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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUBCOMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
10 OCTOBER 1995**

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DRAFT REPORT OF THE CONSTITUTIONAL COMMITTEE SUBCOMMITTEE

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DRAFT BILL OF RIGHTS

SECTION 4: LIFE

It was agreed to include three options:

1. option 2 in the draft bill of rights
2. option 4 in the draft bill of rights
3. the option proposed by the ACDP which combines options 3 and 4 in the draft bill of rights

SECTION 5: FREEDOM AND INTEGRITY OF THE PERSON

It was agreed that the Technical Advisers redraft by taking into account the ANC proposal and that it needs be considered where to accommodate the section.

The ANC proposed the following formulation:

"Every person has the right to bodily integrity which shall include, but not be limited to, the right to be free from all forms of violence from public and private sources and the right to security in and control over one's body."

It was noted that the DP suggested inclusion of the word "security" in subsec (1), and opposed the ANC proposal.

It was noted that the ACDP reserved their position.

SECTION 7: PRIVACY

It was noted that there had been broad agreement the previous day. Regarding the issue of legal persons referred to in subsec (2), it was agreed this would dealt with in Application Section. For the purpose of the Application Section it was agreed that the Technical Advisers draft a list indicating those rights having as bearers human beings only and those rights which clearly include as bearers legal persons. It was agreed that the in-between rights then be discussed by the meeting.

SECTION 18: PROPERTY

The meeting requested the Technical Committees of TC4 and TC6.3 to attempt to consolidate the options contained in the *Supplementary Report to the Draft Bill of Rights* and then noted for consideration their consolidation suggestion. It was agreed to defer debate and that the technical advisers redraft on the basis of this tentative understanding beginning to emerge:

Regarding subject (1), agreement on the third alternative:

- (1) **Property and the right of inheritance are guaranteed. Its content and limits may be determined by law. Property imposes duties. Its use should also serve the common good.**

Regarding subsection (2), it was generally accepted:

- (2) **No one may be deprived of property except in accordance with a law of general application.**

Regarding subsection (3), in 3(a) below the notion of "land reform" be included, and agreement on the second alternative in 3(b)(ii):

- (3) **Property may be expropriated in terms of a law of general application-**
 - (a) **for a public purpose or in the public interest; and**
 - (b) **subject to payment of compensation and a payment schedule which has been either -**
 - (i) **agreed, or**
 - (ii) **decided by a Court of Law to constitute an equitable balance between the public interest and the interests of those affected.**

Regarding subsec (4), agreement in the main and that when cleaning up the formulation there be included possible additional factors, including "property value", to place land reform without doubt:

- (4) **When any Court decides either the amount or the payment schedule of compensation in terms of sub-section (3)(b)(ii), the Court must consider all relevant factors, including, with respect to the amount of compensation -**
 - (a) **the current use of the property;**
 - (b) **the history of its acquisition; and**
 - (c) **its market value.**

Regarding subsec (5), agreement to deletion in its entirety.

Regarding subsec (6), the first alternative:

- (6) **Every person and community dispossessed of land after [insert decided date] as a result of any law or practice which would have**

been inconsistent with [the section of the Constitution which prohibits discrimination] had that section been in operation at the time of dispossession, shall be entitled to restitution of that land or alternative to equitably redress, in the matter described a the law.

Regarding subsec (7), two alternatives be drafted by the Technical Advisers.

It was noted that the PAC and several stakeholders submitted that there be no property clause.

It was also noted that the DP suggested inclusion of the word "arbitrarily" in subsec (2) above.

SUPPLEMENTARY REPORT TO DRAFT BILL OF RIGHTS: HOUSING AND LAND CLAUSE

It was agreed that the technical advisers redraft the Housing and Land Clause in the *Supplementary Report* by taking into account what was said on this issue below and to regroup this with other socio-economic rights:

Regarding sec (1):

There was general agreement that the technical advisers redraft on the basis of the second alternative:

Everyone in need has a right to reasonable and appropriate measures by the State -

- (a) to secure adequate housing; and
- (b) to obtain equitable access to land.

The DP registered reservation regarding the phrase "equitable access to land".

The NP preferred to include a qualification "subject to resources from the state on a non-discriminatory basis."

Regarding sec (2):

The DP expressed reservation about subsection (2)(b).

SECTION 20: HEALTH

It was agreed to regroup this with other socio-economic rights and that the technical advisers redraft taking into the ideas and reservations raised:

The ANC suggested (1)(b) read "reproductive health", the rest of the text in (1) (b) deleted.

The DP raised the question whether it was necessary to have "reproductive health" as a separate category.

The NP suggested use of the term "health care services"

The ACDP had reservation on the use of the term "reproductive health in (1)(b), but supported the term "health care services" broadly.

SECTION 21: SOCIAL ASSISTANCE, FOOD AND WATER

It was agreed to regroup this with other socio-economic rights.

SECTION 22: CHILDREN

It was agreed to reformulate by taking into account and refining the DP's proposal to add under (f) "without derogating from section 5 and 29". It was also agreed to add to subsec (b) to read "parental or family care".

The DP suggested subsec (c) be deleted.

SECTION 23: EDUCATION

It was agreed to regroup this with other socio-economic rights. It was agreed to adopt subsec (1). It was further agreed to use as a basis for further discussion a second option under subsec (2) the NP's proposal contained on p 5 of *Party Submissions: Socio-economic rights* which reads:

Every person shall have the right -

- (c) to educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race and, provided further, that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion.

The DP suggested that the NP's option be taken further by greater emphasis on multi-linguism.

SECTION 24: ACADEMIC FREEDOM

It was agreed the technical advisers retain as self-standing clause for present and reformulate applying their minds to the wording of the correctly translated Art 5(3) of the German Basic Law:

Art and science, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the Constitution.

SECTION 25: LANGUAGE AND CULTURE

It was agreed to retain option (1) for further consideration and that option (2) falls away for now.

The ANC suggested option two or alternatively sec 31 of the Interim Constitution.

The DP stated that the education clause may apply here.

The NP proposed retaining sec 31 of the Interim Constitution.

SECTION 26: ACCESS TO INFORMATION

It was noted that option 3 had been adopted the day before. It was agreed that the technical committee consider possible qualification of the right, taking into account the analyses of comparative law on p 197 of the *Explanatory Memorandum* and a suggestion that the Constitution instruct Parliament to pass a law providing access to information providing for limitation.

The ANC agreed to take further advice.

SECTION 27: ADMINISTRATIVE JUSTICE

It was agreed the technical advisers reformulate this as a single option, taking into account the following:

1. The DP's proposed formulation in their *Revised Submission on Administrative Justice* dated 19 September.
2. The NP proposed a combination of options 1 and 3 and favoured the phrase "administrative action."
3. The ANC's concerns with inclusion of the term "legitimate expectations" and particularly wide scope of the right. The ANC proposed a limitation such as "practicalities and the interests of good governance".

SECTION 29: DETAINED, ARRESTED AND ACCUSED PERSONS

Subsec (1)(e):

It was agreed to retain the brackets to allow the ANC to further consider the question of bail.

Subsecs (2)(b) and (c):

The erratum was noted that (2)(b) and (c) combine to read:

to choose and to consult with a legal practitioner and to have a legal practitioner provided at state expense if substantial injustice would

otherwise result [if the interests of justice required it], and to be informed of both of these rights in a language that the detained or imprisoned person understands

Subsecs (3)(b),(d),(i) and (m):

It was agreed to remove the brackets.

Subsec (5):

It was noted that the ANC reserved its position.

SECTION 30: LIMITATION OF RIGHTS

It was agreed to reformulate this by replacing the words in brackets in subsec (1)(a) with "reasonable and justifiable/necessary" for further debate. It was agreed to take into account the ANC proposal contained in *Additional Documentation: Party Submissions/Public Submissions* under Interpretation of the Bill of Rights replacing the related phrase in subsec (1)(a):

an equal, open and democratic society in which every citizen shall be enabled to enjoy the full range of rights and freedoms

The DP and NP proposed the words "reasonable and necessary" and retention of the words "freedom and equality".

The ACDP's concern that limitation factors be included in the section was noted.

With regard to a question of illimitable rights raised by the DP and NP, the Technical Advisors explained that the implication of making a right illimitable may lead to the courts restricting the scope of that right and that there could be no "reasonable" limitation of these rights. It was noted that the NP wished to reconsider the matter.

SECTION 31: STATES OF EMERGENCY

It was noted there was agreement in principle and that the formulation would be tidied up by the Technical Advisors by looking at the possibility of a general clause to cover aspects not specifically listed in subsec (4)(c).

FAMILY

It was noted that there was a proposal that for the consideration of notion of family in the bill of rights.

