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THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE, THE PLANNING COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION. THE MINUTES ARE STILL TO BE RATIFIED BY THE AD HOC COMMITTEE.

DRAFT MINUTES OF THE MEETING OF THE AD HOC COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD ON TUESDAY, 12th OCTOBER 1993 AT 13h45 AT THE WORLD TRADE CENTRE, KEMPTON PARK

PRESENT: Mrs S Camerer (~~Co~~-Convenor)
Chief Gwadiso (Acting Convenor)
Prof H Cheadle
Mr A Leon
Mr P Maduna

MINUTES: Miriam Cleary (Administration)

ABSENT: Mr S G Mothibe

1. Notice of Meeting:

- 1.1 The meeting had been convened arising from the deliberations at the Negotiating Council meeting on 7th October 1993.
- 1.2 The meeting had been set for Monday, 11th October 1993, but due to flight delays caused through inclement weather, Chief Gwadiso had been unable to arrive in time for the meeting. The Ad Hoc Committee accepted Chief Gwadiso's apologies for the meeting having to be rescheduled.
- 1.3 Mr R K Sizani had been invited onto the Ad Hoc Committee. However he could not attend this meeting due to prior commitments and travel constraints.
- 1.4 Mr Leon wished it recorded that the Democratic Party had requested him to express their displeasure at the fact that it had been understood that the Ad Hoc Committee had been in agreement on certain issues and that any other formulation as proposed by the Chief would be opposed. Chief Gwadiso stated that he had intended the issue of Customary Law to be debated again in the Ad Hoc Committee before debating on it in the Negotiating Council.

2. Agenda:

The following clauses were to be debated with a view to reaching agreement and the Technical Committee would be requested to reformulate where necessary:

- 2.1 Clause 32 - Customary Law
- 2.2 Clause 8(2) and 8(3)
- 2.3 Clause 15(2)
- 2.4 Clause 33 - Education (possible addition of 33(d))
- 2.5 Clause 28 - Property

3. Clause 32 - Customary Law:

- 3.1 Chief Gwadiso stated the concerns of the Traditional Leaders, especially with the Equality Clause (8) and the fact that they wished the Customary Law Clause to be linked with Clause 31 - Language and Culture instead of Clause 17 - Freedom of Association.

The Technical Committee would be requested to advise the Ad Hoc Committee on the implications of substituting Clause 31 for Clause 17 or including a reference to both.

- 3.2 Chief Gwadiso presented a draft formulation - Customary Law and Practices (Addendum "A"). This was discussed at great length with the various pitfalls explained by Professor Cheadle, e.g. the word "practices".

Subclause 32(2) of this draft was discussed at length and Chief Gwadiso agreed that there would be no problem if this subclause was omitted.

- 3.3 The Ad Hoc Committee redrafted the draft formulation (Addendum "B"). Chief Gwadiso would take this redraft back for consultation, but in the meantime it would be handed immediately to the Technical Committee for consideration from a drafting point of view.

4. Clause 8 - Equality:

4.1 Mrs Camerer stated that in subclause 8(2) the phrase "sexual orientation" was of great concern to Minister Coetsee as he was worried that this might in some way "protect" paedophiles and bestiality. He was not convinced that the Limitations Clause would cover this concern. Professor Cheadle explained at length the link between this subclause and 34(1)(a)(ii) and stated that no court of law could ever condone or protect anyone accused of paedophilia on that basis.

Mrs Camerer requested that the following phrase for inclusion in Clause 34: "in accordance with the current norms of society". It was agreed to submit this to the Technical Committee for consideration.

4.2 Subclause 8(3) - once again discussion ensued regarding "reasonable" to be inserted before "measures" or alternatively "reasonably" before "designed". After some discussion it was noted that the Negotiating Council had agreed upon and accepted this subclause without the word "reasonable".

5. Clause 15 - Freedom of Expression:

Mrs Camerer stated that Minister Coetsee had requested at the Negotiating Council meeting that subclause (2) have the words "impartiality and objectivity" included. The Technical Committee had been requested to consider this and had indicated that the inclusion of "impartiality" had been agreed to.

6. Clause 33 - Education:

A request had been tabled by Mr L Wessels at the Negotiating Council meeting for an additional subclause as follows:

"(d) subject to section 8(3) to equal State financial assistance in the exercise of his or her rights in terms of this clause."

It was agreed in the Ad Hoc committee that this point was covered in the Equality Clause - specifically by 8(2). Mrs Camerer agreed to take this back to principals for confirmation.

7. Clause 28 - Property:

(Chief Gwadiso acted as Convenor for this section of the discussions.)

- 7.1 Reference was made to the submission and reservations, especially paragraph 14, made by the General Council of the Bar of South Africa (Addendum "C").
- 7.2 Mrs Camerer stated that there were problems with the whole Property Clause as follows:
- 7.2.1 The rights of ownership set out in the clause referred not only to land but to shares, jewellery, coins, money, etc. These rights should be provided in a Bill of Rights.
- 7.2.2 The right to restoration of land was a separate issue and should be dealt with in a separate clause.
- 7.2.3 There was a request that the words "market value and all other" be inserted before the words "relevant factors" in subclause (2).
- 7.2.4 Subclause (3) should be removed from the property rights clause and be dealt with in a restoration of land clause. When the clause had included only subclauses (1), (2) and (3) it accorded with the principles agreed in the Committee and the subsequent addition of subclause (4) changed it completely.
- 7.2.5 The clause on property rights should be renamed as the present title "Property" caused confusion with "land"
- 7.3 Restoration of Land:
- 7.3.1 After lengthy discussion Mr Maduna stated that, if the separation of "restoration" from the Property Clause be agreed upon, the Restoration Clause should be set out as a substantive clause and be placed immediately under the Property Clause and it be stated that, when action was taken under the Restoration Clause, this would also be subject to Clause 28.

Professor Cheadle and Mr Maduna agreed that they would both have to consult on the question of a separate restoration clause as this might have to be as a result of a political settlement.

7.3.2 Mr Maduna also said there would be problems in overcoming the suspicions that would arise in the de-linking of Property and Restoration.

Another problem would be how to deal with the formulation of subclause (2).

7.3.3 Professor Cheadle stated that the intractable question was how to determine compensation and this might have to be left for a bilateral discussion.

7.4 Subclause (2):

7.4.1 Mr Maduna stated that he had also been requested to look into the phrase "just and equitable". Both Mr Leon and Chief Gwadiso stated that they would have great problems if this phrase was removed.

7.4.2 Professor Cheadle stated that there had been a request that the word "expeditious" be removed. Mr Leon stated that he would have a problem with this request.

7.5 A possible "policing clause" for addition to a separate property rights clause was discussed along the lines as set out in the Italian Bill of Rights and the following was suggested for consideration:

"Nothing in this Chapter shall preclude measures to regulate the use of property in the public interest."

The Technical Committee would be requested to consider this "policing clause".

It was agreed that the Ad Hoc Committee advise the Negotiating Council that they were still having problems with the Property Clause and request that debate on this be set aside for a later date.

8. Date of Next Meeting:

It was envisaged that one more Ad Hoc Committee meeting would have to take place one bilateral discussions had occurred but no date or time was set.

9. Closure:

9.1 The meeting closed at 17h00

6.2 Copies of these minutes would be faxed/delivered to each person of each Committee.

32 (1) Every person who:-

- (a) in pursuance of the right entrenched in section 31, belongs to a community which observes a system of customary law practices; or
- (b) of free and informed choice observes a system of customary law practices and/or associates with other persons observing such a system of ~~indigenous~~ ^{customary} law practices,

shall have the right to the recognition of such a system of customary law practices as the legal dispensation governing the internal affairs of such a community, and/or regulating his or her inter-personal relations with such other persons.

- (2) It shall be competent for a court of law applying a system of customary law practices as contemplated in subsection (1) and finding certain of its rules and practices to be in conflict with section 8, to determine, to the extent that its jurisdiction allows, and in consultation with the relevant community, conditions on and a time within which such rules and practices can be harmonised with section 8.
- (3) Nothing in this section shall preclude the enactment of measures designed to assist the development of a system of customary law practices in accordance with the values embodied in the provisions of this Chapter.

conformity & harmonise

CUSTOMARY LAW

32 (1) Every person who -

- (a) in pursuance of the rights entrenched in sections 17 and 31 belongs to a community which observes a system of customary law; or
- (b) of free and informed choice observes the rules of a system of customary law and associates with other persons observing such a system of customary law

shall have the right to the recognition of such a system of customary law as the legal dispensation governing the internal affairs of the community mentioned in paragraph (a) or regulating his or her inter-personal relation mentioned in paragraph (b) as the case may be.

(2) Nothing in this section shall preclude the enactment of measures designed to assist the development of a system of customary law practices in accordance with the values embodied in the provisions of this Chapter.

**GENERAL COUNCIL OF THE BAR
OF
SOUTH AFRICA**

**COMMENT ON THE TENTH PROGRESS
REPORT (DATED 5 OCTOBER 1993)**

OF

**THE TECHNICAL COMMITTEE ON FUNDAMENTAL
RIGHTS**

DURING THE TRANSITION

INTRODUCTION

1. The General Council of the Bar submitted a memorandum on the Seventh Progress Report of the Technical Committee on Fundamental Rights During the Transition. The present submissions, like those previously made, have been compiled on behalf of the General Council of the Bar under the direction of the chairman. On this occasion, contributions from advocates E Cameron and G J Marcus have been taken into account.

2. The report presently under consideration is dated 5 October 1993. It became available to the Bar on Thursday 7 October. These submissions had to be made at the latest by Monday morning 11 October. As in the case of our previous submissions, we record our regret at the haste under which our comments have had to be prepared.

3. These submissions are compiled in the recognition that the committee's Tenth Progress Report appears in not insubstantial measure, to have taken into consideration submissions in our previous memorandum. In general, we therefore refrain in this memorandum, from repeating the views we earlier expressed, even where they were either disregarded or in our view insufficiently taken into account. We repeat our earlier submissions only where they appear to us to be of central significance to the task the committee attempted to address - that of constitutional regulation under law.

APPLICATION OF THE CHAPTER: CLAUSE 7(2)

4. We noted in our previous memorandum that the chapter on Fundamental Rights is made applicable only to administrative decisions taken during the period of operation of the chapter. The addition in the latest draft, of the words 'or acts performed' does not meet the complaint.

5. We repeat that in our view there can be no justification for the exclusion of administrative decisions taken (or acts performed) before the chapter comes into operation, from constitutional scrutiny. It is, after all, the current efficacy and implications of those acts which will be subjected to constitutional challenge. A uniform standard of administrative constitutionality should apply, regardless of when the decision was taken or the act performed.

ACCESS TO INFORMATION: CLAUSE 23

6. This clause entitles the citizen only to such information as is 'required for the protection or exercise of any of his or her rights'. Although some limitation is understandable, this one is unduly onerous because it imposes an onus on the person seeking information, to prove that it is 'required' for the protection or exercise of a right. This will often be impossible to do, precisely because the citizen is denied access to the very information he or she requires to prove the point.

7. Citizens should moreover be entitled as of right, to all information held by the State relating specifically to the subject himself or herself. There is no justification for the limitation of the citizen's access to such information. This can be achieved by amending the clause to entitle the citizen 'to all information... insofar as such information concerns himself or herself or is required for the protection or exercise of his or her rights'.

ADMINISTRATIVE JUSTICE: CLAUSE 24

8. The present clause has been substantially redrafted. The formulation and the content however remain unacceptable. We infer from the ungrammatical 'is' in sub-clauses (a) and (b) and the incongruent 'action' and 'such actions' in sub-clause (c), that the clause was prepared in extreme haste. Whatever the cause, the product is in our submission not appropriate for inclusion in a constitution.
9. We repeat that a right to 'lawful administrative action' is devoid of meaning. It goes without saying that every person is entitled to "lawful administrative action".
10. We further suggest that the formulation 'rights or interests' be retained throughout (and thus that the substitution of 'legitimate expectations' in relation to the requirement of procedural fairness in sub-clause (b) be removed).

11. But the kernel issue remains the committee's failure to recognise a right to reasonable administrative decisions. We fail to understand why it should be so important to preserve for government, the freedom to act unreasonably to the detriment of the subject. We find ourselves unable to appreciate what conceivable justification there could be for this position. 'Unreasonableness' has a well defined and somewhat narrow meaning in administrative law. It requires proof of an absence of rational warrant, before the administrative decision can be overturned. To require that the administration make only 'reasonable' decisions, will in our view therefore not act as an undue restraint on governmental decision-making.

12. The inclusion of this ground would also bring our administrative law in line with modern systems throughout the world, and would accord with the recommendations of the South African Law Commission in its Working Paper 15 of August 1986.

PROPERTY: CLAUSE 28

13. Sub-clause (4) is appreciably clearer and more precise than its predecessor. But we point out that the width of the provision's wording appears to confer a right to restoration or compensation or other remedy, not only on the victims of discrimination but also on those who might have benefitted from it. It might for instance include a white farmer whose land may have been expropriated for black urban or rural development, but who received full and adequate compensation. This is because (a) the words 'any racially discriminatory policy' do not specify that only the victims of that policy are envisaged in the restoration provision and (b) the clause does not say that compensation received for the dispossession suffered, must be taken into account in assessing the relief granted to the dispossessed.

14. Sub-clause (4) should be redrafted along the lines of clause 8(3) (affirmative action) so that it does not itself confer rights, but provides merely that nothing in the clause shall preclude parliament from making provision for the restoration of rights in land as stipulated. The legislation itself can then, in conformity with the proviso and the other directions in the sub-clause, limit its benefits to the properly intended beneficiaries.

LIMITATION: CLAUSE 34

15. This is the most important provision of the chapter. It qualifies every other provision. It defines the extent to which it would be open to government to derogate from every other right entrenched in the chapter. Its provisions are accordingly vitally important.
16. The loophole created by the clause should at least be tightened by requiring in subclause 34(1)(a)(ii) that the limitation be 'demonstrably justified', rather than merely 'justifiable', in an open and democratic society based on freedom and equality.

SUSPENSION AND DETENTION WITHOUT TRIAL: CLAUSE 35

17. We restate our implacable opposition to any form of detention without trial.
18. We note that the committee has even failed to include an express limitation on the maximum permissible period of detention without trial. We consider that the absence of an expressly stated limit is inexcusable.

INTERPRETATION: CLAUSE 36

19. We would point out, regarding sub-clause (2), that a constitutional presumption of validity is quite different from a constitutional enactment specifying a level of scrutiny, and that the conjunction of these two disparate issues is inappropriate. The matter could be remedied simply by constituting the proviso a separate sub-clause.

20. Regarding the proviso, we submit that the chapter's equality provision (clause 8) should be included in the first category requiring strict scrutiny. Its omission, given that the the equality guarantee is fundamental to the whole notion of constitutional protection in 'an open and democratic society based on freedom and equality', appears to be insupportable.

21. Sub-paragraph (b) of the proviso requires strict scrutiny only insofar as the rights concerned relate to 'free and fair political activity'. The limitation is not warranted. We appreciate that the interim constitution is designed merely to provide for the transition, but we suggest that strict scrutiny should be applicable to derogations from all rights relating to expression, assembly, association and movement, rather than only when political activity is in issue.

WIM TRENGOVE SC
CHAIRMAN

Chambers
JOHANNESBURG
Monday 11 October 1993