

2/21/6/11

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
ADHOC COMMITTEE ON
PUBLIC ADMINISTRATION**

**MULTILATERAL DISCUSSION
(PUBLIC ADMINISTRATION)**

**WEDNESDAY
20 MARCH 1996
(14:00-15:00)
E216**

DOCUMENTATION

TABLE OF CONTENTS

1.	Notice of meeting and agenda	Page 1
2.	Notes of the meeting of the CC Ad hoc Committee on Public Administration held on 18 March 1995.	Pages 2-7
3.	Memorandum dated 20 March 1996 on the implications of Chapter 12 by the Panellists	Pages 8-13

CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE ADHOC COMMITTEE ON PUBLIC ADMINISTRATION

Please note that a meeting of the above Adhoc Committee will be held as indicated below:

Date : 20 March 1995
Time : 14:00-15:00
venue : E216

AGENDA

1. Opening and Welcome
2. Report by the Panellists on:
 - 2.1 The meaning and import of the phrase "other sources of public money"; and
 - 2.2 Suitable name for the Public Administration Commission.
3. Consideration of alternative formulations on s172(2)
4. AOB
5. Closure

HASSEN EBRAHIM
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CONSTITUTIONAL ASSEMBLY

MINUTES OF THE MEETING OF THE CONSTITUTIONAL COMMITTEE AD HOC COMMITTEE ON PUBLIC ADMINISTRATION

MONDAY, 18 MARCH 1996

PRESENT

Vadi, I (Chairperson)

De Beer, SJ
Jordaan, JA
Love, JY
Mokitlane, MC

N Nyoka, M Erasmus, Z Jacob, J Kruger, M Sedibe-Ncholo and J van der Westhuizen were in attendance.

1. OPENING AND WELCOME

Mr Vadi opened the meeting at 14h30 and welcomed members.

2. IMPLICATIONS OF CHAPTER 12 OF THE WORKING DRAFT

- 2.1 Mr Vadi requested the panellists to lead the discussion on the content of the Panellists' memorandum entitled "The implications of Chapter 12". Prof J Kruger spoke to this memorandum. The memorandum is annexed hereto and marked "A" ("the document").
- 2.2 Following Professor Kruger's presentation a discussion ensued and the following questions were raised respecting the provisions of Chapter 12 of the Working Draft:
- 2.2.1 Is it the intention that s171(1) should apply to institutions at a level of government? And what is meaning of the phrase "institutions that are dependent on government funds or other sources of public money"?
- 2.2.2 Is the intention that the Public Administration Commission (PAC), referred to in s172(2), should be responsible for safeguarding the promotion of the basic values and principles contained in s171(1) in institutions, such as Universities, dependent on government funds, other than the Public Service?

2.3 Replying to the above concerns, the respective backgrounds of ss171(1) and 172(2) were explained as follows:

2.3.1 S171(1) is intended to cover all institutions that are:

- (a) dependent on government funds for their operation costs;
- (b) conduct their business on the basis of guarantees furnished by the Government.

It was further explained that the main rationale behind s171(1) is to ensure that all institutions which derive their funds from the fiscus adhere to the basic values and principles enumerated in s171(1).

2.3.2

The PAC, referred to in s172(2), is not intended to prescribe the day to day management of any institution, including the Public Service; nor has it have been the intention that Universities should fall under the aegis of the PAC. Different views were, however, expressed as to whether s172(2), as presently couched captures the spirit of the deliberations in Theme Committee 6.1. The DP and NP's view, on the one hand, is that this section should spell out in no ambiguous terms that the PAC's responsibility is solely the Public Service. The ANC's view, on the other, is that the length and breadth of the PAC's tentacles should be determined by legislation and for this reason supports the formulation in the Working Draft.

2.4 After a lengthy discussion, it was agreed that:

2.4.1 The basic values and principles enshrined in s171(1) should apply to Public Administration at all levels of government, including the administration of institutions that are dependent on government funds or "other sources of public money";

2.4.2 The Panel of Constitutional Experts should-

- i. investigate, and report to the Ad hoc Committee, the meaning and import of the phrase "other sources of public money";*
- ii. prepare two different formulations reflecting the sentiments expressed by the DP and NP, on the one hand, and the ANC on the other, as outlined in Paragraph 2.3.2 above, with regard to the PAC; and*

iii. propose an alternative name to the PAC for consideration by the Ad hoc Committee.

3. INPUT BY THE COMMITTEE OF UNIVERSITY PRINCIPALS (CUP)

Mr de Beer proposed that a consultation with the CUP be arranged. The decision on this proposal has been deferred to the next meeting.

4. APPOINTMENTS ON POLICY CONSIDERATION.

Mr de Beer proposed that s172(2) of the Working Draft be amended in accordance with the proposal of Panellist contained in paragraph 10 of the Panellists' document. The decision on this matter has also been deferred to the next meeting.

5. DATE OF NEXT MEETING

DATE : 20 March 1996
TIME : 14h00 - 15h00
VENUE : E216

6. CLOSURE

The meeting rose at 16h20.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA
DATE: 14 MARCH 1996
RE: THE IMPLICATIONS OF CHAPTER 12

1. The Panel was requested to render advice on the reformulation of clauses 171, 172 and 173 in order to avoid their (possible) misapplication, particularly by subjecting the management, internal administration and financial and human resources administration of certain institutions to direct or indirect government control. The institutions referred to, in terms of the reference to the Panel, include parastatal institutions, organs of civil society, tertiary educational institutions as well as statutory bodies normally not classified as belonging to or associated with the civil service.
2. The Panel has come to the conclusion that Chapter 12, and particularly clauses 171(1) and 172(2), may be interpreted to mean that all the institutions mentioned in paragraph 1 will be susceptible to direct or indirect government (state) control, pertaining to their internal administration, and financial and human resources management.
3. Whether it is the intention that such institutions may be subjected to government (state) control, is a matter for policy decision and we express no opinion in that regard. Any substantive redrafting of clauses 171 and/or 172 is dependent on further instructions in this regard.
4. The precise ambit of S. 171(1) is not clear from the draft. For instance - is it intended to cover only institutions at a 'level of government' and what is 'institutions dependent on other sources of public money' intended to cover? Does it cover any money donated by or coming from the public e.g. money donated by congregation members or money invested by the public in companies noted on the stock exchange? Answers to these questions (and refinement to the draft) are essential if the questions put to us are to be satisfactorily amended.
5. It is the agreed position that all the institutions mentioned in the reference to the Panel should apply the values and principles mentioned in clause 171(1), without unduly impinging on their autonomy. We do not consider it apt to analyze the notion of autonomy as it pertains to different institutions.

Suffice it to say that whether and to what extent the application of the principles and values mentioned in 171(1), by the institutions, would result in unduly impinging on their respective autonomies, depends on a variety of factors.

One example may suffice to illustrate the point. If it is accepted that in most democracies universities enjoy a unique autonomy compared to, for instance, parastatals or other statutory bodies, then content must first be given to the notion of "university autonomy" before it can be decided whether the application of the values and principles and/or the method of promoting them would result in undue impingement on such autonomy. From submissions by the public we have noticed that the Committee of University Principals has taken a particular position on the probable effect of Chapter 12 on university autonomy. If considered necessary, further inputs may be obtained from the CUP in that regard in order to ascertain what the possible effect of Chapter 12 on university autonomy might be.

6. It is advisable to differentiate between different types of institutions, taking into account differences in their nature and functions. (See the suggested addition to 171(3)).
7. As organs of civil society will be affected by Chapter 12 to the extent of them being dependent on government funds and public money, and depending on the question whether organs of civil society can by definition become part of the public administration, there is a possibility that Constitutional Principle XII will not be complied with.
8. The use of the words "dependent on" in clause 171 (1) may have the effect of narrowing the potential scope of application of the clause and the Chapter as a whole. It will be a factual issue as to when an institution could be said to be "dependent on" government funds or other sources of public money. On the other hand, the use of "dependent on" could create immense problems in order to ascertain whether an institution is in fact dependant on government funds or public money. When is an institution "dependent on" such sources; when it needs them for its mere existence, for its proper functioning, to pay its office rental or the whole or part of its staff, to run one or two of its many projects?
9. Regardless of a possible narrowing effect that might be ascribed to the words "dependent on", clause 171(1) has the overall effect that any institution which receives state funds or other public money to the extent that it is "dependent on" such funds, will by definition form part of the public administration.

10. Pending further instructions regarding the issues referred to above, the following provisional amendments are suggested:

clause 171(2):

"The appointment in the public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service".

This formulation purports to make it clear that:

- (i) legislation should not oblige institutions in the public administration or of civil society to make such appointments;
- (ii) legislation should not be necessary in order to permit organs of civil society to make such appointments;
- (iii) legislation should be necessary in order to make such appointments in the public service.

clause 171(3):

"Legislation regulating public administration **must** differentiate between different sectors, administrations or institutions in the public administration, **taking into account their nature and functions**"

add a new clause 173(4):

"Institutions of tertiary education are not part of the public service".

Depending on the policy decisions taken with regard to what was said in paragraph 3, this clause may become superfluous.

The contents of **clause 172(2)** may have to be revisited, depending on the policy decisions taken with regard to paragraph 3.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA
DATE: 20 MARCH 1996
RE: THE IMPLICATIONS OF CHAPTER 12 (SECOND MEMO)

1. This memorandum must be read in conjunction with the memorandum by the Panel, dated 14 March 1996.
2. The Panel has received additional instructions from the multi-lateral held on 18 March 1996 to draft alternative formulations which will encapsulate the different options discussed at the multi-lateral. As we understand the different options, they are based on the following points of departure:
 - (i) There is agreement that all institutions mentioned in the referral to the Panel, must be bound to apply the values and principles of clause 171(1) without unduly impinging on their autonomy.
 - (ii) There is a difference of opinion concerning **how** the institutions could be bound to the values and principles. The one option prefers the route as reflected by the current draft, while the other prefers the reference in clause 171(1) to "including the administration of institutions that are dependent on government funds or other sources of public money", to be deleted, and the principles to be made applicable through legislation.
 - (iii) There is a difference of opinion regarding the "control mechanism" currently reflected by clause 172(2). The one option prefers for 172(2) to remain intact, while the other prefers that the "control mechanism" currently established by 172(2) will apply to the public service only.
3. The reference to "public money" in addition to "government funds" in clause 171(1), gives rise to interpretational problems. As currently formulated, "public money" must be distinguished from and cannot be part of the notion of "government funds"; a different meaning must be ascribed to it. That being the position, it is uncertain what the notion of "public money" in addition to "government funds" entails.

4. It seems as if both the problem relating to "public money" and the problem relating to the ambit of 171(1) could be addressed by dividing the first part of clause 171(1) into two subclauses as follows:

"171 (1) Public administration includes administration at all levels of government and the administration of institutions that are dependent on government financial support.¹

(2) Public administration must be governed by the democratic values and principles enshrined ..."etc.

The suggested amendment obviously only applies to option 1, and the alternative formulation of clause 171(1) in option 2.

5. It seems as if the PAC may be renamed "Commission for Effective Administration" to satisfactorily capture the thrust of option 1, and "Commission for Effective Government" to satisfactorily capture the thrust of option 2

6. For the purposes of redrafting option 1 we have assumed:

- that the redrafted clauses 171(2) and 171(3) as are contained in our memo of 14 March 1996, are acceptable to the proponents of this option;
- that clause 172(2) will provide the "control mechanism" over all institutions which may be affected by clause 171(1); and
- that clause 171(1) is not intended to apply to organs of civil society which do not receive government money.

Option 1:

171 (1) Public administration includes administration at all levels of government and the administration of institutions that are dependent on government financial support.

(2) Public administration must be governed by the democratic values and principles enshrined ..."etc.

¹ There is some uncertainty as to what should fall under the notion of "Government financial support" (or any other notion that is used in this regard) e.g Government guarantees, levies charged by parastatals, etc. The exact phrase and the implications it is intended to convey, needs further considerations.

(3) The appointment in the public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(4) Legislation regulating public administration must differentiate between different sectors, taking into account their nature and functions.

Note: Through clause 171(4) the amended version requires legislation to be sensitive to the differences among parastatals, statutory bodies and NGOs taking into account their "nature and functions".

172: Stays intact except that consideration may be given to renaming it "Commission for Effective Administration" be substituted for PAC.

173: Stays intact. The addition of 173(4) as suggested by the Panel in our memo of 14 March 1996 seems to be unnecessary.

Option 2:

Note: The Panel is not certain of the extent to which certain concerns raised at the ad hoc meeting on Public Administration were incorporated in its mandate regarding option 2. We have included them in the option to suggest how they may be accommodated, if this is desired.

(a) **171(1):** delete the words "including the administration of institutions that are dependent on government funds or public money" or the words "and the administration of institutions that are dependent on government money", if the formulation suggested by the Panel is followed.

or

(b) if the words referred to above remain part of the text, then add a new clause 173A:

"173A (a) Institutions of tertiary education are excluded from the public administration.

(b) National legislation may provide that the values and principles of section 171(1) (or 171(2) of the amended version), or similar values and principles, apply to institutions of tertiary education and other institutions that are dependent on government financial support to the extent that

the nature and functions of those institutions permit."

re 171(2): Move to the clause dealing with the public service (currently clause 173) and substitute "the public service" for "the public administration".²

re 171(3): Leave in amended form as suggested by the Panel (memo 14 March 1996). The amended version requires legislation to be sensitive to the differences among parastatals, statutory bodies and NGO by taking into account their 'nature and functions'.

Add 171(5) (if 171(1) option (a) applies):

National legislation may provide that the values and principles of section 171(1) (or (2)), or similar values and principles, apply to institutions dependent on government financial support to the extent that the nature and functions of those institutions permit.

re 172(2): Switch clause 172 and 173 around. Insert "as they pertain to the public service" between the words "administration" and "as".

The redrafted option 2 would then read as follows;³

Basic values and principles governing public administration

"171(1): Public administration includes administration at all levels of government"

or

"171(1): Public administration includes administration at all levels of government and the administration of institutions that are dependent on government financial support" (to be read together with 173A).

171(2): (the same as option 1)

² The Panel suggests that moving this clause is unwise, as it is directly related to the application of the principles.

³ This option assumes that the proposals by the Panel relating to 171(2) and (3) in their previous memo, are acceptable.

171(3): Legislation regulating public administration must differentiate between different sectors, administrations or institutions in the public administration, taking into account their nature and functions".

Add 171(5) (if 171 option (a) applies):

National legislation may provide that the values and principles of section 171(1) (or (2)), or similar values and principles, apply to institutions dependent on government financial support to the extent that the nature and functions of those institutions permit.

The Public Service

172(1): formerly 173(1): stays intact
172(2): formerly 173(2): stays intact
172(3): formerly 173(3): stays intact
172(4): formerly 171(2) or (3): to read as follows:

"The appointment in the public service of a number of persons on policy considerations as regulated by national legislation is not precluded."

Commission for Effective Government

"173(1): There is a single Commission for Effective Government for the Republic, which is independent and must be impartial and regulated by national legislation. Each of the provinces may nominate a representative to be appointed to the Commission.

173(2): The object of the Commission for Effective Government is to promote the basic values and principles of public administration as they pertain to the public service, as prescribed by national legislation.

173(3): formerly 172(3): stays intact (change of name)

173(4): formerly 172(4): stays intact (change of name)

Exclusion of Tertiary Institutions

(To apply when the alternative wording of clause 171(1) of option 2 is preferred)

"173A: (a) Institutions of tertiary education are excluded from the public administration.

- (b) National legislation may provide that the values and principles of section 171(2), or similar values and principles, apply to institutions of tertiary education and other institutions that are dependent on government financial support to the extent that the nature and functions of those institutions permit."

