

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 14h45 ON MONDAY, 8 NOVEMBER 1993 AT THE WORLD TRADE CENTRE, KEMPTON PARK.**

**PRESENT:            Ad Hoc Committee:**

- Mrs S Camerer (Convenor)
- Prof H Cheadle
- Chief Gwadiso
- Mr A Leon

**Technical Committee:**

- Prof. L M du Plessis (Convenor)
- Mr G Grove
- Ms D S Nene
- Adv. Z Yacoob

**MINUTES:**            Miriam Cleary (Administration)

**APOLOGIES:**        Mr P Maduna            ) Ad Hoc Committee  
                          Mr R K Sizani            )  
                          Prof. H Corder         - Technical Committee

**ABSENT:**            Mr S G Mothibe - Ad Hoc Committee

**1.    Agenda:**

- 1.1    Draft Eleventh Report - as faxed/handed out on 4 November 1993.
- 1.2    Clause 8 - Equality
- 1.3    Clause 28 - Property Rights
- 1.4    Clause 32 - Customary Law

## 2. Draft Eleventh Report:

The Draft Eleventh Report had been faxed/handed out to the members of the Ad Hoc Committee. Professor du Plessis explained that this Draft Report had been for discussions he intended having with the members of the Technical Committee and as a result technical amendments were made to streamline the Draft. This streamlined Draft Report was handed out and Mrs Camerer asked Professor du Plessis to take the Ad Hoc Committee through it. He stated that various concerns had been catered for as discussed at the Council meeting of 7 October 1993 and went on to enumerate them.

## 3. Clause 8 - Equality:

3.1 There was still a problem with the phrase "sexual orientation" in clause 8(2). Discussion ensued and Professor du Plessis drew attention to the fact that laws prohibiting the practises such as paedophilia, necrophilia and bestiality would qualify under the Limitations clause 34(1) and thus the fears expressed in the Ad Hoc Committee meetings would be adequately covered.

Professor Cheadle asked whether it was remotely possible that a court would read this subclause and not come to the conclusion that bestiality was not allowed as a norm. Mr Leon agreed with Professor Cheadle and stated that it did seem a bit pointless to tamper with this clause.

Mrs Camerer said that Christian churches in the country had objected to this phrase and they had asked whether the phrase "public morality" could be placed in the Bill of Rights. It was the opinion of some of those present that the churches were anti-gay and this was the main objection to "sexual orientation". Mr Grove pointed out that as the Bill would operate vertically marriages between gays, or adoption by gays etc. would be disallowed if the Limitation clause was in operation.

Mrs Camerer asked what the implications would be if a clause making the Bill subject to "public morality" and "public health" etc. along the lines of clauses incorporated into a number of human rights instruments internationally was incorporated into clause 34 (the "Limitation Clause"). Professor du Plessis stated that to make this amendment would entail the complete restructuring of the Limitation clause and this would take quite a lot of time. Professor Cheadle stated that the occurrence of these concerns were so remote that this would not justify tampering with the Limitation clause and he was strongly opposed to any changes being made to the Limitation clause in order to accommodate a clause on "public morality" etc.

3.2 Regarding the possible inclusion of "reasonable" before the word "measures"

in clause 8(3) or making the clause specifically subject to clause 34 (Limitation clause) Professor du Plessis stated that it had been agreed in Council to accept this clause as formulated. He went on to state that the clause as it stood was a restricted authorisation of affirmative action already and that specific reference to "reasonableness" would water it down and restrict it further. Mrs Camerer pointed out that Minister Kobie Coetsee had noted the Government's disagreement with the omission of "reasonableness" from the clause when it was previously before the Council. Both Mr Leon and Mrs Camerer stated the Government's and DP's strong opposition to the clause as it stood and that an element of "reasonableness" should be brought into this clause. Professor Cheadle stated that this was a political issue and, as there could be no political agreement on this, the decision whether they want a strong clause or a watered-down one would be left to the Negotiating Council.

#### **4. Property Rights - Clause 28:**

- 4.1 Mr Leon stated his extreme concern regarding subclause (2) in the first Draft. Professor du Plessis stated that in this first Draft subclause (2) was merely an example as requested by the Ad Hoc Committee, of a policing clause taken directly from the German Constitution but this has not been included in the Report.
- 4.2 Mrs Camerer noted that she had immediately objected to the inclusion of this clause in a memo to Prof. du Plessis and circulated to the Ad Hoc Committee members.
- 4.3 Mr Leon stated that subclause (3) should end after the words ".. all relevant factors" as great uncertainty would be created if the balance of the subclause were included, however he would have no problems with this clause if he knew in advance how the Constitutional Court was going to be comprised but, as we did not have that knowledge, this clause would become very dependent on that. Those, he said, were the reservations expressed by the Democratic Party.
- 4.4 Professor du Plessis had obtained legal opinion on the distinctions between "public interest" and "public purposes" and it was recommended that "public purposes" had a wider meaning in South African law. Professor Cheadle stated that he would have to obtain confirmation from his legal advisors on this and wished to have his reservations recorded.

Chief Gwadiso stated he would also have to consult on this and wished to have his reservations recorded.

## 5. Customary Law

- 5.1 The Traditional Leaders wanted this clause included in the Chapter on Fundamental Human Rights. None of the other parties represented on the Ad Hoc Committee were in favour of this inclusion in its present form in the Chapter. They were of the opinion that:
- 5.1.1 Rights and powers of Traditional Leaders, the recognition and scope of customary law and the rights of those living under customary law should be dealt with elsewhere in the Constitution.
- 5.1.2 Clause 22 - Access to Court - could not deal adequately with this issue and it should be dealt with elsewhere in the Constitution.
- 5.1.3 A clause should be introduced stating:
- "The parties to a dispute may appeal to the application of a system of customary law for the purpose of settling their dispute."
- The ANC believed that this clause was more appropriate and that a general clause dealing with the provision of customary law, the role of the chief and those under customary law should be included.
- The S A Government's attitude was that the abovementioned clause should be included in the Chapter itself, possibly under Access to Court or wherever the Technical Committee would suggest.
- 5.2 Professor Cheadle stated that the two parties he represented agreed that this issue should be dealt with elsewhere in the Constitution. Both the Democratic Party and the S A Government agreed along those lines and stated that they were under extreme pressure from women's groups regarding the whole issue of customary law.
- 5.3 Chief Gwadiso stated he could not accept any of the above suggestions as this was interfering with customary law and the institution of the way of life of the chiefs and the Black people in particular. In order not to waste time he did not want to discuss this further as he would have to consult on the clause as set out in the Draft Report.
- 5.4 The Ad Hoc Committee failed to agree on this matter as Chief Gwadiso, representing the Traditional Leaders wanted the retention of this clause whilst the other parties stated that the role of customary law and the rights, powers and functions of Traditional Leaders should rather be dealt with in the Constitution (subject to the S A Government's position as set out under 5.1.3 above) and Clause 32 as it was, should therefore be deleted from the Bill of Rights. It was also their view that this be subject to accommodation reached

with the Traditional Leaders. Chief Gwadiso stated emphatically that there would be objection from the Traditional Leaders if this clause be removed from the Bill of Rights.

- 5.5 It was agreed that this whole issue would have to be referred to the Council as it was a political decision.

**6. Clause 34 - Limitation:**

6.1 Professor du Plessis explained the concept of "strict scrutiny" which came from the U.S. Equal Protection Jurisprudence. The Technical Committee had relied on the Canadian Charter of Rights and Freedoms as its point of departure and there would be endless problems in using "strict scrutiny" in the South African Chapter on Fundamental Rights. Mr Leon stated that he had gone through this clause very carefully and agreed with the Technical Committee. The other members of the Committee also agreed.

6.2 Mr Leon stated his concern regarding the fact that he felt that the Freedom of Expression clause should generally enjoy strict scrutiny.

Professor Cheadle stated that the contents of 36(1)(b)(ii) which identified the rights identified was agreed to at the Negotiating Council, and must remain. He felt that the concerns of the DP were not well founded. It was agreed that subclause 36(1)(b)(i) in the Draft Eleventh Report be deleted.

6.3 It was suggested that the right of freedom of expression in the sub-category not be given special protection in general terms and that it had to remain in the way in which it was stated in the Draft, DP dissenting and S A Government expressing reservations.

**7. Next Meeting:**

It was envisaged that, subject to any decision by the Planning Committee, there would be no more Ad Hoc Committee meetings as the deadline for the finalisation of the Chapter on Fundamental Rights was Wednesday, 10 November 1993 when the Eleventh Report would be presented to the Negotiating Council.

**8. Closure:**

- 8.1 Mrs Camerer extended a vote of thanks to the members of both the Technical Committee and the Ad Hoc Committee for their co-operation.
- 8.2 The meeting closed at 17h00.
- 8.3 Copies of these minutes would be faxed/delivered to each person of each Committee.