

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 COMBINED MEETING OF THE AD HOC COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD AT 10h15 ON WEDNESDAY, 29th SEPTEMBER 1993 AT THE WORLD TRADE CENTRE

PRESENT: Ad Hoc Committee:

- Chief Gwadiso (Acting Convenor)
- Prof H Cheadle
- Mr A Leon (left meeting at 15h30)
- Mr P Maduna (left meeting at 11h15)

Technical Committee:

- Prof. L M du Plessis (Convenor)
- Prof. H M Corder (left meeting at 16h45)
- Mr G Grove
- Adv. Z Yacoob

MINUTES: Miriam Cleary (Administration)

APOLOGIES: Mrs S Camerer)
Mr S G Mothibe) Ad Hoc Committee

Mrs D S Nene - Technical Committee

1. Agenda:

It was agreed that no formal agenda would be followed as the nature of the meeting was such that this was not really required.

It was agreed that the meeting would refer to the minutes of the Ad Hoc Committee of both 20th and 28th September 1993 as well as the latest draft of the proposed Chapter. Each clause would be discussed and formulated as far as possible.

2. Amendment to Minutes of 28th September 1993:

- 2.1 There was an amendment to the minutes in item 3.3 where the second sentence should read as follows:

"It was agreed that the restoration of land clause should be drafted as a subclause (4) to clause 28, and the right made subject to the terms of subclauses (1), (2) and (3) of clause 28 as a whole."

3. Draft of Proposed Chapter 3 - General:

The latest draft was discussed with agreed amendments/additions shown in bold. [Where there is agreement with no changes to be made, or merely punctuation etc. to be attended to, those clauses are not referred to in the minutes]

- 3.1 In response to Chief Gwadiso's query why the Restoration of Land clause had not been formulated as requested, Prof. du Plessis said that this omission was due to a misunderstanding as the Technical Committee were under the impression that they had to await a decision from the Ad Hoc Committee as there had been some reservations and also to await a decision on whether it should be a separate clause or not.
- 3.2 Prof. Corder stated that one of the greatest difficulties had been that no one from the Technical Committee had been present at any of the Ad Hoc Committee meetings to know exactly what decisions had been taken and an opportunity given to discuss any decisions. He also felt that the minutes had at times been changed afterwards and thus not reflected the decisions taken.
- 3.3 It was agreed that the proposed amendments to clauses would be discussed with Minister Coetsee in such a manner that he would be in accord with the proposed reformulations. The Sub-Committee however, had said that any decisions resolved by this combined Ad Hoc and Technical Committee meeting should remain and not be changed.

The Technical Committee stated that they would reflect in their "Comments" on the various clauses that the decisions were made by the Ad Hoc Committee without a Government representative being present.

4 Application - Clause 7:

- 4.1 (1) "(a) bind the legislative and executive organs of the State at all levels of Government including all statutory bodies and functionaries;"

This new formulation was now in accord with the wording of the rest of the proposed Constitution.

- 4.2 (1)(b) Discussion ensued regarding making the Bill applicable through common law.

Horizontal or vertical application on this subclause (and the impact on certain other clauses) was still to be resolved. Mr Maduna said that this was being referred to another meeting and the decision would be advised as soon as possible. It was agreed that this subclause be left in abeyance pending the outcome of Mr Maduna's consultations.

- 4.3 (1)(c) Deletion as in draft. The "Comment" following would be omitted.

- 4.4 (2) It had been decided to retain the words "decisions taken and acts performed" only in this particular subclause (see amendment to Clause 24 below). Prof. Cheadle advised that if private law became subject to the Bill of Rights the plural "laws" would need to be considered.

- 4.5 (4) The Technical Committee on Constitutional Issues had used the word "violation" in their reports. It was strongly felt that the better word was "infringement" as used in 7(4)(a) and they would be requested to change this so that both their reports and this proposed Chapter are in accord.

- 4.6 (5) The "new" 7(5) as reflected in the draft, was agreed to.

5. Equality - Clause 8:

- 5.1 (3) After discussion on the words "reasonably designed" Mr Leon stated that he would have to take consultation on this and advise the outcome

at the next meeting.

It was agreed that the word "unfair" be inserted - the phrase would then read as follows: **"..disadvantaged by unfair discrimination .."**

- 5.2 (4) In the minutes of the meeting on 20th September 1993 it had been agreed that this subclause be totally deleted. After lengthy discussion it was agreed that the subclause be reinstated and reformulated as follows:

"(4) Notwithstanding section 36(4), prima facie proof of discrimination on the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination contemplated in subsection (2), until the contrary is established."

6. Freedom and Security of the Person - Clause 11:

After lengthy discussion regarding the deletion of the words after "security of the person" it was agreed that Mr Leon should consult on this and advise the outcome at the next meeting. It was generally agreed however, that this should be left for discussion by the Negotiating Council.

7. Freedom of Association - Clause 17:

Subclause 7(2) was part of the problem of horizontal and vertical application. If the decision was for vertical application only this subclause would be removed, and vice versa.

8. Political Rights - Clause 21:

In subclause 21(2) the word "enfranchised" would be deleted and the "Comment" accordingly amended.

9. Access to Information - Clause 23:

This formulation was amended as follows, subject to the outcome of the decision on horizontality or verticality:

"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 protection or exercise of any of his or her rights."

10. Administrative ~~Decisions~~ Justice - Clause 24:

It was agreed that this clause and its Comment required "sanitarising". Prof. du Plessis stated the Technical Committee's reasons for questioning the phrase "decisions and acts". After debate the word "action" was agreed upon. The title "Administrative Justice" was also agreed to.

11. Detained, Arrested and Accused Persons - Clause 25:

11.1 (1)(e) After discussion on compensation for unlawful detention it was agreed that Mr Leon could consult on this and advise the outcome at the next meeting.

11.2 (2)(c) This would be reformulated according to discussions.

12. Property - Clause 28:

12.1 Restoration of land would be formulated as subclause 28(4). However as Mr Maduna was not present, this reformulation would be held over for discussion at the next meeting.

12.2 Discussion with Minister Coetsee on restoration of land and the whole Property Clause would take place at the meeting on Thursday, 30th September 1993, in Pretoria.

13. **Customary Law - Clause 32:**

13.1 (1)(a) The word "**entrenched**" to be added after the words ".. of the right" and before "..in section 17..".

13.2 (2) The words "**to the extent that its jurisdiction allows**" to be added after the words "... to invoke" and before ".. the powers granted.."

This would refer to any court of law.

14. **Limitation - Clause 34:**

Discussion ensued regarding the rights that were illimitable. Mr Grove stated that, in his opinion, all rights are limitable with the exception of the right not to be tortured. Prof. Cheadle stated that by stating which rights were illimitable could be seriously problematical and strongly advised that subclause 34(2) be deleted.

It was agreed that no rights should be listed as illimitable, but that more rights should be added to the "strict scrutiny" provision in clause 36(4).

15. **Suspension - Clause 35:**

15.1 (2)(b) "**The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to be valid in law twenty-one days after such declaration, unless the declaration is extended for a further period of not more than three months, by a two thirds majority of the total number of the directly elected members of [the legislature] within the said twenty-one days.**"

15.2 (2)(c) The "six months" amended to "**three months**".

15.3 (2)(d) To be left unamended until decision reached regarding horizontal or vertical application of 7(1)(b).

15.4 A Comment would be included to read: **These alterations were made at the request of the Ad Hoc Committee.**

16. Interpretation - Clause 36:

- 16.1 After discussion it was agreed that subclause (1) would be reformulated by the Technical Committee with the words "competent" and "may" being deleted.
- 16.2 Subclauses (2) and (3): Changes to these were subject to the outcome of the decision of either horizontal or vertical application and the Technical Committee would consider these in their relation to subclause 7(5).
- 16.2 Subclause (4): The word "construed" to be substituted by "**scrutinised**".
- 16.3 (4)(b) "**Sections 12 and 25** to be included but the Technical Committee would reformulate in the light of the discussions with the Ad Hoc Committee.

17. Next Meetings:

- 17.1 The Ad Hoc Committee would be meeting with Minister Coetsee on Thursday, 30th September 1993, from 15h00 to 17h00 in the Presidia Building, Pretoria.
- 17.2 The Technical Committee would meet from 09h00 at the World Trade Centre on Friday, 1st October 1993 in order to finalise their Tenth Report.
- 17.3 A combined meeting would take place at the World Trade Centre on Friday, 1st October 1993, at 11h30 to discuss the outstanding issues in an attempt to finalise the Tenth Report.

18. Closure:

- 18.1 The meeting closed at 17h30.
- 18.2 Copies of these minutes would be faxed/delivered to each person of each Committee.