

2/21/1/8/29

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
18 MARCH 1996**

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DRAFT REPORT

**CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING
MONDAY 18 MARCH 1996**

1. OPENING

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

CC Subcommittee Documentation Monday 18 March 1996
CC Subcommittee Draft Report of Discussions - 12 March 1996
Memorandum from the Panel of Experts and Technical Committee 4 on "The Effect and Desirability of the use of the word "Arbitrarily" in Section 25 (2) of the Working Draft (Bill of Rights)
Memorandum from the Panel of Experts on possible amendments to Section 13 ("Unreasonably")
Memorandum from the Panel of Experts and Technical Committee 4 on Free Expression and the Media (Section 15(3) of the Bill of Rights and Chapter 7)
Memorandum from the Panel of Experts and Technical Committee 4 on "Section 35(1) and (2)"
Draft Memorandum from the Panel of Experts "Tentative Draft for discussion on States of Emergency and comments arising from a Multilateral"
Panel of Experts - States of Emergency - Explanatory Memorandum

2. DISCUSSION: BILL OF RIGHTS

- 2.1 The meeting agreed that discussion would be based on the document entitled "*Draft - 12 March 1996 - Chapter 2: Bill of Rights*" contained in the *CC Subcommittee Documentation - Monday 18 March 1996*.

2.2 Section 7: State's Duties

- 2.2.1 The meeting agreed to this section but agreed that a comma had been omitted and should be inserted between the words "*protect*" and "*promote*" so that the section is amended to read:

The state must respect, protect, promote and fulfil the rights in this Bill of Rights.

2.3. Section 8: Equality

2.3.1 Regarding Section 8(1), the meeting agreed to this section.

2.3.2 Regarding Section 8(2), the meeting noted that the DP did not support the wording of this section.

2.3.3 Regarding Section 8(3)

2.3.3.1 The meeting agreed to await the memorandum from the Panel of Experts and the Technical Advisors on the Equality clause and to allow the parties to discuss the matter further once the reformulation had been received.

2.3.3.2 The meeting noted that the ACDP stated that its position on Section 8(3) remained the same.

2.4 Section 9: Human dignity

2.4.1 The meeting agreed to this section.

2.5 Section 10: Life

2.5.1 The meeting agreed to defer discussion of this section.

2.6 Section 11: Freedom and security of the person

2.6.1 Regarding 11(2) and (3)

The meeting agreed that the matter was deferred for further discussion to allow parties to consider to the reformulation proposed by the ANC.

2.6.1.1 The ANC stated that, given the ambiguity raised regarding this section and following multi-lateral discussions, it proposed that the section be separated into two clauses, one subsection dealing with security of the person and one subsection dealing with bodily and psychological integrity. The ANC proposal read as follows:

11(A)(1) Everyone has the right to freedom and security of the person, including the right -

- (a) not to be deprived of liberty arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) to be free from all forms of violence from*

- both public and private sources;*
- (d) not to be tortured in any way; or*
- (e) not to be treated or punished in a cruel, inhuman or degrading way.*

11(B)(2) *Everyone has the right to bodily and psychological integrity, including the right -*

- (a) to make decisions concerning reproduction [free from coercion, discrimination and violence];*
- (b) to security in and control over their body;*
- (c) not to be subjected to medical or scientific experiments without that person's consent.*

2.6.1.2 The NP stated that it would happy to look at the new formulations.

2.7 Section 12: Slavery, Servitude and forced labour

2.7.1 The meeting agreed to this section.

2.8 Section 13: Privacy

2.8.1 The Panel and Technical Advisors tabled a document entitled "*Memorandum from the Panel of Experts on possible amendments to Section 13 ("Unreasonably")*".

2.8.2 The ANC stated that it had considered the Memorandum but that it was not completely convinced by the explanation therein and proposed that Prof Steytler should discuss this matter with the Panel and the Technical Advisors.

2.8.3 The NP accepted the opinion of the Panel on this matter.

2.8.4 The meeting agreed to the proposal by the ANC that the Panel of Experts and the Technical Advisors should discuss the matter with Prof Steytler and report back to the CC Subcommittee.

2.9 Section 14: Freedom of religion, belief and opinion

2.9.1 The meeting agreed this section.

2.10 Section 15: Freedom of expression

2.10.1 Regarding Section 15(1)

The meeting agreed to this section but agreed to retain the footnote until the applications clause was finalised as the NP wished to ensure that these sections applied to juristic persons.

2.10.2 Regarding Section 15(2)(c)

- i The DP stated that it supported the narrower wording of "cause harm" in Section 15(2)(c) which was a major improvement, although it still held the view that there should be no immunisation of the right of freedom of expression. The DP stated further that it was important to bear in mind that under the Interpretations section the courts would be obliged to consider all applicable international law provisions.
- ii The NP stated that it would be prepared to consider the formulation with the reservation that they would do so in the light of the Summary of Submissions awaited from the Technical Advisors.
- iii The meeting agreed to await the Summary of Submissions from the Technical Advisors and thereafter to allow further discussion of the matter amongst the parties in order to finalise the wording of this section.

2.10.3 Regarding Section 15(3)

2.10.3.1 The Panel of Experts and Technical Advisors spoke to their document "*Memorandum from the Panel of Experts and Technical Committee 4 on Free Expression and the Media (Section 15(3) of the Bill of Rights and Chapter 7)*" contained in the documentation.

2.10.3.2 Regarding the various options proposed in the Memorandum, the parties stated their positions as follows:

- i The NP stated that it would be happy with Option B(2) but would also like to consider Option C.
- ii The DP stated that they had previously tabled their preference for this section but, from the recommendations in the Memorandum, Option A

would be their first choice and they would take the matter back to their principals.

- iii The ANC stated that its preference would be for a formulation along the lines of Option B2 but noted the recommendation in the Memorandum regarding Option A and would take the matter back to their principals for further consideration.
- iv The meeting agreed that the matter would be deferred to allow parties to consider the matter further and to report back to the CC Subcommittee.

2.11 Section 16: Assembly, demonstration and petition

- 2.11.1 The meeting agreed to retain the words "*to picket*" in brackets and to defer the matter for further consideration by the parties.

2.12 Section 17: Freedom of Association

- 2.12.1 The meeting agreed to this section.

2.13 Section 18: Political rights

- 2.13.1 The meeting agreed to this section.

2.14 Section 19: Citizenship

- 2.14.1 The meeting agreed to this section.

2.15 Section 20: Freedom of movement and residence

- 2.15.1 The meeting agreed that the Technical Refinement Team should consider reformulation of this section taking into account the proposal of the ANC:

- 2.15.1.1 The ANC proposed the following:

- i the section should be separated into two with one section dealing with "movement" and the other with "residence".
- ii The present Section 20(3) should be reformulated to read:

"Every citizen had the right to enter, to remain and to reside anywhere in the Republic."

The ANC expressed concern that the current formulation appeared to grant these rights to all persons and that it would be preferable to grant rights of permanent residence through legal procedures.

2.16 Section 21: Freedom of occupation

- 2.16.1 The DP stated that it had undertaken to research the question of "permanent residents" and had obtained some information from a legal advisor to the Department of Home Affairs, although it was only an example regarding the rights of a specific category of persons, namely former South African citizens through descent or birth. The DP stated that the right should not be limited to citizens but that every person should have the right of freedom of occupation.
- 2.16.2 The ACDP stated that it would prefer a specific limitation to be included in this right and proposed that the following words be inserted in the section:
- "These occupations would not be contra bones mores."*
- 2.16.3 The ANC expressed concern about granting these rights in a blanket form and stated that even if it were phrased "every citizen", this does not prohibit rights being conferred to "permanent residents" through legislation.
- 2.16.4 The NP said that it had discussed the matter and asked the experts to look at the implications of the word "everyone".
- 2.16.5 Prof Cheadle explained that if the matter was left to legislation, it would be easier to regulate.
- 2.16.6 The meeting agreed that the DP should make the information it had received available to the Panel of Experts and the Technical Advisors who would consider the matter and report back to the CC Subcommittee.
- 2.16.7 The meeting further agreed that the whole section would be placed in brackets and that the matter would be deferred for further discussion by parties.

2.17 Section 22: Labour relations

- 2.17.1 The meeting agreed that this section was still under discussion by the parties.

2.17 Section 23: Environment

- 2.17.1 The ANC stated that it had considered the NP proposal tabled previously and proposed the following reformulation of this section:

"Everyone has the right -

- (a) to an environment that is not harmful to their health or well-being;*
- (b) to have their environment protected through reasonable legislative and other measures for the benefit of present and future generations that:
 - (i) prevent pollution and ecological degradation;*
 - (ii) promote conservation; and*
 - (iii) secure ecologically sustainable development and use of natural resources."**

- 2.17.2 The NP reserved its position to give the proposal further consideration.

- 2.17.3 The meeting agreed to defer discussion of this section to allow parties to discuss the matter further.

2.18 Section 24: Property

- 2.18.1 The meeting agreed that there was progress on this issue and that the matter was deferred for further discussion between the parties.

2.19 Section 25: Housing and land

- 2.19.1 Regarding Section 25(3)

- i The meeting noted the Memorandum and the proposed reformulation from the Panel of Experts and Technical Committee 4 on *"The Effect and Desirability of the use of the word "Arbitrarily" in Section 25 (2) of the Working Draft (Bill of Rights)* contained in the documentation.
- ii The NP stated that it preferred the earlier proposal and that it was difficult to see how parliament could pass a law allowing

an arbitrary eviction.

- iii In response the question of whether "*authorise*" or "*permit*" was preferred, Prof Cheadle suggested that "*permit*" should be included.
- iv The meeting agreed to the general thrust of the proposed reformulation in the Memorandum, subject to further refinement. The meeting noted an error in the formulation that the phrase "*or have their home demolished*" had been omitted and agreed that this should be reinstated in the formulation.

2.20 Section 26: Health, food, water and social security

2.20.1 The meeting agreed to this section.

2.21 Section 27: Children

2.21.1 The meeting agreed to this section with the removal of the brackets around "*parental care*" in Section 27(1)(b).

2.22 Section 28: Education

2.22.1 The meeting agreed that this section was deferred, to allow for further discussions between the parties.

2.22.2 The Technical Advisors drew the meeting's attention to two issues relating to the Section 28 referred to in Footnote 13:

- i Section 28(1)(a) was the subject of a memorandum being prepared by the Panel and the Technical Advisors who wished to draw the meeting's attention to the fact that this wording might be problematic.
- ii Depending on how the equality clause is finally formulated, some of the references to discrimination might have to be revisited to ensure consistency between the sections.

2.23 Section 29:

The meeting agreed to delete the reference to Section 29 as this section had been incorporated under Section 15.

2.24 Section 30: Language and culture

- 2.24.1 The meeting agreed that this matter should not be referred back to the Panel and the Technical Advisors but should be referred for further discussion between the parties taking into account Prof Cheadle's suggestion.
- 2.24.2 Prof Cheadle proposed a reformulation of the wording after "*choice*" along the lines of:
- " , but no one exercising these rights may violate the **other rights in the Bill of Rights.**"*
- 2.24.3 The NP stated that it had considered the matter and still had concerns about adding a specific limitation to this clause. The NP suggested that this limitation was found in international instruments because they did not have an equality clause or limitations clause. The NP expressed the view that the formulation created a hierarchy of rights and an internal limitation in this right but not in other rights. The NP stated that it would consider Prof Cheadle's proposal and give the matter further consideration.
- 2.24.4 The DP stated that it was inherently wrong to have an internal limitation in a particular right and that the argument was met by the limitations clause.
- 2.24.5 The ANC stated that this was not a limitations question where there would be a process of weighing up those rights which clashed with each other. The intention in this section was to state that in relation to language and culture, there was not going to be a balancing of rights but that this right could be exercised but not to violate the rights of others.

2.25 Section 31: Access to information

- 2.25.1 The meeting agreed that the Technical Refinement Team and the Technical Advisors should provide a new formulation taking into consideration the views expressed that the right should be stated as a positive right exercisable within a specific legislative framework and with the qualification of Section 31(2)(a).
- 2.25.2 The meeting agreed that the redrafted formulation would be considered in further discussions between the parties.

2.26 Section 32: Just administrative action

- 2.26.1 The meeting agreed that the position was the same as for Section 31 and agreed to await the reformulation before discussing the matter further.

2.27 Section 33; Access to courts

- 2.27.1 The meeting agreed to this section.

2.28 Section 34: Arrested, detained and accused persons

- 2.28.1 Regarding Section 34(3)(f)

The meeting agreed to delete Footnote 21.

- 2.28.2 Regarding Section 34(4)

The meeting noted the wording proposed in the "*Memorandum on Section 34(4) - Exclusion of Evidence*" which had been tabled at the meeting of 12 March.

- 2.28.3 The NP proposed the addition of the wording "*unless the exclusion of that evidence would be detrimental to the interests of justice*"

- 2.28.4 The ANC stated that it had previously noted its concern that it did not want a rigid exclusionary rule as that which existed in the United States and that this formulation came close to such a rigid exclusionary rule. The ANC preferred reference to be made to the fairness or not of a particular trial.

- 2.28.5 The meeting agreed that the ANC should provide a proposed reformulation for further consideration by the parties.

2.29 Section 35: Limitations

- 2.29.1 The meeting agreed that the matter should be deferred to allow the parties to give further consideration to the Memorandum contained in the documentation entitled *Memorandum from the Panel of Experts and Technical Committee 4 on "Section 35(1) and (2)"* and the proposed new formulation contained therein.

- 2.29.2 The meeting noted a further proposal from the Panel of Experts to consider in the new formulation of Section 35(2)(a) the replacement of the wording "*be able to achieve its purpose*" with the wording "*be*

rationally connected to its purpose".

2.29.3 The ANC, DP and NP stated that they wished to take the matter back to their principals.

2.30 Section 36: States of emergency

2.30.1 The Panel of Experts and Technical Advisors tabled a document entitled "*Draft Memorandum from the Panel of Experts "Tentative Draft for discussion on States of Emergency and comments arising from a Multilateral"*" together with an "*Explanatory Memorandum*".

2.30.2 The Panel of Experts and the Technical Advisors reported that discussions had taken place between the parties which had given rise to this reformulated Section 36 but that this was not the final formulation and a number of issues which still had to be finalised included:

- i The inclusion of a reference to an emergency committee in order to provide for the continued functioning of the National Assembly during a state of emergency;
- ii The list of non-derogable rights;
- iii The concept of one single emergency clause dealing with all matters of emergency including a state of war.

2.30.3 The meeting noted the report and agreed to defer this section for further discussion between the parties.

2.31 Section 37: Enforcement of rights

2.31.1 There was no further discussion of this section.

2.32 Section 38: Application

2.32.1 Regarding Section 38(2),

- i The NP asked whether the word "*applicable*" was the one that was going to be finally included in the section.
- ii The Panel of Experts and the Technical Advisors responded that they were still attempting to find a more useful wording and would report back to the CC Subcommittee.

- 2.32.2 The meeting agreed that the NP would give further consideration to the section and would await the wording from the experts and the advisors.

2.33 Section 39: Interpretation

- 2.33.1 The ACDP questioned how the courts would interpret an "open society".
- 2.33.2 The experts responded that this would be a society that was transparent, which allowed an exchange of information and which was accountable.

3. PROVINCES

- 3.1 It was agreed that there was virtually unanimous agreement amongst the parties on these matters, other than the matters listed for further discussion.

3.2 Section 120: Composition and election of provincial legislatures

- 3.2.1 It was agreed that the electoral system regarded further discussion.

3.3 Section 125: Elections and duration of provincial legislatures

- 3.3.1 It was agreed that further discussion was required regarding the position when the result of the election was not declared as required.

3.4 Section 125(A): Dissolution of provincial legislatures before expiry of the term

- 3.4.1 It was agreed that more discussion was required amongst parties regarding matters related to votes of no confidence.

3.5 Section 128: Internal Autonomy

- 3.5.1 It was agreed that although there were no major problems with this matter, some further discussion was required.

3.6 Section 138: Vacancies

- 3.6.1 It was agreed that there were no major disagreements regarding this matter, and that there was only one aspect that required further discussion.

3.7 Section 154: Adoption and Certification

- 3.7.1 It was agreed that this required further discussion amongst parties. It was

also agreed that these discussions would have to include related matters in the transitional arrangements and the executive structures.

3.8 Regarding Deputy Speakers

3.8.1 It was agreed that this matter would be flagged for now, and that the Rules Committee was also looking into this.

4. COMPETENCIES

4.1 It was noted in clarification to a question from the DP that there was a reference to their proposal on Section 3 in the footnote to that section.

4.2 It was noted that the documentation included a memorandum from the TC3 technical advisers on *Constitutional principles applicable to the allocation of national and provincial competencies*, with an explanatory memorandum from the Executive Director.

4.1.1 The DP stated that they also wanted the technical advisers to give an evaluation of their proposal and the draft as against the constitutional principles.

4.1.2 The technical advisers referred to their memorandum and indicated that it would not be possible to take the analysis further at this stage by superimposing their opinions on the draft.

4.1.3 The NP said they accepted the explanations but would welcome guidance, and that they would not like to "sign blank cheques." They felt that these matters, including the DP proposal, should be discussed further in bilateral.

4.1.4 The ANC stated that the NP seemed to be shifting their position.

4.3 After a brief adjournment, the Chairperson reported that most parties had been consulted, and there was agreement that a multi-lateral meeting would be held, as they had to begin to deal more thoroughly with these issues, to report progress on 27 March 1996.

5. NATIONAL COUNCIL OF PROVINCES

5.1 It was agreed that the Panel of Experts would prepare a memorandum on whether the NCOP as presently conceptualised could be seen as part of Parliament.

5.2 Section 1: Composition

5.2.1 Regarding Subsection 1(2), it was agreed that further discussion was required amongst the political parties concerning the appropriate numbers.

5.3 Section 2: Participation in National Legislative Process

5.3.1 Regarding Subsection 2(1)(d) and (c), it was agreed that further discussion amongst political parties were required on:

- a. Whether the time period was the appropriate one; and,
- b. Whether the time period should apply at all.

5.3.2 Regarding 2(2)(d), there appeared to be agreement regarding the procedure.

5.3.3 Regarding Subsection 2(2)(e), it was noted that some parties preferred option 1, but it was agreed to still accommodate the DP which indicated that although they would prefer this to lapse, it would depend on how one dealt with competencies. It was agreed that further discussions were required on this matter.

5.4 Section 8: Appointments

5.4.1 It was agreed that this required further discussion amongst the parties.

5.5 Section 9: Chairpersons

5.5.1 It was agreed that this also required further discussions amongst the parties.

5.6 Section 11: General

5.6.1 It was agreed that "*property*" should read "*properly*".

5.6.2 It was agreed that Section 11(2) required further discussion amongst parties, particularly regarding the meaning of "*properly mandated representatives*". It was noted, however, that this was merely a first exploration of this matter, and would require reformulation, taking into account that the schedules have not been discussed properly, and that the principle incorporated at this stage was that local government would participate in the NCOP, but that the details of this would have to be discussed further.

5.6.3 It was noted that the NP raised the possibility of a role for traditional leaders in this regard, although the ANC raised a concern that this was possibly a personal opinion. It was noted that there had been various proposed roles in different structures regarding the traditional leaders, but that there was not agreement about a role regarding the NCOP.

3. CLOSURE:

3.1 The meeting closed at 17h45.

