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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
26 MARCH 1996**

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DRAFT REPORT

**CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING
TUESDAY 26 MARCH 1996**

1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 16h40.
- 1.2 The following documentation was tabled:

*CC Sub-committee Documentation Tuesday 26 March 1996
Refined Working Draft 4th Edition*

2. CHAPTER 13: SECURITY SERVICES

- 2.1 Ms Schreiner spoke to the document "*Draft-22 March 1996, Chapter 13: Security Services*" contained in the documentation and reported that this was a revised draft arising out of proposals from a multi-lateral discussion.

2.2 Section 174

- 2.2.1 The meeting agreed to Section 174 and noted that the issue of mercenaries which was raised in Footnote 1 might need further consideration.
- 2.2.2 The NP stated that it was not suggesting that mercenaries be addressed but if the matter was dealt with it might not be in this chapter but might be considered under Section 3 dealing with citizenship.
- 2.2.3 The DP expressed concern about the "ring" of Section 174(a) and asked whether the Technical Refinement Team could ensure that this section did not conflict with the wording in the Founding Provisions, the State's Duties in the Bill of Rights and the Preamble.

2.3 Section 175

- 2.3.1 The meeting agreed to this section.
- 2.3.2 Ms Schreiner reported that apart from stating explicitly in Section 175(1) that it is a "single" police service and apart from the division of the old Section 175(2) into Sections 175(2) and (3), the clause

remained unchanged.

2.4 Section 176

2.4.1 The meeting agreed to Section 176 which had remained unchanged.

2.5 Section 177

2.5.1 The meeting noted the amendments to Section 177(2) with the addition of the words in bold "**as regulated by national legislation**".

2.5.2 The ANC proposed that Section 177(2), Section 181(2) and 185(a) which all related to the question of oversight by multi-party committees of Parliament should be rationalised into one subsection under Section 175 (Establishment, structuring and conduct of security services) along the following lines:

"There shall be parliamentary oversight of the security services as determined in national law and/or the rules of Parliament."

2.5.3 The meeting agreed that the Technical Refinement Team should consider how these three sections could be rationalised into one section as proposed by the ANC.

2.6 Section 178

2.6.1 Ms Schreiner reported that Section 178(1) had been substantially changed to allow for flexibility in terms of the command of the defence force and that Section 178(2) had accordingly been reworded in line with the amendments to Section 178(1).

2.6.2 Gen Viljoen of the FF stated that if there was a single defence force there could only be one commander and proposed that the words "*or senior military officers*" should be deleted. He stressed that in the defence force there had to be a very clear-cut line of command. The system of joint chiefs of staff is a coordinating mechanism of different armed forces, not an operational command.

2.6.3 The ANC stated that the revised formulation provided flexibility and that a command could be a function that is not vested in one individual and that there could be joint chiefs of staff which did not deny the right to appoint a commander for a specific operation. The emphasis was not on "a commander" but on "to command". The ANC stated that the proposed amendments had been supported by the Ministry of Defence and the Defence Secretariat in their submissions.

- 2.6.4 The DP suggested that it appeared to be most desirable to have a senior military officer.
- 2.6.5 The NP stated that it had been persuaded by the submissions to include the alternative provisions in the draft but had assumed that during a state of war it would be a single military officer in command.
- 2.6.6 The meeting agreed that the parties would "sleep on the matter" and that it would be revisited.

2.7 Regarding Footnote 2,

- 2.7.1 The NP suggested that the designation of the President as Commander in Chief in Section 77(b) was anachronistic and sentimental and should be deleted.
- 2.7.2 The ANC stated that it had revisited the matter and felt that it was important that this provision be retained in the chapter dealing with the National Executive. The ANC proposed the provision that the President should be the Commander in Chief of the Defence Force should be re-included in Section 78 which deals with the powers and functions of the President. The reasons for inclusion of this provision were firstly, because it is the President who appoints military officers and that this was not a political role, but he did so as Commander in Chief and it was therefore essential to have a clear military line of command. Secondly, the conferring of commissions has to be done by someone acting in a military capacity and it is the President as Commander in Chief who would perform this role.
- 2.7.3 The NP disagreed, stating that the President appoints military officers after consultation with the Cabinet, as the political head of the country.
- 2.7.4 The FF agreed with the ANC that the President should be in supreme command.
- 2.7.5 The DP stated that the practical arguments are valid but were not certain about whether they would be legally valid.

2.8 Regarding Footnote 3

- 2.8.1 The Panel of Experts drew the meeting's attention to Footnote 3 dealing with proposed additions to Section 78 and to the fact that these should be considered together with the proposals relating to the states of emergency (Section 36) in the Bill of Rights and noted that this entire matter and the interrelationship between these sections

was still under discussion. The Panel suggested that once a decision had been taken on Section 36 it would become clearer what the powers of the President should be.

- 2.8.2 Ms Schreiner stated that those CA members dealing with Chapter 5 have also been debating this same issue and that those dealing with the Security Services were raising issues to be fed into those debates.
- 2.8.3 The DP stated that in all of these functions, the President is acting as head of the National Executive. Mr Eglin asked the Experts to consider that if there was a dispute involving the head of the defence force in a constitutional matter, in those circumstances the court may rule that the President as Commander in Chief would have extraordinary powers but other than that has no function other than to be a unifying factor.
- 2.8.4 The Panel pointed out that every reference to the President is to the President acting in consultation with Cabinet. The Panel further suggested that there would be more clarity when the section dealing with the States of Emergency was finalised.
- 2.8.5 The meeting agreed to this section but subject to further consideration once the section dealing with states of emergency had been finalised and subject to the Technical Refinement Team providing further clarification on the issue of the President as Commander in Chief. The Chairperson proposed that the Technical Refinement Team consider this in relation to Section 228 of the Interim Constitution dealing with accountability.
- 2.8.6 The meeting further agreed to the inclusion of the additional Sections 78(5) and 78(6) as proposed in Footnote 3 and agreed that the Technical Refinement Team should uplift these sections into the body of the draft in the Chapter dealing with the National Executive.

2.9 Section 179

- 2.9.1 The meeting agreed to Section 179.
- 2.9.2 Ms Schreiner reported that the words in bold were amendments which had been made to bring the wording of this section in line with the wording of Section 183 so that both sections refer to *"to exercise any powers and perform any functions"*.

2.10 Section 180

- 2.10.1 Regarding Section 180(1)

- i The meeting agreed to this section with the inclusion of the words in bold "*and, where necessary, local levels*" and agreed to the deletion of the words in brackets.
- ii The DP stated that if there was going to be local level policing, and if the words in brackets were included the phrase should be amended to read "*as set out in national and provincial legislation*".

2.10.2 Regarding Section 180(2)

- i The DP expressed concern about the limited power of provincial executives and proposed the insertion of the words "*taking into account the requirements of the provinces*" in order to strengthen this section.
- ii The Chairperson pointed out that the question of provincial legislation and the competencies of provinces was still under discussion and proposed insertion of a footnote that this matter would be finalised when the question of competencies had been dealt with.
- iii The DP responded that because police was highlighted as part of a chapter in the Constitution, the power relationships that exist between different levels of policing needed to be spelt out in this chapter and should not only be dealt with in the chapter on competencies.
- iv The ANC expressed the view that the command relationships should not be included in detail in the Constitution but should be dealt with in national legislation.
- v The meeting agreed to the proposal by the Chairperson that a footnote should be inserted by the Technical Refinement Team that this matter would be finalised when the question of competencies had been dealt with.

2.10.3 Section 180(3)

The meeting agreed to this section.

2.11 Section 181

The meeting agreed that the Technical Refinement Team should rationalise Section 181(2) together with Section 177(2) and Section 185(a) into one section.

2.12 Section 182

2.12.1 The meeting noted the DP's proposals with regard to Section 182 as stated in Footnotes 7,8 and 9.

2.12.2 Regarding Section 182(4)

The meeting noted that Section 182(4) in the draft under discussion was the reformulation which had arisen from the opinion and proposed reformulation by the National Commissioner of Police Fivaz.

2.12.3 Regarding Section 182(5)

- i The NP stated that with regard to the police, there was one police force and one budget from which resources were allocated to the provinces by the national police commissioner. However it was necessary for the other levels of government to play a role and the draft had not succeeded in capturing the role of the provincial MEC. The NP suggested that in order to improve the formulation, the role of the provincial government should be clarified in Section 182(5).
- ii Adv Yacoob explained that there was a distinction between Sections 182(2) and (5) which dealt with political responsibility and Sections 182(3) and (4) which dealt with control and management.
- iii The DP expressed the view that Section 182(5) gave the provincial governments no effective control of any meaningful nature. The DP asked whether the new formulation of Section 182(5) gave more or less power or responsibilities to the provincial MEC than under the present constitution or whether this was merely formulated in another way.
- iv The ANC stated that it was important to look at the relationship between levels of government in the context of legislation and in the context of the mechanisms that are in place that ensure that MEC's participate in policy matters. The ANC proposed that the sections remain as they are and should not be looked at in isolation.

The ANC stated further that in terms of this draft an MEC would not have the same powers as under the

Interim Constitution but that this draft must be read together with the legislation which would define functions of the national and provincial commissioners. The ANC expressed the view that these details should be defined in legislation and not in the constitution as these were complex relations in an evolving situation.

- v The FF stated that if the powers of the provincial MEC were as stated in Section 182(5), the present Police Act might be unconstitutional, if it went further than what is contained in that provision.
- vi The NP referred to Sections 217 and 218 of the Interim Constitution dealing with the powers of the provinces, and stated that the provision in the present draft was an improved formulation.

2.12 Section 184

2.12.1 The meeting agreed to this section.

2.13 Section 185

2.13.1 The meeting agreed that the Technical Refinement Team should rationalise Section 185(a) with Section 177(2) and Section 181(2) into one composite section.

2.13.2 In response to the question from the Panel as to whether it was correct that Sections 185(a),(b) and (c) related to the Intelligence Services established by the President in terms of Section 184 and to the Intelligence divisions established by the police service and defence force, Ms Schreiner confirmed that this was the position.

2.14 The meeting agreed that it would not be necessary to deal with the Chapter on the Security Services at the retreat from the 1-3 April but that the TRT should provide the reformulations and the chapter would again be discussed at the Constitutional Committee meeting either on 4 or 15 April.

3. INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

3.1 The meeting agreed to defer discussion of this chapter.

4. ANY OTHER BUSINESS:

4.1 There was no other business.

5. CLOSURE

5.1 The meeting rose at 18h15.

