certainly similar to
Christ's teaching His Sermon on the Mount (Matthew 5: 10). How often have modern day eunuchs (gay men and lesbians) who hold fast to the new covenant as Christians faced persecution from other children of God? If we stand firm on that covenant, we will certainly inherit the kingdom of heaven with a better reward than the other sons and daughters of God.

May God treat us all as equals and His blessings be with us for evermore.

The Reforming Church
1995-05-08
FIRST CITY BAPTIST CHURCH

11th May, 1995

I write on behalf of the First City Baptist Church, East London.

We are grateful for the opportunity of expressing our views on the drafting of the new constitution.

There are two major concerns which we have:

1. The serious decline of moral standards within our country. We believe that this trend is being accelerated by the liberalising of official standards relative to public decency.

2. The preservation of religious liberty for all. Many of our people are troubled by reports that our religious practice will be curtailed or controlled by the state in some way. As Baptists we have always stood for religious liberty for all people and groups.

In relation to particular issues:

a) We oppose abortion on demand, and uphold the present legislation and its application.

b) We reject pornography as an assault on personhood, in particular on women and children, and urge that the freedom of speech and expression under section 15 be interpreted in the light of section 10 viz. the respect for human dignity.

c) Whilst we are sympathetic towards people with a homosexual orientation, we do not believe that unnatural lifestyles and practices should be specifically protected by the law. The general protection which every individual enjoys under the law is adequate.

d) We oppose any legal restriction on our religious liberty to worship, evangelise or conduct our practices according to the dictates of conscience. Of course, this applies to other religions as well as Christianity.

We wish you well in your mammoth task of re-writing the constitution. Anything done in a good cause is worth doing well!

REV. PETER HOLNESS
Worldwide vegetarianism is being recognised as the healthiest, sustainable, environmentally friendly, humane way of feeding every person in the world. Millions of people are vegetarians. Currently nutritional education in schools is based on indoctrination and outdated information provided by the Department of Agriculture in order to "utilize animals and produce in equal proportions" which fall under their control. This being the case meat will always be touted as 'healthy' as they have to "support" the meat farming sector, and the Meat Industry has the funds to advertise and promote through schools, the media, etc., in unfair competition against vegetarianism. The Physicians Committee for Responsible Medicine (which is a group of 3400 physicians) in America have issued their own "Vegetarian Starter Kit" to encourage Americans to become healthier.

Farmers’ debt currently running at R17 thousand million, malnutrition, hunger, crime, disease, misery and desertification are all part of the chain reaction related to this agricultural policy. 50% of our maize, grain, sorghum, etc., is used for animal feed which could sustain at least 10 times as many people. Our 26.3 million sheep are devastating the Karoo and causing desertification as are our 10.5 million cattle and 44.6 million goats in this and other areas. 1.2 million pigs and 380 million broiler chickens - kept under the most inhumane conditions - are unsustainable "recycling machines" for our vegetarian produce,

Only 13% of our land is arable yet our third largest field crop is ‘hay’. An enormous amount of power and topsoil are being wasted.

It takes 670 litres of water to produce one 225g hamburger whilst Minister Kader Asmal is trying to provide 5 litres of water for every household.

As children have the right to be taught this healthy, sustainable, environmentally friendly, humane way of eating we respectfully request that the Education Clause No 32 should be amended to read:-

Education

32. Every person shall have the right

(a) to basic education (free from indoctrination)
and to equal access to educational institutions.
We believe, that the inclusion of vegetarianism as a "healthy alternative" will have a tremendous impact on every South African and a major impact on the health of all the peoples on the continent of Africa. In the words of Mahatma Gandhi "The rich man’s meat steals the poor man’s bread". Vegetarianism is non-violent - killing animals encourages violence and disrespect for life. As more people are employed in grain, vegetable and fruit growing it will create employment for millions of people and more grazing and fodder growing lands can be utilised for feeding people. American and British vegetarian food products are booming as will the soya, etc. products in this country.

Seminar:

We would be prepared to send a delegation to the Constitutional Assembly to present a seminar in order to discuss this proposal and address any problems or questions which the Theme Committee Four might have in this regard.

ALEXANDRA SPICER
Chairperson
INTRODUCTION

1. The Suid-Afrikaanse Onderwysersfederasie (SAOF) and its member associations, namely the Suid-Afrikaanse Onderwysersunie, Suid-Afrikaanse Onderwysersvereniging (KwaZulu-Natal), Transvaalse Onderwysersvereniging (TO), Oranje Vrystaatse Onderwysersvereniging (OVSOV) and the Suid-Afrikaanse Vereniging vir Beroeps- an Buitengewoneonderwys (SAVBBO) are grateful for the opportunity to submit its inputs with regard to the establishment of the 1996 Constitution to the respective theme committees of the Constitutional Assembly in terms of the "Public Participation Process".

2. As a result of constitutional principle II (Schedule 4) which reads as follows

"Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenchment and judicable provisions in the Constitution, drafted after having given due consideration to inter alia, the fundamental rights contained in Chapter 3 of this Constitution" the SAOF reflected on the universally accepted fundamental rights included in international instruments with regard to fundamental rights. The SAOF supports the principle that international instruments with regard to fundamental rights must be ratified by South Africa and serve as a basis for the refinement of the present Bill for inclusion in the 1996 Constitution, with specific reference to the stipulation of the present Section 35(1). Its inclusion will enable our education to benefit from international knowledge and experience as well as to implement an objectively grounded educational system.

3. The SAOF is a registered employee organisation with the Education Labour Relations Council constituted in terms of the Education Labour Relations Act, Act nr. 146 of 1993 and apart from its primary role with regard to the relevant labour legislation, it also has the responsibility to represent and express the professional-, Language, cultural- and religious interests of its almost 40 000 members.

4. Against the background of the basic principles and objectives of its Constitution, the SAOF will limit its submission mainly to the following theme committees:

- Theme Committee I: Submission limited to the matter regarding “Separation of church and state”;
- Theme Committee III: The nature of the provincial system and local government;
• Theme Committee IV Constitutional Principle II - An Entrenched Bill of Fundamental Rights; and

• Theme Committee VI (i) : Public Administration (Public Service).

5. With regard to the activities of Theme Committee IV, the SAOF is of the opinion that the following fundamental rights must be given special attention from an educational perspective:

• education;
• equality;
• freedom of religion and the practice of religion;
• language;
• culture;
• human dignity;
• political rights;
• access to information;
• administrative justice;
• labour relations;
• environment; and
• children.

B GENERAL VIEWPOINTS

Before the SAOF makes specific submissions to the respective theme committees, it politely wishes to put forward the general viewpoints below in view of the association's and its members', perceptions and experience of the influence of Chapter 3 of the Constitution of the RSA, 1993 on society, in general and education in particular, as well as the SAOF's requirements of a future Constitution:
• The SAOF as a voluntary member association, supports the principle of organisations requesting legal aid for and on behalf of their members in cases where a member, group of members or members in general's rights or interests are infringed upon or are threatened.

• Educators' fundamental labour rights must receive sufficient protection in order to make provision for the distinctive character of the teaching profession and the sensitive nature and influence of their service. In this regard the SAOF, with more than 70% of its membership being female, must unfortunately express its deep disappointment at the slow progress made by the Government in abolishing sexual discrimination against married female educators in particular, considering the prohibition on unfair discrimination in Section 8 of Chapter 3.

• Certain rights and the interpretation thereof need clarifying, e.g. the duty of the State as employer to honour the labour rights of its employees. The present large-scale unrest among state employees, particularly in education, can be directly ascribed to the state's negation of statutory, entrenched collective agreements as well as to the lack of a creative, objective and constructive approach to the formal negotiations in the respective labour forums. There is a perception of 'lip service' and of 'objective decision-making being largely subordinate to party political considerations'.

• With reference to the positive duties imposed by Sections 33 and 116, the State has the responsibility to create a culture of objective fundamental rights. The positive acceptance of the Bill of Fundamental Rights is seriously handicapped as a result of the perception in a certain section of the population, that certain rights are absolute and unlimited, that they operate in isolation and may be used only when needed. It must be generally emphasized that fundamental rights are interdependent, no right of any person and/or group can be regarded as absolute, and that for the sake of the public, certain cases can merit the limitation of rights.

With reference to the development of a culture of fundamental rights, more emphasis must be placed on the responsibilities of good citizenship. At present there is a general overemphasis on the rights of the individual without a correct interpretation of the implications thereof for the group to which such an individual belongs, or the importance of the respect for the fundamental rights of others.

• The inclusion of statutory enforceable fundamental rights in the Bill of Rights, place certain obligations on the State. This specifically refers to the indissoluble duty of the State to provide education to children of school going age in terms of the implementation of statutory policy. The SAOF does not deem it necessary at this stage to become involved in the debate whether education is a first or second generation right,
since such a distinction is artificial and would not make any difference to the essence of any of the fundamental rights. However, it is a fact that the right to education is the only fundamental right where the State compels its citizens (in this case children of school going age) by law and by means of policy to make use of it. This fact necessarily implies that **education as a state service can not be treated like other services of the state.**

In a diverse community like the South African one, it is advisable **to devolve as much power as possible of the original authority to the lowest possible functional level** where it can be effectively executed. Functional and effective control is essential for offering the respective communities the opportunity to effectively exercise their languages cultural- and religious rights.

- To realise the **democratic control and** management of educational institutions, it is essential to provide **sufficient powers and competencies to governing bodies** so that they as democratic institutions, can effectively execute their functions.

- Special **precautions** must be taken to ensure that the **Bill is not abused** to influence the **relationship** among natural persons, between private legal persons and natural persons and/or between private legal persons to such an extent that it dominates and controls such relationships in an unreasonable manner.

- Special precautions must be taken to ensure that the envisaged new 1996 Constitution **serves all the citizens of the country and not only a particular political party**. The SAOF is therefore convinced that the **1996 Constitution must be an entrenched Constitution with supreme authority** as this is the most effective mechanism to ensure inter alia that the following highly praised democratic principles will stand the test of time in the RSA,

  - The right of each citizen to vote;
  - MultiParty elections;
  - An independent judiciary;
  - Separation of powers (judicial, legislative and executive); and
  - The recognition of fundamental rights.

**C. SPECIFIC COMMENTS ON ASPECTS WHICH ARE OF SPECIAL CONCERN TO THE SAOF IN TERMS OF ITS CONSTITUTION**
1. **Theme Committee I : With specific reference to the aspect of “Separation of Church and State”**

Seen against the background of the stipulations of Chapter 3 of the present Constitution of the RSA, 1993, it is important that the State assumes a neutral position with regard to the practice of religion and the determination of rules for religious practice in educational institutions as organs of the State. **Such a neutral position does not mean that the State must withdraw itself to the extent that it implies the prohibition of all forms of religious practice on or in state property.** In the opinion of the SAOF this "aspect” has been carried too far in the constitutional law of the United States of America, where all forms of religious practice in and on state property, as well as reading from the Scriptures, a prayer, meditation and the distribution of literature regardless of it being exercised voluntarily, are inadmissible.

The State's duty is much rather to create an environment for the various denominations and religious groups to voluntarily practice their religions without infringing upon each other’s rights. It is thus essential that the State does not favour any one faith/denomination more than other, but rather that the State assumes the **duty to create equal opportunities and that the competency to determine the rules for religious practice in the educational sector is delegated to the level of educational institutions.**

The SAOF regards the school as an extension of the parental home and therefore, in view of the above, the parent community of each school must be empowered to determine the religious character as well as in general the nature and ethos of each school. This implies that religious practice at a certain school does not necessarily have to be limited to a single faith, and furthermore that the school may be accessible to pupils of other religions as well. Against this background the SAOF wholly supports the present Sections 14(2) and 15.

As far as the **position of teachers** appointed at a school is concerned, the teachers' own fundamental rights must also be taken into account and respected, and that the exemption of the duty to teach on the grounds of contentious objection is justifiable.

2. **Theme Committee III : The nature of the provincial system and local government**

The SAOF supports the principle that government functions must be exercised at the level where they can be functionally and effectively executed. Government functions must therefore be devolved to the lowest possible level. This counteracts the concentration of power, increases citizens’ involvement in decision-making,
improves the possibility for the meaningful settlement of regional and local differences, and generally results in more effective decision-making and service. At the same time, one must guard against the creation of unnecessary, bureaucratic structures.

All these considerations also apply to education as well. It is in the interest of education to devolve those respective powers as cost-effectively as possible to lower government levels where possible.

The SAOF is thus in favour of strong provincial and local governments which can effectively govern in the interest of its residents. In principle education ought to be a provincial function. However, national legislation for the sake of the establishment of a policy framework, norms and standards for provincial education, must be possible. We therefore envisage that it must be possible for the national parliament to also make educational provision laws in certain cases. In addition, certain powers with regard to education should also be devolved to the local level, specifically to the governing bodies of educational institutions. Many decisions in respect of admission, the character of institutions, rules regarding religious practice and many others can just as effectively be taken at that level, i.e. where local needs and situations can better known and can be more easily dealt with.

Devolution of the education function must be accompanied by the necessary financial means. The higher authorities thus can not simply devolve power without providing the necessary financial means and power.

In addition, care should be taken that the higher authority as the provider of finances, does not hold the governing bodies to ransom.

3. Theme Committee IV : Constitutional Principle II : An Entrenched Bill of Fundamental Rights

(i) Education

The SAOF's viewpoint with regard to each person's right to education is based on the fact that education is the only fundamental right which carries with it the positive duty of the state to provide it and the positive obligation by means of policy and statute of the qualifying citizens of the country to utilize it. Against the background of the SAOF's comments in this document, each person has the right

- to basic education;
- to education in his or her mother tongue;

- to establish educational institutions based on a common culture, language and religion.

It is often argued that only private schools may be based on a common culture, language and religion (present Section 32(c)) and that this right does not apply to public state schools and/or state aided schools. The SAOF can not accept such an argument because the present Constitution, with specific reference to the stipulations of Chapter 3, is mainly applicable to the legislature and executive state organs at all levels of government and to all administrative acts of the state. The implications are that the present rights of Section 32(b) and (c) indeed applies to school financed by the state (partly or fully financed by the state) in their capacity as executive organs of the state.

The present Chapter 3 does not regulate the legal relationships between private juristic persons (including private schools) and natural legal persons. According to a broader interpretation this right can also give a person, group of people and/or a juristic person the right to establish private schools however. they already have this right.

Every person has the right to mother tongue instruction. Local as well as international educational research results indicate mother tongue instruction as the most successful means of instruction. The allegation that it is too expensive to afford each pupil this right is made from a certain political and ideological perspective and by the proponents of a common lingua franca without properly taking into account the costs related to a high drop-out rate in schools where pupils are instructed in a second or even third language. The high drop-out rate can partly also be related to the fact that pupils do not receive instruction, in their mother tongue. The cost thereof, i.e. in terms of wasted working- and teaching hours, the occupation of space which other pupils have to forgo, and the negative psychological and emotional effect on the drop-outs, is much higher that the investment in a system and policy of mother tongue instruction. The implementation of a policy of mother tongue instruction must also be seen as an integral part of the process of creating a culture of tolerance and respect for other people's human dignity, because the respect for a person's mother tongue and the person's own positive image thereof form an integral part of the process.

The SAOF defines the concept education as a comprehensive term for teaching, educating and a clearly articulated component of training, and to the SAOF it thus does not make sense that educationally accountable components of culture,
language and religion are not included in education. Education is definitely more than the mere clinical transfer of academic knowledge and facts, or the acquisition of certain skills. **Successful education is characterised** when the school is regarded and experienced as an extension of the parental home and the respective community, and serves to expose sensitive minors to the same value system. It is least of all the mere pursuit of satisfactory academic results.

The SAOF believes that the right to education imposes the positive duty on the State to provide at least an acceptable standard of education, since this right depends on the financial ability of the State. The governing bodies of schools and the communities which are served by them must therefore, within the ambit of the Bill of Fundamental Rights and educational policy with regard to the various management models for schools, be vested with the powers and competencies to raise compulsory school fees in order to provide a **higher standard of education**. As part of the state's duty to provide education, it should implement a **bursary scheme** for poor families, since it would be grossly unfair and unjustifiable if pupils gain admission to a school on the grounds of the right to “equal access”, but have to be subsidised by the parents of other pupils.

(ii) **Equality**

Each person must have the right to equality, as well as equality before and protection by the law. Unfair discrimination, be it directly and/or indirectly, should be inadmissible, but a fair and rational distinction between people should be accepted, provided that the **distinction is not artificial, infringes upon** another person's **fundamental interest or is contrary to the interest of the public**. For education this would imply that there is no absolute equality, but rather that equal opportunities for access to available educational facilities according to people's abilities and those fair and objective distinguishing criteria, should be offered. The SAOF therefore feels that the setting of certain and limited admission criteria by the **competent authority** of the educational institution should be admissible, provided that **discrimination on the grounds of race will be inadmissible**.

Such universally accepted criteria are included in the international instruments approved by the United Nations (UN) and the Organisation of African Unity (OAU), specifically the:

(a) "**Convention on the Rights of the Child**";

(b) “**Convention against Discrimination in Education**”.

(c) “**International Covenant on Economic, Social and Cultural Rights**”; and

The SAOF is convinced that the signing and ratification of the aforementioned instruments can make an important contribution to the objectification of educational provision, and furthermore against the background of the equal status of people, to recognise and respect their "being different", bearing in mind those universally accepted distinguishing criteria.

(iii) Freedom of religion and religious practice

There must be a right to freedom of religion. In addition, schools, as community establishments, should be able to determine the rules for religious practice, on condition that the attendance thereof shall be free and voluntary and furthermore that there is no infringement upon the rights of others. The State is, therefore, responsible, without favouring any denomination, to create a favourable climate for the realisation of religious convictions and religious instruction at a school in accordance with the rules relating to religious practice at such schools.

(Note: Also see comments to Theme Committee I in this regard).

(iv) Language and culture

In a multilingual country like the RSA people must be allowed the freedom of choice in respect of language and culture. In this regard the State should have the duty to also recognise the multilingualism and multiculturalism of society in education and to take positive steps to promote it,

(v) Human Dignity

The right to respect for and protection of a person's dignity can be seen as an essential and indispensable part of each of the other fundamental rights. Each human being has the right to human dignity, the recognition of the fact that each human being is a unique being and to the full development and empowering of his or her own human dignity.

Against the background of the SAOF's view of education, namely a collective term for the educating and teaching of pupils and/or students as well as an articulated component of training, education is regarded as one of the most important mechanisms for the exposition and development of the individual's knowledge of the content of the concept of human dignity as a fundamental right, and an
understanding of the importance of respecting people as equal individuals and each person’s right to an own independent self-image and human dignity.

(vi) **Political rights**

There must be no discrimination with regard to the political rights of people or groups of people - all citizens of the RSA must enjoy full and **equal political rights** and citizens should be able to participate in **regular, free and fair elections**. In addition positive steps should be taken to ensure that the stipulations of Section 21 of the *Universal Declaration of Human Rights*” and Section 25 of the *International Covenant and Civil and Political Rights*” are met.

Educators must enjoy the same political rights as other professional groups and if restrictions are put on the exercising of their political rights, this should be regulated by an agreement among the organised profession, e.g. the voluntary acceptance and signing of a **professional code of conduct** while taking into account stipulations such as those of the present Section 33.

(vii) **Access to information**

Each person has the right to certain information which is kept by the state or an organ of the state, irrespective of the level of government should such information be necessary for the exercising or protection of his or her rights.

The SAOF does not view this right to be an absolute right which is valid under all circumstances in the school environment. It should be read in close conjunction with the stipulations of the present limitation clause, Section 33.

Although in the view of the SAOF, education is characterised by a special relationship of trust between educator and child in terms of the “in loco parentis” principle on the one hand, and between educator and parent on the other hand, it may happen that certain information, which may be sensitive and be to the detriment of the child, is regarded as confidential and privileged by the school.

(viii) **Administrative justice**

In terms of the right to administrative justice, each person should be entitled to the application of the **rules of natural justice** with specific reference to the right to legal administrative action, the right to be provided in writing with the reasons for administrative action which infringe upon any of his or her rights or interests, the right to procedurally fair administrative action in cases where rights or rightful
expectations are threatened or infringed upon, and administrative action in respect of cases where rights are infringed upon or threatened, being justifiable.

The members of the SAOF who find themselves in an employer-employee relationship with the state and who act as instruments of the state fully support the above.

(ix) **Labour relations**

In conjunction with the right to freedom of association, each person must be entitled to fair labour practices in terms of this right. Since education is such an important fundamental right and especially in view of its central role in the Reconstruction and Development Programme (RDP) it is of utmost importance that **education as a core service sector be given the right to make its own statutory and collective labour arrangements.** This includes teachers' rights to establish employee organisations, to join them, as well as the right to organise, bargain collectively and to strike.

As far as this is concerned it is absolutely essential that the prescriptions of the International Labour Organisation (ILO) with regard to education and more specifically the educator sector, are also included in the general guidelines in respect of labour legislation. **The proposed draft labour act which deals with a new labour dispensation does refer to the ILO's directions with regard to labour relations in the general public service and the private sector, but do not meet the directions with regard to the differential treatment of education.**

The reason for the advocacy of the differential treatment of the educational sector, is because education is the only fundamental right which qualifying citizens are statutorily forced to utilize, and also because educators are at present planning to establish the already approved registration body, namely the South African Council for Educators (SACE) which includes the possibility of an own mutually agreed upon code of conduct.

The SAOF therefore advocates the **provision in the Constitution of the principle of deferential treatment for certain professional groups, on the grounds of certain duties imposed upon them by the Constitution and the sensitive nature of their services,** without restricting their fundamental rights and still within a broad labour dispensation. The advocacy of this principle refers specifically to the "third party" (parents and pupils in the case of education) which forms an integral part of the employee - employer relationship and whereby fundamental rights may be directly or indirectly adversely affected during the collective bargaining process.
(x) **Environment**

According to Section 24 of the "African Charter on Human and People’s Rights" each person shall be entitled to a generally acceptable clean and healthy environment which will promote the full development of people. The SAOF believes firstly, that this aspect must be duly considered in the planning of where to erect schools, and secondly, that education can make a valuable contribution towards making people aware of the importance of a clean and healthy environment.

(xi) **Children**

The present Section 30 must be extended to meet the directions of the international human rights instruments with regard to the educational rights of children.

3. **Theme Committee VI(i) : Public Administration (Public Service)**

3.1 Although national and provincial education departments, which are responsible for the provision of education or the formulation of educational policy, traditionally form an integral part of the Public Service and public administration, there are essential differences between the education sector and the rest of the public service, in exactly the same way the private sector is different from the public sector.

According to the White Paper on Education and Training issued by the Ministry of Education on 28 February 1995, education is a constitutional fundamental right which imposes a positive duty on the State - the State compels its citizens (children of school-going age) to utilise these fundamental rights. This is not the case with other services provided by the State by means of the central public service.

This situation necessitates specific and specialised structures with regard to policy formulation and the management and provision of education. The SAOF believes it would be detrimental to both the accelerated evolutionary process and the substance of a new education dispensation if the Constitutional Assembly does not take into account the following principles:

(a) The Ministry of Education must at the national level have the competency to determine national educational policy. It is thus essential that the education ministry at a national level has a national education policy act, as is presently the case.
(b) Although the State is primarily responsible for the provision of education in terms of the Constitution of the RSA, such educational provision at present, as well as most probably will be the case in future, occurs by means of differential structures with regard to funding, management competencies and management structures. The result of this is that education staff render their services to enable the State to meet its constitutional duty and to reach its objectives in terms of the RDP. In addition, the discretion regarding their appointment not only rests with the State, but also with the parents in whose community the school is situated. This is one of the most important reasons why education staff can not be employed in terms of the Public Service Act, or other legislation, which regulates the services of public servants in the central public service. Education staff are employed in terms of the Educators Employment Act, 1994 which was proclaimed by the President in terms of Section 236 of the Constitution (1993), and shall render service in accordance with provincial educational provision laws.

(c) As a result of the special constitutional position of education, as well as other essential reasons, there is separate legislation to regulate labour relations in education. With reference to the proposed draft act concerning the proposed comprehensive Labour Bill, the SAOF is of the opinion that the position regarding the differential treatment of education should be maintained and that provision should at least be made in a separate chapter of the aforementioned bill for the special position of education.

(d) The White Paper on Education and Training specifically acknowledges the above-mentioned principles regarding educational provision, both as a constitutional right and as a State service. The developing statutory framework as mentioned in the White Paper on Education and Training must therefore make adequate provision for the contributions of stake-holders to policy development. This aspect also applies to the education sector as an agent for human resources development within the broader framework of the Reconstruction and Development Programme.

3.2 Another aspect of the present public administration determined by the Constitution of the RSA, 1993, which deserves to be mentioned because of its negative influence specifically on positive labour relations in education, is the role of the Public Service Commission.

In terms of the present Constitution, the Public Service Commission is vested with so much authority that its position is almost unreasonable. Despite being vested with the competency in terms of national policy legislation to determine policy with regard to the bargaining and conditions of service including salaries, the Minister of
Education's competency actually is no more than theoretical competence, since he actually receives his mandate from the Public Service Commission whereby his discretionary competencies are seriously restricted and prejudiced.

This problem has increased tenfold with the coming into effect of the Constitution of the RSA, 1993 since each of the nine provinces is authorised to establish a provincial service commission. The necessary checks and balances are absent from the present constitutional stipulations and there is the likelihood that the provincial service commissions can appropriate so much power and competency that their position also becomes insoluble. A serious and intensive debate is developing between the Public Service Commission and the Provincial Service Commission in respect of the interpretation of the present Constitution and the powers which should reside in the national and provincial levels respectively.

Experience has shown that a specific provincial service commission regards itself as the employer of all employees in the province who are in the employ of a state department or organ of the state, as well as responsible for determining policy relating to bargaining and conditions of service while being responsible only to the provincial legislator. The result is that such a provincial service commission does not regard itself to be bound to the negotiations in the respective labour forum of education.

The SAOF holds the view that the Public Service Commission (and now also the new provincial service commissions) is a creation of a previous political dispensation and that it has become obsolete, necessitating a redefining of the role of the Public Service Commission and the provincial service commissions, as well as the restraint of their powers and competencies.

D. CONCLUSION

The SAOF hopes and trusts that the Constitutional Assembly, using the present Bill of Fundamental Rights as a basis, will produce a Constitution for all the people of South Africa and that everyone will be given a rightful place, and to enable each person as a secure citizen, to contribute towards the creation of a fair and safe future for our children. The SAOF believes that its submission, arising from an educational perspective, emphasizes important practical aspects and offers fresh perspectives which are not always taken into account in the strictly technical and legal debates on a new constitution.

Further enquiries: J. C. Klopper
Director :TO (Transvaalse Onderwysersvereniging)
Possible practical implications

During reflection on a formal submission to the Constitutional Assembly, the following aspects and implications thereof for the practicing teacher were debated. The objective interpretation of these matters and their effect on teaching and the school will have to be carefully considered.

Privacy.

- Initiation and the searching of pupils - affecting human dignity.
- Implementation of a culture of fundamental rights in schools.
- Freedom of expression.
- Access to information,
- Disciplinary measures.
- Freedom of faith.
- Language policy and the accommodation of other language groups
- The implementation of a culture of human rights in the school and introducing teachers and pupils to it.
- Pupils' participation in the decision-making process regarding school policy.
- Political rights of teachers and pupils.
- The influence of a bill of fundamental rights on a future code of conduct
- Exercising of labour rights and acceptable forms of industrial action.
THE OVERBERG FORUM

The OVERBERG FORUM is a network of Advice Offices and Service/Training Organisations delivering a service to the disadvantaged rural areas of the Overberg, Western Cape.

The Overberg Forum consist of the following Advices Offices and Service/Training Organisation.

1. Botrivier Advice Office
2. Bredasdorp Advice Office
3. Caledon Advice Office
4. Genadendal Advice Office
5. Grabouw Advice Office
6. Helderberg Advice Office
7. Hermanus Advice Office
8. Kleinmond Advice Office
9. Macassar Advice Office
10. Napier Advice Office
11. Riviersonderend Advice Office
12. Stellenbosch Advice Office
13. Swellendam Advice Office
14. Villiersdorp Advice Office
15. Centre for Rural Legal Studies (CRLS)
16. Lawyers for Human Rights (LHR)
17. Legal Education Action Project (LEAP)

Introduction:

The Advice Offices, with the support and services provided by the Service Organisations as listed above respectively, work and assist around a variety of issues in the rural areas of the Overberg. It is our belief that the "constitution in process" should by all means aim to represent and include the concerns of those communities who has been extremely marginalised because of apartheid. We further believe that because of our objective in making justice accessible to communities, we have the duty to ensure that the constitution is well representative of all in society.

In order to achieve accessible justice and to use the system to implement the rights therein, we make the following submissions. Our submissions are directed at THEME COMMITTEES 4 AND 5.

Issues of concern:

1. Rights of Representation;
2. Funding of para-legals’ work and Autonomy;
3. Access to education and Tertiary Institutions and the licence to practice.
4. Accessibility to Courts.

1. RIGHTS OF REPRESENTATION:
1.1 At present: every person has the right to be represented by a legal practitioner of their choice at state expense.

This right, up to now has not been effectively enforced, as thousands of South Africans still appear in court without adequate representation. Reports and statistics confirm that for example the Legal Aid Board fails to provide representation to the so many indigenous people in South Africa. Statistics confirm that there are not enough legal practitioners in South Africa to represent the so many people who are in need thereof.

We propose that the constitution be amended to give para-legals the right to represent people in matters of concern, including within court. This will require some criteria to promote the licensing of para-legals to perform such a duty. It should also go hand in hand with the recognition of the work para-legals have done.

Our motivations on the above are as follows:

1.1(a) Para-legals do valuable work in assisting and representing people in matters of concern, such as in opposing an eviction order, preparing a client's case and acting as witness in court processes, referring and representing workers in matters of unfair labour practices;

1.1(b) Para-legals take statements, assist and advise clients through the whole process of referring a dispute to court;

1.1(c) In most small rural towns there are only a few or no lawyers at all. These lawyers serve members of the community largely because of the availability of capital within such. It therefore ignore communities who cannot afford legal fees. Para-legals on the other hand provide a free service to those who cannot afford usual legal fees;

1.1(d) Para-legals acquire much needed skills through practical and ongoing training, which enable them to perform their duties to communities who are otherwise in desperate need thereof. In some issues para-legals have advised legal practitioners on law;

1.1(e) Many South Africans will still not enjoy the right to be adequately represented as the legal profession has failed to provide an extensive service. With para-legals denied the right to represent people, the constitution will fail in bringing about a fair and just society.

2. FUNDING OF PARA-LEGALS' WORK AND AUTONOMY:

2.1 At present para-legals receive no/limits funding to perform the much needed work to their constituencies. This includes access to facilities, allocation of resources and financial support. State and semi-state Institutions on the other hand, have access to state financial support.
We propose that the constitution be amended to include the provision of support as mentioned above, to para-legal organisations. This should happen within parameters set out by both para-legals and the state and should ensure the autonomy of para-legals.

Motivations on the above are as follows:

2.1(a) Para-legals cannot be as effective in their work as they ultimately feel they should be due to radical funding limitations. It is an ongoing struggle. Even if funding is received, it is in most cases insufficient.

2.1(b) Para-legals deliver a service to those disadvantaged communities unable to pay for legal services. Our existence is therefore crucial to a large sector of civil society who would otherwise not enjoy their rights as stipulated in the constitution and other Statutes of Law.

2.1(c) Para-legals have to maintain their autonomy as this has been the strongest asset in delivering an effective service to all sectors within communities.

3. ACCESS TO EDUCATION

3.1 We propose that the present education curriculum of tertiary institutions be amended to include para-legals' work.

The motivations for 3.1 above are as follows:

3.1(a) The present education system provides more theoretical information, which in most cases cannot be adopted in our work. Such a system therefore, should ensure that the information and knowledge acquired through the institutions be implemented in a way which is beneficial to all people of South Africa.

3.1(b) The practical education at present provided, is in most cases not suitable to the needs of the ordinary person of civil society. Although there have been dramatic changes in improving the practical education system, it is not sufficient, as it does not balance the theoretical education provided.

3.1(c) In our experience it became apparent that lawyers working in rural areas lack the communication skills which is essential for servicing such areas. Their level of communication in most cases discriminates against those not so articulated, and therefore hampers clients from understanding their methods of operation. Lawyers' theoretical education also dominate the service delivered, as it is not sensitive enough in approach.

3.2 We propose that the training provided to para-legals by Non-Governmental Organisations (training organisations) should be acknowledged and endorsed by Tertiary Institutions and through negotiations be incorporated within Tertiary Education.
The motivations on 3.2 above are as follows:

3.2(a) Training modules and courses for para-legals are developed in conjunction and in consultation with para-legals, ensuring that the training acquired is effectively implemented. It ensures sensitivity, application of practical methods and constant feedback, a methodology which provides for thorough assessment and evaluation of their work and the needs of communities. In turn it provides NGO’s training organisations with the much needed information to develop appropriate training material and courses on a continuous basis.

3.2(b) The involvement of NGO’s/training organisations in training para-legals has resulted in an agreement (in the para-legal movement) to develop a national curriculum for training, which can be nationally implemented by and for para-legals. This development, once again is an inclusive process.

4. ACCESS TO TERTIARY INSTITUTIONS:

4.1 We propose that para-legals should be allowed access to study at any tertiary institution of their choice as stipulated in the Interim Constitution. In order to achieve this the present criteria in allowing access to tertiary institutions should be changed or amended to accommodate para-legals.

Our motivations on 4.1 above are as follows:

4.1(a) The present criteria prescribed by tertiary institutions discriminates against the experiences, existing qualifications, accountability and commitment of para-legals.

4.1(b) Para-legals, because of their build up of experience are even more advanced than students allowed to tertiary institutions purely on performances at secondary level (senior certificate). We as para-legals are denied access because of such specific criteria.

4.1(c) Para-legals are the first step in providing access to justice. We are constantly communicating with people on the ground, understand the community dynamics and have made a major impact in making justice accessible to the ordinary person.

4.1(d) Para-legals know how to effectively address issues and to communicate with its audience due to its common cultural background. This forms an integral part of its accountability and commitment to the community.

5. ACCESS TO COURTS

People living in rural communities have a historical fear of appearing in courts. Its been an essential part of the lobbying process of para-legals to represent the ordinary person in court.
Para-legals have for example represented people in the Small Claims Court, opposed eviction-orders and represented workers in matters of unfair labour disputes.

5.1 We propose that in order to allow for accessibility, the courts need to be restructured in the following ways:

5.1(a) Court procedures must be more informal. This will allow a person appearing in the court to be more relaxed;

5.1(b) allow representation in court in all matters of concern;

5.1(c) courts must be in reach of those who want access. An example: In Bredasdorp there is no small claims court to hear cases in that area. The nearest SCC is in Caledon. Legislation prohibits a person from Bredasdorp in referring a case to the SCC in Caledon, as the dispute or matter must have occurred within approximately 50 km from the nearest SCC. As such, this is problematic as it denies certain towns and therefore people access to court.

5.2 We propose that Community Courts be recognised and included within the Statutes of South African Law.

Motivations on 5.2 above are as follows:

5.2(a) Common Law and Customary Law are consistently applied where these courts are in existence. Mediation and Dispute resolution has become a major tool in these courts;

5.2(b) In applying penalty, local morale and sensitivity are consistently applied;

5.3(c) In 90% of these cases handled by the court, sentence is mostly beneficial to the victim, the broader community and the accused party;

5.3(d) The appointment and involvement of assessors in courts are a step towards making the courts accessible and representative of communities' concerns. This however is only the first step in making the courts accessible.
EVANGELICAL LUTHERAN CHURCH IN SOUTHERN AFRICA

A PRESENTATION OF THE BISHOP’S OF THE EVANGELICAL LUTHERAN CHURCH IN SOUTHERN AFRICA TO THE CHAIRMAN OF THE CONSTITUTIONAL COMMITTEE.

We thank God together with all People of Southern Africa that he has Permitted the great change to take place. It has opened now possibilities for all people to participate in social and political activities and to improve the quality of life for all, but it has also brought with it new challenges for our Christian faith and life.

1. We support the Reconstruction and Development Programme of the new government, understanding it as an attempt to improve the quality of life of all the peoples of Southern Africa. For our church the RDP is nothing new as in its diacanical services, e.g. its schools and hospitals, pre-schools and day care centres, arts craft centres and many other ways of development and imparting skills it has given a practical expression to its gospel message.

2. We encourage all our members to freely and actively partake in the political and civic activities. It is the right of every person to elect the government of its choice and to assist in the election of the provincial and civic authorities. The members should feel free to be voted into any such positions, aiming at filling them with the Christian spirit of responsibility, commitment and reconciliation.

3. An area that now no less than in the past needs the urgent attention of all our members is that of education. We encourage parents, educators, pupils and students to make use of all the opportunities to further their education to the highest level. The New South Africa needs the highest qualified people in all areas of development and science. In this connection we would implore the government to make a maximum of funds available for education and bursaries instead of putting so much into military budgets.

4. Because Chiefs have in the past played such a decisive roll in the communities we believe they should be accorded representation in the national and provincial governments.

5. Being convinced that with the words of Psalms 127:1: 'Unless the Lord builds the house those who build it labour in vain, unless the Lord watches over the city the watchman stays awake in vain' nothing
can succeed without the help of God. We would suggest that in rewriting the constitution the Word of God and prayer should be an integral part of all opening and closing sessions of parliaments.

ON BEHALF OF THE BISHOPS OF ELCSA

  BISHOP   M. BUTHELEZI
  BISHOP   R. SCHIELE
  BISHOP   M. NTUPING
  BISHOP   C. MOLEFE
  BISHOP   R. TISANE
  BISHOP   S.P. SULU
WE ARE A NON-GOVERNMENT ORGANISATION WORKING IN THE HEALTH FIELD. OUR SPECIFIC FOCUS IS MENTAL HEALTH.

There are many people in the deprived communities who live under conditions of chronic stress. This situation is not likely to change rapidly. Many are unemployed, and few have enough money for basic necessities.

A great many people make use of customary practices, traditional remedies, and herbs in their attempts to sustain or restore their health.

We believe it would be counterproductive, arrogant, needlessly expensive, and unenforceable, to attempt to regulate these indigenous practices through the medical hierarchy. It is also an infringement of the freedom of people to care for themselves, and an unacceptable attempt on the part of one model of health care to achieve total domination.

We would support attempts to provide information, and enforce quality control on any preparations sold commercially. The body regulating this would need to be selected by those using these preparations.

CHRIS GILES
CCATC - CO-ORDINATOR
10 April 1995

FREEDOM OF HEALTH CHOICE

We at Bioharmony, believe in and place enormous value in the individuals fundamental right to choose and maintain optimum natural holistic health, free from the interference from artificial monopolies. We therefore are strongly and absolutely in favour of freedom of health choice and that this choice should be clearly and equably entrenched in the Final Constitution.

The present situation is such that any methods of healing by safe, simple and natural means, are constantly assailed and denounced as fraud, including every practitioner who does not ally himself.

We are of the opinion that the current Medicines and Related Substances Control Act (101 of 1065) is so rigidly and undemocratically controlled by our Medicines Control Council to the detriment of the general public and the taxpayer in particular. The current act enables the Council to decide that literally anything, including pure water, to be declared a medicine if marketed as in any way being associated with the improvement or maintenance of health and wellbeing, including prevention of ill-health. Medicinal registration requirements currently supports a private monopoly which is subsidised by the taxpayer without permitting the taxpayer to the right to self-access to “Pure Water” if he so chooses.

We are therefore in favour of compromise legislation that will effectively ensure the right of all South Africans to have self-access to natural products.

In conclusion, we demand to have freedom of health choice clearly and equably entrenched in the Final Constitution.

THE STAFF AND MANAGEMENT
BIOHARMONY

6 signatures
29 April 1995

Further to my recent submissions to the Constitutional Assembly, I would like to add the following:

Under the present Bill of Rights, "every person has the right to an environment which is not harmful to health" and which is "conducive to well-being". The widespread, deliberately induced or avoidable suffering of animals in South Africa has infringed our (human) "right to well-being".

Speaking on behalf of the members and supporters of Animal Voice of South Africa, please understand that every aspect of our lives has become tinged with the sorrow we feel for intensively farmed and laboratory animals in the world today. We refer you to ANIMAL VOICE (Summer 1994/95 issue) as well as the Winter 1995 issue which will be sent to you soon, both of which deal with specific areas of ongoing cruelty.

Thus we implore those responsible for formulating the new Constitution to ensure that it incorporates a new dispensation for our animals which acknowledges their essential sentience and their equal birthright to enjoy life's basic gifts.

Further, we implore that the right of animals to protection from man's greed, indifference, ignorance, neglect and cruelty, also be included in the New Constitution.

Lastly, we think it is a grave mistake to devolve and fragment animal welfare to the 9 different provinces. This means that there will be 9 different approaches to animal welfare which can only lead to chaos. We believe the protection of animals is a national concern and that a single standard must apply throughout South Africa. We believe it is of fundamental importance that the rights and welfare of South Africa's animals be in the hands of the highest level of government. We suggest that a subdirectorate of the Department of Agriculture with private sector advisers be created specifically as caretaker of animal welfare.

Louise van der Merwe
EDITOR
Animal Voice of S.A.
(Incorporating Humanity for Hens)
FALCON
FRONT FOR ANIMAL LIBERATION AND CONSERVATION OF NATURE

22 May 1995
RE: LOCUS STANDI AND A FREEDOM OF INFORMATION ACT IN
RESPECT OF ANIMALS AND THE ENVIRONMENT

In making this submission to the Constitutional Assembly, we first of all want to provide you with a brief introduction to our organisation.

Based in Durban, FALCON was formed in 1986 as South Africa's first animal rights organisation. Whilst the organisation is not membership orientated, its membership fluctuates between 600 and a 1000 members from all over South Africa. FALCON is a registered charity in terms of the Fundraising Act.

The following is an abridged version of one of FALCON'S leaflets on animal rights, which will give you an idea of what the ARM strives to achieve and why the new constitution must support the endeavours of the ARM:

"What is the "animal rights" movement (ARM)?

The ARM is an informal coalition consisting of hundreds of organisations with millions of members throughout the world who believe in animal rights and have undertaken to work for an end to all animal abuse and exploitation.

What are "animal rights"?

Animals have the right to a life free from human abuse and exploitation, in circumstances which afford them the best opportunity to live in harmony with their nature rather than according to human dictates.

Exploiting animals in the name of science or education, exhibition or service, religion or culture, or for fashion, food or recreation is to deny them.

Animals have certain basic moral rights, including in particular the fundamental right to be treated with the respect that, as possessors of inherent value, they are due as a matter of strict justice. (Inherent value refers to that value which each individual possesses, in themselves, by virtue of their very existence. All living beings possess it equally and it is completely independent of any other value, real or perceived, which certain humans might attach to other beings.)

Animals, in common with humans, are recognised as having equal inherent value and have a prima facie basic moral right not to be harmed.

There are obviously important differences between humans and animals and these differences must give rise to some differences in the rights that each have. It would be senseless to demand for animals the right to vote, receive an education or have a job. However, animals share with humans some very important basic rights. These include a life
free from persecution or exploitation and the right to live their lives in a manner which affords them the best opportunity to satisfy their basic needs, namely, for security, shelter, food and living space in an healthy environment. As a matter of strict justice animals are also entitled to freedom of choice, movement and association.

Where there are differences in rights these must not be used as the basis for discrimination against animals.

Accepting that an animal has the basic right not to be harmed, then any arbitrary human action which leaves it worse off than before must be considered a harm and an infringement of its right to be treated with respect.

**What is meant by "animal liberation"?**

Although it would be absolutely wonderful if all the abused and exploited animals of the world could be literally liberated at once under circumstances where they could live out their lives as nature intended, this sadly cannot be.

Humans who support or tolerate practises which require the sacrifice of the most important interest of other species in order to promote the trivial interests of their own species are guilty of speciesism, and this is as morally indefensible as the most blatant racism or sexism. Tragically for animals, most humans are speciesists.

"Animals liberation" demands a change in human attitude and behaviour towards animals. In other words, once humans stop seeing animals as "here for us", when those speciesist practises which are now regarded as natural and inevitable, but which infringe animals' basic moral rights, are regarded as intolerable by human society at large, then animals will have been "liberated" from the shackles of unjustifiable human prejudice.

**Who should support the ARM?**

Those who believe it is wrong for animals to suffer the cruelty and indignity of being killed in slaughterhouses and back yards, on fur farms and in gin traps, in driftnets and the bull ring, in research laboratories and student dissection classes; those who object to animals being hunted, caged in zoos or forced to perform in circuses: those who yearn for an end to the apathy and indifference which leads to so much animal suffering - it is they who should be part of the ARM.

Only once animal rights becomes an universally accepted ideology will there by a significant reduction in the abuse and exploitation of animals which now results in horrific levels of suffering and death. Each individual who becomes an animal rightist makes an important contribution towards reducing the abuse and exploitation of animals.

FALCON is also committed to actively promoting the philosophy of "ethical" conservation which differs somewhat from "orthodox" conservation. Whereas the latter seeks to conserve for the sake
of a healthy environment and biodiversity so that humans ultimately benefit, irrespective of the cost to individual animals or other "dispensable" components of the environment, the former conserves in order to do justice to the inherent rights of every individual wild animal and the other components of the natural environment, whilst at the same time doing justice to the rights and basic needs of humans.

It is a sad indictment of our society at present that in order for anything to be taken seriously there must derive from it some benefit to humans. As a consequence those who presently dominate the organisations charged to "manage" the environment with its wildlife, and also the domestic animals which have become a feature of human society, must "necessarily" place the interests of their charges second to any conflicting human interests. Therefore animals specifically, and the environment with its various natural phenomena generally, do not receive adequate protection or just consideration within the current legal framework, not do they within the current interim constitution.

There is an urgent need to review current animal and environmental legislation in order to ensure that it adequately addresses the basic needs and rights of animals, domestic and wild, and also protects the inherent rights of nature.

FALCON has from bitter experience come to the conclusion that those charged with official responsibility cannot always be trusted to act in the best interests of those dependant on them. Individuals and organisations outside of officialdom are a prerequisite for the smooth and honest functioning of any democracy. To fulfil this role adequately civil society must at all times be empowered to act in its environmental self-interest and also in the interests of animals and the environment. This can only be done if individuals and organisations have locus standi with regard to the aforementioned.

Animal rights in particular are not adequately, not even remotely, protected or even addressed in current animal protection legislation. Furthermore, the animals welfare organisations which do have locus standi in respect of animals are not empowered, nor are they inclined, to pursue the issue of animal rights.

It follows that the logical companion to locus standi as argued for here, though not necessarily dependant on constitutional granting thereof, is access to all information which any individual or organisation deems to be relevant to any issue relating to animals or the environment. In other words, the establishment of a Freedom of Information Act is a prerequisite for the smooth and honest functioning of any society and guarantees transparency, both in the public and private sector.

In conclusion then, we contend that it is our constitutional right as individuals and organisations to be constitutionally empowered to act in the best interests of animals and the environment. In this regard the new South African Constitution must adequately address the issue of locus standi for individuals and a Freedom of Information Act on behalf of animals and the environment.

We trust that our contribution and suggestions will meet with serious consideration by the Constitutional Assembly and we look forward to a constitution which is truly representative of all the inhabitants of South Africa, not only the humans.
STEVE SMIT
FOR FALCON
1. The Church Council of Bonteheuwel of the United Reformed Church in Southern Africa at its church council meeting held on Saturday, 13 May 1995, took note of the position around the citizens of this country, especially with regard to religion.

2. The church council would like to point out to you some of the problems, with the request that they be rectified during the drafting of the final Constitution. The following aspects are of cardinal importance to us:

2.1 It cannot be comprehended why the name of the Triune God is omitted from the introduction to the Constitution of the Republic of the democratic South Africa. The Government must realise that the Bible determines that the State was instituted by God and is therefore a servant of the Living Triune God. If the Government expects that the citizens of the country be obedient/submissive to it, then it must realise that God also claims obedience to Him by the government (Romans 13:1-7). Mindful of this we therefore demand that the name of the Triune God be included in the introduction to the Constitution.

2.2 It is an accomplished fact that South Africa is a Christian country and that it should be managed as such at all levels of government institutions (i.e. Nationally, Provincially and Locally).

In view of the preceding, we cannot associate ourselves with an announcement about the broadcasting (radio and television) according to which equal rights or time is allocated to all denominations/religions. The Christians represent 70% of the total population of the country and can therefore lay claim to the full time which is allocated to religious communication in the public broadcasting.

2.3 We are aware of the fact that the Government/Parliament is representative of various other religious groups. Fact remains that this country is a Christian religious country and therefore the name of Christ must be praised and honoured at all times. Other religious groups in the Government would probably vote against this request. They, however, have to bear in mind that in other countries where the Christian religion is not recognised, the Christians there cannot lay claim to equal recognition. Indeed, we have no problems with everyone being dealt with on the same basis at political, social and economical level. Freedom of religion has always been the policy of the country. It does not, however, mean that other religious groups should enjoy equal recognition with the Christian religion. In view of our objection to equal recognition and right in the area of our religion, the Government is required also to honour our point of view.
2.4 Taking into consideration the above-mentioned, it would be appreciated if the government could reconsider its decision with regard to the abolishing of Ascension Day as Christian holiday.

3. We trust that our request will be considered by your assembly in the spirit in which the church council sees it.

MINISTER AND CHAIRMAN
CHURCH SECRETARY/CASHIER
Allow us on behalf of the tenants and the homeless communities we serve and who are directly elected and represented on the OCR's executive and substructures to commend the government on its WHITE PAPER. The housing policy and strategy envisaged marks a dramatic and resolute break from the past undemocratic and apartheid policy. The inclusion of a people-oriented approach deserves further compliment.

On the rights and obligations of tenants and landlords the WHITE PAPER, unfortunately, has made just one or two scant fleeting remarks. We therefore make the following submissions in earnest and with the hope that urgent cognisance is taken of the need to formulate policy, strategy and law regarding tenants and landlords.

Granted that there exists consultation between the state and civil society through the National Housing Forum (NHF) and the eight Joint Technical Committees (JTCs). OCR has established that neither the NHF nor the JTCs have recognised, for argument sake, the existence of tenants. Hence, there appears to be no police development on specific priorities.

It is our humble submission that the state is pursuing its objective of adequately addressing the housing backlog and new household requirement must simultaneously develop a national policy framework regarding the rights and obligations of tenants and landlords. The failure to do so will impact negatively on the State's housing policy and strategy.

The further submissions below form part of our detailed discussion on the rights of tenants in South Africa and submissions made to the Housing Ministry on August 25, 1994.

1. Tenants occupy 1/3 of the country's total housing stock.

1.2 Tenants are in urgent need of security of tenure, improved living conditions and to have related matters attended to swiftly and with justice. This would necessitate an overhauling existing laws governing landlord-tenant relationships.
1.3 The present housing crisis will be not be resolved immediately and it is therefore absolutely necessary to ensure the rights of tenants. Hence, it is necessary to place the responsibility of overseeing and enforcing the rights of tenants with specialised structures. Landlord-Tenant Courts and Dispute Resolution Centres are two such examples.

2. FACTORS NEGATIVELY AFFECTING TENANTS

2.1 The OCR's on going grassroots activities and its contact with bodies nationally, reveal growing problems and hardships which may be summed up in the following major categories:-

2.1.1 AFFORDABLE RENTS: the average family cannot afford the ever increasing rents;

2.1.2 PENSIONERS as well as other tenants are being displaced in increasing numbers; such displacement may be due to conversion or demolition;

2.1.3 EXPLOITATION: Landlords have superior bargaining power over tenants who are:-

   2.1.3.1 forced to pay premiums [goodwill/keymoney]
   2.1.3.2 faced with arbitrary evictions
   2.1.3.3 faced with retaliatory actions when they complain
   2.1.3.4 compelled to accept exorbitant rent hikes
   2.1.3.5 forced in live in substandard, unsanitary and uninhabitable conditions

2.2 Existing housing legislations do not provide adequate protection to tenants. Where protective measures do exist, these are blatantly violated and not enforced by the relevant government departments.

2.3 There is little or no focus on the hardships experienced by tenants which is intensifying because of the socioeconomic conditions. Rentals cannot be written off or reduced. Tenants cannot choose affordable rentals. Neither can they withhold nor reduce rentals. Yet, rentals are calculated on the "open market" when in practical and logical terms, there is no "market-related" basis.

2.4 There are other relevant factors negatively affecting the rights of tenants:-
2.4.1 Government structures are not geared to handle violations of existing residual rights of tenants.

2.4.2 The State Attorneys office is overworked, understaffed and consequently not interested in criminal prosecution.

2.4.3 Existing legislations do not provide easy and reliable access to government departments. Tenants cannot therefore be assured of the enforcement of their rights.

2.4.4 It is too expensive and time consuming for tenants to claim their rights through the present legal system.

3. PROPOSALS

3.1 It is therefore proposed that all interested groups and relevant departments, including the Ministry of (National) Housing, the Ministry of Justice, National Housing Forum, Constitutional Committee, inter alia, be part of the restructuring of tenants'-landlords' rights;

3.1.1 In this respect, the OCR hopes to present recommendations for revised rent control laws and related matters; submit proposals for the establishment of Landlord-Tenant Courts, its structures and recommendations for the rules and procedures relating thereto.

3.2 The following is therefore proposed for the medium to long term [estimated period being 18 - 24 months] which OCR is willing to undertake as a project:-

3.2.1 Developing guidelines for restructuring of rent boards and rent control boards;

3.2.2 Developing a landlord-tenants' Bill of Rights

3.2.3 Developing a legal framework to introduce:-

(a) Landlord-tenants courts
(b) A revised rent control legislation
(c) Dispute-Resolution centres
3.3 **THE FOLLOWING PROPOSALS, IF POSSIBLE, TO TAKE EFFECT IMMEDIATELY:-**

3.3.1 The reconstitution of all rent boards. New members to be appointed through a process similar to the selection, interviews and appointments of members to the SABC board. Such an approach would ensure, interalia, impartiality, competence and efficiency.

3.3.2 The establishment of an ombudsman to investigate tenants' complaints;

3.3.3 The establishment of Dispute Resolution Centres which would.

   3.3.3.1 Arbitrate, mediate and make referrals to courts and welfare institutions. It would take up issues of unreturned rent deposits, unfair withholding by a recalcitrant tenant, need for repairs, arbitrary evictions;

   3.3.3.2 These centres could be an extension of rent boards, staffed by qualified personnel.

3.3.4 Moratorium on exemptions of dwellings from rent control;

3.3.5 Moratorium on the displacement of tenants. Such displacement may be due to proposed/impending demolition, conversion of rented accommodation for non-residential use or "upmarket" refurbishment or property development schemes, such as Sectional Title and Share Block Schemes;

3.3.6 Moratorium on arbitrary evictions and evictions based on retaliatory and discriminatory reasons.

3.3.7 The "freezing" of all rentals for a period of 18 months where exploitation exists;

   *[Explanatory Note: The reconstituted rent boards or an ombudsman could investigate tenants' complains.]*

3.3.8 The introduction of rental subsidy for tenants experiencing hardships. These will include pensioners and the unemployed.
4. Legislation is needed urgently to protect tenants from racial discrimination.

5. Recognition, by law, of all properly constituted democratic tenants' committees.

[Explanatory Note: Most tenants' committees are ignored or dismissed by landlords as not having locus standi. Often, punitive action is taken against members of tenants' committees.

Sayed-Iqbal Mohamed
Chairperson

in the service for better & just living conditions
February 28, 1995
R. B. M. P. CONSORTIUM
BUILDING & CIVIL (PTY) LTD

17/06/1995

Fraud, Law and Case No's 2657/92, 2541/94 and 10668/94

As can be seen by the letter attached, Annexure "A", the attorneys have not done their work properly.

We request that all attorneys should only be paid once they have completed a case. In this way, all of the truth can come out and the attorney will also do all of his work properly by looking at all of the documentation.

Nobody is forced to sign a document at the time of an agreement. If both parties sign an agreement, good business practice is being applied as both parties are shown to be in agreement, otherwise signatures would/should not have been applied.

An attorney, who is aware of the above, should not agree to certain methods and then not apply them.

We refer to the Van Lingen, Medalie & Francois case, as monies were taken from R.B.M.P. Consortium and charged to an account.

The only recourse was to negotiate with an attorney by advising him of the situation and he then allowed the case to continue. The attorney, being more knowledgeable, should have done his part, but he did not as he did not confirm the agreement. Especially as the latter party, who had been involved with so many attorneys, did not wish to cause more problems.

Moreover, when issues were pointed out to D. Francois, he did not wish to acknowledge his mistakes. We are all part of the same God and so we should have then come to an understanding. It was K. R. McDonald who had made the original mistakes and D. Francois was unable to see these mistakes as he was not aware of K. R. McDonald's cover-up and thus could not function properly. A person in K. R. McDonald's position should not do that kind of wrong to another.

When monies are taken and one is unable to pay, why should one not make an agreement with an attorney when he knows that it is all offer and acceptance. This is not to fraud someone of their belongings but to work within the framework of the structure being fair and reasonable so that when the agreement is concluded, we are all then put in the situation that we should have been in, had K. R. McDonald not done what he had done.

We, however, do sympathize with K. R. McDonald and thus he should be given another chance to start anew, with a new concept of moving forward as opposed to just taking that which is not rightfully his.
Moreover, we went up against Van Lingen, Medalie & Francois as they did not do their work and continued to confirm that they would falsify documents (as appeared) into court, see "Annexure B". Should they as attorneys require the matter to continue, they would be able to continue the judgement and associated proceedings for 30 years.

We believe that no matter should be allowed to continue for 30 years. If documentation is found that proves the other party is wrong, then this evidence should be brought to light in the shortest possible time.

We point out, with regard to the above, that when there is a problem with any issue then the courts should hear these injustices immediately as we cannot allow the attorneys to do anything they want and get away with it. They should be penalized when they make mistakes.

We believe that when the courts are in process and a case is being heard, the evidence must be kept in court and remanded to the next day or two, not weeks from the last hearing. We have been continually at court for the past year over this case. The magistrate keeps allowing that the case be heard the next time or that a new case be opened over the same issues that are in process and still nothing is done about the original case i.e.: the K. R. McDonald matter.

We believe that when an issue such as ours arises and the attorneys do not sign to go before the media, then the media should have a right to publish the issue. Certain attorneys and other people within our law, hide in the law and thus weasel their way around the law at another's expense.

When a case is opened as a result of another case, then why does the law not look at all of the issues relating to the original case instead of separating documentation. One cannot be accused of defamation if what has been said or done can be proven true by the documentation. If nobody will look at the documentation because we are not attorneys, then how come we are unable to have an attorney present from the start of the case if we are representing ourselves? How is one able to explain the truth when the documentation is not even looked at? This is defamation in itself, caused by the attorneys who are meant to represent the law and be honest.

No person should be allowed to represent himself if he is not an attorney or advocate. This would be unfair and unethical as the attorneys can get away with technicalities, which are not the true facts of the case, if the magistrates do not look at all of the information involved.

We also believe that a separate channel should be opened on television for this type of argument, so that it can be known, through the media, the type of things people do to others. When people are looked at properly, they certainly will not want to do harm to others. The attorneys will realize a means of truth to follow, so that they are not brought before the media and seen for who they really are.

All documentation should be handed to a person for signature when required to attend court and not just put in an open postbox as it could be blown away or eaten by the dog, never to be seen or known about. This is not a fair way of obtaining judgements by an attorney who has something to hide. It should be in the open and realized by the magistrate as well.
The local police should or could be used to deliver certain documents for signatures during court procedures. If signatures are unobtainable during the day, they could operate during the early hours of the evening and morning. This would increase the police staff and give unemployed people work.

The Revenue should be one department, so that the money taken by the Receiver is accessed as an amount taken as one sum over and above all remuneration, not taken as V.A.T. then P.A.Y.E. then JSB, etc. Make it easy. Before a contract is done, the amounts required by the Receiver should then be recorded on the contract. Let us be realistic and not of the attitude that many small claims make a large claim. This is a devious manner of which all of the departments are guilty.

We trust that this letter will help you to sort out the problems needed to be sorted out immediately.

R. B. McCamon
Director

[editor's note: Annexure "A" & "B" are unscannable]
PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

13 April 1995

SUPPORT FOR THE FREEDOM OF HEALTH CHOICE INITIATIVE; PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

This letter serves to support in principle the campaign initiated by the Gaia Research Institute and the submission from The Cape Metropolitan Mental Health Forum.

We appreciate the complexity of attempting to transform the legal constitution-making apparatuses from the Apartheid ideology to the new dispensation and would also wish to add our organisation's appeal for rigorous and systematic impact assessments of current amendments to existing bills to ensure that these too are brought in line with the new constitution. A number of anomalies exist from the old order which require immediate modification for the new to be built upon.

RACHEL PRINSLOO
President: PsySSA
REPORT BY THE V.L.U.(WOMEN'S AGRICULTURAL UNION). SOEKMEKAAR

The Soekmekaar VLU are in support of the death penalty for the following crimes:

1. Murder
2. Rape under certain circumstances

JUSTIFICATION:

Although the right to live was guaranteed by the provisions of section (9) of the interim Constitution, this is not absolute, particularly in view of section 33. Should the death penalty be retained the two sections could not be reconciled.

If it is true that following 27 April 1994 South Africa adopted a fully democratic system, and there should be no doubt about this, the decision about the retention of the death penalty should not be taken by politicians, Judges of the Constitutional Court, academic or other pressure groups, but by voters themselves.

The major increase in crime alone, particularly immediately before and after the April 1994 election, bears evidence of the fact that sentences imposed by courts as well as liberalised management of prison services are drastically wayward.

The fact whether the Death Penalty is a deterrent or not is of no consequence. The death penalty should be imposed following a conviction of murder where circumstances necessitate the sentence as suitable. Facts to be considered should be determined by the courts themselves.

The Appeal Court is indeed the final guarantee that a condemned person's rights were not affected. Those in favour of the abolition of the death penalty point out that numerous Western countries have abolished the death penalty, by the same token not admitting that there are many countries which have re-introduced the death penalty or are about to do so. The same applies to various American States which did not retain the death penalty.
Arguments that the death penalty were imposed on racist grounds, are also not convincing; South African Court Reports would prove that no pro-rata inequality exists.

It is furthermore unacceptable to argue that the Government as Executive authority should not be saddled with the killing of its own citizens. The historic fact is that Governments for the sake of political and ideological gain are sending their own totally innocent people in the name of Soldiers to their death or potential death. Can this anomaly be explained?

We believe therefore, that only one criterium should be applicable, i.e. one person killing another should, under certain circumstances, pay with his own life as the only suitable punishment. We wish to emphasise that we believe that only the inhabitants of this country should take the final decision regarding this major issue.

It is furthermore a social fact that any community consists of some members who would not hesitate to kill a fellow human being. According to overseas studies, such persons tend to commit murder more frequently. To argue therefore that a person found guilty of murder would perhaps "rehabilitate", is to put the interests of the individual before those of the community.

According to our information in the case of Furman versus Georgia (1992) 408 US 239 (majority 5 - 4) it was said, "that the death penalty in most states would be unconstitutional because it constitutes cruel and inhuman punishment. The imposition of the death penalty does not conform to the requirement that punishment must be evenhanded, nonarbitrary, non-selective nor spottily imposed on selective groups. It was found to be degrading to human dignity. There is no reason to believe that the death penalty serves any penal purpose more effectively than the less severe punishment of imprisonment."

Apart from the fact that we do not agree with this part of the verdict, the fact that following this verdict the death penalty was re-introduced in states of the USA is most illuminative.

In conclusion it is our firm belief that the constitution should specifically provide for the death penalty to ensure that no one would hide behind the conditions of the constitution.
(Mrs) L BOTHA
CHAIRPERSON: SOEKMEKAAR VLU
Following an invitation received from the Constitutional Assembly (CA) for inputs into the final constitution presently being drafted, the South African Chamber of Business (SACOB) commissioned Professor IM Rautenbach of the Department of Constitutional Law at the Rand Afrikaans University (and a technical adviser to the CA) to examine and re-articulate earlier SACOB policy stances, and submissions made during 1993 to the Multi-Party Negotiating Process, World Trade Centre, Kempton Park, and to deal with certain technical issues.

SACOB's members were also invited to submit comments, while certain SACOB Standing Committees and Working Groups identified problem areas and issues to be addressed.

The attached document, prepared pursuant to receipt of various comments and inputs and approved by SACOB's Board of Management, is now submitted to the Constitutional Assembly and its various organs for consideration.

RWK PARSONS

DIRECTOR-GENERAL
4 April 1995

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ANNEXURE:

Matters arising from Sacob's oral evidence

on 20 February 1995

EXECUTIVE SUMMARY

1.  INTRODUCTION
The stake of business in the Constitution-making process arises from various considerations, and especially because the primary economic freedoms including rights of ownership and freedom to engage in business activity - supply the 'basic needed for wealth generation and are, as such, fundamental prerequisites for the, material upliftment of humankind.

SACOB sets out to identify constitutional principles which would enable the business community to make its full and legitimate contribution to the welfare and prosperity of all sectors of South African society.

The Constitutional Principles contained in Schedule 4 of the Interim Constitution, provide for basic points of departure.

2. THEME COMMITTEE I

2.1 Democracy

SACOB fully supports the retention and implementation of sections in the Chapter on Fundamental Rights dealing with a multi-party democracy, including supremacy-of the Constitution and its effective entrenchment.

SACOB nevertheless calls for

clarity that all organs of the state are to be bound by the Constitution, not only the legislature and executive;

retention of entrenchment provisions requiring at least a two-thirds majority approval of amendments to the Constitution;

consideration of alternative entrenchment provisions involving referenda, and/or which require the prior approval of, or consultation with, provincial legislatures to a greater extent than at present; and

conferment of inviolate status on other principles regarded as fundamental to our constitutional dispensation, in addition to the existing Constitutional Principles contained in the Interim Constitution.

SACOB also calls for clarity and certainty on the subject of judicial control.on compliance with all provisions of the constitution.

On the subject of accessibility to government processes, SACOB favours the retention, as far as possible, of certain institutions, commissions and councils currently provided for by the Interim
Constitution together with possible entrenchment of relevant principles.

2.2 Character of State

SACOB notes that the character of the State will be determined by matters being dealt with by the respective Theme Committees.

3. THEME COMMITTEE 11

Separation of Powers

SACOB fully supports separation of powers between the legislature, executive and judiciary with the appropriate checks and balances; notes that conventional forms of legislative and judicial control of executive action are provided for; and supports their retention in the final Constitution.

4. THEME COMMITTEE III

4.1 The nature of the Provincial System and Local Government

SACOB strongly reiterates its support for a system embodying principles of federalism, with maximum original powers being devolved to provincial and local levels of government to facilitate better government closer to the people and more responsive to their needs.

However, SACOB considers that such a system can and should co-exist with national uniformity in regard to certain economic and infrastructural matters, including a unified companies code, unrestricted trade and movement of people and goods across provincial boundaries, centralised control of interprovincial communications, etc.

Recognising the present problems inherent in rationalising existing and establishing new provincial and local government structures, and mindful of the fact that the shape of the final provincial and local dispensations will depend on what the new provinces and local governments achieve for themselves, SACOB suggests that completion of the relevant sections of the final Constitution be dealt with at a later stage should this be legally and constitutionally possible.

Insofar as local government is concerned, SACOB expresses doubt as to whether present constitutional provisions relating to local autonomy are
adequate. It urges that local government constitutional issues be examined afresh.

4.2 Specific Problem Areas

Specific problem areas identified to be addressed include

4.2.1 The Supply of Electricity -

4.2.2 Consumer Protection Legislation and Legislation Affecting National Business Interests; and

4.2.3 Road Traffic Legislation

5. THEME COMMITTEE IV

5.1 Constitutional Principle 11: An entrenched Bill of Rights

5.1.1 General Principles

In unconditionally endorsing the Constitutional Principle which guarantees that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, SACOB cautions that deviations from those enshrined in the Interim Constitution could elicit negative local and international reaction.

In SACOB's view, appropriate socioeconomic goals which depend on affordability and which cannot realistically be made justiciable, can be accommodated in a Preamble to the Bill of Rights, or as 'Constitutional Directives of Social Policy'.

Furthermore SACOB cautions that rights extending to "horizontal" relationships, i.e. between one citizen and another, should be limited and quite specific in their application, especially in view of the availability of so-called "class actions".

SACOB urges retention of existing rights of juristic persons, and rights relating to labour relations and property, while pressing for clarity on existing (and possibly conflicting) constitutional limitations on the right to freely engage in economic activity.

5.1.2 Property Rights
SACOB strongly re-iterates its views that rights of ownership in property, widely recognised as an essential element for an effectively-operating economy, must be clearly and unambiguously enshrined in the final Constitution in the interests of sustained economic progress and job creation.

6. THEME COMMITTEE V

6.1 The relationship between different levels of the court

SACOB supports the introduction, and continued existence, of the Constitutional Court as presently structured, together with the provisions relating to the structure, powers and functions of the respective divisions of the Supreme Court.

7. SUB-THEME COMMITTEE TWO OF THEME COMMITTEE VI

7.1 Financial Institutions and Public Enterprises

SACOB submitted this section of the submission to, and gave oral evidence before, the sub-Theme Committee on 20 February 1995.

SACOB believes that "independence within, but not of the system", is needed for the Reserve Bank, and that similar considerations apply to the Auditor-General and the Financial and Fiscal Commission (FFC).

The Reserve Bank should still be accountable to Parliament - through public hearings - and its policies co-ordinated with fiscal policy. However, this can be achieved without sacrificing the Bank's authority.

Constitutional amendments are capable of improving the revenue collection capabilities of the Inland Revenue and Customs and Excise Departments.

8. SUB-THEME COMMITTEE FOUR OF THEME COMMITTEE VI

8.1 Security Apparatus

the South African Police Service to be decentralised into separate, autonomous provincial police forces headed by a Commissioner responsible for operational control, and accountable to an independent and apolitical police board or committee.
the establishment of a relatively small national police service with some line
functions, headed by a National Commissioner, accountable to an
appropriate Minister, with no direct responsibility for day to day policing,
but responsible for specialised and support services to other police services;

9. CONCLUSION

The submission concludes by referring to checks and balances which are needed to
secure preferred outcomes, especially in the concepts and institutions discussed in
the SACOB input.

- 1 -

A BUSINESS PERSPECTIVE ON A FINAL CONSTITUTION FOR SOUTH
AFRICA: SACOB'S SUBMISSION TO THE RESPECTIVE THEME AND
SUB-THEME COMMITTEES OF THE CONSTITUTIONAL ASSEMBLY

1. INTRODUCTION

1.1 At the outset the South African Chamber of Business [SACOB] wishes
to reiterate the stake of business in the constitution-making process. It
is our broad view that business has a vital interest in the outcome of this
process, more so in a country which still has to establish a final track
record in a highly competitive global environment.

1.2 The stake of business, as indeed the stake of society as a whole, derives
from the following important considerations :-

    The primary economic freedoms - including rights of ownership
    and freedom to engage in business activity - supply the 'basic
    chemistry' needed for wealth generation and are, as such,
    fundamental prerequisites for the material upliftment of mankind.

    · Business and investor confidence require as much broad
      predictability as possible in the social and political spheres.

    · The business community would prefer to see a future
      constitutional dispensation which upholds certain key values.

    · Business perceptions of the political system are important and
      have a significant impact on business confidence and hence on
      the longer term capacity of the economy to grow and create
      jobs.
The final constitution must also inspire confidence in foreign investors and bankers. With the abolition of the finrand and the gradual opening of South Africa to the world economy, foreign investors will look carefully at the economic aspects of the final constitution. The search for a final constitutional order is not only of importance to those who live here, but also for those from other countries who do business here.

1.3 It is against this background of financial, political and overall economic stability, predictability, confidence and global compatibility that SACOB wishes to make submissions on some aspects and principles it would like to see embodied in a final constitution.

1.4 In making this submission SACOB does not wish to propose or formulate a comprehensive constitutional model or system, but merely to advocate one which promotes or protects certain principles which would enable the business community to make its full and legitimate contribution to the welfare and prosperity of all sectors of South African society.

1.5 This does not mean that SACOB, in its approach to the final constitution or components thereof, believes that a constitution in itself provides all answers. However, the constitutional framework does make its significant contribution to stability within accepted norms.

1.6 It must be realised that a legitimate and stable constitutional order which is ultimately to be embodied in a constitution is in itself not guaranteed by such a constitution. Constitutional and political stability is very much the aggregate of the acceptance and legitimacy as well as the social and economic well-being of a society, coupled with traditions of civility, responsibility and tolerance.

1.7 Seen in that light, a constitution is more in the nature of a durable seal on an existing state of stability and peace than a prime instrument to bring about tranquillity in times of turmoil and unrest. A constitution accepted by all, and legitimate in its operation, can achieve much to promote progress, unity and advancement and to create a favourable climate for economic growth. It cannot, however, in itself create these positive conditions; should these conditions fail to exist, no constitution, not even one with the best intentions and most solid principles, will stand the test of time.

1.8 One of the most important preconditions for establishing a stable constitutional order is a sound economy and a favourable economic climate. It is accepted that political and social stability are closely bound up with economic stability.
1.9 A final constitution must not, via a system of rigidly devised state powers, limit entrepreneurial initiatives or worse, jeopardise existing rights and safeguards to such an extent that government under that constitution is perceived as a threat.

1.10 During the transitional period, up to the coming into force of the constitution presently being drafted, predictability and consistency have, to a great extent, been catered for by the inclusion of the Constitutional Principles in Schedule 4 of the Interim Constitution (Constitution of the Republic of South Africa Act No. 200 of 1993). These Principles have to be incorporated in the final constitution and our comments focus mainly on how they can be accommodated in maintaining predictability and consistency. References to the provisions of the Interim Constitution are mainly for the purpose of making recommendations on how the Constitutional Principles should or should not be provided for in the final constitution.

1.11 While this submission deals mainly with broad principles and issues, certain specific and important topics, mechanisms and institutional structures have been addressed in the light of actual and perceived problems experienced or anticipated. We may wish to make further additional or supplementary submissions as and when deemed necessary.

1.12 SACOB would welcome the opportunity of giving oral evidence before the respective theme and sub-theme committees in support of, or in elaboration on its views.

1.13 We have already addressed Sub-Theme Committee Two of Theme Committee VI on the matters detailed in section 7 of this memorandum. Attached as an Annexure is SACOB’s response to additional issues raised by that sub-theme committee.

2. THEME COMMITTEE 1

2.1 Democracy

2.1.1 SACOB believes that a multi-party democracy is essential for political stability and it fully subscribes to Constitutional Principle VIII contained in Schedule 4 of the Interim Constitution reading :-
"There shall be representative government embracing multiparty democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation. "

2.1.2 In our view, multi-party democracy is satisfactorily secured by the following elements:

2.1.2.1 The entrenchment of political rights

The present Interim Constitution adequately secures these rights. For example, there are provisions for universal, adult suffrage (ss 6 and 21 (1)), freedom of belief (s 14), freedom of expression (s 15), freedom of assembly, demonstration and petition (s 16), freedom of association (s 17), rights relating to political parties and political activities (s 21 (1)), and access to public office (s 21(2)). These rights could be retained in their present form in the final constitution.

2.1.2.2 The entrenchment and supremacy of the constitution

This principle is enshrined in Constitutional Principles IV and XV. In terms of Constitutional Principle XVIII provisions in the Interim Constitution relating to amendments to the powers, boundaries and functions of the national government and provincial legislatures, will be retained.

2.1.2.3 The present confusion regarding the wording of Constitutional Principle IV [the constitution shall "be binding on all organs of state at all levels of government and s7(1) of the Chapter on Fundamental Rights (the section "shall bind all legislative and executive organs of State" underlining) should be resolved. In the interests of certainty and greater clarity, we believe that the constitution should make it clear that all organs of state are bound.
2.1.2.4 The supremacy of the constitution and its effective entrenchment are of cardinal importance for securing a stable and predictable political environment. At the very least, the two-thirds majority requirements should be retained.

2.1.2.5 In addition SACOB proposes that it would be desirable to carefully consider the amending provisions contained in certain constitutions which involve the electorates in referenda, and/or which require the prior approval of, or consultation with state, provincial or regional legislatures to a greater extent than what is provided for in the present constitution.

2.1.2.6 Reference has already been made to the stabilising effect of the Constitutional Principles in the Interim Constitution. In view thereof serious consideration should also be given to identifying certain principles regarded as fundamental to our constitutional dispensation, and which should then also be accorded an inviolate status.

2.1.2.7 Judicial control on compliance with all provisions of the constitution

This principle is universally regarded as an essential prerequisite to sustain a multi-party democracy, and is contained in s98(2) of the Interim Constitution. Constitutional Principle 11, however, only refers to a "justiciable" Bill of Rights. From the entrenchment of all the provisions of the constitution as envisaged in Constitutional Principle XVIII, it would follow that all provisions of the final constitution will have to be subject to judicial control. Any uncertainty in this regard should be eliminated.

2.1.2.8 Accessible government processes

It is of prime importance to business that constitutionally guaranteed opportunities be provided for individuals, institutions and special interest groups to have an input into the activities of policy-planning agencies and legislatures. The Interim Constitution provides for advisory inputs by a number of institutions, for example, the Judicial Service Commission, the Public Protector, the Human Rights Commission, the Commission on Gender Equality, the Commission on Provincial Government, the Council of Traditional Leaders, the Financial and Fiscal Commission, and the Public Service Commission. These institutions should, in our view, be retained as far as possible.
2.1.2.9 In addition, we believe that serious consideration should also be given to entrenching certain principles relating to the transparency of, and public inputs into, legislative processes in terms of the final constitution.

2.1.2.10 Freedom of Information

Constitutional Principle IX, emphasising the need for freedom of information to achieve "open and accountable administration at all levels of government," is presently the subject of proposed legislation which could also impact directly on the private sector. SACOB may wish to make a supplementary submission on this topic in due course.

2.2 Character of State

2.2.1 The character of the State is determined by various other matters that will be attended to by the Theme Committees, for example, Democracy, Separation of Powers, the Bill of Rights, and the Relationship between Levels of Government.

3. THEME COMMITTEE 11

3.1 Separation of Powers

3.1.1 SACOB fully endorses Constitutional Principle V] which provides:-

"There shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

3.1.2 All conventional forms of legislative control of the executive action are provided for, or can be accommodated by the provisions of the Interim Constitution. These include, for example, approval of the budget, tabling of subordinate legislation, question time, interpellations, reports of the Auditor-General, office of the Public Protector, and parliamentary committees. Judicial control of compliance by all executive bodies and legislatures [including parliament] is provided for. All these features should be retained.
4. THEME COMMITTEE III

4.1  The nature of the Provincial System and Local Government

4.1.1  SACOB has always been strongly in favour of a political system in which power is devolved as far as possible to respective levels of government. This not only recognises, and accommodates, inter-regional cultural, demographic and other diversities, but also brings original and effective power closer to the people governed.

4.1.2  We are indeed aware of the inherent danger that simplistic debates on whether a final dispensation should embody a "unitary" or "federal" system of government could divert attention from the primary task of evolving a system best suited to South Africa’s needs and problems. We nevertheless wish to reiterate our firm conviction that the final constitution should embody certain principles of federalism with maximum original powers being devolved to provincial and local levels of government, with secure provincial boundaries, functions, powers and equitable provincial access to public revenues. This would in turn enhance predictability through the self-balancing nature of the system and facilitate government closer to the people and responsive to their needs.

4.1.3  At the same time, it should be emphasised that such a system should not detract from the necessity for, inter alia, a single currency and central bank, a unified companies code and companion securities code to provide for efficient operation of the single capital market, unrestricted trade and movement of people and goods across provincial boundaries, centralised control of inter-provincial communications, including roads and railways, and the unqualified application of the National Bill of Rights to all provinces.

4.1.4  Since 27 April 1994 South Africa has embarked on an imaginative programme in replacing the existing racially-based structures at the provincial and local levels of government. It is too early to assess the success or otherwise of this endeavour and we believe that the reform initiatives in this extremely complex field should be afforded an opportunity to run their course, should this be legally possible.
4.1.5 It is obvious that the shape of the ultimate provincial and local government dispensations will depend on what the provinces and local governments achieve for themselves. It is therefore imperative to expedite the consolidation and rationalisation of provincial and local government administrations (which include the former provincial administrations, those of erstwhile TBVC states and self-governing territories and regional-type structures such as Regional Services Councils [RSCS] and Joint Service Boards [JSBS]), into efficient and effective structures.

4.1.6 Although satisfactory progress has been made in many provincial and local government areas, little or no progress has been made in others.

4.1.7 There appear to be difficulties in reconciling the work programmes of the Constitutional Assembly and the Commission on Provincial Government, which in terms of the Interim Constitution, is obliged to make recommendations to the Constitutional Assembly concerning a final provincial system.

4.1.8 Furthermore, with local government elections scheduled for 1 November this year, it will still take some time before new local governments will be able to fully function as effective, cohesive bodies. Many "teething" problems are likely in the early stages of their operation.

4.1.9 We accordingly believe there is a strong case to be made for dealing with future provincial and local government dispensations at a later stage should this be legally and constitutionally possible. We understand that legal advice on this issue is being sought. In our view the Interim Constitution should, if necessary, be amended to cater for such a postponement.

4.1.10 While it is accepted that the initial costs involved in setting up final provincial and local structures will be high, we firmly believe that in the longer term they will lead to improved and more cost-effective utilisation of financial and other resources, and better government, provided functions are properly defined and co-ordinated.

4.1.11 There is no doubt that the direct involvement of affected persons with local knowledge within a provincial or local government area leads to better prioritisation of development and other needs. Shorter lines of
communication invariably result in more expeditious and informed decision-making, increased administrative efficiency and motivation, greater creativity and a more effective application of skills, which in turn should reduce the overall cost of government.

4.1.12 However, generally speaking, and in principle insofar as provincial government is concerned, SACOB broadly endorses the principles contained in Constitutional Principles XVI to XXVI I. To the extent that the relevant Constitutional Principles are already provided for in the Interim Constitution, SACOB recommends that there should be as little as possible deviation from the present provisions.

4.1.13 We wish to point out that while Constitutional Principle XIX inter alia provides that the provincial level of government shall include exclusive and concurrent powers, S126 of the Interim Constitution as presently worded, "A provincial legislature shall...... have concurrent competence with Parliament........ does give rise to doubts as to whether provinces do indeed have such exclusive legislative powers. In our view these doubts must be resolved in the final constitution.

4.1.14 SACOB has consistently advocated the entrenchment of the status and autonomy of local authorities in accordance with the principle of maximum devolution of power to local levels. While S174 of the Interim Constitution provides that a local government shall be autonomous and "within the limits prescribed by or under a law" (of a competent authority - our underlining), shall be entitled to regulate its affairs, Constitutional Principle XXIV merely provides that a "framework for local government be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both".

4.1.15 In our view neither of the provisions referred to above adequately provide for local autonomy in the desired sense, and have the propensity to perpetuate the unsatisfactory situations catered for in the old Local Government Ordinances and other statutes presently still in force, where local government is still subject to impeding, and, in our view, unwarranted intervention by higher levels of government via costly and largely unproductive bureaucracies.

4.1.16 SACOB wishes to renew its earlier representations for the introduction of a corporate vote, should this be possible from a constitutional point of view. The business community, as collectively the largest contributor to local coffers and a principal
stakeholder in local government, has consistently held the view that a corporate vote should be available to its members in respect of primarily commercial and industrial areas which generate a major portion of local government income. As the position now stands, only natural persons, namely the residents of those areas comprising mainly flat or apartment dwellers, will be able to elect councillors representing business districts, thereby perpetuating an anomaly which existed for many years in some parts of the country, while creating one which did not previously exist in others.

4.1.17 In conclusion, we strongly urge that local government constitutional issues be examined afresh with a view to securing and entrenching structures which can be closer, accountable and more responsive to the wishes and needs of the people they serve and represent.

4.2 Specific Problem Areas

From comments and inputs elicited from within its broad membership, and in the course of its participation in various fora, SACOB has identified some practical constitutional issues and problems arising from the Interim Constitution which we believe will have to be addressed, and resolved as far as possible, in the drafting of the final constitution. These include:-

4.2.1 The Supply of Electricity

4.2.1.1 In terms of s126(1) and Schedule 6 of the Interim Constitution, the supply of electricity is outside the legislative capacity of the provinces.

4.2.1.2 Accordingly, pre-April 1994 provincial laws authorising local government bodies are, except for the transitional arrangements contained in the Interim Constitution, ultra vires the powers of the provinces. Provincial ordinances authorising local government bodies to supply electricity accordingly remain valid until they are repealed or amended by a competent authority, which, in the case of electricity, cannot be the provinces.

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4.2.1.3 However, in terms of sl 75 of the Interim Constitution, the powers, functions and structures of local government are determined by a competent authority, which in terms of s126(1) and Schedule 6, is the province.

4.2.1.4 However, sl 75(3) provides that a local government shall, [subject to a "means test"] and to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction, to electricity. This has given rise to the anomalous situation that while provinces have legislative competence over local government affairs, they have no legislative powers in regard to electricity matters, while local governments are given certain powers in regard to electricity supply.

4.2.1.5 The situation is further complicated by certain omissions and perceived deficiencies in the Local Government Transition Act 1993 relating to electricity.

4.2.1.6 We would accordingly urge that these matters be addressed and satisfactorily resolved in the course of drafting the final constitution, bearing in mind the fact that electricity is the country's most important source of energy.

4.2.2 Consumer Protection Legislation and Legislation Affecting National Business Interests

4.2.2.1 Having had sight of the submission made by ABSA Bank Limited, SACOB shares the concerns expressed, presumably on behalf of the banking sector, on the need for uniform consumer protection legislation as far as possible.

4.2.2.2 Examples cited include various versions of the Usury Act, the Insolvency Act, the Companies Act and the Credit Agreements Act, which apply in different parts of the country, whereas other pieces of legislation of major importance to those in the business of granting credit, such as the Close Corporations Act and the Security By Means of Movable Property Act do not apply in many areas of the country. Furthermore, regulations in force under the relevant legislation also vary from area to area.
4.2.2.3 These laws not only affect the validity of security taken and the validity of agreements in terms of which credit is granted insofar as the banking sector is concerned, but also impact on the entire credit industry in South Africa, which is a prime generator of economic growth and employment opportunities.

4.2.2.4 As with the banks, major furniture, appliances and other organisations granting credit are in the main branches or subsidiaries of national organisations, who face considerable additional costs and inflationary pressures in complying with different legal systems requiring diverse sets of documents, instructions, training manuals and the like.

4.2.2.5 Similar considerations also apply in respect of laws affecting national business interests such as, for example, customs and excise, liquor and insolvency legislation, where uniformity is also vitally necessary.

4.2.2.6 Other business legislation, such as that relating to trading hours, informal trading etc., can, and should, be devolved to provincial and/or local levels.

4.2.2.7 To sum up, we believe that in the interests of efficient and effective operation of the economy, consumer protection and other legislation central to the operation of most businesses, should be uniform throughout the country.

4.2.2.8 While the present constitutional provisions relating to inter-provincial commerce may arguably be interpreted to apply to consumer legislation, we believe the final constitution should, in the interests of certainty, be more specific on this issue.

4.2.3 Road Traffic Legislation

4.2.3.1 SACOB broadly supports the views submitted on behalf of ABSA Bank Limited on the need for, and advantages inherent in uniform road traffic legislation, with particular reference to the issues relating to the registration and transfer of vehicles, and the need for a centralised national registration system to assist in combating the massive vehicle theft problem in South Africa.

4.2.3.2 Our basic point of departure is, however, that national uniform road traffic legislation should apply to problems and
issues of commonality to all provinces, which would include uniform road signage, provisions relating to fitness and safety of vehicles, vehicle overloading and serious-moving violations.

4.2.3.3 Other matters such as parking provisions, stationary violations and roadside advertising for example, normally within the purview of local government by-laws and regulations, should be devolved to local levels.

4.2.3.4 These views are in line with those submitted by SACOB to the Department of Transport at the latter's request.

5. THEME COMMITTEE IV

5.1 Constitutional Principle 11: An entrenched Bill of Rights

5.1.1 General Principles

5.1.1.1 SACOB unconditionally endorses Constitutional Principle 11 which guarantees that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties. We also subscribe to other Constitutional Principles that have a bearing on the contents of the Bill of Rights in the final constitution. These include citizenship, political rights, the equality principle and affirmative action, the binding effect of the Bill of Rights, judicial control, the right of access to information held by the state or any of its organs at any level of government, freedom of opinion, expression and association, collective rights in forming, joining and maintaining organs of civil society, and the rights of employers and employees. (Whether the right of access to information contemplated in the Interim Constitution should be extended to sectors other than the public sector, as contemplated in draft legislation currently being prepared, is, to say the least, highly debatable, and may, as stated before, be the subject of a separate submission).
5.1.1.2 Regarding appropriate socioeconomic goals which depend on affordability and therefore cannot realistically be made justiciable, SACOB would support their inclusion in the Preamble of The Bill of Rights or as Constitutional 'Directives of Social Policy'.

5.1.1.3 The primary purpose of the Bill of Rights will be to afford protection for citizens in respect of their relationships with the State. Any rights extending to the so-called 'horizontal' relationships, i.e. those between one citizen and another, should be limited and quite specific in their application. This is the more critical in view of the implications of section 7(4)(b) of the Interim Constitution, providing as that does for relief under the Bill of Rights to be sought, not only by those whose interests may be directly affected, but also by a person or persons acting as a member of or in the interests of a group or class of persons; or a person acting in the public interest. It would, inter alia be inappropriate for such so-called 'class actions' to be provided for in respect of the 'horizontal' situations.

5.1.1.4 Although Constitutional Principle 11 obliges the Constitutional Assembly to only give "due consideration," to the rights in Chapter 3 of the Interim Constitution, the contents of Chapter 3, generally speaking, contain a "standard" Bill of Rights comparable with other national and international human rights instruments. Drastic deviations will most certainly elicit negative local and international reaction, and amendments which could be perceived as derogating therefrom should be approached with the utmost caution and circumspection, bearing in mind that the Constitutional Court will be the final arbiter.

5.1.1.5 In reflecting the concern of the business community and of present and potential investors in the country's productive resources, SACOB has repeatedly and consistently called for acknowledgement of, and for the necessary emphasis to be placed on, economic issues and rights.

5.1.1.6 S7(3) refers to the rights of juristic persons, and we strongly urge their retention in the final constitution. Juristic personality is fundamental to business activities, both nationally and internationally, and any express or tacit exclusion of these rights would have disastrous consequences for business and investor confidence.
5.1.1.7 Although the right to freely engage in economic activity in s26(1) of the Interim Constitution overlaps with various other rights in Chapter 3 [for example the rights relating to property, labour relations, freedom of movement, expression, association, etc], SACOB nevertheless strongly advocates its inclusion, as it provides a firm basis for freedom of occupation and freedom of contract.

5.1.1.8 The formulation of s26(2) is however cause for some concern. While SACOB is not opposed to the enumeration of public interests in respect of which the protection and promotion of the right may be limited - the courts will in any case certainly identify such interests for purposes of applying the general limitation clause contained in s33 - there is nevertheless uncertainty as to the exact meaning and impact of the subsection. It could arguably be interpreted as overriding the essential requirements of the general limitation clause (s33), namely that rights may be limited only by "laws of general application", that limitations must be "reasonable", and that the "essential content of rights may not be infringed". Such an interpretation would clearly be unacceptable, and would in any event cause considerable confusion on account of the overlap with other rights which are subject to the general limitation clause.

5.1.1.9 In the interests of certainty and equity we would strongly urge that in the final constitution it be made clear that the general limitation clause contained in s33 would at all times prevail and not itself be subject to specific limitations relating to any other rights.

5.1.1.10 The provisions relating to rights regarding labour relations and property as contained in the Interim Constitution (ss27 and 28) are broadly in line with SACOB's views as to how these rights should be formulated, and should accordingly be substantively retained.

5.1.2 Property Rights

5.1.2.1 While agreeing that socioeconomic issues and injustices have to be addressed, SACOB firmly believes that if primary economic rights are secured, that will itself help to improve socioeconomic conditions. Conversely, if these primary rights are not secured, there can be no real or lasting improvements in socioeconomic conditions in South Africa.

5.1.2.2 SACOB accepts that economic policy cannot be written into a constitution or a bill of rights. However, it has been previously
emphasised that business and investor confidence will depend to a large extent on the kind of economic system reflected - and guaranteed by - a final constitution. In this regard South Africa must be seen to commit itself, inter alia, to property rights.

5.1.2.3 Property rights are widely recognised as an essential element for an effectively-operating economy. The Government of National Unity has committed itself to a market-driven economy - and property rights are a centrepiece of any such system. Without a guarantee on basic property rights, both economic growth, and the economic system, will be damaged.

5.1.2.4 SACOB accordingly strongly reiterates its views that in the final constitution, rights of ownership in property, both corporeal and incorporeal, must be clearly and unambiguously enshrined, in the interests of sustained economic progress and job creation. In other words, there is a vital need for certainty and confidence that nobody would, under any circumstances, be deprived of their property without due process of law and fair compensation.

6. THEME COMMITTEE V

6.1 The relationship between different levels of the court

6.1.1 A single or split judiciary

6.1.1.1 SACOB considers the introduction of the Constitutional Court an essential and most welcome feature of our final constitutional dispensation. Provisions on its composition, jurisdiction and functioning in the Interim Constitution are satisfactory and, broadly speaking, we are in favour of their retention in the final constitution.

6.1.1.2 Similarly we support the provisions relating to the structure, powers and functions of the respective divisions of the Supreme Court.

6.1.1.3 Insofar as other courts are concerned, we note Constitution provides that that sl 03(1) of the
Interim the establishment, jurisdiction, composition and functioning of all other courts shall be as prescribed by or under a law.

6.1.4 Some five years ago SACOB formulated certain proposals concerning streamlining the judicial system with a view to, inter alia, making access thereto more readily available and affordable to all citizens of South Africa. A number of these proposals, submitted to the Department of Justice, have been, or are in the process of being implemented.

6.1.5 While we believe that sl 03(1) in its present form is adequate from a constitutional point of view, we would gladly make our views on judicial reform available to the Theme Committee should this be considered necessary.

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7. SUB-THEME COMMITTEE TWO OF THEME COMMITTEE VI

7.1 Financial Institutions and Public Enterprises

7.1.1 The Auditor-General

7.1.1.1 Public sector accounting, procurement and other money handling procedures have developed over the years primarily to ensure that public funds are spent only as authorised by Parliament and that they are properly accounted for. This also helps to minimise the tax burden.

7.1.1.2 The auditing of public and semi-public expenditures is therefore essential to ensure good governance, as entailed in the need for economy, efficiency and proper political accountability. It is today also broadly recognised that adequate measures to ensure the absence of wastage and corruption from all levels of economic activity is a necessary condition for successful economic
development. It is therefore important that the constitutional framework must provide the audit offices of government guaranteed adequate resources and sufficient operational independence to meet the requirements of efficient and adequate auditing of the usage of public funds and resources.

7.1.1.3 SACOB believes that there is a gap between the public's expectations of the function of the Auditor-General and his or her actual statutory responsibilities. This needs to be addressed by way of published guidelines which prescribe in some detail the extent to which the Auditor-General is required to report.

7.1.1.4 The Auditor-General should be required in terms of the constitution [in a section corresponding to s193[1] of the Interim Constitution] to report whether accounts and financial statements that he or she audits represent a true and fair reflection of the finances of the office under review, and whether they accord with their books of accounts.

7.1.1.5 The Auditor-General should not be limited in his or her discretion to conduct performance audits in respect of any office under review. S193[3] of the Interim Constitution should accordingly be broadened to permit the conduct of performance audits at all levels of government, and in statutory bodies, as deemed fit in the public interest. Consideration should also be given to further defining "performance audits".

7.1.1.6 The Auditor-General's office should not only have access to books and information, but should also be empowered to obtain any information and explanations from any person involved in the operation under audit [s193[6] of the Interim Constitution].

7.1.1.7 In addition to being required to submit reports on audits to Parliament [s193[7]U] of the Interim Constitution], the Auditor-General should also be required to report on any
public office that does not have its accounts ready for audit within twelve months of the end of its financial year.

7.1.1.8 SI 94[1] should be amended to require the Auditor General to appoint "suitably qualified" persons to his office. We would also query the necessity for the proviso that appointments should be ‘in accordance with law’, and propose that this phrase be deleted unless sufficient justification exists for its retention.

7.1.2 The Reserve Bank

7.1.2.1 The overall capacity and the political will to institute and follow through proactive and timeous monetary policy measures despite their possible political unpopularity at times, is today widely recognised as a necessary condition for effective overall macroeconomic packaging. It is therefore essential that the right institutional framework be in place to ensure a country's ability to meet this condition. SACOB believes that monetary policy is an important building block and may at times even be required as a counter-balancing force in the overall macro-economic policy package.

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7.1.2.2 The weight of practical evidence and theoretical argument have, in recent years, been in favour of the neutrality of monetary stability in the spectrum of economic policy objectives. Inflation can only benefit real growth temporarily. Yet once inflationary expectations set in, they seriously distort the allocation of resources and the distribution of income, and they tend to reduce growth. This is one of the lessons of South Africa's poor economic performance in recent years. But inflationary expectations are also very difficult to remove, a process which unavoidably involves considerable loss of output and employment. Little can be achieved in the real economy by allowing inflation to take hold. The monetary stability objective is a necessary condition for other legitimate policy objectives. Ideally monetary policy, as applied by the central bank, should be politically neutral.

7.1.2.3 SACOB therefore believes it to be vitally important that the independence of the Bank should be clearly enshrined in the final constitution. Business is often critical of Reserve Bank decisions but it recognises the economic merits of according the Bank considerable autonomy. Although the Reserve Bank may sometimes make mistakes this does not weaken the case for a high degree of independence. This approach is strongly
supported by international experience where countries with autonomous central banks seem to be performing better with respect to maintaining relatively low inflation rates, exchange rate stability and order in their financial markets.

7.1.2.4 SACOB therefore strongly supports the principles contained in s196 of the Interim Constitution that the primary objective of the Bank shall be "to protect the internal and external value of the currency in the interest of balanced and sustainable economic growth ", "that its powers and functions will be those customarily exercised and performed by central banks", and that it shall "exercise its powers and functions independently". In the final Constitution it should be expressly stated that the enabling Act of Parliament establishing and regulating the Bank shall not detract from the abovementioned principles. SACOB believes that this would be a sensible approach to the status of the central bank.

7.1.2.5 SACOB endorses the proviso to s196[2] of the Interim Constitution that there should be regular consultation between the South African Reserve Bank and the Minister responsible for national financial matters, and it recommends that in order to enhance the accountability of the Bank, provision could explicitly be made for appearance before the Joint Standing Committee on Finance. This provision should however in no way be formulated in such a manner that it detracts from the ability of the Bank to conduct an autonomous monetary policy directed at achieving price stability.

7.1.2.6 Transparency and consultation would therefore still be achieved. In Britain, for example, the minutes of the monthly meeting between the Chancellor of the Exchequer and the Governor of the Bank of England are published. In these ways autonomy and accountability can be brought into juxtaposition.

7.1.2.7 Consequently the following points may be useful in reconciling autonomy and accountability:

The Reserve Bank should be independent of the Minister of Finance and accept institutional responsibility for monetary and exchange rate policy. A high degree of central bank independence in the governance of the country does not mean isolation - coordination is necessary and beneficial,
- Any conflict between the Minister of Finance and the Governor of the Reserve Bank should be resolved by parliament.

* The terms of office of the Governors and Directors appear short when viewed from an international perspective. Additional international research will be needed on this issue.

a Persons who are politically active should not be eligible for appointment and the Directors and Governors should not be political appointees in a more representative Board of Directors for the Reserve Bank.

7.1.3 The Financial and Fiscal Commission

7.1.3.1 Constitutional Principles XXII, XXVI and XXVII broadly define the operational framework and constitutional role of the financial and Fiscal Commission [FFC]. The key principle referring to fiscal issues is contained in Principle XXVI which states that:

"Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them in the constitution".

Principle XXVI I relates directly to the Financial and Fiscal Commission and defines the following main operational parameters for the FFC:

* The FFC represents, amongst others, all the provinces

* Shall recommend equitable financial allocations to the provincial governments from nationally collected revenues

* Must take into account the national interest as well as the economic disparities between provinces.

7.1.3.2 Nevertheless, Principle XXI 1 has to be regarded as the overriding guiding principle which reads as follows:

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"The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces".

7.1.3.3 The key role of the FFC derives from these principles and seems to assist in refining and implementing equity between different provinces to the extent that such goals can be achieved through taxing and spending decisions at all levels of government. The FFC is an indispensable element in the future success of "provincialism".

7.1.3.4 It is SACOB's belief that political decisions should be taken by appropriately elected political representatives at different levels of political authority. The FFC should not be expected to usurp this function. Instead, the FFC should be enabled by the constitution to make recommendations on equitable fiscal relationships between different levels of government. Essentially the FFC must assist in defining the parameters and rules within which bargaining over resources between different levels of the state should take place.

7.1.3.5 The FFC will be especially important in the early years of the final dispensation in assisting to lay down criteria for equitable fiscal relations between different layers of government as well as efficient systems of fiscal governance. The new fiscal system needs to have its own dynamism which will allow it to adapt to changing circumstances.

Obviously the FFC still has to make its contribution to this dynamic development of the new fiscal order. Hence SACOB believes that the constitution should provide the broad parameters of the framework within which the FFC will operate in the final system.

7.1.3.6 If the FFC is to fulfil the important role which it has been accorded, it is vitally necessary to introduce safeguards into the constitution to ensure that its recommendations will be respected and that they receive the attention they deserve in order to achieve this objective. SACOB urges that additional provisions be included in the constitution to require the government to:

- publish all reports of the FFC: and
7.1.3.1 SACOB agrees in principle with the provisions made in ss185 and 186 of the Interim Constitution, ie that all revenue be paid into a fund from which monies may only be withdrawn once authorised by an Act of Parliament and that a budget be presented to parliament each year.

7.1.3.2 SACOB also recommends that the following principles be investigated with the view to possible incorporation into the final constitution:

all monies raised by the central government be paid into the National Revenue fund unless a specific Act
of Parliament creates a dedicated fund into which monies collected under such Act are to be paid and disbursed from:

monies may only be disbursed from the National Revenue fund for expenditure budgeted for and approved by parliament by means of an Appropriation or Supplementary Appropriation Act.

7.1.5 Public Enterprises

7.1.5.1 Apart from a provision which requires all public enterprises to be subject to audit by the Auditor General, SACOB believes that no further provision need be made in the final constitution in this respect. Presently such enterprises are governed by separate Acts of Parliament and we recommend that this practice be continued.

7.1.6 Inland Revenue

7.1.6.1 The Commissioner for Inland Revenue was not mentioned under the topics to be dealt with by Theme Sub-Committee VI, nor were his or her functions dealt with by the Interim Constitution.

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7.1.6.2 It is our belief that the final fiscal order, as well as business confidence both here and abroad, will depend on perceptions about the efficient and equitable collection of taxes in the future. We thus submit that the tax collection function is of equal importance to the functions and duties of the Auditor-General. Provision should thus be made for certain principles which will govern the operational efficiency of the Commissioner for Inland Revenue and Customs and Excise in the final constitution.

7.1.6.3 SACOB recommends that consideration be given to including provision in the final constitution to give effect to the following recommendations of the recent interim report of the Katz Commission of Inquiry into the Tax Structure of South Africa:

- to recognise the independence of the revenue authorities, in terms of Statutory Boards responsible
for Inland Revenue and Customs and Excise departments, and

Inland Revenue and, as appropriate Customs and Excise, should provide a revenue collection service to national and provincial governments, as well as the metropolitan level of local government.

7.1.7 Income Tax

7.1.7.1 Unless specific justification exists for the retention of sl 90 of the Interim Constitution [providing for the annual assessment of the income tax returns of all elected representatives at all levels of government] it should be deleted.

8. SUB-THEME COMMITTEE FOUR OF THEME COMMITTEE VI

8.1 Security Apparatus

8.1.1 Future Policing in South Africa

8.1.1.1 Introductory Remarks

8.1.1.1.1 On the initiative of the SACOB Security Committee, a multidisciplinary Working Group, representing a wide variety of bodies, institutions and disciplines, was constituted approximately two years ago to make recommendations on how policing in a final constitutional dispensation should be undertaken and structured.

8.1.1.1.2 The Working Group, in the course of extensive deliberations over a considerable period of time, came to the conclusion that the South African Police, in its then predominantly centrally-structured format, was no longer effective from a purely policing, as opposed
to a political point of view, and that far-reaching changes and improvements were required.

8.1.1.3 The Group then prepared a document covering a wide range of policing issues, which was fed into various organs of state, including the then PWV [now Gauteng] Legislature when comment was invited on the Draft Police Act published for general comment last year.

8.1.1.4 As some of the matters covered in this document were subsequently overtaken by events, a new Working Group of the SACOB Security committee revisited the original submission with a view to, inter alia, making a further, revised submission on the Draft Police Act.

8.1.1.5 This further submission, [as does the original) deals not only with organisational and operational aspects, but constitutional issues as well, which SACOS wishes to draw to the attention of the Sub-Theme Committee for serious consideration.

8.1.2 Decentralised Provincial Police Forces

8.1.2.1 It is common cause that in the past the South African Police have been generally regarded as the servants of the State rather than servants of the people and of the Law, a situation which is totally unacceptable.

8.1.2.2 Both Working Groups considered it to be of paramount importance for the South African Police Force to be decentralised into separate, autonomous provincial police forces each headed by a Commissioner responsible for operational control, and accountable to an independent and
apolitical provincial police board or committee, as opposed to a political functionary.

8.1.2.3 These provincial boards or committees would, inter alia, appoint the respective Commissioners, decide on establishment requirements or changes thereto, disciplinary and appeal procedures, the siting or establishment of police stations and related matters. It is considered that With the welcome emphasis on community policing, the interests of the community would be better served by structures which would receive and evaluate reports from the Commissioner on, for example, crime statistics and trends, and on steps to be taken regarding the safety of the community.

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8.1.2.4 Although such a police authority should to a large extent take over functions hitherto performed by a Minister of Law and Order, or of Safety and Security, it should have no authority in regard to operational policing. As stated before, the underlying philosophy is that the police are answerable to the law and act on behalf of and in the interests of the community and not under the mantle of the Government. It is essential that the police are seen to be politically independent in that they serve the people collectively, and are not influenced by any Minister, political party or pressure group insofar as operational decisions or actions are concerned.

8.1.3 National Police Service

8.1.3.1 In addition to regional police forces, a relatively small national police service should be established, with entirely different functions, powers and duties to that of the present SAPS. Although it should have its own National Commissioner, it would be accountable to an appropriate Minister and not a police board or committee.

8.1.3.2 Although it would have some fine functions, the national service would have no direct responsibility for day-to-day policing, and would in the main provide specialised and support services to other police forces, on a
basis to be negotiated.

8.1.1.3.3 The national police service would continue to provide a central criminal records office along the lines of the present Criminal Records Bureau in respect of which certain functions presently being performed could however be transferred from police to civilian personnel.

8.1.1.3.4 The national police service should also maintain a paramilitary police in the form a mobile task force, armed, equipped and trained along military lines. Unlike regional police, foot and arms drill will play a role in their training, as they will be required to deal with riots, unrest situations and any incidences of terrorism.

8.1.1.3.5 The views expressed in regard to a national service are in broad and general terms only, as detailed planning and extensive negotiations and deliberations will have to be undertaken in regard to functions and jurisdiction.

8.1.1.4 Training

8.1.1.4.1 National Government training centres should be set up at agreed localities, with instructors seconded from the various provincial forces. This would facilitate all officers to receive a basic and acceptable standard of training in accordance with accepted national norms.

8.1.1.5 National Inspectorate

8.1.1.5.1 A National Inspectorate of all police forces should be established within the Ministry of Safety and Security. The officers employed by the Inspectorate would carry out periodic or annual inspections, and report to the Ministry on the efficiency [or lack thereof, of all the police forces in the country. Where practicable, all police forces should be subject to performance audits by the
8.1.1.6 Concluding Remarks

8.1.1.6.1 While the Interim Constitution caters for some of the abovementioned concepts, we do not believe that it goes far enough to devolve sufficient powers, duties and functions to provincial police forces in the interests of effective policing. We also do not believe that there are sufficient checks and balances to effectively remove policing from potential unwarranted and undue political influence, particularly insofar as issues such as operational control and accountability are concerned.

8.1.1.6.2 SACOB appreciates that the proposals put forward cannot be dealt with in any great detail in the final constitution, but we nevertheless believe that the underlying enabling principles can be, and should be effectively accommodated.

8.1.1.6.3 We accordingly urge that serious consideration be given to formulating appropriate constitutional provisions to give effect to these proposals, in the best interests of the safety and security of all citizens of South Africa.
9. CONCLUSION

South Africa faces the challenge of making its new democracy work successfully in the years ahead. Certain economic and other institutions and mechanisms are indispensable to that success - and have been referred to in this submission. It fundamentally concerns the design of institutions in a democratic society. Among the basic characteristics of a successful democracy is the presence of several independent centres of power and allegiance, none of them above the law. There are certain obvious checks and balances which are needed to secure preferred outcomes, especially in the concepts and institutions under discussion in this submission.

CAPE TOWN
4 APRIL 1994

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ANNEXURE

SUB-THEME COMMITTEE TWO OF THEME COMMITTEE VI

MATTERS ARISING FROM SACOB’S ORAL EVIDENCE
ON 20 FEBRUARY 1995

1. Matters belonging to subsidiary legislation

SACOB raised a number of issues which do not belong in the constitution but rather in subsidiary legislation, but those were raised in the spirit of the need for such additional legislation to strengthen the spirit and framework of the constitutional dispensation. It was therefore not SACOB’s intention to broaden the constitution to include such matters, excepting in those cases where it was explicitly stated that we deem it necessary to include certain additional aspects in the constitution.

2. International evidence on the terms of office of Reserve Bank Governors and Directors

Internationally, Central Banks differ widely with respect to terms of office of both Governors and Directors. The following examples illustrate this point

<table>
<thead>
<tr>
<th>Institution</th>
<th>Position</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reserve Bank of Zimbabwe</td>
<td>Governor</td>
<td>5 years</td>
</tr>
<tr>
<td></td>
<td>Directors</td>
<td>5 years</td>
</tr>
</tbody>
</table>
US Federal Reserve
  Governor  14 years
  Directors  3 years

Deutsche Bundesbank
  President  8 years
  Directors  8 years

Bank of England
  Governor  5 years
  Directors  4 years

This wide diversity with respect to terms of office of officers leaves the door open for South Africa to base its own choice on our particular need for continuity and stability.

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3. Fiscal and Financial Commission

SACOB will prepare additional views for further examination by the Committee in June.

4. Balanced Budgets

SACOB believes that a constitutionally prescriptive attitude is inappropriate and not achievable. Instead the checks and balances provided for by an independent Reserve Bank and a democratic political system must take care of the need for government to follow prudent and strict fiscal policy at all levels. The Joint Parliamentary Standing Committee on Finance also acts as a "watchdog" over macro-economic issues. In addition the national government, perhaps with the aid of the Financial and Fiscal Commission and the various Auditors General should have the responsibility to enforce previously agreed upon fiscal discipline parameters at all lower levels of government.

5. Capital/Recurrent breakdowns in Budgets

To be dealt with in a similar fashion to point 4 above.

6. Constitutional limitations on the State's right to engage in trade and industry or the provision of services

Any attempt at imposing constitutional limitations of this nature on any element of society, be it state or private, could lead to unnecessary and lengthy constitutional court litigation. Instead, the enshrining of the right of the individual to freely engage in economic activity [s 26(1)] together with the
protection of private property rights should be regarded as sufficient guarantees against unwanted government encroachment on typical private sector terrain.
Council for the Environment

ENVIRONMENTAL CONTENT IN THE NEW CONSTITUTION

A submission to the Constitutional Assembly on the inclusion of a human right to a sustainable environment and environmental quality.

March 1995

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SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
ON THE INCLUSION OF A HUMAN RIGHT
TO A SUSTAINABLE ENVIRONMENT AND
ENVIRONMENTAL QUALITY IN THE NEW CONSTITUTION
INTRODUCTION

"The degradation of the environment has already reached alarming proportions in many areas and further urgent steps are required to save our natural heritage and institute appropriate management systems to deal with these problems. The quality of life of millions of our people is being destroyed by a dangerously polluted and destitute environment. The magnitude of some environmental problems has reached a stage where looming catastrophe seems almost inevitable. Africa, and to some extent South Africa, has been directly caught up in this critical struggle to reverse the trend and save the environment and the Continent. High population growth and many ill-conceived and poorly planned developments are exerting enormous pressures on the environment. If this trend continues unabated, it will eventually leave us and succeeding generations with a waste land."

With these dramatic words, Dr D J de Villiers, MP, Minister of Environmental Affairs and Tourism in his budget speech on 16 August 1994 sketched the need for the protection of our environment. The Minister was not over-stating the case.

Immediate and drastic measures are required for the preservation of our environment.

2. WHY IN THE CONSTITUTION?

While an environmental ethic may exist in the South African common law, it is undeveloped in our case law. While it has been argued (1) that it would not be beyond the ingenuity of our courts to import an environmental ethic into the common law, the better view (2) is that given the state of environmental degradation in our country and the urgent need for action, the most effective method of establishing an environmental ethic would be by way of legislation. The most effective legislation, indeed the only suitable legislation for the proper protection of an environmental ethic, would be the Constitution, from which the law-making bodies of the State draw their authority, which is binding on those bodies, and which can only be amended by extra-ordinary procedures.

3. WHY A HUMAN RIGHT?

Again, to quote Dr de Villiers in the speech referred to above:
"Environmental matters are central to our daily lives. There is a misconception that environmental conservation concerns mainly the protection of wild life. on the contrary, it is linked to every aspect of human endeavour it concerns the environment where people live, work, do business, play and relax. The environment is about people. It is people-orientated."
It is clear that the equitable distribution amongst all our citizens of the resources of a sound environment will ensure a sound future for South Africa. In addition, a sound environment protecting the biological diversity found in South Africa will encourage tourism which will in turn create jobs (3). Environmental protection thus plays a vital role in the reconstruction and development of South Africa.

All this was recognised by the drafters of the interim Constitution in enacting Section 29 thereof. It is even more important for the continued health, well-being, economic and social development of our people that a human right guaranteeing environmental protection be carried forward to the final Constitution now being drafted.

4. THE PROTECTION REQUIRED BY THE ENVIRONMENT

There are three forms of protection required by the environment which should be constitutionally guaranteed, (4) viz -

4.1 Resource conservation and management
Renewable resources should be managed on a sustainable basis to ensure that our ecological base is maintained, both for the benefit of present and future generations. Exploitation of non-renewable resources should be managed, having regard to the irreversibility of such activity and the finite nature of such resources.

4.2 Planning for development
Strategic policy planning at central and provincial government levels, and sub-regional and local land-use. Structure planning at provincial and local levels need to integrate environmental and ecological considerations with all other issues such as socioeconomic development, land-use, built environment and land redistribution.

4.3 The prevention of pollution
All three constituent elements of the biosphere, air, land and water are being increasingly affected by pollution. The degradation of those resources must be minimised by the application of appropriate technology at the cost of the polluter.

5. THE SHORTCOMINGS OF SECTION 29

Section 29 of the Constitution reads as follows -
"Every person shall have the right to an environment which is not detrimental to his or her health or well-being."

The section is too anthropocentric. It accords no protection to the environment save insofar as human health and the vague and ill-defined concept of "well-being" is affected. In its present form, the clause does little more than simply restate the common law of nuisance. It will be effective only for the curbing of pollution where human health and "well-being" are concerned, but will not have any effect on renewable resource conservation, the maintenance of biological diversity, or the wise use of non-
renewable resources. The clause is akin in its effect to the Atmospheric Pollution Act, 1965 (Act 45 of 1965) (5). Its vagueness weakens the effectiveness of that legislation.

6- ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT
It is acknowledged that South Africa is in urgent need of development. While this must not be allowed to take place on a non-sustainable basis and at the expense of environmental concerns, it is important that urgent environmentally sustainable development not be delayed by protracted litigation. Fear has been expressed that a too liberally worded environmental right would open the door to litigation preventing such development. It is considered, having regard to the provisions of our legal system, particularly in relation to costs, that this threat is more illusory than real. Moreover, the threat of such delays can be minimised in several ways -

6.1 a participative approach to development should be adopted, so that interested members of the public are afforded an opportunity to express their views at an early stage of the process;
6.2 reasons for administrative decisions should be required as is the case in the interim Constitution (6);
6.3 the principles of integrated environmental management (IEM) should increasingly be adopted (7);  
6.4 furthermore, legislation could establish a special tribunal to hear appeals in regard to decisions affecting the environment with special procedures to avoid the time consuming procedures of conventional litigation, and ensure finality of the decision on the development proposal concerned within a reasonable time (8). Tribunals as envisaged in the Development Facilitation Bill may be able to fulfill this role. It is submitted that these measures will ensure that essential development is not stultified while according environmental concerns their rightful place in the planning process. South Africa must at all costs avoid, and ensure that the necessary procedures are in place to avoid development at the expense of environmental concerns. One cannot build successful development on a bankrupt environment. In short, good environmental management is good business.

7. CONTENT OF THE RIGHT
It is not clear whether directive principles, or principles of State policy, will be incorporated into the Constitution, such as is the position in India and Namibia. If it is decided that such directive principles are to be incorporated into the Constitution, then it is suggested that the right to be incorporated in the Bill of Rights be of a relatively limited nature. It is further considered that the right should contain within itself a correlative duty upon all persons, the State and all juristic persons to protect the environment. The need for this duty arises from the fact that the Bill of Rights as presently constituted, and as we assume it will be constituted in the new Constitution, is binding as between citizens (and including in many cases juristic persons) and the State, but is not binding between citizens inter se. The Bill of Rights is accordingly said to have "vertical application" but not "horizontal application". It is submitted that by inserting the correlative duty to protect the environment and placing that duty not only
on the State but upon natural and juristic persons, the provisions of the right can be
given "horizontal effect" and be enforceable by natural persons against other natural
persons and juristic persons, as well as against the State.
It is further clear that the environment as a whole, in every part of the national state,
affects the interests of all inhabitants of the national state, either directly by for example,
atmospheric pollution, loss of food production, or indirectly, for example through an
effect on the national economy through reduction of tourism or destruction of export
crops or products. The right to be included in the Constitution must, therefore, be a
right to an ecologically sound environment within the whole of the national state.

8. A MODEL CLAUSE
Having regard to the above considerations and assuming that directive principles are to be
incorporated into the Constitution, it is suggested that the clause to be contained in the Bill of
Rights should read as follows -
"All persons shall have the right to a sustainable environment which is conducive
to health and wellbeing. All natural and juristic persons shall have the duty to
protect and to promote the protection, sustainability and quality of that
environment."

The directive principles which will be allied to that right fall into the three categories
referred to in paragraph 4 above. The first group of principles relates to resource
conservation and exploitation and the need for sound land-use planning for development
and takes into account globally recognised norms such as the need for sustainable
development and the maintenance of bio-diversity. The second group includes generally
accepted norms relating to pollution control and waste management such as treatment of
waste at source, reduction, re-use and recycling of material. The following directive
principles are suggested -

8.1 The State and its citizens shall ensure that the land and natural resources are
regulated and utilised in a manner which:

8.1.1 benefits both present and future generations;
8.1.2 promotes the ideal of sustainable development;
8.1.3 maintains ecosystems and related ecological processes, in particular, those important for
food production, health, and other aspects of human survival and sustainable
development;
8.1.4 maintains biological diversity by ensuring the survival of all species of fauna and flora at
natural rates of extinction, particularly those which are endemic or endangered;
8.1.5 integrates environmental considerations with strategic planning, development and land-
use planning whilst also applying techniques such as Integrated Environmental
Management (IEM) and Environmental Impact Assessment (EIA);
8.1.6 promotes the promulgation, maintenance and development of areas of cultural, historic and natural interest.

The State shall, insofar as waste management and pollution control is concerned, actively promote policies for -

1. the treatment of waste at source;
2. the reduction, re-use and recycling of waste;
3. the promotion of clean technology.

9. COMPOSITE CLAUSE

Assuming that the new Constitution does not make provision for directive principles, the following is offered as a composite clause encapsulating all the above principles, to be contained in the Bill of Rights -

"Current and future generations have the right within the national state to a sustainable environment which is conducive to health and wellbeing, where pollution and waste generation are minimised and where environmental considerations are taken into account in land-use planning and development. All persons, including the State and its organs, and juristic persons, have the duty to protect and to promote the protection, sustainability and quality of that environment."

10. THE DEGRADATION OF THE ENVIRONMENT IS CAUSE FOR SERIOUS CONCERN

One of the principle reasons for this concern has been that in terms of the South African common law the owner of property has what is known as the ius utendi, fruendi et abutendi. This has been interpreted as the right to use and abuse, indeed to destroy ones own property, and while that right has obviously been much curtailed by legislation (9) it is desirable that the concept of trusteeship be applied to the ownership of land. The Council would accordingly propose that in the reconsideration of Section 28 of the interim constitution for purposes of the new constitution that Section 28(1) be amended to read:

"28.1 Every person shall have the right to acquire and hold rights in property, to the extent that the nature of the rights permit to dispose of such rights, and to use immovable property on the basis that every owner of immovable property holds that property as a trustee on behalf of future generations".

11. LOCUS STANDI, ACCESS TO INFORMATION, REASONS FOR DECISIONS, ADMINISTRATIVE JUSTICE

The provisions of Sections 7, 23 and 24 of the interim Constitution are of paramount importance to the exercise and protection of any environmental right enshrined in the Constitution and should be retained in the final Constitution.
12. CONCLUSION AND EXECUTIVE SUMMARY

12.1 There is a requirement for environmental protection in the Constitution.

12.2 The present Section 29 of the interim Constitution offers little or no environmental protection and does little more than restate the common law of nuisance.

12.3 An environmental right should contain the following elements -

12.3.1 resource conservation

12.3.2 land-use and development planning

12.3.3 pollution control

12.4 This can be achieved either by the incorporation of an attenuated human right plus directives of State Policy, or by the inclusion of a comprehensive human right. Model clauses for each alternative will be found in paragraphs 8 and 9 above.

12.5 The justification for the proposals made has been set out very briefly and with little attempt to set out the full reasons for the proposals or to deal with possible counter-arguments. The Council for the Environment will seek a meeting with the Theme Committee concerned in order to present a full motivation for the proposals and to attempt to deal with any arguments or difficulties which the members of the Theme Committee may have in regard to the proposals made.

ANNEXURE

1 "The ecological norm in law or the jurisprudence of the fight against pollution"
B van Niekerk 1975 SALJ 78.

2 "The need for the legislative adoption of a conservation ethic"
P D Glavovic 1984 CILSA 144.
"Human rights and environmental law: The case for a bill of rights"
P D Glavovic 1988 CILSA 52.


5. Section 1(1) of Act 45 of 1965. The definition "Best Practical means "refers to the provision of the necessary appliances and the adoption of any other methods which..... may be reasonably practicable and necessary for the protection of any section of the public against the emission of poisonous or noxious gasses, dust or..... fumes. The test for the grant of a registration certificate without which a "scheduled process" in terms of
the act may not be carried on, is the best practicable means test. With its emphasis on human health rather than environmental protection, the Act has permitted air pollution on a massive scale in for example, the Eastern Transvaal Highveld, which has led in this area to the pollution of air, soil and water, the possible disease of the forests in the Eastern Transvaal, with potentially serious health and economic consequences, and possible trans-boundary, effects both regional and international. See in this regard the National Report to UNCED held in Rio de Janeiro in June 1992 prepared by the Department of Environmental Affairs and Tourism in March 1992 pages 82 to 86. See further "Environmental Management in South Africa" Fuggle and Rabie (Editors) Juta 1992 - pages 417 to 455, especially at 426 - 430.

6. Section 24(c) Act 200 of 1993. See also Section 23 of that Act.


9. See, for example, the Conservation of Agricultural Resources Act, 1983 (Act 43 of 1983).
INTRODUCTION

Theme Committee 6, a Committee of the Constitutional Assembly, is briefed to formulate a Constitutional position on the Commission on Gender Equality, one of the Specialised Structures of Government for which provision has been made in the interim Constitution.

This submission seeks to address two (2) issues viz

i. The need for the inclusion of a Commission on Gender Equality in the final text of the Constitution; and

ii. A comparative overview of Gender Commissions in other Countries.

iii. The status and function of the Commission.

The Need for the Inclusion of a Commission on Gender Equality in the final text of the Constitution. The Need to give effect to Constitutional Principles.
South Africa has a legacy of racial and gender inequality and a strong and urgent intervention is required to address this. The interim Constitution (Act 200 of 1993) contains a framework for the intervention of the State in promoting racial and gender equality in the Bill of Rights as well as the provision for the establishment of a Human Rights Commission (Section 116 of the Act) and a Commission on Gender Equality (Section 119).

The equality clause contained in Section 8 of the interim Constitution is a recognition that women constitute an historically disadvantaged group and Clause 8 (3)(a)'s reference to what amounts to affirmative action measures are both indicative of the necessity for our fledgling democracy to accord inter alia special status to gender equality in the light of historical gender oppression which existed under the old order.

The Constitutional Principles contained in Schedule 4 of the Constitution states in clause 111 that the Constitution "shall promote racial and gender equality....... and in Clause V, Equality before the Law is defined as including "laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender." The inclusion therefore on the Commission for Gender Equality (CGE) in the interim Constitution is in the light of the Constitutional principles enunciated above a structure that is intended to give effect to those principles of achieving gender equality.

Whilst racial and gender inequality are oft seen to go hand in hand, there is a sufficiently widespread understanding and agreement about the nature of racial inequality and mechanisms necessary to address the problem. Gender Inequality on the other hand has been identified by Women's Organisations themselves as being a subject or concept that is marked by a pervasive lack of understanding. * Prior to the interim Constitution this meant that Policies, Programmes and laws were formulated and gazetted without attention being accorded to their Gender implications thereby entrenching gender inequality. Without an independent structure such as the CGE, the Constitutional principle of advancing gender inequality is meaningless. The CGE in its role of promoting Gender Equality potentially then has the capacity to combat widespread ignorance of the concept of gender equality through:-
(i) publication of recommendations on the implications that laws, programmes and policies have for
gender equality and introduction of pro-active laws, programmes to advance gender equality; and
(ii) its recommendations on strategies for Government, Business and NGO's to advance gender
equality.

The inclusion of the CGE therefore in the final Constitution amounts to a Consolidation of the
abovementioned Constitutional Principles which must be adhered to in the writing of the final
constitution. Without the CGE - the constitutional principles will necessarily appear to be a matter
of paying lip service to the principle of gender equality.

(iii) Need for CGE as an Affirmative Action Strategy.
Affirmative Action is a systematic strategy that has been devised as a means of a positive,
purposeful method of eliminating and redressing the effects of systemic discrimination based on
amongst other things - gender.

In regard to the nature of the Affirmative Action mechanisms required, the following statement by
Norman Levy of the Centre for Community and Labour Studies is instructive:

" An important perspective in approaching Affirmative Action is the impact that the existing
structure has on implementing change. That is to say that the more profound the racial, gender and
occupational disparities, the more vigorous and urgent the implementation strategies need to be to
address the imbalances". *

The Constitutional Principles recognise this legacy of gender inequality and having stated that if the
existing structure's gender disparities are indeed "profound" , a more vigorous strategy will be
necessary to redress the imbalances, it follows that a structure that is explicit in its focus is
necessary to combat gender inequality.
A CGE is one way of intervening to ensure a break with the past institutionalised gender
discrimination. It is primarily through a structure like the CGE that the State's role in mediating
relationships between itself and civil society and within the institution of the family that it will have
the capacity to address gender needs.
The underlying assumption in this argument is that the State has previously made a strong intervention in oppressing women's gender needs through discriminatory policies/laws relating to inter alia ownership of property, domestic violence, welfare, the right to abortion, government subsidies, ad nauseam. A CGE will in future need to address this legacy of gender inequality in order to meet the gender needs of women. The CGE has the potential to cause a break with our patriarchal past in:

(i) Recognising that women's oppression is a political, social and economic problem.

(ii) That it requires state intervention in consultation with civil society to enable women both within and out of government to inform policy/law making.

Affirmative Action therefore, is a strategy recognised by the Constitution both in Section 8 (3) (a) and in Clause 5 of the Constitutional Principles. The inclusion of CGE is therefore essentially an Affirmative Action construction.

COMPARATIVE STUDIES - GENDER COMMISSIONS IN OTHER COUNTRIES.

THE CANADIAN EXPERIENCE

Since our Constitution has borrowed extensively from the Canadian Constitution, an overview of that country’s Gender Equality Machinery is apposite.

This is particularly so because the gender equality clauses contained in our Constitution were borrowed directly from the Canadian Charter of Rights and Freedoms. Section 15 of the Charter reads as follows:

"Every individual is equal before and under the law and has the rights to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"
subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The school which argues that the Constitutional entrenchment of these clauses is a sufficient condition for womens’ liberation and advancement is a fallacious one. Our submission is that these equality clauses are merely a necessary but not sufficient condition for the promotion of womens’ interest. Beverley Baines writes of these provisions in the Canadian Charter that:

"These provisions suggest that it should be easy to predict that the Courts can no longer render legal decisions that lag behind the change in womens' lives.

Unfortunately this prediction is premature. There has been considerable disagreement over the meaning of the Charter's sex equality provisions, and the task of resolving such disagreement rests solely with the Courts” * Thus the value of the equality clauses is that alleged violations thereof provide women with an opportunity to challenge them in the Courts. That done, they have no guarantee that judges will define such equality in a manner that favours women for eg. the Canadian Courts in the 70's founded judgements on the notion that "equal" meant "same" and accordingly Courts decides that unemployment insurance legislation did not discriminate against pregnant women because all women were not pregnant.

It was only after 1989 that the Canadian Courts employed a new test for discrimination viz. looking at situations in terms of "disadvantage" ie. looking at women in their place in the real world and confronting the fact that systemic discrimination occurs because of women's place in the sexual hierarchy.

Gender Equality clauses therefore have grave, shortcomings: they do not guarantee egalitarian government policies, they will not necessarily be used to further women's rights as in Canada for eg. very few women litigated on the basis for their enforcement and in the absence of machinery designed to influence policy makers or introduce proactive gender equality legislation such as a CGE, the equality clauses will be nothing more than paper rights.
NATIONAL MACHINERY IN CANADA

As far back as 1967, a Royal Commission on the Status of Women was established with a brief to enquire into and report on the status of women in Canada and to recommend to the Federal Government the necessary steps to be taken to ensure that women had equal opportunity with men.

In 1970, the Royal Commission, in its report to the Federal Government recommended that a federal "Status of Women Council" should be established to be directly responsible to Government.

The Royal Commission recommended that this "Status of Women Council" should have the following brief:

To advise on matters relating to women and report annually to Parliament on the progress being made in improving the status of women in Canada;

Undertake relevant research on the status of women and suggest research topics that could be carried out by governments, private business, universities and voluntary associations;

Establish programmes to correct attitudes and prejudices adversely affecting the status of women;

propose legislation, policies and practices to improve the status of women; and

Systematically consult with Women's bureaux or similar provincial organisations and voluntary associations particularly concerned with the problems of women.

These proposed functions and objectives are identical to the proposed functions of South Africa's Commission on Gender Equality contained in the CGE Bill which was withdrawn. The similarity of objectives renders the Canadian model invaluable as an analogous study.
The "Canadian Advisory Council on the Status of Women" (hereafter referred to as CACSW) was established in May 31, 1973 as an independent advisory body funded by the Federal Government and comprising 3 full time members, the President, two Vice-Presidents and up to 27 part-time members. CACSW was charged to bring before the government and public matters of concern to women and to advise the Minister Responsible for the Status of Women (the latter position was created in December, 1971.

Members of the CACSW are appointed for 3 year term and are representative of the regional, linguistic, cultural and racial diversity of Canada.

THE ROLE OF THE PRESIDENT IN CACSW

The President is the Chief Executive Officer and provides direction for CACSW's operations as well as advising the Minister Responsible for the Status of Women and federal government officials. She sets the policy and programs. She liaises on behalf of CACSW with both governmental agencies and NGO's as well as with representatives of foreign governments. Within the National Office from which she works she provides direction to the following Departments: Research, Communications, Administration and Liaison.

THE ROLE OF THE VICE-PRESIDENTS

The 2 Vice-Presidents, represent the Eastern and Western Regions of Canada and are responsible for CACSW regional offices in that they monitor regional issues with a view to identifying issues of peculiar concern to the attention of the Council. They do receive support from the National Office.

The concept of members of the CACSW representing regional diversity is one well worth emulating in the South African model given South Africa's history.

THE ROLE OF ORDINARY CACSW MEMBERS
Council members complement the work of the President and Vice-President. They represent the Council in their areas, liaising with individual women, women's interest groups; provincial Councils and institutions that work for women.

It is to be noted that the Structure of CACSW is one of decentralisation and inclusivity. The Federal, Provincial and Local Government levels are all represented in the Council and consultation at local level with organisations that represent women's interests are a fundamental part of the operation of the Council. Community outreach is the basis for recommendations made by CACSW.

CACSW's work is complemented by several bodies within the Federal government which are engaged in programme for the benefit of women, although CACSW was mandated to advise Federal Government only, it maintains informal relationships with Advisory Councils, and women's directorates and secretariats that support with work of the provincial ministers responsible for the status of women. In fact CACSW meets the provincial and territorial structures twice a year to involve them in activities and as an information sharing exercise.

CACSW maintains a strong relationship with a broad spectrum of NGO's that represent women, research institutions that assist women in dealing with their lives on a day to day basis eg battered women's shelters and women's resource centres.

Weaknesses: Canadian Model

Glenda P Simms, the President of CACSW, has identified the following weaknesses of State Advisory Councils in Canada:

1. Their power is consultative and does not necessarily translate into positive change or action as the State bureaucracy views these Council as outsiders. On the other hand, NGO's view the Councils as arms of Government;
11. The independence of the advisory Councils are questionable because their members are appointed politically. The independence of the advisory bodies is thus crucial to their success.

111. Because members are appointed politically, the dangers exists that they may not be representative of or accountable to the Women's Movement.

National Machinery for Gender in South Africa should accordingly take this into account, particularly with regard to the CCE establishing a clear agenda independent of Government.

THE STRENGTHS OF NATIONAL MACHINERY FOR WOMEN IN CANADA

Glenda Simms has identified the following strengths of CACSW:

1. The capacity to undertake public research, identified according to their (CACSW'S) priorities using their own methodologies and conducted by people of their choice and their ability to utilise legislation before Parliament.


111. Community outreach programmes initiated by CACSW has ensured that its members have a finger on the pulse of Women's issues which in turn enables the members to sensitise decision makers to opinions expressed by women themselves.

V. It has assisted in the area of social change by encouraging the participation of grassroots women's representations on Commissions and Boards thus giving women access to Federal Government initiatives.

LESSONS FROM CANADA FOR A CGE
The sketch on the composition/ the functions and weaknesses and strengths of the Canadian National Machinery has demonstrated that an entity such as the CGE should for eg. be representative of regional diversity, that consultation and liaison with organisations representing womens' interests should be an integral part of their brief and that fundamental to its success will be its status as an independent institution.

The equality clauses contained in the Bill of Rights will not on their own ensure the promotion of gender equality.

COMPOSITION OF THE CGE

As stated earlier, the CGE should comprise members who are representative of the regional diversity of the society.

It is our further submission that the membership of the CGE that was contained in the CGE Bill which was withdrawn for revision is not inclusive enough in that it restricts membership to a judge, members of the Senate and regional nominees.

THE FUNCTIONS / OBJECTIVES OF THE CGE

It is fundamental to the success of the CGE that it plays a pro-active role in introducing legislation policies and programmes that advance the position of women at the political, social and economic levels.

The following are therefore the suggested functions and objectives of the CGE

i. To promote gender equality through inter alia: providing indicators for measuring progress towards gender equality;

ii. To monitor the application and administration of laws
iii. To scrutinise government policy and programmes with a view to eradicating gender inequities and promoting the advancement of women;

iv. To introduce pro-active legislation, policies and programmes that advance the position of women;

v. To report to civil society by way of Public Fora on a regular basis to ensure that women at grass-root level are informed of the work of the CGE as well as to obtain their input;

vi. To initiate public education programmes on laws, policies and programmes that affect women;

vii. To ensure that the particular concerns and needs of rural women are prioritised;

viii. To monitor the budget for gender sensitivity;

ix. To obtain the involvement of grass-roots women in commenting on new legislation.

CONCLUSION

The comparative study contained herein has illustrated that an entity such as the CGE has the potential to play a significant role in focusing policy on women's gender needs thereby keeping it on Government's agenda, it assists in legitimising equality issues as a public policy concern and creates an enabling environment for the promotion and integration of women's needs into the overall development process. The inclusion of the CGE in our final constitution will give content to our equality clause contained in the Bill of Rights and the Constitutional Principles contained in schedule 4 of the Constitution. It is trite that the Equality Clause is not a sufficient condition for ending systemic discrimination.
A final Constitution that creates an independent CGE is a corollary of the constitutional principles that espouse gender equality and affirmative action.

REFERENCES


2. Report by CALS Gender Research Project on the Workshop held on 24/O9/94 entitled: "National Machinery for Women and the Commission for Gender Equality"


5. Putting Women on the Agenda - Edited by Susan Bazilli.


*This viewpoint emerged at a Workshop on "National Machinery for Women and the Commission for Gender Equality" convened by the Gender Research Project - Centre for Applied Legal Studies held in Cape Town on 24/O9/94.
DIKWANKWETLA PARTY OF SOUTH AFRICA

We, the DIKWANKWETLA PARTY OF SOUTH AFRICA, propose therefore for the adoption in the Republic of South Africa for a federal system and structure of government wherein the Constitution divide governmental powers between the national (central) government and constituent autonomous regional (state) government, giving substantial functions to each level of such government.

(1) The principle of power sharing must be discarded from the New Constitution; It has served its purpose in the Interim Constitution.

(2) The New Constitution must enshrine the Federal System of a government in which provinces are given entrenched powers; this is the only way of bringing government closer to the people where they can make decision on matters that affect them intimately and directly.

(3) The Constitution must provide for direct representation of Traditional Leaders in all levels of government. In the provinces representatives of Traditional Leaders in provincial parliament should be elected by their respective houses whereas in the Central government traditional leaders representatives should be elected by a joint College of Chiefs and that a portfolio for Ministry of Traditional Affairs.

(4) A Constitution that allows freedom of Worship in order to accommodate multi-religious nature of our society.

(5) Both the principle of Constituencies and proportional representation should be observed as a means of achieving free and fair elections.
(6) The principle of eleven official languages must be upheld in order to accommodate multi-cultural nature of our South African society.

(7) In a province where one racial group is predominant the language and culture of that racial group should enjoy first preference.

(8) Judges and members of the Appellate Division could be recommended by Judicial Services Commission for approval of the State President in consultation with the chief Justice.
HUMAN RIGHTS COMMISSION

INTRODUCTION

Institutional discrimination has been eradicated in the interim constitution. For future reference it seems unlikely that any court in the Republic of South Africa could give any interpretation to the constitution or any legislation which would have the effect of being discriminatory. This stands out clearly from Chapters 2 and 3 read with Chapter 8 of the Constitution watch. However the weakness is that all the provision except Sections 121 - 123 are futuristic.

WEAKNESS OF GOVERNMENT POLICY

What about the legacy of apartheid. Is Government Policy on redressing imbalance of the past limitates the Reconciliation Development Programme (RDP)- Is this in keeping with section 8 of the Constitution?

My immediate reaction is the answer no.

Much more is needed. Equality before the law cannot be eased to entrench the inequalities which resulted from the apartheid era. The RDP does not have a clear policy of
redressing the evils of apartheid. It is more of a bandaqe to heal the wounds of apartheid. It is a weak and undirectecl method of helping embattled communities to help themselves.

Not all victims of apartheid are without shelter. There are spiritual and psychological victims of apartheid who do not even seem to understand that there is a new order because no one is saying anything about facing up to the question of victims of apartheid.
Equality before the law should as a starting point, identify areas of inequality through an indepth research, and thorough consultation with the victims of apartheid thereafter should come up with a cure for all social evils. A holistic approach is required. There are a whole lot if unresolved disputes issues and bitterness festering in the hearts of the victims of apartheid which if not addressed will result in the ongoing social strife in South Africa.

**STRUCTURE OF HUMAN RESOURCES COMMISSION**

A national body with sub-structe at a local levels that Will operate in conjunction with the Comission would serve to crystalise the Policy of RDP and direct the RDF to achieve certain specific aims by targeting areas of development.

In my opinion the RDP the HRC and Gender Commission should on some level be fused into a powerful organ dealing with redressing the legacy of discrimination and planning for, the future of the country on all levels of the government. The issuer in the three department overlap and needs to be treated holistically instead of peace meal.
The bulk of South Africa's problems cannot he solved by legislation but by a in-depth research into the causes and innovative ideas on the solutions. Adoption of foreign ideas is unlikely to have the desired results.
DOES SOUTH AFRICA NEEDS THE HUMAN RESOURCES COMMISSION?

The answer is yes, but the functions should be different from those enunciated in the interim constitution. The policy behind the appointment of the community should be changed to include a research body identifying the needs of specific communities, the socio-conomic needs should be looked into.

ORGANS OF THE HUMAN RESOURCES COMMISSION

Every local authority should have an organ whose main function would be to identify the sources of disintegration and involve the community itself in solving the problems. Social workers, church ministers, teachers and lawyers working with the community could make up such an organ. The personnel of the Commission could convene meeting and preside over meeting of such a body. A body removed from the community would be a useless white elephant.

The other function of the HRC can be futuristic and deal with law reform, identify human rights abuse, education programmes but the HRC should not be burdened with resolving disputes, because from the HRC disputes would still be referred to the Courts.

PROPOSED FUNCTION:

PROPOSED ROLES AND FUNCTION OF THE HUMAN RIGHTS COMMISSION
The functions which I believe would best serve the community are:-

- The Human Rights Commission should be utilised as an instrument for investigating violations of both horizontal (between individuals) and vertical (between the State and its subjects) rights for a time frame predating the new Constitution.

- The Human Rights Commission should participate in the formulation, auditing and reformation of legislation.

- The Human Rights Commission should receive complaints and refer such disputes to the courts, who will be established as specialist tribunal - with particular expertise on Human Rights and discrimination law.

- The promotion and protection of human rights through education, dissemination of information and training programmes for Government officials.

- The Human Rights Commission should receive and investigate complaints human rights, infringements from everyone, including third parties.
For as long as the public is ill-informed and illiterate such public inquiries might only serve to confuse issues. I do not support the idea.

Question 3.1 - 3.4 have been answered.

Question 4.1 have already been dealt with above.
PLEASE DIRECT THIS LETTER TO : THEME COMMITTEE 4 AN ENTRENCHED BILL OF RIGHTS : RIGHTS TO BE ENTRENCHED AND WHO SHOULD ENJOY THEM.

For the sake of order and clarity I will focus on rights as set out in the Interim Constitution, Chapter 3, Fundamental rights.

**SECTION 8 - EQUALITY**

This section should not mention 'sexual orientation' as a special category of persons who should not be discriminated against.

While there should not be a general Persecution of people with deviant sexual behaviour we should not indirectly legitimise what is specifically declared to be unnatural and wrong in the Bible (and in all major religions).

If this category is mentioned in this section, without qualifications following, then there will be no protection for institutions, organisations, and companies who find a person with deviant sexual behaviour to be harming other employees or members.

Among forms of deviant sexual behaviour a person may be bestial, sadistic, masochistic, promiscuous, or a paedophile. A person who is homosexual sometimes interferes with and corrupts a younger person who has been wholesome and heterosexual. It happens in the work place and in organisations.

So either the constitution should omit the category “sexual orientation” or it should allow for action to be taken to protect other people from the harm they do sometimes experience from a person with a deviant sexual behaviour. In any case the term ‘sex orientation’ must be amended. It implies that a person’s sexual behaviour is somehow constitutionally or genetically determined as if there were nothing one could do about it. This is not at all proven. It is a mere assumption. There is more evidence for the view that a person can change or be changed to a more natural sexual behaviour. The term we should use, in even discussing this is ‘sexual’ behaviour.'
SECTION 9 - LIFE

Every person shall have the right to life. Here we should add something like:

The right to life starts from conception subject only to the extraordinary exceptions set out in the National Health Act, Chapter section -

The constitution and the relevant Health Act should between them definitely rule out abortion on demand. Abortion on demand cannot be defended on grounds of the Christian faith, any other religion or even a humanist morality.

SECTION 15 - FREEDOM OF EXPRESSION

Freedom of expression should not be allowed to be interpreted as licence of expression by persons or the media.

Unlimited expression of violence (except where it is simply being reported in a newscast and is preceded by the appropriate warning) or pornographic or obscene material or blasphemy should be expressly prohibited.

This means that there has to be a public watchdog to rule on the permissibility and availability of this kind of material. I watchdog I mean a corporate and representative body.

Pornography and obscenity conflict with

* the right of human dignity (section 10) e.g. the misuse and display of women and their bodies in dehumanising and degrading way to satisfy the lusts of men. And it affects men's attitudes towards all women and girls.

* the right to an environment which is not detrimental to people's health or well being (section 29). Social and spiritual pollution has to be ruled out as much as the physical.

In section 15 on freedom of expression, in sub-section (1) we must add ‘- subject to the moral standards
revealed by God.'

**MARRIAGE AND FAMILY LIFE**

There should be a section in the Constitution and Bill of Rights that entrenches marriage and family life.

A family needs to be defined as comprising a married couple of opposite sex and their natural and adopted children.

And the Constitution and Bill of Rights should not legitimise the sexual act outside of marriage.

In your great responsibility as you work on a more long lasting Constitution and Bill of Rights I assure you of my prayers and the prayers of our Church in accordance with the Word of God (1 Timothy, Chapter 2 verses 1 & 2)

IAN THOMSON
MODERATOR OF THE DURBAN PRESBYTERY PRESBYTERIAN CHURCH OF SOUTHERN AFRICA.
24 March 1995

The members of this Association are deeply concerned at the wave of violent crime and its effect on women and children.

We urge that the Police force be strengthened.

We feel that bail conditions, particularly in the case of violent crimes, are far too lenient.

There should be statutory minimum sentences for those convicted of rape or child molestation.

The use of one-way glass for use in identification parades should be standard equipment in all regional Police stations.

We therefore ask the Commission consider these points as requiring immediate attention.

CONSUMERS ASSOCIATION

Hon. Secretary.
25 March 1995

FREEDOM AND THE CONSTITUTION

One of the two objectives of this Foundation is the preservation of the freedom of human beings, which is always under threat from governments.

Wise men of the past have issued many warnings against governments, for example: "Power tends to corrupt, and absolute power corrupts absolutely". Lord Acton. "The object of the state is always the same: to limit the individual, to tame him, to subordinate him, to subjugate him". Max Sterner.

"The natural progress of things is for liberty to yield and government to gain ground". Thomas Jefferson.

"Government is an association of men who do violence to the rest of us". Tolstoy. "Fire water and government know nothing of mercy". Albanian proverb. "Caesar decreed that the whole world must be taxed". The Bible. "But (the State) still remains, as it was in the beginning, the common enemy of all well-disposed, industrious and decent men". H.L. Mencken.

"The right most valued by all civilized men is the right to be left alone". Supreme Court Justice Louis Brandeis.

There is endless discussion on human rights, but almost invariably they are special privileges demanded by one group at the expense of others. For example, trade union leaders have been given the right to do many things which would be a crime, or at least a cause for redress in a civil court, if done by anyone else.

The demand for "compulsory tree education" is a demand that taxpayers shall subsidise irresponsible parents who refuse to accept responsibility for their own children, and so on. All such so-called "rights" are granted at the expense of others, whose natural rights are thus violated.

But all governments, which are purely parasitic, and thus can never provide anything, exist only to control and tax, and apart from common criminals a citizen's only real enemy is his own government. It follows that the new constitution must restrict the powers and functions of government to maintaining law and order, with special restrictions and safeguards to prevent the government from increasing its powers in any other direction.

This danger is particularly great with a government dominated by communists, whose hypocritical speeches always mask an insatiable lust for total control. Even the much worshipped Ex. Mandela Is a former terrorist who created, organised and commanded MI, an organisation whose tens of thousands of victims were mainly innocent blacks. Also he wrote the book, "How To Be A Good Communist". When the communists stop receiving largesse from America and
Europe, they will reveal their ultimate agenda, which is dictatorship. We should not be deceived by all the smooth talk designed to attract foreign aid and investment for the first two or three years.

Such a government will not willingly privatise anything now Controlled by the state, unless driven to it by foreign pressure or the need for cash. Thus South Africa will fall farther behind the rest of the world unless it privatises quickly.

In 1987 New Zealand deregulated its Post Office, ending postal monopoly. Within three years, on-time delivery of first-class mail increased to 99%, the work-force was reduced by 20% and postage rates did not rise. It progressed from an annual lose of $37 million to an annual profit of $76 million. When one considers the appalling service provided by our Post Office this is obviously the way to go. It prosperity is desired, the constitution must exclude the government from all activities except police work and defence.

Since there is no external threat to South Africa, the constitution would in practice restrict the government to controlling crime. Ironically it now controls everything and everybody EXCEPT crime and criminals, which are completely cut off of control.

There must be free banking instead of government control, of money. At present the people are forced to accept government money by legal tender laws. Protected by these iniquitous laws the government continually increases the supply of paper money, causing ever rising prices. In the past, when bank-notes (as the name implies) were issued by banks, they could not print money uncontrolled. Competition between banks ensured that, to be accepted, their notes had to be convertible into gold or silver, and for at least two hundred years there was no inflation.

No government has ever resisted the temptation to print money. After centuries without inflation the British Government seized control of the money. Having eliminated all competition they were able to go off the gold standard, and since the first World War, the pound, which was for centuries the world's most popular and strongest currency was so terribly debased that it has lost 99% of its value.

Inflation Is simply theft, as is generally recognised by the severe punishment imposed upon anyone (other than the government) who prints money. To prevent continuous government theft by inflation the constitution must prohibit legal tender laws and guarantee the restoration of free banking.

There must be a free market, which means the abolition of all tariffs, import duties, quotas, and restrictions on foreign goods or services. This would stimulate efficiency in our own industries, grown fat and lazy because they enjoy so much protection. This new efficiency coupled with the abolition of all the taxes would reduce the cost of living by around 50%.
The protection afforded by labour legislation creates a lazy, greedy and militant working class which will never be able to compete with efficient foreign competitors. For example, Asians are more skilled and more industrious than Africans, and they are powerfully motivated by their work ethic. To ensure South African survival all labour legislation must be completely abolished. This will leave employers and workers with equal rights, instead of constant favouritism towards the group with the most votes.

Labour laws are a denial of an employer's natural right to choose freely whom he will employ, and to set the terms which he will offer in a free market. If the terms he offers are not competitive he will not obtain the labour he wants. Workers are entitled to refuse his offer, but they have absolutely no right to intimidate or prevent other workers from accepting that offer. They have no right to set up pickets to prevent supplies from reaching the employer, which obviously would be a crime without the labour legislation which operates so harshly against the employer.

A strike is a conspiracy, which would be a crime if committed by anyone other than a union leader. The damage done to the economy by union leaders is enormous. Here are three examples from Britain alone.

The London Docks were the largest and most important in the world. They were totally ruined by the dockers' union, and eventually the whole area became completely derelict and remained so indefinitely.

The shipbuilding industry, in which Britain was the world leader for generations, was also totally destroyed by its unions. There was one strike which never involved the employer at all. On a large ship there was a panel of metal and wood requiring four screws to fix it. The Metal Workers and Wood Workers unions both claimed the right to fix it, and as they could not agree they struck for so long, that the purchaser cancelled the agreement of sale, and the shipyard lost its other orders long delayed by this nonsense. The shipyard closed down and the whole town became unemployed. The unions killed the whole of this great industry, which was taken over by Japan.

The coal industry was dominated by Britain for several centuries, but was destroyed in Britain by union action. And while mine after mine became uneconomic and closed down, making hundreds of thousands of miners unemployed, communist union leader Scargill lived a life of luxury which included a chauffeur-driven Jaguar.

It is important to observe that unions not only ruin their industries, but they have no hesitation in making their duped members unemployed. Unions benefit only the power-seeking parasitic union leaders, everyone else, especially the consumers, suffer from the reduced production and increased cost of production.

The people have been totally brain-washed, by a century of relentless union propaganda, into accepting such idiotic nonsense as the concept of "unfair dismissal". One can see how unjust and irrational this is by reversing the position. What a howl of rage there would be if the law compelled
a worker to work for an employer he did not want to serve! He would be described quite rightly as a slave, but no one realises that the employer is enslaved by this stupid and outrageously unfair law.

But there is worse to follow, because an employer who loses an “unfair dismissal” case, which is probable, because the verdicts of industrial courts show extreme bias against employers, can never again discipline his workers, and production will be greatly reduced.

Employers are victimised constantly by governments (they even have to serve as unpaid tax-collectors!) because they have little voting power, but the effect on the economy is inimical, and ultimately the consumers, mostly workers, must suffer.

Union leaders often bankrupt employers and make workers unemployed. The workers are taught to blame the employer instead of the union leaders. They are not economists, and never understand that the constant disruptions of industry, and inflation of production costs, directly harms them as consumers and eventually destroys their jobs. Every "victory for union leaders is a defeat for the consumers, who are mainly the workers themselves.

Therefore the constitution must guarantee a free market in labour, abolishing all labour legislation. It is absurd for South Africa to tolerate increasing union power, when America and Europe, having learned from bitter experience are reducing the powers and privileges unions have abused for so many years.

There is no mistake that the so-called GNU will not make unless this is prevented by the new constitution. Affirmative action is a typical example. Obstinately continued for 25 years in America, this policy now has to be abandoned because of the economic damage and social problems it has caused there.

For example, it is fashionable to legislate that women must have equal rights to employment with men. In America this was applied to firemen. As the tasks are so difficult and dangerous, firemen have to pass the most rigorous physical tests. It was found that women could not pass the tests. It was then held that the tests violated women's right to be fire fighters, and that therefore the tests must not be used for female candidates, who were accepted without taking the tests.

But in asserting the so-called "rights" of women to be firemen the rights of others were violated. Males with exceptional strength and agility which qualified them to be firemen were unfairly deprived of their natural right to this work, while the consumers (the forgotten people who are never considered in such matters), were deprived of their right to be rescued in life and death situations by competent firemen.

Another example of harmful government interference with the free market was the compulsion of employers to employ the same percentage of blacks in factories, etc. as existed in the population of the area. Those firms which employed only whites or orientals for their special skills were ruined when they had to replace them with blacks, and whole factories closed down. is always happens when a government interferes with the free market, the effect was the opposite of that intended, both whites and blacks all became unemployed.
As stated before, the government is purely parasitic and can never give, it can only take. The people can never have something for nothing as they hope and believe. The government can never create jobs. It could provide the illusion of creating jobs very easily, by employing one group to dig holes and another group to fill them in, but it would be an illusion. Because before it can spend money it has to take the money from the people, which reduces their power to spend, to save, and invest. This reduces employment, but as this loss of employment is widely diffused it is never connected with the heavily publicised job creation scheme which causes it. And the number of jobs lost is always more than the number of jobs created, because to actually spend say, $100,000,000 on a project, the government will collect $165,000,000, two fifths of which is lost in the totally inefficient pipeline. So the more jobs a government "creates", the greater will be the ultimate increase in unemployment, by approximately two-thirds more than the jobs created.

The human tragedy is that when government controls create problems, the government’s reaction is always to impose more controls, which of course create more problems, and so on, until the economy finally collapses. For example, if money-printing has caused prices to rise to the extent that government popularity is waning, the government's response will be price controls. Politicians are ignorant of economics, and so do not know that price controls have failed consistently during forty centuries. But price controls, especially when applied to food, bring instant popularity, the only thing that interests politicians. Yet ultimate failure is absolutely certain.

Suppose that inflation has caused the price of tomatoes to rise from $3 to $5p and the government decrees that in future they must be sold for $3. But competition in the free market has established that the correct price is $5, and therefore no one can produce and distribute tomatoes for $3. So instead of providing cheap tomatoes for everyone as intended, the price control ensures that there are no tomatoes for anyone at any price. Fries controls were introduced after the French Revolution, universally believed to be a wonderful event for the French. But like all revolutions it was a disaster. All the intelligent and well-educated people of France were murdered, and food price controls prevented the farmers from producing food, so that within eighteen months people were dropping dead in the streets from hunger. On his way to the guillotine Robespierre was reviled and the people jeered, "There goes the dirty maximum" (meaning price controls).

But we can expect the government to impose price controls, unless the constitution establishes the free market as inviolable.

The converse of price controls is minimum wage rates, which we are certain to get from this government sooner or later. Although very popular, they will have the opposite effect from that intended, as has always happened in the past.

Minimum wage rates harm the people they are intended to help. Certain classes have always earned less than averages such as juveniles unskilled blacks, women, and handicapped people. The government's attempt to achieve equality for unequal persons, by decreeing that they shall be paid the average wage, has the opposite effect from that intended, as always happens when a government interferes with the free market. As it is not economic to pay them more than they are really worth, employers do not employ them, and they earn nothing at all. Not only are they
deprived of the money which they would have earned without the government's stupid interference, but the community is deprived of the useful services they would have rendered if they had remained in employment.

From all the overwhelming evidence accumulated for thousands of years, it is clear that the new constitution must free all non-criminal people from the enormous burden of controls and taxes which exist at the present time. It must ensure that there are free markets in every field, a free labour market, free banking, free trade, free speech and freedom from fear. Crime must be the only target of the government, not the innocent citizens who live behind bars, afraid to go out after dark. The ridiculous punishments meted out to criminals must be replaced by severe penalties which will deter or actually prevent them from repeating their crimes, such as the death penalty for premeditated murder or murder committed in the furtherance of crime, and-life imprisonment for habitual criminals or kidnappers.

The government should be prevented absolutely from extending its powers beyond crime prevention, which would be financed by a moderate sales tax which would be the only tax. With the people freed from the suffocating blanket of bureaucracy, and the crippling burden of taxation which is a total disincentive to effort, the people would have every incentive to work as hard as possible, to save, to invest, and to create new enterprises.

It is a proven fact that goods and services provided by government monopolies cost twice as much as when provided by competitive free enterprise, and the service is always much inferior. For example, government offices always close at week-ends, but the shops open.

A completely free market would generate wealth and prosperity beyond the imagination of South Africans, substituting proud independence for the present mood of dependence demanding everything for nothing - "I want it all and I want it now". South Africa is rich in resources, and would therefore do better than Japan, Hong Kong and Switzerland, which have no resources, but nevertheless have the strongest currencies. By contrast in resources-rich South Africa the rand has lost 90% of its value in the last 20 years.

The alternative to freedom and prosperity is to allow the SA government to continue on its present course, which will cause the same economic ruin that has ravaged the rest of Africa.

LESLIE RIGGALL.

(FORMER MEMBER, ECONOMIC RESEARCH COUNCIL, LONDON.)
9 February 1995

REPUBLIC OF SOUTH AFRICA

Minister of Arts, Culture, Science and Technology

In reply to your letter dated 13 December 1994 I am herewith submitting to you a submission by my Department on the proposed language provisions in the final constitution. It will be appreciated if you would forward the submission to the Theme Committee concerned, for consideration.

B S NGUBANE
MINISTER

LANGUAGE PROVISIONS IN THE FINAL CONSTITUTION: SOME PROPOSALS BY THE DEPARTMENT OF ARTS, CULTURE, SCIENCE AND TECHNOLOGY FOR CONSIDERATION BY THE CONSTITUTIONAL ASSEMBLY

THE POLITICAL POSITIONS WHICH SHOULD DETERMINE THE FORMULATION OF THE LANGUAGE PROVISIONS IN THE FINAL CONSTITUTION

1.1 The concept of multilingualism

In the late twentieth century multilingualism is internationally being accepted as a basic principle in the shaping of public policy in the democratic state. The idealised socioeconomic advantages of Western monolingualism and the presumed unsuitability of so-called non-international, indigenous African languages for the purposes of government and education are heavily outweighed by the acceptance of the functional, communicative value of language in the life of the individual and the nation.

Constitutional Principle XI furthermore recognises the importance of a multilingual dispensation: "The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged."
The principle of multilingualism and recognition of the linguistic diversity of South Africa as a national resource (and not as a national problem) should therefore be retained as a political position.

Proposal: Multilingualism should clearly be enshrined as the guiding principle in the language provisions of the Final Constitution.

1.2 Language as a human right

The concept of language rights entails the right of human beings to use their preferred languages in all manner of public and private business, the right to learn and develop their preferred languages, and the right to learn and use other languages.

1.3 Constitutional language rights

The right to an official language entails the right of the individual to use and to be addressed in his or her dealings with the State in the official language of his or her choice. This right should apply at any or all levels of government.

The recognition of language rights should be retained as a political position.

Proposal: The development and protection of language as a human right should be enshrined in the Final Constitution.

1.4 Language access

The principle of language access is closely linked to that of the recognition and protection of language rights. Language policy should address the fact that language gives access to the resources available to the citizens of a country. Language policy should therefore not only articulate language rights as fundamental human rights, but should also focus on language as a Functional resource. Language is, after all, a real functional, communicative element - and not merely a symbolic element - in the life of the individual as well as a community.

The recognition of language rights therefore implies that a government should ensure conditions which render the exercise of language rights possible for the individual and allow him/her access to the resources available at different levels of government and in different sectors of society.

The principle of access can be applied to people's participation in the economy and the sociopolitical system. For example: health care should be administered in a language that patients understand and speak fluently. Likewise, officials in the Department of Housing should negotiate with squatters in a language that they understand and speak fluently.
The political position should therefore be accepted that it is incumbent on the Government to provide individuals full language access to the services and also an equitable share in the resources Government manages on behalf of its citizens in all domains or functions of government. Provision should however be made for periodic changes in the functions of different languages in society.

Proposal: The development and protection of language as a human right in order to provide citizens full language access to the services of Government and resources in the important sectors of society (education, justice, health, etc.) should be enshrined in the Final Constitution.

Services of Government should include: the legislature (Parliament, Hansard, etc.); judiciary (courts of law, etc.); and executive (Health Care in clinics and hospitals, Education, the Police, the Defence Force, etc.)

1.5 The relationship between language policy and the economy

Since people, and therefore also the languages they use, are critical factors in economic growth and performance, language policy should maximise the contribution of all South Africans to the economy. If the Reconstruction and Development Programme is to be realised fully in all spheres of our society, our human resources, of which language is a major one, should be developed and utilised. This would entail the proper management of language resources and would require a language policy in congruence with the needs of our economy.

The necessity of a National Language Plan as an integral part of the RDP in order to maximise the development of human resources should be adopted as a Political position.

Proposal: The language provisions in the Constitution should support a language policy which could assist in developing South Africa’s human resources, which are critical components of economic growth.

1.6 The concept of language equity

There is an unequal, linguicist (i.e. linguistic domination) relationship between English in particular, and to a lesser extent Afrikaans, and the other official languages. A situation of equal rights does not guarantee equity as far as language is concerned. This situation facilitates (a) the domination of some people by others and (b) the emergence of a sociolinguistic elite. A distinct form of elite closure arises whereby those in power maintain their power and privileges. However, the gap between so-called disadvantaged groups and the dominant elite should be reduced and not widened. This situation is therefore an infringement of people's language rights and disempowers the majority of South Africans by denying them full language access and consequently sociopolitical, educational, cultural and economic mobility.
An essentially antilinguistic policy which favours the principle of language equity and which recognises the sociolinguistic reality of South Africa (i.e. all the languages and the circumstances under which they are used) should be accepted as a political imperative with a view to minimising the conflict potential inherent in linguistic and cultural diversity.

1.7 Nation-building

Multicultural and multilingual societies have an inherent conflict potential. However, the ethnolinguistic nationalism of the past must be replaced by national unity. The flawed and oversimplified European assumption that multilingualism is an obstacle in the process of nation-building must be challenged.

The political position that the acceptance and integration of our linguistic diversity will enhance nation-building - in the African context should be adopted instead.

2 SOUTH AFRICA'S LANGUAGE NEEDS AND ISSUES

The most important language needs and issues which the language provisions in the Final Constitution should address are presumably the following:

The status of English and Afrikaans vis-a-vis the other official languages of South Africa.

The position of all other languages used in South Africa.

South Africa's internal language and literacy needs (including language use in health care, social care, education, the courts of law, security, the media, labour, public administration, rural communities, the arts) and language facilitation services provided by language workers such as translators and interpreters.

South Africa's external language needs, including language requirements for trade, diplomacy and tourism, and the role of language facilitation services provided by language workers such as translators and interpreters.

The special language needs of the Deaf (i.e. the use of South African Sign Language) and other disabled persons (i.e. the use of Augmentative and Alternative Communication).

3 LANGUAGE POLICY OPTIONS FOR THE FINAL CONSTITUTION

Against this background, a number of options - as part of the quest for a workable and legitimate compromise between idealism and practice - are presented for consideration with a view to devising a language clause for the Final Constitution.
The Department favours Option A in view of its guiding principle that speakers of all eleven languages have the same language rights and the right to execute those rights wherever practicable. It must be emphasised that the fact that South Africa has eleven official languages is indeed acknowledged in Option A, but it is accepted that not all eleven languages are used in all circumstances. Option A is therefore considered to be practicable and affordable.

**Option A: Flexible multilingualism**

At national level, retention of the 11 official languages provided for by the present Constitution, as far as written and oral communication between the State and individual citizens is concerned, i.e. a citizen may speak and write to government bodies in any of the official languages and is entitled to a reply in the same language. Government publications, however, normally will appear only in the following languages: English, Afrikaans, one Nguni language, and one Sotho language. In specific circumstances particular publications may also be translated into other official languages.

At provincial level, the same as is provided for in the present Constitution, i.e. English and Afrikaans and any of the other official languages.

**Discussion**

This option still provides for multilingualism with all its obvious advantages, but the number of official languages at central level for purposes of government publications is limited to four, making the whole system much more practicable and affordable. In this way, thanks to mutual intelligibility, approximately 91% of the population can be reached, 55% in their mother tongue.

This approach is all-inclusive in the sense that individual citizens can still communicate with the authorities in the language of their choice, empowering them linguistically. However, for the business of government four official languages will be used, making the option more manageable.

At provincial level (where the citizen comes into closer contact with government) any number of official languages may be declared in order to accommodate the needs of different language groups in the individual provinces.

**Option B: Radical multilingualism**

Retention of the system of 11 official languages provided for in the present Constitution.

**Discussion**

The object of this option is to recognise the reality of South Africa's multilingual population and to promote multilingualism, using language to empower all our people politically, economically and socially and to recognise their human dignity.
In principle and in theory radical multilingualism cannot be faulted, but its practical implementation could cause problems. Having to conduct all government business in all eleven official languages is an impossible task. This fact could undermine both the moral foundation and the practical effectiveness of such a policy.

The example of the European Union (EU) with its nine (now 11) official languages is often quoted in this regard. The EU has a population of approximately 350 million people, giving an average of almost 39 million people (the total South African population) per language. These are highly sophisticated, well educated First World nations with a high per capita income. Their languages are in most cases related to each other and have developed in close association with each other. These languages have been written languages for centuries and are on a comparable level, for instance as far as terminology is concerned.

Yet, even the EU with its vast financial and human resources has failed in its efforts to treat all its official languages equally, simply because of the enormous magnitude of such an endeavour that absorbs 2% of its total annual budget (for the European Commission alone, a translation/interpreting staff complement of 1 700).

In South Africa the situation is vastly different. The population numbers only 40 million and has, generally speaking, a much lower level of education (cf. the high rate of illiteracy) and a much lower per capita income.

Several of our languages are not related to each other; there are vast differences between some of them. The lack of technical terminologies in most of our languages is a problem that will take time to solve.

Financially speaking, South Africa is in an immeasurably weaker position than the EU. We simply cannot afford such an elaborate system (2% of the national budget?), because there are many more urgent needs - housing, education, crime prevention, food production, etc.

This option could be perceived as a compromise and a token gesture to pacify all language groups, one that (because of its impracticability) inevitably will result in de facto (and later probably de jure) unilingualism being imposed on the entire population.

The following options (C to E) presented here are considered to be totally unsuitable to develop and sustain democracy in South Africa. These policy options will facilitate (a) the domination of some people by others and (b) the emergence of an elite. Social injustice will be entrenched because those in power would maintain their power and privileges (hence the term "elite closure") . These options furthermore not only deprive the majority of South Africans real constitutional language rights, but they are in total contradiction with the RDP's demand for "people-centred" policy since only the interests of the State and the ruling 'elite are protected.
Option C: Elite closure

At national level, English and Afrikaans as the only official languages.

At provincial level, the same as is provided for in the present Constitution, i.e. English and Afrikaans and any additional official languages.

Discussion

English and Afrikaans are the only two official languages that are used virtually throughout the country and could therefore function as official languages at central level. Both have proved to be suitable languages in all fields of the national economy - government, state administration, the administration of justice, education, the social and natural sciences, agriculture, etc.

The State will, however, be unable to communicate at all with more than half of the population, reaching only 24% in their mother tongue. It should also be borne in mind that almost 80% of the population cannot speak either English or Afrikaans well enough to be able to participate in the administration and economy of the country.

Multilingualism is still provided for, but only at provincial level (where the citizen comes into closer contact with government). Any number of official languages may be declared to accommodate the needs of different language groups in the individual provinces.

This is a much more practicable and affordable option, but there is no African language at central level. This means that the apartheid legacy of the linguistic domination of English and Afrikaans will merely continue.

Option D: Assimilation

At national level, English as the only official language.

At provincial level, English plus any of the other present official languages as additional official languages for the particular province.

Discussion

This option obviates the need for translating and publishing documents in other languages at central level, making it highly affordable in terms of money, but not affordable in terms of supporting democracy and social transformation. The option will lead to the assimilation of marginalised African language groups into the dominant anglocentric elite.

Such a move away from multilingualism will have serious consequences and will certainly lack legitimacy. It is in conflict with modern international tendencies and it completely denies the
concepts of multilingualism and empowerment through language. The majority of South Africans will be disadvantaged culturally, linguistically and educationally through their subordination by an English speaking elite: it will force millions of people (approximately 90% of the population) to forsake their own language for all official purposes (including employment) at central level, denying them a fundamental human right.

The State at central level will be unable to communicate at all with approximately 60% of the population, reaching only about 9% in their mother tongue.

At provincial level (where the citizen comes into closer contact with government) any number of official languages may be declared to accommodate the needs of language groups in the individual provinces.

Option E: Radical elite closure

English as the only official language at all levels of government.

Discussion

This option obviates the need for all translating and publishing documents in other languages at all levels of government, making it extremely affordable in terms of money.

Such a move away from multilingualism will, however, have serious consequences and will lack legitimacy. It is in conflict with modern international tendencies and it completely denies the concepts of multilingualism and empowerment through language. It forces millions of people (approximately 90% of the population) to forsake their own language for all official purposes (including education and employment), denying them a fundamental human right.

The State at all levels of government will be unable to communicate at all with approximately 60% of the population, reaching only 9% in their mother tongue.

The detrimental effect of this option on the development of the African languages will be immense. It is important in this respect to note that the Organisation for African Unity has taken a clear stand against linguistic domination and has stated that African languages should assume their rightful role as a means of official communication in the public affairs of African countries.

4 LOCAL GOVERNMENT LANGUAGE POLICY

The matter of official languages at local government level should also receive proper attention but is not discussed in depth in this document since it is not specifically dealt with in the interim
Constitution and would probably be a matter for decision by the various provincial governments. However, since language is a sensitive issue, it is suggested that the principle of a two third majority for language policy on local government level should be included in the final Constitution.
13 April 1995

The EcoGrow Foundation would like to have freedom of health choice clearly and equably entrenched in the Final Constitution.

Jeannette Smith
Executive Co-ordinator
The Ecogrow Foundation
CONFEDERATION OF COMPLEMENTARY HEALTH ASSOCIATIONS OF SOUTH AFRICA (COCHASA)

THEME COMMITTEE IV: ENTRENCHED BILL OF RIGHTS

14/04/95

On behalf of the Confederation, which represents 18 Complementary Health Associations, we feel that it is of utmost importance that every individuals right to choose the health care option they deem appropriate, be protected. We consider it essential that this democratic freedom be firmly entrenched in the Final Constitution. In view of the high cost of Health Care (especially medicines) we are particularly concerned that the opportunity to utilise affordable accessible natural products, such as those presently used by Traditional Healers, Herbalists, Homeopaths, Ayurvedic consultants, (to mention but a few), as well as home use, could be denied to the community through over regulation by the Medicines Control Council. We feel that over regulation in this area would infringe on our democratic right to the health care option of our choice and penalise those disadvantaged communities that it should be assisting by refusing them access to simple affordable remedies.

We would like to have the opportunity to make verbal representation to the committee on this matter.

MICHAEL O’ BRIEN
The Zion African Christian Church of South Africa

24 April 1995

As Ministers of religion in this denomination we would like to appeal to that Christianity be included in this Constitution of South Africa. We voted for this government to be set free. So as Christians we do not feel free if Christianity has been left out of the Constitution. We would like hold prayer meetings in hospitals, schools and other public places. Therefore we ask that our religion not be left out.

Rev. E. Dlamini
GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

22 March 1995

SUBMISSIONS FROM STAKEHOLDERS ON THE HUMAN RIGHTS COMMISSION

Your invitation dated 14 March 1995, regarding the abovementioned matter, has reference.

Please find attached hereto a memorandum by the General Council of the Bar regarding this matter for your attention.

Should the General Council of the Bar have any more submissions to make, it will be forwarded to you before the 28 March 1995.

A.M. DU PLESSIS

(Secretary : General Council of the Bar of S.A.)

THE HUMAN RIGHTS COMMISSION - SUBMISSION BY THE CONSTITUTIONAL AND HUMAN RIGHTS SUB - COMMITTEE OF THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA
MEMORANDUM

1. This memorandum is addressed to the Secretary of the General Council of the Bar in response to the invitation addressed to him by the Constitutional Assembly on 14 March 1995. This memorandum will be sent directly to the relevant Sub-Theme Committee of the Constitutional Assembly with a copy to Bertelsman S.C. (Pretoria Bar) and G Marcus (Johannesburg Bar). Due to time constraints I have been unable to consult the mentioned colleagues, but a copy of my memorandum will be sent to them prior to the dosing date for submissions, namely the 28th of March 1995.

2. At present, Chapter 8 of the Constitution provides for a statutory Public Protector, Human Rights Commission, Commission on Gender Issues and Restitution of Land Rights.

I will deal with the questions posed:

3. Does South Africa need a Human Rights Commission? Should this Commission be constitutionalised? If so, what should be the content of such provision? Should such a provision be detailed or should detail be left to legislation?

3.1 In my view a Human Rights Commission can play an important role within certain stipulated parameters to achieve those obligations as are presently provided for in terms of the provisions of section 116(1)(a) to (e) of the Constitution. Section 16(1)(a) and (b) gives the
Commission undefined and in fact undefinable powers. One can refer to these as being the general powers at the Commission. Sub-sections (c), (d) and (e) are more specific.

3.2 Section 116(2) is of substantial importance. The sub-section does, however, in my view, contain a fundamental flaw: It does not oblige the relevant legislature to react to the relevant report of the Commission. It is submitted that section 116(2) be amended to make provision for the following addition after the word "legislature" - “and to the Constitutional Court”. I have previously suggested that the Constitutional Court be given the power (as in Germany) to interdict Parliament and a Provincial legislature from passing any legislation which would be contrary to the provisions of Chapter 3 of the Constitution or to norms of international Human Rights law which form part of South African law, or to other relevant norms of international law.

3.3 Section 98(2) of the Constitution would therefore have to be amended accordingly.

One major task of the Commission would be to act in terms of section 116(3), i.e. to investigate any alleged violation of fundamental rights and to take certain steps thereafter. It is not clear from this provision whether such obligation relates to the investigation of a violation on a vertical basis or on a horizontal basis. At this stage it seems to be generally accepted that Chapter 3 of the Constitution only has a vertical application. The ideal is of course to achieve a human rights culture and philosophy on all levels. The Human Rights Commission should therefore not operate in a vacuum in this context. In my view, and especially as far as the provisions of section 116(3) are concerned, the Human Rights Commission should operate within the ambit of a 'Civil Rights Act'. It is therefore my view that a Human Rights Commission should not be constitutionalised but should
operate within the parameters of a separate Civil Rights Act which would obviously have horizontal
application.

3.4 Inasmuch as is not already provided for by the provisions of Chapter 3, the Human Rights
Commission would, in terms of the Civil Rights Act, also operate vertically.

4.

How should the Human Rights Commission be composed?

4.1 The Human Rights Commission would obviously function more efficiently if it were
composed of separate but interrelated structures. By way of example, questions of law reform
would be more efficiently addressed by lawyers than by non-lawyers. Then again, education
Programmes and socio-economic problems could most probably be more efficiently dealt with by
qualified people in other fields. It could also profitably contain a Dispute Resolution Forum to
achieve conciliation in cases of dispute. Such a Forum should function without cumbersome
procedures and should, in the absence of conciliation, refer the relevant dispute to a Court.

4.2 The present Constitutional Principle XV provides for amendments to the Constitution by
special procedures involving special majorities. This is another reason why I do not believe that the
Human Rights Commission should be constitutionalised, but should in fact be contained in a
separate statute. The provisions of such a statute, especially because it would deal with aspirations
of society which would change from time to time, should be able to be subject to amendment by Parliament as and when necessary and without special procedures requiring special monies.

5.1 I submit that the Human Rights Commission should *inter ari* function within the ambit of a Civil Rights Act. Within the parameters of such statute, it would be able to deal with abuses that occur both horizontally and vertically, where such vertical abuses are not already dealt with by way of the provisions of Chapter 3 of the constitution. The Civil Rights would deal with abuses in the following spheres (I mention only a few by way of example):

(a) Discrimination in places of public accommodation

(b) Discrimination in public facilities

(c) Discrimination in education.

(d) Discrimination in employment where such is not already addressed by any relevant Labour Relations Act;

(e) Religious discrimination

(f) Age Discrimination

(g) Political discrimination

(h) Homosexual discrimination

(i) Discrimination in public employment

(j) Discrimination in housing

(k) Discrimination in transportation

(l) Discrimination in municipal services and facilities
A “Civil Right” in American law has been defined as a privilege accorded to an individual, as well as a right due from one individual to another, the trespassing upon which is a civil injury for which redress may be sought in a civil action. It has been said that interference with a person's lawful conduct & actions is the violation of a civil right. Thus, a civil right is a legally enforceable claim of one person against another. No right that is unenforceable in a Court of law or equity can be classified as a civil right.

5.2 The Commission should have the power to mediate and to conciliate. Where a justifiable dispute remains, it should have the power to refer the relevant dispute to a Court of law.

5.3 The relationship between the Human Rights Commission and a proposed a Gender Commission: In my view, and if my submission is accepted there is no need for a Gender Commission. Section 8, the equality clause, of Chapter 3 of the Constitution, adequately makes provision for equal treatment. Where it does not do so, and more particularly by way of horizontal abuses the proposed Civil Rights Act will do so.

6.

I therefore propose that the Constitutional and Human Rights sub-Committee of the General Council of the Bar actively supports and promotes a Civil Rights Act that the General Council of the Bar make the necessary detailed recommendations to the Constitutional Assembly in this regard.

H.J. FABRICIUS  S.C.
PRETORIA BAR
WOMEN FOR RESPONSIBLE RIGHTS
MENLOPARK

URGENT INTRODUCTORY NOTE TO THEME COMMITTEE IV

PLEASE NOTE THAT THIS SUBMISSION ON PORNOGRAPHY ADDRESSES THE BALANCE BETWEEN THE RIGHTS OF WOMEN AND CHILDREN AND LIMITATIONS WE DEEM NECESSARY ON THE RIGHT TO FREEDOM OF EXPRESSION IN THE CASE OF PORNOGRAPHY WHICH IT VIOLATES THE RIGHTS OF WOMEN AND CHILDREN AND COMMUNITY RIGHTS.

R Dekker (Vice President) G Sealete (President)

WOMEN UP IN ARMS AGAINST BILL LEGALISING PORN

Women for Responsible Rights demand that the Film and Publications Draft Bill be revised to redress the imbalance which elevates the right to freedom of expression above the rights of women and children and community rights!

The Draft Bill does not define pornography adequately:

The word is derived from Greek words meaning the depiction of the activities of whores; in common parlance it usually means sexually explicit material intended primarily for the purpose of exploiting the human body for the sole purpose of the arousal of sexual lust. Porn obviously propagates a dehumanised, disfigured and defiled form of sex, because it is devoid of true love, consideration and spiritual commitment to a lasting relationship involving the whole human person - body, emotions, and spirit.

Involving only the body to arouse selfish lust, this depraved sex inevitably breeds promiscuity, AIDS and other venereal diseases, sexual harassment, rape and violence. Its devastating effects on family relationships and society should be obvious.

The task group reported their failure to find any proof of harm caused by pornography, yet did not prove that it never causes harm. Denmark initially accepted that there was no harmful consequences in porn, but JH Court report in the International Journal of Criminology and Penology that some of the more serious sex crimes such as rape actually increased following legalisation. Evidence of the role of porn in the infliction of grievous bodily, moral and spiritual harm emerged during court cases in our own country. Advocate Tessa Heunis reported: "...every single case I've done for the last eight and a half nearly nine years, has involved men showing their victims pornographic material. In the latest case a few months ago, a man took 8, 9 and 10 year olds, two girls and a boy to a motel in Mossel Bay, y, locked the door. He put the TV set in the middle, showing blue movies... telling these children that this is how they must behave, this is normal, this is natural - look what fun they're having... almost with exception, pornography has been used to make children, boys and girls up to the
age of about 17, lose their inhibition to regard this as natural behaviour, as the norm and society’s values...

In a case against Butler, the owner of a pornography store in Manitoba, he argued that the obscenity law was an unconstitutional restriction on his freedom of expression. The Supreme Court of Canada ruled that the evidence on the harm of pornography was sufficient for a law against it; that harm to women that was 'contextually sensitive' was harm to society as a whole; and that this could include humiliation, degradation, and subordination; the Court also found that the appearance of consent by women in such materials could exacerbate its injury. The unanimous Court noted that 'if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material'. Apart from their finding that violent materials always present risk of harm, the Court noted that explicit sexual materials that are degrading or dehumanising (but not violent) could also unduly exploit sex under the obscenity provision if the risk of harm was substantial. Harm in this context was defined as 'predispose[ing] persons to act in an anti-social manner, as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse'.

The right of a child to government protection, which is entrenched in our constitution, is indirectly violated in the bill. The Bill loses all touch with reality of our broken society when it assumes that all parents will protect their children. According to a legal expert, this serious basic flaw should alone sink the bill, because it ignores the reality of street children, neglected children, children of single parents, working parents and careless parents; it disregards the hard reality of perverted parents, family members and other adults who use porn to seduce and sexually abuse children. Even if restricted to adult shops or covered with wrappings, porn will circulate in the community and inevitably reach children.

The right to equality, protection, dignity and privacy is violated. The portrayal of human beings as sex objects of sexual arousal is a distortion of sex which propagates subordination, denigration and sexual exploitation. The power of the printed word and image has always been an effective weapon in revolutionary struggles and in the incitement of racial degradation, subordination and hatred. Propaganda effectively triggers action. In Europe the role of hate propaganda in the Holocaust have not been forgotten. Porn should be recognised as similar incitement of sexual degradation and hatred, desensitising whole populations to inhuman sexualized inequality, discrimination and group defamation. In his findings on the effects of pornography, Professor James Weaver, University of Kentucky, USA, reported that men who viewed sex in R-grade films (2-18) between two consenting individuals or sex initiated by the woman, lost their respect for women. In African culture as in many cultures, men despise women portrayed pornographically. Group defamation of women amounts to the perpetuation of social inequality.

Pornographers claim that women used in porn actually enjoy doing so. Some women may enjoy it and are handsomely paid. Yet others are economically exploited, eg. in Bombay, the production cost of a blue movie is around 28,000 rupees (about a thousand British pounds). The female model used is paid around thirty pounds. As many as 20,000 copies of the video will be produced and circulated to markets in India, the Middle East and Europe. Women are frequently coerced and assaulted, subjected to humiliation and torture and kidnapped for this abominable job. Pornography portrays women bound, raped or sodomised -- are we to believe they actually enjoy it?
**Community rights:** American communities discovered that a sex shop in a neighbourhood attracts an array of 'support services': prostitution, narcotics and street crime proliferates. It is totally unacceptable that the draft bill allows these foul businesses to pollute the spiritual and physical health of a community, which should rather be protected against spiritual defilement and the inevitable spread of AIDS and other sexually transmitted diseases and the destruction of family relationships. It should be obvious that no individual has the right to sexual preferences which pollute or contaminate others and the society as a whole, or the dignity of women as a group. Government cannot change attitudes, but it has the duty to create laws that protect healthy community values. Porn is objectionable to all religious traditions on religious, moral and cultural grounds.

The bill makes a mockery of democratic people's participation in legal decision making, ignoring the overwhelming public response against the relaxation of porn legislation (only 0.38% were in favour) value, it can be restricted by properly targeted means.

We protect the fact that the draft bill allows the rights of dehumanised sex speech of peddlers and consumers of sexual filth to benefit at the expense of the rights of the community as a whole. Because porn is dehumanising and degrading speech, it can be restricted by specially targeted means, without limiting other categories of freedom of expression.

Child pornography is based on the assumption that children are harmed by having sex pictures made of them. Is it mere 'fear' of injury to children that supports the law against the use of children to make pornography? If that isn't enough, why isn't proof of injury required in the case of children too? Must we avert our eyes, lock our doors, stay home, stay silent and hope we will not be assaulted... and accept the freedom of expression of our abusers? What has to be added to fear of serious injury and evidence of serious injury to justify doing something about the speech that causes it? Why not rather err on the safe side with stricter laws, than expose women and children to the fear that legally legitimised porn will increase the very real threat of rape and sexual abuse?

Any person who can prove the role of pornography in their abuse, should be allowed to recover for the deprivation of their rights, and to stop it from continuing. At the very least, pornography should never be imposed on a viewer who does not choose, without pressure of any kind, to be exposed to it.

Our country shows the highest rape statistics in the world, and the sexual abuse of children is escalating alarmingly since the relaxation of law enforcement on porn. We demand strict laws and more effective law enforcement than in the past!

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1 Reported by Catharine A McKinnon in her book Only Words, Harper Collins Publishers, p 71,72

R Dekker, Vice President
G Sealetsa, President
THE INTERIM CONSTITUTION
AND THE NATIONAL DEFENCE FORCE

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INTRODUCTION

Differences. On the subject of defence a particular characteristic of the interim Constitution of 1993, (Act 200 of 1993), is the way in which it differs from past South African constitutions in dealing with the subject of defence and the defence force.¹ To begin with, it deals with defence in far more detail than other constitutions have. For example, Section 17 of the South Africa Act, 1909, (9 Ed.VII,ch.9) which established the Union of South Africa merely provided that "The command in chief of the naval and military forces within the Union is vested in the King or in the governor-general as his representative".²

Indeed, in 1912 when it came to actual command, when the South Africa Defence Bill, was introduced.³ Smuts did not provide for the appointment of a single executive military commander. The Permanent Force was commanded by an Inspector-General, the Citizen Forces by a Commandant-General and the Cadets by a Commandant of Cadets.⁴ The reasons are not apparent from the debates in the Assembly and the Senate. One may speculate whether this was the result of an interpretation of the extant colonial practice of governors being the actual commanders-in-chief or whether it was because the Commandant-General of the South African Republic (the Z.A.R. 1881-1902) also served as the Republic's minister of defence.

The subsequent constitutions all vested command in the State President. Section 7 of the SA Constitution Act, 32 of 1961 provides that "(2) Command in chief of the South African Defence Force is vested in the State President." Since the Queen's prerogatives needed to be spelt out as those also of the State President there was also provision that "(3) he shall subject to the provisions of this Act have power ... (c) to confer honours ... (h) to proclaim and terminate martial law: (i) to declare war and make peace".

¹. SA Constitution Act, 1910 (9 Ed.VII, Ch.9); Constitution of the Republic of SA Act, 1961; Constitution of the Republic of SA Act, 1993
². This accords with Art. 52 of the Indian Constitution, 1947.
³. General J.C. Smuts, Staatspokurer i.e. state attorney of the Zuid-Afrikaansche Republiek, 1895-1902, became vecht -generaal of the ZAR during the Anglo-Boer War (1899-1902) during the guerrilla phase of the War. With the granting of responsible government to the Transvaal Colony in 1907 he became Attorney-General and in 1910 was made Minister of Justice, of the Interior and of Defence in the first Union Cabinet. During the First World War he commanded forces in German South West Africa and then commanded forces in German South West Africa and then commanded the British and South African forces in German East Africa. In 1917 he was invited to join the British War Cabinet. He chaired the committee whose findings led to the establishment of the Royal Air Force as a separate service in 1918.
There were, however, relatively detailed clauses in the constitutions of the Orange Free State and of the Transvaal Republic (1881-1902) which were comparable to those of the 1993 Constitution. In addition, both had defence acts.

The Grondwet van de Oranje Vrijstaat, 1854, was less detailed than that of the Transvaal. In both republics military service was mentioned because this was intimately tied to the right to vote. Art.2 provided in its later form that

"Alle burgers ... zestien jaren bereikt hebben ... zijn verplicht hunne namen te doen inschrijven bij den veldcornet ... en zijn tot den volle ouderdom van zestig jaren onderworpen aan burgerdienst."

Article 23 permitted the Volksraad to pass an act termed " een burger- of kommandowet" to provide for the defence of the OFS. Articles 50 to 55 provided for the election of officers including the appointment of a commandant-general solely for the period of a war, as in Switzerland. Art. 38 provided for the State President to declare war and make peace with the permission of the Volksraad.

The Grondwet der Zuid-Afrikaansche Republiek, 1896, contained the following provisions.

"4. Het volk zoekt geen uitbreiding van grondgebied, en wil die alleen volgens regvaardige beginsels; waneer het belang der Republiek die uitbreiding raadzaam maakt".

"14. Het volk vetrouwt de handhawing der orde toe aan de krijgsmacht, de politie en andere persone daartoe door de wet aangewezen.

22. Zoo ook, dat in tijd van vrede voorzorgende maatregelen genomen worden, om een oorlog te kunnen voeren of te weerstaan.

23. Ingeval van vijandelijken inval van buiten, zal ieder zonder onderscheid gehouden zijn om met de uitvaardiging der oorlogswet zijnen bijstand te verleenen tot verdediging van den Staat." "117. De krijgsmacht bestaan uit al de weerbare manne van deze Republiek, en zoo noodig uit al die der kleurlingen binnen's lands, wier Opperhoofden aan haar onderworpen zijn." Further articles 118 to 138 describe the defence system, age limits, territorial organisation, the command and control structure, election and terms of officers and their duties - which were also administrative and judicial and much wider than solely defence.

In the 1993 Constitution, however, there are clauses that would normally be expected to be seen in an act of Parliament establishing armed forces. Even more surprisingly, the Constitution also refers to matters that could be better described as policies rather than as subjects of a permanent nature to be dealt with in a constitution.
ARTICLES

Chapter 14: Defence. The articles of the Constitution that deal with defence are to be found in Chapter 14. Apart from incidental clauses such as that defining the Public Service as including the Permanent Force (# 212 (8)) and the powers of the President as Commander-in-Chief (# 82 (4)), they are Sections 224, 225, 226, 227 & 228. Section 82 (4) designates the President as Commander-in-Chief and as such permits him to declare "a state of national defence" (not to declare war as is more usual), to employ the SANDF in accordance with the provisions of Sections 227 and 228 and to confer permanent commissions upon members of the SANDF (but it is silent about commissions for police officers). His power to confer honours under Section 82 (1) (e) is also related to this role.

PREMISES ON WHICH THE CLAUSES ARE BASED

CONTROL

Without having attended or read the detail of the debates that led to the writing of these clauses of the constitution, one must surmise that the premise which justifies these articles is that unusual circumstance have led to the conclusion that a form of close control is required over the defence force and over the public representatives responsible for its employment. One can find little reason to quarrel with the second part of that proposition even though there almost seems to have been a tacit agreement among the politicians themselves, not to mention the mass media, to ignore the role of the politicians in the matters for which the servicemen have been rebuked not to say abused, in recent years. What is important is that it should be realised that control can only work if there is commitment to it. Control will be by Parliament acting in terms of the provisions of the new Constitution and of existing legislation. The various actors set up by legislation and regulation simply act as agents for Parliament. But the success of Parliamentary control relies particularly on the premise that the public watch-dogs will not again abdicate their tasks and create rationalisations either for keeping themselves in ignorance or to shift their responsibility onto the servants of the state. Incidentally, after all the opprobrium heaped on it, it is surprising that nothing is said in the Constitution about the State Security Council which remains on the statute book as a means of co-ordinating government actions aimed at keeping the peace and maintaining control.

ONLY ONE FORCE

INITIAL SOURCES OF MANPOWER

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5. Apart from Chapter 14 of the Constitution and Sections 82 and Section 212, there are several other acts as well as Regulations under various department that are concerned with the SANDF
6. See the popular press passim. The politicians in the previous parliament remained remarkably silent about allegations that the SANDF was ruling SA or that it was a law unto itself.
Section 224 (1) & (3) provides for the establishment of the NDF (now known as the SANDF) as the only defence force (sic). The sub-clause (2) by implication explains this quaint phraseology when it provides that on its establishment the NDF shall consist of the SADF, the Homeland forces [224 (2) (b)] and any armed force as defined in the Transitional Executive Council Act. A genteel new jargon has grown up around this requirement. The SADF and the forces of the homelands accorded independence by the South African parliament in the past, are described as "statutory forces". The armed wings of the ANC, PAC, AZAPO, the AWB and anyone else laying claim to being the armed wing of a political party or movement, are known as the "non-statutory forces". The negotiations for the inclusion of the various forces in the SANDF demonstrated a lot of tough negotiating but at the same time they also revealed a remarkable readiness for compromise.

CONTROLS ON INTEGRATION - # 224 (2)

There are certain provisions in the Act providing for control over the various forces:

a. the requirement for a Certified Personnel Register viz TEC Act;

b. the exclusion of any force whose "political organisation" did not participate in the first election under this Constitution.

OTHER FORCES - # 224 (3)

Clause 224 (3) does however, provide for the potential establishment of forces, by implication armed:

a. for the protection of public property or the environment:

b. and for the protection of persons or property, presumably private in this case.

COMMENT

The following comments may be made:

a. **Armed Forces.** The Section clearly is an attempt to bring the armed wings of the various political movements to an end for the sake both of peace and of security of tenure in the country. In some respects South Africa has become like Weimar Republic Germany in which armed and uniformed gangs ranging from the Communists on the left to the NSDAP on the right ruled the streets in some suburbs.

b. **Certified Personnel Register.** This requirement was apparently inserted as a manner of ensuring that neither the government nor any of the various political movements introduces more members than each is entitled to claim as registered members at the time the TEC Act entered into force. As subsequent events have shown, failure to keep accurate registers resulted in some 4000 people out of about 7000 not being accepted for the SANDF at Walmanstal Base in June, 1994. It is to be doubted whether simply sending the discarded personnel off with no more ado is likely to be the correct answer to the problem.
c. **Exclusion.** The odd character of this document as a constitution is again apparent in the exclusion of forces whose movements fail to take part in the first election. This provision makes it appear as though the Constitution was being used as a means of drawing movements into the process, as a means of punishing them for staying out and to ensure that their personnel do not gain access to arms and other NDF facilities.

**THE CHIEF OF THE NDF**

In the present situation in South Africa the Defence Force falls under a superior executive commander even though the President is constitutionally the Commander-in-Chief. This situation has prevailed for many years and there seems to have been doubt as to the role of the executive head since the post was instituted under the title of Chief of the General Staff in 1919. During the 1930s the CGS was indeed a Chief of Staff and General Andries Brink was designated General Officer Commanding the Union Defence Force with Brigadier-General Sir Pierre van Ryneveld as his Chief of the General Staff. During the Second World War the governors-general delegated the Command-in-Chief to the Prime Minister, General (later Field Marshal Jan Smuts) who was also Minister of Defence. The present constitutional situation is probably anomalous but no one has seen fit to challenge the present role of the Chief of the defence Force - a term used since about 1970.

**APPOINTMENT**

Clause 236 states that the President shall appoint a Chief of the NDF to exercise military executive command subject to:

a. the direction of the Minister of Defence; and

b. the direction the President himself during a state of national defence.

**COMMENT**

These arrangements simply make an existing state of affairs explicit. The head of state has always been regarded as the Commander-in-Chief of the Defence Force with the Minister acting tacitly as his political deputy or agent. Governors-general appointed by the British government were more likely to have been better prepared for this role than the South African governors-general. This is likely to be the reason why Field Marshal J.C.Smuts, as Prime Minister and Minister of Defence, held this appointment himself during the Second World War. In the First World War the exercise of the appointments were carried to extremes when Louis Botha, as Prime Minister, and Smuts, as Minister of Defence, took to the field in command of formations of forces in German South West Africa. Later Smuts commanded the British and South African forces in German East Africa before accepting an invitation to serve in the British War Cabinet. The Chief of the Defence Force is the professional head of the services, acting in turn on behalf of the political authority. In this constitution the relatively absolute control which these figures enjoyed in the past has been
considerably reined in by the various provisions discussed elsewhere in this paper. A great deal has been written and said - and done - recently about the establishment of a civilian Ministry or Secretariat of Defence aimed at controlling the services. Yet, this was apparently not in the minds of the writers of the Constitution. Were there any desire to cavil over this issue on the part of an interested party, it might mean that this clause would have to be amended before the civilian establishment could be introduced. There are divided views as to where a Secretary for Defence should be located. In Namibia as in Denmark, for example, the Secretary is actually interposed between the Minister and the Chief of the Defence Force. This cannot be a structure with any merit. In Denmark the Chief of Defence continually exercises his right to speak directly to the Minister. In the United Kingdom, on the other hand, the Permanent under-secretary of State for Defence and the Chief of the Defence Staff are equals. Experience gained since the move to the establishment of a single ministry began some ninety years ago, have resulted ultimately in a very workable accommodation, especially since the 1984 reorganisation. For the SANDF a return to the latter system would be a more practicable proposal, provided account is taken of the defects of the system that was abolished in 1966.

COMPOSITION & ROLES OF THE NDF

STRUCTURE

Section 226 prescribes:

a. for a permanent force; and
b. for a part time reserve component; and
c. that establishment, organisation, conditions of service and ..other matters" shall be provided for in an act of Parliament.

STANDARDS AND POLITICS

Section 226 goes on to say that the NDF will provide balanced, modern and technically advanced military forces capable of executing the functions foreseen by the Constitution, that members shall be properly trained to "international standards of competency". No political office may be held and there is provision for compensation for disablement or death in the line of duty. [ # 226 (4),(5)& (6)].

The insistence by the various political movements that their armed wings be represented at all levels in the SANDF casts some doubt on the efficacy of the clause forbidding holding political office.

REFUSAL TO OBEY - # 226 (7)

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8. Retired Lt. Gen. Pierre Steyn assumed office as Defence Secretary (DS) at the end of 1994. The process of establishing his Secretariat by absorbing branches of the SANDF staffs was intended to be completed by the end of March, 1995.
9. Information obtained from a briefing at the Danish Foreign Ministry, Copenhagen, 14th March, 1994.
There is also a provision in Section 226 that a member of the NDF "shall be entitled to refuse to execute any order if the execution ... would constitute an offence (sic) or would breach international law on armed conflict binding on the republic".

COMMENT

These provisions indicate a desire to preserve certain values:

a. **Permanent & Part Time Forces.** There was clearly uncertainty among the parties as to whether the NDF should be preponderantly permanent or part-time. This reflects once again the absolutely incredible lack of interest and of knowledge in depth about defence matters among South African politicians. A concern with providing employment for returning members of the liberation movements seems to be unevenly balanced against the concern with avoiding a coup-making NDF. The cost of maintaining a permanent force with all the attendant expenses related to free benefits such as free medical treatment for the servicemen and their families, insurance, virtually free housing, subsidised cars for higher ranks and other costs make a part-time force a far more realistic proposition for South Africa.

b. **Standards.** This provision indicates a desire to retain a NDF that is up to scratch considering the differing origins of two amalgamating entities. The concept is very hard to formulate and so "international standards" are referred to. What has happened is that British observers have been used to observe the assessment of the candidates for office, apparently including members of the SADF in order to provide an assurance that the assessment has been fair and in accordance with the "international standards". Although the candidates for office have the impression that they have been adequately trained for military appointments, and the writer can attest to the education and intelligence of those he has encountered, there is also evidence that the Soviet bloc governments did not really offer the kind of training to all foreigners that would have been acceptable in other or even the bloc armed forces. There can be no doubt that a form of fraud was perpetrated upon many of the people trained behind the Iron Curtain.

c. **Politics.** This provision refers to the fact that the existing force, having served under one Party for so long may have committed itself entirely to that party and that in the second case, armed wings of political resistance movements engage in political education of members to the extent that they are strongly politicised. (ZANLA vs ZAPU). The ethos of the SADF has been that politics should have no place in the life of a serviceman and it is to be hoped that this spirit will seriously adhered to in the future, especially with the appointment of members of a political movement as generals.

d. **Refusal to obey.** This clause takes account of the problem that disciplined forces tend to obey their political superiors even when they realise that the orders are "manifestly illegal" or when they are persuaded that a state of war justifies the means. At Nuremberg the courts said that a soldier was bound to refuse to obey an order that was "manifestly illegal". This is discussed in 'The criminal responsibility of the individual under International Law',
Ch. 5 in Woetzel, R.K., *The-Nuremberg Trials in International Law*, Stevens, London, Praeger, New York, 1962. passim and pp. 96-121. See also ibid. p.3 *German Military_Code of Justice, 1872* (II Reich) Art 47 (2) prescribed that "a subordinate who obeys an order which is clearly contrary to law, is liable to prosecutions and punishment". In applying this provision the Supreme Court of Leipzig (1920-22) found both for and against accused in the Submarine Cases. Art 8 of the *Charter of the International Military-Tribunal* at Nuremberg provided that there is responsibility, but orders "...may be considered in mitigation of punishment...". IMT found in the *Einsatzgruppen Case* "If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order".10 This was repeated by Art 4 of the *Draft Code of Offences_against the Peace and Security of Mankind*, 1951, International Law Commission i.e. that a defence that an accused "acted pursuant to orders of his government or of a superior does not relieve him from the responsibility, provided a moral choice was, was in fact, possible to him ".11 The German Federal Armed Forces (Deutsches Bundeswehr) teach this as a principle to be followed by their modern serviceman. They admit, however, that it is really impracticable to apply. In any event, the DBW has not participated in war since 1945. It is extremely difficult for an officer to take such legalistic decisions when he is under pressure. It is easier perhaps when there is time to consider and to persuade. Formerly, the correct decision would have been for a superior officer asked to embark on an illegal war, for example, to resign. People would do this seldom anywhere today. Servicemen brought up in an atmosphere of disciplined obedience generally regard this kind of clause as an invitation to mutiny.

**ROLES AND RESTRICTIONS**

**ROLES OF THE NDF- # 227 (1)**

These were apparently narrowly defined and very restricted in an attempt to ensure that the country is manifestly peaceful and that it does not engage in war. It should be read with Principle XXXI. The clauses are idealistic but really seem not to have been drafted by politicians. Despite previous attitudes towards duties in aid of the police, the provision for aid is inevitably present again.

**RESTRICTIONS - # 227 (2) & (3)**

In the same way ideal restrictions have been written into this clause. It remains to be seen in the absence of guarantees that I mention later whether these are enforceable.

**ACCOUNTABILITY**

These are remarkable in that they provide for certain new control measures formally. On the other hand conventions of Parliament and other legislation have provided for these controls before. They depend for their success on the degree to which the members of Parliament on all sides of the House are prepared to abdicate their responsibilities.

10. Ibid. pp. 275 and 225.
MINISTER OF DEFENCE - # 228 (1)

The clause makes the Minister accountable to Parliament for the National Defence Force - which leaves room for a host of other responsibilities which an astute politician could legalistically evade. In fact he should represent Parliament to the NDF and he should represent the NDF to Parliament.

BUDGET APPROVED BY PARLIAMENT - 228 (2)

This simply states that Parliament shall approve a budget and does not provide the stricter controls of the British and the American constitutional practices, conventions and Constitution.

JOINT STANDING COMMITTEE ON DEFENCE

Previously this kind of committee existed in terms of the rules and conventions of Parliament and was not mentioned either in the Constitution or the Defence Acts and their Amendments. It is a subject which was produced under German influence and can be a very useful instrument as well as a control instrument. Again it depends on the intentions of the Members of Parliament.

THE PRESIDENT'S ROLE - # 228 (4)

There is a duty imposed on the President to inform Parliament of actions under Clause 227 but he is not forced, apparently, to ask for permission to act. The next sub-clause gives parliament a veto however.

PARLIAMENTARY VETO - # 228 (5)

This is an interesting control measure because it gives parliament the power to overrule the actions of the President and to terminate any employment of the NDF. It is much like the War Powers Act of the USA Congress entered into after the Vietnam War. It can be a good measure from the point of view of control but it may have hideous consequences for soldiers employed on operations.

In terms of Art. II, Section 2 Clause 1 of the United States Constitution the President is the Commander-in-Chief and has the power to order the forces into military operations. A formal declaration of war (for which Congress is empowered by Art 1, Sec. 8,.Cl.11) has been dispensed with under several pretexts at various times from the Franco-US Naval War of 1798-1800 to the Korean war of 1950-53. An empowering resolution by Congress enabled the President to send forces into Vietnam without a declaration of war.

The War Powers Act, 1973, however, made provision for very similar restrictions on the traditional powers of the US President to engage in war and the article in the South African Constitution seems to have been copied almost literally.

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a. If the President commits ground forces abroad he must report to Congress within 48 hours.

b. Congress may rescind the President's action by a majority of both Houses.

c. President must halt operations within 60 days unless Congress approves the military operations

GENERAL COMMENTS

Apart from being unusual in a constitution, the defence provisions of this Constitution are in many ways not those one finds in countries with pretensions to being a federation. In other countries with pretensions to being federated special provisions exist for the structure and control of the armed forces with a view to democratic rule. For example, in the United States and in Switzerland the constitutions of 1789 and of 1848 and 1874 made specific provision for the control of the armed forces to accord with needs of federation. These provisions do not breach the allocation to the central government of the duty to defend the country nor of the power to command the armed forces. However, by granting certain powers to the second tier and by restricting the powers at the centre, those two constitutions purported to provide guarantees for the constituents of the American federation and of the Swiss confederation.

The American Constitution (C1.14) forbade the maintenance by the central government of an army (not of a navy, however) without the explicit authorization of Congress by way of limiting appropriations. Instead

Clause 15 of the United States Constitution provides that all male citizens aged 18 to 45 belong automatically to the unorganised, untrained militia of each state. The organised, trained militia or National Guard as some units began to be called in 1824, also belong to each state. Enlistment is voluntary. Cl. 16 Although they are the armies of the respective states, the National Guard are part of the national armed forces and may be called to federal service by the President. Among the well-known examples of their use in state and federal roles were those seen in the struggle for Black rights in the 1960s when troops used to keep Blacks away from schools were federalised and obediently immediately protected the students from interference by state authorities and others. See also the Militia Acts of 1792 and 1808, and the National Reserve Act, 1955.13

In the Bundesverfassung der Schweizerischen Eidgenossenschaft 14, of 29 May 1874, Article 13 provides that neither the Federation nor the Cantons may maintain a standing army. Art. 18 states that "Every Swiss is obliged to render military service." Art. 19 provides inter alia that "The Federal army consists of the military corps of the cantons] [and] all other Swiss, who although not members of these corps, nevertheless remain liable to military service. The right to control the army and war materials rests with the Confederation." Under the Federal Treaty of 1815-1848 each canton had to provide forces according to its population and the federal army would be composed of the cantons' forces. Today cavalry and infantry remain cantonal.

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Each American state was allowed to maintain a militia which Congress could mobilise in case of need, however. Today this is the National Guard which may serve at the will of the State governments or be "federalised" by executive order of the President to serve as a national force. In Switzerland the cantons retain control over cavalry and infantry units including recruitment and appointments and promotions up to the rank of lieutenant-colonel. In war and other emergencies the central government may call upon these cantonal units which in fact make up the Swiss armed forces. These provisions have enabled both countries to engage in wars between the states or cantons. To my mind this proves their value in both cases as guarantors of the Constitution and state or cantonal rights. On the other hand as confidence has developed in the central government through an historical process, the central governments have gained effective control with the tacit agreement of the second tier governments and their inhabitants.

Had the South African negotiators wanted to, there were ample examples from which they could have drawn precedents elsewhere as well. South Africa's principle force, the Citizen Force and the Commandos, constitute an active militia, not a reserve. Although members representing the Part Time Forces have in fact held negotiations with the various parties since September, 1992, it seems that whatever they had to say was either not understood or ignored. Yet it would be in South Africa's best interests to promote a part time active militia as a constitutional guarantor of rights and as a source of co-operative citizenship. Moreover, it is understood that Judge Olivier included a recommendation of this nature in one of his reports. One can only speculate there might have been a variety of reasons for the failure to do anything about this: fear of losing control of the armed forces, desire to keep a tight rein on the armed forces or even incompetence. It is perhaps likely that the negotiators themselves, being civilians by persuasion as much as by calling failed to apply their minds to a fundamental issue despite their including most unusual provisions about the defence force in the Constitution.

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Dealing with "defence" in Constitutions.

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INTRODUCTION

1. This has to be a brief review of the military provisions of various constitutions. It is understood to be meant to serve as a screen against which the drafters of the South African Constitution may project their conceptions of provisions regarding the military department of government in the future.

2. The scope is limited by the brief time allowed between the commissioning of the paper and its presentation. It is also limited by the fact that the author no constitutional lawyer - has had to be selective in order to present an image of what is needed rather than a wearisome comprehensive catalogue of constitutions of which there have been and are a great many.

3. A further limitation was placed on the scope by the need to present the paper in some twenty minutes at the beginning of the workshop.

THE FRAMERS' MOTIVES

4. The inclusion of varying clauses regarding military affairs by the drafters of constitutions in different countries at different times have been determined by a wide range of reasons. Some countries have produced mirror images of the contents of other countries' military constitutional provisions. Others have produced more original provisions. Some have drafted details whereas others have dealt with military affairs in broad outline of principle.

5. The reasons may be summarised as:
   
   a. the results of historical experience;
   
   b. precedence;
   
   c. the product of ideals;
   
   d. the product of ideology.
6. **Experience.** The French and the Americans had both experienced the use of professional soldiers for intimidation. For example, the Huguenots had endured the *dragonnades*. The Americans had suffered quartering when they objected to the interference by the English parliament in the continued free conduct of affairs by the colonial assemblies. In England the dictatorship by Cromwell's major-generals had also made the English wary of a standing army.

7. **Precedent.** The American constitutional precedent was followed everywhere - in Poland in May, 1791, as much as in France in September, 1791, or, in the nineteenth century, in the Transvaal and the Orange Free State. Whatever the Americans included in their various state and federal constitutions was seen as a model for others to follow.

8. **Idealism.** The idealists in America as in France and Switzerland also believed their citizens should obey the call of duty as citizens as they claimed rights. Consequently, their constitutions also provided for their serving in militias and national guards.

9. **Ideology.** In the Soviet Union the ideology implicit in Stalin's 1936 constitution also saw the Soviet Citizen as serving the Soviet State. This seems implicit in the Nicaraguan constitution.

**RESUME OF SELECTED CONSTITUTIONS**

10. When one is expected to give an audit or resume of the constitutions of various countries respecting the manner in which they have dealt with military affairs one is faced with an extremely difficult task. One has to answer the question "which countries are relevant to South Africa's needs and why?"

11. This paper has attempted to respond to the needs by looking at countries that framed constitutions relatively soon after experiencing turmoil so that they would have some parallels that South Africans might find useful.

12. More constitutions were considered than are mentioned here but those specifically mentioned were chosen because, for the most part, they were drafted soon after governments had changed in a radical manner. To an extent some were also interim constitutions but though some have disappeared, others have remained the permanent constitutions.
13. **The United States of America.** The Americans had cast off British rule but had endured strife between the former colonies and in 1787 they were ready for a definitive arrangement. The 1787 Constitution of the United States of America contained very little on military affairs. What it contained was so little that amendments to compensate for silence resulted soon after its adoption. Together these clauses have formed the foundation of a great deal of debate, especially in the most recent two decades. It is doubtful that any more developed provisions would have made any difference since resolutions and acts of congress in recent years have added fuel to the debate rather than to settle it. No further additions have been made and it appears that the American politicians are happy that simple legislation is all that is requisite.

14. The constitution provided for the President to be the Commander-in-Chief of the armed forces. It also provided for Congress to have the power to declare war. On some 200 occasions Presidents, including Bill Clinton, have evaded the impact of the second provision by not declaring war but and alleging that the command-in-chief simply enables them to order the armed forces into military operations.

15. The other issue about which debate rages is the right to bear arms. Initially, the right concerned the provision for the existence of a militia (since 1824 the National Guard) since the Constitution also prohibits the establishment of a standing army without the explicit approval of congress. Today the issue of the national defence has become irrelevant and argument ranges about the question of the carrying of any description of arms by ordinary members of the public.

16. **France, 1791.** The French constitution did not survive for long but it contained the ideals of a new society. The provisions in the first constitution were clearly aimed at protecting the legislature and the voters from the executive the King - who had used regulars and foreign soldiers in the past. In this it was clear that the Constitutional Convention saw the danger to liberty in their fellow politician, the King. The provision were more than in the US Constitution, but still not lengthy. They were to the effect that:

   a. Qualifications to vote included enlistment in the National Guard.
   
   b. The King
i. was supreme head of the armed forces but could only commission fixed proportions of the officers

ii. responsible for the country's external security, was to prepare the forces for war and "control" them in war.,

iii. was allowed a permanent guard of no more than 1800 who had to be French and whose officers could not be allowed to command the line.

iv. would be deemed to abdicate if he were to use armed forces against "the nation".

c. The legislature's powers included

i. the determination of the strength of the armed forces;

ii. the declaration of war on the King's proposal;

iii. the rights to call on the King to stop a war of which it disapproved, to call on him to begin to negotiate for peace after war had been declared and to determine how soon after peace the armed forces were to be reduced. This provision in Art 111.2 is much like the similar provision in the interim Constitution.

17. Switzerland, 1848. Switzerland had experienced a small! civil war which had almost torn the Confederation asunder. Though the 1848 Constitution WAS revised in 1874 it remains essentially the same. Some commentators regard the Swiss constitution as being quite wordy on military affairs. But really, although more than in the American the military provisions are relatively brief. They provide that:

a. Every Swiss is compelled to serve - but that there may be no standing armies.

b. Only the Confederation, i.e. the central government may declare war and cantons may not make war upon one another.
c. The structure of the army was determined to be the active force (i.e. the Citizen Force) and the reserves. Another section indicates the responsibility of the cantons for the infantry and that of the Confederation for the artillery and technical units.

d. In some ways similar to the 1993 Constitution- the Swiss Constitution provided for principles for fitness and readiness of the army and for later legislation to regulate the army.

18. Mexico, 1917. Mexico adopted the first twentieth century revolutionary constitution in 1917 after a long struggle following the overthrow of the dictator Porfirio Diaz in 1910. The Mexican Constitution is interesting as being a radical but not Marxist constitution and also one that is concerned- albeit unsuccessfuully, with the redistribution of land. The Constitution has been described as a "code" rather than a constitution since it is very detailed in all respects. Many sections continue with unnumbered paragraphs which give very close details as to procedures, for example, the subjects upon which Congress may legislate. The provisions on military affairs are:

   a. the power to declare war is reserved to Congress and the President together - as in France in 1791;

   b. the establishment of the armed forces and a national guard in each state - much as the Swiss did;

   c. the duty of each citizen to serve in the National Guard - again much as in France, 1791;

   d. the command in chief of the armed forces and the National Guard is vested in the president with the authority to dispose over them in defence of the country. As in our past Constitutions, he has the authority to commission officers.

19. Germany 1919. Some constitutional law writers have described the 1919 constitution as the most democratic at the time it was drafted. It was an attempt by the Germans to recover from the First World War politically. The provisions of Article 48 permitted the President to lift the protection on civil rights. When the
NSDAP and the Communists and the Socialists were slaughtering one another on the streets of the cities of Germany the octogenarian Hindenburg used the provisions of Article 48 to enable the police and army to stop the killing. By doing so he created a precedent which the electorally weak Hitler was quick to use once he was given power as Chancellor. Once again, it was the political structure rather than the military structure that determined the road Germany would follow. The constitution provided:

a. The Reich had exclusive legislative power over military organization. (Art. 6)

b. The President has supreme command over all the armed forces for the Reich but "the declaration of war ... " is "dependent on the passing of a law of the Reich". The President seems to be bound by the latter provision but in fact Art. 48 enabled him to take power by decree and this would amount to legislation.

20. Ireland, 1937. The Irish constitution of 1922 was born of generations of strife and the pre-independence atmosphere was coloured by the use by the British government of a military gendarmery, the Black and Tans, immediately prior to the adoption of the constitution. The provisions in the later constitution regarding military affairs are:

a. Supreme Command of the Defence Force is vested in the President. This is to be regulated by law. Officers' commissions are from the President. (Art. 13.4-5)

b. The right to raise and maintain military or armed forces is vested exclusively in the Oireachtas (National Parliament) and other military or armed forces are forbidden. (Art.15.6)

c. Declaration of war is reserved solely to the Dail Eireann, i.e. the House of Representatives, except in the case of invasion when "the Government may take whatever steps they may consider necessary .... and Dail Eireann shall be summoned to meet...". The Constitution may not be used to invalidate laws for securing public safety and the preservation of the State in time of war or armed rebellion..."even when the State is not a participant. (Art. 28.3)
21. **USSR, 1936.** The USSR is represented by Joseph Stalin's 1936 constitution. It was exhortatory but provided very little regarding defence except for the duty to render military service.

22. **Japan, 1946.** Article 9 of the Japanese Constitution was apparently inserted at Gen Douglas MacArthur's insistence and provided that Japan would have no armed forces whatsoever. Article 9 reads:

"Aspiring sincerely to an international peace ... the Japanese people forever renounce war as a sovereign right of the nation and the threat of the use of force as a means of settling international disputes.

In order to accomplish the aim ... Land, sea and air forces, as well as other war potential, never will be maintained. The right of belligerency of the state will not be recognized".

23. The wording appears almost to be drawn directly from the Kellog-Briand General Treaty for the Renunciation of War, 1928. Yet in 1950 under the impact of the Korean War MacArthur told the Japanese government to establish a 75 000 strong National Police Reserve. In 1954 this became the Self-Defense Forces. the Japanese governments have always argued that these forces are not a contradiction of Article 9 since firstly, since they were not capable of fighting modern war, later that war and the threat had been renounced and thirdly that self defence had not been renounced. Although a variety of conflicting decisions have been handed down on the Constitutionality of the clause and of the self-defence forces, no absolute decisions have been given and the forces continue side by side with Article 9.

24. **India, 1947.** India's constitution although amended since has prevailed since 1947, and it included to show the thinking of a major Asian country immediately after the passing of a government that was essentially rule by civil servants backed by powerful armed forces. India's encyclopaedic Constitution provides:

Art. 52 "...the supreme command of the Defence Forces of the Union shall be vested in the President and exercise thereof shall be regulated by law."

25. If there are other provisions as to defence or military affairs I could not find them. The Constitution is encyclopaedic and extremely difficult to find one's way about. What is important is that this is a modern state, emerging from a colonial period but adhering to the same formula as that used by South Africa prior to 1993.
26. Malaysia, 1962. Malaysia is a multi-ethnic federation with what may be described as a semi-monarchical style of presidential government. The Constitution is very wordy and difficult to come to grips with in limited time. The constitutional provisions as to the armed forces are the following:

a. The Yang di-Pertuan Agong (i.e. the Supreme Head of the Federation elected from the nine state rulers) shall be the Supreme Commander of the armed forces of the Federation. (Arts. 32 and 137).

b. An Armed Forces Council is responsible under the "general authority" of the Yang di-Pertuan Agong" for the command, discipline and administration and other matters relating to the armed forces, other than operational use. This provision is subject to any federal law providing for the vesting of any functions in the Council. The Council includes the Minister of Defence, a representative of the Conference of Rulers (i.e. the princes) the Chief of the Armed Forces Staff, (appointed by the YDPA), the civilian Secretary for Defence various other military members representing the services.

27. Nigeria, 1979. The Nigerian Constitution of 1979 was adopted after a period of actual military rule and after the Biafran War. It was aimed at achieving unity among Nigerians as a nation despite their diversity. The provisions regarding the armed forces were:

a. The officers' corps and other ranks composition was to reflect on the federal character of Nigeria and the National Assembly was to establish a body to ensure this. (S. 197 and 198)

b. The executive President was to be Commander-in-Chief, to include operational control and the appointment of the Chief of Defence Staff, and the heads of the services. (S.198 [11 and [2].) At the same time a military law was to be enacted by the National Assembly to regulate the President's powers and the appointment, promotion and discipline of the other members of the forces.

c. The power to establish and maintain an armed force is vague and, much like the Swiss constitution refers to the powers of "the Federation" to establish equip and maintain forces subject to any Act of the National
Assembly. Read as a whole the provision suggest that the National Assembly has these powers implicitly, leaving the impression that the President cannot raise armed forces except under law. S 197 provides for the armed forces to:

defend Nigeria from external aggression, maintain its territorial integrity, suppress, insurrection, aid the civil authorities to restore order (when called on to do so by the President) and to perform such other functions as may be prescribed by an Act,

d. A National Defence Council, of service chiefs, the vice-president and the Minister of Defence is provided for (S. 140) to advise the President on matters relating to the "defence of the sovereignty and territorial integrity of the country".

e. The Constitution contemplated compulsory military service for citizens

28. Nicaragua, 1987. Nicaragua was chosen to show the constitution of a radical revolutionary government in the recent decades of the twentieth century. Its tone is very much more like that of the exhortatory French constitution of 1793 which converted the French revolution into the Jacobin revolution.

a. Article 44 Provides that the President is the "Commander-in-Chief of the Defense and Security Forces of the Nation..."

b. Articles 92 to 95 under Title V "National Defense" provide that

i. "it is the right and duty of Nicaraguans to struggle for the defense of life, Homeland, justice and peace for the full development of the nation

ii. the Nicaraguan people have the right to arm themselves in defense of their sovereignty, independence and revolutionary gains" and "it is the duty of the state to direct, organize and arm the people..."

iii. The defense of the Homeland and the Revolution rests on the mobilization and organized participation of all the people in the
struggle..." and "the state shall promote mass incorporation of the people into the various structures and tasks of the country's defense".

iv. "The Sandinista Popular Army has a national character and must protect, respect and obey this Political Constitution". Art 95 goes on to explain that the SPA is the military arm of the people.

APPROACHES TO THE MILITARY CONTENT OF CONSTITUTIONS

29. Three approaches to the military content of the various constitutions can be discerned in the foregoing analysis. They are:

a. The comprehensive approach. This is an attempt to include a wide range of subjects in the provisions dealing with military affairs in constitutions.

b. The principled Approach. This is an attempt only to outline in constitutions the principles that may guide governments and their agents in the regulation of military matters and the direction of military forces.

c. The elemental approach. This seeks only to outline the barest guidelines, including principles, in the regulation of military matters in constitutions.

MILITARY OR DEFENCE CONTENT OF CONSTITUTIONS

30. The most essential content of constitutions that deals with military or defence matters may be boiled down to five features on analysis. The more politically mature the constitutions were the less they needed to say and the more could be left to legislation concerning the armed forces. India seems to be to most significant example 48 years after its constitution was accepted. The elements for the constitutions are:

a. the power to declare war;

b. the command of the forces and the location of authority over the armed forces;
c. the constitution of the forces;

d. the employment of the forces;

e. the responsibility of the politicians who in the last analysis are responsible for the utilisation of the armed forces.

CONCLUSIONS

31. It seems from this analysis that the better form of constitution requires brevity, simplicity, flexibility and principles rather than tortuous detail which really has no more effect than extra-constitutional legislation. A constitution works when it is wanted to work - not because very conceivable eventuality has been woven into its fibres.

32. Chapter 14 of the interim SA Constitution has characteristics which do not meet with the requirements of brevity, clarity, flexibility etc. It is based on a variety of questionable assumptions, although understandable in the circumstances of the period in which the Constitution was negotiated, e.g. that the SADF was a maverick that carried out its own policies, disregarding the government and virtually ruling as a military dictatorship. I do not believe this to be true.

33. The real focus of the Constitution seems to be to determine efficacious means of control the people who are the masters of the SADF. There forerunners chose to remain silent when the press and some academics directed accusations at the SADF. The conduct of the SADF and of the SANDF seems to be to underline the assertion that they have always been, perhaps foolishly, disciplined while their masters were reckless of acts and consequences. What is needed is probably a careful determination of principles with particular emphasis on the fact that politicians are human and frail and sometimes worse than that.

34. A constitution which has provisions built in to control the armed forces does not appear to hold any more promise for the future of the countries than the simpler ones had. Despite the best of intentions Nigeria has a worse military dictatorship than ever before. When soldiers have the arms and the wrong intentions the law will not stop them. British soldiers have not engaged in coups because it is their will to behave. With the simplest provisions India has had no military coups. The Weimar Germans trusted their future presidents to have political discretion and sense. While
their soldiers considered themselves to be utterly above political matters they failed to take any steps that might have stopped Hindenburg's 'blundering. That he was a soldier simply added to the problems because he had no political experience nor sense. Hitler spent four years of his life as a soldier and the remaining 52 as a civilian despite his posturing.
I write in response to your advertisement in the Business Day of 17th May 1995. I have considered the issues mentioned by you and respond to the topics in the order in which they are raised:

1. **APPOINTMENT OF ATTORNEYS GENERAL AND OTHER JUDICIAL OFFICIALS**

1.1 How should AG's be appointed?

AG's are as important as judges in the development of criminal jurisprudence as they determine the policy of the state on the offences to be prosecuted and the emphasis placed by the State on individual offences and classes of offences. For that reason their appointment should be dealt with by the judicial services commission on exactly the same basis as the appointment of judges. The appointment should include public hearings, should be for a defined period and the terms and conditions of employment should be governed by statute and fixed for the period of appointment. In short, the appointment must be seen to be independent of government and government must be in no better position to influence the decisions of an AG than the general public.

1.2 What should the function of AG's be?

AG's are responsible for all public prosecutions in the jurisdictions for which they are appointed and are to control those prosecutions in accordance with the will of the majority of the public. They must ensure that those offences viewed by the majority of people as serious are treated as such by the criminal process and those offenders deserving of harsh treatment receive that harsh treatment. The AG will, by necessity, be required to co-operate with the police in the jurisdiction to ensure that the offences that the public wish to see prosecuted are in fact investigated in such a fashion that sufficient admissible evidence is collected to enable a prosecutor to obtain a conviction.

Whilst it is difficult to guage public opinion of the efficiency of a particular AG without resorting to elections, I believe that the holding of public hearings prior to the appointment of AG's will help to promote public interest and participation in the system. If an AG is responsive to calls from the public for action then lobby groups are sure to form.

I am not in favour of direct elections of AG's as politicians tend to avoid controversial decisions and pander to political interest groups.

1.3 Who should have final responsibility for decisions concerning prosecutions and other functions of AG's?
The final responsibility for the functions of the attorney general in a particular jurisdiction should be the attorney general himself. If we follow a policy that an attorney general is appointed for a particular area for a defined period and that an attorney general is not answerable to cabinet then there is no place for an attorney general in cabinet. If there is to be an attorney general in cabinet, and I am not convinced that there should be one, then that person's function will be to ensure that the attorneys general of the various jurisdictions are given sufficient ammunition in the form of legislation and budget effectively to prosecute crime. Such an attorney general in cabinet could also effect co-operation between the police, department of prisons and department of justice in order to see that the criminal justice system functions effectively.

1.4 **Independence of attorneys general**

I have already dealt with the appointment of attorneys general by the judicial services commission, security of tenure and conditions of tenure. In addition to that I believe that attorneys general should only be subject to impeachment in the same way as judges.

1.5 Should the appointment of any other officials in the judicial system be dealt with in the constitution?

The appointment of all judges, including constitutional court judges and attorneys general should be dealt with in the constitution as it is highly desirable that these issues are entrenched and not capable of amendment by simple majority of parliament.

2. **LANGUAGE AND INTERPRETATION**

I believe that the constitution should lay down English as the language to be used in Court proceedings. It should also be a fundamental right of every person in any legal proceedings to have those proceedings translated into their home language, especially if that home language is one of the 11 official languages.

3. **PRINCIPLES OF LEGAL INTERPRETATION**

The provisions of Section 35 of the present constitution should be retained as it is essential that principles of legal interpretation are included in the constitution. This is because the constitution is paramount and no rules applicable to other statutes will be applicable to the constitution. In particular, it should be made clear that the constitutional court will not be bound by any decision of any court, including itself, in deciding on constitutionality of legislation.

4. **INTERNATIONAL AGREEMENT AND INTERNATIONAL LAW**
This need not be dealt with by the constitution as any action by government with regard to international agreements would be capable of being a challenged in the constitutional court if it conflicts with the constitution in any way.

5. **LEGAL EDUCATION/LEGAL PROFESSION**

Legal education and the regulation of the legal profession should not be dealt with in the constitution.

6. **TRANSITIONAL ARRANGEMENTS**

No transitional arrangements should be included in the constitution.

7. **CORRECTIONAL SERVICES**

This should not be dealt with specifically in the constitution as it is covered in the bill of rights.

**CLIFFE DEKKER & TODD INC**  
Per: T S FLETCHER
THE CASE FOR PRETORIA

The purpose of this document is to prove that a single, consolidated, national capital, with Parliament situated in Pretoria - will best ensure effective government, save substantial amounts of money and unite the country in a new shared tradition of nationbuilding. We can not afford another 85 years of indecision on such a fundamental issue.

A project of the Directorate of Marketing and Communication, in close collaboration with the Directorate of City Planning and Development of the Central Pretoria Metropolitan Substructure

Project leader: Peet du Preez; Research co-ordinator: Mike Yates; Editorial team: Theo Venter (Final and Technical Editor); Prof. John van Tonder (Final Editor)

May 1995
Pretoria

1. SCENE SETTING

“10 May dawned bright and clear. For the past few days I had been pleasantly besieged by dignitaries and world leaders who were coming to pay their respects before the inauguration. The inauguration would be the largest gathering ever of international leaders on South African soil.

The ceremonies took place in the lovely sandstone amphitheatre formed by the Union Buildings in Pretoria. For decades this had been the seat of white supremacy, and now it was the site of a rainbow gathering of different colours and nations for the installation of South Africa’s first democratic, non racial government.”

President Nelson Mandela
Long Walk to Freedom (1994)

In a world where the peaceful transition from one political order to another is a rare phenomenon, South Africa stands out as one of the political miracles of the last decade of this century. This miracle was achieved through the mutual understanding among all South Africans that we are interdependent on each other. The political miracle of 27 April 1994 was the beginning of what President Mandela referred to as a long walk to freedom. He added, with the insight of an elder statesman, that what South Africans received through the peaceful transition was ....”the freedom to be free, the right not to be oppressed” (Mandela, 1994: 617)

To sustain this miracle of democracy, South Africa still has reach a number of milestones on the road to nation-building:

- embrace new and national symbols,
- commits itself fully to the socio-economic development of the entire community through - the implementation of the RDP;
- establish one, consolidated capital.

Although the historic compromises that made the 1910 unification possible should still be considered, we are now confronted with new realities and is functioning in a fast moving technological era far removed from the 1910 steam age. The 1910 compromises have served...
their purposes, including living and working with an inadequate system of divided capitals and the many negative and unproductive implications flowing from it.

Today South Africa is acknowledged as a trend-setter in this age of democratisation, yet it still needs to break out of the confined category of countries with conflicting capital loyalties. In order to break out of this category that we share with, inter alia, Bolivia, Peru, Chile and Malawi, it should be noted that the modern demands for any national capital in a global society must include the following features:

A capital with ambience and atmosphere that reflect the nations spirit and aspirations.
A capital with scope.
A capital with character and dignity (Union Buildings etc.), reflecting an international capital image and prestige such as New Delhi and Washington DC.
A capital that serves as a national hub.
A capital that is accessible to the community and civil society.
Accessible to the business world
Accommodating the diplomatic corps and the international community.
Demographically well positioned.
A networking hub - Regional and global accessibility.
A capital that addresses the needs of civil society in its planning and lay out.

South African politics has entered a phase where the needs of the broad population and the rights of individuals are central to the activities of Government on all levels. Today, it can be argued that a roof over one’s head, adequate education and health care are more important than where the capital is situated. The continuing wastage of the money through the costly dual-capital system puts the delivery of these essential services in danger.

The choice of a national capital - a decision that we can not avoid - can never be a rational choice only. Although we are sensitive to emotive aspects, we can never allow ourselves to be only dictated by tradition and emotion.

2. FROM COMPROMISE TO CONSENSUS

The negotiated settlement of 1993 that enabled all South Africans to participate in a democratic national election had a number of unique features. It opted for internal debate instead of calling in foreign powers to facilitate the process; it accepted the fact that the outcome would be achieved through a process rather than the outcome of a single event; it fearlessly addressed the holy cows of the past. The result was a shining example of a solution reached on the basis of consensus rather than compromise.

These points of consensus include:

The constitution is sovereign - not parliament as in the old order;
Equality for all before the law, enshrined in a chapter on Human Rights;
A Constitutional Court;
An electoral system of proportional representation;
A Government of National Unity;
Eleven official languages;
A new flag;
Two anthems; and
Nine provinces with executive and legislative powers.

2.1 The 1910 Compromise

The Union Buildings on Meintjieskop and Parliament Building against the backdrop of Table Mountain symbolise something of the extreme positions that had to be overcome in the 1910 solution. At the time it served its purpose, but as predicted then, it soon became a costly anomaly and compromise.

Today’s consensus approach is in stark contrast with circumstances surrounding the 1910-constitution. The approach of the National Convention (1908-1909) was to reach a set of compromises within the parameters of British colonialism. For this reason the compromise was not only between “Boer and Brit” but really between South Africa and British colonial interests. This included, amongst others, a compromise that denied the majority of South African citizens their political rights.

In contrast, the present process cannot afford to compromise on the people’s interests because it would not deliver the lasting solution expected from consensus.

The capital compromise of 1910 subsequently became a fixed institutional arrangement - in spite of the fact that it remained controversial. It resulted in the fragmentation of national government functions to different centres. We believe this fragmentation to be dysfunctional, costly and ineffective. It also disruptive and highly inconvenient. It clashes with the very function of a Government of National Unity, i.e. effective national government. It also creates ongoing internal divisions and conflicting loyalties within national government. To perpetuate the status quo would be unwise, short-sighted and counter-productive.

Furthermore, the logic of our differentiated and comprehensive three-tier structure of governmental does not allow the compromised divisions of national government into two capitals any longer. A single capital does not amount to the centralisation of political power as some people tend to argue. Power and authority is determined by the sovereign constitution and not by the venue where the power is physically situated. The process to fully establish the new dispensation is an ongoing one on all levels and the issue of a consolidated capital not only remains on the agenda but needs to be resolved urgently.

2.2 The need for a momentous decision

The 1910 compromise allowed for three capitals and left South Africa with a divisive, unsatisfactory, costly and ineffective dispensation for more than eighty five years and it is essential that we now grasp the moment in the process of change and address the outstanding issue of a national capital for South Africa. It is in the national interest to do so. If we avoid this issue now, the country will indefinitely remain burdened with the old, ineffective and costly compromise of 1910. This opportunity will not repeat itself.
3. THE NEED FOR EFFECTIVE GOVERNMENT

3.1 The imperative of one location

One issue on which virtually all South Africans are united is that the future of our country should be characterised by effective government. In addition to political direction, leadership, democratic systems and institutions, effective government also means:

- good administration
- co-ordination
- communication
- accessibility
- continuity
- efficient and cost effective government
- financial responsibility and accountability.

The governing function of a country is represented by a complicated web of communication linkages and interaction between the following:

- The legislative function comprising Parliament, with its two houses and its supporting facilities such as offices for parliamentarians, committee rooms, officials’ offices, archives, library, reading rooms, caucus rooms, ministers’ offices, restaurants, lobby area and press conference facilities.
- The administrative function comprising the permanent offices of the President and his two Deputy Presidents, headquarters of state departments, the permanent offices of cabinet ministers, heads of departments and officials, press conference facilities and many other subsidiary facilities.
- An extended civil service with major institutions such as the headquarters of the military, police, foreign affairs, reserve bank, the national fiscus etc.

Official residences.

- Embassies and the entire diplomatic corps.
- International agencies
- Interest groups across the spectrum.

Having the executive in Pretoria and the Parliament in Cape Town since 1910, resulted in an obvious, expensive and disruptive compromise. This has now become totally unacceptable and more wasteful on a much larger scale than was predicted in 1910.

The new South African Parliament, with its 490 elected representatives, numerous officials and commuting embassies, delegations, select and standing committees, diverse interest groups, advisors and consultants, presents a totally new and drastically extended parliamentary dispensation. A dispensation in which separate locations of the administrative and legislative functions have become an archaic and disruptive compromise which cannot be reconciled with the new era of consensus politics and effective government. Nor can this wasteful spending be
justified in an era when there are such huge demands for spending on essential social services and development.

Moreover distance, air travel, telecommunications, media, couriers, travel time and accommodation, parking expenditures, family disruptions, management and administrative duplication - all of these stretch the essential links between and within departments across the long haul between Pretoria and Cape Town to breaking point.

It is generally acknowledged that the degree of efficiency of government depends strongly upon these linkages, most importantly on a personal contact level, between the various role players. Where possible the physical distance between the structures and the role players should be kept to a minimum. A study of the Bonn-Berlin indicated that cost effective government is enhanced when the legislative, executive and bureaucratic functions are within the framework of one location. A parliament removed from the core of the administrative and executive centre of the country is not conducive to cost effective and efficient government. In South Africa’s case a new approach has now become unavoidable and the short and only answer is to establish Parliament in Pretoria. It is simply not economically viable to translocate Pretoria’s existing government functions, with its established infrastructure and linkages to Cape Town.

With regard to the cost and economic considerations of such a move it is important to take cognisance of what the Minister of Finance recently said to the Senate. He said that “the governments travel and entertainment bill was a frightening R166 million since the April election.” Translated into another perspective this amount, in terms of the housing needs in the country of those individuals earning less than R800.00 per month (90% of the population), would have enabled more than 11000 South Africans to qualify for a housing subsidy of R15000.00.

3.2 Government close to the majority of the people

At stake is the creation of a cost efficient framework within which effective government, close to the people, may take place in a locality best suited to exercise the comprehensive functions involved. There can be no doubt that a National Capital should be readily accessible to as many of its citizens and interest groups as possible, and that it should be seen and experienced as such. Some capitals in the world sometimes do lack accessibility due to adverse weather conditions and in the case of Cape Town, some winter months are very wind and weather prone.

It is also a fact that Pretoria is situated in the most densely populated part of the country. A radius of 200 km from Pretoria contains the whole of Gauteng, and includes portions of four of the remaining eight provinces of South Africa. A substantial 29%, if not more, of the total population of the country falls within such a radius, compared to only 7,6% in a similar distance from Cape Town. This simply means that Pretoria is readily accessible to nearly four times as many people than Cape Town, or in numbers 11 million people compared to the 3 million of Cape Town.

The population of Gauteng alone is expected to reach 12,3 million by the year 2000 and increase to 16 million by the year 2010, when the Cape Town metropolitan area is expected to have only 4 million inhabitants.
Moreover, the population surrounding Pretoria very closely reflects the national diversity, which Cape Town's surrounding population is totally at odds with.

In line with the constitutional provisions for eleven official languages, all the important languages are well represented within a 200 km radius from Pretoria, compared to only three in the case of Cape Town, of which Afrikaans accounts for nearly 60%. The same trend is confirmed when using other criteria such as political orientation and demographic composition.

With the massive population growth expected due to urbanisation, Pretoria will in future even more closely reflect the rainbow composition of the country. It should be apparent that this rapid urbanisation will place great strain on the Reconstruction and Development Program of the Government of National Unity and future governments. Therefore, it will be essential for politicians to stay in close contact with people's needs on the ground where these needs are of the greatest magnitude, and be accessible for direct face-to-face consultation with the public. In this context, an isolated Parliament in Cape Town will inevitably be severely handicapped. It is significant to note that more than 75% of all parliamentarians live closer to Pretoria than to Cape Town. From a developmental point of view and taking into account South Africa's dire needs in this field we can ill afford conflicting capital loyalties - let alone competing capitals.

### 3.3 Most nations have a single capital

Nations without a single national capital are the rare exception, such as Bolivia, Chile, Peru, and Malawi. The accepted practice and world wide norm is that the legislative and administrative government functions are seated in one venue. This is the case, especially in countries with strong regional or decentralised government systems, such as for example the federal system of the United States of America and India. In this case Washington DC is the well known national or central seat of government.

Some would argue that accommodation of national government in one location would amount to political centralisation. From a constitutional point of view this argument is totally invalid, since power and authority is determined by the constitution and not where the authority is physically situated. However, a dispensation consisting of nine provincial governments necessitates an accessible capital suitably placed to care for effective co-ordination. Ninety nine percent of the countries of the world have their national government in one centre.

In the recent case of German unification, it was decided that, although it inherited two capitals, practical considerations demanded only one integrated capital. A compromise solution was ruled out. Thus the Germans set the scene for an intensive debate after which a momentous and final decision had to be taken. The choice fell on Berlin in the interest of unification and Germany's longer term future and needs. In the German case it entails the movement of the entire government seat, legislature, executive and civil service from Bonn to Berlin over a period of six years.

South Africa, with its separate executive and legislative capitals, is obviously out of pace with other countries in the world. However, there can be no doubt that, both here and internationally, Pretoria has always been regarded as South Africa's capital and seat of government. This is not surprising, because Pretoria has been home to the core government infrastructure since at least 1910.
Presently the city accommodates the head offices of 32 government departments, housing the offices of the relevant ministers, as well as the major parastatal and privatised corporations and the South African Reserve Bank. These offices are mostly located in the central business district and other areas close to the Union Buildings. With Parliament in Pretoria, the essential linkages between parliament and these departments can be maintained more easily and efficiently in the interest of effective government. To move the civil service and the executive to Cape Town would mean the relocation of 20% of the economically active population of Pretoria or at least 100 000 state employees and their families. To move the executive to Cape Town was not considered in the light of the above.

### 3.4 An integrated capital seat

Pretoria as a city has many locational advantages and is uniquely and ideally developed to integrate Parliament into its governmental functions. Pretoria’s planning and development as a governmental seat dates back to the erection of the first government building on Church Square in 1864. Since then the integration of the various elements relating to government has been reflected in the planning and development of the city. Pretoria links city, country and continent. The Holford Report of 1949 recommended that government buildings be developed in the same pattern. The Pretoria policy plan of 1972 and the subsequent structure plans of 1980 and 1993 can be seen as an extension of planning in line with the original planning foundations.

Parallel and in tandem with the above planning and urban design studies and urban renewal projects has been undertaken and today Pretoria’s development, from a governmental seat point of view is well provided for in the City Core Project (CCP) of 1986. This master plan is an ongoing project which has already resulted in the development of the Sammy Marks Square and has now begun to address the redevelopment of Church Square. Figure 5 illustrates that within five kilometres from each other the main elements of government such as the Union Buildings, Presidency, diplomatic community and state departments are to be found.

In this context Parliament can be integrated into the governmental and urban fabric of the capital. To the extent that it can be sited on more that one possible site. Pretoria’s planning initiatives over the years therefore allows for Parliament to be linked into the existing systems in an intimate and efficient way.

Pretoria’s infrastructure, atmosphere, climate, traffic flow, accessibility, urban and residential environment compares excellently with other capital cities - Washington, Ottawa and Bern - to name but a few. Pretoria has the additional advantage, compared with other cities and centres in South Africa, that it has access to seven airports, one being Johannesburg International and the others include:

- Lanseria
- Wonderboom
- Grand Central
- Rand Airport
- Waterkloof Military Airport
- Swartkops Military Airport
Other spatial advantages facilitating the relocation of Parliaments include the highway network reaching out in all directions, railway network linking the city to all destinations country wide and regular national bus services.

In the context of South Africa, Pretoria is highly regarded and seen as the most important political centre in the region. In the African context, Pretoria is the nexus for communication and relations with South Africa. Internationally, reference to Pretoria implies the political metropole - it is the place that speaks on behalf of South Africa - it is South Africa.

Pretoria’s capital status is obvious even to foreigners and if their impressions coincide with Jacaranda season, the memories of this city lingers on for ever.

3.5 An epicentre of the major stakeholders

Pretoria already finds itself in the hub of the country, servicing all the major stakeholders including those with an interest in the process of government. Pretoria and its environment serve as the focal point for most of the head offices of the following institutions:

- Political parties
- Trade unions and trade union federations
- Organised Agricultural Organisations
- Professional bodies
- National Organised Business Organisations
- The corporate sector
- Non governmental organisations
- National parastatals (Eskom, Transnet)
- Financial sector
- International organisations e.g. the UN, EU and the Red Cross.

It is therefore clearly in the interest of effective liaison with all the countries’ major interest groups and stakeholders to consider the advantage of having Pretoria as the nation's capital. Furthermore, the demands placed on the country in the process of national integration and nationhood, not to mention the RDP needs necessitates that Pretoria in the epicentre of the country becomes the integrated capital of the nation.

3.6 Accessibility to provincial government

Given the emergence of new provincial capitals (see figure 6) South Africa also needs a centre of national government where administration, decisions and policy can be co-ordinated, executed and controlled by interdependent, but separate government institutions. Fears expressed that such a development would endanger and compromise the RDP programme lose sight of the fact that the delivery platforms of the RDP programme are the provincial and local governments.

A strong and effective system of nine provincial governments, each with its own capital, is an essential and integral part of the new South African political and constitutional dispensation. At the same time, unhindered and effective liaison and consultation between provincial and national government to ensure long term success in this regard has already become practice. Therefore,
national and provincial government structures should be readily accessible to and within reach of each other.

It is moreover significant to note that Pretoria, on an average basis, is 800 km nearer to the capitals of the provinces than Cape Town. This implies considerable savings in travel time and costs in the short and long term for both the national and the provincial governments. More important, however, is the positive effect this may have for effective co-ordination and consultation in the interest of effective government on both these levels of government.

3.7 The gateway to Southern Africa

Notwithstanding the many years of isolation policies, South Africa is widely considered and accepted as the economic power house of Southern Africa and even Africa. The new democratic South Africa has opened new political, diplomatic, social and economic links with all the Southern Africa states. Strong relationships in diverse areas are increasingly being forged between South Africa and its northern neighbours, and a new organisation of Southern African States is now a reality. In this respect it is important to note that four of the capitals of these states fall within a radius of 500 km from Pretoria, and another three within an extended circle of 1200 km. The distance of these capitals from Pretoria is on average more than 900 km closer or only 42% of their distance from Cape Town. Scheduled flights from all of these centres converge on Johannesburg International Airport. It is clear that Pretoria has become the springboard to Southern Africa and Africa.

3.8 Hosting the nations of the world

The capital of a nation is the meeting place and forum for missions and representations from the four corners of the globe. As we all experienced with the inauguration of President Mandela and so eloquently stated by himself in his biography “10 May dawned bright and clear. For the past few days I had been pleasantly besieged by dignitaries and world leaders who were coming to pay their respects before the inauguration. The inauguration would be the largest gathering ever of international leaders on South African soil” (Mandela, 1994: 115)

Hosting all the major foreign missions to South Africa, as well as various other international bodies and institutions, Pretoria is also home to major international interest groups and organisations and an excellent base to network with decision makers in all spheres including the Southern Africa and African context.

Some very important diplomatic facts are that there are presently 97 diplomatic missions situated in Pretoria, and the number is still increasing. If one were to add the number of missions and other diplomatic offices, like the 55 consulates based in Johannesburg, 152 diplomatic offices are within the immediate vicinity of Pretoria. Compare this to the 27 missions in Cape Town. It is also very important to consider the level of diplomatic duplication in Cape Town, because of the 27 missions in Cape Town, 25 have main missions (Embassies or High Commissions) in Pretoria. The duplication does, however, not stop there, during parliamentary sessions 14 of the latter 25 missions in Cape Town do not use their official consular office addresses, but another address!
In Pretoria most of the missions are situated almost within walking distance from each other in the suburb of Arcadia, and also within a few minutes’ drive from the Union Buildings and other government offices. Many embassies in Pretoria, such as the extensive new complex of the United States of America, also serve other countries. Organisations such as the United Nations, UNICEF, UNDP and International Red Cross are also established here, while others are still moving in.

At a time when it is critical for South Africa to establish and maintain its international position as the leading country in Africa, the need for effective liaison with foreign missions and international interest groups and stakeholders cannot be underestimated. This necessitates continuous close proximity to the government and not the present shuttling between Cape Town and Pretoria. This also applies to parliamentarians who need continuous exposure to foreign representatives and in this day and age our opening up to the world, necessitates Parliament moving to Pretoria. Should Parliament remain in Cape Town the cost to foreign missions, interest groups, etc. who inevitably have to maintain close and personal links with will continue to escalate.

4. THE FINANCIAL REALITY: THE COST SAVINGS IMPERATIVE

One of the major criticism of the 1910 compromise was that the three national capitals and the compensation paid to Natal for not having a national capital, would escalate into unaffordable dimensions. Reviewing the financial implications of shuttling between Cape Town and Pretoria, that warning now seems to have resurfaced again.

The governance of a country and the maintenance of parliamentary structures are costly operations. Effective government demands that these costs should be kept under control. Given the socio-economic needs of the broad South African population this requirement takes on an added significance.

4.1 Annual cost savings of state departments

The following brief outline gives an insight into the current annual costs arising from Parliament being housed in Cape Town. These costs would ipso facto represent an annual saving should Parliament be established in Pretoria. Calculations for the cost of moving the civil service on during a ten month session of Parliament, amounts to a total of R49 million. Once Parliament has been established in Pretoria, a further recurring annual saving of R16 million would be possible, which if combined, totals to approximately R65 million. It must be pointed out here that these calculations are based on traceable expenditure only and has been supplied by the Central Economic Advisory Service of the state, using 1995 figures (see figure 8).

From a hidden cost point of view it has been pointed out that the calculation of hidden costs regarding travelling, could probably be as much as 7 times higher than indicated, because the cost involved is not linked to Parliamentary expenditure, but to directorates’ travelling costs.

In can be concluded that an amount of approximately R75 million plus per annum could be saved if Parliament is established in Pretoria. This cost figure, however, does not include indirect costs which are generally accepted to be extensive. The estimated R75 million plus is therefore a very conservative figure.
4.2 Duplicated facilities

Pretoria already provides permanent offices and residential accommodation to all the primary role players involved in government. To enable Parliament to function in Cape Town the following facilities are duplicated:

- Offices and other facilities for Ministers and their officials,
- Residential accommodation for the President, Deputy Presidents, Cabinet Ministers and officials.
- Government conference facilities
- Diplomatic facilities
- Offices for interest groups

The cost savings that can be effected from the sale of some of these facilities are reflected in annexure A.

4.3 The cost saving imperative

The cost factor alone makes it imperative to consider the case of Pretoria as the parliamentary seat of South Africa. By relocating Parliament to Pretoria, substantial savings will be effected in the following areas:

- Capital expenditure on physical infrastructure
- Communication costs
- Costs to government departments
- Running costs of Parliament
- Productivity
- Travelling costs, etc.

Calculations done by one of the most prominent auditing firms in the country and by a team of econometric and statistical experts, estimate the total current saving by relocating Parliament to Pretoria at R75 million for the year 1995.

It was also calculated that if a fully-fledged high quality parliamentary complex is to be established in Pretoria, it would cost between R366 million and R467 million. The market value of certain buildings used for the parliamentary function in Cape Town (excluding the Parliament building itself) was estimated at R184,600,000 (a 9.8% increase from 1994). Should this amount, for example, be subtracted from the actual construction costs, then a new parliamentary complex could cost between R182 million and R283 million. The cost of current and future alterations and extensions to the existing parliamentary complex in Cape Town should also be subtracted and will reduce this cost even further.

Several sites with exciting possibilities have been identified, and will be available at no or little cost (see figure 9). A purpose-made new parliamentary complex, with an appropriate design and spatial setting, will naturally have great advantages in terms of cost, functionality and suitable symbolism.
There is, however, also the possibility of altering an existing complex in Pretoria at an estimated cost of between R116 - 130 million. The Church Square options falls in this category. Such an alternative would amount to a net saving of between R54 and 68 million.

It will be found that the interest or instalment on a government loan will inevitably be considerably less than the estimated annual savings that can be achieved by relocating parliament. Should any of our estimates be even significantly too low or too high, this argument would still suffice. This positive cost differential will naturally increase when such a loan is being paid back or inflation increases the running cost of the alternative.

If Parliament is not relocated the inefficient practices will not only be perpetuated, but taxpayer’s money will continue to be wasted rather than allocated to productive programmes.

### 4.4 A capital in the economic heartland of the country

Pretoria is situated in Gauteng, the economic heartland of South Africa. Although it comprises only 2,5% of the land mass of the country, it is the home of 25% of the population and annually produces 43% of the country's gross domestic product. As such, Pretoria possesses all the requirements of a strong and viable national capital:

- ample natural resources,
- an excellent and purposeful infrastructure,
- sufficient and stable labour provision,
- and a developing industrial base.

Within convenient distance from the Johannesburg Stock Exchange most major financial institutions, the bulk of the manufacturing industry, and the large mining corporations. Pretoria provides the ideal platform for the kind of government-private sector interchange that is acknowledged to be so essential for economic growth and foreign investments.

### 4.5 Cost options for Parliament in Pretoria

The perception was created in the media that the relocation of Parliament would necessitate a massive capital outlay of “billions” of Rands, but in careful analysis and systematic financial research that preceded the generating of a number of cost options for the establishment of Parliament in Pretoria this “billions”-perception turned out to be a myth and an emotional reaction.

Three important issues were taken in consideration in the financing options i.e. how they are going to be financed; where would a possible Parliament be situated and what the cost implications of each of the four options would be.

Alternative financing options. Several alternative financing options can be explored further to finance the establishment of Parliament in Pretoria such as:

- Creative funding packages such as: lease-back, parliamentary bonds, foreign funding, private sector funding.
- Financing through sale of selected state properties in Cape Town
- Direct expenditure from the annual budget
- Financing through annual savings

To accommodate Parliament in Pretoria the following were options considered to develop a framework in which Parliament can be relocated immediately, in the medium term and in the long term:

A completely new building, custom designed to accommodate the new size, style and manner of government.

Alterations to an existing building with additions to suit parliamentary requirements. Using certain existing buildings and facilities in Pretoria as an interim measure. This option was not explored further, because an analysis of the workings of Parliament seems to preclude this option in favour of a single building complex.

Possible locations. The suitability of a three sites in Pretoria has been analysed. Criteria included size of site, accessibility, prominence, distance from established role players, security, strategic placement and relationship to existing housing. Three of these sites, namely the Klapperkop site and the Blackmoor site (see figure 9) and the Church Square development, were found to be eminently suitable.

Cost implications. To arrive at a basis for cost evaluation, it was necessary to choose various options for a new Parliament. These options were chosen for analysis and illustrative purposes only, and were not intended to be prescriptive in any way.

The construction cost implications of the most expensive option as well as the low cost option are illustrated in figure 11 as a graph that indicates the cost of construction, as well as the net cost. The net cost graph was calculated by subtracting the potential income from selected buildings in Cape Town, previously calculated at R184 million.

4.6 The cost aspect in perspective

The following graph indicates that the cost involved in even the most expensive option (a new Parliamentary complex on Klapperkop), amount to approximately 5 years of cost savings. It also shows that a total of more than R1 200 000 000 can be saved over a period of ten years.

It has been pointed out in the document that calculations excludes the sale or alternative uses of the Parliamentary complex in Cape Town. Alternative uses could reduce costs even further. It can also leave Cape Town with a valuable asset that, due to its status, location and unique character, can be used for purposes much more profitable for the local economy than is currently the case.

5. PUBLIC OPINION

Any decision with an impact on the national interest must be able to take public opinion along. Depending on the issue, public opinion could be more or less informed about the facts or have
more or less informed perceptions. It is possible to ascertain what the position is regarding a particular issue and whether it is based on fact or perception. There is a dynamic exchange between facts and perceptions and responsible governments are very sensitive to this dynamic exchange.

A recent survey by the HSRC (February 1995) conducted among 2000 South Africans from all walks of life indicated the following levels of awareness to the facts. On the question “Can you tell me in which city is Parliament?” only 64% of all the respondents indicated Cape Town as their answer. The implication of this example is that 36% of respondents either did not know or indicated the wrong venue. A second question was where the head offices of government departments were situated again 66% indicated Cape Town. People approached in this manner of questioning reflected their perceptions as was indicated above.

During 1994 two national surveys were conducted to determine public opinion on various issues including the question of where Parliament should be based. The questions were direct questions whether Parliament should remain in Cape Town or relocate to Pretoria. The IDASA survey of September 1994 based on a telephonic survey among 2517 respondents among all racial groups indicated that 51% favoured Cape Town. A postal survey among national elites done by the Centre for International and Comparative Politics, University of Stellenbosch, 62% of the 588 respondents indicated the preference that Parliament should remain in Cape Town.

In a survey commissioned by the PCI a different approach was taken in that the entire questionnaire focused on the issue of the possible relocation of Parliament and more nuanced options where available to respondents. On a question of what major considerations (see figure) should determine the seat of Parliament, 33% indicated the cheapest option and 24% indicated that Parliament should be close to the seat of government. Historical reasons received the support of only 8%. The dynamic situation since this survey (the prominence of this issue in the media) is reflected in the results of the February 1995 HSRC survey that indicated the following:

- 66% of the respondents indicated that they favoured one capital because it would be more cost effective.
- 66% indicated that they would prefer one location due to easier accessibility
- 61% indicated that a single capital would be in the national interest.

A further question respondents were given a scenario and were then asked to reconsider the question of the relocation of Parliament. The scenario described a Parliament with longer sessions and added issues such as costs, effectiveness and accessibility. Respondents were tied at 47% for relocation and 47% for the status quo position on this question, indicating again there sensitivity to the cost argument.

In another question two statements were given to the respondents. The first statement related to Parliament staying in Cape Town and the second statement related to the fact that Parliament relocated to Pretoria would offset the cost factor by savings; Here the responses were as follows:

- 56% of Black respondents favoured the Pretoria option
- 47% of Whites favoured the Cape Town option while 45% favoured the Pretoria option.
When confronted with the dynamics of the decision-making process on the issue respondents indicated that the political and cost considerations would be the most important deciding factors. 31% were of the opinion that the eventual decision would be a political decision and 30% thought that cost considerations would be the deciding factor. Effective government was also indicated as an important issue that will determine the outcome (see figure 12).

If government takes a cue from this response it could affect a decision with the kind of support that would unload controversy. While all the surveys reflect an emotional dimension amongst the existing perceptions it is also clear that a rational decision based on cost effectiveness and the need for effective government will comfortably take the vast majority of public opinion along. If government succeeds in basing its decision on comprehensive national considerations, it will allow differing minority positions to come to terms with the decision on the bases of agreeing to differ and thus contributing to consensus.

6. CONCLUSION: THE UNFOLDING VISION

The arguments developed so far do not lead to a single-perspective conclusion. Because the issue, in the final analysis, will require a clear cut decision, the broad, encompassing vision of the options are briefly summarised.

6.1 The “myopia” scenario

This scenarios implies a maintenance of the status quo. Because it closes its eyes for the dynamics of the new realities it will, as time drags on, become the most costly option, settling for compromise. It focuses on short term considerations and emotionalism. This scenario reflects an inability to break with past tradition and will continue to keep the future of South Africa hostage to the mistakes of the past. Eventually the myopia scenario will force the country to revisit the opportunities that we had in 1995, but at a cost that will make change increasingly prohibitive if not totally unaffordable. This amounts to the continuation of the parliamentary tradition and frustrations of the past eighty five years.

6.2 The muddling through scenario

“Let things develop” is the motto of this scenario. Supporters of this scenario do have the willingness and insight to understand the new reality but lacks the courage to change the future. It will amount to a compromise on a compromise - settling for conflicting capital loyalties by splitting parliamentary sessions between Cape Town and Pretoria. This panel-beating approach will increase the cost of governance even further and leave us with the same old model, but under the guise of effective government. Eventually this decision will drown in its own indecision and will increase the dilemma we now find ourselves in. Changing gears in terms of a process of muddling through will be very costly and may even be impossible to maintain in the long term. We will muddle through to an eventual decision and then ask ourselves why have we been so short-sighted in the first place.

6.3 The momentous decision scenario
This option implies a bold and strategic decision against the background of a solid well-researched information base and a process that took along the people in a transparent way. It is pro-active, inclusive and initiating to the extent that it allows for a breakthrough to let things develop as oppose to wait and see. To a large extent the process has already begun, the vision is unfolding and with the correct incentives, initiatives and visionary leadership it can be carried through to fruition.

This document substantiates that a single integrated national capital, necessitating the relocation of Parliament to Pretoria, will best facilitate effective national government, afford much needed national savings, and allow for a new tradition to be developed in the interest of the country and all its people, now and in the future. The argument is clear, we cannot wait, nor waste, nor afford another eighty years of division on this crucial fundamental issue. Let us therefore compliment our forerunner image and ability to create breakthroughs, and take another momentous decision in the process of our transition, and reach a final consensus to establish one national and international capital for our country. Our people and deserving nation is ready. They, and the generations to follow, will appreciate such a bold decision on an issue that for eighty five years fostered conflicting capital loyalties in a now defunct union of South Africa.

It is therefore, not whether we can afford it - we cannot afford not to embark as a nation on a process to relocate Parliament and to set the RDP free!

7. Bibliography

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Dear Lyn

As you know, on 11 October my Branch held a Symposium on Crime with speakers from our local police force.

Whilst I was aware of the fact that the police budget had been slashed to give more funds to the RDP - and disapproved of the action since the RDP as very little hope of getting off the grounds with the ... high crime rate prevailing in this country - none of us realised the impact the Constitution had on the police force.

Whilst the Constitution guarantees the life of a murderer, rapist or child molester, it cannot guarantee your life or mine. Obviously, this means that criminals have more rights under the Constitution than law abiding citizens.

Criminals on the very rare occasions they are actually convicted, are guaranteed a reasonable standard of life - open to inspection of the public. They have an assortment of societies working on their behalf even one to get them the vote. What about the disrupted lives of their numerous victims? Who gives a damn about them? Who sees to it that dependents are housed and fed? Who cares for and supports a person paralysed for life of a shooting incident? Is there a support group in this country who can support them financially? Personally I doubt it there are far too many victims.

Something is very wrong with the Constitution and it MUST BE AMENDED. It should be changed to read "Guarantees the life of all law abiding citizens" and there must be no loopholes. Since money is at the root of all reforms, I very much doubt that the Constitution could be amended with clause to the effect that "Victims of criminal assaults will be compensated by the State". The State has no money other than that gathered from the taxpayers and we certainly have no money to spare. It is naturally assumed that while victims at any rate are covered by private insurance, a very high percentage of them are not, as they can no longer afford the premiums. Also, as we know, many insurance companies are very adroit at evading the payment of claims - and few of them, in any case, are paid immediately.

Violent crime is on the increase throughout the entire world, particularly in those countries where the death penalty has been abolished. Evidence enough I would say, that the ultimate penalty was a deterrent. I feel that if it were reintroduced in South Africa - rather than having a finger pointed at us - other countries would be only too willing to follow suit - provided of course, that JUSTICE WAS SEEN TO BE DONE. America has ratified it anyway.
We had it confirmed, as if living in Kempton Park was not enough evidence in itself - that we had the highest rate of crime in the PWV as we were the largest residential area. We barricade ourselves in to try and preserve our lives and what little property we have left - we are virtually prisoners and the criminals with their AK47’s walk free and do what they will. We came away from the meeting very troubled indeed. Other points that came up at the meeting were:

1. There must be no bail allowed for charges of murder, child molestation or rape. In these days of AIDS rape could mean a slow and torturous death for the victim, apart from other traumatic effects. This also applies in the case of child abuse.

2. The police must be supported. They must have higher wages and be better trained and be far better equipped. They must also know they are supported by the Courts of Law. They must not be brutal but conduct their investigations in a proper and orderly manner, knowing they are supported and appreciated. There must be more of them and they must be visible at all times whether they patrol on foot, bicycles, motor bikes, cars or horseback.

3. The money saved from salary cuts to MPs to be given to the police force, plus money from the army budget - we are not at war with our neighbours and from other funds. Fighting crime is our No. 1 priority. Without internal stability we can't progress.

4. Crime is putting up the cost of living by incurring higher prices of commodities - due to theft of stock, trucks and vans, additional costs for customer safety, security in general, higher insurance costs, etc.

5. That women form kangaroo courts and deal with the sentencing of murderers, rapists and child molesters.

6. That Islamic law be introduced for convicted burglars - their left hands be amputated.

7. That the laws must be simplified, not written in legislation so that everyone through the country knows the law. That sentence for crimes be prescribed so that if you break the law you know your sentence. It should not be left to a judge to decide - he will only be there to ensure a fair trial.

8. The reintroduction of the cane for young first offenders thinking back to my childhood I think the cane, far from doing any harm, prevented many youngster from taking to a life of crime. Needless to say, murder, rape and child molested must carry the death penalty. There must, however, be no delay between the sentencing and the hanging. We do not have the finances or the accommodation to feed, clothe and keep these people in idleness for twenty years.

9. There must be no bail facilities for murderers, rapists or child molesters. The minds of these people are such that they are out and repeat their crimes all over again and do not surrender to their bail.

10. Drink and drugs should not be considered extenuating circumstances - rather as additional crimes.
Certainly I gathered that people are not only extremely worried, they are extremely angry. Unless something is done and done quickly, I am concerned that more and more people will take action into their own hands - replacing one form of anarchy with another. Whilst I deplore apathy and am delighted to see people raised out of it - I do not want them to go to the other extreme and counter violence with violence - though I can understand it. Crime is no longer a joke.

As I said, we left angry - not with the police, who want up in our estimation, particularly the black detective, but against the whole situation. I know the criminal element threatened President Mandela with the loss of votes if he implements stiff action against them. If he relies on their votes he will lose a lot of other votes. Operation Fruit Salad was implemented. It is not enough. I don't think the President will be intimated - I sincerely hope not for his own sake. Given a chance - if only the trade unions would stop all these strikes - he might prove to be an excellent President and that, coming from me with my known antipathy towards any politician or political party, is saying something.

Sorry to burden you with my problems Lyn, but I am deeply concerned by all this. You are the elected head of the League - a very democratic organisation - and you know far more people than I. Is there anything you can do to help?

Love Alys
MUSLIM ASSEMBLY
(CAPE)

23 May 1995

The Executive Committee of the Muslim Assembly have resolved that the written submissions annexed hereto be considered by the Constitutional Committee in drafting the New Constitution for South Africa.

Kindly consider our application, dated 15 May 1995, in which we requested to make oral submissions to Theme Committee 4.

We thank you for allowing us to participate in this historic process and we value your cooperation.

MOOSA VALLIE ISMAIL
[EXECUTIVE DIRECTOR]

A Fundamental Document Of Human Motivation, Relationships And Human Endeavours From An Islamic Perspective

1. INTRODUCTION

This document should serve as a basis for specific submissions on various aspects of the new constitution with a view to imbue a spirit of cohesiveness for a common loyalty in all human spheres for the benefit, security and happiness of all our people in South Africa.

We share the view that the only refuge for mankind lies in the establishment of a society that permanently binds all people. It is increasingly being accepted that this can only be achieved by structuring society on the basis of time tested, universally accepted values rather than the present preoccupation with materialist and behaviourist models. These latter models have in both East and West shown to lead to the degradation of man and his alienation from fellow man, State and the rest of creation.

It is noteworthy that underlying the strident call for change in the living conditions, is, plea for a restoration, f that which makes all of us human again. These considerations devolve on us the duty of re-channelling the basis and direction of development, to achieve real all round
development, the potentialities of which there is a glimpse and a promise in the nature of man properly understood.

It is for these compelling reasons that we submit this document, drawing attention to the need to appreciate the true nature of man, and of the acceptance of its fundamental position in the restructuring of human society.

The fountainhead of all our planning is to take into account the common universal human values, norms, principles, standards, laws and codes which can only enhance the progress of mankind provided all this fits into and is in harmony with the spirit and nature of the human personality.

2. THE BASIC NATURE OF A HUMAN BEING

The nature of all human beings is basically and essentially the same consisting of three mutually interpenetrative, inter-dependant and interacting components (phases) or centres of energy. This includes the entire domain i.e. all the aspects and components of the human personality. The human personality can be considered to function on three levels.

2.1. The Biological/Instinctive self is the energy/force which binds man to his earthly existence for self-preservation. It functions on the level of satisfying our bodily and material needs and desires i.e. hunger, thirst, sleep, comfort and passion. These instincts are inborn tendencies and inclinations.

Because of the high degree of biological and psychological evolution of man's mind which grants him (self-consciousness), the Instinctive Self has a loftier side which comprises the urge for self-love and self assertion. This self-love gives rise to the desire for ruling over others, praise and flattery, status and fame, material greed and wealth, luxurious comforts, miserliness, arrogance, cruelty, cunning, prejudice, racism, oppression, protectiveness of the group, the desire for conquest and domination, hatred for opposition. Man may even sacrifice comforts and material things in an urge to dominate and gain worldly power and glory (for an ideal).

2.2. The Intelligent Self Or Discerning Self grants man self-consciousness that gives meaning and purpose to his existence and creation. The Intelligent-Self refers to the nucleus of the human personality. The main instruments of the intelligent-self are the faculties of the mind i.e. curiosity, reason, cognition, volition, imagination, memory, intelligence and the realm of thought. The Intelligent-Self is the master and director of
these instruments. It is the master of the entire personality with all its facets, qualities and energies. It is receptive to universal truths. It is therefore the seat of human responsibility and accountability, for it is to this intelligent-self that the freedom of choice has been granted, for it alone has the capacity to think, understand, reflect, evaluate, analyze, develop concepts, seek, recognize and accept universal truths.

2.3. The Higher Self contains the seed of the goodness in a human being for it continually strives and aspires towards Beauty and Goodness. The higher-self guides man to beauty, truth, justice, purity, refinement, mercy, compassion, harmony and balance and is averse to untruth, ugliness, discord and foulness.

From this Higher-Self emanates the qualities of truthfulness, selflessness, generosity, dignity, righteousness, decency. The Higher-Self is created good and pure and continually influences and draws the entire human personality to goodness, because the most powerful urge and impulse in the human personality is love for beauty, goodness towards perfection. The perception of the Higher-Self is thus qualitative and synthetical in contrast with the analytical and logical processes of the mind on its own. The higher-self can only be nurtured and nourished by exemplary role-models of conduct in virtue and through prayer and paying heed to prayers, through inner conviction with a sense of accountability and that all of life is consequential.

3. THE NATURE OF THE UNCONSCIOUS MIND

3.1. Urge for the Ideal Search for-Beauty

The strongest and the most basic impulse (urge) in man is his love for beauty, expressed as a yearning for truth, dignity, and honour. No human being would like to be lied to therefore truthfulness, honesty, trustworthiness is what all human beings love. No human being loves injustice, therefore throughout history we find governments, empires, dictatorships with all their instruments of destruction had to succumb to this essential urge and desire in man for truth, justice and dignity.

The urge for the true or right ideal I originates in the unconscious mind. The more recent work now reveals that the unconsciousness is the real and sole source of the true and prosperous motivation in man. The true nature of this motivating power has been misunderstood (and subsequently rejected) as the urge for sex (Freud); urge for power (Adler); the urge for sex and power (Jung). It is really the urge for beauty, the satisfaction of this urge will unify man's personality, bringing about individual security, happiness, with loyalty and compassion for others. Clearly, this has implications for us
in the search for solutions to political and social problems in education and legal institutions.

3.2. Interaction Of These Components

The instincts constantly influence the Intelligent Self for its own satisfaction and ends. The Intelligent-Self will use reason to justify the Instinctive influences ignoring the influence of the Higher-Self for goodness and beauty, truth, justice. The Intelligent-self capitulates to the Instinctive Self and man's fragile nature taken over, resulting in all ignorant manifestations of misery, destruction, conflict, tyranny and discord.

4. NEGATIVE FACTORS IN THE DEVELOPMENT OF THE INDIVIDUAL/GROUP/NATION

4.1. Environment

Much has been written about this. Suffice to say that although the environment is of utmost importance in determining the destiny of the citizens, the focus should be on the total needs and aspirations of the citizens, i.e. catering for the entire personality of the citizen.

Compartmentalisation

4.2. In the light of the above it is vital that the new lawmakers take into account the entire personality of man. If a human being's personality becomes compartmentalised he/she will be unable to express his/her true self and the whole of him/herself, to the detriment of himself, others and creation.

4.3. Regimentation

The human personality will never accept laws that are in conflict with human nature. All man's experiences in this century we live in, proves beyond any doubt that nothing can be enforced on the human personality. Regimentation of the human personality has no place in the development and aspirations of the people. In formulating and planning any and all aspects of human endeavour, success can only come about if norms, standards, laws, concepts if it does not fit this unique, universal, eternal nature of man.

5. CONCLUSION
5.1. It is only in this dynamic and whole understanding of the human personality, that a common, cohesive, intelligent, well-proportioned and balanced outlook on human issues, problems can be achieved for the common enlightenment and enhancement and empowerment of all our peoples.

This fundamental understanding of the human personality becomes the very source of man's hope for a universal value system and for a stable secure society.

5.2. It is our fervent hope that in the light of the daunting tasks facing us, of the realisation that this may be our best and last chance to bring real progress, coupled with the realisation that current political, economic and social theories may not solve our problems, our leaders will accept the view that permanent and successful change effects a transformation primarily of human nature, a redefining of the motives and ideals driving man and society. Furthermore, in the light of these, to expose the uncritical assumptions unproven and even false claims, of theories and system that have been given the primary role in the restructuring of South Africa.

THE ISLAMIC CONCEPTS AND ATTITUDE TO HUMAN SEXUALITY AND FAMILY PLANNING

1. INTRODUCTION TO THE NATURE AND SPIRIT OF ISLAM

Islam originates in the spirit of the messages that Allah, The Lord of all the worlds, Lord of the Tremendous Throne, sent unto mankind. Islam is the final, total and perfect Message unto mankind. This message of Islam is in the form of the Holy Quran, which is the only repository of Islam. The God, Author, Authority, Owner and Defender of His religion is Allah Alone. The human practicality of the Holy Quranic guidance and the only divinely-ordained authority, and the only divinely-ordained leader for the whole of mankind, is vested in the most illustrious personality, life-style, character and the entire conduct of Muhammad,(PBUH) the final and most illustrious Messenger of Allah.

Islam presents itself unto mankind in the conduct of Muhammad (PBUH) and in the conduct of the believers in Islam. Muslims are those who indicate or say they believe but belief has not entered their beings while the believers are those who believe in Allah, they do righteous work and have righteous conduct and are certain of accountability to Allah, Glorious and Great is He!
The distinguishing features of Islam is that it is simple, practical, free from fantasies, fables, day-dreams and magical chantings. Every feature of Islam is unique, in that it is in total truth and aims at unifying the diverse components of the human personality, to function in unity so that the believer functions in all aspects of life as a total human being and thus, is distinguished from the animal. This unity of constituent components of the human personality is brought about in the belief of The One and Only True God, Allah Almighty, and in total unconditional submission with the surrender of the believer's entire personality and the subjugation of the personality in expressions and actions through inner conviction to the Absolute Sovereignty and Perfect Majesty of Allah Alone.

Every feature in Islam is universal in its applicability and also in its direction and guidance with its ethical ideal of the spiritual expansion of mankind. The essence, spirit and nature of Islam is the ever-living dynamic Unitary Will of Allah Alone, which The All-Merciful and Compassionate Lord of all the worlds asserts on the whole of His creation.

The assertion of His Unitary Will, thus, unites the whole creation, which is in diverse patterns of law and order but independent and interrelated in the Ever-living Glory and Power of the Unitary Will of Allah Almighty. The believer in Islam who also functions in the Unitary Will of Allah, harmonises himself in the Unitary Harmony of the universe and like it, is in harmony with the Harmony of all harmonies, which is the harmony of the Unitary will of Allah Almighty.

Islam grants mankind definite patterns of human practicality in belief, its basic order of life together with stops and procedures in a practical path of life. This path becomes possible only through inner conviction, for Islam forces nothing upon the human personality; on the contrary, it invites, enjoins and appeals to the conscience of man and in respect to the basic essential nature of man.

The practicality of life in Islam, is radiated, through a set spiritual procedures, which provides channels of piety and through which the human personality is regulated in the constant remembrance of the Glory of the Lord. Thus, constant watchfulness of the conscience, together with reminder of a keen perception of the morality of Islam, makes it possible for man to overcome his greatest inherent weakness, which is forgetfulness. Thus piety, as the regulating mechanism, anchors the human personality in constancy, to stabilise and develop itself, in proper proportions, so that it can totally express itself, as a beautiful, decent and balanced human being, as a human being who is creative, contributive and constructive in life.
Islam presents mankind with an operative factor in life, and that is God-consciousness and God-fearingness, fearing the wrath of Allah and His displeasure, because in the pattern of Islamic belief there is the certainty of accountability in the after-life. This life is in continuity to the life in the hereafter. Islam presents mankind with a definite purpose in life and that is, the worship of Allah Alone, with a definite destiny which is "from Allah we are and to Allah is our return". The cause of life in Islam is in the total guidance of Allah Alone and operates only in submission to His Unitary Will, for He has no relatives, no partners, no shareholders, no chosen people, no privileged class and He is under no obligation to anyone and anybody in creation. He is no obligated to His laws, for He has only to say, "Be, and it becomes". He does not necessarily have to create.

Islam presents a constant objective in life for the believer and that is to "worship Allah and purify your religion for Him". Thus Islam, in all its beauty, frees mankind from all ignorance and the egotistic oppression accompanying it and the oppression from the monopolises of religion and the oppression of tyrannical rulers and also the oppression of worlds, wealth and power.

The believers in Islam in truthfulness to themselves and trustworthiness to the worship of Allah, are guaranteed success in this life and the life hereafter, for Allah Alone is the Only Guarantor for success. The believer thus frees himself from all fear, misery, sorrow and grief. The believer in practising and adhering to the directions benefiting him through blessings from The Lord of the tremendous throne, receiving constant guidance, achieves success in the realization of oneself, to the realisation of the Absolute Sovereignty of Allah, and thus successfully achieves peace, contentment, happiness and security with hopefulness for success in the life hereafter.

Thus the human personality constantly adheres and upholds the values, norms, principles, standards and laws that is ordained for the benefit of the believer in Islam, whose constant watchfulness of the conscience is stabilised in the belief of accountability to an Ever-Living, All-Knowing, All-Seeing, All Hearing, Ever-Aware Allah, Owner of The Day of Judgement.

2. ISLAM'S ATTITUDE TOWARDS HUMAN DIGNITY, HUMAN DECENCY AND HUMAN CONDUCT

Allah, in His Infinite Wisdom, has created the entire creation, consisting of seen and unseen patterns, imaginable and unimaginable features of creation which are interrelated, interdependent and subject to a living Divine-order with immutable laws. So are the functions of the human body subject to eternal laws governing the physical function and basic essential
nature of all human beings. Thus Allah, in His Infinite Wisdom, Mercy and Compassion, has also ordained immutable laws governing human relationship. These laws:

(a) The cardinal law of human dignity,
(b) Selfless service in the cause of life for the sake of Allah Almighty,
(c) Implementing absolute social justice,
(d) The law of human decency,
(e) The laws governing the entire human conduct in humility, shame and modesty.

And these laws are permeated by the all-pervading law which is the law of consequence. "As you sow, so shall you reap". This was said by the Spirit of God, His Illustrious Messenger, Jesus of Nazareth (May Allah bless him and accept our salutations upon him).

The Holy Quran emphasises this law and declares it as follows: "And man shall achieve nothing except that which he strives for". Allah creates man potentially the highest of creation, provided man, in the Glory of Allah, in the remembrance of love of Allah, submits his entire personality unconditionally to the will and guidance of Allah Almighty. Thus, in Islam, there can be no place whatsoever for anything that belittles, humiliates, ridicules, oppressing the body and spirit of any man. Asked by his companions, "O Messenger of Allah, who is the best of mankind?" He replied straight and to the point" "The best of mankind is he who serves mankind best".

3. RELATIONSHIP BETWEEN INDIVIDUAL, FAMILY AND SOCIETY IN ISLAM

The individual in Islam is not directly the unit of society but is the unit of the family and the family constitutes the unit of society. Although the rights of the individual are paramount because of taste, temperaments, faculties, powers and outlook, all of which cannot be traced to differences of environment or upbringing. It is also impossible in practice to level all differences and qualities, for each individual acquires rights and duties according to the initiative for developing innate potentialities. Therefore, although the individual can under no circumstances be regimented, the individual has no right to violate the law and rules regulating family structures in Islam, neither can the individual violate and distort the norms and standards of human society within the spirit and perimeters of the laws governing human relationships.

It is imperative that these rules and regulations which form the fabric and structure of the family, be made a permanent feature of human civilised life. The family is the cornerstone of a civilised people and it is self-evident that its stability and betterment should have the first claim
of a nation's attention. For if a family becomes disorganised, it is unable to maintain and produce healthy and sound individuals, not only in the field of industrial efficiency, but also all other spheres of human activity will suffer an account of unsound, irresponsible, ill-equipped and unhappy individuals, who have to shoulder the demands in these fields. Therefore, a pattern of collective life, which weakens and disorganises the family in the interest of increased material and industrial productivity is certain to suffer from social and economic maladjustments, because it undermines the very fountain-head from which the individuals health and efficiency is inspired. It is only a healthy and happy family that can create happy, well-adjusted individuals, with initiative, drive and moral idealism. Only such individuals can be truly productive, materially and spiritually, in any field of life they enter. A balance between self-expression and self-control, freedom and order, uniformity and diversity, should be achieved to put the human family and the society an a secure and prosperous basis.

4. ISLAM'S ATTITUDE AND OUTLOOK ON SEX.

Islam views sex as crucial to personality development, family and social survival, because it is intimately bound up with psychological gratifications, the need for security, feelings of personal worth, feelings of power, and the assurance of being loved and lovable. So crucial is sex, that no social system can ignore it or be indifferent to its implications. The light in which a religion views sex, is probably not indicative of that religion with regard to man, family, society and the universe. Islam nor only recognises but accepts the essential nature of man. Part of that nature, is the sexual urges and desires which must find expression in life. The spirit and nature of Islam channels this sexual urge and desire as a religious duty, to become a consequent moral safeguard, as well as a social necessity, and like all other duties in Islam, marriage is enjoined upon those who are capable of meeting the responsibilities involved. Marriage, thus, is a healthy means to emotional and sexual gratification. It is also a mechanism of tension reduction, legitimate procreation, social placement moreover it is an approach to family alliance and group solidarity. In Islam marriage is regarded first and foremost as an act of piety. Sexual control and protection, reproduction and sound health are reinforced as they are intertwined with the constant, watchfulness of the conscience for pleasing Allah and avoiding everything that displeases Him. These are conceived as a religious commitment and eternalised as divine blessings, for, in Quranic verses, the call is addressed to mankind to be dutiful to Allah, who created them from a single soul and from this single soul created its mate, and from the two of them, spread abroad many men and women (Chapter IV verse 1)

"It was Allah who created mankind out of one living soul and created of that soul a spouse so that he may find comfort and rest in her". (Chapter 7 verse 107)
Piety and integrity are great focal aspects of marriage in the precepts of Islam and blessed and fortunate is he who chooses his mate on that basis. The economic factor is the least important, no matter how powerful this may have been in other ideologies.

5. ISLAM’S IDEAL AND ATTITUDE TOWARDS SEX EQUALITY

If by sex equality is meant that artificial Customs, traditions and laws which prevent the female from playing her full part in collective life and developing her inherent capacities to the maximum extent, should be removed out of the fabric of human society, then all normal human beings true to the essential nature of man, will agree to such a removal of inequalities. But, on the other hand, if sex equality that the type of mental and bodily faculties, psychological make-up and temperamental equipment by the two sexes is identically the same, and that men and women exist and have their being, not as complements to each other, but as competitors and rivals in a common sphere of action, then such an ideal breathes misery and insecurity, not only for the individuals, but also for the families and the society.

The Holy Quran negates all inequalities due to sex, race, colour, nationality, cast or tribe. Declares the Holy Quran: 110 people, be careful (of your duty) to your Lord who created you from a single being and created its mate of the same (kind) and spread from these two, many men and women”. (Chapter 4 verse 1)

And again, "they are an apparel for you and you are an apparel for them”. (Chapter 2 Verse 118)

Again, "They have rights similar to those against them in a just manner”. (Chapter 2, verse 228)

An a human being woman is absolutely equal to man. In Islam there is a specific sex individuality in a man and woman, which they must preserve and cherish because it gives them mutual honour and dignity and enables them to fulfil their specific roles in an effective manner in society. Where this specific sex individuality is effaced, as if to involve man or woman into an inferiority, it produces a dead and colourless equality which is in truth a denial of real equality, for it makes less differentiation and therefore leads to abnormal attitudes and relationships. The Prophet of Islam warned men who imitate women and women who imitate men in their dress and manners. For in Islam both sexes have equal rights and are regarded in Islam as distinct legal personalities. Even in the Islamic marriage, even after a wife has come into active partnership with her husband, she is still a separate legal person in Islamic law,
capable of suing and being sued in her own individual capacity and entitled to sue her own husband for her just rights. Freedom and equality are concepts which have been very much misused in today's world. "Human progress depends to a large extent on freedom and equality which can be based only on an inequality of function where each individual and each sex is entrusted with the tasks to which its natural endowments, and inherit qualities qualify it most". (M. M. Siddiqi: Woman in Islam) Real freedom does not lie in unrestricted licence, but real freedom presupposes certain wholesome natural restrictions. Similarly, equality cannot mean a total obliteration of the diversity arising from the natural and inborn differences between a man and a woman.

In plain and simple terms, in Islam, although as a human being woman is equal to man, absolutely, she in view of her biological and emotional difference, is blessed with a distinct role and duty in life, therefor has distinct rights. Man, too, is endowed similarly with a distinct role and rights.

6. ISLAM'S STANDPOINTS ON BIRTH CONTROL AND CONTRACEPTIVES.

It is most important to understand and appreciate that in Islam, the religious component's purpose is to integrate and to reinvigorate the ethical and legal elements and the appeal of the religious component upon the believer, is greater and deeper than that of formal codes of Law and Ethics. In simpler terms, the influence of Allah Almighty in all His Glory and Splendour permeates everything in creation and also His Laws. The most characteristic feature of Islamic Law, is to moralise legal action and formalities by placing them in the context of the spirit of religion and its morality. The fact that Islamic Law holds the religious, moral and legal elements as indivisible and thus grants the family and society the mechanisms of social control as indivisible. In Islam there is thus an integrative synthesis of religion, morality and law. In fact, all aspects of life is integrated and rooted in the belief of The Ever-Living Dynamic God-Allah, the Perfect and Absolute Sovereign. Islamic law incorporates in one system, a religious spirit, a moral fabric, through which it flown and a mundane practicality. It is distinguished in, that it assigns to man a greater responsibility and action with more consequences, that are perhaps found in comparable systems of law and behaviour. "It sets before man ends beyond his immediate sense of time and space conceiving God as an integral part of any action situation". (Family Structure in Islam by H.Abdal Ali)

In the spirit and nature of Islam, judgement on any issue or problem is evaluated on the following principles:

(a) The factual truths of the matter,
(b) The intentions and motives involved,
(c) The capacity and capability factors,
In the age in which we live, all aspects of life being dominated by economic, industrial and materialistic pressures, urges and desires, together with its soul-sapping and moral-eroding social norms and values, has brought to the forefront the desire of birth control as a national policy in both the developed and underdeveloped regions of the world. Thus, as a National policy, birth control and Family Planning ignores the spiritual and moral aspects as, of a by the way, incidental factor, if not completely neglecting and compartmentalising within the four walls of religious institutions. Birth control as a national policy, thus acts as an economic, industrial, military demand, that erodes human relationships. Let us never forget that "man does not live by bread alone".

Family Planning, as a national policy, merely patches up the extreme demands of a greed motivated and power-hungry materialistic economic order, industrial and military demands. Thus, as a national policy, Family Planning and birth control, is unacceptable and the consequences has already become so glaring as family life crumbles and society is reverted to a technological new aspect of the Jungle. Islam is a natural religion and as stated by the authority if Islam on earth, i.e. the illustrious personality of Muhammad, the Messenger of Allah (Peace and blessings of Allah be upon him), "Reason is the root of my religion". For belief without reason becomes superstition. Although Islam, in its spirit and vital teachings, does not under any circumstances, compromise with evil, yet it accepts man for what he is, with all his falterings and failings; inviting, enjoining, appealing and approaching any problems of mankind in the spirit of mercy and compassion, meeting the demands of the situation in a realistic and comprehensive spirit of truth. Birth control and Family Planning is thus considered by Islam only in the background and in the light as, has been stated above. Birth control and Family Planning is therefore considered only in marriage, and only on an individual and specific basis with a consideration filled with compassion and in the consequences not only to person involved, but to the family interest, with the cardinal view of strengthening the bonds of marriage, in mutual respect and feelings. Therefore, premarital sex has no place in the realm of sanctions in Islam. Contraceptive methods in specific married Individual cases should, of course, be considered in the light of the best medical facilities based on the merits of the whole medical, moral, social and economic aspects of the problem.

Contraception for teenagers, - of course, has no justification whatsoever, and in Islam great stress is laid on social restrictions affecting the segregation of sexes to a sound healthy extent, compatible with individual and collective self-preservation, a pattern of society in which men and women do not intermingle too freely. For each sex a certain sphere of life has been allotted within which it concentrates its energies, leaving other fields for the opposite sex. If
Intermixture becomes necessary at any time, even then it is necessary to avoid laxity and tendencies to permissiveness, but to observe even the minimum requirements of decorum and sexual purity. Islam places certain restrictions on women as well as men in order to regulate their sex and family lives, both of which it regards as the foundations of a stable and progressive civilisation. Among the first restriction of both men and women is the Divine-ordained command to the duty of behaving with shame and modesty in the public. Another is that for both sexes there is the compulsory duty of keeping certain parts of the body covered. The absolute minimum for men is from the navel to the knees. The standard for the a woman is the entire body excepting her face, hands and feet. Another restriction is for men not to enter any home unless the inmates of that home have granted permission, and when they do enter, salute the inmates. The touching of women beyond the categories of divine sanctions, is also forbidden, except in cases of grave emergencies, endangering health or life. All these restrictions on man and women are intended to guard sexual purity. The safeguarding of one's chastity is of real and lasting spiritual and social value, and therefore there is no doubt that such restrictions are healthy and justified. A definite distinction of dress between male and female is made, and even within the utmost privacy of the home, the husband and wife should conduct themselves in God-consciousness and God-fearingness to observe the rules of decency, and should conduct themselves with decorum and ever retraining from acts of mere animality. Therefore, contraception for teenagers has no place in Islam.

7. ABORTION

Abortion can only be sanctioned in case of a married woman based on the individuals specific state of health and medical factors, which may burden a healthy and sound family's relationship with a burden of stress and strain, adversely affecting the individual and the family's capacity and capability to flower in mutual love and gratification. The abortion in such specific cases, can only be decided, of course, in the directions of sound, judicial experience and with the total facts and consequences of such procedure for the benefit of the individual and family, safeguarding, at the same, the interest of the norms and standards of the society. Economic and social-inspired urges and desires for abortion has no place in Islam, for the glaring consequences of such demands for abortion is only too glaring to any discerning person. Allah Promises and Provides for mankind, and Forbids the killings of offspring.

Masturbation, homosexuality, bestialities any abnormal sexual deviation, aberration like rape, is severely admonished or even severely punished, depending upon the specific individual case and the quality of the act involved. In the case where there is definite medical facts involving the helplessness of the individual, physically, spiritually and mentally, then with such specific cases, the permanent institutionalisation of such persons must be ordered by responsible God-
minded administrative authorities. This is done so that the family and the society is safeguarded from the helpless transgressions of a grotesque and distorted human personality.

8. CONCLUSION

Islam aims to grant men not only as individuals but also as families and communities precautionary measures against sexual misbehaviour. A healthy society can only come into being, can only maintain its standards of integrity if it takes great care of making simultaneous use of its moral and legal sanctions. Both are equally necessary, but the primary importance in this respect, is the spiritual outlook that flows and is attached to moral sanctions determining the entire conduct in all aspects of human activity. And this again is the product of the spirit and quality of their educational environment.

THE STATUS OS WOMEN IN ISLAM

PRE-ISLAMIC PERIOD

The world of humanity prior to the appearance of the final and total Messenger of Allah (God), Muhammad *, was a world in which women had no established status. In every society of the whole world women were subjugated to the whims and fancies of men and were regarded as chattel, they had no property rights, could not inherit, etc. Women were denied their status and their true role as human beings. Before the advent of Islam all human societies practised rampant polygamy.

PRESENT STATUS OF WOMAN

Ignorance of the total way of life in Islam makes a human being's outlook confused and his stance in life distorted, and he/she succumbs to the wiles and whims and ambitious fancies that are borrowed from other sources of ignorance. The status of woman in society at present is the result of ignorant values and economic circumstances. In this prevalent age and time, in the materially developed nations, it is the trend and fashion to emancipate women by stripping them of their modesty and shame to a false position of total equality with men. This false "liberated" position distorts her sense of gracefulness, shame and modesty, defeating her true role in life, leaving her to naked exploitation and a miserable perpetual state of insecurity and fear. In a state of ignorance where religion is just a formal practice of customs and usages, the poor women have been regimented to a status of social-
religious serfs, stifling all their expressions and thus depriving them of their true position as the backbone and nucleus of a healthy society.

[ * Peace Be Upon Him]

In ignorance, alien customs have taken for granted the backbone of the nation i.e. woman, who have been shut up and shut out of the world around her, paralysing the primary most influential teachers of its society - the woman. Alien ideologies, in so-called modern civilization claim to strive for the interest of the woman by giving her a monogamistic social status, but in its morality and practice, in the name of permissiveness, poor woman has been debased with fanciful titles like mistresses, escorts, call girls, hostesses, which in most instances deprive poor woman of her modesty, dignity, her motherhood and sisterhood. In this permissive man-made concept of human values, the free will of man is entirely expressed through material successes and excesses to cater for his whims and fancies for a false destiny of comfort, pleasure, lust and greed.

STATUS ACCORDING TO ISLAM

Allah Almighty in His Infinite Wisdom and Mercy grants woman a status, like everything else in Islam, a status in life as a human being in the Unitary (One) Will of Allah, the same as any male human being. It is only when the human personality functions in Total Truth, that it becomes balanced and proportioned and functions in the harmony of all Harmonies i.e. Allah Almighty, in that it receives guidance, vision with wisdom, protection and blessings. But in view of the woman's different physical equipment and her role in life, she has rights, responsibilities and duties pertaining to her distinct role as a woman. Her vital role as mother makes her the backbone of humanity. Allah Almighty's Messenger, Muhammad *, emphasized this when he stated that heaven lies at the feet of the mother to whom the child first turns to for every need. It is the mother who is the first teacher of the child. The early years of childhood are the years, when the child can implement every good act to reap good habits. Good habits result in a healthy, good character and a healthy, good character results in successful destiny.

Islam gives status to woman with honour thrice that of the male, thrice that of the husband, thrice that of the father. Thrice that of the brother is the honour of the sister and thrice of a son is the honour of the daughter. The gifts bestowed on woman such as physical beauty, of voice, a greater capacity for shame and modesty, steadfastness and patience is by Divine Ordinance. There is also her vital role as the heart of the home where one expects to find refuge from the trying challenges of each day. Islam as the Eternal Message of Total
Guidance for the whole of mankind, grants woman a status in the spirit of The oneness of Allah with crystal clear rights, unique to her being and her role in life, universal and eternal for all womanhood. These rights are entrenched in the very foundations of an Islamic outlook and approach in life.

Islam gives clear direction as to the principles of dress and covering of a woman living a life in Unitary Will of God, together with her relationship with her closest of relatives. This in no way curtails her in her worship of Allah, but on the contrary enhances her honour and her dignity as a woman. The Messenger of Allah stated that a man's most treasured gift in life is a virtuous wife. An ignorant, secluded, oppressed woman is unable to equip herself and her offspring to face up to the challenges of life.

Islam grants mankind an evolutionary path in which polygamy is disciplined and regularised. Islam advocates that the relationship of multiple wives be restricted to four and will have to be meted out with justice. If the Believer fears inability of adhering to this condition, then Allah Almighty reminds him to restrict himself to one wife, for that will be best for him. The illustrious Messenger of Allah, Muhammad *, has reminded that: "The best among you are those who are good to your wives" and "paradise lies at the feet of the mother". The Holy Quran states that women have rights similar to those over them. Islam advocates a common morality for both sexes in every respect, and in most of the moral injunctions, men and women are mentioned together. Woman share equality before the law and they are granted civil contract between man and woman in which any lawful conditions can be inserted. Women is granted a right to inheritance. She has a right to own property in her own name. Islam give clear and consistent proof of the fact, that in liberation of man, woman has a vital role to play.

Justice in Islam, is an absolute social norm, and that the mothers and sisters, the wives and daughters of the nation are its first and most influential teachers and fountainheads of actions and habits for the development of character for a good destiny. The woman should also individually and collectively take on the struggle to equip themselves, to assert their rights with responsibilities and duties. These rights are Divinely Ordained and are meant to be asserted. For too long has the world witnessed the consequence of ignorance and all its consequent evils, especially in relation to the status of woman.
In the reality of the diversity of all creation, presenting in harmony, the spectacle of the unity of one day and similarly the spectacle of the unity of one night, in the reality of the inter-dependence, inter-balance and interrelationship of each and every form and pattern of creation, in the reality of the whole of creation with diverse forms and patterns, subject to constant change, where action, inter-action, reaction and existence, destruction, birth, growth and death all take place to the set norm and principle of diversity functioning in unity, in the reality of the whole and only one South Africa of all the diverse cultural groups and in the reality of the Oneness of mankind, this diversity must be moulded in the vital teachings of Total Truth and conduct in the essential basic nature of all mankind.

In all this reality, the reality of the whole of creation is subject to Absolute Law and Order. The Reality of Norms, Principles and Laws forms a set Basic Pattern of the human form, nature and relationship, distinct from the animal and the rest of creation. Thus the human being and human society is unique, universal in all its basic expressions and is capable of eternal motives and purpose. We humbly submit the basic concepts, approach and purpose, attitude and outlook for the vital, essential pattern of education, that will not only form, but forge and maintain in spirit the unity of diverse cultural groups of all our people in South Africa.

This vital essential pattern of education must permeate and infuse the whole structure and form of education. For although the individual has every right to belong and to be proud of his/her cultural group, he will nevertheless be the unit of a dynamic South African nation.

A nation comes into being when it can produce persons from within its body polity, to stimulate natural concepts, principles and laws of human relationship, taking on the pattern of all that is beautiful and constructive, in the light of its geographical, historical features and above all in the spirit of the Oneness of mankind.

This spirit of the oneness of mankind is universal and is founded upon eternal, immutable features, which grant man the capacity to be dignified and to constantly observe the dignity of all men in all aspects of life. These eternal features of the oneness of mankind are as follows:

(i) The oneness of the human form.
   The same procedures at birth, in growth and in death. The one essential nature of all mankind i.e.
   (a) All men have a soul (higher self which draws them to beauty, truth, justice) and an intellect (intelligent self which enables them to understand, evaluate, think). Man is primarily spirit.
(b) The spirit and the body form an organic whole. All men have an innate urge of curiosity and a basic capacity for common sense and sense of reasoning.

(c) All men have a basic capacity of expressing instincts, emotions and sentiments.

(d) All men have a free will to choose within the province of natural laws.

(e) All men, if they submit to function within the framework of natural laws governing human relations, are capable of growing in the entire personality in truth, gracefulness and in honour.

(f) The nature of man grants opportunity for a consultative response to all mankind

All are born with different innate potentialities, thus having different capacities and capabilities, and different capabilities grow depending upon the individuals circumstances, environment and of course the assertion of personality.

It is because of this basic essential nature of man that all men are born innocent and capable of good. Because very few amongst mankind assert themselves to think, the great majority of mankind learn only by example, style and fashion set by the few. Still all of mankind, by the very nature of man, will accept everything that is beautiful and good to the human spirit and will of course reject and oppose all that is ugly, vicious and hateful.

The educationists are the primary leaders of people and they ought to be best equipped to formulate and plan education, within a vital essential pattern of human relationship. only this pattern can dynamically forge and maintain the unity of our diverse cultural groups into a united prosperous nation of South Africa.

Therefore, the approach, purpose, attitude and outlook to his education must be in the vital essential pattern, a pattern of beacons illuminating the natural laws of human relationship which are as follows:

1. **THE DIGNITY OF ALL MAN:**

   This is to be seen, to be heard, to be felt. Upholding the dignity of all men is the prerequisite for any healthy and prosperous society. It is the cardinal natural law in human relationship and the essence of human conduct and the nucleus of the bond of all people.

   From it flows all virtue, beauty and prosperity for both the individual and the society. It is only the upholding of the dignity of all men in day to day life, that will guarantee
common motivation, common purpose with common responsibility. Thus the
upholding of the dignity of all men draws scattered groups in diversity into a unity of
common dignity and thus common loyalty is founded and realised for instituting the
signposts of a true and healthy cultural civilization.

2. THE BEACON OF SELFLESS SERVICE TO MANKIND AND CREATION

All life is temporal, and death levels all nobody and no one have ever and will take
anything with death even our bodies are left by us, except the good deeds that lightens
up a personality, to make it immortal. It is the conduct to one's fellow men, conduct of
selfless service to the flora and fauna around us, that helps the individual to realise
his/her true self. Although the practice of selfless service to one's fellowmen brings on
a struggle in life, yet it bears with it the fruits of true contentment, peace and
happiness. Material comforts and pleasure is only an apparent illusion of security and
happiness. The tragedy of it all is clearly visible all around us.

3. THE BEACON OF TOTAL JUSTICE IN EVERY ASPECT OF LIFE

By total justice is meant justice not only social, economic, political, financial, but
justice in every aspect of life. History has shown that any people and any one guilty of
the travesty of total social justice, even disappeared from the surface of the earth,
irrespective of their religion, temporal might and culture. Upholding total social justice
moulds human beings into genuine personalities who alone can establish a true humane
and lasting cultural civilization.

4. THE BEACON OF SELFLESSNESS AND SHARING IN WORD AND DEED

The freedom of man can only flow like a river through the banks of responsibility and
duty on the one hand and human decency on the other.

5. THE BEACON OF HUMAN DECENCY:

This of course comprises responsibility, cleanliness, manners and behaviour, self-
respect, gracefulness and courtesy. Thus the product of such an education can only
become a dignified and beautiful dynamic and effective unity of the nation, playing a
healthy contributive role in South Africa.
6. **BEACON OF CONSEQUENCE:**

As you sow so shall you reap, sow a sound thought and you'll reap a sound act, sow a sound act and you'll reap a healthy character, sow a healthy character and you'll reap a prosperous destiny. Man shall attain nothing except that which he strives for.

Thus within such a vital and essential spirit and pattern of education can the educationists and teachers weave and spin arts, sciences, technology and productivity of every form and category of education in South Africa. Conformity to this essential concept is vital for one and all, and therefore must be maintained, infused, reinforced constantly by every means and aid in education for the whole population. Conformity to vital teachings brings organisation with prosperity but conformity must never be interpreted or confused with regimentation which is degrading to the human personality. Regimentation can only be brought about and maintained by the gun! The nature of man will always rebel and right regimentation, even if it is brought in the name of God.

Education to improve the mere material productivity of the country debases the aspirations of the common man and increase the greed of power-hungry individuals. Man does not live by bread alone, although bread is a most essential commodity for his terrestrial existence.

The expressions of the beacons of human relationship is founded in fundamental human rights:

a) To be dignified human being under all circumstances is an inherent right of all men. For all human beings, no distinction is based on man-made artificial values, no privilege class or caste, no invidious distinctions can be tolerated or accepted.

b) Freedom of expression is circumscribed for a healthy balanced relationship with all men. A person's liberty for an expression ends when it becomes a curse to his neighbour or when it transgresses the norms of human decency or when it disrupts the healthy status of society.

c) Reciprocal responsibility is the right of every person to lead an honourable life to get rid of ignorance, poverty and need.

d) Every person must have education. Reality opens zones of Heaven and earth to mankind. Reality calls for acceptance, co-operation and mutual consultation for common reference to all righteous deeds towards all human beings. In the
unity of the human family the best of mankind are those most useful to that family.

e) Every human being must have his/her share of public health.

f) As human beings the rights of the females are absolutely equal to the males.

g) The females must qualify for their special endowments as females and their special role in life and so have special rights, responsibilities and duties, which makes them thrice honourable to males.

h) Every human being is entitled to marry anyone of his/her own choice and must have the right to associate with whom he/she wishes.

i) Every human being have the right to reside where he wishes.

A well-balanced approach and dispensation of education can only be implemented if there is a correct understanding of the basic essential nature of a human being. A theory of education should take into account the following factors:

1. Every person, because of his/her nature has an urge for an ideal/belief/ideology or philosophy. The person is compelled to follow the law of that ideal because of an inner pressure. All actions, urges and desires are controlled, guided and directed by the ideal.

2. Every system, approach, attitude, and purpose of education represents some ideal on which it is based. Education is the servant of ideals. Education is a means which, if utilized with equal efficiency, will produce balanced/total human beings or regimented, stunted and distorted personalities. Education is a powerful instrument of conversion.

3. Of all ideals there can only be one ideal which is correct because it truely suits and fits the nature of all human beings. If we do not search for and discover the correct ideal and base our education system on it, we shall be fashioning it to serve one of the many wrong ideals. An incorrect ideal will produce wrong and unjust actions in the student.

4. The right ideal is the ideal of the self i.e. the entire personality (See fundamental document - Nature of The Human Being). It alone is capable of granting a permanent satisfaction to the personality and able to inculcate a true moral behaviour. The correct ideal is in agreement and is in harmony with the inner desires of our nature and initiates the possibilities and potentialities for the full growth of the personality in beauty, truth, decency, purity, righteousness.

A universal, overall and real aim of education can only be propounded when the true ideal for life is determined and stated. In spite of its diversity mankind is one, and it is therefore logical and reasonable that there must be a single, perfectly satisfactory ideal for all of mankind. Each one of course will respond to it in one's own way according to one's environment,
circumstances, potentialities and capacities. Each individual's response to the one ideal will be unique. Basic unity is possible with diversity.

Each of the multitude of contributions towards the new constitution by the multitude of individuals, cultural groups, political parties will be different from each other, but it is possible for those contributions to have the same basic ideal (theme) i.e. the love for South Africa.

If education can convert people to wrong ideals, it can convert them much more readily to the right ideal which cannot externally be enforced upon people. It is the natural inborn urge and desire for beauty, goodness, truth in the nature of every human being that has to be aroused and given impetus by proper direction to allow for the free, balanced and uninhibited growth of the human personality.

Education will impede the natural and free growth of the individual if it promotes and forces an ideal externally. It is a fact that education in every materially developed country (with its manipulative tentacles extended all over the world) is planned to subjugate people to slavery in one form or another. History bears testimony to the fact that people have revolted where education has been forced on them externally in order to regiment them to become slaves of wrong ideals e.g. Nazism, Fascism, Apartheid, Communism, etc.

**CAPITAL PUNISHMENT: AN ISLAMIC PERSPECTIVE**

In this acute issue facing our nation we humbly present this realistic view in the light of the foundation document attached herewith.

From an Islamic perspective any issue or problem can only be truly assessed to the best of one's capacity and capability by taking into account all the available truth, the whole truth of the issue/problem. A sound analysis and evaluation is made of all the factors and also the consequences involved. This can only be achieved through the mutual consultation of well-informed, experienced, reasonable and responsible persons who would be able to contribute positively towards solutions and decisions.

In the Islamic view there are three role-players:

1. **THE INDIVIDUAL**
The right of the individual to life, justice and dignity, is paramount provided the individual's right does not transgress the values, norms, principles, standards and laws of society in the basic essential spirit of mankind.

2. **THE SOCIETY**

The second role-player is the society of mankind whose security of life and property is paramount for the general good and well-being of everyone. Everything in creation has position, is in proper proportion and balance with remarkable interrelationship and interdependence. The society cannot in any way enforce and regiment dispensations upon the individual but every step should be taken to educate and enlighten the individual to a deep sense of responsibilities and duties.

The organisations within the society must therefor strengthen our families in every possible manner, for the family unit is the bastion of the growth of the human personality in its love for beauty, goodness and morality. The State must facilitate and provide the means for community organisations to plan in order to strengthen the families of society at community level.

3. **THE STATE**

The third role-player is the authority and power of the State with its cardinal and overall responsibility of coercing and safeguarding, through its distinct means and powers at its disposal, to protect and safeguard the overall rights, security and development of its citizens in all aspects of national life as a whole. All of life is consequential. Every feature of life, whether natural or man-made can only proceed and progress in an evolutionary manner.

The issue of capital punishment can therefore only be viewed in the light of the following criteria:

i) The overall state and level of development of society. Everything in creation evolve and human society in the reigns of civilised, cultured and democratic government does also aspire with time and overall evolution with the development of society. This development will reach a stage when the individual is educated in universal values, responsibilities and duties towards his fellow man, strengthened and encouraged within sound and healthy families. only then and then only can capital punishment be reviewed and assessed. Mankind must face the realities of the unideal situation focusing, development
and progressing with an objective and purpose of moving towards an ideal situation. The State in its vision at present is far above the State of development of society.

ii) The second criteria

The whole motivation of a human being begins with intention and if the intention for murder is pre-planned, deliberate, cold-blooded, devoid of any respect for common human decency, then the state, in the light of sound evidence, must in the interest of total justice fulfil the just desserts of the perpetrators of such acts by implementing the death sentence.

Life sentence for such crimes defeats not only the deterrent effect of the laws, but in this defeat it indirectly punishes the society by overburdening society for the purposeless upkeep and welfare of these criminals, e.g. the cost of incarceration presently is R43 per individual per day. What to say of building more and more elaborate prison structures. In America, the country with the largest number of prisons, they will have to build double the number of prisons.

Alternative Step instead of Capital Punishment

In the interest of total justice the direct harm done to the victim's dependants and family must be addressed by the state through facilitating providing meaningful and just, effective overall relief to the dependants and families of the victims. The family must be safeguarded against disintegration of family life. only the victim's family can waive the capital punishment with the appropriate compensation granted. The state must oversee that the murderer's family implement the compensation asked for by the victim's family.

Retribution or Revenge

The state is in no position to decide on retribution or revenge since the harm and loss has not been committed against the state but it is the taking of life of the victim(s) and the consequential harm done to the victim's dependants and family. The revengeful attitude has no meaningful solution.

Retribution fits the essential universal nature of man and tends to balance the scale of justice.
1. **Definition:** It is the termination of pregnancy.

2. **Types:**
   2.1. Induced abortion on demand. Legal abortion since 1974 in U.S.A.
   2.2. Induced therapeutic abortion: Missed (undiagnosed); inevitable; habitual; psychological problems.
   2.3. Abortion for socio-ethico considerations.

3. **General Principles And Considerations For Approach To Problems**

   3.1. From an Islamic perspective any issue or problem can only be truly assessed to the best of one's capacity and capability by taking into account all the available truth, the whole truth of the issue/problem. A sound analysis and evaluation is made of all the factors and also the consequences involved. This can only be achieved through the mutual consultation of well-informed, experienced, reasonable and responsible persons who would be able to contribute positively towards solutions and decisions.

   3.2. The Islamic perspective considers every case, issue or problem under the following criteria:
   3.2.1. The intention of motivation
   3.2.2. The Justification for such a motivation
   3.2.3. The analysis and evaluation for a justification
   3.2.4. The religious-socio effect of such a motivation with the interest of the individual concerned and the individual's relationship with the norms and standards of the specific society.

   3.3. It is a universal and eternal principle, in the light of the basic essential nature of mankind, that the rights of the individual is paramount and that regimentation and force can never be tolerated. Recent history proves this all too clearly and conclusively.

   3.4. Although the rights of the individual is paramount, it can only exist as such provided that it respects in turn the rights of the community/society. The individual's rights must also be in balance, proper proportion and in harmony with the norms, standards and useful customs and traditions of a society in order for a healthy mutual relationship to exist between the individual and society.

   3.5. Where desires and urges of persons bring about a radical deviation from social norms and standards, then in such a case the right of those persons can be asserted within groups contributing to such deviation (abnormality).
3.6. If abnormal, perverted norms and standards are to be forced on a society seeped in its own belief and ethos, then the consequence of the granting of such dispensation will be of conflict consequence and will be detrimental to everyone concerned.

3.7. The deviation from revelation-based beliefs with its concepts, norms, values, standards, laws, customs and traditions, cannot be tolerated. The consequences of such deviation/perversion is totally and absolutely unacceptable. Individuals who have congenital defects or physical/psychological abnormalities are accepted and tolerated because of sound education and upbringing in the belief of such societies. Where individuals have diverted from the norms due to no fault of their own and where they do respect the norms and standards of society and they do not flaunt the right of society, then such individuals can live in those societies as part of the normal members of that society.

3.8. Where individuals or groups do not adhere to the universal norms and standards of revealed religion, they have a right to do so, but must face the consequences on their own.

3.9. The fragile nature of man composed of instinctive urges, reinforced by sentiments and emotions and in turn brings about the reinforcement of the intellect which misuses its instrument of reason. Reason now acts as a servant of the lower (instinctive) self with the result that the human personality is able to function at levels even lower than the animals.

3.10. When human beings act from their fragile nature then they totally ignore the cardinal weakness in them, i.e. their forgetfulness. They become hasty, imagine that they are the creator of every day and night with their meagre knowledge. They delude themselves into being all-knowing and well-equipped for what is going to happen on the morrow. Their arrogance have become unbounded and become judgemental about everything. The realities facing mankind on this planet plead and beg the ever-present question: "When will you ever learn?"

3.11. The perfect and absolute authority from the Islamic perspective is Allah Almighty, The Sole Sovereign, Creator, Nourisher and Sustainer of all entire creation, The Owner of all human intentions, expressions and actions. Thereafter in the light of the Islamic outlook on life there is a total definiteness about everything in life. The Islamic attitude of tolerance is so clear cut that it is entrenched in the very foundation of upholding the dignity of all mankind. But tolerance cannot be expressed when the dignity of mankind is assailed and justice is for a selected group.

3.12. The family, consisting of individuals tied directly through biological, psychological and cultural relationship, forms the unit of society. Various societies based on cultural differences and developments become the units of a nation.
3.13. From an Islamic perspective fornication and adultery is the worst of crimes for indulgence in such acts distorts the personalities of those involved. These acts deprives the individual of healthy expressions. It distorts not only their personalities but also ignores and destroys healthy family structures with the consequential misery of those involved, families that are affected and also the future of the innocent offsprings in such crimes.

4. **SUMMARY**

Abortion can only be sanctioned in case of a married woman based on the individual's specific state of health and medical factors, which may burden a healthy and sound family's relationship with a burden of stress and strain, adversely affecting the individual and the family's capacity and capability to flower in mutual love and gratification. The abortion in such specific cases e.g. rape can only be decided, of course, in the directions of sound, judicial experience and with the total facts and consequences of such procedure for the benefit of the individual and family, safeguarding, at the same, the interest of the norms and standards of the society. Economic and social-inspired urges and desires for abortion has no place in Islam, for the consequences of such demands for abortion is only too glaring to any discerning person. Allah Promises and Provides for mankind and forbids the killing of offspring.

**RE: FURTHER AMENDMENT TO SECTION 14.3 OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993**

Our organization for reasons set out in the memorandum enclosed herewith, demand that Section 14.1 and 14.2 be retained and that 14.3 be amended.

**URGENT STEPS TO BE TAKEN**

FOR THE RECOGNITION AND IMPLEMENTATION OF ISLAMIC PERSONAL AND FAMILY, LAW

AND

THE CREATION OF ISLAMIC (SHARIA) COURTS

AND
THE RETENTION OF SECTION 14.1, 14.2 AND 14.3
(SUBJECT TO FURTHER AMENDMENTS)
OF THE CONSTITUTION OF THE REPUBLIC
OF SOUTH AFRICA, 1993 ACT 200 OF 1993
AS AMENDED BY ACT 2 OF 1994
AND ACT 13 OF 1994

A. INTRODUCTION

(a) **The Right of Muslims to regulate their lives in terms of their own legal system**

In many states in Africa and Asia, for practical reasons the customary laws of inhabitants are recognised, as most of the indigenous African peoples were not accustomed to the western imported culture which were alien to them, as they could not adapt themselves to the norms and values of westernised laws. The colonial powers, in any event, did not have the necessary finances to impose their legal systems on the local inhabitants. Anthropologists and certain legal jurists realise that Customary Law must be permanently recognised as such laws form part of the particular community's culture. It would seem that there is an ever increasing realisation by governments and jurists throughout the world that in a culturally heterogeneous community the culture of every group including their legal systems must be recognised.

(b) It was during the time of the Colonialist that, in many Muslim countries, Islamic Law was tampered with beyond recognition, confining the Sharia to the domain of Private Law, whilst ignoring other facets of Islamic Law such as **International, Constitutional, Criminal** and **Commercial Law**. The United Nations Commission for Human Rights issued a Draft Declaration on the rights of indigenous people, which declared that minority groups in a state possess the following rights:

"The collective right to exist as distinct peoples ... The right to promote their cultural Identity and traditions ... The right to develop and promote their own languages ... and to use them for administrative, juridical, cultural and other purposes ... The right of children to have access to education in their own languages ... and to establish their own educational systems and institutions:

(E/CN.: 4 Sub. 2/1989/33).
(c) **The situation where legal systems clash**

In South Africa certain tribes such as the Xhosas, Pondo, Venda and Zulus have their own legal systems which have been legally recognised by the Nationalist Government and its predecessors, as early as the 18th Century and were given powers by the creation of courts which were specially constituted to give effect to the customary laws of such tribes. The concept of legal pluralism, inevitably results in a conflict of legal systems thus necessitating a set of rules in order to regulate the conflict.

(d) From an Islamic perspective the rights of Muslims to practice their own Islamic Legal System is a fundamental right and not a privilege and ought to be recognised by the incorporating of such rights in a **Bill of Rights** and **Constitution**. In a separate Act perhaps to be called an **Islamic Administration Act**, rules can be laid down as to what is to happen if, the general law of the land, including customary laws and religious laws of other groups and tribes come into conflict with the Islamic Legal System. In this manner the ruling government will be recognising the Islamic Legal System of the Muslims by allowing Muslims to adjudicate Islamic Personal and Family Law in Islamic Courts which must be built and financed from government taxes.

(e) **The Right of Muslims to choose the Legal System that must regulate their private lives**

Muslims must accept that the unqualified recognition of Islamic Law will lead to conflict with other legal systems which will lead to chaos in the land. There is the general law of the country that caters mainly for the aspirations of the Whites and so-called Coloureds with their western orientated culture and legal system. The Legal System is based chiefly on the Roman Dutch Law, English Law and some remnants of the laws stemming from the Roman Empire which are still presently engrafted on our legal system, apart from statutes, ordinances, regulations and case law. The South African Legal System is presently a hybrid one.

(f) **The South African Legal System and the accommodation and application of African Customary Law**

The South African Legal System has accommodated in certain respects the particular legal system of the other African cultural groups (presently Muslims being excluded). South African legislation recognises African Law and customs in certain respects. See **Black Administration Act 38 of 1927 - Section 12(1)** gives the Minister the power
to appoint a Black Chief or Headman to determine civil claims arising out of Black Law and customs and brought before him by Black against Black residing within the area of jurisdiction. South African Law also recognises the customary marriages of the aforesaid African tribes for the purposes of pensions, taxes, maintenance, housing and the delictual claims in respect of the unlawful death of a breadwinner. In terms of Section 11 (1) of the Black Administration Act 1927, the South African Government catered for African Customary Law by providing the following:

"Notwithstanding the provisions of any other law, it shall be in the discretion of Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black Law applying to such customs except In so far as It shall have been repealed or modified: provided that such Black Law shall not be opposed to the principles of public policy or natural justice: provided further that It shall not be unlawful for any Court to declare that the custom of Lobolo or Rogedi or other similar custom is repugnant to such principles".

(g) **Discrimination against Muslims in South Africa**

A Muslim wife, were she to contract a marriage with her husband only in terms of Islamic canon law and were her husband subsequently to die in an accident involving an insured motor vehicle whose driver was clearly negligent, would in these circumstances be denied the right to institute a third party claim, for loss of support, against the authorised insurers of the aforesaid vehicle. She has also been denied the right on the dissolution of the marriage contracted by Islamic Law or even during the subsistence thereof to legally claim maintenance from her husband and has to go through the humiliation of seeking redress in a secular court in order to pursue a maintenance claim for the children. If a Muslim gets married in terms of South African Law, the proprietary consequence on the dissolution of such union is that both spouses must share equally in the joint estate, whilst in terms of Islamic Law, the parties are deemed to be married out of community of property. According to South African Law, Muslim marriages are regarded as inherently polygamous and contrary to public policy. This is clear discrimination and arrogance on the part of the authorities in not recognising Muslim marriages for the truth of the matter is that monogamy Is the Ideal In Islam and polygamy the exception. Muslim adult males can only, in terms of Islamic Law, take a second wife on certain recognised grounds. In any event the Islamic system is more just and equitable as a man is liable to maintain his wives and children born out of the relationship with such wives. Furthermore, children born out of such
unions are stigmatised as being illegitimate. In the western system a man may not take a second wife and children born from a second wife are deemed to be "bastards" with the consequent disadvantages flowing from such conduct. It is clear that the former South African Government was either prejudiced against the Muslims or was totally ignorant about the principles and procedure of Islamic Law more in particular personal and family law, by not recognizing certain facets of the Islamic Legal System. After all Muslims regard Divine Law as having superior force to man made laws.

See the following verses from the Quran:

"Discretion lies only with God"
Livestock 6: 57

"Surely creation and authority belong to Him"
The Heights 7: 54

"No believing man nor any believing woman should exercise any choice in their affair once God and His Messenger have decided upon some matter. Anyone who disobeys God and His Messenger has wandered off into manifest error."
The Confederates 33: 36

"David we have placed you as an overlord on Earth, so judge among men correctly and do not follow any whims which will lead you away from God's path." (The Letter) Sad 38:26

"Heed God and obey me; do not obey the order of extravagant people who corrupt (things) on earth and never reform." Poets 26: 150-152

"So judge among them according to what God has sent down, do not follow their whims."
The Table 5:49

(h) **As regards Custodial Rights of the parties to a marriage contracted in terms of Islamic Law**

In the event of a divorce, or estrangement between the parties to a marriage solemnised in terms of Islamic Law, the father of a child has been deprived of custodian rights and is precluded from claiming any custodian rights or rights of
reasonable access to such child in terms of South African Law. The Supreme Court has consistently followed certain principles emanating from Roman Dutch Law, which regards such a child as illegitimate on the principle that "een moeder maak geen bastard nie". The result is that were the mother to decide to change the religion of the young child or has seriously neglected her child, the father has no legal remedy, even if he can prove that it is in the paramount interest of the child that he be awarded custody of the child. Despite having complied with the formalities of Islamic Canon Law, as such union had been duly witnessed and celebrated in the eyes of the public, nevertheless such a father is regarded in the eyes of the Secular Law, as a stranger viz a viz his child. This is a situation which can no longer be tolerated and South African Muslims insist that all matters relating to Muslim Family and Personal Law be adjudicated in properly constituted Islamic Courts. The only remedy open to such a parent is to endeavour to have such child declared a child in need of care and then like any outsider attempt to legally adopt such child. The danger however exist that even if the child's mother is declared not a fit and proper person, she can still defeat her husband's custodian rights by stating that her own mother or aunt or sister has assumed the responsibility of looking after such child, as a parentis in loco. It is ironic that the mother of the child in terms of South Africa law is precluded from claiming maintenance from the child's paternal grandfather.

See: Moutan v Joosub 1930 AD p61 at p70 in which, Wessels, J A

analysed a number of Roman Dutch texts and concluded that Roman Dutch Law did not place any duty on the paternal grandfather to maintain his son's illegitimate child.

As stated earlier such a child is in terms of Islamic Shari'ah legitimate because the parents have validly entered into a marriage ceremony in terms of Islamic Law.

AS REGARDS THE PROPRIETARY CONSEQUENCES OF A MARRIAGE CONCLUDED AND TERMINATED IN TERMS OF MUSLIM LAW:

As regards the proprietary consequences of a marriage contracted in terms of Islamic Law, a Muslim woman cannot enforce such consequences in a Secular Court. In the case of Ismail v Ismail 1983 (1) SA 1006 (A) the facts were as follows:

"The parties marriage were celebrated and terminated according to the tenets and customs of the Muslim faith. The Appellant (Plaintiff) claimed payment and arrear maintenance as well as maintenance for a specified period after
termination of the marriage, delivery of a deferred dowry, and delivery or payment of the value of two sets of jewellery which the Respondent had given to her, but which she had returned to him for safe keeping."

Trengove J A, after dismissing the appeal said the following:

"Having considered the arguments presented on Plaintiff's behalf, I have come to the conclusion that we would not be justified in deviating from the long line of decisions in which our courts have consistently refused, on grounds of public policy, to recognise, or to give effect to the consequences of, polygamous unions contracted in South Africa, statutory exceptions apart. The concept of marriage as a monogamous union is firmly entrenched in our society and the recognition of polygamy would, undoubtedly, tend to prejudice or undermine the status of marriage as we know it; and from a purely practical point of view it would, in my view, also be unwise to accord recognition to polygamous unions for the simple reason that all our marriage and family laws - and to some extent also our law of succession - are primarily designed for a monogamous relationship ...

Furthermore, in view of the growing trend in favour of the recognition of complete equality between marriage partners, the recognition of polygamous unions solemnized under the tenets of the Muslim faith may even be regarded as a retrograde step; ex facie the pleadings, a Muslim wife does not participate in the marriage ceremony; and while her husband has the right to terminate their marriage unilaterally by simply issuing three 'talaaq' without having to show good cause, the wife can obtain an annulment of the marriage only if she can satisfy the Moulana (a high-ranking ecclesiastical office-bearer of the Muslim creed) that her husband has been guilty of misconduct. While this may be consistent with the tenets of the Muslim faith, it is entirely foreign to our notion of a conjugal relationship. I also mention, in passing, that it seems unlikely that the non-recognition of polygamous unions will cause any real hardship to the members of the Muslim community, except, perhaps, in isolated instances. According to the pleading's, only about 2% of all Muslim males in South African have more than one wife. This means that approximately 98% of all Muslim males have either contracted valid civil marriages or de facto monogamous unions. And, in the case of the latter the parties have, for many years, had the right to convert their de facto monogamous unions into de jure monogamous unions. They had the option of doing so under the Indians Relief Act 22 of 1914 (which was repealed by the General Law Amendment 57 of 1957) and they can still do so by entering into valid civil marriages under Act 25 of
1961. In the result, I have come to the conclusion that the polygamous union between the parties in the instant case must be regarded as void on the grounds of public policy."

From the aforesaid judgment it's clear that the learned judge is applying principles of Roman Dutch Law upon the legal system, regulating the lives of Muslims. It appears further from the judgment that the learned judge seems to have been misinformed as regards the criteria to be applied before a husband and a wife can obtain a decree of divorce in terms of Islamic Law.

As stated earlier, monogamy is the ideal in Islam and polygamy is the exception, and that a man can enter into a second, third, or fourth marriage only in certain recognised instances. Islamic Law does not permit a husband to unilaterally divorce his wife by simply issuing three "talaaqs". As the judge said "without having to show good cause". In terms of Islamic Law, a husband cannot simply divorce his wife according to his whims and fancy.

The misconception some people regarding Islamic Law, and more particularly, Islamic Personal and Family law, must be eradicated. The time is ripe for the legitimate aspirations of Muslims of South Africa to be satisfied by the recognition of Islamic Personal and Family Law; and the creation of the means for its implementation.

(i) Certain aspects of the Law of Succession pertaining to Muslims in South Africa

The laws of inheritance also prejudicially affect Muslims in South Africa. Muslim marriages are not recognised unless the Sheik/Imam had been appointed as a marriage officer in terms of the Marriage Act. Hence the Supreme Court had to come to the rescue of a child who could not inherit because his/her father had died without a will. Our courts sought refuse in canon law in order to ameliorate the harsh consequences that would have ensued, as such a child would have been deprived of his/her lawful right to inherit from his father's estate.

In the case of Moola & Other v Autsbrook NO & Others 1983 (1) SA (N) Judge Friedman J, held that it was never the intention of the parties to a marriage solemnised by a Sheik/Imam in terms of canon law to procreate illegitimate children. At Page 693 paragraphs G-H the learned judge said the following:
"The concept of a putative marriage was one which to my mind, originated not only as a device to mitigate the harshness and annulment to an innocent spouse but also, and more particularly, to mitigate the harshness of that annulment to children born of the union. Until the union is invalid, it is their intention, in procreating children, to procreate legitimate children; or where only one of the parties is ignorant of the defect in the union, that at any rate is his or her intention. The concept of putative marriage is designed to preserve that intention and to permit the children who, after all, were entirely innocent in the matter, to benefit from it."

See also Ex Part Azar 1932 OPD 107, The Supreme Court held that children of a marriage contracted by the Archimandrite of the Greek Orthodox Church, not being a duly appointed marriage officer, was legitimate upon the basis that they were children of a putative marriage.

See also Ex Part L 1947 (3) SA 50 (C), it was held that a marriage solemnised by a Rabbi presiding at the particular synagogue and being a marriage officer was a putative marriage and the children stemming from the marriage were therefore legitimate.

It is thus clear that canon law has been engrafted into our legal system. In this regard I quote from a judgment by Judge Friedman J in the case of Moola & Others v Aulsebrook No & Others supra p691:

"The requirements that the union must have been contracted 'palam et solemniter' or 'rite et solemniter secundum morum patriae' is more easily understood when one appreciates the background against which the concept of putative marriages developed. As I have said, the concept was a product of canon law. Consequently it applied only to unions contracted 'in facie ecciesiae with all due solemnities and after publication of banns'. The canon law had no application to what it regarded as clandestine marriages. In these circumstances, by its very nature, the concept of a putative marriage could only apply to those unions which, although formally correct, were invalid by reason of a defect of capacity, e.g. marriages within the prohibited degree, bigamous marriages, etc. Once, however, the canon law principle was taken over by the courts of Holland as part of the legal system of Holland and, more particularly, once the principle is accepted as being part of the law."
Accordingly, the concept of a putative marriage was designed to mitigate the devastating consequences that would have resulted if an heir were to be denied the right to inherit from his or her father's estate where the father has died intestate on the basis that such a child had been born illegitimate.

(j) **Status affecting Muslim Personal Law**

The following are some of the statutes while needs urgent scrutiny and review as some of these statutes impinge upon Islamic Personal and Family Law:

- Intestate Succession Act No 81 of 1987;
- Criminal Procedure Act No 51 of 1977;
- The Divorce Act 70 of 1979;
- Maintenance Act 23 of 1963;
- Matrimonial Affairs Act 37 of 1953;
- The Child Care Act 74 of 1983;
- Adoption of Children Act 25 of 1923;
- Succession Act 130 of 1934;
- Republic of South Africa Constitutional Act 1961;
- Will Act 7 of 1953;

(k) **Legal contracts concluded between Muslims**

Muslims ought to be given the right to exercise a choice as to whether contractual and delictual disputes ought to be determined in Islamic Courts. In this regard Muslims can insert a clause in a contractual agreement that in the event of a breach of any terms of a contract that the dispute be resolved before an Islamic Court, or by consent of the parties the dispute be referred to an Islamic Court of Arbitration, as the Islamic System has its own rules of evidence and procedure.

(l) **The implementation of Islamic Penal law**

A Muslim ought to be given a choice whether to be tried by a secular or Islamic court, in regard to certain criminal offenses. The parties affected must naturally be Muslims and will have to consent to the jurisdiction of a Sharia Court, and as in a civil dispute
must be given the right to appeal to a superior court, consisting of Islamic judges and thereafter to the Supreme Court.

We annex an article by Kerr SC, entitled "Recognition and Application of Systems of Law in a Charter of Fundamental Rights.

It is our prayer that with wisdom, courage and the determination to achieve the above objective, and with the backing of the majority of Muslims, in this country, that the aforesaid proposal and demands be seriously considered by the constitutional committees engaged in the drafting of the final constitution and to achieve that objective the provision of 14.1, 14.2 and 14.3 in the interim constitution be retained in the final constitution, subject to Section 14 being amended further with proposed amendment set out hereunder:

"14.4 Every person shall have the right to the recognition and application of systems of law in accordance with the following provisions:

(a) South African Law, including its rules on conflicts of law, shall be the general law.
(b) The law of religious groups including tribunals shall be recognised and applied in accordance with choice of law rules relating thereto.
(c) Judicial notice shall be taken of the systems of law referred to in sub-sections (a) and (b) above.
(d) All legal disputes, other than those settled out of court, shall be settled by a court of law, whether in the first instance or on appeal or review."

B. CONCLUSION

We accordingly demand:

(a) That the right of Muslims in certain spheres to practise and implement Islamic Personal and Family Law be entrenched in the final constitution.
(b) That a Commission of Islamic experts be appointed at state expense in order to investigate and recommend how best the aforesaid legitimate proposals can be implemented.
(c) We annex a document entitled "Muslim Personal Law in South Africa. A Brief History."
May the Master of the Day of Judgment guide and protect all the Inhabitants of this land who are trying to tread in the path of righteousness.

PREPARED BY ADVOCATE SHERIFF, MOHAMED

Muslim Personal Law (MPL) in South Africa:
A Brief History

1652-1795

Limited recognition of Muslim family law and succession under the Commander's Court of Dutch East India Company.

1807

Taun Guru's son teaches Muslim Law (fiqh) in the Cape.

1906

Mahatma Gandhi initiates passive resistance campaign amongst Indians in Natal against government's attitude towards customary Indian marriages -Hindu and Muslim.

1907

J de V Roos writes on Muslim Personal Law in the context of South African Law.

1942

Shaykh Abd al-Rahim ibn Muhammad al-Iraqi, early South African writer who probed into marriage and divorce issues.

+-1977

Application by the Institute of Islamic Shari’ah Studies in Cape Town to the late Prime Minister BJ Vorster to recognise Muslim family law.

+-1980's
Parliamentary move to promulgate legislation affecting Muslim family law. This was an attempt to propose a private members' bill by Mr PT Poovalingham MP (House of Delegates).

1984

Human Science Research Council Section for Political Science Research, Research Project - Muslim Law, Ref. no 3/10/121. Submissions were made by Advocate AB Mohammed of the Islamic Council of South Africa, presently President De Klerk's advisor on Muslim affairs.

1987

South African Law Commission solicited public opinion on MPL and forms an MPL Committee, consisting of the Muslim Judicial Council, Jamiat Ulama of Transvaal and Natal.

1988

Rand Afrikaans University Conference on MPL.
THE PRESIDENT'S AWARD
Youth Empowerment

23 May 1995

Please find attached documentation pertaining to the submission request: Public Hearing Youth.

On behalf of The President's Award Youth Committee a request for a youth commission to be established.

Herewith a brief outline of Powers, Functions, Composition, Selection procedure, Aims, Objectives and relations with the legislature government and civil society.

VANNESSA DE JONGH
REGIONAL MANAGER: EASTERN CAPE
cc. PERMENTBRI PILLAY

Powers, Functions, Composition, selection procedure, aims, objectives and relations with the legislature government and the civil society:

DOCUMENT A

POWERS OF THE YOUTH COMMISSION

- Pass mandates.
- Formulate policy in response to input from Youth Forums and NGO's.
- Negotiate nationally and regionally with youth organisations, political and church organisations.
- Have access to training and basic Adult Education Sector, NGO's and the NYDF.
- Implement a "bottom up process by reversing youth marginalisation by empowering youth and allowing them to reach their full potential.
- Be integrated members of society and represented whenever their interests are at stake.
- To take responsibility for their own development.
- Advise the minister of youth on development and implementation of a national youth policy.
- Advise the government on resource allocation to youth affairs.
- Initiate relevant legislation.
DOCUMENT B

FUNCTIONS: Aims, objectives and relations with the legislature and civil society.

- To initiate and support research on the problems, challenges and opportunities facing South African youth.

- To generate sound research results that would have significant policy implications.

- To deal with "Youth Development" i.e.: Human Resources, Education, training, Sport and recreation.

- Establish special programme aimed at addressing the need of young people.

- To mobilise youth constructively and take the lead re: facilities, funding and projects.

- Create more contact and opportunities for communication between South African youth.

- Find solutions for challenging realities:
  - Addressing family and community instability.
  - Assisting with the implementation of a relevant and quality education system.
  - Addressing the rural-urban divide.
  - Racial isolation.
  - Economic stagnation.
  - Adopt the National Youth policy. This policy should focus on areas that can be managed realistically.
  - Have links with national education policy, education and training, employment, organised sport and civic responsibility.
  - To participate full in all sectors of society.
  - Be a functional example gender equality and equal representation of genders.
  - Promote unity in schools.
  - Share in economic reconstruction and development of South Africa.
  - Contribute to the RDP and related projects that are of benefit to them and their communities.
- Participate fully in the politics of South Africa.
- Act as a link between the cabinet and society.
- To serve as a "forum" for the monitoring of the implementation of relevant policy.
- Prioritize national youth issues.
- Serve as legitimisation and accountability mechanism.
- Assess new needs, opportunities and challenges.

**DOCUMENT C**

**COMPOSITION**

- Youth Development should be the collective responsibility of the state and all other stakeholders. At the same time, youth should have as many opportunities as possible to take responsibility for their own development.

- Although the state is responsible for policy regarding youth development, stakeholders, i.e.: churches, NGO's, Trade Unions and the private sector should be fully and systematically involved in planning and programmes. This should however, not be in conflict with the principle that youth should as far as possible be allowed to be involved in matters related to their own development.

- A National Youth Policy should provide for a range of youth development programmes aimed at specific needs for training, employment, recreation, etc.

**DOCUMENT D**

**SELECTION PROCEDURE**

Selection should be made on set criteria if possible. One representative from each or similar organisations, including schools, etc., should be selected. Selection at grassroots level is vital.
25 May 1995

Submission re lesbian and gay rights

We send this fax to support efforts towards ensuring that the rights of gay and lesbian persons are enshrined in the new Constitution of South Africa.

As you may know, thousands of women from all over the country were represented by 350 at the December 1994 Women's Health Conference, organised by the Women's Health Project, where lesbian health needs and issues were discussed. The policy proposals on lesbian health issues, finalised at the conference and currently available from the project, highlighted the plight of lesbians and made a number of recommendations. The policy proposals for lesbian health issues are summarised below:

The Context

Lesbians, like gay men, suffer from the fact that they are different from other women. Some people in society think that because gay people are different, they should be discriminated against. This affects lesbians in the following way:

* They are ostracised by their families, in the workplace, and in society as a whole;
* Health workers have negative attitudes towards lesbians;
* Lesbians are constantly reminded through the media and in other ways, that they are not 'part of the world';
* Lesbians have very few role models who have openly declared that they are lesbian or who have long term relationships.

Mental Health

Lesbians' mental health is adversely affected because of society's attitudes. This can lead to lesbians becoming self critical and ashamed of their sexual orientation. This in turn can lead to isolation and loneliness, depression, lack of confidence and low esteem, stress, abuse or addiction to substances and suicide.

Physical Health

Because lesbians do not bear children, they are more likely to develop cancers of the breast, the ovaries and the endometrium or lining of the womb. Lesbians do not have access to free pap smears because these are only available to women who go to family.

The Effects of Violence
Lesbians are often the victims of physical abuse and violence. This can take place within lesbian relationships themselves or in previous relationships with men.

**Legal Status**

Current legislation in South Africa discriminates against lesbians in a number of ways. For example, a contract drawn up between two lesbians granting rights to each other can be contested as being against society's morals. The new Constitution lays the basis for fair treatment for all South Africa's peoples. Through the Constitution it will be possible to challenge discriminatory laws.

**Attitudes of Health Workers**

The current health system is not geared to deal with lesbians or gay people. Anti gay attitudes prevail and there is a lack of public health material specific to lesbians.

**Reproductive Rights of Lesbians**

Lesbians face the following problems with regard to reproductive rights:

* Lesbians do not qualify for artificial insemination or in vitro fertilisation;
* Lesbians do not have access to public health services for fertility treatment:
* Lesbians are often considered unfit mothers and hence, loose custody of their children.

**The Way Forward**

To ensure adequate treatment of lesbians in the health care system, the following is proposed:

* Make health personnel aware of issues relating to lesbians;
* Provide lesbian-friendly counselling services;
* Provide non-discriminatory sex education both in and out of school;
* Make fertility services accessible to lesbians;
* Recognise lesbian partnerships in law;
* Facilitate further research and encourage open debate to ensure that a good and sound policy is developed in regard to lesbianism.

The policy proposals can be obtained from our office.

We support the efforts of gay and lesbian organisation who are trying to ensure that lesbian and gay rights are enshrined in our Constitution and respected in the wider South African society.
VOSSIE GOOSEN for
WOMEN'S HEALTH PROJECT
1. **Appointment of Attorneys-General**

We are of the view that the Attorney-General be appointed by the Judicial Services Commission in the same way that judges are appointed. We are aware that in certain other countries, including the United States of America, these officials and, indeed, many others are elected by popular vote. We do not have a tradition of electing such office-bearers. It is difficult to judge whether the political, social and legal culture of our society has reached the stage where we can safely recommend this process of appointment.

2. **Functions of the Attorney-General**

The Attorney-General should be restricted to the prosecution of Criminal offences. Some historical background is necessary to examine this question. Prior to dealing with the position in South Africa at present it is necessary to look briefly at the position in England and the USA. Traditionally in England the attorney-general was the chief legal adviser of the Crown and litigated on behalf of the Crown in criminal and civil suits. So wide were the powers that, apart from control of litigation on behalf of the State, he could intervene in proceedings of a public nature, while his specific powers involved enforcing public charities, assisting lunatics and abating nuisances which affected the general public. In the USA these English common law powers have been inherited and unless restricted by statute apply with full force and vigour.

"Accordingly as the chief law officer of the state, he may, from time to time, require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the law of the state, the preservation of order, and the protection of public rights."

Perhaps in this role of the protector of public rights the Attorney-general in England has been most controversial; and an apt illustration of this role is the case of *Gouriet v Union of Post Office Workers et al*. In that case the Union of Post Office Workers in a political protest against apartheid in South Africa decided not to handle post between that country and England and Wales. This was a clear contravention of the Post Office Act and *Gouriet* secretary of the national Association for Freedom sought an interdict against the

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5. 1953 secs 58 and 68.
union. The Attorney-general refused his fiat to bring the interdict and Gouriet brought it alone. Delivering the judgement of the House of Lords Lord Wilberforce said the following

"[It is] a fundamental principle of English law that private rights can only be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law the rights of the public are vested in the Crown ... That it is the exclusive right of the Attorney-General to represent the public interest - even where individuals might be interested in a larger view of the matter is not technical, not procedural, not fictional. It is constitutional ... it is also wise."

Lord Wilberforce went on to hold

"The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact that as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well known principles, discretionary remedies. These matters are widely outside those areas."

In South Africa the influence of English law and culture meant that some features of the duties were transferred. In the Cape the office of office of Attorney General involved the duties of public prosecutor and legal adviser to the Government. In a despatch dated 5 August 1827 from Lord Goderich to Governor Bourke the former sets out the powers of the Cape Attorney as follows:

"The attorney general will of course not consider himself bound or entitled to offer his professional advice except when you may require it and you must exercise your own discretion as to the propriety of consulting him upon each particular occasion."

Whether this embodies an independence of political control may be open to conjecture. The despatch goes on to say

"The attorney general will also afford you his assistance in framing all the ordinances which may be passed by yourself with the advice of your council and in preparing the drafts of any other legal instruments which you may have occasion to issue."

Nowadays the drafting of acts of parliament has been handed over to government draughtsmen but it certainly would have been interesting to hear the attorney-general expostulating in Court on legislation he himself had drafted. In those days the attorney-

6 Op cit 477, 481.

7 Ibid p 482.
general conducted civil trials on behalf of the Government of the day. Nowadays no civil litigation is embarked on, to the knowledge of the present writer, and it is for this reason that the appointment of attorneys-general to the Bench has evoked wails of protest from the bar and the public at large. The despatch sets out the duties of the Attorney-General at that time as follows:

"Whenever any question may arise in the Supreme court relating to the rights or property of the Crown this officer will be employed to maintain or to defend His Majesty's Title and the conduct of every action of this nature from its commencement to its close must take place under his superintendence."

Clearly in the early days the attorney-general was at the beck and call of the government and answered questions of *inter alia* law in audience with officers of the colony. The despatch indicates that

"If the personal attendance of the attorney General should be required by yourself or by the Council of Government or by the Colonial Secretary it will be his duty to obey any summons which may be given to him for that purpose. In general you will resort to him for Counsel and assistance upon every question of law which may arise in the Administration of Government and you will regard him as a confidential officer upon whose cooperation in his own department you will be entitled to place the utmost reliance."

The cosy atmosphere created by this relationship including the confidences and reliance placed on the attorney-general rather militate against the fierce independence and prosecuting zeal expected in an adversarial system. Common sense dictates that the attorney-general and the colonial governors were part of a team ensuring the survival and prosperity of the settlers in the colonies.

According to a letter dated 2nd March 1899 from the Attorney General of the Cape to his counterpart in Natal little is said about the independence of his office from any political influence. It is implied that he acts on his own initiative. He explains that the Cape was divided into three parts under the Attorney-General, the Solicitor General and the Crown Prosecutor, the latter two officers being in charge of the Eastern Districts and Griqualand respectively. He further explains that the Attorney General conducts civil trials if they are important. Mention is also made of the debate as to whether the attorney general should be permanent officer or not.

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8 In Attorney-general, Transkei v Duli and others 1990 (4) SA 402 (TK) the court held that whilst in civil proceedings affecting an Attorney-General, it is competent for the Attorney-General concerned to appear in person, very careful consideration should always be given to the desirability of briefing outside counsel; and rarely, if ever, should such Attorney-General appear without at least the assistance of the State Attorney.
There does not appear to be a need for the Attorney-General to use his powers outside the criminal sphere. Although the position is that in Roman-Dutch law no private person can proceed by a popular action (actio popularis) as such, it is clear that the interdict de libero homine exhibendo is part of our South African law.\(^9\) Although the actiones populares generally have become obsolete in the sense that a person is not entitled "to protect the rights of the public" or "champion the cause of the people" it does not mean that when the liberty of a person is at stake the interest of the person who applies for the interdict de libero homine exhibendo should be narrowly construed. On the contrary it should be widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order. The provisions of section 7 of the Second Chapter of the Constitution of the Republic of South Africa (Act 200 of 1993) allows a party to have locus standi to act in the public interest. There is also a National and provincial Public Protector, Commissions to protect Human Rights and rights relating to Gender and Land Restitution. It seems therefore that the Attorney-General should concentrate on Criminal work.

**Independence of Attorneys-General**

We are of the view that the Attorney-General should be independent. Historically Attorneys-General were subject to control by the Minister which was most undesirable. There are widespread fears about the independence of the present incumbents who during the Apartheid years carried out the instructions of the last government. They are perceived as linked with the last government and do not enjoy the confidence of the broad public as independent. To investigate why this is so it is necessary to look in some depth into the background and history of the position of Attorney-General.

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\(^9\) See Wood and Others v Ondangwa Tribal Authority and Another 1975 (2) SA 294 (A).
MEDIA ENQUIRY ON OFFICIAL LANGUAGE

Your latest advertising campaign on the determination of public views on language preferences is most commendable and a sure sign of pro-active participation in the writing of a new Constitution.

Allow me however to express my concern about a fundamental difference between the English and Afrikaans copy (of the advertisement concerned). In the Afrikaans copy, as published in Die Volksblad of 16 and 17 May 1995, the question on the choice of a language is put in the singular: "What should our official language be", while English copy is offering the plural: "What should our country's official languages be". Although the explanatory note at the bottom of the Afrikaans advertisement offers perspective on the matter, we have to assume that most readers would be guided by the question itself, while you certainly did not intend this to be the case.

I trust that this potentially confusing matter would be rectified in order to offer an explicit choice in respect of official languages.

I wish you everything of the best with negotiations on official languages and trust that the presentation we have done in this respect would enjoy your attention.

DR L T DU PLESSIS
COORDINATOR
I would like to make the following submission regarding the Constitutional Debate and have conveniently reflected the various issues under one Submission.

1. **re 1 Accountable Government**

   **re 5 (c) Labour Relations:** the right to strike should merely be entrenched if a concommittal right of 'lock out' is afforded to the employer - lest the scales would weigh too heavily in favour of the former. The said right should however necessarily have to be qualified to exclude employees from certain essential services as determined by, I suggest, a statutory labour forum comprising of trade unions, employer organizations, representatives of employees in "essential services" (referred to above).

2. **re 7 Representative Government**

   7(a) combination of proportional and constituency - based systems. Both latter mentioned systems are flawed: in a system of Proportional Representation the representatives are too far removed from the electorate with the danger of the abuse of powers.

   The Constituency System on the other hand is, as evidenced during past history in SA, open to manipulations by the government. I would suggest a system of proportional representations with the lists of candidates of the political parties, being constituency-based and elected by each parties local branch thus ensuring a mix of both systems. There should be far sticker requirements regarding the eligibility of members of national or regional parliaments then is the case at present. Persons convicted in a court of law for certain crimes including murder, attempted murder, armed robbery, theft (e.g. conviction of imprisonment) forgery, fraud, kidnapping, any crimes relating to children and rape are not fit to govern and should be excluded. This would lend more respectability to the positions of MP's.

   (b) **Franchise** - should remain as it is.

   (c) **Frequency of Elections**

   (i) General Elections - every Years.

   (ii) Provincial every 3 years (the provincial electorate need to be able to exercise their right to vote more often than is the case for the National Assembly, since the powers of the Provincial Government generally affect the local inhabitants to a much greater degree.
(iii) Local Elections - every 2 years (same arguments apply as above regarding greater degree of frequency),

3. re 9 Suffrage

(a) Constitutional right to vote - should be entrenched.

(b) Qualifications - these should be entrenched to avoid manipulation by politicians. I am satisfied with qualifications as per General Elections i.e. excluding prisoners convicted of more violent crimes and longer prison sentences for fraud/theft, embezzlement.

(c) non-citizen should not have voting rights.

4 re 10 Court Systems

10.1 **Language and Interpretation** - as long as the constitution provides for a 'language equality clause' the same principles should apply to the right of language usage in courts.

Two issues arise in this regard:-

(a) the use of language by legal practitioners - since legal education is presently being conducted in either English or Afrikaans there should be no undue problem regarding the language used by local practitioners and I see no need for such a right to be enshrined.

(b) the language use of the parties - in order to ensure accessibility to justice, the right by a witness to speak in her/his own language should be enshrined thus placing a burden on the State to provide interpreters

10.2 Legal Education - a clause should be introduced to legal education (and legal research the effect that at academic institutions be aimed at the needs of the entire population (I submit, for instance, that research as well as teaching presently widely ignores the needs of the rural population).

10.3 Legal Profession - The various role players are represented on the legal forum. The worst could happen would be to regulate the professions- Anti-monopolistie/discriminatory/equality clauses in the Constitution offer sufficient protection to members of the profession who feel aggrieved.

JOBST BODENSTEIN
DEPUTY DIRECTOR
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (NADEL)

23 May 1995

THE NATIONAL MACHINERY WORKSHOP

The Durban branch of the gender desk of NADEL makes the following submission in response to a fax received on 16 may 1995 regarding the commission for gender equality.

1. The gender desk of the Durban branch of NADEL is of the opinion that a commission of gender equality is needed, as that commission would focus on gender discrimination which is a real and pervasive problem in our country at the present time. If the issue of gender discrimination is left to the human rights commission, then that issue might become sidelined. Gender discrimination is in the opinion of the gender desk too important and fundamental an issue to be left to become one of many issues that will be addressed by the human rights commission.

2. There is a need for a gender equality commission which will be in a position to co-ordinate future national machinery to advance gender equality.

3. A gender equality commission will be in a position to influence structures presently provided for in the Constitution namely the Human Rights Commission, the Public Protector and the Courts, to advance the interests of women.

4. It is submitted that the commission of gender equality should perform the following functions :-

   (a) To make recommendations on legislation and policy : there should be a provision that consultation with the commission for gender equality is mandatory when legislation is debated.

   (b) To monitor gender discrimination.

   (c) To promote gender equality in education.

   (d) To investigate complaints about gender discrimination.

   (e) To mediate in disputes concerning gender discrimination.

   (f) To enforce anti-discrimination legislation : In this regard it is submitted that the commission for gender equality should be given specific power to enforce anti-discriminatory legislation affecting women.

5. Functions to be performed by other structures:
It is submitted that both the Human Rights Commission and the Gender Equality Commission should have jurisdiction to enforce women's rights or anti-gender discriminatory legislation.

6. **The structure of the Commission for Gender Equality:**

   It is submitted that the structure should not be prescribed in the Constitution. The establishment of a commission for gender equality should be entrenched in order to give it permanence and greater legitimacy. However, there should be flexibility with regard to the functions and the structure of such a commission, as the functions of the commission will change with time as might the structure of the commission. It is therefore submitted that there should be enabling provision in the Constitution to provide for the establishment and powers of the commission for gender equality but that the functions and the structure of such commission should have a degree of flexibility.

7. It is submitted that there is a need for the commission for gender equality to be entrenched in the Constitution because in this way the extend and the seriousness of the problem of gender discrimination will be acknowledged and a proper and concerted effort will be made to redress the injustice that women have been subjected to as well as the imbalances in the economic sphere.

8. **The relationship between national and Provincial commissions for gender equality:**

   It is submitted that separate provincial commissions for gender equality should be established but that these provincial commissions should work under the national commission in the following way: the national commission would establish policy and agenda. The provincial structures would then be responsible for carrying out such agenda and policy. Provincial commissions are necessary because different provinces might have different problems and different needs that will have to be addressed in different ways. However, the entire programme has managed at national level as this is a national problem and not a provincial one.

ADV. L. U. DAYAL
ADV. S. R. BALTON
1. Thought will again have to be given to the desirability of the institution of the Commission for Gender Equality, for which provision is made in the Interim Constitution and for its inclusion in the new Constitution.

The equality clause contained in the Constitution, Chapter 3, and the laws for the prevention of family violence and the promotion of equality between men and women and the international convention which was signed, are ample indication that this is taken seriously and does not necessitate the institution of a Commission.

2. A justiciable CHARTER OF HUMAN RIGHTS and a HUMAN RIGHTS COMMISSION exist now already, which will have to create divisions for the handling of the various aspects. A Division for Women's Rights is one of the most important ones to address the essential discrimination which exists. Women's rights will have to function as integral part of the Human Rights Commission, otherwise it might land on a side-track and become an objective in itself which could lead to one-sided aggressive action. A "one stop service" must be offered (SAROS) which limits red-tape to the minimum.

3. Research about how Women's Rights might best provide for the needs of women within the context of established traditions and the variety of customs and circumstances in the South African society, is an important point of departure.

Women's Rights are something totally foreign to the woman in our country. From research/opinion polls and conversations with women (apart from professional women and activists against discrimination against women) the large majority of women are not interested in active participation in society or to assert herself. "A lack of role models, mentors and encouragement have held women back from applying for ... administrative posts" (M Ryder: Women breaking the statistical norm in educational administration).

4. As for Human Rights, a very discreet start will have to be made to make women aware of their rights in a holistic manner, to be proud thereof and where necessary to lay claim to these. "A right is only a right if people know they have it".

It must be done in a manner which empowers the woman to take her place in the work place/society/public life with self-confidence and self-respect, not at the expense of the man, nor under coercion or pressure, but from inner conviction.
"The most serious challenges facing managers today are understanding law and a sensitive approach to problems such as affirmative action, equal employment opportunity..."

5. The empowerment of the woman can in reality be brought to ground level by a one-stop service eg local development council offices where it can form part of the RDP with other development projects ("bottom up approach") i.e. NEEDS-DIRECTED.

A one-stop service in which the "women's non-governmental organisations" (NGO'S) will play an indispensable role. Close cooperation between women's organisations with a common objective in view:

* the introduction of women's rights
* the process of elimination of discrimination against women and
* the development/upliftment/empowerment of women, are a winning recipe - provided it is not shattered by hidden political agendas.

"...It is women organising, acting and supporting one another that will achieve real gains". S Hassim - Putting women on the agenda; some issues and debates.

RECOMMENDATION:

1. That the Commission for Gender Equality not be included in the new Constitution, in the light of the comprehensiveness of the Charter for Human Rights and the Commission for Human Rights which can also, within the context, handle Women's Rights.

2. That the term "gender equality" be dropped because it did not succeed in overseas countries where it was applied.

"Changing societal assumptions and our reactions to them is a complex and overwhelming task. Most of the ideas offered in our action plan are simple and almost painfully obvious. However, we believe that change can come through a series of simple and often repeated gestures. " (J R Epp - Gender Equity: a simple, effective group action plan).
RE: UTILISING "STATE BUILDINGS" FOR RELIGIOUS PURPOSES

It is with deep concern and a feeling of disgrace, that I find myself writing this letter.

This country has been freed from an evil such as the apartheid regime by the Almighty God. Thousands died and thousands were imprisoned and exiled, because they had a belief that apartheid was evil and that the people had to be set free from that evil. We are now free from that evil and there is suppose to be a new South Africa, with a "Holy" new Government in place. If your government removes the principles and the morals which the Lord Jesus Christ has given this nation then this country will be doomed for destruction.

The buildings belong to the people and have been paid for by the people and the Government has no right in removing the privilege of using these buildings for religious purposes. When you attack the Church you directly attack the Lord Jesus Christ and then this government will feel the wrath of God.

I hope and pray that the Constitutional Assembly will make the right decision.

Yours in the Masters service

EVANGELIST CHRISTOPHER THEVAR
N.B. The A.N.C. defied the apartheid government and they were correct in doing so what are you going to do when the Church of the Lrd Jesus Christ defies the ungodly decisions that this government is making?
Our Complaint and requests

1. Schools in remote areas are neglected by the Department in many ways. No roads leading or going to school from the main road. Teachers have to travel more than 15 km on foot to school. On rainy days it’s hard for them no transport at all. Teacher trainees refused to go in such places.

2. Schools in these areas are in bad conditions. No Health Inspectors, Education Inspectors or any one from the various departments visit these places because of the road. They are afraid of the damage that may occur in their expensive cars.

3. Parents in these areas are very much helpful towards the departments. They are paying every cent needed or asked from them but they are neglected or even forgotten when it comes to them they are cast out.

4. (a) They need water as the river is very far from them and always dirty in summer. (Umzimvubu River)

(b) They need school as they use poles and sticks to build huts and houses which are very weak indeed.

   Road is the first thing to be done so that all may go well.

   From the remote area kwa-Ngcoya location the under Bomvini Tribal Authority.

Mceteni S.P. School
Re: Our flag

Please keep our new flag or we will make the rest of the world think that we cannot make a decision and stick with it.

[Signature: illegible]
Export Finance and Trading Pty Ltd
Christian Students’ Association
22 March 1995

We hereby request that:

1) Any clause in the new constitution of SA that, in any way, suppresses or outlaws the present liberty we have to express our praise, worship, prayer, thanksgiving to the triune God be omitted from the constitution. We believe that we should be allowed to worship our Creator in open public gatherings or any other building and not only in church buildings.

2) The name of God must not be excluded from the new constitution of SA.

3) Religious leaders must also be nominated as office-bearers in the Government of SA.

We hereby strongly object to the legalisation of immoral and unnatural sexual lifestyles under Chapter 3, paragraph 8.2 of our interim constitution. The phrase "SEXUAL ORIENTATION" must be deleted from our present constitution and must not be included in the final constitution that is being drafted. Homosexuality, lesbianism, sodomy and bestiality are unnatural abnormal and immoral and do not deserve any constitutional protection under clauses like "sexual orientation".

This request is on behalf of our 80,000 school members who represent all the different population groups in SA.

dr Vic Brink
ADMINISTRATIVE HEAD
We dare not begin our constitution with the words, 'In humble submission to Almighty God - ' without declaring that we intend as a Nation to make His revealed standards the foundations of our national life.

I agree that Church and State should be separate as institutions, but not that you can separate people's religious convictions from government or politics.

Since the majority of South Africans are professed Christians and acknowledge the sovereignty of God over the whole universe, we are entitled to start our constitution with 'In humble submission to Almighty God - Father, Son and Holy Spirit - whose revealed standards we accept as the foundation of our national life,

We the people of South Africa declare - '

It will not be right to declare South Africa a secular state in order to avoid any semblance of discrimination towards minorities of other religions and persuasions. Obviously, minorities of other religions and persuasions should be accorded the freedom to practice their religions and to participate in state and society.

But the fact is that the majority of our people believe in God as He has revealed Himself in Jesus Christ, even though their degree of commitment may vary a great deal. The majority believe that our government, our democracy, is ultimately subject to God's will for us and answerable to Him for the character of the state and nation. We cannot divorce our politics, government and constitution from that reality and that context.

Hence we should add in the first paragraph of the Preamble:

' - in a sovereign and democratic constitutional state which is subject to God's revealed moral standards and in which there is equality - '

This will then form the basis on which we interpret for example the rights of equality, freedom and expression and life itself. We are not legitimizing homosexuality, pornography, or abortion on demand.

It was right that we should establish a basic liberty and equality for our people, but this does not mean that we should carelessly flout God's moral standards or even sit loosely on them.

Then we will have established a better order in one sense and allowed evil to undermine its foundations in another. We will pay dearly for such contempt of God.
I hereby submit certain queries and suggestions to do with the Transitional constitution.

1 The omission of a religious preamble of the kind that the old constitution had is to be welcomed. The aim must be a secular constitution offering equal protection to all religions (in, Oliver Cromwell's phrase, 'a good constable to keep the peace in the parish'). This is the state's job. The previous constitution was based on a faulty conception of a Christian state.

2 The new constitution must be made known in draft form, section by section as each is drafted, for public scrutiny and debate, in good time for criticism to be made. Transparency must be more than a word.

3 14.1 Academic freedom. The addition of this specific freedom among the broader freedoms of conscience is greatly to be welcomed but is limited. The four freedoms which have been fought for in the history of this country are the freedoms of who to appoint, who to teach, what to teach and how to teach. In other words the struggle for academic freedom in South Africa against the apartheid regime involved not only freedom of opinion and therefore of research and expression of individual academics, but certain aspects of university autonomy of the right of university governing bodies to see to their own affairs. It would be highly ironical if the same struggle were to take place in a new South Africa with the ANC as the strongest political party. The argument flows, therefore, to 247(2). There was a clause in an early draft of the Transitional Constitution allowing the government to change the powers of university controlling bodies of which 247(2) is an amendment. Even 247(2), as it stands, offers only slight protection from the wrong kind of government control of universities. Universities should be regarded as essential institutions in any sound democracy, so the general theme of democracy is relevant here, as well as the theme of fundamental right to freedom of conscience. A government's relationship with the universities is one of the touchstones for assessing the democratic health of a state, as witness the fate of both academic freedom and university autonomy in recent history under both fascism and marxism. In South Africa the first struggle for autonomy took place in the late 1950s but continued intermittently up to as late as 1987 when a financial clause was used to try to compel certain universities to conform.

4 Religion and censorship. 14.1 and 15.1

1 5.1 grants freedom of artistic creativity and freedom of the press. 14.1 grants freedom of religion and in my remarks in 1 1. I talk of the need for the state to offer equal protection to all religions. The possibility of clashes is obvious. An example is the banning at the moment in South Africa of a major modern novel at the insistence of a certain religious grouping, the novel being The Satanic Verses by Salman Rushdie. A parallel from earlier literary history is the placing of Ulyssses by James Joyce on the Index by the Roman Catholic Church, a banning that has long been lifted. It is suggested that the protection of rights to beliefs and rights to particular forms of worship and church organisation do not constitute a total ban on criticism or individual artistic or theological or
philosophical insight. The classic statement in English on this theme is John Milton's Areopagitica, (1 644) directed against a Puritan parliament (his own side) during a time of civil war and great ideological stress. The framers of the constitution should consider these issues as courts will, in the future, have to make decisions about them.

5· Language rights (Section 3) The use of a language depends on the number of mother tongue speakers or on the general functions of a language in society as a whole. Section three calls for equal use of all languages declared official. Elsewhere in Section 3 language rights are subjected to the test of practicality. Some more thought is needed here, but it is emphatically not suggested that any of the present eleven official languages should cease to be official. Equal use, however, for all languages, is a impracticable. Nevertheless, the speakers of minority languages must be protected in their dealings with the state and have the right to instruction in the mother-tongue as a subject and as medium of instruction at least in the early years, if the parents want it.

In the provisions for the Pan South African Language Board there might be a clash between the duty laid on the Senate (3.1 Oa) to establish the Board and the question of which Minister should be responsible for the Board and its funding: where does the buck stop? At the moment it would appear that the Ministry of Culture Arts Science and Technology is responsible, as the Deputy Minister of this department opened the conference in May that discussed the Board. The question of responsibility must be settled. What is the role of the Senate vis-a-vis the Pan South African Language Board?

8 Language and Education (31 and 32)

32b. talks of the right to instruction in a language of choice. Is medium of instruction meant or instruction in a language as a subject? Both could be important rights. The phrase instruction in is ambiguous.

Naturally, the language used as a medium of instruction in a school may also be taught as one of the subjects in that school - in fact this is highly desirable. The right of a pupil or of a pupil's parents to choose the medium of instruction is obviously very basic and significant. The desire for instruction in a significant language as a subject, while compelling, could also result in a wide range of impracticalities. The right to be taught one's mothertongue as a school subject is important.

In general, the constitution avoids laying down which languages should be taught in schools. This is wise. It should be left to local education authorities, even local communities and schools, and market forces should be allowed to operate, within the broad scheme of the constitution.
PRODUCTION OF THE FUTURE CONSTITUTION OF SOUTH AFRICA IN BRAILLE

In response to an approach from our Vice-Chairman, Mr Philip Bam., regarding the production of the future Constitution of South Africa in braille you have confirmed that the Constitutional Assembly is committed to ensuring that the process towards developing the new Constitution involves the largest majority of South Africa's people, including those sections of the community with special needs such as blind people. You further express your willingness to make documents available in a medium accessible to blind persons bearing in mind budgetary constraints.

Of course, the most important document concerned is to be the future Constitution itself and to prepare the way for its reproduction in braille we have called for a quotation from the organisation Braille Services which is based in Johannesburg. Braille Services, a printing press operated by the South African Blind Workers Organisation, has indicated that it is prepared to transcribe the Constitution at a reduced cost based only on materials used. Assuming that the future Constitution will be similar in length to the Interim Constitution the price per copy would therefore be in the region of R50.00. If we were to produce a basic supply of 500 the total cost would be R25 000.

Accordingly the SANCB wishes to request the Constitutional Assembly to budget an amount of R25 000 for the production of the future Constitution of South Africa in braille. We ourselves, in partnership with Braille Services, would attend to the printing and distribution which would be based on the final text provided by yourselves. We would be grateful to receive your agreement to this proposal as soon as possible enabling us to acquire the necessary braille paper in time for the brailling of the Constitution next year.

William Rowland

EXECUTIVE DIRECTOR
Sir, I am confused and helpless, I do not know where to go and what to do. My concern is that of flying circulating information (rumours warning about Secular State). Mpho/Mphonyana were siamen twins, they supposed not to be separated. Although there were so many prayers from all sides, nobody tried to stop the circular blade above their heads. We quitely waching patiently a miracle circular blade hoovering over siamen heads to happened. State and religion are the siamen twins that in any way should not be separated.

If this information is true about new Democratic Government, that the words God Almighty will be removed from the new constitution South Africa is going to be like Persia and Babylon of the olden days, like Iran and Iraq at this present moment experiencing unpleasant time without having any religion to their states. We shall be without any progress character to stop the war. Think of our young people. It seems that many of them are out of control. They refused to listen to their parents or teachers. So many of them live lives that are very far from God's Will.

Joseph was sold by his own brothers as a slave. He was accused of something he had not done, and thrown into prison just like our President Mr N Mandela. There those who could help him forgot all about him. Afterwards he understood why it all happened to him. God turned all the evil plotted against Mr Nelson Mandela into good, in order to preserve the lives of many people who are alive today, because of what had happened during apartheid time. (Gen 50:20) In the end it led to his being appointed as governor of South Africa.

(I John 15:5) "Apart from me you can do nothing. We really need God's power and the working of the Holy Spirit before anything is changed for the good. Our strength lies in unity, we have to do things together. We should realize that no plan can be a success without God's help and blessing. We must always remember that God has the last word. He is in full control of everything. Both State and Religion have to pray for clear guidance to resolve this matter. Maybe we have misunderstood his Will about certain projects.
My request to you is that: will you please give me the right information concerning Christian religion, where about in the New Constitution? The aim and wishes of Christians is to preach the right message to the community, to convince people to repent from doing wrong to give full support to do right things. Christians do not consider themselves to be too important to serve others.

Yours, In union with Christ Jesus
Bishop : A Phafuli
CHILDREN'S RIGHT IN THE CONSTITUTION

This Council was represented at the public hearing on 13-05-95 but, would like to forward the attached documents for your information.

We are concerned because the Children's Charter of South only mentions the child with disability in Part !! Article 1.1 & 1.2. Article 7.6 states that "Disabled Children have the right to special Health Care and Protection". Children with disabilities however need equal opportunities to access their right e.g. to attend mainstream schools, lifts and ramps to public buildings and pavements are needed for the mobility impaired.

It is also noted that the proposed text on the rights of the child in the final constitution, by the National Children's Rights Committee do not mention disability while it makes provision for special groups - children in detention.

We would like to draw your attention t the United Nations convention on the Rights of the Child, Article 32 that has specifically recognise the rights of the mentally and physically disabled child.

Attached please find the following annexures for your further information.

(1) Excerpt from: A Rehabilitation International/UNICEF Technical Support Programme To Prevent Childhood Disabilities and To Help Disabled Children.


Standard Rules on the Equalization of Opportunities for person with Disabilities.

(3) Disability Rights Charter of South Africa - Article 11 has reference.

Lastly we want to point out that disabled children are in many cases already the product of violence, abuse and neglect. Special attention is needed to prevent further handicaps in their lives that will make them a burden to society.

Your attention to the matter will be greatly appreciated.

H MARAIS
ASSISTANT DIRECTOR - WELFARE
24 May 1995

You will be aware of SACOB’s view that, as part of the essential checks and balances in a final constitution, the Reserve bank should be accorded a high degree of autonomy.

Given this SACOB stance, the business community in general - and SACOB in particular - are concerned about the new dimensions introduced into the debate by proposals which appear to be presently mooted. I refer to recent reports in “Beeld” and “Business Day”.

The outcome of the debate will impact upon:

- monetary policy
- economic performance
- investor confidence both here and abroad.

In this context it holds serious implications for the positive inflow of capital to South Africa at a time when South Africa is seeking to build a new track record in economic and financial policy.

SCAB therefore feels that it is necessary that our representatives be given another opportunity to give verbal evidence on this matter to your committee before final recommendations are made to the Constitutional Assembly.

R.W. K. Parsons
Director General
South African Chamber of Business
Dear Executive Director,

The Publishers' Association of South Africa (PASA) strongly supports the establishment of the office of Public Protector, for the following reasons.

1. Financial stakes involved in textbooks.
   The educational publishing industry's turnover is roughly estimated at R700 million, and much of this money is spent by the state, in the purchase of large quantities of school textbooks. Indeed, South Africa is the only country in the world where print runs of a single title can run to 600,000 copies, a phenomenon due entirely to the centralised system of textbook purchasing by the state in certain regions. It appears that this system will continue, albeit in modified form, into the near future. Obviously, the potential for corruption is high, given the financial stakes involved in very large state tenders. Conflict of interest situations are allowed to flourish, as no regulations exist to prevent officials involved in the book selection process from having a financial interest in the books that can be chosen.

   In the past, the Department of Education and Training exposed instances where departmental officials had behaved corruptly in the ordering and supply of books to schools. At the present time, the Publishers' Association is aware of unprofessional practices around book supply in at least one-province (the North-West province).

   During the year past, PASA drew up a code of conduct the intent of which was to regulate the practices of publishers, tenderers and state officials when supplying books to schools. The Department of Education has pointed out the problem with the notion of a regulatory code of conduct, namely that it would necessitate legislation governing the terms of employment of civil servants. PASA feels that the only legal arena where regulatory mechanisms can be set in place is now the office of Public Protector, and that this office should crucially have powers to intervene in provincial affairs. Indeed the Public Protector's terms of reference should be precisely one of the exclusive national powers detailed in the Constitution.

2. The status of tenderers.
   Both presently and in the past, the tendering booksellers whose task it is to distribute books physically into schools sometimes proved to have no official bookselling status and no knowledge of bookselling - indeed they were shell companies owned by businessmen or departmental officials with good contacts, and operating more often than not as hardware and stationery businesses. This situation looks set to continue, unless provincial governments provide more stringent qualifications for the award of tenders (such as recently happened with major banks tendering for provincial financial accounts). PASA would support efforts to make the process of tendering for book supply more professional.
The Department of Education's ultimate goal is to empower teachers to select and buy books. In the meantime, it is recognised by the state that the present situation, where publishers submit manuscripts for evaluation and selection by the provincial departments, must continue. PASA's view is that 9 education departments are better than 17, and also better than one, from the point of view of checka and counter-balances and the necessary devolution of power. PASA would urge that book selection committees be comprised of suitably qualified and representative members who can declare that neither they nor their families stand to gain financially from committee decisions.

In addition, the workings of the committees should be open and transparent.

PASA hopes that the office of Public Protector will transpire, and also hopes that the Protector will consider these three areas of educational provision.

With best wishes

Nicholas Evans
Development Portfolio: Publishers' Association of South Africa

Editor's Note: Attachment with Compliments from Heinemann Publishers (Pty) Ltd
To whom it may concern
A slightly revised version of the original submission from PASA, made after more extensive consultation.
On behalf of the members of United Christian Action we would support the inclusion of a clause to be included in the fundamental rights and freedom section of the new Constitution which would protect animals from cruelty and abuse.

We support the work of the Animal Groups Alliance and the Society for the Prevention of Cruelty to Animals. We add our voices to theirs in pleading for constitutional protection of animals.

In the light of the clear teaching of Scripture concerning Creation and mankind's stewardship we recognise our responsibility to care for all life. We should treat animals with the compassion and concern of those who must give an account of our conduct to God. We must recognise that the welfare and protection of animals from cruelty and abuse is an essential part of our Christian responsibility.

Should we be called upon to present verbal evidence in support of this position we would be prepared to do so.

Rev. Peter Hammond
DIRECTOR
COMMITTEE OF UNIVERSITY PRINCIPALS

7 August 1995

ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

The Committee of University Principals consists of the vice-chancellors of all 21 universities in the country. At its recent meeting on 27/28 July 1995 it unanimously accepted the attached proposal that academic freedom and institutional autonomy for institutions of higher education should be explicitly reflected in our new constitution.

This proposal has been submitted to Theme Committee 4, but the CUP feels so strongly about its contents that it is also brought to your attention in your capacity as chairperson of the Constitutional Assembly.

Please be assured of the support of the constituency that we represent with the very important task of drafting a constitution for our country, that you are engaged in.

Prof. J. W. Grobbelaar
CHIEF DIRECTOR

COMMITTEE OF UNIVERSITY PRINCIPALS

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY

ACADEMIC FREEDOM

The Committee of University Principals wishes to propose that academic freedom should have a distinct place in the new Constitution.

Academic freedom is one of the constitutive elements of a democratic society. Academic freedom is widely recognised as a public good in a democratic society because it enables both the reproduction of existing knowledge and intellectual skills in society through the training of students, and the extension and growth of those skills and knowledge through scientific and academic research.

Because of its importance to a democratic and open society, we believe that academic freedom deserves a distinct place in the Constitution.

As it stands, the Interim Constitution refers to academic freedom in two separate sections: 14(1) and 15(1), under the respective headings of Religion, Belief and Opinion and Freedom of
Expression. 14(1) reads "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion which shall include academic freedom in institutions of higher learning." 15(1) reads "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research".

While the CUP concurs with these sentiments, we believe that the cause of academic freedom would be better served if academic freedom is recognised as an issue though related to issues of belief and expression, is distinct from them.

The CUP submits that granting individuals the right to enjoy academic freedom means little unless the institutions of higher learning in which academic freedom is embodied are themselves granted the autonomy necessary to academic freedom. Individuals enjoy their rights to academic freedom only in the context of institutions of higher learning which work to embody the distinctive components of academic freedom.

We therefore propose the following addition to the Constitution:

Academic Freedom

(1) Every person shall have the right to academic freedom in institutions of higher learning.

(2) Every institution of higher learning shall be autonomous with respect to teaching and research.

May it be noted that the CUP is aware that it is unusual to grant rights to anything other than individuals, as (2) does: but we feel that there is already sufficient precedent in the Interim Constitution Section 15(2), which stipulates certain requirements with regard to public media ('All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of diversity of opinion.')

May it also be noted that, if adopted, one consequence of this new section would be the deletion of the last part of section 14(1) 'which shall include academic freedom in institutions of higher learning'. Section 14(1) would then read 'Every person shall have the right to freedom of conscience, religion, thought belief and opinion.'
GAY RELATIONSHIPS / MARRIAGES / REGISTRATION

1. Thank you for allowing the voice of the people to be heard in South Africa.

2. We do propose legalisation of gay relationships in this country for various reasons:

   a) it would promote a stability and commitment in an otherwise unstable situation;

   b) it would promote "next of kin" status in the events of illness, arrest and death;

   c) it would promote social acceptance and legal status and dignify the individuals;

   d) I fully believe (after consultation with many persons and bodies) that such a status would help obviate casual relationships and the spread of Aids as a registered relationship would place the individuals on the same level as married couples and provide a reason for faithfulness;

   e) Spousal / Joint investments, ownership and confidence would be possible as never before.

The Rt. Rev Dr J. N. Manson
PROPERTY AND LAND RIGHTS: AN AGRICULTURAL PERSPECTIVE.

1. PREAMBLE

The establishment of property rights is an essential feature of a market based approach to land tenure systems and land ownership. This coincide with the democratic and market based approach which is generally accepted as an integral part of the Rural Development Programme (RDP).

Ownership of land and property is a basic human need and it not only entails the right to own land but also include the right to use land for different purposes and the obligation to conserve natural resources for future generations. Furthermore the creation of a sustainable society aims at the improvement of the quality of human life in all respects (not merely at a lifting of standards of living).

Sustainable resource management depends essentially on matching demands on the environment to its capacity to maintain its production potential. Poverty reflects societies which are not sustainable under present conditions indicating an imbalance between people numbers and resource levels. Poverty increases as the land's capacity to supply basic human needs declines.

2. HISTORICAL PERSPECTIVE

Property rights have always been a very sensitive issue in the South African context and has recently again become an important national and political issue. Over the years various aspects have contributed to the modern property rights system with rippling effects especially in agriculture were it created certain obstacles. Property rights did, however, play a very important role in the construction of the present agricultural and land-tenure systems. In South Africa there are various forms of land-tenure which include privately owned land and communally owned land. In terms of area the dominant form of property right is private land-ownership which in the past has been mainly in the hands of a certain sector of the population.

Private ownership creates the incentive to invest scarce capital into intensive agricultural production as well as conservation measures for scarce agricultural resources and water. The private landowner knows that any increased effort in preserving the land will lead to a rise in output that in turn will lead to an improved income. Private land owners should however be made aware that the future of the natural resources are in their hands and it is their responsibility to look after it and preserve it.
Certain land-tenure systems as a form of ownership, possession and occupation represents a specific constraint to the implementation of conservation policies and practices. Many resource problems arose as a direct result of certain tenure systems in that there are increased degradation of communally owned resources, expansion of residential sites, failure to identify transgressors and difficulties in reaching consensus under communal decision making.

Traditional tenure systems do however have a rightful place within the South African context and therefore should not be discarded without careful consideration of their individual costs and benefits. It is in circumstances like these that it is the Government's responsibility to address the problems which cannot be solved by private initiative.

It is also true that agricultural and economic policies of the past encouraged commercial farmers to increase farm size and to substitute labour with scarce capital. This however resulted in the incorrect allocation of agricultural resources.

Various countries in Africa have experimented with privatization of communal land with mixed success. The benefits of privatisation of land will however only really be determined in the long term and over extended periods of time. This process of privatization and obtaining property rights should, however, be a market based approach in a market orientated economy and individual entrepreneurship as the driving force. The value of the property should thus be market orientated and be determined by market forces.

3. NEW POLICY APPROACH

The new vision for agriculture in South Africa is that it is to become a highly efficient and economically viable market directed sector, characterised by a wide range of farm sizes which will be regarded as the economic and social pivot of rural South Africa and which will influence the rest of the economy and society.

This lead to the formation of the Mission statement for agricultural policy namely to ensure equitable access to agriculture and promote the contribution of agriculture to the development of all communities, society at large and the national economy, in order to enhance income, food security, employment and quality of life in a sustainable manner.

To accomplish this, the following critical agricultural policy goals must, inter alia, be pursued:

* Developing a new order of economically viable, market-directed commercial farmers, with the family farm as the basis.
The broadening of access to agriculture via land reform should be enhanced by adequate agricultural policy instruments, and supported by means of the provision of appropriate instruments.

4. OBJECTIVES

In order to achieve the above-mentioned vision, certain objectives were set and have to be pursued. A few general objectives in this regard are reflected by the following policy principles:

* Agriculture is an important economic sector for social and economic growth and development in rural areas and will be recognised and promoted as such.
* Farming systems and the incentives that drives them change over time, but they should be sustainable; environmentally, economically and scientifically sound; and socially and politically acceptable.
* Affirmative projects will be focused on South Africans with a low income who were previously denied access to opportunities in agriculture and will ensure access to agricultural resources, credit and farmer support services.
* Agricultural support programmes will be designed in such manner as to improve the of life, skills and productivity of farmers and farm workers.
* Security of land-tenure under all systems will be promoted as a basis for effective utilisation of agricultural resources. The question of land-tenure is of central concern because it can make or break a country. A land-tenure system can spell the difference between improved quality of life or a perpetuation of poverty and misery.

Important natural resource conservation objectives are the following:

* The objective of the South African Government should be to combat soil (land) degradation through effective action at all levels, support by international, regional, sub-regional and provincial co-operation and partnership arrangements.

* Achieving these objectives should involve long-term integrated strategies focusing simultaneously, in effected areas on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources.

5. STRATEGIES

In order to achieve these objectives government should sustain and promote individual property rights by:

* Ensure that decisions concerning the design and implementation of soil (land) conservation programmes are taken in a spirit of solidarity and partnership thereby focusing available
financial, human, organisational and technical resources on those points where they are needed most;
* build a better understanding amongst all its people concerning the nature and value of soil, vegetation and scarce water resources and work towards their sustainable use; and
* consider the special needs and circumstances of the least developed.

6. RECOMMENDATION

Property rights and land-tenure systems have a major impact on agricultural productivity and land conservation.

In future the Government should sustain and promote land-tenure in South Africa based on private land ownership. In order to fulfil this, means must be implemented to make it possible for people to obtain property rights pertaining to the land they occupy. Participation in production and marketing by new entrants into farming should therefore be facilitated. Allowing new entrants into farming, property rights either by way of privatization or any other secured land-tenure system, should lead to expansion of small scale farmers with the possibilities of investing in the property in the long term.

The natural resources is a national asset and the Government should make all private land owners aware of and accountable for the sustainable utilization of the natural resources.

The Government must also recognise its responsibility to provide assistance and law enforcement for the appropriate management of the natural agricultural resources while maintaining a balance between the basic needs of people and the promotion of an all inclusive environmental ethic.

NATIONAL DEPARTMENT OF AGRICULTURE
25 July 1995
Federation for Small Stock Breeders Societies

22 November 1994

STOCK THEFT IN THE CONTEXT OF THE RIGHT TO OWN PROPERTY AND THE PROTECTION OF THIS RIGHT

At the Annual General Meeting of this Federation held on 16 November this year, the problem of Stock Theft, the alarming rate at which it is increasing and the inability of the police to curb it or bring culprits to justice, was urgently discussed.

Particularly the small stock (Sheep and Goat) industry is most seriously affected by this problem - to such an extent that many sheep and goat breeders have been forced to disband their flocks and so seek other means to a living in some areas. This is having disastrous consequences in an industry that is so vital for a stable meat supply in South Africa. Many regions are only suited to small stock production, and should these enterprises fail because of stock theft, many thousands of people will be severely affected by loss of work. In addition the industries involved in the transport, marketing and processing of the products of the small stock industry are becoming less viable due to ever smaller supplies of wool, mohair, skins and fresh meat reaching the market. This decline in the industry is largely due to stock theft, which is apparently impossible to arrest.

While the co-operation of the Police and Department of Safety and Security is being urgently sought, there is one way in which the drafters of the new Constitution and the Manifesto of Citizen's Basic Rights could strengthen the hands of those seeking to maintain law and order and bring thieves to justice.

We appeal to drafters of the new Constitution to ensure that the RIGHT TO OWN PROPERTY AND TO THE PROTECTION OF THIS RIGHT by the police and the courts, be elevated to a much stronger position than at present. We believe that this right is the cornerstone of a strong and healthy free economy, and failure to protect and strengthen this right will lead to a decline in production, economic activity and employment which will completely negate the progress that we are attempting to make with the RDP.

PLEASE ENSURE THAT PROPERTY RIGHTS AND THE MECHANISM TO PROTECT THESE RIGHTS ARE MORE STRONGLY ENTRENCHED IN THE NEW CONSTITUTION. We make this appeal on behalf of the entire small stock industry in South Africa and the millions of people who depend upon this industry for employment and food.

Henri Londt
Secretary
1. INTRODUCTION - CHILDREN ARE VULNERABLE

The legacy of apartheid lives on in South Africa. Poverty is widespread and deep, particularly in rural areas. Low wages, high unemployment, homelessness, escalating violence and the
resultant breakdown of fully life has resulted in an enormous waste of human life and potential, of course it is the most vulnerable in society who have been its victims - our children.

It is against this background that SA. interim constitution has recognised fundamental rights of all persons. It further recognizes children as persons and accepts the motion of the Rights of the Child.

2. **A CHILDRENS RIGHTS IMPERATIVE FOR S.A.**

The idea that children have rights of their own which transcend the family is considered a fairly radical and complex issue.

Rights of the child have generally been subsumed in the rights of adults, particularly parents and family and hence does not take cognizance of childrens innocence and vulnerability. This is the basis for arguing for special provision of the highest level viz the constitution.

For SA. the ongoing inclusion of childrens rights has moved from a moral obligation to a legal one with our commitment to the adoption and ratification of the UN Convention of the Rights of the Child (1990).

The SA. Childrens Charter adopted by children themselves in 1992 at a summit in Cape Town and the African Charter on Human and Peoples Rights also speak of the Rights in such a way as to acknowledge the special status and needs of children.

Finally noting that 44 % of our population (population census 1991) is comprised of children and that 18 % are below the age of 7 means that in S. A. we cannot allow children to be excluded from otherwise universal human rights.

3. **THE RIGHT TO EDUCATION**

**LIFELONG LEARNING AND DEVELOPMENT**

The UN Convention or the Rights of the Child (article 28,29), the African Charter on Human and Peoples Rights (article 17) and the childrens charter of S.A. (article 8) all point to the importance of Education and Learning which is directed to Development of a childs personality, potential and talent, which prepares children for responsible life and which enables the development of respect for parents, basic human rights, the natural environment and their own and other cultural and national issues.
It promotes the motion of both formal and non-formal education, the key role that parents play in providing care and promoting development of children as well as the need for support to parents in order to enable them to fulfil their responsibilities.

In addition to the specific clause on education several other articles of the UN convention reflect the rights of children to Early Childhood Development.

They include:

- article 2: Rights for all children
- article 3: best interest of the child
- article 6: the right to life and survival and development
- article 9: right to both parents
- article 18: responsibility of both parents to child
- article 27: a standard of living conducive to optimal development of the child
- article 31: the right to play

If we are to accept the right to education as encompassing all the rights above, the consequence of neglecting to meet the rights can span generations, and place a huge strain on limited resources. It will also mean the violation of basic human rights of the child in developing to their full potential.

Let’s look more specifically at educating the South African context:

Education has been both a terrain of struggle and a terrain of liberation in that the long demand of equal education to a majority of South Africans served as a tool of oppression but also as 1970 illustrated for us a vehicle pupilseration. Today we live with that painful legacy of an education system which is fragmented, underprovided, unequal and where large segments of one society have been disadvantaged.

I believe that education is and will continue to be a terrain of struggle as we grapple with the task of reconstruction and development.

In our current interim constitution, article 32 provides the right of every person to

a) A basic education and equal access to education institutions

b) to instruction in the language of his / her choice where reasonably practicable and education institutions based on common culture, language or

c) To establish where practicable religion provided there shall be no discrimination on the ground of race.
I wish to argue that in order to ensure redress and to transform the educational system we must place our emphasis on the following:

- The promotion of Early Childhood Development and lifelong learning
- A commitment to providing support for parents
- Fair and equal provision for development of disabled children
- Promoting appropriate learning opportunity for out of school children and youth.
- A shift from didactic learning to concept of holistic Education.

**PROMOTION OF E.C.D.**

There is international acceptance of ECD as providing the foundation for a child to become healthy, active and sociable.

ECD is defined as a process whereby a child from birth grows and develops physically, mentally, emotionally and socially.

ECD is seen as a continuous developmental process of care and education, within the context of the family and community.

Noting the extraordinary levels of disadvantage suffered by SA children and the need for ECD is now even greater as an effective vehicle for providing support to children in poverty and where family life has broken down.

We need to rear both physically healthy and emotionally stable children and ECD provides this through the freedom to play, talk, touch, question, move and manipulate.

ECD provides an opportunity for the nurturing of a child’s:

- sense of self esteem and confidence
- development of social relations
- building independence
- development of trust
- self discipline
- development of a child’s creative and intellectual potential
- encouragement to have fun

The focus on ECD is justified as a mechanism for intervening in the cycle of human deprivation.
It is unfortunate that ECD is equated with centre-based care when in fact this is only one model for care and where family and home-based care is seen as the goal for most children.

**COMMITMENT TO SUPPORTING PARENTS**

If we are to free the child we must help the parent. The care and well being of children is closely linked with that of their parents, especially their mothers.

However, parents and family are too vulnerable and disempowered to take fully the responsibility for their childrens well being and health in developing countries. This is where the state must commit itself.

A world development report of the World Bank (1991) finds that the level of maternal education is the best single predictor of childrens well being.

In a country where approximately 15 million people are not literate and less that 1% are in A. B. E. programmes, the urgent need for Adult Basic Education is stressed.

Through these sort of programmes parents will be strengthened in their roles as 1st and lifelong education of their children.

**FAIR AND EQUAL PROVISION FOR DISABLED CHILDREN**

All human beings have the need to be seen as unique and this is for disabled children as well.

The reality, however, is that a disabled child already deprived of some of the riches of life, experiences further disadvantage by the denial of / or inappropriate provision of education and care.

The question of integration of disabled children is crucial to accepting that they have some right to education and to take part in the same activities.

However it is accepted that this will require physical modification, training and support for parents, caregivers and teachers and access to adequate resources.

It is an accepted fact that children with disabilities benefit enormously from early detention and intervention and this too could be facilitated by ECD programmes.

Where it is not possible to integrate children, effort should be made to provide services and facilities to both child and parents.
OUT OF SCHOOL CHILDREN AND YOUTH

Past policies of apartheid have resulted in massive education backlogs. The S.A. Foundation estimates that approximately 17 million children are out of school and a further 17 million aged under 30 have dropped out, with 600 000 not having attended school.

According to DET the number of over age pupils is also a growing concern with 32 % of children being 3 years above the norm and 19 % being 4 years above the norm in their respective grades.

There is surely a cause for alarm, and for the development of appropriate infrastructure to cater for a variety of learners.

They include children and youth.

- previously out of school for whatever reason
- over age for specific grades
- are homeless on the streets
- cannot attend school on a continuous basis
- have had disciplined schooling

What they need is not remedial education but a more challenging from of education what takes cognizance of their ages, experience and need for appropriate leading methods which are age specific.

This is important if we want to ensure that there is an opportunity for full development of potential. Some recommendations from the Gauteng Education ministry task force on this matter include:

- special relevant open learning curricula
- children / youth age 15 entering school for the 1st time should be accommodated in ABE classes or other secondary distance education classes.

A PARADIGM SHIFT - HOLISTIC EDUCATION

Education is far too often confused with schooling and academic learning. What we need in fact is a process of life long learning within an informal and formal environment and which is child centred. It should recognise the importance of empowerment for the sake of the children as individual and for the sake of the community in which they live.
In revisiting education curricula we need ensure that a focus on Peace Education and Anti Bias is a strong component to facilitate nation building.

The UNDP 1993 report sees child development as a "process of exploring choices.. there can be no limit...... no bliss point",

4. CONCLUSION

A constitution should embody the highest aspiration of a nation to ensure basic human rights for all especially the most vulnerable in society.

Hence it is argued that the failure to entrench childrens rights in a future constitution will deny children their future. We cannot afford this.

We must however be cautious on the need for careful drafting of childrens rights clauses for 2 reasons:

i) so that they are not too specific as this could restrict negotiations and interpretations

ii) be too unrealistic as this could prevent any reasonable attempt to halt the tremendous dearth of needs because they will be regarded as Utopian by the many people whose job it is to interpret the constitution.

In a world which caters largely for adults, I wish to urge for a constitutional provision which supports the following:-

(a) free and compulsory education for at least 10 years
(b) life long education from Early Childhood through to Adult Basic Education; a role for parents in governance of educational institutions
(d) appropriate learner centered environment and curricula
(e) appropriate institutional provision for children with special needs
23 March 1995

African Christian Democratic Party (ACDP)

Greetings to you in the name of peace, love and grace, the one who died for you Jesus Christ.

Mr Ramaphosa I wish to take this opportunity to congratulate you on your position as chairperson for the constitutional assembly. I remember watching a documentary on you on television with Evita Bezuidenhout/Pieter-Dirk Uys at your home and at the lake where you caught trout. It was inspiring for me to watch such a gentleman, keen trout fisherman and politician as yourself become chairperson to the board to implement a new constitution for South Africa.

I wish to encourage you with the knowledge that many prayers have been prayed for you from ACDP Youth in Mossel Bay as you are an important man, an important instrument in God's hands and as you seek Him, He will draw near to you and guide you so that the many blessings He has for you, you will receive.

It is also at this opportunity that I wish to submit three proposals to be implemented in the new constitution.

(a) I believe that there should be a reference to the triune God. God the Father, the Son Jesus Christ and the Holy Spirit. This will allow us to continue receiving His blessings in our country as we acknowledge Him, He will acknowledge us.

(b) I believe that the state should allow Christian observances in all its institutions to enable them to hear the will of God, and have His guidance.

(c) I believe that there should be a freedom that allows all Christian office bearers to hold any office of state, e.g. the ACDP were voted by the people to have seats in government, some of these people including Kenneth Meshoe MP still holds his office as a Pastor in the church. Also then the state will hear the will of God through these people.

I agree with you that in the past certain denominations of churches supported past laws, this was an evil on their part, and they will answer to the Lord. The Lord has heard the cries of many people in this land and has answered their prayers, it would seem strange now to remove Him from the constitution. If we confess Him He will confess us to the Father, if we deny Him He also will deny us.

Finally I wish to bless you with many good blessings of God's providence for your life and success in all that you do especially with regard to our future constitution.

I look forward to your reply and wish you well, and thank you for your time in reading this letter/fax.

For the Gospel and in His service,
love always.

SIMONDAVID WHITEHEAD
On behalf of the members of Lugnos Congregation I submit the following proposals for inclusion in the new Constitution:

1. The following words should be included in the Preamble to the Constitution: "in humble submission to Almighty God who is judge over all the universe, and whose principles we uphold, we, the people of South Africa declare that . . ."

2. The following words should be included in the Preamble to the Bill of Rights:- "All human beings are created equal in that they are endowed by the Creator with equal dignity and inalienable rights. It is not the prerogative of the government either to grant or to withhold them. The government is ordained by God to preserve that these rights, to establish justice and to maintain peace and order within the framework of God's moral standards."

3. The submission of proposal 8 by the ABC that South Africa shall be a "secular state" is conflict with the wishes of the overwhelming majority of the electorate.

4. The Constitution shall recognise that national morality can prevail only through the recognition and upholding of religious principle. The state has spiritual accountability and is not secularistic.

5. Notwithstanding paragraph 4, the Constitution shall provide for the separation of church and state whilst recognising that the church may challenge the state if it fails short of its divinely ordained responsibilities.

6. The Constitution shall provide for religious freedom both in belief and practice and for the autonomy of religious bodies over their theological and ecclesiastical affairs.

7. In consequence of paragraph 6 there shall be no established state religion nor a state Department of Religion.

8. The right to freedom of thought, conscience, belief and religious practice includes the right to change one's religion or belief or practice, and the freedom to disseminate one's religious beliefs either alone, or in community with others, in public or private.
9. Religious communities shall be entitled to establish and maintain their own educational institutions at all levels. Such institutions shall have the right to financial support by the state provided that they comply with recognised academic norms.

10. The Constitution shall recognise that respect for human rights depends both on the rule of law and on moral and spiritual values.

11. In article eight (2) of chapter three of the Interim Constitution the words "sex" and "sexual orientation" should be deleted in the new constitution. The word "gender" provides complete protection against discrimination in this context.

12. If a clause such as "sexual orientation" is included in the constitution, citizens young and old, will not be protected from abuses such as paedophilia, bestiality, necrophilia, sadomasochism, sodomy and other unnatural, abnormal and immoral activities, contrary to natural and biblical law and the created order.

13. Freedom of expression (article 15 in the Interim Constitution) must be defined in the new constitution by those internationally recognised limitations which protect the individual from denigration, invasion or privacy and corruption of minors.

14. The new constitution will provide for the freedom from exposure to violence, pornography, obscene and offensive material on this media.

15. The right to equality will ensure respect for women which may not be undermined by degrading pornographic publications.

16. The right of children to a healthy environment will be defined to include physical, moral and spiritual spheres.

17. The sanctity of human life shall be recognised from the moment of conception.

18. The right of every person to have his/her life respected shall be protected by the law from the moment of conception.

19. The Constitution will affirm that there can be no human rights without accompanying responsibilities.

20. The Constitution should emphasise the principle of proportional representation. Consequently, the New Constitution must require that this principle will be observed in the compilation of judicial bodies such as the Constitutional Court, Appeal Courts, High Courts and Regional Courts. In this respect the constitution must require that the compilation of judicial bodies reflects the principles of proportional representation particularly with respect to religion and gender. Obviously this requirement will be expressed in broad terms rather than precise mathematical calculation.
S C VAN DER WALT
Pastor
1. BILL OF RIGHTS

1.1. Right to Strike

1.1.1.(a) The right to strike should specifically include the right to defend and promote social and economic interests of workers. The report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa (International Labour Office, Geneva, 1992) accepted this principle as stated by the Committee of Experts on the Application on Conventions and recommendations:

"the Committee considers that trade union organizations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a Government’s economic and social policies" (Report, paragraph 647).

The Commission also accepted this principle as stated in the digest of decisions and principles of Freedom of Association Committee of the governing body of the ILO (1985) in paragraph 388:

"the right to strike should not be limited solely to industrial disputes that are finely to be solved by the signing of a collective agreement; workers and the organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their interests".

This approach is endorsed in Section 4.8.3.2 of the RDP, which calls for the constitutional right to strike and picket on all social and economic matters. Furthermore, South Africa is about to ratify Conventions 97 (Convention concerning Freedom of Association and Protection of the Right to Organize) and 98 (Convention concerning the application of the principles of the right to organize and to bargain collectively) of the ILO which makes these principles directly applicable to South Africa.

We would propose the following wording

"Organised workers shall have the right to strike to promote and defend the social and economic interests of workers."

Note: our legal advice is that the right to strike includes the right not to be criminally prosecuted, civilly sued, interdicted or dismissed. If the Constitutional Assembly is advised to the contrary, we would want this protection to be explicitly provided for. Further, the right to strike without fear of dismissal, implies that there should be no replacement or 'scab' labour, permanent or temporary. Consideration needs to be given on how to give effect to this.
1.1.2. (b) **The right to picket**

The right to picket should be stated explicitly in the provisions of the Bill of Rights dealing with labour relations.

Accordingly we propose the following wording

"Trade unions and workers shall have the right to picket at the premises of employers"

1.1.3. **Lock-outs**

There is a fundamental misconception in certain circles that the employers' 'right' to lock-out balances workers right to strike. This fails to understand the nature of the relationship between employers and workers. It incorrectly assumes that we are dealing with equal partners. Workers have only their labour to sell. Employers own and control the means of production. The right to strike attempts to balance this huge inequality in power. This is recognised in the RDP, now supported by all parties in the GNU, which states in 4.8.4 that "the right to lock out should not be included in the constitution".

There is no reason why lock-outs need special constitutional protection, and all references to the lock-out should be excluded from the constitution. The recourse to lock-outs can be dealt with adequately under labour legislation. The right to lock-out is not a universally accepted right for the purpose of Constitutional Principle 11 and there is no constitutional reason for its inclusion in the Bill of Rights. Most constitutions do not include the right or freedom to lock-out.

1.2. **Properly Rights**

COSATU does not believe that a right to property belongs in our constitution. Constitutions in a number of democracies, including New Zealand and Canada, do not contain an entrenched right to property. It is particularly inappropriate in the South African context, where existing property rights are directly linked to colonial conquest and racial domination. To constitutionally entrench property rights, would perpetuate existing patterns of in equality ad infinitum. This would limit the ability of society to realise many aspects of the RDP, particularly in areas such as land reform and restitution. Property rights and their limitation are more appropriately dealt with in legislation.

1.3. **The Right to Privacy**

The privacy clause as contained in s13 of the interim Constitution, deals mainly with search and seizure and the protection of citizens against abuses by the police. However, the right to privacy is often used to circumscribe a zone of freedom that the
State cannot interfere with, and has provided a hiding place for private discrimination in other jurisdictions, for instance, in the case of private clubs that discriminate on the grounds of race. The right to privacy also needs to be formulated in a way which prevents employers from abusing this right to deny workers access to information.

1.3. **The Right to Economic Activity**

The right to economic activity is not an internationally recognized fundamental right, and should not be included in the Constitution. This right effectively entrenches one economic system and should be removed. It is fundamentally undemocratic to constitutionally prescribe to people that they adopt a particular type of economic system.

1.4. **The Right to Information**

South Africa is a country where a veil of secrecy has existed, not only in relation to the state, but also in relation to employers. Lack of access to information by workers, consumers and society as a whole, has enormously prejudiced their human rights. This is true whether in relation to the right to a healthy living and working environment, the right to work, and so on.

The right of access to information held by the State or State organs only, and only insofar as such information is required for the exercise or protection of a person's right, is not adequate.

In particular, workers employed by a company need to be constitutionally empowered to gain access to information which is of vital interest to their lives and their future. This could be covered by a clause such as:

"Workers and trade unions shall have the right to organise which shall include the right to information for matters of mutual interest".

Consideration would need to be given to broaden this to protect consumers and society as a whole, in gaining access to information which is vital to their interests.

1.5. **Freedom of Association**

The Constitution must guarantee the right of Freedom of Association and, more specifically, the right to form and join trade unions. The Constitution should not include the right to disassociate or the right not to associate. The ILO leaves the question of closed shop agreements to individual nation states to decide, and does not deem the closed shop and agency shop to constitute an infringement of Freedom of Association.
Accordingly the rights to freedom of association and the right to form and join trade unions should be qualified in such a manner in the limitations clause as to permit closed and agency shops. The wording of such a clause might read as follows:

"Nothing in the Bill of Rights shall preclude measures permitting trade unions and employers concluding union security agreements".

Further, no law should prevent representative trade unions from negotiating collective agreements binding on all workers covered by such agreements.

1.6 **Limitation on Trade Union and Workers Rights**

Provisions of the current Public Safety Act do not include the power of the state to suspend the right to strike, under states of emergency. COSATU is of the view that the constitution needs to ensure that fundamental trade union and worker rights are not subject to suspension, including during states of emergency.

1.7 **Workers Rights**

To convey the importance which the constitution attaches to workers rights, all provisions dealing with trade union and workers rights, should be grouped under a heading in the constitution called “Workers Rights”.

2. **SOCIO-ECONOMIC RIGHTS IN THE NEW CONSTITUTION**

It is possible to include socio-economic rights in the Bill of Rights while not imposing legal obligations that are as strict and binding as those guaranteeing civil and political rights. Socio-economic rights must be costed against an audit of available resources.

We should include directive principles for progressive realization by the State, as was done in the Irish, Indian, and Namibian Constitutions. Such directives of state policy would put an obligation on the state to undertake appropriate legislative and executive action to the maximum of its available resources in order to achieve the progressive realization of basic social, educational, economic and welfare rights for the whole population.

3. **SEPARATION OF POWERS BETWEEN NATIONAL AND PROVINCIAL GOVERNMENT**

A number of parties and business have made constitutional proposals which will lead to the continued fragmentation and balkanisation of our country- politically, economically, and otherwise. The Interim Constitution itself leans in this direction, which undermines effective implementation of the RDP.
The RDP attempts to overcome our history of balkanisation, division, and deep inequality, by building a united nation. A nationally co-ordinated programme of reconstruction and development requires an effective and strong national government, a national framework, and national standards. This would normally be true. It is particularly so in the context of the legacy which centuries of colonialism and decades of apartheid have left us with.

National government should exercise authority over labour, economic, trade, industrial policy and other strategic areas like education, health, transport, policing, local government. There should be a unitary state- we reject fragmentation and an ethnic based state. Provincial powers should not include the power to determine conditions of employment of public servants or any industrial relations powers.

The RDP attempts to overcome the legacy of huge inefficiency, duplication, and bureaucracy which characterised apartheid. Yet, minority interests in the country continue to attempt to entrench a system which would have precisely the same result. In particular, proliferation of expensive and unwieldy provincial government structures and bureaucracies would have the effect of draining the countries resources, and undermining effective national co-ordination. COSATU supports the objective of bringing government closer to the people. The emergence of provincial fiefdoms, however, could if anything have the opposite result, as it is likely to undermine the effective operation of the third tier of government-local government.

The powers of provincial governments and the national government should be more closely circumscribed. Specifically, the pre-eminence of national legislation should be spelled out, and it should be made clear that provincial legislation becomes inoperable to the extent that it is incompatible with national legislation. At the moment, provincial legislatures have overriding powers in respect of the matters in schedule 6, subject to five exceptions. This balance should be shifted to give the national legislature overriding powers in the event of conflict, especially where it is necessary for the implementation of national reconstruction and development, labour standards and maintenance of economic unity.

Constitutional Principle XIX provides that the powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis. The criteria to be applied in the allocation of powers to the national government and provincial governments are set out in Constitutional Principle XXI. On the whole these principles do not preclude a state with strong powers of central government. The powers of provinces should be clearly defined.

Where is it effective to do so, provincial governments should have the task of giving effect to national legislation with provincial legislation specifically designed for the needs of that province.
The principles set out above underpin COSATU's approach on the question of separation of powers. COSATU would want to make more detailed submissions on this matter at a later stage.

4. **DEEPENING DEMOCRACY IN GOVERNMENT**

4.1. **Accountability and The Right to Recall**

In a constituency based electoral system, the right to recall would be much easier to exercise. Under a national system of proportional representation, the Constitutional Assembly will have to create a mechanism providing for a minimum number of voters demanding the recall of a parliamentarian. COSATU is in favour of combining a system of proportional representation (required by Constitutional Principle VIII) with a constituency based system, which will allow for accountability of elected representatives, and recall by their constituencies.

4.2. **Majority Rule**

The principle of majority rule must apply at all levels of government including cabinet.

4.3. **The Role of Civil Society**

The state shall have an obligation to promote and strengthen civil society organisations, consult with them in policy formulation, and create a conducive environment for them to operate without interference.

The Constitutional Court should be broadly representative of society. The procedure to appoint it should include a cross section of civil society, including trade unions.

4.4. **Referenda**

COSATU supports the right of citizens in principle to trigger referenda to overturn legislation. This right is included in a number of constitutions internationally. The constitution would have to determine a minimum threshold of support required to call referenda. Further discussion would be needed on numbers. The figure arrived at would need to be high enough to avoid frivolous referenda being triggered, which would place an unnecessary burden on the state and undermine democracy. On the other hand, it should not be so high as to make it impossible for citizens to have recourse to the referendum instrument.

4.5. **Media Diversity**
The state should have a responsibility to promote freedom and diversity of the media.

5. **PUBLIC ADMINISTRATION**

5.1. **Nature of the Public Service**

1. The final constitution should contain only a framework for the regulation of the Public Service.

2. The Public Service should be:

2.1 professional and career-orientated,

2.2 broadly representative of the South African society,

2.3 efficient, effective and responsive in terms of the delivery of service to the public,

2.4 loyal to the government of the day,

2.5 transparent and accountable to the public and Parliament.

3. National legislation should be adopted to ensure merit, equity and representivity in appointments and promotions, and create ability for change, development and administrative reform.

4. The rights of public sector workers at all levels of government, as well as the terms and conditions of service of its members, should be regulated by national labour law. Provision should be made for an ombud relating to the Public Service.

5. The extent of the Public Service Commission's powers and functions shall be compatible with democratic governance and accountability. Provision shall be made for limited executive appointments, only at senior levels of the Public Service, and with posts requiring confidentiality, The composition of the Public Service Commission needs to be reviewed.

6. During their tenure of office no public official shall use his or her position to directly or indirectly enrich themselves or to directly or indirectly benefit any person in a manner which is not fit and proper in the circumstances.

7. The police shall be regarded as part of the public service.
6. **FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES**

6.1. **Financial and Fiscal Commission**

1. A Financial and Fiscal Commission (FFC) broadly representative of society shall be established to advise government of the apportionment of revenue to the provinces. Its function should be broadly similar to the existing FFC.

2. National government shall not guarantee loans by Provincial and Local Government unless the FFC confirms that such loans comply with national norms as set out in an Act of Parliament.

3. Revenue collection should be national and allocation to provinces should be based on equity considerations.

4. The Constitution should not be too detailed or prescriptive in determining the functioning of the FFC.

6.2. **The Reserve Bank**

There is inevitably a tension between the independence of a central bank on the one hand, which is designed to obviate problems of corruption, lobbying, and manipulation of interest rates, and the problem of an independent central bank subverting national economic policy on the other hand. In Germany, the Central Bank is completely independent, while in France it fails under the control of the Ministry of Finance, while the Central Bank of Canada is quasi-independent.

COSATU would favour a constitutional provision on the Reserve Bank which incorporates the following principles:

* representivity of the Reserve Bank Board
* while having operational autonomy, the Reserve Bank would have the obligation to promote the socio-economic development of the entire society
* the Reserve Bank should be open and transparent, subject only to limitations acceptable in a democratic society based on freedom and equality.

COSATU
WOMEN'S FORUM

Herewith a few proposals regarding the government.

1. The President must be independent of any party and he must have executive power.

2. The vice-presidents must remain as at present. i.e., each party with 20% or more representation in Parliament has the right to a vice-president. This will retain the balance of representation in the country.

3. The executive authority must also be elected proportionally.

4. Provincial election - Regional government. We would like to recommend that the current system of Regional Government continue, it appears to be workable. Together with this it would be more meaningful to have the Premier of each province also elected independently - then he would really be the choice of the people in the region.

   The election of the premier can be held simultaneously with the independent presidential election to save costs as well as organisation.

   The Regional government must, however, be more representative - e.g. each mayor of each town must have a seat.

5. We feel very strongly that voting should take place by means of a voters' roll. Voters must register. Those who do not appear on the voters' roll may not vote.

   This would eliminate a repetition of 27 April 1994, where people who were not really citizens of this country, voted after taking a false oath.
6. Members of Parliament must also be appointed proportionally. When he defects to another party, he must be morally obliged to resign and he therefore loses his post immediately.

7. The Local Government System can indeed continue as at present, but knowledgeable people from the past must be accommodated, there is very much uncertainty about the "How".

Each group must be represented proportionally and primary social welfare needs must be addressed first.

We feel that use must be made in each division of knowledgeable people, people who are serious about the country, and who want the government to succeed.

No-one must feel threatened about affirmative actions, we all want a democratic system.

Mrs M.M. Smith
SECRETARY

Mrs L Kas
CHAIRPERSON
VIVIAN REGINA

29th May 1995

The following is the result of a survey carried out amongst all our employees re Choice of Official Language.

<table>
<thead>
<tr>
<th>Language</th>
<th>No of Votes</th>
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<tbody>
<tr>
<td>Afrikaans</td>
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<tr>
<td>English</td>
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</tr>
<tr>
<td>North Sotho</td>
<td>7</td>
</tr>
<tr>
<td>Ndebele</td>
<td>4</td>
</tr>
<tr>
<td>South Sotho</td>
<td>7</td>
</tr>
<tr>
<td>Swazi</td>
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</tr>
<tr>
<td>Tsonga</td>
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</tr>
<tr>
<td>Tswana</td>
<td>5</td>
</tr>
<tr>
<td>Venda</td>
<td>3</td>
</tr>
<tr>
<td>Xhosa</td>
<td>5</td>
</tr>
<tr>
<td>Zulu</td>
<td>8</td>
</tr>
</tbody>
</table>

From the foregoing it seems as if the most popular language is English with Zulu achieving second place although still not reaching a third of the vote for English.

It seems that the majority of our 29 employees would be happy for English to become the Official Language of Communication.

It is important, however, that all other languages be allowed to retain their rightful place in the homes and communities of the various groupings of South Africa's peoples and cultures.

R. J. GILDER
MANAGING DIRECTOR
As part of the Christian majority of South Africa we fully endorse the A.C.D.P.’s objection to the country in which we are citizens becoming a secular state.

We also endorse the ACDP’s proposals regarding the following amendments to the Constitution:

THAT the wording of the Interim Constitution Preamble which upholds Almighty God be retained in the New Constitution, and be amplified to read: "In humble submission to Almighty God who is judge over all the universe, whose principles we uphold and mercy we trust, we the people of South Africa declare That God should be acknowledged by prayer in Parliament and in our schools;

That all children, including the pre-born, should, be protected from all abuse (experimentation, abortion, protection from all forms of sexual abuse, including exposure to pornography and being used in pornography.

That family life and monogamous, heterosexual marriage should be upheld.

That it should be recognised that life begins at conception;

That equality should be limited to broad categories and exclude sexual orientation as a specific; that homosexuality, sado-masochism, bestiality, pederasty, are all “sexual orientations” which are socially harmful and immoral and as such do not deserve any constitutional protection;

That freedom, especially freedom of expression, should be defined in a moral context and limited by Biblical moral standards;

That capital punishment should be retained;

That, except for satanism, witchcraft and other evil beliefs, religious belief and religious practises should be upheld.

We believe that the New South Africa deserves to have a Government which will provide for its people a constitutional framework in which the quality of life can be improved and upheld, thus creating a healthy and happy society, and an environment in which we can confidently bring up the children of the next generation.

(187 signatures attached)
RE: THE PROPOSAL THAT SOUTH AFRICA SHOULD BECOME A SECULAR STATE AND THAT STATE AND RELIGION MUST BE SEPARATE

We wish to object to the above-mentioned proposal on the following grounds:

According to the Readers Digest Complete Wordfinder "secular" means i) not spiritual or sacred, ii) not concerned with religion or religious belief, iii) non spiritual and non religious. Thus a secular state would exclude God from our national thinking.
Psalm 14:1 states "The fool has said in his heart, "There is no God."

Christians wish to see themselves as a people under the authority of Almighty God. This proposal has far reaching implications as it might imply that State owned/subsidised institutions could not be used for holding any religious meetings.

Please clarify the implications of such a proposal:

a) in state owned/subsidised schools
b) in hospitals
c) on Christians holding public office
d) on Christians worshipping God
e) on Christians sharing their faith

Christians have a God given responsibility to serve others and would object to such freedoms being curtailed.

Deut 28: 1-2 Now it shall come to pass, if you diligently obey the voice of the Lord your God, to observe carefully all His commandments which I command you today, that the Lord your God will set you high above all nations of the earth. And all these blessings shall come upon you and overtake you because you obey the voice of the Lord God.

We wish to see our nation become truly a great nation under God.

[LIST OF NAMES]
Methodist Church of S. A. (Benoni East)

Sunday, May 28, 1995

We the undersigned, send our greetings.

We welcome all legitimate moves towards making this a truly democratic nation. Our religion, Christianity, is not dependent for its existence on a democratic State: it has survived and indeed thrived under every other political system. Yet, the Christian insistence on the importance of every individual person, is surely also a fundamental tenet of every true democracy.

The Christian world-view is that "The earth is the Lord's, and everything in it; the world and all who live in it". He is sovereign; every person is a steward, answerable to him. We cannot concede any division between the so-called "sacred" or "religious" and the so-called "secular". We cannot permit the notion that the State stands above God, nor that "religion" and the Church, be shifted off-stage, relegated to some ineffectual role, devoid of powers to commend, criticise and influence the State.

Therefore, it is our conviction that the sovereignty of Almighty God and of our human answerability to Him, be written clearly and unequivocally into the Constitution, - at least into its opening and closing paragraphs. Further, that all our leaders of State be obliged (if not from personal conviction at least out of loyalty to the nation) to recognise, affirm and stress the sovereignty of Almighty God at public functions. This to be expressed through every part of our nation's life - from the high courts of Parliament through to schools, and on public occasions.

The citizens of this land are not pagans: we claim for them the right to see their belief in God recognised, affirmed, stressed and made public, particularly by the leaders of State.

We request that our views be brought to the attention of those concerned with the formulation of the new Constitution. We pray that in the framing and wording of the New Constitution, due honour will be given to God our Maker.

Ministers and members
GEREFORMEEERDE KERK, MAGOL

23 May 1995

RE: Religious Freedom, concerning the Holy Trinity

I, as a Christian, who professes the Holy Trinity, the Father, Jesus Christ, the Son and the Holy Spirit, believe that every Christian must do his or her job thoroughly with dedication and with ardour. This is important so that we will bear witness to our love for the Holy Trinity. (see 2 Thes. 3:6)

In order to do our jobs thoroughly it is important for us to live to honour God. It is therefore also important that where there are Christians together, they can express their faith freely.

We therefore urgently appeal to you concerning the following:
1. We request that religious freedom be maintained at all costs.
2. As Christians we want to start our weekly work with Scripture reading and prayer in the name of our Lord Jesus Christ. (Rom 12:1)
3. We want to worship the Lord our God with all our heart, with all our soul, and with all our mind. (Matt 22:37-40)
4. We want to be free to serve God in our daily work. (see Col 3:23,24)
5. If we are prohibited from worshipping freely, ie by reading from the Bible in the morning and by praying, we will not accept this.

In order to do our work thoroughly, it is important to us to profess to and worship our Lord and God properly.

I therefore urgently appeal to you to allow Christians to worship freely in order for them to do their best in their respective professions.

Ds G. S. Kruger
V I S I M E D
HEALTH CARE COVERAGE

1995-05-25

We kindly refer you to your advertisement in the Volksblad.

We would like to make the following results known to you for submission.

The following results were obtained from the 92 ballots which we distributed among the personnel.

<table>
<thead>
<tr>
<th>Language</th>
<th>Count</th>
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<tbody>
<tr>
<td>AFRICAANS</td>
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<tr>
<td>ENGLISH</td>
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<tr>
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<td>2</td>
</tr>
<tr>
<td>TSWANA</td>
<td>1</td>
</tr>
</tbody>
</table>

These ballots were completed anonymously and voluntarily.

We trust that you will find the information in order.

C. GIANI

PERSONNEL MANAGER
COSMOPOLITAN MAGAZINE SUBMISSION ON ABORTION

Cosmopolitan Magazine believes that every woman should have the right to make her own reproductive decisions, and that reproductive rights should be entrenched in the constitution.

Reproductive rights should include safe, hygienic abortion on request. Abortion should be state-subsidised and accessible to all women. Reproductive rights should also include counselling, education and confidentiality.

In 1990 Cosmo ran a survey on abortion. Of the 600 respondents, 86% were in favour of abortion on request, and just over a quarter of respondents had had abortions.

Every time Cosmo publishes an article on abortion, our offices are inundated with calls from desperate women wishing to find out where to go for safe terminations. We are unable to help them, except to refer them to ARAG.

Anti-abortion groups argue that abortion will never be a part of South Africa. But, in reality, come 200 000 illegal abortions are already performed annually in this country. They are extremely hazardous to women's health and well-being. In some cases, backstreet abortions are fatal for the women concerned.

We believe that a woman's right to control her own reproduction is a fundamental human right, like the right to dignity, privacy and religious freedom.

Lianne Burton
Cosmopolitan Bureau Chief
Johannesburg
My concerns:

The maintenance of the clause on sexual orientation.

This submission comes from the Rainbow Organisation of the University of Cape Town.

What the new constitution should say:

We are all aware of the controversy surrounding the maintenance of the clause on sexual orientation in the new constitution, and thus we, as an organisation feel we have to do what we can to ensure that the constitutional assembly realise how important this clause is. We are also aware that even without the clause, there is still enough in the constitution to allow us our rights - however this indirect support is not acceptable - we feel that we have the right to be directly represented and supported by OUR new constitution. A constitution which does not respect and represent hundreds of thousands of South African's, can not expect to be supported by them either. Please maintain the clause.

Jayson Clark
(Rainbow Organisation of U.C.T)
The Church Council and members of our congregation hereby politely appeal to you to:

1. Recognise the sovereignty of and our dependence on the Holy Trinity in the preamble to the new constitution.

2. Expressly declare that South Africa strives to be a Christian state because the vast majority of its inhabitants are Christians and profess to be such.

3. Clearly reflect in the new constitution that cognisance is taken at all times of the clear guidelines of the Bible regarding matters such as abortion, homosexuality, violence, respect for life, justice, etc.

Good luck with your great and difficult task in writing a new constitution for our beautiful country and all our people.

We pray that you will receive the wisdom and insight of the Almighty.

H. 0. Bekker (VDM)
Newcastle Baptist Church

Constitutional Principle number 12

According to the "Constitutional Talk" newsletter 7 April -27 April 1995, the above mentioned principle reads:

"Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association be recognised and protected".

While we as a Church fully endorse non-discrimination, we are concerned with the implications the protection of the "right in joining" contained in the above clause may have on our right as a Church to refuse membership to anyone who may apply.

As a Church we reserve the right to accept into membership only those who have declared their faith in the Lord Jesus Christ and have confessed same in baptism by immersion as a believer. Furthermore as a Church we reserve the right to refuse membership to or terminate the membership of anyone who, we believe, is deliberately and wilfully living a life which is morally and ethically contrary to that becoming of a disciple of the Lord Jesus Christ as laid down in Scripture.

In short, what we would like to know is, what are our rights in determining the criteria upon which we may admit or refuse anyone into membership.

We look forward to your reply in this regard.

UNITED CIVIC ASSOCIATION

1) We, the above civil association, request an implementation of a law, to protect our people on the ground against small business who exploit our community.

2) Our second request is for the civics or a body to be formed, like a consumer watchdog association to assist in monitoring tenders for that special area where the people of that area can have jobs confined to them. So that they can afford to pay for their rent, water & lights.

We are tired of small businessman and building contractors who take advantage of our people on the ground, who are ignorant and illiterate.

Our communities take their cars, TV's, fridges and other repair or handyman jobs to these attempted businessman or contractors, who takes their money without doing a proper job.

If there can be bodies who take five complaints from residents in that area of a specific businessman than he must be closed down.

T. Fisher

CONTACT: P.R.O. T. FISHER
ELDORADO PARK
NATURAL MEDICINAL SERVICES TVL.(PTY)LTD.
7 APRIL 1995

SINCE 1934 OUR COMPANY HAS BEEN PIONEERS IN THE FIELD OF HERBAL REMEDIES. WE HAVE CONSTANTLY AND SUCCESSFULLY PROPAGATED THE VIRTUES AND VALUES OF THOSE NATURAL ALTERNATIVE MEDICINES. THE GREAT MAJORITY OF THE PRODUCTS WE SELL ARE FROM NATURAL PLANTS. WE BELIEVE THESE PREPARATIONS TO BE TRULY EFFICACIOUS, CONTAINING WONDERFUL HEALING PROPERTIES.

OVER THE YEARS IT HAS BEEN OUR PRIVILEGE TO BE ABLE TO SERVE MANY THOUSANDS OF AILING INDIVIDUALS - THE VAST MAJORITY OF WHOM HAVE REPORTED TO US DIRECTLY OR INDIRECTLY OF THEIR FULL SATISFACTION. THE ALTERNATE MEDICINES HANDLED BY US COMPLY WITH THE MEDICINES CONTROL COUNCIL REGULATIONS.

THEREFORE, WE STRONGLY ADVOCATE THAT EVERY INDIVIDUAL SHOULD HAVE THE RIGHT TO CHOOSE THEIR OWN OPTIONS OR WHICH MEDICATIONS THEY PREFER TO USE TO MAINTAIN THEIR HEALTH.

WE HEREBY WISH TO MAKE SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THAT FREEDOM OF HEALTH CHOICE BE ENTRENCHED IN THE FINAL CONSTITUTION.

L. MILLNER
Pentecostal Holiness Church

17 May 1995

We would like to practice our religion freely and that religion cannot be separated from public life or the civil service.

Pastor H. K. J. Nefale
WOMEN'S NATIONAL COALITION
WESTERN CAPE

WNC submission on retaining Cape Town as the legislative capital city of South Africa

We as the Women's National Coalition (Western Cape region) would like to retain Cape Town as the legislative capital city of South Africa for the following reasons:

1. Moving parliament would translate to costs both overt and hidden that would be incurred by the already overtaxed public. For example, a huge amount has already been spent on enlarging and refurbishing parliamentary facilities in CT which are not taxed for presently.

2. As an organisation with a brief to empower women who are the majority of our society and are the poorest, we would rather encourage the government to fund RDP especially the RDP Women's Empowerment Programmes instead of new parliament facilities.

3. Loss of parliament in CT would lead to considerable unemployment resulting from loss of business and foreign trade in the region. This would also exacerbate the present problem of joblessness, widen the economic gap between the haves and the have nots even further and thus fuel violence, crime and social disorder. In addition, most of the parliamentary staff would be unable to relocate to Gauteng and thus would be retrenched.

4. Centralisation of both economic and political power in one region (Gauteng) would be to the detriment of all other regions and the country as a whole. It would destroy the slowly developing economy of this country and disrupt the fragile National unity while destabilizing the lives of parliamentarians and staff and many communities.

We therefore support that parliament be retained in Cape Town.

M Maboe, Co-President
We would like to make some suggestions about our country’s official languages.

We think there needs to be one common language understood by all South Africans so that people can communicate wherever they go. We suggest English for the common language because many people already know it and also it is useful outside South Africa.

This common language, English, would be one of the official languages. We support the idea of provincial official languages so that people can use their Mother Tongue for their education and for official business. We believe that it is important for people to have the right to use their own language(s).

We hope you consider our suggestions.

14 SIGNATURES
PROPOSALS AND COMMENTARY IN CONNECTION
WITH THE FINAL CONSTITUTION
OF THE REPUBLIC OF SOUTH AFRICA

From: The Council of Southern African Bankers

INTRODUCTION - BASIS OF SUBMISSION

We appreciate the opportunity of commenting on various aspects of the proposed final Constitution for the Republic of South Africa ("the final Constitution").

As it is expected that the various Theme Committees will receive numerous submissions from interested parties, we have restricted our comment to those issues which we consider to be of particular importance to the Banking Sector.

For case of reference, any issues which have been allocated to a particular Theme Committee have been highlighted at the beginning of the section and grouped together in a section relating to that Committee.

This document includes submissions to the following Theme Committees:-

1. Character of Democratic State, in particular
   - the Preamble of the Constitution
   - the supremacy of the Constitution
   - freedom of information and accountable administration

3. Relationship between levels of Government
   - status and powers of provincial and local government
   - legislative competence of Provinces and concurrency

4. Fundamental Rights:
   - the application of the Bill of Rights
   - the limitation an the extent of the rights
- Economic fights: the business community
- Economic rights: the individual Socio-economic rights.

- the Reserve Bank
- the Auditor-General
- the Financial and Fiscal Commission
- Public Enterprises
- the Commissioner of Inland Revenue

THEME COMMITTEE 1: CHARACTER OF DEMOCRATIC STATE

As regards the issues which have been allocated to Theme Committee 1, we have certain proposals relating to the Preamble to the Constitution. With specific reference to the Constitutional Principles as set out in Schedule 4 to the Constitution of the Republic of South Africa, Act No. 200 of 1993 (the "Interim Constitution") we are in agreement with Constitutional Principles 1, IV, VII, IX and Vi. We would submit, however, that in drafting the final Constitution particular attention should be paid to the following:

Constitutional Principle IV

Constitutional Principle IX.

The Preamble:

We propose that the Constitution should have a Preamble in- which certain fundamental principles and values relevant to the kind of society for which we as a nation should strive are stated. Elements of both the Preamble and "postamble" of the Interim Constitution could be adopted for this purpose.

Further, we believe that R is important for the future prosperity of the country that two principles relating to the so-called Economic Constitution be incorporated in the Preamble:

A statement that South Africa should enjoy an open, outward looking economy, consistent with established international standards
A statement of intent regarding socioeconomic rights, in particular those dealing with education, health and housing. We believe that the most appropriate place to deal with this is the Preamble, for the reasons set out under the section dealing with socioeconomic rights in our submission to Theme Committee 4.

Finally, it seems to us that, while the Constitution embodies the set of rules according to which the country will enjoy good governance, it is appropriate that the goals of that governance - a relatively healthy, educated and empowered population - should be stated in the Preamble at the outset as the vision that all governments should strive to realise.

These principles, although not enforceable, would certainly influence the interpretation by the courts of the Constitution and thereby strengthen the applicability of the principles.

**Constitutional Principle IV:**

In terms of this principle the Constitution shall "be binding on all organs of state at all levels of government." Whilst this appears to be self-explanatory, one of the major debates arising from the Interim Constitution relates to the applicability of same and, in particular, of the chapter on Fundamental Rights. Much has been written and argued about the fact that section 7(1) states that the section "shall bind all legislative and executive organs of state and the effect of this on the judiciary. It is also necessary to establish exactly what is meant by "organs of state". The Interim Constitution includes "any statutory body or functionary" in this definition of "organ of state" (section 233(1)(ix)). This means that bodies such as Public Enterprises and Universities are included. Although they would not normally fall within the concept of an organ of state if a were not for this definition, we support their inclusion in this regard on the basis of their being either owned, controlled or funded by the state.

We would respectfully submit that the final Constitution should be specific and clear in all respects so that R is possible for the average citizen to easily ascertain exactly which organs of state are bound by any provision and, in accordance with this principle, the fact that all organs of state are bound should be clear from the Constitution.

**Constitutional Principle IX,**

This principle emphasises the need for freedom of information in order to achieve "Open and accountable administration at all levels of government." We believe that this ideal will be assisted by establishing certain procedural principles in the Constitution. For example, it should be clear that whenever any official or government body makes any discretionary or other decision, citizens who are affected by such decision shall be entitled to request written reasons therefor. In this regard it is noted that, in the Interim Constitution, provision is sometimes made for reasons to be given for administrative decisions without specifying that those reasons should be in writing, for example section 187(2). We would respectfully submit that this loads to unnecessary uncertainty and that, if administrative organs are to be held accountable, it is necessary that they be obliged to
provide written reasons for their decisions. It is further recommended that the written decisions affecting economic activities should be made public to ensure consistency of treatment for all, as well as the development of transparent guidelines for future decision making.

This is of particular importance in tax matters, where the wide discretionary powers of the Commissioner for Inland Revenue make it essential for citizens to have a right to written reasons for administrative decisions affecting them if we are to attain the ideal of an open and democratic government where all citizens are treated equally.

We would suggest the following principles be followed with regard to the freedom of information:

Official information should be made available and provision should be made for each person to have access to information relating to that person, which information should only be protected to the extent that it is consistent with the public interest and the preservation of personal privacy;

In principle information should be made available unless there are good reasons for withholding it;

The right to information must include the right of access to internal rules affecting administrative decisions and the right of access by a person to reasons for any decisions which affect that person.

THEME COMMITTEE 3: RELATIONSHIPS BETWEEN LEVELS OF GOVERNMENT

Two matters of major concern to the Banking Sector have been allocated to this Committee. One relates to the powers of Provincial and local governments, particularly in relation to borrowing. The other is the nature of certain of the legislative powers which are allocated to the Provinces. Certain legislation which is central to our business currently falls within the legislative competence of the Provinces with the result that this legislation may vary from Province to Province.

General Principles:

Constitutional Principles XVIII to XXVII inclusive cover the relationship between central and provincial government powers in some detail. They place the emphasis more on central power than provincial autonomy and the final Constitution will perforce have to be structured in this way. From Constitutional Proposal XXI 4, we conclude that, where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.
Apart from the criterion of uniformity, which we shall deal with hereunder, we believe that the norm stated in Constitutional Principle XXI is of particular importance and should be retained. This states that the level at which decisions can be taken most effectively in respect of the quality and rendering of services shall be the level responsible and accountable for the quality and rendering of the services and be the level empowered by the Constitution. Furthermore, Constitutional Principle XXIV provides that a framework for local government powers, functions and structure is to be act out in the Constitution.

A practical problem in the implementation of these principles is that the capacity to carry out powers and functions at second and third tier levels of government does not, at present, exist uniformly across the country. It is also possible that at some future stage provincial resources and competencies could deteriorate, affecting the rendering of services. We would thus propose the introduction of a mechanism whereby powers which have been developed to lower levels could revert to a higher tier of government when the means or will to carry out such functions at lower levels are absent. In other words, we would support the principle of asymmetry regarding the exercise of provincial or local government powers.

We believe that it is meaningless in practice to apportion powers to different levels of government if those levels do not have the administrative competence or the fiscal capacity to execute those powers. Many of the current Provinces do not have a tax base to be autonomous of the centre and the fiscal viability of Provinces is a major issue. It is therefore critical to economic development that a balance be sought between giving too much power to in the centre and too much power to the second and third tiers of government. It is also important to avoid assigning powers to Provinces which do not have the administrative competence to execute them, especially where increased provincial employment would result in further burdening the budget without necessarily resulting in the delivery of goods and services to the public.

This is also likely to result in tension between the Provinces as certain Provinces become income generators for the national budget and other Provinces cost centres.

**Borrowing Power of Provincial and Local Governments:**

It is essential that certainty as to who has the power to borrow money and incur other debt obligations on behalf of the second and third tiers of government, the basis on which such obligations may be incurred and any security which may legally be taken for such obligations, is obtained as a matter of urgency. This is required if the financial sector is to make the necessary money available for the numerous developmental projects envisaged by all levels of government, particularly in the case of non-income generating facilities such as health clinics and educational institutions. In particular certainty is required as to the power of central government to issue guarantees on behalf of other levels of government-

**Legislative Competence of Provinces:**

Constitutional Principle XXI provides, at point 5 thereof, for the determination of national economic policies, the promotion of interprovincial commerce and the protection of the common
market to be the responsibilities of the national government whilst, inter alia, socioeconomic
needs and the general well-being of the inhabitants of the Provinces are allocated to the provincial
governments in terms of point 6(b). These principles are not, and are not intended to be, specific.
The actual categories of legislation to be allocated to each level of government must still be
determined. In dealing with the allocation of legislative competence to the Provinces, we submit
that, in order to create an environment conducive to economic growth on a cost effective basis, it
is necessary for the laws of the country to be as uniform as possible-

We presume that Schedule 6 of the Interim Constitution gives some indication of the matters
which may be allocated to the Provinces in the final Constitution. Experience to date in South
Africa and the rest of the world has proved that regional or provincial differences in legislature,
regulations, specifications and/or other administrative procedures have a serious impact on the
cost of doing business nationally. This will inevitably increase costs unnecessarily which will be
passed on to consumers. Differential costs and/or uncertainties created between the Provinces
will also have an impact on the distribution and pace of development, as businessmen avoid those
regions perceived and experienced as being too expensive, too complex administratively or too
cumbersome bureaucratically. One example of the impact of Provincial legislation and regulation
which is of particular concern to the Banking Sector relates to Consumer Protection.

**Legislation Intended to Protect the Consumer.**

Practical problems are presently incurred when lending in certain areas of the Republic of South
Africa due to the fact that the laws in these areas differ to those in the rest of the Republic. There
are, for example, various versions of the Usury Act, the Insolvency Act and the Companies Act
applicable in different Parts of the country. The old Hire Purchase Act is still applicable in the
area of the Republic which used to be Bophuthatswana as well as the former Transkei but, due to
certain amendments, is not identical in these two areas.

Various versions of the Credit Agreements Act apply in different parts of the country and
legislation which is Of major importance to those in the business of granting credit, such as the
Close Corporations Act and the Security By Means of Movable Property Act, do not apply in
any areas of the country. In addition the regulations in force under the aforementioned
legislation vary from area to area and in the past have been difficult to obtain timorously if at all.

The different laws applicable do not only make it difficult for the banks but, as these laws regulate
matters which affect the validity of any security taken by the banks and, in many instances, the
validity of the agreement in terms of which credit is granted, uncertainty relating to these issues
makes it imprudent and dangerous for banks to lend money or enter into credit transactions in some
areas. This obviously impacts on the range of development activities and services which banks can,
or are willing to, provide across the country.

This situation is expected to be exacerbated in the future as we follow the world-wide trend
towards increased consumer protection legislation.
Banking is a highly regulated industry and it is no easy task to comply with the myriad rules and regulations applicable to the business at both national and provincial levels. Unfortunately the cost to these organisations of compiling with different legal systems in each Province, printing different sets or documents in each Province, producing different instructions and training manuals, etc., will be so expensive that it will result in an increase in costs and subsequent inflation or possibly in many banks finding it uneconomical to continue to operate on certain Provinces. We would submit that the energy and resources required for this purpose could be much better utilised in the many projects which require finance at this time in South Africa's history.

Whilst there may be certain federal constitutions in other countries which give the rights to legislate in respect of consumer matters to regional/state/provincial authorities, we would submit that this is in countries where numerous small states which were historically independent, both politically and economically, later joined together. The Provinces in our country cannot be said to be economically independent and the size of the country and of the economy makes it necessary for large business and financial institutions to operate on a national level. In the circumstances we believe that it is necessary for the efficient and effective operation of the economy that consumer legislation, which is central to the operation of many of these businesses, be uniform throughout the country.

This same argument holds for many of the other areas designated as the legislative competencies of the Provinces in the Interim Constitution, e.g. housing, language policy, road traffic regulation and urban and rural development.

**THEME COMMITTEE 4: FUNDAMENTAL RIGHTS**

Constitutional Principle 11 enjoins the Constitutional Assembly, in framing a Bill of Rights for the final Constitution, to give due consideration to the fundamental rights enshrined in Chapter 3. We do, however, wish to raise a few matters where, as members of the business community, we believe that improvements may be possible. These relate to:

- clarification regarding the application of the Bill of Rights between citizens;
- the simplification and clarification of the limitation clause;
- the balancing of interests in prop" rights;
- the limitation of the right to engage freely in economic activity;
- the extent to which labour relations should be constitutionally regulated; and how socioeconomic rights should be dealt with in the Constitution.
The Application of the Bill of Rights:

The question as to whether the Bill of Rights has only a vertical application enforceable against the government and its agencies only, or whether R has a broader, horizontal application enforceable against private actors as well, has been hotly debated by legal academics and practitioners. The weight of opinion seems to be that the Constitutional Court will interpret Chapter 3 as being enforceable against the government and its agencies only, following the narrower interpretation of Canadian jurisprudence.

Nevertheless, some doubt remains as to the correct interpretation. In our view, this doubt should be removed by clarifying in the final Constitution all issues which have been raised. Creating to the application of the Interim Constitution. Apart from serving as a declaration of the individual citizens fundamental rights, a Bill of Rights essentially acts as a constraint on governmental action against interference with those rights. Consequently, the possibility of the broader interpretation, extending horizontally as well, should be ruled out.

Those who argue for the broader application raise the harmonisation of the Bill of Rights with the common law in general. However, this aspect is adequately catered for, in our opinion, by section 35(3) of the Interim Constitution, the so-called "seepage clause". which enjoins a court to have regard to the spirit, purport and objects of the chapter on fundamental rights in interpreting any law and the application and development of the common law as well as customary law. This provision should accordingly be maintained in the final Constitution.

The Limitation on the Extent of the Rights:

In principle a limitation clause, such as section 33 of the Interim Constitution, is essential as even fundamental constitutional rights must have some limit. We consider it important, however, that the limitation clause should be expressed clearly, simply and consistently with any internal qualification of the extent of the rights stated in the substantive portion of the Bill of Rights itself.

Section 33(1) contains a complex formulation and introduces distinctions between its application to various categories of rights. This approach can lead to uncertainty and therefore to greater propensity for litigation and the formulation should therefore be simplified.


We believe that a property clause similar to section 28 is essential as it guarantees against the arbitrary deprivation of property by the State. This is a cardinal requirement for the operation of the financial and banking system (e.g. property which has been taken as security for tending). Furthermore, the absence of such a guarantee would inhibit investment, both foreign and domestic, which is, in turn, a key requirement for the successful reconstruction and development of the country.
In our view, section 28 contains a reasonable balancing of the interests of those already holding property and of the State in expropriating property for a public purpose. However, we consider that K should be clarified that compensation is payable, not only in the case of expropriation but also in all other cases of the deprivation of rights in property. We also believe that compensation must be based on fair market value.

The question of the restitution of land rights to persons or communities which were dispossessed under racially based discriminatory laws is important and is already dealt with in terms of the Restitution of Land Rights Act of 1994. However, in order to avoid uncertainty and the undermining of business confidence which we believe uncertainty would bring, we would emphasise the need for this matter to be finalised as quickly as possible (even within the time frames contained in the aforementioned Act).

The right accorded to every person to engage freely in economic activity and to put a livelihood anywhere in the country enshrined in section 26 of the Interim Constitution should be carried forward into the final Constitution. In our view the general limitation clause (the equivalent of section 33) is sufficient to qualify those rights in appropriate circumstances and an internal limitation clause (the present section 26(c)), which is not altogether consistent with section 33 in any event, should be dropped.

**Economic Rights: the individual:**

Obviously the equality clause, as set forth in sections 8(1) and (2) of the Constitution and in Constitutional Principle III, is fundamental. Furthermore, the concept of affirmative action, as contained in section 8(3) and Constitutional Principle V, is necessary as a short term measure to rectify imbalances resulting from the past.

We recommend, however, that affirmative action not be enshrined in the Bill of Rights, but rather contained in the Preamble.

At the very least, it must be qualified with a time limit (based on a definite time or the attainment of certain conditions) which will remove the inherent discriminatory principles from the Constitution. It should also be borne in mind that there is an economic cost to affirmative action programmes and if this cost to reach such proportions as to inhibit growth and undermine the Reconstruction and Development Programme once the major objectives of the affirmative action programmes have been achieved.

In accordance with Constitutional Principle XXVII, fundamental rights regarding labour relations as contained in section 27 of the Interim Constitution should be carried into the final Constitution. Further, the modalities for collective bargaining to be consistent with those principles should be regulated by labour relations legislation outside of the Constitution.

**Socio-economic Rights,**
This category of rights principally concerns areas such as education, housing and health, which are key areas of concern in the present government's Reconstruction and Development Programme. Although it could be appropriate for a statement of intent to encompass the individual’s rights or aspirations in these respects, we do not believe that they should form part of the Bill of Rights, justifiable by the Constitutional Court in accordance with Constitutional Principle 11. This statement of intent should rather take the form of a Preamble as contemplated in our, submission to Theme Committee 1 above.

The observance of socioeconomic rights must be distinguished from traditional civic rights and freedoms. In the case of the infringement of the latter kinds of rights, the Court can order the State to cease the infringement and, if necessary, rule that the infringing law is unconstitutional and therefore invalid. In the case of the former kinds of rights, however, the observance of the rights involves a positive act on the part of the State, and to seek a remedy from the Court becomes inappropriate.

Furthermore, while the government is ultimately accountable to the Constitutional Court in its observance, or failure to observe, the Bill of Rights, accountability for developmental issues, such as education, housing and health lies not to the court but the Parliament, which is the appropriate forum to debate issues and to vote funds through the budget for the implementation of those programmes. The function of the Constitutional Court is, in essence, to act as a brake on the actions of the executive and the legislature.

In the case of developmental issues not infringing civic rights and freedoms it is not in our view, appropriate for the Court to have the power to enjoin Parliament to take or not to take particular courses of action.

**THEME COMMITTEE 6: SPECIALISED STRUCTURES OF GOVERNMENT**

In this regard we are particularly concerned with:
- the independence of the Auditor-General
- the autonomy of the Reserve Bank
- the independence of the Financial and Fiscal Commission and the lack of representation by local government on this Commission
- control of the National Revenue Fund and budgeting
- the Commission for Inland Revenue

**The Auditor General:**

We believe that the independence of the Auditor-General is critical to good government and that this independence should be enshrined in the final Constitution as per many of the provisions in sections 191 to 195 of the Interim Constitution.

In particular, the following should be retained in the final Constitution:

- appointment for between five and ten years and not eligible for re-appointment;
- prohibition on the performance of other remunerative work outside his duties;
- prohibition on the holding of political office;
- restricted basis on which he may be removed from office;
- remuneration and conditions of service not to be altered to his detriment during his period of service.

**The Reserve Bank:**

The Interim Constitution deals very briefly with the Reserve Bank. We support the retention of provisions based on sections 196 and 197 of the Interim Constitution setting out the primary objectives and the general nature of the powers and functions of the Bank, which powers and functions should continue to be determined by a separate Act of Parliament.

An independent Reserve Bank should play a significant role through its duty and ability to conduct an autonomous monetary policy directed at internal and external price stability.

Central Banks should not be made politically accountable by placing political appointees on their Boards or in executive positions. Persons who are politically active should not be eligible for appointment. Competence to carry out the function autonomously and in a technically competent manner must be the main criteria for appointments, not merely being representative of a specific population or interest group. This is particularly important to ensure that proper monetary policies are implemented, and to maintain the international acceptance of the Reserve Bank among its peers.

The terms of office of the Governors and Directors appear short when viewed from an international perspective and it is proposed that the effective functioning of the Bank would be served by increasing the term of office to eight years for the four Governors and to four years for the four directors. In practice this would allow for the appointment of two Directors each year and one Governor every second year.

Transparency of decision making together with effective marketing of issues and decisions would enhance the Reserve Bank's credibility with the population at large. A suitable vehicle for this could be regular televised testimonies to a specific Parliamentary Committee, e.g. the Joint Parliamentary Committee on Finance, in the form of a report back, but not to account for or seek approval of actions.

**The Financial and Fiscal Commission:**

The objects, functions, expertise and impartiality of this Commission have been provided for in sections 199 and 200 of the Interim Constitution and we recommend that similar provisions be retained in the final Constitution.
The creation of this Commission is an innovative measure. Similar types of bodies in other
countries, e.g. the Commonwealth Grants Commission in Australia and the Finance Commission in
India, do not appear to have the extensive powers given to this Commission. Whilst we support the
creation and continued functioning of the Commission, the large responsibility given to the
Commission means that the financial functioning of the country at policy implementation level is
dependent on the proper working of this body.

The functioning of the Commission could well be impaired by it becoming politicized. The
likelihood of this is increased by the short terms for which members are appointed together with the
fact that they are available for re-appointment. In order to allow the commission to function
efficiently and to avoid a permanent polarisation between those members appointed by the central
government and those appointed by the regions, we suggest that their terms of office be lengthened
to 5 years.

The Commission is given the task of looking at national, provincial and local government and
making recommendations regarding their financial and fiscal requirements.

Whilst the national and provincial governments are represented on the Commission the only
concession to local government is a provision that one of the members appointed by the President
on the advice of the Cabinet must have "expertise in local government finance."

It is necessary that the financial requirements of local government be fully understood and
provided for and we therefore recommend that their interest be given proper representation on the
Commission in the same way as the first and second tiers of government.

**The National Revenue Fund:**

We agree in principle with the provisions contained in sections 185 and 186 of the Interim
Constitution, i.e. that all revenues be paid into a fund from which monies may not be withdrawn
unless such expenditure has been authorised by an Act of Parliament (section 185) and that the
budget must be laid before parliament each year.

The final Constitution should therefore incorporate the following principles which are found in
most modern Constitutions:

all monies raised and received shall be paid into and form the National Revenue
Fund unless a specific. Act of Parliament creates a specific fund into which monies
collected under such Act are to be paid;

monies may only be withdrawn from this fund for expenditure which has been
budgeted by Parliament, i.e. by means of an Appropriation Act;

provision can be made for interim budgets in the form of supplementary
Appropriation Bills if it is necessary to incur expenditure which has not been
provided for in the budget.
Public Enterprises:

We were specifically invited to comment on the desirability of including Public Enterprises in the Constitution. The Interim Constitution applies to Public Enterprises insofar as they are included in the definition of "organs of state" (section 233(1)(ix)). To this extent we support the application of the Constitution to Public Enterprises, but we do not see any need for a specific section of the Constitution relating to Public Enterprises. At present such enterprises are governed by separate Acts of Parliament, which Acts can easily be amended as required by changing circumstances from time to time. There appears to be no reason to change this or to provide constitutionally for provisions relating to Public Enterprises, which should be treated the same as any other corporate entities.

The Commissioner for Inland Revenue.-

The Commissioner for Inland Revenue was not specifically mentioned under the topics to be dealt with by Theme Committee 6, nor were his functions and powers incorporated in Chapter 12, or any other chapter, of the Interim Constitution.

The mechanisms of state expenditure, social (e.g. RDP etc) and economic (e.g. attraction of foreign capital, etc), depend on the efficient, equitable and neutral collection of taxes in South Africa.

Tax legislation without efficient enforcement and administration is worthless. The efficiency of the commissioners office is impeded by, inter alia, outdated administrative and computer systems and the inability to attract top tax experts as has occurred in the United States, Australia, the Netherlands and other tax jurisdictions.

In order to attract qualified staff, the Commissioner for Inland Revenue cannot be bound by the rigid bureaucratic structures of the Commission for Administration's human resources salary policies which are inefficient to cope with the special needs of revenue collection in the light of the importance to the State.

It is therefore recommended that consideration be given to a provision in the Constitution enabling the independent function of the Commissioner for Inland Revenue, e.g. through a separate Act of Parliament.
The ANC in the Western Cape holds, with pleasure, of Economic Affairs and RDP, as we are committed to serving the principles of the RDP and realise the importance of this programme to our people. The philosophy of the ANC in the Western Cape has always been the upliftment and empowerment of our people and it is these principles that will make the RDP a success. Along with these principles, the honourable President Mandela has demonstrated a spirit and vision of reconciliation and has shown determination in his support for the RDP.

Based upon this philosophy of reconciliation and nationhood and the principles underlying the RDP, the ANC in the Western Cape cannot support the shifting of Parliament to Pretoria or, for that matter, to any other city in South Africa.

In this era of reconciliation, the loss of Parliament in the Cape would promote regional isolation and separation. The divisiveness wrought by the loss of Parliament and the consequent stimulation of provincial grievances and resentments would only serve to undermine the crucial task of national unity and reconciliation. If Parliament were to move, it would detract from the government's commitment to the building of a national consensus.

There are several salient and pressing reasons why it is in the best interest of the RDP and the nation as a whole to retain Cape Town as the legislative capital of South Africa.

Firstly; there is the traditional argument relied upon and utilized by nations across the globe. This argument is a compelling one and relevant to the current debate. Traditionally, the site chosen as a nation's legislative capital is located not within that nation's industrial heartland. Rather, in an attempt to diversify the economic base of the periphery, a city quite apart from the nation's economic hub is chosen as the legislative capital. The modern convention is to locate various governmental industries away from the centre in an effort to bring about regional economic development. Examples include the designation of Brasilia rather than Rio de Janeiro as the capital of Brazil, Canberra rather than Sydney or Melbourne and, to a lesser extent, Ottawa, Canada. It does not represent good sense to further develop the economic hub, Gauteng in the South African instance, with its comparatively low unemployment rate when the benefits of government could be accrued in the capital of a less developed region. It is not the function of a national government to increase benefits to an already wealthy region but, rather, to perform an equalizing function to benefit the nation as a whole. In this way government can distribute benefits in a manner the private sector cannot.

As stated, the undesirability of excessive centralization of state functions, government institutions and parastatals within a single city is made worse by the fact that South Africa's financial and economic hub is also within Gauteng. This tendency towards concentration further tilts the scales in favour of Gauteng as the focus of national activity and international interest. The economic equilibrium of the nation is already distorted by the fact that Gauteng, with a population of approximately 9.3 million, concentrates close to 25 per cent of
the national population on 2.5 per cent of the land and produces 43 per cent of the national GDP. That region is home to half of the country's total manufacturing industry. In contrast, the Durban-Pinetown complex contributes 12 percent of the GDP and the Western Cape a mere 10 per cent.

Secondly, in terms of arguments concerning costs, the Pretoria Capital Initiative (PCI) estimates that establishing Parliament in Pretoria would save approximately R70 million per annum. Such an estimate is dubious. More realistically, to replace the existing buildings of Parliament, together with the adjacent and auxiliary governmental would cost in the order of R1, 5 billion. The interest payable on this sum alone is R255 million a year. In addition, it has been calculated that the cost of moving ministries up and down from Cape Town to Pretoria is R9 million a year. In reality, keeping Parliament in Cape Town will save the taxpayer R216 million a year.

Furthermore, the long term economic considerations are ultimately more important considerations. What is beyond dispute is that a move by Parliament to Pretoria would impose severe economic losses particularly in Cape Town’s CBD. The most conspicuous economic damage will occur in terms of the property market. The immediate reduction in the demand for office space will be accompanied by a downward pressure on rentals and a steep reduction in the demand for office-related labour. This, in turn, will bring about a decline in property values and result in a decrease in new building activity. The abandonment of office will also have a significant impact on business and employment in the region.

Cape Town's economy is very much service oriented in nature and is, therefore, vulnerable to larger trends. Directly affected by the loss of Parliament will be the demand for services typically support by or contracted out by Parliament as well as any agencies reliant on or connected with its activities. These include foreign embassies, media outlets and various lobbies. Cape Town stands to loose much more than simply itself. For example, at risk are the services of caterers, computer and communications specialists as well as research and information personnel. Restaurants, hotels and taxis in Cape Town will feel a very tangible bite brought about by decreased demand. Less tangible economic effects brought about by the loss of Parliament are also likely to result. With a greater degree of isolation from national public life there will likely be a corresponding decrease in the level of domestic and international business interest. Ultimately, Cape Town will be marginalized rather than receive the promotion it merits as an asset to South Africa and the rest of the world.

Thirdly, in terms of the replacement costs involved in the relocation of Parliament, Australia serves as a good example. In the 1980's Australia decided to build a new parliamentary complex in Canberra. It is argued, in the South African scenario, that the Australian case is likely the most relevant because, while they did not move cities, they did entirely replace their existing facilities with a new purpose-built parliamentary facility. Furthermore, it is likely that the needs of South Africa’s 490 MP's and senators will be very similar to those of the Australians. The initial budget to provide a new parliamentary complex in Canberra for 148 MP's, 76 senators, support staff and media representatives totalling 2600, as well as facilities, totalled A$278 million 1978. The final approved funding in 1989 was slightly over A$1 billion. Although it could be argued that labour costs in Australia are higher than those in South Africa, inflation is considerable lower. Therefore, it can be concluded that the cost escalation of a new parliamentary facility in Pretoria could be even higher than was the case in Australia.
Fourthly; and lastly, the findings of the public opinion surveys are patently obvious in demonstrating a high level of public support for the retention of Cape Town as the legislative capital. Recent market surveys have demonstrated that there is no significant public support for the relocation of Parliament from Cape Town to Pretoria. A nation wide survey conducted by IDASA in August/September 1994 found that 51 per cent of the respondent argued that Parliament should remain in Cape Town and only 23 per cent believed that it should be moved to Pretoria. Respondents from every racial group preferred Cape Town over Pretoria. The report states "In every province including the PWV, which stands to benefit the most from the moving of the national legislative, support for keeping it in Cape Town is significantly greater than moving it to Pretoria. Only PAC supporters favoured Pretoria over Cape Town. Supporters form every other party, including the ANC, favoured retaining Parliament in Cape Town. Similarly, every language group favoured Cape Town over Pretoria with support being highest among Xhosa, Afrikaans and English speakers.

Likewise, a further study indicated "that about two thirds of South Africa’s top decision makers are in favour of keeping Parliament in Cape Town while about a third are in favour of relocating it to Pretoria. This, in addition to the support among the public in general for Cape Town found by the IDASA pool, provides ample evidence that South Africans of all walks of life and political persuasions, are not about to accept the relocation of Parliament of Pretoria without a fight". Precisely because democracy was finally achieved for the majority, in April 1994, the democratic process demands that the majority decision be respected. The relocation of Parliament and its loss to Cape town would represent an abrogation of the democratic process which was so long in coming to South Africa.

REV. A. C. NISSAN
LEADER: WESTERN CAPE
DEBATE BY THEME SUB-COMMITTEE - INDEPENDENCE OF THE RESERVE BANK

With respect to the current debate about the independence or not of the Reserve Bank and e compromise proposal that ti legislature and/or executive of government be responsible for policy and objectives but that the Reserve Bank independent in terms of implementation attached please find a copy of the submission made by the banking sector to t Constitutional Assembly in February 1995.

From this it is clear (pages 13 and 14) that the banking sector is fully supportive of a totally independent South Afric Reserve Bank, as currently provided for in the Interim Constitution. This independence should also include t appointment of directors and governors where political appointments must be precluded.

We trust this contributes to the debate, and are again willing to present verbal comment on this matter.

PJ Liebenberg
Chief Executive
South Africa's New Constitution is being written.

Make sure it contains your ideas - it is your democracy!!
Below is a guide for sending in your ideas.

Write down your ideas and fold the form on the dotted lines.
Post it as soon as possible

Your Name: Holy Family Provincial Convent
Your Address: 53 Ley Road, Victory Park, Johannesburg
Contact Telephone Number:

Ideas/proposals/submissions

A: What my problems / issues / concerns are ...

Gunfree South Africa notes that at least one submission to the Constitutional Assembly has requested the insertion of a clause in the new Constitution which would guarantee to civilians the "right to bear weapons". Such a right would obviously include firearms.

Gunfree South Africa urges the Assembly on no account to accede to this request. Our reasons are as follows:

1. Private ownership of a firearm or the "bearing of arms" or weapons has never been recognised as a fundamental right in South Africa

   Owning and carrying dangerous weapons has always been a privilege circumscribed by law. In respect of firearms it has been subject to the issuing of a licence requiring that the need for that firearm be established. This implies that such a licence can also be withheld. The fact the implementation of this principle was distorted by Apartheid and licences were granted only to white people until five years ago, does not invalidate this principle. Gunfree South Africa favours far more stringent testing of applicants.

2. This is the practice in most democracies

   Western democracies do not recognise this right in their Constitution. The prominent exception is the United States of America where the Second Amendment to the Constitution reads: "A well regulated militia being
necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed'. The interpretation of that clause is the subject of ongoing and heated debate between the gun lobby and the safety from guns movement. While the National Rifle Association contends that it grants rights to every individual to own a firearm, others argue that this clause refers only to the right of states to raise armed militia.

What is not debatable is that this clause in the US Constitution has been used repeatedly by the gun lobby to block many attempts at gun-control legislation in the USA.

3. The inclusion of such a clause in South Africa’s Constitution would prejudge an important debate only recently launched in our country

The question of the link between the proliferation of firearms and the high level of criminal violence is a crucial one. Gunfree South Africa contends that violence will not be reduced without drastically reducing the number of firearms in circulation in our society. Gunfree South Africa wishes to see the elimination of some firearms altogether. Then gun lobby take a different view. It would be wrong to enshrine in our Constitution an idea which is now only beginning to be properly discussed in our country.

4. The inclusion of such a clause would reduce the flexibility of Parliament in dealing with the issue of firearms

Death and wounding by firearms is the fastest-growing form of violence in South Africa, and Parliament must be free to legislate appropriate ways of controlling the proliferation of firearms. Any Constitutional clause guaranteeing the 'right to bear arms' (or 'weapons') could be used to obstruct such legislation, no mater how appropriate and necessary. Even if the vast majority of South Africans desired stricter control, such a clause would shift the onus of proving the necessity for such legislation onto Parliament. Gunfree South Africa believes that if the democratic will of the people is to reduce or eliminate private firearm ownership, that will should prevail without being obstructed by any Constitutional provision.

5. Such a clause could legalise all unlicensed firearms in South African and any type of weapon

Owners of unlicensed firearms who at present at least have to conceal such ownership and hide their weapons, could claim Constitutional protection under such a clause, making any attempt to reduce this vast category of weaponry null and void. In addition, the 'right to bear weapons' could mean that civilians would claim the right to possess a variety of inappropriate weapons. The successful attempt by President Clinton to ban the ownership of certain kinds of automatic assault weapons, is about to be reversed by the new Republican Congress on these very grounds.
6. The 'right to bear weapons' would encourage informal armies

The Oklahoma City bombing has revealed the existence of significant numbers of civilians, linked to extremist para-military groups in the United States, who not only espouse armed action against the State, but have armed themselves heavily. South Africa experienced a similar phenomenon when armed AWB members invaded Mmabatho and used their licensed guns to try and prop up an undemocratic regime there. Also, the creation of armed SDU and SPU units on the East Rand has left us with serious problems of violent crime and attempts to disarm them have failed. It is our firm view that in a democracy, where the instruments of the State are accountable to the people, informal armies must be disarmed and disbanded. Nothing in the Constitution should give any loop-hole to such groups.

7. Nothing must limit the search for non-violent alternatives or accelerate our domestic arms race

Gunfree South Africa contends that the ready availability of firearms and the trust in them for security, limits the imaginative search or other, non-violent techniques which can assist in providing the safety and security of our citizens. Already this country is far too heavily armed, with thousands of licensed weapons falling into criminal hands each year. Our Constitution-makers are urged to avoid any suggestion that the proliferation of arms in civilian hands is acceptable. To endorse the ownership of a firearm or other dangerous weapons as a Constitutional right would send the wrong message to the people of South Africa.

8. The right to be safe from the threat of death by firearm far outweighs any spurious 'right' to own one

At this time, roughly eighty percent of South Africans are still unarmed - a vast majority. Gunfree South Africa contends that most of these unarmed people are more concerned with the disarming of those who terrorise our society than with the right to possess a weapon themselves. The priority of our new South Africa, rather than entrenching weapons possession for the armed minority, should be that of securing safety from guns for that majority.

B: What I think the new constitution should say about this ...
J & J
VEHICLE TESTING STATION
Steeledale

17 May 1995

OFFICIAL LANGUAGE

The management and staff of the above Company have debated the language policy in depth for sometime now and strongly feel that we should have only one official language. That should be ENGLISH. We have also discussed this subject with a large number of our clientele and the feeling is unanimous.

Our reasons for this suggestion are that it is used world wide. The savings that would be derived from the printing of all these languages can then be directed more usefully into the RDP.

We hope that this input would be found useful in this very sensitive issue

M DIPPENAAR
Personnel Manager
16 February 1995

AFRIKAANS AS OFFICIAL LANGUAGE

As a women's cultural organisation we sincerely trust that Afrikaans would still enjoy official status as so many people speak, read and understand Afrikaans.

We recommend that in addition to English and Afrikaans, two black languages should also be afforded official status.

Wishing you everything of the best with your great task.

(Mrs) HETTIE KRUGER
Secretary - ATKV Dames : Roodepoort Branch
Free Market Foundation

Separation between church and state

Proposal

The South African Constitution should contain articles forbidding the government from involvement in any religious organisations and religious affairs. No religion should be given special treatment by the law. No state funds should be spent on the promotion of any particular religion. These articles should complement the freedom enshrined within the Bill of Rights to practice the religion of one's choice, compatible with the freedom of others to do likewise and compatible with the common law. Every person should have the right to freedom of conscience, thought, belief and opinion, including academic freedom in institutions of higher learning.

Religion in South Africa

South African people subscribe to a wide variety of different religious faiths. Even within faiths, forms of worship can differ significantly. Interference in people's religious lives by the State would only serve to antagonise them. Rarely does state interference in religion improve people's moral and spiritual lives.

Countries with formal church-state links

Only in countries where the population is homogenous can the binding together of Church and State ever be widely accepted by the people. It is impossible to force people to believe in a religion. The only countries where a system of state religion is workable are those in which the people would believe in it even if it were not a state religion. This is the case in Iran, where the nation as a whole subscribes to the Islamic faith. Even there, secular and spiritual authorities are responsible for the administration of strictly defined areas of competence: President Rafsanjani has secular authority while Ayatollah Khomeni is the supreme religious leader.
Other states which formally give a particular religion a protected status within the constitution, such as the United Kingdom, give it no protection in reality. Even the Archbishop of Canterbury has accepted that the links between the Church of England and the State are negligible and that the establishment of the Church of England arose from a mere 'historical accident'. Certainly, if the British government sought to instruct Church leaders how to behave, the clamour for the Church to be disestablished would become irresistible. The Church of England has no widespread following in the United Kingdom, where only 2 million people regularly attend its services from a population of 55 million, and more people regularly attend Roman Catholic services. The Church of England remains established in name only.

The advantages of independent churches

Through the ages, religious organisations have served to act as a check on the ambitions of overzealous rulers. By remaining independent of government, churches can protect people's freedom of conscience from a government which attempts to impose moral, cultural and religious
values. The Church can act as a bastion of liberty and a haven for the oppressed. Lord Acton, writing at the turn of the century, recognised that in Western Europe, where the first seeds of democracy were sown, 'if the Church had sought to buttress the thrones of the Kings whom they anointed, then all Europe would have sunk under a Muscovite or Byzantine despotism'. Brutal and oppressive regimes have been resisted by religious groups operating outside the state apparatus all over the world. The Jewish and Christian orthodox churches are credited with ensuring that hard-line Soviet Communism gave way to a regime which, through 'Glasnost' and 'Perestroika', took on a greater acceptance of basic human and civil rights. In South Africa itself, the work of churchmen such as Archbishop Tutu and Rev Trevor Huddleston was crucial in fighting the injustice of apartheid. If the Church had been a part of the State, their freedom of expression would have been undoubtedly curtailed. The best way in which religion can be safeguarded is to ensure that it is kept outside all state affairs. Where it is practised at state or state-aided institutions, such as in Parliament or at Universities, state funds should not be spent since that is tantamount to the state promoting a particular religion. If citizens wish to practise religion at state or state-aided institutions, they should fund it themselves.
We would like to have a view on the legislation and Policy making for the following aspects which influence our society.

1. **ABORTION: and Sterilization Act Regulations and Policies**

   We view this as quite opposite to God's purpose and God's word as in Exodus 20:3 and Jeremiah 1 verse 5. We shall be glad if nobody will have a licence to kill an innocent unborn child, that licence should not be given by you:- the Constitutional Assembly.

2. **HOMOSEXUALITY AND LESBIANISM Act Regulation and Policy**

   God in His word said "No man should have sex with another man as with woman" Leviticus 18 verses 22 - We believe as you were sworn over the Holy Bible into your positions, you will consider the abominations as offensive to God.

3. **PROSTITUTION AND RELATED ESCORT AGENCIES AND OTHER FORMS OF SEX BUSINESS**

   1 Corinthians 5 vs. 9, 1 Cor 6:5-16 and many other chapters condemn prostitution, we firmly believe that for God to help the Government of National Unity govern this country, God's word should be your guidance throughout.

4. We are the Christian Brethren Church with 6500 adults who are above age 21 in the PWV, in unity we would like you to consider our belief in God and in His on Jesus Christ when promulgating your laws and regulation for the Democratic S. Africa.

CHRISTIAN BRETHREN CHURCH
PWV REGION
DUTCH REFORMED CHURCH, SKUIKRANS-PRETORIA

Liberalisation of Abortion Legislation

We are a congregation from the Dutch Reformed Church in Pretoria. We sincerely thank you for taking time to read our letter. You hold a key position in our country and can therefore contribute to the fact that our nation will do the right thing.

After a commission of our church council investigated the moral problem of abortion, as a result of the occurrences in our country and the spirit of the times, we wish to add our voice to the debate.

It is our viewpoint that, in obedience to the living God, also the God of Life, we will not put up with any liberalisation of abortion legislation. This is an official decision from the church council.

There was and is already too much violence in this country directed at the weak and defenceless. Medical Science shows us more and more the human nature of the foetus. Our prayer is that the culture of human lights currently applicable in our country extend to the most defenceless of the defenceless too.

Attached please find a study in which the matter is put forth in more detail.

Nkosi sikelel' iAfrika!

Dr E Kruger VDM
Chairperson

ABORTION UPON REQUEST!??

Presently there has been a very strong focus on abortion. In the USA and various European countries, and also recently in Cairo, there have been serious debates put forth by the supporters and the opponents thereof. Currently in South Africa serious attention has been directed at this topic in view of the planned legislation in this respect. Therefore it is necessary to express a very clear viewpoint once again.

1. **Fertilisation according to Scriptures**

Fertilisation occurs when the male sperm fuses with the female ova to form an embryo. With further development it is referred to as a foetus-

Life begins at fertilisation and not when the embryo only becomes implanted in the woman's womb 8 days later. As soon as fertilisation takes place, there is a living being, despite its size
or underdevelopment. At this stage God has started with the formation of a human being in the womb of the woman, according to Job 10: 8 -12 and Psalm 139:13 -16. Then already the woman expects a child, not merely a foetus or an embryo. In light of this, abortion must be denounced as a form of murder (Ex 20:13; 21:22 -23), except in cases where it can be justified before God and man, as will be evident in the following statement.

IN LIGHT OF THIS, ABORTION SOLELY UPON REQUEST CAN NEVER BE ACCEPTABLE TO THE CHRISTIAN WHO ACCEPTS THE WORD OF GOD AS HIS LIFE PHILOSOPHY.

2. Motives for abortion

Although abortion is nothing less than the killing of a human being, this does not mean that it should never occur. In the world of sin, a situation may develop where it becomes necessary, to kill a miniature person. Then one experiences a conflict of duties in which case a person has to choose, not between good and evil, but between the better of the two evils. In this respect, the following motives for abortion come under discussion.

2.1 Acceptable motives for abortion

* The medical motive
This motive comes into play when the life of the mother, or the child that she is carrying, is endangered by the birth. An example of this is when the development of the embryo or foetus does not take place inside the womb, but in one of the fallopian tubes. Because the life of the mother, and in this case, the life of the unborn child, is threatened as a result, abortion becomes necessary. Situations may arise where a choice has to be made between the life of the mother and the life of the child. Since the life of the mother in the social context of the family, and the community could potentially mean more than that of the unborn child, her life is spared at the cost of the unborn child's life.

* The Judicial motive
This motive is applicable where pregnancy occurs as a result of forbidden sexual intercourse, that is, intercourse that is prohibited by law. The most common form of this type of sexual intercourse occurs as a result of rape, but incest and sexual relations with a minor are also relevant to this motive. In the case of actual rape, abortion is regarded as acceptable for the following reasons:

a. The woman or girl had absolutely no willing participation in the sexual act. It was contrary to her will and was forced violently upon her, regardless of her resistance.
b. It is acceptable to ward off your attacker with violence. With rape it is not only the attacker that is the intruder but also his sperm. "Here the unplanned child is not the issue" rather a forced, unwanted child - the aftermath of an undesired and feared visitor, the fixed deposit of an evil client." (Prof. J H Heyns). It is like a time bomb that has been set, which
explodes with great pan and sorrow long after the guilty person has disappeared from the scene. Therefore, compensation is appropriate in this instance.

c. The rape and pregnancy which results from this, can seriously affect a woman spiritually and physically, for life, even though the child may be put up for adoption.

* The psychiatric motive
With the psychiatric motive one is faced with situations where the psychical life or psychological well-being of the woman is destroyed as a result of the pregnancy, so much so that she has to spend the rest of her life in a psychiatric institution. Therefore, the issue is no longer temporary depression, but rather a very real danger of permanent and serious harm.

In practice, this motive creates major problems. Unless a woman is really subjected to such danger as stated above, it is self-explanatory that abortion should seriously be considered. The problem, however, is that women sometimes bluff and pretend that their psychical life has been seriously disadvantaged, when in reality, this is not so. In such circumstances they often threaten with suicide. In light of this, great caution will have to be exercised and expert advice must be called in before this motive may be accepted as a deciding factor.

2.2 Unacceptable motives for abortion

* The psycho-social motives
By this we understand the psychical conflict and tension that is experienced by the woman in her social relationships (with her husband, family, friend, environment, etc.) as a result of her pregnancy. This particular motive differs from the psychiatric motive, since in this instance there is no indication that the woman involved will land in a psychiatric institution. Examples of situations where one encounters this, is as follows: and unmarried girl who finds herself in trouble and is emotionally upset because she is pregnant; a married woman who has become pregnant from a man other than her husband, and then feels psychologically cornered. This motive can under no circumstances be accepted as reason for abortion. One cannot diffuse the sin of an extra-marital affair by committing the sin of impermissible abortion.

* The social motive
This is offered as a reason for abortion when the woman, as a result of her pregnancy, experiences problems of the following nature: the family is becoming too large; living space is limited, the woman or her family are in financial difficulty; the husband has died, or is an invalid, or has left his wife. The woman is the breadwinner and would not be able to care for the child adequately, the woman is still studying. This motive may also not be accepted as a lawful reason for abortion. What is very clear is that the problems are not so insurmountable that the life of the unborn has to be sacrificed.

* The eugenic motive
Hereby we understand that, where there is a strong possibility the child will be born with serious physical and/or psychological disorders which may affect him for the rest of his life,
this would be reason enough to abort the foetus. Children may have such disorders as Jet result of heredity, like eye or blood diseases, or as a result of harm experienced in the womb due to German measles, through the use of pharmaceutical substances like thalidomide or LSD. Because the children concerned may lead a difficult life and complicate the lives of their parents, some think that an abortion may be carried out. This reason for abortion up request is not accepted by the church because of the following reasons:

a. It cannot be said with absolute certainty that such a child will definitely have a specific, disorder. An investigation in Paris, France, has brought to light that, of the 2488 children whose mothers contracted German Measles at a risky stage in their pregnancies, only 35 of those children were abnormal.

b. No person has the right to deny a child its life simply because he/she thinks that the child will lead a miserable life as a result of its disorder. Many people with disorders lead more enjoyable lives than persons without disorders.

c. It may be in people's opinion that such abnormal children lead futile lives, but God may have a totally different judgement thereof. Here the words of Christ are applicable with reference to the children who were born blind, namely that God's practices must be publicised through him. (Joh 9:1-3). The action of such a child, or the interaction towards him/her could be of great spiritual importance to a particular community.

d. Pious people must, through the strength of God, show that they are able to assimilate strife and in this way their lives become enriched. Suffering, though from an abnormal child, can be a purification for the pious (Ps 66:10-12- 119:67,71); it can serve as a reinforcements of his faith (Rom 5:3-5. Heb 12:10). it can bring him closer to God (Job 42:5); it can serve as a glorification of God (Joh 9:3) The religious person must always remember that God has a way of working things out for those who loves Him. (Rom 8:28) Abortion upon request should in no way be entertained in this case. However, there has to be comprehension for, parents (mother) in these instances, and the parents have to take a decision which is in accordance with God.

3. Conclusion

In light of this argument, it is clear that although we, as Christians in the light of the Word of God, have a strong and definite viewpoint about abortions, we also have an understanding of the problems that may arise, in which cases abortion may be positively considered. These exceptions need to be clearly defined in legislation. Maybe these single exceptions could be the reason for abortion upon request ever to be granted. If we follow the way of abortion upon request, we make ourselves guilty of 'condoned' murder, and then we must accept that we will experience God's judgement and punishment at some time or other, as citizens of this country (Gal 5:21; Acts 21:8), since God does not allow himself to be mocked. (Gal 6:7)
EAST CLAREMONT CONGREGATIONAL CHURCH

17 May 1995.

PREAMBLE TO THE CONSTITUTION

The members of East Claremont Congregational Church are concerned
to hear of the proposal to remove from the Preamble of our Constitution the following words

"In humble submission to Almighty God, we the people of South Africa......”

South Africa’s population is predominantly Christian and while it is agreed that there must be freedom of religion in our land there can not in a predominantly Christian society be freedom from the laws of God.

It must be remembered that all prophetic opposition to the state during the apartheid era was based on the presumption of the states ultimate accountability to God.

In the light of the foregoing can we allow the state to ignore this basic fact?

We therefore earnestly call upon the Constitutional Assembly to ensure that the aforementioned words in the preamble of our Constitution be entrenched therein.

Miss E Brown
Hon. Secretary
ALTA DU TOIT SCHOOL FOR SPECIALISED EDUCATION
Kuils River

29 May 1995

REPRESENTATIONS IN RESPECT OF THE CONSTITUTION OF SOUTH AFRICA

Our school, with 350 pupils, is at present the largest for severely mentally handicapped children in South Africa. Pupils represent all population groups. We serve the Western and Northern Cape.

We are alarmed by rumours that the Holy Trinity will not be afforded a central position in the constitution. This would mean that our school would have to close as pupils will no longer be anchored to the living God.

It would also mean that parents and staff will lose their current freedom of religion.

We urge you to prevent such a step at all costs. We pray for you in your highly responsible task.

A P G TRUTER
Principal
CAPE METROPOLITAN COUNCIL

26 May 1995

RETENTION OF CAPE TOWN AS THE SEAT OF PARLIAMENT

This Council at its meeting held on 3 May 1995 resolved that its Executive Committee make representations to Theme Committee No. 1 of the Constitutional Assembly for the retention of Cape Town as the seat of Parliament.

This matter has duly been considered by the Council's Executive Committee and the submission approved by that Committee is attached for your consideration.

Council's Executive Committee also resolved that a delegation of Council ask for an interview with the Theme Committee, which I hereby do, to give verbal evidence on this submission. The delegation would be made up of the following Councillors:

Councillor D.J.W. Van Schoor (Chairperson of Council)
Councillor R.R. Hulley (Deputy Chairperson of Council)
Councillor B.B. Lugulwana (Deputy Chairperson of Council)
Councillor M.W. Gaba
Councillor J.D. Landingwe
Councillor L.J. Rothman

It would be appreciated if you would advise me further in this matter.

for CHIEF EXECUTIVE OFFICER

SUBMISSION BY THE EXECUTIVE COMMITTEE OF THE CAPE METROPOLITAN COUNCIL TO THEME COMMITTEE NO 1 OF THE CONSTITUTIONAL ASSEMBLY

LOCATION OF PARLIAMENT

1. INTRODUCTION

1.1 It has been noted that the Constitutional Assembly has advertised for submissions from the general public and organisations on the subject, inter alia, "Where should the seat of Parliament sit?" (Argus 20.5.1995). Submissions are required before 31 May 1995;

1.2 Enquiries have revealed that this matter has been referred to Theme Committee 1 in the first instance;

1.3 The present Constitution of South Africa (Act 200 of 1993) states the following in section 46(1):

"The National Assembly shall sit at the Houses of Parliament in Cape Town, unless the Speaker, in accordance with the rules and orders and in consultation with the President of the Senate, directs otherwise on the grounds of public interest, security or convenience."
1.4 In the light of the above the Cape Metropolitan Council at its monthly plenary Council meeting adopted the following resolution:

"That this Council:

1. Appeals to the Constitutional Assembly to retain Cape Town as the seat of Parliament of the Republic of South Africa on the grounds of its importance in the economic political and social life of this Region, and on the grounds that it is in the National interest (inter alia) not to waste any scarce resources in a costly and disruptive programme to relocate Parliament.

2. Mandates the Executive Committee to make representations to Theme Committee no 1 of the Constitutional Assembly in the general terms set out in 1 above before the response deadline at the end of May 1995."

The CMC's Executive Committee accordingly submits the following motivation in support of its appeal for Parliament to remain in Cape Town.

2. SUMMARY OF MAIN ARGUMENTS

The following main arguments are advanced as motivation for the CMC's representations for leaving Cape Town as the seat of Parliament:

2.1 THE REMOVAL OF PARLIAMENT FROM CAPE TOWN WOULD HAVE A DEVASTATING EFFECT ON THE ECONOMY OF THIS CITY AND REGION. SIMILARLY, IT WOULD HAVE A DEVASTATING EFFECT ON PRETORIA IF THAT CITY WERE TO LOSE ITS STATUS AS THE NATION'S EXECUTIVE CAPITAL!

2.2 IT IS NOT IN THE NATIONAL INTEREST TO CONCENTRATE ALL THE MAIN ELEMENTS OF POLITICAL POWER IN GAUTENG WHICH IS ALREADY THE CENTRE OF THE NATION'S ECONOMIC POWER. IT IS IN THE NATIONAL INTEREST RATHER TO ENCOURAGE THE SPREADING OF DEVELOPMENT AND ECONOMIC GROWTH TO ALL THE PROVINCES AND NOT DELIBERATELY TO UNDERMINE THE ECONOMIC STABILITY OF ANY ONE PROVINCE.

2.3 IT IS NOT IN THE NATIONAL INTEREST TO WASTE ANY SCARCE CAPITAL RESOURCES ON GRANDIOSE NEW FACILITIES WHERE PERFECTLY ADEQUATE FACILITIES ALREADY EXIST. THE COST OF REPLACEMENT OF ALL THE EXISTING PARLIAMENTARY BUILDINGS AND SUPPORTING FACILITIES WOULD COST AN ESTIMATED TWO BILLION RAND. THE INTEREST ALONE ON THIS CAPITAL WOULD FAR EXCEED THE PRESENT ANNUAL COST OF CERTAIN PERSONNEL HAVING TO SHUTTLE BETWEEN CAPE TOWN AND PRETORIA;

2.4 ANY PROPOSAL TO MOVE PARLIAMENT FROM CAPE TOWN WOULD BE POTENTIALLY VERY DIVISIVE. IT IS LIKELY TO AWAKEN DEEP
NORTH/SOUTH RIVALRY AND EVEN SECESSIONIST SENTIMENTS WHICH - IF AWAKENED - WOULD UNDERMINE NATION-BUILDING.

2.5 THE PRESENT "INCONVENIENCE" TO CERTAIN CABINET MINISTERS AND OFFICIALS OF THE SHUTTLE BETWEEN PRETORIA AND CAPE TOWN MUST BE SEEN IN THE CONTEXT THAT THIS PROCESS HAS BECOME LESS AND LESS INCONVENIENT OVER THE YEARS SINCE THE UNIFICATION OF SOUTH AFRICA IN 1910. MODERN TECHNOLOGY SUCH AS JET AIRCRAFT, CELLPHONES, FAXES AND TELECONFERENCES WERE UNIMAGINABLE IN 1910, AND WITH EACH PASSING DECADE FURTHER ADVANCES WILL NO DOUBT CONTINUE TO REDUCE THE INCONVENIENCE FACTOR IN UNIMAGINABLE NEW WAYS.

3. THE REMOVAL OF PARLIAMENT FROM CAPE TOWN WOULD HAVE A DEVASTATING EFFECT ON THE ECONOMY OF THIS CITY AND REGION. SIMILARLY, IT WOULD HAVE A DEVASTATING EFFECT ON PRETORIA IF THAT CITY WERE TO LOSE ITS STATUS AS THE NATION'S EXECUTIVE CAPITAL

It is vital to note that Parliament has a far greater economic, social and political significance to Cape Town, and all the people of this region, than the mere physical accommodation of 490 legislators. The growth of Cape Town as a City over the centuries is inseparable from its role as a political and administrative Capital. In particular, Cape Town's economic development during this century owes a great deal to its role as the Nation's Parliamentary Capital.

Parliament not only provides up to 1000 direct employment opportunities to the people of this Region, but indirectly it affects the economic well-being of many thousands of other businesses and workers. For example the location of Parliament in Cape Town brings scores of diplomats and embassies into the Cape Metropole as semi-permanent home-owners and employers, as well as hundreds of regular local and international business, political and official visitors who visit Cape Town in order to interact with Parliamentarians and officials.

THIS CONSTANT FLOW OF VISITORS DIRECTLY AFFECTS THE CONFERENCE, HOSPITALITY, PUBLIC RELATIONS, RESTAURANTS, HOTEL, ENTERTAINMENT, PROPERTY AND PUBLISHING INDUSTRIES OF THE WESTERN CAPE.

Moreover, Cape Town's status as a national Capital places the City on the National and International "mental map" in a way which underpins the general tourism industry in an un-measurable but nevertheless profoundly important way.

We therefore have no hesitation in asserting that if Parliament were removed from Cape Town the effect on this Region would be akin to a devastating body blow. It would be analogous to the removal of a vital organ which would then necessitate the application of artificial life-support measures in the form of financial subsidies from central government from then on.
IN THIS CONNECTION IT IS INSTRUCTIVE TO NOTE THAT EVER SINCE
BRAZIL'S PARLIAMENTARY CAPITAL WAS MOVED FROM RIO DE JANIERO TO
BRASILIA 27 YEARS AGO IN 1968, RIO HAS BEEN IN RELATIVE ECONOMIC
DECLINE COMPARED TO THE REST OF BRAZIL. THE ECONOMIST OF 21.3.95
REFERS TO THIS AND INCLUDES THE FOLLOWING STATEMENT:

"RIO'S ECONOMIC GROWTH FOR THE PAST DECADE WAS 15% BELOW
BRAZIL'S. BEFORE THE 1900s RIO COULD HAVE TESTED ITS ECONOMIC
MUSCLE AGAINST SAO PAULO'S. TODAY, THAT MATCH WOULD BE A JOKE."

THIS ECONOMIC DECLINE ON THE PART OF A CITY WITH TOURIST
POTENTIAL SIMILAR TO THAT OF CAPE TOWN IS A WARNING SIGNAL FOR
ANYONE WHO UNDER-RATES THE IMPORTANCE OF PARLIAMENT TO THE
ECONOMIC LIFE OF CAPE TOWN.

4. IT IS NOT IN THE NATIONAL INTEREST TO CONCENTRATE ALL THE
MAIN ELEMENTS OF POLITICAL POWER IN GAUTENG WHICH IS
ALREADY THE CENTRE OF THE NATION'S ECONOMIC POWER. IT IS IN
THE NATIONAL INTEREST RATHER TO ENCOURAGE THE SPREADING
OF DEVELOPMENT AND ECONOMIC GROWTH TO ALL THE PROVINCES
AND NOT DELIBERATELY TO UNDERMINE THE ECONOMIC STABILITY
OF ANY ONE PROVINCE

At present the Western Cape is one of only two economically self-sufficient and growing
Provinces although it is well behind Gauteng which is indisputably the economic hub of
South Africa.

South Africa needs more economically self-sufficient Provinces, not fewer. Unfortunately,
the mere fact of the present debate about the location of Parliament has caused certain
investment decisions to be put on hold as a result of the uncertainty created.

Political concentration of power and activity in Gauteng would further exacerbate the over-
contraction of economic power and influence in only one small part of the country - THIS
WOULD BE DIRECTLY CONTRARY TO THE SPIRIT AND OBJECTIVES OF THE
RECONSTRUCTION AND DEVELOPMENT PROGRAMME.

In this context it is important to note that many of the leading nations of the world have
developed political capitals which are distinctly removed from their business capitals. The
USA (New York and Washington), Germany (Frankfurt and Bonn), Canada (Toronto and
Ottawa), Australia (Sydney and Canberra), and Brazil (Sao Paul and Brasilia). In the case
of the UK the fact that London is such a concentrated hub of all activity has lead to the
progressive marginalisation and impoverishment of the North and the margins of the UK.
This has lead to recognised economic and political difficulties.

With all the above in mind it could be argued that those who argue for a combined
Parliamentary and Executive Capital for South Africa should give effect to that unification in
Cape Town and not in Pretoria. Why is it that the proponents of Parliamentary and
executive unification always conclude that such unification should take place in Pretoria?
It is also worth noting that South Africa's geographic split between Parliament and the Executive is not entirely unique in the World. The European Community has its Parliament in Strasbourg in France and its Executive headquarters in Brussels.

It should also be noted that modern political science increasingly recognises the importance of preserving a distinct separation of powers between the legislative authority and the executive authority in a healthy democracy.

5. **IT IS NOT IN THE NATIONAL INTEREST TO WASTE ANY SCARCE CAPITAL RESOURCES ON GRANDIOSE NEW FACILITIES WHERE PERFECTLY ADEQUATE FACILITIES ALREADY EXIST. THE COST OF REPLACEMENT OF ALL THE EXISTING PARLIAMENTARY BUILDINGS AND SUPPORTING FACILITIES WOULD COST AN ESTIMATED TWO BILLION RAND. THE INTEREST ALONE ON THIS CAPITAL WOULD FAR EXCEED THE PRESENT ANNUAL COST OF CERTAIN PERSONNEL HAVING TO SHUTTLE BETWEEN CAPE TOWN AND PRETORIA**

While we must at the outset concede that the present location of Parliament in Cape Town with the Executive in Pretoria carries a limited cost of "shutting" which would not otherwise be incurred. However, we cannot agree with the view that the issue of the location of Parliament should be settled deterministically purely on the basis of a cost calculation.

The location-of-Parliament issue has never been a purely financial matter like a calculation on the appropriate location for a corporate head office. Much deeper issues are involved. Similarly, what sensible South African would argue that the issue of South Africa's official languages should be decided purely by a cost calculation!

In the present context we would argue that state expenditures on the Cape Town/Pretoria shuttle (and on multiple languages) should be weighed against the nation-building objectives which are achieved. In this context the costs are not excessive.

On the other hand and attempt to replace the existing Parliamentary buildings and support facilities elsewhere would involve capital expenditure on a scale which cannot be justified. It is in the National interest to guard against any unnecessary expenditure of scarce capital resources on grandiose schemes to duplicate serviceable existing facilities. Every cent of the Nation's precious capital resources should be spent on the RDP.

In this context we aver that the capital cost of replacing Parliament elsewhere would far exceed all estimates which have thus far been advanced by proponents of a move. In Australia the recent rebuilding of their Parliament in the same city cost R3.8 billion (in 1994 rand value!) and that did not include the replacement of all attendant facilities and buildings.

We would particularly warn against fallacious attempts to justify a move by basing cost estimates on the assumption that existing facilities could be sold to reduce the capital outlay.

Specialised properties cannot easily be sold in any market, but if all the state and diplomatic properties (both official and residential) which are linked to the location of Parliament in Cape Town were suddenly to flood onto the market it can only be imagined how general property prices in Cape Town would depress.
6. **ANY PROPOSAL TO MOVE PARLIAMENT TO CAPE TOWN WOULD BE POTENTIALLY VERY DIVISIVE. IT IS LIKELY TO AWaken DEEP NORTH/SOUTH RIVALRY AND EVEN SECESSIONIST SENTIMENTS WHICH -IF AWAKENED - WOULD UNDERMINE NATION-BUILDING**

Removing Parliament from Cape Town would be an extremely divisive initiative at a time when national reconciliation should be the major priority. There is a vital need to nurture national unity and to avoid all regionally divisive issues which could revive old passions of various kinds.

In South Africa the multiple capital system was originally and, we would argue, still is AN INSTRUMENT OF NATION-BUILDING. The agreement on multiple capitals in the Union accord of 1910 was one of the key factors which lead to the geographic union of the four former component territories which had been at war, and this gave South Africa the territorial integrity as a nation which we have inherited today.

Today the location of the Nation's Parliament in Cape Town provides this City with an umbilical cord to the Nation's economic heartland in Gauteng. The multiple capital system in also one of the unique features of our rainbow nation, and in both these senses the multiple capital system remains an instrument of nation-building to the present day.

It is also worth noting that our geographic split between Parliament and the Executive is not entirely unique in the World. The European Community has its Parliament in Strasbourg in France and its Executive headquarters in Brussels.

If Cape Town were to lose Parliament it would have a serious marginalising and alienating effect on the people of the Western Cape - perhaps even to the extent of arousing latent but dormant secessionist sentiments.

7. **THE PRESENT "INCONVENIENCE" TO CERTAIN CABINET MINISTERS AND OFFICIALS OF THE SCUTTLE BETWEEN PRETORIA AND CAPE TOWN MUST BE SEEN IN THE CONTEXT THAT THIS PROCESS HAS BECOME LESS AND LESS INCONVENIENT OVER THE YEARS SINCE THE UNIFICATION OF SOUTH AFRICA IN 1910. MODERN TECHNOLOGY SUCH AS JET AIRCRAFT, CELLPHONES, FAXES AND TELECONFERENCES WERE UNIMAGINABLE IN 1910, AND WITH EACH PASSING DECADE FURTHER ADVANCES WILL NO DOUBT CONTINUE TO REDUCE THE INCONVENIENCE FACTOR IN UNIMAGINABLE NEW WAYS**

While it is conceded that the Cape Town/Pretoria shuttle is still inconvenient for certain cabinet ministers and officials, it is obviously an ever reducing problem, and moreover it is a problem for which practical responses and solutions can be found.

For example, it is understood that the parliamentary rules have recently been amended to considerable reduce the amount of time which cabinet ministers need to be in attendance at the National Assembly in Cape Town.
It also seems obvious that teleconference facilities should be installed to improve the linkage between Parliament and the Union buildings.

In general it is our view that the so-called inconvenience problem can be addressed by focusing on practical ways to make the multiple capital system work as smoothly as possible rather than to even consider addressing the issue by such a radical move as the complete re-location of the institution as such.

FOOTNOTE

IN OUR OPINION THE WORD "CONVENIENCE" IN THE LAST LINE (line 27) OF CLAUSE 46.(1) SHOULD BE DELETED AND SUBSTITUTED WITH THE WORDS "FORCE MAJEUR". THE CONCEPT OF CONVENIENCE IS TOO FRIVOLOUS SUBJECTIVE AND ILL-DEFINED A REASON TO BE A REASONABLE CAUSE FOR THE RE-SITTING OF THE NATION'S PARLIAMENT, WHEREAS "FORCE MAJEUR" WOULD BE A READILY ACCEPTABLE - AND PRESUMABLY TEMPORARY REASON FOR SUCH A STEP.

"Sittings of National Assembly

46. (1) The National Assembly shall sit at the Houses of Parliament in Cape Town, unless the Speaker, in accordance with the rules and orders and in consultation with the President of the Senate, directs otherwise on the grounds of public interest, security or convenience."

[Editor’s note: Excerpt from “Government Gazette 28 January 1994 - 28 No. 15466”]
THE PROVINCIAL DEVELOPMENT COUNCIL SUPPORTS THE CAMPAIGN TO KEEP PARLIAMENT IN CAPE TOWN

The Western Cape Economic Development Forum (WCEDF) and the Regional Development Advisory Council (RDAC) is currently being transformed into a Provincial Development Council which will seek consensus, co-ordinate, advise and monitor development in the Western Cape Province.

The Provincial Development Council would like to register its support for Parliament to remain in Cape Town.

Nation building and the Reconstruction and Development Programme

We feel that the new South Africa is still a fragile entity which should be focusing its energies on nation building and improving the quality of life for all South Africans. The Government of National Unity's Reconstruction and Development Programme (RDP) should be regarded as the major priority in its first five year term of office. Moving Parliament from Cape Town will be divisive at a time when national reconciliation is a priority.

Moneys should be spent to provide affordable housing, adequate health facilities, access to education, employment opportunities and crime prevention to improve the living conditions of all South Africans.

The plan to move Parliament from Cape Town gravitates against the GNU's decentralised system of governance, which could stimulate socioeconomic developments and spur the RDP at provincial level. Centralising the administrative and legislative power in one centre would be counterproductive at a time when the GNU is trying to move to empowering provincial government.

As reported by David Breier "the ANC's provincially based politicians have shifted remarkably towards greater federalism since the elections, supporting greater powers for their regions and less for Pretoria." (Weekend Argus 28/O8/94)

Public opinion

Media reports have indicated that public opinion will be considered before any decision on the issue will be made. One has to but consider the outcome of several opinion polls to see where the public sentiment lies. A survey conducted by IDASA last year revealed that by a margin of
2:1 the people of South Africa, irrespective of political persuasion, ethnic group or area of survey fell that it was in the best interest of the country to retain parliament in Cape Town. Members of Parliament are elected officials, representing the populace who voted them into power, so if their electorate is of the opinion that Parliament should be in Cape Town the Parliamentarians, as the elected representatives of all South Africans should be cognisant of and have regard for this sentiment.

Moving Parliament at this stage will mean that the cost of refurbishing and enlarging the parliamentary facilities in Cape Town, prior to May 1994 would have been wasted, without the guarantee that the cost of either selling it or letting it will justify the original expenses of upgrading it to its present standard. The Government of National Unity, during the time when it is trying to establish itself as an accountable system of governance, can hardly afford the accusation of spending public funds unwisely and irresponsibly.

**Cost implications of moving Parliament**

The cost of operating the twin capitals in 1992 cost the previous government R 18 million, in 1994 the cost was R 22 million. Pretoria estimates that it will be able to build a new parliamentary complex at the cost of R 385 million. Major civil construction estimates are notoriously low, but once the building project get underway the costs escalate considerably, as was the case with the Johannesburg Civic Theatre complex and the Moss gas project. The most recent example was the cost of moving the provincial government from Pretoria to Johannesburg which eventually cost double the original estimates.

Providing office space for 400 parliamentarians, 90 senators, their support staff and the administrators of the new parliament can hardly be estimated at a cost under R600 million, which at current interest rates would mean a annual net cost far higher than the R 22 million it is costing the government to maintain the split capitals.

**Job losses**

Moving the seat of government would jeopardize many jobs in the region, at a time when the focus should be on job creation. The job losses will affect not only the administrative staff, but also the blue collar workers, many of whom have had long years service. It will be particularly difficult for these people to find alternative employment.

**Improving efficiency**

The argument that the cabinet ministers are removed from their administrative departments currently when parliament is in session, can be countered by encouraging more effective management systems and the use of modern technology. Communication via telephone, fax and modern commuter technology, e.g. E-mail can make it so much easier for cabinet ministers to be able to effectively manage their departments, without physically being there.
Conclusion

The Provincial Development Council would therefore support Parliament remaining in Cape Town and having the issue removed from the agenda of the National Assembly for consideration some time in the future when the country has successfully improved the living standards of all South Africans.

PROVINCIAL DEVELOPMENT COUNCIL (PDC)
ABSTRACT

This paper addresses the question: “Under what circumstances may democratically elected legislators take decisions contrary to the wishes of a majority of the people but without forfeiting democratic legitimacy?” It is argued that such circumstances occur when, first, expert judgement is required and, second, the process enjoys tacit consent. The question of moving South Africa’s parliament to Pretoria is then considered as a test case. The results of a survey of the views and attitudes of parliamentarians are then analysed. It is demonstrated that moving parliament, without popular endorsement, could not be defended as a democratic decision in terms of the criteria discussed earlier.

PREFACE

The research-data which this paper records and partially interprets was gathered by a team of students, selected under the auspices of the Archbishop Desmond Tutu Trust, with the help of two other research assistants.

The questionnaire was administered by hand-delivery in hard copy form to parliament, by telephone and by fax. Parliamentarians who were telephoned had the opportunity to respond in English, Afrikaans, Xhosa, Zulu, Northern and Southern Sotho, Shangaan and Tswana.

The questionnaire contains no direct questions concerning the need for a formal constituency system, for an official and/or effective opposition or for the location of the executive and the legislative in a single city. Nor were the researchers aware that these issues were of particular interest in the research programme.

I should like to record here my gratitude to the members of the research team:

Susan Boland
Lulu Dikweni
Xolisile Dyakopu
Lwandile Hasheni
Douglas Mtshali
Julie Pike
Happy Xolani
PARLIAMENTARY EFFECTIVENESS AND THE LOCATION OF PARLIAMENT IN SOUTH AFRICA

This paper is a serendipitous spin-off from a larger research programme which addresses the question: “How democratic has South Africa now become?” The research is intended primarily to shed light on four issues in democratic theory by considering recent developments in South Africa’s political arrangements. The secondary hope is that the reverse process will also occur and that philosophical considerations about the nature, workings and justification of democracy may serve to illuminate concrete questions about the development of South African democracy in practice.

The four theoretical issues are:

i How, or in what sense, is an election authentically democratic if its result is, to a significant and probably crucial degree, negotiated by party leaderships rather than simply reflecting the arithmetic of the voting?

ii What is the function of parliamentarians in a multi-party “Government of National Unity,” when they are not clearly representative of constituencies. Are they merely voting fodder and the beneficiaries of patronage?

iii How secure is the authentically democratic character of South Africa’s new polity, understood in terms of popular sovereignty, given the absence of a credible opposition party or set of parties, capable of offering the electorate the choice of an alternative government? Specifically, is South Africa likely to drift into becoming a de facto one-party-state as, for example, Zimbabwe appears to have become?

iv Given that South Africa’s new democracy is of the representative kind and, in particular, of the kind which obtains in Britain, castigated by Rousseau (1761:1915:94) but praised by Burke (1778:1978:435-438) and J.S. Mill (1861:1910:315-324), whereby parliamentarians do not necessarily feel either duty-bound or constrained by self-interest to vote against the known wishes of the majority of the people, is South Africa’s democracy not vulnerable to the charge made by advocates of participatory democracy that all such representative democracies are a sham?

It is only with the last of these questions that the present paper is concerned. It is, consequently, necessary to begin by briefly rehearsing the theory of democracy which denies that the British type of representative democracy is genuinely democratic.
The argument of participatory democrats from Rousseau onwards is that democracy means popular sovereignty, i.e. that the members of a society all enjoy equally the ultimate power to determine the laws under which that society shall be governed. (This includes the “basic law” or “constitution” which is the set of laws determining how, by whom and within what limitations all other laws shall be enacted and enforced.) However, the periodical election of a number of representatives which is tiny proportional to the total number of voters and who belong to an even tinier number of parties means that the vast majority of people in large, modern, representative democracies exercise no real power over the decisions of government. Consequently, such societies are not really, and certainly not adequately democratic.

It is not necessary in order to feel the full force of this argument to accept the plausible Marxist view that in Capitalist societies representative democracy is really a plutocracy where power resides with a rich minority in which the vast majority of people are politically impotent, mired in alienation and sick with the fetishism of commodities. We need only consider an issue such as the abolition of capital punishment where, in South Africa as in Britain, elected politicians have clearly acted contrary to the wishes of the majority of the electorate and so, on the face of it, undemocratically.

To the general charge, derived from Rousseau and Marx, that representative democracy is a sham, an adequate response is, I think, to point to the power of public opinion which ensures that, throughout their period of office, governments conform their behaviour to what they anticipate will be popular reactions sufficiently favourable to sustain or enhance their chances of re-election - or at least not so unfavourable as to jeopardise these chances. (See Collins:1992:18-25.)

To the charge that when parliamentary majorities legislate on particular issues contrary to the wishes of their electorates (whom, consequently they decline to consult, e.g. via referenda) the classic defence remains that articulated by both Burke and J.S. Mill in declaring to their potential constituents how they conceived the role of a Member of Parliament and how consequently their electorates could expect them to carry this out. Most notably, they each insisted that, if elected, they would speak and vote on issues of public policy according to what they perceived to be the requirements of morality and the true national interest. Specifically, they would not feel bound to vote in accordance with the wishes or even the narrowly sectional interests of their constituents. Burke concludes: “Your representative owes you not his industry only, but his judgement and he betrays, instead of serving you, if he sacrifices it to your opinion” (Burke:1778:1978:Vol III:438).

Such a position can be defended as democratic along the following lines. There are many issues of public policy where the issues are so complex that it would be quite unreasonable to expect the ordinary voter to master all relevant evidence and arguments with respect to each of them.
Consequently, it is impossible for the majority of voters to develop an informed view about either what is in the interest of the community as a whole or what is in their own interest. It is, therefore, right that these decisions should be made by elected political leaders who are able to study the issues in depth and reach decisions which though they be temporarily (or even not so temporarily) unpopular are nevertheless in the public interest.

When this happens, however, can we justifiably continue to claim that the result is democratic or must we concede that, at least in respect of these highly complex issues, democracy has given way to oligarchical rule by the political elite? The general answer to this question, I believe, is that derived from the notion of tacit consent. If an unpopular policy is to be adopted by an elected government, then the question of whether it is consonant with the requirements of democracy depends not on popular support for the individual decision, but on whether there is widespread support for the constitutional framework which confers on elected politicians the right, the power and even the duty sometimes to take unpopular decisions. And in representative democracies, this type of tacit acknowledgement of the legitimacy of the constitution is, in fact, present.

Clearly, however, this argument on its own paves the way for elected parliamentary majorities to adopt unpopular policies in furtherance of their own individual or sectional interest and against the real interest of the people as a whole, but justifying these policies on the basis that they are really acting in the national interest in a matter too complex for ordinary voters to be able to judge. Consequently we need criteria for distinguishing legitimately democratic unpopular decisions taken by government in representative democracies from illegitimate and undemocratic ones. The rest of this paper attempts to illustrate how this might be done by examining the current issue of whether South Africa’s parliament should be moved from Cape Town to Pretoria so that the seats of the national legislature and executive may be located in a single capital. The question to be asked here is: “Under what circumstances could such a decision by government be accounted genuinely democratic?”

We know from the wholly independent work - independent both of each other and of the present study - of the Institute for Democratic Alternative in South Africa (IDASA), led by Dr Wilmot James (1994) and Stellenbosch University’s Centre for International and Comparative Politics under the direction of Prof. H. Kotze (1994) - that there is very strong support both popular and amongst political elites for retaining parliament in Cape Town. The IDASA survey found that “in every province, including the PWV which stands to benefit most from moving the national legislature, support for keeping it in Cape Town is significantly greater than for moving it to Pretoria” (p.4) and “Back for Cape Town is strong across all categories - race, region, age, gender and party support.” (p.4). The Stellenbosch study replicated these results amongst leading decision-makers,
amongst whom almost two thirds wanted Cape Town to remain the site of parliament. We also know that, mainly I imagine for reasons of expense with which I fully concur, this matter has been deemed inappropriate for a referendum.

We know, therefore, that a decision to move parliament would be an unpopular one. It might however be argued, as we have seen, that this issue, like many others in the domains of economic, social and foreign policy, is too complex for the voters to understand and is, therefore, properly to be decided (as is tacitly accepted by the majority of the electorate) by the members of parliament themselves. If, however, an unpopular decision to move parliament were to be democratically defensible in terms of the arguments from complexity and tacit consent outlined above, the argument would have to be made in terms of economics and finance, on the one hand, and in terms of the efficiency of government on the other. As far as the financial argument is concerned, it seems clear that the costs are certain, immediate and vast while the benefits are speculative, remote and marginal. However, it is only with the latter arguments about the efficiency of parliament and of government that the survey report on here engages.

Now, if parliament were to decide to relocate the legislative to Pretoria on the grounds of efficiency, this unpopular decision could only be justified as democratic if it were the case that a large number of parliamentarians:

i. perceive government to be working inefficiently; and

ii. attribute that inefficiency to South Africa’s split capital system.

If South Africa’s parliamentarians believe these two propositions, then it would be reasonable to accept any decision they might take to relocate parliament on grounds of efficiency as consonant with the requirements of democratic government. If not, not. The survey reported on here shows overwhelmingly that parliamentarians do not believe that the location of parliament in Cape Town is an obstacle to effective democratic government.

METHODS

The decision was taken to seek responses from all parliamentarians rather than from a predetermined sample. This carries with it the methodological disadvantage that the actual respondents are self-selected, and it is correspondingly more difficult to make inferences about the views of those who, for whatever reason, do not respond. This disadvantage, however, was outweighed by the impossibility of identifying in advance the criteria which would make a representative sample genuinely representative. In other words, it was impossible to tell whether the significant variables would be party affiliation, geographical location, home language, age, gender or political position.
Information on all these questions was, therefore, elicited in the “personal” part of the questionnaire. The results are tabulated in Appendix B and warrant a high degree of confidence in the representativeness of the 171 responses actually received.

After eliciting basic personal information (section one), the survey continued in three sections: the second consisted of six statements which respondents were asked to assent to or to reject; the third consisted of eighteen items about which parliamentarians were asked to indicate whether or not they had experienced “considerable difficulties”; the last section was open-ended and afforded respondents the opportunity of indicating what they had found best and worst about their experience as parliamentarians during 1994, and then to list between 3 and 5 suggestions for improving the workings of parliament.

Items in each section provided cross checks for consistency and the open-ended final section allows for some measure of intensity of preference or opinion held over and above the simple aggregation of the number of responses expressing these opinions and preferences.

Since it has been suggested forcefully by the advocates of moving parliament to Pretoria that this would render government more efficient, the following questions were applied to the responses received in order to test whether this is a perception shared by parliamentarians:

i. Do respondents believe that, on the whole, parliament is working efficiently or inefficiently?
ii. Do respondents believe that, on the whole, government is working efficiently or inefficiently?
iii. Do respondents mention the location of parliament as a significant factor in enhancing the efficiency of government?
iv. How many respondents report having had considerable difficulties, whether professional or personal, in respect of matters which might, but also might not, be a function of the location of parliament in Cape Town? In this category were two of the statements in the second section, namely 3 and 4 which dealt respectively with the difficulty of getting to parliament from home areas and the pleasantness or otherwise of stays in Cape Town by parliamentarians on parliamentary business. Also accounted of possible relevance to the location of parliament were the items in section three relating to difficulties parliamentarians had experienced. These included items 6,7,8,16,17 and 18, which deal respectively with the expenses of coming to parliament, maintaining contact with “home” communities, lack of social life, maintaining a family life, child care facilities and children’s schooling.
v. How deeply did respondents feel that the possibly location-related problems identified in sections two and three of the survey were uppermost in the minds of parliamentarians when it
came to considering what had been worst about their experience in 1994 and in making their proposals for the future?

Taking the total response picture of those parliamentarians who were experiencing difficulties which might be a function of frequent travelling to a largely remote destination, and assuming that all these difficulties were problems of place rather than time, how many respondents would actually be helped by moving parliament to Pretoria?

What evidence is there that possibly location-related difficulties are indeed problems arising from the location of parliament in Cape Town rather than other factors?

I proceed to address these questions *seriatim*. I shall then make some supplementary general observations before offering what I take to be the most important conclusions.

**THE EFFICIENCY OF PARLIAMENT AND GOVERNMENT** (items i - iii above).

The questions of whether parliament is efficient and whether government is efficient are not identical. Dictatorial regimes can be very efficient. However, it is clear that respondents did not make this distinction.

To question 2.1, “The work of parliament has/has not been conducted reasonably effectively this year,” 127 respondents (75%) thought that it had, 42 (25%) that it had not. Exactly the same figures apply to question 3.2., “I have/have not had quite serious difficulties this year with the way the Government of National Unity has done its work.”

Thus in a ratio of almost exactly 3:1, parliamentarians do not believe there is a serious problem about the efficiency of either government or parliament.

Moreover and more crucially, out of the entire batch of 171 completed questionnaires, only four respondents, two NP and two ANC, indicated in their recommendations for improving the workings of parliament that it would be desirable to have a single administrative and legislative capital. The minuscule nature of this figure becomes particularly apparent when it is realised that respondents could list up to five recommendations.

Other comments of some interest under the “recommendations for improving the workings of parliament” include two respondents, both from P.E., one ANC, one IFP who said that parliament should stay in Cape Town. One NP respondent from Transvaal said that finality needed to be achieved on the location of parliament one way or the other. One ANC member from the Transvaal said: “Parliament should stay in Cape Town for the first ten years.” An NP member from Natal said
his worst experience was “being a migrant labourer.” An ANC member from the Transvaal described her worst experience as “finding my feet and then hearing that parliament might move to Pretoria.”

It is clear that there is extremely little felt need amongst parliamentarians to move parliament to Pretoria in order to improve the efficiency of government and the workings of parliament.

**ISSUES POSSIBLY RELATED TO THE LOCATION OF PARLIAMENT** (items iv - vii above).

It is not possible to be sure with many of the questions in this survey whether expressions of satisfaction and dissatisfaction are connected in any way with the fact that parliament is located in Cape Town.

For example question 2.3. concerning the pleasantness or otherwise of parliamentarians’ stays in Cape Town may or may not be location-specific. Moreover with the clearly related questions, 3.8 and 3.16, concerning social life and family life respectively, there is decisive evidence that problems arise here in consequence of the anti-social hours which parliamentarians are required to work and are consequently problems of time rather than of place. This evidence consists in the fact that a significant number of those who complain on these scores are residents of Cape Town.

However, it is useful to see what the results are even if everything that could conceivably be location-related is (falsely) assumed to be so.

Conceivably location-related issues and the relevant figures are:

2.3. Ease of access to parliament:  
- Difficult = 38 (28%)  
- Not difficult = 121 (76%)

2.4. Pleasant stays in Cape Town:  
- Pleasant = 147 (93%)  
- Unpleasant = 11 (7%)

3.6. Expense of coming to parliament  
- A problem = 69 (40%)  
- Not a problem = 102 (60%)

3.7. Maintaining contact with home community  
- A problem = 105 (61%)  
- Not a problem = 66 (39%)

3.8. Lack of social life  
- A problem = 97 (57%)  
- Not a problem = 74 (43%)

3.16. Maintaining a family life  
- A problem = 114 (67%)
3.17. Child care facilities  
Not a problem = 57 (23%)  
A problem = 29 (17%)  
Not a problem = 142 (83%)  
3.18. Schooling  
A problem = 33 (19%)  
Not a problem = 138 (81%)  

To place these figures further in perspective it is helpful to list problems encountered in Section Three in order of the number of respondents who reported having had “quite serious difficulties”. Thus:

**PROBLEMS IN ORDER OF NUMBER OF RESPONDENTS**

<table>
<thead>
<tr>
<th>Rank</th>
<th>Issue</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Research facilities</td>
<td>118</td>
</tr>
<tr>
<td>2</td>
<td>Committees</td>
<td>116</td>
</tr>
<tr>
<td>3</td>
<td>Family life</td>
<td>114</td>
</tr>
<tr>
<td>4</td>
<td>Secretarial</td>
<td>113</td>
</tr>
<tr>
<td>5</td>
<td>Community contact</td>
<td>105</td>
</tr>
<tr>
<td>6</td>
<td>Social life</td>
<td>97</td>
</tr>
<tr>
<td>7</td>
<td>Expense of travel</td>
<td>69</td>
</tr>
<tr>
<td>8</td>
<td>Parking</td>
<td>64</td>
</tr>
<tr>
<td>9</td>
<td>Leaders</td>
<td>42</td>
</tr>
<tr>
<td>10</td>
<td>GNU</td>
<td>42</td>
</tr>
<tr>
<td>11</td>
<td>Telephone and fax</td>
<td>39</td>
</tr>
<tr>
<td>12</td>
<td>Schooling</td>
<td>33</td>
</tr>
<tr>
<td>13</td>
<td>Office space</td>
<td>32</td>
</tr>
<tr>
<td>14</td>
<td>Accommodation</td>
<td>30</td>
</tr>
<tr>
<td>15</td>
<td>Childcare</td>
<td>29</td>
</tr>
<tr>
<td>16</td>
<td>Transport</td>
<td>21</td>
</tr>
<tr>
<td>17</td>
<td>Multi-party</td>
<td>18</td>
</tr>
<tr>
<td>18</td>
<td>Language</td>
<td>14</td>
</tr>
</tbody>
</table>

In order to assess the relevant strengths of the concerns reported in the preceding section (9) it is necessary to compare them with items mentioned in the open-ended final section of the survey.

The commonest and the most profound complaint here related to the workings of the committee system, the scheduling of its meetings, and the difficulty parliamentarians experienced in discharging its functions, especially in relation to attending for parliamentary debates which were widely seen as
unproductive. There was also some criticism of the punctuality, the perceived attitudes and both the over-formality and the under-formality of fellow parliamentarians.

The second deepest-felt need to facilitate the effective workings of parliament was the provision of research and secretarial assistance. Relatedly, some parliamentarians commented on their own need for time to read.

There was also extremely little mention (see Appendix B, section 5) of possibly location-related items amongst the recommendations which respondents identified. Such concerns - to the extent that they existed - are thus demonstrably of very small importance by comparison with the issues which relate to the actual functioning of parliament and parliamentarians.

Moreover, even on the obviously false assumption that all conceivably location-related problems are in fact location-related, we still need crucially to ask: “Would relocating parliament to Gauteng assist the parliamentarians who have experienced location based difficulties?”

Two points need to be made in answering this question.

First, the majority of parliamentarians are going to have to travel substantially and extensively wherever parliament is located and wherever committee meetings are convened. In this respect, their situation is the same as that of their colleagues in democratic countries everywhere, and for the matter of that, it is analogous to demands made on business leaders. In fact, a majority of parliamentarians, even from Gauteng, do not report problems associated with the location of parliament, and for most of those country-wide who do report such problems, either the problems would remain if parliament were moved to Pretoria or their problems would only be solved at the expense of creating similar problems for others of their colleagues.

Secondly, the currently disproportionate number of parliamentarians located close to Gauteng reflects a situation which is not likely to endure very far into the future. This is because of the increasing pressure for diffusion associated with modern democracies generally, and with the increasing insistence on truly equal representation by South Africa’s provinces, whether or not political practice becomes more or less federal.

It is true that the expense and time consumed in travelling to and from Cape Town is marginally greater for most parliamentarians than it would be to Pretoria. However, complaints on this score are recorded only by a small minority of respondents.
Easily, the most important problems which might appear to be location-based are really function-based. That is parliamentarians feel strong obligations to their communities which they regard as constituencies, even though they do not formally represent constituencies. By contrast, the traditional parliamentary debate is seen as a major time-waster for many parliamentarians.

Most specifically parliamentarians seem to see their function as generating democratic consensus on public policy issues as a consequence of their committee work, which should consequently be liberally supplied with time and resources, and which should act in concert with the relevant constituents of the GNU as the supreme symbol and instrument of government by consent.

What parliamentarians most clearly want are two things: a constituency basis; and the devising of measures to make committees the most effective scrutinisers and generators of legislation which will give substance to the policy goals formulated by the GNU and, in practice at the moment, articulated in the RDP.

This work is a matter of defining the constitutional work for which parliament and parliamentarians are responsible and arranging parliamentary business so that it is discharged as thoughtfully, as consensually and as efficiently as is possible.

**CONCLUSIONS**

A very large majority of parliamentarians quite clearly do not experience the location of parliament as an obstacle to the effective working of parliament, of government and, indeed, of themselves. For the small minority who do, their problems will not be solved by moving parliament to Pretoria, save at the cost of inflicting the same problems on other parliamentarians.

In the perception of parliamentarians the real problems obstructing the efficient functioning of parliament have to do with time: there is too much work for the time available; some of this work is a waste of time; the scheduling of this work is inefficient and anti-social.

It seems likely that the ultra-elaborate committee system was designed in part to solve the problem of what the majority of members who are not part of the executive can usefully be given to do, since they do not have constituencies to look after. This is a strong argument for ensuring that the new system combines proportional representation with a constituency system (e.g. through multi-member constituencies).
Having said all this, the clear majority view amongst parliamentarians is that the business of government was on the whole effectively conducted during 1994, that working in an authentically democratic system is personally very rewarding, that Cape Town is a perfectly congenial place in which to carry out their work and that the system of dual capitals does not impair their work. It is also clear beyond doubt that moving parliament from Cape Town, on even the most lenient interpretation of what representative democracy requires, would be undemocratic and, indeed, anti-democratic.

BIBLIOGRAPHY


APPENDIX A

QUESTIONNAIRE ON THE WORKINGS OF PARLIAMENT IN 1994

In 1994 the number of Members of Parliament increased from 160 to 400. In addition there are 90 senators. Other changes include the fact there are now 11 official languages as opposed to two. On the other hand “homeland” governments no longer exist.

Changes of a more profoundly political kind include the fact that there is now a multi-party government, with all major parties being part of the government as opposed to the system where one party forms the government and other parties oppose it.
The work of individual MPs has also changed, particularly in that MPs no longer represent different constituencies.

This survey has been designed to explore how individual participants in the process of government perceive the way government is conducted.

The questions cover issues that are both specific and general. **The answers given will be treated entirely anonymously, and are for research purposes only.**

### SECTION 1

**PERSONAL**

<table>
<thead>
<tr>
<th>Age Group:</th>
<th>20-35</th>
<th>36-50</th>
<th>51-65</th>
<th>66+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you:</td>
<td>A Member of Parliament</td>
<td>A Member of Senate</td>
<td>A Cabinet Minister</td>
<td></td>
</tr>
<tr>
<td>Are you M or F?</td>
<td>Married/living with partner</td>
<td>Single</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age of children(if any)</td>
<td>0-6</td>
<td>7-13</td>
<td>14-18</td>
<td>18+</td>
</tr>
<tr>
<td>Where do your children go to school?</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where are you normally resident?</td>
<td>Parliamentary Village</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where do you stay when you attend parliament?</td>
<td>Rented accommodation</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td>Your Own property</td>
<td></td>
<td></td>
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<tr>
<td>How many dependants do you have?</td>
<td></td>
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<tr>
<td>What party are you a member of?</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>How many parliamentary committees do you sit on?</td>
<td></td>
<td></td>
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<td></td>
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</tbody>
</table>
Since being an MP/Senator | I have continued to live in Cape Town
---|---
| I have moved to Cape Town and visit my home area when I need to
| I have continued to live in my home area and travel to Cape Town for parliamentary sessions

### SECTION 2
**GENERAL**

Please tick the sentence in each pair below with which you agree with most:

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>a</td>
<td>The work of parliament has been conducted reasonably effectively this year</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>The work of parliament has been ineffectually conducted this year</td>
</tr>
<tr>
<td>2</td>
<td>a</td>
<td>I have had few difficulties in parliament as a place to work in</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>I have had considerable difficulties working in parliament</td>
</tr>
<tr>
<td>3</td>
<td>a</td>
<td>It has been reasonably easy for me to get from my home area to parliament when I have needed to</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>I have experienced quite serious difficulties getting from my home area to parliament when I have needed to</td>
</tr>
<tr>
<td>4</td>
<td>a</td>
<td>I have on the whole had pleasant stays in Cape Town when I have been there on official business</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>I have on the whole had rather unpleasant stays in Cape Town when I have been there on official business</td>
</tr>
<tr>
<td>5</td>
<td>a</td>
<td>On the basis of my experience this year I think the Government of National Unity should continue after 1999 on a voluntary basis</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>On the basis of my experience this year I do not think that the Government of National Unity should continue after 1999 on a voluntary basis</td>
</tr>
<tr>
<td>6</td>
<td>a</td>
<td>I feel that I have achieved many of the goals which I had set myself in coming to parliament</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>I do not feel that I have achieved many of the goals which I had set myself in coming to parliament</td>
</tr>
</tbody>
</table>
**SECTION 3**

With each of the following items, tick **YES** if you would say you have had quite serious difficulties with this year. If you have not had serious difficulties tick **NO**:

<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Following the proceedings in parliament because of unfamiliarity with the language used</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>The way the Government of National Unity has done its work</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Working with a multi-party government</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Finding time for committee work</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Communicating with party leaders</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Expense of coming to parliament so often</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Staying in contact with the community from which I come</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Lack of social life</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Getting adequate secretarial assistance</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Shortage of office space</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Lack of telephone and fax facilities</td>
<td></td>
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<tr>
<td>12</td>
<td>Parking</td>
<td></td>
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<td>13</td>
<td>Adequate accommodation</td>
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</tr>
<tr>
<td>14</td>
<td>Transport</td>
<td></td>
</tr>
<tr>
<td>15</td>
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**SECTION 4**

Please say briefly, in your own words, what you have found best about your experience of parliament this year:
And what you found worst:

Please list what you think are the 3-5 things that could most usefully be done to improve the workings of parliament:

Thank you sincerely for co-operating in this survey

APPENDIX B

SECTION 1: PERSONAL DETAILS

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* = % OF ALL 171 RESPONDENTS

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* = % OF ALL RESPONDENTS (171)

1. SHOULD GNU CONTINUE AFTER 1999?
Yes 89 (54%)
No 75 (46%)
164

2. **SPLIT BY PARTY:**

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89 75 164 (100)

3. **STRONGLY FELT**

GNU must go: 2 x ANC; 1 x IFP. 1 x NP: “farce of ‘saluting’ RDP when we know it will never work.”

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SOUTH AFRICA’S PARLIAMENT SHOULD REMAIN IN CAPE TOWN

Submission by WESGRO, The Association for the Promotion of the Western Cape's Economic Growth to the Constitutional Assembly of South Africa.

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SUMMARY

South Africa's split capital system, with Parliament in Cape Town, and the Civil Service in Pretoria, yields many advantages: it helps to unite a large country; integrates a culturally different area, the Western Cape, into the nation; helps to create another economic pole in South Africa, to supplement the PWV in Gauteng, and the Johannesburg-Pinetown-Durban corridor. It reduces the political an economic over-concentration of activities in Gauteng, and is in keeping with the trend in Africa an internationally to use the functions of government to stimulate economic activity outside of the economic core of the country.

While the system may have been expensive to operate in the days before aeroplanes, faxes, computers and good telephone links, the benefits are so strong that other countries are following our lead: the European union has split its capitals and other countries are increasingly moving to decentrali
government functions from the Capital city -- i.e. British are moving government departments out of London and Germany is leaving some Civil Service departments in Bonn when the capital returns to Berlin.

There are costs associated with operating our split capital system: it does cost more to operate Parliament away from Pretoria; and it is more difficult for ministers to balance their legislative and executive functions. The additional cost is trivial in comparison with the interest payable annually on the cost of building a new Parliamentary complex for the nation; and the issues related to administrative efficiency can be dealt with by using current communications technology and taking full advantage of the new rules of Parliament requiring reduced attendance by Cabinet ministers. These new rules also greatly reduce the financial cost of the split capital system.

If South Africa were to move Parliament to Gauteng there would be vast financial and other costs to be met. Parliamentary complexes are not cheap -- in Australia they have just built a new Parliamentary complex, budgeted to cost Aus $ 278 million (R 738 mil) which finally cost Aus $ 1 458 million (R 3.8 billion). In Germany, it is much more expensive, given the high German building costs. We would lose all the political, social and economic advantages of the current split Capital system, cause further over-concentration of political and economic power in Gauteng and cause great economic damage and possible socio-political disruption to the Western Cape economy. Our government would lose credibility both nationally and internationally for committing itself to a Reconstruction and Development Programme, and then focusing on lovely new offices for themselves.

Most important, all the opinion surveys conducted have shown a 2:1 preference by the people throughout South Africa for keeping Parliament in Cape Town.

ADVANTAGES OF OPERATING A SPLIT CAPITAL WITH THE EXECUTIVE IN PRETORIA AND THE LEGISLATURE IN CAPE TOWN

South Africa enjoys many advantages for operating a split capital system, among them are the following:

1. It helps to unite politically a large country

In 1908 this was a very divisive issue. The designation of capital city status to the cities of Cape Town, Pretoria and Bloemfontein was an act of compromise among the white participants at the National Convention of 1909 in the aftermath of the Anglo-Boer war. Most new large countries face similar problems in apportioning political power among competing cities and regions, as is the case in South Africa today. The solution is generally either a civil war to decide dominance, or creating a new capital
between the contending parties (USA, Australia), or a solution such as ours of splitting the capitals and functions of government. This solution was politically unifying and relatively cheap, in capital costs. Europe which is trying to create a new united country has opted for our model locating the parliament (Strasbourg) in a different location to the bureaucracy (Brussels & Luxembourg).

Our different Cape ethnicity and culture has resulted in a different political leadership in the region. The location of parliament in the Cape is thus even more important than in previous times. If parliament were not here the already latent secessionist elements would be far stronger in the Cape.

For many Cape Townians, the loss of their Parliamentary role would be seen as a punitive reaction to the 1994 national election results in the Western Cape province. This perception must be avoided. The maintenance of the status quo concerning the seat of parliament will reinforce government's commitment to the building of a national consensus and avoid the risks of renewed north-south antagonism which is bound to develop should Cape Town be perceived by her citizens to be stripped of her parliamnta role.

2. **Integrates the Western Cape society into South Africa**

The reality of the situation is that the Cape is cut off from the mainstream South Africa in many ways: different ethnic structure; long distances in between in the Karoo; marginal position in relation to strengthening bond with Africa; different economic structure (no mining, less beneficiation). Parliament (which the Cape is very proud to host) gives a bond to the mainstream which would otherwise be absen

3. **Helps develop another economic pole in South Africa**

South Africa's economy is dominated by a very powerful economic hub in the PWV, and an umbilical cord to the port in Durban. The location of some government functions in the Cape makes it an appropriate head office location (75 quoted company HQ's, compared to Durban's 32), and attracts many trade missions, government contacts, etc. which strengthens the local economy.

Cape Town's status as the location of parliament gives it significant international recognition, thus helping its tourism economy, and helping to attract international business here. Business Week the US magazine therefore lists Cape Town as one of the world's leading second rank cities.

4. **Better spread of government expenditure**
Internationally governments spend a large share of the country's total production. The location parliament in Cape Town and the Judicial capital in Bloemfontein has allowed these two centres receive a small proportion of government recurrent expenditure, although the overwhelming share still goes to the PWV.

5. **Reduces political & economic over concentration in the PWV**

The PWV with a population of about 9,3 million, nearly 25% of the nation's people on 2,5% of the land and produces 43% of the national GDP is already overdeveloped. Over concentration of population and economic power is very bad for countries. Examples of countries paying a severe price for their over concentration are Greece (Athens), France (Paris), Britain (London) among others.

To further entrench the domination of the PWV is clearly not in the national interests, since it further consolidates the economic, financial and political hegemony of one region at the expense of all others, many of which are desperately impoverished.

The South African government presently tries to counter the over concentration of the PWV by the Regional Industrial Development Programme (RIDP) costing nearly R 1,0 billion to persuade business to locate elsewhere in the country, but the location of government investment is an even more important inducement for business location. In the past, our government has located all functions in the PWV including all government departments, the defence force headquarters, as well as all major government investments in the economy and public corporations.

Various governments have deliberately moved their Capital cities away from their economic and business hubs in order to promote a more balanced economic growth pattern. Examples include Rio to Brasilia, Dar Es Salaam to Dodoma, Malawi -- Zomba to Lilongwe, Lagos to Abuja.

6. **Reduces influence of the bureaucracy on political leadership**

The separation of the powers of government has now become a key tenet of modern democracy. This particularly important in South Africa today where there is a fear that the bureaucracy could exert undue influence over the legislature. Physical separation of the functions reinforces the separation of powers.

7. **In keeping with new trend towards decentralised government**
As communications are becoming better, various governments are moving some government functions out of the central capital to other locations for development and cost reasons. In Britain some departments have been moved out of London, while in Germany some departments have been left behind in Bonn when the main organs of government are moved back to the traditional capital of Berlin.

8. **Greater opportunities for inter-government contact**

The Western Cape is considered one of the most beautiful locations in the world, with great potential for international tourism. This has a role for government too, giving South Africa a better opportunity to serve as host for international political conventions, summits, etc. if the legislative arm of government is located in Cape Town. Time magazine noted that a survey of USA diplomats rated Cape Town as the most sought-after diplomatic posting in the World. Now that South Africa is back on the world stage, it is appropriate that it puts its best foot forward in an effort to strengthen ties with other countries.

**PROBLEMS RESULTING FROM A SPLIT CAPITAL**

Operating a split capital does however entail various costs. The Pretoria city fathers, worried about the image of apartheid's capital serving as a capital in a non-racial South Africa, alarmed at the move of the Gauteng provincial government to Johannesburg, and fearful that the decentralisation of functions in the New South Africa would damage their city's property values and its economy, based almost entirely on bureaucracy, launched a pre-emptive strike to move parliament to Pretoria. They produced two "research documents" arguing their case, and launched a massive advertising and public relations campaign to persuade the country that it would be in the nation's best interests to move parliament to Pretoria. Their arguments, some of which have more validity than others are listed below, with comments on each.

All of Pretoria's arguments could also be made to support another location in Gauteng, outside the infamous Pretoria itself, although it is probable that the cost of a new parliamentary complex would even greater outside of Pretoria.

1. **Split capitals were the product of colonial compromise**

A poor argument. The reality of the difficulty of uniting a large and diverse country is still a fact underlined by the results of the first democratic election. This argument merely tries to associate Cape Town with colonialism and Pretoria with democracy!!!

2. **Less efficient government**
While modern travel technologies, communications and information technology have clearly reduced the burden of retaining contact between Pretoria and Cape Town, the need for longer sessions and the difficulty of the new government to manage, control and transform a conservative, self-serving, uncooperative and inefficient national bureaucracy in Pretoria does impose costs on the personal life of cabinet ministers and senior advisors and officials. It also results in financial costs and reduced efficiency in controlling the bureaucracy.

This question of ensuring the efficiency of government needs to be addressed. The question is how to do this -- moving parliament is a very expensive solution in financial and other terms. The new rules of parliament which require cabinet ministers to be in Cape Town for only two days a week when parliament is in session, go a long way towards addressing the problem, and other administrative solutions may also be necessary.

3. Extra expense to operate two capitals and to commute between them

There are undeniable extra costs associated with holding parliament in Cape Town. The government estimates these costs at R 22 million for the 1993 session. The Central Economic Advisory Service, using different assumptions, comes up with a figure of R 35 million. Pretoria argues that the costs are nearer R 70 million per annum, although to get to this figure it has to make some heroic assumptions and impute all sorts of values.

The change in the rules of parliament has, however, dramatically reduced the financial costs of the split capital system since it is no longer necessary to move senior bureaucrats to Cape Town for the duration of the parliamentary session.

The problem which Pretoria faces is that the annual costs of operating parliament, even under the old rules, are far less than the annual interest cost would be of building new parliamentary facilities. Pretoria tries to address this problem by presenting various cost estimates of a low cost parliamentary complex and then further reducing the cost by selling off the parliamentary facilities in Cape Town. An analysis of their estimates does suggest that they make a number of fundamental errors in cost-cutting, and the reality is that after the political decision is made, the costs of the project will escalate. (The cost of moving the Gauteng provincial offices has already more than doubled from R 20 million to R 43 million.)

Australia recently built a new parliamentary complex for their 223 parliamentarians in the Capital, Canberra. The total cost of this complex in 1994 Australian Dollars was $Aus 1,458 billion. At the current exchange rate of (R2.65=A$1.00), this translates to a cost of R 3,863 billion. The reality is that is unlikely that South Africa could build an effective and efficient parliamentary complex for 4
members and senators for much less than this amount, and certainly it would cost much more than 0 billion rand. The interest bill at 15% on one billion is R 150 million annually, R 300 million on R 2 billion, R 450 million on R 3.0 billion and R 580 annually on a cost of R 3,863 billion. This is far greater than even Pretoria's inflated estimate of the cost of operating parliament in Cape Town.

4. Pretoria is located closer to the major population concentration of South Africa.

The value of this argument is not clear. It may be an argument for locating the administrative centre Pretoria where it is anyway, but otherwise it is hard to discern the benefit. The point of government policy, surely, should be to encourage a spread of the nation's population, not to foster over-concentration.

5. All of the countries ethnic groups are represented in the Pretoria region.

Again, it is hard to see the point which they are making. Anyway, notwithstanding this fact, it appears not to have had much of an impact on employment equity in our national civil service.

Pretoria sometimes insinuates that it is a more "African city" and that Cape Town is somehow more European and therefore alien. This hardly seems an appropriate argument, and could only fuel arguments for the political disintegration of the nation. Pretoria hardly has a reputation to be proud of either South Africa or abroad.

6. Pretoria is more accessible to the major lobby groups and economic and social stakeholders.

Hardly a democratic argument. One can easily argue that proximity to the existing vested interest groups is a reason not to locate all political functions in Pretoria.

7. Pretoria is closer to the regional capitals of South Africa.

Another marginal benefit. It might reduce the travel costs of a new government slightly, but is hardly important consideration.

8. More international legations have offices in Pretoria.
So what. They will need them there anyway since Pretoria should remain our executive centre.

More important the need to have two diplomatic presence's, in Pretoria and Cape Town, could impose big burden, especially on some of the poorer third world countries now opening embassies in the country. But this is easily dealt with, by not requiring dual embassies.

9. Pretoria is closer to the capitals of neighbouring countries.

This is true, but it is hard to see how this should influence the location of the country's parliament. might be a good reason not to move the executive, but hardly argues for a move of the legislature. The counter argument of the acclaimed beauty of Cape Town being more able to attract international interest from Europe, Asia and America would counter this argument.

When South Africa has to present its best face to the world it puts Cape Town forward. It is not by chance that the World Cup rugby opening ceremony was held in Cape Town.

It is clear that none of the previous is so serious as to make it necessary to move parliament - at most of them can be addressed more easily and appropriately through other means.

ALTERNATE PROPOSALS TO MAXIMISE THE ADVANTAGES AND MINIMISE THE COSTS OF A SPLIT CAPITAL

1. Move parliament to Pretoria or some other location in the PWV.

Of all of Pretoria's arguments, only the efficiency concern really needs to be addressed, and it would be useful if this could be done in a way which further reduces the costs of operating split capitals. The other arguments cannot compare to the benefits gained by operating split capitals. This could be achieved by moving parliament to Pretoria, or another convenient Gauteng location.

The disadvantages of this option include:

The potentially enormous cost of building the necessary replacement facilities.

The cost of up to R 2,0 billion could impose an interest cost of up to R 300 mil per annum, less a saving of about R 30 million from not having to travel to and from Cape Town. We would thus impose additional cost on the government debt of about R 270 million every year.

Loss of credibility in local and foreign financial markets
Expect negative comment about the government's commitment to fiscal prudence and development priorities as the costs escalate and parliamentarians’ first concern seems to be their own comfort.

**National division and dissension.**

Debate over the costs of a new parliament would distract the nation from its focus on rebuilding our nation and the RDP.

**Damage to the Western Cape and National economy.**

As head offices moved from the Cape to the newly reinforced centre of all power in South Africa, the Western Cape economy would suffer, with an inevitable effect on the national economy. Growth in international tourist arrivals would probably be lower than would otherwise have been the case.

While alternative uses could be found for the parliamentary facilities in the Cape, there do not appear to be any particularly valuable alternative uses for the site.

**Secessionist elements in the Western Cape would be strengthened**

Moving parliament, of which the Cape is very proud, would make the Western Cape feel deserted. At worst this could fuel a major breakaway effort, exacerbating the problems already resulting from the KwaZulu-Natal disaffection.

**Cause further over concentration of economic and political power in Gauteng**

The economic pre-eminence of the PWV would be further strengthened, leading to more migration from outlying areas to the centre. This further over concentration would stretch the region's infrastructure with vast costs and government would probably be forced to spend even more to try to "bribe" businesses locate in sub-optimal locations away from the centre of power and population growth.

**Loss of all other advantages of split capitals.**

South Africa would acquire the dubious distinction of being the first country to move more government functions to the centre of the nation's economic heart. All the other advantages of split capitals would also be lost.

**The people of South Africa don't want to move parliament**
Notwithstanding Pretoria's campaign the people of South Africa have consistently shown in opinion surveys, by a margin of 2:1 that they believe parliament should stay in Cape Town. The largest of the surveys was conducted by IDASA and the tables below show the response to the following question:

Q. Do you think that the parliament should remain in Cape Town where it presently is, or do you think that it should be moved to Pretoria, or have you not thought about it?

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<th>PRETORIA</th>
<th>UNSURE</th>
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<tr>
<td>Northwest</td>
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A possible right wing backlash

A large section of the population see Pretoria as the possible headquarters of their Boerestaat. If Pretoria were to be confirmed as the only capital, and parliament moved there too, it could dash their hopes at this delicate stage of national reconciliation.

While this solution would reduce the cost in terms of time and efficiency in managing and transforming Pretoria's bureaucrats, given the costs associated, it hardly seems an appropriate solution.

2. Keep the current system intact

The current system of split capitals could be kept intact, but with attention given to using the new technologies to streamline the contacts between the twin capitals. In many ways the annual move between Pretoria and Cape Town is still handled in the same way as it was in 1910. The judicious use of video-conference facilities, information transfer facilities, etc. could greatly reduce the burden operating the current system.

3. Make adjustments to the operation of parliament to reduce the inconvenience and cost operating split capitals.

Another option would be to change the rules governing the operation of parliament to reduce the burden of cabinet ministers and senior officials. This would enable the nation to continue to draw the benefits of split capitals without the administrative burden, or the costs of creating a new parliamentary complex.

Various options could be explored. One example would be to follow the Dutch approach in terms which cabinet ministers are drawn from parliament, but once they become ministers they do not have take up their seats in parliament, but are responsible for administering their departments. The vacant seats are taken up by the next persons on the party lists. There are many advantages in this approach terms of separation of powers and it also serves as a good example of how we could keep the advantage of a split capital without paying the costs.
CONCLUSION

A review of the costs and benefits shows that there is no good reason to move parliament from Cape Town. The country would face enormous financial and other costs and would lose the benefits of our current split capital system. The main result would be to cripple the Western Cape economy and reduce the national and international profile of Cape Town, making necessary vast new government transfers to the Western Cape to re-establish its damaged economy. The sooner a decision to keep parliament in Cape Town is made and confirmed, the sooner the costs of uncertainty associated with the debate will ended.
BLACK MANAGEMENT FORUM (BMF)

The Black Management Forum (BMF) is an organization committed to the development and empowerment of managerial and business leadership among black people in South Africa and, in particular, the Western Cape. We wish to express our support for the retention of Parliament in Cape Town. The following points are cordially submitted for the attention of Theme Committee I of the Constitutional Assembly, Character of the Democratic State:

Reconciliation and National Unity will be destroyed

The loss of Parliament in the Cape will promote regional isolation and separation and will destroy any thoughts of reconciliation which in South Africa will be an essential determinant for the upliftment of our people.

For many Capetonians, the loss of their Parliamentary role would be seen as a punitive reaction to the 1994 election results in the Western Cape region.

The divisiveness wrought by the loss of Parliament and the consequent stimulation of provincial grievances and resentments would only serve to undermine the crucial task of national unity and reconciliation. The relocation of Parliament would detract from the Government of National Unity's commitment to the task of building a national consensus.

Economic Considerations

The long term economic considerations are of pre-eminent concern as the presence of Parliament in Cape Town is one of the main contributing factors to the economy of the Western Cape. What is beyond dispute is that the relocation of Parliament to Pretoria would impose severe economic losses particularly in Cape Town's CBD. Lots of businesses (black and white) in this area will therefore be negatively affected since part of their market will dissolve. If one notices in the CBD area in Cape Town today, lots of black small business entrepreneurs operate along the side walks.
These businesspersons depend on passer-by’s many of these passer-by’s are indeed employees of parliament. If these employees of parliament lose their jobs or are transferred, the small black entrepreneur will be severely impacted and may have to close their business. Will the national government be willing to ensure that these businesspersons have some degree of income if parliament is taken away?

The most conspicuous economic damage will occur in terms of the property market. The immediate reduction in the demand for office space will be accompanied by downward pressure on rentals and further resulting in a steep reduction in the demand for office-related labour. This, in turn, will bring about a decline in property values and result in a decrease in new building activity. Again this abandonment of office space will also have a negative impact on business and employment in the region.

Cape Town's economy is very much service oriented in nature and, therefore will be vulnerable to the shifting of parliament. The loss of Parliament will directly affect the demand for services typically supported by or contracted out by Parliament, as well as, any agencies reliant on or connected with its activities. These include foreign embassies, media outlets and various lobbies. Cape Town stands to loose much more than simply Parliament itself.

For example, at risk are the services of caterers, computer and communications specialists as well as research and information personnel. Restaurants, hotels, and taxis in Cape Town will feel a very tangible economic effect brought about by decreased demand.

Less tangible economic effects brought about by the loss of Parliament are also likely to result. With a greater degree of isolation from national public life there will likely be a corresponding decrease in the level of domestic and international business interest. Ultimately, Cape Town will be marginalized rather than receive the promotion it merits as an asset to South Africa and the rest of the world.

**Over-Concentration**
To further entrench the domination of Gauteng is clearly not in the national interest and works against the integrity established by the government commitment of building national unity.

South Africa's economy is dominated by a very powerful economic hub in Gauteng. Business in the Western Cape will suffer if parliament were to move and Gauteng businesses will become stronger (at the cost of domestic businesses). The location of some government functions in the Cape makes it an appropriate head office location (75 quoted company HQs compared with Durban's 32). Parliament attracts foreign embassies, trade missions, the media, and service contracts which strengthen the local economy and further promote the establishment of black businesses.

Cape Town's status as the location of Parliament gives it significant international functions in the former PWV including all government departments, the defence force headquarters in addition to all major government investment in public corporations and the broader economy.

**Cost Considerations**

Realistically, any cost estimate for the relocation of Parliament, however carefully executed, could never be accurate. Therefore, the ultimate cost will be shouldered not by the people of the Western Cape but by the nation as a whole. Pretoria's estimates and arguments are one-sided in concentrating only on the benefits to Pretoria while the considerable disadvantages to the Western Cape are not addressed.

Furthermore, accurate forecasts of the cost of large capital projects of this kind, as was the case in Germany and Australia, have proved impossible. Indeed, the escalation of costs from the time of the initial decision to move until the completion of the project is one the factors that render the making of accurate estimates all but impossible. This is a fact Pretoria fails to admit.

**Concluding Remarks**
Black Management Forum (BMF) cannot on this basis support the moving of parliament from Cape Town. The uncertainties are enormous and decisions on this basis could prove disastrous to the economy of the Western Cape.

Pretoria has failed to acknowledge the negative impact the moving of parliament will have on businesses in the Western Cape but instead has highlighted rather selfishly the benefits Gauteng will experience.

This is clearly goes against the type of "new South Africa" we have fought for all these years.

**BMF therefore strongly supports the retention of parliament in Cape Town.**

**We thank you for the opportunity of expresses our views.**

P.M. Nyewe

CHAIRPERSON: BMF, Western Cape
Submission
from
Molo Songololo
to the
Constitutional Assembly
on
Children's Rights

In 1949 the National Party came to power and set about introducing its policy of Apartheid based on institutionalised racial discrimination. They legislated a wide range of policies which disenfranchised and denied the majority of South Africans their citizenship, excluding them from political decisions.

The Population Registration Act of 1950, which classified the population of South Africa into four categories, namely 'White', 'Coloured', 'Indian' and 'African'; the Pass Laws and Job Reservation Acts, restricting the movement of people and created cheap forced labour; the 'Homelands', created along ethnic lines; and the Group Areas Act, which uprooted families to live in barren areas was legislated for and enforced to ensure 'White' domination. Apartheid brought about shocking disparities and inequalities resulting in different status in living conditions, education, health, welfare and employment for different race groups.

The colour of a child's skin determined to what extent he/she grew up and were denied or allowed to enjoy his/her basic human rights. Our children suffered. Millions of them grew up underfed, poorly housed, receiving apartheid education and with no or inadequate health services. The squalid conditions in which most of their families found shelter; coupled with high unemployment, violence, abuse and alcoholism, saw many children having to fend for themselves and their little brothers and sisters.

Children and young people played a central role throughout the struggle against apartheid. They have been shamboked, teargassed, jailed, killed and left scared (for the rest of their lives) in defence of their rights. At the same time they experienced the brunt of political violence and the deteriorating family and community life.

When the children of South Africa drew up the Children's Charter of South Africa in 1992 they said, 'Where is the New South Africa you all talk about? Show us, because we do not see it'. Children recognised that they are still affected by apartheid policies and continue being abused, neglected and abandoned by the people of South Africa. They presented their charter as a basis to ensure that their survival, development and protection are put first and not last on the political agenda. And in particular for their rights to be placed firmly within the future Constitution and Bill of Rights.
Marking the end of Apartheid, the State President Mr Nelson Mandela in his inaugurating speech said, ‘Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another...’ The new dawn of democracy ensures for the restoration of citizenship and human rights on all the people of South Africa. Our democracy provides for different groups to stand up for their own interest and rights. Children and young people are not in a position to do so. They do not vote or take part in the political process which determines national and regional policies that affect their lives.

Children make up the last major group in our society whose rights have yet to be fully recognized and enjoy full protection thereof. The needs of children often take second place to the demands and requirements of other groups. In general, children's policies receive insufficient care and attention and are often not looked at from a child's perspective. Services for children and young people are often dispersed over different departments in government and local authorities. There is no one authority responsible to implement and ensure the enforcement of the rights of children.

While some rights have been gained for children under a special clause in the 1993 Constitution of the Republic of South Africa, the vast majority of children are not aware of these constitutional rights. Under Section 30 of The Constitution children have been afforded the following rights:

- the right to a name and nationality
- the right to parental care
- the right to security, basic nutrition, health and social services
- the right not to be subjected to neglect or abuse
- the right to be detained under conditions and be treated in a manner that takes account of his/her age, as well as rights for persons in conflict with the law.

The Constitution also defines children as those people under the age of 18 years. This means that when children become 18 years old, they become adults (age of maturity). Until children reach maturity, The Constitution says how they should be treated and protected, but it does not spell out the obligation of the state to ensure that children enjoy these rights. The well-being of our children will require political action at the highest level. The government must give a solemn constitutional commitment to give high priority to the rights of children.

The United Nations Convention on the Rights of the Child provides the government with a political obligation towards children and young people. A commitment to implement the Convention in the long-term will ensure that children's rights receive the political priority it deserves. The time has arrived for South Africa to seriously consider ratification of the Convention. Similarly the Children's Charter of South Africa, which will be evaluated at the end of this year by children themselves, must be adopted and given full recognition by the government as a framework of children's demands and needs concerning their rights.

Molo Songololo, after much consultation with children and young people, on their behalf and on behalf of all the children of the Republic of South Africa, make the following submission to the Constitutional Assembly for the constitutional entrenchment of Children's Rights:

2. The following provisions be included in The New Constitution:

   a. children's right to early childhood development, and free primary and secondary education.
   b. children's right to express their opinion and right to be heard in all matters that affect his/her rights, protection and welfare.
   c. children's right to free legal representation in all matters concerning his/her protection and welfare.
   d. children's right to be protected against violence; political, social and domestic.
   e. children's right to be protected against sexual abuse and exploitation.
   f. children's right to special attention when in difficult circumstances.
   g. children's right to grow-up in a safe and healthy environment.
   h. the right of disabled children to full entitlement and enjoy of all the rights set out for children in the constitution in his/her best interest.

3. That The New Constitution obligates the state to make provision for the creation of a Children's Rights Commissioner. Such a Commissioner shall:
   1. be independent from the state
   2. examine ways in which present policies or practices fail to respect the rights and interest of children and young people,
   3. propose ways in which central and regional government policies that affects children can best be implemented.
   4. consult with children, young people, local communities, interest sectors, central and regional authorities to assess and report annually on the progress of or failure of the enforcement of rights for children.
   5. ensure direct input from children into the Commissioner's work.
   6. continuously evaluate the way forward to a culture of children's rights

The continued violations of children’s basic rights will have major implications for the survival of children and the future of South Africa. South Africa now have the opportunity to assure children that their well being will receive political commitment and action at the highest level.

Children’s Rights
I want to have peace in South Africa.
And I don't want fighting.
I would like in each house love and peace.
All children must be obediyen.
Please let the poor children get food and no more starff.
I would like to see South Africa a beter place for us.
Children must be protected by their Mother and father.

From: Angelica Davids
Notes:
The Children's Charter of South Africa
The UN Convention on the Rights of the Child
Children's submissions to Constitutional Assembly
Taking Children Seriously - by Martin Rosenbaum and Peter Newell.
26 May 1995

Re: Submission/Equality/Sexual Orientation

Our Organisation is the largest gay and lesbian sports group in the Western Cape, representing both men and women, and a wide range of ethnic groups.

We look forward to the day that someone's sexual orientation is no longer an issue, to the day when joining a gay sports group would be as unnecessary and absurd as joining a red-heads' sports group or a left-handers' sports group. Unfortunately that is not yet the case. Our members choose to practise their sports in a gay environment because there is real and current discrimination against them in society.

The guarantee of equal rights in the interim constitution has given gay South Africans a sense of citizenship and national pride, and a desire to help build a better country for all of us. Last year for the first time gay South African sports-people carried the flag at the International Gay Games in New York. At last we can say with dignity that South Africa is our country and we can take our place among its rainbow people.

The interim constitution has also helped to lessen discrimination and hostility many gay people have felt, largely by raising awareness that homosexuality is neither pathological or criminal, it is simply the way some people are.

For these reasons, we believe that it is vital that the phrase "sexual orientation" should be retained explicitly in the equality clause of our new constitution.

R. Richardson (Mr)
Chairman
Cape Organisation for Gay Sport
24 May 1995

Dear Sir

SUBMISSIONS BY HUMAN RIGHTS AND ADVOCACY SECTOR

Please find enclosed submissions by the above forum on theme committee 5.

Thank you

Yours faithfully
LEGAL RESOURCES CENTRE

(SGD) R M LYSTER - DIRECTOR

(End of page 1)

SUBMISSION ON MATTERS RELATING TO THE JUDICIAL AND LEGAL SYSTEM

URGENT ATTENTION: MR N TAFT
FAX: 021 241160
THEME COMMITTEE 5 - CONSTITUTIONAL ASSEMBLY
DATE: 25 MAY 1995

The following submissions are made by the HUMAN RIGHTS AND ADVOCACY SECTOR OF THE NGO FORUM (NATAL), which comprises the following non-governmental organizations:

Lawyers for Human Rights (Durban)
1. INTRODUCTION AND BACKGROUND

There is an urgent need to review several aspects of the office of the Attorney General. The role, status and independence of this vitally important public official was debased under the previous government, under whose auspices the Attorney General lost any real notion of independence, and became a primary political tool for the government.

The recent amendment to the Attorney Generals’ Act has not constructively addressed the problems existing in the past, and arguably, the situation is now worse than prior to the amendment. The Attorney General is not in any manner accountable, to the public or to the Minister, he/she has unassailable security of tenure and the manner of appointment has not been addressed at all.

The aspects which warrant immediate consideration and which will be dealt with in this memorandum include:

- appointment, re-appointment and term of office of the Attorney General
- accountability and independence
- operational methods

2. APPOINTMENT PROCESS, TERM OF OFFICE AND RE-APPOINTMENT

It is recommended that an entirely new system of appointment be instituted, and that legislation be introduced to require incumbent Attorney Generals to submit to the proposed process.

It is recommended that rather than introducing the concept of elections for Attorney Generals, such as exists in countries like the United States of America, that the appointment process be under the jurisdiction and direction of the Judicial Services Commission. The Commission should be responsible for calling for submissions from the public and conducting public hearings and interviews. The selection process should be open and transparent, as in the case of appointment of Constitutional Court judges.

It is recommended that persons appointed to the position of Attorney General should serve a limited period of office, and the maximum period recommend is four (4) years.

It is recommended that re-appointment should be subject to a
reviewing process by the Judicial Services Commission. The Commission should be required and empowered in making its decision, to call for and to take account of reports and memoranda etc. from the Minister of Justice, members of the public, Non governmental organizations, Law Societies and fraternities, and other organisations who may wish to submit reports on the conduct of the Attorney General.

2. ACCOUNTABILITY MECHANISMS

Aside from the public accountability which will automatically flow from a transparent appointment process described above, it is also desirable to legislate more directly in this regard. In the past, the Attorney General exercised no independence. Following the recent amendment, carried out by the previous government, the Attorney General is completely independent and unaccountable. Neither situation is desirable.

Currently, the only accountability mechanism lies in the requirement for the Attorney General to give reasons for his refusal to prosecute to the Minister. The Minister cannot require or force him/her to prosecute.

It is recommended that Attorney General should be required to supply full written reasons to the police and/or the complainant as to why he/she declines to prosecute.

It is recommended that the Attorney General should be held accountable through the creation of the post of National Attorney General. The appointment of a civil servant at national level to whom all Attorney Generals must report will temper the unfettered discretion of provincial Attorney Generals, and act as a check on abuses. The National AG must be have executive authority over all Attorney Generals, and have the overriding decision to require any Attorney General to prosecute. He/she should also be required and empowered to call for and receive reports from police/complainants regarding problems with the Attorney General's office.

3. OPERATIONAL METHODS

The current method of operation of the Attorney General also requires attention.

It is recommended that the Attorney General should adopt a more pro-active approach in investigations. In the United States, District Attorneys take control of investigations, direct the investigating officers, visit crime scenes and take an active role in ensuring successful prosecution. This needs to be entrenched in the structure and operations of the AGs office. This will this improve the quality of police investigations and evidence, and will go some way to ensuring successful prosecutions. In many cases, because of entrenched positions of local policemen, investigations are deliberately not carried out efficiently, and the quality of the evidence in the docket is such that the Attorney General is not able to prosecute.

It is recommended that the Attorney General be given the authority to direct that witnesses be placed in witness protection programmes, and that they should also have
be authorized to exercise discretion on the question of limiting, granting and/or refusing bail in serious matters.

It is recommended that Attorney Generals be empowered, in consultation with the national Attorney General and the Dept of Finance, to delegate their authority and powers to appropriate advocates in the private sector, who will conduct prosecutions on behalf of the Attorney General’s office. This system has been effectively operating in Britain for many years.

(End of page 5)

It is recommended that the Attorney General be empowered to institute a prioritization procedure to ensure that prosecutions take place effectively and efficiently, particularly in areas where there is widespread social and political violence.
CONSTITUTIONAL ASSEMBLY - THEME COMMITTEE 5
RESPONSE TO INVITATION DATED 20TH APRIL, 1995
RE: BLOCKS 6-9: REACTION TO QUESTIONNAIRE BY THE JUDGES OF THE
NORTHERN CAPE DIVISION OF THE SUPREME COURT

BLOCK 6

1. Attorneys-General should continue to be appointed as in the past, i.e. on merit after
   assessment by the Public Service Commission.

2. There is no reason to expand the functions they presently perform. Basically they institute
   and control prosecutions, and there is no other branch of the administration of justice upon
   which they can be empowered to encroach.

3. The ultimate control of prosecutions should remain vested in professionally qualified and
   independent public servants, and not in a political figure who will be open to the criticism
   that he/she is partisan. It is not in the interest of the administration of justice that there
   should be even a hint of political bias with regard to the institution or otherwise of criminal
   prosecutions.

4 - 7 The Constitution should safeguard their independence and broadly provide for their
   appointment and functions as is done in section 108 of the Interim Constitution, but other
   aspects of their appointment and duties should be dealt with in legislation; this also applies
   to other officials in the judicial system.

   A Constitution should lay down a broad framework and broad principles for the operation
   of the judicial system, but should not be a vehicle for matters of detail.

BLOCK 7

1. Section 107 of the Interim Constitution deals adequately with language and interpretation. It
   lays down the broad principle, and if it is felt that there are further matters of detail which
   need to be prescribed, this can be done by legislation or even by way of regulations.

2. The relevant principles are adequately dealt with in sections 35 and 232 of the Interim
   Constitution.

3. There appears to be no reason to expand upon or curtail the provisions of section 231 of
   the Interim Constitution.

BLOCK 8

1. Matters such as legal education and the regulation of the legal profession are not fit to be
   dealt with in the Constitution, and should be the subject of legislation. The only aspect of
   the legal profession which it would be proper to include in the Constitution, is the
recognition of the existence of the bar and the side-bar, together with a safeguard with regard to their continued existence.

2. It is not considered that there are any current provisions which are unconstitutional.

**BLOCK 9**

There can only be transitional arrangements if there is an intention to move from one system to another, and there appears to be no valid reason for moving away from the present system governing the administration of justice. The only transitional arrangements which may be necessary would be those presently contained in section 241 of the Interim Constitution, except that the necessity for some of them has already fallen away. If the Hoexter Commission has not completed its task when the new Constitution is considered by Parliament, it may be necessary to include a provision similar to section 242 of the Interim Constitution with regard to the rationalisation of the Supreme Court.

J. J. KRIEK

JUDGE PRESIDENT

NORTHERN CAPE DIVISION

1995\05\31
26 May 1995

CONSTITUTIONAL PROPOSALS:
From People's Courts to the Constitutional Court;

Integrating Community Courts,
Unifying the Euro-American and African Justice System

In the context of proposals relating to the need for accessibility of the existing Justice System of our country and the need to affirm African culture, and the need to make affirmative action programmes more than window dressing, I herewith submit draft proposals in the form of a conceptual structure which will integrate community courts into a dispute resolution system where both the Euro-American and African systems are compatible. I have kept in mind two primary considerations: firstly, this country's legal system has to be user friendly to foreign investors for purposes of world trade; and secondly, the need for affirmative action in the sense of affirming the value and worth of African culture, in this case, insofar as dispute resolution processes. The proposals are intended to draw the widely diverse legal structures into a cohesive functional system with an in-built potential for orderly growth and development. I believe that these concepts, because of their elegant simplicity, are easily workable.

I have researched and discussed the issue and relevance of so called "peoples courts" with involved members of various communities, including township communities and various people of diverse professional background, including specialists in the field of African customary law and I wish in particular to thank Professor Jan Bekker for his contribution.

This document has been prepared by Mr Stan Posthumus on behalf of and in collaboration with various members of the Institute of Mediators although individual members may dissociate themselves from the views express

The views expressed here relate to the legal system as well as the constitution. I have thus referred a copy to the Minister of Justice and yourselves. We submitted these proposals simultaneously through your offices and the offices of the Minister of Justice as my understanding of the process is that suggestions should ideally come from the main role players and stake-holders such as ourselves.

S. POSTHUMUS
Preface

The Mediation Foundation is a completely independent non-profit educational Trust. Its aims are the enhancement of individual and community conflict resolution capabilities in South Africa and the development of a Mediation Profession with the same aims. Established in 1989 the Mediation Training Institute, which started off by training family mediators, has grown to be only one wing of the Foundation which has become involved in a wide range of activities aimed at developing and implementing dispute resolution practices. The Foundation incorporates also the Institute of Mediators, a group of lay persons and persons from the professions of law, social work and psychology who have been trained as professional mediators. The trained mediators are using an indigenous model we have developed, namely the dialectic re-construction model, in diverse fields, and with great success. The elegant simplicity of this model creates compatibility and allows the adversarial euro-american-centric culture to comfortably co-exist with the culture of different African communities.

This model has great potential in the field of preventive work in conflict resolution and it is an ambition of the Foundation to further its school and youth programme as well as a couple-based, pre-marriage programme throughout the country. To date, the expansion of these programmes has been limited by our lack of resources.

Acknowledgements

I am indebted to my family and to my friends who have given their time and encouragement to these efforts, especially Prof. James Mowatt of the University of Durban Westville Law Faculty, Mr Chris Schembri of the University of Natal Law School, Mrs Sandra Pretorius of the University of Pretoria Sociology Faculty. A special word of thanks to Adv. Frances Bosman for her invaluable input and ideas relating especially to the Family Courts. And I am indebted to Prof. Jan Bekker, a recognised authority on African customary law, for his input. I would also like to thank the Community Dispute Resolution Trust (CDRT) for their willingness to discuss their work and ideas with me, and for inviting me to participate in their conferences.

1. Professor J C Bekker is editor of a standard textbook on South African customary law, namely Seymour’s Customary Law in Southern Africa and past Dean of the Faculty of Law at Vista University. He has commented favourably on these proposals.

2. The work being done by the CDRT is invaluable. Any criticism I may have does not in any
In order to achieve a clear view of the concepts in these proposals as a whole, it may be necessary to put aside one's own ideas which may interfere with the process of proper consideration of the ideas expressed herein. This proposal is intended to be an integrating design concept which will unify all the aspects of the administration of justice or as I would rather put it, the resolution of disputes in South African society. The proposed model has been dialectically constructed from the synthesis of two dispute resolution models, namely: the formal Euro-American based adversarial model, and the non-formal (community based) dispute resolution model typical to African culture.

These proposals focus in the first instance on the settlement of disputes at the social roots of society (the family and local communities). They extend then logically to apply to larger issues (labour disputes and local government) and finally to the constitution and the issue of national (political) dispute resolution. The principle sought to be achieved is that the structure ought to be consistent in respect to processes available to disputants no matter the nature of the dispute nor the level of the dispute.

The design itself is instrumental in bringing disputing parties together through the process of dispute resolution. This applies equally to individuals, groups and our country's leaders and their political groups.

Implicit to our approach is the underlying motive of affirmative action, but not in the sense put forward by, amongst others, Trevor Herbert (Feb. 1994) in his book *Affirmative Action in the South African Work Place* comments on Affirmative Action:

"The term has as its root the idea of giving preference or first privilege to those who previously had been disadvantaged or marginalized"

We do not believe that preference or first privilege ought to be given to anyone or any group, political, social or economic. Trevor Herbert's metaphor of Black eagles leaving the chicken coop to reach great heights is a top down approach. We believe in affirmative action in the sense of affirming African culture, and in the sense of valuing individual and community worth, self respect and human dignity. Here we are talking of doing this through the law, the legal process and Jurisprudence.

**PROBLEMS OF THE PRESENT LEGAL SYSTEM**
system to recognise the following two aspects as fundamental:

The primary need to make the system of justice culturally appropriate and accessible to all. This includes geographic access, affordable access, an understandable and legitimate system, a system which the state can afford, and a constructive rather than a destructive system.

The primary purpose of a legal system is to resolve disputes, either between citizens or between citizens and the State, in a way which will do away with inequalities and empower all participants in and through the process. It can also be expressed as social control or as regulating power. We perceive these as one and the same idea expressed only slightly differently.

The insurmountable handicap limiting the present legal system in achieving these ends lies in the reliance upon flawed American and Euro-centric logic that conflict resolution can only be achieved through an adversarial process. I submit that even those who have recognised this fact have lost sight of how adversarial thinking handicaps creative thought by focusing on differences and problems rather than on needs and the resources available or capable of being created to meet those needs. For example the need for dispute resolution, and how that need can be met can be met.

The call to have a "Community Driven Mediation Tier to the Administration of Justice" (CDRT-submission to the Constitutional Assembly) seeks to promote an entirely voluntary process in forums, distinguished from community courts. We submit that such a proposal is naive and inappropriate; only an integrated system with equality in the law, not a tier-ed system will be acceptable. By way of contrast we suggest a lateral or horizontal, accessible structure, mirrored in all 'superior' or higher structures.

THE NATURE OF CONFLICT RESOLUTION

The Euro-American Adversarial Approach vs. the African Conciliation Approach

From a rational perspective there is no logical difference between the concepts of conflict, dispute and problem. There is a difference in emotional content and complexity of each. The Euro-American adversarial system excludes the emotional elements of disputes by intellectualising and rationalising the system and by formalising and standardising it into the process of litigation. The African perspective, on the other hand, incorporates the human emotional element, and the element of maintaining dignity and self worth in dispute resolution, by for example recognising self-worth and avoiding the loss of 'face'. Disputes are settled through less formal conciliation, usually before a neutral third party, with the support of advisors.

Historically an attempt has been made to superimpose the Euro-American adversarial
The adversarial system and the non-adversarial system are not alternatives, they are different sides of the same coin. On the other side of the conflict resolution coin from the adversarial perspective is a non-adversarial perspective to resolving issues. Processes that accord with this perspective need not disturb the template of the substantive law. The one perspective does not exclude the other, as they can co-exist in harmony, together legitimately providing the community appropriate and accessible resources to resolve disputes.

The African idea of people's courts has, I believe, been met with a range of responses from acceptance to total rejection. One may respond with a debate on whether or not to have people's courts and their fate may be sealed by a political decision, but I submit this will be inappropriate.

In the broadest terms, the needs expressed by those in favour of people's courts are no different from those discussed above, namely the need to legitimately provide, community appropriate and accessible resources to resolve disputes. The needs of those opposed thereto reflect fear of what one might euphemistically call "improper" justice, in the sense perhaps that only the Euro-American adversarial system is understood. We suggest that a deeper analysis will expose conflicting interests and needs to preserve economic, political and social niches. Unfortunately this debate and the need to find an appropriate solution is not likely to be supported by those who benefit most from an adversarial process. (i.e. the legal fraternity)

The concepts and ideas here have been presented as simple and straightforward to avoid the trap of mystifying the ideas and thereby making them unattainable to all.

Combining both adversarial & non-adversarial approaches into a legitimate system

I suggest that the idea of developing the legal system by linking and combining the non-adversarial and adversarial processes, instead of imposing one on the other is worth exploring in order to meet the need for a legitimate system while at the same time calming the fears of the critics of people's courts.

Having used the term "people's courts", I submit that the term community courts is more appropriate, and that they be accepted as non-adversarial in nature, stemming from African culture.

We proposed a structure that would allow parties in dispute to choose between litigation (the adversarial system) and conciliation (or mediation, a non-adversarial system), allowing for both to work symbiotically, with a culture of growth through conciliation. Disputes resolved through mediation in community courts can be referred to the appropriate court for enforcement of the mediated settlement by means of an order of Court but without the necessity for a lengthy court process.
conflict, dispute or problem through the non-adversarial resolution process. Existing Industrial Courts, new Family Courts, and community courts proper (perhaps among others) could all fall under the heading of “non-adversarial community courts”. I believe that this would solve many of the problems of legitimacy, and in fact improve the legitimacy of both the adversarial and non-adversarial courts in the community.

JURISDICTION OF THE COMMUNITY COURTS

The jurisdiction of the community court could be defined according to the community it serves geographically. It could have unlimited civil jurisdiction, but ought to have no criminal jurisdiction, except perhaps the resolution of civil actions as a result of criminal actions. The idea of ‘minor offenses' is a dangerous concept for the legitimacy and continued good name of community courts.

The community court would have concurrent jurisdiction with the adversarial courts, but only to settle disputes in a non-adversarial manner.

Action would be instituted by any party who wishes to use the community court to settle a dispute; or by a respondent who finds himself within the formal legal structure and who wishes to use a non-adversarial process to settle the matter.

The court may make any recommendation to any other court which arises from a settlement of a dispute by non-adversarial means; or endorse to another appropriate court, any joint application the parties to the dispute wish to make, in order to enforce a settlement.

The settlement of civil claims relating to criminal actions can be referred to the criminal justice system for purposes of sentencing after the criminal trial, subject to the proviso that any criminal act giving rise to a civil action, shall first be reported to a police station before being brought before the community court, and the outcome of the settlement of the dispute shall be reported to the criminal court involved for consideration prior to sentencing.

To ensure consistency between the two courts, community representation in the magistrates courts needs to be ensured, in order that community courts gain credibility through mutual respect and co-operation. The collaboration process could be structured through the community police forums or other such community conscious and based forums.

Obviously if appeal mechanisms are appropriate they need to be put in place.

POWERS OF THE COMMUNITY COURTS:

3. Included here would be the justice centres that are being promoted by the CDRT.
adversarial means, by for example mediation, but NO other powers.

The Courts could identify community service type compensation for restitution and compensation to the community, and for rehabilitation purposes.

The community court should have NO power to deliver any judgement, but only power to refer the jointly settled outcome in the form of a joint application for an order in those terms, to the appropriate court, for purposes of enforcement between the parties.

PERSONS PRESIDING IN THE COMMUNITY COURTS:

Respected members of the community properly trained in non-adversarial dispute resolution would be the ideal persons for this role. This may include perhaps election by street committees. They may require specialist advisors on the law or even make use of para-legals. Although the mediators may be able to handle a range of types of disputes, it is foreseen that specialists in certain types of dispute resolution will emerge. Their behaviour as neutral conciliators or mediators ought to be subject to the control of the community forums, whatever form these structures may take.

LEGAL REPRESENTATION IN THE COMMUNITY COURTS:

Anyone may help participants as advisors, and the role of the para-legal may be important here as well as the conventional legal practitioner. Some basic training of para-legals would help the process here especially in the practice of non-adversarial dispute resolution.

The exclusion of legal practitioners from conciliation forums in for example the draft Labour Bill appears to recognise that legal practitioners are trained in adversarial dispute resolution and that the adversarial type of behaviour is inappropriate for conciliatory dispute resolution. We do however believe that properly (non-adversarial) trained legal practitioners may enhance the legitimacy or credibility of that forum.

Legal practitioners may be approached by the parties for legal opinions on vexed questions. This may be done through the person presiding or by one or other of the parties or by the parties jointly.

PROCESS/PROCEDURE IN THE COMMUNITY COURTS

The community courts should adopt a Non-adversarial dispute resolution process.

Choice of Mediation Model / Process to be used in Community Courts

The proposed structure ought to allow for development and change to be gradual and
for six main reasons we can identify:

Firstly, South African law will not necessarily accept a transplant of an adapted legal mediation process that is founded in Euro-American law. The British and American mediation processes have developed from their own adversarial legal systems which are different from the South African legal process. There is no guarantee that such mediation processes will work even as well as they do in their legal systems of origin. Any government importing such models should be wary of Trojan horses. Social conscience dictates that the interests of the people of this country should be protected from foreign exploitation. The underlying motives of those offering support in this field may not be as philanthropic as they appear at first glance.

Secondly, recent overseas research findings on mediation processes report relatively poor success rates in resolving for example divorce related disputes, and we believe it is important that a mediation process succeed in resolving all aspects satisfactorily as an integrated whole, in order to gain credit from success.

Thirdly, mediation has lost some credibility overseas for two main reasons. The cost of mediation is firstly too high, and secondly, the legal fraternity is calling for a return to professionalism because of the low success rate. We can demonstrate that the problems of cost and success can be overcome with the training which we have developed and tested. It is also Afro-centric and compatible with the indigenous African culture of conciliation and building from disputes rather than simply putting out fires which smoulder and break into flame again.

Fourthly, the mediation process adopted needs to reflect the African non-adversarial dispute resolution processes rather than the imported mediation models which have their roots in an adversarial process.

Fifthly, a Euro-American mediation model will help prop-up the adversarial legal system artificially. The eventual collapse of this window dressing would lead to the discrediting of the entire legal process. Further, we submit that the American idea of using affluent volunteers from the white communities is an unacceptable solution in the New South Africa. The adversarial system remains to be exploited by the sophisticated American rights culture entrepreneurs, with no recourse to fair non-adversarial settlements available.

Sixthly, there exists at least one indigenous model of mediation, namely the model developed and used by our mediators and called dialectic reconstruction, which is substantially different from and superior to overseas adversarial based models. It has received wide acceptance by academics and community based mediators. This model was developed by the Mediation Training Institute and has been used and perfected as a legal mediation process since 1989 by members of the Institute of Mediators countrywide. It is not the purpose of this document to expand specifically on this model, but should our proposals be of interest to you we would be happy to elaborate on the specifics of our mediation model.
The legal process of mediation can and should be defined so as to provide transparency, and legitimacy. Until now there has not been a clearly defined set of behaviours which structure non-adversarial dispute resolution or mediation. The procedure and the process of the community court must be defined in such a way that impartiality and neutrality of the presiding person is assured and so that that person is accountable for ensuring a fair process.

The finalisation of the process in the community courts may be formalised by perhaps a standardised joint application to the appropriate court for an order as sought by the parties to enable the enforcement of rights.

The outcomes of certain disputes ought to be subject to scrutiny, for example:

Matters involving children ought to be subject to the scrutiny of the Family Advocate's Office.
Matters open to abuses (e.g. bribery etc.) ought to be scrutinised.

The implementation of such a system ought to be a process designed to achieve legitimacy and establish links with the justice system. Both systems will benefit in acceptance, accessibility, and legitimacy.

FINANCING COMMUNITY COURTS

Community courts ought to be established in the communities for them to be physically accessible. Funding could perhaps be subsidised, but there is no reason why parties should not be required to pay for services if they are kept affordable to all, including the poor. If run efficiently, these centres would take pressure off the formal legal structure. Many N G O's could become involved to lend legitimacy and resources where they are needed.

The above proposals have been made keeping the following factors in view:

a) The needs of parties in dispute can better be served by a non-adversarial dispute resolution process than by an adversarial process.

b) At present there is a shortage of trained mediators to staff such community courts. The demand can quickly and inexpensively be met by training mediators. We submit that

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5. Examples of these structures are justice centres which have already been formed such as those established by the CDRT. It is however necessary that these structures move away from the American/adversarial based style or practice of mediation for reasons mentioned elsewhere in this document.

6. We understand that oversees funders have only committed themselves for limited periods,
especially in the disadvantaged Black communities must be recognised.

c) We believe that lay mediators can and should be trained as professional mediators to fill this gap. Training provided to lay mediators must enable them to function as well as professionals (lawyers, social workers, psychologists) who are trained as mediators. Such non-adversarial mediation training is offered by the Mediation Training Institute and it has been successfully used and tested in many different environments. Training is quick, efficient and inexpensive.

d) We also suggest that members of the para-legal movement could provide an appropriate resource as a nucleus for training. Initial discussions with members of the movement indicate an enthusiastic response.

e) There is a need to reduce court related costs so that the country's resources may better be used, for example on the Government's Reconstruction and Development Programme. We therefore support the idea in the draft rules for the family court relating to the free provision of legal documents by the clerks of court. We recommend further that properly trained and recognised mediators be allowed to prepare certain types of legal court documents. To avoid infringing on the work reserved for attorneys in terms of the Attorneys Act, it is recommended that mediators be allowed to prepare the documents free of charge.

CONTROL OF THE COMMUNITY COURT

Like any legal process of dispute resolution the Community Courts ought to have a built in system of checks and balances to ensure justice and fairness to all. A major problem facing the non-adversarial court is the means of preventing corruption. We suggest that the process be such that transparency is assured. Training in parameters of practice can equip non-adversarial dispute resolution practitioners (mediators) with guides to their behaviour which can be used to evaluate their behaviour in public mediation. Their performance can be measured against these criteria to ensure standardised levels of practice and competence, and the courts can be seen to be transparent to the community.

Community forums\(^7\) (for example community policing forums) of various forms, according to the needs of different communities can form the link between the formal/adversarial justice system and the community/non-adversarial dispute resolution system. These forums can be made up of community members who are elected, together with for example the police and the churches. A primary purpose of such forums ought to be the non-adversarial resolution of community disputes and problems. Such forums could also control the practitioners in the community courts, and ensure compliance with their stated objectives and standards.
settle disputes. One of the remarkable and positive aspects of this type of non-adversarial
dispute resolution is that it can build community spirit or *ubuntu* which is we believe essential
for the upliftment of the country. This idea is in contrast to the adversarial process where one
party is wrong and one is right (or has rights).

**Control Over Mediators or Presiding Officers in the Community Courts**

To facilitate a high standard of practice amongst mediators, and to promote respect for their
function and position, it may be necessary to train teams of mediators with specialist
backgrounds. There is however a shortage of trained personnel who can be freed from their
occupations to provide these new resources. Inexpensive training does exist which is
appropriate for training people selected (say by street or block committees) to be mediators in
order to supplement the professionals.

Certain controls need to be built in:

a) Individual mediators need to be neutral and impartial in order to function effectively
and to retain credibility with disputing parties.

b) In making their own decisions, parties may not make wise decisions in certain
instances.

In regard to children's needs in divorce situations, (for example) a safety net in the
form of the Office of the Family Advocate would prevent harm. To facilitate
mediators' neutrality they ought to be compelled to canvas at least a concise list of
specific needs of children as identified. (by perhaps the office of the Family Advocate.)

Perhaps specialist mediators ought to be trained to deal with specific types of dispute.

The State ought to encourage and support private mediators in order to reduce the costs of
dispute settlement to the State. In order to do this mediators ought to be equipped through
proper training, and controlled by a recognised body. Such mediators require statutory
protection relating at least to confidentiality and litigation. This body must be prevented from
looking after other interests, for example the interests of its members and the professions from
which they come. This body should see that client needs are met, and that society's needs are
met. Such a body should be inclusive, not exclusive or elitist, and have legal powers to
control the practice of mediation. The body's actions should speak of drawing all who can
contribute to the development of the process of mediation into the fold. It should set
standards in training which are developed and recognised in South Africa. The body should
set codes of ethics and standards of practice which must be evaluated against the needs of
parties and society; not against the need of mediators to achieve results.
Statutory protection ought also to be created for mediators in the employ of the State.

**THE NEED TO HAVE THIS STRUCTURE REFLECTED IN THE CONSTITUTION**

I believe that the interim constitution has, built into it, principles which would support these suggestions, namely:

Section 22 provides for the settlement of (justiciable) disputes by a court of law or another independent and impartial forum; and,

Section 24 provides for fair administration of justice; and,

Section 25 provides for a fair trial.

I submit therefore that these suggestions are feasible in that they agree with the "spirit, purport and objects" of the chapter on Fundamental Rights in the interim constitution.

I believe that the new constitution needs to include specific provisions for the implementation of these suggestions. I say this for the following reasons:

Only the wealthy can afford to use the current adversarial system.

In any dispute there is a winner and a loser in the adversarial system. Thus only half of those that can afford to use the system can benefit from it.

Even the Constitution is adversarial being as it is, Rights Based. One can only enforce a right if the reciprocal duty to respect that right is enforced. Up to half of the population can thus be disadvantaged by the majority at Constitutional Court level, and indeed as at any other level down through the adversarial justice system.

Creating the proposed adversarial/non-adversarial justice system would allow greater access to the justice (dispute resolution) system, and greater participation of the community in that system.

**OTHER CONSIDERATIONS**

The exercise of the right to have disputes resolved by non-adversarial means will mean that:

a) All parties can use the system, and can choose between the adversarial or non-adversarial courts.

b) Groups that feel that they are disadvantaged, by not being part of the majority, or
dispute settlement.

c) The country can be protected by community based groups or individuals who wish to prevent the exploitation of South Africa's resources by sophisticated and wealthy Euro-American entrepreneurs well versed in rights litigation.

d) A person or group can choose not to adopt an adversarial approach, but rather one which may yield better results for less cost.

e) The African culture of getting together to settle problems will be protected and nurtured.

f) Such a structure will build the community. It will also affirm the African culture and enhance the feeling of self-worth and dignity through the legal system.

g) Such a system could be an example to the rest of the world where dominated cultures can emerge to their rightful place.

The common needs of parties in dispute:

Annexure "A"

The need for a party to know s/he is making the right decision. It is important that disputing parties be afforded an opportunity to consider objectively, without coercion, the feasibility of conciliation with the interference of overwhelming emotional response to that issue itself, removed. This is especially important for the parties who have committed themselves to the dispute and a need to win at the other party's expense. Disputes can be very sensitive issues, and often decisions are hard to take especially when an ongoing relationship is essential to harmony in society. (This need relates to for example, marriage problems and labour disputes, but also relates to ongoing business relationships.) It is perhaps even harder to go back on decisions that have already been made. A re-consideration does not take away the individuals right to decide his/her own future, rather it allows a disputing party to be sure that s/he is making the right decision.

Parties often need to consider all the issues simultaneously as part of an understandable whole in order that they can be resolved, and not have issues broken down into "legal" aspects and "emotional" aspects that are considered independently as though they have no bearing on one another. It is important that the focus in resolving disputes, and especially in the practice of mediation ought to be on the clients' joint needs and the needs of the parties as a whole vis a vis all the considerations of the dispute rather than simply on individual needs. The parties need to perceive jointly, identify and achieve an integrated, comprehensive, and unlimited understanding of all the issues surrounding the problems in order to facilitate an insight into
Parties need to know the implications of different decisions, what the outcomes can be, emotional outcomes and physical outcomes.

They have a need for a fair outcome.

They have a need to know what the dispute resolution process entails.

They have a need to retain control of the process that they choose. Disputants usually possess the skills and knowledge to resolve conflict themselves, up to the point where their abilities break down and they need the intervention of a third party. They need to have the skills and knowledge they already possess supplemented in order to also resolve the issues surrounding the dispute. When emotional issues become overwhelming and debilitating, disputants with fear of the potentially devastating consequences of non-settlement need the services of a neutral third party who can impart skills and knowledge to them and help them apply it to the end of resolving the dispute themselves. The "parachute in and put out the fire" approach is a failure if the fire starts again and the parties cannot deal with it. This happens especially in labour matters and in family matters where there are reconciliations that do not last. Parties should be able to retain control over their own disputes rather than relinquishing control to a "professional". This reinforces their own self-worth, dignity, confidence and ability to cope with disputes in the future. The mediation process must ensure that this need is attended to.

Parties need to have certainty of outcome. Disputants need to choose their own outcome, not to be uncertain about what a court is going to order. The disputants need the Court to reinforce the mediated settlement with an order that accords with the law of the land.

Disputants need good advice. Although the idea that everyone is supposed to know the law is a pillar of our justice system, this is perhaps not true. Resources offering detailed knowledge of the law must be available, perhaps the para-legals have a role to play here. Ideally an inexpensive look at the outcome of mediation by legally qualified people may protect individual rights by offering advice. The idea that the disputants should decide what is fair has substantial merit, but they should be given sufficient concise information about their rights in certain circumstances. Counsellors, para-legals and lawyers are available for advice, but mediators will compromise their neutrality by giving advice. Thus para-legals could be trained as mediators but mediators do not need to be para-legals.

The parties need to have a resolution of the conflict. Ongoing conflict is harmful.

One needs to lower levels of stress caused by conflict. Stress is not good for people or their relationships.

The need for an effective, efficient service is of primary importance to disputants. Most people in our country cannot afford to use the present adversarial process.
not be left with no alternative, but to take up positions. Any movement or change from a position which has been taken may be seen as losing face. Disputants should also not be coerced into settlements they do not want.

Parties need support from family, from friends, from society, from professionals, counsellors, therapists, lawyers and legal advisors, spiritual support (church and minister / priest) needs to be accounted for in the process.

The parties need to continue with a normal life after the dispute is over.

Disputing parties need to learn conflict resolution skills. Beyond the present dispute, if the parties in dispute are to have an ongoing relationship they need the skills to keep that relationship amicable. The skills and knowledge or problem solving techniques imparted by the mediator should also be generalisable or re-usable in other disputes. This will either help the parties avoid other crises, or help them resolve disputes in their ongoing relationship. Similar events in the future may thus be averted.

Usually parties need to avoid a fight (conflict) and to avoid the need for revenge. The system must mitigate against the taking of revenge.

Once the dispute is settled there is a need to be able to put outcomes in to practice. A jointly reached agreement is more likely to be implemented than one which is imposed by a third party. Disputants need to depart from the mediation session, with the resources, skills and knowledge necessary to implement their decisions and deal with future problems. The mediator ought to ensure that disputants possess these resources, or are offered guidance and information in this regard.

It is important to have disputants needs put before the needs of the mediator. Many overseas mediation models have developed from a need to find an appropriate alternative to the adversarial process, and this unfortunate historical fact helps explain why many mediation services overseas are geared primarily toward meeting the needs of the practitioner rather than toward meeting the needs of the disputants seeking help in dealing with unmanageable interpersonal conflict. In particular the mediator may be presented with the task of facilitating the settlement of a dispute with the focus on achieving a settlement at all costs, where in fact in many cases given conducive surroundings the parties could be helped by the mediator to resolve their conflict without ending their relationship, for example in marriage and labour disputes. A mediator may assist the parties to negotiate a settlement, which may be far removed from conciliation because of the adversarial atmosphere of the mediation. Models of different processes succeed to different degrees in removing the adversarial process.

The mediation environment ought to be non-adversarial and make both parties feel physically, emotionally, psychologically and intellectually non-threatened, in order for it to be conducive to finding the appropriate settlement. Often parties feel more threatened and
example a threat of violence.

It is important that the structure of the mediation is not too rigid and impersonal inhibiting the parties from expressing strong feelings and concerns. Special provision to accommodate the need to release anger and aggression towards another party must also be made.

Parties in dispute need an effective, efficient, available, conflict resolution service. The mediator ought to be able to say that the service offers good prospects of, and usually succeeds in, helping disputants resolve disputes speedily and cost effectively, by the limiting of procedural, personal and societal costs.

[EDITOR’S NOTE: FIG. 1 IS UNSCANNABLE]
INTER-GOVERNMENT RELATIONS

* Inter-government institution should be regulated by the constitution.

* Inter-government institution should supervise and co-ordinate the full spectrum of the society.

The Central Government, who should appoint an independent facilitator, should not be part of a specific party or organisation.

LOCAL GOVERNMENT

* We agree that the local government should provide services to local communities.

* Local government should be autonomous to a degree, particularly in respect of the provision of infrastructure and services to those already having paid for services.

* Traditional leaders should not be accommodated in local governments. This would be racist as Whites do not have such a system (i.e. traditional leaders).

Appointment of Attorney-General and other legal officers

Attorney-General should be appointed following a presentation by the Law Society.

FUNCTIONS OF ATTORNEY GENERAL

a) Status quo should be maintained.
b) Should have access to decisions on the application of law and order, e.g. children guilty of murder who are released.
c) Attorney-General should have final responsibility in respect of prosecution and other functions of attorneys. He should not be a member of the cabinet or have any function on cabinet level.
d) Status quo in respect of Attorney-General’s independence as determined in the constitution should be maintained.

No officials appointment should be addressed by the constitution(?).
LANGUAGE AND INTERPRETING

The constitution should cover language and interpreters in respect of court procedures.

The release of youths guilty of serious crimes is unacceptable.

South Africa, your name.

Your name remains South Africa.

RAPPORTRYERS KORPS
THE NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (NADEL)

THE OFFICE OF ATTORNEY-GENERAL

May 25 1995

1. It is Nadel's considered submission that the current constitutional and legislative
dispensation relating to Attorney's-General is unsatisfactory. These submissions will
address problems relating to the accountability of Attorney's-General and the location of
responsibility for prosecutorial policy, and include specific proposals for the restructuring of
this authority, appointment procedures and designation of functions.

Accountability

2. Nadel is concerned that inadequate provision has been made for the accountability of
Attorney's-General. The Attorney-General Act No. 92 of 1992, promulgated shortly before
the transition to democratic government, shifted the accountability of Attorney's-General
from the Minister of Justice to Parliament (secs 4 and 5). Their accountability to Parliament,
however, is outlined in broad terms; all that is required is that each Attorney-General submit
a report on his activities during the year to the Minister of Justice and that this report be
tabled in Parliament. No criteria are laid down for the form and content of the report and
no indication is given of the mechanism which could be used to ensure that Attorney's-
General are called to account for decisions to prosecute or not to prosecute, or for their
formulation of general prosecution policy. As such, this accountability is superficial and
meaningless.

3. This absence of proper, structured accountability would be unsatisfactory in any situation,
but is of particular concern in the context of post-apartheid South Africa. The incumbent
Attorneys-General are all appointees of the previous National Party government who
systematically applied the laws of the apartheid state. It is of concern that Attorney’s-
General with this background are to exercise their considerable powers in a new democratic
legal order without proper accountability.

4. While it may be possible to structure the accountability of the Attorneys-Generals to
Parliament more substantially so as to make it more meaningful, it is Nadel's submission that
the very principle of accountability to Parliament alone is unacceptable. This principle
effectively constrains the executive branch of government from controlling the development
of prosecutorial policy and undermines the notion that the execution of the criminal law and
the prosecution of crime is a function and responsibility of the executive branch of
government.

The Location of Responsibility for Prosecutorial Policy
5. The situation created by the Attorney-General Act of 1992 results in the effective autonomy and exclusive power of Attorney's-General in respect of proactive formulation of prosecutorial policy. Parliamentary accountability operates reactively and Parliament is not in a position to formulate prosecutorial policy on an ad hoc basis. The powers of the Minister of Justice in this regard are limited to co-ordinating the functions of the Attorney's-General and requesting information, reports or reasons regarding cases, matters or decisions (sec 5(5) of Attorney- General Act 92 of 1992). This means that there is no means of ensuring that prosecution policy is actively developed which reflects the values and pursues the objectives of the democratic legal order and the new constitutional dispensation. This is particularly problematic in view of the abovementioned background of the incumbent Attorney's-General.

6. It is Nadel's submission that the formulation of general prosecutorial policy is, even in the absence of the special circumstances applying to South Africa in transition, an executive prerogative and as such should be under the control of the Minister of Justice.

7. A further problem in relation to policy formulation lies in the devolution of prosecuting authority on a regional basis. While it is important that local prosecuting policy be developed to meet the needs of specific regions, it is also essential that justice is administered equally in every part of the country. The Interim Constitution has established that justice is a national competency and it is accordingly essential that direction be given at a national level.

Proposal for the Establishment of the position of National Attorney-General

8. Against the background of these problems of accountability and policy formulation, Nadel proposes the provision, in the final Constitution, for a National Attorney-General, who would be appointed by the President and be accountable directly to the Minister of Justice and indirectly, through the Minister, to Parliament.

9. The National Attorney-General, it is proposed, would

(a) make recommendations to the President for the appointment of provincial Attorneys-General;
(b) control and co-ordinate the activities and functions of provincial Attorney's-General;
(c) formulate prosecutorial policy on a national basis;
(d) account to the Minister of Justice and, through the Minister, to Parliament, for all decisions taken by Attorney's-General in the performance of their duties and the exercise of their functions.

10. Nadel regards it as important to ensure that the discretion of the Attorney's-General in relation to the prosecution of individual cases cannot be subjected to political manipulation. To secure and protect this independence, Nadel would support a requirement that all directions issued by the Minister of Justice in respect of prosecutions be in written form and be published in the Government Gazette.
Appointment of Attorneys-General

11. Nadel considers it important that the procedure followed for appointment of Attorneys-General should be a transparent one. To this end it is submitted that
(a) the qualifications and criteria to be used in selections should be made public;
(b) the names of candidates for appointment should be made public;
(c) there should be an opportunity for objections to such candidates;
(d) interviews of candidates should be open to the public.

12. Under the current dispensation, appointment of Attorney's-General is formally by the President in terms of Section 2(1) of the Attorney-General Act, No.92 of 1992, within the qualification requirements set out in this section. The process followed in practice, however, apparently involves the Director-General of Justice consulting with all the other serving Attorney's-General and the Commission for Administration in order to obtain proposals of candidates on the basis of merit and seniority. A name is then submitted to the Minister of Justice, who submits the name for appointment by the President after approval by Cabinet. This process, certainly as it has operated until now, has not been a transparent one, as is evidenced by the difficulty involved in establishing what the process is.

13. Beyond the requirements set out in 11 above, Nadel has no specific proposal for the appropriate appointment mechanism. Favourable consideration has been given, however, to appointment by the Judicial Service Commission or a representative body similarly composed.

Functions of Attorneys-General

14. Nadel proposes that the functions, duties and powers of the provincial Attorney's-General would be, subject to the control of the National Attorney-General, as follows: (a) to prosecute, in their areas of jurisdiction, on behalf of the State in criminal proceedings, any person in respect of any offence in regard to which any court in the area has jurisdiction and to prosecute any appeal arising from criminal proceedings in such jurisdiction; (b) to delegate the authority outlined in (a) above, subject to their control and directions, to any person suitably qualified in terms of relevant legislation; (c) to appoint public prosecutors to institute and conduct prosecutions in criminal proceedings in lower courts within their area of jurisdiction, subject to their control and directions; (d) to perform all duties and exercise all powers imposed or conferred upon them by other statutes such as the Criminal Procedure Act; (e) to ensure that the prosecution process is a fair and transparent one, and to uphold the values and principles enshrined in the Constitution.
JUDICIARY AND LEGAL SYSTEMS:
THE OFFICE OF ATTORNEY-GENERAL

The Association of Law Societies of the Republic of South Africa respectfully makes the following submissions to Theme Committee V with regard to the office of the Attorney-General:

1. Section 108 of the Interim Constitution of the Republic of South Africa (Act No. 200 of 1993), hereinafter referred to as "the Constitution", provides that:

"(1) The authority to institute criminal prosecutions on behalf of the State shall vest in the Attorneys-General of the Republic.

(2) The area of jurisdiction, powers and functions of an Attorney-General shall be as prescribed by or under law.

(3) No person shall be appointed as an Attorney-General unless he or she is appropriately qualified in terms of a law regulating the appointment of Attorneys-General in the Republic."

2. The Constitution recognises the Attorney-General as an organ of the State. Section 233(ix) of the Constitution defines an organ of the State as including any statutory body or functionary. The word "functionary" covers the description of the Attorney-General as contained in Section 108(1) of the Constitution.

3. The recognition granted to the Attorney-General in the Constitution is distinct from the recognition granted to the executive authority. The Attorney-General is accordingly seen as an organ of the State separate from the Government, which is also an organ of the State. The Association of Law Societies (hereinafter referred to as "the ALS") submits that this distinction should be preserved in the Final Constitution.

4. An Attorney-General prosecutes on behalf of the State and does so according to the law as interpreted by the courts of the State. This ensures uniformity of action and application in a manner that cannot be achieved through executive control.

5. Theme Committee V is presently engaged in considering whether the Final Constitution should provide for the restructuring of the office of the Attorney-General and if so how it should be restructured. The ALS is of the view that any process of reform or transformation must have a clear purpose -

5.1 It must have the effect of curing an ill or remedying an unacceptable status quo,

or

5.2 it must bring about an improvement of the status quo.
6. The ALS is further of the view that the structure of the office of the Attorney-General, as provided for in Act No. 92 of 1992 and the Constitution, has functioned satisfactorily in practice. We believe that it suffers no structural ill that needs to be cured. We address this aspect later on in these submissions. As far as the possible improvement of the structure of the office of the Attorney-General is concerned we are of the view that the following requirements should be borne in mind.

7. An Attorney-General should have a status independent of executive or political control. As such the Attorney-General should be appointed by the State President on recommendation of the Judicial Services Commission.

8. The Attorneys-General should have representation on the Judicial Services Commission by way of one of their members elected by them to represent their interests on that body.

9. The Attorneys-General should remain accountable to the Minister of Justice and Parliament, as is presently the case in terms of Act 92 of 1992.

10. An Attorney-General should further remain subject to the powers of suspension and/or discharge from office by the State President in conjunction with Parliament as provided for in Section 4 of Act 92 of 1992.

11. Section 108(2) of the Constitution recognises that an Attorney-General is appointed for a specific area of jurisdiction. It is the ALS's view that each province of the Republic of South Africa should have its own Attorney-General, who will exercise the autonomous authority, provided for in Section 108(1) of the Constitution, in that province. Uniformity of approach and application is ensured by law and the interpretation thereof by the courts. We respectfully submit that this control has proved eminently adequate in the past, is accordingly tried and proven and should not be interfered with.

12. The ALS respectfully submits that there should be an autonomous Attorney-General for each of the provinces of the Republic of South Africa due to the fact that the needs of each province, as far as the maintenance of justice is concerned, are different. An Attorney-General should accordingly be attuned to the needs of the province which he or she serves and that can only be so if he or she works in close contact on a daily basis with the problems of that province.

13. Should a prosecution be in bad faith that fact would be pointed out by the court and the State President would be entitled to proceed with his disciplinary powers contained in Act 92 of 1992. Should an Attorney-General refuse to prosecute under circumstances where a prosecution is called for, provision is made in the Criminal Procedure Act for a private prosecution. The Minister of Justice is further entitled to call for an explanation. These checks and balances have had the practical effect of ensuring a balanced approach by Attorneys-General in respect of the discharge of their prosecutorial duties.

14. Executive or political control over the Attorneys-General would pave the way for improper political pressure on the person exercising political control over the Attorneys-General. A
person holding high political office should not have the ability to influence or manipulate
the decision of an Attorney-General whether to prosecute in respect of a criminal offence.

15. The ALS submits that the powers of the executive arm of the State with regard to the
office of the Attorney-General should go no further than is provided for in Section 5(5) of
Act 92 of 1992. This section limits the Minister of Justice's powers to the co-ordination of
the functions of the Attorneys-General and to the right to request information or reports
and reasons for decisions taken by the Attorney-General.

16. It has been stated that the present dispensation does not contain adequate provision for the
accountability of Attorneys-General. The ALS disagrees with this statement. It does so for
the following reasons:

16.1 In the first instance an Attorney-General is bound to act according to the structures
of the law as interpreted by the courts. Should the Attorney-General fail to do so
he or she would be called to account by the court.

16.2 Secondly, the Minister of Justice is entitled in terms of the provisions of Section
5(5) of Act 92 of 1992 to call for information or a report or reasons from an
Attorney-General. The Attorney-General is accordingly accountable to the
Minister of Justice.

16.3 In the third instance the Attorney-General has to report on an annual basis to the
Minister of Justice "on all his activities during the previous year". This is a further
instance of the Attorney-General's accountability to the Minister.

16.4 The Minister has to table the Attorney-General's report to Parliament. The
Attorney-General is accordingly accountable to Parliament in the final instance.
Parliament is the representative of the people of the Republic of South Africa and
by accounting to Parliament the Attorney-General is accordingly accounting to the
people.

17. It has further been said that the incumbent Attorneys-General are all appointees of an
unacceptable regime. That does not, in the view of the ALS, constitute a valid criticism
against the structure of the office. It may in any event not even be a valid criticism against
any of the Attorneys-General concerned. Their performance should be valued objectively
and not by reference to who appointed them to their office. It should not be forgotten that
they are professionals who have risen through professional ranks and not through political
office.

18. A further criticism that has been levelled against the present structure of the Attorney-
General's office is that there is no adequate provision for the formulation of prosecutorial
policy. The ALS does not view this as being a valid criticism and does so for the following
reasons:
18.1 The Attorney-General enforces the law as contained in the common law, as laid down by Parliament and as interpreted by the courts. It is not for the Attorney-General to formulate policy on a political basis. He has to do so on a legal basis.

18.2 The accountability of the Attorney-General, as referred to above, ensures that the necessary checks and balances exist for the proper discharge by the Attorney-General of his or her functions and duties.

18.3 The Minister of Justice co-ordinates the functions of the Attorneys-General and as such is entitled to consult with them and to formulate with them any specific approach that needs to be taken with regard to any problem that exists either regionally or nationally.

18.4 Parliament furthermore can legislate to remove any unacceptable prosecutorial practice. It is interesting to note the substantial degree of past absence of a need in this respect.

18.5 The law and the courts ensure that justice is administered equally in every part of the country. The creation of the office of a National Attorney-General would, in our respectful submission, not bring about any improvement in this regard.

18.6 The Minister of Justice is the best placed functionary of the State to co-ordinate the functions of all the Attorneys-General. He is able to formulate and initiate, whether in consultation with the Attorneys-General or on his own, the legislation that is required to improve the functioning of the prosecutorial system of this country.

19. The fact that the functioning of the office of the Attorney-General as presently structured has in the past produced results that may have proved politically unacceptable should not be confused with the adequacy of that structure. The results flowed not from the structure but from the laws which that office had to enforce. Those laws emanated from Parliament and not from the office of the Attorney-General.

20. In the final instance the ALS is of the view that the South African situation is unique and as such requires unique treatment. Any attempt to impose foreign solutions such as for example following the United States or the United Kingdom models should not be embarked upon unless there is good reason to do so. The ALS respectfully submits that such reason does not exist.

21. To conclude the ALS supports the notion, as expressed by the Minister of Justice during his budget vote in parliament this year, of a prosecutorial authority with assured independence to prosecute without fear or favour.

DATED at CAPE TOWN this 29th day of MAY 1995.

For and on behalf of
The Association of
Law Societies of the
Republic of South Africa

M T STEYN
COUNCILLOR, LAW SOCIETY OF THE CAPE OF GOOD HOPE.
THE METHODIST CHURCH OF SOUTHERN AFRICA
Port Elizabeth West Circuit

What should the Constitution say about the National Defence Force.

1. Those who wants compulsory training, because they love their country, must feel to do so, without any obstacles.

2. Appointment of chaplaincy, must be done by a Chaplaincy Board, and be transparent. I do recommend the following outstanding theologians: Drs F Chikane; S. Mogoba; Rev. Smagaliso Mkhatshwa, Father Michael Lapsley, and Makhenkesi Stofile, to look at the whole issue of Chaplains.

3. Churches in the past never supplied Chaplains to the liberation movement, and therefore need new blood to purify the chaplaincy in the S.A.N.D.F. The Churches should not decide who should be appointed as Chaplains, because good people might be victimised, and send those who has failed in their ministry.

4. Universities like Princeton, in America, should be consulted to give proper training, for ministers going for chaplaincy.

5. Theological training are not efficient enough, for ministers who wishes to be chaplains in the S.A.N.D.F.

6. Chaplaincy in the S.A.N.D.F. needs attention as quickly as possible. To rehabilitate and to transform soldiers, is a major task, because there has been no Liberation theology previously, in the S.A. barracks.

REV S VAVA
RAPCAN (RESOURCES AIMED AT PREVENTION OF CHILD ABUSE AND NEGLECT)

PRO-CHOICE SUPPORTS THE RIGHTS TO A FULL, DIGNIFIED LIFE

For people who work in the field of child abuse and neglect, the choice has got to be the right to a full and dignified life. Thousands of unwanted children are born on a daily basis in this country. The plight of homeless children is increasing and crime amongst young children is escalating on a daily basis. Anybody who knows what it is like to be truly hungry will not want to expose another human being to the same experience. Anybody who knows what it feels like to be unloved and unwanted will not want to put another human being through that same misery.

If we cut to the core of the abortion argument it becomes clear that we are again witnessing the oppression of women based on religious and patriarchal decisions. The concern is surely not for the unborn foetus or else the proponents of this argument would be out on the street trying to salvage human life from psychological death and deprivation by adopting unwanted, unloved and un-cared for children.

We need to put forward a realistic and rational argument for children’s rights and that is a right to a full, healthy, human life. The measure of a society’s values is based on the quality of life of their children. If we are concerned about the amount of abortions occurring on a daily basis in South Africa and the world, the surely the problem that needs to be addressed would be the circumstances that women find themselves in. These would include widespread poverty amongst women, abandonment by male partners, rape, women battering, lack of resources for physical and emotional support for pregnant women, to name but a few. If we can reduce these oppressive circumstances then we would be reducing the need for abortion. If women do not have circumstances then we would be reducing the need for abortion. If women do not have the option to remove an unwanted foetus then they are unable to make positive, practical decisions for themselves and for their lives and for many women it means increasing the load of poverty and raising children for whom they are unable to care for sufficiently.

South Africa is a country made up of diverse groups of people, all of whom are not religious. A decision affecting the lives of thousands of women cannot be made on a religious argument by women and neither on the opinions of men. The statistics of single parenting in this country is enormous. More than 95% of all single parents in South Africa are women. It therefore has to be a women’s decision. If we provide women with the right to decide, we eliminate the ability of men to oppress women by getting them pregnant and then abandoning them to raise children on their own.

Putting the right of an unborn foetus before the right of a live, human women, says a lot about the status of women in society. If the pro-foetus proponents were willing to take responsibility for these potential lives, their
argument would possibly be more balanced. But for as long as women are still largely responsible for child-rearing, and religious proponents base their arguments on moralising, women who face the practical task of child care, have to have the final say. We believe that women should have the right to choose based on their circumstances, their knowledge of their ability to provide the child with a full, healthy life and their own religious beliefs.

RAPCAN supports unconditional access to a medical abortion. Doctors who have ethical reasons for not wanted to perform abortions should be entitled to do so. If anti-abortion legislation is passed, women will continue having abortions under primitive conditions because the circumstances that women often find themselves in would not have changed. We support the struggle for full human equality and a women’s right to choose.

Anita Mashall
for RAPCAN

P.S. Quote “... Isn’t it strange that the same people who are anti-abortion are very often pro the death sentence ....” Enver Hassiem.
SWEET VALLEY PRIMARY SCHOOL

15 May, 1995

On behalf of the parent body and children of Sweet Valley Primary School I would like to voice my objection to the production and sale of pornographic literature and magazines in our country. We feel very strongly that this constitutes an infringement of women’s rights and debases them. This conflicts with the high moral values we wish to present to our children.

We at Sweet Valley endeavour to instil morally upright Christian values in our children and we wish to protect them from exposure to such literature and therefore protest against its open display and sale in family chain stores and those stores which sell school stationery requirements. We respect the right of free expression but object to this when it undermines the freedom of our society to protect and nurture our children in a morally upright environment.

We urge that you hold to high moral standards when forming the new constitution of our country, protecting true Christian family values which are the mainstay of a morally upright nation.

J G N RUIJSWIJK
PRINCIPAL
COSATU
CONGRESS OF SOUTH AFRICAN TRADE UNIONS

RE: THE LOCATION OF PARLIAMENT IN CAPE TOWN

We hereby wish to express our support for the submission of the Citizens Alliance for Parliament, SANCO, ANC and other concerned organisations.

It is of importance that Parliament remains in Cape Town. It will not be in the interest of balanced national economic development, nation building and reconciliation if parliament is located in the Gauteng Province.

The relocation would result in the loss of jobs within the Public Sector in the Western Cape Province. Other sectors such as the printing industry will be affected.

It does not serve the interest of the emerging and vibrant new South Africa for at its' resources to be located in one Province.

JUDITH
PP X NXU
REGIONAL CHAIRPERSON
WESTERN CAPE REGION (South African Clothing and Textile Workers Union - SACTWU)

THEME COMMITTEE 1

LOCATION FOR PARLIAMENT

Our organisation represents 60 000 clothing, textile and leather workers in the Western Cape.

We hereby express our support for parliament to remain in Cape Town. We do not believe that a relocation to Gauteng is in the interest of national reconciliation, nation-building and sustainable economic development for South Africa as a whole.

Our submission is made with the concern that the local authority demarcation dispute in the Western Cape remains unresolved. We think the proposals put by Mr Peter Marais may jeopardise the very principles for which we believe parliament should remain in Cape Town. We are of the opinion that his demarcation proposals are for narrow sectional political interests, and not in the interest of nation-building and sustainable economic development.

Ronald Bernickow
(Regional Secretary)
South Africa's New Constitution is being written.

Make sure it contains your ideas - it is your democracy!!
Below is a guide for sending in your ideas.

Write down your ideas and fold the form on the dotted lines.
Post it as soon as possible

Your Name: Sheikh Nazim Mohamed
Your Address: Muslim Judicial Council, P O Box 4118, Cape Town
Contact Telephone Number: 696-5150

Ideas/proposals/submissions

A: What my problems / issues / concerns are ...

The Muslim Judicial Council (MJC) wishes to express its full support for the retention of Parliament in Cape Town. The following points are cordially submitted for the attention of Theme Committee 1 of the Constitutional Assembly, Character of the Democratic State:-

1. The Cape's Unique Identity:

Our different Cape ethnicity and culture as resulted in a different political leadership in the region. The location of Parliament in the Cape is thus even more important than in previous times. If parliament were not here the already latent secessionist elements would be far stronger in the Cape.

For many Capetonians, the loss of their Parliamentary role would be seen as a punitive reaction to the 1994 election results in the Western Cape province. This perception must be avoided. The maintenance of the status quo concerning the seat at parliament will reinforce government's commitment to the building of a national consensus and avoid the risks of renewed north-south antagonism which is bound to develop should Cape Town to be perceived by her citizens to be stripped of her parliamentary role.

2. Integrates the Western Cape society into South Africa

The reality of the situation is that the Cape is cut off from the mainstream
South Africa in many ways: different ethnic structure; long distances in between the Karoo; marginal position in relation to the strengthening bond with Africa; different economic structure. Parliament (which the Cape is very proud to host) gives a bond to the mainstream which would otherwise be absent.

3. Helps develop another economic pole in South Africa

South Africa's economy is dominated by a very powerful economic hub in the PWB, and an umbilical cord to the port of Durban. The location of some government functions in the Cape makes it an appropriate head office location (75 quoted company HQ's, compared to Durban's 32), and attracts many trade missions, government missions, government contracts, etc. which strengthens the local economy.

Cape Town’s status as the location of parliament gives it significant international recognition; thus helping its tourism economy and helping to attract international business here. Business Week an US magazine therefore list Cape Town as one of the world’s leading second rank cities.

4. Better spread of government expenditure

Internationally governments spend a large share of the country's total production. The location of parliament in Cape Town and the Judicial capital in Bloemfontein has allowed these two centres to receive a small proportion of government recurrent expenditure, although the overwhelming share still goes to the PWV.

5. Reduces political and economic over concentration in the PWV

The PWV with a population of about 9.3 million, nearly 25% of the nation's on 2,5% of the land and produces 43% of the national GDP is already overdeveloped. Over concentration of population and economic power is very bad for countries. Examples of countries paying a severe price for their over concentration: Greece (Athens), France (Paris), Britain (London), among others.

To further entrench the domination of the PWV is clearly not in the national interests, since it further consolidates the economic, financial and political hegemony of one at the expense of all others, many of which are desperately impoverished.

The South African government presently tries to counter the over concentration of the PWV by a scheme costing nearly R10 billion to persuade business to locate elsewhere in the country, but the location of government investment is an even more important inducement for business location. In the past our government has located all functions in the PWV, including all government departments, the defence force headquarters, as well as all major government investments in the economy and public corporations.
6. Reduces influence of the bureaucracy on political leadership

The separation of the powers of government has now become a key treat of modern democracy. This is particularly important in South Africa today where there is a fear that the bureaucracy could exert undue influence over the legislature. Physical separation of the functions reinforces the separation of powers.

7. In keeping with new trend towards decentralised governments

As communications are becoming better, various governments are moving some government functions out of the central capital to other locations for development and cost reasons. In Britain some departments have been moved our of London, while in Germany some departments have been left behind in Bonn when the main organs of government are moved back to the traditional capital of Berlin.

8. Greater opportunities for Inter-government contract

The Western Cape is considered one of the most beautiful locations in the world, with real potential for international tourism. This has a role for government too, giving South Africa a better opportunity to serve as host for International political conventions, summits, etc. if the legislative arm of government is located in Cape Town. Time magazine noted that a survey of USA diplomats rated Cape Town as the most sought after diplomatic posting in the world. Now that South is back on the world stage, it is appropriate that it puts its best foot forward in an effort to strengthen ties with other countries.

SHEIKH NAZIM MOHAMED
PRESIDENT

South Africa’s New Constitution is being written.

Make sure it contains your ideas - it is your democracy!!
Below is a guide for sending in your ideas.

Write down your ideas and fold the form on the dotted lines.
Post it as soon as possible

B: What I think the new constitution should say about this ...
Executive Summary:

The crucial issues relating to the location of parliament are a) political, b) economic, and c) administrative.

A. Political

The political case against moving parliament is that such a move:

i. would be deeply divisive nationally and will provoke bitter resentment in the Western Cape;

ii. will generate profound suspicion in all regions concerning the sincerity of central government's commitment to real partnership between national, regional and community government, thereby frustrating the project of nation-building, rendering relations between all levels of government more acrimonious and, in consequence, making co-operative government more difficult;

iii. will, by dramatically exacerbating the existing over-centralisation of political and economic power, at first create the impression, then promote the reality of a government which is remote, self-serving, arbitrary, bureaucratic and tyrannical;

iv. would be demonstrably undemocratic and would cast serious doubts on the willingness and/or ability of government to sustain democracy in South Africa.

B. Economic

The economic case against moving parliament has two components: first, the direct financial capital costs of relocating parliament in comparison with possible savings; second, the consequences in terms of economic decline for the Western Cape and for the country of removing parliament from Cape Town.

i. The financial arguments with regard to this issue are complex. Figures presented here refute Pretoria's claims that relocating parliament would cost little and save much. They indicate that the opposite is more likely to occur. What is undeniable, as far as the financial argument is concerned, is that the capital costs are certain, immediate and very large while the benefits in terms of savings are speculative, remote and marginal. Financially, relocating parliament would therefore constitute taking a huge and unjustifiable risk;
ii. The economic costs to the Western Cape would be severe resulting in substantial falls in residential and in commercial property values, increased unemployment, declining consumption, and loss of attractiveness to domestic and foreign investors.

Some of these baleful economic consequences for the Cape would be offset by economic advantage to Gauteng but nationally there would be a net loss, and enriching Gauteng at the expense of the Western Cape would be unfair and would compromise seriously the balance and progress of the RDP.

C. Administrative

The claim is made that locating the executive and legislative (and the judicial?) functions of government within a single city makes for greater government efficiency. This may certainly be more convenient and more congenial for some civil servants and some politicians. This, however, is not to be equated with efficiency.

Against the claim that moving parliament would make government more efficient, need to be set the following considerations:

i. The problems experienced by ministers and senior civil servants will be much alleviated by changing the requirements for ministerial attendance in parliament.

ii. Parliamentarians overwhelmingly identify the problems of efficiency as resulting from excessive demands on their time, the organisation of the committee system, and the absence of research and secretarial assistance. They do not identify the location of parliament in Cape Town as a source of inefficiency.

iii. The tendency world-wide, in the interests of efficiency as well as equity, is to "unbundle" the administrative functions of the government and to relocate different ministries and departments throughout the country.

iv. Modern communications technology renders physical proximity obsolete as a condition for the efficient conduct of business in all spheres of life including that of government.

Conclusion:

The advantages to Pretoria or Midrand of moving Parliament would be overwhelmingly outweighed by the economic damage to the Cape and the country, by the financial risks, and above all by the anti-democratic character which such a decision would have in present circumstances.

Introduction:
In this submission, we set out the case as we see it for retaining parliament in Cape Town. There are three main dimensions to the debate: the political, the economic and the administrative. In our judgement, the arguments in each of these areas are much stronger for maintaining the status quo than for relocating parliament in Pretoria or anywhere else.

Clearly, as Capetonians, we have powerful material and emotional interests in the retention of Cape Town as our parliamentary capital. We have tried, nevertheless, to be scrupulously fair in assessing the objective evidence, and to do justice to the case made by advocates of moving parliament. In particular, if we thought that moving parliament would really make large savings in the cost of government which could be redeployed for development purposes, we would accept this as a very strong (though not necessarily decisive) reason for moving. Similarly, if we thought that the efficiency of government would be greatly enhanced by relocating parliament, such that the interests of the country as a whole would be better promoted, this would constitute a powerful, though again not necessarily decisive reason for locating the executive and the legislature in the same city.

Neither of these reasons would be necessarily decisive because they would have to be set against what we believe to be the extremely undesirable consequences of moving parliament in terms of political divisiveness, over centralisation of political and economic power, undermining the prospects for political partnership between the regional and the central government, and violating the requirements of democratic government.

Since we believe the political issues to be the most fundamental and perhaps the least well understood, we begin by setting out our views on these issues before analysing the arguments in relation to economic and administrative considerations.

A. Political

A.1 Political Divisiveness

Removing parliament from the Cape and relocating it in Gauteng will be deeply divisive politically. It will re-inflame ancient and bitter animosities between South Africans and will do serious psychological damage to the process of nation-building, unity, and national reconciliation.

It is frequently argued by those who favour the relocation of Parliament that South Africa's split capital system is the legacy of a colonial past, reflecting historic concerns which are irrelevant in a post-apartheid unitary republic.

To the extent that the designation of capital city status to the cities of Cape Town, Pretoria and Bloemfontein was an act of compromise among white participants at the National Convention of 1909 in the aftermath of the Anglo-Boer war, this argument is valid. But the Union of 1910 nonetheless established a system of split administration which has worked well, has equitably distributed the major functions of state among the regions, and contains no political consequences which are hostile to the ideological imperatives of South Africa's first democratic and non-racial government.
There are powerful grounds for arguing that there are historic parallels between the South Africa of 1910 and that of 1995, and that the circumstances which originally gave rise to the three-capital system are again present today. The 1910 compromise occurred in a country newly emerged from a damaging and divisive civil war where there existed a need to heal long-standing sectional animosities and forge a single nation in a spirit of reconciliation. The new South African state has emerged from an identical set of conditions and is confronted with similar challenges of reconciliation and nation-building.

The maintenance of the status quo concerning the seat of Parliament will reinforce government's commitment to the building of a national consensus and avoid the risks of renewed north-south antagonism which are bound to develop should Cape Town be perceived by her citizens to be stripped of an institution which, perhaps more than any other, symbolises her inclusion in a common polity.

It is important to note that the factors which integrate the Western Cape into South Africa are less powerful than those which serve to cut us off from the mainstream of national life: a differing ethnic structure, long distances across the sparsely-settled Karoo, a marginal position in relation to the strengthening bonds with Africa and a different economic structure characterised by a lack of mineral resources and associated beneficiation industries. The role of the location of Parliament in reducing this sense of isolation is an important one.

The emblematic consequence of removing Parliament from Cape Town cannot be overemphasised. The city enjoys a very high international image, not only as a capital city but as a tourist destination, a region of great natural beauty and environmental appeal and, more recently, a potential host of the Olympic Games of 2004.

Cape Town can boast a reputation which has historically enhanced South Africa's place in the world. (This essentially unquantifiable appeal has been recognised by a survey in Time Magazine in 1994, which reported that diplomats rated Cape Town as the most sought-after diplomatic posting in the world). It is in the interests of national prestige that these attributes should be more actively recognised and celebrated, rather than diminished by reducing the city's political status and constitutional position. It is as a result of these significant international linkages that the American magazine Business Week has listed Cape Town as one of the world's leading second-rank cities.

For many Capetonians the loss of their Parliamentary role will indeed be seen as such a diminution, if not as a punitive reaction to the 1994 national election results in the Western Cape province. It is a perception which must be avoided, since the stimulation of provincial grievances and resentments will only serve to undermine the crucial task of national unity.

This is a particularly sobering consideration in a region which is economically more prosperous and politically more stable than the rest of the country and where latent secessionist sentiments may yet be turned into virulent political passions, leading, in the worst case, to the kind of catastrophe which occurred in Biafra and from which Nigeria has never recovered.
A.2 Undermining Political

However the debate develops about what the nature and extent of regional autonomy ought to be under the new constitution, it will always be vital that the various regions believe that their interests are adequately addressed in the decisions of central government, as also that they possess a real measure of self-determination in respect of matters which are most properly decided at sub-national level.

Confidence that central government is willing to accord regional and local government their due authority, is fragile at present. Removing parliament from Cape Town would further undermine this confidence, not just in the Western Cape but as the implications of the decision sink in, in all the provinces.

This would be an extremely undesirable outcome, not just in the provinces themselves, but also for central government, dependant as it clearly is on developing relationships of co-operation and partnership, rather than of mistrust and confrontation, with the other tiers of government.

At present, central government has a high credibility rating in terms of its integrity and its commitment to fairness. This credibility will be significantly harmed by taking parliament away from Cape Town and giving it to Pretoria (or Midrand) for what will be perceived to be the financial interests of the Pretoria property industry and the marginal convenience of individual parliamentarians and bureaucrats.

A.3 The Evils of Over-centralisation

There are cogent reasons why, far from seeking to centralise its functions, government should be exploring the scattering of its activities throughout the country in such a way as to disperse the benefits of public sector investment and employment to needy provincial economies.

Any tendency towards concentration would aggravate the fact that Gauteng (previously, the Pretoria-Witwatersrand-Vereeniging complex) is already by far the wealthiest region in South Africa. To further entrench this domination is manifestly not in the public interest since it consolidates the economic, financial and political hegemony of one region at the expense of all others, many of which are desperately impoverished.

Not only would this excessive centralisation be nationally harmful, but it runs contrary to the pattern of many modern democracies where the decentralisation of state functions, government institutions and parastatals is increasingly regarded as a necessary stimulus to regional development and a desirable counter to unmanageable metropolitan congestion and over-population. Examples of countries paying a high price for their over-concentration are Greece, France and the United Kingdom where Athens, Paris and London respectively are suffering severe problems of urban congestion.
Pretoria's claim that "the fragmentation of national government to different centres creates ongoing internal division and conflicting loyalties within the national government" is, in the light of international experience and domestic logic, bad argument and bad history. On the contrary, the diffusion of power leads to political moderation, the safeguarding of liberty and the promotion of consensual government.

One does not have to look hard to find examples abroad of centralised political capitals gone wrong. The inadvisability of relocating the South African parliament, depriving Cape Town of the economic benefits of being the legislative capital, and concentrating political power in one place is eloquently reinforced by the experience in North and South America, Australia, Britain and Nigeria, among others.

Economic and political centralism inevitably undermines the practical, democratic arrangement which brings government close to the people, at best reducing democratic commitment to mere "lip-service", and, at worst, neglecting it fatally.

It also inevitably spawns conflict between centre and constituent parts, and smothers government in a mantle of self-serving authority that obscures its sense of mission: it loses touch.

In practical terms, what has the experience abroad been?

If ever there was any doubt about the disastrous impact Cape Town should feel if parliament were to be relocated, the case of Rio de Janeiro should dispel it.

The Economist noted bluntly in the late 1980s that Rio de Janeiro “has been decaying ever since Brazil moved the capital of the country to Brasilia (in 1960)”

“Rio’s vocation,” the respected journal added, “had been politics, paper-shuffling and beach going. Suddenly only the beaches were left”

Through the sixties, seventies and eighties it could do nothing but “watch helplessly as the big money was invested elsewhere”.

Little wonder, then, that Rio’s growth rate since its political emasculation remained a steady 15% below Brazil’s.

That was the cost of Rio. There was a national burden too: the building of Brazilia - between 1957 and 1960 - landed Brazil with foreign debts in excess of two billion US dollars.

In the United States, Washington DC, for all its trappings of awesome superpowerhood, is notorious for its political insularity, administrative arrogance and, frankly, inefficiency in keeping the nation’s pulse it is also the focus of popular distrust and even hatred.

Writing in Time in January 1995, Robert Wright noted that the “most vilified expanse of asphalt in the history of the universe is, almost certainly, the Washington Beltway”, a freeway, but a great deal more than just another freeway.
The Beltway, he explained, “has come to symbolise nothing less than a looming threat to American democracy. It is the great invisible buffer, impermeable to communication, that separates the nation’s capital from the nation”.

The Beltway barrier is critical. Sixty years ago, Washington dealt simply with defence and foreign policy, and the states did everything else, from roads to schools. That has changed steadily. Power has been concentrated in the capital and federal (central government) spending in all domestic spheres has overtaken state spending.

The result is that out-of-touch Washington is politically and financially decisive in states from which it is isolated, and this contributed, largely, to the electoral disaster suffered by the Democrats in 1994. New Speaker Gingrich is now building a dubious revolution on the altar of Washington’s unpopularity with voters from whom it had become isolated and remote.

Commentator and novelist Gore Vidal advocated in the January 1995 issue of New Statesman and Society - under the headline "Strike Out The State" - the notion of dividing the United States into "several reasonably homogenous sections."

“People, " he argued, “want to be rid of arbitrary capitals and faraway rulers, so let the people go.”

In Britain, similarly, the concentration of political and financial power makes London the focus of British politics, at the expense of regional centres and interests, and of the efficient administration of the kingdom. This has also transformed London into one long, vast, 18-hours-day, 7-days-a-week traffic jam.

The sense, in the hard-pressed North of England, for instance, that the country is managed according to the agenda of the well-off South, is acute and not without foundation. And the sentiment in Wales, Scotland - and certainly in Northern Ireland, though the Irish question is a debate all its own is, to a greater or lesser extent, characterised by resentment, and secessionist tendencies.

On the other hand, creating a new capital as a constitutional or political device also holds lessons for South Africa. The idea wells invariably from notions of reconciliation, but, as the international experience shows, falls far short of such lofty ideals.

Again, it is a shift to over-centralisation, and it serves the centre best.

The "new" capital concept - centralising power to achieve political uniformity or to create a symbol of national reconciliation - is well reflected in the Australian capital of Canberra.

The Australian experience is inauspicious: it cost the federal states and territories a fortune, and they ended up losing a significant say over their affairs.
Jacqueline Rees wrote in the Far Eastern Economic Review in 1991 that "since 1942, when the wartime prime minister John Curtin took direct tax powers away from the states, the central government has become more and more powerful and the states an anachronism".

Australia is still grappling with the effects - but the intended unifying symbol of Canberra has created a power-hunger all of its own, and practical solution-seeking to issues such as taxing rights are reduced to power struggles between the capital and the states.

Furthermore, the symbolic power of a Canberra - or a Brazilia, for that matter - is severely undermined by the very artificiality at its core.

Such "cities" fail to meet the requirement simply expressed by Frank Lloyd Wright in 1932 that "architectural values are human values or they are not valuable". And you cannot simply create a "valuable" human settlement because it looks like a good political idea.

The unnecessary costs incurred in creating a new capital - or a single, all-powerful one intended to bind the disparate nation - would be compounded by the enmity and tension such a demonstrative undertakings would generate.

The 1990s have witnessed an invigoration of nationalistic and sectarian fervour worldwide, with ethnic and language groups, creeds, races and communities all asserting their aspiration to one another form of self-governance.

South Africa is no different.

The lesson from abroad suggests that undue an unthoughtful tampering with the distribution of power centres - and, particularly, attempts to centralise power where the trend indicate decentralisation - is a sure recipe for inter-regional strife with a high tendency to issue in secessionism and violence.

The undesirability of the state's consolidation a single city would be less severe were it not the fact that South Africa's financial centre lies within the same province, thus further favouring Gauteng as a focus of both national and international interest. The physical and economic equilibrium of South Africa is already distorted the fact that Gauteng, with a population of about 9.3 million, concentrates nearly 25% of nation's people on 2.5% of the land and produces 43% of the national GDP, containing half country's manufacturing industry. By comparison the Durban-Pinetown complex contributes 12% of the GDP and the Western Cape a mere 10%.

Wolfgang Thomas and other economists have argued in the past that the previous government’s attempts to direct all investment and economic growth towards a number of ideologically determined “growth points” severely prejudiced development of the coastal metropoles. It would be a profound irony were the present government to direct South Africa’s public life to the country's most developed and well-endowed province, producing an identical effect.

A.4 Implications for Democracy
There is much public opposition and little public support for the relocation of Parliament from Cape Town to Pretoria.

A nation-wide survey conducted by IDASA August/September 1994 found that while 51% of the sample respondents thought that Parliament should remain in Cape Town, only 23% believed that it should be moved to Pretoria. In the words of the report: "In every province, including Gauteng which stands to benefit the most from moving the national legislature, support for keeping it in Cape Town is significantly greater than moving it to Pretoria."

Only PAC supporters favoured Pretoria o Cape Town (37% over 26%). Supporters of every other party, including those of the ANC (50% over 27%) favoured retaining Parliament in Cape Town. Similarly every language group favoured Cape Town over Pretoria, with support being highest among Xhosa, Afrikaans and English speakers.

The report concludes: "Support for moving Parliament from Cape Town to Pretoria is relatively weak. Even if the present camp promoting Pretoria succeeds in persuading those who are uncertain and/or unsure, which is unlikely, support for keeping Parliament in Cape Town is still greater. Backing for Cape Town is strong across all categories-race, religion, age, gender and party support."

A survey conducted among "opinion leaders" by Professor Hennie Kotze of the University of Stellenbosch’s Centre for International and Comparative Politics between July and September 1994 reported: “When presented with Cape Town and Pretoria as the two options, twice as many respondents supported Cape Town than did Pretoria - 62% versus 30%. Only 6% of the respondents were undecided.

"If the respondents' party political affiliations are brought into the equation, the findings are even more starkly in favour of Cape Town. Supporters of the three main partners in the government of national unity were unequivocal in their support for Cape Town: ANC (60%), NP (63 %) and IFP (71%). Supporters of smaller parties were no less infavour of Cape Town: DP (66%), FF (53%) and other right wing parties (73%). Support for Pretoria was considerably lower: ANC (24%), NP (32%), IFP (13%), DP (31%), FF (41%) and other right wing parties (23%). Interestingly, supporters of the IFP and the ANC made up the largest block of undecided respondents - 16% and 11% respectively.

"Even when the responses are divided by the home provinces in which the respondents are resident (for comparisons with previous surveys, the old provincial divisions were used), Cape Town is again the favourite. The distribution looks as follows:

- Cape respondents, 87% Cape Town and 10% Pretoria;
- Natal respondents, 70% Cape Town and 16% Pretoria;
• Orange Free State respondents, 65% Cape Town and 27% Pretoria;
• Transvaal respondents, 47% Cape Town and 44% Pretoria.”

Professor Kotze concluded: “These findings clearly indicate that about two thirds of South Africa’s top decision-makers are in favour of keeping Parliament in Cape Town, while about a third are in favour of relocating it to Pretoria. This, in addition to the support among public in general for Cape Town found by IDASA poll, provides ample evidence that South Africans of all walks of life and political persuasions are not about to accept the relocation of Parliament to Pretoria without a fight.

"When the decision is finally made, public opinion should certainly be taken into account. It seems that Parliament as an institution may also be legitimised more easily if it stays in Cape Town. All new institutions need time to be accepted and gain value in the eyes of the public - that is, to become institutionalised. This institutionalisation may be retarded and jeopardised if a major symbol like Parliament is transformed from an institution that is associated with Cape Town to one in a new building in Pretoria.

“Furthermore, an explanation for these findings can be that South Africans are largely uneasy about the concentration of political power in the PWV region. It is possible that this concentration is viewed as in conflict with constitutional provisions for regional empowerments through decentralisation of governmental functions and institutions. It also reflects a fear of the RDP being hijacked and/or stalled by increased state spending on new Parliamentary buildings in Pretoria, thereby limiting the reconstruction budget. Furthermore, it may be case that the stipulation in the transitional constitution that there be a separation of powers is take seriously. If this is the case it is not necessary for the executive to be in Cape Town on a permanent basis when Parliament is in session.”

It might be thought that the question of the location of Parliament is one that is too complicated for the general public to be able to understand. There are, after all, many issues ranging from taxation policy to the conduct of foreign affairs, where it is accepted in all democracies that the people's representatives will have to exercise expert judgement on their behalf, rather merely conforming to transient and inadequate informed popular wishes.

Peter Collins of the Department of Political Studies at UCT, has addressed this problem in his paper “Parliamentary Effectiveness and the Location of Parliament”. He argues that it might be democratic for parliament to decide on the location of parliament contrary to the known wishes of a clear majority of the South African people, if it were accepted that the people could not be expected to understand, as only parliamentarians could understand, how the split capital system is to the effective working of government.

In fact, however, Collins found from a survey of all Parliamentarians to which a substantial 171 responded including 8 cabinet ministers, that:
a) Parliamentarians believed by a majority of 3:1 that both government and parliament had worked reasonably effectively in 1994; that both government and parliament had worked reasonably effectively in 1994;

b) Given an opportunity to make up to five recommendations for the improvement of the workings of parliament only 4 out of 171 respondents mentioned locating the legislative and executive branches in the same city (they expressed no preference for Pretoria or Cape Town);

c) They compared with 112 who mentioned the organisation and scheduling of committees and 99 who mentioned the need for improved research and secretarial facilities;

d) Only one out of eight cabinet ministers said the executive and legislative should be located in the same place and even this one expressed himself personally and professionally content, and of the view that parliament had worked well in 1994.

Collins concludes that there is no warrant for the view that parliamentarians perceive the relocation of the legislature as necessary for the efficient functioning of either parliament or government. Consequently, there is no democratically defensible warrant for moving parliament.

It might be added that should parliament decide to relocate the legislative seat of government in teeth of all this evidence and in the absence of contrary evidence concerning public opinion, this would be construed as the perhaps unwitting surrender by parliamentarians to powerful and undeclared vested interests.

**B. Economic**

**B. 1 The Financial Arguments**

The Pretoria Capital Initiative has attempted to provide detailed figures of the various costs and savings which they foresee, but close scrutiny reveals these to be highly speculative if not plainly incorrect.

Any attempt, whether by Pretoria, Cape Town or government, to marshall the financial and economic costs or benefits of moving Parliament from Cape Town to Pretoria will prove speculative and eventually unquantifiable. Certainly, as is argued below, Pretoria's monetary projections are extremely suspect and do not stand up to rigorous analysis.

There is, in any event, a universal scepticism among South Africans about our ability to accurately forecast costs of large capital projects, as the experiences of Mossgas and Johannesburg's Civic Theatre will testify. Most recently, it has been reported that the cost of refurbishing the Johannesburg City Hall to accommodate the Gauteng Provincial Legislature has been some R24 million more than the R20.6 million which was originally estimated, (and took twice as long).
Consideration of the financial arguments around the proposal to move Parliament to Pretoria is restricted to the costs of the move, which are overwhelmingly capital costs, and the savings which might be achieved in terms of recurrent expenditure. These financial considerations are distinguishable from the broader economic consequences for both Cape Town and Pretoria, and for the country as a whole. The latter are considered separately in the next section of this document.

What is beyond dispute is the major importance attached to the issues of financial efficiency and effectiveness by both government and the public. This is clearly indicated by the terms of refer of the Cabinet committee, established in June 1994, whose brief (as articulated by its chairman Mr Mac Maharaj) "is not whether Parliament needs to be shifted to the Transvaal, but rather the cost of the present structure of government (Cape Times, 14 June 1994).

Pretoria’s figures are fairly easily summarised: “Taking all factors into account it can be safely accepted that establishing Parliament in Pretoria would save South Africa an amount in the order of R70 million plus per annum. A new parliamentary complex in the Klapperkop site could cost 16 million and on the Blackmoor site R160 million. The Armscor option, representing additions to an existing building, could result in a net gain of R29 million.”

These figures contrast with those cited by the then Deputy Minister of Trade and Industry, David Graaff, in a speech in Cape Town in 1994: "To replace the existing buildings of Parliament, together with the adjacent and auxiliary governmental buildings would cost in the order of R1.5 billion. The interest payable on this sum alone is R255 million a year. It has further been calculated that the cost of moving ministries up and down from Cape to Pretoria is R9 million a year.

Keeping Parliament in Cape Town will save the taxpayer R216 million a year.”

The Cabinet Committee referred to above has employed the Department of Public Works to produce a detailed cost analysis. The present document seeks to complement what they themselves describe as “this mammoth task”.

To begin with, a number of errors in the economic arguments of the Pretoria Capital Initiative can be readily identified.

- All calculations assume that the disposal value of assets in Cape Town (excluding Parliamentary Complex) will be R167 million. Significantly, this is the identical figure cited elsewhere in the Pretoria documentation where it is stated, "The market value of certain buildings used for the parliamentary function in Cape Town (including the parliament building its estimated at R 167,000,000)". Both figures correct cannot be correct unless it is assumed that the disposal value of the parliamentary complex is zero.

The truth is that moving parliament would flood the market with about 40 000 square metres of unneeded office space currently used by government, 28 000 square metres of unneeded space
currently used by embassies, and 30 000 square metres of actual parliamentary buildings for which no plausible alternative economic can be found.

- The Pretoria figures assume that interest rates on capital will be “soft”. The Pretoria submission states: “It will be found that the interest or instalment on a government loan will inevitably be considerably less than the estimated annual savings that can be achieved by relocating parliament.” This, however, avoids doing arithmetic as it ought to be done, namely in terms of opportunity costs, i.e.:

  - the real returns on capital which could otherwise have been realised, or
  - the real savings to the taxpayer, or
  - the real loss of government revenue for other public expenditures (most notably on RDP projects).

More accurate figures for the cost of capital would be reached by following normal government practice of calculating interest costs at a minimum of 15%. This would require Pretoria to show a real annual saving of R15 million for every R100 million of capital spent.

- In calculating the savings which could be expected from having a single capital, Pretoria reaches the figure of R70 million per annum by assuming that a 10-month parliamentary session in Cape Town will be exactly two-thirds more expensive than a six month session and cost R46 927 386. Additionally they calculate that R15 212 000 will be saved on the operating costs of government as a result of reducing by a third the cost of parliamentary staff, and a reduction in the travel costs of MPs and bureaucrats. All these assumptions are highly speculative, unsupported and unsounded.

Moreover, as a measure of the perhaps deliberate sloppiness of Pretoria’s document, their own figures amount to a total of R62 139 386 which would still be significantly below the promised annual savings of R 70 million plus and is, in any case, much too optimistic.

- The unsoundness of Pretoria’s reasoning about potential savings deserves to be demonstrated in detail. Here it can only be illustrated. For example, Pretoria’s document includes as a saving the bizarre items: “1. Money (sic, presumably “moving”) of sessional personnel’s furniture, etc. ... 3. Cost of moving office furniture and equipment of ministers”. These items together total a supposed R2 355 245 of savings.

Moreover, the document seems to assume mistakenly the total costs on items such as “communications” will be entirely saved, since presumably once parliament is ensconced in Pretoria the politicians and bureaucrats will do all their communicating with one another face to face in the now centrally located corridors of power. in general, the distinction is not made between what governments spend on themselves and what they need to spend. Nor, conversely, is there any apparent recognition that politicians and civil servants - like business people - will need to travel widely in South Africa wherever they are based.
A much more balanced account of the financial costs and benefits is contained in a *Financial Mail* article, “Costing a move” (17 June 1994). This article is highly sympathetic to Pretoria's plight and even claims (most unpersuasively, however) that the move might benefit Cape Town. The writer is categorical: "Keeping parliament in Cape Town costs relatively little.

“Earlier last year, then-president de Klerk said transporting 723 staff, documents and equipment to Cape Town for 1992's two sessions (emphasis added) cost R2.8 million. Another R10 million went on rents; service charges, maintenance and equipment for 800 accommodation units cost R2.8 million.

Contrary to general perceptions, few civil servants move to Cape Town for the parliamentary session. Usually just senior bureaucrats and their staff as well as the personal staff of ministries and deputy ministers make the move. Modem telecommunications, frequent air connections and the availability of state owned jets allow contact to be maintained almost constantly between officials in Pretoria and Cape Town."

The Pretoria Capital Initiative quite clearly lacks the knowledge necessary to estimate the needs of a modern and efficient parliamentary complex - or has chosen deliberately to ignore the key factors. The areas for cost estimates are so lacking in detail that it is virtually impossible to establish exactly what accommodation has been provided for. But it certainly seems that some important services have been ignored which means the PCI's total estimated requirement for accommodation in a new parliamentary complex is very inadequate and, if accepted, could result in massive cost escalations and extensive redesign to meet requirements. In making a preliminary cost estimate it is necessary at least to have a rough idea of the general needs of all groups and individuals involved in the parliamentary process.

**What a new Parliamentary Complex would need**

A decision by government to move parliament to Pretoria must be based on the assumptions that:

- It will opt for a completely new purpose-built complex or a very expensive conversion.

- A new complex will have to meet all current accommodation and service requirements and make some provision for future growth.

- The standard of design and construction and the quality of materials, finishes and furnishings will be high.

- All role players in the parliamentary process will be consulted and their needs met as far as possible.

- This means the Parliamentary Corps which can assume to consist of:

  - 400 MPs.
• 90 Senators.

• 800 Administrative Staff.

• 100 Political Party Support Staff

• 100 Media Representatives.

• 100 Security Personnel.

Although the Cape Town complex is lacking in some respects it has been successfully adapted over the years and enlarged to meet nearly all immediate requirements. Expansion could be facilitated easily and at relatively low cost by adapting the existing office accommodation in the block bounded by Plein, Roeland and Corporation Streets, much of which already owned by the state.

Access to the existing parliamentary complex could be via a skywalk to 120 Plein Street or a tunnel into the basement of 120 Plein Street. Additional basement parking could be provided under the vacant site on the corner of Roeland and Plein Streets.

A new Parliamentary Complex in Pretoria or elsewhere would require:

DEBATING CHAMBERS

The core of the parliamentary complex is the main assembly chamber which must be able to accommodate the national assembly and senate sitting together (490 members) plus secretarial and other service staff including Hansard personnel, translators and sound technicians. The chamber must have a sophisticated electronic recording system, electronic voting system, an amplified sound system with earphones for every member and a closed circuit television system. The existing main chamber is just under 1 000 square meters and is probably too small for comfort.

There must be a public gallery capable of accommodating up to 800 visitors and a press gallery for up to 100 members. Amplified sound and earphones must also be available in these two galleries in the event of visitors or media representatives needing to listen to translations of speeches.

The senate chamber must accommodate 90 senators plus secretarial and service staff. The public gallery must be able to accommodate 200 people and the press gallery 50. The same type of electronic facilities provided in the national assembly chamber will needed in the senate chamber.

COMMITTEE ROOMS

There can be as many as 10 portfolio committees or other committees meeting on the same day.
Provision must be made for at least 10 committee rooms capable of accommodating 100 persons - committee members, members of the public, media representatives and secretarial and service staff. Sound recording and amplification facilities will be needed in each room.

GENERAL CONFERENCE ROOMS

At least two general conference rooms must provided for media conferences and other large conferences. Based on existing needs, one room will need to accommodate 300 people and other 100. Sound recording and amplification facilities will be needed. MPs and senators would also require at least two general lounges/reading rooms for relaxation and to provide a neutral area to meet.

POLITICAL PARTY ACCOMMODATION REQUIREMENTS

Each MP and senator will need an office. Those who are more senior such as whips, committee chairpersons and party leaders will require more space than ordinary members. The average office size would need to be about 18 square meters (Ministers, deputy ministers, the speaker, deputy speaker, president of the senate and deputy president of the senate would have separate office accommodation, dealt with later). The office would need to be wired for closed circuit television transmitted from the national assembly and senate chambers.

On average the parties have one support staff member for every four MP and senators, i.e. about 100 people. If two shared an office they would require 50 offices of 18 square meters each.

Each party would need a caucus room of its own. Based on current representation, caucus rooms would need to accommodate:

- ANC - 312
- NP - 99
- IFP - 48
- FF - 14
- DP - 10

Facilities for recording and amplification should be provided where necessary.

ADMINISTRATIVE STAFF

There are currently just under 800 administrative staff. About 300 are secretarial workers who require their own offices, and the balance non-office service staff such as caterers and messengers. At least 300 offices of, on average, 18 square meters each would be needed for administrative staff. About 20 work stations of 20 square meters each would be needed for service officers in
various parts of the complex. Suites of offices would be needed by the speaker and deputy speaker, president and deputy president of the senate and the secretary to parliament and their personal staffs.

Provision must also be made for workshops and maintenance areas for electronic facilities, a computer room/s and data storage facilities, and storerooms for electronic equipment, stores and furniture.

There must be a printing works on the premises for the daily production of order papers, minutes, committee reports and other documents.

CATERING REQUIREMENTS

The catering department currently provides about 1,000 meals a day to MPs and senators, parliamentary staff and media representatives in six restaurants that can accommodate 650 people. Three kitchens service the restaurants. It would be difficult to rationalise the restaurant facilities further. There must at least be provision for separate restaurants for MPs and senators; and guests; for parliamentary staff; and for the media. There is currently no facility in parliament for a large state banquet of up to 100 people. This would need to be provided in a new complex. There are currently six bars in the complex serving different interest groups.

THE MEDIA

There are currently just under 100 representatives working full time in parliament. Individual offices of 18 square meter would be needed for at least 50 people. The rest could probably be accommodated in 10 communal offices measuring on average about 30 square meters.

If parliament moved to Pretoria the greater demand for press gallery facilities from foreign correspondents based in Gauteng could be expected to push the number of offices needed to about 80. All the offices would need to be wired for closed circuit television. The press gallery would also need a conference/common room capable of accommodating up to 50 people for meetings and seminars. Additional facilities required by the media would include radio studios to serve 11 different languages services and at least two fully equipped television studios.

PARKING

Parking for at least 1,000 motor cars would be needed to meet current demand. This would have to be provided either in basements or in above ground facilities which would have to be secure and safe and protected from the highveld hailstorms. If the new complex is away from the CBD, parking provision would also have to be made for about 800 visitors and diplomats within or near the parliamentary precinct.

OFFICES FOR THE PRESIDENT AND DEPUTY PRESIDENTS
It is unlikely that the office bearers mentioned above will want or need to maintain two sets of offices in Pretoria. It can be assumed that it will be more desirable and convenient for them to have their offices in the parliamentary complex. The three currently have a total of 535 staff which will need to accommodated. Their offices will also need to include conference facilities and committee rooms. The President's office will need to include a Cabinet room.

CABINET MINISTERS AND DEPUTY MINISTERS

These office bearers are also unlikely to keep two sets of offices in Pretoria and will probably opt to have their personal offices in the parliamentary complex and travel to departmental headquarters or have senior officials travel to them when necessary. This means office suites will be needed for 40 ministers deputy ministers and their personal staff. Six staff members per office bearer (on average) means 240 people. If the requirements of the President and deputy presidents are included it seems that the new complex would require an entire wing with at least as much space as 120 Plein Street for this purpose alone. Additional provision would of course have to be made for catering and parking facilities for these personnel.

OTHER FACILITIES CURRENTLY PROVIDED IN THE PARLIAMENTARY COMPLEX

• A crèche for the children of MPs, senators and staff. The number of children attending the crèche is expected to grow to about 150 in the coming year. Provision will have to be made for a crèche facility capable of accommodating at least this number of children if not more. The need to include catering and recreational areas.

• The library of parliament is a copyright library, which means it must receive a copy of every publication published in South Africa and keep it as a record. It must provide a full library service for MPs and senators and massive collection of publications.

• A reading room provides MPs with copies of all printed media published in South Africa and keeps back copies on file.

• Medical facilities include a fully staffed and equipped sick bay.

• Recreational facilities for MPs and senators include a gym, sauna and squash courts.

• A parliamentary museum houses relics from previous parliaments.

• The costs of a New Parliamentary Complex

Pretoria’s cost estimate for a new parliamentary complex must be seen in the context of experiences in South Africa and abroad. The budget for the new wing on the parliamentary complex built to accommodate the tri-cameral system was initially R23.5 million (in 1985). The final cost was R33.6 million in 1989. Other countries that have opted for new parliamentary complexes or relocated their parliaments have faced similar cost escalations.
Australia is a good example. The initial budget to provide a new parliamentary complex in Canberra for 148 MPs and 76 senators, support staff and media representatives totalling 2 600, plus facilities, was A$278 million in 1978. The final approved funding in 1989 was just over A$1 billion. Although it could be argued that labour costs in Australia are higher than in South Africa, inflation is considerably lower so it can be assumed that the cost escalation of a new parliamentary complex in Pretoria could be even higher than in Australia.

In Germany, the total cost of moving parliament from Bonn to Berlin is estimated at nearly R47 billion. The cost of planning and construction work in Berlin is estimated at nearly R40 billion.

**Further Errors in the PCI Estimates**

The following are amongst the most important reasons for believing the PCI financial estimates to be grossly misleading.

**OPPORTUNITY COSTS**

No mention is made of the opportunity costs of building a new parliament building on any one of the three proposed sites in Pretoria. The opportunity costs involve the alternative uses that the sites and/or properties could have been used for. For example, the opportunity cost of transforming the Armscor building into a new parliamentary building would be the alternative of transforming it into a large secondary school at significantly less cost. The costs would not only include the loss of a school, but also the potential benefits that the country might derive from the well educated school leavers entering the work-force and increasing economic output. In terms of the RDP this is of course, a far more beneficial use of the building.

**SAVINGS NOT R70 MILLION**

The report mentions annual savings equivalent to R70 million from a move of parliament. However, when one accurately adds up their figures one gets a total of R62.1 million. No adjustment is made either for the costs that would be incurred by those parliamentarians and administrative staff currently living in Cape Town, who would have to travel up to Pretoria for the sessional sitting. According to a survey of parliamentarians, approximately 19% of parliamentarians live in Cape Town. If one then reduces the R62 million savings by 19% one ends up with a net total of R50.2 million. Assuming savings amount to R50 million rand per annum, this is a meagre 0.0045% on the government's total budget of R110 billion. This is truly a marginal saving.

**UNREALISM**

Pretoria's maximum construction costs come to R384 million for the Klapperkop site. This seems a truly unrealistic amount when one looks at the fact that it recently cost R44.6 million just to refurbish the Johannesburg City Hall for the Gauteng Provincial Legislature.
MISCALCULATING SPACE NEEDED

In calculating their building costs, they have not provided the relevant floor areas nor shown how they have achieved their figures. These floor areas are considerably underestimated, being approximately one third of what is probably required. For example, a mere 6 400m$^2$ of space was provided for offices in the parliamentarians building.

Assuming each MP (400 in number) gets one office, and a further 300 offices are required for administration staff (secretaries and related staff) giving one a total of 700 offices, according to their figures each office would be a mere 9m$^2$ in size. This is clearly unrealistic, with a minimum office space of 18m$^2$ being required. The same can be said for their figures when it comes to the Senate.

They are also far short in area when it comes to restaurant facilities. There are currently six restaurants in Cape Town's Parliamentary Complex serving over 1000 meals a day. A single restaurant just 600m$^2$ is clearly vastly inadequate both in terms of size and efficiency. One at least needs different restaurants for the senate and for parliament. One would further need banqueting facilities.

The PCI also do not include in their areas adequate space for conference facilities, and no areas for caucus rooms, media facilities, children's crèche, library, recreational facilities and lounges are not included at all. These are all available in the present parliamentary buildings.

One could thus conservatively triple their construction costs to allow for all of these underestimates and exclusions. This would push construction costs up to R1.15 billion, which is still a conservative, but far more accurate estimate.

COST OF ALTERATIONS

One of Pretoria's proposals is to undertake alterations to the Armscor building so as to make it meet the requirements of parliament. They estimate that this will cost a mere R139 million. This is also unrealistic for a number of reasons. Firstly, to upgrade the building to a standard of quality equivalent to Cape Town would be virtually impossible and would cost roughly the same amount as constructing the building from scratch.

Secondly, they have not allowed for all the additional costs involved in constructing the amenities mentioned in the above point which have not been allowed for, and thirdly, a total figure of R2 million to totally revamp the Armscor building for all the ministerial requirement is clearly a ridiculously low figure. To repaint the building alone would cost approximately R2 million, and that excludes any construction costs.

INTEREST COSTS

Assuming relocating parliament costs a minimum of R1.5 billion, the interest alone on this amount would be at least R200 million. The estimated savings of R62 million clearly come nowhere near
to covering the interest bill. The government can ill afford increasing their interest bill at the moment, with annual interest payments already being the largest single expense item in their annual budget, making up approximately 19% of their total spending. If this money could alternatively be spent on the RDP programme, it would be money significantly better spent.

COST ESCALATION

No account is taken of the time value of money, and how construction costs will escalate over time, significantly increasing their estimates. Escalation of costs occur at approximately 12% - 15% per annum.

ALTERNATIVE USES FOR PARLIAMENT

They mention that the current parliament building could be put to alternative uses, thereby lowering costs even further. The parliament building in its present form can be used for little else. The only alternative use would perhaps be for conference facilities. However, the costs to convert the building from its current form to a conference centre do not make this a viable option.

Secondly, there has been a sharp increase in conference facilities in Cape Town at present, with several major hotel chains announcing that they too are to build conference facilities. There is thus clearly going to be ample conference facilities in Cape Town, again making it an uneconomic option to convert the parliamentary buildings.

FUTURE LOCATION OF MP’s

Many of their cost savings calculated are highly speculative and based on the fact that the vast majority of MP's are situated and live in the Gauteng area. That this will continue indefinitely is clearly a heroic assumption, as the composition of MP's will vary greatly over the passage of time. Pretoria also includes a number of additional costs e.g.: schooling, which would be incurred whether parliament was located in Pretoria or Cape Town.

In conclusion, what is clear is that moving parliament is going to involve huge direct costs immediately, while the potential benefits that speculatively might arise, are marginal and unsure. In summary, this would be a very risky decision to make with a very uncertain outcome.

B.2 Economic Effects of Moving Parliament from Cape Town

The economic repercussions of moving parliament from Cape Town to Pretoria could have potentially devastating ripple effects on the economy and its surrounding areas.

These effects can be broken down into a number of key areas, namely a drop in property prices, drop in consumption levels, rising unemployment and a loss of 'prestige' to the city of Cape Town.

INCREASED AVAILABILITY OF OFFICE SPACE
One of the key areas affected by a move of parliament would be the property industry; more specifically, owners of A and B grade offices. The movement of a large number of government departments to Pretoria would result in a flood of office space becoming available in the CBD area of Cape Town. This flood of office space causes downward pressure on office rentals, resulting in landlords losing rental income causing the market value of their properties to drop.

The market value of these properties is calculated on their future stream of net income or more simplistically as the total annual net rental income capitalised at a figure of 10%.

The drop in demand for domestic office space brought about by the movement of parliament to Pretoria will cause a reduction in the market price for office space due to large amounts of excess capacity arising, resulting in falling rentals.

It would probably take a good number of years for landlords to fully re-let this large amount of excess capacity, particularly as many other office users which are ancillary to the government would also have a reduced need for accommodation. It would be a slow and gradual process, taking not less than three years to fully re-let all vacant office spaces. This would also have a very negative effect on the construction industry, with the demand for the construction of new centrally situated office blocks falling away dramatically due to the large availability of already existing office space. Not only will the construction companies lose out, but so also will the labour that they employ, with a large number of jobs being lost.

Currently, approximately 40 000m$^2$ of office space is rented by officials affiliated to parliament and its ancillary activities. The current rental of this floor area is between R14 per m$^2$ and R16 per m$^2$. There are currently approximately 125 000m$^2$ of available office space in central Cape Town, with a take up rate of roughly 50 000m$^2$ per annum. If one therefore assumes that it will take approximately 3 years for the 40 000m$^2$ to be fully re-let (i.e.: one third of the area per annum) one would lose out on R8 251 912 in rental income. Table 1 below shows the calculations, with amounts being calculated to their present value. The discount rate used is 3%, being the real, after inflation cost of capital.

Assuming a landlord is able to fully re-let a property at only R12 per m$^2$, it would lead to a reduction in the market value of the property equivalent to R9 600 000. This drop in market value being the difference between the landlords total rental income at present, and his total rental income at the lower rental, capitalised at 10%. Thus the aggregate loss, equivalent to the sum of the fall in market value of the property and the loss of actual income would sum to R17 851 912.

TABLE 1

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
<td>Re-let</td>
<td>Total</td>
<td>Total</td>
<td>Loss in</td>
<td>PV</td>
<td>PV of</td>
</tr>
<tr>
<td></td>
<td>floor</td>
<td>rental</td>
<td>current</td>
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<td>discount</td>
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<td>income</td>
<td>rental</td>
<td>income</td>
<td>factor</td>
<td>rental</td>
</tr>
</tbody>
</table>
One can repeat this exercise for more up-market office buildings where many of the foreign embassies are found. It can be safely assumed that approximately 28 000 m$^2$ of space will be vacated by the 60 plus embassies currently located in Cape Town. Upmarket rentals are in the region of R25 per m$^2$. Again, if one assumes that the take up rate of the space is over a three year period, the present value of the loss in rental income is R9 329 346. The calculations are set out in Table 2 below. Assuming this office space is fully re-let at say R23 per m$^2$, this will cause a resultant drop in the market value of the property equal to R6 720 000. This, in turn, would result in a total loss in economic value of R16 049 346. When one combines the losses resulting in both the A and B grade offices, one gets a staggering loss of R33 910 258.

**TABLE 2**

<table>
<thead>
<tr>
<th>Year</th>
<th>Re-let</th>
<th>Total floor area</th>
<th>Total rental income</th>
<th>Loss in rental income</th>
<th>PV @ 3%</th>
<th>PV of loss in rental income</th>
<th>(4-3) @ 3% income (5 x 6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>9 333m</td>
<td>R2 575 908</td>
<td>R8 400 000</td>
<td>R5 824 092</td>
<td>0.9709</td>
<td>R5 654 610</td>
<td></td>
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<tr>
<td></td>
<td>R12 per m$^2$</td>
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<td></td>
</tr>
<tr>
<td>2</td>
<td>18 666m</td>
<td>R5 151 816</td>
<td>R8 400 000</td>
<td>R3 248 184</td>
<td>0.9420</td>
<td>R3 059 789</td>
<td></td>
</tr>
<tr>
<td></td>
<td>R12 per m$^2$</td>
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</tbody>
</table>
If one takes into account the direct income losses of R17 581 258 which will be incurred, that is as opposed to the reduction in market value of properties which only in fact occurs when the building is actually sold, and combines this with a multiplier of say, 4 (assuming a reasonable marginal propensity to consume of 0.75), it leads to a total multiple loss to the economy of R70 325 032 a year.

The multiplier effect shows the ratio of change in national income to the change in autonomous expenditure that brought it about. The formula of the multiplier is \( \frac{1}{1 - MPC} \), with the MPC being the marginal propensity to consume. The MPC shows how much of every rand received by someone is spent on consumption with the balance being saved. A multiplier of 4 thus implies that for every increase (decrease) of R1 into the economy, it will result in a total increase (decrease) of national income equivalent to R4. Thus, from our above example, the direct loss of rental revenue equal to R17 581 258 results in a total drop in expenditure of R70 325 032.

This will have a serious impact on the turnover of city retail and wholesale concerns which in turn will further weaken the demand for floor space, exerting more downward pressure on rentals.

As previously mentioned, another industry that will be negatively affected is the construction industry. Due to there being such a large amount of office space available in central Cape Town, the demand for new office space under construction, which is already a very low figure indicative of the current oversupply of available space. This of course has a large negative impact on the employment of labour, with the construction industry being a large employer of semi-skilled labour.

SELLING OF RESIDENTIAL PROPERTY

The residential market will also be adversely affected by a move of parliament to Pretoria. One would find a flood of residential homes coming onto the market as MP’s and government employees sell their homes in the Western Cape in order to buy new homes or re-settle in Pretoria. A minimum of 400 homes would probably flood the market (there are 400 MP’s alone, not to mention the hundreds of government officials who would also sell their homes) which would have a serious impact on the price of homes in the Western Cape. The supply of homes in the short-run is static, so a major reduction in the demand for homes will cause their prices to drop drastically.

Should property prices fall by an average of say 10%, with the average price of a home being R500 000, this would result in a drop in the capital value of the sellers homes amounting to R20
Whilst the multiplier effect of this loss would probably not be as large as previously, it would be safe to say that a loss of R50 000 000 would be a conservative estimate.

DROP IN LEVEL OF CONSUMPTION

The local economy would also be hard hit by the drop in consumption levels brought about by the large number of MP's, government employees, ambassadors, and foreign staff who are no longer economically active in the region due to their move up to Pretoria. The current MP’s salary is approximately R193 000 per annum. Should these MP's spend just 30% (approximately R3000 per month) of their annual disposable income whilst living in Cape Town, on consumption goods and services, the economic effect of this loss in consumption would equal R1 400 000 per month or R16 800 000 per annum. This amount using the original multiplier of 4 would have the effect of a loss in consumption equivalent to R64 800 000 per year. This ignores the astronomic future losses that would occur if one takes into account and includes all individuals who would vacate the city due to a move of parliament.

ECONOMIC DECLINE AND UNEMPLOYMENT

From the above we realise that many industries would be negatively affected by this substantial loss in consumption expenditure. Those industries particularly badly affected would be the restaurant, hotel and private taxi or transportation industries. The airlines would also be negatively affected due to a drop in demand for tickets on their domestic routes. This negative economic impact will also detrimentally affect employment in the Western Cape region.

In times of falling turnover, the first area where business is able to reduce their expenses is in the number of employees employed by the firm. Retrenchment would be rife in times of economic decline. The amount of unemployment that could occur is difficult to calculate, but it could run into many thousands. When one looks at the macro-effect of this it can lead to tens of thousands of people being impoverished with reduced incomes. Beyond any doubt, the total welfare of the population in the Western Cape would deteriorate, which is certainly not what the government would want from choice, nor should it be encouraged, especially in this crucial time of transition and the RDP.

INTANGIBLE LOSSES TO CAPE TOWN

Another aspect that should not be ignored are the intangible benefits to the local community of having parliament located in Cape Town. How do Capetonians value the location of parliament in the city and its ancillary activities in the region? One of the main intangible benefits to the local community of having parliament located in the Cape is the feeling of 'prestige' and importance. It is virtually impossible to put a rand value on the positive social costs and positive externalities that accrue as a result of the local population placing a ‘prestige value' of living in a city that houses the country's parliament.

There will also be additional losses to the region due to many local institutions and government affiliated bodies having to move offices or relocate to Pretoria. Examples of this would be
IDASA and the South African Chamber of Business. Not only would this worsen the office space crisis previously mentioned, but it would also have negative effect on employment, consumption levels and the prestige of Cape Town as a city worthy of accommodating the headquarters of major companies and institutions.

CONCLUSION CONCERNING ECONOMICS

As can clearly be seen from the above discussion there are many substantial costs to moving parliament away from Cape Town. These costs are both tangible and intangible in nature, and the effect would be catastrophic to the local economy. At present, the downside of moving parliament clearly seems to outweigh the theoretical benefits that both the country and Pretoria might achieve.

C. Administrative

C.1 The Efficiency Argument

If we suppose, first, that public opinion within Gauteng as well as in all the other regions could be educated out of its opposition to moving Parliament to Pretoria, and if we suppose further that the financial and economic obstacles can somehow be surmounted, the argument can then be made for saying that government and parliament will operate with greater administrative efficiency if the legislature and the executive are in the same city.

This argument is difficult to refute if the claim that government would be rendered more efficient by moving parliament, is asserted forcefully enough by senior members of the government and the civil service. Nevertheless, for such a claim to be cogent as well as forceful, it needs to be grounded in a very careful consideration of the perceived problems.

It is not enough that senior politicians and officials have a sense that somehow government would work more efficiently if everything were located in the same place. They need additionally to be able to identify clearly the exact nature of such inefficiencies as presently exist and to consider a range of possible remedies. Only if they were finally convinced that:

a) there is no adequate alternative remedy for the problems other than relocating parliament, and

b) the problems are sufficiently grave and enduring to outweigh the very serious disadvantages of such a move, would parliamentarians be justified in voting for the relocation of parliament on grounds of national interest.

In fact, there are four considerations which taken together, furnish overwhelming support for the view that there is no adequate justification for relocating parliament on grounds of governmental efficiency.
C.2 The Need to Travel

First, the rules concerning the attendance of cabinet ministers at parliament have already been changed so as to reduce very substantially the amount of time that ministers will need to spend in parliament and the number of civil servants who will need physically to accompany them. Moreover, there are almost certainly other ways in which the perceived inefficiencies of the split capital system could be alleviated for ministers and other members of parliament. Finally in this connection, it needs to be noted that in every democratic country in the world, the necessity for parliamentarians and especially for ministers to travel extensively is one of the inescapable obligations of elective office.

C.3 The Perceptions of Parliamentarians

Secondly, according to the Collins survey of all parliamentarians referred to in Sections A.4 above, by a large and an overwhelming majority, respectively, parliamentarians believe, first, that parliament and government are reasonably efficient as and where they are and, second, that such inefficiencies as exist are due to problems with the management of time and the lack of adequate secretarial and research facilities. They are not problems relating to the fact that parliament is located in Cape Town, nor with the physical facilities available in the existing parliament buildings.

C.4 The Possibility Of “Unbundling” The Bureaucracy

Thirdly, as indicated in section B.1, there is a growing tendency internationally to relocate the various departments of central government to different parts of the country. This not only avoids the disadvantages in terms of congestion of over-centralisation: it also makes for a more equitable distribution of public sector employment and associated economic advantages. In Britain, various ministries have been moved out of London to the North and West of the country without apparent loss of efficiency. It is not difficult to think of government departments in South Africa which might be more appropriately located somewhere other than in Pretoria.

C.5 Modern Technology

Finally, it is clear from the experience of large private sector corporations that the sophistication of modern communications technology has rendered irrelevant the question of the physical location of offices and departments. Already in South Africa, corporations such as Engen Africa are in instant and constant contact with their operations not only nationally, but also internationally. Moreover, this is a trend which will clearly accelerate as multimedia technology comes on stream in the next decade, making it possible not only to communicate verbally over indefinite distances, but also to replicate all the relevant circumstances of the business meeting.

Conclusion
We are not unsympathetic to Pretoria's needs and interests. It is clear, however, that it would be neither prudent nor equitable to secure these by snatching resources and employment away from the Cape.

This is not in the national economic interest. It would be financially reckless in the extreme. Nor would it render the working of Parliament and of Government more efficient.

Most importantly of all, it would, in present circumstances, be deeply undemocratic and, as such, would seriously undermine confidence in the integrity of the Government of National Unity’s democratic commitment.

CITIZEN’S ALLIANCE FOR PARLIAMENT (CAP)

SUPPORTING ORGANISATIONS

• WESTERN CAPE PROVINCIAL GOVERNMENT
• CAPE METROPOLITAN COUNCIL
• CITY OF CAPE TOWN
• CITY OF BELLVILLE
• SANCO
• COSATU
• WP COUNCIL OF CHURCHES
• THE MUSLIM JUDICIAL COUNCIL
• WESTERN CAPE PROVINCIAL DEVELOPMENT COUNCIL
• WESGRO
• CAPTOUR
• ANC
• NP
• PAC
• DP
• ACDP
• NAFCOC
• FABCOS
• AHI
• KAAPSTAD SAKEKAMER
• SA MUSLIM BUSINESS ASSOCIATION
• CAPE CHAMBER OF COMMERCE AND INDUSTRY
• INSTITUTE OF DIRECTORS
TO: THE AD-HOC COMMITTEE ON TRADITIONAL LEADERS

TRADITIONAL LEADERS IN THE NEW SOUTH AFRICA

Introduction

Constitutional Principle XIII states that traditional leadership will be recognised in the Constitution and that indigenous law will be subject to the fundamental rights contained in the Constitution. What this principle requires in practical reality remains to be seen. And although the voices of traditional leaders or "amakhosi" * have been heard, the perspectives of residents of rural communities and particularly women have not been. This silence is problematic as decisions made by the Constitutional Assembly with respect to the amakhosi will have a direct impact on rural women.

[*In this submission "traditional leadership", "traditional leader", "traditional authority" and "amakhosi" refer to leaders in rural communities who are leaders by birthright and have a following of community residents. Persons excluded from this definition include appointees of colonial and apartheid administrations and so-called traditional leaders who live in urban areas. This definition was arrived at through consultation with the Rural Women's Movement.]

This submission is based on the premise that women whose lives are affected by the institution of traditional leadership must influence the decisions regarding the role of traditional leaders in the new South Africa. The submission also asserts the following basic principles:

(i) this historical moment should not be allowed to be used by one group, for example, the amakhosi, to enhance their power at the expense of other groups, for example, rural communities;

(ii) the institution of traditional leadership should be democratised; and

(iii) the institution of traditional leadership should be subject to the fundamental rights contained in the Constitution.

1. The Role of The Amakhosi in the New South Africa
1.1 As South Africa is writing its final Constitution and establishing the institutions that will shape and regulate the new democratic order, amakhosi should not be allowed to augment their power beyond what it has been historically. Rather, the erosion of the self-determination of rural communities that occurred under colonialism and apartheid should be addressed. This moment should be used to restore the power of rural communities to determine for themselves their own institutions.

1.2 Traditionally, some amakhosi have played legitimate roles in rural communities. For example, they have acted as mediators of family disputes. It may be appropriate for amakhosi to continue in these traditional roles. Some amakhosi, however, did not serve their communities and were appointees of colonial and apartheid structures. Therefore, first, in determining what roles amakhosi are to play in the new South Africa, the roles they have played traditionally must be analysed. Second, in determining who will play a role in the new South Africa as a traditional leader, distinctions must be made between those legitimate leaders that are leaders by birthright and have a community-based following and those illegitimate leaders that are attempting to permanently entrench themselves in the new political order. Third, rural men and women* themselves must play a role in determining what institutions will exist in their communities.

1.3 Moreover, whether at local, provincial or national levels of government, amakhosi should not have greater status than elected officials. Amakhosi can play critical non-political roles in rural communities. If they wish to be political players, they can relinquish their roles as traditional leaders and become candidates for political office.** Those traditional leaders with a following and a desire to have political power will be elected and be able to exercise that authority within democratic and accountable structures.

1.4 Further, traditional leaders should not have judicial authority. First, the costs of traditional courts are burdensome on rural people because the communities are subject to double taxation. Rural communities pay for these courts through general taxation and then must pay for them a second time with levies imposed upon them when they use the courts. Second, traditional courts are not accountable and can apply general law or customary law arbitrarily. Traditional courts tend to apply the most conservative elements of both bodies of law to the detriment of rural women. Third, the existence of traditional courts prevents the development of consistent jurisprudence on customary law because traditional courts establish certain precedents and courts of general law establish others.

[* According to some estimates, 80% of rural residents are women and children. Consequently, if just and appropriate decisions regarding traditional leaders are to be made, the perspectives of women must be taken into account.

2. The Institution of Traditional Leadership Must Be Democratised

2.1 Culture and customs are valuable and important parts of people's lives and rural women experience some aspects of traditional leadership as affirming. Hence, the positive aspects of traditional leadership should be retained. The positive aspects of traditional leadership can be measured by the extent to which they involve and empower people and are not experienced as oppressive. The democratisation of the institution of traditional leadership, that is the inclusion of rural people in creating, recreating and defining the norms and values that regulate their lives, is the means to emphasise these positive elements.

2.2 The democratisation of traditional leadership involves creating a framework that allows people to:

2.2.1 challenge traditional leadership where it is unjust; and/or

2.2.2 allows people to decide how they want the institution of traditional leadership structured; and/or

2.2.3 whether they want to be subject to the institution at all.

2.3 A political and legal framework of rights enshrined in the Constitution is the best mechanism to:

2.3.1 empower rural people to create institutions that serve them and that they are able to change;

2.3.2 challenge and change existing public hierarchical relationships and discriminatory practices as well as the unequal distribution of rights, responsibilities and resources; and

2.3.3 challenge and change the hierarchical and discriminatory aspects of traditional authority regulating private issues such as family and property relations.

2.4 The Constitution is unequivocally a pro-democracy document with equality as its bedrock principle. Consequently, its provisions must be read in ways that strengthen systems of democratic leadership and promote equality. It would be incoherent within a participatory democracy based on freedom and equality for there to exist state-sanctioned or state-mandated enclaves of non-democratic authority. To the extent that traditional leadership is wielded in ways that compromise democracy or equality, it must be rejected. The positive elements of traditional leadership can be retained while facilitating the involvement of members of rural communities by reconciling the principles of democracy and equality with culture.

3. The Institution of Traditional Leadership Should Be Subject to the Fundamental Rights Contained in Chapter 3 of the Constitution
3.1 The Constitution's recognition of the institution of traditional leadership is not a grant of unlimited power. In fact, both the Council of Traditional Leaders and the Provincial Houses of Traditional Leaders have limited powers of advising on and delaying legislation. The acknowledgement of traditional authority in the Constitution must be viewed in light of (i) the mandates of the entire document and (ii) the fact that the fundamental rights at issue here are universally recognised norms.

3.2 Section 7(2) of the Constitution provides that the fundamental rights bind all legislative and executive organs of state. If traditional leaders are regarded as having certain powers and performing certain functions normally associated with the state, then the institution can be considered a state organ. Consequently, traditional leadership is subject to Chapter 3 of the Constitution.

3.3 Even if traditional leaders are not considered state organs, they are still subject to the fundamental right. First, it is implied that traditional leaders are subject to the fundamental rights because the interim Constitution provides that indigenous law is subject to the fundamental rights. To the extent that traditional authority is based on indigenous law, traditional leadership must be constrained by the fundamental rights. The final Constitution should be explicit on this point.

3.4 Second, the Constitution emphasizes equality and democracy. The protection and fulfilment of the fundamental rights breathes life into these principles. It would be inconsistent for the framers to make reference to and place limitations on traditional leadership and then not make the institution subject to the fundamental rights that animate the Constitution's underlying values.

3.5 Because of the historic disregard of African culture by White power structures for many South Africans the struggle for democracy means the ability to express one's culture. These aspirations are more than justified, however, a recognition and sensitivity to them does not require a cultural relativism that would deflect us from the Constitution's vision of a non-racial, non-sexist society based on freedom and equality.

3.6 Culture is not a sacred cow and is not a shield to defend aspects of traditional leadership that deny the equality and dignity of women. For example, Uganda and Canada, countries with strong traditional cultural bases to their societies, have prioritised equality over culture in their bills of rights. In South Africa, traditional leadership should not be recognised in the final Constitution in a way that permits or mandates violations of women's rights to equality and dignity.

3.7 Chapter 3 of the Constitution articulates human rights which are universally recognised norms. The principles of non-discrimination, equality and dignity included in the Constitution are enshrined in the bills of rights of many countries, the International Bill of Human Rights*
and international documents such as the Convention on the Elimination of Discrimination Against Women and the Convention on the Elimination of Race Discrimination. The achievement of substantive equality requires an understanding of human rights as indivisible and that the promotion and protection of one category of rights should not exempt or excuse states from the promotion and protection of another, nor should it result in the oppression of or discrimination against one particular group such as women, for example.

[* The Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights are known collectively as the International Bill of Human Rights.]

Conclusion

This submission presents broad principles to be applied in analysing the role of amakhosi in the new South Africa and recommends that the institution of traditional leadership be subject to the constitutional principles of equality and human rights. In the process of change, the voices of residents of rural communities must be heard and the structures and mechanisms established must grant the greatest degree of access, protection, involvement and certainty for rural communities.

For further inquiries regarding this submission, contact the Gender Research Project, Centre for Applied Legal Studies.
Telephone:    (011) 403-6918
Fax:            (011) 403-2341
PETITION AGAINST THE GRANTING OF SPECIAL RIGHTS TO HOMOSEXUALS

We greet you in the Name of our Lord Jesus Christ.

We value your and your staff’s concern and interest in the issues we as the Christian Church in South Africa are bringing to the attention of the Constitutional Assembly at present, and we continue to pray for you all that you will all know the love of Jesus around you and the wisdom given as a gift by His Holy Spirit to all who seek it.

As the copies of the enclosed correspondence indicate, we petitioned The Hon. Mr Roelf Meyer’s office in accordance with procedural instructions given to us at the time. Today I received a phone call from a Miss Garach in the Dept of Justice in Pretoria, who advised me that our correspondence and petitions should rather be directed to yourself.

I do hope that this redirection of our correspondence does not disqualify them for consideration by yourselves, as I understood that any petitions had to reach your offices by 15th May. The date on our letter indicates that they were sent to Parliament well before the abovementioned due date.

Please acknowledge receipt of this letter.

With every good wish,

In Christ’s service,

THE REVD L.G. WILMOT

Enclosures:

MOTION AGAINST SPECIAL RIGHTS FOR HOMOSEXUALS AS PROPOSED IN
THE INTERIM S.A. CONSTITUTION

That this Synod,

Whilst affirming that the homosexual condition requires sympathy, counselling and prayers for healing, nevertheless continues to recognise and reaffirm that homosexual behaviour is described as sinful throughout the Scriptures;

And noting with concern the special rights proposed for homosexuals in the Interim Constitution, over and above the civil rights now enjoyed by all South Africans.

And, furthermore, aware of the grave consequences both for ourselves as the Church, and for our children, should the proposed special rights be incorporated into our final Constitution;

RESOLVES

that the Constitutional Committee be urged to delete any clauses which give special rights to homosexuals;

REQUESTS

Both the Synod of Bishops and all members of this Synod to write to, or petition, both individually and as concerned bodies, the relevant authorities. firstly, the Minister of Provincial and Constitutional Development, The Hon, Mr Roelf Meyer; secondly, the Chairperson for the Steering Committee of the said Hon. Minister (both of whose postal addresses are: P 0 Box 15, Cape Town, 8000); thirdly to the local M.P.; and fourthly, for publicity purposes, to the editors of local and national newspapers.

50. Proposed by the Diocesan Secretary
Seconded by

APPROVAL OF SCHEDULE OF PARISHES
That the Schedule of Parishes a set forth on pages 14 and 15 of the Year Book Part 1 be approved as required in the Acts of the Diocese, Chapter IX, paragraph 1.

Signed by 148 people
GAY CHRISTIAN COMMUNITY

25th. May, 1995

We wish to submit our opinion in respect of ensuring that non-discrimination against Gay and Lesbian persons is incorporated in the New South African Constitution.

As the Gay Christian Community we believe that every single person is loved by God. God's purpose for all man-kind is that each Individual should come into His Kingdom through a personal faith in Jesus Christ, as Lord and Saviour. No individual or group of Individuals is excluded from God's love.

Discrimination against Homosexual persons is based on Ignorance of the homosexual condition, by the lay public and professionals such as Psychiatrists, Psychologists, and religious leaders. The antipathy of Christian leaders is formed on Incorrect translations of the Bible, and on a non-comprehension of bye-gone situations. It is to be noted that vast lists of heterosexual behaviour are taken very lightly in present-day situations, by Christian religious leaders.

Opinions about homosexual persons are largely based on observations of the lifestyles' of 'visible' homosexual persons. Virtually no cognisance is taken of the remarkably similar life-styles of a large proportion of heterosexual persons, particularly in respect of promiscuity and prostitution and 'deviations' such as sadomasochism, pederasty and divorce,

The vaster percentage of homosexual persons lead celibate lives or discreet committed relationships and are not “visible” to scrutiny.

Homosexual persons contribute significantly to every discipline in life, as valued and esteemed workers and professionals.

One is informed that the term “homosexual” only came into the English language in the mid-1800’s and thereafter spread to other languages. Prior to that period no words to describe homosexual persons occurred in the languages of any of the major civilisations, except where reference was made to religious prostitution.

As homosexual Christians, we believe that there should be no discrimination made against persons who are, not by choice, homosexually orientated.

Should you require a more fulsome explanation of our opinions we will gladly submit a more detailed account.

Hume S.P.Maxwell. (Chairman)
RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITY:

I write with regard to the rights of persons with intellectual disability who are unable to express their needs or wishes. This is of great concern to us and we feel strongly that those charged with drawing up the new Constitution have a special duty to ensure that the rights of persons who are intellectually disabled are protected in the new Constitution in accordance with United Nations Declaration of General and Special Rights of the Mentally Handicapped (adopted by the U.N. General Assembly in 1971), copy attached.

In 1993, a campaign was organised and a petition with over 40 000 signatures supporting a request for acceptance of the principles set out in the above Declaration, together with a Memorandum (copy attached) submitted in support and explanation of, was presented to the S.A. Law Commission in March 1993.

Either by incorporating the fundamentals of the U.N. Declaration of Rights for the Mentally Handicapped into our new Constitution or by adopting this as a Charter, annexed to our Constitution, we can ensure that the rights of this group, who are unable to effectively stand up for themselves, are adequately protected.

I cannot express the point strongly enough, that persons who are unable to speak for themselves, to ensure that their rights are catered for in the new Constitution, should be protected like any other member of society.

C.R. BEER (MRS)
Chairman


1. The mentally retarded person has the same basic rights as other citizens of the same country and the same age.

2. The mentally retarded person has a right to proper medical care and physical restoration and to such education, training, habilitation and guidance as will enable him to develop his ability and potential to the fullest possible extent, no matter how severe his degree of disability. No mentally handicapped person should be deprived of such services by reason of the costs involved.
3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to productive work or to other meaningful occupation.

4. The mentally retarded person has a right to live with his own family or with foster parents, to participate in all aspects of community life and to be provided with appropriate leisure time activities. If care in an institution becomes necessary, it should be in surroundings and other circumstances as close to normal living as possible.

5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interest. No person rendering direct services to the mentally retarded should serve as his guardian.

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If accused, he has a right to a fair trial with full recognition being given to his degree of responsibility.

7. Some mentally retarded persons may be unable, due to the severity of their handicap, to exercise for themselves all the rights in a meaningful way. For other, modification of some or all of these rights must contain proper legal safeguards against every possible form of abuse, must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic reviews and to the right of appeal to higher authorities.

MEMORANDUM IN SUPPORT OF CHARTER OF RIGHTS FOR PERSONS WITH MENTAL HANDICAP

Many South Africans, such as parents, relatives and friends of persons with mental handicap, as well as persons with mental handicap themselves, feel very strongly that there is a need to protect the interests of persons with mental handicap by means of a Charter of Rights for Persons with Mental Handicap as an addendum to an official Charter of Fundamental Rights in South Africa. To support this statement we have approximately 45 000 signatures to a petition which was distributed nationwide, as well as written support of major religious groups. The Charter of Rights which we have promoted is the Charter adopted by the United Nations General Assembly in 1971 (copy attached).

WHY DO PERSONS WITH MENTAL HANDICAP NEED SPECIAL RIGHTS?

   Mental handicap is not mentioned as a special minority group in the proposed Charter of Rights published by the Government.

   Persons with mental handicap are generally not able to speak for themselves and therefore require protection.
The rights of persons with mental handicap are often overlooked, since it is agreed that they are unable to understand these rights or to exercise them.

They are often regarded as not being in need of fundamental human rights, such as the right to education, health care and personal freedom.

Persons with mental handicap are often confused with persons with a physical disability or mental illness.

THOSE WITH MENTAL DISABILITY ARE PEOPLE TOO AND HAVE AS MUCH RIGHT AS ANY PERSON TO A FULL, SATISFYING AND HEALTHY LIFE.

In South Africa 1 in 25 persons has a mental handicap. This means that over 1 million of our population are affected. Therefore, 5 to 6 million people's lives are affected in some way by mental handicap.

The following additional comments may be made on individual clauses in the Charter of Rights for Persons with Mental Handicap.

Clause 1:

Although persons with mental handicap technically have the same basic rights as other citizens, in reality they are incapable of exercising these rights and need special protection. Since they are also unaware of these rights they are often taken advantage of and abused.

Clause 2:

In white urban communities 60% of persons with moderate or severe mental handicap are in receipt of some special care, education or training. Whereas most facilities are now open to people of all population groups, they are often inaccessible to Africans. As a result, only 3% of Africans with moderate or severe mental handicap benefit from special services.

Clause 3:

Unlike many other countries there is no legislation in South Africa to compel large employers to employ disabled people. In view of a stigma towards mental disability in particular, it is almost impossible to place a mentally disabled person in the open labour market. The availability of sheltered employment is also inadequate. The Means Test which applies to disability grants is also a big disincentive to employment.

Clause 4:

The almost total absence in South Africa of support systems for disabled people living in the community results in many people with mental handicap being placed in institutions unnecessarily. Although many of these homes and institutions do their best to create a homely living environment, it can never replace the advantages of living within a nuclear family setting.

Clause 5:
Since persons with mental handicap cannot exercise their own rights it is important that someone is appointed to ensure that they are not exploited or abused. The State should assume responsibility for seeing that this is done.

Clause 6:
Since a mentally handicapped person does not have a legal capacity to act it is often assumed that he has no responsibility whatsoever or right to an opinion. It is very important that even in legal actions the person with mental handicap be allowed to participate in proceedings to the full extent of his mental capability.

Clause 7:
The person with mental handicap must be evaluated within the context of his total situation and these evaluations must be periodically reviewed and be subject to appeal to a higher authority, since a person's situation is never static. In this process the individuals right to self-determination should be respected as far as that is possible.
ASSIGNMENT OF RESPONSIBILITIES OF MINISTERS

Section 91 of the Constitution of the Republic of South Africa, 1993 ("the Constitution")(,) provides:

"(1) The President may assign the administration of a law which is entrusted to any particular Minister or which entrusts to any particular Minister any power or function, to any other Minister.

(2) Any reference in such a law to a particular Minister as the Minister to whom the administration of such law is entrusted, shall upon their assignment under sub-section (1) of its administration to another Minister, be construed as a reference to the latter."

The effect of this provision is that an Act may provide that a certain Minister is responsible for the administration of that Act, but the State President may subsequently assign the administration of that Act to a different Minister.

There is nothing in the Constitution or any other law that specifically requires the President to publicise the exercise of his power under this section 91, and he, in fact, does not publicise the exercise of his powers under this section. The only document or instrument which the President uses when he exercises his powers under the section, is a Presidential Minute. The Presidential Minute, however, is an internal Cabinet document and is not a formal government publication. The public is therefore not informed when the President assigns the administration of an Act to a different Minister (and thus to a different department).

As attorneys, we often find ourselves in a difficult position where we are unable to advise our clients with any certainty as to which Ministers are responsible for the administration of some Acts.

Our attempts to find the relevant Presidential Minutes either from the President is office or a relevant Minister’s department have never been fruitful. It is clear that Presidential Minutes are never kept in such a way that they can easily be made available to the public.

Frequently some of our clients have to make business decisions which first require a permission or some other action on the part of the Minister in charge of the administration of a particular Act. Without the President Is exercise of his powers in terms of section 91 of the Constitution being publicised, we are unable to confirm such information for our clients.
We also believe that the failure to publicise such exercise of power by the President, is contrary to the stated policy of the Government of National Unity and the letter and spirit of the Constitution.

The right of access to information is provided in the Constitution. Section 23 provides:

"Every person shall have the right of access to all information held by the State or any of its organs at any level of Government insofar as such information is required for the exercise or protection of any of his or her rights."

Constitutional Principle IX in Schedule 4 to the Constitution is also instructive:

"Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of Government."

It is therefore our submission that the failure to publicise the exercise by the President of his powers under section 91 of the Constitution, is undesirable and inconsistent with the spirit and the letter of the Constitution. It also causes practical difficulties aforesaid.

SUGGESTION 1 : AMENDMENT TO THE PRESENT CONSTITUTION

We suggest that section 91 of the Constitution be amended to require the President to exercise his powers under section 91 by proclamation in the Government Gazette. The section may therefore read:

"The President may by Proclamation in a Gazette assign the administration of a law which is entrusted to any particular Minister or which entrusts to any particular Minister any power or function, to any other Minister."

Section 152 of the Constitution relating to the exercise of the powers by the Premiers should also be similarly amended.

We see this matter as urgent and requiring interim intervention even before the new Constitution is finalised.

SUGGESTION 2 : PROVISION IN THE NEW CONSTITUTION

We also suggest that the requirement that the President should exercise his aforesaid powers by proclamation in a Gazette should be incorporated in the new Constitution that is being drafted by the Constitutional Assembly.

We have limited our suggestion to this one particular provision of the exercise by the President of his powers. Needless to say, such a procedure and the reasons therefore might also be desirable in other circumstances which we have not specifically dealt with in this submission. You may therefore consider it worthwhile to make this procedure to be of general application whenever the President exercises his powers entrusted to him under the Constitution.
We trust that the above suggestions will be given favourable consideration.

DENEYS REITZ

cc Minister of Constitutional Development
23 May 1995

We would like our voices felt regarding the right to self-defense. The universal agreement with the committee, is that citizens should be allowed to carry weapons which are licensed by the Police or the residing government.

RALPH ROSE
CHAIRMAN

CAPE TOWN BUSINESS WATCH
27 May 1995

At a recent workshop held by the SAAUW, Cape Town, many of the issues raised provide firstly an affirmation of a constitutional principle - but then looked at administrative problems in the implementation of such a right.

Issues discussed were:

THEME COMMITTEE 4 : FUNDAMENTAL RIGHTS

Rights link with Responsibility

It was felt that more emphasis needs to be placed on the symbiotic relationship between rights and responsibility.

This will also manifest itself in issues such as judicial punishment for crimes. The granting of bail is a right but must be linked with the issue of responsibility - the suspect should not be automatically granted bail. Of particular concern to us was the issues of crimes against women and children not being treated seriously enough. Letting a suspected rapist, for example, out on bail does not provide a secure and healthy environment for women and children. First offenders are hardly considered criminal and therefore, again, a light sentence is metered out.

Wives who are battered by their husbands/partners are often subjected to continual harassment despite legal proceedings, frequently ending in the woman's death.

Children's Rights

Between 30 -35% of infants are born to girls between the ages of 10 -18 years, yet the law prevents "family planning"/contraception counselling to people below the age of 16 years. (Sex education covers only biological aspects). Health authorities, although aware of this problem, cannot act outside of legislation.

In this instance, both the mother and baby are issues under "Children's Rights".

Freedom of Religion, belief and opinion

This was agreed as a fundamental right.
However, the question of psychological protection for children (linked with Children's rights) against the operation of certain sects was raised.

**Access to Education**

Here, again, the implementation was the issue. It was felt that this right should take precedence over culture.

SAAUW, because of our international research, also feel very strongly about the continuing existence of "all-girl" schools as it has been proven that less stereotyping and stronger self-worth as a girl/women come from such schooling.

**Affirmative Action**

We agree that imbalances created by apartheid must be redressed. However, it was stressed that any programme must be implemented/required to be implemented with fairness to all previously disadvantaged people and particularly that women must be equally part of such a programme.

**Minorities**

This includes age, language and the disabled.

**Age**

Elderly people are, too often, treated as "minors"/children.

Also, in the workplace, anyone over 40 is considered too old to employ. In this way, people with important experience are being lost to the country/economy. We understand the unique problems of a country with a youthful population and the need for employment and progression but a creative way must be found in which to use the experience which is available to mentor those lacking it.

**Language**

Much has been said about the rights of each language/cultural group. Members felt that this is often not being applied to English - which should not be viewed merely as a language common to most South Africans. It is also a language with a cultural background for a number of South Africans and that aspect should also be considered and recognised.

**Disabled**

Physical access (rails and ramps) to all buildings should be automatically required in all new plans, and in the reconstruction of old buildings.

**THEME COMMITTEE 5 : JUDICIARY/LEGAL SYSTEMS**
Rights link with Responsibility

It was felt that more emphasis needs to be placed on the symbiotic relationship between rights and responsibility.

This will also manifest itself in issues such as judicial punishment for crimes. The granting of bail is a right but must be linked with the issue of responsibility - the suspect should not be automatically granted bail. Of particular concern to us was the issues of crimes against women and children not being treated seriously enough. Letting a suspected rapist, for example, out on bail does not provide a secure and healthy environment for women and children. First offenders are hardly considered criminal and therefore, again, a light sentence is metered out.

Wives who are battered by their husbands/partners are often subjected to continual harassment despite legal proceedings, frequently ending in the woman's death.

Indigenous/Traditional Law

Other organisations have raised issues such as:
- the man becoming the owner of the woman is property, on marriage
- the woman having to accept polygamy
- the woman retaining the status of "minor"

We agreed that the Bill of Rights (Human Rights - of the individual/woman) must take recedence over traditional law.

Access to Courts

The following issues were raised:

- the financial cut off point (qualification) for legal aid limits access to a vast cross-section of the community
- the Small Claims Court: the limit has been increased to R 5 000 but there are too few courts, resulting in long delays
- Constitutional Court - this was seen as an essential structure for true democracy and accountability (a real expression of the separation of church, state and judiciary). We felt that this court should, like all other courts, be independent. It should be a central structure (ie not established within each province) and all legislation - whether provincial or central - should be open to be tested. Access by all should be ensured.
- The structure, operation and staffing should be openly geared to ensure independence of all courts.

R. BOWEN
PRESIDENT
INPUTS FROM QWAQWA WOMEN ORGANISATIONS

THE FOLLOWING ORGANISATIONS WERE REPRESENTED:

1. ICT (INSTITUTE FOR CONTEXTUAL THEOLOGY)
2. NCAW (NATIONAL COUNCIL FOR AFRICAN WOMEN)
3. ANC
4. PAC
5. DIKWANKWETLA

CHAPTER 3 on the Interim Constitution - FUNDAMENTAL RIGHTS

1. EQUALITY

1.1 AFFIRMATIVE ACTION

- The principle in equality shall be enforced at all levels in legislation and Government policy to ensure a balance with regards to gender in the workplace. The workplace should reflect a true composition of the society.

- Monitoring and punitive measures to be legislated clearly so as to make affirmative action a reality.

2. LIFE

The principle of preserving life is highly honoured and supported provided that list is of good quality where the individual is still fully conscious and all the vital organs are still functioning well is brain, heart or kidneys. Secondly, if the individual is no longer aware of anything including his surroundings, the person's life is not of quality. The following is therefore suggested:

2.1 Euthanasia to be legalised in cases of terminal illnesses with irreversible damage e.g. cancer, AIDS, etc.

2.2 Abortion at fourteen weeks to be legalised for those women who want it and it should be free since most of our people are living below the breadline.

The light sentence of murderers has really contributed to the high rate of crime in South Africa.

We therefore demand that:

2.3 Life sentence with hard labour should be implemented.
2.4 Murderers not to be released on parole as they are inclined to commit the same crime again and also become victims of the families of the murdered person.

3. **HUMAN DIGNITY**

The women demand constructive protection from the constitution as women abuse is continuing in all spheres of their lives, i.e. in families, workplace and in society.

The principle of human dignity needs to be enforced, e.g.

3.1 **SEXUAL HARASSMENT**
- all workplaces to have a regulation / policy concerning sexual harassment
- sexual harassment to be classified as crime.

3.2 **RAPE**
- to be treated in the same manner as murder; i.e. perpetrator should be given life sentence with hard labour and no release on parole.

3.3 **MARITAL RAPE**
- to be treated as crime so that women dignity and respect can be restored.

3.4 **HOMOSEXUALITY** to be legalised in order to avoid discrimination against other members of the society who happen to be different from the vast majority of the population.

3.5 The legal administration should be reconstructed to be able to handle sexual harassment and rape crimes objectively; to the satisfaction of the victims.

We demand that these issues be handled in the following manner:

3.5.1 A special unit to handle these issues, e.g. A Rape Crisis Unit consisting of special Female police at charge office.

3.5.2 The charge office to have a female counsellor for the victims.

3.5.3 The State to have Crisis Centres which will render after care and follow up care for victims. These centres will also provide information to the community. Where care is rendered by NGOs as part of ..., the State is to give financial assistance.

4. **ECONOMY**
Women demand involvement in decision-making and participation at all levels and in all spheres of the formal and informal economy.

Women demand therefore that the economy policy must secure their place in the economy through:

- effective affirmative action programmes
- flexible reorganisation of the workplace to take account of family responsibilities
- provision for parental rights, including paid maternity leave, i.e. 6 months and 2 weeks for the wife and husband respectively, with job security. Adequate provision of child care facilities and reasonable working hours to accommodate family responsibilities in the public and private sector is necessary.
- recognition must be made to women who are breadwinners.
- prostitution to be legalised with strict annual or half yearly check up as a censer for practice to prevent the spread of sexually transmitted diseases. The service to be provided in decent buildings. The income of prostitutes should also be taxed.

5. CHILDREN

Perpetrators of child abuse in any form should be regarded as criminals. For Rape and Incest crimes, life sentence and hard labour to be given with no parole at all.
SUPREME COURT
BOPHUTHATSWANA PROVINCIAL DIVISION

THEME COMMITTEE 5
SUBMISSIONS (ON GUIDELINES: BLOCKS 6 - 9)

BLOCK 6

1. APPOINTMENT OF ATTORNEY-GENERAL AND HIS DEPUTIES

The position of the Attorney-General carries important responsibilities in the administration of justice. It is of the utmost importance that his discretion to prosecute should not only be unfettered but should be totally free from political influence. The method of his appointment and that of his deputies should be the same as that applicable to Supreme Court Judges. Prospective candidates should be interviewed by the Judicial Service Commission. Attorney-General's functions should be limited to institution and control of prosecutions.

I am in favour of the following structure:-

(a) Chief Attorney-General who will exercise control over the Attorneys-general of the nine provinces;

(b) Senior Attorney-General for each province;

(c) Attorneys-General who assist incumbent under (b).

The Chief Attorney-General has to formulate uniform policy for all the provinces but should not interfere in the discretion of any senior attorney-general or attorney-general in the prosecution of crime. An alternative may be to give the Chief Attorney-General cabinet status and thus make him accountable to Parliament for the general performance of criminal prosecutions in the country.

I want to stress that the decision to prosecute in any matter must rest with the Senior Attorney-General of that particular province. The Chief Attorney-General of that particular province. The Chief Attorney-General must handle only policy and the smooth running of the prosecution machinery. Only as much as I have said need be contained in the Constitution, the rest should be dealt with in the Criminal Procedure Act No. 51 of 1977.

BLOCK 7

7. LANGUAGE AND INTERPRETATION

South Africa has eleven official languages which can be used in Court. It is enough to state these languages in the Constitution but the details of what qualifications Court interpreters should possess and language proficiency of the members of the bench and other Court officials should be dealt with in a special law which may bear the titled "The Official Languages Act" or some other suitable title. My submission is that a Constitution should
not be burdened with matters which can be dealt with in an ordinary Act of Parliament. It is not always an easy process to amend the Constitution too frequently but an ordinary Act can be so amended without difficulty.

3. **PRINCIPLES OF LEGAL INTERPRETATION**

The sections in the Interim Constitution which touch on how the Constitution should be interpreted are in my view sufficient. There is already a wealth of Judicial authority backed up by the Interpretation Act No. 33 of 1957 which will assist the Courts in interpreting the Constitution.

There is in my view more merit in leaving this aspect to the Constitutional Court than to burden the Constitution with provisions which may require frequent amendment. The very fact that the Interim Constitution permits our Courts to look at the Constitutions of other countries creates an ideal opportunity for our Courts to be creative and thus establish the rules of how our Constitution should be interpreted.

4. **INTERNATIONAL AGREEMENTS AND INTERNATIONAL LAW**

The Constitution should bind the government to honour any trade agreements and treaties with other countries. But other matters should be left to ordinary Acts of Parliament, e.g. Aviation, Laws regulating territorial waters etc. The Constitution should empower the President or a Deputy President designated by the President to sign treaties ratifiable by Parliament. Customary International Law should form part of South law.

**BLOCK 8**

**LEGAL EDUCATION/LEGAL PROFESSION**

This matter should be dealt with in ordinary legislation affecting universities and the professions.

I am not certain what is meant by transitional arrangement because the Constitution that is being written now is final and not interim. It follows therefore that if a need to add to it arises that should be dealt with when that stage is reached.

J A M KHUMALO  
JUDGE OF THE SUPREME COURT
Groundswell is an educational organisation that was founded in 1986 to promote participative democracy in South Africa. We believe that ordinary people can and should be empowered to play an active and effective role in their political and economic future. Our proposals include:

* maximum devolution of power to regions and communities;
* a limited central state;
* direct democracy (referendums and initiatives);
* and an unambiguous first-generation bill of rights
* upheld by an independent judiciary.

Groundswell is a non-profit organisation and is not affiliated to any political party or group. Since our inception we have promoted the democratic ideal through intense debates at over 600 house parties; through more formal seminars such as Federalism: Making it Work, The Great Debate: The ANC meets Groundswell, and The Interim Constitution: What's it all About?; and through our Stand Tall seminars which were subsidised by the business community and run in a variety of "townships" on, amongst others, the following topics:

* Democracy's Building Blocks
* Crime: Prevention is Better
* Affirmative Action: Paving with Good Intentions?
* Community Empowerment: The Road to Peace.

Groundswell's voter education programme was initiated in early 1992 and was run in factories and schools throughout South Africa until the April 1994 elections. Our latest project includes a booklet and training course on registration and the forthcoming local elections.

Groundswell has researched and/or published several books since 1986. These include:

* Let the People Govern
* The Heart of the Nation: Regional and Community Government in the New South Africa
* Know Your Rights: How to Run Democratic Meetings in Voluntary Organisations
* Democracy's Building Blocks
* Voting in Local Elections.

As our contribution to the constitutional debate we submit and include a copy of No More Martyrs Now by Don Caldwell. We have flagged the chapters we believe will be of particular interest to you.

Good luck with your deliberations.

Gail Day
Groundswell Co-ordinator

[editor's note: the copy "No More Martyrs Now" by Don Caldwell is unscannable]
The South African Congress for Early Childhood Development (SACECD) is the nationally acknowledged mouth-piece for the young children and educare workers of our country. It was launched in March 1994 and has a membership of 40000 stakeholders in early childhood development.

SACECD wishes to see enshrined in the new national constitution for South Africa;

- the fundamental right of every pre-school child, i.e. age group 0 - 6 years, to early childhood education and development.

- acknowledgement that it is the responsibility of the family, society and the state to ensure that this right is respected and vigorously advanced.

- that those persons responsible for the education and care of the young child should be recognised, appreciated and adequately remunerated for the invaluable contribution they make to society.

- the principles and values in the United Nations Convention on Children's Rights, the Tembisa declaration (1993), Organisation of African Unity Declaration of the rights and welfare of the African child and the Children’s Charter of South Africa should be the foundation on which the education, care and development of the young child is built.

Motivation:

- the young child is one of the most valuable assets of society and should be afforded the opportunity to reach his / her full potential,

- an investment in the education, care and development of the young child results in a cost saving on drop out rates, repetition of school classes, remedial education and rehabilitation of delinquents. This has been proved by research in South Africa and elsewhere in the world,

- a child successful in it's early learning and development becomes an economic asset in his / her community in adulthood.
On behalf of SACECD’s membership.

Joyce Matube
National Co-ordinator

Inge Arndt
National Office Bearer
17.5.95

As a devout and concerned Christian and a citizen of South Africa, I would like to suggest the following concerning the constitution of South Africa.

That religious freedom be guaranteed in all private and government buildings/ open-air grounds
That religious office-bearers be allowed to fill any government position
That Satanism and occultism not be acknowledged as religions
That the Interfaith Movement be strongly opposed

That biblical values, ethics (morals) and doctrines be maintained and promoted in the new Constitution

That the "sexual orientation clause" be removed from the constitution (Homosexuality, lesbianism, sodomy and intercourse with animals are highly unnatural, abnormal and immoral and do not deserve admittance or protection in the new constitution).

May God grant that you and your council preserve the country to move in the right direction. A Constitution without God is definitely a country without God and we cannot afford that. We are after all a 70% Christian country.

E. van de Venter

[Editors note: attached copy of the letter from the Kibbutz El-Shammah is unscannable.]
31 May 1995

**Moving Parliament**

During the course of history change for the sake of change has been proven wrong.

As far as the Cape Town Chamber of Commerce is concerned, moving Parliament to Pretoria resorts under the above statement.

The Cape Town Chamber of Commerce therefore supports all the aspects presented to you by the AHI [Afrikaans Institute of Commerce] Western Cape (copy attached) and urgently requests that the idea be abandoned.

We would much rather see that the costs that such a move would entail, be spent on the RDP. In this instance we are thinking, for example, of the never-ending lack of housing. Training disadvantaged people, which will help ensure that affirmative action will run smoothly.

We trust that you will reconsider thoroughly and will realise that we will never be able to justify the potential costs to the 40 million inhabitants of South Africa.

Hennes Schreuder
Chairman
Democratic Party

20 May 1995

FINAL CONSTITUTION : REPUBLIC OF SOUTH AFRICA

The Democratic Party has consistently opposed and fought injustice and discrimination in every form. We are therefore particularly concerned at recent attempts by a small minority to tamper with Section 8(2) of the interim Constitution.

We strongly urge, once again, the retention of Section 8(2) in the final Constitution of this country. Discrimination in any form, including on the basis of sexual orientation, must be rejected and we hereby give notice of that fact.

We therefore totally and absolutely align ourselves with any submission to RETAIN Section 8(2) of the interim Constitution in the final Constitution of the Republic of South Africa.

C. M. LOWE
Democratic Party Caucus
Durban Transitional Metropolitan Council
12 May 1995

We would just like to say that our country will be lost without God and our church. We do not accept abortion (murder!!!), pornography (sin) and sex clubs. Satanism is the end of our existence. Homosexuality is an abomination in the eyes of the Lord. Let us be free and live a clean life and let us kneel in prayer for our country. No secular states 1! Many thanks One of the country's citizens We pray for you!

ANONYMOUS
AKTION BUNDESSCHLUSS

10.5. 95

Following the situation in South African as a member of the Anti-apartheid movement and especially of the church based “Aktion Bundessclus” which has been working against forced removals I feel, of course, relieved and even thankful since the new Government under Mr. Mandela has been established.

We can imagine how big the challenges are which the new government has to face in order to overcome the hardships and injustices created by the apartheid system.

As a group working for the implementation of human rights we follow also the discussion concerning death penalty. We think, of course that the new South Africa being on the way of regaining its international reputation and getting even high respect from the international community will abolish this inhuman penalty and taking into account the Universal Declaration of Human Rights and the arguments of human rights organisations like amnesty international, but we want to remind that anti-apartheid solidarity groups in Europe expect the decision of explicit abolition of death penalty in South Africa. We do hope that the South African government will not disappoint us but follow its way becoming a model for other states.

We will follow the development of your country with great sympathy, commitment and respect. May your anthem become true: Nkosi sikelel ‘iAfrica...

Heclerose Hesse
FRIENDS OF THE PIG
Sandton
2 June 1995

I enclose a brief letter I sent The Star newspaper last year and the almost overwhelming response: over 900 signatures. I also enclose a copy of a note from Archbishop Tutu.

There is an enormous demand in South Africa for constitutional protection for animals and I do hope your committee will be able to prove South Africa's essential humanity by introducing a bill for their protection.

J Victoria Canning

The Star, 31 March 1993:
PIG'S LIFE MISERABLE ON CEMENT SLAB

I am establishing a society called Friends of the Pig whose primary aim is to bring pressure to bear against the factory farming of pigs.

These animals are both affectionate and intelligent and to keep them fastened to a cement slab so that they cannot move all their adult lives seems to me grossly cruel. They are filthy only because they cannot move - left to themselves they are among the cleanest of animals. Allowed to run free in a decent field they enjoy the little life we allow them.

People interested in supporting this cause are asked to send me their name, address and telephone number so that we can show the authorities that there is substantial support for humane treatment for pigs.

Vicky Canning
Box 785799,
Sandton 2146

FROM THE ANGLICAN ARCHBISHOP OF CAPE TOWN

BISHOPSCOURT CLAREMONT CAPE 7700

9 March 1994

Ms Vicky Canning
Friends of the Pig
Box 785 799
Dear Ms Canning,

Thank you for your letter of 1 March.

I appreciate your active concern for the welfare of pigs and will gladly pray for improvements in their living conditions and treatment.

God bless you in Lent and at Easter.

Yours sincerely,

SIGNATURE
THE BRITISH SCHOOL OF YOGA

7 April 1995

We hereby wish to voice opposition to any law which prohibits a citizen of South Africa to free choice of Health Methods of healing. We believe that the individual has the right to decide for him/herself if he/she wishes to make use of safe, simple and natural means of healing.

E. Doveton
5 April 1995

I and 6 of my work colleagues would like to have the freedom of health choice clearly and equably entrenched in our new bill of rights.

Guy Bury and 6 signatures
24 May 1995

It would seem to me a great pity that, having shown the world what South Africa is capable of in terms of equal human rights, we were now to make fools of ourselves by limiting these equal rights in any way. Especially by the exclusion of the “Sexual orientation” clause.

How gay and lesbian communities rejoiced and cited US as an example to their own dilatory governments - how PROUD we were.

Please don’t let South Africa down and please don’t let down the gay and lesbian community which has waited so long for mere acceptance. We do not ask for special rights, merely for the same basic human rights as any other section of South Africa’s diverse population.

Gerry Davidson
Editor/Publisher of Exit, SA’s only gay and lesbian newspaper
Support for Equal Rights for Lesbians and Gays

I am a 42 year old English speaking clinical psychologist in private practice and a lecturer in the Psychology Department at the University of Cape Town.

I would like to request that the guarantee of equal human rights for gays and lesbians that appear in the current Constitution be retained in the final Constitution. I believe that any discrimination against someone on the grounds of sexual orientation should be unconstitutional.

Amanda Kottler, MA (Clin. Psych.)
Lecturer/ Clinical Psychologist
THEME COMMITTEE 5 (JUDICIARY AND LEGAL SYSTEMS) REGARDING BLOCK 6
(APPOINTMENT OF THE ATTORNEYS-GENERAL)

1. This memorandum is submitted by me in my capacity as an attorney-general appointed in
terms of section 2A of the Attorney-General Act, 1992, (Act 92 of 1992) and as the director:
Office for Serious Economic Offences ("OSEO") appointed in terms of section 3 of the
were announced in Government Notice R3432 published in Government Gazette 14503 of 31

2. I have been involved in drafting a memorandum to Theme Committee 5 by the attorneys-
general regarding the position of attorneys-general appointed in terms of section 2 of Act 92
of 1992, and fully support it. However, as the position of section 2A attorneys-general is not
dealt with in the said memorandum, I decided to submit this memorandum to Theme
Committee 5 regarding the position of the director of OSEO who is a section 2A attorney-
general.

3. Sections 2 and 2A of Act 92 of 1992 read as follows:

"2. Appointment of attorney-general.- (1) The State President
shall appoint in respect of the area of jurisdiction of each
provincial division and of the Witwatersrand Local Division
of the Supreme Court of South Africa a person who-

(a) has been admitted to practice as an advocate in terms of
the Admission of Advocates Act, 1964 (Act No. 74 of 1964);
(b) has been concerned in the application of the law for a
continuous period of at least ten years after his admission
to practice as an advocate; and
(c) possesses such experience as, in the opinion of the State
President, renders him suitable for appointment as an
attorney-general, as an attorney-general."

and

"2A. Appointment of attorney-general to perform certain
functions.- (l) The State President may, notwithstanding the
provisions of section 2 but subject to the requirements referred
to in paragraphs (a), (b) and (c) of section 2(1), appoint a
maximum of five persons as attorneys-general to perform the
functions assigned by the State President by notice in the Gazette
to such an attorney-general: Provided that such functions shall
not include the duties imposed and the powers conferred on an
attorney-general by this Act."

4. It is to be noted that the director of OSEO does not have to be an attorney-general, as
section 3 of Act 117 of 1991 reads as follows:
“3. (1) (a) The Minister shall, subject to the laws governing the public service, appoint a person to the office of Director: Office for Serious Economic Offences.

(b) The person so appointed shall be a person who -

(i) holds the rank of attorney-general or an equivalent or higher rank; or

(ii) by virtue of his qualifications is entitled to be admitted and authorized to practise and be enrolled as an advocate in terms of the Admission of Advocates Act, 1964 (Act 74 of 1964), and, after obtaining those qualifications, was concerned in the application of the law for a period of at least 10 years or periods which together amount to at least 10 years.”

5. Unlike the attorneys-general appointed in terms of section 2 of Act 92 of 1992, the director of OSEO who is an attorney-general is not independent from ministerial control, in that Act 117 of 1991 contains the following provisions:

“2(2) The functions of the office shall be performed by the Director, subject to the control and directions of the Minister. ”

115(1)(b) If the Minister refers a matter in relation to the alleged commission or attempted commission of a serious economic offence to the Director, the Director shall hold an inquiry on that matter.

“5(12) Upon the completion of an inquiry, the Director shall furnish the Minister with a report on his findings and recommendations, if any, and send a copy of the report to the attorney-general concerned.”

6. OSEO is a specialist investigative unit, that also conducts prosecutions at the request of attorneys-general and with their delegations. It has wide-ranging powers, inter alia the power to summon witnesses to appear before the director to be questioned under oath (see section 5 of Act 117 of 1991). The special nature of OSEO has been recognised by the Judiciary. In Park-Ross v Attorney-general: Cape and Director: Office for Serious Economic Offences 1995(2) SA 148 (C) the following was said by Tebbutt J (with whom Scott J concurred):

“From what has been set out by Swanepoel and Captain Van Ginkel, there is to my mind no doubt that what I regard as an alarming increase in the incidence of “white-collar” crime required urgent steps to be taken to combat and contain it. I also hold the view that such steps had to be immediate and had to be such that they could deal effectively, with offences and with those that perpetrated them. Swift and proper investigation was therefore Justified. Experience in these Courts has shown that certain types of “white-collar” crime are serious and in some instances extremely, complicated, involving often large sums of money and complex manipulations of the country’s currency and monetary laws and
regulations and contraventions of company, banking and fiscal laws. A great number of such offences can by no means be regarded as "run-of-the-mill" fraud cases. Their investigation demands knowledge and skills of a specialised commercial nature. While in no way seeking to belittle or be critical of work done by the commercial crime units of the South African Police, the type of offence to which I have referred, requiring as it does the attention of specially qualified and skilled persons with the necessary time to conduct the detailed investigations needed, the establishment of a special body or unit to deal with them was, in my view, warranted. To enable that unit effectively to operate and to provide it with the necessary machinery to conduct its investigations properly, the interrogatory procedures provided in the Act, in my opinion, are rationally connected to the objective of the Act." (169A-E).

7. From the above it is clear that the director of OSEO should be an experienced lawyer, with specialised knowledge of the investigation and prosecution of commercial cases.

8. In my view the director of OSEO should be an attorney-general, appointed in terms of section 2A of Act 92 of 1992. This is necessary for the following reasons:

8.1 He or she should oversee investigations, and should ensure that such investigations are conducted properly with a view to a prosecution (if, of course, there are grounds for a prosecution).

8.2 He or she should give guidance to his or her staff members involved in prosecutions regarding inter alia the drafting of indictments and the conducting of prosecutions.

8.3 He or she should naturally be of a higher rank than his or her staff, which at present includes officers with the rank of deputy attorney-general.

9. Furthermore it is my submission that, if the director of OSEO holds the rank of attorney-general, he or she should be on a par with his or her section 2 counterparts as far as appointment, independence and accountability are concerned. This can be achieved by simply inserting a further subsection into Act 117 of 1991 in the following vein:

"3(1)A. If a person appointed to the rank of Director: Office for Serious Economic Offences holds the rank of attorney-general, sections 2(2) and 5(1)(b) shall not apply to him or her, but section 5(6) of the Attorney-general Act, 1992, shall apply to him or her."

10. The main reason for the submission is that there exists no reason why, if the director of OSEO is an attorney-general, he or she should not be independent and accountable to Parliament.

11. Although the director of OSEO merely has powers of investigation, this in itself does not militate against independence. The Auditor-general e.g., who also has an inspection function in terms of section 5 of the Auditor-General Act, 1989 (Act 52 of 1989) is independent. Furthermore, as has been pointed out above, the director often conducts prosecutions on
behalf of the attorney-general: it would be untenable in such a situation that he or she should have to contend with instructions from both the attorney-general (in terms of section 6 of Act 92 of 1992) and the Minister of Justice (in terms of section 2(2) of Act 117 of 1991).

12. Although I have never experienced any attempt at interference from the Minister of Justice or his predecessor, I believe that the law should be such that it makes interference impossible. The director should therefore be able to investigate whoever or whatever case independently from political pressure or interference, subject only to his or her accountability to Court and Parliament. This means not only that the director should be able to perform his functions independently, but also that his or her dismissal should only be possible by Parliamentary action.

13. The need for such independence, is demonstrated by the so-called Watergate affair in the United States of America.

13.1 In the case of United States v Richard M Nixon, President of the United States et al 418 US 683, the Special Prosecutor filed a motion for a subpoena duces tecum for the production of certain tapes and documents, which President Nixon opposed on the ground of executive privilege (p3095). This was after a grand jury of a District Court had returned an indictment charging seven individuals with various offences, including conspiracy to defraud the US and to obstruct justice; the grand jury named the President as an unindicted co-conspirator (p3097). The Special Prosecutor had authority to control the course of investigations and litigation relating to the 1972 Presidential elections (p3100/1).

13.2 In this regard Tribe, American Constitutional Law (second edition) at 254 and 255 refers to the Nixon case, and also to the unlawful dismissal of the Special Prosecutor by President Nixon and the acting attorney-general.

13.3 This case clearly demonstrates that the director of OSEO should be legally empowered to investigate fearlessly and independently.

14. As the law stands at present, the Minister of Justice can legally interfere with the director (although it has never happened).

14.1 In terms of section 2(2) of Act 117 of 1991 he may instruct the director to stop an investigation, or not to proceed with certain aspects of it.

14.2 He could make completion of an inquiry impossible by refusing permission for the director to conduct investigations abroad in cases where such investigation is essential.

14.3 He could delay an investigation through an instruction to the director, or by merely delaying the taking of a decision.
14.4 He could instruct the director in terms of section 5 of Act 117 of 1991 to investigate an opponent in order to discredit him or her.

14.5 He could cover up fraud in the government by refusing to allow the director to investigate it.

15. Apart from what has been stated above, the perception that the director is a mere tool in the hands of the Minister, should at all costs be avoided. Such a perception can easily be created, and will affect the credibility of OSEO and of the government.

16. Consequently the following is submitted regarding the Block 6 questions in respect of a section 2A attorney-general who is a director of OSEO:

Ad question 1
In view of the need for independence of such a functionary, and the importance of transparency, it is recommended that the appointment should be made by the President on the advice of the Judicial Service Commission.

Ad question 2
The functions assigned to the director of OSEO by Act 117 of 1991.

Ad question 3
The director should be responsible and accountable for his or her actions, both to Court and to Parliament.

Ad questions 4 to 6
It should be provided in the Constitution that the director of OSEO should be a section 2A attorney-general, and that he or she should be independent.

Furthermore provision should be made in the Constitution for a dismissal procedure similar to that applicable to judges in terms of section 104(4) and (5) of the interim Constitution.

The question of accountability to Parliament can be dealt with in other legislation, i.e. Act 117 of 1991 and Act 92 of 1992.

J. A. SWANEPOEL
DIRECTOR: OFFICE FOR SERIOUS
CONSTITUTIONAL ASSEMBLY CAPE TOWN

LINK is a Lesbian organization in KwaZulu- Natal representing aver 200 women in the region. On behalf of these women and all lesbians and gays in South Africa we urge the Constitutional Assembly to ensure that our rights are entrenched in the final constitution.

The inclusion of sexual orientation in the interim constitution provided our organization with the space to organise openly in the lesbian community, providing women with an opportunity to come forward and get involved in building a healthy and positive community within the region. Without the protection of the constitution, this work would not be possible, and many lesbians would continue to be forced to lead oppressed and unfulfilled lives for fear of discrimination an the grounds of their sexual orientation.

LINK therefore requests that the equality clause is retained in the final constitution including protection against discrimination an the grounds of SEXUAL ORIENTATION.

Chairpersons (Signatures illegible)

LINK.
I wish to submit a plea for the provision and protection of open spaces.

The right to clean air, pure water and to the control of other factors affecting bodily health is generally accepted. As important, if not more so, is mental health particularly in the age of multiplying pressures.

Communities have over centuries, developed many different ways for relieving such tensions - religion, entertainment in many forms, libraries, sport - but as urban living has become more congested, simple access to space has become of vital importance. Space for the temporary alleviation of the tensions due to close proximity, space for putting at a distance the hurry and noise of the city. This is where public parks, botanic gardens or even just open spaces play their part. The last when they are urban nature reserves and so the least touched by man provide the strongest therapy. This thesis is substantiated by the correlation between crime rate and population density, by frequently quoted personal experiences and by psychological research.

As open spaces are so important for community well-being, the Constitution should protect all existing designated open spaces, particularly urban and place an obligation on all authorities from local to central to keep the creation of open spaces in step with urban development and population growth.

A practical way of doing this, would be to lay down whenever it is proposed, to change the use or ownership of publicly-owned open spaces, this must be approved by a referendum of the constituents of the authority. In the case of local authorities where areas are small and boundaries are likely to cut through affected populations, the referendum should be among residents living within 5 km of the open space.

Richard Hall,
Hon. Secretary,
Johannesburg Branch of the Botanical Society of S.A.
Greetings to you in the name of peace, love and grace, the one who died for you - Jesus Christ.

Mr Ramaphosa I wish to take this opportunity to congratulate you on your position as chairperson for the constitutional assembly. I remember watching a documentary on you on television with Evita Bezuidenhout/Pieter-Dirk Uys at your home and at the lake where you caught trout. It was inspiring for me to watch such a gentleman, keen trout fisherman and politician as yourself become chairperson to the board to implement a new constitution for South Africa.

I wish to encourage you with the knowledge that many prayers have been prayed for you from ACDP Youth in Mossel Bay as you are an important man, an important instrument in God's hands and as you seek Him, He will draw near to you and guide you so that the many blessings He has for you, you will receive.

It is also at this opportunity that I wish to submit three proposals to be implemented in the new constitution;

a/ I believe that there should be a reference to the triune God. God the Father, the Son Jesus Christ and the Holy Spirit. This will allow us to continue retrieving His blessings in our country as we acknowledge Him, He will acknowledge us.

b/ I believe that the state should allow Christian observances in all its institutions to enable them to hear the will of God, and have His guidance.

c/I believe that there should be a freedom that allows all Christian office bearers to hold any office of state, e.g. the ACDP were voted by the people to have seats in government, some of these people including Kenneth Meshoe MP still holds his office as a Pastor in the church. Also then the state will hear the will of God through these people.

I agree with you that in the past certain denominations of churches supported past laws, this was an evil on their part, and they will answer to the Lord. The Lord has heard the cries of many people in this land and has answered their prayers, it would seem strange now to remove Him from the constitution. If we confess Him He will confess us to the Father, if we deny Him He also will deny us.

Finally I wish to bless you with many good blessings of God's providence for your life and success in all that you do especially with regard to our future constitution.

I look forward to your reply and wish you well, and thank you for your time in reading this letter/fax.
For the Gospel and in His service,
Simon David Whitehead
A.C.D.P. Youth Co-ordinator Western Cape,
WE DEMAND PROTECTION OF THE FOLLOWING RIGHTS IN THE CONSTITUTION:

- THE RIGHT OF THE UNBORN TO BE BORN.
- THE RIGHT TO LIFE FROM CONCEPTION TO NATURAL DEATH
- THE RIGHT OF THE UNBORN TO PROTECTION FROM VIOLENCE

* The demand for the right to choose an abortion is a sinister plot conceived by white racists, eg. the American racist Margaret Sanger. The white race is decreasing not increasing! Could abortion not deprive us of future Mandelas?

* What gives any person the "right to choose" to destroy our future generations for their own comfort?! Abortionists ignore the obvious fact that the unborn is a separate, living being, in order to mask outright murder. It is an indisputable medical and biological fact that human life commences at fertilisation a separate life with its own blood type and specific characteristics. The fact that a baby can be given shelter and sustenance in a surrogate mother's womb, proves that he or she is never part of the mother's body. Videos of abortions reveal how babies thrash around and frantically try to escape the cruel violence inflicted, either by burning them tearing limb from limb, vacuum cleaning them out of their mother's womb, or smothering them! Many mothers realise too late that abortion destroyed their own spiritual, emotional and psychological well-being, wounded their bodies and endangered their own health and life. At no stage of its development and for no reason is it morally permissible to kill and innocent child!

* It is a well-known fact that Aids will wipe out thousands in our country in the next 5 years - why then does the government even contemplate the further decimation of the population? Why contemplate killing thousands by state funded abortions, needing expensive, sophisticated medical facilities - whilst sufficient funds are net even available for basic life-supporting necessities such as health services and water!

* If the government is genuinely worried about protecting our rights as women, why are rapists and murderers out on bail, regularly perpetrating the same crimes on us and our children after their release? Is it not a contradiction that murderers and rapists enjoy rights whilst state-funded abortions of innocent babies receive earnest consideration? Can people not suspect that murderers are let loose and abortions encouraged as a means to contain population growth?! NO GOVERNMENT HAS THE RIGHT TO ALLOW A CRUEL HOLOCAUST AMONGST THE INNOCENT AND THE UNBORN, BUT IT IS THE
DUTY OF THE GOVERNMENT TO PROTECT PRESENT AND FUTURE CITIZENS OF A COUNTRY!

* As women from all race groups, we emphatically reject the exploitation of women for pro-choice demands falsely made in or name. The recent Omnicheck survey revealed that 67% of black women, 66% of white, and about 60% of all the other races rejects abortion. The "right" to become accomplices in the cruel murder of our nation's innocent babies is mainly advocated by a few radical women in the media and parliament. **They do not speak for us!**

Government claims to people's participation in a transparent democratic process will be exposed as a farce if abortion on demand is legalised against our wishes, or if loop-holes in the constitution and laws achieve the same effect! We demand that previous submissions to the Department of Health and politicians be taken into account. Murder is not justifiable even to correct unbearable social circumstances, or to placate radical feminists even if they were a majority - which they are not!

We therefore trust the CA will prevent following the cruel and immoral example of other nations by safe-guarding the human right to life in the constitution from the **time of conception to natural death**! The spilling of the blood of the innocent will call down the wrath of God upon our nation and government!

M.E.G. SEALETSA (chair)
Association for the Mentally Handicapped
Vereniging vir Verstandelik Gestremdes

3 April 1995

We wish to appeal for the enclosed "Declaration of General & Special Rights of Persons with Mental Handicap", as approved by the United Nations General Assembly in 1971, to be included as an addendum to the General Bill of Rights in the new South African Constitution.

We believe that people with mental handicap constitute a group of people whose rights are constantly overlooked and this problem can only be properly addressed by a separate bill of rights.

Some of the injustices suffered by people with mental handicap are as follows:-

1. Absence of free primary education for persons with profound mental handicap (means test of R16 000 per family per annum);
2. Lack of facilities and subsidies relevant to needs of persons with mental handicap;
3. Means test on disability pensions is an obstacle to gainful employment (free income level only R90 per month);
4. Sub-economic level is far too low at R450 per month, as a result of which persons with mental handicap in need of residential care or protective employment, do not qualify for subsidy and usually cannot afford to pay their way.
5. Lack of parity in subsidies;
6. Mental handicap is discriminated against in the case of medical income tax deductions;
7. General disregard of basic human rights of persons with mental handicap.

Here I would like to quote some examples:

* One of our biggest frustrations at the moment concerns an alleged family sexual abuse case. The mentally handicapped person involved has to appear and defend herself according to her chronological age and not mental age. In effect she cannot be removed from her home under
the Child Protection Act as she is over 21 yet her Constitutional right to choose where she wants to live and with whom, is denied her in that her parents are her custodians. She is in a lose/lose situation and can do little about it.

* We are also very concerned about the fact that mentally handicapped adults accused of crimes, are referred to Valkenberg Hospital for observation and if found unfit to stand trial, are never given the chance to defend themselves in open court but are condemned indefinitely to Valkenberg Hospital as State President's patients.

We are aware of 2 cases where evidence of attempted rape was very circumstantial (no proof and no previous offences). The right to a fair trial and to be presumed innocent until the contrary is proved, was denied them and both were sent to Valkenberg.

We suggest that the rules and regulations of the Children's Court could be more appropriate for mentally handicapped adults as cognitively they function as children.

* Persons with mental handicap are often subjected to ridicule, cruelty, assault and other degrading treatment. They should have the right to protection from such treatment and it is the responsibility of every citizen to report any such acts to the authorities concerned.

* We would like the law to enforce the right of mentally handicapped children to attend school from age 6 until 18, but preferably from 3 - 21 years and for the State to make provision for early intervention i.e. prior to 3 years. In later classes the education programme should be geared towards adult education, independence-training and preparation for work.

* It is a fact that parents/guardians often take away every cent earned by a person with mental handicap including his/her disability pension. The person with mental handicap should have the right to benefit from his/her own earnings.

* Likewise the single care grant provided by the State to assist a family to meet the additional cost-burden of have a profoundly mentally handicapped child, is often used as family income and not for direct benefit of such child.

* Children in need of care who have been placed by the Court in the care of a Principal of a school for specialised education, when they reach the age of 18 years, are often denied the right to choose where they wish to live when they leave school, but are automatically transferred to residential care in a home for mentally handicapped adults - even though they
may wish to go back to their families. We strongly appeal that the Act be amended to allow the Family Advocate to adjudicate such cases.

We feel that the rights of people with mental handicap need to be specifically entrenched as unlike other people, even other disabled people, they are unable to exercise their rights because of intellectual disability.

We feel that it is very important that people with mental handicap are advised and educated about their rights and responsibilities as citizens in ways which they can understand, that they, as a group, have representation and that lobby groups ensure that their basic rights are enforced.

In conclusion, we would appeal most earnestly that the Declaration of General & Special Rights of the Mentally Handicapped adopted by the United Nations General Assembly in 1971 be incorporated in South Africa's new constitution.

MRS V J VAN DER MERWE

ADMINISTRATIVE MANAGER

THE DECLARATION OF GENERAL AND SPECIAL RIGHTS OF PERSONS WITH MENTAL HANDICAP ADOPTED BY THE U.N. GENERAL, ASSEMBLY 1971

1. The person with mental handicap has the same basic rights as other citizens of the same country and the same age.

2. The person with mental handicap has a right to proper medical care and physical restoration and to such education, training, habitation and guidance as will enable him/her to develop his/her ability and potential to the fullest possible extent, no matter how severe his/her degree of disability. No mentally handicapped person should be deprived of such services by reason of the costs involved.

3. The person with mental handicap has a right to economic security and to a decent standard of living. He/she has a right to productive work or other meaningful occupation.
4. The person with mental handicap has a right to live with his/her own family or with foster parents, to participate in all aspects of community life and to be provided with appropriate leisure time activities. If care in an institution becomes necessary, it should be in surroundings and other circumstances as close to normal living as possible.

5. The person with mental handicap has a right to a qualified guardian when this is required to protect his/her personal well-being and interest. No person rendering direct services to the person with mental handicap should serve as his/her guardian.

6. The person with mental handicap has a right to protection from exploitation, abuse and degrading treatment. If accused, he/she has a right to a fair trial with full recognition being given to his/her degree of responsibility.

7. Some persons with mental handicap may be unable, due to the severity of the handicap, to exercise for themselves all the rights in a meaningful way. For others, modification of some or all of these rights must contain proper legal safeguards against every possible form of abuse, must be based on an evaluation of the social capability of the mentally handicapped person by qualified experts and must be subject to periodic reviews and to the right of appeal to higher authorities.
Refer to the proposals of the Rector of the University of Stellenbosch, Prof. A.H. van Wyk, and that of the Registrar of Potchefstroom University for Christian Higher Education, Prof. WE Scott, dated 13 June 1995.

The Rand Afrikaans University supports the principals as defined by the Universities of Stellenbosch and Potchefstroom and is also of the opinion that the principles should be included in the final Constitution of South Africa.

C. F. Crouse
Rector

[editor’s note: the submission no. for academic freedom and related matters by the rector of Stellenbosch University is 8493]
4 April 1995

The South African Veterinary Association represents the majority of veterinarians in South Africa and in all forms employment and we therefore speak as the voice of the profession.

We are concerned that the contemplated delegation of Agricultural matters, which includes veterinary matters, the Provincial level will have very adverse unintended consequences related to our animal industry and agricultur business.

We are well aware of the reasons for which Agricultural matters have been assigned to Provincial control. We however believe that those who are charged with drafting our constitution must be fully aware that unless there centralised control over certain veterinary matters there will be a series of potentially disastrous consequence which are both unacceptable and inevitable.

These can be briefly listed as follows:
1. Animal disease control measures must be uniform to make an impact.
2. Import and export control of animals and animal products must be centrally controlled.
3. From a veterinary Public Health point of view, the import and export control of all animal origin food stuffs like meat, milk, eggs and the export control of these products must be centrally regulated.
4. The National trade i.e. interprovincial movements of animals, animal products and foods stuffs from animal origin must also be centrally controlled.
5. There is no objection that the execution of certain functions can be delegated to provincial veterinary services under the firm understanding that the final control and accountability shall rest with the central minister and his chief veterinary officer.
**REPRODUCTIVE RIGHTS CAMPAIGN**

We support the Reconstruction and Development Programme in its clause on women’s reproductive rights”

2.12.6. Women and Children
2.12.6.4. “... Reproductive rights must be guarantee and reproductive health services must promote people’s right to privacy and dignity. Every woman must have the right to choose whether or not to have an early termination of pregnancy according to her own beliefs. Reproductive rights must include education, counselling and confidentiality.

21 SIGNATURES
The Free Market Foundation of Southern Africa

SUBMISSION ON:
1. DEMOCRACY
2. CHARACTER OF THE STATE
3. SINGLE SOVEREIGN STATE
4. SUPREMACY OF THE CONSTITUTION

Summary

The question of sovereignty is central to constitutional theory because it determines in any society who shall have the final say in questions of state, and, therefore, the degree of freedom and democracy in that society. That people should be sovereign is central to the democratic ideal. In this submission we argue, therefore, that South Africans will benefit most if the character of our future state is one in which sovereignty lies with the people. Their right to overrule governments should be included in the Constitution. To this end the Constitution should state: The Republic of South Africa shall be one, independent state in which the people are sovereign.

The constitution should be the supreme law of the land. A constitution forms the basis of all the rules which directly or indirectly affect the exercise of power by the state. These include rules which aim to contain the exercise of state power within specified parameters. The state should be prohibited through constitutional safeguards from revoking or infringing upon the natural rights of the people. The functions which government may not undertake, such as control of religion, press censorship and the invasion of property rights should be listed.

Democracy is achieved, not only through universal franchise -- which ensures that the will of the majority prevails -- but through checks and balances that aim to contain the exercise of state power within certain well-defined limits. In this submission we argue that the three most important checks and balances which characterise a democratic state are a bill of rights, devolution of power and direct democracy.

The bill of rights should include the right to personal freedom and its corollaries of habeas corpus; freedom of movement, assembly, and speech; the right to own property; the right to vote for political representatives and in referenda and plebiscites; and equality before the law.

Most democratic governments devolve power to regional and local levels of government and in this way help to prevent its abuse. When democratically-elected regional and local governments have real decision-making powers there are numerous benefits. These include: Legislative diversity, flexibility, accountability, competition, and more democracy.
**Direct democracy** is the only way of ensuring that sovereignty rests with the people, and that elected representatives remain accountable to them. In modern democracies direct democracy takes the following forms:

- the **obligatory referendum** that forces the government to put proposed constitutional amendments to the vote of the people; the **optional referendum** that allows people to call for a vote on a new law passed by the legislature - provided a specified number of people sign a petition to that effect - and to revoke that law if a majority vote to do so; the **constitutional initiative** that allows people to make changes to the constitution provided a specified number of people sign a petition and a majority vote in favour of the change;
- the **legislative initiative** that allows people to introduce new laws provided a specified number of people sign a petition and a majority vote in favour of the law, and the **recall** that allows people to de-elect politicians provided a number of people sign a petition and a majority vote in favour of the recall.

These rights should be written into the constitution.

1. **Democracy**

The word *democracy* is derived from the Greek words for *people* and *govern*. In its original sense the word means that the people, rather than politicians, should control the decisions which affect their lives by voting directly on specific issues or by choosing accountable representatives to carry out their wishes. Thus the idea that people should be sovereign is central to the democratic ideal. The extent of democracy in a society depends on the relationship between the state and people. In highly democratic societies people can ensure that their chosen representatives remain answerable to them and take their wishes into consideration when making decisions.

All governments fall somewhere along the spectrum between pure democracy, in which the state acts only to carry out the will of the people and is completely answerable to them, and an unlimited autocracy, in which the rulers exact obedience to their whims and have no concern for any interests but their own.

Although unpopular dictatorships cannot be ousted peacefully via the ballot box, in the final analysis both elected governments and dictators depend on the acquiescence of the governed for their survival. Even extremely authoritarian regimes have self-imposed limits on the exercise of power so as to avoid the possibility of a coup or revolution.

**One-person-one-vote**

Universal franchise is an essential prerequisite for democracy but *on its own* is no guarantee of democracy or personal freedom.

For example, if 100% of people have the vote and 51% vote to chop off the left ears of the remaining 49%, the will of the majority will have prevailed, but few would call the decision
democratic. If whites were the majority in South Africa and they voted in favour of apartheid, then apartheid could be reinstated under a system of one-person-one-vote with no checks and balances.

Unlimited democracy can lead to the destruction of democracy. A classic example is the popular vote which led to national socialism (Nazism) in Germany.

Clearly universal franchise alone is not an adequate guarantee of democracy or freedom.

**Checks and balances**

Because governments are legally entitled to use force (the army, police and prisons) to compel obedience, all democratic constitutions are based to some degree on trust. The people elect and empower representatives trusting that they will not abuse their position.

Trust alone is clearly insufficient to prevent power from being abused, so in constitutional democracies various checks and balances aim to contain the exercise of state power within certain well-defined limits.

In this submission we argue that the three most important checks and balances which characterise a democratic state are a **bill of rights**, **devolution of power** and **direct democracy**.

**Bill of Rights**

While the right of the majority to govern is acknowledged, in a true democracy there are some rights which neither the majority nor its representatives can override.

A bill of rights should provide a clear statement on the importance of fundamental individual rights, including personal freedom and its corollaries of *habeas corpus*; freedom of movement, assembly, and speech; the right to own property; the right to vote for political representatives and in referenda and plebiscites; and equality before the law. The bill should be subject to change only through a significant majority in a national referendum and agreement by all the provincial legislatures.

**Maximum devolution of power**

Many people define democracy as a society in which a government chosen by 51% of the people has the right to make decisions that affect not only the 51% who support it, but the 49% (nearly half of the population) who don't. What is lacking in such a model is genuine freedom and accountability.

South Africans often take for granted the degree of centralisation which existed under apartheid. Consequently they assume that most decisions will continue to be made by the central government. However, none of the world's major liberal democracies centralise power as we do -- they all spread power through regional and local levels of government and in this way help to prevent its abuse. The only other countries which approach our degree of centralisation, such as the Scandinavian countries, are geographically small and have homogeneous populations.
When democratically-elected regional and local governments have real decision-making powers there are numerous benefits.

**Legislative diversity**

Firstly, regional and local power allows and fosters the legislative diversity which characterises a free society. Instead of one law imposed upon all, different regions have their own laws which represent special needs and values. For example, in the USA, laws regarding liquor, gambling, education, licensing, taxation and so on vary from state to state.

Don Caldwell recommended in his book *No More Martyrs Now* (Conrad Business Books, March 1992) that regional and local governments in South Africa be allowed to make laws on a wide variety of issues including: abortion, capital punishment, policing, education, health, language, culture, recreation, housing, roads, town planning, business regulation, industrial development, liquor laws, shop hours, gambling, prostitution, monument building, pollution control, conservation and tax. He pointed out that these laws, by reflecting the norms of the people living in a particular area, would be seen as legitimate and would, therefore, be more likely to be obeyed.

**Flexibility**

Small governments are more flexible and responsive to change than big ones. Changing the course of a mammoth oil tanker takes hours, a small boat minutes and a canoe seconds. A big central state sometimes takes years to make policy changes.

**Accountability**

Local power encourages accountability. It is easier to keep an eye on local politicians who live nearby than on those in remote central government. It is also far easier for the people to influence a small local government.

**Competition**

When regional and local governments wield meaningful powers they are forced to compete with each other for workers, investors and taxpayers by offering the best packages of policies. People are free to move away from areas with bad policies and into areas that govern well. In time unpopular policies are driven out and workable policies are adopted.

**Minority participation**

Small political parties and groupings that are outnumbered and therefore barely heard or acknowledged in a centralised society can win a majority of seats in a local government and thus play an active role in the decision-making processes that affect them.

**More devolution means more democracy**
Perhaps the most important benefit of vesting power in local communities is that many more people would live under the laws of their choice than in centralised systems.

As a member of a large state an individual possesses an infinitesimal degree of sovereignty. In South Africa, for example, he is only one of more than forty million people represented by central government. As a member of a neighbourhood or community, however, he is one of a few hundred or a few thousand people and has a far better chance of influencing decision-making.

Majority rule still applies when power is devolved, but even more so: The size of each majority is increased, and so democracy prevails.

**Direct democracy**

The world's first democracies were the city states of ancient Greece, these were *direct democracies* in which all adult male citizens voted directly on major issues.

Direct democracy is still the basis of much decision-making in Switzerland and the USA today, and traditional African societies are based on a similar kind of participatory democracy.

The next step was from direct to representative democracy, in which a small number of people are elected to act on behalf of others, is an obvious one, and easily made.

However, direct democracy through referendum and recall remains the only way of ensuring that sovereignty rests with the people, and that elected representatives remain accountable to them.

In modern democracies direct democracy takes the following forms:

* the **obligatory referendum** that forces the government to put proposed constitutional amendments to the vote of the people. Without the people's consent changes to the constitution cannot be made;

* the **optional referendum** that allows people to call for a vote on a new law passed by the legislature - provided a specified number of people sign a petition to that effect - and to revoke that law if a majority vote to do so;

* the **constitutional initiative** that allows people to make changes to the constitution provided a specified number of people sign a petition and a majority vote in favour of the change. This allows the constitution to reflect the changing needs of society;

* the **legislative initiative** that allows people to introduce new laws provided a specified number of people sign a petition and a majority vote in favour of the law.

* the **recall** that allows people to de-elect politicians provided a number of people sign a petition and a majority vote in favour of the recall.
Simple majority rule versus real democracy

In discussing democracy, people tend to confuse "the majority" with "the people". They say a law passed democratically reflects the will of the people. Though widely used, this phrase is correct only when there is unanimous agreement, which is rare. The correct term is "the will of the majority." And it's not clear why 49 percent or 10 percent or even 1 percent must become slaves of everybody else.
(Don Caldwell, No More Martyrs Now)

Governments based exclusively on majority rule are more likely to abuse their power than those that entrench devolution of power, direct democracy and an unambiguous bill of rights in their constitutions.

2. Character of the state

In this submission we argue that South Africans will benefit most if the character of our future state is one in which sovereignty lies with the people.

What is a free society?

In the simplest terms, a free society is one in which all individuals are free to do as they choose as long as they do not coerce others. In a free society people can, therefore, also live without fear of coercion or the threat of coercion by others.

This principle has been the basis of common law for centuries and, in recent years, there has been a revival of interest in its application to political, social and economic analysis.

Perhaps the easiest way to acquire a clear understanding of what a free society entails is to contrast it with its opposite -- a centrally planned or regulated society. A free society is characterised by limited government, decentralisation, devolution of power to local levels, individualism and personal responsibility. Individuals are supreme: the purpose of government is to serve people. In an unfree society, the state is supreme and people serve the state. The political characteristics of an unfree society are powerful central government, collectivism, paternalism, coercion and social engineering.

A free society has a free economy, governed primarily by market forces. It is characterised by individual planning, entrepreneurial activity, competition and spontaneity. These factors lead to rapid wealth creation and high living standards. In an unfree society, the economy is centrally planned and people with ability and resources are compelled by the state to provide for the needs of others. Advocates of this type of society generally, though not necessarily, prefer government ownership of the means of production and distribution, and government control of human and non-human resources.
In a free society, social relationships are voluntary and result from free choice and consent. In an unfree society, relationships between people are regulated.

A free society is based on the rule of law and common law, an unfree society on the rule of men and discretionary law.

Economic, social, legal and political freedoms are completely interdependent. For instance, voluntary exchange between individuals cannot take place unless there is private ownership of property, and freedom of speech is meaningless if the media are not permitted to publish and disseminate ideas which criticise the existing order.

3. Sovereignty

Sovereignty should be vested in the people, and their right to overrule governments should be included in the Constitution. To this end the Constitution should state: The Republic of South Africa shall be one, independent state in which the people are sovereign.

The question of sovereignty is central to constitutional theory because it determines in any society who shall have the final say in questions of state, and, therefore, the degree of freedom and democracy in that society. Sovereignty may be vested in the people, in parliament, in a dictator, a council, the judiciary or elsewhere.

Parliamentary sovereignty in Britain

Over the centuries, British sovereignty has passed from the monarch to parliament. Because the British constitution makes no distinction between ordinary laws and fundamental laws which may not be changed or overruled, parliament may pass laws on any matter whatsoever, and amend any or all parts of the constitution. Individual rights are protected by common law, but parliament may override the common law at will. Judges cannot overrule parliament, but parliament can and does overrule judicial decisions. "It is a fundamental principle with English lawyers," said De Holme, "that parliament can do everything but make a woman a man, and a man a woman."

Some theoreticians argue that acts of the British parliament are not valid if they are immoral or contravene international law, but this is not so: even a bad law must be obeyed. All laws can be passed or changed by a simple majority in the House of Commons, and there is no competing legislative power. The voters have neither the right nor the means to initiate, sanction or repeal legislation. Prior to this century the House of Lords could veto legislation, but with the passing of the Parliament Acts of 1911 and 1949 that is no longer the case. The Crown's veto has long since fallen into disuse.

Until it joined the European Union, the UK had the most flexible constitution in the world. Every part of it could be expanded, curtailed, amended or abolished with equal ease.

There are limitations on the British parliament. One is the possibility of popular resistance. Parliament, like governments everywhere, depends for its authority on the willingness of the people
to obey its laws. Secondly, it is limited from within by the attitudes of its members, which are conditioned by the same factors and governed by the same morality as British society in general. Thirdly, it is restricted by the existence of opposing parties which have always counterbalanced one another. Whichever party is in power governs in the knowledge that if it oversteps the bounds of convention and tradition, it will lose the next election.

Many of the unwritten conventions of the British parliament were written into the South African Union constitution of 1909. Consequently, the South African government enjoyed the same powerful and flexible political system, in which almost any law could be changed by a simple majority of one house, and there were no legal limitations on the ruling party. But because of the recent overwhelming National Party majorities, there was no effective opposition to provide a political constraint, no convention of local decisionmaking, nor any traditional respect for individual rights and the rule of law.

We will not dwell on the consequences of untrammelled parliamentary sovereignty in South Africa, which are well known, except to say that the degree of centralisation, authoritarianism and abuse of power which resulted caused so much bitterness and anger that many people were willing to risk their lives to change the system.

**Sovereignty in the USA**

In theory the American people are sovereign and express their will primarily through their representatives in the state legislatures, which are entitled to amend the constitution. However, the process of calling the State legislatures into action is extremely difficult and complicated.

This means that while in theory the people have the final say, in practice ultimate power is balanced between Congress, the president and the judiciary.

Because the terms of the constitution are broad, Congress can pass many laws without being challenged on constitutional grounds. When legislation is challenged, the rulings of the Supreme Court judges are heavily influenced by their personal attitudes and values.

**Sovereignty in Switzerland**

In Switzerland the people are truly sovereign, and in this they are unique in the developed world. Governments at all three levels are no more than the agents of the people, who can and do intervene directly, via the referendum and the initiative, to register their approval or disapproval of all important acts of parliament. As an important constitutional commentator said:

In Switzerland, in short, the nation is sovereign in the sense in which a powerful king or queen was sovereign in the time when monarchy was a predominant power in European countries, and we shall best understand the attitude of the Swiss nation towards its representatives, whether in the Executive or in Parliament, by considering that the Swiss people occupies a position not unlike that held, for example, by Elizabeth I of England. However great the Queen's authority she was not a tyrant, but she really in the last resort governed the country, and her ministers were her servants
and carried out her policy. The Queen did not directly legislate, but by her veto and by other means she controlled all important legislation. Such is, roughly speaking, the position of the Swiss people.

(AV Dicey)

**Sovereignty should rest with the people**

As mentioned above, sovereignty determines who shall have the final say regarding questions of state.

Switzerland is the only country in the western world in which the people are genuinely sovereign. They exercise their power through the referendum (or people's veto) and the initiative, voting frequently on national, regional and local laws. This has ensured that the Swiss people have more democracy and greater freedom (as well as peace and prosperity) than any other nation on earth.

Under South Africa's interim constitution the constitutional court plays a similar role to that of the US Supreme Court and the situation is also somewhat similar to the US in that the final say is shared between parliament and the constitutional court.

We believe that to vest sovereignty in a small group of elected representatives and appointed judges is dangerous and undemocratic. Sovereignty in South Africa should be vested, as in Switzerland, in the people.

This is not to say that the judiciary and legislature should lose their important roles. National, regional and local governments should continue to legislate, and execute their decisions. The judiciary should continue to interpret legislation in the light of the constitution. But the people should have the right to intervene and overrule legislation through direct democracy, if they see fit to do so.

The right to vote directly on laws and amendments to the constitution, and to make popular proposals should be entrenched in our bill of rights. (*Direct democracy and accountability will be discussed in more detail in another submission to your theme committee.*)

4. Supremacy of the constitution

**Principles of good government**

A limited government democracy is based above all on entrenched constitutional prescriptions of what government may not do. The most popular view of this style of government is that the state should be prohibited through constitutional safeguards from revoking or infringing upon the *natural rights* of the people.

Specific limitations have been attempted in various constitutions, the most famous of which is the United States Constitution. In this and other constitutions, the functions which government may
not undertake, such as control of religion, press censorship and the invasion of property rights are listed.

The purpose of a constitution

The constitution of a country forms the basis of all the rules which directly or indirectly affect the exercise of power by the state. These include rules which aim to contain the exercise of state power within specified parameters.

They are necessary because government, by its nature, is allowed to use force where others may not. There are many ordinary laws from which only the state is exempt.

Government is legally entitled to force people to obey its laws, and as a consequence most societies have special constraints and conventions, over and above the ordinary law, which aim to prevent the state from abusing its power. These special constraints are often embodied in a written constitution.

The constitution should be the supreme law of the land.
Interpretation of the Term “competence”

For the purpose of this submission to Theme Committee Three, the word competence is interpreted as meaning the legal powers to be assigned to local government.

The Powers of Government

It is submitted that there is no fixed and defined list of the powers of government in general.

What a government may do, depends on a number of factors, as follows -

(a) the constitutional status of that government, i.e. first, second or third tier;

(b) a particular situation or event in a particular place or the country as a whole;

(c) the feelings or attitudes of citizens;

(d) the needs of citizens

However, time and practice in most countries have resulted in the establishment of tiers of government and the sharing out of competences between those governments.

A Cautionary Note on Finance

It is one thing to deal in isolation with functions or competences, but the entrustment of a function without an accompanying source of finance or funds, would make the whole exercise a hollow one - it is thus necessary to record, that whenever a level of government is entrusted with something to do, there is a cost attached to that.

Allocation of Powers
The Constitution should be unambiguously specific in allocating powers to the established tiers of government. A major weakness of the present interim Constitution is the ambiguity in designating powers to the central and provincial level leaving too wide an area for interpretation. In practice it invariably enables central line function departments in complete control to interpret and decide which powers should be devolved to provinces and which should be retained at central level. Experience has shown that whenever the Constitution has allowed interpretative decisions, central line departments have tried to retain as much as possible and to devolve as little as possible. If the Constitution makers are serious about establishing three levels of government, they should collect the mistakes of the Kempton Park drafters and identify in precise terms and language specifically which powers should be assigned to provinces as exclusive and/or overriding powers and which should be provided as concurrent and/or subordinate. If a level of government does not exhibit certain generic characteristics applicable to any government, it is not a government but an administrative body.

The generic characteristics of a true form of government are -

A. A legitimate franchise leading to periodic elections and the election of a government which can perform legislative and executive functions.

B. Powers to -

(i) impose and collect taxes and to raise loans;

(ii) make and enforce laws:

(iii) approve or reject requests, petitions and applications;

(iv) draw-up, approve and manage a budget;

(v) employ staff and direct their efforts

C. Duties and functions to -

(i) provide and render public services;

(ii) provide and maintain public infrastructure and facilities.
The essential conclusion from A, B and C is that the degree to which a government can be called a government lies in its autonomy and power to act.

**Relationship between National and Provincial Governments in relation to their powers**

The interim Constitution because of its imprecision in terms of legislative exclusivity regarding Schedule 5 functions causes unnecessary ambiguity and confusion which invites and encourages unfair practices. The concept of concurrency allows for an ambiguity of interpretation of legislative competence. Constitutional principle XIX provides for the powers and functions at the national and provincial levels of government to include exclusive and concurrent powers. According to legal advice all the present powers of the provinces are concurrent and none can be regarded as exclusive. Section 126 of the interim Constitution does not provide for an absolute division of functions between the national and provincial levels but merely provides a mechanism with reference to which legal certainty can be obtained in the event of conflict between national and provincial legislation pertaining to Schedule C. functions.

The omission to give exclusive powers to provinces appears to be in violation of Constitutional principle XIX. The prescribed instances where a parliamentary Act may prevail is a very wide category and it dilutes the legislative competences of provincial legislatures to a large degree.

A clear distinction should be made in the Constitution in respect of exclusive and concurrent powers for both central and provincial government respectively. In regard to concurrent powers provincial legislatures should be given overriding legislative competence in respect of defined aspects of Schedule 6 functional areas. Similarly, National Parliament should be in no doubt of its overriding legislative competence in respect of those same aspects of Schedule 6 functional areas in regard to which provinces posses concurrent but potentially subordinate legislative competence.

The dividing line between the overriding and potentially subordinate legislative competence in respect of Schedule 6 functional areas must be determined precisely. It should be so worded in the Constitution that the following construction would be unquestionably accepted:

Parliament enjoys overriding competence in respect of these aspects of Schedule 6 functional areas described in Section 126(3)(a) to (a) (provided it applies uniformly in the country) while the provincial legislature's competence is thereby reduced to a potentially subordinate concurrent competence. Similarly a provincial legislature enjoys overriding legislative competence regarding
those aspects of the Schedule 6 functional areas in respect of which Parliamentary legislation
exercised in accordance with the prescriptions of Section 126(4) does not prevail over provincial
legislation by reason of any of the considerations contemplated in Section 126(3)(a) to (c).

Because of the designation in the interim Constitution of concurrency in respect of certain powers
between central and provincial government much emphasis is placed on interpretation to determine
primary or secondary responsibility, This leads to vagueness and inadequate accountability. What
should have been directed and guided by clarity and precision in the Constitution is now left or the
governmental process to correct. This raises the need for an intergovernmental process to regulate
interdependency between governments. In order to address and rectify this weakness, provision
will have to be made in the constitutional and governmental system for structured
intergovernmental relations through which the process of the respective levels of government can
be integrated.

What needs to be debated is the relative merits of constitutional and/or legislative provisions for
intergovernmental relations between central and provincial governments. The focus should be on
the institutionalisation of intergovernmental relations through the establishment of institutions and
structures through an Act of Parliament or through the new Constitution.

As long as the intergovernmental process in SA is subject to development and changes the
structures regulating the relationship will have to adapt responsively. Providing for
intergovernmental structures and institutions in the new Constitution may complicate the process of
change and adaptation because of the understandable reluctance and the attendant difficulty to
change Constitutions. An Act of Parliament may therefore be a more appropriate mechanism to
deal with the changing institutional requirements of the intergovernmental process.

LOCAL GOVERNMENT IN REGARD TO THE DISTRIBUTION OF COMPETENCES

Definition of Local Government

Without a clear prior understanding of the meaning of local government, it is difficult to understand
what local government should do.

In most democratic countries, local government is viewed as indirect local self-government, that is,
the government and representation of a community by elected councillors. Bonded into this view,
is that acceptance of this concept means that local communities, through their councillors, take decisions on local affairs without some person in a higher level of government having the power to veto or amend those decisions.

Local government is sometimes described as the cradle of democracy (cf. the Greek city-states) but democracy can only flourish where people are sufficiently free to govern their local communities as they see best without interference. Of course there have to be checks and balances, as with any system of government, but there is a vast difference between constitutional checks and balances and unrestrained interference.

Local administration is something entirely different. By definition it means that it is an extension of a higher level of government and this has nothing to do with local democracy.

**Approaches in General to the Distribution of Competences**

Ideology plays a role in this matter. For example, the more a national government moves away from the concept of liberal democracy, the more it tends to centralise administration. In the USA, the Constitution is supreme, while according to the 1936 Constitution of the former USSR, the Supreme Council was the highest organ of state power exercising all rights vested in the USSR - see articles 30 and 31. Chapter VIII of the same Constitution gave local soviets virtually no real local government powers they were given tasks such as guiding the work of administrations, maintenance of law and order and law enforcement, the protection of citizen's rights, local economic and cultural affairs and local budgets.

By contrast, German municipalities may undertake all local tasks not assigned by law to other authorities (Humes and Marlin, A Survey of 81 Countries, 542). In Germany, the powers of the Federal Government and the länder are fairly tightly prescribed (see S. E. Finer, Five Constitutions) which leaves a lot of leeway for municipalities there.

**The South African Approach to the Distribution of Competences**

This issue was strongly influenced by developments in England and British colonial policy. Prior Dutch practice was to authorise local authorities also to exercise limited judicial and law enforcement powers, but this tradition was eliminated under British colonial rule.
From about 1850, South African local authorities started acquiring the powers they now have and as a result of the South Africa Act of 1909, a power-sharing between the former provinces and the Central Government developed.

In order to compel provincial and local authorities to fit in with, apply and administer apartheid law provincial and local powers, there was a creeping centralisation and a diminution of provincial and local government powers between 1948 and 1990.

The Interim Constitution of 1993 provided the platform for a reversal of that trend and the purpose of this document is to argue for that trend to be continued.

The Current State of Local Government Competences in South Africa

An examination of this aspect requires an examination of municipal ordinances and other laws, the Constitutional Principles and the Constitution itself.

(a) Municipal Ordinances and Other Laws

There are in essence in South Africa -

(i) Four municipal ordinances
(iv) The Joint Services Board Act (KwaZulu Natal only).

The municipal ordinances and laws relating to fire brigades, traffic, health, civil protection and the like have conferred on local authorities permissive powers to render services which are grouped hereunder -

Engineering services
Water provision
Sewerage
Stormwater drainage
Electricity provision
Roads
Transport

**Community Services**
Preventive (primary) health care
Environmental health protection
Parks and recreation (including caravan parks and resorts)
Libraries
Sports facilities
Public halls
Public swimming baths
Markets
Civil protection
Abattoirs
Fire and Rescue Services
Traffic control
Nursery schools (in some towns)
Ambulance services

**Area-wide Services**
Land and use and transportation planning
Building control
Pollution control
Motor vehicle registration

**Non-classifiable Services**
Administration
The Treasury function
Dog and Vermin control
Project management
Mechanical engineering and vehicle fleet management
Architectural services (for the organisation)
Law enforcement in parks, etc. and security against theft and loss.
Personnel management
Surveys and land information
Scientific services (testing water and air for pollution)
Voters' rolls
(b) **The Constitutional Principles**

Those principles which are relevant to local government are -

**Principle XVI**

Government shall be structured at the national, provincial and local levels.

**Principle XVII**

There shall be democratic representation at each level of government.

**Principle XX**

Each level shall have appropriate and adequate legislative and executive powers and functions to enable each to function effectively. Powers shall be allocated on a basis conducive to financial viability and effective public administration.

**Principle XXIV**

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features (sic) of local government shall be set out in parliamentary statutes or provincial legislation or both.

**Principle XXV**

The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

**Principle XXVI**
Each level of government shall have a constitutional right to an equitable share of revenue collected to ensure that, inter alia, local governments are able to provide basic services and execute their functions,

(c) **The Constitution**

For the purpose of this report, reference will only be made to those provisions of the Constitution dealing with functions, powers and finances, i.e. the operation of legislation on local government is not dealt with. The principles contained in Chapter 10 of the Constitution relating to powers and finances are summarised below:

1. Provision is made for urban, metropolitan and rural categories of local government.

2. Within law, a focal government shall be autonomous.

3. The powers, functions and structures of local government shall be determined by law.

4. A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all residents.

5. A local government shall, subject to law, provide access or all residents to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, (These are all positive duties).

6. A local government shall have the power to make by-laws-

7. A local government shall have such executive powers as to enable it to function effectively.

8. The administration of a local government shall be based on sound principles of public administration, good government and public accountability, shall render efficient services and administer its affairs effectively.
A local government shall, within the prescriptions of law, be competent to levy and recover such rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions.

Conclusions and Findings

The lists of current functions given above are evidence of what local authorities already do and that local authorities are geared up institutionally and organisationally to perform those functions and services.

If, for example, the provision and operation of water, sewerage, roads, halls or traffic control were centrally provided and managed, the consequences would be -

(a) An ignoring of local wishes and the imposition of the goals of a different level of government, as happened up to 1990.

(b) A denial of the democratic right of local communities to take their own decisions.

(c) The creation of dysfunctions (see below under the Dysfunctions of Centralisation).

It is submitted that the term “competence” includes both functions and services.

The Dysfunction of Centralisation

As an introduction to this topic, it is necessary to state clearly that the term “centralisation” refers to the provision and operation of local services and not controls over standards or performance by higher levels of government.

If, for example, the National Government were to decide that it will provide facilities such as public halls and swimming pools, as well as water and electricity services, the consequences that would follow would be something along the following lines:

CABINET

New Ministry created
A central government department would have to be created and staffed.

On the other hand, if the local government concerned were itself to handle the matter, the sketch could be simplified as follows:

Under some circumstances, applications to purchase land or raise a loan.

Establish the needs of residents and take decisions to act.

The important factors in any governmental system are the length of the lines of communication, the flow of the work to be done and the cost attached thereto. Therefore, if a document has to progress through stages, the cost increase as follows:

Stage 1
<table>
<thead>
<tr>
<th>Stage 2</th>
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<tbody>
<tr>
<td>Origination of document - typing checking, printing, distribution, etc.</td>
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<tr>
<td>Cost = RA</td>
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</tbody>
</table>

<table>
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<tr>
<th>Stage 3</th>
</tr>
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<tbody>
<tr>
<td>Document reviewed, report written thereon and matter sent to stage 3.</td>
</tr>
<tr>
<td>Cost = RA + RB</td>
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</table>

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<tr>
<th>Stage 4</th>
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<tbody>
<tr>
<td>Document again reviewed, another report written and document sent to stage 4.</td>
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<tr>
<td>Cost = RA + RB + RC</td>
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</tbody>
</table>

| All documents reviewed - submission for final decision compiled, typed checked, printed and distributed. |
| Cost = RA + RB + RC+ |

The above sketch shows how long lines of communication and decision-making results in a progressive rise in administrative costs, all of which has to be paid for out of public funds. A real danger in this sort of process, is that the clear terms of the original document could well become obscured and distorted, resulting eventually in an incorrect decision being taken.

Based on the finding reached above and accepting the argument that there are clear financial arguments in favour of a wide range of services being performed at the local level, the proposal made below is divided into two parts, viz principles and actual functions and services.
Part A: Principles

1. Local government has a right to continue as a legitimate form of government.

2. Every local government shall have the autonomy to enable it to fit in with the concept of indirect local self-government.

3. The fiscal powers and capacity of local government shall be such as to perform its functions and render services to its residents.

4. The existence of local government as an autonomous form of government (which is subject to the Constitution) shall be entrenched against higher levels of government.

5. Local governments shall be accountable to the voters in their area.

6. Forms of local government shall be differentiated in terms of powers, duties, functions and services according to whether they are for urban, metropolitan or rural areas of local government.

Part B: Functions and Services

<table>
<thead>
<tr>
<th>Functions</th>
<th>Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Taxation functions</td>
<td>(a) Existing functions as listed earlier in this memorandum.</td>
</tr>
<tr>
<td>(b) Legislative functions (by-laws)</td>
<td>(b) Housing</td>
</tr>
<tr>
<td>(c) Fiscal functions, taxes, tariffs and</td>
<td>(c) Infrastructure</td>
</tr>
<tr>
<td>(d) Other government functions</td>
<td>(d) Managing urbanisation</td>
</tr>
<tr>
<td>(e) Internal functions as described above</td>
<td>(e) Economic development</td>
</tr>
</tbody>
</table>
RE: PUBLIC HEARINGS ON THE PUBLIC PROTECTOR: WRITTEN SUBMISSIONS
BY THE DURBAN AND DISTRICTS BRANCH OF THE BLACK LAWYERS
ASSOCIATION

It is with great regret that I forward, so late, the submissions of the Durban Branch of the Black Lawyers Association, of which I am Chairperson. Quite apart from the fact that it is apparent from your letter of 24 February, 1995 that your circular invitation to various organisations and persons to make their submissions left very little time for discussion of submissions, the Constitutional Officer of the B.L.A. in Johannesburg faxed the invitation circular to me only at 13H52, on Friday, 10 March, 1995. I only became aware of the facts on Monday, 13 March, 1995. As the last date for presenting submissions, was Wednesday, 15 March 1995, our branch had no option but to discuss the issue only after the deadline had passed.

In view of the importance of the office of Public Protector, membership of our branch felt that we had to go through all the issues raised, notwithstanding that it was then passed the deadline. I am mandated to transmit to you, our submissions and comments in respect of each of the questions. Due to time constraints and the complexity of the matter, there are some aspects on which it did not become possible to arrive at a well-thoughtout conclusion. We trust, however, that the Constituent Assembly will find it possible to consider our late submissions, which are as follows

QUESTION 1
1.1 Should the final text of the Constitution have a constitutional provision on the institution of the Public Protector/Ombudsman or should this institution be regulated by ordinary legislation?

ANSWER:
It was felt that the Constitution should make provision for the institution of Public Protector.

QUESTION:
1.2 Should the name "Public Protector" and not "Ombudsman" and (vice versa) be utilised to describe the Institution?

ANSWER:
It was unanimously agreed that the title "Public Protector" should be used, because it tells the ordinary person, in simple terms, what that office is for and about. Care should be taken, however, never to use the abbreviation PR, as it is also used for the Public Prosecutor.

QUESTION 2:
2.1 Should Public Protectors be lawyers, or should they be specialists in other areas such as Sociology, Social Work, Psychology and Public Administration in order to qualify for appointment as Public Protectors?

**ANSWER:**

It was unanimously agreed that nominations for this institution should not be drawn from lawyers only, and that any knowledgeable person should be eligible for nomination. It was felt that it is not mere knowledge of the law that is required for such an office and that what knowledge of the law is required should not be with regard to technical details that cannot be readily acquired by non-lawyers.

**QUESTION 3:**

3.1 Should the tenure of office of the Public Protector be permanent or be for a certain defined period?

**ANSWER:**

There were, at first, different views on this aspect. One view was that a Public Protector, like a judge, should not possibly suffer from insecurity of office, and that, as in the position of a judge, tenure of office should be permanent i.e. until he/she reaches retirement age. The other view was that a lesson learnt from many of the judges is that the permanency of an office tends to breed indifference and arrogance on the part of some holders of such an office. Consequently, the latter view was for tenure of office being no longer than twelve months, but being renewable from time to time for a further period of twelve months thereafter. It was, eventually, resolved that a compromise between the two situations, and one that removes the objectionable elements of each of the alternatives be adopted. The compromise is a period of 5-7 years, subject to renewal.

**QUESTION 4:**

4.1 Should the Public Protector investigate matters upon receiving complaints or should she/he also investigate matters on her/his own initiative or should she/he play both roles?

**ANSWER:**

The Public Protector should play both roles. In the course of discussing the various questions, and more particularly when dealing with the present one, membership agreed that the Public Protector's office would need to be adequately human-resourced. It will be essential to devise a perfect or near perfect mode of screening staff for such an office, so as to ensure a high degree of integrity and clean past history on them and the Public Protector.

**QUESTION -**
4.2 What is the nature of the powers that should be accorded the institution of the Public Protector?

ANSWER:

This question unexpectedly initiated a lot of debate. It was eventually resolved that the Public Protector should merely be empowered to exert pressure upon the organs of the State, without herself/himself being called upon to perform the functions of such organs. There was a minority view that the Public Protector should be able, for instance, to personally intervene where he/she finds a serious offence being committed, provided, she/he felt that it was physically possible for her/him to so intervene.

In other words, the suggestions was that it would not be necessary for the Public Protector, in such a situation, to have to wait until the police had come to the scene. The overwhelming view, however, was that the Public Protector should not be settled with that kind of task - as long as she/he had enough powers to ensure performance of duties by those with obligations to perform them.

QUESTION:

4.3 Should the powers of the Public Protector be extended beyond the investigation of problems of unfairness caused by government, to include those emanating from the private sector or should other equitable mechanisms be found for investigating unfairness from the private sector?

ANSWER

After a very lengthy debate - in the context of the little time available to the members - it was not possible to arrive at a majority view out of the two main conflicting ones, viz. that:

4.3.1 The Public Protector is, by definition, one who protects the public from whatever source it is endangered. It is not only the State, but also powerful private concerns - eg. large factories that pollute the atmosphere and poison rivers and powerful individuals - such as warlords and wealthy business people that which endanger peoples lives and or property and/or interfere with human liberty;

4.3.2 Once the Public Protector is given all-embracing powers, there is the danger that, she/he may usurp them e.g. by interfering with individual liberty and privacy. Because a lot of time had already been spent on this question, it was not possible to deal with the last portion thereof viz. whether other equitable mechanisms should be found for investigating unfairness from the private sector. Afterall, it would not have been possible to deal with that portion without first arriving at a conclusion regarding the first portion of the question.

QUESTION 5:
5.1 Should the Public Protector intervene in the judicial system with regard to dealing with any maladministration in the system of justice?

**ANSWER:**

It was also not possible, due to time constraints and the hectic debate engineered by the question, to arrive at a majority view. There were, once more, two main conflicting views, viz:

5.1.1 That once a matter was before a judge - (no mention was made of magistrates) the Public Protector should not be entitled to intervene as this would otherwise have the effect of interfering with the judiciary and the smooth running of legal proceedings;

5.1.2 Several centuries of experience with the South African judiciary and experiences elsewhere, internationally, serve to indicate that it is very often from the judiciary (including magistrates) that individuals need protection. There is also the danger that, once the bureaucracy or any other powerful body or individual had managed to frog-march an individual to court, without being detected by the Public Protector, the latter could not intervene once the judicial process was in motion, even if she/he had ample proof that the individual was improperly before court. According to this view, it would be much better to try to find means whereby the Public Protector's intervention would not cause undue strain upon the judicial process rather than to put the judicial system out of reach for the Public Protector.

**QUESTION 6:**

Membership agreed that there is a question that should have preceded the existing ones. It should have been 6.1, with the numbering of the remaining two questions changing accordingly. In what follows, the numbering is in accordance with the aforementioned suggestion.

6.1 Should there be a single national Public Protector, with deputies in the various provinces, or various independent provincial Public Protectors?

**ANSWER:**

The overwhelming majority view was that, in the light of recent experiences, more especially what is happening in the KwaZulu-Natal province, it was extremely undesirable to have Independent Public Protectors and that the first option should be adopted. It was emphasised that it was important that people be guaranteed similar and equal protection in the country, regardless of the province in which they are. It was felt that this can be secured only if a national Public Protector is capable of visiting her/his deputies in the various provinces and being able to inspect the manner in which they perform their functions. This would also ensure that criteria for appointment for the office of Public Protector - including disqualifying factors - are uniform. There was however, a minority view that it was best to go for a federal approach, with the autonomy of Provincial Public Protectors being assured.
6.2 & 6.3 The questions what the role and powers of the Provincial Public Protectors should be, and whether the national and provincial Public Protectors should compliment each other or not, became irrelevant, in the light of the option adopted in 6.1.

**QUESTION 7:**

7.1 What is the nature of the relationship between the Public Protector and other specialised structures of government, such as the Human Rights Commission and the Gender Commission?

**ANSWER:**

Similarly, there was inadequate time to deal adequately with this question. The general feeling was, however, that the office of the Public Protector, the Human Rights Commission and the Gender Commission should all form part of one office, which could be either, the Public Protector's office or the Human Rights Commission, in which office there would be branches dealing with various aspects, like the gender issue, that need specialised attention. The advantage of such a move is that it would:

7.1.1 ensure uniformity of treatment issues of human rights; and

7.1.2 simultaneously serve to cut down on expense, substantially, by decreasing the number of heads of commissions or departments to only one. It was felt that this suggestion adequately deals with the common criticism that gender issues are not given the special attention that they deserve, in that the suggested rationalisation and cutting down on costs would not interfere with the specialisation required.

**CONCLUSION**

I repeat that, inadequate as the effort of the Durban branch of the Black Lawyers Association may be, due to no fault of the branch, and as late as these contributions are, it is hoped that efforts will be made to accommodate them. Moreover, seeing that the Interim Constitution was rushed through, without any consultation at grassroot level, efforts should made to give grassroot structures more time than they are now given, in most cases, for preparation and presentation of well-thought and fully-debated submissions.

J. N. M. POSWA
CHAIRPERSON, DURBAN AND DISTRICTS
Several of the aspects on which comment is presently invited have been addressed previously in submissions. In view of the importance of the subject however we would be happy again to respond and perhaps to provide some additional perspective which we trust you will find helpful in your deliberations.

The core issue that needs to be addressed is the relationship between the legislative competence of Parliament and that of a Provincial Legislature with reference to Schedule 6 functional areas.

**Herbert Beukes**
DIRECTOR-GENERAL

**Interpretation of the Term "competence"**

For the purpose of this submission to Theme Committee Three, the word competence is interpreted as meaning the legal powers to be assigned to local government.
The Powers of Government

It is submitted that there is no fixed and defined list of the powers of government in general.

What a government may do, depends on a number of factors, as follows -

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However, time and practice in most countries have resulted in the establishment of tiers of government and the sharing out of competences between those governments.

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It is one thing to deal in isolation with functions or competences, but the entrustment of a function without an accompanying source of finance or funds, would make the whole exercise a hollow one. It is thus necessary to record, that whenever a level of government is entrusted with something to do, there is a cost attached to that.

Allocation of Powers

The Constitution should be unambiguously specific in allocating powers to the established tiers of government. A major weakness of the present interim Constitution is the ambiguity in designating powers to the central and provincial level leaving too wide an area for interpretation. In practice it invariably enables central line function departments in complete control to interpret and decide which powers should be devolved to provinces and which should be retained at central level. Experience has shown that whenever the Constitution has allowed interpretative decisions, central line departments have tried to retain as much as possible and to devolve as little as possible. If the Constitution makers are serious about establishing three levels of government, they should correct
the mistakes of the Kempton Park drafters and identify in precise terms and language specifically which powers should be assigned to provinces as exclusive and/or overriding powers and which should be provided as concurrent and/or subordinate. If a level of government does not exhibit certain generic characteristics applicable to any government, it is not a government but an administrative body.

The generic characteristics of a true form of government are -

A. A legitimate franchise leading to periodic elections and the election of a government which can perform legislative and executive functions.

B. Powers to -
   (i) impose and collect taxes and to raise loans.,
   (ii) make and enforce laws.
   (iii) approve or reject requests, petitions and applications.
   (iv) draw-up, approve and manage a budget.
   (v) employ staff and direct their efforts.

(c) Duties and functions to -

   (i) provide and render public services;
   (ii) provide and maintain public infrastructure and facilities.

The essential conclusion from A, B and C is that the degree to which a government can be called a government lies in its autonomy and power to act.

**Relationship between National and Provincial Governments in relation to their powers**

The interim Constitution because of its imprecision in terms of legislative exclusivity regarding Schedule 6 functions causes unnecessary ambiguity and confusion which invites and encourages unfair practices. The concept of concurrency allows for an ambiguity of interpretation of legislative
competence. Constitutional principle XIX provides for the powers and functions at the national and provincial levels of government to include exclusive and concurrent powers. According to legal advice all the present powers of the provinces are concurrent and none can be regarded as exclusive. Section 126 of the interim Constitution does not provide for an absolute division of functions between the national and provincial levels but merely provides a mechanism with reference to which legal certainty can be obtained in the event of conflict between national and provincial legislation pertaining to Schedule 6 functions.

The omission to give exclusive powers to provinces appears to be in violation of Constitutional principle XIX. The prescribed instances where a parliamentary Act may prevail is a very wide category and it dilutes the legislative competences of provincial legislatures to a large degree.

A clear distinction should be made in the Constitution in respect of exclusive and concurrent powers for both central and provincial government respectively. In regard to concurrent powers provincial legislatures should be given overriding legislative competence in respect of defined aspects of Schedule 6 functional areas. Similarly, National Parliament should be in no doubt of its overriding legislative competence in respect of those same aspects of Schedule 6 functional areas in regard to which provinces posses concurrent but potentially subordinate legislative competence.

The dividing line between the overriding and potentially subordinate legislative competence in respect of Schedule 6 functional areas must be determined precisely. It should be so worded in the Constitution that the following construction would be unquestionably accepted.

Parliament enjoys overriding competence in respect of those aspects of Schedule 6 functional areas described in Section 126(3)(a) to (e) (provided it applies uniformly in the country) while the provincial legislature's competence is thereby reduced to a potentially subordinate concurrent competence. Similarly a provincial legislature enjoys overriding legislative competence regarding those aspects of the Schedule 6 functional areas in respect of which Parliamentary legislation exercised in accordance with the prescriptions of Section 126(4) does not prevail over provincial legislation by reason of any of the considerations contemplated in Section 126(3)(a) to (e).
Because of the designation in the interim Constitution of concurrency in respect of certain powers between central and provincial government much emphasis is placed on interpretation to determine primary or secondary responsibility. This leads to vagueness and inadequate accountability. What should have been directed and guided by clarity and precision in the Constitution is now left for the governmental process to correct. This raises the need for an intergovernmental process to regulate interdependency between governments. In order to address and rectify this weakness, provision will have to be made in the constitutional and governmental system for structured Intergovernmental relations through which the process of the respective levels of government can be integrated.

What needs to be debated is the relative merits of constitutional and/or legislative provisions for intergovernmental relations between central and provincial governments. The focus should be on the institutionalisation of intergovernmental relations through the establishment of institutions and structures through an Act of Parliament or through the new Constitution.

As long as the intergovernmental process in SA is subject to development and changes the structures regulating the relationship will have to adapt responsively. Providing for intergovernmental structures and institutions in the new Constitution may complicate the process of change and adaptation because of the understandable reluctance and the attendant difficulty to change Constitutions. An Act of Parliament may therefore be a more appropriate mechanism to deal with the changing institutional requirements of the intergovernmental process.

LOCAL GOVERNMENT IN REGARD TO THE DISTRIBUTION OF COMPETENCES

Definition of Local Government
Without a clear prior understanding of the meaning of local government, it is difficult to understand what local government should do.

In most democratic countries, local government is viewed as indirect local selfgovernment, that is, the government and representation of a community by elected councillors. Bonded into this view, is that acceptance of this concept means that local communities, through their councillors, take
decisions on local affairs without some person in a higher level of government having the power to veto or amend those decisions.

Local government is sometimes described as the cradle of democracy (cf the Greek city-states) but democracy can only flourish where people are sufficiently free to govern their local communities as they see best, without interference. Of course there have to be checks and balances, as with any system of government, but there is a vast difference between constitutional checks and balances and unrestrained interference.

Local administration is something entirely different. By definition it means that it is an extension of a higher level of government and this has nothing to do with local democracy.

**Approaches in General to the Distribution of Competences**

Ideology plays a role in this matter. For example, the more a national government moves away from the concept of liberal democracy, the more it tends to centralise administration. In the USA, the Constitution is supreme, while according to the 1936 Constitution of the former USSR, the Supreme Council was the highest organ of state power exercising all rights vested in the USSR - see articles 30 and 31. Chapter VIII of the same Constitution gave local soviets virtually no real local government powers they were given tasks such as guiding the work of administrations, maintenance of law and order and law enforcement, the protection of citizen's rights, local economic and cultural affairs and local budgets.

By contrast, German municipalities may undertake all local tasks not assigned by law to other authorities (Humes and Martin, A Survey of 81 Countries, 542). In Germany, the powers of the Federal Government and the Lander are fairly tightly prescribed (see SE Finer, Five Constitutions) which leaves a lot of leeway for municipalities there.
The South African Approach to the Distribution of Competences

This issue was strongly influenced by developments in England and British colonial policy. Prior Dutch practice was to authorise local authorities also to exercise limited judicial and law enforcement powers, but this tradition was eliminated under British colonial rule.

From about 1850, South African local authorities started acquiring the powers they now have and as a result of the South Africa Act of 1909, a power-sharing between the former provinces and the Central Government developed.

In order to compel provincial and local authorities to fit in with, apply and administer apartheid law provincial and local powers, there was a creeping centralisation and a diminution of provincial and local government powers between 1948 and 1990.

The Interim Constitution of 1993 provided the platform for a reversal of that trend and the purpose of this document is to argue for that trend to be continued.

The Current State of Local Government Competences in South Africa

An examination of this aspect requires an examination of municipal ordinances and other laws, the Constitutional Principles and the Constitution itself.

(a) Municipal Ordinances and Other Laws

There are in essence in South Africa -

(I) Four municipal ordinances
(IV) The Joint Services Board Act (KwaZulu Natal only).

The municipal ordinances and laws relating to fire brigades, traffic, health, civil protection and the like have conferred on local authorities permissive powers to render services which are grouped hereunder -

**Engineering services**
- Water provision
- Sewerage
- Stormwater drainage
- Electricity provision
- Roads
- Transport

**Community Services**
- Preventive (primary) health care
- Environmental health protection
- Parks and recreation (including caravan parks and resorts)
- Libraries
- Sports facilities
- Public halls
- Public swimming baths
- Markets
- Civil protection
- Abattoirs
- Fire and Rescue Services
- Traffic control
  - Nursery schools (in some towns)
  - Ambulance services
Area-wide Services
Land use and transportation planning
Building control
Pollution control
Motor vehicle registration

Non-classifiable Services
Administration
The Treasury function
Dog and Vermin control
Project management
Mechanical engineering and vehicle fleet management
Architectural services (for the organisation)
Law enforcement in parks, etc. and security against theft and loss.
Personnel management
Surveys and land information
Scientific services (testing water and air for pollution)
Voters’ rolls
Computer services
Stores management
Work Study

(b) The Constitutional Principles

Those principles which are relevant to local government are

Principle XVI
Government shall be structured at the national, provincial and local levels.

Principle XVII
There shall be democratic representation at each level of government.

**Principle XX**

Each level shall have appropriate and adequate legislative and executive powers and functions to enable each to function effectively. Powers shall be allocated on a basis conducive to financial viability and effective public administration.

**Principle XXIV**

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features (sic) of local government shall be set out in parliamentary statutes or provincial legislation or both.

**Principle XXV**

The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

**Principle XXVI**

Each level of government shall have a constitutional right to an equitable share of revenue collected to ensure that, inter alia, local governments are able to ‘de basic services and execute their functions.

(c) **The Constitution**

For the purposes of this report, reference will only be made to those provisions of the Constitution dealing with functions, powers and finances, i.e. the operation of legislation on local government is not dealt with. The principles contained in Chapter 10 of the Constitution relating to powers and finances are summarised below.
(1) Provision is made for urban, metropolitan and rural categories of local government.

(2) Within law, a local government shall be autonomous.

(3) The powers, functions and structures of local government shall be determined by law.

(4) A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all residents.

(5) A local government shall, subject to law, provide access for all residents to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment. (These are all positive duties).

(6) A local government shall have the power to make by-laws.

(7) A local government shall have such executive powers as to enable it to function effectively.

(8) The administration of a local government shall be based on sound principles of public administration, good government and public accountability, shall render efficient services and administer its affairs effectively.

(9) A local government shall, within the prescriptions of law, be competent to levy and recover such rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions.

Conclusion and Finding

The lists of current functions given above are evidence of what local authorities already do and that local authorities are geared up institutionally and organisationally to perform those functions and services.

If, for example, the provision and operation of water, sewerage, roads, halls or traffic control were centrally provided and managed, the consequences would be -

(a) An ignoring of local wishes and the imposition of the goals of a different level of government, as happened up to 1990.

(b) A denial of the democratic right of local communities to take their own decisions.
(c) The creation of dysfunctions (see below under the Dysfunctions of Centralisation).

However, the Constitutional Principles make it clear that local government must be empowered to perform functions, render services and to have fiscal powers - see Constitutional Principles XX, XXIV and XXV in particular.

This clear statement is reinforced by the provisions contained in Chapter 10 of the Constitution, as set out above. Taking the summary derived from Chapter 10 as a whole, it is clear that local government is empowered to perform functions and to render services.

The only reasonable findings that can be reached out of current constitutional law, is that not only is there a duty on local governments to perform functions and to render services at present, but there is a duty on the Constitutional Assembly to legislate for the continuation of a system of democratic local government that must be empowered to perform functions and to render services.

The Difference between a Function and a Service

A function is what a government can or may do, e.g. to make a law or levy a tax or to approve a budget or to accept or refuse requests or applications. These functions are essentially external by nature, but there is also a group of matters of internal interest to a local authority which could either be called services or functions, e.g. internal audit, management services, administrative or financial controls, work standards and the like. Whether these matters are described as functions or services is not really important: what is important is that these matters are necessary for a local authority to function efficiently and effectively.

A service in local government parlance relates essentially to something provided for residents, either for their use, e.g. community facilities, or to meet their needs, e.g. water, electricity or refuse removal.

It is submitted that the term "competence" includes both functions and services.
The Dysfunctions of Centralisation

As an introduction to this topic, it is necessary to state clearly that the term "centralisation" refers to the provision and operation of local services and not controls over standards or performance by higher levels of government.

If, for example, the National Government were to decide that it will provide facilities such as public halls and swimming pools, as well as water and electricity services, the consequences that would follow would be something along the following lines..

[Ed’s note: figure not scannable]

On the other hand, if the local government concerned were itself to handle the matter, the sketch could be simplified as follows..

The important factors in any governmental system are the length of the lines of communication, the flow of the work to be done and the costs attached thereto. Therefore, if a document has to progress through stages, the cost increases as follows..

[ed’s note: sketch not scannable]

The above sketch shows how long lines of communication and decision-making results in a progressive rise in administrative costs, all of which has to be paid for out of public funds. A real danger in this sort of process, is that the clear terms of the original document could well become obscured and distorted, resulting eventually in an incorrect decision being taken.

Proposals

Based on the finding reached above and accepting the argument that there are clear financial arguments in favour of a wide range of services being performed at the local level, the proposal made below is divided into two parts, viz principles and actual functions and services.
Part A: Principles

1. Local government has a right to continue as a legitimate form of government.
2. Every local government shall have the autonomy to enable it to fit in with the concept of indirect local self-government.
3. The fiscal powers and capacity of local government shall be such as to perform its functions and render services to its residents.
4. The existence of local government as an autonomous form of government (which is subject to the Constitution) shall be entrenched against higher levels of government.
5. Local governments shall be accountable to the voters in their area.
6. Forms of local government shall be differentiated in terms of powers, duties, functions and services according to whether they are for urban, metropolitan or rural areas of local government.

Part B: Functions and Services

<table>
<thead>
<tr>
<th>Functions</th>
<th>Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject to Principle 7 above -</td>
<td></td>
</tr>
<tr>
<td>(a) Taxation functions</td>
<td>(a) Existing functions as listed earlier in this memorandum.</td>
</tr>
<tr>
<td>(b) Legislative functions (by-laws)</td>
<td>(b) Housing</td>
</tr>
<tr>
<td>(c) Fiscal functions, taxes, tariffs and</td>
<td>(c) Infrastructure</td>
</tr>
<tr>
<td>(d) Other Governmental functions</td>
<td>(d) Managing urbanisation</td>
</tr>
<tr>
<td>(e) Internal functions as described above</td>
<td>(e) Economic development</td>
</tr>
</tbody>
</table>
NEW CONSTITUTION : LOCAL GOVERNMENT

Attached hereto please find proposals on amendments to Chapter 10 of the Constitution, as well as proposals on provisions to be contained in provincial legislation. Afrikaans and English copies are attached hereto for your convenience.

The above vacuums were identified during an investigation into the amendment of Municipal Ordinances in order to adjust to the new political dispensation.

Your kind consideration would be appreciated.

J J v L SADIE
DIRECTOR

CHAPTER 10

LOCAL GOVERNMENT

Establishment and status of local government

174. (1) Local government shall be established for the residents of areas demarcated by law of the Provincial, Legislature for this purpose, provided that such legislation shall be framed in accordance with the principles as contained in Schedule "A".

(2) A law referred to in subsection (1) may make provision for categories of metropolitan, urban and rural governments with differentiated powers. Where such
structures are established it shall be done according to considerations of
demography, economy, physical and environmental conditions and other factors
which justify or necessitate such categories.

(3) A local government shall enjoy maximum devolution of authority in respect of the
exercise of the functions, duties and powers as, provided for in section 175(2), and
shall be entitled to regulate its own affairs, and Parliament or the Provincial
Legislature shall not encroach on the authority, powers and duties of local
government, provided that the Provincial Legislature concerned may limit the
authority, powers and duties of particular local Governments to the extent in which
a particular local government or category of local government have economic
and/or financial means at its disposal to exercise or carry out such authority,
powers and duties. The Provincial Legislature will by means of a grading system or
other recognised scientific measuring instrument determine the means level of local
Government within its province.

(5) Proposed legislation which materially affects the status, powers or functions of local
governments or the boundaries of their jurisdictional areas, shall not be introduced
in Parliament or a provincial legislature unless it has been published for comment in
the Gazette or the Provincial Gazette, as the case may be, and local governments
and interested persons, including organised local government, have been given a
reasonable opportunity to make written representations in regard thereto or to be
heard after such representations have been thoroughly considered.

Powers and functions of local government

175. (1) The powers and structures of local government shall be determined by law of a
Provincial Legislature, provided that no local government shall be charged with any
function or duty unless sufficient financial sources to effectively carry out or meet such function or duty have been allocated to local government.

(2) Local government shall be assigned such authority and Power by the Provincial Legislature so as to allow it to undertake those actions, carry out the functions and render the services which are essential for the promotion of the general well-being of the community which functions, duties and services are set out in, but are not exclusive to Schedule “A” of this Act.

(3) Subject to the provisions of section 174(3) a local Government shall make provision for access by all persons residing within its area of jurisdiction to those services, functions and duties mentioned in Schedule “A”, provided that such services and facilities shall be available to all residents on an equal basis and can be rendered on a cost-effective basis.

(4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.

(5) A local government shall have such executive posters as to allow it to function effectively.

(6) A local government may, in its discretion, by means of a resolution of its council provide for the assignment of specified functions to local bodies or submunicipal entities within its area of jurisdiction where, in the opinion of the council, such assignment of functions will facilitate or enhance the provision or
administration of services, the adherence to municipal by-laws or, more generally, good governance in the public interest: Provided that such assignment of functions:

a. shall not be inconsistent with an Act of Parliament or an applicable provincial law; and

b. shall not diminish the accountability of such local government.

176. **Deleted** in its entirety. This section does not belong in the Constitution, but in provincial legislation.

177. **Deleted** in its entirety. This section does not belong in the Constitution, but in provincial legislation.

Administration and finance

178. (1) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability, subject to the Provisions of section 174 and conditions as may be determined by the legislature, so as to render efficient services to the persons within its area of jurisdiction on a cost-effective basis and effective administration of its affairs.

(2) A local government shall, subject to such conditions as may be prescribed by law of a Provincial Legislature, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction.

(3) A local government shall be entitled to an equitable allocation by the provincial government of funds, and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations, taking into account the different categories of local government referred to in section 174(2).

Elections
179. (1) A local government shall be elected democratically, and such election shall take place in terms of an applicable law and at intervals of not less than three and not more than five years.

(2) The election for a local government shall take place according to a system as determined by the provincial legislature and shall be regulated by a law referred to in subsection (1).

(3) - (5) Deleted. Belong in provincial legislation.

Code of conduct

180. An enforceable code of conduct for members and officials of local governments shall be provided for by law.

PROVISIONS TO BE CONTAINED IN PROVINCIAL LEGISLATION

1. A system of local government must make provision for proper voter participation.
2. The policy-making and administrative functions must be kept apart.
3. An executive committee must not be compulsory.
4. The devolution of authority and the decision-making power of a local authority must correspond to its grading.
5. Local government must not be charged with duties unless a source of financing too carry out such duties has been allocated to local government beforehand.
6. A distinctive pattern of relations must be created between local government and provincial government.

7. The provincial legislature must keep in mind that local government is development-orientated.

8. Legislation must be enabling in nature and not restrictive. The legislation must include all powers entrusted to local authorities and exclude those which are specifically entrusted to provincial and national government.

9. The act must contain definitions which are essential and appropriate for uniform legislation and the new system of local government. The definitions must be generic in nature and must only establish uniform terminology where this is essential. Different provincial names for local authorities are retained.

10. The act must establish general fundamental provisions on aspects such as the demarcation, areas of jurisdiction, establishment, composition, the role of committees, functions and powers, finances, administration and personnel of local authorities. These principles apply to all local authorities, irrespective of geographic location, population group or size. The act may also make provision for the introduction of special or single-objective authorities at local level. Financial administration must be regulated in greater detail to ensure uniform standards.

11. The act must grant maximum devolution of authority to local government, protect the powers of local authorities and make provision for an appropriate categorisation of local authorities for the purposes of granting greater autonomy, as well as laying down guidelines for the devolution of additional functions and powers to local authorities, submunicipal bodies and special-objective or single-objective authorities at local level.

12. The act must make provision for a series of constitutional and institutional local options, as well regulating the exercise of such options.
13. The legislation must make provision for a democratic local government system which will bring about equality between men, women and persons of all races.

14. The legislation must make provision for a local government system incorporating regular democratic elections, universal adult franchise, a joint voters' roll and an acceptable form of ward and proportional representation.

15. The provincial government may not exercise its powers over local government in such a way as to encroach upon the functions or institutional integrity of a local authority.

16. A national loan fund for local authorities must be created to finance duties which are devolved from higher government levels to local government, such as the RDP.
THE TRANSVAAL MUNICIPAL ASSOCIATION (TMA)

4 April 1995

PROPOSAL ON LOCAL GOVERNMENT


In the last paragraph of the letter under cover of which the document was submitted it was stated that the President and Steering Committee of the TMA had decided to urgently request an interview between members of the Steering Committee who have expertise in all facets of Local Government and members of the Theme Committee no 3 of the Constitutional Assembly in order to present the point of view of the TMA. To date I have not received a reply to this request.

In view of the importance and urgency of the finalisation of the Constitution as well as the forthcoming municipal election an in-depth study has been made by the TMA of the finer points which are considered to be of cardinal importance in facilitating the ultimate realisation of democracy at Local Government level. It would therefore be greatly appreciated if this information could be put across to members of the Constitutional Assembly personally and, at the same time, afford them the opportunity to clarify issues on which they might not yet have certainty.

I look forward to receiving a favourable reply to this urgent request in the very near future.

J J ROOS
DIRECTOR
FRIENDS OF THE CAT

1 MARCH 1995

REQUEST

COMPULSORY STERILIZATION OF ALL DOMESTIC DOGS AND CATS, WITH THE EXCEPTION OF REGISTERED BREEDER'S CATS AND DOGS - HUGE FINES TO BE IMPOSED FOR THE CONTRAVENTION THEREOF.
23 March 1995

**WOMEN FOR RESPONSIBLE RIGHTS**

THEME COMMITTEE IV  (CONTINUED: our second submission)

1. We request the C.A. to include the following rights which were omitted in the interim constitution:

   - The right to protection of the normal family, consisting of a husband, wife and children
   - The right of children to be adopts only by such normal families
   - The right to effective protection against the spread of AIDS. Legislation should specify that AIDS sufferers provide a list of all their sex partners. To knowingly infect others with AIDS should be punishable as manslaughter.

11. We urgently request omission of:
   The prohibition of discrimination against people’s sexual preference (clause 8 of the Bill of Rights of the interim constitution.)

111. Any clause which would allow same-sex couples to marry and adopt children,

**MOTIVATION**

Clause 8 would in effect certainly interfere with the rights of more people than it protects. Apart from the legislation of immorality, homophile, (and apparently of perversions such as bestially and pedophilia!), this clause in effect also inhibits the freedom of association and freedom of beliefs of many others:

* In our churches homosexuals and lesbians could cause severe problems by demanding the following in direct defiance of the laws of God which we and our churches want to uphold and obey.
  - To be married by our pastors.
  - To become members of our churches.
  - To become church deacons, pastors, etc.
  - To demand that God’s warning against sexual perversion be ignored.
We have no choice to reject the enforcement of any laws which attempts to overrule God’s instructions in our churches!

* Legalizing sexual promiscuity and perverse unnatural sex would cause the escalation of AIDS and other venereal diseases. Promiscuity and unnatural sex is the defiance of our Creator’s instructions for all mankind regarding sexual relationships - no wonder it caused venereal diseases throughout the ages! If our government means well with its people, why be in the forefront
of the legislation of sexual immorality which is a threat to the nation’s health? The only safe sex is with one life-long partner of the opposite sex in the normal marriage as instituted by God.

* As mothers we implore the C.A. not to expose children to abnormal and immoral foster parents. Children can not speak for themselves!

* It would be unacceptable if teachers who practice abnormal sex could expose our children to the influence of sexual practices which God forbids.

Why place South Africa “ahead” of other countries in the legalization of immorality? In 1960 the USA Supreme Court declared that the American Bill If Rights “does not confer any fundamental right on homosexuals to engage in consensual sodomy”. (Hardwick V. Bowers).

We implore the C.A. not to allow the constitution to interfere with African Cultures: our religious beliefs, our churches, our schools, our institutions or with individuals who want to obey God’s sexual laws.

M.E.G. Sealetsa (Chairperson)
During the period preceding the elections of 1994 when negotiations were held to compile the Interim Constitution for South Africa the military veterans of South Africa were not afforded the opportunity to present their case. Neither the political parties represented in the current Government of National Unity nor those others in Parliament took a stand on the State's responsibility to military veterans.

The Council of Military Veterans' Organisations which represents some twenty-three (23) military veteran organisations in South Africa speak on behalf of over 900 000 military veterans of all South African armed forces, both statutory and non-statutory. It is of serious concern to us that the constitution of the future South Africa must include provisions that will enshrine the Rights of Military Veterans and Victims of War (Conflict).

Lessons which all sides to the struggle for democratic freedom for all South Africans have learnt over the past eighty or more years should not be allowed to fade into oblivion. It is thus of paramount importance that the role which the military veterans in particular have played in numerous international armed conflicts and internally be recognised and that the politicians of the future and the governments of the day be so obligated through the Constitution of South Africa of tomorrow.

The World Veterans Federation with the endorsement of the United Nations has emphasised the need for special provisioning for military veterans and victims of war by issuing a very important policy document titled "Guidelines to Basic Rights for War Veterans and Victims of War"; a copy of which is attached.

We would like to underline the first paragraph of the Preamble to this document which reads as follows: "The moral obligation of a nation to care for its war veterans and victims of war has long been recognised, but acceptance of the total implication of this obligation has not yet been universally achieved, nor have the basic principles of this care been fully established"

If we analyse the attitude of the South African Government to the care of military veterans and their dependants it is lacking in the extreme. From the period 1941 to 1995 for example the social old age pensions have been increased by 3150 percent from R12,00 to R390,00 per month whereas the War Veterans Allowance has ONLY increased by 128 percent from R8,00 to R18,00 per month. The proportion of War Veterans Allowance to social pension in 1941 of R8,00 to R12,00 or 66.67 percent has been reduced to 4.62 percent in 1995. It should also be considered that all military
veterans who have served in the armed forces after the Korean War do not qualify for this benefit. The only conclusion which one can rationally reach is that the State through the governments of the day has completely ignored the vital role which the armed forces in South Africa have played to achieve democratic rule not only in South Africa but elsewhere as well. The people of South Africa owe it to their comrades-in-arms to prevent a recurrence of this discrimination by enshrining the Rights of the Military Veteran in the Constitution now under discussion.

It is thus proposed that the Rights of Military Veterans be written into the Constitution. A suggested wording is the following:

"The State and the People of South Africa are to adequately care for South African Military Veterans and Victims of War in accordance with international norms and prescriptions".

Your indulgence in listening to our case is very much appreciated. The future harmony in our society and the morale of the armed forces depend a great deal on the caring attitude which the State through the Governments of the day display towards the Military Veteran and any Victim of War.

(COL I.W. RIMMER)

CHAIRMAN: COUNCIL OF MILITARY VETERANS' ORGANISATIONS

WORLD VETERANS FEDERATION
17, rue Nicolo
75116 Paris

GUIDELINES TO BASIC RIGHTS

FOR WAR VETERANS AND VICTIMS OF WAR

Article 1 Definitions
Article 2  Medical Treatment, Compensation and Priorities

Article 3  Special Allowances

Article 4  Review and Taxation

Article 5  Scientific Progress and International Co-operation

Article 6  Dependants

Article 7  Civilian Victims of War

Article 8  Peace Keeping Forces of the United Nations

Article 9  Granting of the Status of War Veteran and Victim of War

Article 10  Right to Appeal and to Organise

Article 11  Inviolability

**************

Annex 1  "Definition of Civilian Victims of War"

Annex 2  "Granting of the Status of War Veteran and Victim of War"
PREAMBLE

1. The moral obligation of a nation to care, for its war veterans and victims of war has long been recognized, but acceptance of the total implication of this obligation has not yet been universally achieved, nor have the basic principles of this care been fully established.

2. The purpose of this document, drawn up by the World Veterans Federation, is to provide guidelines for the solution of that problem regarding those who suffered disablement through acts of war so as to improve the economic and social conditions of those war veterans and victims of war in the world.

3. It outlines the basic principles that should be adopted by individual governments and the fundamental provisions that should be maintained as a prior social obligation.

4. It contains recommendations based upon the experiences of member associations of the World Veterans Federation, and upon the discussions of International Conferences on Legislation Concerning Veterans and Victims of War held with the participation of representatives from Governments and war veterans organisations.

5. These recommendations also take into account the changes in the nature of armed conflicts: the steadily, increasing number; of the resulting civilian victims of war, especially, women and children, and the problems that the persons serving in the United Nations Peace Keeping Forces are facing.

Article 1

Definitions

1. The provisions outlined in this document should apply, to the following persons, referred to hereinafter as "war veterans and victims of war".

   1. 1. All those who served in the forces of a nation in armed conflict and suffer Consequent disablement.
1.2. All those who, in pursuance of the orders of the government, or of a duly recognize resistance movement to foreign occupation during hostilities or of other measures for preserving or regaining national independence suffer consequential disablement.

1.3. All those who, as civilians, suffer consequential disablement and are recognized as victims in their national legislation.

1.4. The dependants (widows, orphans, parents) of persons killed in acts of war or who died from their service-connected disablement.

2. In the framework of Article 7 below, these provisions apply to persons defined below as "civilian victims of war" who, without having participated directly or indirectly, in armed conflicts, have suffered physical and/or mental impairment as a result of fighting or the circumstances or consequences thereof (*).

3. In the framework of Article 8 below the provisions outlined in this document apply also to persons having served in the United Nations Peace Keeping Forces.

4. As concerns the terms "service" and "service-connected" for the purpose of this document:

4.1. "Service" should be interpreted as any of the functions defined in paragraphs 1.1., 1.2.

4.2. "Service-connected disablement" means disabilities including physical and/or mental impairment due to, or resulting from, such service.

4.3. For the persons defined in paragraphs 1.3. and 2 above, these terms mean disablement consequential to acts of war.

5. "Disablement” and "mental impairment" should be understood as including psychosocial effects of armed conflicts and in particular post traumatic stress disorders (PTSD).

Article 2

Medical Treatment, Compensation and Priorities
All governments should ensure that their war veterans and victims of war receive a proper share of national resources. The special protection afforded by governments to their war veterans and victims of war should guarantee the following minimum rights, in recognition of their service and compensation for consequential disablement:

1. All necessary medical treatment and care with hospital priority, as a direct charge upon the government.

2. The provision of medicines, prostheses and orthoses as a direct charge upon the government: for those with severe locomotor disablements which limit their mobility, the provision of means of transportation to enable them to enjoy normal amenities of life, and especially, where such provision will assist in obtaining or retaining employment.

3. The provision of the opportunity to undertake courses of ongoing rehabilitation, education and training for employment appropriate to his or her capability, and, because of his or her entitlement to employment, a guaranteed preference in submission of vacancies and retention in employment.

4. Priority in, and assistance in, the provision of housing facilities, especially, in respect of adaptations within the home to facilitate a normal life in spite of disablement.

(*) Annex 1: "Definition of civilian victims of war".

5. Entitlement to compensation to be:

   5.1. based upon a medical assessment of the degree of disability, making a comparison between his or her condition, as disabled, and that of a normal healthy person at without taking into account earning capacity, in any particular occupation or other individual factors;

   5.2. assessed also on the deterioration of his or her condition both due to time and advancing age.
6. Entitlement to receive adequate protection and/or assistance by way of supplemental allowances intended to relieve specific hardships and difficulties.

7. Allowances during his or her lifetime for the following dependants:

   7.1. the wife or husband;

   7.2. the unmarried dependant living as or her spouse;

   7.3. the child or children, particularly for their education and training;

   7.4. the parents or foster parents, where the son or daughter was helping to support them.

   The rate of allowances should be determined by, each nation in the light of the circumstances.

**Article 3**

**Special Allowances**

In order to meet the special needs of war veterans and victims of war arising from their service-connected disablement or its effects, governments should also grant the following allowances, in addition to the basic assessment of compensation:

1. A special allowance in respect of the personal nursing care and attention necessitated by severe disablement (constant attendance allowance).

2. A special allowance to be payable where the attributable disabilities are major factors in the person concerned being unable to obtain or maintain employment (unemployability supplement).

3. A special allowance to be payable to those who, because of their disablement, are unable to fulfil the conditions of eligibility, for the normal State social service benefit with a view to ensuring that the compensation they receive for their attributable disabilities is not less than the assured minimum level of the government social service benefit.
Article 4

Review and Taxation

The rates of compensation and supplementary allowances granted to war veterans and victims of war should:

1. be subject to continuous upward review within the general framework of the development of the social programmes and the economy of the country and in accordance with Article 11 below;

2. be exempt from taxation and be disregarded for the purpose of calculating the resources of the person.

Article 5

Scientific Progress and International Co-operation

The benefits of scientific investigations into the continuing effects of service-connected disablement and the psycho-social effects of armed conflicts should be made available for the treatment of war veterans and victims of war in individual countries. Such investigations should be encouraged and supported with the highest priority.

Governments should take steps to stimulate co-operation in the pooling of information and experience in the development of, and improvement in, prosthetics and orthotics, and the transmission between countries of aids for disabled war veterans and victims of war should be free of trade tariffs and/or restrictions.

Article 6

Dependants

Where a war veteran or victim of war dies either during acts of war or as a result of service-connected disablement, compensation should be paid to the following dependants, who thereupon become victims of war as defined in paragraph 1.4. of Article 1 above:
1.1. the widow or widower;

1.2. an unmarried dependant who was living with the deceased as his wife or husband and was maintained by him or her;

1.3. orphans, where the child of a person who is killed or dies as a result of service or act of war;

1.4. parents or foster parents, where the son or daughter was helping to support parents and would have done so had he or she survived.

Where a widow has given long personal nursing care and attention to her seriously disabled husband, the government should recognise this service in assessing her compensation. This should apply also to dependants referred to in 1.1. and 1.2. above.

Article 7

Civilian Victims of War

1. The civilian victims of war defined in paragraph 2 of Article 1 above should be, as a minimum, rapidly reintegrated in their respective communities by the reuniting of dispersed families and by adequate support in the medical, professional and economic fields.

2. Special programmes should be designed for children victims of war taking into account their specific needs.

3. The specialized agencies of the United Nations and other international organisations and bodies concerned should contribute to this support in their respective fields.

Article 8

Peace Keeping Forces of the United Nations

1. The provisions set forth in Articles 2 to 6 and 10 and 11 of this document should apply to persons having served in the Peace Keeping Forces of the United Nations.
2) In view of the character of the mission they have to perform in the framework of peace keeping operations, these persons should be provided by their respective governments:

2.1. Before their deployment:
   a. with an appropriate training, about the psychological aspects of such operation;
   b. with detailed information concerning their obligations and responsibilities towards the civilian population under Humanitarian and human rights laws.

2.2. During and after their deployment: with adequate and qualified psychological care and treatment.

Article 9

Granting of the Status of War Veteran and Victims of War

The recognition of the laws of war veteran and victim of war should be the subject of an impartial procedure including all the legal guarantees (*).

(*) Annex 2: "Procedure for granting the title of veteran or victim of war".

Article 10

Right to Appeal and to Organise

1. War veterans and victims of war should have the right of appeal to independent
tribunals or similar courts against the government's decision on their entitlements and/or assessments.

2. War veterans and victims of war should never be denied the right to organise themselves in order that their special interests may be effectively safeguarded, and those organisations should be recognized as representing interests of direct responsibility of the government. Special committees should be established by governments to facilitate legislation or to advise on particular problems or needs of war veterans and victims of war. Such committees should include amongst their membership representatives of the organisations dealing with the special needs of war veterans and victims of war.

Article 11

Inviolability

In all measures of social policy, the principle of the inviolability of compensation to war veterans and victims of war should be maintained.

Annex 1

DEFINITION OF CIVILIAN VICTIMS OF WAR

As an example, civilian victims of war should include persons who, without having directly or indirectly participated in armed conflicts, have suffered physical or mental health damage as a result of

- acts of war by friendly or enemy, forces;
- special circumstances surrounding flight;
- internment abroad forced removal, deportation or being taken hostage;
- internment by troops or administrative services of enemy forces in work or other camp.
violent actions of troops, services or individual members of enemy forces including killing, bodily, harm and rape and which arise from circumstances in which the victims were involved through no fault of their own;

- later effects of war-like events, including, but not limited to, victims of the explosion of landmines and ammunition, exposure to chemical elements and radiation and manifestations of post-traumatic stress disorders.

Annex 2

GRANTING OF THE STATUS OF WAR VETERAN AND VICTIM OF WAR

1. The procedure for the recognition of the status of war veteran or victim of war and of the entitlement to the related rights should be based on the following principles:

- The principle of equality of treatment should be more firmly cemented not only in legislation but also in its enforcement.

- Decisions concerning legal rights, on the basis of a procedure established by law, should be made by impartial and independent authorities such as tribunals.

- A public hearing should be held, during which the applicant should be entitled to make an oral statement on the result of the presentation of his case (fair trial).

- The authorities should be obliged by law to make their decision within reasonable time limits.

- The transfer of the case to the next higher instance, if the authority, concerned does not make its decision within a time limit set down by law, should be ensured.

- The possibility, of contesting the authority’s decision by, going to the next higher instance (Court of Appeal) or by, instituting proceedings at a court called upon make this decision should be created.
The possibility, should be created of having the decision reviewed by, a High Court (Constitutional Court) as to whether it is compatible with the constitution and the provisions of the law which are the basis of the decision should also be examined on that occasion.

Co-operation with organisations of war veterans and war victims in matters of jurisdiction should be ensured by having them represented in the judicial bodies.

The effective representation of these associations in the procedure should be guaranteed.

2. Regarding the situation in all States where there are veterans and victims of war, but where there are no legal provisions for them (particularly in States where there have been internal conflicts), the following steps should be taken:

- Efforts should be pursued to reach a universal definition of the principles for granting the status of war veteran and victim of war that could be applicable by all States.

- The persons concerned should form organisations with a view to encouraging their State to implement laws or regulations specifying who should be recognized as a war veteran or a victim of war.

- Once such provisions have come into force, the procedure for recognition should also be determined, possibly by law.

- Co-operation between the government and the persons concerned as well as their organisations should be guaranteed during every phase of the procedure.
The new Constitution presently being prepared for our country must be the single most important document in the history of our country.

It is of vital importance that the quality of life of all its citizens be satisfactory and the basic and most important factor is the protection of our environment.

This applies to the entire environment but particularly to flora and fauna which should be protected, in terms of the Constitution, against degradation or over-exploitation.

It is an economic reality that such protection will be of tremendous financial benefit to the country, particularly in tourism which has become a major world industry.

South Africa has everything in its favour to exploit tourism provided the environment is protected.

The Parks Boards, and other conservation bodies, are performing an admirable service in this respect but their authority applies to limited areas. Protection of the environment should be clearly included in the Constitution so that it may apply to the country as a whole.

Whilst people have, and indeed should have, various "rights" they should not be such as to cause harm to others by degrading our environment in any way.

D P TAYLOR
(CHAIRMAN)
AMSA

FAMILY & MARRIAGE SOCIETY OF S.A.

AMSA, the Family and Marriage Society of South Africa aims to empower people to reconstruct, build and maintain sound relationships in the family, in marriage and in communities. A Professional Social Work Service specializing in family life issues is provided to all citizens in our country (and has been provided for the past 40 years) towards this end.

We believe that the family is the primary social context in which every human being is guided through their formative years, where basic needs of food, clothing, shelter and nurturing are met: where beliefs, values and behaviour codes are shaped; where we learn to care about others, to tolerate and accept them; where our self image is determined in the interaction with family members; where unconditional love is experienced. The home and family are our haven in a heartless world until such time as we are launched into the world as young adults in turn to structure our own new family.

AMSA has taken up the challenge to serve families in South Africa with its diverse family life situations and structures.

It was therefore with much dismay that note was taken of the lack of emphasis on Families in the Constitution of the Republic of South Africa, No. 200 of 1993.

A submission for consideration by your Constitutional Assembly committees representing the view of AMSA nationally is enclosed.

Although our views might be clumsily formulated with regard to the inclusion of rights for the family, I suggest that you will pass these ideas on to one of the working committees who will be more able to word the issues. The issue underlying this submission has to do with the terrible legacy of broken families that remain with us after so many families were disorganized and disrupted by influx control, migrant labour schemes etc. Our intention is to prevent such abuse of family life from ever happening again. I feel sure that you will agree with us in sentiment if not in our lay wording!

With all good wishes for you and your team in the very valuable vital work that you are doing,

DR. ANNETTE VAN RENSBURG
NATIONAL DIRECTOR

Chapter 3 - Fundamental Rights: No. 30 CHILDREN please add:

Every child shall have the right
(f) to family life

Please add number 36    FAMILY -

All individuals shall have the right to

a) family life from birth to death

b) security, basic nutrition and basic health and social services

c) not to be subjected to neglect or abuse

d) not to be subject to exploitative labour practises nor be required or permitted to perform work or to live in conditions which are hazardous or harmful to his/her education, health or well-being.

e) not be subject to separation on account of migrant labour, influx control, lack of housing, or unemployment.

f) shall maintain these rights whether in a rural, an urban or an agricultural area: in a city or an informal settlement

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. (from article 16 of the UDCHR*)

(* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS)

Every individual has the right to

g) rest and leisure including reasonable limitation of working hours and periodic holidays with pay (article 24 of the UDCHR *)

h) a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and

i) the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

j) enjoy the best attainable state of physical and mental health (article 16 of the ACHPR +)

(+ THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS)

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the right of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs. (Article 18 of the ACHPR +)

All family members shall have the right to

- be accommodated together
- not to be separated for purposes of employment

Persons who do not belong to in-tact families have special needs and are entitled to the special rights of

a) adequate shelter, nutrition

b) health care

c) social security

d) employment opportunities

e) recreational facilities

All people shall have the right to

k) their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively ensure the exercise of the right to development. (Article 22 of the ACHPR +)

l) Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.

The rights and freedoms of each individual shall be exercised with due regard to the right of others, collective security, morality and common interest. (Article 27 of the ACHPR +)
The individual shall also have the duty:

m) To preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need;

To serve his national community by placing his physical and intellectual abilities at its service.

To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

To preserve and strengthen the positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;

To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of National Unity. (Article 29 of the ACHPR+*)

motherhood and childhood are entitled to

a) special care and assistance

b) all children have the right to enjoy the same social protection, whether born in or out of wedlock (article 25 of the Universal Declaration of Human Rights)

Number 37 - MARRIAGE

All persons should have the right to

a) marry

b) found a family

c) equality within marriage, during marriage and in/during its dissolution

Marriage shall be entered into only with the free and full consent of the intending spouses.

SCHEDULE 4 - CONSTITUTIONAL PRINCIPLES - POINT V

Please add some words to ensure that abuse against women and abuse against children would be considered in this point.
Please add the words “or age” at the end of the sentence - to protect abuse against young children.
The Association of Law Societies (ALS), through the provincial law societies, represents the more than 9 000 practising attorneys and 3 000 candidate attorneys in South Africa.

In deciding on which principles should be included in our country's new Constitution, the ALS referred, firstly, to all its standing committees for comment. Thereafter, this issue was discussed by the councils of the provincial societies and, finally, by the full council of the ALS.

After all these deliberations, it was decided that the ALS would at this stage restrict its comments to the following principles:

1. The new Constitution should not specifically mention that Chapter 3 thereof will also apply horizontally. It should be left to the courts in specific circumstances to allow seepage to take place when interpreting the Constitution.

2. Matters relating to labour law should not be treated differently from all other law and should be subject to all the terms of the Constitution.

3. Property rights should also be protected in the Constitution.

4. The Constitutional Court should be a chamber of the Appellate Division.

5. Legal personae should also enjoy the protection of fundamental rights.

The ALS trusts that you will refer these comments to each of the various theme committees for inclusion in their reports.

Finally, I may just add that the ALS has to date also made detailed written and oral submissions on the Human Rights Commission, the Truth Commission, the Gender Equality Commission, the Public Protector, Environmental Affairs and the Structure of the Courts.

B J A W HARDY
PRESIDENT
MIKE MOLLART
23 MARCH 1995

As a Private Company and of a committed Christian family, and one of the 75% professing Christian population,
I wish to submit the following proposals for inclusion in the New Constitution:

1. The following words should be included in the Preamble to the Constitution
   "In humble submission to Almighty God who is judge over all the universe, and whose principles we uphold, we, the people of South Africa declare that....."

2. The following words should be included in the Preamble to the Bill if Rights:
   "All human beings are created equal in that they are endowed by the Creator with equal dignity and inalienable rights. It is not the prerogative of the government either to grant or to withhold them. The government is ordained by God to preserve those rights, to establish Justice and to maintain peace and order within the framework of God's moral standards."

3. The submission of proposal B by the A.N.C that South Africa shall be a "secular state" is in conflict with the wishes of the overwhelming majority of the electorate.

4. The Constitution shall recognise that national morality can prevail only through the recognition and upholding of religious principle. The state has spiritual accountability and is not secularistic.

5. Notwithstanding paragraph 4, the Constitution shall provide for the separation of church and state whilst recognising that the church may challenge the state if it falls short of its divinely ordained responsibilities.

6. The Constitution shall provide for religious freedom both in belief and practice and for the autonomy of religious bodies over their theological and ecclesiastical affairs.

7. In consequence of paragraph 6 there shall be no established state religion nor a Department of Religion.

8. The right to freedom of thought, conscience, belief and religious practice includes the right to change one’s religion or belief or practice, and the freedom to disseminate one's religious beliefs either alone, or in community with others, in public or private.

9. Religious communities shall be entitled to establish and maintain their own educational institutions at all levels. Such institutions shall have the right to financial support by the state provided that they comply with recognised academic norms.
10. The Constitution shall recognise that respect for human rights depends both on the rule of law and on moral and spiritual values.

11. In article eight (2) of chapter three of the Interim Constitution the words "sex" and "sexual orientation" should be deleted in the new constitution. The word "gender" provides complete protection against discrimination in this context.

12. If a clause such as “sexual orientation” is included in the new constitution, citizens young and old, will not be protected from abuses such as paedophilia, bestiality, necrophilia, sado-masochism, sodomy and other unnatural, abnormal and immoral activities, contrary to natural and biblical law and the created order.

13. Freedom of expression (article 15 in the Interim constitution) must be defined in the new constitution by those internationally recognised limitations which protect the individual from denigration, invasion of privacy and corruption of minors.

14. The new constitution will provide for the freedom from exposure to violence, pornography, obscene and offensive material on the media.

15. The right to equality will ensure respect for women which may not be undermined by degrading pornographic publications.

16. The right of children to a healthy environment will be defined to include physical, moral and spiritual spheres.

17. The sanctity of human life shall be recognised from the moment of conception.

18. The constitution will affirm that there can be no human rights without accompanying responsibilities.

19. The constitution should emphasise the principle of proportional representation. Consequently, the New Constitution must require that this principle will be observed in the compilation of judicial bodies such as the Constitutional Court, Appeal Courts, High Courts and Regional Courts. In this respect the constitution must require that the compilation of judicial bodies reflects the principles of proportional representation particularly with respect to religion and gender. Obviously this requirement will be expressed in broad terms rather than precise mathematical calculation.

MG MOLLART
Kloof Methodist Church

Enclosed are submissions to the Constitutional Assembly signed by various members of our Church.

1. The following words should be included in the Pre-amble to the Constitution.
"In humble submission to Almighty God who is judge over all the universe, and whose principles we uphold, we, the people of South Africa declare that............ "

2. The following words should be included in the Preamble to the Bill Of Rights:-
"All human beings are created equal in that they are endowed by the Creator with equal dignity and inalienable rights. It is not the prerogative of the government either to grant or to withhold them. The government is ordained by God to preserve these rights, to establish justice and to maintain peace and order within the framework of God's moral standards."

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page 2 ...

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15. The right to equality will ensure respect for women which may not be undermined by degrading pornographic publications.

16. The right of children to a healthy environment will be defined to include physical, moral and spiritual spheres.

17. The sanctity of human life shall be recognized from the moment of conception.

18. The right of every person to have his/her life respected shall be protected by the law from the moment of conception.

19. The constitution will affirm that there can be no human rights without accompanying responsibilities.

I encourage all Christian leaders to submit their proposals to:-

Mr P.A.D. Lilienfeld  
The Secretary  
Constitutional Assembly  
P.O.Box 15  
Cape Town  
8000.

Fax: (021) 403 2235

36 signatures
We enclose our submission on the entrenchment of the commission on gender equality in the final constitution for consideration by the constitutional assembly and theme committee 6. The submission is made by the Black Sash and is endorsed by them as well as the Gender Advocacy Project, The Law Race and Gender Project (University of Cape Town). The National Association of Democratic Lawyers and Rape Crisis. We suggest that the categorisation summary for this summary reads "The Commission on Gender Equality be entrenched in the Final Constitution".

We would like to thank the Constitutional Assembly for the opportunity of making this submission.

ALISON TILLEY

THE BLACK SASH
SUBMISSION TO THEME COMMITTEE 6 SUB-THEME COMMITTEE 3

ENDORSED BY THE BLACK SASH, THE GENDER ADVOCACY PROJECT, THE LAW RACE AND GENDER PROJECT (UNIVERSITY OF CAPE TOWN), THE NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, AND RAPE CRISIS.

The Constitution of the Republic of South Africa Act No. 200 of 1993 makes provision for a Commission for Gender Equality is "the Commission". The Commission is currently charged with prompting gender equality and advising Parliament with regard to any laws or proposed legislation affecting gender equality.

In writing the final constitution the Constitutional Assembly will apply its mind to whether or not the Commission should be entrenched as a permanent structure for transformation, monitoring.

We submit that the Commission should indeed be entrenched in the final constitution. We believe the Commission's duties and functions should not be limited to these concerning Parliament but should include the advancement of gender equality and social justice for women. We therefore suggest that no reference to Parliament be made in the Constitution concerning the Commission, in order to avoid its powers and functions being unnecessarily limited.

We argue for entrenchment for a number of reasons:
- the Commission has substantial support among all groups of women who have debated the issue.

- failure to entrench the Commission, especially if other structures of transformation are entrenched, will send a signal to women that this government is not serious in its commitment to ending the oppression of women.

- entrenchment as opposed to legislative enactment of the Commission will best guarantee the survival of the Commission, regardless of the changes in the political and economic climate.

- the interim constitution has been commanded for its commitment to gender equality. With the attention of the international community upon us, South Africa is in a position to demonstrate the practical application of its commitment to gender equality and democracy for all its citizens.

- entrenchment of the Commission in our constitution will support

and encourage women lobbying for the creation of such structures in their own countries.

We believe that the Commission should be entrenched in such a way as to allow it maximum flexibility through the medium of legislative change. Only the broad objectives of advancing gender equality and social justice for women should be entrenched. To specify the structure and functioning of the Commission in the constitution will create the need for continual constitutional amendment. This is not desirable, as it erodes confidence in the Constitution and creates an element of expediency in constitution making.

30 JANUARY 1995
SUBMISSION REGARDING FREEDOM OF HEALTH CHOICE

THE SOUTH AFRICAN SOCIETY OF TEACHERS OF THE ALEXANDER TECHNIQUE
(hereafter refered to as SASTAT) herewith submits a request that freedom of health choice be clearly and equably entrenched in the Final Constitution.

SASTAT considers that individuals should have the right to freedom of choice with regard to health care - which practitioners s/he chooses to consult, which therapies s/he chooses to use, what medication s/he chooses to take, whether these choices include conventional medicine, complementary therapies or natural medicine.

SASTAT considers that the medical monopoly in the United States, South Africa and elsewhere has noted against the bent interests of the people by taking direct and non-direct steps to exclude natural, non-intrusive health care and health preventive methods. With clear consequences in the enormous sums of money spent on allopathic medical care, and breakdown of medical and medical aid systems.

SASTAT considers that true health care consists not only of allopathic medicine, but of other, natural medication and practices and health preventive practices. Different methods address different health factors and the individual should have freedom to choose that which s/he considers the most appropriate.

The Alexander Technique in a method of re-educating a person in the ways in which s/he USES him/herself by encouraging good body mechanics, good postural and movement patterns, release of tension and effort and conscious, constructive control of the use of the Self. It is a method by which an individual may learn how to take responsibility for his/her own health and well-being, in so doing, promote better health and reduce the possibility of expensive medical care in the future.

SASTAT stipulates high standards of training and practice for its professional members and is affiliated internationally to other national Societies of teachers of the Alexander Technique.

We consider that democracy should be extended into the health field and that there should be freedom of choice in health care.

M VAN DER MERWE
HON SEC SASTAT
HILLCREST BAPTIST CHURCH

24 March 1995

I write on behalf of this church, which has a membership of 56. We would appreciate your bringing the following to the attention of the Constitutional Assembly.

SANCTITY OF LIFE

The Bible teaches that human life is not to be taken, and that it is a prime duty of the state to protect life, murder being a violation of God's name. This has two practical implications, both of which belong in any civilised constitution.

[1] Capital punishment

Where human life is wilfully taken then the life of the murderer must itself be forfeit. It is on this foundation of principle, rather than arguments of expediency, that the case for capital punishment rests. [See Genesis 9:63]

[2] Abortion

The sanctity of life extends to the weak and the strong, irrespective of race, age, gender and financial circumstances. Since the unborn foetus is also human - the most helpless and vulnerable of humans - abortion, except in the case where it is necessary for the saving of life, is murder and cannot be justified in any way. [See Psalm 22:10 and Psalm 139:13-16]

JUSTICE AND THE ROLE OF GOVERNMENT

There are many passages in the scriptures which teach that the government has to administer equal Justice for all, acting as an honest broker between its various citizens. These passages will be well known to you as they were often referred to in the struggle. Again, there are two implications, one general and one specific.

[1] Such a role cannot be fulfilled by a government which takes upon itself the role of social engineer, for by definition it is then a participant in the very process over which it has to be an impartial arbiter. Many South Africans can testify to the truth of this, to their bitter cost, over the last 40 years.

[2] Laws which discriminate cannot ever be just, nor justified. This means that equality clauses in the constitution ought to take precedence over social change clauses, dealing with such things as affirmative action, not the other way round as is presently the case.
It is to be hoped that in the new constitution government will be prohibited from all social engineering, which has been so harmful in the past and if permitted will be in the future, whether driven by a right or left wing ideology. [See Psalm 2:10-12, 1 Timothy 2:1-2]

RULE OF LAW

Closely allied to the role of government is the Important issue of the rule of law. The Bible teaches that all without exception are subject to the law. A reasonable constitution would ensure that this is true not only of the Executive and Legislature, but also of the Judiciary. If the Constitutional Court is to be the highest authority in the land, it is essential that its powers be carefully defined so as to exclude the possibility of it becoming a law unto itself. It's task should be to interpret, not to make law. Were it ever to be permitted to see itself as, say, an instrument of social change, then far from being the guardian of democracy, it would become its greatest threat.

FREEDOM OF RELIGION

It is widely accepted that in the new South Africa citizens must enjoy freedom of religion. This is the most vital of all freedoms, as each person will have to give an account to God at the end of his life, and therefore needs to be free to seek him and worship him.

There are certain rights without which meaningful freedom of religion cannot exist. These include

1. The right to persuade other people to convert to a different religion, and the right to oneself make such a change.
2. The right to refute the dogmas of other faiths.
3. Freedom to associate, and equally freedom not to associate.
4. Freedom to teach and counsel according to conviction without fear of civil suite.
5. Freedom of individual churches to regulate their own affairs, sets their own standards of belief, appoint their own leaders, and take in and remove people from membership, without interference from the government or the constitution. This does not of mean, of course, that they stand above common or criminal law in regard to the normal affairs of life.
6. Freedom to teach religion in schools, subject to the parents right to withdraw their children from R.E. classes.

Since freedom of religion Is essentially freedom to seek God, it cannot ever be used as a cover for Satanism, which should not be permitted. [See Acts 4:19-20, 17:30-31, and Romans 2:5-11]

PORNOGRAPHY

The heart of man is wicked and as a result he is easily led astray by what he sees, hears and reads. For this reason freedom of speech, although a fundamental right, should not extend to pornography. [See Jeremiah 17:9, Phil 4:8-9]

SEXUAL ORIENTATION
The right to choose one's sexual orientation is not recognised by God, who teaches in his word that homosexuality is a sinful perversion. To say people have a right to such behaviour would be a studied insult to God. [See Genesis 19, Romans 1:26-27]

GENDER

We would support all reasonable measures to protect women from abuse, and to protect the individual from discrimination. However, we do sound a note of caution in this area. The Bible clearly teaches that while man and women are of equal value in the sight of God, he has assigned them to different roles. In the church and home, and by implication in society as a whole, the burden of leadership is given to men. In a healthy society moulded on the Biblical model one would therefore tend to see men as the primary bread-winners, and women as the home-makers. Notwithstanding the individual's legal right to choose to do otherwise, nor the exceptions which will always be with us, the social consequences of a widespread departure from this pattern would in the end prove disastrous, for God cannot be mocked. Gender discrimination laws would need to be very carefully drafted to ensure that their purpose or effect was not to bring about such a result. [See Genesis 2:20-24, Ephesians 5:22-24, 1 Tim 2:12-14]

CONCLUSION

Whether we recognise it or not, all of us will have to give an account to Jesus Christ for deeds done in this life. This is also true of you, the members of the Constitutional Assembly, each of you having been put there by God himself. In the final analysis your task is to write a constitution which is pleasing to him. We hope these notes will help you to do this, and we promise to pray for you all - that God will give you the wisdom to seek and to find his will for our new constitution.
Response to Question 1

The constitutional provisions for the Public Service must be minimal and only indicative as guidelines. The present provisions found in Chapter 3 of the Interim Constitution are adequate. Detailed regulations for the Civil Service can always be issued in statutory instruments or civil service regulations; otherwise the constitution itself must not attempt to detail anything on the Public Service.

Response to Question 2

2.1 The definition of the Public Service must be inclusive of all public sector institutions. However, there must be cognizance of the fact that some sectors (e.g. Defence, Local Government) be may overseen by special commissions. An alternative is to have one Public Service Commission covering all public sectors, but each major sector having a sub-commission to oversee its activities.

2.4 Representativeness should entail the restructuring of the Public Service in such a manner that it should reflect main demographic composition of its society. Additionally, the services must be targeted, to all relevant clientele groups, and special consideration must be paid to variables like
race, ethnicity, religion, gender, age, the state of being handicapped, the rural-urban divide.

2.6 Managers in the Public Service must accept and practice tenets of participative management and involve employees in major decisions affecting their departments.

2.8 Consideration must be given to the creation of administrative tribunals or courts, otherwise, the office of the Public Protector should be strengthened to deal with grievances arising from dissatisfaction with service delivery. Public agencies should also establish some two-way interactive processes with clientele groups - complaint boxes, hotlines, community fora, etc.- to address the issue of public dissatisfaction with service delivery.

Response to Question 3

3.1 The separation between policy-making and administration is never a complete one, because both politicians and administrator have inputs in the policy-making process. However, political roles are broader, and more psychodramatic than those of administrators. It must be recognised that while it is impossible to separate policy-making from administration, the latter’s world is technodramatic, and emphasis should be on goal output and performance. Hence recruitment to administration should emphasize competence and those attributes that facilitate performance in a democratic state.

3.2 It is a general trend throughout the world to make limited political appointments in the Public Service. Apart from well known examples (U.S.A., France, the Netherlands, etc.) systems that follow the British model have also resorted to limited political appointments- especially to the office of permanent secretary. South Africa may wish to make a few political appointments at the levels of Director-General and Deputy Director-Generals. The rest of the Public Service grades must be governed by public service regulations. The larger the politically appointed sector, the more problematic personnel management becomes. Examples of failed politicized civil service systems in postcolonial Africa should service as a to South Africa. Similarly, the highly politicized apartheid bureaucracy should caution against the resurrection of such a pr A country with an administrative history, racial and ethnic diversity like South Africa should avoid a highly politicized civil service in terms of partisan allegiance.

The recruitment of political appointees - i.e. Director-Generals and their Deputies - should not only be based on partisan considerations, but also on integrity, competence, and commitment to national as opposed to partisan goals; and require their appointees to be more loyal to the state than to the appointing authority. Such appointments should be ratified by a select committee of Parliament. These officials cease to hold office when the appointing authority loses elections, or in case of some serious shortcoming during tenure.

Response to Question 4
4.1 The Public Protector as an ombuds should be a constitutional body, and be directly accountable to Parliament. The Public Service Commission should confine its role to personnel management issues: coordinating, monitoring and developing personnel policies and procedures, but is should not deal with appeals other than those that arise from its commission or omission. Public or employee complaints about unfair practices and dissatisfaction with delivery of services should be directed at the Public Protector.

The Public Service Commission should be appointed by the chief executive (state President) but ratified by a select committee of Parliament, representing various political parties. It should work closely with the Ministry of Public Service in matters of Public personnel policy and management. Alternatively, amalgamate it with the Ministry of Public Service, as the U.S. Civil Service Commission was amalgamated with Human Resource Management to form a division of Public Personnel Management, responsible for developing, coordinating, evaluating, and monitoring personnel policies implemented in a 'more or less decentralized fashion by various departments. Amalgamating the Public Service Commission with the Ministry will reduce role ambiguity and duplication of efforts and sometimes outright conflicts between the two sister wings of government.
Politics and Administration

This submission concerns section 3 (Politics and Administration) of First Report Sub-theme Committee 6.1 Public Administration.

At issue in this section is the relationship between policy-making and administration, which occasions the question of the desirability or otherwise of making so-called political appointments in the public service.

As the report itself suggests the matter at issue is a complex one that has been variously addressed both among scholars and in the practical arrangements in different countries.

The views that have been dominant among both students of public administration and practitioners in South Africa have been patterned on the British model according to which it is supposed that public servants pursue professional life-long careers in the service of government and administration who are expected to execute and carry out policy as set out by the government of the day. It is also suggested, therefore, that these professionals should be politically neutral.

It should be clear that this is not the only model that could be followed. For example, as the report suggests, the USA follows a quite different view. There, whenever one of the two major parties takes over the administration from the other on the basis of electoral support, the "spoils system" entails that many significant administrative positions will be newly filled by political appointments. Clearly, the administrators concerned are not expected to be politically neutral but partisan and loyal supporters of the government of the day.

When the question is raised as to whether we in South Africa should also have such political appointments it should be considered that our political landscape differs significantly from that of the USA. The patterned involved in the "spoils" system is cushioned in its effects by the fact that the outgoing administrators are not dependant on these positions for career purposes, and continue to be prominent experts able to "shadow" from the wings, as it were, the administration of the new government; they are also ready to be recalled to significant administrative posts when their party regains control of government.

All that is not the case in South Africa where we (1) (seek to) have a multi-party democracy
have public servants who depend on their service-career for their livelihood and
lack a sufficiently representative number of public service experts (as pools of talent) from
which to draw with any change of government.

As for France, the appointment by the Minister of persons to a Departmental Cabinet, indeed does
serve to interrelate the public service with the political outlook of the government of the day. We
could do something similar as long as we build in conditions that must be met to ensure technical as
well as policy expertise. For example, it could be prescribed that the minister must appoint at least
six (6) Senior Public Servants (define required seniority) among the ten (10).

It may be pointed out that such departmental cabinets are not established in the most democratically
transparent manner.

As for the Netherlands, the political party organisations there are well differentiated and the major
parties command, within their ranks, prominent experts, academics and otherwise, so that they have
no difficulty in gaining access to acquired expertise, and making senior appointments to reflect,
more or less, party-representation in parliament in the senior ranks of the public service. I say more
or less, because indeed, top officials do not need to show the same ideological hue as the minister.
There is no "spoils" system as in America and people do make lifelong careers as public servants.

All of this goes to show that the relationship that should obtain between "politicians" and "public
servants" is not a simple matter. Indeed, it is open to doubt as to whether this distinction itself is
proper.

If it suggests that public servants merely execute policy without regard to political environment and
influence, then this distinction is mistaken. Again, if it suggest that ministers are merely politicians
as if they don't administer, again a wrong suggestion is created. The idea of a watertight separation
between policy-making (as task of the legislature) and policy-execution (as task of the public
service/administration) is not acceptable. That is as is to be expected since, after all, parliament,
cabinet ministers and state departments are all of them part and parcel of the organisation of the
state. Certainly the state's government (cabinet) has the over-all responsibility for the day to day
administration of the state, and for the integration of legislative intent and administrative
implementation of policies. But that is not to say that parliament has no interest in the way policies
are administered nor that public servants can be oblivious to the political intentions and
environment in which they work.

In all of this it must be remembered that all the players involved must work within the limits of the
law of the land, which, in the new South Africa entails supremacy of the Constitution and beyond
which no legislation or executive decision can have validity.

In short we should not seek to maintain strict division and separation between public servants,
parliament and cabinet in the actual working of the state in the carrying out of public tasks.

So, for example, a public servant, in the course his duties, is bound to be directly confronted with
problems that need to be addressed. It is his duty to apprise his superior of such problems,
explaining his views and suggesting ways in which those might be addressed. This is in fact, for the public servant to be making significant inputs in policy-formulation. Not all policy initiatives, surely, come from parliament. Such formulation may well concern matters of such scope and importance that go all the way to the Minister/Cabinet who may take decisions on the matter. Again such matters might lead to debates in parliament as well.

In practice top echelon officials, knowing their responsibility and being accountable to the minister, should be able to recognize what kind of decisions concerning the implementation of policy fall within their competence and discretion and what kind require prior approval from and consultation with the minister. After all, all policies when executed are as much political as they are administrative.

In practice every operational decision made by a public official ought to take place within the framework of legislation that was promulgated by the legislator. Public officials in the top echelons are responsible for the compilation of work programmes necessary for the execution of government policy. The policy functions of the top officials in the compilation of such advisors, policy formulators, policy implementors, policy monitors, policy analysts and policy evaluators. Their knowledge and experience of the particular work programmes in their respective departments put them in a unique position because they have to decide on what is feasible or not, and be able to anticipate what the implications of a particular policy could be, what would be in the best interest of society, what the results of a policy are, as well as what is administratively possible. In various capacities with a view to ensuring that the apportionment of values and resources to society are in line with what the legislator has decided.

Their intimate knowledge of the work situation, and of the possibilities to achieve the governments' goals, as well as their co-operation with the political office bearers go to illustrate that public officials are essential to the proper functioning of government in the provision of equitable services by the states' government to the states' citizens. It is clear, therefore, that public administrators are critically important to efficient government. They are by no means neutral instruments for the exclusive use of elected politicians in achieving their aims.

They are public officials who participate professionally in the country's governance.

From the discussion above it may be deduced that there can be no separation of powers between policy-making and administration, political office bearers and public servants, both contribute to proper government. They fulfill complementary roles in the policy-making process, so much so that one cannot exist without the other.

Regarding the 'limited political appointments' in South African public service, it would be unwise to replace public officials who have intimate knowledge and experience of management, by political appointments who lack such knowledge and experience of the public service. The balance between politics and administration can be seriously disturbed with dire consequences for the successful implementation of the RDP if political appointments are made with the purpose of imbuing the public servants with the 'proper' political ideological stance that reflects the ideology of the
dominant parties. The political commitment of the public servants in making their contribution to
government is one that is geared to the efficient provision of the services to be provided to the
public in terms of established policy and legislation. Other ideological inspirations within the
context of the public service could tend to make a mockery of the kind of objectivity and efficiency
that is requisite for most effective implementation of established policies and in the end, leave the
RDP to be little more than political and ideological sloganeering.

In conclusion we think it is wise to remember that public servants throughout the state’s
administration, are, willy nilly, whether they like it or not, people whose task has its' political
dimension even as they remain subject to the minister in charge. That being so, there is no need to
complement the ranks of public servants with political appointments.

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PROPOSED SYSTEM OF LIMITED POLITICAL APPOINTMENTS

INTRODUCTION

1. Due to the complexity of modern governance it is essential to constantly bring appropriate experience into the process of policy analysis, formulation and monitoring, as well as continuous strategic thinking, networking and developmental initiation.

2. The Gauteng Provincial Government has been experiencing a definite need for permanent appointment of strategic staff to develop and drive new policy frameworks, facilitate the practical understanding and adoption of these frameworks, facilitate the practical understanding and adoption of these frameworks and monitor implementation and feedback. The current SMT system is providing such strategic assistance to political office bearers, but will be concluding their assignments at the end of March 1995, due to budgetary constraints. Furthermore the need is for strategic assistance located in the offices of political office-bearers, for the full term of office to ensure continuity and sustained strategic inputs.

3. This proposal describes the use of a system of limited political appointments, used in conjunction with conventional appointments and consulting contracts to carry on the necessary policy and strategic tasks and to continue the change momentum.

BACKGROUND

4. The need of political office bearers for strategic advice and assistance, as mentioned above, should be weighed against the cost of meeting that need possibly at the expense of other demands. The policy framework pertaining to personnel matters as set out in the Constitution, the RDP White Paper, and the Public Service Regulations must also be considered. Gauteng Provincial Government intends to act inside this policy framework in the execution of all its functions and considers the regulatory and budgetary framework as a matter of priority in the formulation of its own policies. This proposal must be considered against this background as an attempt to meet a crucial need while remaining within the policy framework defined by national government.
5. Scope application of a system of limited political appointments

5.1 Many governments have developed a system of limited political appointments to ensure constant new ideas, innovation and fresh policy advice to political principals. The best known and developed of these models is the French and Canadian systems of ministerial cabinets and exempt personnel respectively. Many other countries, including Germany, the USA and UK have also developed mechanisms to allow new expertise and ideas to be brought rapidly and smoothly into the process of governance and policy-making.

5.2 It should therefore be immediately noted although a system of limited political appointees may be appropriate for South Africa at a time of transition from apartheid to a more representative government, the system may also be needed on an ongoing basis for the purposes of constant re-energization, innovation and state-of-the-art advice to elected politicians, especially in complex and rapidly moving governance environments.

6. Limited political appointments versus permanent policy capacity

6.1 If strategic and policy experts are permanently appointed the very real danger exists that these experts will become bureaucratised and will no longer represent fresh and dynamic ideas and networks. Permanently appointed policy analysts in the offices of a Premier or Minister may over time cease to be the most appropriate people or may not shift with movement of ideas, interests or paradigms.

6.2 A new Minister would be saddled with analysts appointed five or ten years ago when a different kind of advice or expertise was needed. A Premier or Minister would therefore have great difficulty to change his policy team in order to remain congruent with changes in the external environment. The whole purpose of allowing fresh thinking from the professional, academic, trade union and business worlds would be defeated if such appointees would simply become ordinary public servants with all the vested interests and career needs of that group.

7. Specific advantages of a system of limited political appointments

7.1 It is traditionally agreed that the Public Service as such has the responsibility of providing policy analysis and advice as well as strategic guidelines to political office bearers. When a change of government takes place, however, it is unrealistic to expect from both Political office bearer and public servant to be unquestioning and comfortable with each other’s differing policy views. Where no opportunity exists for limited political appointments, the
tendency exists that political office bearers attempt to appoint preferred experts in relatively senior posts on the fixed establishments of their departments. In the event of a political office bearer vacating his/her office for any reason whatsoever, such appointees cannot easily be replaced by incoming political office bearers. This could lead to contaminating the management echelons of the Public Service with de facto political appointments, a practice which will certainly have an adverse effect on the political objectivity and integrity of the Public Service. A system of political appointments, where the appointments are linked to terms of office of political office bearers will act as a "pressure valve" in this regard. It will allow political principals to bring strategic ideas and people into government without having to interfere with the personnel process, the normal service career path and especially without permanently adding to the size of the Public Service.

7.2 In the South African context it would remove the pervasive confusion which exists between affirmative action and political appointment. It will allow for proper affirmative action to take place within the Public Service, connected to appropriate human resources and training processes.

7.3 Limited political appointments should generate some policy competition within time system which will serve to keep career public servants on their toes and constantly in touch with recent policy thinking in various fields. It will also provide political principles with a counter-research capacity which will generate a balance between traditional policy and strategic inputs and new developmental needs. The synergistic advantages of dual advice and strategic capacities available to political principals cannot be over-emphasized.

8. The current situation within the Gauteng

8.1 In terms of Public Service Commission guidelines, Premiers and Ministers are entitled to the appointment of two policy advisors. Provincial Members of Executive Councils are not entitled to such advisors although they are in many instances responsible for functions which necessitate policy and strategic advice to the same or a larger extent than the responsibilities of Ministers.

8.2 Due to the fact that MEC's cannot make limited political appointments similar to those of Premiers and Ministers, there is a tendency to try to appoint policy and strategic advisors to the role-playing positions provided for senior administrative staff. In most cases Public Service staff and salary structures prevent the successful use of this practice, and the situation is rapidly leading to confusion and the contamination posts on the fixed establishment with functions responsibilities which were never intended.

9.1 It appears that the most effective way in which the prince of limited political appointments could be implemented is to extend the existing authorization to Premiers and Ministers to also include MEC’s. This will afford MEC’s the opportunity to appoint policy and strategic
advisors on a contract basis but within preset budgetary limits. Remuneration of contractual appointees could vary according to qualifications and experience.

9.2 In the Gauteng the needs of different MEC's may vary to such an extent that one MEC may require the assistance of two full-time advisors whereas another may require assistance from one full-time and/or two or more part-time advisors.

**REMUNERATION**

10. A remuneration package for political appointees should provide for a level of flexibility, but should also maintain parity with the Public Service, to avoid labour disputes. In order to achieve both of these requirements, it is suggested that political appointees be remunerated on a salary scale that starts on par with the salary scale average of a Deputy Director: Administration and ends at the level of Deputy Director-General. Any specific appointee's level of remuneration should be within this scale, and can be determined after consideration of the specific job description, his/her experience, qualifications, competencies and skills. To allow for the contributions usually made by the state towards pension funds and medical aid, an escalating factor of 29.7% can also be taken into account. The level of remuneration must be specified in a contractual agreement and, unless provision for changes in remuneration is made in the agreement, should not be changed without entering into a new agreement.

**FINANCIAL IMPLICATIONS**

11. Should the authorization for the appointment of special advisors be extended to MEC’s a fixed amount could be budgeted for the Province in general whereafter the allocation, per MEC could be negotiated within the Executive Council taking into account the specific needs of each MEC. The number of appointments that each MEC and the Premier can make, will then depend on the funding available, the needs of the MEC and the priorities assigned to different needs by the Executive Council.

12. Based on the average of the minimum and maximum salaries as set out in paragraph 10, two policy advisors per MEC and five policy advisors for the Premier would amount to R4 498 930 annually. (See Annexure A.)

**RECOMMENDATIONS**

13. It is recommended that:
13.1 authorization for the appointment of special advisors to Premiers and national Ministers be extended to Members of provincial Executive Councils:

13.2 limitation on the number of advisors and other political, contractual appointees be decided by each Executive Council, based on available funds and provincial priorities: and

13.3 the proposal for the implementation of a system of limited political appointments, as set out above, be approved in principal allowing the Gauteng Provincial Administration to continue with the detail design of the system

14. A draft letter to the Chairman of the Public Service Commission is attached for your signature.
PUBLIC HEARING: PUBLIC ADMINISTRATION AND THE CONSTITUTION

Your letter dated 20 February 1995 refers.

Thank you very much for inviting my Department to give evidence regarding the role of the Public Administration in the Constitution. I am unfortunately, due to prior commitments, not in the position to orally present my views and that of my Department, but would gladly deal with the issues raised in the first report on the Committee by way of written representation.

It must be appreciated that the views expressed hereunder is to be interpreted in the context of section 71 of the interim Constitution, which provides that a new Constitutional text shall comply with the Constitutional Principles contained in Schedule 4 of the interim Constitution.

When evaluating the answers given it must also be taken into account that a holistic approach has been taken in answering the questions. In other words, in accepting Constitutional Principle VI that there should be separation of powers between the legislature, executive (including the public administration) and the judiciary, the functions to be performed by the three tiers of Government (national, provincial and local) in each of these fields are to be taken into account when deciding the question whether and how provision is to be made for the public administration in the Constitution.

Due to the viewpoint in the answer to question 1.1. the opinion is expressed that, with a few exceptions, the question posed in question 2.2 and further are questions which although very important, should be catered for in laws other than the Constitution. I will, however, also endeavour to express a viewpoint on some of these topics.

Although all of these issues raised are burning issues and I have certain viewpoints on them you would appreciate that these questions cannot be answered without researching the pros and cons of the answers to each of these questions. In this regard it would seem to me, for example, that the institution of an administrative court dealing with certain matters would be a solution to some of the questions asked. An administrative court can-

* deal with matters concerning the accountability of public servants
* act as a body of appeal for public servants; and
* be a final forum of review and redress if the public is dissatisfied with the delivery of services.

How such a court should function is to be presiding officers are, however, some of the aspects to be researched.

QUESTION:
1.1 Should the Public Service be regulated by way of a constitutional provision? If so, what should the content and form of the constitutional provision be?

**ANSWER:**

Although the wording of Constitutional Provision XXX does not expressly provide for provision to be made in the Constitution as such for a public service and the regulation thereof, it is my considered opinion that it has been the intention of the legislature that some kind of reference to the Public Service was to be made in the Constitution. Apart from the Constitutional Provisions I am furthermore of the opinion that as part of the executive functions of Government specific reference to the Public Service should in principle be made in the Constitution. It is, however, not advocated that everything regarding the Public Service should be dealt with in the Constitution but only the principle issues regarding public administration.

As far as the contents and form of the constitutional provision are concerned it is recommended that taking into account the definition of "Public Service" the wording of Constitutional Provision XXX be closely followed namely:

“There shall be an efficient non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law. ”

**QUESTION:**

2.1 How is the Public Service to be defined and which institutions of government should be incorporated in the definition? For example, should the army, police, health, education, local government and parastatals, as well as administrative personnel in the judiciary, be covered in this definition?

**ANSWER:**

Taking into account that Government is structured at national, provincial and local levels, there would in principle not be any objection if all three tiers of government be included in the definition of Public Service. Unlike these three tiers of government parastatals can, however, be seen to perform different functions than those performed by the Public Service. Some differences between parastatals and the Public Service are -

* although parastatals are inmost instances assisting with the execution of the policy of the Government, the functions they perform are mostly directed at an economic activity such as the supply of telecommunication and electricity;
some parastatals are receiving funds from the fiscus, that they are also dependent on the
generation of own funds; and

parastatals are separate legal entities and due to the specialised functions performed by their
officials and their economical orientation it is hard to see how they would fit into the Public
Service, which is mostly service orientated. This does, however, not mean that special
provision cannot be made for the transfer of certain officials, such as managers or
administrative personnel from these parastatals to the Public Service and vice versa.

It is thus not recommended that parastatals be included in the definition of Public Service. Thought
may, however, be given for the National Government to impose specific service conditions on
parastatals to bring such conditions in line with those generally applicable in the Public Service.

As far as the inclusion of provisional and local administrations into the Public Service is concerned
it has been argued above that in principle there is no bar in including them into the definition of
"Public Service". Taking a holistic view and that Constitutional Provision XX expressly provides
for each level of government to have adequate legislative and executive powers and functions it
can, however, also be argued that separate administrations are to be created for the three tiers of
Government.

As far as the third tier of Government is concerned the same argument as for parastatals can also in
a lesser degree be used. It is thus not recommended that local government be included into the
definition of "Public Service". Provided that service conditions should be related to those generally
applicable in the Public Service.

As far as the inclusion of provincial government is concerned it would in my opinion enhance a
more efficient, non-partisan, career-orientated public Service, broadly representative of the South
African community if provincial government is included into the definition of "Public Service". The
greatest motivation for this recommendation is that the functions performed by public servants in
these two tiers of government are basically the same.

QUESTIONS:

2.2 What should be the guiding values and principles for the Public Service?

ANSWER:

In Constitutional Principle XXX a number of guiding values and principles that can be used are
enumerated namely -

- efficient;
- non-partisan;
- broadly representative of the South African community;
- serving all members of the public in an unbiased and impartial manner; and
loyally execute the policies of the government of the day.

An important guiding principle not expressly contained in the abovementioned principle is the question of public responsibility. What is meant hereby is that the Public Service must be able to explain its activities when required to do so by way of a system of reporting supported by adequate records of its actions as well as the grounds and reasons for its actions.

**QUESTION:**

**2.3** What would be appropriate, speedy and effective mechanisms for ensuring accountability of public servants for their actions or inactions?

**ANSWER:**

For purposes of answering this question a distinction should be made between public responsibility and accountability. Public responsibility shall in the last instance vest in the Minister and Cabinet, who are responsible for the policies.

On the other hand public servants are statutory appointees and should as such be responsible for their actions or inactions. Depending on the action or inaction of a public servant -

* can be held accountable to the Public Service, the Director-General and the Minister concerned. A Public Servant, just as an employee of other institutions, should in the execution of his/her duties take a reasonable degree of care and skill in the execution of his/her duties.

* can be held accountable to third parties for certain actions or inactions. For this type of accountability more than mere negligence is usually required. A Public Servant will only be held accountable by third parties if the act or inaction cannot be seen as having been performed in the execution of his duties with the Public Service. The Public Service will in cases where a public servant acted in the execution of his/her duties be held responsible by third parties and not the public servant as such. In those cases the Public Service will have redress against the offender if such a deed can be seen as being of a delictual nature. Provision does exist in inter alia the Treasure Instructions for public servants to be held personally accountable. The question does, however, arise whether the scope of this accountability should not be broadened.

* can be held criminally responsible for certain actions such as theft and fraud. It might even be possible to enact certain offence to be criminal, such as the destroying of documents under certain circumstances or the distributing of false documentation.

* can be acted against in a disciplinary action. Ample provision is made in the Public Service Act, 1 994 for such disciplinary action and if the public servant is found guilty of certain offence it can even lead to his/her discharge.
QUESTION:

2.4 How should the concept of a representative Public Service can be defined and what affirmative mechanisms and procedures will assist in achieving such representivity?

ANSWER:

For purposes of the Constitution a general provision, such as contained in Constitutional Provision XXX, namely a public service broadly representative of the South African community, shall suffice. Details such as mechanisms and procedures are to be provided for in separate legislation.

QUESTION:

2.5 Does representivity entail both deracialisation, as well as transformation of state institutions?

ANSWER:

Representivity to my mind means that the Public Service should be broadly representative of the South African community. If mechanisms and procedures to assist in achieving this goal are not effective within a reasonable time there may well have to be resorted to deracialisation and transformation of state institutions. Transformation of institutions is not necessarily linked to representivity, unless it is culturally or otherwise unsusceptible to affirmative action. Representivity should not be an objective on its own. It should be implemented with due care to the quality of service to be rendered and thus merit should always be taken into account.

QUESTION:

2.6 Should the public employees be entitled to participate in formulating policy on public services and should public service managers be responsible for creating the mechanisms for such participation?

ANSWER:

As the sole purpose of the Public Service is to render services to the community to meet their needs and as such seen to be the client of the Public Service, it goes without saying that both the employees and the public should be consulted in all phases of the rendering of these services.

QUESTION:
2.7 Should there be an obligation on public managers to monitor and evaluate the implementation of public policy and what would be the appropriate mechanisms?

ANSWER:

One of the most crucial functions of management, whether in the private or public sector, is to monitor whether objectives have been reached. It is thus considered absolutely essential that public managers should monitor and evaluate the implementation of public policy.

As the Public Service is rendering service to the public the most appropriate mechanism would be to get inputs from the client (the public at grass-roots level) by way of a system of representative committees/forums.

QUESTION:

2.8 What forms of review and redress should the public/public employees have in relation to dissatisfaction with service delivery?

ANSWER:

In the first instance the public should have redress to the person they elected to represent them in parliament. But before such a form of redress is resorted to the possibility of administrative redress within department context should first be exhausted. In the final instance the public may resort to the proposed administrative tribunal and finally, if not satisfied, they could approach the courts.

QUESTION:

3.1 Should there by a separation of powers between policy making and administration?

ANSWER:

The answer to this question is twofold. On the one hand there is the formulation of broader policies, which should solely fall within the jurisdiction of the politicians. On the other hand there is execution policy which falls within the ambit of administration.

In the latter instance policy making and administration cannot be separated. Intervention on political level in the normal course if implementation should not be accepted.

QUESTION:

3.2 Should provision be made for limited political appointments in the South African Public Service? If so, what should be the procedure and criteria for such appointments?
ANSWER:

In principle political appointments in the Public Service *per se* should not even be considered. Political appointments in Ministries to assist a Minister with the formulation of policies and decisions on a political level might, however, be an option to be considered.

QUESTION:

4.1 Should an institution such as the Public Protector be embodied in the final text of the constitution? Is there a need for another body, such as the Public Service Commission, that deals exclusively with ombuds aspects relating to the Public Service? If so, what should be its role, particularly in relation to appointments, promotions, human resource development and performance evaluation of departments and employees? How should it be composed? By whom should it be appointed and what are the appropriate mechanisms for public accountability? Should any provisions for the above be made in the Constitution?

ANSWER:

Constitutional Principle XXX provides that the independence and impartiality of a Public Service Commission and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of effective administration and a high standard of professional ethics in the public service. It would thus seem that some kind of provision has to be made in the Constitution for both the Public Protector and the Public Service Commission.

Although the independence and impartiality of both the Public Service Commission and the Public Protector are to be entrenched in the Constitution their functions, duties and powers are to my mind to be provided for in separate legislation. The functions and powers of the Public Service Commission should be limited to guidelines for the ordering of the Public Service. Departments should have genuine autonomy to arrange their organisational and staff establishments in accordance with specific requirements. This is the only way in which resources, such as budget, staffing, etc. could be responsibly managed and accountability could be vested in a Director General.

QUESTION:

4.2 What should be the respective roles and responsibilities of the Ministry for the Public Service and the Commission? What, if any, should be the relationship between the Ministry and the Commission?

ANSWER:
Since the Constitution makes provision for the establishment of powers and functions of the Commission, they are accountable to Parliament and the President. Therefore, there is no need for the Commission to fall under the political supervision of a Minister of Cabinet.

QUESTION:

4.3 What role should Parliamentary Select Committees play in relation to the Public Service and the oversight of policy formulation and implementation? Should the Public Service Commission be accountable to a Select Committee on the Public Service?

ANSWER:

On the strength of its broad policy the majority party of the Government is elected by the people. If this broad policy is not refined in more specific objectives (in most cases by way of empowering legislation) or if done and not implemented the Minister and Director-General responsible for the department concerned should appear before a Parliamentary Select Committee being the representative of the people. To deal specifically with staff and related issues is may be a good idea to create a separate Select Committee on the Public Service. The PSC and its office should likewise be accountable to a Select Committee.

QUESTION:

4.4 Should the Public Service Commission act as a body of appeal for public servants or should this role be entrusted to an independent agency?

ANSWER:

The answer to this question will depend entirely on the future role of the Public Service Commission will play. At present the Public Service Commission, unlike the Office of the Public Service Commission, can be seen as an independent agency.

As set out in my preliminary remarks the role of a body of appeal should in a future dispensation be fulfilled by an administrative tribunal.

QUESTION:

4.5 Who should represent the state as employer in the bargaining process and who mandates these representatives of the state as employer?

ANSWER:

As with all legal entities the State can only act by means of representatives. In the case of private enterprise bargaining with employees is dealt with by management.
If a parallel can be drawn between the private sector and the public sector it would thus seem logical that bargaining of the state as employer should be handled by management of the different departments.

The reason why the management in the private sector is acting for the employer is because management usually has the final say on bargaining matters such as remuneration and other conditions of service. If it is accepted that these bargaining matters in the public sector vest in the Public Service Commission it would seem logical for that organisation to represent the state as employer. Where matters have been delegated to departments and vest in the management of departments these departments will have the mandate to represent the state. The PSC must, under the present circumstances, take the collective responsibility for the Public Service in this regard.

QUESTION:

4.6 Should there be provincial Public Service Commissions? If so, what should their role be? What should be the relationship between the national and provincial Commissions? Should the Constitution contain any provisions on the above?

ANSWER:

If it is accepted that the Public Service should consist of both the first and second tiers of government (see answer to question 2.1) it will be unnecessary to have provincial Public Service Commissions. This does not mean that the Public Service Commission could not be managed on a regional basis as well.

QUESTION:

4.7 How should norms and standards of public administration and management be developed and what, if any, should be the instruments of delegation from national to provincial governments?

ANSWER:

In developing norms and standards it should be taken into account that public administration is only a branch of administration and that the same kind of norms and standards applicable to administration and management in the private sector should apply to public administration. The only difference being that the public service is handling public funds, resulting in more stringent norms and standards to be made applicable.

As far as the question of delegation to provinces is concerned I do not think that the development of norms and standards is to be delegated to provinces but that they should be superimposed by the National Government. This would seen to be in agreement with the provisions of section 126 of the interim Constitution.
QUESTION:

5.1 Should the Public Service Act as an agent for development? If so, how can the Constitution create an enabling framework for such action or should this matter be dealt with elsewhere?

ANSWER:

Contrary to the private sector the public service predominantly concerns itself with the rendering of services and not primarily to make a profit. Not that the financial side is totally neglected but when circumstances demand it certain services will be rendered by the Public Service as long as it is a priority and regarded as being in the interest of the country. In other words the main purpose of the Public Service is to render services to meet social objectives. The Public Service and public servants are to serve the political objectives of the public as expressed in laws or directives of the Government of the day. As the political objectives of the Government are contained in the RDP and the RDP is mainly directed at development it is the purpose and function of the Public Service to see to it that the developmental objectives of the RDP are realised. In short the Public Service should act as an agent for development. In this process the private sector should be involved in development execution itself.

If the above-mentioned role of the Public Service is accepted there should be no need for an enabling framework to make the Public Service responsible for development. For purposes of defining the political objectives of the Government and to provide the resources and for the distribution of work, it is, deemed feasible for the RDP - programmes to be contained in separate legislation. The structures and staff components of departments should reflect the developmental role to be played.

CG DE VILLIERS
DIRECTOR-GENERAL
DATE : 24/O2/95
We the concerned members of the Uitenhage Baptist Church would appreciate it if the Constitutional Assembly considers the following when the final constitution is drafted.

We want to assure the Constitutional Assembly of our prayers as you draw up this vital document.

REV A SULLIVAN ON BEHALF OF
UITENHAGE BAPTIST CHURCH CONGREGATION

1. CHARACTER OF THE STATE

A very great man once said: "If you would be great ... then be a servant".

We believe that when ordinary men are democratically elected, those who put them into a position of authority should expect to be governed in fairness, honesty and righteousness. Those found guilty of corruption, bribery and self enrichment must be dealt with in the same way as the man in the street. Those elected to parliament must remember that they serve the country not just a section of the people or a party or themselves. They should be men and women of integrity and accountable for all their actions, making laws that are acceptable to all our peoples.

The State must not spend more than it has budgeted for and thereby burden the tax-payer. A close watch is to be kept on Government firms on semi-Government firms which always start the spiral in the cost of living announcing an expected rate of inflation before it occurs and then escalates prices and wage increases. Only a person born in the country and having reached the age of 18 years, or a person resident in the country for 5 years should be allowed to vote in the elections. In Parliament, parliamentarians should speak in a language understood by all or through an interpreter. Names and symbols should only be changed if hurtful to any group to avoid confusion and tax-payer burden.

The state is to have no authority over the Church of God, yet cannot separate itself from God as God is interested in all man's actions. The State is not above God.

2. STRUCTURE OF THE STATE

We believe that government must be governed by men and women who are trustworthy in the manner using safeguards to prevent corruption and individuals from usurping position or powers.

Jethro said to Moses - "You must be the peoples representative before God and bring their disputes to Him. Teach them the decrees and laws and show them the way to live and the duties they are to preform. But select capable men from all the people - men who fear God, trustworthy men who hate dishonest gain - and appoint them as officials over thousands, hundreds, fifty and tens. Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves" (Exodus 18: 19b - 22a)
3. **RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT**

Central Government must be responsible to govern the country and laws passed in Parliament must be adhered to by Regional Governments. Money allocated by Central Government should be distributed in fairness, remembering that some of the regions do not have the resources of others.

Disputes between Regions and Central Government should be discussed between relevant Central Government Minister involved with Regional Government until a compromise is reached.

4. **FUNDAMENTAL RIGHTS**

If you pay attention to these laws and are careful to follow them then the Lord your God will keep His covenant or love with you". (Deuteronomy 7:12)

We believe that everyone has rights but with rights comes responsibility. Therefore failing in ones responsibility one loses his rights. Therefore we urge Government and the Courts of our land to use wisdom when enforcing the law. The masses and their demands are not always right, e.g. when the masses do not agree with the rates imposed on them, or with paying house-rents, lights and water, T.V. licences etc., that does not make it right. If one enjoys the privilege there is always a price to pay.

We believe every child born or unborn has the right to be protected by law. Simply because a child is unwanted it does not give the right for him/her to be aborted or abused. It is the responsibility of the parents to protect that child and if not they should be made responsible to the law. When we speak of equality human dignity, privacy, freedom and security of life this is not only for the adult also for the unborn, the young and the aged.

We advocate freedom of worship and the propagation of the truth. We contend that violence, whether on T.V., radio, on the streets or through children's toys are against Christian principles of reconciliation, peace and mutual respect. Violence and the overlooking of crimes are against the true interest of our country and genuine welfare of our people.

We believe in the protection of Christians and those with similar moral standards against the invasion of their privacy and sense of decency by those seeking to promote and sell the practices and products of all immoral, indecent, inhumane and violent acts. This is not only against our Christian principles but history has proved that great empires have collapsed after failing to uphold these standards.

We believe that the buying and selling of sex degrades all parties involved and is an affront to the dignity of men, women and children, and undermines the moral fibre of society. The multiplication of the number of casinos and gambling gimmicks, causes the addiction of thousands to the gambling habit and the subsequent impoverishment of many families, especially among the poor.
Pornography is nothing more than obscene literature or pictures which deliberately exploits human sexual weaknesses resulting in the degrading of sex, and the distortion of proper sexual development (especially of the young) with tragic social consequences. The public have been indoctrinated to believe that films etc. will only be for adults - a wise man has said 'like father like son'.

We fully defend the basic human rights of people but affirm that the "gay" lifestyle is morally wrong and detrimental to personal and social welfare. The rapidly increasing abuse of trafficking of alcohol and drugs of all types, brings misery, poverty, and death into millions of South African homes.

We believe that family life is ordained by God and every Government is put into power by God. Therefore the family should expect the state to protect their interests. A happy family will bring about a prosperous state. Work must be created for all who seek employment. Rape, murder and spouse abuse are crimes which must not be overlooked, but dealt with severely.

We fully believe in Affirmative Action but would suggest for a limited period of time. The country cannot afford inefficiency.

Every child reserves an education but parents should not be content to allow the state to carry the full burden. We would therefore suggest that the first two children of any family of the lower income group receive free education. The third child in the family receive education at ½ rate and thereafter the parent to pay in full. Children should attend a school where they are taught in the language they are familiar with. With education comes responsibility and discipline and even punishment for misbehaviour.

Every working citizen should be guaranteed medical assistance according to their income. People who can afford to, should pay for medical services at State Hospitals. Children are not responsible for the number of children their parents have, but parents must be encouraged not to bring unwanted and uncared for children into this world. Every person who is able to pay for a home and the costs involved are entitled to a home.

We should learn from other countries where it has been proved that sex instruction is not neutral but encourages experimentation and promiscuity, thus placing vulnerable sexually immature adolescents/teenagers at risk of sexually transmitted diseases and HIV/AIDS. Moreover the proposed sex education syllabus is based in the so-called "Alternative Lifestyle's" which is unacceptable to Christians. Every child is to receive religious instruction by a fully competent person according to his/her belief and in no way must be subjected to teaching that is foreign to them.

5. JUDICIARY AND LEGAL SYSTEMS

"You shall not add unto or take away from the commands of the Lord ... teach them to your sons and your sons sons." Deut 4 : 2,9. Judges magistrates etc. are not to be elected for their political persuasion but for their integrity. Languages spoken in court must be a language the accused and witnesses etc. fully understand, or an interpreter must be used.
Punishment must fit the crime (E.g. if someone is apprehended and found guilty of stealing he/she must be made to return the goods in the same condition, or pay the person/firm the replacement value of the stolen goods, besides whatever fine the law may decide they will impose.) An offence that is premeditated and blatantly committed E.g. murder, rape and drug trafficking deserves the maximum penalty. ("An eye for an eye .. ")

6. **SPECIALIZED STRUCTURES OF GOVERNMENT**

Police, the National Defence Force, Security Forces and Intelligence must serve the interests of the citizens of the country. Failure to take commands from those in command is mutiny and must be dealt with as such. Should there be unfairness or dispute of any kind this should be solved by negotiation between those involved and failure to come to an compromise, the Cabinet Minister dealing with law and order, should be brought in a mediator.
We wish to make a submission to you in respect of:

THE MATTER OF ABORTION

We appreciate the complexities of this issue and the variety of cultural and pragmatic perspectives. Nevertheless we wish to put forward the principle that the right to life of the unborn child should be greater than the right to privacy of the Mother and that abortion on demand or abortion as a means of contraception be not condoned.

We would request legislation against abortion except in such cases where the delivery of the child will be destructive to or life threatening to the mother.

We would urge legislation that would count any abortion of a fetus of more than 3 months as criminal.

FREEDOM OF ASSEMBLY AND PUBLIC GATHERINGS

We affirm the right of Religious freedom and wish this to be reinforced by a clause entitling the right of assembly in private homes and Church Building. But more than this we would request that religious groups have the right to the use of State and municipal property such as City Halls, Schools, Auditoriums, amphitheatre, offices etc. subject to the normal conditions and provisions.

WITCHCRAFT AND SATANISM

We believe that the practise of Witchcraft and Satanism, while possibly understood as religious belief, should be curbed and prohibited by law. Our reason for this is that these practises quite apart from offending the religious beliefs of the majority of citizens, are directly responsible for, social conflict and disorder and even the death and murder of our citizens.
THE EMERGENCE OF A SECULAR STATE

We have come to accept the inevitable replacement of a so called Christian State with a Secular State which has an ethos empty of an allegiance to God and an ethic which is not informed directly by the bible. We understand that by our witness, example, representation and persuasion we will have to moderate the shaping of our South African Society.

Nevertheless we wish to remind the assembly that demographically speaking a vast number of South Africans, If not the majority, are Christians and that the words "Almighty God" should not be too readily expunged from the constitution and that Christian beliefs are not simply cast out because of the secularism of a relative few.

PORNOGRAPHIC LITERATURE AND SEXUAL LICENSE

We know pastorally the impact of temptation and the soiling of imagination caused through the proliferation of pornographic media of many kinds. We are particularly concerned that the innocence of our children be not violated and that the unbridled display of or availability of salacious erotic material in public places should not give rise to a false understanding of healthy human romantic love among our citizens. May we request that the freedom of access to these materials will be so curbed that the moral future of our society and the sanctity of marriage is not put at risk.

GAY AND HOMOSEXUAL RIGHTS

While being conscious of our Christian pastoral responsibility to cherish and minister to those of our society whose sexual orientation is at variance with recognised Christian norms, we cannot believe that sexual orientation is simply a matter of personal preference especially where this impacts on the public sphere. We believe that the active advocacy of alternative sexual lifestyles can threaten the healthy development of our children and subvert and disrupt the conventions and commitments of married life which we as Christians believe is essential to the common good.

We believe that the rights so strongly pursued and desired by the Gay Movement to further their lifestyle undermine the right of Christian people to seek norms and values which have been the building blocks of functionally sound society for centuries. We request that our children be shielded from the active advocacy of dysfunctional human relationships.

We the undersigned concur with the above.

109 signatures
Submission on:
1. The relationship between different levels of the court
2. A single or split judiciary
3. Constitutional court
4. Other court structures

Submitted by: The Free Market Foundation of Southern Africa

Summary

We propose a judicial system for South Africa based on our present system combined with aspects of the United States and Swiss judiciaries.

The powers of the American federal judiciary are granted to it by the constitution and cannot be removed by Congress or the President. Its task, and that of judges throughout the land, is to interpret and uphold the constitution, and they are bound to treat as void any legislative act that is inconsistent with the constitution.

The role of the Swiss judiciary is different from that of the United States. The people are the sovereign power in Switzerland and have the final say on laws through referendums. Thus, although the constitutionality of cantonal laws is decided by the Federal Tribunal (the highest court in the land), this Tribunal does not decide on the constitutionality of federal statutes. However, federal laws can be repealed by the people's veto in a plebiscite. The framers of the Swiss Constitution wanted to prevent judicial decisions from overriding the decisions of the people’s representatives in parliament. They also did not want the courts to have the power to invalidate the people’s decisions in referendums.

Far less judicial centralisation has occurred under the Swiss system, where the people have the final say on federal legislation, than in the US, where the courts have the final say.

For South Africa we propose a judicial system in which the provinces have complete control over first and second tier courts, while the national government takes responsibility for a central Appeal Court.

Access to the constitutional court established by the interim constitution is difficult time consuming and far too costly for any but the very rich, or those few poor who are fortunate enough to merit legal aid. Furthermore, most of the members of the present constitutional court are, directly or indirectly, political appointees and therefore subject to political influence.
The constitutional court should be scrapped and instead the regular courts should protect constitutional rights, as in Canada, the US and Namibia.

**The Provincial Courts**
The provincial courts should constitute the courts of the first and second instance which uphold the national and provincial constitutions and apply national and provincial statutes at the provincial level.

**The Appeal Court**
The Appeal Court, with members elected by parliament, should be the court of the final instance and have the power to decide appeals from the provincial courts. We propose that Appeal Court decisions regarding constitutional issues be binding on every court throughout the country to ensure that individual rights are protected.

**The People's Veto and Initiative**
The people should be entitled to call for a vote challenging legislation they consider to be unconstitutional at any level of government. This form of direct democracy (the challenge to proposed legislation) should require a petition signed by a specified percentage of voters.

We propose a judicial system for South Africa based on our present system combined with aspects of the United States and Swiss judiciaries.

**The US judicial system**

The powers of the American federal judiciary are granted to it by the constitution and cannot be removed by Congress or the President. Its task, and that of judges throughout the land, is to interpret and uphold the constitution, and they are bound to treat as void any legislative act that is inconsistent with the constitution.

The Supreme Court is the highest court in the land and one of the triumvirate of power which includes the President and Congress. It is the final court of appeal regarding the constitutionality of federal and state laws, and comprises nine justices, including a Chief Justice, who are appointed for life by the President subject to ratification by the Senate.

Because the Supreme Court is the final court of appeal, it has become not only the guardian of the constitution but also its master. It is the task of the Bench to determine the limits of the legislature, and in the course of time it has placed these limits far beyond anything envisaged by the Founding Fathers of the constitution. The constitution states that the courts must protect individual citizens' rights, but it also contains a catch-all phrase to the effect that Congress should uphold "the public interest", and the Supreme Court has frequently ruled against individual rights on the basis of serving the public interest. For example, it has ruled that Congress may levy or collect taxes without restraint subject only to the principle of uniformity.

Prior to the 1930s the Supreme Court was independent of political pressure and interpreted legislation, for the most part within the spirit of the constitution. But during that decade, President Roosevelt paved the way for politically-inspired appointments to the Bench by
deliberately and openly threatening to pack the Court with judges who supported the New Deal policies of his administration. Succeeding presidents have appointed judges who are likely to agree with them. As a result, the Court has often been criticised for its decisions, which some authorities believe have been at variance with the views of many or even most Americans.

The problem is that this new and pliable approach to the constitution has led to its interpretation being a matter of value judgement and personal opinion. Judges should be impartial, but their rulings are invariably coloured by their subjective political leanings and convictions. Moreover, the numbers of the Supreme Court can be increased by Congress, so it is able to add jurists who share its convictions. Supreme Court judges may be impeached for misconduct but the only other constraint on them is public opinion.

**The role of the Swiss judiciary**

The role of the Swiss judiciary is different from that of the United States. The people are the sovereign power in Switzerland and have the final say on laws through referendums. Thus, although the constitutionality of cantonal laws is decided by the Federal Tribunal (the highest court in the land) this Tribunal does not decide on the constitutionality of federal statutes. However, federal laws can be repealed by the people's veto in a plebiscite. The framers of the Swiss Constitution wanted to prevent judicial decisions from overriding the decisions of the people's representatives in parliament. They also did not want the courts to have the power to invalidate the people's decisions in referendums.

The Swiss Federal Tribunal is an independent court located in Lausanne which consists of 26 to 30 full members and 12 to 15 substitute judges. The members are elected by parliament for six years, and though any Swiss citizen is eligible for election, members are usually cantonal judges, law professors or federal parliamentarians. The Tribunal's composition reflects the country’s main languages, regions, religions and major political parties.

The Tribunal stands at the apex of a pyramidal system of courts. The canton courts apply federal and cantonal statutes at the cantonal level and are courts of the first and second instance. The Federal Tribunal is the court of last instance and has the power to decide appeals from the cantonal courts. It deals with civil and criminal law violations, the interpretation of public and administrative law, debts and bankruptcies, and social security questions.

Although the Tribunal does not decide the constitutionality offer statutes, it may hear an 'administrative complaints' against the cabinet regarding ordinances, orders or decrees which violate constitutional rights, or other federal laws. As a rule, however, federal ordinances which are based on federal statutes cannot be invalidated by the Tribunal.

The Federal Tribunal is, however, empowered to rule on "constitutional complaints" against cantonal and community governments. Any citizen can present a complaint against his canton for the violation of his fundamental rights, which include property rights, freedom of commerce and industry, voting rights, rights to referendum and initiative, and equality at law. In a series of decisions the Federal Tribunal has ruled that any application of cantonal law which is "arbitrary" or "capricious" amounts to inequality before the law. Through this interpretation of "equality" it has approved violations of rights and freedoms guaranteed in the federal and
cantonal constitutions, just as the US Supreme Court has done in its interpretation of the 'public interest', though to a lesser extent.

The Tribunal also decides conflicts of competence between federal and cantonal authorities or between two or more cantons. In this case it sits as a court of first instance. It does not have the power to decide on disputes between the cabinet and parliament.

**Swiss Cantonal Courts**

The organisational structure, proceedings and execution of sentences of all courts other than the Federal Tribunal are purely cantonal matters and vary from one canton to another.

There are several types of cantonal courts including civil courts, criminal courts and administrative tribunals. (The tribunals are based on European administrative law, a coherent system of rules and procedures not found in the same form in the UK, USA or South Africa.) About half the cantons also have labour or industrial courts to decide disputes between employers and employees, and commercial courts.

In most cantons there are two levels of courts: community-based courts in which civil and criminal cases are tried by a single judge or lawyer president or by lay members who are usually elected by the people; and cantonal or superior courts, which can hear appeals from the community courts, and may refuse to enforce canton statutes which violate federal laws. These usually consist of a professional tribunal elected by the people or the canton parliament. Only two cantons, Zurich and Geneva, have jury trials.

The administrative tribunals deal with controversies regarding canton law. They can declare a canton statute invalid if it violates the canton constitution.

**A comparison of the American and Swiss systems**

It is interesting that far less judicial centralisation has occurred under the Swiss system, where the people have the final say on federal legislation, than in the US, where the courts have the final say.

In theory, the US Congress cannot restrict the power of the states; in practice, however, if Congress enacts a statute, the President signs it, and the Supreme Court finds it constitutional, the states are powerless to oppose it. Article VI of the constitution declares that all statutes enacted by Congress shall constitute the supreme law, laws in the states to the contrary notwithstanding. While the Supreme Court can rule a federal law unconstitutional on the grounds that it goes beyond federal lawmaking competence, it doesn't often do so. The Supreme Court is itself a federal institution, and during the past half-century its decisions have resulted in an ever-expanding conception of federal power.

In Switzerland, where the cantons and the people have the final say, they often block laws which aim to centralise power at the expense of local interests. Moreover the cabinet has to lobby the cantons and other interest groups such as trade unions and consumer groups to gain their support for legislation, since without their approval it runs the risk that a referendum will be called to reject the proposed measure. In the
United States the opposite is true. Interest groups set up foundations and organisations in Washington whose full-time task it is to lobby Congress to pass laws in their favour.

The true seat of power in the two countries is clearly demonstrated by this difference. In constitutional terms the Swiss legislature is more powerful than the US legislature, but in reality the Swiss legislature is much more answerable to the people.

1. **The relationship between different levels of the court,**
2. **Single or split judiciary,**
3. **Constitutional court**

For South Africa we propose a judicial system in which the provinces have complete control over first and second tier courts, while the national government takes responsibility for a central Appeal Court.

Access to the constitutional court established by the interim constitution is difficult, time consuming and far too costly for any but the very rich, or those few poor who are fortunate enough to merit legal aid. Furthermore, most of the members of the present constitutional court are, directly or indirectly, political appointees and therefore subject to political influence.

The constitutional court should be scrapped and instead the regular courts should protect constitutional rights, as in Canada, the US and Namibia.

**The Provincial Courts**

The provincial courts should constitute the courts of the first and second instance which uphold the national and provincial constitutions and apply national and provincial statutes at the provincial level.

Each province has established magistrates courts and supreme courts within its area of authority. The existing infrastructure could be retained virtually as is, with an option to devolve the control of magistrates courts to local government.

Over time provincial and local structures could vary a good deal from one another in accordance with innovative developments, customary law and local administrative systems.

**The Appeal Court**

The Appeal Court, with members elected by parliament should be the court of the final instance and have the power to decide appeals from the provincial courts.

An independent court of appeal helps to avoid the possibility of local ethnic or cultural domination or miscarriage of justice. The Appeal Court would apply the law of the province in which the case originates, as happens now.
If all the provinces are to have confidence in the central government judiciary, special care must be taken to ensure its independence and impartiality. To achieve this there might be a rule that there may not be more than three judges from any one province and that a certain number of provinces may veto the appointment of a judge.

Certain conventions would probably evolve, as they have done in the USA and Switzerland, to take account of ethnicity and socioeconomic factors.

All courts should decide the constitutionality of any legislation, as in the USA, Canada and Namibia.

**The People's Veto and Initiative**

The people should be entitled to call for a vote challenging legislation they consider to be unconstitutional at any level of government. This form of direct democracy (the challenge to proposed legislation) should require a petition signed by a specified percentage of voters.

**Conflict of laws**

Clearly, if laws differ from one province to the next, some of them will conflict. This is not a new problem. It occurs in Switzerland and the USA and all systems in which different constituent units have different laws. It has always been the case between provincial court jurisdictions in this country.

We do not need to re-invent the wheel, an entire body of law has been built up over time to settle disputes which result from conflicting laws. In cases regarding contracts, for instance, the law of the place in which a contract was concluded is usually invoked.

**Legal precedent**

The system of judicial precedent applies currently in South Africa. In other words, when there is a legal dispute the court settles the point by referring to previous judgments on similar cases. If a higher court has made a decision regarding a point of law, its decision is binding on all lower courts.

We propose that Appeal Court decisions regarding constitutional issues be binding on every court throughout the country to ensure that individual rights are protected. However, as at present different provincial courts should be free to follow or reject decisions made in other provincial divisions.

**4. Other court structures**

**Cheap and accessible courts for South Africa**

It is very important that South Africa have courts which are accessible to ordinary people. At present our courts are accessible only to the wealthy, or to those poor enough to qualify for legal aid.
By devolving the control of local courts to provincial and local levels we would expect a variety of options to emerge which would be cheaper and more accessible than our current magistrate's courts and small claims courts. For example, there would probably be community or peoples courts in which cases would be tried by locally elected lay people, or lay magistrates (that is, people without formal judicial qualifications who are respected community members, such as school principals, members of the clergy, business people or academics) as in Britain, Switzerland and the USA. Lay magistrates evaluate the evidence and determine the courts ruling with the aid of advice from the clerk of the court on questions of law. These courts could dispense with documentation, legal representatives and costly procedures and allow summary hearings. There are interesting similarities between lay magistrates and the traditional courts of black chiefs and headmen in South Africa.

Provinces need not limit the jurisdiction of small claims courts to minor litigation by individuals as is currently the case in South Africa. These courts could (and should) also be accessible to organisations such as small businesses or trade unions.

One of the greatest problems with enforcing rights in our current court system is that law is inaccessible to ordinary people. With a variety of systems and with small claims courts, arbitration and customary courts, access to law would become quicker and cheaper.

Also, under conditions of judicial devolution we would expect different methods of administering the law and appointing officials to be used in various forms and combinations. Competition between different systems in different localities would help to bring about the best judicial system overall.

FREE MARKET OF SOUTHERN AFRICA
PROTECTION OF PROPERTY RIGHTS IN THE CONSTITUTION

The ECAU supports the principle / concept that protection of property rights should be enshrined in the constitution and supports the following viewpoints:

* All land claims arising from the forced removal of people on the grounds of racially based legislation of the past (including producers who forfeited land with the consolidation of homelands) should be settled by means of a legal process.

* Except for land belonging to the DFA no agricultural land should be allocated before claims arising from racially based legislation have been settled.

* Artificial redistribution of land by means of measures such as nationalisation, confiscation and expropriation are totally unacceptable.

* Where the State expropriates land it must only be for public purposes and the owner must be compensated at market prices.

* Permanent occupation rights and right of access to private property cannot be obtained on the basis of previous employment unless this was agreed upon with the land owner.

R.P. O’MOORE
MANAGER
27 May 1995

We have just attended an excellent workshop on the Budget, in which we discussed the problems of choosing priorities in shaping a new budget that will bring about Reconstruction and Development throughout the country. We wrestled with priorities within each department, the advantages and disadvantages of each process of raising more revenue to meet all the needs, and possible trade-offs between different departments. The whole process has made us feel a new sympathy for the difficulty Government must experience in coming to a decision about the allocation to different departments.

The workshop has also convinced us of the importance of making provision in the Constitution to ensure that ordinary citizens can make inputs into the Budget process. In the U.K. preparation of the Budget starts at the level of Local Government. In the USA, the Congress discusses the Budget for six to eight months every year.

At present in South Africa the Members of Parliament have only two weeks in which to discuss the Budget and there is no opportunity for ordinary citizens and Civic Organisations to make suggestions. We think that this is an essential aspect of Democracy.

We request that you would include making citizen participation in the preparation of the Budget an integral part of the constitution.

THE DELTA WOMEN’S LEADERSHIP TRAINING GROUP
Thank you for your above-mentioned letter and the annexure thereto.

I set out hereunder the submissions of the Judges of the O. P. D. These follow the questions listed in the annexure to your letter, and they are as follows:

UNANIMOUS SUBMISSIONS BY ALL THE JUDGES OF THE ORANGE FREE STATE PROVINCIAL DIVISION OF THE SUPREME COURT OF S.A. TO THEME COMMITTEE 5:

**Ad Block 6:**

**Appointment of Attorneys-General and other judicial officials:**

1. Attorneys-General should be appointed by the President acting on the advice of the Judicial Service Commission. An Attorney-General should be appointed from the staff of the Attorneys-General, who has been employed on such staff as a duly admitted advocate for a period of at least 10 years and who has been awarded the status of Senior Counsel.

2. The function of Attorneys-General should be the performance of the duties as set out in section 5 of the Attorney-General Act, Act No. 92 of 1992. They should not perform other functions.

3. The first responsibility should rest with the Attorneys-General. No Attorney-General should be a member of the cabinet.

4. Provisions relating to the removal from office of Attorneys-General should be in the constitution or in legislation.

The grounds and procedure for the removal from office should be the same as those pertaining to the removal from office of, a judge; see section 104(4) of the (Interim) Constitution, Act No. 200 of 1993.
5. Provisions relating to the appointment, duties, powers and removal from office of the Attorneys-General, and the provisions which are contained in section 108(1) and (2) of the (Interim) Constitution should be in the (final) Constitution.

6. No.

7. No.

**Ad Block 7**

1. **Language and interpretation:**

For the time being the languages to be used in court proceedings and the record of the proceedings of a court should be English and Afrikaans only.

The provisions of section 107(1) of the (Interim) Constitution should be retained in the (final) Constitution.

2. **Principles of Legal Interpretation:**

The principles embodied in section 35 of the (Interim) Constitution should be included in the (final) Constitution, but only in regard to fundamental rights. NO other principles of legal interpretation should be included.

3. **International Agreement and International Law:**

None; these matters should be dealt with in Acts of Parliament.

**Ad Block 8:**

**Legal Education/ Legal Profession:**

These aspects should more appropriately be dealt with in legislation.

There are not, as far as we know, any current provisions concerning legal education and the regulation of the legal profession that are unconstitutional.

**Ad Block 9:**

The transitional arrangements for which provision is made in sections 243 to 246, of the (Interim) Constitution could be retained in the (final) Constitution in so far as such retention is necessary.
In general, the provisions of the Interpretation Act, Act No. 33 of 1957, should apply.

(E.K.W. LICHTENBERG,
JUDGE PRESIDENT OF THE
ORANGE FREE STATE PROVINCIAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA)
The Free Market Foundation of Southern Africa.

Submission on:
A. Public Administration
B. Financial Institutions
C. Transformation and Monitoring

Introduction

The parties representing the South African people have agreed that, in the transition to freedom and democracy, various specialised structures should be established. Many of the interim commissions which have been established (such as the Commission on Gender Equality and the Commission on the Restitution of Land Rights) will become increasingly unnecessary as the injustices of the past are addressed.

South Africa has a long tradition of establishing commissions of inquiry as a means of fact-finding or resolving disputes which cannot be resolved under normal governmental structures. While commissions and other specialised structures of government are often necessary to come to agreement over certain issues, they can also have detrimental effects.

The establishment of commissions can be a device used by politicians to avoid making difficult or unpopular decisions. In democracies, the government should decide upon a policy, seek to carry out the policy, and allow itself to be judged by the electorate on the success or failure of the policy. A government which decides to let some other body formulate the policy abdicates its responsibility to govern and its accountability to the electorate. It is therefore vital that a clear distinction is made between commissions, which have powers of investigation and recommendation, and politicians, who wield direct power.

Accountability to politicians and people is lacking in many of South Africa's commissions and governmental organisations. Commissions are also expensive to maintain. Members who are paid to sit on a commission may have little interest in the swift and efficient reporting of policy advice and recommendations. The length of time which they sit should therefore be strictly limited.

A Constitution is not supposed to set down policies and political priorities of a Government. Rather, it is supposed to describe the formal relationship between the government and the people. It would be better for issues such as gender and land rights to be addressed by a Transitional Affairs Act passed by Parliament instead of establishing Commissions within the Constitution. If such Commissions are established formally within the constitution, then it would be sensible to place a limit of say, five years on the time that they are able to sit.

A. Public administration

Bureaucratic behaviour
Good government depends to a large extent on quality of administration and on quality of policy advice. Public service officials involved purely in administration should be non-partisan so that they can serve all members of the public in an unbiased and impartial manner. The case for a non-partisan public service rendering policy advice is more difficult to defend, for bureaucrats will often be guided not by the public interest or even by the ruling party's policy but by their own interests. Democracies throughout the world have suffered from bureaucracies seeking to extend the scope and number of functions which they undertake in their own self-interest. This phenomenon has become the subject of a particular branch of economics: public choice analysis. Policy advice rendered by bureaucrats rarely consists in returning power from officialdom back to politicians and people themselves. Career-orientated elite’s responsible for public administration also tend to insulate themselves from what is happening in the real world. The maintenance of democratic government consists to a large degree in curtailing the tendency of the bureaucrat to maximise their own power, status, budget and scope of responsibility.

An open public service

The solution is to have a public service which is not career-orientated. Posts should be advertised as openly as possible. The more applicants who compete for the position, the higher the quality of the successful applicant will be. People who have experience of the private sector may be attracted to the service, bringing with them all the expertise and new techniques which the private sector generates. The result would be far greater efficiency in the administration of government. It is widely accepted that people who work in the private sector understand far more about how wealth is created than those who work in the public sector whose job is merely to redistribute it. The public service would benefit from having some members with that broader appreciation and perspective upon the nation's affairs.

The interim constitution guarantees the pensions of public service employees. Public service employees should not have their pensions guaranteed under the constitution any more than business people, plumbers, gardeners or shopkeepers. All of these people play their part in society. It is manifestly unjust, and ought to be unconstitutional, that one groups pensions should be protected by the state when another's is not. Public service employees should like anyone else have the right to a private pension scheme, so that the question of whether the state will ever be able to afford the payment of their pensions does not arise.

The Constitution should prohibit domination by a state in favour of a defined group of people. All citizens should be equal before the law.

The Public Service Commission

The interim Constitution also provides for a Public Service Commission, appointed by the President and vested with the power to give directions with regard to the machinery of government. The only person able to reject a recommendation or direction of the Commission is the President yet the commission is supposed also to
be accountable to Parliament. This is a recipe for confusion. If the previous system which led to the use of patronage and private appointments is not to be perpetuated, the mechanism for public appointments should be as transparent as possible.

The Commission will make numerous recommendations for appointment to public service. Although it is unreasonable for Parliament to be expected to duplicate all of the Commission's work by examining each and every personnel recommendation made, Parliament should set down the criteria for civil service appointments in a Public Service Act. Persons appointed to senior, unelected positions should have to enjoy the approval of the Commission, the relevant departmental minister and Parliament. Appointments for those positions for which Parliament should have the right of veto - which might include senior departmental civil servants or the head of police - should therefore be listed in an Act of Parliament. Appointments to lower levels of the public service should be made by the relevant departmental minister after the appropriate candidate has been recommended by the Public Service Commission.

The Commission's other principal function should be to give directions to promote efficiency and effectiveness in departments and the public service. This would ensure that practices which are wasteful of public funds could be prevented. The provision in the interim constitution that the commission has no right to make recommendations or directions which involves expenditure of public funds without the approval of the Treasury for such expenditure is also welcome. With regard to its task of keeping a check on the work of the executive branch of government, the Public Service Commission should be accountable to Parliament only. Parliament should appoint its members, receive its reports, and have the right to veto its recommendations.

The Public Service Commission should only be able to investigate, recommend and direct matters of public administration at a national level. At provincial level, these duties should be performed by a provincial service commission, separately responsible to a provincial legislature.

**B. Financial institutions and public enterprise**

**Fiscal Policy**

Public revenues should as far as possible be raised and spent by the same organ of government. The creation of a people-centred society entails giving people greater control over all aspects of their own lives. That includes giving them greater control over the money which they earn and how that money is spent. Low taxation is the best way of leaving money in people's own pockets so they can decide for themselves how their money should be allocated. Where people do pay tax, there should be maximum transparency and openness, so that people can see for themselves how their money is being spent. The current situation, whereby national government can recycle funds to those areas which it regards as most in need of them, is wasteful, inefficient and likely to cause resentment.
When taxes are raised and spent locally, people do not tolerate wastefulness and corruption. The relationship between the money they spend and the services which they receive is far more visible at the local level. In addition, when governments rely on their own sources of revenue, the greater is their incentive to make sensible fiscal decisions, balance budgets and strive for efficiency. Recipients of subsidies tend to develop a dependent mentality instead of striving for self-sufficiency. If the national government does nonetheless make intergovernmental grants, it should not design expenditure programmes. When poor areas receive transfers over which they have control, they make better spending decisions than when a large jurisdiction dictates the use of subsidies to them. The fact that they are unable to raise sufficient revenues locally should not be used as an excuse to deprive poorer areas of the right to determine their own needs. They should receive grants according to a formula established by an Act of the national Parliament with no provisos, so that they can spend the money according to local priorities. If each level of government was responsible for its own revenue and expenditure, the electorate could see clearly how much was being taken from them and how much was being spent. They could then make more informed judgements on whether their local, provincial or national government is using their money efficiently and effectively.

**The Fiscal and Financial Commission**

The Fiscal and Financial Commission is a central body appointed at national level with the responsibility of making recommendations on fiscal and financial policy matters to the relevant legislative authorities at all levels. Specifically, the Commission must recommend on equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level. This detracts from the responsibility of provincial legislatures to run independent fiscal and financial policies. Further, it could be used as a device by the national government to exert pressure on provincial legislatures. The Commission is supposed to perform its duties fairly, impartially and independently in deciding how revenue should be allocated. Yet it will also have to take into consideration the different fiscal performances of the provinces, efficiency of utilisation of revenue and the needs and economic disparities within and between provinces. People will inevitably disagree over whether the Commission’s recommendations subsequently turn out to be fair and impartial. Indeed, it could be argued that redistribution of revenue is by its very nature unfair. There is no need for the Fiscal and Financial Commission to be making policy recommendations on redistribution of wealth. The national government should be perfectly capable of deciding how much revenue should be distributed from one province to another in order to remove disparities. The Minister of Finance should bring forward recommendations to Parliament as to how funds are to be raised and distributed annually. Public debate should take place about the Minister’s proposals and the legislature should then decide on whether it accepts the proposals by passing an annual Finance Act setting out in detail how state funds are to be raised and
spent. While it may be reasonable for a Fiscal and Financial Commission to advise on the efficacy of redistribution mechanisms, the degree of wealth redistributive mechanism is an issue which should be decided in a political arena - by the Cabinet and Parliament.

**A balanced budget requirement**

All democratic governments are subjected to pressure by special interest groups to increase their spending. Yet they also realise that spending increases always have to be paid for in some way. Forcing a government to run a balanced annual budget prevents it from using the politically expedient but economically irresponsible, tactic of letting people think they are getting benefits without commensurate costs. Without a balanced budget, the price of increased spending is high inflation and high interest rates, leading to sluggish or no economic growth. Responsible governments seek to balance their budget to make sure that their country's economy is not overburdened with debt. Debt always has debilitating effects on the economy and has to be paid off at some stage. If spending is greater than revenue, government debt can be reduced in two ways only: increasing taxation, or inflating the debt away by reducing the purchasing power of the currency (thus making every citizen poorer).

It is for this reason that mature democracies are seeking to curtail severely or eradicate budget deficits. For example, the Maastricht Treaty of the European Union requires all member states to have budget deficits of no more than 2.5 per cent of gross domestic product by 1997. In the United States of America, more and more individual states are incorporating balanced budget requirements in their constitutions. The United States Congress is currently considering a proposal to amend the Constitution to ensure that balanced budgets become mandatory.

A stable fiscal and financial environment is necessary if foreign companies are to have sufficient confidence to invest large quantities of money in the South African economy. A requirement in the Constitution for the Government to run a balanced annual budget would go a long way towards providing such an environment.

There is one major practical obstacle which all countries face when seeking to balance their budgets. It is notoriously difficult to predict how much future revenue certain tax measures will deliver.

The requirement in the Constitution should therefore be that the Government should aim to run a balanced budget. If the year’s accounts subsequently prove that a budget deficit has been run, the Government should be constitutionally required to run a corresponding surplus in the subsequent year. If a deficit is then recorded for a second year running, then the Reserve Bank should be constitutionally bound in the third ear not to issue any more debt on behalf of the government, thus forcing the government to seek non-inflationary forms of borrowing or to cut its spending.

**Special pensions**
The interim constitution guarantees special pensions paid by the taxpayer to those persons who have made sacrifices or who have served the public interest in the establishment of a democratic constitutional order, including members of any armed or military force not established by or under any law and which is under the authority and control of, or association with and promoted the objectives of a political organisation. Special pensions will also be paid to dependants of such persons.

Although an Act of Parliament will set down further conditions of entitlement to a special pension, the whole idea of special pensions is a misnomer.

Pensions should not be determined according to what anyone has done or achieved. Just as no company should pay pensions to its former employees according to how productive their work was, so no democratic state should pay pensions according to the actions of their work in bringing about democracy. Entitlement to pensions should result from a lifetimes contributions to a fund, which can be used on retirement to purchase an annuity (giving the pensioner an annual pension income). This is the practice in the private sector, and so it should be in the government sector.

The reason that money should be paid to people who have served the democratic interest by engaging in the struggle is that they should be rewarded at least no less than those who fought on the other side of the struggle against the democratic interest. The parallel is with the South African Defence Force. Where a former member of the SADF is entitled to a pension for length of service, so too should a member of the resistance movement be entitled to a pension for equivalent length of service.

It would be wrong and an abuse of taxpayers' money to pay out funds in an arbitrary fashion. The terms and conditions of payments should be set out in an Act of Parliament so that it is abundantly clear who is entitled to how much money according to their work. Payments to people who have not been adequately compensated for past services rendered are a matter for political judgement. They should not be set out in a Constitution, which is supposed to describe the legal and institutional relationship between the government and the people. Payments should not be made in instalments; they should be one-off payments for past services.

If people want to give further money to those who have helped establish a constitutional democratic order through their sacrifices and efforts, then they should be free to contribute voluntarily to a charitable fund. People would then have the freedom to choose who should receive their money as a reward for services to the state by enabling them to make donations outside of state structures.

The constitutional provision special pensions should be dropped, although the constitution should not proscribe any future Act of Parliament which provides for payments to people who have contributed to the creation of a democratic order.

Public Enterprise and Procurement Administration

Service Provision
It is extremely tempting for politicians, when they perceive demand within society for a particular service, to attempt to provide it directly. If politicians satisfy people's demands, the theory goes, then they will become more popular. Yet in practice, politicians rarely succeed in satisfying such demands, precisely because it is they and their bureaucrats who seek to do so.

There is another course which politicians can follow. That is, when they perceive a demand within society for a particular service, they should ask themselves why that service is not being provided already. Usually, they would discover that it is because regulatory barriers to the provision of the service have been imposed. They then simply have to remove the barriers and allow businessmen to sell the service to those individuals in need of it.

Such an approach to public policy is beneficial to politicians. It enables them to take the credit for taking the initiative in the provision of services to the public, while allowing them not to have to bear the burden of responsibility of providing the services directly. It is also beneficial to business, who can seek to make profits from providing people with services; and to people themselves, who can choose for themselves whether they need a particular service and choose an appropriate combination of price and quality.

**Private provision of public services**

The fact has been proven the world over that the public sector supply of goods and services is far more inefficient, inflexible, pedestrian and inept than those provided by the private sector. The words 'public' and 'enterprise' do not stand comfortably alongside one another. Indeed, enterprise within the public sector can only be found in the ingenuity of public sector interest groups to ensure the continuation, and even expansion, of the public programmes over which they preside. Public programmes cost taxpayers money. Yet the political forces within the public sector who demand more money for public services are often too strong for government to oppose successfully.

Restructuring of state assets and enterprises within the public sector does not in itself restrain costs to the taxpayer. Only by moving state operations into the private sector can taxpayers' money be saved. The actual transfer to the private sector can take a service out of the political world and into the purely economic world. It can expose the service to the perpetual effects of competition and cost controls. It can give consumers choice and input. It can leave decisions about capital spending and prices free to be determined by straightforward economic logic, instead of by an anticipation of what the public might be prepared to tolerate.

The most attractive aspect of privatisation is its permanence. Once the service is outside the direct area of government responsibility, its costs no longer have a direct impact on taxation; and its level of service is determined by demand. In short, the government is no longer blamed for its performance.

The government of South Africa currently presides over many state-owned industries. It would be unrealistic to frame the Constitution in such a way that
prohibits the government from owning industries. Privatisation will proceed regardless of a constitutional requirement for the state to divest itself of shares. Instead, the constitution should require the state not to stand in the way of private companies who wish to offer a service being provided by the state, should not allow the state to provide a service directly where one is already being provided by the private sector, and should prohibit the state, state enterprises and statutory bodies from exempting themselves from laws to which private individuals, businesses and institutions are subject. Such constitutional provisions would give companies providing services alongside the state the opportunity to prove that they can deliver services far more efficiently and flexibly. It would also give those companies providing services which are not provided by the state the confidence to invest in the knowledge that their assets will not be expropriated and that the state will not seek to compete unfairly with them.

The procurement of public services

Relinquishing the ownership of shares in companies providing public services does not mean that politicians necessarily relinquish control over what services people are and are not entitled to receive. In education, for example, parents could be presented with a tuition credit redeemable in cash from the state by the school to which they send their child. The school itself need not be owned by the state, but the education service which the school provides in respect of each child could be funded by the state. Contracting out a service to private business means that while the finance can be kept in the public sector, production can be moved over to the private economy. Even where it is difficult to have firms in competition doing certain tasks, it might be possible to have them compete to be allowed to do the tasks in the first place. They should bid against each other for the right to operate the monopoly service for a limited period. Where the period for which this monopoly period is granted is sufficiently short, firms will need to keep costs down and efficiency high, or they will lose the privilege, when next it is awarded to a newcomer who will beat their price. Thus consumers can gain many of the advantages of competition, even where actual competition on the job cannot be secured. Competitive tendering of services has proven in many countries to be most effective at local government level. In the United Kingdom, for example, local councils put out to tender the services which they intend to fund. These include refuse collection, road building & house building and maintenance, street building and maintenance, street lighting and leisure facilities. The constitutions of the provinces should set down the requirement for private tendering of provincial and local services.

A section in the new national Constitution should read:

**Service Provision**

Parliament shall be prohibited from introducing laws which block entry by private sector companies into service provision activities which are also provided by the
government. Private companies which provide services already provided by the
government shall be entitled to the same treatment and benefits as the government
body.
The government shall be prohibited from providing a new service to members of the
public unless it first determines whether the proposed service is already made
available by a private sector company and has removed all regulatory barriers to the
provision of that service by a private sector company.
Where the national government has the approval of Parliament to spend public funds
on the provision of a service to members of the public, private companies must be
asked to submit public bids to provide the service. The company asked to operated
the service will be that which meets the criteria set sown in advance by an Act of
parliament and which saves the largest amount of public funds.

The South African Reserve Bank

The objective and powers of a central bank

The interim constitution assigns a number of objectives to the Central Bank. Clause
196 (1) says that the primary objective of the Reserve Bank is to protect the value of
the currency 'in the interest of balanced and sustainable economic growth. This
means effectively that the Reserve Bank is mandated to manipulate monetary policy
in pursuit of growth. The clear danger is that in the pursuit of growth, the money
supply will be inflated, leading to excessive price increases.
The major defect of the constitutional demands placed on the Reserve Bank is that
its attention is not concentrated exclusively on the pursuit of price stability. In
addition to providing a sound currency, too often it presently sees its role as that of
lord of the economy. In trying to manage aggregate demand and the level of
imports as a means to economic growth, the Bank simply increases money supply
growth - which inevitably fuels price inflation.
Only when the increase in the quantity of money reflects the increase in the quantity
of goods and services will prices remain stable. Controlling the supply of money is
therefore the key to controlling prices. Any functions which the Reserve Bank
undertakes without reference to the effect on the money supply will have an adverse
impact on the price level.
Most tasks which the Reserve Bank currently undertakes are merely reactions to its
failure to control the money supply in the first instance. For example, the Central
Bank often intervenes to fix the price of the Rand at an artificial level by dealing in
foreign currency purchases and sales. In addition, controls on the quantity of
currency which may be exchanged means that the market is much less efficient than
it would otherwise be.
If the Reserve Bank did not increase the supply of money in the first instance, then
there would be no need to try to fix the value of the And. It would find its own
level according to the supply of and demand for Rand at any given moment. If the
internal value of the Rand was preserved, the Rand would over time appreciate
against inflationary currencies and depreciate against those currencies with even lower inflation rates.
The task of the Reserve Bank should therefore be to focus narrowly and effectively on the control of the money supply. Other interventions detract from this task.
From time to time, a Reserve Bank may need to engage in open market operations: the purchase and sale of government securities and of foreign and domestic currency. The Reserve Bank is the government's banker. As such, it may need to issue bonds or securities on behalf of the government if the government needs to borrow funds.
But just as a businessman is not able to borrow increasing amounts of money from his banker year after year to cover losses, so too a government should not be able to borrow from its banker in perpetuity to cover deficits. Government borrowing drives up interest rates, because the Bank has to offer a higher interest rate or yield on government securities in order to borrow more from the private sector. Since government borrowing can have profound effects on the money supply by changing the interest rate, the price of money, it is preferable to keep borrowing to a minimum. That is why, as the government's banker, the Reserve Bank should refuse to issue credit to a government which runs a deficit for two years running until the government has put its finances back in order.
As the monopoly issuer of domestic currency, the Reserve Bank directly affects the level of inflation. If the Government borrowed funds from agencies other than the Reserve Bank, the effect would not be inflationary, since no more money would have been supplied by the Reserve Bank. The clause limiting the borrowing of the Government from the Reserve Bank should not therefore preclude the government borrowing from private tenders. These private sources may, of course, choose not to lend money to the Government. The Government's capacity to borrow will be limited by the confidence which its creditors have in the Government's ability to pay back the money. If genuinely unavoidable budget deficits arise, then the Reserve Bank should be allowed to issue credit to the government as long as this has the consent of the Bank, the President and a two-thirds majority in both Houses of Parliament. The provisions regarding the South African Reserve Bank in the interim constitution should be deleted.

The section on the objectives and powers of the Reserve Bank in the next Constitution should read:

**Objective**
There is hereby established a South African Reserve Bank whose objective shall be the maintenance of the internal value of the currency.

**Powers and Functions**

The Central Bank shall have sole responsibility for monetary policy. Accordingly, it shall possess the right to engage in open market purchases and sales of South African Government securities and of foreign exchange; the right to issue or not to issue currency denominated in notes and coins; the right to hold reserves; and the
right to alter the reserve percentages which the commercial banks are required to deposit with the Reserve Bank in respect of their deposit liabilities.

Four times annually, the Bank shall produce an inflation report which will be made available to the public. This will explain what measures the Bank is taking in pursuit of its objective of maintenance of the internal value of the currency.

If the government has run a budget deficit for two years in succession, then the Reserve Bank shall not issue any more debt on behalf of the Government in the third year or any subsequent year until the Government has repaid the outstanding debt by running budget surpluses or equivalent value. This provision can be overturned with the agreement of the Bank, the President and a two thirds majority in both Houses of Parliament.

**Entrenching independence**

It is clear that there is general consensus that the Reserve Bank should be independent. Where there is not consensus is how best to entrench independence.

The interim constitution does not provide for a truly independent central bank. (clause 195 states that the Reserve Bank established and regulated by an Act of Parliament shall be the central bank; clause 196 (2) states that the Reserve Bank shall exercise its powers independently subject only to an act of Parliament; and clause 197 states that the powers of the Reserve Bank shall be those customarily exercised by central banks and 'shall be determined by an Act of Parliament' and be exercised subject to such conditions as may be prescribed by or under such Act'. Although the interim constitution on states that the Reserve Bank shall function 'independently', the bank will be subject to control by parliament and the government.

In contrast the interim constitution entrenches the independence and impartiality of the Public Protector (ombudsman) and the Auditor-General unambiguously (in clauses 111 and 192). To remove the Reserve Bank from government control, the independence and powers of the Reserve Bank should be entrenched in the constitution rather than defined by Act of Parliament.

The new Constitution should therefore read:

**Independence and Impartiality**

The Reserve Bank shall be independently and impartially and shall exercise and perform its and functions subject only to this Constitution.

No organ of state and no member or employee of an organ of state nor any other person shall interfere with the Reserve Bank in the exercise a, performance of its powers and functions.

**Accountability of the Reserve Bank**

Independence and impartiality is a necessary, but not a sufficient condition to ensure that monetary policy is carried out responsibly. When the Governor of the Reserve Bank has one overriding objective or target (zero inflation), it is easy to assess his performance. In New Zealand the Governor is not appointed for a further term of
office if he fails to meet his objective. This ensures that he is personally accountable for the monetary policy of the bank and his terms of employment depend on the effectiveness of the monetary policy which he runs.

Since the system came into force in New Zealand on 1 February 1990, the policy pursued by the Reserve Bank has been highly successful. The rate of inflation fell from 7.2 per cent at the end of 1989 to 4.9 per cent at the end of 1990, and to 1.0 per cent at the end of 1991. In 1993, it also stood at 1.0 per cent

Adopting a system of accountability along the lines of the New Zealand model would help to ensure that the South African Reserve Bank keeps inflation under control. This could be best achieved through sanctions set out in the constitution. Reasonably, however, sanctions should be imposed only if those affected are really responsible for the undesirable developments. There are some situations which lead to an increase in prices that may be beyond the control of a Reserve Bank Governor. These might include: where there have been strong short-term fluctuations in the terms of trade owing to changed import or export prices; where there has been an increase or reduction in indirect taxes or public levies; and where natural disasters or comparable events have had a direct impact on prices. In such situations it may be felt unreasonable for the Governor to be held directly responsible for an increase in inflation. A mechanism should therefore be inserted in the constitution to provide for inflationary situations which are unavoidable. This might involve Parliament and the President in some rates of inflation. Further, detailed sanctions and regulations governing the internal functioning of the Reserve Bank should be set out in a Reserve Bank Act. In order to preserve the Bank’s independence and integrity, Parliament should not be able to introduce any law which supersedes the provisions of the constitution.

The constitution should read:

**The Governor**

The Reserve Bank shall be administered by a Governor who shall be appointed by the President with the approval of a two thirds majority of both Houses of Parliament.

The Governor shall be a South African citizen and a fit and proper person to hold such office and shall be appointed with due regard to his or her specialised knowledge and experience of banking and economics. The Governor shall be appointed for a term of five years. He shall thereafter be eligible for re-appointment for one further term of five years on condition that the annual inflation rate as measured by the Consumer Price Index stands at 5% or more for any twelve month period during which the Governor has held office, the Governor must submit his resignation to the President. The President may only refuse to accept the Governor’s resignation where both Houses of Parliament have approved by a two thirds majority a report prepared by the Bank providing evidence that the inflation rate was due to factors outside the control of the bank.

The Governor may at any time for any other reason resign by lodging his or her resignation in writing with the President.

The Governor shall not hold office in any political party or political organisation.
On appointment the remuneration of the Governor shall be the same as that of the Auditor General. The Governor shall not perform remunerative work outside his or her official duties.

**The Consumer Price Index**
The Consumer Price Index shall be measured in the same way as it is measured when this Constitution comes into force. Changes to the way in which the Consumer Price Index is measured require the approval of the Reserve Bank Governor, the President and a two thirds majority in both Houses of Parliament.

**C. Transformation and monitoring**

**Commission on Gender Equality**
The interim constitution provides for a Commission on Gender Equality of which the composition, powers, functions and functioning will be determined by an Act of Parliament. The new Constitution should place a time limit of three years on the Commission’s duration.

Equality before the law should be a fundamental democratic right of all citizens. Laws which discriminate between particular categories of citizen, like apartheid laws, are by their nature fundamentally unjust regardless of the Commission’s desired goal, it should not create legal inequalities to achieve it. It is social engineering to discriminate in favour or against certain groups in order to achieve a political end. The Commission should seek to promote equality of treatment of men and women before the law. This will involve a three year project of identifying and eliminating all laws which discriminate between men and women. Removal of legal obstacles will provide men and women with equality before the law.

A provision in the Constitution should read:
The function of the Commission of Gender Equality shall be to identify laws which discriminate on grounds of gender and to recommend to Parliament that they be amended. The Commission shall sit for three years. After this period, any law which directly discriminates on grounds of gender shall be prohibited.

**The Public Protector**
Every democracy needs an institution to investigate maladministration and corruption within state bodies. The interim constitution provides for a Public Protector to fulfil this role. Yet the status of the Public Protector is not as secure as it should be.

To be most effective the Public Protector should be as independent of other state bodies as possible. Instead of its powers merely being to bring matters to the notice of the relevant authority charged with prosecutions, it should itself be able to bring prosecutions against politicians and state officials. This would prevent collusion
between the state prosecuting authorities and state officials or politicians to stop cases of fraud, corruption or maladministration going to court.

The President currently has the power to remove the Public Protector from office where he deems the Protector no longer fit for the job on the grounds of misbehaviour, incapacity or incompetence. This means that a ruthless President could remove the Public Protector to protect friends from investigations by the Public Protector. A further safeguard should be added. If the President wishes to remove the Public Protector, then he should only be removed if both Houses of Parliament vote for his removal by a 75 per cent majority.

**Human Rights Commission**

The constitutions of many developed democracies contain a Bill of Rights without the need for a commission to help enforce those rights. The United States of America is a notable example. While South Africa is in a phase of transition between a regime which had little respect for human rights and a democratic government which observes all human rights, the theory behind the existence of a Human Rights Commission is that it may serve to reassure people that their government is making every effort on their behalf to preserve their rights. This is ironic, since the largest threat to human rights in most countries is the government itself.

Constitutions evolved for the express purpose of protecting citizens from arbitrary government and of ensuring that governments remain the servants of the people. Bills of rights were added to specify the nature of the laws that governments could not enact in abrogation of the freedoms possessed by citizens as of right. When a Bill of Rights is enshrined as a permanent feature of the new Constitution, the need for an arm of government (the commission) to oversee human rights will be redundant. All issues relating to infringements of human rights will be settled in independent courts.

After the new Constitution has been put in place and become widely accepted, the continued existence of a human rights commission would do more harm than good. In order to justify its continued existence, the Commission, like any bureaucracy, would look for work to do. It might decide that various amendments are needed to the Bill of Rights; perhaps one new right should be inserted; perhaps another should be removed. Such actions would certainly undermine public confidence in the Bill of Rights. It is vital that the rights in the Bill of Rights are regarded as fundamental and sacrosanct rights which no government should have the power to abuse. South Africans born with certain fundamental human rights should keep those same fundamental human rights throughout their lives.

The commission on human rights currently has the power to investigate alleged breaches of human rights and to bring them to court. Although this idea appears initially attractive, in practice the commission's power may work to the advantage of some citizens but to the detriment of others. If a citizens rights have been breached but the commission does not think his case is strong enough to bring to court, then
that which will have no recourse to justice. In effect, the commission would be acting as judge and jury of first resort. More effective would be a more people-centred mechanism of redress. In criminal cases, any person who cannot afford to pay for legal representation has the right to legal representation paid from state funds. Legal aid should be extended to human rights cases. This would put the citizen - rather than a commission - in charge of securing redress for infringements of his rights. As soon as such a system of legal aid is established, the need for a commission is removed. The courts system is the proper independent vehicle for adjudicating upon these cases.

**Restitution of land rights**

The need to restore land expropriated from their rightful owners is clear. The interim Constitution provides for a Commission for the Restitution of Land Rights to achieve this task, although a Land Restitution Act could be at least as effective. Since the land rights provisions of the interim Constitution have been agreed in some detail between the parties representing the people of South Africa, it would be sensible for Articles 121-123 of the interim Constitution to form part of the new Constitution. Any further detailed legislation could be set out in an Act of Parliament as long as it is compatible with the provisions of the Constitution. There is a strong case for the addition of one further Article - dealing with the right to own, let and dispose of land.

This might read:

- Any person should have the right to own property, provided that the property was purchased with the consent of both the buyer and the vendor.
- Any South African citizen should have the right to purchase, at market value, any state land on which he has a dwelling.
12 May 1995

We of Women’s Agricultural Union Branch hereby give our submission on education.

Education at a school level must be obligatory and free, but it must comply to an international standard. Post-school and Tertiary education must also be free but the student must comply with certain criteria which will be set by the authorities. A high standard must be set.

Mrs H Henning
We are encouraged by the fact that the Government of National Unity has established a Constitutional Assembly, in order to deal with the matters of the New Constitution. This is good and necessary in our Country at this particular time in order that basic document can be available to all in order to bring about equality and freedom in our land. For too long this vital aspect has been missing.

We have looked at the draft documents, and whilst acknowledging there may be further changes, it is important that you also open to any comments at this late stage.

My position is that I am a Pastor of a large Fellowship and have come out of a business environment where I was the initiator of the whole Wimpy, Golden Egg, Juicy Lucy, Pizza Hut and Milky Lane franchise business for the South of the equator. God in His wisdom arrested me out of this business and now I am in full time ministry.

With this kind of background I am involved in many community tasks, perhaps the most important is the Chairman of the Community Supported Policing Program in the upper Highway Area from Kloof to Camperdown in Natal. The program working well and we have opened sub-forums and there is open contact and communication with the community. We have not yet quite arrived there, but are working at it, I am also the Chairman of the Development Forum for the upgrading various communities in order that we may share a lifestyle together.

So what is my concern? It is really two fold

a) Under the heading of "RIGHT TO LIVE" there is the abolishing of the death penalty other than for political assassinations and child murder.

This should be extended to cover those individuals who have been tried by the court and have been found to be totally irresponsible and have ignored the value of life. There is enough information available at your office to show that such persons are seldom dealt with effectively in Prison Therapy and will strike again. The constitution makers have very clearly covered in point 10 in the Constitution that "every person has the right to respect for and the protection of his/her dignity". Again point 30 says “every child has the right to security’. We need to take action and should bring in a death penalty for those who deliberately, knowingly and wantingly destroy life.

b) The issue of legalised abortion. Please tread warily in this particular issue and bring about legislation which will prevent the wantoned destruction of unborn children because of one moment of intimacy which has the consequence of producing a precious life.

Your team is doing well and we commend you.

Should you require any further information please do not hesitate to contact me.
KENMARE PRIMARY SCHOOL

23 May 1995

Hereby, I wish on behalf of Kenmare Primary School, all our parents, pupils and teachers, to
strongly disapprove of South Africa becoming a secular state. There are many Christians in
the Civil Service - that is why the civil service has functioned so well till now.

Freedom of worship is important to all of us - all people must be able to practise their religion
in their daily existence.

Our school has a Christian character and God, our Heavenly Father has a Place of Honour in
our school activities.

The mission of this school is to teach the child by medium of Christian Education, on the path
to adulthood. We as parents and personnel are colleagues of the Eternal Kingdom. The state
ought to have respect and should not be threatened.

Michael Hay
ACTING PRINCIPAL
PREAMBLE TO THE CONSTITUTION

We are concerned to hear of a move to delete from the Preamble the words: "In humble submission to Almighty God, we the people of South Africa..."

We have no objection to our state becoming a secular state (i.e. not attached to any one faith), nevertheless a state and nation in which something approaching 99% of the population are theists and believers in a Sovereign Divinity or deities of some sort ought to acknowledge itself as 'under God' and seek to govern the people in 'humble submission' to Him. We believe that a state which declares itself autonomous (i.e. acknowledging no ultimate and transcendent reference point in the divine), as must be the case with a state which does not acknowledge the sovereignty of the divine, is forever in danger of becoming a law unto itself.

We respectfully remind you that all spiritual and prophetic opposition to the state in the apartheid years was based on the conviction that the state is accountable to God.

We sincerely and earnestly plead that our constitution will retain acknowledgement of God and our national submission to Him.

REV. RAY ALISTOUN
We are grateful for the opportunity to record our concerns regarding the New Constitution. The fact that we make use of the opportunity, proves that we believe in the sincere intention of the Constitutional Assembly to accommodate the needs of the people.

We are deeply concerned by

1. the proposal to omit the words "Almighty God" from the Pre-amble to the New Constitution;

2. the submission of proposal H by the ANC that South Africa shall be a "secular state", which is not what the majority of the electorate desires;

3. the possibility that Christian education and morality within the school system will be compromised;

4. the possibility that prayer will no longer be permitted in schools. This will not only have a detrimental effect on the development of our children, but also on the nation as a whole.

The following aspects should be considered in the drawing up of the New Constitution:

1. that the Constitution shall provide for religious freedom both in belief and practice;

2. that the right to freedom of thought, conscience, belief and religious practice, includes the right to change one's religion or belief or practice;

3. that religious communities shall be entitled to establish and maintain their own educational institutions at all levels and that such institutions shall have the right to financial support by the state provided they comply with recognized academic norms;
4. that the New Constitution will also protect those South Africans who are offended by pornography and obscene, offensive material on the media.

We very specifically remember in our prayers yourself, Mr Ramaphosa, as well as the Constitutional Assembly. 
May the Lord grant you His wisdom and grace in the rendering of your tremendous task.

PROF. H.J. DREYER
CHAIRMAN OF COUNCIL
Theme Committee 4

With reference to the Government's invitation to contribute to the constitution, we wish to submit the following:

Recreation should be ensconced as a fundamental right in the constitution, the attached recommendation being our justification.

We trust that our proposal would enjoy favourable consideration and look forward to hearing from you. would you please acknowledge receipt.

STAFF : DEPARTMENT OF RECREATION AND TOURISM

Signed : Mrs E Odendaal; Dr M Saayman; Prof. G Scholtz; Mr C du P Meyer.

1. What is recreation?

Recreation, derived from the Latin word recreation meaning "recreate", implies activities recreating people for going about their daily routine (Torkildsen, 1983:143). In the "Dictionary of Sociology" recreation is defined as "any activity pursued during leisuring, either individual or collective, that is free and pleasurable, having its own immediate appeal, not impelled by a delayed reward beyond itself" (Fairchild, 1944:251-252).

The above implies a variety of activities taking place within the domain of free time, including sports activities.

Kelly (1982:25) emphasised the value of recreation to the country, the economy, the family and the community as a whole: "recreation is leisure that is organized to pursue personal and social benefits. One such benefit is recreation for more effective participation in the economy, family, state and community." Goodale and Godbey (1988:113) suggested that recreation should be organized, "because work and the rest of life was becoming more highly organized".
Anderson (1961:48) emphasised that recreation should take place within the time dimension of free time: "Recreation is usually associated with programmes for using leisure time". By implication this means voluntary participation by the individual in activities.

Meyer and Brightbill (1948:28) focussed on personal satisfaction offered by recreation: “... for the individual, recreation may be any wholesome leisure experience engaged in solely for the satisfaction derived therefrom". Enjoyment is a hidden component of personal satisfaction. Winn (1943:30) defined the purpose of recreation as a striving for enjoyment: "Recreation, then is what one does for the enjoyment there is in it, for no reward other than the activity itself and which does not contribute to earning a living. It is not what a person does but the reason (or purpose underlying his doing it) that determines whether it is recreation or not".

Kelly (1982:17) alleged: "Recreation... refers to leisure activity that is organized for the attainment of personal and social benefits". Jensen (1977:24) and Hom (1987:15) suggested that recreation should also be socially acceptable to the community, i.e. drug and alcohol abuse and crime are not recreational activities.

Following the above it seems that recreation should take place within the domain of free time and that it should meet the following requirements:

- Should take place within free time;
- Primary motivation should be personal satisfaction: and should result in social upliftment.
- The following definition could be derived from the above:

Recreation is the positive utilisation of free time for personal satisfaction, resulting in social improvement.

2. Free Time Problems

Recreation is a society phenomenon rooted in the past of society's culture, economy and social order (Kelly, 1990:96). As a result of the fact that these aspects are constantly changing, recreation is a dynamic and sociological cultural phenomenon changing with the former three aspects. Recreational activities are an essential component of each community's social activities, inextricably part of the individual and society (Scholtz, 1992:38). A vital part of human and social experiences, it offers direct advantages to a large variety of social values. The fact that recreation offers direct advantages to the individual by virtue of the fact that it
contributes to the general well-being of the individual, explains why it should be seen as essential to society.

Over the past three decades recreation has developed into a vital aspect in the modern life of all industrial communities. Individuals have more free time available as a result of:

- **Unemployment**

Unemployment is problematic; more than 30 per cent of the SA labour force is unemployed. A possible solution is activities where individuals acquire skills to enable them to start their own business (currently most successful in Johannesburg).

- **Longer holidays, earlier retirement, four-day working weeks and shifts**

All of the above imply money (and not a shortage of money). Individuals, however, become involved in destructive recreational activities (prostitution, crime, gangs, drug and alcohol abuse). The reason for this could be attributed to the fact that individuals never identified a free-time activity which would be exciting and challenging to their needs, with the result that the individual becomes bored during free time. Idleness is the main reason for vandalism and destructive behaviour, resulting in numerous problems.

It is essential for a healthy society to be exposed to and educated in a field of activities which are socially acceptable. This is coupled with the acquisition of skills and knowledge required to stabilise, enrich and motivate the human being (and society) into a constructive and healthy society.

- **Prisons**

One of the government's major problems is to find a solution to problems related to our prisons. Prisoners are idle, which results in sub-cultures. Recreational programmes could not only solve the problem of idleness, but also develop entrepreneurship. Free-time problems are part of the influence of social, economic and cultural change and as such unavoidable in South Africa.

The exclusion of organised recreation results in frustration and destructive behaviour. The positive influence of health, physical activities and recreation on deprived communities should not be undervalued. Idleness is one of the main reasons for vandalism and mischief. Although various programmes are offered, the individual remains idle during his free time, which could
be due to the fact that he never identified a recreational activity both exciting and challenging to his needs - and the recreational expert is subsequently pressurised to accommodate and educate the individual concerned in respect of the successful handling of free time. In this regard the Rebuilding & Redevelopment Programme has noted that the abuse of sport and recreation in the community has deprived a large number of people of the opportunity to lead a normal and healthy life.

Recreation could be the key element in the solution to a free-time problem. Jenkins & Sherman (1979:174) said:

“It is time for action, not words: a time for policy implementation, not electoral promises. The action must cover two separate things: Preparation for the ever-increasing unemployment levels and the setting up of mechanisms to ensure that the collapse of work is transmuted into a policy for leisure.”

By focussing upon recreation and the future thereof by no means implies that major problems such as economic decline and unemployment would be ignored. On the contrary, by utilising recreation joint efforts and mechanisms could be devised to handle such crisis situations. Recreation could contribute to the establishment of a stable community as it lends itself to community development which in turn forms part of a process to establish economic and social progress. The Rebuilding & Redevelopment Programme emphasises the fact that sport and recreation should be part of all community development programmes and that this service should be accessible and affordable to all South Africans. It is also emphasised that sport and recreation should be seen as an integral part of the rebuilding and redevelopment of the community.

Functions of recreation include aspects such as:

- socialising
- bridging (between races and classes)
- training
- intellectual formation
- social mobility
- cultural upliftment
- education (informal education)
- humanising
- social assistance
- relaxation
The advantages of recreation are infinite, including:

- provision of leadership opportunities to build sound communities;
- reduction of alienation, loneliness and asocial behaviour;
- promotion of cultural harmony;
- opportunities for the building of strong families, the very foundation of strong communities;
- integrated and accessible free-time services are of utmost importance to the quality of life of the under-privileged;
- protection of the environment through the provision of parks and open spaces;
- motivation for the expansion of businesses in the area;
- meaningful recreation reduces vandalism and mischief in the area/community.

3. **Recreation as possible second-generation fundamental rights**

Second-generation fundamental rights emphasise social, economic and cultural rights, all of which are influenced by recreation.

UNESCO's report (1970:9) mentioned that more additional free time is coupled with the realisation that, in addition to material provision, human beings also have a need for creativity. Within the second-generation fundamental rights, provision is made for the right to free time. Free time however implies recreation, i.e. recreation functioning within free time (recreation being enjoyable free-time activities, recreation being participation in self-chosen activities within a person's free time, recreation being a meaningful and socially acceptable free-time experience). The claim to recreation should therefore probably be classified as a second-generation right.

The enforceability of second-generation fundamental rights is however of a problematic nature and for this reason it has been proposed that the direction of countries such as India, Ireland and Namibia should be followed. These are countries which have made provision for
constitutional policy directives which require the state to be involved in the socio-economic sphere of society. Various countries have utilised these principles in aid of socio-economic reform. As mentioned, recreation could be a key element in South Africa's socio-economic reform. Recreation experts could relieve other institutions from enormous pressure by being fully involved in the development of the community through the introduction of programmes to the benefit of the individual (all ages).

4. **Recreation as a possible third-generation fundamental right**

Comparing the definition of recreation with the qualities of third-generation fundamental rights, recreation seems to fit into this category with ease.

Recreation is regarded as participation in enjoyable free-time activities, recovering and rebuilding the individuals strength and as such resulting in the improvement of a person's quality of life (Edginton et al, 1980:9). It also implies participation in selected, enjoyable activities during a person's free time in order to lead a more meaningful, enjoyable and enriched life. In addition, recreation is a social service exposing the individual to meaningful experiences. The purpose of recreation is to contribute to the development of the human being.

Emphasis in this instance is upon individual and personal advantages through personal development. Third-generation rights emphasise personal development.

5. **Conclusion**

The provision of recreation is an identified social function which should be the task of local authorities (Hammand-Tooke, 1877:10): Services concerned should be supplied to groups and individuals in conjunction with private sector institutions (Meyer, 1988 and RDP, 1994:72). The assumption is that recreational experts, employed by local authorities and other institutions, should develop and implement free-time programmes which would contribute to self-fulfilment, the improvement of quality of life and the promotion of stability in the community (Meyer, 1988:2). This service however is not always executed, for reasons which according to Meyer et al (1986:6) should be contributed to:

- little attention on higher levels to the introduction of a recreation policy;

- little attention to the necessity for the provision of recreation to the community, including facilities, infrastructure, manpower, programmes, services and finances;
Recreation in South Africa requires support from high levels. Recreation involves more than games and hobbies. It is a science which has quietly assumed its position, playing a significant part in informal education in order to create job opportunities and to generate income. Community development is becoming increasingly important in recreation and various institutions, e.g. prisons, community development, training centres and local authorities are approaching recreational institutions. Recreation however would not function successfully without highest level support.

Should recreation be recognised as a second-generation fundamental right but for implementation reasons not be included in a charter of fundamental rights, it could be ensconced in the constitution in the form of constitutional directives, similar to other constitutional directives e.g. housing and employment. The purpose of these constitutional directives would be to bring about socio-economic reform in the country.

Even if recreation should not become a second-generation right, but indeed a third-generation right, it could possibly be included in an Act similar to other third-generation rights, e.g. Section 30 on environmental rights in the current constitution.
W.A.W.A (Women Against Women Abuse)

W.A.W.A was established in 1989 by a group of women who identified the need for services for abused women. Women have been oppressed and abused in many ways and they have nowhere to turn to. That is why we found it imperative to assist abused women and children.

We started by forming a support group to which women could come whenever they needed someone to talk to or to get advice. We then started with fund raising to generate some income.

A shelter was leased in which we could house the women when they had nowhere to go, or if they wanted to get away from the abusive situation temporarily.

The services we offer the women are:

**Counselling:**

We have a qualified psychologist who does counselling to the women in and out of the shelter.

**Legal assistance**

If women decide to go through a divorce or if they needed legal advice. We also working in a close relationship with the police in order for them to help us with protection from the perpetrators.

We also give assistance to rape victims in terms of accompanying them to the police station to report the matter, we also offer them counselling.

Our intention is not to break up families, should the husband or boyfriend need help and if he acknowledges that he has a problem, assist him by referring him to the relevant people or organisations where he can find help.

The main aim for W.A.W.A. National is to start these support groups in all regions. We would also like the Government of National Unity to start subsidising shelters in all areas, because we find it very necessary to have services for abused women and children in our communities.

- Women should have the right to equality before the law and equal protection of the law.
- Women should not be unfairly discriminated against directly or indirectly.
- Women should have the right to decide about life e.g. ABORTION - only in extreme cases e.g. rape, mental disability and the right to life.
- Women who are being abused should have the right to free legal advice or legal aid from the Government. The Interdict does not protect the rights of the women to the full extent. i.e.

VICE CHAIRPERSON: GAUTENG REGION (W.A.W.A.)
MICHELLE MASANA
1. BILL OF RIGHTS

1.1. Right to Strike

1.1.1.(a) The right to strike should specifically include the right to defend and promote social and economic interests of workers. The report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa (International Labour Office Geneva, 1992) accepted this principal as stated by the Committee of Experts on the Application of Conventions and recommendations:

"the Committee considers that trade union organizations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a Government's economic and social policies" (Report, paragraph 647).

The Commission also accepted this principal as stated in the digest of decisions and principles of Freedom of Association Committee of the governing body of the ILO (1985) in paragraph 388:

"the right to strike should not be limited solely to industrial disputes that are finely to be solved by the signing of a collective agreement; workers and the organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their interests"

This approach is endorsed in Section 4.8.3.2 of the RDP, which calls for the constitutional right to strike and picket on all social and economic matters.

Furthermore, South Africa is about to ratify Conventions 97 (Convention concerning Freedom of Association and Protection of the Right to Organize) and 98 (Convention concerning the application of the principles of the right to organize and to bargain collectively) of the ILO which makes these principles directly applicable to South Africa.

We would propose the following wording

"Organised workers shall have the right to strike to promote and defend the social and economic interests of workers".
Note: our legal advice is that the right to strike includes the right not to be criminally prosecuted, civilly sued, interdicted or dismissed. If the Constitutional Assembly is advised to the contrary, we would want this protection to be explicitly provided for. Further, the right to strike without fear of dismissal, implies that there should be no replacement or 'scab' labour, permanent or temporary. Consideration needs to be given on how to give effect to this.

1.1.2. (b) The right to picket

The right to picket should be stated explicitly in the provisions of the Bill of Rights dealing with labour relations.

Accordingly we propose the following wording:
"Trade unions and workers shall have the right to picket at the premises of employers"

1.1.3. Lock-outs

There is a fundamental misconception in certain circles that the employers 'right' to lock-out balances workers right to strike. This fails to understand the nature of the relationship between employers and workers. It incorrectly assumes that we are dealing with equal partners. Workers have only their labour to self. Employers own and control the means of production. The right to strike attempts to balance this huge inequality in power. This is recognised in the RDP, now supported by all parties in the GNU, which states in 4.8.4 that "the right to lock out should not be included in the constitution".

There is no reason why lock-outs need special constitutional protection, and all references to the lock-out should be excluded from the constitution. The recourse to lock-outs can be dealt with adequately under labour legislation. The right to lock-out is not a universally accepted right for the purpose of Constitutional Principle II and there is no constitutional reason for its inclusion in the Bill of Rights. Most constitutions do not include he right or freedom to lockout.

1.2. Property Rights

COSATU does not believe that a right property belongs in our constitution. Constitutions in a number of democracies, including New Zealand and Canada, do not contain entrenched right to property. It is particularly inappropriate in the
African context, where existing property rights are directly linked to colonial conquest and racial domination. To constitutionally entrench property rights, would perpetuate existing patterns of inequality and infinitum. This would limit the ability of society to realise many aspects of the RDP, particularly in areas such as land reform and restitution. Property rights and their limitation are more appropriately dealt with in legislation.

1.3. **The Right to Privacy**

The privacy clause as contained in s13 of deals mainly with search and seizure and against abuses by the police. However, the right to privacy is often used to circumscribe a zone of freedom that the state cannot interfere with, and has provided a discrimination in other jurisdictions, for instance, in the case of private clubs that discriminate on the grounds of race. The right to privacy also needs to be formulated in a way which prevents employers from abusing this right to deny workers access to information.

1.3. **The Right to Economic Activity**

The right to economic activity is not an internationally recognized fundamental right, and should not be included in the Constitution. This right effectively entrenches one economic system and should be removed. It is fundamentally undemocratic to constitutionally prescribe to people that they adopt a particular type of economic system.

1.4. **The Right to Information**

South Africa is a country where a veil of secrecy has existed, not only in relation to the state, but also in relation to employers. Lack of access to information by workers, consumers and society as a whole, has enormously prejudiced their human rights. This is true whether in relation to the right to a healthy living and working environment, the right to work, and so on.

The right of access to information held by the State or State organs only, and only insofar as such information is required for the exercise or protection of a person's right, is not adequate.

In particular, workers employed by a company need to be constitutionally empowered to gain access to information which is of vital interest to their lives and their future. This could be covered by a clause such as:
"Workers and trade unions shall have the right to organise which shall include the right to information for matters of mutual interest".

Consideration would need to be given to broaden this to protect consumers and society as a whole, in gaining access to information which is vital to their interests.

1.5. Freedom of Association

The Constitution must guarantee the right of Freedom of Association and, more specifically, the right to form and join trade unions. The Constitution should not include the right to disassociate or the right not to associate. The ILO leaves the question of closed shop agreements to individual nation states to decide, and does not deem the closed shop and agency shop to constitute and infringement of Freedom of Association.

Accordingly the rights to freedom of association and the right to form and join trade unions should be qualified in such a manner in the limitations clause as to permit closed and agency shops. The wording of such a clause might read as follows:

"Nothing in the Bill of Rights shall preclude measures permitting trade unions and employers concluding union security agreements".

Further, no law should prevent representative trade unions from negotiating collective agreements binding on all workers covered by such agreements.

1.6. Limitation on Trade Union and Workers Rights

Provisions of the current Public Safety Act do not include the power of the state to suspend the right to strike, under states of emergency. COSATU is of the view that the constitution needs to ensure that fundamental trade union and worker rights are not subject to suspension, including during states of emergency.

1.7. Workers Rights

To convey the importance which the constitution attaches to workers rights, all provisions dealing with trade union aid workers rights, should be grouped under a heading in the constitution called "Workers Rights".

2. SOCIO-ECONOMIC RIGHTS IN THE NEW CONSTITUTION
It is possible to include socio-economic rights in the Bill of Rights while not imposing legal obligations that are as strict and binding as those guaranteeing civil and political rights. Socio-economic rights must be costed against an audit of available resources.

We should include directive principles for progressive realization by the State, as was done in the Irish, Indian, and Namibian Constitutions. Such directives of state policy would put an obligation on the state to undertake appropriate legislative and executive action to the maximum of its available resources in order to achieve the progressive realization of basic social, educational, economic and welfare rights for the whole population.

3. **SEPARATION OF POWERS BETWEEN NATIONAL AND PROVINCIAL GOVERNMENT**

A number of parties and business have made constitutional proposals which will lead to the continued fragmentation and balkanisation of our country- politically, economically, and otherwise. The Interim Constitution itself leans in this direction, which undermines effective implementation of the RDP.

The RDP attempts to overcome our history balkanisation, division, and deep inequality, by building a united nation. A nationally co-ordinated programme of reconstruction and development requires an effective and strong national government, a national framework and national standards. This would normally be true. It is particularly so in the context of the legacy which centuries of colonialism and decades of apartheid have left us with.

National government should exercise authority over labour, economic, trade, industrial policy and other strategic areas like education, health, transport, policing, local government. There should be a unitary state- we reject fragmentation and an ethnic based state. Provincial powers should not include the power to determine conditions of employment of public servants or any industrial relations powers.

The RDP attempts to overcome the legacy of huge inefficiency, duplication, and bureaucracy which characterised apartheid. Yet, minority interests in the country continue to attempt to entrench a system which would have precisely the same result. In particular, proliferation of expensive and unwieldy provincial government structures and the effect of draining the countries resources, national co-ordination. COSATU supports the objective of bringing government closer to the people. The emergence of provincial fiefdoms, suit, as it is likely to undermine the effective operation of the third tier of government-local government.
The powers of provincial governments and the national government should be more closely circumscribed. Specifically, the pre-eminence of national legislation should be spelled out, and it should be made clear that provincial legislation becomes inoperable to the extent that it is incompatible with national legislation. At the moment, provincial legislatures have overriding powers in respect of the matters in schedule 6, subject to five exceptions. This balance should be shifted to give the national legislature overriding powers in the event of conflict, especially where it is necessary for the implementation of national reconstruction and development, labour standards and maintenance of economic unity.

Constitutional Principle XIX provides that the powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis. The criteria to be applied in the allocation of powers to the national government and provincial governments are set out in Constitutional Principle XXI. On the whole these principles do not preclude a state with strong powers of central government. The powers of provinces should be clearly defined.

Where it is effective to do so, provincial governments should have the task of giving effect to national legislation with provincial legislation specifically designed for the needs of that province.

The principles set out above underpin COSATU's approach on the question of separation of powers. COSATU would want to make more detailed submissions on this matter at a later stage.

4. **DEEPENING DEMOCRACY IN GOVERNMENT**

4.1. **Accountability and The Right to Recall**

In a constituency based electoral system, the right to recall would be much easier to exercise. Under a national system of proportional representation, the Constitutional Assembly will have to create a mechanism providing for a minimum number of voters demanding the recall of a parliamentarian. COSATU is in favour of combining a system of proportional representation (required by Constitutional Principle VIII) with a constituency based system, which will allow for accountability of elected representatives, and recall by their constituencies.

4.2. **Majority Rule**
The principle of majority rule must apply at all levels of government including cabinet.

4.3. **The Role of Civil Society**

The state shall have an obligation to promote and strengthen civil society organisations, consult with them in policy formulation, and create a conducive environment for them to operate without interference.

The Constitutional Court should be broadly representative of society. The procedure to appoint it should include a cross section of civil society, including trade unions.

4.4. **Referenda**

COSATU supports the right of citizens in principle to trigger referenda to overturn legislation. This right is included in a number of constitutions internationally. The constitution would have to determine a minimum threshold of support required to call referenda. Further discussion would be needed on numbers. The figure arrived at would need to be high enough to avoid frivolous referenda being triggered, which would place an unnecessary burden on the state and undermine democracy. On the other hand, it should not be so high as to make it impossible for citizens to have recourse to the referendum instrument.

4.5. **Media Diversity**

The state should have a responsibility to promote freedom and diversity of the media.

5. **PUBLIC ADMINISTRATION**

5.1. **Nature of the Public Service**

1. The final constitution should contain only a framework for the regulation of the Public Service.

2. The Public Service should be:
2.1 professional and career-orientated,

2.2 broadly representative of the South African society,

2.3 efficient, effective and responsive in terms of the delivery of service to the public,

2.4 loyal to the government of the day,

2.5 transparent and accountable to the public and Parliament.

3. National legislation should be adopted to ensure merit, equity and representivity in appointments and promotions, and create ability for change, development and administrative reform.

4. The rights of public sector workers at all levels of government, as well as the terms and conditions of service of its members, should be regulated by national labour law. Provisions should be made for an ombud relating to the Public Service.

5. The extent of the Public Service Commission’s powers and functions shall be compatible with democratic governance and accountability. Provision shall be made for limited executive appointments, only at senior levels of the Public Service, with posts requiring confidentiality. The composition of the Public Service Commission needs to be reviewed.

6. During their tenure of office no public official shall use his or her position to directly or indirectly enrich themselves or to directly or indirectly benefit any person in a manner not fit and proper in the circumstances.

7. The police shall be regarded as part of the public service.

6. **FINANCIAL INSTITUTIONS AND PUBLIC ENTERPRISES**

6.1. **Financial and Fiscal Commission**

1. A Financial and Fiscal Commission (FFC) broadly representative of society shall be established to advise government of the apportionment of revenue to the provinces. Its function should be broadly similar to the existing FFC.
2. National government shall not guarantee loans by Provincial and Local Government unless the FFC confirms such loans comply with national norms as set out in an Act of Parliament.

3. Revenue collection should be national and allocation to provinces should be based on equity considerations.

4. The Constitution should not be too detailed or prescriptive in determining the functioning of the FFC.

6.2. The Reserve Bank

There is inevitably a tension between the independence of a central bank on the one hand, which is designed to obviate problems of corruption, lobbying, and manipulation of interest rates, and the problem of an independent central bank subverting national economic policy on the other hand. In Germany, the Central Bank is completely independent, while in France it fails under the control of the Ministry of Finance, while the Central Bank of Canada is quasi-independent.

COSATU would favour a constitutional provision on the Reserve Bank which incorporates the following principles:
* representivity of the Reserve Bank Board
* while having operational autonomy, the Reserve Bank would have the obligation to promote the socio-economic development of the entire society
* the Reserve Bank should be open and transparent, subject only to limitations acceptable in a democratic society based on freedom and equality.
ANIMAL VOICE OF S. A.

13 March 1995

Further to the attached letter received by me from Mr Hassen Ebrahim (Executive Director), I request that the enclosed videotape be incorporated with my earlier submission on the desperate need to protect South Africa's farm animals.

As the Theme Committee will see from the video, unless adequate laws are made to protect farmed animals, the morals and ethics of the entire country disintegrate.

I further request that a chance be given to me, if possible, to address the Theme Committee responsible for laws regarding animals.

Louise van der Merwe
EDITOR
Junior Rapportryers - Western Cape
30 May 1995

As Chairman of the JRB in the Western Cape and Counsellor the JRB strenuously objects to some of the submissions for inclusion in the constitution of the Republic of South Africa and would like our strongest support for the following to be heard:

- That Freedom of Religion be guaranteed in all private and state buildings and/or open-air places,
- That Religious office-bearers be granted the right to fill any position in the government of national unity,
- That Satanism and occultism not be recognised as religion,
- That the Interfaith Movement be opposed in the strongest terms,
- That the "sexual orientation clause" in the Constitution be removed (Homosexuality, lesbianism, sodomy and intercourse with animals is highly unnatural, abnormal and immoral and certainly do not deserve admission to or protection in the new constitution.)

Furthermore we strongly object to the legalisation of pornography in any form as it is a great evil which cannot be condoned. I wish to refer you to Chapter 3.29 of the interim Constitution, from which I quote the following: "... an environment which is not detrimental to his or her health or well-being ..." From this quote I cannot understand how it can be achieved if pornography is allowed. Furthermore I also refer to chapter 3, 8, 10 and 11 of the Interim Constitution in order to protect all citizens from uncensored freedom of speech and the disdain for the fundamental right of women's dignity and co-equality.

Lastly we wish to express ourselves strongly against the legalisation of abortion on demand. Human life is ordained by God Almighty. By legalising abortion, the Government of National Unity will call a great judgment upon itself.

The JRB therefore requests you:

- not to legalise abortion through legislation,
- not to turn the Republic of South Africa into a secular state,
- to prohibit pornography in the strongest terms through legislation.

May God the Trinity grant that you and your assembly preserve the country in order to move in the right direction. A Constitution without God the Trinity is a country without God and we cannot afford this. South Africa has a population of at least 70 percent Christians and we insist on allowing democracy to triumph. The above-mentioned basic principle forms part of the JRB's core values and Constitution for which we will struggle to the death.
Johannes A. Kleinhans
Counsellor - Western Cape
THE PROVINCE OF THE EASTERN TRANSVAAL
DEPARTMENT OF HEALTH AND WELFARE
Nelspruit

PROPOSAL: REPRODUCTIVE RIGHTS

As Community Health Nursing: we support the proposal that reproductive rights be included in the constitution.

We would like to bring the following comments to your attention concerning safe abortion:-

1. We don’t see abortion as a family planning method or linked to a family planning programme.

2. We feel that there are enough opportunities available to prevent undesirable pregnancies and that abortion is not the only answer.

3. Abortion should be available for cases as defined in the present legislation and for women who had a unsuccessful sterilization.

Draft formulation:
Under point (a) we would like to include:
Without infringing on the rights of other people.

M E GOOSEN
Community Health Nursing
Eastern Highveld
1. **Introduction.**

The right to freedom of expression is included in the Bill of Rights contained in Chapter 3 of the Interim Constitution. Section 15 reads as follows:

(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.
(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

This submission will consider if and in what form the right to freedom of expression should be protected in the Final Constitution for South Africa which is to be drafted by the Constitutional Assembly.

It will be submitted that the right to freedom of expression is essential and one of the cornerstones of a democratic society and therefore without any doubt should be included in the Final Constitution.

It will furthermore be submitted that although the existing Section 15 in many ways provides for a high level of protection of the right, certain amendments should be made for the Final Constitution in order to provide the most satisfactory protection of this most important right, and a protection which corresponds more fully with international human rights standards to which South Africa wishes to adhere.

2. **Should the Right to Freedom of Expression be Entrenched in the Final Constitution?**

Freedom of expression has been internationally recognised as one of the cornerstones of a democratic society. All major international human rights instruments as well as all major national Bills of Rights in various countries contain provisions for this right.(1)

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(1) See inter alia Article 19 of the Universal Declaration on Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 10 of the European Convention on Human Rights; Article 9 of the African Canadian Charter on Fundamental Rights; the First Amendment of the Constitution of the United States of America.
Freedom of expression is not the property of any political system or ideology. It is, as outlined above, a universal human right, defined and guaranteed in international law. As an international human right, freedom of expression means that every individual has the right to hold opinions and to express them without fear and it includes the right of everyone 'to seek, receive and impart information and ideas of all kinds through any medium of choice, regardless of national frontiers or state boundaries.' Freedom of expression therefore entails press freedom and freedom of all media as one of its principal guarantees. Censorship is any interference with the individual or means of communication that denies these basic rights and freedoms or arbitrarily encroaches upon them.(2)

Courts around the world have further entrenched the right by interpreting it as deserving particular protection. In Palco v Connecticut 302 US 326-7 Cardozo J said:

"(Freedom of thought and speech) is the matrix, the indispensable condition, of nearly every other form of freedom."

The European Court of Human Rights has repeatedly expressed similar views, namely that

'If freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for progress ... it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"'(3)

In recent South African jurisprudence, following the introduction of the Bill of Rights in the Interim Constitution, the importance of the right to freedom of expression has been described as follows:

"The history of liberty shows that the currency of every free society is to be found in the marketplace of ideas where, without restraint, individuals exchange the most sacred of all their commodities. If the market is sometimes corrupt or abused or appears to serve the interests of the wicked and unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature.

In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all other depend; it is the freedom without which the others would not long endure. ' 

With particular reference to freedom of the press it has been said that

"(t)he role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed. " (5)

Based on the convincing theory and the impressive precedents which all point towards a strong protection of the right to freedom of expression and to freedom of the press it is argued that this right must be firmly entrenched in the Final Constitution.

3. **Comments on the Existing Constitutional Clause on Freedom of Expression.**

It is submitted that the present Section 15 guaranteeing the right to freedom of expression for the most part provides a reasonably satisfactory protection of the right.

Indeed, in some respects Section 15 offers a more explicit guarantee than international and comparative provisions, for instance by explicitly including freedom of the press. This is to be welcomed and it is submitted that this explicit guarantee of freedom of the press should be included in the freedom of expression clause in the Final Constitution.

The most noticeable exception from the rights listed in s 15(1) is the right to 'seek, receive and impart information and ideas regardless of frontiers', as guaranteed in the International Covenant on Civil and Political Rights. Even if the right to freedom of expression is assumed by the drafters of the section to include 'the right to gather information preparatory to its expression' it is not clear from the section itself that this right is included. Without a guarantee of the right to impart information the right to freedom of expression right can be seriously restricted. It is therefore submitted that a freedom of expression clause in the Final Constitution should include 'the right to seek, receive and impart information and ideas regardless of frontiers' in order to provide a more comprehensive protection of the right.

The present wording of the section puts the onus in the first instance on the person alleging that his or her right under Section 15 has been violated to prove it. In the United States the wording of the First Amendment to the American Constitution provides that

"Congress shall make no law .. abridging the freedom of speech, or of the press..."

This formulation puts the onus on the state to avoid infringing the right to freedom of expression. This, of course, does not mean that the right cannot be limited in certain instances in the public interest, but by shifting the onus the right to freedom of expression may be further entrenched. It is therefore submitted that provision for such shifting of onus should be incorporated in the freedom of expression clause in the Final Constitution.

Section 15(2) of the Interim Constitution provides that all media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion. Given South Africa's recent history of powerful state controlled media being used as government mouth pieces and propaganda units serving the government in power it is understandable that the clause was drafted the way it is. However, even with the guarantee of impartiality and the expression of a diversity of opinion there is no guarantee against government
interference of stories which for example expose government abuse of power without a guarantee of independence.

6. Signed by the South African President Mandela in 1994. A process leading to ratification of the Covenant by South Africa has subsequently been embarked upon.


Secondly, to tie broadcasters to a diversity of opinion may carry with it the threat of editorial interference, if the independence of the media in question is not guaranteed.

On this basis it is submitted that the clause on freedom of expression should provide independence as well as impartiality and diversity of opinion. That way the concerns arising from the experiences of the past will be met without threatening some basic principles of media freedom.

In March 1994 the Independent Broadcasting Authority Act(9) came into force. This act revolutionised the regulation of broadcasting in South Africa by removing from the hands of the South African government the authority to regulate broadcasting services, and has entrusted such authority to an independent regulatory agency, the Independent Broadcasting Authority.(10) Other countries have also made provisions for a regulatory body to regulate and administer the broadcasting and telecommunications spectrum.(11)

Such bodies have been the subject of various challenges alleging that such a body infringes on the right to freedom of expression and freedom of the press. It is very likely that constitutional challenges will be brought against the Independent Broadcasting Authority on that basis.

The European Convention on Human Rights expressly provides, in the section which guarantees for the right to freedom of expression that "(t)his article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

It is submitted that, like the European Convention on Human Rights, it might be useful to clarify that the mere existence of a regulatory body like the Independent Broadcasting Authority does not in itself violate the rights set out in the clause guaranteeing freedom of expression and freedom of the press.(12)

During the time the Interim Constitution has been in force, Section 15 has been introduced or tried to be introduced in various defamation cases. One major obstacle in applying the Constitution in defamation cases is the fact that the issue of whether the Constitution applies vertically (that is only to litigation between an individual and organs of the state) or horizontally (application extended to litigation between private individuals or entities) is as yet undecided by the Constitutional Court. (It is expected that the Constitutional Court will make a decision on this issue some time later this year
which will solve this question with regards to the interim Constitution. The question, however, still
remains open with regard to the final constitution.

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(10) See Wend Wendland 'Tightroping Freedom of Expression and Broadcasting Regulation: The New Bill of

(11) See for an analysis of the United States Federal Communications Commission and a comparison with the

(12) This does not imply that certain actions or decisions taken by the Independent Broadcasting Authority can
not be the subject of constitutional challenges. It would only serve to clarify the constitutional position of the
Independent Broadcasting Authority as such.

Without going into the whole debate on whether the Final Constitution is to apply verticality versus
horizontality (I assume that this issue is being discussed and decided at some other time) it is
submitted that it is imperative that the clause on freedom of expression makes express provision for
horizontal application in the area of defamation. Defamation actions can be potentially very
damaging for the exercise of a right to freedom of expression and it is submitted that the risk of
leaving this area outside of constitutional application would be seriously limit the practical value of
the clause.


Based on the analysis above it is submitted that a constitutional clause on freedom of expression
should read as follows:

(1) Every person shall have the right to freedom of speech and expression; this right
shall include the freedom to seek, receive and impart information and ideas of all kinds,
regardless of frontiers, and it shall include freedom of the press and other media, and the
freedom of artistic creativity and scientific research. No law restricting this right shall be
valid.

(2) All media financed by or under the control of the state shall be regulated in a manner
which ensures independence, impartiality and diversity of opinion. (3) This section shall not
prevent the regulation and administration of the broadcasting and telecommunications
spectrum in the public interest.

Like any other clause in the Bill of Rights this section would be subject to the limitation clause.

Lene Johannessen
Inclusion of a Right of Access to Information in the Final South African Constitution.

1. Introduction.

South Africa is one of the very few countries in the world which provides for a free-standing, albeit not absolute, right of access to information at the constitutional level. Section 23 of the Interim Constitution reads as follows:

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Constitutional Principle IX of the Interim Constitution furthermore supports the notion of freedom of information, and we would argue compels its entrenchment in a broader form than what Section 23 provides.

It will be argued in this submission that it is of great importance for the development of the South African democracy that a right of access to information be included also in the Final Constitution to be drafted by the Constitutional Assembly.

Section 23 as it presently stands, however unique it is, provides an inadequate right to access to information and therefore ought to be amended in the Final Constitution. The following submission will outline some of the rationales for a more comprehensive right of access to information and how such rationales are inadequately reflected in the existing constitutional provision. Based on the outline of rationales and the critique of the existing clause the submission will provide a proposal for a clause guaranteeing the right of access to information in a way which adequately reflects the rationales.

(1) Other such countries include Sweden where Chapter 2 of the Freedom of the Press Act (one of Sweden's constitutional documents), known as the principle of Public Access to Official Records, provides a right of access to all documents for the public, unless there is an explicit statute which regulates otherwise. In countries such as South Korea the Constitutional Court has recognized a fundamental constitutional right of access to public information in the possession of state agencies (case 88-Honka 22, Constitutional Court, Judgement of 4 September 1989).
Constitutional Principle IX reads: "Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government."

2. Rationales for a Right of Access to Information.

At least four separate rationales support a right of access to information.

First, access to information is part of the human rights culture that South Africa wishes to build. Most international human rights instruments see the right of access to information as a corollary to the right to freedom of expression. The importance of access to information (or freedom of information as the term most often is in international instruments) has been recognized by the General Assembly of the United Nations which stated unequivocally just after its inception that "Freedom of information is a fundamental right and it is the touchstone of all the freedoms to which the United Nations is consecrated.

Another human right, the right to , supports the particular aspect of the right to access to information which provides individuals with a right of access to information about themselves held by the government. With the particular history of South Africa, where organs of state held a wide range of information about individuals without those individuals having a right of access to such information, this particular aspect is important.

More specifically in a South African human rights context, the vision of 'an open and democratic society based on freedom and equality' is central to the Interim Constitution because the courts are instructed to interpret the Bill of Rights (Chapter 3 of the Constitution) so as to promote the values which underlie such a society and they may not recognise a limitation on any of the Bill's rights unless it is justifiable in such a society.

The word 'open' in this formulation is unusual and conspicuous. Its presence contrasts, for instance, with its absence in the corresponding formulation in Section 1 of the Canadian Charter of Rights and Freedoms, which was an important drafting models for the limitation clause (s 33) of the Interim Constitution. This suggest that our constitution-makers attached great importance to the value of openness.

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(3) See for example Article 19 of the International Covenant on Civil and Political Fights. The Covenant has been signed by the South African president and a process of ratification has been embarked upon. The right to freedom of expression is recognized in Section 15 of the Interim Constitution.

(4) Resolution 59(1) of December 96.
A second rationale is less rights-regarding and more democratic in spirit. The importance of access to information according to this rationale lies in its effect on ordinary citizens and their participation in government. Allowing citizens to obtain information is essential for full democratic participation in society, and passing legislation on access to information opens a dialogue between the government and the people. Without full information, the citizen cannot criticize policy. Without a voice and the right to put forward views, the citizen cannot contribute to political and social change.

Indeed, the free flow of information supports not only a representative form of democracy but also a participatory form of democracy, as knowledge enables the electorate to interact in the decision-making process. People must be able to engage in public contestations of ideas, offer alternatives to proposed and official policies, and influence decisions that affect them. The government needs to be responsive to its citizens. Once it is conceded that a vital aspect of democracy is this right of active participation by citizens both at elections and in between them, it must be conceded as a logical necessity that participants need access to information to make their participation effective and worthwhile.

Linked to participation is accountability, another democratic rationale for access to information. In a responsible democracy the sovereign body is the people and it is to the people that the governors must justify the decisions taken on their behalf. Constitutional Principle IX of the Interim Constitution emphasizes the importance of accountability:

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

The adequate flow of information about government is itself a form of justification letting people affected by government decisions know the bases for those decisions. Enhancing accountability, a right of access to information means that a citizen will be in a position, if he or she so chooses, to know what the government is doing and why. It gives any individual or group in society the opportunity to acquire information about government.

Underlying both the participation and the accountability rationales is a recognition that the South African state includes an essentially authoritarian bureaucracy largely (but not exclusively) averse to change. These features will be difficult to alter but are crucial subject to a thoroughgoing reform of
the administrative process, if we are really to outgrow apartheid traditions. A right of access to information thus aims to bring to the bureaucracy at least a degree of the public access and transparency that has been brought to the legislative process by the election of 27 April 1994.

Another rationale, improved process, is really the result of the two last rationales - by encouraging participation and strengthening accountability, access to information encourages better administrative decisions.

The final rationale is the role of access to information in development. As The Reconstruction and Development Programme: A Policy Framework states,(12)

> '[o]pen debate and transparency in government and society are crucial elements of reconstruction and development. This requires an information policy which guarantees active exchange of information and opinion among all members of society. Without the free flow of accurate and comprehensive information, the RDP will lack the mass input necessary for its success.'

A right of access to information facilitates a reconstruction and development programme in at least two ways. First, by allowing organizations and individuals outside the government to tap into information held by the government, such a right can encourage the community-based initiatives that are necessary to drive the programme and ensure its longevity. Secondly, access to information ensures that governmental action is taken on the basis of the best possible information. Legislation on access to information ensures that the information the government uses is genuine and accurate, since it has been shared with organizations and individuals outside the government.(13)

Indeed, in order to contribute fully to the Reconstruction and Development Programme, access to information should be recognized to cover not only information about government but also information held by the government. In other words, the right of access to information has not only a civil and political dimension but also a socio-economic dimension. This means recognizing that governments control vast amounts of what might be termed developmental information: information the use of which can facilitate development. The right of access to this information should be regulated in line with the RDP, with a view towards enhancing its ability to encourage development.(14)
3. **Section 23 of the Interim Constitution.**

As outlined in the introduction a limited recognition of the above rationales resulted in a constitutionally entrenched right of (limited) access to information in Section 23 of the Interim Constitution. The ambit of this section is all information held by the state or its organs at any level of government, to the extent that such information is required for the exercise or protection one's rights. As this section presently stands, the scope of this section is undoubtedly vertical in that it expressly applies to only the state and any of its organs and not to private bodies.

It is submitted that Section 23 in its present form is seriously flawed. By limiting the right to apply only when "required" for the exercise or protection of one's rights it puts the onus on a requester to justify the need for such information. In other words, the Section does not provide for a Right to Know, but merely for a Need to Know. This does not comply with the rationales outlined above and it leaves a much too wide scope for civil servants unwilling to disclose information to refuse and/or delay disclosure.

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(14) ibid.
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The present formulation of Section 23 furthermore subjects this fundamental right to a double limitation, since the right is subject not only to the proviso of "required for the exercise or protection" of one's right but also to the general limitation clause in Section 33. It is submitted that the right of access should be subject only to the same limitations as any other of the fundamental rights in Chapter 3 of the Interim Constitution and that any legitimate reasons for non-disclosure of information can be justified under Section 33.

It is furthermore submitted that the scope of Section 23 should not be exclusively vertical. It is suggested that in order to fully reflect the rationales for access to information the ambit of Section 23 should cover information held by all bodies exercising public power and not only organs of state. State organs at any level would still be the primary target of the section but it would make it possible to get access to certain information held non-statutory bodies, to the extent that such information can be seen to relate to the exercise of any public power. Covering a subject treated to some degree in foreign jurisdictions(15), the obligation to release information would apply to a limited degree to institutions such as trade unions or private companies where they exercise public power.
Finally, we want to stress that even though a process is underway to draft legislation on access to information this does not diminish the importance of having this right protected at constitutional level. We firmly support the notion of access to information legislation, and welcome the initiative taken by Executive Deputy President Thabo Mbeki to appoint a task group, chaired by his legal advisor advocate Mojanku Gumbi, to draft such legislation. However, by including the right in its Final Constitution, South Africa's commitment to "an open and democratic society based on freedom and equality" will have a much better foundation to become a reality.

4. Draft Proposal

Based on the analysis above it is submitted that a constitutional clause on access to information should read as follows:

(1) Every person shall have the right of access to all information held by any organ of state.
(2) Every person shall also have the right of access to information held by any other body to the extent that information held by such bodies relate to the exercise of public power.

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For instance, the Australian Privacy Act (1988) has some limited provisions addressing the provision of credit-worthiness information in the private business world.

In the alternative, in case the notion of a limited horizontal application of the clause is found to be unacceptable we submit that the clause at least be drafted in a way which provides for an unqualified right (although of course still subject to the limitation clause. In that case we propose that the clause should read as follows:

Every person shall have the right of access to all information held by any organ of the state.

It is submitted that the section should continue to fall within the limitations category of “necessary” (if free and fair political activity) and "reasonable" (if not).

Lene Johannessen and Jonathan Klaaren
SUBMISSION TO THEME COMMITTEE FOUR: VIOLENCE AGAINST WOMEN

At a conference hosted by the Community Law Centre, University of the Western Cape, entitled 'Towards the Final Constitution: A Critique of the Present Constitution from a Gender Perspective', on 27-29 January 1995 in Cape Town, a working group on violence against women, representing a broad segment of women in South Africa from a range of social, class, religious and racial backgrounds, agreed that the following submission in relation to violence against women needed urgently to be made to Theme Committee 4 of the Constitutional Assembly:

The working group urges the drafters of the final constitution to acknowledge the fact that gender-based violence permeates both the public and private spheres; that women are overwhelmingly the victims of crimes of violence especially rape and domestic violence; that gender-based violence is one of the greatest obstacles to the achievement of gender equality.

The following submission is therefore made:

1 The interim constitution contains a number of rights which could be interpreted to protect, specifically women and children from violence, namely the right to dignity (section 10), freedom and security of the person (section 12) and the right to equality (section 8). However, these rights do not specifically address the issue of violence directed against people because of their status. Gender-based violence prevents women from participating equally and fully in the new order and is at odds with the spirit and purport of the constitutional undertaking: namely that all people shall enjoy freedom and equality. The Constitutional Assembly is urged to recognize that women cannot enjoy either of these rights in the presence of violence and threats of violence.

It is submitted therefore that a separate right should be included in Chapter 3 of the Constitution called Protection from Violence, to read as follows:

Every person shall have the right to be protected from physical, mental or emotional abuse or violence based on race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Unlike the language of section 12 'freedom and security of the person', this clause imposes an affirmative duty on the state to protect people from violence, hence the word 'protection' as opposed to 'free'. Whilst the motivation for this submission is
the protection of women from violence, a clause that singles out women for protection from gender violence (e.g. 'Every woman shall have the right to be protected from rape and violence') would not capture the spectrum of abuse that may be suffered by women on the basis of the enumerated grounds set out in section 8 of the interim Constitution. Moreover, it is not only women but children who suffer from domestic abuse and children may be male or female. This section aims to protect individuals from violence that is based on racial hatred, misogyny (rape, sexual assault, domestic violence), homophobia (gay-bashing) or any other violence rooted in prejudice which infringes the right of a person to be free from discrimination and to be treated as an equal.

Due to the affirmative duty on the state to protect all persons, but particularly women from gender violence, it is submitted that omissions (not only positive acts) on the part of the state to provide women with safe streets and safe homes should be recognized as the basis of constitutional action. Failure on the part of police to respond promptly to incidents of domestic violence; failure by magistrates to issue interdicts in terms of the Prevention of Family Violence Act 133 of 1993 and other such omissions ought to be constitutionally actionable.

2. The fundamental rights in Chapter 3 of the Interim Constitution may be limited in terms of section 33 of the constitution. There are two levels of protection afforded by section 33; a lower level of protection, where it must be shown that the limitation on the right is 'reasonable and justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the right'. Some of the rights subject to this level of protection are the right to freedom of speech and expression (section 15) and the right to equality (section 8).

The higher level of protection afforded to various fundamental rights and freedoms requires that in addition to being reasonable and justifiable, not negating the essential content of the right, the limitation also be NECESSARY. Some of the rights protected in this way are, the risks to dignity (section 10), freedom and security of the person (section 11), freedom from servitude (section 12).

If the two-tiered limitations test is retained in the final constitution, our proposal is that the 'Protection from violence' right ought to be subject to section 33(1)(b) of Chapter 3 - the higher level of protection afforded by the limitations clause.

3. Alternatively, the above clause protecting people from violence should be included as a subsection of section 11 'Freedom and security of the person' as 11(3).

4. The interim constitution protects people from state infringements of their rights and freedoms. This is what is meant by the 'vertical application' of the constitution. It
has not yet been determined whether or not the constitution will protect relationships between individuals and thereby have ‘horizontal application’. The reality is that most gender violence occurs between individuals, by men against women. For this reason, a failure to interpret the constitution as having horizontal application, effectively denies women constitutional protection from gender-based violence. When a woman is raped or beaten, her human rights have been violated - both by the individual perpetrator and by the state for failure to protect her sufficiently. A full discussion of the intricacies of the application of the chapter on fundamental right; is beyond the scope of this submission. However, it is urged by the supporters of this submission that rights protection be extended horizontally to protect individuals from violence that is gender or race based.

This submission has been endorsed by Rape Crisis, Cape Town; People Opposing Women Abuse; ADAPT (Agisanang Domestic Abuse Prevention and Training), Alexandra; Community Peace Foundation, University of the Western Cape; Advice Desk for Abused Women, University of Durban-Westville; NICRO Women's Support Centre, Cape Town; Rape Crisis, Port Elizabeth; Community -Arts Project; RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect), Cape Town; Ilitha Labantu, Guguletu.

Joanne Fedler, Law School, University of the Witwatersrand
Bronwyn Pithey, Rape Crisis, Cape Town
THE PROTESTANT ASSOCIATION OF SOUTH AFRICA

3rd April 1995

Prior to the epoch-making election on April 27th 1994, we received a copy of your manifesto NOW IS THE TIME - A BETTER LIFE FOR ALL. We were deeply impressed, more particularly with the paragraph four which reads as follows,

A programme to bring about the equality and respect for women.

Under ANC Government, women will be given a voice. They will be respected and treated equally. At least one-third of our parliamentary candidates are women.

Our purpose in writing to you now, is to express our deep concern that the draft "Film and Publication Bill" is in direct conflict with the objective expressed in your manifesto. We interpreted the sentence we have underlined, They will be respected and treated equally, to mean that no assault upon the dignity of womanhood would be permitted. We submit that paragraph 5.5, summary of the draft Bill, by its failure to prohibit explicit sexual display, otherwise known as hard-core pornography, in film or publication, leaves the door wide-open for the pornographic industry to build their financial empires in South Africa, as they have done in the United States and the United Kingdom, by mounting such an assault.

We are aware that there is confusion in the minds of lawyers, legislators, psychologists, and sociologists, as to what constitutes an assault in this field of discussion. We are convinced, however, that there will be no such confusion in the minds or emotions of adolescent girls and mature women - especially the wives and mothers of our land - when they find their gender subject to such abuse, or they suffer physical violence, even to the point of being raped, in consequence of it.

There is a further aspect of this matter to which, respectfully, we must draw attention. The draft Bill appears to have accepted the submission of the pornographic industry that Section 15, chapter 3, of the interim Constitution allows unrestricted freedom of expression regardless of the provisions of Section 10 which reads:

HUMAN DIGNITY

10 Every person shall have the right to respect for and protection of his or her dignity.

The Government, however, is currently appealing to all our citizens to suggest ways and means of improving upon the Interim Constitution - in short to make it their very own. This is highly commendable, and, probably without precedent in constitutional history.

The Protestant Association, with others, has responded and made representations relating to the issue we have now raised. A summary of our representations is attached. They include suggested amendments to both sections 10 and 15, aimed at strengthening the former and qualifying the latter. Whatever the merits, or demerits of the suggested amendments, which the Constitutional Assembly will see in them, is it not a breach of faith on the part of the Government to introduce legislation at this stage which virtually pre-empts any serious discussion, let alone the acceptance, of them.
We are convinced that it is not the intention of the Government, that this should be so; its regard for the rights of the average citizen to have a meaningful part in fashioning the constitution of our land is above reproach. Nevertheless, we respectfully submit that this will be an inevitable effect if the draft bill goes forward in its present form. Ought not such legislation, hinging as it does upon a disputed interpretation of the Interim Constitution, be postponed until the Final Constitution is accepted by the people through their parliamentary representatives?

Mr President, we have learned to admire and appreciate the fair and objective manner in which you have exercised the duties pertaining to your office during the past year. In the light of this, we have confidence in asking for your personal intervention in the matters we have raised.

(REV) A H JEFFREE JAMES
EXECUTIVE SECRETARY.

SUMMARY OF SUBMISSIONS TO THE CONSTITUTIONAL ASSEMBLY BY THE PROTESTANT ASSOCIATION OF SOUTH AFRICA COVERING THREE SPECIFIC SECTIONS

1 Application Section 7 (4)

“When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.”

If the underlined statement means involvement in lengthy expensive litigation, it is obvious that the common man is excluded from exercising the rights inherent in this section. We have asked for direct access to the Constitutional Court with authority vested in the Chairman thereof to decide whether a complaint merits serious consideration or could be regarded as merely frivolous or unreasonable.

2 Human Dignity Section 10 versus Freedom of Expression Section 15

“Every person shall have the right to respect for and protection of his or her dignity.”

“Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.”

The right inherent in Section 10 appears to us to be meaningless if Section 15 is interpreted to allow absolute freedom of speech and expression to the point of abusing individuals, or groups. The pornographic “industry” is staking a claim to publish explicit hard-core pornography on the basis of such an interpretation. We are contending that such constitutes an assault upon womanhood, as this has been defined by the Canadian Courts, and thus
nullifies the protection afforded in Section 10. We have suggested the following amendments:

1) That Section 10 be amended to read

   Every person shall have the right to respect for his or her personal, gender, or group dignity, and protection from any form of abuse or derogation thereof.

2) That a clause, as underlined, be added to Section 15

   Every person shall have the right to freedom of speech and expression....... subject to legislation, existing or to be enacted, guaranteeing the right expressed in Section 10 of this Constitution.

3 Religious belief and opinion - Paragraph 14

   “Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.”

   “Nothing in this Chapter shall preclude legislation recognising

   (a) a system of personal and family law adhered to by persons professing a particular religion; and
   (b) the validity of marriages concluded under a system of religious law subject to specified procedures.”

We raise the question whether sub-clause 3(a) nullifies the rights explicity stated in the main clause. Regrettably, not all religions, in their family law, allow the right of their adherents to convert to another. We are asking that such a right be entrenched in our Constitution as it is included in the United Nations charter of human rights.

With regard to Section 3(b) we point out that some religions still permit child-marriage, bigamy or polygamy. Is such to be legalised side by side with our present laws governing marriage?

Apart from those factors, we argue that in a secular state (as distinct from a secularist, on the one hand, or a theocratic state on the other) clauses which determine distinctive rights on the basis of religious belief have no place. Civil law governing marriage ought to be paramount.

A H JEFFREE JAMES
Executive Secretary

The Protestant Association of South Africa
Cape Town
5 June 1995

re: Theme Committee 4 : ANC Submission - reproductive rights

The Social Justice Resource Project as part of the Institute of Criminology has an overall objective to facilitate public education, training and research in the broad field of social justice by providing a resource centre and producing and distributing accessible resources.

The SJRP is committed to informing the broader public about, and stimulating debate on, issues of social justice. One of these issues is abortion and reproductive rights. The Social Justice Resource Project therefore supports the ANC’s proposal that reproductive rights should be included in the Constitution as one of our rights.

Maria Farelo
Co-ordinator
Social Justice Resource Project
CENTRE FOR APPLIED LEGAL STUDIES  
UNIVERSITY OF THE WITWATERSRAND  

SUBMISSION TO THEME GROUP 4 ON THE PROPERTY CLAUSE

The Land Rights Project of the Centre for Applied Legal Studies, the University of the Witwatersrand, submits that there should be no property clause in the constitution. The reasons for this submission are set out below.

TO ENTRENCH PROPERTY RIGHTS CONSTITUTIONALLY IS OUT OF STEP WITH CURRENT INTERNATIONAL DEVELOPMENTS

The inclusion of a property clause in the interim bill of rights is surprising and unusual in terms of international precedents and the debates and developments in respect of recently adopted constitutions. There are highly developed countries such as Britain and Holland in which property rights have never enjoyed constitutional protection, without any detrimental affect on the stability or security of property rights in those countries. Furthermore, countries such as Canada, New Zealand, Hong Kong and Sri Lanka, which have recently adopted new constitutions, decided after much political debate that it was inappropriate to give property rights constitutional protection.¹

In SA there are additional particular and compelling reasons for not entrenching property rights in the constitution.

CURRENT OWNERSHIP PATTERNS ARE BUILT ON THE DENIAL OF PROPERTY RIGHTS

Existing property rights are built on the denial and prohibition of the principles that property rights are meant to embody. The existing patterns of landownership in South Africa were created by the Land Act, the Group Areas Act and the massive physical restructuring that took place under the policies of forced removals, Bantustan consolidation, and the pass laws. These laws and over one hundred others² were designed precisely to controvert the willing buyer - willing seller mechanism,  

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¹ The reasons go beyond the issue of land reform, and include the fact that the constitutional entrenchment of property rights has had the effect of making it impossible for governments to introduce or uphold laws relating to environmental protection, the length of the working day, the reduction of public sector wages, rent control and even measures to freeze the bank accounts of people accused of embezzling public funds.

² In this regard it is instructive to look at the list of over one hundred racially based laws and other legal provisions repealed by the Abolition of Racially Based Land Measures Act of 1991.
to prohibit the free contractual relations of lease and sale, and to allow for the arbitrary seizure of property, with or without the payment of compensation.\(^3\)

The fact that over eighty percent of South Africa's land is owned by the white minority is the result of a market that was never "free" because the majority of the population was prohibited by law from buying land, or keeping the little land they had managed to acquire before the enactment of the Land Act in 1913. Much of the land which was confiscated from black people was sold to whites at vastly subsidised rates through the Agricultural Credit Board. White people now own the houses from which black people were forcibly removed in terms of the Group Areas Act.

**Entrenching Inequality**

Thus white property rights and black dispossession are the flip sides of the same coin. They were created under the same legal system. To confirm existing white land rights as deserving special constitutional protection is similarly to confirm black landlessness, homelessness and poverty. As long as the debate about property rights relates to the protection of existing rights and title deeds, it will remain a debate about protecting the spoils of apartheid, and not about establishing a secure and legitimate system of property rights for all.\(^4\)

**COMPROMISING LAND REFORM**

The property clause in the interim constitution would jeopardise even the most basic and uncontroversial land reform measures. By so doing it has the result of setting in stone great inequalities, and making it impossible for ordinary people to find lawful ways of meeting their basic needs and legitimate expectations. This can only exacerbate the instability and illegitimacy of current property relations. What follows is a discussion of ordinary and minimalist land reform measures which are jeopardised by the property clause.

**Upgrading processes**

\(^3\) Section 5 of the Black Administration Act of 1927 was the provision which was used to finally effect the forced removal of people who had managed to hold out and resist all other measures. This section was last used to order the forcible removal of the Mogopa people in 1984. In its original formulation it states: "The Governor-General may ... order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such conditions as he may determine." No provision was made for compensation. Time and again black landowners removed in terms of this and other provisions, received no compensation whatsoever for the land they lost.

\(^4\) In this regard it is instructive that the people lobbying hardest for the entrenchment of property rights are those responsible for perfecting and administering the laws which systematically controverted all the principles they now so fervently and righteously support. The timing of their sudden concern exposes its self interest. What they wish to preserve is the results of apartheid land law, and not the principles of property rights *per se.*
Under apartheid black people were prohibited from owning land not only in the common area of South Africa, but even in the Bantustans. The policy was that the form of land rights best suited to black people was that the land should be held in trust on "their behalf". Thus most land in homeland areas was effectively "nationalised" land held in the name of the government or the South African Development Trust. The people who live on this land have no legal guarantee of security of tenure, even when they have lived on the land for generations and built houses and other improvements.

Throughout the world the response to such disjunctures has been upgrading processes, in terms of which the long-term occupation of residents is upgraded into legally secure and defendable rights. This process was begun under the Nationalist government using laws such as the Upgrading of Land Tenure Rights Act of 1991 and the Conversion of Certain Rights to Leasehold or Ownership Act of 1988.

Under the property clause, this process can now be held to ransom by the nominal owners of the land who may protect that it contravenes their property rights. Thus municipalities which are the nominal owners of land which black people have occupied since time immemorial, have opposed such upgrading schemes as being in conflict with their property rights.

In the early part of the century black people were told they could not buy land unless it was registered in the name of either a chief or a mission. There are many tragic instances where the chief and the missionaries turned around and claimed the land as their own. Some chiefs and owners of mission land now oppose upgrading mechanisms as being in conflict with their property rights. The consequences for rural people are devastating as they find their land sold from under them by people who are the registered, if not the real, owners. Thus the property clause has the effect of thwarting measures designed to ensure that a system of security of tenure and legitimate property rights can be extended to all South Africans.

**Redistribution**

The property clause in the Interim constitution provides that land can be expropriated only for "public purposes". This has a narrower meaning than "in the public interest" and has been interpreted to mean that the state can expropriate land only for public purposes such as dams, roads and hospitals. While the "public interest" includes redistribution projects such as low cost housing schemes or the kinds of upgrading projects mentioned above, the Appellate Division has held that "public purposes" do not include the expropriation of land from one owner, in order to transfer it to other owners.

In terms of such judgements it would be unconstitutional for the government to expropriate unused mining land which is well suited for low cost housing development, if it planned to transfer this land
to landless people. Thus the government may find itself powerless to settle disputes between land invaders and private owners by offering to make alternative settlement land available. If the government cannot expropriate land but must rely on current owners' willingness to sell, it will find itself held to ransom by exorbitant asking prices - as is already happening in the pilot land reform areas.

**Zoning Laws**

Municipal zoning laws as well as land use and development rights need to be amended in the process of restructuring our cities, in order to move away from apartheid planning. The present clause will make this unlawful unless compensation is paid for zoning changes which affect existing land use and development rights.

**The siting of low income housing**

The establishment of low income housing inevitably affects certain of the rights of people in neighbouring areas. In these cases, neighbours will allege that the state's action in establishing low income housing close to them amounts to removal of certain of their "rights in property" - and that it is therefore unconstitutional unless they are paid compensation.

**Controls on "slumlords"**

Measures to regulate and control slum landlords may similarly be unconstitutional. Slum landlords move into an area, make enormous short-term profits, and then pull out when the area has completely degenerated and ordinary residents and individual owners find the value of their property has crashed. Measures such as rent control, limits on the number of tenants allowed and slum clearance provisions may all be found to be infringements of the property rights of the landlords.

**Restitution for forced removals**

The property clause also creates certain problems in the process of restitution for forced removals. People who were removed from their land in terms of a discriminatory law have their right to restitution enshrined in the constitution. But there are many people who were removed simply because they had no formal, defendable land rights under apartheid and they were politically powerless. An example are the people whose land was simply confiscated in terms of deals between chiefs and casino owners. They were dumped in resettlement areas and now have no means to address this injustice because the casinos, as the current landowners, are protected by the property clause.
A general problem with the way in which the restitution process intersects with the property clause is that restitution can take place only on payment of compensation to current owners. In other words, if the state does not have enough funds for this purpose, the present holders will retain the land, and those who were dispossessed will remain dispossessed.

The above examples are just some of the ways in which the property clause in the interim constitution will inhibit the government's capacity to introduce even minimalist land reform measures aimed at stabilising and promoting the extension of a legitimate and stable system of property rights for all South Africans. None of the measures mentioned above imply or entail that property should be arbitrarily taken from those who have it now, nor that current owners would not receive compensation. Yet all these measures would be vulnerable to constitutional challenge in terms of the present property clause.

LAWLESSNESS IN LAND TRANSACTIONS

Given the vast scale of racial inequality in land rights and the resultant problems of landlessness, rightlessness and overcrowding, many South Africans have no option but to break the law in order to establish their homes. The problems of squatter settlements and land invasions are endemic in our country. These means of acquiring land have obtained a degree of legitimacy and acceptance because everyone knows that no viable alternatives exist for "squatters", and that their plight was created by decades of racially discriminatory property laws. Thus there is a reluctance (which started in the last years of National Party government) to use force to evict squatters. In this way all property becomes inherently vulnerable, not so much to "arbitrary government takings", as to "arbitrary squatter settlements".

Burden on the poor

Ironically the burden of this instability falls most heavily on new entrants to the property market (that is new black homeowners) and on "the ordinary person in the street" rather than the big companies whose vast landholdings, acquired under apartheid, are what make the imbalance in property rights dysfunctional and unstable. This is because the problems of overcrowding and pressure on land and buildings are concentrated in low income areas. These areas then degenerate and are "red-lined" by the banks. The value of houses crashes, and first time buyers find themselves saddled with vast bonds and houses they cannot sell in neighbourhoods that are degenerating before their eyes. Whatever confidence they initially had in the South African system of property relations dealt a death blow as they, personally, have to absorb the costs of its discriminatory and exclusive history.

A similar dynamic exists in rural areas. Those black groupings who have recently managed to acquire land rights are inundated by destitute relatives and friends petitioning them for a place to stay. The problem is exacerbated by the continuing and increasing number of people evicted from
white farms, who arrive destitute and begging to be taken in. The new owners are faced with the choice of turning away relatives whom they know to have no alternatives, or finding their newly acquired land degenerating into residential slums. Meanwhile the white farmers use their "property rights" to evict families who may have lived on their farms for generations.

Both urban and rural areas are vulnerable to the exploitation of warlords who establish themselves by brute force and consolidate their power by bringing destitute people onto land in return for payment, irrespective of the fact that the land is not theirs to sell. The newcomers then owe the warlords political allegiance and support in exchange for the warlord's physical protection of their residence on the land. Such systems are becoming an endemic problem in African owned areas. The police seem powerless to intervene and protect the rights of the owners against the brute power of the warlords. What drives the system is the fact that most landless people know they have no alternative means of acquiring land to meet their basic residential requirements. Thus they have no option but to align themselves with warlords who are fast creating an extra-legal system of property rights which operates on the principle of military conquest.

**THE CRISIS OF LEGITIMACY**

The legitimacy of existing property relations is inherently vulnerable because these relations were built on racially exclusive laws and the systematic prohibition and destruction of black people's land rights. Once the property clause is seen to thwart and limit land reform measures which are introduced to address these inequalities, the legitimacy of "property rights" as a human rights vehicle will be utterly destroyed.

The result will be to reinforce the current practice in terms of which people "acquire" land rights by taking the law into their own hands and simply occupying land and then resisting eviction. Thus the already tenuous "rule of law" is further undermined and land comes to be transacted and defended by force and violence rather than within a legitimate legal system. Because it is obvious that the people concerned have no viable alternative ways of meeting their basic human needs their actions will be recognised as morally defensible and it will be the legitimacy of the constitution, which enshrines property rights, that suffers.

**DAMAGE TO THE CONSTITUTION AND THE RULE OF LAW**

The damage to the standing of the institutions and vehicles which contain and promote property rights will be serious, with devastating consequences for the functioning of a democracy governed by a bill of rights and constitutional principles.

For example, India in 1948 faced land problems similar to those South Africa is currently experiencing. Like South Africa its new constitution entrenched property rights. The new Indian government believed (on legal advice) that the new constitution nevertheless permitted land reform.
From 1950 to 1973, successive governments attempted land reform. Each time they did so their actions were successfully challenged in the courts. The basis of the challenges was the constitutional guarantee of compensation, which the courts interpreted to mean market value. When the government tried to amend the property clause to permit land reform, this too was held to be unconstitutional.

The constitutional struggle over a period of twenty years not only stopped land reform; it also deeply damaged the courts, which were perceived as obstructing social justice. In 1975 a state of emergency was declared. The courts, now weakened by the ongoing constitutional crisis over land reform, were unable to resist the excesses of government power. One of the first things the new Indian government did in 1978, after the emergency had ended and an election had been held, was to abolish the property clause in the constitution.

Closer to home, in Zimbabwe, there have been similar developments. The Lancaster House Agreement ensured that land could not be expropriated for land reform, it could change hands only via the market on the basis of "willing buyer, willing seller". Thus there was no effective redistribution of land to the peasants who had waged a costly war against the white ownership of the richest parts of the country. Popular disappointment and disillusionment were so high that the government swung entirely the other way once the 10 year period of the Lancaster House Agreement was over. It introduced measures to provide for the summary taking of farms with no legal oversight or basis for establishing fair compensation. Such provisions are unlikely to assist the landless and poor because the very lawlessness of the process encourages corruption.

Developments such as those in Zimbabwe, India and squatter areas in South Africa are probably what motivate the pro-property lobby to look for tighter and tighter controls and constitutional guarantees to protect existing property relations. It is ironic that it is their over-zealous controls which create the very scenario they are desperate to avoid.

**THE ALTERNATIVE APPROACH**

**No property clause - a normal and viable alternative**

The alternative is simply not to entrench a property clause in the bill of rights. This does not imply that property rights will fall into chaos. Many highly developed countries such as Britain, Holland, Canada and New Zealand do not constitutionally entrench property rights. Instead they rely on laws such as expropriation acts to control the circumstances under which property may be taken from current owners. Until 1994 a similar situation existed in South Africa. White people's land could be expropriated, but only in terms of a circumscribed legal process. The legal system protected the interests of white people very well. The problem was that different legal systems applied to black and white people, and so there were no equal protection to black South Africans. In future that type of racial discrimination would be unconstitutional in terms of the equality
provisions of the constitution. Furthermore the sections of the constitution dealing with administration due process would protect owners from arbitrary state action such as that introduced by President Mugabe in Zimbabwe.

Building a legitimate system of property rights on shared values

The strongest and best protected rights are those which enjoy widespread subjective acceptance and respect. In this context, the only way to re-legitimise land law and build a stable system of property rights is to build on the underlying values and concepts which are prevalent in our society. This requires moving beyond the narrow self-interest of using "property rights" to entrench the result of apartheid, and starting to build a viable system which is widely accepted as legitimate.

Modern Developments in Property Law

The basis of this system is that the individual's security and protection is best served by the stability and legitimacy of the wider society, and the reciprocity of the rights and values embodied in the system of relative land rights. This kind of pragmatic acceptance of reciprocal rights and the implication of sharing the land asset is found the African land ethic, but goes beyond African society. Recent developments in Europe embody a move away from the absolutist notion of exclusive individual ownership rights, in favour of shared use rights and the notion that property is a natural and national asset which imposes not only rights but also obligations on owners. This approach is embodied in the German Constitution which states: "Property shall involve obligations. Its use shall simultaneously serve the general welfare." It is also exemplified in conservation laws which restrict owners' rights to abuse society's national assets.

Pragmatic negotiations in South Africa

Recent developments in land issues mirror the tendency towards pragmatic solutions based on recognising and accommodating reciprocal rights and thereby stabilising the overarching context of property rights. Thus negotiations are taking place between farmers who obtained land which had been the subject of forced removal, and the affected communities. Companies are approaching long-term labour tenants to find a way of dividing the land or sharing its use. In some cases, farmers are cutting off adjoining sections of land to make farm villages. Conservationists are accepting and recognising pre-existing land rights in reserves.

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5 Catherine Cross has written extensively about the African land ethic, which applies in peri-urban as well as rural situations. See in particular Informal tenures against the state: Landholding systems in African rural areas in A Harvest of Discontent: The land Question in South Africa Idasa 1891.

6 Andre van der Walt has written extensively on this subject. See for example Towards the development of post apartheid land law: an exploratory survey 1990 De Jure 1-45.
The overarching context is that these landowners believe they cannot defend their property against future political intervention and arbitrary land invasions unless they take steps to address the gross inequalities of the past and stabilise the situation by recognising black vested rights to part of their land. In these negotiations African land claimants are saying that as long as white owners are prepared to "share" with them, they will reciprocally recognise their land rights.

CONCLUSION

A constitutional guarantee that existing title deeds constitute "basic human rights", and that present owners need never give up anything except in extremely limited circumstances, and then only with market value compensation, undermines the incentive to reach such settlements. A property clause will lull existing owners into a false sense of security that there is no need for change because the status quo is both legitimate and legally guaranteed. Yet is neither. Even the previous government, with the levels of force at its disposal, could not contain "squatting" and land invasions. It certainly never managed to legitimise the current distribution of land, nor to "criminalise" "squatters" in the eyes of the general public.

By taking away the incentive for pragmatic solutions based on shared notions of fairness, the property clause condemns "property rights" to be a euphemism for white privilege. It severely compromises the government's capacity to introduce basic and necessary land reform measures. And on in the process, it precludes the development of a shared and legitimate system of property rights. Thus we are condemned to remain within a unstable system of property rights, where violence and force are fast becoming the means and measure of land transactions. Within this spiral no property rights are secure, and the poor and landless have to take enormous and illegal risks in order to survive. Notwithstanding these risks, the tenuous "rights" they obtain will remain vulnerable to the increasing power of war-lords and "squatter patrons" as land is increasingly acquired and protected by force of arms and numbers, rather than within the law.

It is ironic that over-zealous attempts to protect private property will have the opposite effect to that which is intended. Neither the constitution nor the law can contain certain levels of Inequality. Wishing the problems away with a "constitutional guarantee" of property rights will encourage those who own dysfunctionally large pieces of land to bury their heads in the sand. In the short term those who suffer the most are the landless and people who own houses and land in the poorer areas. But in the long run the damage done not just to the legitimacy of existing property rights, but to the laws and the constitution which entrench this, will rebound on all South Africans in the form of uncontainable instability.
INSTITUTE OF MUNICIPAL TREASURERS AND ACCOUNTANTS

1995-08-07

SUBMISSION TO: CONSTITUTIONAL ASSEMBLY: THEME COMMITTEE 3: RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT (14 AUGUST 1995, PARLIAMENT)

BLOCK (V) : FINANCIAL AND FISCAL RELATIONS

With reference to your letter dated 1995-07-17 (addressed to Mr T F Meyer, Boksburg), I attach hereto two documents, as requested.

Some of the points may have been covered in both documents. However, because of the time constraints, it was not possible to consolidate them into one document and your indulgence in this regard would be appreciated.

E. D LANDSBERG
City Treasurer (Cape Town)

RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

BLOCK (V) FINANCIAL AND FISCAL RELATIONS

INTRODUCTION

The successful future of local government will depend on how well local government can perform during this interim period in terms of quality of financial management, and the degree to which the community is involved and acts responsibly. Ultimately, it will revolve around whether services can be delivered effectively, efficiently and economically and paid for by the community. As is the experience in all public sector endeavours, the key to the whole process will be affordability and financial viability. Fundamentally, fiscal and financial management best lie where decisions take place and linked to autonomy in raising revenue - an important concept.
The Constitution of the Republic of South Africa (Act 200 of 1993) includes certain constitutional principles that will also appear in the 'final' Constitution and which will affect inter-governmental fiscal relations in the new South Africa.

Clearly, these provide for local governments to have executive powers and functions that will enable it to function effectively on a basis which is conducive to financial viability with a constitutional right to own taxing powers, as well as an equitable share of revenue collected nationally so as to assist to provide services.

The Financial and Fiscal Commission has a responsibility to apprise itself of all financial and fiscal information relevant to local government, and to render advice and make recommendations to the relevant legislative authorities. Undoubtedly, the Commission has a very difficult and wide range of responsibilities pivotal to the whole system of future financial relations between the different levels of government. The credibility and acceptability of its recommendations must create certainty, transparency and trust in the whole set of inter-governmental fiscal relations in South Africa, which will also influence the country's internal political stability.

The Institute of Municipal Treasurers and Accountants (IMTA) is anxious and willing to assist the Commission as far as possible.

**TRANSITIONAL PROCESS COSTS**

Management of the transitional process will not be easy. Financial arrangements specifically are likely to be a major key exercise while being intricately linked with politics and administration. South Africa is characterised by a unique set of circumstances which by all accounts, when compared to foreign countries - is more complex, political, and volatile. As an example, it took the United Kingdom a few years to achieve reforms, whereas while New Zealand was able to complete the main process over two years, with a few areas following on.

What particularly distinguishes the South African reform, are, *inter alia*, factors such as:

- the high proportion of new councillors, many drawn from disadvantaged community groups who were denied from acquiring the skills necessary to manage highly developed urban areas;
- absorbing geographical areas neglected in terms of services, facilities, and advanced industrial and commercial activities;
• the integration and recruitment of staff from ethnic groups whose knowledge and skills have been suppressed in the past.
• a non-payment culture - results of political protest, poverty and adverse economic conditions;
• restraints imposed on councils’ ability to increase rates, tariffs and rents;
• significantly reducing inter-governmental transfers;
• escalating militant labour union activity - coupled with demands for significant increases in remuneration, fringe benefits and improved service conditions.
• a dramatic reduction in the number of local authorities which in the metropolitan areas require more extensive negotiations. When accompanied by material border changes the consequential required resource audits, rationalisation, and re-allocation of all resources will be prevalent for some time to come.

Practically all of the above factors, and many more, will cause additional expenditure and in the case of some, significant costs. In particular, the integration of Black local authorities’ needs special mention. At the request of central government Strategic Management Plans have been developed which identifies, assesses and costs the restoration of collapsed infrastructure which presently deny the community basic services. Even restoration will not ensure an adequate level of services and extensions and new works will be necessary. Further, the operation of the services will demand much greater funding than that of the previous and existing fiscal transfers. Inadequate fiscal transfers were the cause of the present situation. Unless, for the foreseeable future, adequate fiscal transfers are received, the situation is unlikely to be remedied.

Re-orientation of existing personnel to re-direct efforts to areas where services are inadequate requires, not only a hefty paradigm shift in thinking and attitudes, but also consultation with the community - this all affects efficiency and economy and has a cost attached.

Consequently, the implementation of the Constitutional Principles and Provisions as they relate to local government, is imperative.

While financial restructuring between levels of government must look at the long-term, circumstances now and for the next five years demand short-term measures which can be reviewed again in, say, five years. Already the support services to the democratic process have experienced a greatly increased workload in servicing the new and larger councils. More time and effort is necessary to ensure a transfer of knowledge, insights into the reasoning behind past policies and practices, as well as exploring new initiatives and alternatives when clearly new directions and paradigm mindshifts are called for.
Under transitional conditions it would be impractical to streamline, or flatten the organisation. This means that the potential to save costs in this way is negative. On the contrary, transitional process planning indicates a need for additional staff to free dedicated experienced staff to manage the transition. Add to this the pressure to apply affirmative action policies and it will readily be seen that additional expenditure is probable.

The only hope of containing these additional costs and achieving some savings is a successful partnership with Unions, with less appeal actions, increased productivity and a culture of striving for excellence. The chances of achieving this however are negligible. In time, amalgamation and restructuring may well bring rationalisation and economies, however, during the transitional stage and probably the interim period, to depend upon such savings will be imprudent.

**AMALGAMATION AND RATIONALISATION**

The national government has committed itself to making a significant financial contribution to the RDP through decreasing certain departmental expenditure and shifting priorities, and by rationalisation of functions and eliminating duplication of administration.

The rationalisation of local government through amalgamations should similarly achieve financial savings. However, in the short-term much of these savings will not materialise due to the assurance given on security of employment, strong trade union resistance, synchronising conditions of service and early retirement. In any event, experience has shown that in the short-term amalgamations bring additional one-time costs which will off-set any potential savings. However, while in the long-term savings will more than likely materialise, additional infrastructure, facilities and maintenance will result in additional staff and other costs which will inevitably off-set any savings.

Nevertheless, if during the process of amalgamation, the transition is not managed properly and resources optimised, wasteful and unnecessary expenditure could be significant. The following are merely a few examples of numerous tasks:

- harmonisation of systems such as computer, billing and financial;
- training and re-training of staff;
- remuneration parity costs such as pensions, unfunded leave and housing.
The cost of reform is ad hoc and abnormal and local authorities should be assisted in funding by the State. It could in reality be construed as RDP expenditure.

MAINTENANCE OF ASSETS

When budgets are subjected to pressures and inadequate funds, assets are often deprived of proper maintenance and invariably there is little control over this. In addition, a shift in the allocation of funds can be expected in terms of the Reconstruction and Development Programme, or a redistribution of wealth. Insufficient maintenance expenditure on present infrastructural and other assets will result in asset stripping and can lead to a disastrous situation very quickly. Should this happen repeatedly, the collapse of infrastructure will be inevitable. Therefore, proper maintenance must have a priority claim over funds. Visible depreciation can be monitored and maintenance planned, but buried / underground infrastructure is subject to invisible depreciation and is at risk in contributing to a growing unknown liability which may have serious consequences. This hidden depreciation can far exceed the value of new assets created.

HOUSING

Although Housing is receiving specific intense consideration, brief comments on a few points are appropriate.

- Development of housing schemes in terms of the Housing Act has seen associated costs which have been borne by local authorities and the ratepayers in varying degrees between individual local authorities.

- Not all local authorities are affected in the same way - some on a relative ratio to total budgets have on the one hand undertaken more extensive developments than others, and on the other hand have concomitantly extensively created social infrastructures.

- Because the national government was responsible for black housing and because of demographic variances between provinces the consequential burden of social costs have impacted more heavily on some provinces than others. Furthermore, this geographical imbalance has been compounded by the varying structure and intensity of industrial development and natural resources. The perspective of this can be measured if a study is made of the major cities of Cape Town, Port Elizabeth, Durban, Pretoria and Johannesburg.
• Housing reserves are proving to be inadequate for maintenance and potential bad debts and therefore the soundness of Housing Accounts is at risk of collapsing in some areas. **Any writing off of arrears by the national government must embrace not only black housing, but also coloured, Indian and possibly certain while schemes.** Not to address all arrears equitably would be politically unacceptable. However, arrears comprise not only interest and redemption on national government loans, but also contributions to reserves for community facilities, maintenance and services. In consequence, **the financial strength of these reserves have deteriorated significantly.**

**PRESENT INCOME SOURCES AND REASONS FOR RETENTION**

**Income**

Basic Principles:

• Tariffs should be appropriate. Much has already been researched on the subject and a large quantity of literature exists. It would be impractical to debate this issue in this paper.
• Also, who benefits from services, in whatever form, should pay for such services.
• Affordability must be addressed.
• Individuals should be subsidised on merit, but not communities,
• Cross-subsidisation between and within services must be accepted for at least the next five years.
• All financial assistance should be separately accounted for and transparent.
• Charge systems should be simple and easily understood.

**Property Tax**

Property valuation and rating is complex (particularly improvements) unpopular, difficult to administer, and compounded by legal requirements. As community interest, participation and capacity intensifies, this tax will increasingly become more unpopular and probably controversial. When the fundamentals of the RDP are considered then the question can well be asked whether the system, to some degree, does not oppose the RDP goals of:

• a people driven process;
• home ownership;
• housing;
• assisting the elderly and poor;
• land reform;
• economic restructuring.

Because property rates represents such a significant proportion of total Rate and General Service income, and further, because of its unpopularity, Councils tend to restrict strongly the annual increase. However, other sources of income have even greater limitations, eg. State grants and subsidies.  **The result is severe restrictions on expenditure at a time when community demands are growing.**

Nevertheless, as an income source, it has many advantages which are well documented and therefore unnecessary to elaborate on in this memorandum, except to say that it has a significantly strong character of a wealth tax, which is appropriate in these times.

Furthermore, considering:

• the difficulty of substituting the tax with another income source;
• the major burden of restructuring which militates against additional major changes;
• the restricted scope of additional sources of income;

it appears that on balance the **tax should be retained, for the foreseeable future.**

Nevertheless, serious consideration should be given to the following

**Recommendations:**

• simplify the valuation system;
• speed the whole property systems process, including transfers;
• standardise on-site rating;
• for existing Black local authorities and informal settlements consider a simple valuation or its equivalent in a flat rate;
• introduce for the lowest portion of a valuation an exemption from the payment of property rates in favour of a flat rate which would:
  - simplify Black local authority property rating;
  - assist the provision of housing for the low income group.
• standardise property tax relief for the elderly persons by using the Natal system.
• consider reducing, over time, reliance on property rates as a major source of income.

Sewerage and Refuse
Up until the time of the Browne Committee investigation, most local authorities included the recovery of costs for sewerage and refuse services in the property rates account. Flowing from that committee's investigations these two services were defined as economic services for which a separate tariff and account based on full cost recovery was approved and recommended for implementation. A move to a tariff related basis from a valuation of property basis was intended. In consequence, a range of tariff structures has developed across the country based on different methods, and impacting upon low-income groups differently. Some local authorities have continued to use valuation as a base, but accounted for separately. **True cost tariffs for these services are more burdensome to low-income groups than those based on property valuation which effectively have an in-built subsidy, in respect of these groups.**

It will be impractical to charge economic tariffs to balance these service budgets in the newly incorporated Black local authority areas - being essentially services of a health nature. There is also a VAT implication as these services attract VAT, which compounds the burden. Because these two services feature prominently in the RDP as basic essential health services they justify consideration for a tariff structure that subsidises the low-income group. Reverting to a valuation system would be an alternative but has the disadvantage of the subsidy not being transparent.

**Recommendation:**

**Structure a tariff that subsidises the low-income group.**

**Ambulance**

This service is intimately related to the Health Service and therefore any net cost should form part of that service and costed separately. Ratepayers should not be expected to cover any ambulance costs at all; **this should form a charge against the Provincial budget and is recommended accordingly.**

**Fire Protection**

While this service may be available to the whole city, an analysis of past experiences may reveal that the potential real risk and availability need has a ratio of business to residential greater than business property rates to residential property rates. **Possibly business should**
pay more. The basis upon which business should be charged could for example be a levy on the insured fire cover value which business takes out.

Traffic - Parking Fees

The enormous cost of building roads justifies a serious look at many inter-linking considerations in those areas where heavy traffic use is problematical. Many alternatives exist to discourage road use and levying high parking fees is merely one method. Consideration should be given to exploiting parking income as a greater potential source of income than at present.

Electricity surplus

In terms of earlier recommendations of the National Electricity Forum (NELF) the present rates relief benefit was intended to be phased out. Effectively this would have meant a loading of property rates of anything ranging between 15% - 30%, depending upon the local authority. Furthermore, the cost of all general administration support services previously charged to the Electricity service would need to be recovered from property rates. In addition, all maintenance work, etc. previously performed for the corporate organisation by the Electricity Service, will have to possibly be contracted out at an increased cost. This serious impact must be assessed not in isolation but as part of the overall financing package and other burdens which local government will be expected to carry.

The following are advantages of a package of services:

- A local authority offers a range of services many of which are non-productive, non-measurable in use, and some constitute social or community facilities. Having a mixed package of these and trading services allows flexibility in rates and tariff setting.
- Economic cycles affect various services differently as also capital development requirements, cost increases, and ultimately marginal costs.
- The ability to cross-subsidise allows more discretion in financial management to smooth and optimise the annual impact upon the community.
- The principle of creating a surplus and what to allocate it to can vary from trading service to trading service.
- Needs vary significantly over time and the "mixed package" allocation, including electricity, can be regularly reviewed.
In the final analysis, if a surplus is purposely generated on electricity who is to say whether such should be spent on electricity, or social services or Housing or Health or Security?

To significantly disturb this balanced package during:

- poor economic conditions;
- major geographical re-structuring;
- major political restructuring;
- a potential re-arrangement of the roles of levels of government;
- a re-arrangement of national income sources;

is totally inadvisable!

**Recommendation:**

Retain the present status quo for at least five years and provide appropriate legislation to protect it.

**Other Regional and General Service Income**

These comprise a host of items, wide in variety, but mostly of insignificant value, which in a financial context are not adequately meaningful to comment upon. Examples of these are libraries, swimming pools, cemeteries, etc.

**Turnover and Payroll Tax (RSC Levies)**

These should be retained, despite any shortcomings, as local authorities income. In the short-term the income should be considered for:

- writing off arrears;
- contributing to shortfalls on the incorporation of Black local authorities to supplement inter-governmental transfers;
- contributing to strategic management plans for Black local authorities;
- contributions to RDP projects.

**NEW SOURCES OF INCOME**
Firstly, the "Framework Document" issued by the FFC, for comment covers certain principles and proposals which are supported strongly, and will not be commented on in this document, except to emphasise the points made that the system should be inherently easy to administer and, more importantly, should be in place before local government assumes fiscal independence.

Secondly, the document "Possible Future Sources of Finance for Local Government, paper delivered to: The Financial and Fiscal Commission" on page 5 - 6 covers some additional sources of revenue, which will not be repeated here.

Thirdly, the following additional sources, not mentioned in the document, also warrant serious consideration:

- A parking levy on all regular daily full-time parkers. For this purpose all parking areas would need to be registered and a collection system implemented.
- A bed levy on all commercial residential establishments.
- Regional lotteries.
- A share of the petrol levy.
- A fire protection levy on property insured.
- Betting and totalisator taxes.

Fourthly, the following should be considered for existing revenue sources:

- Increasing significantly short-term parking fees, particularly in major urban areas.
- Economic lending library charges with concessionary rates for low-income earners and the elderly.
- Using part of RSC levies during the Transition period to contribute to debtor arrears write-offs.

ARREARS AND NON-PAYMENT FOR SERVICES RENDERED

The burden of arrears as a result of economic circumstances, the non-payment culture and boycotts of the past will vary from authority to authority. These debts have now accumulated to large sums. Consumer arrears have escalated so dramatically over the past three years that an irretrievable position has either been reached or is fast approaching. A major concern is that despite the Masakhane Campaign, the culture of non-payment will continue for some time and that a small economic base would, in the interim, have to pay for the broader base, which
could lead to significant increases for those already paying for services. In these circumstances, the provision of new services merely compounds the problem.

The principle of writing off of arrears must be properly understood. Local authorities adhere to sound and proper accounting principles, and consequently accrue accounts not paid in the Balance Sheet as Debtors. **Debts cannot be written off without cash.** Consequently, debt write-offs require an overall increase in rates and tariffs to generate cash. **The only equitable way to deal with this problem is for the national government to pay for the major portion of these debts.** Debts of individual consumers should not be written off "across the board". Should any funds be forthcoming for the purpose, then individual consumers should be required to make application so that each case can be treated on its merits. **Basically assistance should be given only to the poor and elderly.**

The Agreement on Finance, Service and Service Rendering signed on 1994-01-20, dealt with debts of Black local authorities exclusively. Since then the similar plight of residents of other areas has also been raised as an issue to which no positive response has been forthcoming. **Confusion surrounds the writing off of arrears and no coherent clear message is being given.** There is now a widely held perception that arrears in all areas should be written off. The Premier of the Western Cape, when recently referring to the issue, has described such treatment as nothing other than discrimination. Thus an amendment of the Agreement on Finance, Service and Service Rendering signed at the National Summit for Local Government on 1994-01-20 is imperative. **This is an important issue which needs to be speedily resolved otherwise it could well impede progress on the RDP at local government level because of its financial significance.** Debt arrears, Inter-governmental Grants, the restructuring of local government and the RDP are inextricably linked.

During the "Transition period", serious consideration should be given to "cleaning the slate" so that progress on other fronts will not be impeded. **A combination of State funds, RDP funds, RSC levies, local government funds and debtor share should be considered.**

E D LANDSBERG  
City Treasurer (Cape Town)  
(on behalf of the IMTA)

1995-08-07

ADMINISTRATION AND FINANCE
OWN SOURCES OF REVENUE FOR LOCAL GOVERNMENT STRUCTURES

1 WHAT SHOULD BE THE OWN SOURCES OF REVENUE FOR LOCAL GOVERNMENT STRUCTURES

1.1.1 Section 175(3) of the Constitution of the Republic of South Africa, 1993 makes, provision for:

"A local government shall to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.

1.1.2 Section 178 of the Constitution reads:

“(l) A local government shall ensure that its administration is based on sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.

(2) A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction.

(3) A local government shall be entitled to an equitable allocation by the provincial government of funds, and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations, taking into account the different categories of local government referred to in section 174(2)."
1.1.3 Section 199 of the Constitution makes provision for a Financial and Fiscal Commission and reads as follows:

“(1) The objects and functions of the Commission shall be to apprise itself of all financial and fiscal information relevant to national, provincial and local government, administration and development and, on the basis of such information, to render advice and make recommendations to the relevant legislative authorities in terms of this Constitution regarding the financial and fiscal requirements of the national, provincial and local governments, including:

(a) financial and fiscal policies;
(b) equitable financial and fiscal allocations to the national, provincial and local governments from revenue collected at national level;
(c) taxes, levies, imposts and surcharges that a provincial government intends to levy;
(d) the raising of loans by a provincial or local government and the financial norms applicable thereto;
(e) criteria for the allocation of financial and fiscal resources; and
(f) any other matter assigned to the Commission by this Constitution or any other law.”

1.1.4 The onus on a local government to make provision for access by all persons residing within its area of jurisdiction to the services referred to in Section 175(3) of the present Constitution should be entrenched in any New Constitution. However, the proviso to this Section namely “...... provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable” gives rise for concern.

1.1.5 In many areas communities have access to these services which for both financial and practical reasons are not sustainable. Whilst it is envisaged that the Masakhane Campaign should over time eliminate this state of impasse in service delivery and financial collapse, the economic aspects relating to the social structure and fabric of society in terms of sustainable affordability levels will remain the weak link for a considerable period of time.

1.1.6 Responsibility for the performance of service or product delivery at any level of government must by necessity be supported by an entrenched right to financial sources
sufficient to meet such responsibility subject to agreed minimum levels of service and or standards.

1.1.7 Accordingly, it is deemed essential that the question of local government having access to funding sources sufficient to meet the responsibilities with which it is or may be charged with be entrenched in any New Constitution. In this regard, Section 199 of the present Constitution lacks sufficient obligatory responsibility should the recommendations and advice provided to the relevant legislative authorities not be adhered to, followed, or adopted.

1.2 PRESENT SOURCES OF INCOME

1.2.1 The financing of the activities of local governments just as in the case of higher levels of government, is wide-ranging and complex. All activities of a local government have, to a greater or lesser degree, financial implications and affect the local economy in one way or another. Collectively, the local government level has a substantial impact on the national economy.

1.2.2 The administration of a modern city or town and the availability and maintenance of the public services supplied to inhabitants and consumers can, without exaggeration, be described as a formidable undertaking. Witness to this is borne out by the annual total local authorities budgets throughout the country. Expenditure incurred is largely determined by the availability of revenue and the proposition may therefore be made that in the public sector income is inextricably linked up with expenditure. It is important to note that revenue is not collected to show a profit but to provide essential goods and services.

1.2.3 Expenditure may not be incurred unless the necessary finance is available or unless provision has been made by means of legislation or otherwise for the finance to be raised, for example by taxation, tariffs or user charges. For the past few years, (the budgets of local authorities bear testimony to this) local authorities have been experiencing difficulty in meeting the ever growing demands of their communities and in finding the additional finance to cover the cost thereof.

1.2.4 The Ordinances governing local government activities need review in the light of not only the changing role of local government, but the financing of its changing role. In particular, this becomes apparent when cognisance is taken of local governments role in the reconstruction, developmental, economic and social spheres.
1.2.5 Essentially the present sources of income available at the local government level are:

- Property tax;
- User charges;
- Consumer levies and tariffs;
- Specific purpose subsidies \[1\]
- Specific purpose grants;
- Inter-governmental grants as they relate to former Black Local Authorities;
- The regional services and establishment levies.

1.2.6 In view of the fact that particularly in the case of the property tax there is little likelihood of another more equitable tax being made available to local governments sufficient to equate to the yield of the property tax, it is imperative that all existing sources of revenue be retained.

1.2.7 Most local governments who distribute electricity as well as the few who currently generate electricity determine tariffs so as to give rise to a surplus. Surpluses are transferred to general operating account and are commonly referred to as "a contribution in lieu of rates".

In as much as these contributions are limited to a maximum surplus margin of 10% per annum - in accordance with a decision of the Permanent Finance Liaison Committee - it is considered desirable that the limit, which is often exceeded by a number of local governments, should be prescribed through appropriate legislation.

1.3 ADDITIONAL SOURCES OF REVENUE

1.3.1 The question of additional sources of revenue at local government level is highly complex when viewed against the backdrop of the functions and powers of each level of government, National and Provincial government policies, the varying degree of financial investment and the impact on operating account necessary in the resumption of services delivery (both engineering and administrative) in areas where the provision of service(s) have collapsed, upgrading to acceptable or prescribed levels/standards of service, the extension of existing services as well as the provision of new services. These issues together with the restructuring of government at local level with its associated costs flowing from reparation, rationalisation, administrative and political issues have to be supported by access to the required financial services. In view of
the short-term impact in respect of the latter mentioned items which in any event relate to National government requirements, funding should be made available by way of Inter-governmental Transfers.

[1] as examples fire brigade, health, roads

1.3.2 Possibly the most internationally acknowledged report on additional sources of revenue is the Layfield Report.

1.3.2.1 According to the report there is a long list of yardsticks of divergent importance which may be applied in judging the appositeness of local sources of revenue. In the first place any new main source of revenue must be able to stand two basic tests. The first is that such a source must be able to generate a material amount of revenue (in other words, it must be highly productive). Material in this context means that such a source of revenue should yield an income large enough to cover approximately half of the net operational costs of a local authority. It should be borne in mind that the Layfield Report is actually looking at a source of revenue to replace assessment rates and that, where new sources of income in addition to assessment rates are being considered, the yardstick of the product, generating approximately half of the net operational costs, may possibly be somewhat relaxed, but sufficient to meet the objective.

1.3.2.2 The second test laid down incorporates the principle of local authorities being accountable to their voters for every item of revenue collected or expenditure incurred, being unfailingly adhered to. As a consequence the level and, more importantly, any change in the level of any local source of revenue to be determined locally, must relate directly to local expenditure, and the effective financial burden should also not be borne to any material degree by residents or consumers outside the locality concerned. This would ensure that elected responsibilities would always be fully alert to the consequences of their decisions regarding expenditure as they would be financially dependent on, and answerable to, local ratepayers and voters.

1.3.2.3 In investigation of other possible sources of revenue consideration should be given as to what extent local voters, as opposed to the general public, would be called upon to contribute to cash revenues and to what extent the financial results of every local authority's decisions would be evident to its local voters.
1.3.2.4 Where it is found that a new source of revenue has the potential to generate a material yield and where its adoption would promote local accountability, the following considerations would have to be taken into account:

* The distribution of the tax burden among individuals and firms (tax division).
* The social and economic consequences of the tax - its influence, for instance, on migration patterns and economic activities in the areas concerned; the outcome the tax may have on the fiscal and economic policy of the State.
* Variations in the acceptability and yield of the tax when economic conditions change (the elasticity of the tax).
* The predictability of the yield and its variation from area to area.
* The cost of collection and administrative complexity of the tax.

1.4 FINANCIAL AND FISCAL COMMISSION

1.4.1 However, within the South African context the Framework Document For Intergovernmental Fiscal Relations (First draft for discussion) prepared by the Financial and Fiscal Commission is seen as a milestone in the assessment of the financial and fiscal arrangements (and impacts thereof) necessary taking into account the powers and duties that are or could be performed at each level of government.

1.4.2 Apart from the retention of all existing sources of revenue, which is dealt with in paragraph 1.2.6 above, what will be of critical importance to local government in the future is the assurance that revenues allocated by Central and Provincial levels of government, following consideration of the recommendations of the Financial and Fiscal Commission, will in fact reach the local government level and not as in the past where previously agreed allocations have been reduced to meet so called other more pressing demands.

1.4.3 As stated in paragraph 1.1.4 above the responsibility for the performance of service or product delivery at any level of government must by necessity be supported by an entrenched right to financial sources to meet the net cost of such responsibility.

The only manner in which the local government level can be assured of receiving the allocations referred to in paragraph 1.1.2(3) above is through entrenchment in any new Constitution.

1.5 RETENTION OF PRESENT SOURCES OF REVENUE
1.5.1 Until such time as additional sources of revenue are made available which would be sufficient to meet not only the present, but also future demands - all the present sources of revenue including the regional services and establishment levies must be retained.

1.5.2 In a number of instances the legislation, procedures and tariff structuring relating to certain sources of revenue should be reviewed. By way of an example, the property tax based on property valuations is a prime candidate.

1.5.2.1 In as much as property rates generate the bulk of operating income at local government level, valuation procedures, which are governed by legislation, are cumbersome, time consuming, complex to administer and very costly.

1.5.2.2 When thought is given to the requirement contained in Section 178(2) of the present Constitution that “...... fees, taxes and tariffs shall be based on a uniform structure.......” which by implication necessitates the valuation of property in the former Black Local Authority areas in order to levy property taxes it becomes abundantly clear that serious attention must be given to the revision of the procedures relating to the tax base.

1.6 STANDARDS AND AFFORDABILITY

1.6.1 Through the integration of previously separated local governments which in many instances includes former Black Local Authority areas it has highlighted the stark differential in service provision and standards, local governments are faced with the task of bringing about an acceptable level of parity. This could include a reduction in standards in certain areas with a concomitant increase in others.

1.6.2 The integration of previously separated local governments as well as areas previously administered and or funded by Provincial and other government agencies involving informal and squatter units has given rise to a new dimension in this regard. In many instances virtually no local government services were provided.

1.6.3 Whilst on the one hand it is necessary to improve and upgrade the provision of services in previously disadvantaged areas, it has also become necessary to introduce or provide adequate levels and standards of service where these previously did not exist.
1.6.4 The net economic impact will, bearing in mind the income levels of the communities involved, be of such magnitude that in most instances it will render the necessary actions unaffordable without external financial assistance i.e. inter-governmental grants OR the present sources of revenue available to local government being expanded.

1.7 CAPITAL FINANCING SOURCES

1.7.1 The following are the main sources of finance normally employed by local authorities to finance capital expenditure projects:

External loans
Internal capital reserves/funds
Public contributions
RSC grants and/or loans
State housing funds
Contributions from Operating Account
Trust Funds
Grants - mainly ex Provincial Government
Inter-governmental Grants as they relate to former Black local authorities

1.7.2 It is of paramount importance that not only these sources be retained but also supplemented the form of which could be specific inter-governmental grants, international donor finance and the like. However, the impact of all capital investment programmes must be carefully assessed in order to ensure that the resulting impact on operating account in the form of interest and redemption payments (where loans are involved) and running costs such as staff costs, maintenance etc. do not give rise to unaffordable tariffs and charges.

1.7.3 Bearing in mind the huge demand for capital funds over the next five to fifteen years in order to meet the requirements of all levels of government, local governments should retain the right of free access to both the money and capital markets within a structured environment in order not to create imbalances in the supply of investment funds, which otherwise would be accompanied by highly fluctuating interest rates.

1.7.4 Although, opposed by certain quarters, the concept of prescribed investments, and the attendant classification of municipal stock as investments failing within this class, may be of considerable merit in local government lobbying for the re-introduction of this
concept, particularly in view of the substantial demand which will be made on local
government over the next ten to fifteen years.

1.7.5 The introduction of municipal bonds - under the supervision of the Department of
Finance - for selected capital projects, such as the provision of infrastructure for
housing development, or social projects is strongly supported. However, such bonds
will only prove viable if all or part of the interest paid on such bonds is non-taxable.
The total amount which may be raised annually in respect of such bonds will thus have
to be controlled by the Department of Finance, and the allocation of this amount
between local authorities will have to be similarly planned and scheduled by the
Department.

1.7.6 In regard to housing funds, the allocation of State loans and subsidies will have to be
co-ordinated in order to ensure that adequate finance is timeously available, and that it
also be possible for possible general borrowing requirements to be supplemented in the
short term through State funding. In the past the allocation and scheduling of these
loans and subsidies tended to be a protracted matter, giving rise to innumerable
difficulties for local authorities in planning and estimating costs particularly in the case
of housing projects.

1.8 DEVOLUTION OF FUNCTIONS

In regard to functional competencies, should any functions be devoluted to the local
government level, presently the responsibility of either Central or Provincial
Government, such devolution must by necessity be accompanied by either the
devolution of the funding source OR a new revenue source made available.

1.9 SECTION 178(3) OF THE CONSTITUTION 1993:

1.9.1 The retention of this clause in any new Constitution is deemed essential in view of the
fact that no other new source of revenue to finance the legitimate demands and
responsibilities of local government is likely to generate the level of finance necessary
to comply with National and Provincial Government policies.

2. How Will Access to Funds Be Protected?

2.1 Ordinances
The various Provincial and Local Government Ordinances currently provide for and empower local authorities to raise revenues by way of property tax, various charges, tariffs etc. in order for local authorities to meet the cost of discharging their responsibilities, which are also prescribed in the aforementioned Ordinances.

2.2 Acts of Parliament

Similarly, local authorities are charged with carrying out certain functions, the cost thereof being met by either Central or Provincial Government.

2.3 Constitution, 1993

2.3.1 In this regard, Sections 175(3) and 178 of the Constitution charge local government with providing various services and to ensure sound administration, public accountability and to render services in an efficient manner.

2.3.2 As a corollary to these responsibilities, the Constitution provides for the establishment of a Financial and Fiscal Commission whose functions are contained in Section 199 of the Constitution.

2.3.3 The advisory and recommendatory role of the Financial and Fiscal Commission insofar as the local government level is seen as of major importance in ensuring that both Central and Provincial Governments remain in an informed position of the fiscal arrangements necessary to ensure that local government can in fact finance its responsibilities.

2.4 In order to ensure that access to funds be protected, the relevant protection given in the present Constitution as referred to above should be entrenched in any New Constitution. In this regard, reliance is also placed on the Constitutional provision that local government is a function of Provincial Government.

3 Regulating Revenue Sharing and Inter-governmental Transfers

3.1 Revenue sharing should be seen in the light of total expenditure requirements at each level of government and the total income (including tax) pools also at each level. Each level of government has its specific responsibilities and in addition at National level, policy dictates affecting lower levels could also impact on requirements.
3.2 Prioritisation of expenditure at each level of government will within the democratic environment currently being structured, become an ever increasingly important tool in the revenue sharing process.

3.3 Regulating the revenue sharing process by and amongst stand alone model local governments within each Province by legislation, is not considered desirable in view of the negative impact this would have on the autonomy of the local government bodies involved.

3.4 However, in the case of the metropolitan areas the position is quite different with the Local Government Transition Act, 1993 making adequate provision for revenue sharing.

3.5 Inter-governmental Transfers, to ensure that local government is in a position to discharge all of its functions, irrespective of whether from National or Provincial Government level, have already been addressed in a number of sub-paragraphs under paragraph 1 above.

N. G. LOMNITZ
DEPUTY CITY TREASURER
CAPE TOWN
(On behalf of the IMTA)
1995-08-07
UNITED RATEPAYERS LIAISON COMMITTEE  
(comprising representatives of the Ratepayers' Associations of East London, Gonubie and Beacon Bay) 

29/05/95

May we submit the following suggestions for inclusion in legislation for new Local Government.

CODE OF CONDUCT FOR AN ELECTED COUNCILLOR

1. Must be a registered voter, plus compliance with existing regulations re not being in arrears in payment of Municipal Rates, no criminal convictions, and payment of deposit upon registration as a candidate, etc.

2. An INDEPENDENT CANDIDATE must submit a signed DECLARATION OF HIS INTENT as a Councillor, together with his deposit, to the TOWN CLERK.

3. Should a candidate be put up by any recognised body or organisation - i.e. Chamber of Business & Industry, Ratepayers'/Residents' Associations, political parties, church groups, etc. the organisation should prepare a mandate or declaration of their intent for the Candidate, which must be accepted, agreed to and signed by the candidate.

ALL SIGNED DECLARATIONS OF INTENT should be registered with the TOWN CLERK and remain available for examination at all times.

RECALL OF A WARD ELECTED COUNCILLOR FROM A TLC OR TMC:

Existing regulations re being convicted of a Criminal offence, non-attendance at meetings etc. to be amplified:

a. Should an elected WARD COUNCILLOR renege on his declared intent by voting in favour of a resolution knowing it to be against the wishes or best interests of his ward he must attend a meeting called by a petition of not less than 25 residents of the ward. If as a result of a meeting he receives a vote of no confidence and a petition of not less than two thirds of the number of votes by which he was elected, he must resign. He is entitled to defend himself and invite supporters to the meeting or call a separate meeting. His non-attendance at a meeting will be accepted as an admission of guilt, and resignation will then be automatic.

b. Should a Councillor not heed three warnings regarding bad behaviour at Council meetings, or for being inebriated at meetings, brief attendance at meetings, (i.e. he signs on at
meetings - stays for a short period - then departs), he shall be called before a FULL council and, on a two thirds majority vote, may be dismissed.

N.B. Dismissal or demand for resignation must never be in the hands of a few, or on an emotional matter, but only in the hands of a substantial number in his ward and after a fair hearing or on a 2/3 Council majority vote.

It is essential to now have a recall system for badly behaved, including drunk, incompetent or disinterested Councillors, or Councillors who ensure that they benefit personally in any way - be it through service, property or financially, but safeguards must be built-in to the recall system to ensure it is not abused.

c. Councillors must at all times be accountable to and aware of their wards residents' needs and should they be uncertain of how to vote in any matter of major importance to their ward they must consult the Ward's Ratepayer's Association or Residents’ Association, or call a meeting in the ward.

N.B. THIS DISCIPLINARY CODE MUST BE INCLUDED IN THE DECLARATION OF INTENT SIGNED BY EACH COUNCILLOR.

NOMINATED COUNCILLORS

The same rules of a recall system should apply, but NOMINATED COUNCILLORS must be accountable to their supporters (the organisation which nominated them) and subject to their dismissal/demand for resignation by the organisation concerned. This disciplinary code must be included in their DECLARATION OF INTENT.

JOHN BEER
CHAIRMAN
In response to your advertisement for public comment on the Bill of Rights, and in particular the environmental right (theme committee member - Mr John Tsalamandris), we are pleased to have the opportunity of making these representations. The writer is a director in our Environmental Law, Constitutional and Labour Departments (one of the few attorneys' firms which has a specialised department dealing with environmental issues in Cape Town).

Our suggestions are first:

• that an environmental right should be included in the Bill of Rights of the new Constitution, and:

• second: that such right should be formulated in the same or substantially similar way to the current Section 29 of the Interim Constitution (see below).

The reasons for this are as follows:

1 SUFFICIENT PRIORITY

1.1 The protection of the environment for both this and future generations is of such a high priority as to require the highest level of protection. The necessity for this protection is even more acute in the light of admitted and obvious past failures to prioritise, or even actualise environmental protection. This failure and imbalance needs to be brought into the consciousness of both the public and the organs of government which implement laws and policies and to give them the necessary teeth.

1.2 Each government department has its own interest areas, constraints and goals. Pursued independently, these are likely (and history reinforces this) to neglect, to a large extent at least, the conservation of the environment. The Environment Conservation Act has recognised the need for a single authority not only to co-ordinate matters which affect the environment, but to override other departmental authorities in specified areas if no consensus can be reached.

1.3 To leave an environmental right out of the Bill of Rights would be to demote this fundamental right in environmental concerns which already exists, is accredited and actualised, and would effectively deprioritise all efforts at environmental conservation.
2. **SALUTARY EFFECT**

The existing Section 29 of the interim Constitution already has a salutary effect on organs of State in their decision-making. The threat of an interdict to the Supreme or Constitutional Court strongly encourages due process, *audi alteram partem* and urgent substantive reasons for decisions. More than this, it effects policy decisions which now have to take into account environmental concerns. These involve social values, which in turn, need to be balanced with conflicting values enshrined in other Constitutional rights, such as the right freely to engage in economic activity.

3. **FUNCTION OF THE BILL OF RIGHTS**

Given the history of South Africa and the need for social change, the positive function of a fundamental right, recognised as such in the Constitution and allowing the right of individual participation in enforcement, is appropriate for the new Constitution. Many of the fundamental rights in the interim Constitution are cast in positive language which imply this type of function and there is no reason to exclude the environmental right when it comes to redressing past wrongs.

For example, our Bill of Rights does not serve the function of merely protecting minority rights from majority intrusion, or providing ordering principles for organs of state, or setting out value decisions to guide statutory interpretation and the exercise of administrative discretion. Pre-existing social standards can be challenged by direct individual action, and it should be regarded as essential that environmental standards receive the same standard of enforcement and protection as any other social standards.

4. **CERTAIN PROBLEMS**

4.1 **Broadness of Language/Ascribing a Meaning**

This problem is neither unique to the existing Section 29 environmental right, nor is it an insurmountable hurdle. The courts have to embark on an interpretational exercise in respect of every fundamental right and though admittedly some of the rights give more specific direction as to their content, others leave it to the Courts to determine the ambit. It is submitted that it is no more difficult in the case of the Section 29 right than a number of the other rights.

The Section 29 right is capable of precise judicial interpretation by reference to extra-textual sources. The term "environment" is a term of art, as used in international treaties, international arbitrations and court cases, foreign constitutions and court cases and the large body of environmental law.
Although a fundamental right in the form of Section 29 will initially lack the quality of certainty as to its ambit, over time, the right will be given substance by the courts, and the alternative of breaking down the right into more specific areas runs the real risk of omitting important areas that require protection. This is particularly so in regard to an environmental right as there are so many facets to the concept "environment" and this makes the flexibility of a clause like Section 29 most important. Hence broad, flexible language is the best option.

### 4.2 Courts deciding on allocation of resources

A valid criticism sometimes levelled at promoting so-called "third generation" rights to a Bill of Rights is that these require the courts to get involved in decisions regarding the allocation of resources, whereas they are not as skilled for this task as government departments are.

The counter-arguments are that, firstly, in by far the majority of cases in which courts would be required to enforce an environmental right, this would only indirectly impact on the allocation of resources by government. Secondly, one cannot neatly separate the protection of fundamental rights from the allocation of resources in society, and this on its own is insufficient reason to exclude an environmental right from the Bill of Rights. Thirdly, the same argument would apply to a number of other fundamental rights, and the special role of the Constitution calls for the courts in appropriate circumstances to intervene even if this sends the State back to the drawing board in terms of how to allocate its resources.

In general, it is submitted, the benefits of including environmental right in a Bill of Rights clearly outweigh any problems arising from doing so.

### 5. THE INTERDICT REMEDY

Although, for example in terms of Section 98(7) of the Interim Constitution, the Constitutional or Supreme Court may order an organ of State to refrain from unconstitutional conduct and to correct such act or conduct in accordance with the Constitution, it is likely that most forms of action based on environmental constitutional right will be for a restraining interdict on an organ of State. This carries the twofold advantage of preventing any damage before it occurs, and also preventing major expenditure before unconstitutional actions or projects are implemented.

The net effect is that the remedy of enforcement by interdict affords a potent right to the individual or interest group, without causing substantial cost or harm to the government.
We are aware that these representations are in summarised form and touch on a number of complex issues, and we would be pleased to have the opportunity of making further representations on any relevant aspects should the need arise. Please do not hesitate to contact the writer in this regard.

P. F. L Kantor
RE: LOCAL GOVERNMENT

As a lifelong resident of KwaZulu Natal, I can speak with authority on the system in place here and not on the other provinces. However, I think my proposals would be equally equitable in the others as well.

In order to understand the proposals, it is important to know the present Autocratic system in KwaZulu. The provincial council delegated its powers of Local government over more than half the province in 1948 to the Town and Regional Planning Commission (T & RP) and its administrative arm, the Development and Services Board. The rest of the province was controlled by Town and City Councils or Tribal authorities.

A puppet MPC in charge of Local Government was appointed who seems to only handle crises and controversies. Apart from this the T and RP is a total law unto itself, acting as both Judge and jury and playing lip service to the democratic will of the people. At a recent appeal board hearing I attended where the T & RP refused a tourist development application even though unanimously supported by the Town Council, without one object from the public, the T & RP Chairman justified his rejection on the basis that they were the experts and no one would tell them what was in the best interests of the Province.

In the new South Africa this type of autocratic behaviour is totally unacceptable and must be urgently changed.

PROPOSALS

These proposals are based on the assumption that the new government wishes to get away from the old socialist autocratic system and introduce "democracy" to the people. Democracy has 1000 definitions. Even the Russian communists considered themselves Democrats.

I define Democracy as Government of the people, by those people, for those people. Since South Africa is a rainbow nation it is physically impossible to introduce true democracy from the ground up by imposing a top down situation. As such I consider it imperative that decision-making is taken as low as practically possible as found in Switzerland. In order to clarify this point, it is important to define the various levels of government.

1) 1st Tier - Parliament
2) 2nd Tier - Provincial
3) 3rd Tier - Regional
4) 4th Tier - Local or Area

The power pyramid must be structured like a pyramid. Power must flow up from the wide base at the bottom with only national issues handled at the top.

LOCAL OR AREA GOVERNMENT
At the moment numerous structures already exist that can be easily converted and utilized. For example, we already have Town Boards, Local Health Committees, Regulated areas. Tribal areas under Traditional Chiefs and Farmers Associations.

Once regional boundaries within Provinces have been established by the present delimitation committee, democratically elected representatives of the abovementioned public bodies, together with the traditional chiefs must be given seats on the Regional Board for that regional area.

Numerous provincial functions can then be delegated down to these regional boards for action. Such functions would include all aspects of local government affecting the people of that region i.e. tourism, sport and recreation, services, roads, planning and development and so forth.

**DECISION-MAKING** - could be made area specific. In other words decisions or requirements within the jurisdiction of a Tribal chief can be delegated down to him for recommendations or action. Tourist facilities within a local town could be devolved to that town board for a decision. Only decisions effecting the entire region would be region specific and requiring a majority approval of all the local government representatives.

**FUNDING** - is also a key issue. Where an area specifically funds some decision of its own, it should not need Regional approval. The converse would also apply where an area needed regional or even provincial funding.

**SOURCE OF FUNDS** - will vary area to area. However, the present system of Joint Service Board or Regional Service Councils is an excellent start and should become the future basis of the new Regional Governments. Obviously the better developed, the more taxes can be collected by way of levies on businesses. However, here again I must stress the democratic principle.

Regions should be allowed to collect levies on a basis decided by themselves and not dictated to by Central government. If a region is so disadvantaged to be unable to collect levies in some form or other, then provincial and national government could be approached for assistance. However, what must be appreciated is that levy collection possibilities are endless and cover business levies, gambling, water sales, tourist levies and so forth.

I think I have answered your first question in the advertisement.

I agree with your second point that local government is there to service the local community.

On the 3rd point I strongly urge that Regional Government is given total autonomy in those areas delegated to it such as stated above. However, Local or Area Government such as existing town boards or areas under Tribal chiefs must be delegated powers by the Regional Government on matters directly affecting their areas and paid for by themselves.

On the 4th point, traditional chiefs are in the present situation an existing local government of their own. As mentioned they need to be given a seat on the Regional Government where they can be assisted in upgrading and improving their areas. Where settlements exist outside of the control of traditional chiefs, then these areas as with any town board or local authority need to elect their own representatives to present their needs to the regional board or government for assistance. This situation, in the somewhat different form of the JSB of RSC, already has worked extremely well in some areas with vast sums of money, having been collected and
reinvested into the provision of critically needed basic facilities such as water, sewerage, electricity and roads.

This has worked extremely well where homogeneous areas have made up a JSB or RSC area and been to the benefit of all races and different committees with in those boundaries.

All in fact that is needed, is to take over those existing administrative facilities created by the JSB/RSC organisations, turn them into regional governments and define their areas of jurisdiction. The various committees from the Local Government then can elect their own representatives and get on with the job of creating jobs.

RUSSELL TUNGAY
NATIONAL CHAIRMAN

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<td>LOCAL GOVERNMENTS  TOWN COUNCILS TRADITIONAL CHIEFS FARMERS ASSOC. BUSINESS ASSOC.</td>
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DAVEYTON CIVIC ASSOCIATION (S.A.N.C.O.)

From our side as a civic body, we think a vote of a citizen should be protected by law.

Candidates are voted into office because of their nil promises. Once they are in they forget or they ignore their promises. This happens so often, especially in The Local Elections. As for now, we are going for the November election in The Local Town Council.

If a candidate wants to be elected in the local Town Council first the people must tell him or her what they want from a Councillor. Secondly, the candidate must tell the people what he or she will do for the people. Then a candidate should sign a declaration form to commit himself. A candidate must tell people at a time frame it will take to achieve those promises. If within a reasonable time frame those promises are not realised the law must take its course. The Councillors salary must be cut off. People are having it enough of those candidates who promise people heaven and earth.

SOLLY RAMAKATANE
ACTING SECRETARY
RECOMMENDATIONS FOR A REGIONAL ARTS POLICY

INTRODUCTION

These recommendations are based on the resolutions adopted by the National Arts Coalition (NAC) at its founding convention held in December 1993. The resolutions were researched, formulated, debated, amended and finally adopted by representatives of the arts community, including practitioners, educators and administrators. These proposals thus represent the interests and insights of some eighty arts organisations and institutions around the country. The National Arts Coalition, a politically independent, non-sectarian arts body, was launched at the convention to represent the interests of the arts and of arts practitioners on an ongoing basis, and to lobby major political and other decision-makers to develop and implement arts policies that would serve the artistic needs and interests of all the people of our country.

CONTEXT

For the next five years, it is clear that national and regional priorities will be largely determined by reconstruction and development. The NAC believes that the arts and development are not mutually exclusive and that in fact, the arts are crucial to a post-apartheid, democratic dispensation. The importance of the arts and culture within development has been recognised by major development
agencies such as the Swedish International Development Authority (SIDA) and UNESCO. Dr Carl Tham, Director General of SIDA writes:

... material growth alone does not compose the evolution and transformation of a society. It is also this conviction which constitutes the foundation for SIDA's work in the field of culture.

In a world characterised by enormous chasms between rich and poor countries, by mass poverty, and desperation emanating from misery and injustice, by enormous environmental problems ... it might appear extravagant and esoteric for a development agency to deal with cultural issues. I believe - I am convinced - that this is an error of judgment. It was no coincidence that in 1987, the General Assembly of the United Nations proclaimed the period between 1988-1997 as the World Decade for Cultural Development, thereby acknowledging and promoting what was called the "cultural dimension of development".

Extract from opening address to an international seminar on culture and development cooperation, Stockholm Sept 2-5, 1991

Explaining the World Decade for Cultural Development, UNESCO states that

Despite the progress achieved, the results of the first two International Development Decades revealed the limitations of a development concept based primarily on quantitative and material growth.

From 1970 onwards .. critical reflection gave rise to the Intergovernmental Conferences on Cultural Policies ... in all parts of the world, and finally led to the Mexico City Conference of 1982 to put forward with great conviction the idea that "culture constitutes a fundamental part of the life of each individual and of each community ... and development...whose ultimate aims should be focused on man (sic) ... must therefore have a cultural dimension."

The two principal objectives of the World Decade for Cultural Development - greater emphasis on the cultural dimension in the development process and the stimulation of creative skills and cultural life in general - reflect an awareness of the need to respond to the major challenges which shape the horizon of the twenty-first century.


The Universal Declaration of Human Rights states in Article 25
Everyone has the right to a standard of living adequate for the health and well-being of himself((sic) and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 27 states

Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Article 28 declares that

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

Both current international developmental strategies and the Declaration of Human Rights deem the arts and culture to be important components of human and social existence. Indeed, the significance of the arts as an integral part both of development and of bringing about and sustaining a democratic order, cannot be underestimated.

The government's reconstruction and development programme recognises the importance of integrating development on a range of fronts in order to overcome the legacies of the past and provide the basis for a democratic, sustainable future in which basic needs are met and the full potential of individuals is realised (see Reconstruction and Development Programme 1.4.  The key programmes of the RDP pp 7-12). Integral to the RDP, is arts and culture as stated in 1.4.8

An arts and culture programme is set out as a crucial component of developing our human resources. This will assist us in unlocking the creativity of our people, allowing for cultural diversity within the project of developing a unifying national culture, rediscovering our historical cultural heritage and assuring that adequate resources are allocated.

Further, the document states

3.4.3. The RDP arts and culture policies aim to:
3.4.3.6 link culture firmly to areas of national priority such as health, housing, tourism, etc, to ensure that culture is entrenched as a fundamental component of development.
Clearly, we have been able to benefit from the experience of those in other parts of the world who embarked on forms of development which downplayed the relevance of culture (ultimately to the detriment of development), but who have recently discovered the importance of culture and creativity within development processes. Many African, Asian and South American countries which followed models of development which emphasised rapid economic growth first, and then social, cultural and political development, have slid further and further into foreign debt without acquiring the resources to be able to meet social cultural and other needs. We are now in a position to learn from those experiences, and the RDP reflects a new and mature approach to development and reconstruction which integrates economic growth with social, political, cultural and human development in a way which benefits all of these areas simultaneously thus leading to the holistic development of society.

It is with the confidence gleaned from the experience of international development agencies and the RDP itself which both affirm the arts and culture as crucial components of development, that the National Arts Coalition is able to make representations to regional and national government about their proposals for future arts policies.

The role of government policy generally, should be to create the social order in which the rights and freedoms listed in the Universal Declaration of Human Rights, can be fully realised. Specifically with respect to the arts, the goal of government policy should be to create the optimum conditions in which
a. those who so desire, may become artists
b. those who practise as artists may create and distribute their works effectively
c. everyone may have access to the arts and cultural artefacts and
d. informed, critical audiences are developed and markets created to support the arts and culture.

VISION FOR THE ARTS AND CULTURE AT A REGIONAL LEVEL

To determine the policies, strategies, structures and funding mechanisms to create such optimum conditions for the arts, we need to begin with our vision for the arts and culture at a regional level. Such a vision may be broadly understood as the creation of a vibrant, dynamic cultural life and artistic practice which would serve, respect and affirm all the people and communities of the region. The realisation of such a vision should be guided by the following principles:

1. **Artistic pluralism:** the recognition of the right to existence of all artistic forms and practices being practised in the region
2. **Multi-lingualism:** the recognition and affirmation of all the languages spoken in the region
3. **Artistic excellence:** the pursuit of the highest possible technical and creative standards in all
forms and practices of the arts, whether professional, amateur or community-based

4. **The correction of historical imbalances in the arts through development and affirmative action:**

   *Development* the provision of skills, resources, facilities and opportunities to persons who have been unfairly discriminated against in the past (economically, educationally, politically, socially and culturally) to enable them to develop and eventually compete on merit in the sphere of their choice.

   *Affirmative action:* the preferential granting of employment and opportunities for advancement and for acquiring skills and experience to persons who have been unfairly discriminated against, in instances where they compete on merit, and are at least as qualified for the positions concerned as other persons who have not been so disadvantaged.

   Both development and affirmative action need to have a time limit eg. ten years, after which their impact is evaluated and a further period is agreed to, or these are ended.

5. **Innovation and originality:** these are to be strongly encouraged.

6. **The right to freedom of expression** without fear of victimisation or censorship.

7. **Political independence of statutory arts bodies and publicly-funded institutions** i.e. arts institutions, organisations and practitioners supported by public funds are to be free of government and party political control or interference in their decision-making, policy formulation and creative acts. Arts policies should emerge out of regular (annual or 2-3 year cycles) consultation between regional government and major and representative arts bodies in the region, but their implementation should generally be the responsibility of independent, statutory bodies which receive ards length public funding eg. a regional arts council and a regional heritage council.

8. **The right of arts practitioners to participate meaningfully in the decision-making structures which affect their lives and livelihood**

9. **The encouragement of interdisciplinary experimentation and cooperation between different artforms across and within different art disciplines**

10. **Internationalism:** the encouragement of interaction with, exposure to and learning from the arts in the rest of the world, particularly Africa.

11. **Building knowledge of, pride in and respect for local and traditional arts**

12. **Minimal bureaucracy, maximum art:** maximum resources available for the arts should be spent on education and training in, and on the creation, display and performance of the arts, with the minimum administrative infrastructure necessary to make these happen effectively. **The protection of**
human and environmental interests 14. Accessibility: this is one of the most important principles underpinning a vision for a future, successful arts policy for it refers to everyone having geographical (close to where they live), financial (affordable) and cultural (eg. in their language) access to education and training in the arts, to resources and infrastructure to create and distribute art, and to the arts themselves.

We believe that a vision underpinned by these principles will create a vibrant artistic practice which will raise the quality of people's lives, build knowledge of and deepen respect for different cultural practices, contribute to peace and reconciliation, reinforce democratic values and practices, and contribute significantly to the economy of the region by attracting tourists, creating jobs, generating taxes and reducing crime and violence.

STRATEGIES, STRUCTURES AND FUNDING MECHANISMS TO REALISE THIS VISION

In bringing about a new dispensation for the arts and culture in the region, four crucial areas need to be addressed:

1. **Education and training** of practitioners in all the arts, administrators, critics and arts educators as well as the creation of informed, supportive audiences
2. **Development of infrastructure** eg. rehearsal rooms, studios, museum,..., the provision of materials and equipment to support the creation and distribution of art and the conservation and display of cultural artefacts as well as the development of **management** and administrative skills to run this infrastructure effectively
3. **Funding of the arts and culture**, to enable artists to work on a full-time basis to produce qualitative, innovative art and to enable the conservation and celebration of our cultural heritage
4. **Creating mechanisms to increase access to the arts and culture** i.e. to bring the arts closer to where people are, in rural and urban areas, particularly where there has been little access to the arts in the past

1. **Education and training**

   a. AB pupils are to have arts education as **part** of the core curriculum for the first ten years of their schooling.; such exposure will identify potential practitioners and create interested audiences in the long term (cf RDP 3.4.8: Arts education should be an integral part of the national school curricula at primary, secondary and tertiary level, as well as in non-formal education. Urgent attention must be given to the creation of relevant arts curricula, teacher training, and provision of facilities for the arts within all schools)

   b. All pupils attending secondary school should have at least one arts subject as a matriculation option, in the same way as they would have biology, maths or accountancy as options. c. At least
one publicly-funded tertiary institution per discipline (preferably more) in the region should offer courses of international quality for practitioners in the visual arts, theatre, dance, music, literature and perhaps video. These institutions should also train arts administrators, arts educators in each discipline and critics.

d. Community arts centres and formal arts-training institutions should offer part-time/nonformal/informal courses to those who have not had the opportunity or who do not have the necessary tertiary entrance qualifications, but who would like to be trained as practitioners or educators or administrators in the arts.

e. Ideally, there needs to be at least one publicly-funded Community Arts College, centrally located, which offers bridging, foundation or certificate/diploma courses in the visual and performing arts as well as in arts administration, for those who do not have tertiary entrance qualifications; such courses should be designed and accredited to enable participants to pass on to more formal courses.

E An accreditation board needs to be established to accredit courses at formal and non-formal institutions eg. community arts centres, to ensure that the minimum standards required by the respective industries are met, and also to facilitate mobility of students between non-formal and formal institutions.

2. Development of infrastructure

a. Multi-functional multi-disciplinary community arts centres need to be established throughout the region, located in each community, with each serving 200 000 - 400 000 people. Such centres would be the vehicle for making the arts more accessible to rural and marginalised urban communities. Part of the centre would be a museum to preserve the heritage of the local community, another part would be a library; there would be one or two multi-functional halls for music, dance, theatre performances and for showing movies and there would be a gallery space. There would be rehearsal rooms for local performing artists, studios for local craftspeople and artists and a shop to sell their wares. There would also be rooms for classes in creative writing, dance, theatre, music, visual art and where children, youth and adults from the local community can learn about and acquire skills in these. Having access to such infrastructure, will assist artists in producing work, will bring the arts closer to people live, and will introduce the arts to people at a grassroots level from an early age, thereby creating new markets and audiences and facilitating much greater participation in, and ownership of, cultural institutions by local communities.

RDP 3.4.6 Ultimately government is responsible for the provision of cultural amenities for each community. As an immediate measure, established community art centres should be subsidised by government. In the longer term, the Ministry of Arts and Culture should work with local and
regional government and community structures to form community art centres throughout the country.

b. The region should have at least one venue of international standard for musical theatre (including, opera) performances, classical music, theatre and dance (classical and contemporary). Such a venue should have rehearsal space as well as the required technical back-up eg. lighting technicians, publicity, workshops for set and costume construction. In regions which have had performing arts councils, these facilities do exist; other regions will need to build these or upgrade an existing facility to play this role.

c. It is also necessary that the region has at least one major museum of art which conserves the visual art heritage of the region as a whole, and exposes local citizens to the works of international and national artists. As town and city councils in the region develop the economic means and political will to do so, they should establish such art museums in their respective localities (if these are not already attached to a community arts centre) and/or continue to support such institutions where they already exist.

d. Similarly, each region should also have at least one major museum which conserves, exhibits, affirms and celebrates the traditional and contemporary cultural heritage of the region. Again, town and city councils within the region, as they develop the economic means to do so, should establish such cultural museums in their respective localities.

e. The private sector has a monopoly on cinemas at the moment and it is not really necessary for government to have to develop such cinemas; incentives need to be created by the regional government to encourage the private sector to develop cinemas in areas where these do not currently exist.

f. Existing public buildings for the arts need to be investigated and space made available for artists to have studio and rehearsal space. The role of the private sector and private initiatives should be encouraged too, to relieve the financial burden on government. Where space exists in townships, this is to be upgraded and made appropriate for use for the arts. Where no such space exists, community arts centres need to be established.

3. Funding of the arts

a. Public sector funding of the arts

The current situation with regard to public funding of the arts, rooted in the old constitutional dispensation, is that central government is responsible for funding the followin-:
i. the performing arts, which are catered for through the performing arts councils with money from central government being channelled via the provincial administrations to these four councils located in the major centres of the four previous provinces (the total subsidy during the last financial year was close to 90 million rand)

ii. the creative arts (visual art, literature, music composition, etc) which are funded through the Foundation for Creative Arts (the FCA was set up in 1989 with an initial grant of 2 million rand to distribute to the "creative arts", but during the last financial year received only R300 000)

National cultural institutions eg. SA National Gallery and at least twenty other such institutions which receive direct support from central government.

Provincial administrations provided some support to cultural institutions either through leasing them buildings rent-free or at highly subsidised rents, or by making small amounts of direct financial aid available. While figures are generally difficult to obtain for the TVBC states and self-governing territories with respect to expenditure on the arts, Bophutatswana developed the Bophutatswana Arts Council which did significant artistic work, in the region in dance, theatre and music, while the Kwazulu government provided much support to heritage conservation and in recent times, did more than most such territories to develop arts education within the schools.

Local government (town and city councils), depending on their resources and ambitions, provided various levels of support to museums and galleries located within their areas of jurisdiction, as well as funding for particular arts projects and institutions which benefited the city eg. Cape Town Symphony Orchestra, Arts Alive Festival in Johannesburg. The Durban City Council provides an annual grant to the Durban Arts Association which then distributes funding to arts projects within Durban, on application.

A future scenario for public funding of the arts will need to take cognisance of the following:

1. constitutionally, regional government will have primary responsible for arts and culture as opposed to central government, although central government will have an important role as well.
2. there will be nine regions as opposed to four provinces; limited public resources for the arts that were spent for example, on the four performing arts councils (based mainly in four urban centres) will now need to be channelled through new regional and national mechanisms to distribute resources to all regions and all parts of each region (rural and urban) more equitably to develop the arts and support artists

Proposals for future public funding of the arts

Responsibilities of local government
Local government should be responsible for the building and maintenance of arts Infrastructure eg. museums, public theatres, community arts centres. Regional government should assist those town councils which do not have the resources, to enable them to build and maintain such infrastructure, not necessarily by providing direct funding, but by creating incentives for the private sector to assist in the creation of such infrastructure eg. by providing tax breaks for the private sector to invest in such infrastructure and derive mileage so that for example, there could be the Nedbank Community Arts Centre, Volkskas Contemporary Photography Gallery and Plascon Museum of Traditional Culture.

One means for local government to raise money to run arts centres, would be to levy the community served by such a centre at R1 per person annually or R5 per family and this could be collected through the water bills so that a centre which serves 10,000 people, could for example raise R300,000 annually for maintenance and running costs.

The model of the Duiban City Council in making an arts length grant available to a membership-based body of artists (Durban Artists Association) who decide on grant allocations, is commendable. Other cities have different models eg. Johannesburg employs a director of culture to develop cultural projects to enhance the city while other cities/towns have a subcommittee of councillors with a small budget, and who respond to requests for funding for arts projects, or who initiate such projects.

Major cities with sound economies and which wish to compete internationally for tourism conventions and status, should also directly fund arts activities expected of a major city. For example, a major city should have a philharmonic or symphony orchestra. One means of raising money for such activities is to follow the San Francisco model where a hotel tax is levied, and this goes directly to the arts in the city, the argument being that one of the major reasons for tourists coming to the city, is its many, varied and highly developed arts activities.

Responsibilities of Regional Government

Regional government should generally not fund infrastructure unless it is infrastructure which serves as a cultural/arts flagship of the region as a whole eg. regional museums. It may provide matching grants or some assistance to local governments which do not have the resources to develop such infrastructure, but generally, its funding will go to regional flagship cultural institutions and to funding the creation and distribution of art.

In serving this latter function, a Regional Arts Council needs to be established, similar to regional arts councils in other federal states eg. Canada, Australia and Germany where both a National Arts Council and regional arts councils exist. The regional arts council has the responsibility of developing and promoting the arts within the region.
The features of such a council would be
* it would be a statutory body
* it would receive a steady stream of funding from the government i.e. the regional government would be statutorily obliged to give the council an annual grant, but would have no say in its policymaking and grant allocation responsibilities
* the council members would be people involved in the arts, selected through a publicly transparent process ~ to that of the SABC Board, and they would be representative in terms of languages, gender, art disciplines, rural/urban areas in the region
* the council would be advised by practising artists on grant allocations; council members and advisors would serve for limited periods eg. 2-5 years, to prevent long term power bases being established
* fifteen-time staff would be employed to administer the Council’s decisions and to monitor projects
* a maximum of 15% of the annual grant from government is to be spent on the administration of the council; the rest must go directly to the arts
* all artists and arts organisations throughout the region (visual artists, craftspeople, theatre practitioners, dancers, musicians, writers, etc), may apply to the Council for a grant to enable them to work on a fifteen-time basis to create art, or to distribute their art.
* the council would provide an annual financial report to government giving account of its expenditure and income.

A second regional statutory body to be established, would be a Regional Heritage Council also an independent body which receives an annual appropriation from regional government, and whose responsibilities will include developing and overseeing the implementation of policies with regard to identifying, conserving and maintaining museum, monuments, historical sites, archives and libraries within the region.

Both the Regional Arts Council and the Regional Heritage Council will be represented on their respective national counterparts to contribute to national policy and programmes of action in these areas.

The responsibilities of regional government with respect to the arts then, would be to find regional flagship arts and heritage institutions, to provide some assistance with developing local Infrastructure where deemed necessary and to provide annual grants to the regional arts council and the regional heritage council respectively.
 Nation, and local government should aim to spend at least 1% of their annual budgets on the arts and culture.

b. Private sector sponsorship of the arts

Given the various pressures on government to provide a range of services, it would be in its interests to create tax incentives to enable the private sector to provide more support to the arts. The private sector will seek to be associated with arts projects from which it can derive some mileage, but should they be given tax incentives, they may be encouraged to provide funding to the regional arts council too, to distribute to the arts in the region.

Again, companies in the region should be offered tax breaks where they may donate at least 1% of their annual turnover to the arts, tax free.

c. Development agencies

Development agencies working in the region should be strongly encouraged to follow international trends and integrate the arts into their development projects. For example, each development project supported either by government or international agencies, should stipulate that at least 1% of the budget should be allocated to the arts. So, for example, a clinic which costs R200 000 can have R2 000 allocated to a local artist to produce an educational poster on AIDS or the benefits of breastfeeding. In this way, development-related messages can be conveyed creatively using media and cultural symbols understood by the local community, and it can create employment for artists and develop the artistic literacy of the local community.

d. Market

It is true that only when people have disposable income, do they spend money on the arts. In the long term then, it is when the regional economy improves and people have better incomes that they will spend more on the arts. However, regional government should assist in helping to create these potential audiences and markets by bringing the arts closer to where people are through community arts centres and through providing arts education from the earliest possible age. Investment in the arts at this stage, will begin to reap fruits at a later stage in terms of new markets generated, increased tourism and greater job opportunities for artists and related industries.

4. Distribution of art

Line arts can contribute significantly to reconciliation, building community spirit and restoring and celebrating humanity. The challenge facing us is to make the arts and their potentially healing
Effects accessible. While community arts centres and arts education will eventually and organically contribute to this in the long term we need mechanisms to distribute art in the short term which will also help generate art, improve the economy and build audiences.

In this regard, local and regional arts festivals and events within each discipline would be a major means for budding a regional artistic consciousness and developing a vibrant artistic practice. If on an annual basis, there were local arts festivals throughout the region, with development programmes @ed to them training artists, building infrastructure and training administrators, then the best works of the local festivals could be selected to appear at an annual Regional Arts Festival which will become a major tourist attraction in the same way as the Grahamstown Festival is, contributing significantly to the local economy. This would generate higher standards as artists from around the region compete to be at the regional festival it would enable artists to learn from each other, it would generate work and the best works at the regional festival would be encouraged and subsidised to travel around the region so that rural and other communities would have a chance to see such works. Money within the regional arts council should be set aside particularly for travelling exhibitions, tours by performing arts groups and travelling movie shows to make the arts accessible to everyone.

Through a strategy of local and regional festivals with development programmes linked to them improving skills constantly, the region will generate artists and art of a high calibre which will then influence the arts nationally. The best works at the regional festival should be sponsored to go to National Festivals of the Arts and international festivals to fly the regional flag and so bring more artists and tourists to the region.

The above proposals address the four major areas which are necessary in terms of creating a new, exciting, visionary and vibrant cultural dispensation in each region. Certainly, @her research and discussion are necessary, but by addressing these areas in the above ways we believe, wffi begin to impact significantly on the cultural life of the region.

TIME FRAMEWORKS

1. As soon as possible, the following needs to be determined through a research commission which needs to be established by 31 July 1994:

a. an inventory of arts infrastructure throughout the region L e. how many theatres exist, with what kinds of facilities, how many commercial and public galleries and museums; exist, what do they do, where are the community arts centres, etc. Once such an inventory is done, it needs to be
mapped onto a map of the region so that the deficient areas may be identified and a strategy formulated to address these deficiencies

b. an inventory of all the arts education institutions in the region - both formal and non-formal what they teach, to who by who etc needs to be undertaken and then mapped too

c. a register of all artists in the region in each discipline needs to be established - names, addresses, telephone numbers, area of involvement, etc.

d. a register of all arts organisations and institutions, service organisations, publicists, training organisations, membership-based organisations, etc needs to be established so that the networks can be established and problems addressed without duplication

All four areas need to completed by 31 March 1995.

Based on the findings, a regional strategy needs to be devised within specific time frameworks over the next ten years, of how the needs will be addressed.

2. A Regional Arts Council needs to be functional by 1 April 1995, the start of the new financial year

research and prepare draft legislation for such a council by 31 August 1994

I August 1994

- establish the publicly-transparent process for selecting the council by
- establish the council by 30 October 1994
- the Council then
  * sets up administrative systems
  * employs staff
  * prepares policy documents

A process needs to be undertaken to establish a Regional Heritage Council by 1 April 1995.

4. Support urgent negotiations between central and regional government, the relevant local governments and the arts community (representative arts organisations) to agree on a plan/programme to dissolve the resource-consuming performing arts councils in favour of the new arts dispensation.

Possible features of such a plan could be:
a. The theatre spaces attached to the councils, are to become independent institutions, with the respective local governments having major and final financial and maintenance responsibility for these in the same way as the Johannesburg Civic Theatre is the responsibility of the Johannesburg City Council. These should be run as commercial venues with all able to rent space (as opposed to the current situation where it is primarily performing arts council productions which happen there) and their brief will be to at least break even annually, but to stage the best local and international acts available. Each of these theatres will then have its own Board of Governors with their own Articles of Association spelling out the theatres' functions and their responsibilities as governors. These Boards of Governors would be established through negotiations between the relevant city council and the arts community and would have representatives from the business community, the city council, local educational institutions and the arts community.

b. The companies attached to the performing arts councils are to become independent and exist through a combination of box office receipts, local government sponsorships and grants from the Regional and National Arts Councils. This would mean that the orchestras would become independent in the same way as the Cape Town Symphony Orchestra is independently and professionally managed, dance and theatre companies would follow a similar route as would ballet and opera companies. To assist this process, these companies would receive decreasing guarantees of central government funding over two years eg. 60% in '95, 40% in '96 as they seek private sector sponsorship and local and regional government sponsorship to sustain themselves.

They would be entitled to compete with all other professional and semi-professional performing arts companies in applying for grants from the Regional Arts Council and/or the National Arts Council and their applications will be considered, along with all other applications, on need and merit. In this way, those companies currently attached to performing arts councils are not lost in the process of dissolving the councils, while at the same time other performing arts companies may also have access to public funds, which are currently the sole preserve of the performing arts councils.

The office space, equipment and infrastructure which the performing arts councils currently occupy, will then be made available to community, professional and semi-professional groups to use for rehearsal space, office space, etc.

We will thus no longer have performing arts councils, but we will have Regional Arts Councils to distribute public funds more @ to support and develop the arts throughout the region, there will be a greater number of independent music, dance and theatre companies, there will be more rehearsal space and infrastructure for more groups to have access to, and more freed up resources for arts activities throughout the region, while still maintaining venues of international standard, and having mechanisms to support the companies and artists formerly attached to the performing arts councils.
Such a plan needs to be further negotiated and agreed to by 'JO September 1994.

5. A commission on arts education needs to be established jointly by the Ministries of Education and Arts, Culture, Science and Technology by 31 August 1994 to
- investigate how the curriculum needs to be changed to accommodate arts education
- what kind of training and education is necessary at primary, secondary and tertiary levels
- what kinds of facilities are needed for such arts education
- what the costs and staffing requirements would be
- what time frameworks are necessary to realise the ideal

This commission needs to report within one year.

6. In association with the SA Tourism Board and the regional ministry responsible for the arts, a massive regional Arts Festival should be held in December 1995
- set up 3-15 month development programmes throughout the region to encourage greater and more elective participation in the festival
- set up a planning and co-ordination committee by 31 August 1994
- get the private sector and local government to help fund this programme

festival could be the first of an annual festival designed to attract tourists, generate a vibrant artistic practice and make the arts more accessible throughout the region.

CONCLUSION

There is much potential for the arts in each region and throughout the country. If a visionary approach is taken with a comprehensive plan rather than ad hoc interventions, if they are removed from partisan politics and if their economic, social educational and healing potential is recognised and respected, then the arts could play a tremendous role in each region and in the country as a whole.

BRIEF HISTORY OF THE NATIONAL ARTS COALITION (NAC)

In April 1992, with international and local funding for the arts ever-decreasing, the Congress of South African Writers initiated a Campaign to place the Arts on the Agenda with fraternal, mostly anti-apartheid arts organisations in Johannesburg. These organisations included the South African Musicians Alliance (SAMA), Film and Allied Workers Organisation (FAWO), Arts Educators Association (AEA), Performing Arts Workers Equity (PAWE), Association of Community Arts Centres (ACAC), Dance Alliance and the South African Workers Cultural Union (SAWCU).
One aspect of the Campaign was to ensure that unlike current arts policies, future arts policies would have broad legitimacy and serve the widest artistic interests in our society. Accordingly, the Campaign initiated a National Arts Policy Plenary in December 1992, which drew together 900 delegates representing the broadest range and largest number of interests in the arts ever gathered together in our country.

At the Plenary, delegates adopted a Statement of Intent committing the arts community to a year-long process under the banner of the National Arts Initiative, in which they (artists, arts educators and arts administrators) would research and make recommendations for future arts policies, strategies and funding mechanisms to promote and protect the arts, and to launch a nationally representative, politically non-sectarian body to lobby in the interests of the arts.


The National Arts Initiative climaxed in December 1993 at the Convention of the Arts held in Durban, and where 17 comprehensive resolutions on future arts policies were adopted by 225 delegates representing more than 80 arts organisations from around the country. Most resolutions were adopted with more than 90% voting in favour, thus representing significant unity among the formally fractured arts community. The National Arts Initiative was formally dissolved at the Convention and the National Arts Coalition with those present as founding members, was launched with a powerful steering committee elected to lead it in its first year.

While there is much recruiting work still to be done, for the first time in our country's history, we now have a truly representative, politically non-aligned arts structure. For the first time too, the arts community itself has come with proposals for future arts policies for negotiation with the government of the day.

§ Y OF RESOLUTIONS ADOPTED AT THE ARTS CONVENTION
Resolution 1: Principles to guide future arts policies/practices
The correction of historical imbalances in the arts through development and affirmative action; the right to freedom of expression; geographical and financial access to the arts for all; multilingualism; political independence of publicly-funded arts institutions; artistic pluralism; artistic excellence; minimal bureaucracy, maximum art; the right of arts practitioners to participate meaningfully in decision-making structures which affect their lives; building pride in, and support for local art.
Resolution 2: Establishing a National Arts Coalition

To dissolve the National Arts Initiative, and to launch the National Arts Coalition with all organisations present at the Convention, as founding members: The Coalition would lobby and undertake activities and campaigns in support of the arts.

Resolution 3: Establishing a National Council for the Arts

To establish a statutory, yet politically independent authority, similar to the British Arts Council and the USA's National Endowment for the Arts, which would channel public and private sector resources to promote the creation and distribution of visual art, music, literature, dance, theatre and community art.

Resolution 4: Establishing a statutory Film Foundation

To establish a statutory, yet politically independent body, similar to the National Council for the Arts, to promote and develop the local film industry.

Resolution 5: Supporting the Independent Broadcast Authority

To generate support for the provisions of the IBA Act which encourage minimum local content quotas for broadcasters and which promote ownership and control of electronic media by persons from historically disadvantaged communities.

Resolution 6: Ensuring Freedom of Expression

To establish a task force to review all laws governing freedom of expression and to make recommendations on their amendment or abolition in line with international conventions to promote and protect freedom of expression.

Resolution 7: Preserving our National Heritage

To establish a centrally-funded National Heritage Trust to identify, develop, conserve and maintain museums, monuments, historical sites, libraries and archives, and to develop and promote our indigenous cultural heritage.

Resolution 8: Dissolving the Performing Arts Councils

To dissolve the resource-consuming performing arts councils over
a period of two years, and to establish a commission to make recommendations on the most
effective use of their human, physical and material resources in the interests of the arts.

Resolution 9: Funding of the Arts and Arts Education

To launch the 111% campaign" to lobby government to spend at least 1% of its budget on the arts;
to enable companies to donate at least 1% of their annual turnover to the arts tax free; to have
individuals claim tax rebates on expenditure on the arts which amount to 1% of their annual
incomes and to establish a National Arts Bursary Trust to support students in the arts.

Resolution 10: Arts Education - pre-primary, primary and secondary levels

To have arts education as part of the core curriculum for all pupils from the beginning of their
compulsory schooling to the first exit point, and for all pupils to have at least one arts subject as a
matriculation option.

Resolution 11: Arts Education - tertiary level

To ensure that specialised tertiary education in all the arts is available in each region.

Resolution 12: Art and Community Development

To develop the arts at grassroots level through multi-functional, multi-disciplinary arts centres and
activities to upgrade existing conditions eg. building parks and mural painting.

Resolution 13: Rights and Status of Arts Workers

To establish a commission to do international and local research and then to make
recommendations on improving the rights and working conditions of arts workers with respect to
medical aid, pension schemes, health and safety, minimum wages, taxation, etc.

Resolution 14: Ministry responsible for the Arts

To establish a Ministry of Arts and Culture which would work closely with the ministry responsible
for education.

Resolution 15: International cultural Exchange
To encourage greater international cultural exchange, particularly with Africa, while ensuring adequate protection for the development of the arts locally.

Resolution 16: Festivals and the Development of the Arts

To encourage arts festivals at local, regional and national levels with preceding developmental programmes, to develop greater participation in creating and distributing the arts.

Resolution 17: Programme of Action (this was simply to give the incoming Committee some guidance on its initial.. Activities
Constitutional Entrenchment of the Rights of the Child

TREE (Association for Training and Resources in Early Education) is an organisation whose mission is to improve the quality of care and education of the pre-school child in KwaZulu Natal, through:

* The training and support of those concerned with the education and the care of the young child.
* The provision of resources in connection with such education and care, and generally to promote the proper education and care of such children.
* The enhancement of awareness in the community of the needs of the young child and of the benefits to the community from the proper fulfilment of these aims.

1. The Importance of Early Education: All Children should have the Right to Education.

The early childhood years are widely regarded as optimal learning years. During these years, the overall goal is to provide children with an environment which will encourage development at a time when children are experiencing rapid growth and are vulnerable to deprivation of opportunities.

Encouragement of this nature can be done at home, but there are some important reasons why attending an educare facility is advantageous, particularly in the South African context:

1. The legacy of Apartheid has meant that black families have been disadvantaged:

   - It has led to widespread poverty among the black population and to a system of migrant labour, which has meant that many parents are at work far away and for long hours. There are often no adults at home to care for the young child. By attending an educare centre, children are therefore also being protected from possible neglect.

   - It has led to widespread violence, which once again points to the need for the care of children during the day while parents work, and for the need for positive, non-violent role models, so that the cycle of violence can be broken.

   - If the school aged siblings are attending school, this means not only that the child is uncareed for at home, but that tasks and responsibilities become those of very young children, such as caring for younger siblings and doing housework. Children lose out on the joy of childhood and the right to play, which are Rights to which all children should be entitled.
- Another important function of early education is that it helps to formulate a positive self-image. This is vital for the children of South Africa, due to the poor self-images which have been cultivated in many people due to the legacy of Apartheid and its consequences.

- Children who have been disadvantaged by Apartheid and poverty, need extra support and stimulation through school readiness programmes, during the early years, if they are going to be equipped to manage the years of formal schooling ahead of them, in the way that their more advantaged peers are able to.

2. Children are at the stage in their lives when they are beaming through play. They have the right to early childhood development:

Through play children are able to acquire new concepts, skills and knowledge by experimentation and exploration of the environment around them. To learn well through play it is necessary to provide a learning environment with a wide enough choice of materials to meet the developmental needs of individual children. This is not always easy in the home environment, and all carers need support to provide this stimulation.

TREE believes too that "disabled children" have as much right as their "able-bodied" peers to attend mainstream educare centres which are easily accessible to them and their families. Separate education facilities for disabled children means that they often have to be separated from their families and at great expense attend a school which is not locally situated.

2. Disabled Children should have the Right to Mainstream Education:

Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (UN 1993) is that "States should recognise the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure that the education of persons with disabilities is an integral part of the educational system".

Article 4 of The Disability Rights Charter of South Africa (DPSA 1992) states: "Disabled people shall have the right to mainstream education with personal assistance if necessary, appropriate assistive technology and specialised teaching. Parents of disabled children shall have the right to participate in the planning and provision of their children's education"

2.1 A move towards Integration:

Integration of disabled children into mainstream education is being actively promoted by organisations such as UNESCO and WHO. The rationale behind it:

1. Disabled people are not a separate group found in a particular area or sector. They form part of the community, and have a right to community life, therefore, if service agencies are seeking
to provide for a particular community they need to account for the diversity of needs within the community.

2. We all have individual and common needs. The challenge for institutions and structure of society is to learn to cater for the diversity of needs and to develop ways of working that address the issue of disability in a holistic way and not to compartmentalise it into the addressing of "special needs". This means that all teachers should be supported to provide ways of catering for pupil diversity, as part of the general preparation for their jobs.

3. There is a need to adopt the "Social Model" of Disability: The disability is seen as the loss or limitation of opportunities to participate in normal life on an equal basis due to physical or social barriers. The emphasis is on attitudes, awareness, acceptance, knowledge and not merely on the delivery of a technology.

4. Attitudes: Integration promotes better relationships between disabled and able bodied people.

### 2.2 Integration in Practice

Lessons can be learned from other countries (such as Austria, Ghana, China and Norway) where an Integrated Approach has been taken:

1. This approach is only possible with extra resources including more educare workers, smaller student groups and individualised instruction.
2. There is a danger of overload by having too diverse a range of special needs within the classroom.
3. The success of integration programmes depends on ensuring success for the individual child, and this in turn depends on the commitment and skill of the educare worker. Thus training and support is essential.
4. In order for educare workers to transform their working practices and take responsibility for children with special educational needs, they must have the opportunity to observe others, see practical solutions to classroom organisation and management problems and see individual programmes being planned and implemented.
5. There is the need for support systems to be in place e.g. resource centres.
6. Teamwork and team teaching are central.
7. There is a need to start in reasonably developed areas and schools with adequate funding. Once expertise has been gained, the programme can be expanded to include areas with more problems.
8. It is important to involve parents.
9. There is a need for true assessment of each child, rather than an emphasis on meeting "normal standards".
10. There is a need for effective monitoring and assessment procedures.
11. Integration programmes can contribute towards raising awareness and mobilising resources at community level, thereby enabling parents to be more effective in helping disabled children to
attend school, learn skills and participate productively in family and community life. There is
the need for communities to become more aware of their disabled members, and play a role in
meeting their needs.

12. Playgrounds with parallel bars, ramps and swings which could be used by children with
physical and other disabilities, provides the space for children to play together.

In summary, what is necessary is a new approach to teacher training and this needs to be
linked into the existing legal framework:

Educare workers should be able to respond to the diversity of educational needs in the classroom.
If this is to be achieved, there needs to be significant shifts in educare workers’ attitudes to teaching
and learning. One needs to go beyond basic skills training to teacher development programmes, in
which educare workers are equipped to adopt problem solving approaches in the classroom and to
develop learner-centred teaching. The UNESCO project has demonstrated that a school that
caters for individuality is, in fact, and effective school for all. Individual difference is something to
be nurtured and celebrated. On the whole, it appears that teachers and student teachers have few
reservation in meeting special needs, if they are provided with appropriate training and support.

Staff development cannot happen in isolation, but must be paralleled by the establishment of
support systems. I.e.: the setting up of resource centres, the ensuring of environmental
accessibility, the identification of key resources and resource people within the area. Teamwork
and collaboration is essential.

Parents need to be involved in the integration process.

2.3 Existing Special schools and institutions:

The disadvantages of having separate schools have already been highlighted. Another point to note
is the questions of what is cost effective. Putting money into staff development instead of
institutions is seen by UNESCO among others are being more cost effective. It may be that for the
more severely impaired people separate institutions are necessary, or that for families who do not
have the resources to care for a disabled child, institutional care is necessary. 80% of "disabled"
children, however could be coped with within the community according to the WHO and
UNESCO. It is envisioned that ALL young children, regardless of the severity of the disability can
be happily accommodated into educare centres within the community.

TREE does not advocate the closure of "Special Schools", but a refocus. These schools are seen as
an invaluable resource and have an effective role to play as training centres.

Mainstreaming in rural schools may not be possible because of inadequate facilities, according to
Catrina Macleod (Wits University). She sums up the position as follows: "here needs to be an
incorporation of the mainstreaming idea within the overall policy planning and on-the-ground
transformation of education from the outset. Otherwise we may find ourselves in the situation
where we have high quality education unable to respond to the needs of children with special
educational needs." She also suggests the need for an overhaul of the system of training of teachers. "Instead of having an add-on system in which techniques used for the child with special education needs are taught as an extra, a system which is flexible and adaptable to the needs of all children needs to be devised."

3. **Children who have been exposed to and affected by violence**

In the same way that TREE promotes an integrated approach to pre-school education by including children who are disabled, TREE promotes the inclusion of children who have been affected by violence. The challenge is seen as being the training of educare workers to cater for those who have been exposed to and affected by violence, as part of a "learner centred", holistic approach, which seeks to cater for individual needs which are expressed in terms of pupil diversity.

"What is needed is to equip all those who work with children in the fields of education, health or through social or religious agencies with sufficient knowledge and skills to recognise those who are most severely traumatised and to ensure that they are brought to agencies which can offer skilled help. However there is also a strong need to provide support, guidance and understanding to those who suffer less severe symptoms of post traumatic stress but whose lives and minds have nevertheless been severely affected. Furthermore in order to break the cycle of violence which is perpetuated from one generation to another it is necessary that more constructive forms of conflict resolution be taught and modelled in all areas of interaction with children. These considerations must shape the training and functioning of teachers, social workers, nurses and community workers." (Clark, P., 1994).

TREE has recognised this and therefore as part of a programme to "cater for pupil diversity" is hoping to equip educare workers with positive attitudes, knowledge and skills of the positive steps that they in their role as educare workers can take to provide support for those children who have been exposed to and affected by violence.

By giving all children the right to a pre-school year, where a holistic teacher training approach has been taken which caters for the diversity of needs within the classroom, other proposed Children's Right's are also being protected such as:
* The right to early childhood development.
* Equal rights for both disabled and able-bodied children.
* The right to be protected from all forms of abuse and neglect.
1. This document is a DISCUSSION document; its intention is to spark debate, develop ideas and encourage further research and discussion, all of which will hopefully lead to more informed policy proposals in the sphere of the arts.

2. The views contained in this document ARE NOT NECESSARILY THE VIEWS OF THE NATIONAL ARTS INITIATIVE, ITS STEERING COMMITTEE OR EXECUTIVE. The document has been commissioned by the Executive in response to requests from various N.A.I. working groups for material to assist them in their research and policy formulation activities. Members of the Executive, Steering Committee and working groups may or may not agree with some or all of the ideas in the document, and are free to respond publicly or otherwise to the document.

3. The document itself is a combination of ideas gleaned from international research, from local papers prepared by a variety of arts organisations and individuals and from various formal and informal discussions. The document attempts to put all of these ideas into some kind of coherent whole. It is necessarily long as it encompasses inter-related facets of the arts. However, the document does not pretend to be detailed; appropriate details may be filled in by the various working groups. It is the first in what may become a series of papers commissioned by the Steering Committee and working groups to elicit debate, comment and new proposals.

4. The Steering Committee has made available to all working groups and regions, international and local material in which some of the ideas have their origin, so that working groups may use this material and perhaps arrive at entirely different conclusions and proposals, and/or will extend the ideas contained herein.

5. The onus is on various players within the arts arena to debate the ideas presented in this paper and to present alternatives. We would like to encourage all interest groups and players in the arts to respond and to present alternative, practical proposals where deemed necessary, to ensure maximum debate. Please send written responses to P.C. Box 883, Newtown, 2113, before 15 August 1993.

CONTEXT OF ARTS POLICY FORMULATION

The overall socio-economic-political context at the moment does not favour the arts or arts policy formulation. We are told that the material legacies of apartheid need to be overcome and that accordingly, public and private sector resources should be spent on development. The arts are considered a luxury which cannot, and morally should not, compete for state expenditure on medical care, housing, education, job creation, and so on. For democracy to work, we are told that
it is important that the basic needs of people are taken care of. We cannot have democracy when people do not have houses and food, and do not know how to read and write.

The economy is in decline and new economic investment will take a long time to generate the disposable resources to spend on the arts. The economy's needs are such that a stable work force is required, hence the need to provide the basic food and shelter to satisfy the work force. The state of the economy requires technical skills so that the education system needs to be designed accordingly; in other words, education should focus on technical training rather than on, and even at the expense of, the humanities.

2.
The level of violence in the country is extremely high, and available resources need to be channelled to quell the violence. Social problems such as the high crime rate stemming from massive unemployment, necessitate increased welfare spending which will further restrict funding for the arts, which only a minority of people with disposable income have access to anyway.

Taking all of the above arguments and sentiments into account, we are left with the impression that all the socio-economic-political problems need to be resolved first before the arts can or should be attended to, We are asked to believe that it is only when people have jobs and disposable income, when they can make democratic choices about how to spend their income, when they no longer need to worry about where to live and what to eat, that they will be able to enjoy the arts.

How do we respond to what seem perfectly reasonable and powerful arguments? Why are we engaged in policy formulation with regard to the arts at this point in time? Why should the arts be taken seriously at this moment?

TEN ARGUMENTS IN SUPPORT OF THE ARTS - AND ARTS POLICY FORMULATION - AT THIS TIME IN OUR COUNTRY'S HISTORY

1. “Overcoming the legacies of apartheid” has to do with improving the overall quality of people's lives. It is necessary therefore, that it should not be limited to meeting the material needs of those who have been victims of apartheid. To not be concerned about the legacies of apartheid in the sphere of the arts at the same time as attending to other apartheid legacies, is to perpetuate the maldistribution of resources, skills, knowledge and infrastructure in the arts in favour of those already favoured by apartheid, and to continue to limit the quality of life of the majority of people victimised by apartheid.

The fact of the matter is that there are arts institutions which exist and which receive significant state subsidies. It is also true that the vast majority of people in our country have not had access to
these institutions and thus to the benefits of public sector support for the arts. It is highly unlikely that state support for the arts will stop altogether. But it is also unlikely that public sector funding for the arts will be able to support that which currently receives state support as well as cater for the artistic needs of 30 million more people whose artistic needs have generally not been catered for by state-funded arts institutions.

If it is likely that state support for the arts will continue, even if this means in declining amounts, it is necessary that new, creative and pragmatic policies be formulated to ensure that the available public resources for the arts are more equitably distributed to develop the arts among all people in South Africa.

2. “Development”, insofar as it seeks to provide better living conditions for the victims of apartheid, should surely have as its end the creation of material, social, political (democratic and respectful of human rights), cultural and educational conditions in which such victims may realise their full potential as creative, holistic beings. 'Victims of apartheid' did not only suffer physically or materially; they were scarred psychologically and emotionally, and stunted culturally and intellectually. 'Development' must seek to create the total social conditions for holistic human development. All aspects of human and social development need to be integrated rather than material and physical aspects of development emphasised at the expense of others.

Observing Latin America and other parts of Africa where material concepts and practices of 'development' have been in existence for decades, one sees those societies sinking further and further into economic debt, without the material base being created for other aspects of social and human development as initially promised. Similar notions of 'development" with similar promises of 'first generate wealth, then we will pay attention to all your needs", are much in vogue here, yet it is clear from other experiences that these forms of development have not improved the lot of former victims of colonialism, but have in fact created more poverty, sunk developing countries into a debilitating cycle of foreign debt and have generally created conditions which have only served the interests of foreign capital and new local elites.

Having learned from other parts of the world, it is clear that we need a development programme which integrates economic, political, social, cultural and educational growth rather than one which emphasises material development- with a vague, and historically ambiguous, hope that it will provide the basis for other forms of development.

Perhaps it would be instructive to heed the words of Dr Carl Tham, Director General of the Swedish International Development Authority (SIDA) - one of the world's largest development organisations on culture and development:

“material growth alone does not compose the evolution and transformation of a society. It is also this conviction which constitutes the foundation for ... SIDA's work in the field of culture. In a world characterised by enormous chasms between rich and poor countries, by mass poverty, and desperation emanating from misery and injustice; by enormous environmental problems ... it might appear extravagant and esoteric for a development agency to deal with cultural issues. I believe - I am convinced - that this is an error of judgement. It was no coincidence that in 1987,
the General Assembly of the United Nations proclaimed the period between 1988-1997 as the World Decade for Cultural Development, thereby acknowledging and promoting what was called 'the cultural dimension of development'.

Extract from his opening address to an international seminar on culture and development cooperation, Stockholm Sept 2-5, 1991.

That no less a body than the United Nations has declared a World Decade for Cultural Development, is indicative of the international community's recognition of the importance of culture in development. A practical guide to the World Decade of Cultural Development, 1988-97 produced by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in 1987 declares that

Despite the progress achieved, the results of the first two International Development Decades revealed the limitations of a development concept based primarily on quantitative and material growth.

From 1970 onwards ... critical reflection gave rise to the Intergovernmental Conferences on Cultural Policies ... in all parts of the world and finally led to the Mexico City Conference of 1982 to put forward with great conviction the idea that 'culture constitutes a fundamental part of the life of each individual and of each community ... and development ... whose ultimate aim should be focused on man (sic) ... must therefore have a cultural dimension.'

The two principal objectives of the World Decade for Cultural Development - greater emphasis on the cultural dimension in the development process and the stimulation of creative skills and cultural life in general - reflect an awareness of the need to respond to the major challenges which shape the horizon of the twenty-first century.

Local politicians and development agencies which emphasise 'development' at the expense of culture, should be made aware that they are out of step with, and are in fact behind, international trends in development. The artistic community should take great encouragement from the fact that after decades of material concepts of development, the international community now favours a concept of development which emphasises the cultural and creative dimensions of human existence.

For the sake of clarity though, it needs to be emphasised that we are not arguing for the arts to be placed on the same par as housing, medical care, job creation, and so on; we are arguing only that the arts be integrated into overall processes of development. Too often we regard life in our country as an either/or matter; we are arguing for a both/and approach, which integrates all aspects of human and social development, while recognising that some aspects of development may need to have greater emphasis at certain moments within certain historical conditions.

On a practical level, this may mean that 1-2% of every development budget be allocated to the arts eg. of a budget of R400 000 to build a clinic in a rural area, R8 000 can be set aside for a local popular theatre group to run an educational, participatory programme in the benefits of breast
feeding or local visual artists can be commissioned to design and produce posters encouraging the local community to inoculate their children.

3. Lest the impression be gained that we are arguing for "development art" at the expense of other forms of art, or at the expense of promoting the arts in their own right, we need to state clearly that since the primary motivations for declining resources for the arts are that resources have to be channelled to 'development' to 'overcome the legacies of apartheid', we have started by dealing with those arguments to show that the arts and development are not mutually exclusive phenomena, but that in fact the best forms of development would include the arts and would be served by it.

Our society is one in which we have different (for want of a better description) 'worlds' at the same time; a developed 'first world', a developing "third world' and a few 'worlds' in between. The challenge is to create an equitable and just society out of these 'worlds' which we have inherited from our apartheid past. In doing so, we need to recognise that there are these different realities, and that each might have different traditions, tastes, aesthetic needs and values and artistic aspirations.

Democracy is synonymous with pluralism and accordingly, we need to cater for all tastes. We cannot wish away the fact that some sectors of our society have been privileged in the past and that "western" forms of art have flourished in that context. Such art forms - among them opera, ballet and classical music - have developed significant followings, serve the aesthetic tastes and needs of a significant sector of our population and therefore cannot and should not be done away with.

On the other hand, we cannot ignore the fact that the majority of people in our country live in 'third world' conditions characterised by poverty, illiteracy, low life expectancy, unemployment and the like, and that in this context, people may have different (not inferior, different) aesthetic values, tastes, needs and artistic practices.

While it is necessary to develop new audiences and to even set affirmative action goats to achieve greater participation in these art forms by black people, particularly if these forms continue to be supported by the taxpayer, the survival of 'western' art forms in our country should not come from desperate strategies to try to convince "the masses' that it is suddenly (after decades of being excluded) in their interests to appreciate and love opera, ballet, classical music and so on. The survival of these forms should come from a pragmatic arts policy which recognises the validity of and promotes and protects these forms in their own right; a broader appreciation of and support for these forms will occur organically in terms of such a policy.

However, while such a policy might ensure the continued existence of 'western" art forms, it cannot guarantee the privileged status which these forms enjoyed under apartheid. Their existence and validity will come not from the belief that they are the highest forms of art or the highest expressions of human civilisation, but rather from the fact that they serve the aesthetic needs and tastes of a significant sector of our population.
Similarly, a new arts policy would need to promote and protect other art forms which serve the aesthetic tastes and needs of other sectors of our population. Since 'western' forms of art have been the primary recipients of public funding for the arts, it is clear that the need to cater for the artistic needs of other sectors of our society, will inevitably mean that with limited public funds available for the arts, public funding for these 'western' forms and/or for the structures which promoted them, will be significantly reduced.

In other words, if R85 million rand of state funds is provided in one year to run the four performing arts councils, which have traditionally served 'western' aesthetic tastes, and if the artistic needs of all South Africans now need to be catered for with more or less similar amounts of money, then it is clear that there will have to be significant changes to the performing arts councils.

The arts need to be developed in accordance with the conditions which prevail for different sectors/communities within our country, recognising that different socioeconomic realities will necessitate different, pragmatic responses to those conditions. But conditions also need to be created in which different art forms may meet, challenge and feed off each other and perhaps develop new forms - so that our art is constantly in a state of dynamism, changing and ever-becoming new.

It should be stated clearly that the situation in the arts is not an either/or one; it is not a case of either conventional, 'western' forms of art or community-based-art or art-in-a-developing context - it is all of these at the same time. Given the legacies of the past though, it needs to be accepted that more resources will be channelled towards developing the aesthetic tastes, values and practices of those who have had limited or no access to public funds in the past. We are not starting on a clean slate; we cannot simply say that we are now all able to compete on equal terms for public funding and in the market place. Due to apartheid; some arts practitioners and art forms have had access to more resources, skills, infrastructure, experience, and the like and have developed accordingly. Resources, skills and infrastructure need to be made available to formerly disadvantaged arts practitioners to enable their marginalised forms, practices and selves to compete on more-or-less equal terms in the foreseeable future.

Furthermore, if art is to help individuals and communities to explore, interpret and make sense of their respective realities, then it is likely that the art of those living in "third world" conditions will reflect the themes, forms and cultural practices of those conditions, while the art in "first world" conditions will reflect the needs and tastes of its audiences. This is to be expected and there is little constructive point in beating each other over the head about the merits or demerits of, for example, 'protest' art on the one hand and 'bourgeois' art on the other. Art will reflect the conditions in which people live - their aspirations, hopes, tastes and fears - and art will change organically in form and content as its creators have their socioeconomic and political circumstances change and as their exposure to other worlds and experiences broadens their ideas and impacts on their artistic practices.

The point that is being made in this section is that:
a. as the country undergoes change at the moment, there is an incredible amount of anxiety, fear, ignorance, false expectation and cynicism on all sides of the political spectrum

b. in this context, having a pluralistic arts policy that respects the artistic needs of all, that promotes and protects the aesthetic values and artistic practices of everyone, but which will also contribute to cultural 'crossovers', will hopefully quell anxiety about losing certain art forms on the one hand, and the anxiety that nothing is really going to change in the arts, on the other. At the same time, a pluralistic, vibrant, inclusive artistic practice will contribute towards the reconstruction of our society as a non-racial, anti-sexist, multi-cultural one, respecting, celebrating and not being threatened by diversity, while exploring and building upon what is common.

The importance of arts policy formulation at this time and the involvement of a broad cross-section of our population in the process, lies in the potential contribution of such a policy to the reconstruction of our society, and the putting at ease of different sectors of our society at a time when political turmoil is creating a great amount of uncertainty.

4. It is true that democracy will be better served when people have their basic needs - houses, jobs, literacy, and the like taken care of. But it is also true that meeting people’s basic needs can be a form of domestication i.e. to stifle criticism and -co-opt dissent, which in fact inhibits democracy and serves the interests of politicians who generally do not like critical voices raising questions.

For democracy to develop and be sustained in our country, it is imperative that human rights such as freedom of expression, are guaranteed constitutionally. Furthermore, the state has the responsibility to create the conditions to ensure that people are able to exercise these rights. Nurturing creative, confident, constructively critical voices is part of, and should be integrated into the democratisation and development processes of our society. This should be done from school level, with numerous studies having shown that those pupils involved in the arts eg. drama, are more likely to be confident in expressing themselves, than those who are not.

In society at large, the arts must be resourced and be free of political interference and state or party-political control to ensure that writers, actors, film-makers, 'visual' artists, dancers and musicians, can play the important role of interpreting and challenging society and holding up alternative visions, without fear of victimisation or economic or political censorship.

It is in the interests of politicians to not have confident, critical voices and we should beware of allowing the 'resources for development" argument to be used to justify the lack of resources for democracy and human rights. Democracy, human rights and overall processes of development must be integrated, lest narrow, material definitions of development again simply serve the interests of a (albeit non-racial) powerful elite. To quote from Carl Tham again:

... (the seminar) ... I hope (will) shed light upon how cultural policies shall be designed in order to stimulate without directing, or smothering. The fundamental prerequisite is., naturally, freedom of speech and artistic freedom. Artistic activity is seldom profitable. For it to survive and prosper, public support is needed - but support which is so directed that it stimulates without domination.
...this is possible. It is essentially a question of resources and priorities. For those who lack democratic legitimacy, art can be worrying, even dangerous and undermining. For decision-makers all over the world, culture usually appears at the bottom of the list of priorities. It is precisely for these reasons it is so important to support art and artists.

(Stockholm seminar)

5. The Universal Declaration of Human Rights adopted by the United Nations states in Article 25 (note: the masculine gender is from the original document)

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 27 states:

Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits and

Article 28 declares:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

The interesting point about the Universal Declaration of Human Rights is that it declares that food, clothing, social security and access to the arts are all basic human rights; access to the arts is not a privilege, but a right.

That everyone is entitled to a social order in which these rights can be fully realised at a local level, is the responsibility of government. The Universal Declaration of Human Rights lends international weight to the demands of the artistic community that government protects and promotes everyone's right to the arts, along with all other basic human rights. Any political programme, proposed Bill of Rights and constitution designed to shift our country towards a more just, post-apartheid, democratic dispensation, needs to be tested against the Universal Declaration of Human Rights which reflects the wisdom and agreement of not just one political party or government, but of the full international community as represented by the United Nations.

These rights must be protected and exercised irrespective of whether an individual actively supports, simply conforms to, or opposes the state and the dominant political ideology.

The demand for the arts to be taken seriously at this time then, is a demand which is entirely consistent with the Universal Declaration of Human Rights.
6. Violence - institutional, political and criminal - has for decades been the scourge of our society. Even if a more just political dispensation succeeds in quelling the incidence of violence, the psychological, emotional, spiritual and intellectual scars and the human costs eg. relationships between people of different 'races", will affect our society for decades to come.

The therapeutic and cathartic qualities of the arts for those creatively involved in them and for those who have access to the arts as audiences, are well documented. It is for these reasons - the healing, reconciling and challenging roles of the arts - that they should be encouraged and employed ever more vigorously in the healing of our society.

Rather than taking away resources from the arts to help decrease the incidence of violence, more resources need to be made available to the arts as a means for involving those affected by violence and those most prone to violence in programmes and activities which heal, reconcile and build a greater sense of and respect for life and humanity.

7. Upgrading the physical conditions where people live is a necessary prerequisite after an apartheid era which effectively saw the townships where black people lived, as dormitories in which they slept in between working in the 'white world'. The apartheid philosophy meant that townships lacked the social amenities which could improve the quality of life for those who lived there. The effects of this situation include alcoholism, high crime rates, gangsterism and other forms of anti-social behaviour which are hardly the kinds of conditions for human beings, including children, to grow up in and realise their full potential.

Since the conditions in which most black people lived were determined by the philosophy of apartheid, reconstructing our society requires a new philosophy. The upgrading of those conditions and the creation of new living areas must be based on a philosophy which regards all human beings as having an intrinsic worth and with emotional, physical, spiritual, intellectual and aesthetic needs. The conditions in which people live must then cater for those needs.

Providing access to the arts in terms of movies, theatre, music, and so on, close to where people live, will raise their quality of life by providing a greater range of activities for them to be engaged in; activities which cater for their emotional and intellectual development. Central, regional and local government and town planners can no longer be guilty of repeating the evils of apartheid - people should live close to social amenities eg. parks, theatres, movie houses, bars, restaurants, galleries and so on, which enhance their quality of life.

The provision of such amenities will also decrease high crime rates and contribute to greater social cohesion.

8. There is the perception that the arts are a luxury, that artists do not have real jobs and that the economy cannot afford the arts. In reality though, quite a different picture may be painted. While the figures may not be entirely relevant here, in Canada, for example, research has shown that while it costs $200 000 to create a job in light industry, it costs $20 000 to create a job in the arts i.e. ten times less. The contributions of the arts industries - music, film, theatre - to the national economy in terms of taxes and creation of jobs, cannot be underestimated.
It is true that certain forms of art cannot survive without state subsidies and in most countries, the state contributes towards the arts. However, it must be borne in mind that in the same way as the state makes it possible for other industries to flourish by providing the infrastructure and essential services eg. roads and airlinks, the state has a similar responsibility in providing the infrastructural support for the development of the arts industry eg. theatre spaces. The provision of subsidies for the arts, while not necessarily having the same return as other industries, should be seen in the same light as the provision of subsidies to other sectors of the economy eg. agriculture.

It is necessary for the state and private sector to accept that doing art is work, that it does constitute a real job and that it does constitute a significant sector of the economy. If one took away the arts industry, not only will our quality of life be significantly poorer, but the economy would suffer both in terms of the loss of tax revenue and in terms of the drain on it through unemployment.

The state needs to regard investment in/subsidy of the arts as an investment in the economy, not as the provision of a luxury in a society that cannot afford it. There are numerous talented, unemployed people who, should they have minimal capital resources, will be able to produce work and create employment for others which will contribute to the economy.

9. The argument that the arts are competing for resources from more pressing areas of need really does not hold water when one realises that in real terms, even wealthy countries spend on average, less than 1% of their annual public sector budget on the arts. It is difficult to ascertain the percentage of our budget spent directly on the arts as such expenditure is bound up with the education budget, but the most visible forms of state expenditure i.e. the performing arts councils, received less than 0.3% of this year's budget.

It is highly unlikely that the local arts community will ask for anything more than 1% of the total budget to be spent on the arts so that in real monetary terms, it is not really an acceptable argument that the arts are competing with other more important sectors for funding. However, if this is the case, then it is quite possible for the arts community to sit down with the politicians and decide where to make budget cuts in other areas, to free more money for the arts. The best scenario through, might be to link the arts industry to a growth industry such as tourism in terms of public expenditure, so that they may mutually benefit each other.

10. Contributing to the wealth of the nation should not only- be measured in material terms, but also in terms of the nation's heritage, the richness of its ideas and images, the quality of its art, the overall quality of the lives of its citizens and its contribution to the development of humankind on a global scale.

For a government or political players to ignore the contribution of artists and the arts to the overall wealth of the nation, is shortsighted in the extreme. Rather than curtailing the arts, it should be encouraged.
VISION FOR AND PRINCIPLES OF A NEW ARTS POLICY

Given our past, the idea of policies—being formulated in the arts, immediately conjures up thoughts of stifling, prescriptive policies. Why can artists not just get on with doing art, without policies?

Policy can indeed by prescriptive and stifling, but it can also be facilitative and liberating. The intention of arts policy should be to ensure maximum freedom for the arts and for artists to create, with public resources being allocated to artists irrespective of their political, moral, or other persuasions. In order to achieve that, however, we need policies and even laws to prevent government and other agencies from limiting the freedom of artists and to ensure that the allocation of public resources for the arts is not in any way determined or controlled by the state or party political interests.

But, also given the legacy of our past and the maldistribution of resources, skills and infrastructure in the sphere of the arts, a new arts policy will have to have some elements of prescription eg. the allocation of public resources linked to affirmative action goats, to ensure that past imbalances are overcome.

The goal of policy formulation should not be to prescribe what art should look like or how it should be created; rather, the primary aim of an arts policy should be to guarantee the right to freedom of expression and to create the optimum political, material and educational conditions for this right to be realised and exercised to the full.

Given the legacies and lessons of our apartheid past and the above stated goal, any new arts policy should have as its basis the following eight principles:

1. Accessibility
2. Freedom of artistic expression
3. Political independence of state-supported arts structures
4. The right of arts practitioners to participate meaningfully in decision-making that affects their lives
5. Artistic pluralism
6. Artistic excellence
7. Correction of historical imbalances
8. Internationalism

1. Accessibility

The principle of accessibility means that there must be broad access for everyone who desires it, to education and training in the arts, to resources to create art, to infrastructure to distribute art and to artistic products themselves for stimulation and enjoyment.
This would further entail geographical access i.e. these must be available reasonably close to where people live, they must be financially accessible i.e. they should be affordable and finally they should be aesthetically accessible i.e. the art forms should generally be meaningful to those requiring access.

2. Freedom of artistic expression

A democracy and a democratic government must guarantee the right to freedom of expression, freedom to criticise and the freedom to hold opposing views without fear of victimisation or censorship. Our history of political intolerance, of political and moral censorship and of the criminalisation of dissent, means that these rights must not only be constitutionally guaranteed, but also nurtured in the educational and other social systems.

The rights of individuals, including the right to freedom of expression, should be protected in a justiciable Bill of Rights attached to or contained within the constitution. Any infringement of these rights by the state or other party, or the conflict between the exercise of the freedom of expression and other individual human rights, should be tested in an independent court of law, rather than decided upon by a censorship authority appointed by the state.

3. Political independence of publicly-supported arts

To ensure that the constitutional principle of freedom of artistic expression is not compromised either through overt economic censorship (i.e. where state resources are channelled only to those artists who and arts organisations which do not conflict with the ideology or interests of the state) or self-censorship, and to ensure that independent artistic voices are nurtured in accordance with democratic principles, those structures which allocate state resources for the arts or those arts institutions and individual practitioners who receive public funds, should not be controlled by or dictated to by the state or by party-political interests, either overtly or covertly.

In democratic countries around the world, state funding of the arts in this way is known as "arm's length funding" i.e. the state is legally obliged to provide funding to the arts, but has no say in how it is allocated. The arts bodies which distribute the funding though, do have to account for the expenditure of the money in annual financial and narrative reports.

The arts must be able to flourish with the maximum freedom, with maximum public sector support and with minimal state interference; the right to free artistic expression must not be limited by the state through the political control and allocation of resources. Rather, in accordance with the Universal Declaration of Human Rights, it is the duty of the democratic state to both protect the right to free artistic expression and to create the conditions for this right to be fully exercised.

4. The right of artists to participate meaningfully in decision-making structures which affect their lives
It is a basic democratic principle that people should have a direct say in, and actively participate in the structures and policies which govern their lives. Accordingly, it is arts practitioners, rather than politicians and state-appointed bureaucrats, who should determine how public resources for the arts should be allocated and what kinds of policies need to be implemented to promote and protect the arts and the interests of arts practitioners.

Arts practitioners are also more competent than state-appointed bureaucrats and politicians in determining needs within the arts, and the policies and resources required to meet those needs. With arts practitioners playing an active role in policy formulation and decision-making structures which have to do with the distribution of resources for the arts, the principles of political independence and freedom of artistic expression, will be further entrenched.

5. Artistic pluralism

The principle of artistic pluralism recognises that all art forms have a right to exist. It also respects, and in fact encourages, different art forms and creates conditions in which these are protected and promoted. It is coupled to the 'live and let live' principle which accepts that while an art manifestation may not be something which one particularly enjoys or is attracted to, it does have a following and a legitimacy in another context, and therefore has the right to existence and to public resources to sustain its existence in the same way as the art forms which one holds dear, has a similar right.

Artistic pluralism also recognises that some forms, by their very nature, may require more resources than others. Within one particular discipline, there may be a variety of forms eg. theatre may have educational theatre, community theatre, cabaret, classical Shakespeare, theatre for development, and so on. The principle of artistic pluralism accepts that each has its place and validity in particular circumstances; one is not intrinsically better than another; rather, they are different with different functions in different circumstances. It is the imposition of one form over others or the elevation of one form over others that creates unnecessary 'us-them' tensions. As many forms as possible need to be nurtured, not only the old and classical, but also the new and experimental. In fact, in our situation, cross-pollination between forms may be encouraged and be considered highly desirable in the next five years, and so be offered incentives to reflect in art forms and content, a coming together of that which has historically been kept apart.

A pragmatic formula needs to be devised to ensure fair distribution of public resources to implement this principle, which formula may change from time to time as issues and circumstances on the ground change.

6. Artistic excellence

While there may be much therapeutic and cathartic value in general participation in the arts by as many people as possible, it is also necessary that for the arts to achieve their most exhilarating effect, the highest possible technical and creative standards be attained. Whether it be amateur, professional, community-based, youth or children-oriented, the highest standards of artistic
excellence should be encouraged and pursued, with sufficient resources and skills being made available for this purpose.

The issue of standards (whose standards?) is of course a contentious one and should not be naively dismissed. However, standards and aesthetic values will increasingly be contested over the next while and may very well come to be defined and redefined as the extension of skills and resources to formerly disadvantaged sectors, and the provision of incentives towards attaining the highest quality of work, begin to impact organically on, and be manifested in a greater diversity and wider range of art practices, forms and expressions.

7. Correction of historical imbalances

While a new arts policy in the context of a more democratic and non-racial political dispensation may distribute resources, skills and infrastructure in the arts more equitably than was the case during the apartheid era, it has to be recognised that within the new dispensation it will be those who have historically had access to resources and skills who, for this very reason, may continue to have their interests dominate in the sphere of the arts. It is necessary then, that active steps be taken to redress past imbalances by allocating resources for training and for the provision of facilities and opportunities for those who have had little access to these under apartheid.

The principle recognises that those who have had unequal access to skills, resources and opportunities in the past, cannot now be expected to compete on equal terms. The pursuit and maintenance of artistic excellence, the development of new, informed audiences and the encouragement of greater diversity and vitality in the arts, require that opportunities for training, for acquiring experience and for exposure to and within the arts world, be provided to historically disadvantaged artists.

In implementing this principle, two concepts - which have both caused much consternation - are important: development and affirmative action. Accordingly, it is necessary to provide a definition of what is meant by these terms in the case of the arts.

Development needs to be understood as the extension of skills, resources, facilities and opportunities to historically disadvantaged persons or to persons who have been unfairly discriminated against on grounds of gender, colour, sexual orientation or religion, to enable them to eventually compete on merit in the sphere of their choice.

Affirmative action needs to be understood as the preferential granting of employment and other opportunities for advancement, to historically disadvantaged persons or to persons who have been unfairly discriminated against on grounds of gender, colour, sexual orientation or religion, in instances where they compete on merit, and are at least as qualified for the positions concerned, as other persons who have applied and have not been so disadvantaged or so discriminated against.

There are at least three kinds of affirmative action: moral, strategic and politically correct.
Moral affirmative action is implemented because it is the morally right thing to do i.e. where people were once disadvantaged or discriminated against on the basis of colour, and it becomes possible to correct that situation, affirmative action is implemented because it is the right thing to do, because past discrimination was wrong.

Moral affirmative action would also ensure that those being employed or advanced in terms of such action, will have the necessary skills and whatever else they need, to do their respective jobs well, because this too, is morally right and in the best interests of both the company or institution and the individuals concerned.

Moral affirmative action would also be implemented proactively i.e. the company or institution would not wait for vacancies to occur before they are filled in an affirmative action manner; the company or institution concerned would immediately - when it becomes legally or politically possible to do so - begin to take steps to correct the governing, managerial and staffing components of the company or institution in accordance with affirmative Action goals.

Strategic affirmative action is implemented where the overall political climate changes and it is in the company's or institution's strategic interests to be seen to be employing those who have been unfairly discriminated against. Such affirmative action may gain the company or institution concerned, political credibility or legitimacy, and thus enable it to pursue its original ends in different political circumstances.

The best forms of strategic affirmative action will ensure that those employed or advanced will be sufficiently skilled so as to maintain the standards and quality of the company or institution.

Politically correct affirmative action is implemented where external political pressures on the company or institution or the overall political circumstances in which the company or institution is required to pursue its original goals, change dramatically, so that the company or institution makes the changes it believes the external pressure groups would like it to make, even if this means that those employed or advanced in terms of such action, are not adequately skilled. In such instances, affirmative action has a potentially destructive, negative effect on both the company or institution and the persons employed or advanced.

There is often a perceived tension between 'affirmative action' which is generally taken to mean replacing whites with blacks or at least favouring blacks and 'maintaining high standards” which generally means what white people may regard as 'high standards'. Affirmative action is often also feared by those who have been advantaged as a revenge strategy by blacks, with large scale white retrenchments in the offing.

However, affirmative action in the sphere of the arts has to be done because it is the morally correct path to follow. Particularly where the company or institution concerned is subsidised with taxpayers' money collected from all taxpayers, it is morally correct that all people have a right to benefit from and be employed or advanced in such companies or institutions, and not only those who have been advantaged under apartheid. Morally-based affirmative action will also ensure that those employed or advanced will have the necessary skills for their respective positions, so that the
fear of the loss of standards is not necessarily synonymous with affirmative action, unless the latter is applied for politically correct reasons.

Where morally-based affirmative action is implemented and the person employed or advanced may lack in some areas, it is necessary that an appropriate development programme be designed for the person to follow and obtain the experience or rounding of skills required.

Apartheid was immoral. The discrimination against and disadvantaging of black people because they were black, was immoral. It is therefore morally proper to correct the historical imbalances in the sphere of the arts through development programmes and morally-based, rather than strategic or politically correct, affirmative action.

In doing so, we would however, recommend a pragmatic policy that would seek to achieve optimum affirmative action goals in all existing state-subsidised arts institutions over a period not exceeding five years, so as to achieve these goals as organically as possible with minimal retrenchment (although it must be accepted that these will occur) of present incumbents and with no duplication or creation of unnecessary posts.

8. Internationalism

After decades of apartheid, there is much to discover and rediscover about ourselves and each other and about our cultural traditions. There is also much to do in developing our arts. At the same time, we need to recognise that we are part of a global community which is becoming increasingly accessible after years of isolation.

There is much which we can offer the world, and there is a tremendous amount which we can learn from the arts traditions and practices of other countries. International cooperation in the sphere of the arts will challenge us to grow, extend our ideas, our world views and beliefs, and will develop the quality and range of our art forms and artists.

To enhance the development and vitality of our art, we need to encourage cultural exchange with other parts of the world and not only with the areas of traditional influence i.e. Europe and the USA, but Africa, Asia, Australia and South America as well.

FOUR PRIMARY AREAS OF CONCERN IN TRANSLATING THESE PRINCIPLES INTO PRACTICE For the arts to flourish in our country, we need to be concerned with four primary areas:

* education and training

This would involve training those directly involved in teaching, creating and distributing art i.e. actors, musicians, film-makers, arts administrators, technicians, marketing experts, arts educators, and the like. It would also involve cultivating informed audiences and educating public aesthetic tastes.

* supporting the creative act
This would require the provision of resources and facilities to enable creators to create; to allow them to have sufficient time and space to produce creative products without the pressure of having to earn a living elsewhere in order to support their creative acts.

* distribution of art
This involves access to infrastructure which artists need to distribute their art to the public; infrastructure which the public should have geographical and financial access to i.e. theatres, community art centres, galleries, publishers, cinemas and so on. Besides such 'hard infrastructure', other forms of distribution could include festivals, exhibitions, national competitions, etc.

* evaluation of art
in pursuit of artistic excellence, the training of informed, knowledgeable critics and the theoretical, critical and academic reflections on art are important. Incentives need to be created for the pursuit of the highest possible achievements in the arts. This will include the provision of state and private sector grants for such ends.

The market, of course, also has a role to play in evaluating and conferring success. While this may not always be success in terms of artistic merit, the importance of the market cannot be underestimated or arrogantly ignored.

ESSENTIAL COMPONENTS OF AN IDEAL ARTS POLICY AND PRACTICE

Taking all of the above principles and primary areas of concern into account, how does one translate all of this into concrete reality?

Observing democratic societies elsewhere and models that operate in the developing world, we believe that the best future arts scenario should consist of the following:

1. An independent National Council for the Arts which receives an annual "arm's length" grant from the state, which is then distributed to support individual practitioners, organisations, companies and projects to create and promote literature, music, theatre, dance and visual art.

2. An independent film authority which would oversee the development of the film industry and would, like the National Council for the Arts, receive an annual 'arm's length' grant from the state which it would distribute to subsidise local films and independent film-makers.

3. Multi-functional, multi-disciplinary community arts centres, approximately one for every 200 000-400 000 people in areas and communities deprived by apartheid and which would provide access to training, infrastructure and the arts at a local level.

4. National institutions in each discipline which would receive full support from central government i.e. a National Gallery, National Library, National Opera Company, National Symphony Orchestra, National Theatre Company, National Dance Company and a National Film Institute.
With multi-party negotiators apparently agreeing on some form of regionalism with strong regional governments, it will be up to these regions to determine - based on public interest and needs and the availability of resources within the region - whether they would like art forms such as opera, ballet and classical music. However, it will be the responsibility of central government to provide maximum support to one such institution or company nationally, to ensure the preservation and development of the nation's heritage in those respective disciplines, to pursue and maintain standards of excellence, to serve as models for others to follow and to represent in their staffing, art forms and programmes the diversity and multi-culturalism of the nation as a whole.

These national institutions and companies will be located in different parts of the country, and will seek to be truly national (and their subsidies will be dependent on it) in reflecting the full range of the country's population in their staff, management, governing boards and artistic programmes.

5. New tax policies which encourage the private sector and individuals to support the arts,

6. An arts education policy which introduces arts education at primary school level, and provides tertiary and community-based training for arts administrators, professional artists, arts educators and so on.

7. Local festivals feeding into regional festivals which feed into national festivals. These can be discipline-based or multi-disciplinary, with the best works at each level proceeding to a higher level. In this way, work for artists is generated, new audiences are developed and standards of excellence are encouraged. We could have seven to ten regions with the capitals of each hosting an arts festival every year, with the best works from these travelling to the National Arts Festival in Grahamstown.

8. Legislation and programmes recognising and protecting the status of the artist in terms of medical care, taxation, pension schemes, collective bargaining rights, and the like.

1. NATIONAL COUNCIL FOR THE ARTS

Democracies like Australia, Britain, the Netherlands and Canada all have such an Arts Council whose chief characteristics tend to be 'arm's length funding' i.e. the state is legally obliged to give an annual grant to the Council but has no say in how the resources are allocated, and "peer assessment" i.e. applications for funding by the Council are considered and decided upon by experts in the field and fellow artists,

Legal Status of the National Council for the Arts

The National Council for the Arts would be a statutory authority i.e. it would exist by law of parliament. It will, however, operate with complete independence from the state in terms of its policy-making and funding roles.
Relationship of the Council to the State

Since it is taxpayers' money which is channelled by the State to the Council for distribution to artists and arts projects, the State would have to have some degree of responsibility. However, this responsibility is not in the areas of policy-making or in the allocation of funding to particular projects; responsibility is limited to ensuring that the Council's expenditure of taxpayers' money is stringently accounted for through annual audits by the Auditor General. A further function of government may be to appoint an independent ombudsperson (permanent or ad hoc) to investigate complaints of bias, prejudice or non-fulfilment of its mandate against the Council, should these arise.

Attempts to control or dictate to the Council by the State may result in the State being taken to court.

The only area of legitimate parameters being set by the State would be to ensure that the maximum possible amount of the annual grant to the Council, be spent directly on the arts. in the Australian model, the government stipulated that a maximum of 1 3.5 % of the grant be spent on administering the Council (salaries of staff, Council meetings, rent, etc). It would be an extremely good example to follow to ensure that a local National Council for the Arts conducts its business in as efficient and businesslike manner as possible to ensure maximum benefits for the arts. We recommend that a maximum figure of 15% of the State grant be spent on administration in accordance with the recommended figure set by international development agencies for legitimate administration costs of projects which they support.

There are at least three models regarding the relationship of an Arts Council to the State. Whichever ministry is responsible for the arts, the relationship might be one
a. where the Council advises the Ministry on how to fund the arts: which projects and individual practitioners to support and the Ministry has the final decision in acting upon this advice
b. where the Council decides on the allocation of the annual grant which is known beforehand, and the Ministry then implements these decisions as it has the infrastructure to do so and
c. where the Council is totally independent in that it receives a grant through the relevant Ministry, makes policy and priority decisions, allocates resources in terms of these policy and priority goals and practically distributes the money. It is accountable for how it spends the grant and so has its books audited annually, and this audit report as well as a narrative report is submitted to the relevant Minister and Ministry.

We favour the third approach as it allows for maximum independence and thus for the protection of the principles of freedom of artistic expression and the right of arts practitioners to be involved in the decision-making structures which affect their lives and livelihood.

As to which Ministry should be responsible for the arts, there are at least four options:

a. a separate Ministry of Culture
b. a Ministry of Education and Culture
c. a Ministry of Sport and Culture and
A separate Ministry of Culture sounds like a good idea because it implies that the government will take the arts seriously by providing resources for the arts. The possible problems though, would be that a Ministry and Minister of Culture would need to justify their existence and could be more interventionist in the sphere of the arts than what is desirable, so that the independence and role of the arts will always be subject to the changing personalities, ideologies, knowledge of and interest in the arts of the ministerial incumbents. If the minister is a visionary, it will be positive for the arts; if the minister is an ideologue, it would be disastrous. Having a separate ministry of culture will also consume resources and create a beauracracy, the expenditure on which could be much more usefully spent on the arts. Finally, if the principles of a new arts policy and the concomitant structures outlined in this document become the basis for a new arts policy and practice, then it will simply be a matter of setting up appropriate mechanisms to channel state resources to independent arts structures, and these may be located in any Ministry so that there would be very little for a separate Ministry of Culture to do.

Recognising the links between education and culture, it would seem to be natural to locate the arts within a Ministry of Education and Culture. However, given the vast legacies of apartheid which need to be overcome in the area of education and training, the arts would always have to battle for resources and would always come off second best. While a Ministry of Education might certainly be responsible for some aspects of the arts eg. arts education, the arts need to located in a ministry where it stands the best chance of surviving and developing in its own right.

It is for this reason that being part of a ministry of sport and culture would not serve the interests of the arts either since, given the major role which sport plays in the life of our country, the ministry will favour sport rather than the arts.

With tourism just being given a ministry of its own and this being one of the potential great income-generating industries of the future, it would be in the mutual interests of the arts and tourism to be located in the same ministry, as the arts are a potentially significant means of attracting tourism. It would be in the interests of tourism to ensure that the arts, artistic excellence and appropriate infrastructure are developed, and it would be in the interests of the arts throughout the country, to attract and develop international and national markets.

We recommend then, that a Ministry of Tourism and Arts be created. This would not be a first; Australia has a Ministry for the Arts, Tourism and Territories.

Functions of the National Council for the Arts

Note: Despite the words 'arts council' in the title, the proposed National Council for the Arts is nothing like the performing arts councils we currently have. The performing arts councils are essentially production companies subsidised by the state, to present a variety of performing art forms.
The proposed National Council for the Arts will not consume resources, nor will it stage productions as do the performing arts councils; rather, its function will be to distribute public resources as widely as possible to encourage the development, diversity and excellence of art (dance, music, visual art including photography and craft, theatre and literature) on a national scale.

A second important note is that the idea of a statutory arts council for SA is not a new one. Many progressive arts organisations have argued for one as it is the most common mechanism for developing the arts in democratic countries. But a national arts council was also recommended by the state-appointed Schutte Commission into the funding of the arts which completed its report in 1984 after 3 years of local and international research.

According to Sheila Camerer, (speaking at a COSAW debate in May 1992 as the then Information Officer of the NP);

A key recommendation of the white paper (on the promotion of the arts, formulated in 1986 on the basis of the Schutte report) was that an arts council should be formed. But this was not accepted by government at the time. The government's argument at the time was that such a council would reflect government control and therefore would be in conflict with government policy of full autonomy of the arts.

If this statement was a reflection of government thinking in the mid-eighties, then clearly, current political conditions favour such a council. In 1989, when FW de Klerk was still Minister of National Education, the Foundation for the Creative Arts was established to play a similar role to that of an Arts Council, but not on the scale suggested by the Schutte report. The point to note is that the idea of such an arts council has already been accepted by the current government both in principle as well as in limited practice.

Mission Statement

A possible Mission Statement for a National Council for the Arts could be:

To develop a strong artistic life throughout the country by promoting access to, and diversity, pluralism and excellence in the arts among all the people of South Africa

Objectives

The objectives of the Council would include (most of these are taken from the listed objectives of the Australian Council for the Arts):

a. to support the creation and development of South African literature, performing arts and visual arts through financial support, advice and appropriate arts policies

b. to encourage and assist communities to obtain the resources and infrastructure they need to actively participate in the development of their own culture and to encourage and support
communities and groups from different cultural backgrounds to contribute towards the development of South Africa's cultural identity(ies)

c. to support the creation and development of innovative South African art by encouraging the attainment of the highest levels of creative and technical skills

d. to promote excellence in the arts and the provision of incentives for and recognition of achievement in the practice of the arts

e. to help create and support initiatives and opportunities to foster, nurture and celebrate the arts at local, regional and national levels

f. to foster greater understanding and awareness of the arts in South Africa through policy, research and development activities and the collection, creation and dissemination of information

g. to promote national and international awareness and appreciation of South African art, highlighting the place of the arts in society and the contribution they make to South Africa and its economy

h. to uphold and promote the rights of all persons to freedom in the practice of the arts

i. to promote the appreciation, understanding and enjoyment of the arts among all South Africans

j. to encourage support for the arts by the state, local governing bodies, the private sector and other relevant persons and bodies

k. to advise the government on matters connected with the arts

l. to support education and training in the arts and to advise central and regional educational authorities on arts education

m. to assist in the coordination and the development of the arts on a national scale

n. to encourage and oversee the development of the arts among traditionally disadvantaged groups eg. women, workers, children and the physically challenged

o. to do anything incidental or conducive to the performance or realisation of any of the foregoing objectives

Structure of the National Council for the Arts

Again, following the Australian model (more-or-less), we would recommend a National Council for the Arts which consists of:
a. 15 members who constitute the Council and which is the highest decision-making authority. The Council should be representative of all the art disciplines, the regions, of gender and language groups, and all members must have relevant expertise and experience. The Council would be responsible for making policy, for setting priorities and defining a strategic plan, and for coordinating the activities of the Council as a whole.

Members of the Council may be required to attend meetings at least once per month and would be paid a monthly stipend in the same way as the SABC Board is paid in recognition of the amount of work involved (membership of the Council is not on a full-time basis, but neither is it an honourary position)

b. 5-7 member Boards in each of literature, visual arts, dance, music, theatre and community art with each Board being chaired by a Council member.

The functions of these Boards would be to set policy and funding priorities in their respective areas and to consider and decide on applications for funding.

These Boards will meet for a maximum of four times per year and members will receive appropriate stipends as well.

c. Each Board will have an Administrative Unit which consists of full-time staff whose task it is to implement the decisions of the Board, to collect information, monitor the projects supported by the Board, collect financial and narrative reports, process applications for funding, etc.

d. The Council as a whole will also be serviced by full-time staff such as a Director or General Manager and a Strategic Development Unit and Corporate Services Unit which will implement the Council's overall aims in terms of fund-raising, liaison with central, regional and local government, research and information collection and dissemination.

A. Council

The qualities of Council members should be that they:
- are politically independent i.e. that they at least do not hold high profile office in any political organisation
- are highly respected within the arts community, or at least within the discipline they represent
- are people of integrity
- have great knowledge, expertise and experience in the arts, either generally or within specific disciplines
- must not have any conflict of interest (financially or otherwise) with the Council's activities; they themselves cannot receive, or be involved in projects which apply for, grants from the Council

The appointment of the Council could come about in at least three ways:

a. unilateral appointment by the minister concerned
b. appointment by the minister after nominations from arts organisations and the public have been invited and received

c. selection by an independent panel of judges based on nominations by arts organisations and members of the public and consequent public hearings as with the SABC Board. The selected names are then passed on to the relevant minister for official appointment. Based on nominations for the position and on the interviews, the panel would also recommend appointments for the positions of Chairperson and Vice-Chairperson.

We recommend the final method as it allows for greatest transparency, independence and public confidence.

The first Council would elect an Executive from among themselves of no more than 8 members, including the Chair and Vice-Chair already appointed. The Executive would serve for a period of five years to ensure continuity, and may be elected/appointed for another term of three years after that. Other council members would serve for three years and then may be nominated again or stand down or be replaced by others. No Council member - other than Executive members mentioned earlier - may serve for longer than two periods of 3 years. Those who stand for renomination may be subject to public scrutiny again in terms of how they fulfilled their mandate the first time round. The limit on length of service is to ensure that no long term power bases are developed and that new blood, vision and ideas are channelled into the Council.

B. Boards in literature, dance, music, theatre, visual arts and community art

The qualities of members of each Board will be similar to those of Council members. The Boards could come into being in at least three ways:

a. a member for each Board could be elected by the respective artists and educators within each region and each discipline so that each Board has members from different regions; where more nominations are received than required, the Council has the final say in selecting out of those put forward by the regions

b. the Council appoints the Boards based on nominations received from the public and from arts organisations and practitioners, nominations for these positions will be subjected to public hearings conducted by the Council

c. the Council invites nominations from the public and arts organisations by a certain date for each Board. Based on the qualities required and CVs submitted, the Council publishes a short list of prospective members of each Board who could be artists, educators, administrators or other persons active in or knowledgeable about that particular field. Arts organisations and individual practitioners are then invited to submit a list of names out of the short lists which they would support, as well as objections to any candidate and the reasons for these. The Council will then make a selection out of the short lists based on recommendations and the strength of support which candidates have from a range of arts organisations and institutions in the field.
For the selection of the first Boards, given the role that they will be required to play and the success which they will need to make of their positions, we recommend the third approach as it allows for participation and consultation with arts organisations and practitioners, but the selection by the independently appointed Council ensures that those selected are not necessarily the most popular, but the most skilled and experienced for the job at hand.

Members of each Board will serve for a maximum of three years.

Applications for grants to support individual practitioners or projects to promote any discipline will be considered twice per year by each Board. Once applications have been received, applications from each region will be scrutinised by committees of 5-7 artists or other persons active in or knowledgeable about that particular field (e.g. educators), in that region. These committees will be elected by artists, administrators and educators in that field in that region. Alternatively, they may be nominated by arts organisations, arts institutions and tertiary educational institutions, with the respective Boards making selections out of these nominations to ensure the widest representation on these committees, and to prevent them being dominated by one particular organisation or interest group. These regional committees will be chaired by a Board member. Members of such committees will serve for a maximum of two years and may not apply for grants from the Council themselves during their period of service.

Applications from the region are scrutinised by these regional committees and recommendations are made to the Board as to which projects should be funded and by how much. Once all applications have been screened by the respective regional committees, the Board meets and considers all the recommendations. The Board then decides on grant funding; their decision being final.

This process allows for maximum participation by regions and artists in the process of selecting those projects which and those practitioners whom they think will make the best contribution to their respective disciplines during that year. It is a longer process, but it is more democratic.

A shorter process would simply be for each Board - which would already consist of members nominated by their peers - to consider applications twice per year in accordance with the criteria and priorities set for that year, and to make decisions about who should receive funding and how much.

These two options need to be debated and decided upon by the artists themselves.

Each Board will determine what kinds of projects it will support and the criteria used to make a selection within the broad policy and strategic frameworks set by the Council as a whole. Such projects could include:

* individual practitioners who receive monthly support to enable them to work on a creative project for 3-12 months
* education and training projects designed to train artists in the field
* festivals or events to bring the arts to the public
* mobile, travelling exhibitions, libraries, film units
* developing distribution networks for art and craft
* research
* information magazines

The kinds of things which would not be supported by the Boards would include:

* the purchase or building of buildings
* administrative costs of more than 15% for any project
* undergraduate study in the arts

Each Board, at its discretion, may grant funding in the following ways:

* 100% of the budget requested
* a percentage of the budget depending on the availability of resources and other factors
* matching grants of 1:1, 1:2, 1:3 i.e. for every R1, R2 or R3 raised by the individual or organisation for the project concerned, the Board will give R1, R2 or R3 as the case may be.

Criteria used for allocating resources:

Each Board will determine its own criteria for allocating resources and each category of projects within any discipline may have its own criteria, but general criteria to be used for deciding on applications could include:

- is the project run by competent people, does it have a reasonable chance of achieving its goals
- does the organisation/project/individual have a record of professionalism, competence, adhering to report schedules
- how does the project contribute to the development of the discipline
- how will it impact nationally
- is it innovative, original, does it seek to break barriers
- how does it contribute to building a non-racial, multicultural society

Kinds of projects/programmes which could be supported by different Boards:

Literature Board

- support for individual writers to write on a full-time basis for 3 months to 3 years
- campaigns to develop a reading public
- writers-in-residence at schools, libraries, tertiary institutions, community arts centres: part of their time in residence is spent teaching, encouraging writing, talking to interested public members and the other part is spent writing
- the publication of particular books
- public readings
- workshops, non-formal courses to train writers
• competitions to encourage writing in particular genres
• playwrights-in-residence at particular theatres; they will be commissioned to write plays, and may be required to run playwriting workshops in the area
• conferences of writers or to promote writing
• projects to promote writing by women, workers, children
• projects to promote creative writing in indigenous languages

• national and regional literary magazines which promote the theoretical development of writing and exchange of ideas
• advocacy work by writers and writers' organisations to promote and defend writing and writers
• promotional activities to promote young, new writers locally and abroad
• translation of local and international works into indigenous languages and vice versa

Music Board

• grants to commission composers for particular works eg. to write operas
• composers and/or conductors-in-residence at particular training institutions to pass on skills and develop their own skills
• education and training projects to promote music
• experimental music projects, cultural crossover projects
• projects/programmes to develop a music-loving public
• opera, chamber music, choral music performances or companies
• recordings and promotions by independent studios of local music
• master classes
• music magazines
• regional or national music festivals
• local tours by music groups

Theatre Board

• projects to promote theatre among children, youth
• grants to support particular companies of merit or particular projects of companies
• director-in-residence either with a company or at a theatre, to both teach directing skills as well as direct her/himself
• support for mime, puppetry, experimental theatre companies
• grants to support regional or national theatre festivals
• education and training programmes and workshops to impart skills
• support for particularly experimental or innovative productions
• theatre magazines to encourage the theoretical development of theatre
• local tours by theatre companies
Dance Board

Similar to theatre above

Visual Arts Board

grants to support individual artists and craftspeople for
3 months to 3 years
• advocacy work by visual arts organisations to defend the interests of artists
• support for regional and national individual or group exhibitions
• support for travelling exhibitions
• artists-in-residence at schools, community arts centres, tertiary institutions, to teach and to
produce work support for projects to develop a visual art public
• support for projects to distribute visual art works support for institutions in need to purchase
art works support for projects/programmes to develop visual arts among youth, children
• support for research, writing and publishing works to promote the theoretical development of
the visual arts visual art conferences, seminars

While the National Council for the Arts will essentially have to do with the professional
development of the arts, the apartheid legacy is such that it would be those who already have skills
and access to resources who would most continue to benefit. We would like to therefore
recommend that for the first five years of the Council's existence, the grant of each Board will be
divided equally i.e. 50%/50% between direct support to professional arts activities on the one hand,
and to development (as defined earlier) on the other, within that discipline.

After this initial 5 year period, the percentage allocated to development will decrease depending on
the respective needs to a minimum of 20% over the next five years, at which point it will stay. In
other words, for the second five year period of the Council's existence, each Board shall have the
discretion - within the parameters set by the Council - to decrease the percentage of the annual
grant spent on development to a minimum of 20% by the end of that five year period. After that, at
least 20% of the Council's resources will still be allocated to development for at least the next five
years, after which it will be evaluated, depending on what progress has been achieved in the first
fifteen years of the Council’s existence.

Development within each discipline will have as its end the extension of professional career
opportunities, professional values, discipline and artistic standards to those who have formerly been
discriminated against, particularly on the basis of colour and gender.

Professional activities and development are, of course, not mutually exclusive. For example,
support for a professional theatre company could be provided should they also train a young,
disadvantaged actor for that year. Professional arts activities will be supported in their own right,
but may be more likely to receive support during the first five years of the Council's existence if
they include a development programme,
Community Arts Board

The five Boards mentioned so far have to do primarily with the professional development of their respective disciplines. The Council will however, also play a role in developing the arts at a local, community level.

Community art refers to forms of artistic activity and endeavour which may in the long term contribute to professionalism in its more traditional sense, but which essentially have to do with fostering and nurturing the arts at a grassroots, community-based level as a means of empowering such communities and individuals with confidence, with communication, financial and organisational skills, and with the means to take responsibility for the celebration and improvement of their quality of life.

The Community Arts Board would support

- projects and programmes of community art centres
- local cultural festivals
- local community-based craft, theatre, dance, mural
- projects aimed at self-sufficiency
- community-radio and television projects
- resource development
- skills training in the arts, management and administration
- community arts officers located within trade unions, women, youth and civic groups to develop the arts within such contexts
- national and regional networking among community arts projects

We believe that developing a healthy arts practice and life at a local, community-based level and developing a highly skilled professional arts practice simultaneously, will feed into each other and should not be seen as either/or phenomena, but rather as phenomena which will both contribute to a vibrant arts life and practice nationally.

Criteria which may be used to determine whether an application is successful or not could include:

- involvement of the community in decision-making
- does it have self-sufficiency as an end and does it have a reasonable chance of attaining it
- sustainability i.e. does it have access to the necessary skills and infrastructure to sustain it in the long term
- is it cost-effective in terms of what product is achieved considering the money, time and energy vested in it
- what level, kinds of skills are being imparted

Each of the Boards may initiate or commission projects or their full-time staff units to provide basic training to groups and organisations which apply for funding, in administration, management, fund-
raising, organisational development, report-writing, bookkeeping and financial management. The granting of funding to groups may be linked to their participation in such training first.

Interdisciplinary or multi-disciplinary projects which do not fall into any of the above Boards' spheres of grant allocation, may be addressed to any Board. A special inter-Board meeting, with one member of each Board, will meet to consider such applications.

C. Administrative Units

Each Board will have full-time staff to administer the decisions and fulfil the functions outlined earlier. These staff positions will be advertised, applicants will be interviewed by the Board and recommendations will be made to the full Council or Executive who will finally be responsible for the employment of senior staff.

D. The corporate services and strategic development units will also have full time staff, accountable to the General Manager or Director (also a full-time employee who sits ex-officio on the Council). These posts are advertised too with applicants being interviewed by the Executive or a staff committee, and recommendations are made to the Council.

Whatever staff component such a Council has (the Australian Council has 115), it should be such that salaries together with general administrative costs of the Council (travel, rent, stipends to Board and Council members, regional committee meetings of artists, etc) should not exceed 15% of the annual grant given to it by the state.

Applications for grants

Anyone and any organisation or institution may apply for a grant to support a particular project or creative process. The kinds of projects, criteria used to decide and application forms should be made public by the Council well in advance of each closing date for applications. Grants will be made twice per year.

Accountability of the Council

The Council and each Board will prepare an annual narrative and financial report detailing expenditure and the projects and individuals supported, These reports will be submitted to the relevant Minister and will be available to the public.

2. INDEPENDENT FILM AUTHORITY

The proposed National Council for the Arts outlined above, essentially deals with supporting literature, the performing arts (music, theatre and dance) and visual arts and craft. Given the nature of the industry and the amounts of money involved, an independent statutory body is required to oversee the development of the local film industry, which will include the channelling of state-subsidies to independent film-makers, At the moment, film state subsidies are administered through the Department of Home Affairs. A model to follow Could be an independent film commission
along the same lines as in Australia where such a commission has played a significant role in establishing the Australian film industry internationally.

Again, we could do a lot worse than follow the Australian model.

The Australian Film Commission (AFC) is a statutory authority established in 1975 by the Australian Film Commission Act 1975.

The primary functions of the AFC are to:
- provide development and production funding for film and television projects
- promote and facilitate international co-productions
- assist the cultivation of new and critical audiences for film
- support the marketing, distribution and exhibition of Australian films
- provide an information and resources centre for the film and television industries and monitor industry developments and
- provide advice to the government on film matters.

These functions and the idea of an independent film statutory authority are consistent with the ideas of the major organisations representing the local film and television industry i.e. South African Film and Video Institute (SAFVI), Film and Allied Workers Organisation (FAWO), Film Makers’ Association (FMA), SA Film and Television Technicians’ Union (SAFETY) and the Performing Arts Workers Equity (PAWE).

Since these organisations are the most representative voices within the industry, the N.A.I. wishes to do little other than lend support to their ideas which have emerged out of their research and discussions.

**Aims of an independent film authority**

In an interim consensus report dated 18 November 1991, these film bodies call for the establishment of an independent statutory body to oversee the development of the film industry. Its aims and objectives would include:

- promoting the development of an indigenous, national South African film industry, free of racism and sexism
- setting up financial mechanisms involving both the state and the private sector to support the above objective
- putting the funding and administrative procedures of the film industry on a sound, consistent and equitable footing
- putting the funding and administrative procedures in the hands of suitably qualified personnel
- making the industry responsible for liaising with the statutory body to utilise the funding in the best possible way
- serving as the basis for the overall rejuvenation of the industry
- adopting affirmative action policies to redress the imbalances of the past
- supporting film training
i. supporting wider distribution and exhibition of films and videos, particularly in areas which currently have the least access to audio-visual communication
j. funding ongoing research into audio-visual matters and making the information available as widely as possible
k. maintaining relations with foreign film industries and
l. funding film and video archives.

**Structure of an independent film authority**

The consensus document further declares that the independent statutory film authority, provisionally titled the South African Film Foundation (SAFF), will be headed by a Board of Governors selected from leaders within society and within the communications and media industries. Nominations would be invited and received from the public and various interested parties, and the government of the day will appoint the Board from the nominations received.

The Board should be broadly representative, have business acumen and have an interest in and an understanding of communications.

The SAFF should be run by a Chief Executive Officer and full-time staff who should have an understanding of the film industry and so will probably be drawn from that and related fields. The document states that the staff team should be small and efficient and not a self-serving beauracracy.

In 1990, R50 million was set aside for the local film industry. It is intended that the state would make this kind of money available to the SAFF for it to distribute in accordance with its aims and objectives. Further recommendations for generating income to support the SAFF are a levy on cinema tickets and TV licences as well as import duties on video tape and film which are then channelled to the SAFF.

The broad principle of an independent film authority is one mooted by the major local film bodies. They have also advocated that intensive research be done into a range of issues including the criteria to be used to allocate funding, kinds of films to be supported, and so on.

At this stage, it is the principle of an independent, statutory film authority, which receives an annual state grant to develop the local film industry, which is important. Another principle is that it should be people involved in, and knowledgeable about the industry who should be making the decisions about how the funds are allocated. Both these principles parallel the 'arm's length funding' and 'peer assessment' principles of the proposed National Council for the Arts.

3. **COMMUNITY ARTS CENTRES**

One of the final points 'Made in the consensus document on film is

The lack of cinemas in black areas is one of the main limiting factors in local film-makers reaching local audiences, and it is possible that the SAFF could be a motivating force in making the development of such cinemas possible.
indeed, the same may be said for visual art, literature and the performing arts: that the lack of facilities in black residential areas where most people live, make it difficult to bring the arts to where people are and to cultivate new audiences and new markets that would ensure the future survival and growth of these art forms.

In the urban, mainly white areas, there are sufficient structures to provide access to all forms of art - galleries, theatres, cinemas, libraries, concert halls, etc. These have been provided through a mixture of central, regional and local government funding as well as through the private sector, and some are linked to educational institutions. It is also consistent with most developed, "first world' contexts that separate kinds of facilities have provided access to different kinds of art forms.

In developing the future of the arts, it is necessary that facilities be provided in the townships, close to where people live. A moratorium should be placed on all new public expenditure on arts facilities in what have been urban, white areas, with public expenditure going towards providing facilities in traditionally black areas.

With the general lack of resources available for such facilities and the kinds of conditions which prevail in the townships, we need to look to the developing world for models in how to deal with this issue i.e. what kinds of facilities are the most appropriate for providing access to the broadest range of art forms, as quickly as possible.

In this context, we may look to models in Nicaragua and Cuba; models which have already begun to develop organically in our own situation i.e. the model of the multi-functional, multi-disciplinary community art centre.

During the apartheid era, a range of community art centres sprang up throughout the country, primarily in black neighbourhoods. With access to limited resources and with the range of facilities that were taken for granted in urban areas not available in the townships, these community art centres came to play a variety of functions in response to the range of needs within the communities they served. A community art centre, could, for example, provide a variety of full-time and part-time training courses in a range of disciplines for adults, youth and children. Some courses would produce creators/producers, others would train trainers who would go out and teach others and still other courses would combine both these functions. Then the centre would also provide infrastructural support to those who wish to create but who had no access to facilities or resources, For example, the centre would provide rehearsal space for dance and drama groups, studio space for artists and craftspeople, and even a bit of start up capital or materials to assist creators/producers. The centre would also serve as a means for distributing art eg. by hosting performances by local or outside dance, drama or music groups, hosting an exhibition or having a shop to sell the works produced at the centre or by local artists/ craftspeople within the community.

This variety of functions which community art centres were obliged to play as a result of apartheid's maldistribution of resources, should, we believe, be formalised and extended so that community art centres become the primary vehicle for making the arts accessible on a national scale, particularly in areas where facilities have been absent. The difference would be that whereas before such centres were underresourced, they would now be a major part of national strategy to make access to
education and training, to performances and to resources to create art much easier for the majority of people. This would also necessarily mean the professionalisation of the management and administration and teaching at such centres, through appropriate training courses. Simply because it is 'community' will not mean that it is 'inferior' or poorly managed or whatever people may have come to expect of 'the community'; to make the arts more accessible and develop to their full potential at a community-based level, will require significant skills and this will need to be taken account of in our education and training courses at tertiary level.

Ideally, a multi-disciplinary (catering for all art forms), multi-functional (involved in education and training, in the creation and distribution of art) community art centres, should be established around the country, one for every 200 000 to 400 000 people. Part of such a centre would be used as a museum to preserve the heritage and history of that community, another part would be a library which would provide access to local and world literature, at least some of it in the language of the local community, still another part would be a gallery space, and there would be halls for theatre, dance and music performances as well as equipment and facilities for showing movies and videos.

There would be rehearsal rooms, studio space for local artists and craftspeople, and a shop to sell their wares. On a daily basis, there would be full-time and/or part-time classes for children, youth and adults in visual art, creative writing, dance, music, theatre and film as well as courses in theoretical subjects related to the arts and practical management and administration courses.

There might also be a hostel attached to the centre for travelling bands of music, theatre and dance performers, artists with their travelling exhibitions, writers who would live in residence for a while and those with mobile film distribution projects.

Community art centres would be overseen by Boards of Governors consisting of local community leaders, educationists, representatives of arts organisations, business people and those with skills (eg. legal) which the centre might need access to. Centres would be managed by highly skilled and competent staff, who would have the necessary training and experience required for their respective management and administrative jobs.

It would be the responsibility of local and regional government to build and equip such centres, with the assistance of local business, on the understanding that such facilities are necessary to improve the quality of life at a local level. The proposed National Council for the Arts would not fund the building or equipping of such centres; but it may provide funding for particular programmes and projects run by these centres.

Funding for the centre would come from:

a. a R1 levy per person served by the community art centre or a R5 levy per family per year, so that if, for example, one centre serves 400 000 people, that might mean R400 000 per year for general running costs. Such a levy can be collected through the water or electricity bill
b. those who attend courses will pay for them and for performances i.e. box office and educational courses should at least break even.

c. particular projects run by the centre which may receive a subsidy/grant from the National Council for the Arts

d. private sector sponsorships of particular events/projects

e. fund-raising events by the local community

To run such centres and make them financially viable, they would need to be linked to the empowerment of local communities through appropriate skills training eg. marketing and management skills, fund-raising skills, and so on. They should be seen not just as centres to develop the arts, but centres to serve as the centre of the community's life, to facilitate the empowerment of the community in broader terms eg. literacy programmes and adult education courses as well as to raise the quality of life by providing links to the outside world through travelling exhibitions, performances, movies, literature and arts festivals at the centre.

This more integrated approach which employs decentralised, multi-functional, multi-disciplinary community, art centres to provide access to the arts and to play a broader role in developing the quality of life at a local, grassroots level, is a more appropriate and efficient model for developing the arts in our country in ways which are meaningful within the living conditions, and more relevant to the needs, of most people. They are also cheaper than building separate theatres, galleries, libraries, cinemas and museums.

The provision of such centres is obviously a long term goal, realised probably only in the next 15-20 years; but it should be a component of every new plan to develop a new residential area or to upgrade existing areas ghettoed by apartheid. To help pay for the building of such centres, we can perhaps learn from cricket where a percentage of ticket sales at internationals pay for the development of sports facilities in historically deprived areas. A similar model could be that a percentage of ticket sales for international concerts as well as a development levy on all theatre, cinema, music, opera and dance tickets (eg. 50 cents per ticket), should help pay for the development of community art centres. Either VAT should be scrapped from such tickets or VAT should go directly to upgrading and developing such facilities. Perhaps it may also be in our interests to negotiate with sports bodies, and work out a deal where levies on soccer, rugby and cricket tickets go towards developing arts facilities in deprived areas, so that together we contribute to a healthier society.

Summary: We recommend that multi-disciplinary, multi-functional community art centres be the primary vehicles for developing the arts at a local level, by providing affordable, geographical and aesthetic access to education and training in the arts, infrastructure and resources to support creativity and exposure to local and national performances and art works.

4. NATIONAL INSTITUTIONS
The rationale for central government to support one national institution or company per discipline is three-fold:

a. It seems as if all the major players at negotiations are thinking along the lines of some form of regionalism which favours relatively strong regional government in 7-10 regions. It should be up to these regions, depending on the public interest and needs as well as the economic, strength of the region, to decide what kind of art forms and structures it will need and support.

Central government can and should, however, support one national institution or company per discipline to pursue and maintain standards of excellence in that discipline, to serve as models to similar institutions around the country, to reflect - in their management, staff composition and artistic programmes - the non-racialism of the changing SA, to ensure that certain forms are protected and to facilitate processes of cultural cross-over and the development of indigenous forms.

b. Central government simply cannot afford to support full-time companies or institutions in every discipline in every region; however, central government may be able to assist local and regional governments - particularly those regions where the basic infrastructure has not been developed to the same levels as in regions where performing arts councils are currently present. In other words, central government may help build the infrastructure at local and regional level; but assistance to performing arts companies at a local or regional level should come from local or regional government or from the National Council for the Arts.

c. The responsibility of the proposed National Council for the Arts will be to distribute state funds directly to companies, individuals and groups to facilitate the growth of the arts on a national scale. Rather than support permanent companies in a few regions, the Council would encourage the growth of a number of professional and semi-professional companies which may have access to the infrastructure at local and regional level and which through competition with each other, will result in higher standards, greater diversity, more experimentation and innovation.

The system of funding proposed then, is that central government be responsible for

a. an arm's length grant to the National Council for the Arts
b. an arm's length grant to an independent film authority
c. direct (or indirect through the National Arts Council) support to the following national institutions:
   • National Gallery
   • National Theatre Company
   • National Dance Company
   • National Opera Company
   • National Film Institute
   • National Library
   • National Symphony Orchestra

This central government funding would all be handled by the ministry concerned eg. the Ministry of Arts and Tourism.
Regional, metropolitan and municipal government would be responsible for developing and sustaining regional infrastructure for the arts eg. community art centres, at least one major theatre space, a gallery and museum. Regional and metropolitan government would be responsible for permanent orchestras, opera companies, dance and theatre companies at a regional/local level, should they deem these necessary.

The difference in this model of arts funding by central government to the current one is that whereas central government currently subsidises up to four opera, ballet/dance, theatre companies and symphony orchestras nationally through the per-forming arts councils, the proposed model would have central government supporting one of these nationally which would then free resources to be channelled through the National, Council for the Arts to a range of semi-professional and professional companies in these areas, who otherwise may not have had access to public resources.

It is possible that over and above the National Council for the Arts, at some future stage, each region or federal state (however these come to be named by the politicians) may have its own Regional Council for the Arts as is the case in federal countries elsewhere eg. Canada, USA, Australia. For this to occur in the near future though, is to favour the regions which already have performing arts councils some of whose resources would go into such regional councils. The proposed National Council of the Arts however, would be the best means in the short to medium term to ensure that public resources are allocated nationally, that all artists would benefit irrespective of the region in which they are based and that the development of the arts is co-ordinated on a national scale without the wealthier regions which have benefited in the past, continuing to necessarily consume most of the resources.

This new model of distributing state funds for the arts obviously raises the question of the future of the performing arts councils.

We are aware of the arguments in favour of the performing arts councils: that we cannot afford to lose the expertise and infrastructure built up over a few decades, that the technical and performance standards set by the councils cannot be lost, that many people are employed and it will be sad that so many people lose their jobs and that the councils can be, and to a greater or lesser extent are being, restructured to serve all South Africans.

We are also aware of the arguments against the performing arts councils: that they serve essentially 'eurocentric' notions of art, that their governing boards, staffing and management reflect apartheid history; that they are impossible to transform internally given the authoritarian and apartheid culture built up over the years, that they are inaccessible geographically, that they are wasteful, that should there be retrenchments in the councils, at least black artists would benefit from the freed resources and that current changes are to ensure the longevity of the councils rather than because of a true change of heart.

We believe that we need to go beyond the current debates and not start with the performing arts councils, but start with our vision for the future of the arts in our country. Once we have ascertained such a vision, we can determine the kinds of structures and funding mechanisms
required to realise that vision, within the context of practical economic and political realities. When we have such a vision, structures and funding mechanisms, we can evaluate existing structures which we have inherited from our apartheid history, and determine whether they need to stay as they are, be transformed to meet new needs or be entirely eliminated in favour of more effective and appropriate structures.

The performing arts councils are essentially structures that came into being at a certain time in our country's history to serve a particular, limited vision of the arts. We have been trying to spell out a new vision which includes the continuation of the art forms - opera, ballet, classical music and theatre - which have been promoted by the performing arts councils. A distinction needs to be drawn between the continuation of the performing arts councils as structures, and the continuation of the art forms traditionally associated with them i.e. it is eminently possible for opera, ballet and classical music to continue and grow without the performing arts councils.

In terms of the vision, structures and mechanisms for distributing public resources to the arts which we have outlined so far, our view of the future of the performing arts councils is that they be dissolved in favour of a National Council for the Arts and the following scenario:

a. The theatre spaces currently attached to the performing arts councils should become independent theatre spaces, run on a semi-commercial basis through a combination of public and private sector support and the market/box office. These theatres will be the responsibility of local and/or regional government in terms of maintenance and picking up any deficits in running costs (although theatre managements will be expected to at least break even annually).

One possible variation is that if we are to have a National Opera Company and a National Theatre Company, then it may be possible to house the opera company at the National Opera House which could be the reincarnation of the State Theatre in Pretoria, and the theatre company could be housed in the National Theatre i.e. the former Nico Theatre in Cape Town. Should the latter option be preferred, then the National Theatre and National Opera House would receive central government support to pay for the rent costs of housing the National Theatre Company and National Opera Company respectively.

Alternatively, all these theatres could be semi-commercial Civic Theatres, with central government only covering the costs of the national theatre, opera or dance companies housed in their respective spaces (this will be a cheaper option for central government with the financial responsibility for maintaining the theatre spaces being equally shared by the four cities or regional governments where they are located).

The national performing arts companies should be decentralised with the National Opera (or Musical Theatre) Company being housed for example in PACT’s premises in Pretoria, the National Dance Company in NAPAC’s premises in Durban and the National Theatre Company in CAPAB's premises in Cape Town.
Both the National Opera Company and the National Dance Company will have a core symphony orchestra (of 30-40 permanent members supplemented by temporary members) attached to it, which may also have seasons in their own right.

The newly independent, semi-commercial theatre spaces will all have new Boards of Governors, appointed to be broadly representative of the population they serve and have the expertise to run the respective venues in the most efficient manner. These Boards of Governors will be appointed by the appropriate regional or local authorities after consultation with the major organisations in the performing arts, and after public nominations have been invited for such positions. These appointments may very well follow the model of the Johannesburg Civic Theatre in appointing Board members nominated by local educational institutions, representative performing arts organisations, the private sector and the public as well as the local municipality whose representatives (to constitute a maximum of 25% of the governing boards to prevent state control), will play the Primary task of ensuring that taxpayers' money is responsibly spent and accounted for.

b. Each new national company i.e. the National Opera/Musical Theatre Company, the National Theatre Company and the National Dance Company, would be started from scratch with auditions open to everyone including members of current performing arts council companies.

Since each national company will be supported by public money, since its role is to encourage the development of the discipline and -a love for it across 'population groups', and since it should symbolically reflect a society free of racism, these national companies and the orchestras attached to them, should be at least 50% black. Starting these companies from scratch allows that kind of start.

The size of each permanent company will be determined by an independent task force to be established as soon as possible, which would set the functions, constitution, size, budget and funding formula for each company, based on international and local research and consultation.

Since the mandates of such companies include attaining and maintaining the highest possible standards, it is possible that - given the apartheid legacy - there may not be sufficient black members to assume 50% of the positions in some companies eg. orchestras.

The selections of these companies, through auditions and interviews, are to be carried out by panels of 8-12 people, who are themselves fully representative and highly skilled. These panels would come about through nominations by performing arts organisations and academic/training institutions, and would be appointed by an independent panel, consisting of, for example, the heads of a few tertiary academic institutions.

(These recommended processes of selecting boards all seem to be lengthy and beauracratic ones, but generally follow the principle and practice of the appointment of the SABC Board. It is necessary that if we have an opportunity to rectify the past and have a better chance for the future,
then it is important that we get it right from the start with the most transparent, independent and thorough processes possible).

Each respective panel of experts chosen to select each respective national company, will also become the first Board of Governors of each Company. There will be one Board for the National Theatre Company, one Board for the National Opera/Musical Theatre Company and its orchestra (the Board should have musical expertise as well) and one Board for the National Dance Company and its orchestra. The function of these Boards is to ensure that the companies fulfil their mandates as technically proficient, culturally diverse, representative and innovative companies.

Where sufficient numbers of suitably skilled black company members are unavailable at the initial selection process, these national companies should be constituted in such a way as to aim to reach their ideal targets within 5 years. Potential black performers and classical musicians may be identified and sent for further training locally and internationally, and be incorporated into the companies over that period of time.

At least for the first five years of their existence, it will be necessary for these national companies to apply strict affirmative action policies to correct past imbalances. After this period, hopefully general development of the arts through the role of the proposed National Council of the Arts, the education system and public needs, will mean that such companies can develop more organically from the year 2000, provided, of course, that those making the selections and looking after standards i.e. the Boards of Governors and senior artistic directors, are themselves representative and competent.

A further proviso for national companies and their attendant orchestras in the case of opera/musical theatre and dance, should be that the permanent companies are 100% South African. It is desirable that international performers be employed in such companies in order that local performers learn from and be inspired by international techniques and standards; but such employment should be on a temporary basis, allowing for new international performers to be attached to the companies from time to time.

So, like each publicly-supported theatre venue, each publicly-supported national company will have a Board of Governors responsible for it, who are experts in the field. Each national company will also be professionally managed and will be able to raise funds for itself outside of the state subsidy.

(c) In the above scenario, what happens to current companies and orchestras based at the performing arts councils if these councils are to dissolve?

The aim of the N.A.I. is that art should develop that artists’ jobs should be protected and that all forms of art need to be encouraged. We are not in favour of current companies being dissolved; rather, we believe that the beauracracies which have developed in support of these companies need to be dismantled to free resources to be spent more directly on the arts.

Where performing arts councils have permanent companies or orchestras, and provided no company or orchestra is made permanent or has its permanent numbers extended after December
1992, and provided the city in which they are located does not already have a publicly funded (by local or regional government) similar company or orchestra, we propose the following:

i. the permanent company transforms itself into an independent company, with professional management

ii. each such company will, for three years, have access to the space that they have been using in the performing arts council, rent free, to develop as an independent company

iii. each such company will receive decreasing amounts of support from central government over the next three years eg. 90% in first year, 70% in second year, 50% in third year while it looks for private sector sponsorship, develops its reputation to become more market-driven OR negotiates with the new regional or local authorities which will emerge through elections to take them over or at least provide some form of subsidy

This process allows the artistic companies to become independent and continue to exist so that arts expertise is not lost. After those three years in which direct state subsidy is granted, these companies, like any other professional or semi-professional company, may apply for funding from the National Council for the Arts and will be considered on merit.

To summarise then, the proposed future of the performing arts councils is that:

a. they would dissolve, the theatre spaces attached to them would be run as semi-commercial venues and be the responsibility of local municipalities, with new, competent and representative Boards of Governors appointed to each.

The State Theatre could become the National Opera House, the Nico could become the National Theatre.

b. There would be a National Opera/Musical Theatre Company possibly based in Pretoria, a National Theatre Company possibly based in Cape Town and a National Dance Company possibly based in Durban. The Dance and Opera/Musical Theatre Companies will each have core orchestras of 30-40 members. Although based in particular centres, the national companies will be required to conduct national tours.

Each national company will be professionally managed and will be overseen by a Board of Governors consisting of experts in the field.

c. Current permanent companies will become independent and will look to establishing themselves as regional companies with subsidies from the regional government, but will continue to receive declining levels of support from the central government. for 3 years after such a decision has been agreed to.

The bureaucracies of the performing arts councils will be dismantled. Production services will be privatised and administrative staff will be retrenched. The spaces not used by the national companies, will be transferred to the local authorities and freed for use by a range of independent
professional and semi-professional as well as community groups for rehearsal and office space, and education and training projects.

We believe that these proposals will best maintain and utilise the infrastructure and artistic expertise built up by the performing arts councils, while at the same time taking account of the needs and parameters of new economic and political realities.

We already have national institutions in other fields such as the National Gallery, National Library and National Symphony Orchestra. Insofar as these became 'national' during the era of apartheid, it is necessary that they be given 'a clean bill of health' for a non-racial future if they are to continue to receive public funding.

Accordingly, we propose that an Independent Commission be established to look at the policies, governing boards, management, staff, constitution, programmes and constituencies or user markets of these national institutions, and then to make recommendations on how these should change, where necessary, to reflect the composition and interests of the broad South African population, with minimal disruption to standards and loss of jobs over a period of five years.

With respect to a proposed National Film Institute, whose tasks will include preservation of film, collecting international films, liaising with television about educational film, research, and so on, we propose that it be linked to the proposed Independent Film Authority.

5. ARTS FUNDING POLICY OPTIONS

Thus far, we have concentrated on the distribution of state funding for the arts. We believe though, that the state should make it possible for the private sector to provide significant support to the arts through tax incentives. If the state's role in supporting the arts is to decrease or to remain relatively constant so that funding may be spent elsewhere, the role of the private sector in supporting the arts becomes even more important. Advertising through the arts is not generally as high profile as advertising in sport at the moment so that private sector sponsorship of the arts should not be seen in the same way as sports sponsorship. The private sector - particularly in these economic times - needs to derive some benefit from supporting the arts; this can either be through advertising or tax rebates.

We are aware that the private sector is hard pressed to provide support to a range of projects and we are aware that the state needs to increase its funding/tax base for the kinds of social projects it needs to undertake. Taking these into account and in order to kick-start the arts industry, the answer lies neither in no tax breaks or in complete tax breaks.

We would propose a mix of the following:

1. That private sector sponsorship of the arts which goes directly to arts education programmes, support for institutions which do not have high public profiles eg, museums and community art
centres, be tax free, provided that a maximum of 2% of a company's annual turnover be spent in this way.

2. That private sector support for high profile arts events and activities eg. festivals and publications, be tax free up to 50%. This situation is to come into effect from April 1 994 for a period of five years, after which it will be reviewed in terms of the growth - or lack of it - of the arts industry. What we are proposing then, is a period in which the private sector can help kick-start the arts, after which the arts industry may have to begin to look after itself more, having laid the basis in the years preceding the year 2000.

What constitutes high profile advertising through the arts and what not, should be clearly spelt out.

3. That individuals, for the same period of five years, can spend up to 5% of their annual salaries on the arts, tax free. This allows for growth of audiences, new markets, greater freedom of choice and greater patronage of the arts.

4. That every ticket for every arts-related show - film, theatre, music, opera - and every book, be levied between 50-100 cents which are then channelled to the development component of the National Council for the Arts i.e. consumers pay for the development of the industry. This may also be subject to review after a period of 5 years.

5. That a national lottery be instituted, specifically for the arts, in the same way as Britain has just introduced a lottery for this purpose.

6. That, as with the San Francisco model, major cities be allowed to levy a 2% tax on every hotel bill of visitors with foreign passports, to help pay for the development and maintenance of the arts in that city. In this way, major cities will be able to develop and maintain the arts infrastructure and pay for the most expensive forms of art like orchestras, ballet, opera, galleries and the like which may help to promote tourism in that particular city.

7. That, as in most democratic countries, every building built with public funds - from schools, to stadiums and convention centres - 1-2% be kept aside to commission works by artists eg. murals, paintings and sculptures. This is a way of providing work for visual artists.

Perhaps though, the principle can be extended i.e. that of every budget for development using public money eg. housing, medical care, job creation, etc, at least 1-2% should be spent on the arts. For example, for a developmental medical project, a budget can be made available to a theatre group to travel around with educational theatre on breastfeeding or AIDS.

Representative arts organisations should begin to meet with the private sector, local and international development agencies and local and regional government to lobby for this principle i.e. that 1-2% of every development or social project budget be allocated to the arts so that the arts are integrated into overall processes of social development.
The arts community would have a huge responsibility to ensure that sufficient growth in the arts industry occurs in the next five years to make it worthwhile for the private sector to continue to provide support and to enable some sectors of the arts to begin to take care of themselves.

Arts organisations need to consult with the private sector, tax and legal experts and other interested parties to determine the most viable and practical mix of the above proposals, and then launch a campaign to have that mix adopted by government.

This would require unity, vision a sense of purpose and maturity on the part of the arts community, as well as a more professional and business-like approach to its affairs so that artists and arts organisations take more responsibility for their own existence rather than constantly be on the look for handouts. We need to declare a five year period, culminating in huge festivals in the year 2000, in which artists and arts organisations and groups develop self-sufficiency, build management skills, develop new markets, create arts events and activities that would generate much publicity and advertising; in other words, generate an arts industry based on more lenient tax incentives for private sector sponsorship and greater public-sector support for the arts in the next five years, that could begin to look after itself.

6. ARTS EDUCATION POLICY

With the country going through the kinds of changes that it is and with thin economic woes of the past pressing upon us, the education system has again become a site for "either/or' debates, mostly by those favouring technical forms of education and training to provide skills to meet the needs of the economy, the rationale being that if the economy is in order, everything else falls automatically into place.

It is quite possible though, to have an excellent economy with a high growth rate, and still have fascism, stunted individuals, a low quality of life for the majority, and so on. The point is that the education system should surely not simply be training cogs in the economic machine, but should rather be creating individual human beings to be responsible, creative, constructive citizens within society, to ensure that society develops as a whole, that human beings develop to their full holistic potential, and that they understand and may consciously act - as free individuals - within society to bring about and sustain a democratic order, free of racism and sexism, where human beings and human relationships are restored and human rights and life are respected and celebrated..

In such a case, it cannot be that we have an education system which only trains technical people in the same way as the apartheid education system in its crudest forms, trained people for functionality, to be "hewers of wood and drawers of water'. We have to educate and train human beings not robots or sub-human androids.

With apartheid having recognised some as human beings and most as not, most white schools have at least one art discipline as a matric subject, while most black schools do not. Inevitably, with a change in the political status quo and the current emphasis on technical education, it is likely that those at traditionally white schools will continue to receive arts education, while those at traditionally black schools will continue to not receive arts education, but now for different, more
economy-driven, rather than apartheid-ideology reasons. Both though, are as guilty as each other in their functionalist views of humankind.

We now need an education system which enable those who pass through it to become responsible, constructive citizens, with emotional and intellectual integrity, with sufficient cognitive, conceptual and analytical skills, and with the confidence, creative ability and flexibility to be able to make choices and act upon their realities in an informed, conscious way. To simply train technically skilled people because that is what the economy needs, completely ignores - at great peril - what the broader needs of society are, a society which for decades will struggle to become a democracy, to overcome the psychological and physical barriers and scars of the past and to restore human relationships. Education should improve society as a whole, and should impact positively on the quality of life and the quality of human relationships within that society; education and training are not simply mechanisms to serve the needs of the economy, which in reality may mean the needs of a relatively small band of people..

The point is that we are not training either philistines or bohemians, we need to be providing an education that creates holistic human beings, who are able to think and act confidently, creatively and independently and yet at the same time have the array of technical skills and theoretical knowledge required to fulfil certain economic tasks.

We find resonance with the ideas expressed in a paper by the Curriculum Development Project for the Creative Arts (CDP) which states that

Art education, ultimately, teaches us that we ourselves can change reality: we can make our perceptions and ideas into real objects, making additions to the world around. Others can look at these objects, evaluate them, learn from them, and be enriched by them. We learn that we can have an effective and meaningful impact upon our surroundings. There is very little in the formal educational structures in place today that teaches us that we can participate innovatively in acts of transformation and genesis.

It states further that:

art is part of our community, our culture, and our life experience. We must not view art education as an optional extra, aimed at providing a skill to a few students who will produce the commodity called art. Rather, art education empowers the learner with technical and life skills, enhancing social, aesthetic, critical, conceptual and practical capabilities. The subject should be taught within a spirit of inquiry, promoting a methodology and a culture of learning founded in democratic practice. We cannot doubt that art education should be an essential, integral part of the common core curriculum.

The arguments thus far have essentially had to do with the arts not necessarily taught in their own right, but as vehicles for developing other skills, with pupils being sensitised to art and the processes of art-making in these processes. There is an argument though, for acquiring skills in a particular discipline from an early age as well.
The Recommendation concerning the Status of the Artist adopted by UNESCO at its twenty-first session in Belgrade, 27 October 1980 states that

Member States (of UNESCO) should encourage, at school and from an early age, all measures tending to strengthen respect for artistic creation and the discovery and development of artistic vocations, and should bear in mind that, if it is to be effective, the stimulation of artistic creativity calls for the provision of the necessary professional training of talent to produce works of outstanding quality. For this purpose, Member States should:

a. take the necessary measures to provide an education designed to stimulate artistic talent and vocation
b. take all appropriate measures, in association with artists, to ensure that education gives due prominence to the development of artistic sensitivity and so contributes to the training of a public receptive to the expression of art in all its forms
c. take all appropriate measures, whenever possible, to institute or develop the teaching of particular artistic disciplines...

Art teaching within the education system, should have at least three ends:

a. to serve as a vehicle through which pupils develop cognitive, conceptual, imaginative, problem-solving, creative and communication skills; art as a vehicle may also be employed as a means to teach other subjects such as mathematics and biology
b. to be taught in their own right i.e. vocation training
c. to develop an educated and informed, appreciative public for the arts

In accordance with the above, we propose the following broad policy framework:

A. Primary school level

1. An integrated arts curriculum should introduce children to a variety of art forms - visual art, drama, music, dance, creative writing - which would be used primarily as vehicles for training or sensitising pupils to other things, with skills in the arts being acquired only as secondary intentions. This would have its place as part of the core curriculum in every child's education at primary school level, in a subject to be taught as 'life skills'.

Life skills would have to do with developing confidence, developing communication skills, developing problem-solving skills, developing imagination, putting creative skills into action, learning to co-operate with others, learning to express thoughts creatively and in different forms - verbally, dramatically, visually and in writing. Furthermore, it would have to do with learning to express emotions and intuition in non-judgmental ways; children will be allowed to experiment, explore and express themselves without the constant threat of 'right and wrong'.

An education system that encourages this kind of development may, of course, constitute a threat to those in authority who feel that 'right' and 'wrong' should indeed be taught in ways which affirm
their authority and moral values and so they would seek to emphasise traditional academic education.

The kind of education described above though, has to do with developing critical, analytical, creative, independently minded human beings able to make decisions and act upon them as would be encouraged in a democracy. The important point then, is that art is not simply taught for the sake of art - although the appreciation of art would be an important secondary spin-off - rather, arts education is a vehicle for training, people for life within a democracy. This kind of curriculum which has arts education as a core component in teaching life skills, would apply to all pupils at primary school, at least till standard five.

2. Over and above the life skills component of the curriculum which would use the arts as the essential vehicle, the arts will be used in the teaching of other subjects too. The training of teachers to do this should of course be a priority. Teachers of all subjects should have a core component of their course in their teacher training, which has to do with using the arts as a means of teaching their respective specialist subject(s). Those who wish to, may specialise in this area and learn more advanced techniques.

In a society suspicious of the arts in the education system, it needs to be emphasised that the aim of this is not just a gimmick to get the arts into schools through the back door; the use of the arts as a methodology which enhances skills needed in a variety of subjects, is well tested and used throughout other parts of the world.

3. While the education system may not be able to cater for everyone to be trained in art skills of some sort, it is necessary that it enables those with talent to be identified, to grow and develop. Certain disciplines eg. music instruments and dance, need training from a young age to produce the highest quality later in life. Such classes may be made available to those who wish to, as part of the syllabus or after hours in consistent classes run by appropriately trained teachers or artists who teach these classes depending on the need. Training in one discipline or another, should occur through parental choice or by teacher identification of talent. If it is by parental choice only, it is likely that those with money will be able to afford such classes (since such tuition may require extra resources); if by teacher identification as well, the school might be able to approach parents for support or raise scholarships for such teaching.

The proposal then, is that at primary school level, all children have a core part of their curriculum called life skills, with the essential methodology being arts-based. Secondly, other subjects may be taught using the arts as a vehicle as well. Finally, space should be made for young children to have access to skills training in particular disciplines where training from an early age will result in works of the highest possible quality at a later stage.

B. Senior secondary school

1. Life skills as a core component of the curriculum should continue all the way through secondary school (perhaps replacing what is often called 'guidance'), still using arts-based
techniques as the essential methodology. Whereas life skills may have been a daily part of the syllabus at primary school level, it may be taught once, twice or thrice per week at secondary level.

2. A second compulsory component of the core curriculum at secondary school level, would be a once-per-week subject which would introduce a theoretical aspect which develops the theoretical and critical abilities of pupils with respect to the arts. Through this subject, pupils should acquire a broad understanding of the history of the arts as well as an introduction to contemporary arts and current debates.

3. Secondary school should offer particular disciplines as matric subjects - music, drama, visual art and dance. These should be taken along with biology, maths, and other subjects, as a subject which pupils may choose at the beginning of secondary school. Both the theoretical and practical aspects of these disciplines will be taught. Some schools may offer all, others may offer only one; parents can then choose where to send their children to school.

4. In every standard at secondary level, at least one play or novel or book of short stories by a South African author should be studied as part of the literature course, along with literature from other parts of the world.

Creative writing should also form a component of the literature course, to help stimulate imaginative and communication skills.

5. Local school authorities and the departments of education should encourage and create opportunities as part of the annual school calendar, where the creativity of pupils is developed and given expression at both a local level (school plays, school orchestra, choir, etc) as well as celebrating this creativity with pupils from other schools in regional school arts festivals.

C. Tertiary level

At a tertiary level, given the needs that exist within the arts arena and that would come into existence should the proposals outlined in this document come into effect, arts education should be concerned with training at least three kinds of people involved in the arts:

a. creators: professional artists, performers, musicians, writers, dancers, film-makers
b. educators who
   • will teach integrated arts curricula at school level
   • teach particular art disciplines at secondary school level
   • teach in non-formal education structures eg. community art centres
   • are skilled in a particular discipline and may pursue their vocation in a variety of formal and non-formal education structures

c. arts administrators who have a good understanding of the arts or the particular discipline they would choose to be involved in (theatre, visual art, etc) and whose training will include management, organisational and financial skills, marketing and publicity, legal contracts, and so on.
Our tertiary institutions need to produce people of high quality who will be able to produce works of high quality, teachers who can teach with in-depth knowledge of their subjects and highly skilled, business-like administrators. The courses of such administrators should equip them with practical knowledge and experience in working in a variety of contexts including community arts centres, professional theatres, civic galleries and the like.

Professional performers will no longer only need to be trained in the skills and theory of their respective disciplines, but also in a variety of other areas eg. legal contracts and theatre company management, which will enable them to become more self-sufficient. They will thus be more well rounded and have the variety of skills necessary to look after themselves as professionals in a changing market.

To maintain the highest possible teaching standards in the development of professional arts practitioners, a Board should be established in each discipline which consists of representatives, of professional/trade union organisations in the different disciplines, representatives from the educational institutions and national education department as well as representatives of the National Council for the Arts, which would regularly check and evaluate training courses for professionals, make recommendations for changes, vet new courses, feed in new ideas as needs are identified by professional practitioners and recommend courses to continue to provide training for professionals.

At the moment, we have various tertiary institutions which offer courses which produce artists in different disciplines who may vary drastically in level of expertise from institution to institution. In the interests of professional training and the pursuit of excellence, is it necessary for there to be at least one National Training institution for professional artists per discipline? These do not need to be created afresh. Once Boards to oversee the professional training of artists in each discipline are established, existing institutions may compete for National Training Institution status which will be determined according to what is offered, methodologies used, range of experience and training provided, competence of staff, record of institution, etc. These national training institutions would have significantly higher entrance qualifications and may be given extra resources to execute their training.

A National School of Theatre would train professional actors for stage and screen and directors. The National School of Dance will train professional dancers and choreographers in a range of styles. A National Writing School would train writers in television and film scripting, playwrighting, novel and short-story scripting and poetry, with writers specialising in one genre. The National School for the Visual Arts will train professionals in painting, sculpture, printmaking, craft and the like. A National Film School will train designers, technicians, directors, producers. The National School of Music would train professional musicians in a range of forms, opera singers, conductors and composers.

Existing departments which apply for such status and which do not get it, may continue to provide the courses they do. With the variety of needs for training that exist, each institution may focus on
providing a particular aspect of training eg. educators or administrators. Those institutions which wish to be granted recognition that they train creators in a particular discipline at professional standards, may apply to the Professional Education Board in their particular discipline which may grant them such status should that be deemed appropriate. Institutions which obtain such status, will be subject to regular evaluation to ensure the maintenance of the highest possible standards.

The arts departments at tertiary institutions may need to be evaluated in any case and granted a rating in terms of their respective standards of education and training, both for the benefit of the potential student and for the professional arts industry.

D. Community-based and non-formal arts education

With millions of people not having had access to the kind of education necessary to become professionals or. not having basic literacy in the arts, a necessary focus of arts education in the foreseeable future should be community-based, non-formal arts education in a range of disciplines. While it is necessary to train a band of highly skilled professionals, arts education needs to be made much more accessible to develop an informed public and new markets, to develop potential at a community level, to identify and send for further professional training those who have not had access to arts education in the past but who display great potential, and to nurture interest and talent in the arts at all levels of our society.

Community arts centres should become the primary means for making such education available. The courses offered should range from certificate courses providing a good basic training for those who might want to pursue the arts as a Career, to courses which provide basic literacy in the arts, for interest sake. These courses too, should be of the highest possible quality, with those courses requiring certification having to be passed by the relevant educational authority. These courses are provided for people who may not have the entrance qualifications necessary for tertiary institutions, but who nevertheless have the talent and level of literacy required to have access to training which may result in a career. These courses may also serve as an entrance qualification to a tertiary level course.

While community art centres are not yet available on a large scale, tertiary institutions in all cities which have arts departments, should be encouraged to offer at least one part-time adult training course in their respective discipline, to train those who otherwise might not have access to training and who do not have the qualifications to enter their institution otherwise. These courses should be offered for at least the next 7-10 years.

The proposal then, is that four levels of education and training should become permanent features of the arts landscape, all levels to be approved by professional arts and arts educators organisations and educational authorities to ensure high standards:

a. primary school level
b. secondary school level
c. tertiary level to train educators, professional artists and administrators and
d. community-based - training those who want a career, children, youth and adults.
7. LOCAL, REGIONAL AND NATIONAL FESTIVALS OF THE ARTS

There is little point in having all the necessary infrastructure, progressive arts education policies and best mechanisms to distribute state and private sector funds to stimulate the arts if we do not provide regular opportunities for performance and the display of arts products, and the simultaneous cultivation of audiences and markets to support the arts in the long term.

We therefore propose the following strategy to
a. create opportunities for artists to have maximum expression and exposure
b. develop audiences and new markets
c. develop and maintain high standards
d. facilitate cross-cultural pollination
e. improve the quality of life and stimulate the arts at local, regional and national levels and
f. generate high profile events which will attract sponsorship

Beginning from as soon as possible, we should stimulate local festivals in as many towns as possible; in the long term, such festivals would happen around the local community arts centre. These annual festivals would be a celebration of the arts produced at a local level and should be the culmination, each year, of training programmes which would have produced more and more skilled participants.

The best works of these local festivals in all disciplines would then be selected to participate in regional festivals held every year as well. The centres where these festivals would be held would be the capitals of each region as they may come to be defined eg. Pietersburg in Northern Transvaal, Cape Town in the western Cape, Umtata in-the Kei area, Bloemfontein in the OFS, and so on. These week-long festivals held between September of one year and March of the next year to coincide with the main tourist seasons, will in turn have their best works travel to the National Festival of the Arts which is held at Grahamstown each year.

The best works at the National Festival, will be sponsored to travel to the different centres, with participants in these art works running workshops in the areas where they are based from time to time. in this way, the arts are stimulated at a local, regional and national level, standards are raised as groups and individuals compete to reach regional and national festivals, cross-pollination occurs as groups from around the country meet and learn from each other and as the best groups travel to outlying-areas through sponsorship, and the national festival becomes a truly national festival in a much more organic way, with the best works from around the country on display.

It is also possible and indeed desirable, to have festivals within particular disciplines such as the Dance Umbrella, which may also go through regional and national selections, with the best works feeding into the National Festival.

Sponsors should be found to fund annual national events which generate works and the attainment of high standards eg. national experimental theatre festivals, national exhibitions, national young
composer events and so on.
In the foreseeable future, these local and regional festivals will have a strong development component i.e. 'disadvantaged' groups will receive training, infrastructural support and other forms of professional assistance to enable them to compete effectively.

By developing the arts at local level, new audiences are created and with regional festivals occurring at major tourist times, the private sector may be tempted to provide sponsorships to enhance their advertising presence. As the Standard Bank sponsors the National Festival of the Arts, so other sponsors could be found to solely, or with others, sponsor regional and local festivals. Whatever profits are made, or at least a percentage of these profits, should go back into development and training at a local level.

Annual local festivals feeding into regional festivals which feed into a national festival, will generate art on a national scale, develop audiences, raise standards and provide numerous work opportunities.

8. STATUS OF THE ARTIST

The status and nature of the work of the artist within our society need to be recognised in appropriate ways, not least through legislative means to improve and protect the rights and interests of artists. Accordingly, we would strongly recommend and campaign for South Africa to become a signatory to a range of international conventions governing the status and rights of artists. In this regard, we would like to highlight certain clauses in UNESCO's Recommendation concerning the Status of the Artist.

The guiding principles of the Recommendation, which would constitute the minimum of what a new government should be expected to do with respect to the arts, are:

1. Member States, recognising that art reflects, preserves and enriches the cultural identity and' spiritual heritage of the various societies, constitutes a universal form of expression and communication and, as a common denominator in ethnic, cultural or religious differences, brings home to everyone the sense of belonging to the human community, should accordingly, and for these purposes, ensure that the population as a whole has access to art

2. Member States should encourage all activities designed to highlight the action of artists for cultural development, including particular activities carried out by the mass media and the educational system, and for the employment of leisure and cultural purposes. 3. Member States, recognising the essential role of art in the life and development of the individual and of society, accordingly have a duty to protect, defend and assist artists and their freedom of creation. For this purpose, they should take all necessary steps to stimulate artistic creativity and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission, and to improve their status by acknowledging their right to enjoy the fruits of their work. Member States should endeavour by all appropriate means to secure increased participation by artists in decisions concerning the quality of life. By all means at their disposal,
Member States should demonstrate and confirm that artistic activities have a part to play in the nations' global development effort to build a juster and more humane society and to live together in circumstances of peace and spiritual enrichment,

4. Member States should ensure, through appropriate legislative means when necessary, that artists have the freedom and the right to establish trade unions and professional organisations of their choosing and to become members of such organisations, if they so wish, and should make it possible for organisations representing artists to participate in the formulation of cultural policies and employment policies, including the professional training of artists, and in the determination of artists’ conditions of work.

5. At all appropriate levels of national planning, in general, and of planning in the cultural field in particular, Member States should make arrangements, by close co-ordination of their policies relating to culture, education and employment among other things, to define a policy for providing assistance and material and moral support for artists and should ensure that public opinion is informed of the justification and the need for such a policy. To that end, education should place due emphasis on the encouragement of artistic awareness, so as to create a public capable of appreciating the work of the artist. Without prejudice to the rights that should be accorded to them under copyright legislation, including resale rights when this is not part of copyright, and under neighbouring rights legislation, artists should enjoy equitable conditions and their profession should be given the public consideration that it merits. Their conditions of work and of employment should be such as to provide opportunities for artists who so wish to devote themselves fully to their artistic activities.

6. Since freedom of expression and communication is the essential prerequisite for all artistic activities, Member States should see that artists are unequivocally accorded the protection provided for in this respect by international and national legislation concerning human rights.

7. In view of the role of artistic activity and creation in the cultural and overall development of nations, Member States should create conditions enabling artists fully to participate, either individually or through their associations or trade unions, in the life of the communities in which they practice their art. They should associate them in the formulation of local and national cultural policies, thus stressing their important contribution in their own society as well as towards world progress in general.

8. Member States should ensure that all individuals, irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status or birth, have the same opportunities to acquire and develop the skills necessary for the complete development and exercise of their artistic talents, to obtain employment, and to exercise their profession without discrimination.

There are numerous clauses flowing out of these guiding principles in the UNESCO document, but a selection of these will give some indication of the kinds of duties expected of the democratic state and the kinds of things which artists can legitimately demand:
Within the context of a general policy to encourage artistic creativity, cultural development and the promotion and improvement of conditions of employment, Member States are invited, wherever possible, practical and in the interest of the artist, to:

a. encourage and facilitate the application of the standards adopted for various groups of the active population to artists, and ensure that they enjoy all the rights accorded to the corresponding groups in respect of working conditions
b. seek means of extending to artists the legal protection concerning conditions of work and employment defined by the standards of the international Labour Organisation, in particular the standards relating to:
   (i) hours of work, weekly rest and paid leave in all fields of activities, more particularly, in the case of performers, taking into consideration the hours spent in travelling and rehearsal as well as those spent in public performance or appearance
   (ii) protection of life, health and the working environment
c. take into consideration the particular problems of artists, in respect of the premises where they work while at the same time ensuring the preservation of the architectural heritage and the environment and upholding regulations pertaining to safety and health, when administering regulations relative to the alteration of artists' premises where this is in the interests of artistic activity

Recognising the part played by professional trade union organisations in the protection of employment and working conditions, Member States are invited to take appropriate steps to:

a. observe and secure observance of the standards relating to freedom of association, to the right to organise and to collective bargaining, set forth in the international labour conventions ... and ensure that these standards and the general principles on which they are founded may apply to artists
b. encourage the free establishment of such organisations in disciplines where they do not yet exist
c. provide opportunities for all such organisations, national or international, without prejudice to the right of freedom of association, to carry out their role to the full

Member States are invited to endeavour within their respective cultural environments to provide the same social protection for employed and self-employed artists as that usually granted respectively to other employed and self-employed groups. Provision should likewise be made for measures to extend appropriate social protection to dependent members of the family. The social security system which Member States may find it well to adopt, improve or supplement should take into consideration the special features of artistic activity, characterised by the intermittent nature of employment and the sharp variations in the incomes of many artists without, however, this entailing a limitation of the artist's freedom to create, publish and disseminate his (sic) work. In this context, Member States are invited to consider the adoption of special means of financing social security for artists, for example by resorting to new forms of financial participation either by the public authorities or by the business undertakings which market or which use the services or works of artists.
a. Convinced of the uncertainty of artists' incomes and their sudden fluctuations, of the special features of artistic activity and of the fact that many artistic casings can be followed only for a relatively short period of life, Member States are invited to make provision for pension rights for certain categories of artists according to length of career and not the attainment of a certain age and to take into account in their taxation system the particular conditions of artists' work and activity b. in order to preserve the health and prolong the professional activity of certain categories of artists (for example ballet dancers, vocalists) Member States are invited to provide them with adequate medical care not only in the event of incapacity for work but also for the purpose of preventing illness, and to consider the possibility of research into the health problems peculiar to artistic professions c. taking into account the fact that a work of art should be considered neither as a consumer good nor as an investment, Member States are invited to consider the possibility of alleviating indirect taxation on works of art and on artistic performances at the time of their creation, dissemination or first sale and this in the interest of artists or of development of the arts.

The above recommendations, and indeed the Recommendation as a whole, place a huge responsibility on the state to ensure the future of the arts, and to protect and facilitate the exercise of the rights of artists. It is a hugely encouraging document as local artists now know that no less a body than the United Nations and its member states have made these recommendations.

On the other hand, it places a huge responsibility on artists to organise themselves into strong, national, representative bodies - trade unions or other forms of organisation - to consistently and proactively articulate, promote, defend and monitor their rights and interests. It will mean that artists in our country, who have been notoriously reluctant to become involved in organisations for a range of valid and not so valid reasons, will need to take more responsibility for themselves.

The minimum that we should have in this country is a representative body - for professionals this must mean a union - in each discipline, organised on a national scale with regional expression in the major regions. These organisations should exist in theatre, dance, music, film, literature and visual art. Educators in each of these disciplines may want to organise themselves separately as their interests are different to those of professional arts practitioners. Finally, those in community-based structures within each discipline and across disciplines, may want to organise themselves separately too, as they often do not have the same interests as professional organisations. The onus though, is on artists themselves to take the initiative and organise themselves, since no authority is simply going to give them the rights which have been recommended by international bodies such as UNESCO.

On the subject of cultural policies, the UNESCO Recommendation states that

Member states should endeavour ... to take appropriate measures to have the opinions of artists and the professional and trade union organisations representing them, as well as the people at large ... taken carefully into account in the formulation and execution of their cultural policies. To this end, they are invited to make the necessary arrangements for artists and their organisations to participate
in the discussions, decision-making processes and the subsequent implementation of measures aimed, inter alia, at:

a. the enhancement of the status of artists in society, for example, measures relating to the employment and working and living conditions of the artist, to the provision of material and moral support for artistic activities by the public authorities, and to the professional training of the artist

b. the promotion of culture and art within the community, for example measures relating to cultural development, to the protection and effective presentation of the cultural heritage, including folklore and the other activities of traditional artists, to cultural identity, to relevant aspects of environmental issues and the use of leisure, and to the place of culture and art in education

c. the encouragement of international cultural co-operation, for example measures relating to the dissemination and translation of works, to the exchange of works and of persons, and to the organisation of regional or international cultural events.

The recommendations of the UNESCO document regarding the participation of artists in the formulation of cultural policies and the organisation of artists into bodies and trade unions to defend and promote their interests, coincide exactly with the stated aims of the National Arts Initiative which are

a. to formulate recommendations - from the perspective of artists, arts educators and arts administrators - for future policies, strategies, structures and funding mechanisms to promote and protect the arts in our country, for negotiation with and implementation by the government and

b. to facilitate the development of national, politically independent and truly representative arts bodies and organisations to consistently and proactively promote and defend the interests of the arts and of arts practitioners.

This is what the Initiative and the recommendations/proposals in this discussion document are all about: nothing more than that which has been recommended by an international authority such as UNESCO.

TIME FRAMEWORKS

We pointed out at the beginning that this was a document to set out what would be ideal components of a new policy and strategy to develop the arts among all sectors of our society. What we have spelt out cannot happen overnight and/or simultaneously. For example, providing community arts centres for every 400 000 people will take at more than ten years, introducing arts education in most schools as spelt out, could take at least 5-8 years - so we are not proposing that all of this happens next year. Neither should the proposals be dismissed because they cannot all happen overnight. We have tried to spell out a set of pragmatic recommendations and believe that their implementation, to have maximum effect, should be pragmatic too and not be rushed to appease the legitimate desire to correct decades of apartheid in the cultural sphere, overnight.

There are, however, things that can happen in a relatively short space of time, and we would like to end off by recommending concrete 'where to from here' proposals within possible time frameworks.
1. Relatively coherent proposals from the major arts organisations need to be forthcoming by the end of 1993. These proposals may not be thoroughly detailed, but in broad terms, they should address the areas which this document has addressed.

From our perspective, there should at least be agreement in principle on:

- A National Council for the Arts, its functions, structure, decision-making mechanisms, relationship with the state, and initial means and date of establishment

- an Independent Film Authority, its functions, composition, decision-making structures, relationship with the state and initial means and date of establishment

- the dissolution of the performing arts councils in favour of different structures, and the time framework for such dissolution

- the need for multi-functional, multi-disciplinary community arts centres, their roles and funding

- proposals to submit to the government on public and private sector funding of the arts eg. tax incentives

- a broad educational policy and particularly the question of training professionals in each discipline

- the idea of local, regional and national festivals linked to development in the arts

- the need to establish national professional, community based and educator bodies in each discipline and across disciplines where necessary

- concrete proposals regarding the rights and status of artists

These broad proposals, as detailed as can be, should become the basis for negotiating the transformation of the arts scene in our country, with the appropriate authorities and interest groups.

2. Much of negotiating, monitoring and implementing future policies and strategies depends on the establishment of truly representative, national organisations representing different interests in theatre, music, visual art, dance, literature and film. Once these national organisations are formed, whether as individual membership-based organisations, federations of existing organisations, new organisations, extensions of some regionally-based organisations, there should be a co-ordinating structure which emerges and which has representation from all of these bodies. Co-operation needs to occur at regional and national level.

These organisations and the national and regional co-ordinating structures should, come into being by April 1 994 at the very latest.

It is one of the N.A.I.’s aims to facilitate this process.
3. The Convention of the Arts in December should set up a new structure or mandate existing structures which enjoy wide support and which represent major arts players, to begin the process of realising agreements reached at the Convention.

This structure should immediately negotiate with the Transitional Executive Council or appropriate political body, to set up a Multi-Party Committee on the Arts, to work with the arts structures to oversee the transformation of the arts in accordance with the agreements reached at the Convention.

Agreements reached within the Multi-Party Committee on the Arts and with the arts structures, should then be referred to the relevant governing body for ratification and implementation. 4. In consultation with the arts community, the Multi-Party Committee on the Arts, which should have its own budget or at least work in association with a department which has earmarked funds for this purpose, should appoint the following task forces, each with a clearly spelt out brief and consisting of 3-5 ‘experts’

a. A task force to come up with detailed proposals about how a National Council for the Arts would function (already the Schutte Report would be a more than useful starting point).

The Task Force would have four months to deliver its report; the intention being that enabling legislation to establish such a Council should be prepared and come before the constituent assembly or relevant authority by the end of 1994, so that the Council may be established by 1 April 1995 (the start of the new financial year).

The Task Force would also have the responsibility of making recommendations on the dissolution and/or transformation of the performing arts councils in accordance with agreements reached at the Convention. The Task Force would set time frameworks and work out a formula for decreasing funding over three years for the companies which would become independent.

The goal would be that the performing arts councils would be officially dissolved by 1 April 1995, the same date on which the National Council for the Arts is established.

The performing arts councils should receive 10-15% less than what they would receive for 94/95.

This could amount to 8-12 million rand in total, which would be channelled to the Foundation for the Creative Arts. This Foundation will have its Board of Directors increased in consultation with the arts structures, to be more representative and to administer these increased resources particularly for developmental, organisation-building and festival projects during 94/95. This increased Board will be an interim measure till the National Council for the Arts is established, at which point the Foundation will be dissolved as its functions will be taken over by the Council.

The performing arts councils currently receive a subsidy in the region of R85 million. The idea is that after a period of three years, the National Council of the Arts will come to administer an annual grant of R50-60 million (the Australian Council was given a state grant of $58 million Australian in
90/91). As central government funds for the independent companies declines over the three years, so that money is channelled to the National Council for the Arts. The balance will be used to support the national theatre, opera/musical theatre and dance companies,

A likely scenario then could be the following:

94/95
12 % cut for the performing arts councils; this could mean R10,2 million available, via a more representative Foundation for the Creative Arts, for supporting art development projects, developing national representative organisations in each discipline and supporting local and regional festivals

The permanent companies at the performing arts councils would begin to be established as independent companies.

95/96
The performing arts councils dissolve, the Foundation for the Creative Arts dissolves and the National Council for the Arts comes into being.
The initial budget of the Council is about R20 million, and assuming the total grant to the PACs remains constant, about R55 million will still be available to former PAC companies to assist their independence i.e. they might still receive 70% of the support they received the previous year.

96/97
The Council would have a budget of R30 million and the rest will be divided between full support for the national companies and percentage-based support for the independent companies.

97/98
The Council would have a budget of R40 million, the rest being divided as above.

98/99
The independent companies would no longer receive direct public funds from central government, but may apply to the Council which now operates a budget of R55-60 million, the rest going into support for the permanent national performing arts companies.

With this kind of time framework in mind, the task force should make recommendations on how, and the time frameworks in which the National Opera/Musical Theatre Company, National Theatre Company, National Dance Company, and attendant orchestras will come into being. The task force should also oversee the formulation of the constitutions, management structures, affirmative action goals, budgets and funding formulae of these national companies.

The task force would also make recommendations on how the theatres attached to the performing arts councils should be run and taken over by the local municipalities or regional governments.
The work of this task force is comprehensive since the dissolution of the performing arts councils, the establishment of a National Council for the Arts and the creation of national performing arts companies are all related. The task force can call on the technical expertise of lawyers, business consultants and others to assist them.

b. A task force to investigate the artistic and other programmes, governing boards, management, staffing, policies, constitutions and user markets, of national arts institutions such as the National Gallery, the National Library, the National Drama Library and the National Symphony Orchestra and to make recommendations regarding changes to these, where necessary, (some immediate, others over a maximum period of 5 years), in order for these to become truly representative of the South African population.

This task force is to report within 4 months and action is to taken on the recommendations before December 1 994.

c. A task force to make concrete recommendations on the establishment of an independent film body. Much work has already been done in this regard, and enabling legislation should be prepared to establish such a body by the end of 1 994 or early in 1 995.

d. A task force into existing legislation covering the rights and status of artists and to make concrete recommendations for changes and for new legislation where necessary regarding taxation, health and safety, pensions and medical care for artists and other rights in accordance with international conventions.

5. The Multi-Party Committee on the Arts, representative arts organisations and tertiary institutions should consult and make concrete recommendations about:

a. what new courses should be introduced to meet new needs eg. arts administration, and who should do them
b. how current courses need to be changed to serve new needs
c. what these institutions can do in the short to medium term to provide training and access to infrastructure for those who might not have the qualifications to enter such institutions.
d. what affirmative action in their arts departments might mean and how and over what period of time this might be effected
e. which institutions should become national training institutions in each of the disciplines and how this should be implemented

6. A commission needs to be established to prepare arts education curricula from primary to secondary school level, to investigate the cost involved in introducing such education in schools and to set strategies and time frameworks for such implementation. Changes to teacher training courses to complement the curricula to be offered, also need to be investigated.

7. A national competition should be organised in which all architects and designers are invited to submit designs for any of three kinds of multi-disciplinary, multi-functional community art
centres; the least expensive and most basic one, the 'medium range' and the state-of-the-art community centre.

8. All of the above have to do with changes to structures and education, the effects of which may only be realised after many years. To give impetus to all of the above though, actual events should occur next year which produce practical results and high profile gains for the arts within a relatively short space of time.

The provision of skills, infrastructure, resources to create and distribution networks are primary concerns at the moment.

We would like to propose then, that the idea of regional festivals with development programmes preceding them, begin on a small scale in 94/95, that they increase in 95/96 and climax in a 'mother of all festivals' in Grahamstown 1996. All these festivals will encourage the identification and development of new artists and new works.

From Sept 94 to March 95, festivals and preceding development programmes should at least take place in Cape Town, Johannesburg, Durban, Pietersburg and Bloemfontein. The following year, festivals should again take place in these centres as well as in places like Kimberley, Umtata, Mmbatho, Nelspruit and Port Elizabeth. These festivals should be the result of cooperation between town/city councils, the tourist board, arts organisations and the private sector.

Maybe these first festivals though, could happen around a theme such as 'Peace, tolerance and goodwill' or 'Festivals of Goodwill' which may be necessary as the country begins to reconstruct itself after its first non-racial elections. This means that the National Peace Secretariat can also be drawn in, more access to resources may be possible and artists can have an opportunity to prove what they have been declaring all along i.e. that the arts can contribute to peace, cooperation and reconciliation at a local level. These festivals which may occur in even more places and not only in major centres, could go a long way to raising the profile of the arts and contributing to a new spirit in the country. Funding for these festivals and their concomitant development programmes will initially be supplied by the extended Foundation for the Creative Arts, with its extra funds from the performing arts councils.

9. Next year, the arts community should also launch a 1 % campaign in which they campaign for every development or social project funded by the state, development agencies or the private sector, to have 1 % of its budget set aside for the arts to be used within the project.

CONCLUSION

These are proposals, ideas, recommendations. Some may be more formed than others, but hopefully they give some indication of what may be possible and desirable. Hopefully, this document will help stimulate debate, new and exciting ideas, and an organised, active and innovative arts community.
THE AFRIKAANSE TAAL- EN KULTUURVERENING (“ATKV”)

THEME COMMITTEE 1 (BLOCK 2) SECTION 8: EQUALITY

1 INTRODUCTION

1.1 WHAT IS THE ATKV?

The ATKV is a voluntary cultural organisation established in 1930 with its main purpose the preservation, upholding and furtherance of the Afrikaans culture.

The ATKV, which has 70 000 enrolled adult members, is based on Christian values and non-discrimination on the grounds of race and gender.

1.2 WHAT IS CULTURE?

"Culture" can be described as the way of living of a specific group of people and includes components like religion, social customs, the economy, the judicial system, language(s) (including dialects of a specific language), art and sport. All these components together form a cultural unity which identifies a specific group of people and creates an environment of belonging and security for the specific group.

1.3 BASIS FOR THE SUBMISSIONS

1.3.1 South Africa is now one sovereign state wherein a common South African citizenship is recognised (Constitutional Principle I) in the midst of a diverse multi-lingual and multi-cultural nation (Constitutional Principle XI).

1.3.2 The ATKV supports the democratic system of government of which freedom and equality form the basis (Constitutional Principle I).

1.3.3 The ATKV supports the principle of the Rule of Law which includes the supremacy of the Constitution (Constitutional Principle IV and Section 4 of the Constitution) as well as the entrenchment of the Constitution (Section 62(1) of the Constitution).
1.3.4 The individual's recognised fundamental right to human dignity fails within the recognition and protection of his right to free participation in cultural activities in order to establish and protect his own identity and environment wherein he (within his group, if required) can experience a sense of security. This will ensure an effective and healthy unity amongst all citizens.

1.3.5 The ATKV accepts that the Constitution is mainly directed at the vertical relationship between Government (organs of State) and the citizens of the country. It is accepted that the spirit, purports and objects of the Constitution should play a role in the horizontal application of the Constitution; this is, however, not the primary aim of the Constitution.

1.3.6 It is accepted that no citizen may enforce any of his rights in such a manner that it infringes upon the rights of any other citizen. Chapter 3 of the Constitution should be amended to the extent that it does not make provision for this general principle.

2 SUBMISSIONS:

The ATKV considered the 1993 interim Constitution and hereby makes the following submissions. (The phrases in italics are the suggested amendments.)

SECTION 8. EQUALITY

(3) (a) This section must be interpreted to understand under equality before the Law the inclusion of laws, programs or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

Motivation:

The existing section 8(3)(a) authorises unreasonable discrimination in implementing affirmative action. This is contradictory to the spirit and aims of the Constitution if due regard is had to Constitutional Principle II and III. The general principle of law of proportionality must be the basis of the so-called affirmative action programmes. The suggested amendment coincides with Constitutional Principle V and would prevent unreasonable discrimination.

The ATKV supports the rest of Section 8 for the reasons indicated in paragraph 1.2 and 1.3 above.
1  INTRODUCTION

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2. **SUBMISSIONS:**

The ATKV considered the 1993 interim Constitution and hereby makes the following submissions. (The phrases in italics are the suggested amendments.)

2.1 **SECTION 14: RELIGION, BELIEF AND OPINION**

The ATKV supports Section 14 of the 1993 Constitution.

**Motivation:**

The ATKV supports the approach to religious freedom as stated hereunder. This approach coincides with the German approach. It entails that -

a) freedom of religion is *inter alia* guaranteed in educational institutions. The Government may in terms of subsection 14(2) issue rules which would ensure the practice of religion in these institutions on a fair, free and voluntary basis. A duty therefore rests on the Government to ensure religious practices in accordance with the directions set out in subsection (2); and

b) the phrase "equitable basis" coincides with the requirement imposed by German courts which ensures equal opportunities for different religions; and
c) the condition that religious practises should be free and voluntary, is also accepted in the German community. Subsection 14(2) therefore ensure a continuation of the existing South African approach towards freedom of religion and the creation of favourable circumstances by the Government to create opportunities for religious practises. (Malherbe E F J : "Die onderwysbepalings van die 1993 Grondwet" TSAR 1995(1) p 7 8).

This approach is the direct opposite of the USA approach wherein the neutrality dilemma led to the courts' approach which inhibit the education of religious beliefs but does not inhibit education which runs contrary to religious beliefs.

2.2 SECTION 15: FREEDOM OF EXPRESSION

Every person shall, to the extent that no right of another is contravened thereby, have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

Motivation:

The proviso included in the above Section would ensure that no person would, for example, be subjected to undesired publications and media. This submission is in accordance with paragraph 1.3.6 above wherein it is stated that it is accepted that no citizen may enforce any of his rights in such a way that it infringes upon the rights of any other citizen. Chapter 3 of the Constitution should be amended to the extent that it does not make provision for this general principle. This proviso further ensures that defamation claims wherein the existing Section 15 is pleaded as defence cannot be utilised. The status quo ante 27 April 1994 in relation to private law relating to defamation claims is therefore restituted.

2.3 SECTION 17: FREEDOM OF ASSOCIATION

The ATKV supports the existing Section 17 of the 1993 Constitution.

Motivation:

This right forms the basis for forming, joining and maintaining the organs of civil society, including linguistic, cultural and religious associations. The citizen can practice his culture through this right to freedom of association and the organs which are established thereby.
Collective rights of self-determination are ensured in accordance with the aim of Constitutional Principle XII.

SECTION 30: CHILDREN
SECTION 32: EDUCATION

2 SUBMISSIONS:

The ATKV considered the 1993 interim Constitution and hereby makes the following submissions. (The phrases in italics are the suggested amendments.)

2.1 SECTION 30: CHILDREN

(1) Every child shall have the right -

a) ........
b) ........
c) ........
d) to be protected against neglect, spiritual and moral denigration, sexual abuse, drug abuse and abuse in general.
e) ........

Motivation :

This amendment ensures that the troublesome question relating to the exposure of children to pornography, violence on television and in the written media, bestiality and unnecessary crude language are covered. This amendment ensures comprehensive protection of the child in relation to negative spiritual and moral influence.

2.2 SECTION 32: EDUCATION

The ATKV supports the existing Section 32 of the Constitution with the exception of paragraph (c) which should be amended as follows:

(c) to establish, continue and to run, where practicable, state supported - or other educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.
Motivation

It is clear that the intention of the writers of the Constitution was to ensure the right to establish, continue and run these institutions. Through the amendment the intention of the writers of the Constitution is articulated.

Government organs would forsake their duty in a diverse country if this Section is only applied to private schools. This Section should be worded in the above manner in order to ensure that a duty rests on the Government to support the continuation, establishment and running of educational institutions based on a common culture, language or religion.

The dignity of the individual should be protected in the educational system in relation to his specific needs for the reasons set out in paragraph 1.3 above.

SECTION 33: LIMITATION

The ATKV supports the existing Section 33 of the 1993 Constitution.
We are enclosing for your information and the support of the A.N.C. a summary of our submissions to the Constitutional Assembly. Further documentation is available should this be required.

We are also enclosing a copy of our letter addressed to the President, The Hon. Nelson Mandela, which relates to the draft Film and Publication Bill. For reasons stated in the letter we believe that this bill is in conflict with the manifesto issued by the A.N.C. prior to the election.

We would welcome your support of our viewpoint on the critical issues raised.

Rev. A. H. Jeffree James
Executive Secretary

The Protestant Association of South Africa

3rd April 1995

The Hon. N R Mandela,
President of South Africa

Dear President Mandela,

Prior to the epoch-making election on April 27th 1994, we received a copy of your manifesto NOW IS THE TIME - A BETTER LIFE FOR ALL. We were deeply impressed, more particularly with the paragraph four which reads as follows;

A programme to bring about the equality and respect for women.

Under ANC Government, women will be given a voice. They will be respected and treated equally. At least one-third of our parliamentary candidates are women.

Our purpose in writing to you now, is to express our deep concern that the draft ‘Film and Publication Bill’ is in direct conflict with the objective expressed in your manifesto. We interpreted the sentence we have underlined, They will be respected and treated equally, to mean that no assault upon the dignity of womanhood would be permitted. We submit that paragraph 5.5, summary of the draft Bill by its failure to prohibit explicit sexual display, otherwise known as hard-core pornography, in film or publication, leaves the door wide-open for the pornographic industry to build their financial empires in South Africa, as they have done in the United States and the United Kingdom, by mounting such an assault.
We are aware that there is confusion in the minds of lawyers, legislators, psychologists, and sociologists, as to what constitutes an assault in this field of discussion. We are convinced, however, that there will be no such confusion in the minds or emotions of adolescent girls and mature women - especially the wives and mothers of our land - when they find their gender subject to such abuse, or they suffer physical violence, even to the point of being raped, in consequence of it.

There is a further aspect of this matter to which, respectfully, we must draw attention. The draft Bill appears to have accepted the submission of the pornographic industry that Section 15, chapter 3, of the Interim Constitution allows unrestricted freedom of expression regardless of the provisions of Section 10 which reads:

**HUMAN DIGNITY**

10 Every person shall have the right to respect for and protection of his or her dignity.

The Government, however, is currently appealing to all our citizens to suggest ways and means of improving upon the Interim Constitution - in short to make it their very own. This is highly commendable, and, probably without precedent in constitutional history.

The Protestant Association, with others, has responded and made representations relating to the issue we have now raised. A summary of our representations is attached. They include suggested amendments to both sections 10 and 15, aimed at strengthening the former and qualifying the latter. Whatever the merits, or de-merits of the suggested amendments, which the Constitutional Assembly will see in them, is it not a breach of faith on the part of the Government to introduce legislation at this stage which virtually pre-empts any serious discussion, let alone the acceptance, of them.

We are convinced that it is not the intention of the Government, that this should be so; its regard for the rights of the average citizen to have a meaningful part in fashioning the constitution of our land is above reproach. Nevertheless, we respectfully submit that this will be an inevitable effect if the draft bill goes forward in its present form. Ought not such legislation, hinging as it does upon a disputed interpretation of the Interim Constitution, be postponed until the Final Constitution is accepted by the people through their parliamentary representatives?

Mr President, we have learned to admire and appreciate the fair and objective manner in which you have exercised the duties pertaining to your office during the past year. In the light of this, we have confidence in asking for your personal intervention in the matters we have raised.

(REV) A. H. JEFFREE JAMES
EXECUTIVE SECRETARY.
As Board of Management of our school which represents about 600 parents of various races, we wish to propose the following in respect of the constitution:

1. That the constitution should make ample provision for the pursuit of free religion by each cultural group so that religion could be part of our education. Religion is a basic need of each person and we believe that true democracy will never materialise if people are prohibited to have their children educated in the religion of their choice.

H ELS
CHAIRMAN - BOARD OF MANAGEMENT
AGRICULTURAL RESEARCH COUNCIL

INPUT FOR ATTENTION OF THE CONSTITUTIONAL ASSEMBLY
OF THE REPUBLIC OF SOUTH AFRICA

1. SUBJECT

The confirmation of agricultural research, technology development and technology transfer as a national function.

2. OBJECTIVE

To ensure that agricultural research, technology development and technology transfer will be confirmed as a national function in the new Constitution in order to promote maximum cost-effectiveness.

3. DELIBERATION

3.1 Dependence of the agricultural sector on relevant technology

History has proved that all agricultural sectors throughout the world rely heavily on the constant revitalizing of technology. South Africa is no exception to this rule. In fact, this phenomenon is even more valid for the South African agricultural sector than for most foreign agricultural industries, especially. In view of the extremely limited local resource situation, this phenomenon is even more valid for the South African agricultural sector than for most others.

The dominant economic and socioeconomic role of the South African agricultural sector, demands that it should at all times be maintained at an optimum level. This would only be possible if demand-driven technology requirements could be satisfied on an ongoing basis. In order to achieve this, it would be necessary to maintain demand-driven research, technology development and technology transfer on a cost-effective and ongoing basis.

3.2 Preconditions for an effective and cost-effective agricultural science system

3.2.1 Effective use of scarce resources

The Agricultural science system must make provision for the cost effective utilisation of scarce resources, namely expert manpower, costly infrastructure and equipment and available funds.

This precondition implies that an agricultural science system must have an exclusive mandate that may not be duplicated by any other government institution. This means that the science system must accept a national responsibility, irrespective of provincial or other artificial boundaries. Accordingly it will be possible to address peculiar requirements of commodities across provincial boundaries by targeting the limited resources in the most efficient manner. Such a system will
ensure that available expertise and other essential sources will thus be used on a national basis, thereby preventing unaffordable duplication and maintenance of unnecessary structures within the provinces.

The same arguments are valid in respect of demand-driven research, technology development and technology transfer relating to the extremely limited natural agricultural resources such as soil, climate, water and natural pastures irrespective of provincial boundaries.

3.2.2 Instrument of Central Government

The agricultural science system must lend itself to the effective realisation of national objectives determined by the Central (national) Government. Accordingly the agricultural science systems should therefore be retained as a national science facility in order to address national objectives such as the promotion of economic and social prosperity, which represent an integral part of the RDP.

3.2.3 Autonomy and financing

A particular science system can only function effectively if it is autonomous and supported by adequate human and financial resources. This should result in independent decision-making in respect of the efficient implementation and practice of science. Adequate funding can only be done through Central Government, whose interests in fact are being served.

4. CONCLUSION

If due cognisance is taken of the aims and requirements of a scientific service to the South African Agricultural sector it is obvious that it can only be achieved by a national agricultural science system which is responsible to Central Government.

5. IMPLEMENTATION

In order to implement the above principle, it is imperative that distinctive role allocation between the national agricultural science institution (Agricultural Research Council), the National Department of Agriculture and the Provincial Departments of Agriculture be established. This should be entrenched in the Constitution. The following role division is proposed.

PROPOSED CO-ORDINATED SERVICES TO AGRICULTURE ON CENTRAL AND PROVINCIAL LEVELS BY DEPARTMENT OF AGRICULTURE AND THE AGRICULTURAL RESEARCH COUNCIL DEPARTMENT OF AGRICULTURE (CENTRAL LEVEL)
Mission Statement

To promote, within the constraints of the national economy, sustainable agricultural production and marketing to the best advantage of the agricultural industry and the continual development of rural areas.

Functions

An overall agricultural strategy must be developed, resulting in a national agricultural development plan, with fixed objectives which can be implemented in conjunction with regional governments.

The following guidelines exist:

1. The determination of norms and standards regarding
   1.1 Plant improvement
   1.2 Livestock improvement
   1.3 Subdivision of agricultural land
   1.4 Agricultural resource conservation
   1.5 Utilisation of agricultural resources
   1.6 Agricultural credit and financial assistance

2. The determination of macro agricultural economic policy

3. The regulation of
   3.1 Animal health
   3.2 Plant health
   3.3 Agricultural marketing
   3.4 Combating of agricultural pests
   3.5 Co-operatives
3.6 Veterinary public health

3.7 Quality of plant and animal material and products

3.8 Livestock brands

4. The control of

4.1 Import and export of animals, agricultural material and products (phytosanitary and zoosanitary control)

4.2 Agricultural and stock remedies, stock feeds and fertilisers

5. The production of vaccines and other animal health products as long as it remains a State function

6. The rendering of

6.1 Specialised diagnostic and research services with regard to animal diseases

6.2 Financial assistance in national disaster situations

6.3 Agricultural statistical services

7. The maintenance of international agricultural relations *inter alia* in co-operation with the ARC

8. The promotion of agricultural research, technology development and transfer (including agricultural engineering technology)

ASSOCIATED STATUTORY BODIES

Agricultural Marketing Boards

Advisory Board: Livestock Improvement Act

National Marketing Council

Agricultural Research Council
DEPARTMENT OF AGRICULTURE AT PROVINCIAL LEVEL

Mission Statement

To promote sustainable agricultural production and development on the provincial level, which will ensure a livelihood and provide in the food requirements of communities and an acceptable standard of living of the population.

Functions

Functions should entail the implementation of the central policy elements applicable to regions as well as the formulation and implementation of a provincial agricultural development strategy which is based on the national development plan, as follows:

1 The rendering of support to farmers and agricultural communities with regard to:

1.1 Extension services
1.2 Training
1.3 Financing
1.4 Household food security
1.5 Disaster aid
1.6 Agricultural economics
1.7 Agricultural engineering technology
1.8 Marketing infrastructure
1.9 Irrigation

1.10 Stock watering systems

2. **The promotion of:**

2.1 Agricultural resource conservation

2.2 Sustainable utilisation of agricultural resources

2.3 Agricultural technology development, adaptation and transfer (including agricultural engineering technology)

2.4 Agricultural marketing

2.5 Improvement of livestock, plants and related products

3. **The rendering of:**

3.1 Animal health services

3.2 Veterinary public health services

3.3 Plant health services

3.4 Veterinary laboratory services

3.5 Agricultural statistical services

4. **The determination of agricultural economic policy**

5. **The administration of matters pertaining to state agricultural land**

6. **The combating of agricultural pests**

7. **The registration of livestock brands**
DEFINITIONS OF TERMINOLOGY

Determination of norms and standards - Fixing the basis on which a service will be rendered or an activity dealt with nationally by the lower levels of government.

Regulations - The drafting of laws and regulations. This may or may not include the enforcement of the regulations.

Control - Signifies actions on a continuing basis in order to exercise control over the execution of a function.

Provision, rendering - The production or delivery of a service.

Promotion - Rendering of financial and other assistance, extension as well as other professional services, etc.

Research - Is the scientific process by means of which existing knowledge is verified or new facts are being established in order to reach scientifically sound conclusions.

Technology development - Is a scientific process by means of which applicable technology is developed through application of available scientific knowledge.

Technology transfer - Is the process by means of which developed technology is effectively transferred to clients or representatives of clients.

NATIONAL AGRICULTURAL RESEARCH INSTITUTION (AGRICULTURAL RESEARCH COUNCIL)

Mandate

To promote, via technology creation (research), technology development and technology transfer, sustainable agriculture, agriculture-directed and agriculture-dependent industries, thereby contributing to the improvement of the quality of life of all South Africans, taking into account the protection of the environment.

Functions

1 To undertake research thereby creating relevant technology in order to promote development by applying the acquired knowledge at both national and regional level,
2. To relay relevant knowledge and technology to extension officers and other potential users in regional governments as well as the private sector by means of publications, mass media, open days and other ways of personal contact.

3. To advise all relevant agricultural authorities concerning policy aspects.

4. The resource characterisation and maintenance of national natural agricultural resource databases for soil, climate, water and natural vegetation in co-operation with regional institutions subject to their particular sets of environmental conditions.

5. To render certain services on request as required by agriculture which cannot be rendered, or satisfactorily rendered, by the private sector.

6. To keep abreast of international technology developments.

7. To prepare vaccines and related biological products in order to prevent or control animal diseases which affect certain agricultural industries. (This is a function to be transferred to ARC from National Department of Agriculture).

An existing national facility, namely the Agricultural Research Council (ARC) was established to create, develop and transfer demand-driven technology for the benefit of all components of the total South African Agricultural Sector.

The ARC has to a large extent the necessary expertise, infrastructure and facilities to carry out the above mandate and the functions arising from it.

In order to ensure that the technology chain functions effectively and that services to agriculture will be rendered cost-effectively and in a co-ordinated manner, the following points should be emphasized.

Firstly, duplication of this mandate should be avoided at all cost. Liaison structures should be created involving institutions such as the Department of Agriculture, certain scientific councils, departments at universities and private-sector institutions (e.g. co-operatives), to ensure cooperation thereby avoiding unnecessary duplication.

Secondly, in order to keep abreast with the problems and needs of the various agricultural industries and communities, the ARC may have to decentralise accordingly.

With the present method of financing, a more regionalised ARC could find it difficult to render efficient and ongoing services. It would, however, be feasible to regionalise provided the ARC could be contracted by the national Department of Agriculture and regional departments of agriculture.

**Plan of Action**
Liaison structures have already been developed namely the DA/ARC Policy Committee and the Regional Research Co-ordinating Committees, which will facilitate effective co-operation between the two institutions, which is crucial.

The autonomy of the various institutions must be mutually recognised and honoured at all times.

Transfer of further research and other components from DA to ARC

1. In absence of an agricultural engineering research component within the ARC, this deficiency should receive urgent attention.

2. Research on production economics as well as economic and socioeconomic impact studies are currently a departmental function which could possibly be transferred to the ARC. This would be subject to the need for economic research.

3. The vaccine manufacturing facility at Onderstepoort has already been identified by both ARC and DA as a function that should be transferred to the ARC.

4. The functions of animal production, pasture, and agronomical science have already been fully established at the ARC. Current research projects at Provincial Department of Agriculture which overlap with or are duplicated by the ARC should be critically evaluated and should be transferred to the ARC where practically possible.

5. The function of veterinary diagnostics is being conducted fairly effectively. Although some rationalisation would take place if the DA regional laboratories were transferred to the control of OVI, the financial burden on OVI and the ARC would be increased substantially. It is therefore recommended that the regional laboratories should not be transferred to the ARC.

The veterinary laboratories of the DA will undoubtedly be transferred to the respective provincial governments in a new constitutional dispensation.

DR J H TERBLANCHE
PRESIDENT

10 APRIL 1995
31 May 1995

RE: SOUTH AFRICA SHOULD BE RE-CHRISTIANIZED

1. The NAME SOUTH AFRICA is not relevant to our situation. A new name is needed. The best name is "MAZANTSISI" meaning souther parts of Africa. Hence there are many peoples in South Africa this name will be relevant to indicate that people of Southern Africa, i.e. "Abezantsi"

2. On NATIONAL ANTHEM:
Yiza (Yihla) moyo
Yiza (Yihla) moya
Oyingwele

This verse should be deleted or rephrased in this way: "Yiza Nkosi" [illegible line in the fax] totally uprooted from this Anthem.
The anthem should not be linked to any faith as the country is a multi-faith state.

The SeSotho version with special emphasis on Jesus leaves much to be desired. This verse reads thus, i.e. "Morena .... SethabasaYesu". Therefore it must be removed.

"Die Stem van Suid Afrika" should not be sung.

3. On STATE OF EMERGENCY

This particular right should be retained by the State President. He should have complete powers of declaring the State of Emergency. No Power should oppose him, except Judiciary Court of law.

4. On Parliament Seat

The seat should together with administrative office be situated in Pretoria to avoid unnecessary waste of taxpayer's money.

MPONDO KINGDOM COUNCIL (this council represents the entire nation of Mpondoland East)
Submission to Constitutional Assembly on Children’s Rights

I. SASPCAN believes in the Protection of children’s rights as follows:

I The Children's Rights to survive

II The Children’s Rights to develop

III The Children’s Right to be protected

2. It is important while implementing services to observe also the world's summit goals as follows: Major goals for the child survival, protection and development.

I Between 1990 and year 2000, reduction of infant and under five child mortality rate by one third or to 50 and 70 per 1000 live births respectively) which-ever is less;

II Between 1990 and the year 2000, reduction of maternal mortality by half;

III Between 1990 and year 20(©, reduction of severe and moderate malnutrition among under five children by half;

IV Universal access to safe drinking and to sanitary means of excreta disposal;

V By tear 8000, universal access to basic education and completion of primary education by at least BO per cent of primary school age children;

VI Reduction of the adult literacy rate the appropriate age group to be determined in each country) to at least half it's 1990 level with emphasis on female literacy

VII Improved protection of children in especially difficult circumstances.

3. SASPCAN advocates for family approach in protection, survival and development of children and wish that this be enshrined in the Constitution of South Africa as follows:-

- The state in rendering social Security to children should provide it in the form of family allowance instead of giving children individual grants which in any way become a family benefit because of the destitute situation people find themselves in.
- There should be no discrimination in payments because children and families are the same regardless of races colour or creed.

- Whatever the reasons the children must never be separated from their families and the South African constitution must protect the family unit and bond between siblings.

4. CONCERNS ABOUT PRESENT CONSTITUTIONAL PROVISION

I There is much concern about the fact that only children who are mentally retarded receive single-care grants.

Children with gross physical disablements who equally require/demand much more care and management should be in receipt of such grants too. This should be built into family allowance

The subject of disability is very complex and therefore calls for Inputs from experts to ensure that there are proper provisions available in the constitution.

Day facilities for this group of children is a subject of major concern. Home care should be encouraged and this will be more successful if family allowances are made available.

11 Children who lose their mothers should be equally catered for with maintenance grant like children who have lost their fathers.

111 The present constitution is silent about refugee children who may probably be the responsibility of United Nation's High Commissioner for the refugees.

- The present constitution should stipulate what should be done about children of illegal immigrants.

IV There has to be proper constitutional provision for children who are supposed to be maintained by Court order. These children most of the time become nobody’s responsibility in the sense that the state does not take responsibility because their fathers are still alive and employed. On the other hand the fathers do not contribute towards maintenance of these children and are not prosecuted.
v The trial in the case of an abused child traumatises children more. Our constitution should be
drafted in a manner that it ensures that an abused child will be protected from the normal
judicial procedures.

VI In general our children have grown up and are still growing up in a culture of violence and
we therefore need to have a constitutional provisions which will ensure availability of
rehabilitative programmes for these children.

Children are our future. Each an every responsible government take it an its responsibility
therefore the protection, survival and development of the children as a way of creating a caring
society.

Chairman
SYNOPSIS OF SUBMISSIONS MADE BY THE SOCIETY OF STATE ADVOCATES OF S.A.

THE CONSTITUTIONAL ROLE AND POSITION OF ATTORNEYS GENERAL AND THE PROSECUTING AUTHORITY

1 INTRODUCTION

1.1 The Society of State Advocates is a voluntary association counting as its members the vast majority (but not all) Attorneys-General, deputy attorneys-general and state advocates.

1.2 The Society is today represented by its Chairman and three other members of its executive committee:

Adv. A.C. HUMAN S C
Adv. W.F. JURGENS S C
Adv. J. HIEMSTRA
Adv. B. DOWNER

2 HISTORICAL BACKGROUND

2.1 The office and title of attorney-general stem from a very old tradition in England which can be traced back to 1247, and which still exist, in various forms, in the English speaking world of today.

2.2 The typical English attorney-general is a member of the Cabinet who has the final authority over and accountability for the prosecuting service, but with the day to day decision making on and supervision over prosecutions being left to a director of public prosecutions (D.P.P.) and his staff.

2.3 The four colonies which made up the Union of South Africa in 1910 had attorneys-general in the English mould, being members of the legislature and of cabinet.

2.4 Since 1910 the attorneys-general of South Africa were civil servants in charge of all prosecutions within their respective areas of jurisdiction.

2.5 In 1910 no provision was made for ministerial or any other public control over the various attorneys-general, and in 1926 the situation was drastically changed by placing the authority to prosecute in the hands of the Minister of Justice, with the various attorneys-general as his deputies.

2.6 In 1935 the decision making authority was given back to the attorneys-general, subject to a right of review by and direction of the Minister.

2.7 This, broadly speaking, remained the position until 1992.
2.8 Since 1985, this Society waged an active, albeit low-profile, campaign to free attorneys-general from political control and supervision. Although the government of the day was not against this principle, they were unfortunately only persuaded in 1992, to enact the Attorney-General Act, No.92 of 1992, which is still in force today.

2.9 It needs to be stressed that the 1992 statute was not a knee-jerk reaction of a dying regime to entrench a certain position, but was the end result of process which was started by the Hoexter Commission in 1983, and pursued since then by various role players, including our Society.

3 CONVENTIONS INHIBITING DIRECT POLITICAL INFLUENCE

3.1 In England, and elsewhere, strong conventions have been established whereby (political) attorneys general respect the independence of their Directors of Public Prosecutors. Ministerial intervention by the Attorney-General in decisions of the DPP relating to prosecutions are thus only very rarely resorted to.

3.2 In South Africa too, a strong tradition of non-intervention was established. However, it must be stated that Ministers of Justice did from time to time convey their own opinion, or that of the government, to attorneys general, although no directive was ever given.

3.3 The 1992 Act therefore did not signify a new trend, but to a large degree served to formalise and entrench a tradition of independent attorneys-general.

4 THE PRESENT DEBATE

4.1 This Committee, and the Constitutional Assembly, is presently tasked to look at the whole constitutional dispensation of our country, and we submit that the role and function of the prosecution service, and thus also the position of our attorneys-general, should be included in this process.

4.2 We do not submit that the position of the attorneys general, their staff and their functions be spelled out in detail in the new constitution, but believe that it should contain at least the basic principle. This committee should also make recommendations to Parliament for further and consequential enactments.

4.3 This is not merely an academic exercise, as the authority to prosecute is a sensitive and important factor in society which, if not handled correctly, can easily lead to much discontent and distrust, and may even undermine the legitimacy and acceptability of a constitutional dispensation.

4.4 The perception (erroneous, but nonetheless very real) that the prosecuting power was a tool in the hands of the previous government was one of the
reasons for the distrust in and lack of credibility of our system of criminal justice in the past.

4.5 We come from a past of bitter divisions, and the prosecuting authority was unfortunately perceived to be a tool of repression and harassment of those engaged in or sympathetic to the anti-apartheid struggle, and also to be aloof and even unsympathetic to the needs and pressing problems encountered in crime-ridden communities which suffered neglect and deprivation under previous policies.

4.6 We as a Society and as individual members of course deny and refute the truth of such perceptions. We are a body of professional lawyers who execute our mandate to the best of our abilities and often under trying circumstances, and will in future continue to execute our statutory mandate to enforce criminal law, irrespective of the identity of the Government of the day or of the identity or cause of alleged transgressors. The perception that a certain political policy was applied with particular vigour and enthusiasm is therefore an unfortunate one. However, perceptions exist, and cannot be ignored.

4.7 The true lesson to be learnt from our history giving rise to these perceptions, it is submitted, is that the prosecuting authority must never again be placed in a position where it can even be perceived as being an instrument of political repression or harassment.

4.8 The present unprecedented escalation in crime present unique problems to our society and especially its law enforcement agencies. Our system of criminal justice, and especially the role played by the prosecuting authority is all important in the fight against crime, and in preventing law abiding citizens from large scale vigilante activities which may seriously undermine the fabric of orderly society.

5 BASIC POINTS OF DEPARTURE

5.1 We make bold to say that the following principles are so basic to good governance as to be universally acceptable, namely that our country should have a prosecuting service which is:

5.1.1 professional and effective

5.1.2 independent from any improper motive or pressure;

5.1.3 accountable and fitting to an open and democratic society.

5.2 From these broad principles a number of important criteria or guidelines can be inferred:
5.2.1 The service should be staffed by professionally qualified lawyers, i.e. a prosecutor in the Supreme Court should in all respects be qualified and entitled to practise in that Court;

5.2.2 Staff should be paid a salary commensurate to their Professional training and standing;

5.2.3 The service should be as independent as possible;

5.2.4 The service should also clearly be seen as independent and beyond manipulation by anybody;

5.2.5 The service should be open and accountable to the public, but should not be amenable to political manipulation.

6 STRUCTURE OF THE PROSECUTING AUTHORITY

6.1 The present structure of the prosecuting authority may be summarized as follows:

6.1.1 Regional Offices for each of the Provincial Divisions of the Supreme Court and for the WLD, headed by Attorneys-General and staffed by professional advocates;

6.1.2 Local prosecutors in each district, forming part of the staff of Magistrates Offices;

6.1.3 Attorneys-General are independent, and individually accountable to Parliament through the Minister of Justice;

6.1.4 State Advocates and prosecutors are not under the full and independent control & authority of the Attorneys-General, as they are members of the Public Service in the Dept. of Justice and thus under the usual authority and discipline of the Public Service Act;

6.1.5 Offices of the Attorneys General are sub-offices of the Dept. of Justice which renders auxilliary service and exercise control over administrative and financial functions of those offices.

6.2 It is submitted that it is vitally important that not only the Attorneys-General, but also their subordinates should be removed from Departmental and direct Governmental control, and that all should be members of an independent prosecuting service, under the control and supervision of an authority that is public, transparent and democratically appointed or elected.

6.3 The present prosecuting authority includes attorneys-general, deputy attorneys-general, state advocates, regional court prosecutors and district court prosecutors. We realise that it will not be an easy or quick process
to rationalise all these components into a new independent service, but urge this committee to set this ultimate ideal very clearly, whilst allowing room for a gradual process. We urge that, as a first-step, deputy attorneys-general and state advocates should also be made independent and be included in the Attorney-General Act, 1992.

6.4 It is further submitted that the proposed new Prosecution Service should continue to be structured on a regional basis with a semi-independent office for each region. The nature and boundaries of such regions should follow the boundaries of Divisions of the Supreme Court. Whether these should in turn follow provincial boundaries, will not be addressed in this paper.

7 INDEPENDENT REGIONAL HEADS OR ONE NATIONAL HEAD OF THE PROSECUTING SERVICE?

7.1 At present the Regional Offices are headed by independent Attorneys General, with the Minister of Justice being able to play only a limited role to coordinate their activities, and serve as communication channel with Government and Parliament.

7.2 This association is of the firm view that the proposed Service and our country will best be served by having the individual attorneys-general retain their independence as at present.

7.3 We are aware of a contrary viewpoint to have a "National Attorney-General" with the present Attorneys-General reduced to his deputies. Whilst we are not unmindful of the advantages of such a structure for uniformity and accountability, our Society is of the considered opinion that the following disadvantages outweigh the possible advantages:

7.3.1 Too great concentration of power in the hands of one individual

7.3.2 The risk of such singular appointment being amenable to all manner of political considerations and manipulations;

7.3.3 The added logistics, delays, costs and uncertainty of having to refer cases from regional offices to "Head Office" for decision.

7.3.4 This would run counter to the present trend to decentralize government to provinces or regions. (BUT we do not say that this should become a provincial matter or fall under Provincial Government).

7.4 Whilst we see some advantages in a one national head for the proposed Prosecution Service, we wish respectfully to record our gravest concern over the further viewpoint that such National Attorney-General should be a member of Cabinet.
7.5 We hasten to add that our concern does not stem from a fear of the Government of the day making life miserable for us, but from a genuine fear that our own standing and credibility will suffer in the perceptions of the community if we were to be seen as 'puppets of government'.

7.6 It matters little that no improper motive will be served by such "political" Attorney-General. What will matter is that such a perception will be created by a change in the legal status of the Attorneys-General.

7.7 Furthermore, we believe that the Minister of Justice, in his presently defined role, can still fulfil all the positive functions of such National Attorney-General such as to attain co-ordination and uniformity, being a bridge between the Government of the day and the Attorney-General, and in promoting accountability, without the negative factor being present, namely the perception that prosecutions are instituted to suit political or other governmental interests. All the advantages of a "National Attorney-General" can thus be had by the purposeful application of the Constitutional role of the Minister of Justice without encountering any of the disadvantages.

7.8 It is therefore submitted that the power and functions of the Minister of Justice in terms of sections 5(5) and 5(6) of the Attorney-General Act, 1992, be retained and be purposefully exercised in a full and meaningful nature so as to actively promote co-ordination and uniformity (especially in matters of policy) and in ensuring that debatable decisions (especially in matters of policy) are in fact brought to open debate (BUT without harming any specific proposed prosecution).

8 CONTROL OVER ACCOUNTABILITY OF THE PROSECUTION SERVICE

8.1 At present Attorneys General are independent with only a limited and indirect accountability by means of annual reports to Parliament. Other members of the prosecuting staff are not fully under the independent control of Attorneys General, in that they are subject to the control, supervision and discipline of the Public Service Act and the various authorities in the Public Service.

8.2 We have already submitted that prosecutors and state advocates should be independent of the Public Service and be fully under the control of Attorneys General.

8.3 We further propose that Attorneys-General and the whole prosecution service should be, fully accountable to a body which is public, transparent and democratically elected or appointed.

8.4 We have no firm views on the identity or composition of such a body, but wish to refer to the recommendation made in 1983 by the Hoexter-Commission for the establishment of a "Council of Justice" to oversee various judicial functions. Such Council or Commission could then have
committees for judicial service of Judges, to oversee the Magistrate's Courts functions, and to oversee the Prosecution Service.

8.5 The functions of the Judicial Services Commission as it exists under the present Constitution may very easily be extended for this purpose. Alternatively, a new board or council may be appointed by Parliament.

9 TITLES OF HEADS OF PROSECUTION SERVICE

9.1 Whilst we will certainly be sorry to see the centuries-old title of Attorney-General disappear from our legal scene, we must face the fact that the name is not descriptive of the office or function, and that it even from time to time causes misunderstanding and embarrassment.

9.2 We therefore suggest that the title "Attorney-General" not be used for either the national head or regional heads of the Prosecution Service. We suggest the following:

9.2.1 The cabinet member who liaises with the Service (but who would not have any direct decision-making power over prosecutions) should continue to be known as the Minister of Justice;

9.2.2 The various heads of the regional offices, in whom will repose the real and actual power to institute and control prosecutions and prosecutors (our present Attorneys-General) might then be known as Director of Public Prosecutions (DPP) or Prosecutor General;

9.3 Having to translate official titles into eleven official languages in future, makes it essential to choose titles which are descriptive of the position and function of the office. The former Ciskei and Transkei has herein perhaps shown the way by naming their Attorneys-General in Xhosa as the Umtshutshisi Jikelele (Prosecutor General).

10 CONSTITUTIONAL AND OTHER LEGISLATIVE PROVISIONS REQUIRED

10.1 It is respectfully submitted that the new Constitution should contain only a broad outline of how the prosecution authority should look like, and to leave it to ordinary legislation to contain the detail.

10.2 It is suggested that the Constitutional provision be as follows:

(1) The authority to institute criminal prosecutions on behalf of the state shall vest in the Directors of Public Prosecutors and a Prosecution Service of the Republic.

(2) The Prosecution Service shall be independent, but accountable to the Minister of Justice, Council for Justice (or Judicial Services Commission) and Parliament.

(3) A director of public prosecutions may only be removed from office by the President on the grounds of misbehaviour, incapacity or
incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate praying for such removal”.

11 SPECIFIC QUESTIONS POSED IN THE INVITATION TO MAKE THESE SUBMISSIONS

11.1 Q How should AG’s be appointed?
   A By the President on the advice of the Judicial Services Commission or similar body.

11.2 Q What should the function of AG’s be?
   A Firstly the institution of and control over prosecutions, and secondly other functions closely related hereto- but these should be kept to the minimum. However, state advocates in the Prosecution Services should be available to assist also in certain civil litigation of the State. This should not be part of the defined function of attorney general, but room should be left for their subordinates to fulfil this role as and when the need arise, and at the request of the Department of Justice.

11.3 Q Who should have final responsibility for decisions concerning prosecutions?
   A The individual Attorneys-General should have the final responsibility, but with accountability to the Judicial Services Commission and Parliament, through the Minister of Justice.

11.4 Q What provisions relating to the independence of AG’s should be in the constitution or in legislation?
   A It should be guaranteed and entrenched in the Constitution.

11.5 Q To what extent should any of the above issues be dealt with in the Constitution?
   A Only the basic principles.

11.6 Q Should there be any further provisions in the constitution dealing with the AG’s.
   A To cover also the independence of the whole prosecuting service, and not only the AG’s.

11.7 Q Should the appointment of any other officials in the judicial system be dealt with in the constitution?
   A We have no submissions in this regard.

12 SUMMARY OF SUBMISSIONS

12.1 There should be an independent Prosecution Service separate from the Public Service.
12.2 This service should be structured into regional offices.

12.3 Each regional office should be headed by a Director of Public Prosecutions (DPP).

12.4 The power to institute and control prosecutions should be vested in the individual DPP's.

12.5 DPP's should be appointed by the President upon the advice of a Council of Justice (or Judicial Services Commission).

12.7 DPP's should be accountable to this Council of Justice (or Judicial Services Commission) and to Parliament, through the Minister of Justice.

12.8 The independence of the DPP's and their subordinates should be guaranteed in the constitution.

12.9 DPP's should only be discharged by a procedure involving the President, Parliament and the Council of Justice (or Judicial Services Commission).

12.10 The appointment, service and discharge of other members of the Prosecution Service should be regulated by Statute, and be under the control of the Council of Justice (or Judicial Services Commission).

12.11 The manner in which the DPP's should account for their actions, the areas of competency of Parliament, Minister of Justice, Council of Justice vis-a-vis the DPP's should also be spelt out in legislation.

12.12 Only the broad outline of the Prosecution Service and the guarantee of independence should be contained in the new constitution, and the other findings / recommendations of this Committee should be contained in a report to Parliament for further consequential legislation.

13 CONCLUSION

The Society of State Advocates of South Africa avails itself of this opportunity to thank this Committee for the invitation to make these submissions and to wish you well in your deliberations.

W F JURGENS (Adv)
King William’s Town
With regard to the above, we write to express our deep concern about matters which have recently come to our attention and which are set forth hereunder, namely:

1. **BASIC PREMISE:**
   1.1 In a democracy, the Constitution must represent the morality and mores of the electorate;
   1.2 The recent S A B C finding that approximately 70% of South Africans are Christian is an extremely important factor to keep in mind when drawing up the Constitution. To put it in a nutshell, the Constitution will have to reflect Christian morality;
   1.3 Non-Christians, who wish to insert their standards into the Constitution, will not be representing the electorate and accordingly they have no mandate, and any attempt to push through non-Christian standards will be *ultra-vires* the mandate from the electorate.

2. **THE PROPOSED SECULAR STATE:**
   2.1 The proposed removal of all reference to God in the constitution is a blatant disrespect for God;
   2.2 The proposed removal of all reference to God in the constitution is a blatant disrespect for the electorate (remembering that 70% of them are Christians and that most of the remaining 30% are religious);
   2.3 The proposal that ministers of religion may not hold office in Parliament is an extension of the disrespect for God and the electorate and, again, falls outside of the mandate given by the electorate.
   2.4 Those who consider that they can run a country without God should also consider how they are to make things like rain without God.

3. **ABORTION ON DEMAND**
   3.1 Leaving aside the special cases, abortion on demand is nothing short of murder. The argument that a fetus is not human or, that it is not alive, is contrary to medical evidence. The life that is conceived at the very beginning, is the same life that will remain with that person until death and the occasion of birth is merely a physical separation of the child and the mother.
   3.2 The argument that a woman has the right of control of her own body and consequently that she may have an abortion on demand, is a half-truth. The woman obviously has rights but her choice in the matter is as to whether or not she will have sex. If she falls pregnant as a result of that choice, then she must take responsibility for the results of that choice and the
rights of the unborn person within her take precedence over her rights in respect of her body.

3.3 If the law recognizes the legal rights of unborn children, then why should the constitution not do the same?

3.4 For those who argue that a fetus is not human, it is interesting to note that abortion on demand was allowed in pre-world war II Germany and it was not long thereafter that the Germans declared the Jewish race to the sub-human. The Germans were already used to killing unborn people. In addition, and during the apartheid era, elements of the extreme right-wing argued that Black people were not human. Now it seems that the same spirit is operating against unborn people.

4. **PORNOGRAPHY**

4.1 The Government has spoken frequently about "building the nation" and yet it allows easy access to pornography. If a man sees such things it is natural for him to desire the same. Apparently most pornography is of a perverted nature and should a man or woman see such things and desire the same, there is an extreme pressure put on marriages. How can one "build a nation" when you provide the very substance that will break down the family. The Christians (and 70% of the electorate) believe that the family is the building block of the nation. If one promotes strong families one promotes strong nations.

5. **RECOGNITION OF SEXUAL PREFERENCE**

5.1 That Christianity is in disagreement with homosexuality in males and females is very clear. God destroyed Sodom for this reason. In the book of Romans in the Bible, we see the following:

"The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness, since what may be known about God is plain to them, because God has made it plain to them. For since the creation of the world God's invisible qualities - his eternal power and divine nature - have been clearly seen, being understood from what has been made, so that men are without excuse.

For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. Although they claimed to be wise, they became fools and exchanged the glory of God for images made to look like mortal man and birds and animals and reptiles.

Therefore God gave them over in the futile desires of their hearts to sexual impurity for the degrading of their bodies with one another. They exchanged the truth of God for a lie, and worshipped and served created things rather than the Creator - who is forever praised. Amen."
Because of this, God gave them over to shameful lusts. Even their woman exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion." (Romans 1:18 - 27)

It is clear from the above that the majority of the electorate do not support recognition of sexual preferences. Romans 1:32 says:

"Although they know God's righteous decree that those who do such things deserve death, they not only continue to do these very things but also approve of those who practice them."

Let us not be found amongst those who encourage homosexuality.

6. CORPORAL PUNISHMENT

6.1 Without belabouring this point, undermining the authority of parents and other authorized persons will create a lawless society eventually. We are already being called the "crime-capital" of the world by the international press.

The above does not purport to be an exhaustive coverage of items raised and neither is it complete.

V R H SOUTHEY
**Introduction**

The purpose of the submission is to offer suggestions to the constitutional assembly from The Salvation Army on the nation and its government.

The suggestions emerge from The Salvation Army's:
* Faith in God as Creator, Preserver and Governor of all things
* Belief that the Bible only constitutes the Divine rule for Christian faith and practice
* Acknowledgement that humankind is created in the image of God but is by nature selfish and sinful and that such tendencies require regulation by law
* Experience that by faith in Jesus Christ human persons may be transformed (saved) and that the church should be free to encourage such transformation not only of those addicted to damaging behavioural patterns but for the good of the nation as a whole
* Special contact and experience with some disadvantaged groups in society including the homeless, the aged, victims of family disorders and family violence, alcohol and other drug addictions, refugees and persons with AIDS
* Great desire for peaceful transition from the present to the future constitution and system of government

**Preamble to the constitution**

The Salvation Army recognises that the majority of South Africans acknowledge God and God's sovereignty. We therefore wish to preserve the wording in the preamble to the present constitution: "In humble submission to Almighty God.... etc.". The constitution should conclude with the words: 'Nkosi, sikelela iAfrika'

"Blessed is the nation where God is the Lord' (Psalm 33:12)

1. **Character of a Democratic State**

A democratic state must enshrine and uphold *inter alia* the following principles and values:

* The responsibility of government to interpret the divine rule for all humankind, and therefore to allow the church and other religious leaders to influence and speak prophetically to government.
* The principal value of the human person above all else
* The sanctity of all human life

* The family as the basic unit of society with marriage the bond to establish a family

* Equal rights for women and men

* Security, safety and protection of all citizens by the state, especially the weak Equality of opportunity for all

* Distribution of resources with equity and justice but with special recognition of the needs of the disadvantaged

* Election of law-makers by universal franchise but in addition with non-political nominees to legislative, regulating and administrative bodies

* Acceptance of and adherence to the rule of democratic law

* The preservation of freedom and personal choice but protection, especially of the young and the unborn from substances, publications, practices and other abusive influences which are likely to injure body, mind or spirit

2/3 The structure of government and the relationship between levels of government

The Salvation Army recognises and values the wide and rich diversity of peoples within South Africa. It also acknowledges and values the desire of some of those people for autonomy or so-called self-determination. The Salvation Army nevertheless firmly upholds the principle that South Africa is one sovereign nation.

In order to address varying aspirations and to create a balance of power both in the interests of good government and peace for all South Africa The Salvation Army proposes the following structure of government at various levels:

2/3.1 A Central Government with the following components:

* A non-executive president appointed by a joint sitting of parliament whose powers shall include signature of all legislation, appointment of and guidance to the prime minister, and the right to impose central government rule temporarily on a province when recommended by the governor of the province and following a process of due consultation

* A bicameral parliament with deputies elected by universal franchise to the lower house with legislative powers; with 61% of the members of the upper house nominated by political
parties provincially in proportion to the number of votes in a general election, the remainder appointed by the president for specified period from the following sectors of society:

- Traditional leaders 15%
- Church and Religious leaders 8%
- Academics 8%
- Industry, Trade and Commerce 8%

The upper house shall have an advisory function only except for such powers vested in a joint sitting of parliament.

* An Executive Premier with a cabinet comprised mostly of members of the majority party, but with provision also for appointment to the cabinet of persons from the upper house with or without party affiliation

2/3.2 Provincial Government with the following components:

* A governor appointed as the President's representative in the province whose powers shall include the signature of all provincial legislation and the right to recommend central government rule in the province

* A unicameral legislative assembly with deputies nominated by the parties in proportion to the number of votes cast in that province in a general election

* An executive Premier with a cabinet comprised of members of the majority party but with provision also for appointment to the cabinet of persons without party affiliation but whose competence is required in the provincial cabinet

2/3.3 Local Government with the following components:

* An elected council presided over by a chairperson. Members are to be elected on a ward or constituency basis. These representatives will not only be local government legislators but must also be regarded as the principal means by which a citizen will make contact with all levels of government, thus assisting the local person to relay any suggestion or concern to the appropriate level or department of government.

2/3.4 A joint sitting of Parliament with the following membership and powers:
* To comprise the deputies of both houses of central government together with the premiers of the provinces

* By a two-thirds majority to exercise the following powers:
  - appoint, impeach or dismiss the president
  - amend the constitution
  - declare a state of emergency or war

4. **Fundamental Human rights**

These must include the following:

* Every person shall have the right to freedom of conscience, religion, thought, belief and opinion and express those either individually or in association

* Religious freedom shall include the right to hold, promote, propagate and practice the faith whilst maintaining respect for those of other or no religious belief and without the use of force or coercion in the promotion of the faith. It shall include the right of conversion from one faith to another

* Religious personal, family and marriage law recognised by the state shall have precedence

* The state shall recognise the primary right and duty of a citizen to obey God above the responsibility to obey the laws of man

5. **Legal and Judicial Systems**

The following principles shall apply:

* The ultimate purpose of the judicial and correctional services shall be to promote and preserve peace and justice within society, to administer justice fairly and timeously and to assist with the reform of those judged guilty and sentenced. The potential for partnership between religious bodies and government agencies within the justice and legal systems shall be acknowledged and promoted

* The judgement of a religious body in the discipline of its members and personnel shall be in keeping with the rules of that religious body legitimately constituted and formulated in keeping with basic human rights

* Traditional judicial systems shall be permitted to judge minor offences and those areas of community life traditionally regulated
6. Specialised structures of Government

The following suggestions relevant to The Salvation Army are offered:

6.1. Public Service and Electoral Commission:
The state shall recognise the ability of religious bodies to provide expertise, experience, funding and specialised resources for some of the services ordinarily provided by the state. These services could include: education, health and social welfare services, community development, protection of the environment etc. The state will monitor such services but will also make available appropriate support which include:

- Tax Exemption
- Financial grants

6.2. Financial and Fiscal Matters:

Ultimate responsibility for taxation shall rest with central government. Such revenue will not only finance the central government and civil service, but also be distributed equitably to the provinces on a per capita basis.

Provincial governments shall have the responsibility to raise revenue on a fee for service basis and to utilise such revenue generated together with central government grants for the further development of services to the people.

Local government shall have responsibility to raise revenue on a fee for service basis and by property taxation and be responsible to utilise revenue for the development of services to the people.

6.3. Transformation, Monitoring and Evaluation

Apart from the provision for public accountability by all public bodies it shall be the duty of central government to set up an independent body to monitor the use of public funds and to investigate any allegations of the misuse of public funds, fraud or corruption with a view to prosecution.

The transformation of government and the nation to a truly democratic society should be monitored by a body similar to the existing constitutional assembly.

6.4. Security apparatus

The state shall defend the integrity of the country and the safety of its citizens whether attack such be from without or as a result of internal unrest. The minimum amount of force necessary only shall be used in order to protect citizens and defend the country.
In Conclusion
The Salvation Army reserves the right to offer further comment on the draft constitution and will oppose the following if included:

1. Attempts to regulate churches by government
2. Removal of religious public holidays
3. Legitimising homosexual behaviour or marriage
4. Legitimising occultism and Satanism as religions.

P A du Plessis (Colonel)
The Salvation Army
Submission : The Property Clause

Please find attached a submission by the land rights project of the Centre For Applied Legal Studies on the property clause, please circulate this submission to the members of the Theme Committee.

We request the opportunity to make oral submissions to the theme committee on this subject. Please inform us whether this will be possible,

Submission To Theme Group 4 On The Property Clause

The Land Rights Project of the centre for Applied Legal Studies, the University of the Witwatersrand, submits that there should be no property clause in the constitution. The reasons for the submission are set out below.

To entrench property rights constitutionally is out of step with current international developments

The inclusion of a property clause in the interim bill of rights is surprising and unusual in terms of international precedents end the debates and developments in respect of recently adopted constitutions. There are highly developed countries such as Britain and Holland in which property rights have never enjoyed constitutional protection, without any detrimental affect on the stability or security of property rights in those countries. Furthermore, countries such as Canada, New Zealand, Hong Kong and Sri Lanka, which have recently adopted new constitutions, decided after much political debate that it was inappropriate to give property rights constitutional protection,'

In S.A. there are additional particular and compelling reasons for not entrenching property rights in the constitution.

Current ownership patterns are built on the denial of property rights

Existing property rights are built on the denial and prohibition of the principles that property rights are meant to embody, the existing patterns of landownership in South Africa were created by the land act, the group areas act and the massive physical restructuring that took place under the policies of forced removals, Bantustan consolidation, and the pass laws. These laws and over one hundred others' were designed precisely to controvert the willing buyer - willing seller mechanism, to prohibit

[Footnotes]

1.
The reasons go beyond the issue of land reform, and include the fact that the constitutional entrenchment of property rights has had the effect of making it impossible for governments to introduce or uphold laws relating to environmental protection, the length of the working day, the reduction of public sector wages, rent control and even measures to freeze the bank accounts of people accused of embezzling public funds.

2
In this regard it is instructive to look at the list of over one hundred racially based laws and other legal provisions repeated by the abolition of racially based land measures act of 1991.
[end footnotes]

The free contractual relations of lease and sat. And to allow for the arbitrary seizure of property, with or without the payment of compensation,

The fed that over eighty percent of South Africa’s land is owned by the white minority is the result of a market that was never 'free' because the majority of the population was prohibited by law from buying land, or keeping the little land they had managed to acquire before the enactment of the land act in 1913. Much of the land which was confiscated from black people was sold to whites at vastly subsidised rates through the agricultural credit board. White people now own the houses from which black people were forcibly removed in terms of the group areas act

Entrenching inequality

Thus white property rights and black dispossession are the lip sides of the same coin. They were created under the same legal system. To confirm existing white land rights as deserving special constitutional protection is similarly to confirm black landlessness, homelessness and poverty. As long as the debate about property rights relates to the protection of existing rights and the deed, it will remain a debate about protecting the spots of apartheid, and not about establishing a secure and legitimate system of property rights for all.

Compromising land reform

The properly clause in the interim constitution would jeopardise even the most basic and uncontroversial land reform measures. By so doing it has the result of setting in stone great inequalities, and making it impossible for ordinary people to find lawful ways of meeting their basic needs and legitimate expectations. This can only exacerbate the instability and illegitimacy of current property relations. What follows

[Footnotes:]
3 Section 5 of the Black Administration Act of 1927 was the provision which was used to finally effect the forced removal of people who had managed to hold out and resist all other measures, this section was last used to order the forcible removal of the Mogopa people in 1994. In its original formulation it states: ‘the Governor General may order the removal of any tribe or portion thereof or any native from any piece to any other place within the union upon such conditions as he may determines.’ No provision was made for
compensation, time and again black landowners removed in terms of this and other provisions, received no compensation whatsoever for the land they lost.

4 In this regard it is instructive that the people lobbying hardest for the entrenchment of property rights are those responsible for perfecting and administering the laws which systematically controverted all the principles they now so fervently and righteously support. The timing of their sudden concern exposes its self interest, what they wish to preserve is the results of apartheid land law, and not the principles of property rights per se.

Is a discussion of ordinary and minimal land reform measures which are jeopardised by the property clause.

Upgrading processes

Under apartheid black people were prohibited from owning land not only in the common area of South Africa, but even in the Bantustans. The policy was that the form, of land rights best suited to black people was that the land should be held in trust on "their behalf". Thus most land in homeland areas was effectively "nationalised" land held in the name of the government or the South African development trust. People who live on this land have no legal guarantee of security of tenure, even when they have lived on the land for generations and built houses and other improvements.

Throughout the world the response to such disjunctures has been upgrading processes, in terms of which the long-term occupation of residents is upgraded into legally secure and defendable rights. This process was begun under the Nationalist government using laws such as the upgrading of land tenure rights act of 1991 and the conversion of certain rights to leasehold or ownership act of 1988.

Under the property clause, this process can now be held to ransom by the nominal owners of the land who may protest that it contravenes their property rights. Thus municipalities which are the nominal owners of land which black people have occupied since time immemorial, have opposed such upgrading schemes as being in conflict with their property rights.

In the early part of the century black people were told they could not buy land unless it was registered in the name of either a chief or a mission. There are many tragic instances where the chief and the missionaries turned around and claimed the land as their own. Some chiefs and owners of mission land now oppose upgrading mechanisms as being in conflict with their prop" rights, the consequences for rural people are devastating as they find their land sold from under them by people who are the registered, if not the real, owners. Thus the property clause has the effect of thwarting measures designed to ensure that a system of security of tenure and legitimate property rights can be extended to all South Africans.

Redistribution

The property clause in the interim constitution provides that land can be expropriated only for "public purposes". This has a narrower meaning than "in the public interest" and has been interpreted to mean that
the state can expropriate land only for public purposes such as dams, roads and hospitals. "the "public interest" includes redistribution projects such as low cost housing schemes or the kinds of upgrading projects mentioned above, the appellate division has held that "public purposes" do not include the expropriation of land from one owner, in order to transfer it to other owners.

In terms of such judgements it would be unconstitutional for the government to expropriate unused mining land which is well suited for low cost housing development. If it planned to transfer this land to landless people. Thus the government may find itself powerless to settle disputes between land invaders and private owners by offering to make alternative settlement land available. If the government cannot expropriate land but must rely an current owners' willingness to sell, it will find itself held to ransom by exorbitant asking prices - as it; already happening in the pilot land reform areas.

Zoning laws

Municipal zoning laws as well as land use and development rights need to be amended in the process of restructuring our cities, in order to move away from apartheid planning. The present clause will make this unlawful unless compensation is paid for zoning changes which affect existing land use and development rights,

The siting of low income housing

The establishment of low income housing inevitably affects certain of the rights of people in neighbouring areas. In these cases, neighbours will allege that the state's action in establishing low income housing close to them amounts to removal of certain of their 'rights in property"-- and that it is therefore unconstitutional unless they are paid compensation.

Controls on "slumlords"

Measures to regulate and control slum landlords may similarly be unconstitutional. Slum landlords move into an area, make enormous short-term profits, and then pull out when the area has completely degenerated and ordinary residents and individual owners find the value of their property has crashed. Measures such as rent control, limits on the number of tenants allowed and slum clearance provisions may all be found to be infringements of the property rights of the landlords.

Restitution for forced removal

The property clause also creates certain problems in the process of restitution for forced removals. People who were removed from their land in terms of a discriminatory law have their right to restitution enshrined in the constitution, but there are many people who were removed simply because they had no formal, defendable land rights under apartheid and they were politically powerless. An example are the people whose land was simply confiscated in terms of deals between chiefs and casino owners. They were dumped in resettlement areas and now have no means to address this injustice because the casinos, as the current landowners, are protected by the property clause.
A general problem with the way in which the restitution process intersects with the property clause is that restitution can take place only on payment of compensation to current owners. In other words, if the state does not have enough funds for this purpose, the present holders will retain the land, and those who were dispossessed will remain dispossessed.

The above examples are just some of the ways in which the property clause in the interim constitution will inhibit the government’s capacity to introduce even minimalist land reform measures aimed at stabilising and promoting the extension of a legitimate and stable system of property rights for all South Africans. None of the measures mentioned above imply or entail that property should be arbitrarily taken from those who have it now, nor that current owners would not receive compensation, yet all these measures would be vulnerable to constitutional challenge in terms of the present property clause.

**Lawlessness In Land Transactions**

Given the vast scale of racial inequality in land rights and the resultant problems of landlessness, rightlessness and overcrowding, many South Africans have no option but to break the law in order to establish their homes. The problems of squatter settlements and land invasions are endemic in our country. These means of acquiring land have obtained a degree of legitimacy and acceptance because everyone knows that no viable alternatives cast for squatters and that their plight was created by decades of racially discriminatory property laws. Thus there is a reluctance (which started in the last years of National party government) to use force to evict squatters. In this way all property becomes inherently vulnerable, not so much to "arbitrary government takings", as to "arbitrary squatter settlements".

**Burden on the poor**

Ironically the burden of this instability falls most heavily on new entrants to the property market (that is new black homeowners) and on "the ordinary person in the street" rather than the big companies whose vast landholdings, acquired under apartheid, are what make the imbalance in property rights dysfunctional and unstable, this is because the problems of overcrowding and pressure on land and buildings are concentrated in low income areas. These areas then degenerate and are "red-lined" by the banks, the value of houses crashes, and first time buyers find themselves saddled with vast bonds and houses they cannot sell in neighbourhoods that are degenerating before their eyes, whatever confidence they initially had in the South African system of property relations is dealt a death blow as they, personally, have to absorb the costs of its discriminatory and exclusive history.

A similar dynamic exists in rural areas, those black groupings who have recently managed to acquire land rights are inundated by destitute relatives and friends petitioning them for a place to stay. The problem is exacerbated by the continuing and increasing number of people evicted from white farms, who are destitute and begging to be taken in. The new owners are faced with the choice of turning away relatives whom they know to have no alternatives, or finding their newly acquired land degenerating into residential slums. Meanwhile the white farmers use their "property rights" to evict families who may have lived on their farms for generations.
Both urban and rural areas are vulnerable to the exploitation of warlords who establish themselves by brute force and consolidate their power by bringing destitute people onto land in return for payment, irrespective of the fact that the land is not theirs to sell. The newcomers then owe the warlords political allegiance and support in exchange for the warlord’s physical protection of their residence on the land. Such systems are becoming an endemic problem in African owned areas. The police seem powerless to intervene and protect the rights of the owners against the brute power of the warlords. What drives the system is the fact that most landless people know they have no alternative means of acquiring land to meet their basic residential requirements. Thus they have no option but to align themselves with warlords who are fast creating an extra-legal system of property rights which operates on the principle of military conquest.

**The crisis of legitimacy**

The legitimacy of existing property relations is inherently vulnerable because these relations were built on racially exclusive laws and the systematic prohibition and destruction of black people’s land rights. Once the property clause is seen to thwart and limit land reform measures which are introduced to address these inequalities, the legitimacy of "property rights" as a human rights vehicle will be utterly destroyed.

The result will be to reinforce the current practice in terms of which people "acquire" land rights by taking the law into their own hands and simply occupying land and then resisting eviction, thus the already tenuous "rule of law" is further undermined and land comes to be transacted and defended by force and violence rather than within a legitimate legal system. Because it is obvious that the people concerned have no viable alternative ways of meeting their basic human needs their actions will be recognised as morally defensible and it will be the legitimacy of the constitution, which entrenches prop” rights, that suffers.

**Damage To The Constitution And The Rule Of Law**

The damage to the standing of the institutions and vehicles which contain and promote property rights will be serious, with devastating consequences for the functioning of a democracy governed by a bill of rights and constitutional principles.

For example, India in 1948 faced land problems similar to those South Africa is currently experiencing. Like South Africa its new constitution entrenched property rights. The new Indian government believed (on legal advice) that the new constitution nevertheless permitted land reform. From 1950 to 1973, successive governments attempted land reform, each time they did so their actions were successfully challenged in the courts, the basis of the challenges was the constitutional guarantee of compensation, which the courts interpreted to mean market value. When the government tried to amend the property clause to permit land reform, this too was held to be unconstitutional.

The constitutional struggle over a period of twenty years not only stopped land reform; it also deeply damaged the courts, which were perceived as obstructing social justice. In 1975 a state of emergency was declared. The courts, now weakened by the ongoing constitutional crisis over land reform, were unable to resist the excesses of government power. One of the first things the new Indian government did in 1978, after the emergency had ended and an election had been hold, was to abolish the prop” clause in the constitution.
Closer to home, in Zimbabwe, there have been similar developments. The Lancaster house agreement ensured that land could not be expropriated for land reform, it could change hands only via the market on the basis of "willing buyer, willing seller". Thus there was no effective redistribution of land to the peasants who had waged a costly war against the white ownership of the richest parts of the country. Popular disappointment and disillusionment wore so high that the government swung entirely the other way once the 10 year period of the Lancaster house agreement was over. It introduced measures to provide for the summary taking of farms with no legal oversight or basis for establishing fair compensation. Such provisions are unlikely to assist the landless and poor because the very lawlessness of the process encourages corruption.

Developments such as those in Zimbabwe, India and squatter areas in South Africa are probably what motivate the pro-property lobby to look for tighter and tighter controls and constitutional guarantees to protect existing prop’ relations. It is ironic that it is their overzealous controls which create the very scenario they are desperate to avoid.

The alternative approach

No property clause - a normal and viable alternative

The alternative is simply not to entrench a property clause in the bill of rights. This does not imply that property rights will fall into chaos. Many highly developed countries such as Britain, Holland, Canada and New Zealand do not constitutionally entrench property rights. Instead they rely on laws such as expropriation acts to control the circumstances under which property may be taken from current owners, until 1994 a similar situation existed in South Africa. White people's land could be expropriated, but only in terms of a circumscribed legal process, the legal system protected the interests of white people very well. The problem was that different legal systems applied to black and white people, and so there were no equal protections for black South Africans, in future that type of racial discrimination would be unconstitutional in terms of the equality provisions of the constitution. Furthermore the sections of the constitution dealing with administrative due process would protect owners from arbitrary state action such as that introduced by President Mugabe in Zimbabwe.

Building a legitimate system of property rights on shared values

The strongest and best protected rights are those which enjoy widespread subjective acceptance and respect. In this context, the only way to re-legitimise land law and build a stable system of property rights is to build on the underlying values and concepts which are prevalent in our society. This requires moving beyond the narrow self-interest of using "property rights" to entrench the results of apartheid, and starting to build a viable system which is widely accepted as legitimate.

Modern developments in property law
The basis of this system is that the individual's security and protection is best served by the stability and legitimacy of the wider society, and the reciprocity of the rights and values embodied in the system of relative land rights. This kind of pragmatic acceptance of reciprocal rights and the implication of sharing the land asset is found the African land ethic, but goes beyond African society. Recent developments in Europe embody a move away from the absolutist notion of exclusive individual ownership rights, in favour of shared use rights and the notion that property is a natural and national asset which imposes not only rights but also obligations on owners. This approach is embodied in the German constitution which states, "Property shall involve obligations, its use shall simultaneously serve the general welfare." It is also exemplified in conservation laws which restrict owners' rights to abuse society's national assets.

**Pragmatic negotiations in South Africa**

Recent developments in land issues mirror the tendency towards pragmatic solutions based on recognising and accommodating reciprocal rights and thereby stabilising the overarching context of property rights. Thus negotiations are taking piece between farmers who obtained land which had been the subject of forced removal, and the affected communities. Companies are approaching long-term labour tenants to find a way of dividing the land or sharing its use. In some cases, farmers are cutting off

[Footnotes]
5. Catherine Cross has written extensively about the African land ethic, which applies in peri-urban as well as rural situations. See in particular informal tenures against the state: landholding systems in African rural areas in a *Harvest Of Discontent: The Land Question In South Africa*, Idasa 1991.

Andre van der Walt has written extensively on this subject: see for example towards the development of post apartheid land law: and exploratory survey 1990 De Rebus -45

[End Footnotes]

Adjoining sections of land to make farm villages. Conservationists are accepting and recognising pro-existing land rights in reserves,

The overarching context is that these landowners believe they cannot defend their property against future political intervention and arbitrary land invasions unless they take steps to address the gross inequalities of the past and stabilise the situation by recognising black vested rights to part of their land. In these negotiations African land claimants are saying that as long as white owners are prepared to "share" with them, they will reciprocally recognise their land rights.

**Conclusion**

A constitutional guarantee that existing title deeds constitute "basic human rights", and that present owners need never give up anything except in extremely limited circumstances, and then only with market value compensation, undermines the incentive to reach such settlements. A property clause will full existing owners into a false sense of security that there is no need for change because the status quo is both legitimate and legally guaranteed. Yet it is neither, even the previous government, with the levels of force at is disposal,
could not contain "squatting" and land invasions. It certainly never managed to legitimise the current distribution of land, nor to “criminalise" “squatters" in the eyes of the general public.

By taking away the incentive for pragmatic solutions based on shared notions of fairness, the property clause condemns "property rights" to be a euphemism for white privilege, it severely compromises the government's capacity to introduce basic and necessary land reform measures. And in the process, it precludes the development of a shared and legitimate system of property rights. Thus we are condemned to remain within a unstable system of property rights, where violence and force are fast becoming the means and measure of land transactions. Within this spiral no property rights are secure, and the poor and landless have to take enormous and illegal risks in order to survive. Notwithstanding these risks, the tenuous "rights" they obtain will remain vulnerable to the increasing power of war-lords and "squatter patrons' as land is increasingly acquired and protected by force of arms and numbers, rather than within the law,

It is ironic that overzealous attempts to protect private property will have the opposite effect to that which is intended. Neither the constitution nor the law can contain certain levels of inequality, wishing the problems away with a "constitutional guarantee" of prop" rights will encourage those who own dysfuntionally large pieces of land to bury their heads in the sand. In the short term those who suffer the most are the landless and people who own houses and land in the poorer areas. But in the long run the damage done not just to the legitimacy of existing property rights, but to the laws and the constitution which entrench this, will rebound on all South Africans in the form of uncontainable instability.
FINDINGS AND PROPOSALS: THE CONSTITUTION AND THE NATIONAL POLICE SERVICE: THEME COMMITTEE 6 (SUBTHEME COMMITTEE 4)

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Introduction

One assumes that the interim Constitution on the South African Police Service (ch 14 sects 214-223) has served its purpose. Being in a process of formulating a new Constitution it is probably not necessary to dwell too long on the merits and demerits of the interim Constitution. The South African socio-political environments are changing and developing so fast that it would probably best to think so creatively and pro-actively as possible.

Except for the adage that one does sometimes "learn by mistakes", the interim Constitution did serve one extremely useful purpose: it re-introduced the state police to the concept constitutionalism (encompassing fundamental rights). In the interim Constitution there are some demerits: on the police management level there are still traces of militarization, bureaucratization, politicalization and centralization; on a lego-technical level the ongoing process of structural amalgamation, rationalization, delegation of responsibilities, the sequence of proclamatory powers et cetera hamper the Constitution-making process; and on the operational level difficulties are experienced by sections 23 (access to information) and 25 (detained, arrested and accused persons). The latter are offering opportunities to explore different and better ways of policing - presently we are still too confession-driven.

The last worrying factor is the relative and respective positioning of the Constitution vis-à-vis the impending Police Act. One was under the impression that there is suppose to be a fairly logical sequence from the Constitution (as the supreme law) to the Act to the Regulations to the National Orders to the Provincial Orders. Although there are shared priorities and ultimate aims, the Act, Regulations and Orders are essentially separate entities. Obviously the Constitution should concentrate on broader, ideological principles and aims. Contentwise the interim Constitution differs little from the draft Police Bill. Chapter 14 has all the features of Act (Police Act) rather than Law (supreme law).

Generally speaking a Constitution should never give the impression of the police having too much power or that because of the Constitution some offender/accused has some marked advantage to the detriment of society. In this sense it is my submission, that in regards to policing one should consider constitutionalism rather than the Constitution.

Constitutionalism

Structurally and functionally constitutionalism proceeds beyond the Constitution as it stands. It implies more than the old McIlwain-principle (1939) that the relationship between government and
the individual be controlled by law and that government authority is bound by the law and is not arbitrary. Constitutionalism is an enquiry how Constitutional law develops or remains relatively stable within a changing environment.

Constitutionalism further implies a relationship between the individual and the Constitution. Ultimately it would be the individual who will be required to swear allegiance to the Constitution. It seems easier to swear loyalty to values than to law. Thus the Constitution should have certain requirements: broad based, accessible and applicable.

Within the Constitutionalism three subthemes will be explored: broadening the base of the Constitution; the Constitution as contract/consensus; and the positioning of policing under the ambit of supreme law.

**Broadening the base**

Value shifts and changes within organizations require an open and dynamic approach. Bennis, a political scientist, referred to present and future organizations as "fast changing temporary systems". Consequently one may assume that the National Police Service would undergo extremely radical changes.

Popularizing the Constitution as well as looking at chapter 14 of the interim Constitution the following questions invariably arise: Why only state police? For that matter, why only police; why not policing? Historically speaking the concept policing preceded police. Policing refers to a socio-political function (rather than merely a formal legal one) exercised in civil society (rather than merely within the confines of the state).

South Africa's history abounds with examples of policing systems parallel (sometimes in opposition) to the existing state police: traditional policing, self-policing (SDU'S and SPU'S), parastatal and private policing. Especially the latter is a massive resource, filled with significant number of personnel, armed with a wide array of technology, and directed by professionals, who have spent their lifetimes learning how to prevent and reduce crime. This resource has been studiously ignored by the state police and has not been tapped to its full potential by governments. To rationalize further -

- the human resources ratio private police per state police is 3:1
- during ordinary interaction members of the public more often encounter private police than state police
- the private police officer performs the full complement police functions
- one could argue that private police are not imbued with the same authority (some would call it coercive powers) than state police: the counter argument would be constitutionalism implies "a change of mindset" rather than a "granting of authority".
In prof Geldenhuys' submission (Provision for Police in Constitutions: an international audit) it was stated that seldom if ever Police per se are mentioned in Constitutions. It should not be Police that are taken up in Constitutions, but policing (functioning of police or the style of policing).

Two processes are proposed:
1) Amending the heading of chapter 14 to read:

South African Police Service and policing

2) As the National Commissioner of the SA Police Service enacts the Police Act to serve its purpose, the Security Officers Act should be brought inter alia much more in line with the Constitution and would encompass all residue policing functionaries (parastatal as well private).

There are two lateral spinoffs for this request -
• In some political circles private policing agencies are referred to as private "armies". This proposal is one way of bringing these into the fold of constitutionalism.
• The service style of policing implies that some recognition should be give to the VICTIM of crime. Should not the Constitution serve that purpose?

Contracting and consensus

The Constitution as social contract means that it is based on a visible and mutual agreement on reciprocal obligations, accountabilities and responsibilities. In this contract there is a sense of partnership in balance. Perhaps it is important to note that the actualization of the legal value of freedom in the Constitution does not imply that individual rights apply absolutely. A conflict of legal values is evident when the legal value which demands that the interest of the subjects of the state (in their liberties and rights) be protected, must be weighed against the legal value which demands that the interests of the community (order or state security) be considered. Authority should not encroached more upon the interests of its subjects in their rights and liberties than is demanded by the interests of the community.

In the policing sense there are two balances to be considered:

1) Fundamental balance. Policing is sometimes referred to as a process of preserving and supporting the sensitive balance between individual rights to freedom and privacy and the collective need for safety and security. Too often in the past the balance was tilted in favour of the latter.

2) Operational balance. Lord Scarman's Inquiry into the disorders in Brixton (UK) raised the point of operational balance. His Lordship asked for a change of emphasis in traditional policing principles and for an attempt to create a more acceptable balance between consent and policing. If law enforcement put public tranquillity at risk, then the police should test the wisdom of law
enforcement. He reasoned that law enforcement involving as it must the possibility of force, thus can create friction in a community, particularly if that community is tense and the cause of the lawbreaker is not without support.

The gist is that policing will not succeed without the help of respective communities. In them resides a definite and overall responsibility to the South African society to support its national, provincial and other policing agencies.

The idea of contracting and consensus as part of constitutionalism in the sense that the Constitution and policing should be in a format of a social contract is probably not new. It has however merits: 1) **Highly visible**. The visible utterance of accountability and mutual declaration of intent were probably never so dramatically brought home when the Commissioner of the SA Police publicly became a signatory to the National Peace Accord in September 1991. It had a definite effect on all police officials: the vast majority felt morally and duty bound to that accord.

2) **Quantifiable**. In his first press interview the Minister of Safety and Security expressed the desire for demilitarizing and of democratizing the police service. These were laudable objectives and could be construed as statements of intent. If these are to be constitutionalized in a form of a contract we would be in a position to measure performance. Then only the Constitution would be more than merely a collection of generalities.

My proposal is that the South African society (represented by the State President) for instance may take up a portion of the responsibility by a declaration to regard the National Police Service and other policing agencies as essential first order Public Services or private enterprises; to uphold it; and not to misuse it. The relevant Ministries could then be tasked to oversee politically this responsibility (eg the Minister for the National and Public side; the Deputy Minister for the Private side). Subsequently the National Commissioner and the restructured Security Board could pledge (as in Schedule 3: Oaths of office and Solemn Affirmations) loyalty to the Constitution and all people; to police in a non-partisan fashion; to protect and restore civil liberties; to render service; to be accountable; and to perform high quality duties.

**Positioning**

At the moment there are three options open: the police being part of the Security Forces or being part of the Criminal Justice or being part of the Welfare Departments. It is important to define this position because the police would invariably adopt its philosophy and style from its positioning.

**Option 1 : Security Forces.** In the interim Constitution (Schedule 4 sect XXXI) it is somewhat glily accepted that the police are part of the Security Forces. This, to my mind, runs counter to the new philosophy of the police (demilitarization). Their policy document will bear this out: "The existing military culture of the police agencies hamper the development of a true professionalism which focuses on serving the community. The military tradition has also encouraged the use of maximum rather than minimum force in policing" (p6 of the Policy Document). The general trend towards civilianization in the National Police Service militates against paramilitarism.
Recent events indicated that the police are not disinclined to use the military for civilian (anticrime) operations and in public order policing functions. I would like also to point to the overtures to and consequent debates on the formation of a so-called Third Force: a unit comprising both police and defence force complements which function is in the main to combat wide scale social unrest.

Ultimately one has to look at the successes and non-successes in the primary police function viz the control of crime. Over and over again in the past it was mistakenly assumed (by the police) that the successful control of crime is dependent solely upon the amount (quantity) of human resources. The involvement of the defence force was thus unconditionally accepted although this had no visible effect on the crime situation.

**Option 2: Criminal Justice System** (with the departments of Justice and Correctional Service). In various quarters the need for South Africa to move towards a Law State (German: Rechtstaat) were expressed. This idea underscores constitutionalism and emphasizes the notion that the basic relationship in a state is a legal relationship governed (ruled) by the law and where a government is bound by particular legal values in the exercise of authority. This idea runs counter to a Police State.

It is obvious that this positioning would have a major influence on the practice of policing in South Africa. In the past the responding (reactive) side of policing was to fit our accusatorial (adversary) form of justice. Greater involvement and closer co-operation by Justice (and for that matter, the South African society) could change the present system to a much more acceptable inquisatorial procedure. It is ironic that the inquisatorial procedure had been and still is part of our indigenous law.

Visible problems with policing in the past related to specific issues in the reactive side to policing: arrest, interrogation, searching and confiscating. There were many (far too many) accusations of deaths in custody and police brutality. The inherent integrated control system of the inquisatorial procedure would prevent the misuse of power and authority to a large extent. In South Africa an example of such an integrated (multidisciplinary) control system is already in place: the Office for Serious Economic Offenses (OSEO) this could be expanded to improve the quality police service. Obviously ministerial control on national level would then need reconsideration.

**Option 3: Welfare Departments.** By own admission the police have changed from a Force to a Service. For an outsider this change is difficult to discern because one does not really see any substantial and visible changes in powers and functions. Perhaps the service-orientation would come out in the way these functions are performed.

There are ample empirical data to the effect that police functionaries daily perform more social service-orientated tasks than crime-related functions. Members of the public accept these service functions more readily than the mere policing functions of preventing and investigating. Moreover the police are always open and available for social service. Although this wreaks havoc on managerial level because there is no clear mission statement nor is there any adequate definition or demarcation of social service the police are supposed to perform - this "softer side" to policing
needs consideration. This is especially true where the concept community policing is now an inseparable part of the policing philosophy.

If this is true should the National Police Service not be positioned under the Ministry of Social Welfare?

**General comments**

1. The Constitution dealing with police and policing should be based on general principles and be as inclusive as possible. Inclusivity should be ordered on general rather than specific issues. More specifics could be taken up by the ensuing Police Act, Regulations and Orders.

2. The interim Constitution (chapter 14 sect 214 - 220) is in some instances far too specific especially those sections dealing with the Provincial Commissioners (sect 219) and local Policing (sect 221).

3. All policing should be included in the Constitution. Consequently the present and future Security Officer’s Board and existing Organized Parastatal Policing Bodies should fall under the ambit of the Constitution. Provincial Commissioners should be charged with bringing traditional/parallel (private and civilian policing) in line with the principles of this Constitution.

4. Relationship with the National Defence Force.

4.1 The National Police Service is unconditionally on its way to demilitarization.

4.2 There should be a clear distinction between the functions of the SA Police Service and those of the National Defence Force.

4.3 Public order policing should remain a primary function of the SAPS. The function itself should be made part of the ordinary functions of the Uniformed Branch. All members should be trained in public order policing.

4.4 The NDF should only be called in extreme situations of national implications but then only in a supportive role. Both these concepts should be defined in the Police Act.

5. There is a recent tendency in the United Nations to use a specific country's Police Force for the task of Peace Keeping and the Re-establishment of Democracy (in lieu of or parallel to the UN Peace Keeping Forces). This notion was voiced by a UN-representative (dr Taroor) on a visit to South Africa. In the Constitution an enabling section should be incorporated wherein the State President could at his discretion and on advice deploy the National Police Service (or members) for a certain period of time outside the borders of South Africa.

6. Effectiveness and accountability
6.1 Effectiveness should be measured against the backdrop of overall acceptability of the Police Service by the society, the level of competency in controlling crime and the manner in which policing is managed.

6.2 Accountability for policing to the South African society (represented on a national level by the Parliament; provincially and locally respectively by the Provincial and Local Councils) should be defined. One could decide that reportage could be done by either the political leader (indirectly accountable) or by the manager (directly accountable: National Commissioner/ Provincial Commissioner/ Station Managers).

6.3 Control mechanisms. Except for the internal control mechanisms, external control could either politically be exercised by the Ministry or the Parliament and Councils and/or judicially by ombuds bodies on national and provincial levels (sects 222 and 243 of interim Constitution).

7. Community policing

7.1 One assumes that Community Policing is a Provincial rather than a National concern - due to the divergence of the South African communities. The needs of communities could be better served "closer to the ground".

7.2 Community Policing Forums (CPF's) should be established but through the office of the Provincial Commissioner. The CPF's should strive for financial self-reliance and statutory status. Standards for statutory acceptance should be formulated.

Specific proposals

Chapter.....

South African Police service and policing

1. Preamble. Synonymous to the National Peace Accord and Credo's of the past. In the form of a specific pledge and commitment to loyalty and service to South Africa and its Peoples and the Constitution.

2. Positioning

"214 (1) Concur .... except Acts (plural)
[This is to bring other Policing Services - parastatal or private - under the Constitution, perhaps under the general heading Parastatal and Private Policing Services Commission (PPSC)]

add to....... and other policing services.
2. Acts (plural) and conclude the introductory sentence by in regards to the South African Police Service - the rest of subsections (2)(a) and (b); one subsection and add a new subsection 2 (b):

2(b) subject to the provisions of this Constitution provide for Parastatal and Private Policing Services Commission which shall set uniform standards, requirements and functions for parastatal and private policing services.

216 Concur

3. Functioning

215. A new subsection (e) should be added

(e) the provision of social services.

[Social service should be defined in the Police Act within the following wide parameter: any task performed by a member of the Service at his/her discretion which, if not performed might lead to an endangering (to life, body or property) situation.]

217 Concur

218 Concur but too much detail

(g) Training needs can only be established by Provincial Commissioners

(k) delete

219 Concur but too much detail

(1)(h) co-ordinate all policing services in conjunction with the Parastatal and Private Policing Services Commission

(i) maintain public order policing services

220 Concur but add

(3) Co-ordinate and co-operate with the Parastatal and Private Policing Services Commission.

221. This section is not necessary in view of the following -

- the divergence of South African communities
- Provincial Commissioners have already been charged under section 219 (1)(b) to establish these - how he/she is going to do it should be left to his/her discretion.

A chain of co-operation and liaison between the Provincial Commissioner's office and the Forums should be identified and structured.

222 Concur - this should be in conjunction with section 243 of this Constitution.

223 Concur
A new section should be added

-- The State President may on advice from the Parliament deploy the South African Police Service or members thereof for police service duties outside the borders of South Africa.

Amend Schedule 4 Chapter XXXI to read as follows:

"Every member of the security forces (military) and other social and judiciary services (police, intelligence and Correctional Service), and these forces and services as a whole, shall perform (etc) 
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2 June 1995

Submission to Theme Committee 6 of the Constitutional Assembly

The Southern African Catholic Bishops’ Conference hereby wishes to register its endorsement of and support for the submission by the Gunfree South Africa Movement to exclude from the new Constitution any reference to the “right to bear arms”

Fr Emil Blaser OP
Associate Secretary General
Southern African Catholic Bishops
GAUTENG PEACE STRUCTURE

5 June 1995

re: Submission to Constitutional Assembly regarding firearms and other weapons

The Gauteng Peace Structure is a network of 21 Local Peace Committees in Gauteng who are voluntarily maintaining their committees, formerly under the national Peace Secretariat, for peacebuilding and conflict prevention at grass roots level in their communities. At a Plenary Meeting of the Gauteng Peace Structure, held in Johannesburg on Thursday, 1 June 1995, it was unanimously resolved to put the following submission in writing to the Constitutional Assembly.

Firearms and Other Weapons:
We believe that it would be wrong to enshrine the right to carry firearms in the new Constitution.

We believe that ownership of firearms and other weapons should be severely restricted.

Mavis Cook
Administrative Secretary for and on behalf of the Gauteng Peace Structure
LEGALISATION OF PORNOGRAPHIC MATERIALS

As representatives of some seven hundred South African families in association with this congregation our leadership deplores the possibility that in the fair name of freedom of speech and expression, pornographic magazines, video tapes, on circuit movie films etc. will be legally available to the South African public. We believe that no serious minded person honestly supposes that the use and viewing of pornographic materials in any form do not inflame the baser instincts and undermine the moral character of those who view them.

We are persuaded that age and other restrictions designed to prevent the children and young people of our land from exposure to pornography and its effects will not succeed. Furthermore, our children and youth must take their place in a society which will either expose them to or protect them from both pornographic literature and adult individuals who will influence them either for good or for evil. Believing that pornography influences for evil and not for good, and that it undermines sound values of sexual morality and family life, and that it endangers the well-being of the children and youth of our nation, we urge you to write into our constitution articles which will protect and uphold of standards which will contribute to the moral fibre of our nation.

Rev. Ray Alistoun
Brackenhurst Methodist Church
NATIONAL DINGAKA ASSOCIATION
"The Traditional Healers Organisation"

We belong to a family planning self Help Traditional Healers. We respect our Natural Gift by Almighty God and our Ancestors as they gave us the knowledge and power to know all about herbs, we use and how to administer them to the sick.

The Ancestors that enter the traditional healers. Did not have the opportunity to go to school. That is why most of them, don't understand English.

F. Matsiela
President
(Traditional Healer)

CONSTITUTION OF THE
NATIONAL DINGAKA AND SPIRITUAL HEALERS ASSOCIATION

PREAMBLE

We the ordained natural endowed healers commits ourselves to our specified task of taking care of our fellow mankind health and well-being and preserve the enveron for man to have a peacefull and ever lasting life.

NAME

The name of the organisation shall be the NATIONAL DINGAKA AND SPIRITUAL HEALERS ASSOCIATION, here in after referred to as NADISHA

HEAD OFFICE

The head office is presently situated in PRETORIA but it may change if the dictate that.

COLOURS

The colours of NADISHA shall be black, red and white

AIMS AND OBJECTIVES
It is to unite all practitioners and their discipline for them to offer a better service to the communities they serve.

It is to infuse a spirit of fellowship among themselves.

It is to cement the bond of trust which they enjoy from the community they serve.

It is to co-ordinate-and publish research undertaken by it.

It is to promote better health ethics among the communities they serve.

It is to promote better working relationship with other relevant institutions.

It is to represent its members in any dealings with any other party, organisation or authority.

It is to agitate for formal recognition within the law and to

It is to serve as a forum where all matters concerning members, communities and authorities are tabled and discussed.

It is to advise its members communities and authorities in matters relating to their craft.

**MEMBERSHIP**

It shall be open to all ordained and naturally endowed practitioners.

All members of NADISHA shall have to pay a joining fee of not less than R and an annual subscription fee of not less than R this is to be payable at local level.

**RIGHTS AND DUTIES OF MEMBERS**

A right to have a saying in the runnings of the organisation

To engage in all matters pertaining to the activities of the organisation.

To be informed on matters envolving around the organisation.

To stand for election unless disqualified for some reason.

**DUTIES**
To give information concerning organisation

To give direction in the runnings of the organisation

To protect the organisation at all times

To help in building up the organisation

To live up to the expectation of the constitution.

**CODE OF CONDUCT**

Gossiping and destructive criticism is not allowed.

Every member should be disciplined obedient and loyal to NADISHA

Every member should be bound by rules and regulations

**RULES AND REGULATIONS**

i) Disrupting meetings and interfering with ordinary functioning of the organisation is not allowed.

ii) Behavior in a manner calculated to bring the organisation into disrepute is not allowed.

iii) Proper channels of addressing issues should be made use of all times.

C Penalty for breach of conduct

i) There shall be a disciplinary committee in all levels to keep discipline amongst members.

ii) Any person faced with disciplinary proceedings shall receive due notice of any herring and of the basic allegation against him/her.

iii) Such a person shall be afforded a reasonable opportunity to prepare his/her offence.

iv) Any person adversely affected by the outcome of any hearing shall have the right to have the matter reviewed by the committee set up by the National Executive Committee of Nadisha.
v) Violations of basic principles, rules and regulations, of Nadisha shall be penalised in either of the following manners, counselling and reprimand.

vi) In case of persistent breach of rules and regulations, suspension and expulsion from Nadisha shall be considered.

CLAUSE 9 REGULATIONS GOVERNING OFFICE BEARERS

a) Nadisha office bearers at all levels shall be accountable to all members.

b) Office bearers shall carry out their tasks in consultation with other committee members and in the case of addressing public meetings, such should be done after consultation and mandate wherever possible.

c) Abuse of office shall be an offence and consequently, corruption and favouritism are forbidden.

d) Breach of duty by office bearers shall be punishable by demotion, suspension or expulsion, subject to the serious nature of the case.

CLAUSE 10. MEETINGS

Office bearers at all levels shall hold meetings at least once every month to plan, strategise and facilitate working relationships within the organisation.

CLAUSE 11. QUORUM

The quorum of any committee meeting shall be half the members of the committee plus one.

CLAUSE 12 DURATION OF OFFICE

The term of all executive committee at all levels shall be one year.

CLAUSE 13 ATTENDANCE OF MEETINGS
If a committee member does not attend meetings for three consecutive meetings, such a member ceases to be a member of the committee, unless there is an apology for each meeting either before or during the meeting.

**CLAUSE 14 OFFICE BEARERS**

a) The office bearers shall consist of the following president, deputy president, secretary general, secretary-assistant general, treasurer and four additional members.

b) At all levels of the organisation office bearers shall resemble those of the National office bearers.

**CLAUSE 15 DUTIES OF OFFICE BEARER**

**PRESIDENT**

a) He/she shall be the chief directing officer of the organisation.

b) He/she shall be accountable to all members

c) He/she shall preside over meetings of Nadisha at the level where he/she is elected.

d) He/she shall lead Nadisha in all spheres

**DEPUTY**

a) The deputy shall deputise for the president

**SECRETARY GENERAL AND HIS ASSISTANT**

a) They shall be responsible for all correspondence

b) They shall set up a public relation desk for the organisation

c) They shall see to the day to day activities of the organisation

d) They shall be responsible for minute taking and distribution at all meetings.

e) The secretary general shall be the chief administrator
TREASURER

a) He/she shall be responsible for all financial affairs

b) He/she co-ordinate fund-raising and liase with funders

c) He/she be one of the signatories of the bank accounts of Nadisha

d) He/she shall maintain and monitor the bank accounts and financial books

e) He/she shall submit an independently audited financial at annual congress.

CLAUSE 16 AMENDMENT OF CONSTITUTION

This constitution may be altered or amended if two-thirds of the votes of delegates of the national congress is in favour of.

CLAUSE 17 DISSOLUTION

Nadisha shall be dissolved only at a National Congress or special National Congress by two-thirds of the votes of delegate is in favour of.

Fenny Matsiela
PRESIDENT

Agnes Khumalo
SECRETARY GENERAL

PLACE WHERE THIS CONSTITUTION WAS ADOPTED : TSAKANE

DATE ON WHICH THIS CONSTITUTION WAS ADOPTED : 21/06/89

[editor's note: F. Matsiela's National Dingaka Association Certificate and family planning certificate is attached.]
THE COMMITTEE OF COLLEGE OF EDUCATION RECTORS OF SOUTH AFRICA (CCERSA)

29 May 1995

SUBMISSION REGARDING COLLEGES OF EDUCATION

The Committee of College of Education Rectors of South Africa (CCERSA) wishes to make a submission regarding the placement of colleges of education for governance purposes.

CCERSA represents all of the 105 colleges of education in this country. In view of the size of our constituency, we have divided the colleges of education into 10 regions which, with one exception, correspond with the provinces. The Eastern Cape Province had to be split into a A Region (Ciskei and old Eastern Cape) and a B Region (old Transkei).

We wish to request you to allow us the opportunity to testify before the Constitutional Assembly should you require further explanation of our viewpoints or arguments as stated below.

Colleges of education should be place under the central government and not under the provinces, as the Interim Constitution has done.

Our reasons for the submission are the following:

1. **Colleges of education should be part of the higher education sector**, whose institutions fall under the central government. The process of moving colleges of education from generally being glorified high schools to accepting roles and responsibilities that suit fully-fledged higher education institutions, should be tackled at all levels. For that reason it is important that they should be treated equally to other higher education institutions.

2. **Every effort should be made to ensure that the limited educational resources in the country, be used maximally**. Expensive facilities like college education, should be used according to the needs of the country as a whole and not merely according to the perceived needs of a limited area like a province. In the case of colleges of education which offer teacher education through distance education, the problem becomes more acute because the limited budgets of the provinces only allow them to attend to the needs of those who live and work within their boundaries. (In some cases services are provided to other provinces on an agency basis.) Our country cannot afford the resultant wastage of human and material resources.

3. **The present arrangement causes simple administrative procedures to become complex**. The fact that colleges of education are placed under provinces, impedes the implementation of decisions on certain matters (e.g. financial aid and tuition fees). Decisions taken by the central government, could become distorted because of the processes they have to go through at provincial level. The provincial authorities (who jealously guard, what they see as, their areas of authority) first have to examine and interpret these decisions before they can be implemented. In other words, the process
of implementation becomes longer and the final product is different to the letter and spirit of the initial decision. In view of the desperate need to improve teacher education in this country, it is vital that such distortions and unnecessary delays be avoided as far as possible.

4. We believe that one of the most important reasons for the varying standards that occur in colleges of education (and the poor state of some of the m), is the fact that they were placed under so many different authorities before. In order to ensure that the inequities of the past be eradicated speedily, it would be better to approach the task in terms of national priorities and budgetary considerations.

We hope that the Constitutional Assembly will consider this submission seriously and place colleges of education under the national government.

Basil F. May
Executive Director
WESTERN CAPE PROPERTY VALUERS c.c.

30th May 1995

VOLKSTAAT/COMMUNITY SELF DETERMINATION.

Definitely no self-determination regarding Volkstaat areas. Once self determined areas are accepted in the constitution, all races will be entitled to claim the same privilege.

This will only lead to segregation.

There can be no argument on this fact.

ELECTORAL SYSTEM.

Each Province to have an equal number of representatives in Parliament, irrespective of the number of voters.

This will eliminate Party Politics, where boundaries are manipulated to obtain more voters per area.

CONSTITUTIONAL AMENDMENTS.

Amendments to the Constitution should only be made after 12 months notice, during which time the public must be informed of the proposal and canvassed for their opinion.

Wallace Snowden
Who or what made the peaceful transition from oppression and injustice to liberty and equality possible? Was it just a stroke of good luck? We know that there was too much sacrifice, hard work and prayer for that to be true. We talk glibly about the miracle in South Africa but forget to give honour to the One who creates order from chaos.

You and I have seen the struggle that the mothers of our country have endured and still are enduring. Where will we find most of them when they have a little free time? They will be dressed in the uniform of the umanyano. They have maintained some form of identity, strength and sense of being from their faith and have been the hands of mercy to so many.

Is the New Constitution going to ignore them because they do not understand the workings of the Constitutional Assembly and hence make little comment for themselves? Will the New Constitution negate what is central to the lives of millions of South Africans and really only reflect the mind of the political intelligentsia who so easily loose touch with the person in Zwa Zakele, Zwide or Crossroads?

Religious tolerance does not result from us removing religion from public life. The state of Israel is a case in point. Religious tolerance is the result of truth showing the Afrikaans community that Beyers Naude is not the "devil incarnate" and that Desmond Tutu is not the "anti-christ in Anglican vestments". Religion does have the potential to cause strife especially when one religion is given preferential rights or when they co-exist in the same society without our leaders taking a lead, through the constitution, to ensure mutual respect and tolerance is practised in civic life. We cannot ignore the fact that different religions are practised every day and that those people have to live with each other. Is government and civic life going to be an ivory tower where religion is ignored and only "pure political" thinking is tolerated? This is pure foolishness.

The prophet Haggai writes;
"Give careful thought to your ways. 6 You have planted much, but have harvested little. You eat, but never have enough. You drink, but never have your fill. You put on clothes, but are not warm. You earn wages, only to put them in a purse with holes in it." 7 This is what the LORD Almighty says: "Give careful thought to your ways. 8 Go up into the mountains and bring down timber and build the house, so that I may take pleasure in it and be honoured," says the LORD. 9 "You expected much, but see, it turned out to be little. What you brought home, I blew away. Why?" Declares the LORD Almighty. "Because of my house, which remains a ruin, while each of you is busy with his own house. (Haggai 1:5-9).

This letter is a plea that we build this house of South Africa with a Godly and moral foundation. Do we really expect peace, justice and morality to rule when our leaders and constitution do not honour the source of these virtues? There is an ultimate standard for all aspects of our life and it is to be found in acknowledging God who created all.
Yours in Christ Jesus our Lord
Rev. Erik Momsen (on behalf of Bluewater Bay United Church)

We the undersigned agree and affirm the contents of the preceding letter and call for the following aspects to be incorporated into the New Constitution.

1. We believe that the State should allow religious observance in its institutions.
2. We believe that there should be a freedom that allows all religious office bearers to hold any office of State.

57 signatures
"You have the right to defend yourself. Does that mean you have the right to carry arms?"

1. Weapon control

There needs to be very strict weapon control - both of traditional and other weapons. The definition of a "traditional weapon" needs to be fully discussed and explored once and for all to clarify its meaning. Weapon control needs to be exercised in such a way as to prevent those most vulnerable becoming easy targets and victims.

Greater distance from telephones and police gives more justification to carry a gun and use it in self-defence. But we still have the problem of controlling people who want guns for evil purposes. These people mostly steal them from private individuals, except for very organised syndicates who will steal from the police/military.

So we propose there be no privately licensed firearms kept at private homes.

Game hunters could draw their weapons from a central armoury only when needed. Fewer guns makes them easier to trace if they are stolen or used (using ballistics tests). This may place some at risk. But in many cases you can not even use your gun when you are attacked - eg in a carjacking - and the attackers are more likely to fire at you if they see you have a gun.

2. Having asked the government to act against citizens carrying guns and traditional weapons, then how are citizens who are being violently attacked to defend themselves?

The first and only defence in an ideal, democratic situation would be for the police to be seen as the protectors and defenders of civil society. There needs to be effective, impartial policing which sees an equal distribution of resources in all areas. A national rather than regional police force would have greater legitimacy. Community police should work with democratic street committees. Everybody could be issued with a whistle rather than a gun as a means of self-defence. This could be used to raise the alarm when you are attacked so that the neighbourhood and police can assist you.

We have a right to privacy, but a blanket police raid now to search for weapons could be considered. Roadblocks and aiming at weapons trade routes would also be effective for this. An initial indemnity could again be granted for handing in weapons, but a further incentive may be needed.
LANTERN SCHOOL

30 June 1995

It has recently been brought to our attention that the A.N.C. has submitted a proposal for inclusion in the New Constitution, that it is our duty to express our feelings on this matter.

As educationalists we are of the opinion that Bible Education and the freedom to express one's religious belief must remain an integral part of a child's education. It is our duty as educationalists to uphold these values and principles held by the primary educator in the home of the child. Therefore a child whose parents hold a belief in a Divine Creator should have these values reinforced in the child's education and there should be no conflict in these values.

The primary aim of education is to guide the child to responsible adulthood so that he or she may contribute to the ongoing existence of the culture and society in general. For this the child requires knowledge in order to internalise a sound, moral value system. Bible education and a belief in the Divine Creator provide the child requires a point of departure for the establishment of moral values, without this knowledge of right and wrong the child is limited in his ability to make a democratic and responsible choice as a moral adult. One must educate the child in his totality i.e. his/her physical, social, emotional, academic and religious being must be catered for in education.

In our modern materialistic society, the child is placed under extreme pressure to adapt to change, succeed academically in order to enter the labour market, to adapt to single parent families and overcome poverty. Most children will have to develop under one or more of these conditions, but with the support of prayer and a religious belief he is able to develop to responsible adulthood. The curtailment of religious freedom and the expression thereof would have a devastating effect on the harmonious existence of the South African society and the moral values of our future adult generation and leaders of our State.

L. C. ROBINSON
PRINCIPAL
You are cordially requested to refer the following submission to the relevant sub-committee: Abortion and Sterilisation.

The Federal Council of Women, on the instructions of its *four member associations, namely the Afrikaans Christian Women's Association, SA Women's Federation, Natal Christian Women's Association and the Orange Women's Association, representing approximately 10 000 women from all over the Republic, urgently appeals to the Government of National Unity not to legalise abortion unconditionally.

The ideal would be for women world-wide to be completely empowered to enable them to use contraception so that abortion would not be necessary. Abortion is however a reality with which we must reckon.

Abortion per se is a violent intervention which implies the termination of human life. Since it is claimed that 70% of the South African population can be classified as Christian, the legalisation of abortion would conflict with the consciences of the majority of the population/community.

It is our view that no person has the right to end life for his/her own convenience or benefit. According to the Word of God, it is believed that all life is created by God, has the right to survive and may not be arbitrarily terminated by humankind.

It is accepted that the rights of women must be protected, but the rights of the child/unborn child must be equally protected. The right of the mother should therefore not automatically be protected at the cost of the unborn child.

Crimes against children have already risen to such an extent that the rights of the unborn child should also be protected by legislation.

If abortion is freely available as a means to get rid of the consequences of a dissolute lifestyle, this will strengthen and promote irresponsible sexual practices. This will contribute to a further decline in the moral values/norms and standards of the community.

To counter unwanted pregnancies, inside as well as outside marriage, better information and education on sex are called for. This would have a further positive effect by fighting the spread of sexually transmitted diseases. Responsible sexual practices and effective family planning are therefore proposed as a counter-measure to unwanted pregnancies and the resulting abortions.

It is understandable, and at the same time called for that abortion should continue to be applied legally in cases of serious aberrations in the foetus - which can be determined before birth; where the pregnancy threatens the life of the mother, or where the pregnancy is the result of rape.
The physical and psychological trauma experienced as a result of abortion, particularly in the case of very young girls and women, often leaves a permanent psychological scar, which could have been avoided if she had been supplied with the necessary information to avoid a pregnancy.

The Federal Council of Women trusts that this submission will have the careful consideration of the relevant committee.

(Mrs) C M Bothma  
DIRECTOR: FEDERAL COUNCIL OF WOMEN

* The organisations listed supply welfare services to the community as follows:

- Afrikaans Christian Women's Association (FI 08 80012005): Western Cape, Eastern Cape and Northern Cape Provinces.

- SA Women's Federation (FI 02 200032 005): Gauteng, Northern Transvaal, Eastern Transvaal and North West Provinces.

- Orange Women's Association (FI 07 700039 0004): Free State

- Natal Christian Women's Association (FI 06 600340 0005): KwaZulu Natal
20 May 1995

We would like to express our concern as a Mission community to the suggested change in the preamble, the proposed deletion of the words, “in humble submission to Almighty God we the people of South Africa”. We are concerned that although it seems that South Africa will inevitably become a “Secular state” this State and nation where 99% of the people are Theists and believers of some sort, this nation needs to acknowledge itself as under God and in humble submission to Him.

If we delete this and ignore it we are declaring ourselves autonomous, and a law unto ourselves. The State will have no ultimate and transcendent reference point in the Divine and no final moral accountability to any law above itself. It needs to be grasps that freedom of religion does not mean freedom from religion or from God.

We would like to remind you and those concerned that we are prayerfully holding up as you lead us into the new South Africa. May you not forget that all prophetic opposition to the State in the apartheid years was in fact based upon the pre-supposition of the State’s ultimate accountability to God. We want to call upon you all at this crucial point not to forget the Church which was relevant in the struggle and that God the Father of our Lord Jesus Christ who brought about the miracle of a peaceful transition at the Elections of 1994.

G. B. Mitchell
Mahyeno Mission Secretary
19.05.95

PETITION BY THE RASTAFARIAN SOCIETY OF PORT ALFRED

1. GANJA is a Holy (straight from creation) herb not a drug, therefore, it must be LEGALISED.

2. We are not drug addicts, for we don't use cocaine, heroine, LSD(pills) nor tobacco.

3. We use GANJA (tree of life) for religious and medicinal purposes, so it is of vital importance in our culture.

4. All GANJA prisoners must be free at home and those abroad for the tree of life is a healing of all nations.

5. Rastafarianism is a religion, not a warfare of gangsters therefore it must be recognised. Every man has a right in life - liberty i.e. freedom of speech, choice and livelihood.

6. No more police brutality nor harassment among the Rastas in their dwelling place for having GANJA in their possession.

7. We want to be granted a piece of land so that we can live a happy life and practice our culture perfectly and freely without disturbance for we are the African cultivators.

8. We fight for the freedom of all herbs, animals and human beings, we pay much respect unto nature, for our culture depends on it.

9. We are God people, we are not expected to be justified by the laws of mankind but of the most high God (Jah Rastafari).

10. Every man has a right to decide his own destiny, no-one can decide for us, our own future and our levity so let us be what we want to be.

11. Peace and love is what we believe in so one must learn to respect each and everyone’s religion culture. We are what we are and that is the way it is going to be.

12. We call for an immediate repatriation of all our fellow brothers, those in Jamaica and those worldwide, we are paving the way for hem. Africa must be green again.

B. Masetwa
20th May 1995

STATES OF EMERGENCY AND PRESIDENTIAL POWERS

In response to the request in the Weekly Mail and Guardian for public comment on the above matter the Chairperson and Secretary of the above Committee have conferred together. There has not been time to convene a special meeting of the whole Peace Committee, which has a broad representation including Police, Unions, Employers, Churches, Welfare Organisations, and Civics. However the Chair and Secretary believe that the views expressed below conform broadly to the opinions of the majority of members.

We conclude that in an emerging democracy, such as South Africa, situations of civil unrest are to be expected. A homogeneous national identity takes time to develop, especially following years of authoritarian rule by a minority group. The most likely components of large scale unrest in South Africa in the foreseeable future would seem to be either separatist movements, which could be Right Wing or KwaZulu/Federalist, or large scale Industrial Unrest due to economic hardship.

In such an emerging democracy the development of a strong National identity is of paramount importance if the nation is not to be fragmented. To allow a Provincial Government to veto a Presidential decree of a State of Emergency would create serious dangers of disruptive confrontation and indeed of insurrection. Such a veto would be a sure invitation for the eventual break-up of the nation into a group of possibly hostile separatist units.

The above matters do of course impinge on the whole question of the powers of Provinces in the new Constitution. This is not the place for us to air such views except to re-iterate that during the development of a democratic South Africa strong National Identity is of key importance. There might well be a case for increasing Provincial powers in perhaps a decade's time, when such homogeneity has been achieved. It would of course then be open to amend the Constitution when the time was right for such decentralisation.

Signed on behalf of both the Chairperson and Secretary,

Pastor James Dowd, Secretary.
Dispute Resolution Group of Highway Local Peace Committee
Dear members of the Constitutional Assembly,

We wish to make a submission to you in respect of:

THE MATTER OF ABORTION.

We appreciate the complexities of this issue and the variety of cultural and pragmatic perspectives. Nevertheless we wish to put forward the principle that the right to life of the unborn child should be greater than the right to privacy of the Mother and that abortion on demand or abortion as a means of contraception be not condoned.

We would request legislation against abortion except in such cases where the delivery of the child will be destructive to or life threatening to the mother. We are not able to speak with one mind on the matter of abortion due to deformity or abnormality in the fetus and would leave this as a matter of conscience for the parents to decide.

We would urge legislation that would count any abortion of a fetus of more than 3 months as criminal.

FREEDOM OF ASSEMBLY AND PUBLIC GATHERINGS

We affirm the right of Religious freedom and wish this to be reinforced by a clause entitling the right of assembly in private homes and Church Building. But more than this we would request that religious groups have the right to the use of State and municipal property such as City Halls, Schools, Auditoriums amphitheatre, offices etc subject to the normal conditions and provisions.

WITCHCRAFT AND SATANISM.

We believe that the practise of Witchcraft and Satanism, while possibly understood as
religious belief, should be curbed and prohibited by law. Our reason for this is that these practises quite apart from offending the religious beliefs of the majority of citizens, are directly responsible for social conflict and disorder and even the death and murder of our citizens.

THE EMERGENCE OF A SECULAR STATE

(End of page 1)

We have come to accept the inevitable replacement of a so-called Christian State with a Secular State which has an ethos empty of an allegiance to God and an ethic which is not informed directly by the bible. We understand that by our witness, example, representation and persuasion we will have to moderate the shaping of our South African Society.

Nevertheless we wish to remind the assembly that demographically speaking a vast number of South Africans, if not the majority, are Christians and that the words "Almighty God" should not be too readily expunged from the constitution and that Christian beliefs are not simply cast out because of the secularism of a relative few.

PORNOGRAPHIC LITERATURE AND SEXUAL LICENSE

We know pastorally the impact of temptation and the soiling of imagination caused through the proliferation of pornographic media of many kinds. We are particularly concerned that the innocence of our children be not violated and that the unbridled display of or availability of salacious erotic material in public places should not give rise to a false understanding of healthy human romantic love among our citizens. May we request that the freedom of access to these materials will be so curbed that the moral future of our society and the sanctity of marriage is not put at risk.

GAY AND HOMOSEXUAL RIGHTS

While being conscious of our Christian pastoral responsibility to cherish and minister to those of our society whose sexual orientation is at variance with recognised Christian norms, we cannot believe that sexual orientation is simply a matter of personal preference especially where this impacts on the public sphere. We believe that the active advocacy of alternative sexual lifestyles can threaten the healthy development of our children and subvert and disrupt the conventions and commitments of married life which we as Christians believe is essential to the common good.

We believe that the rights so strongly pursued and desired by the Gay Movement to further their lifestyle undermine the right of Christian people to seek norms and values which have been the building blocks of functionally sound society for centuries. We request that our children be shielded from the active advocacy of dysfunctional human relationships.

We the undersigned concur with the above.
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(SGD) (28 SIGNATURES AND ADDRESSES)
CONCERN ABOUT GODLESS ATTITUDE IN DECISION MAKING

We, as a Christian church, wish to state our utter dismay at many of the godless things which seem set to appear in our new constitution.

The Word of God, the Holy Bible, is the only and final authority for all life and practice and the minute this is deviated from, disaster will result. We would like to warn those writing the constitution that anything contrary to God's Word will result in His judgement against this nation.

No man, no political party, no government or anybody else is able to stand against Almighty God when He brings down His judgement hammer against the nation that has turned their back against Him.

Our plea to you, Sir, is please go back to what the Bible teaches. That is our only hope!

PASTOR PAUL SMIT

Letter also sent to:
1. Chairperson of Standing Committee
2. ACDP Parliament Office
3. Editor of Local Paper
CONSCIENTIOUS OBJECTOR SUPPORT GROUP

THEME GROUP 6.4

8 May 1995

EXCLUDE CONScription FROM THE CONSTITUTION

The Conscientious Objector Support Group earnestly requests this Theme Committee, and the Constitutional Assembly, to exclude any reference to conscription in the new constitution.

Conscription is unnecessary and undesirable. It is unnecessary because there is no serious threat to South Africa's territorial integrity, and is undesirable because of the major militarizing effect conscription has on society.

If the military or the government desires conscription at some point in the future, they should have to convince parliament first (via an amendment to the Defence Act), rather than simply introduce it on the basis of it being enshrined in the constitution. A decision to introduce conscription will then be reviewable by the Constitutional Court.

INCLUDE CONSCIENTIOUS OBJECTION IN THE CONSTITUTION

The Conscientious Objector Support Group has already made a submission to Theme Group 4 calling for the inclusion of the right to conscientious objection to military service in the new constitution, by extension of paragraph 14(1) of the present constitution. Paragraph 14(1) will then read: "Every person shall have the right to freedom of conscience ... and the right to conscientious objection to military service”

At the very least, the right to conscientious objection should be included in the Defence Act, as it is at present.

END CONScription

We would like to draw attention to the fact that conscription as designed by the previous government still functions in South Africa today. White males are still being called up for part-time service. This is racist and sexist and should be stopped immediately, and conscription should never be re-introduced.

It is our contention that conscription as a means of military personnel procurement is logistically, economically, politically and morally untenable.

1. CONSCRIPTION IS LOGICALLY AND ECONOMICALLY UNTENABLE

Conscription presupposes registration of all liable citizens. Registration would need to include all race groups as well as males and females or else it could be challenged in the constitutional court as being racist and/or sexist.
The massive task of registering millions of young people would be logistically complex, and very expensive - hardly a priority project in South Africa today.

Attempts to register only a portion of the eligible population for reasons of convenience (e.g. school students, or tertiary institution students) could be deemed discriminatory and be unenforceable.

Unless people were called up straight away, registration would be ineffective because registration information would soon be out of date, considering that young people are very mobile.

Would people who did not register be punished? Would it be logistically and economically possible - and politically sensible - to follow up all offenders and prosecute them?

2. CONSCRIPTION IS POLITICALLY UNTENABLE

Even if the military service is of short duration, or part-time, one segment or other of the population is bound to have serious political and/or moral objections to it. This is the case everywhere in the world where there is conscription. How will the government force these people to register? And if they do register, how will it force them to serve? Will it punish those who do not register or refuse to serve?

If offenders are not punished, it would make a mockery of the SANDF and the government, and in practical terms would lead to the collapse of conscription.

However, to punish objectors would be politically very costly. Such action would serve to make martyrs of the objectors and publicise their cause. Resistance to conscription would become a rallying point for opposition to the government. This certainly was the case under the previous government, as proved by the Conscientious Objector Support Group and the End conscription Campaign. Resistance to conscription as a rallying point for opposition to the government occurs in every country in the world where there is conscription.

3. CONSCRIPTION IS MORALLY UNTENABLE

Compulsory service of any sort is anti-democratic. Freedom of conscience and freedom of choice are basic human rights.

In particular, we believe that forcing people to serve in an organisation where, amongst other things, they will be trained to kill, is morally untenable.

Richard Steel

13 January 1995

Proposal on the Bill of Rights
In response to press advertisements inviting submissions on the drafting of the new constitution, we submit the proposal shown below, dealing with Conscientious Objection to military service.

In 1992 and 1993 this organisation made submissions to the bodies drawing up the interim constitution, on the subject of the right to conscientious objection.

Our proposal now is:

That section 14(1) of the current constitution, Act 200 of 1993, be altered to read as follows:

\[
14.(1) \text{ "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning and the right to conscientious objection to military service." }
\]

Motivation for this proposal.

1. Although section 14(1) recognises the general right to freedom of conscience, we feel that the right to Conscientious Objection needs to be stated explicitly;

2. Even when there is no conscription for military service, the right to Conscientious Objection is still relevant and necessary. For instance, members of the US forces, although volunteers, still have the right to apply for Conscientious Objector status, and this right was exercised by some American servicemen and servicewomen at the time of the Gulf War.

We enclose a 1990 pamphlet entitled "What is COSG?" which gives some background on this organisation.

One of our members would be glad to enlarge on the proposal in person to the Theme Committee if necessary.

NAN CROSS
JOHANNESBURG COSG
NEW CONSTITUTION FOR THE RSA POSITION PAPERS BY THE SOUTH AFRICAN NATIONAL DEFENCE FORCE (SANDF)

The preliminary submission tendered by the SANDF refers.

The following position papers regarding some of the initial inputs are enclosed for the consideration by your Theme Committee.

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<th>Enclosure No</th>
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<td>Jurisdiction of the Public Service Commission in matters concerning the SANDF</td>
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<td>2</td>
<td>Change of Nomenclature: “permanent force” to “regular force”</td>
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<td>Functions, Duties and Responsibilities</td>
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If required, the above mentioned position papers can be discussed with the Project Team appointed to revise the Defence Act.

J. MODISE
MINISTER OF DEFENCE

[Please note these are not necessarily the position of the Ministry. Signed: R. Kasrils]

JURISDICTION OF THE PUBLIC SERVICE COMMISSION IN MATTERS CONCERNING THE SANDF

INTRODUCTION

1. It is universally acknowledged that the military profession is clearly distinguishable from any other dispensation for which the State is responsible. The unique demands placed on military personnel differ markedly from those required of other Public Servants. Ultimately soldiers are by implication expected to endanger their own lives to protect the State. The Defence Force has to remain intact, retain credibility and impartiality and prove reliable even when other organs of State fail or are severely disrupted.

2. The Constitution (Sec 210 (1) (a)) sets out the role and function of the Public Service Commission and includes the SANDF in the Public Service (Sec 212(8)).

AIM
3. The aim of this submission is to motivate for a special provision to give the SANDF greater management autonomy respect of those unique service conditions including salaries and pay pertaining to the SANDF and direct access to the Public Service Commission in regard of all other service benefits of a common nature.

DISCUSSION

4. The majority of the uniformed members of the SANDF serve in terms of the Military Practitioner Personnel Administrative Standard (PAS). The SANDF already has wide delegated powers with regard to the following functions:

   a. Organisation and administration of the SANDF. For a number of years the SANDF has been authorised to create its own structure and to create posts in the Military Practitioner PAS without reference to the PSC.

   b. Personnel practices, appointments, promotions, transfers, discharge and other career incidents and most matters in connection with employment of uniformed members have been delegated to the SANDF and are handled internally within the SANDF without reference to the PSC.

   c. The SANDF has always been wholly responsible for its own promotion of efficiency and effectiveness.

   d. The Code of Conduct for the SANDF is promulgated in the Military Discipline Code which is part of the Defence Act. The PSC does not play any role in the upholding of the provisions as laid down.

5. The PSC is, however, at present responsible in all matters concerning salaries, pay and allowances and other conditions of service of members of the SANDF as part of its mandate to make recommendations and give direction in this regard for the whole public service. It is particularly in this area where specific problems occur when the Office of the PSC amends and prioritises or rejects Defence Force submissions.

   a. Very specific career prospects are applicable to the military especially the requirement for shorter terms of service as well as more flexibility in service dispensation to ensure the necessary supply of young, fit junior ranks and to retain personnel for middle and senior level position in the SANDF.

   b. Occupational allowances, operational duty allowances and very specific dispensations for example with regard to service outside the borders of the country (now that UN Peace-keeping operations are anticipated) require decisions vastly different to the rest of the public service.

   c. Quick reaction time is often essential to guarantee success. The Defence Force is frustrated and impeded by having to stand in line and at times wait years for directives from the Office of the PSC.

   d. The position of the members of the SANDF who are excluded from the Central Bargaining Chamber due to their exclusion from the mechanism of bargaining through the formal labour/trade union movement is, to say the least, unenviable.

   e. The Constitution will have to address the problem of providing a mechanism through which the members of the SANDF can enter into negotiation with the State especially with regard to wage and similar disputes. The role which the PSC presently plays in the Central Bargaining chamber places it on the ‘same side of the
table’ as the SANDF, so no proper bargaining structure is created. The role which the Secretary for Defence can play in addressing this significant lacuna, is acknowledged.

6. The endeavour of the Office of the PSC to keep all public service benefits regarding employment, remuneration and all other conditions of service in balance throughout the Public Service, is appreciated. It is clear, however, that although special measures. As an instrument of State to manage and support the potential for maximum force with the sole purpose of ensuring its sovereignty, the demands of the State on the military stretch to the extreme of paying the ultimate price. Furthermore cost efficiency is essential in the modern high technology defence and to ensure that superior capabilities and leadership are available at all times. The struggle to increase flying pay to retain the services of qualified pilots in the NDF is a prime example of our ever present dilemma. Through the powers vested in the Minister of Defence (Sec 82 bis of the Defence Act) the NDF nee autonomy to make Regulations in respect of all service conditions and benefits unique to the military.

7. All submissions and or requests must be channelled through the office of the Public Service Commission. The result of this is that decisions of the PSC are based on written and/or verbal information/argument presented to it by the officials of the Office of the PSC which may or may not agree with or appreciate the arguments and submitted needs of the SANDF. It is therefore often not a case of convincing the PSC, but of convincing the officials in the Office of the PSC. This is true both in respect of pay and allowances and non cash conditions of service and benefits.

8. When there is a dispute between the SANDF and the Office of the PSC there is no dispute resolution mechanism to deal with it with the result that never ending negotiations between the SANDF and the Office of the PSC follows until such time as one or the other capitulates. This leads to frustration on the part of management in the SANDF and probably unfair criticism of the Commission itself.

9. One of the most frustrating aspects for the SANDF is the competition with the broader Public Service for funds to satisfy the unique military needs of the SANDF. SANDF members only form a very small part of the total manpower of the Public Service. By the nature of things there is also a much greater commonality in the needs of the broader Public Service than between the SANDF and other Departments. The result is that when priorities with needs have to be determined in the PSC forum created for this purpose, it is often a case of the SANDF against the rest. With the critical funds situation experienced over the last number of years, it is understandable that the needs of the SANDF are often outvoted by the majority.

10. It is our submission that the NDF should be excluded from the stipulation in Sec 210 (1) (a) of the present Constitution requiring the PSC to 'give direction” (Afrikaans: "gee lasgewing" is clearer) into all uniquely military organisational and human resource matters. A Military Service Commission in which the Defence Secretary fulfils the Administrative role, by means of specific stipulations in the new Defence Act, can perform the function of ensuring that it reflected in human resource management in the military vis-à-vis the rest of the public service.

11. The problem of the exclusion of the military from the bargaining mechanism organised through the trade union movement has been addressed. A system has been initiated within the SANDF, on a trial basis where different forums at unit level provide separate groupings in the rank structure, the opportunity to reflect on improvements in conditions of service and the formulation of proposals in this regard; the generation of
improvements in the effective management of their work and the maintenance of high morale. The forums are formally structured and meet with the Officer Commanding at least once a month. The representation proceeds along the Command Channel right up to the Chief of the SA National Defence Force. Structured feedback is also passed down the chain of command back to forum level. The opposition from the labour/trade union movement to welcoming the SANDF as a legitimate workers' representative is thought to be unfair as such an independent legitimate voice for the Military would in no way jeopardize their position. In any event it would provide the necessary stability to present factional interest in this one institution of State (namely the SANDF) where fragmentation could prove harmful to the very stability of the State and jeopardise the day to day functioning of the Public Service.

CONCLUSION

12. In essence our submission is that:

   a. A Military Service Commission regulated by stipulations in the Defence Act, be mandated to make regulations, subject to approval by Treasury, in respect of conditions of service including those pertaining to allowances and other benefits including salaries and pay, which cater for the unique and specific requirements of all members in uniform in the SANDF;

   b. the possibility of creating a Services Commission which would cater for the SAPS and the SANDF would be acceptable as a second alternative to a Military Service Commission;

   c. provision be made for a mechanism to review salaries, pay, allowances, benefits and other conditions of service of members of the SANDF, in the event of a dispute between individual members and the State. The recommendation would then be referred directly to an appropriate Parliamentary Committee. This should alleviate the problem of the military who do not have the right to organise, belong and negotiate as a trade union; and

   d. if common benefits and service conditions are proposed by the Office of the PSC, and/or the Central Bargaining Forum, and are approved, such common benefits and service conditions should similarly apply to the SANDF.

13. It follows that the Constitution should exclude the National Defence Force from the provisions of Section 210(1)(a)(iii) and furthermore make provision for

   a. matters concerning

      i. the running of;

      ii. appointments in and to;

      iii. promotions in;

      iv. transfers in; and

   b. procedures concerning
v. discharges from the SANDF, and for matters of career incidents of all uniformed members of
that Force to be recommended, be given directions in respect of and be enquired into by the
Minister of Defence as provided for in law and not by the Public Service Commission; and

b. the making by the Minister of Defence of regulations providing for the matters referred to in subpar
12.a, supra.

SANDF POSITION PAPER

CHANGE OF NOMENCLATURE : PERMANENT FORCE TO REGULAR FORCE

INTRODUCTION

1. There is a requirement to distinguish between the different groupings of personnel structure of the South

AIM

2. The aim of this submission is to gain approval for the use of the term "regular" force instead of "permanent"
force when referring to full-time professional military personnel.

DISCUSSION

3. Since 1912 when the erstwhile Union Defence Force was established, a dispensation has existed in which
personnel have been in full-time permanent employment as career soldiers, sailors, airmen and medics.

4. During this time these members were referred to as Members of the Permanent Force. (Afrikaans : Staande
Mag). This terminology was consequently incorporated in the Defence Act (Act no 44 of 1957).

5. For the last approximately 35 years the Permanent Force has provided the smaller command structure and
leader group of the support services. The larger component and main source of manpower was provided by
system of white male conscripts. (Commonly known as National Servicemen).

6. When the development towards a new dispensation started gaining momentum in the early nineteen nineties,
became clear that white male conscription would not be the acceptable source for providing the bulk of the so
called 'feet on the ground", especially for the high manpower needs of the SA Army.

7. Throughout history in the compilation of effective fighting forces, the need has been recognised to fill the
ranks of the fighting troops with young men who were fit and strong, amenable to group discipline and filled
with the spirit of daring to face the challenges of battle. From the earliest times of organized armies the
requirement has always been for a steady inflow of this type of personnel.
8. With the change of the manning strategy from a National Serviceman throughput to an alternative fully representative, all population group source, the requirement immediately arose to ensure that the lowest rank retained the essential element of youth.

9. Consequently a system of term service was introduced in which members joined the full-time force for a term of service of two years initially, renewable for two further terms, (therefore six years in total). This type of service now provides the bulk of the junior ranks in the so-called front end of the manning mix. This type of service is known as Short Term Service (STS).

10. There are also medium and long service contracts to provide for those considerably smaller groups of personnel whose abilities and return on investment in their training make it necessary to retain their services for three to ten years (medium term) or 30 years (long term).

11. Apart from certain lesser service benefits the pay of rank of all types of term service are similar.

12. With the recruitment and entry of a wider spectrum of population groups for service in the full-time force, it has become clear that the term "permanent" force is causing confusion and unnecessary disillusionment. Especially STS members are reluctant to accept their termination of service on expiry of their contract as the clinging to the concept of permanent employment. If a member does not show the necessary potential to progress to the leader group, his service in the lowest ranks beyond the age of about 26 27 becomes an embarrassment to himself as well as a hindrance to the maintenance of standards in the NDF.

13. One of the most basic socially disruptive consequences of Service life is inevitably that :Military Service personnel seldom serve near their homes. When they start establishing families of their own it is not conducive to the fabric of society to have too many disrupted families. Thus the Defence Force can serve society best if it makes training opportunities available to a continuous throughput of young persons.

14. The requirement for knowledge and skill in military service is spread over a wide spectrum of the population and if the need were to arise for large scale mobilization to protect the country in the event of a state of National Defence (war), the Reserve of trained manpower is available to make the sacrifice required of all nations throughout the ages when it is necessary to defend their country.

15. Most democratic and organized states which can provide role models for our emerging new order, refer to the full-time military forces in the English language as the "Regulars" or Regular Forces. It is submitted that this will to an extent avoid the unnecessary confusion with regard to the length of the time of service for which a member of the full-time force is bound.

CONCLUSION

16. The term "permanent" force when referring to the full-time forces of the NDF should be changed to "regular force. The terminology in Afrikaans namely "staande mag" is adequate and remains unchanged.
SANDF POSITION PAPER

MILITARY PENSIONS

INTRODUCTION

1. In Sec 226 (8) (a) the present Constitution (Act No 200 of 1993) provides for an Act of Parliament which will pay adequate compensation to a member of the NDF who suffers loss due to physical or mental disability sustained in the execution of his or her duties ... This provision should obviously be retained in the new Constitution.

AIM

2. The aim of this submission is to plead for the principle of acknowledging the unique sacrifice made by the military when such men and women grow old. The present dispensation applicable to combatants in World War I and II and the Korean War could then be extended to Military Veterans of more recent conflicts.

DISCUSSION

3. It is, our submission that citizens who either volunteered or were conscripted to serve in the military forces of South Africa are not sufficiently catered for by the existing measure (Sec 226 (8)(a)) if they, are not clearly able to prove that they suffer from a residual medical condition of a physical or mental nature sustained during their service.

4. Provision has been made in the Social Pension Act (Act No 59 of 1993) for the payment of an additional allowance to War Veterans who qualify for old age pensions. The allowance is only R18 per month but the benefit is further enhanced in that a War Veteran's social pension falls due at 60 years and not at 65 as is the case with normal old age pensions. Only veterans from World War I and II and the Korean War qualify for a War Veteran's Pension under the present dispensation. Veterans from the post Korean War period cannot therefore qualify for a War Veteran's Pension.

5. The definition of who should be considered a military veteran could cause confusion especially in the light of Section 189 of the Constitution. The very wide scope of Section 189 may result in a considerably smaller dispensation falling due to military veterans. Their contribution as Servicemen and women under arms with the recognized additional danger and sacrifice which is inherent to the military, should qualify them for a special dispensation when they grow old.

6. It is thus submitted that a military veteran should be considered for a military veteran's pension if the ex-service person in question has served in one or more of the Union Defence Force, the South African Defence Force; the former TBVC States' Defence Forces; the non-statutory forces Umkontho we Sizwe (MK) and
the African Peoples Liberation Army (APLA) and the South African National Defence Force; when he/she reaches the age of 60 years.

7. Figures. There are an estimated 65,000 veterans from World War I and II and Korea. About 16,500 of these veterans are receiving War Veteran's Pensions at the moment. It is estimated that about 650,000 persons took part in military type service post Korea. This figure includes members of the nonstatutory forces (MK and APLA). It is difficult to draw comparisons but judging from the present statistics 25% of combatants qualify for welfare pensions by the time they reach the age of 60 years. The extrapolated figure for Military Pensioners by the year 2010 could comprise 182,000 persons.

8. Amount. At present a War Veteran is granted an R18 allowance in addition to the normal social pension provision which at present is R390.00 per month. The allowance has not increased in proportion to the Social Pension and there is obviously a serious plea from War Veterans for an increase in the allowance.

9. It is submitted that adequate records exist by means of the Certified Personnel Register for which provision was made in Sec 224 (2)(c) of the present Constitution and the personnel records of the former SADF to confirm a person's claim to the status of Military Veteran.

10. It goes without saying that persons who fail the so called means test would not qualify for any social pension and thus also would not receive a Military Veteran's allowance.

CONCLUSION

11. Without derogating from the provisions of Sec 226(8), it is necessary to establish the principle in the Constitution that citizens who have made the sacrifice to join the military and serve under arms are entitled to a special dispensation in the form of a military Veteran's Pension when they grow old and are in need.

SANDF POSITION PAPER

LIMITATIONS TO FUNDAMENTAL RIGHTS

FREEDOM OF ASSOCIATION, SEC 17 (LABOUR RELATIONS) AND ASSEMBLY DEMONSTRATION AND PETITION, SEC 16

INTRODUCTION

1. The injunction that the fundamental rights as stipulated in the present Constitution "shall bind all legislative and executive organs of state at all levels of government" is noted.

2. Argument will be made that there is sufficient justifiable grounds to limit such rights with respect to the uniformed branch of the SA National Defence Force.

AIM
3. The aim of this submission is to appeal for the inclusion of a provision in the Constitution which will acknowledge the unique character of the SA National Defence Force as an organ of State which would justify the limitation of the fundamental rights of persons when acting on behalf of the SANDF in uniformed military service of the country.

DISCUSSION

4. Emergent democracies are by definition, engaged in a process of developing a new political culture characterised by democratic values. Because values and attitudes are far less amenable to rapid change than structures, it may take several years for a new dominant political ideology to emerge from many different contending ideologies and many more years of nation building.

5. During this period and thereafter, the democratising state is faced with a high potential for internal conflict a instability, and is therefore in need of cohesive and politically subordinate defence force to stabilise the transition and ensure the safety of the state. Under such circumstances, it is undesirable for the military, with their latent power of armed veto, to rely on recognised civilian values, rights and freedoms as the cement for organisational bonding.

6. It is internationally accepted that when all other systems fail the armed forces of any country is the final institution that will have to uphold the Constitution. To allow the armed forces free trade union activity could lead to discontent, dissatisfaction and discord and ultimately, inability to fulfil its mission. Unionism can be a very strong force in the military especially when considering that the members have already access to weapons and are automatically organised to act cohesively.

7. The strength of any armed force depends largely on the cohesion, discipline, morale and esprit de corps of its members. The SANDF is integrating the armed forces of the former TBVC states, the former SADF, MK and APIA into a new SANDF. The success of this integration process depends largely on the discipline, morale, co-operation and esprit de corps of the integrating soldiers. Should the SANDF allow its members to become members of any politically or ethnically aligned union it may lead to the creation of factions and inhibit unity the force. Faction formation will not only lead to dissatisfaction, as displayed by the ill fated National Peace Keeping Force but it will also negatively influence morale and the maintenance of military discipline. This in turn could lead to the destruction of the military culture as the binding factor in the integration process. In the end it will not only jeopardise integration of the SANDF, but could lead to an escalation of violence, instability and ultimate anarchy. Such a situation the new South African can ill afford.

8. In Section 126 B of the Defence Act, the members of the full-time force component of the SANDF are prohibited from belonging to trade unions. Thus their fundamental right to freedom of association is clearly affected. In many other sections of the Defence Act and the Military Discipline Code, stipulations occur which are fundamental to the operational effectiveness of the military. These stipulations when invoked would deprive uniformed members of the right to assembly and demonstration.

9. The complex nature of national security and defence and the concomitant requirement that the SANDF has to display cohesion, continuity, reliability and credibility in the eyes of the total population, points strongly to
provision of a stronger limitation clause than is at present contained in Sec 33(a) (i) and (ii) of the present Constitution where the SANDF is concerned.

10. The SANDF makes sufficient and speedy mechanisms available to its members for handling grievances. Furthermore the requests dealt with under other headings and brought before the Sub-Theme Committee on Public Administration (hearing dated 27 Feb 95) and in a different submission numbered 01 to this committee intimate that the SANDF be permitted to form a legitimate, unified bargaining mechanism with some measure of autonomy, further removed from the Public Service Commission, to collectively represent the case of the military in all aspects of service benefits, pay disputes and any other personnel related negotiation with the State.

SANDF POSITION PAPER

FUNCTIONS, DUTIES AND RESPONSIBILITIES

THE PRESIDENT AS COMMANDER IN CHIEF
1. The President is appointed as the Commander-in-Chief by Sec 82(4)(a) of the Constitution. His functions, powers and duties are conferred on him in terms of Sec 82 (4) (b) of the Constitution and contain the following:

a. To declare a state of national defence.

b. To employ the NDF into Sec 227 and 228 of the Constitution.

c. To confer on and cancel commissions of members of the NDF.

d. Some other powers are deferred on the President into the Defence Act.

2. The functions, powers and duties of the President are laid down in the Constitution and the Defence Act. With the exception as pointed out in par 8 below no difficulties are foreseen with the exercising of these functions, powers and duties and any further comment is seen as superfluous.

THE MINISTER OF DEFENCE

3. The Minister of Defence is appointed by the President into Sec 88(1) of the Constitution. His functions, powers and duties as far as the National Defence Force is concerned are laid down in the Defence Act not in the Constitution. This is the correct way as his mandate to act is not part of constitutional principles and should remain so. No further comment on his functions, powers and duties, as far as the Constitution is concerned, is deemed necessary.

THE JOINT STANDING PARLIAMENTARY COMMITTEE ON DEFENCE
4. The National Assembly and Senate are empowered to Sec 58(1) of the Constitution to lay down rules and orders in connection with the conduct of its business and proceedings including rules and orders regulating the establishment, constitution, powers and functions, procedures and duration of Parliamentary Committees. These rules have been promulgated and the committees are functioning in terms thereof. These established committees are empowered to Sec 58(2) to summon persons to appear before it, to give evidence, produce documents and to receive representations from interested persons.

5. These committees are not empowered to make any decisions with binding results. The Standing Committee on Defence can only make recommendations regarding defence matters to Parliament who, if it agrees, can issue an order by means of an act of Parliament. The committee can also make recommendations to the Minister of Defence- who can take administrative steps to the Defence Act regarding these recommendations.

6. No problems are foreseen to the functioning, powers and duties of the Joint Standing Parliamentary Committee on Defence and this point does not need any further elucidation.

CHIEF OF THE NATIONAL DEFENCE FORCE

7. The Chief of the NDF is appointed by the President to Sec 225 of the Constitution. He is the military executive commander of the NDF and exercises his command under the directions of the Minister of Defence and during a state of national defence, under that of the President.

8. It is recommended that Sec 225 of the current constitution be retained.

DEFENCE SECRETARY

9. The current Constitution does not provide for the appointment of a Defence Secretary.

10. The Defence Secretary has submitted a paper on the subject of his appointment (See Appendix A).

11. It is recommended that the following section be included in the New Constitution:

"Defence secretary. There shall be a Defence Secretary who shall advise the Minister on defence related policy and who shall execute such functions as be determined by Law"

SANDF POSITION PAPER

LIABILITY OF CITIZENS TO RENDER NATIONAL SERVICE

INTRODUCTION

1. A citizen is a member of a Country. As such the citizen enjoys not only the rights and privileges which such citizenship bestows, but also a responsibility for the defence of the State; of defending his, and fellow citizens, rights and privileges.
2. Currently, the practice to call on citizens for service to defend a country in time of war, exists in various western democracies. It is the South African National Defence Forces' position that the same obligation of a citizen to render National Service in time of war should be entrenched in the constitution.

THE REQUIREMENTS FOR A CONSTITUTIONALLY ENTRENCHED RESPONSIBILITY TO RENDER MILITARY SERVICE

3. The need to retain a large standing army, more correctly a defence force, for the RSA at present is correctly being questioned. In the era before its political transition national security was largely determined by the reaction of the World to the domestic policies followed inside the country. The consequent threat levels brought about a situation where military instruments were occupying a position of dominance in pursuance of national security. Normalisation is now feasible and the focus should shift to pursuance of security through diplomacy and socioeconomic development.

4. The direct military threat to the RSA at present, and for the medium term (up to five years), is considered to be low and indeterminable. Instability in the World, particularly in Africa however, demands that a degree of defence readiness be maintained in order to deter potential military adversaries.

5. Indirect threats resulting from instability and deprivation in Southern Africa presently constitute the main threat to RSA security and prosperity. These threats include:
   
   A. Saturation of RSA domestic resources by economic refugees from the region.
   
   b. Threats of spill-over of armed conflict from unstable states in the region.
   
   c. Threats to the security of RSA investments, assets and citizens in an unstable Southern Africa.
   
   d. Threats which restrict opportunities and potential top economic growth in Southern Africa.

6. The RSA has no aggressive intent towards any other state. On the contrary, the RSA relies on peace and stability for the implementation of reconstruction and development. The preferred and primary course of action will be to prevent armed conflict rather than resolving differences through clash of arms. Solutions will be sought through the removal of the cause of instability rather than combating the effect. The RSA will only resort to military means in self defenc when deterrence and all other non-violent options have tailed........ and herein lies the rub.

7. The RSA cannot afford a large standing army at a time when the threat is perceived to be low and when vast capital sums are required for reconstruction and development. An option, historically adopted by South Africa, is to retain small standing army supported by large reserve forces who can be called upon in times of national crisis. In the case of South Africa these reserves have been volunteers or part-time forces allocated to specific Citizen Force units in terms of their statutory military service obligations.

8. The manpower policy for the future may rely entirely upon the concept of voluntarism. This should suffice to provide the SANDF with force levels required for the periods of relative peace. The challenge will arise when force levels are required to teem far more serious threat to the country or in response to come international situation demanding
participation by South African forces. In this latter cast the RSA has a Constitutional obligation to employ the SANDF 'for service in compliance with the international obligations of the Republic with regard to international bodies and other states”.

9. Statesmen and women and military commanders of the future alike need to know that the citizens of the country will respond to their obligations to serve the State by rendering service in times of war, more correctly described as state of national defence. What recourse does the state have in the event that citizens do not respond to the call to arms? How can the state ensure that all segments of society, all groups within the population, the well-off and the underprivileged, the elite and the working classes, in short ALL physically capable citizens who can be made available to serve the country will, in fact, do so?

10. Reliance on a concept of voluntary service for national defence is all very well, but the State needs to make provision for situations where such voluntary service does not deliver the required force levels. It is submitted that the citizen’s obligation to render service, not necessarily military, in times of national crisis or when required by the state to do so in compliance with its international obligations should be in the Constitution. Citizens not willing to respond to an obligation to defend their rights and privileges, and those of their fellow citizens or the international community, must understand that they could be compelled, in terms of the Constitution, to do so. The details of such service would be contained in the appropriate Acts, eg the Defence Act, which would be deliberated upon and exhaustively debated by Parliament before passage into legislation, thereby ensuring that the concerns of the citizens and society in general are adequately addressed. The first step, however, remains some form of Constitutional prescription which will determine what the state, and society in general, may expect from citizens in terms of rendering service in times of crisis.
The Executive Director  
Constitutional Assembly  
P.O. Box 15  
Cape Town  
8000

MR EBRAHIM HASSEN

I, the undersigned as a born again Christian list below my objection

I am opposed to the idea that a sexual orientation clause be written into the Constitution, giving homosexuals and lesbians a right to do the things they are doing.

Thanking you for your attention in this matter.

(Signed) D. G. Laubscher  
6609185258086
It is a source of pride and of great pleasure to note that people of South Africa have reached the stage of maturity to acknowledge the equality of women with men, at the time they have triumphantly proclaimed the equality of the races.

The Baha’is of South Africa, having the equality of sexes as one of the principles of their faith, whole heartedly support the establishment of the commission for gender equality. The Baha’is consider the equality of sexes as a major requirement for attaining peace and justice amongst the people of the earth. Abdu’l-Baha’ the interpreter say “Humanity is like a bird with two wings - the one is male, the other female. Unless both wings are strong and impelled by some common force, the bird cannot fly heavenwards.”

The exposition that follows depicts the Baha’s point of view on gender equality and it is in this light that the formation of a commission for gender equality, its powers and structured should be interpreted.

A. The Meaning of equality

The world of humanity consists of man and woman. The happiness and the success of a society depends on the health and well being of both men and women. They equally share the destiny of mankind. equality however should not be seen as uniformity. The aim gender equality is not the creation of a society whose members act the same and women try to behave like men. Women are very different from men and it is this diversity which is of great value to mankind, The feminine characteristics of women well complement the masculine characteristics of men. The violent and merciless world of today desperately needs the gentle qualities of women. Equal contribution of women to society creates the balance necessary for the equilibrium of the society.

Furthermore, equality does not simply mean equal pay and equal benefits, as important as it may be. equality means giving women equal opportunity to grow, to develop and fulfil one’s potential. For generations women have been deprived of equal education and social and vocational opportunities. Now is the time to give then this opportunity and utilise the half of the population which for long has been kept behind. The purpose of equality is not to a feminine force which cometes against men for power, money and status, but to provide women the basic right to develop into a full individuals. Giving women the basic right to develop into full individuals. Giving women equality makes it possible for them to contribute towards their society and share the responsibilities of the nation building with men.

.. Can improve themselves. Women themselves should believe in equality, before the can be treated as equals. On the other hand the public at large needs to change it discriminating attitudes towards women, stereotypes and misconceptions should be corrected. Media and the school system can play a sensitive role. The school curriculum can be used to correct some of the misconceptions and prepare children for living in a prejudice free society. The education curriculum should go beyond teaching information
and content. It must address the problems and needs of present day society. The education system should fulfil the aspirations of the society whose member wish to live together in equality, harmony and peace.
THE BLACK SASH

REPRODUCTIVE RIGHTS: THE RIGHT TO CHOICE

We wish to refer you to a submission dated the 14th February 1995, referred to yourselves by the Abortion Rights Action Group.

We wish to advise you that we endorse the submission made by the Abortion Rights Action Group and we wish to associate ourselves there with.

We would further wish to add that The Black Sash National Conference of 1993, took a resolution arguing that a clause on the Bill of Rights be introduced as follows “That the Right to Life should not derogate from a woman’s right to choose abortion, should she wish to do so.” We would suggest that this submission be characterised as dealing with reproductive rights rather than the rights to life.

We wish to take this opportunity to thank the Constitutional Assembly for the opportunity of making this submission.

[signature: illegible]

THE BLACK SASH

RIGHT TO LIFE

In the constitution of South Africa Act No. 200 of 1993 Article 9 of Chapter 3 reads, 'every person shall have the right to life'. The Black Sash supports the retention of this right in the final constitution and advocates for the abolition of the death penalty. In doing so and also adopting a pro-choice position with regard to abortion, we recognise the necessity to explain what is likely to be perceived as an inconsistency. We believe that a number of individuals and groups have taken a contrary position, supporting the death penalty and also supporting a pro-life position. We believe that it would be a useful contribution to the debate for these groups to examine this apparent contradiction in their positions and place the results before the Constitutional Assembly, which we have done below.

If we first consider the question of the nature of the right to life we begin with the understanding that all rights may be limited, with the possible exception of the right not to be tortured. In our interim constitution such limitations allowed are only those which are consistent with an open, free and democratic society and provided that they do not negate the content of the right in question.

We believe that the death penalty negates the content of the right to life. Where judicial killing takes place and the judgement of the courts is found to be wrong, no amount of
compensation can redress the wrong done to that individual. The rights that we are talking about inhere in the person who is faced with the death penalty.

In question of abortion the foetus lacks the status of 'legal person', which status has been defined as beginning when a child is born. In countries where abortion has been legalised the right of the woman to choose to terminate the pregnancy is generally constrained by the question of the viability of the foetus. At the point where the foetus becomes viable, that developed to the point where it would be born alive, the termination is usually not be permitted. Only in very extreme circumstances, in order to save the life of the mother, will termination be legal.

We believe that in the question of abortion a number of rights must be weighed up, the one against the other. We subscribe to freedom of religion, and accord to those people who take a pro-life position, the freedom to believe that the foetus has a soul from point of conception. We would argue that this is a question of religious belief, however and riot capable of being legislated by the state. We believe that the pro-choice position does not devalue life - it on the contrary it upholds the value of those lives that otherwise be would stunted or damaged by the woman carrying the foetus to term.

We believe that a number of rights protect the right of women to choose. Included among these are the rights to dignity, privacy and to equality. With regard to the right to privacy we would argue that the state is not entitled to make on behalf of women decisions involving her fertility and the use of her own body.

With regard to the right to dignity we believe that the decisions made by an individual about their own lives and their own personhood are extremely important. We believe that Ronald Dworkin stated the argument most succinctly when he said "Because we cherish dignity, we insist on freedom, and we place the right of conscience at its centre, so that a government that denies that right is totalitarian no matter how free it leaves us in choices that matter less. Because we honour dignity we demand democracy and we define it so that a constitution that permits a majority to deny freedom of conscience is democracy's enemy, not its author." (Dworkin, R. Life's Dominion An argument about abortion and euthanasia. Page 239 Harper Collins Publishers 1993.)

We would further argue that a pro-choice position flows from the right to equality. The existence of a foetus is frequently not the choice of the woman who carries it. As a result of the inadequate availability of contraception and the refusal of some men to use contraception, many pregnancies are unwanted. Even where the pregnancy is welcome, although unplanned, the cost of raising that child frequently falls entirely or disproportionately heavily on the mother. Many fathers refuse or are unable to take on the financial responsibility of raising children. They are further in many instances unwilling or unable to take a fair share of child care. We would argue that if the right to equality is to mean substantive equality for women in the constitution, this right must be understood to encompass a pro-choice position.

We would point out that none of the above arguments precludes the decision for an abortion from being a difficult and sometimes traumatic one for many women. We would argue that women have been in the vanguard of the struggle for peace in South Africa and have demonstrated again and again their commitment to the life affirming qualities of tolerance,
justice and peace which have been enshrined in the interim constitution. We believe they have done so because they understand the value of life and not because they wish to wantonly destroy it.

We believe that it is neither acceptable or proper for the State to attempt to intervene in this difficult decision making process and make the decision on behalf of the woman, except in those instances where abortion will result in the birth of a viable child.

We would propose that the clause in the constitution dealing with the right to life be elaborated along the lines 'The right to life shall not derogate from a woman's right to have an abortion.'
The National Association of Democratic Lawyers Gender Desk, Cape Town, hereby submits for consideration various proposed amendments to sections of the interim constitution (Constitution Act, 1993), which deal with the notion of equality.

Our purpose, in proposing amendments to the interim constitution, is to ensure that the courts which deal with constitutional matters interpret the notion of equality in a substantive rather than a formal way. A substantive interpretation of the equality provision is the only way in which the position of women and other historically disadvantaged groups or persons may be ameliorated, to the extent that a Bill of Rights is ever effective in actually changing the status quo.

A substantive interpretation of equality contains within itself notions of anti-discrimination and affirmative action, thus strictly speaking it should not be necessary to list these individually. However, we are of the view that in order to achieve a measure of equality between people, rather than merely to ensure identical treatment (which will surely only entrench the status quo), it needs to be spelt out in the equality provision that those aspects are included in such a wide notion of equality.

We therefore present our proposals for the wording of Section 8 of the Constitution, followed by a short memorandum of explanatory notes:

**EQUALITY**

8. (1) Every person shall have the right to equality, which includes the right to equal protection and benefit of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, social or economic status, disability, religion, conscience, belief, culture, or language.

(3) Equality includes measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

**LIMITATION**
33. (1) .... (bb) a right entrenched in section 8, 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity.

MEMORANDUM OF EXPLANATORY NOTES

Section 8(1) We feel that a generalised "right to equality" is necessary, since equality is intended to be one of the foundational rights of our Constitution. Also, if the equality provision is going to be wide enough to permit, for example, affirmative action programmes, without being internally contradictory, there should be a "right to equality", the content of which will be determined incrementally by judicial interpretation. A "right to equality" also permits the possibility of a degree of "horizontal" applicability of that right, whereas a mere procedural right to equal protection of the law fails to do so.

The inclusion of the phrase "equal benefit of the law", as in the Canadian Charter of Rights and Freedoms, ensures a substantive reading of the notion of equality, and obviates the danger of the notion of "equality" being conflated with that of "sameness", as in early United States constitutional jurisprudence.

We cannot foresee that "equality before the law" adds anything to the notion of procedural equality which is contained in the phrase "equal protection of the law", thus there is a need for one of those phrases only. We feel that "equal protection of the law" is the phrase which most clearly describes procedural equality.

Section 8(2) We support the inclusion of the category "social or economic status" in the list of enumerated grounds, as motivated by the Socio-economic Rights Lobby Group.

We also support the retention of the word "unfair", which qualifies "discrimination". While we recognise that this inclusion might detract from the pejorative force of the word "discrimination", we feel that it is necessary in order to distinguish not only between differentiation and discrimination but also between fair and unfair discrimination.

Section 8(3) We prefer a positive formulation of the affirmative action provision, to the negative formulation in the interim constitution. Also, since we have included a generalised right to "equality", our 8(3) is formulated as a guide to the interpretation of that right, rather than as an exception to equality. Treating people differently to achieve equality of outcome is as much a part of equality as treating people the same.
We have excluded the present section 8(3)(b), as it does not fit coherently into the equality provision, and does not add anything substantive to the notion of equality which section 8 seeks to formulate.

Section 8(4)  We support the formulation in the interim constitution, as it stands.

Section 33(bb)  Since equality is a foundational right in the interim constitution, any limitation on it should be subject to a standard of reasonableness, justifiability and necessity, so as not to undermine its special significance in the constitution. We read the exclusion of section 8 from the present list of rights which are subject to a stricter limitation test as being based on a fear that state affirmative action programmes will be challenged by historical oppressors, as happened in the United States. We share this concern, thus we have included section 8 in the strict limitation provision only in so far as it relates to political activity.

Section 33(4)  We wholeheartedly support the retention of this subsection in the final constitution.

General Notes: We attempted to formulate a provision which specifically acknowledged the disadvantaged position of women in society, rather than a neutral "gender, sex"-based criterion for constitutional protection. We realise that women are not the only group of persons which has been systematically discriminated against, but that is our particular interest. We found it ultimately too problematic to formulate such a provision, but it remains our concern that there is no acknowledgement in the Bill of Rights that women’s position in society is such that it is they who should benefit from state measures to achieve equality.