

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, 2nd NOVEMBER 1993 AT 14h45 AT THE WORLD TRADE CENTRE, KEMPTON PARK**

**PRESENT:** Mrs S Camerer (Convenor)  
Prof H Cheadle  
Mr A Leon  
Mr P Maduna

**MINUTES:** Miriam Cleary (Administration)

**APOLOGIES:** Chief G Gwadiso  
Mr R K Sizani

**ABSENT:** Mr S G Mothibe

**1. Apologies:**

- 1.1 Chief Gwadiso had advised that he had to attend a meeting of the Traditional Leaders scheduled for the same time as the Ad Hoc Committee meeting and he could only attend this meeting once the meeting of the Traditional Leaders had ended.
- 1.2 Mr Sizani was unavailable and no one from his Party was able to represent him.

**2. Agenda:**

The following would be discussed:

- 2.1 Clause 32 - Customary Law
- 2.2 Clause 8(2) and 8(3) - Equality

- 2.3 Clause 15(2) - Freedom of Expression
- 2.4 Clause 27(c) - Labour Relations
- 2.5 Clause 28 - Property Rights Clause

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

- 3.1 The ANC proposed and both the Government and DP agreed, that, as this clause was not a "rights" issue it should be removed and dealt with in the Constitution.

It was noted that the role of customary law and the rights, powers and functions of Traditional Leaders should rather be dealt with in the Constitution and Clause 32 should therefore be deleted from the Bill of Rights.

- 3.2 It was noted that there was agreement between the S A Government and the ANC that the following subclause be in the Constitution. The S A Government's suggestion was that it be included in the Bill of rights as Clause 22(2):

22(2) "Without derogating from the provisions of the Chapter on Fundamental Rights in this Constitution, the parties to a dispute may agree to the application of a system of customary law for the purpose of settling their disputes."

The Ad Hoc Committee agreed that the Technical Committee should be requested to consider the question of where this clause would be appropriately included.

Professor Cheadle suggested, and it was agreed that any final decision by the Ad Hoc Committee should await the decisions of the Negotiating Council on the role of Traditional Leaders.

**4. Clause 8 - Equality:**

- 4.1 The Ad Hoc Committee noted that subclause 8(2) including the phrase "sexual

orientation" had been referred to the Technical Committee for finalising. (Point 4.1 of the minutes of 12th October 1993). **The Technical Committee to advise whether or not** the Limitations Clause 34(1) would adequately cover the fears discussed in previous Ad Hoc Committee meetings.

- 4.2 In order to accommodate the concerns expressed by both Mrs Camerer and Mr Leon about "reasonable measures" in subclause 8(3), an alternative was proposed by rendering subclause 8(3) subject to section 34(1)(a). The Ad Hoc Committee would request the Technical Committee to look at this. Mr Leon stated that, in his opinion, this was not an advance in any one way or another.

**5. Clause 15 - Freedom of Expression:**

The Ad Hoc Committee noted that, in subclause 15(2), it had been agreed to include the word "impartial" before the word "expression". **The Technical Committee had been requested to amend the clause accordingly.**

**6. Clause 27 - Labour Relations:**

Regarding subclause 27(3) Mr Leon reminded the Ad Hoc Committee and wished it be reflected in these minutes, that when the Democratic Party made very strong objections against the insulation of the labour laws in subclause 34(5), COSATU and other parties strongly supported such an insulation clause. The fact that this subclause 27(3) was now being disputed by COSATU was a complete about-face. In the DP's view COSATU's actions in respect of 27(3) constituted bad faith. Mr Leon indicated his intention to reopen the debate on the insulation clause.

It was noted that as the NMC would be reporting to the Negotiating Council on Wednesday afternoon - 3rd November, this subclause would have to be held over.

**7. Clause 28 - Property:**

7.1. Property:

- 7.1.1 Mrs Camerer handed out a formulation which had been agreed in a bilateral between the S A Government and the ANC entitled "Property

Rights" - Annexure "B".

7.1.2 **It was agreed that the title of this clause should be "Property Rights".**

7.1.3 The Ad Hoc Committee noted that the formulation of 28(1) had been agreed.

7.1.4 Mr Leon stated that he could not see the use for the inclusion of subclause 28(2). Professor Cheadle replied that it was a way to ensure that "deprivation" was done according to law and statutes for example if someone was deprived of rights as a result of rezoning.

7.1.5 The Technical Committee would be asked for their comments on the distinction between "public interest" and "public purpose" and which of the two was the more appropriate one for inclusion. **Their comments would also be requested regarding the reservations of Mr Leon that a full stop after "... all relevant factors" would be sufficient as reflected in (4) in Annexure "A".**

7.1.6 The question was raised whether subclause 28(2) met with the requirements of a "policing" clause as raised by Mr Maduna in point 7.5 of the minutes of 12th October 1993:

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

The Technical Committee would also be requested to comment and advise on the inclusion of such a subclause.

7.1.7 Mr Leon reiterated his Party's extreme opposition to the latest amendments to subclause 28(3) suggested by the S A Government and ANC and wished it to be reflected in the minutes that the Democratic Party was firmly of the view that no one should have his or her property expropriated on an arbitrary basis without due process. Equally, many of the victims of apartheid were entitled to special consideration and, in certain instances, to compensation or even restoration of property where their rights had been infringed. However, the DP was firmly of the view that these two ideas had to be separated and not collapsed into one concept, because by doing that one would simply be taking away rights from both groups without affording any equitable compensation to those who should have rights or those who currently possessed them. The Democratic Party strongly felt that those people who had been dispossessed of their property as a result of the Group Areas Act or the Land Act, as well as those people in the same category who had not received adequate

compensation should be compensated. Compensation to such groupings would never be equitable if it was done on the basis of simply invading the rights of people who currently owned title.

## 7.2 Restoration of Land:

- 7.2.1 Mrs Camerer explained that it had been agreed between the S A Government and the ANC that Property Rights and Restitution to Land would be de-linked.

Discussion ensued regarding the Restoration of Land clause being dealt with separately, where appropriate, in the body of the Constitution.

The ANC wanted the Restoration of Land clause to be in the Bill of Rights and Mr Maduna reiterated the ANC's stance that restoration of land was considered to be an actual right and if de-linked from the Property clause, still to be placed immediately after the Property clause in the Bill. The S A Government however, wanted the Restoration of Land clause to be dealt with in the Constitution and not in the Bill of Rights.

- 7.2.2 Discussion ensued as to the date from which restoration should be calculated. Mr Maduna said that going as far back as, say 1652 would not be feasible, and 1910 when South Africa became a Union was the suggested date.

- 7.2.3 Mrs Camerer gave each member of the Ad Hoc Committee a copy of a suggested formulation on Restitution of Land Rights - Annexure "A".

The problem between the ANC and the S A Government was that the S A Government did not want to link expropriation (subclause 28(2)) to restitution of privately owned land. Mr Leon asked if the ANC were stating that privately owned land should be capable of expropriation if it was land from which rights had been removed. Mrs Camerer replied that if it was State land it was no problem, but that the Bill should not provide that private land could be expropriated for this purpose. Mr Leon stated that the DP agreed with the ANC that due process of law should be followed and was critical where expropriation of property was concerned.

This Annexure would be given to the Technical Committee for

possible alternative formulation with the reminder that this be recognised as a political issue.

It was agreed that the Ad Hoc Committee advise the Negotiating Council that they were still having problems with the whole subject of Property Rights and Restitution of Land as well as other outstanding matters as reflected in these minutes, and request that debate on this scheduled for Thursday, 4th November, be postponed for the following week.

**8. Clause 33 - Education:**

It was agreed that the request tabled by Mr L Wessels for the inclusion of a further subclause (d) would not be dealt with in the Bill of Rights, but **referred to the Technical Committee on Constitutional Issues** for inclusion into the body of the Constitution. Clause 33 remains as drafted in the Tenth Progress Report.

**9. Date of Next Meeting:**

The Ad Hoc Committee would have to meet again as soon as possible and to meet with the Technical Committee. However, due to various bilaterals and other meetings taking place no date or time was set but as the Technical Committee would be meeting on Wednesday afternoon, 3rd November, as well as Thursday 4th November 1993, efforts would be made to hold a combined meeting.

**10. Closure:**

10.1 The meeting closed at 16h40

10.2 Copies of these minutes would be faxed/delivered to each person of each Committee as soon as possible for their urgent comment/amendments.

"A"

## RESTITUTION OF LAND RIGHTS

- (1) Any person who, or any community which, was dispossessed at any time after a date (after 1910/1948) to be fixed by an Act of Parliament of a right in land under, or for the purpose of furthering the object of, any law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession, shall be entitled to claim restitution in respect of such right from the state.
- (2) Any claim under subsection (1) shall be subject to such conditions and limitations as may be prescribed by such Act and shall be justiciable in accordance with such Act by a competent court of law or a tribunal established for the purpose of such claims by such Act.
- (3) A court of law or such tribunal may order the state -
  - (a) to restore such right to the claimant (where the land in question is state-owned land) and such restoration is otherwise feasible;
  - (b) to grant the claimant an appropriate right in available alternative state-owned land, to be designated by the State to the satisfaction of the court or such tribunal;
  - (c) to pay the claimant, subject to subsection (4), just and equitable compensation; or
  - d) to grant the claimant alternative relief.
- (4) The compensation referred to in subsection (3) shall be determined by the court or the said tribunal as just and equitable, taking into account all such factors as may be prescribed by the said Act, including any compensation that was paid upon such dispossession.

- (5) (a) This section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No 63 of 1975), or any other law incorporating the Expropriation Act, 1975, or its provisions with regard to compensation, if just and equitable compensation as contemplated in subsection (4) was paid in respect of such expropriation.
- (b) In this section "Expropriation Act, 1975" shall include any expropriation law repealed by that Act.

Alternative proposal

1. Substitute subclause (3)(a) and (b) as follows:
  - "(a) to restore such right if such restoration is feasible;*
  - (b) to grant the claimant an appropriate right in available alternative land to be designated by the State to the satisfaction of court or the said tribunal."*
2. Insert the following after subclause (3):
 

*"If the restoration under subsection (3) of a right cannot be effected otherwise than by way of expropriation the provisions of section 28(2) and (3) shall apply."*

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## Property rights

- 28.(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permissible otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible in the public interest/for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.