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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
7 FEBRUARY 1996**

CONSTITUTIONAL ASSEMBLY

DRAFT REPORT

SUB-COMMITTEE MEETING

WEDNESDAY 7 FEBRUARY 1996

1. OPENING

- 1.1 Mr Ramaphosa opened the meeting at 10h15.
- 1.2 The Chairperson noted a letter from the ACDP distancing themselves from an earlier letter from their youth league.
- 1.3 The following documentation was tabled:

Panel's memorandum dated 5 February on Freedom and Integrity of the Person

Panel's memorandum dated 5 February on Children

DP's provisional reformulations on selected contentious issues on the bill of rights

Tentative ANC Proposals in respect of the Property clause

Draft by Panel of Experts and the Technical Committee of Theme Committee 4 on Section 14

2. LANGUAGE

- 2.1 It was agreed that a new formulation would be tabled at the next Sub-committee meeting on this issue.
- 2.2 It was noted progress had been made in bilaterals between the ANC and NP, where agreement had been reached on three issues:
 - a) It was acknowledged that English and Afrikaans had benefited in the past.
 - b) It was acknowledged that the nine other languages must be prioritised in the future.
 - c) It was not desirable in South Africa that one language be prioritised at the expense of another.

3. ANTHEM

- 3.1 It was agreed that this be deferred to the next Sub-committee meeting on this issue.
- 3.2 The DP stated their support for the condensed version of Nkosi Sikelele-iAfrika and Die Stem, the last mentioned in both English and Afrikaans.
- 3.3 The NP stated that this was the officially approved combination version that the NP had proposed during 1995.

4. BILL OF RIGHTS

4.1 Section 7: State's duty to respect and protect rights

- 4.1.1 It was agreed to deal with this matter at the end when related issues had been completed.

4.2 Section 8: Equality

Regarding Subsection (2)

- 4.2.1 It was agreed that the proposal tabled at the previous meeting be adopted.
- 4.2.2 The DP preferred their proposal noted in the Sub-committee report of 31 January at point 4.1.2. It was agreed that this be reflected in the sidebar note, and that the wording in contention be underlined.

Regarding Subsection (3)

- 4.2.3 It was agreed that the NP would make available a reformulation after studying an opinion of the experts distributed earlier. It was noted there was disagreement only on wording, but that the DP's position be noted in the sidebar. It was also agreed to reconsider this issue when the question of horizontal application was discussed.
- 4.2.4 The ANC noted that they preferred the provision as is, but without the words "*but not limited to*".
- 4.2.5 The NP suggested deletion of the words "*nor any person*", whereas the ANC advocated their retention.

- 4.2.6 It was noted the DP favoured deletion of the term "*nor any person*"; although they were in favour of horizontal application and preferred provision for the state to legislate on private discrimination.

Regarding Subsection (4)

- 4.2.7 This was agreed.

4.3 Section 10: Life

- 4.3.1 It was noted that there was a dead-lock.
- 4.3.2 It was agreed that parties consider the Panel suggestion that option 2 may be in conflict with the Constitutional Principles in light of decision of the Constitutional Court.
- 4.3.3 The ANC added that what was accepted internationally as universal human rights be looked at, and suggested enquiry into the extent that rights based cultures accepted that legislation qualify the right to life. They stated that the numbers of petitions could not decide this matter absolutely. They stated that this could mean the ANC was in a position to seek overwhelming numbers of petitions on other contentious matters.
- 4.3.4 The NP suggested the large number of public submissions on this topic be taken into account. They stated that they supported the death penalty but that they had agreed at Kempton Park to leave the interpretation of the section in the Interim Constitution on the right to life to the Constitutional Court. They suggested not that the death penalty be Constitutionalised, but that in terms of the Constitution enabling legislation be allowed at a future date should the majority party then feel that the death penalty is desirable. They stated that they supported option 2 in the Working draft, and that in their view this did not constitutionalise the death penalty.
- 4.3.5 The ACDP pointed out that the ruling of the Constitutional Court was based on the Interim Constitution that was not drafted with the participation of the public. They also noted the many public petitions for the institution of the death penalty.

4.3.6 The Technical Committee indicated that a comprehensive overview in their Supplementary Memorandum on the Bill of Rights indicated a definite trend internationally towards abolition.

4.3.7 The PAC said that one should also look at how the death penalty was used in South Africa before, and the trend arising from that.

4.4 Section 11: Freedom and security of the person

Regarding Subsection (1)

4.4.1 This was agreed.

Regarding Subsection (2)

4.4.2 It was agreed that this subsection be refined further by the Technical Refinement Team.

4.4.3 The Independent Panel of Experts presented their memorandum. They explained that although they had been asked to focus on abortion and prostitution, the opinion was wider as this right did not essentially concern those issues.

4.4.4 The Technical Committee agreed with the Panel, that the reason for the inclusion of 2(b) was to ensure that the right was not narrowly interpreted, as had been the trend in other jurisdictions. The right was intended to relate not only to detention, but also to issues such as the right to cremation or donation of one's organs.

4.4.5 It was noted that "*control over one's body*" would conceivably be one of the many factors that would be considered by the court in deciding on abortion, but that this clause did not constitutionalise the right to abortion.

4.4.5 The ACDP said it did constitutionalise abortion and should be deleted. They said if it was necessary to include the right of security of the person to cover matters such as organ donation, then this right should be qualified to say that it did not mean to include the right to abortion.

4.4.6 The NP felt that inclusion of the phrase "control over one's body" could well tip the balance towards the conclusion that the right did constitutionalise abortion.

4.4.7 The DP said they thought these words were tautologous.

4.5 Section 13: Privacy

Regarding Subsection (d)

4.5.1 It was agreed the Technical Refinement Team refine this section by using the words "*infringed*" to replace "*violated*" and taking into account consistency. It was agreed that this was a technical matter, and that there was general agreement on this issue.

4.6 Section 14: Freedom of religion, belief and opinion

4.6.1 It was agreed that the Independent Panel of Experts and the Technical Committee's proposal serve as the basis for the Technical Refinement Team to refine the formulation with reference to the parties' responses:

"(3) (a) *The validity of marriages concluded under a system of religious law or other recognised traditions or a system of personal and family law adhered to by persons professing a particular religion may be recognised by legislation.*

(b) *The applicable rules of the systems or traditions recognised in paragraph (a) must be consistent with the Bill of Rights.*"

4.6.2 The NP said that the removal of the brackets around [*or other recognised traditions*] depends for them on whether the redraft does qualify all systems stated.

4.6.3 The ANC said the term "*religious law*" may be too narrow, and requested clarity on the difference between "*a system of religious law or other recognised traditions*" and "*a system of personal and family law adhered to by persons professing a particular religion.*" It was agreed the Panel would respond to this query.

4.7 Section 15: freedom of expression

Regarding Subsection (1)

- 4.7.1 It was agreed the Technical Refinement Team reformulate this by incorporating academic freedom, freedom of artistic creativity and scientific research. It was agreed to leave in abeyance the question whether this applied also to juristic persons.
- 4.7.2 The NP stated a proviso that their agreement would depend whether this was dealt with in a way that academic freedom still be treated as a basic right. They suggested the formulation:

"Every person has the right to academic freedom, scientific creativity, and scientific research"

Regarding Subsection (2)

- 4.7.3 It was noted that there was a deadlock on this matter.
- 4.7.4 It was agreed the Technical Refinement Team look at this matter, and that it not be discussed further at this meeting.
- 4.7.5 It was noted that some parties did not want this subsection included, because they believed Freedom of Expression would unnecessarily be curtailed.

Regarding Subsection (3)

- 4.7.6 It was agreed that the Technical Refinement Team move this provision to chapter 7: State Institutions Supporting Constitutional Democracy.
- 4.7.7 The DP said a strong case could be made for retention of the position in the Interim Constitution and suggested their formulation:

"The state must provide for the independent regulation and licensing of broadcasters to ensure a diversity of voices. Any public broadcaster must be impartial and present a diversity of opinion."

4.8 Section 17: Freedom of association

4.8.1 This was agreed.

4.8.2 It was noted that according to the technical advisers, the NP's concern whether collective self-determination was dealt with, was covered by this provision.

4.8.3 It was noted the NP wished to consult their own advisers on this matter.

4.9 Section 18: Political rights

4.9.1 It was agreed that this be reformulated to deal only with political rights, and that another section be drafted that deals with the franchise.

4.10 Section 20: Freedom of movement and residence

4.10.1 This was agreed.

4.11 Section 21: Economic activity

4.11.1 It was agreed in principle to delete "economic activity" and insert a new formulation:

"Freedom of occupation

Every citizen has the right to choose freely their occupation or profession, their place of work and their place of training. The practice of an occupation may be regulated by law."

4.11.2 It was noted that the DP would consider the new formulation.

4.12 Section 22: Labour relations

4.12.1 It was noted there was a deadlock.

4.12.2 The NP and DP insisted that both the right to strike and the right to lock-out were either both included or both removed from the section.

4.12.3 The ANC insisted there be a right to strike, but not a right to lock-out.

4.13 Section 23: Environment

4.13.1 This was agreed

4.13.2 It was noted that the DP may at a later stage want to table amendments of a technical nature.

4.14 Section 24: Property

4.14.1 It was agreed that a multi-lateral discussion on this take place with the Chairpersons, members of the Panel, and Technical Committee, on Friday 23 February. It was noted that after various discussions amongst parties there was some agreement for the draft of the ANC tabled as *Tentative ANC Proposals in respect of the Property clause*, to be used as a basis for the further discussion:

- "(1) The state shall respect property, and it shall foster conditions which enable people to gain access to property on an equitable basis.**
- (2) The content and limits of property shall be determined by law.
No one may be deprived of property except in accordance with a law of general application. OR
No one may be arbitrarily deprived of property.**
- (3) Property may be expropriated only in terms of a law of general application-**
 - (a) for public purposes or in the public interest which includes land reform.**
 - (b) subject to the payment of compensation within a time period and in a manner as agreed or decided by a court.**
- (4) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine an equitable balance between the public interest and the interests of those affected, having regard to all the relevant factors, including -**
 - (a) the current use of the property**
 - (b) the history of its acquisition**
 - (c) its market value; and**
 - (d) the ability of the state to pay.**

(5) This section shall not invalidate reasonable legislative and other measures that are designed to bring about land reform to redress the results of past racial discrimination."

4.14.2 It was noted that there was general agreement that there may be merit in dealing with the issue of land and immovable property on its own, at least in order to facilitate discussion. It was suggested those aspects relating to land in Section 25 on "Housing and Land" also be amalgamated for this purpose.

4.14.3 The ANC commented further on the new draft:

- a. In (2), they proposed insertion of the word "*nature*" before the words "*content and limits of property*."
- b. In (4), they proposed to add to the factors listed "*the purpose of expropriation*."

4.14.4 The NP commented on the new draft:

- a. Regarding (2), They stated their support for the second option, namely "*No one may be arbitrarily deprived of property*."
- b. Regarding (3), they stated that they were happy with "*land reform*" being included as a "sub-definition" of "*public interest*". However, they proposed insertion of the element "*just and equitable compensation*" to (3).
- c. Regarding (4), they proposed the addition of the factor "*the state investment and subsidy*."

4.14.5 The DP commented on the new draft:

- a. Regarding (1), they proposed that regarding the articulation of the right itself the following be considered: "*The state must guarantee property and it must foster conditions which enable people to have access to property on an equitable basis*."

They stated that if it could be agreed in principle to the expression that no one may be arbitrarily deprived of property, they would be prepared to consider the German formulation, and that subject to that the contents nature and limits of property will be determined by law.

- b. Regarding (2), they requested clarity on how inclusion of the word "*nature*" may effect the suggestion that the clause deal only with land and immovable property.
- c. Regarding (3)(a), they proposed to add "*to address the results of past racial discrimination.*"
- d. Regarding (4), they stated that they may be able to meet the ANC on this basis by retaining the equitability test. They proposed to replace factor (d), "*the ability of the state to pay*" with "*the level of the state and private investment in the property,*" and to insert a further factor "*the purpose of the expropriation.*"
- e. Regarding (5), they stated this depended on how the other subsections were dealt with.

- 4.14.6 The ACDP commented on the new draft that they supported a property clause with land reform measures, but that they also proposed a land tax on all land.
- 4.14.7 It was noted that the NP felt some sections of the new formulation dealing with expropriation and compensation were intended to deal with land and immovable property, rather than property in general. However, they stated that there may be a possibility of dealing with a specific clause generally on land first, which may assist the wider debate on property.
- 4.14.8 It was noted that the ANC indicated that they would consider this and had intended to deal mainly with land and immovable property, but also by relating it to other forms of property.

4.15 Section 25: Housing and Land

Regarding Subsection (1) and (2)

4.15.1 It was noted that there was general agreement on the core values and this was a matter for technical refinement. It was noted that parties wanted to look again at what the Independent panel of Experts was proposing in the memorandum *The meaning of "progressive"*, and after seeing the reformulation may look again at this aspect of it.

4.15.2 It was agreed to consider insertion of "*within the state's available resources*" in 25(1) after the words "*and other measures.*"

Regarding Subsection (3)

4.15.3 It was agreed to consider that this subsection related to land should be placed in a separate clause in accordance with the discussions under the property clause above, and that the words "*within the state's available resources*" be inserted in line with the above amendment.

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

Regarding Subsection (1)(a)

4.16.1 It was agreed to delete "*of the highest attainable standard*".

Regarding Subsection (1)(c)

4.16.2 It was agreed to replace the term "*social system*" with "*social security*".

Regarding Subsection (2)

4.16.3 It was agreed this be reformulated by the Technical Refinement Team along the lines of 25(3), taking into account the phrase "*within the state's available resources.*"

4.17 Section 27: Children

Regarding Subsection 27(1)(b)

- 4.17.1 It was noted that whilst the NP still wished to insert "*parental care*" after "*family care*", parties were moving closer to agreement. It was noted that the ANC would come back to the committee on this matter.

Regarding Subsection 27 (1)(d)

- 4.17.2 It was noted that it had previously been agreed to inset the word "*degradation*" in this Subsection.

Regarding Subsection 27(1)(f)

- 4.17.3 It was noted that a proposal was under discussion whether to substitute the word "*possible*" with "*appropriate*."

4.18 Section 28: Education

- 4.18.1 It was reported that bilateral meetings were still to take place on this matter.

4.19 Section 29: Academic freedom

- 4.19.1 It was agreed that this section would fall away as it had been incorporated in Section 15 on Freedom of Expression.

4.20 Section 30: Language and culture

- 4.20.1 It was agreed that the Technical Refinement Team explore a reformulation with the appropriate wording taking into consideration what was said by the NP and also consider further information from the Technical Committee regarding the position in international instruments.

- 4.20.2 It was noted that the NP proposed the deletion of the words after "choice", therefore the deletion of "*but no one exercising these rights may violate the rights of anyone else.*" Alternatively they suggested words to the effect that it be "*consistent with the Bill of Rights*". They also suggested that this be looked at in relation to traditional practices in Section 14(3), to ensure consistency in wording.

4.20.3 The technical experts said this qualification was usually included in international instruments whenever culture was protected, because culture should not be able to be used to override other rights, such as equality and dignity.

4.21 Section 31: Access to information

4.21.1 It was agreed to flag this for reconsideration when horizontal application and the issue of juristic persons were discussed. It was noted that the ANC was preparing a formulation along the lines of an earlier proposal of theirs.

4.21.2 It was noted that the DP had changed their position and no longer insisted that it should apply to juristic persons or that one could make it apply horizontally.

4.22 Section 32: Just administrative action

4.22.1 It was noted that discussions between parties on this matter must still take place.

4.23 Section 33: Access to courts

4.23.1 This was agreed.

4.23.2 It was noted that the DP wanted to add a "due process clause" before Section 33.

4.24 Section 34: Arrested, detained and accused persons

4.24.1 It was noted that the ANC was considering proposals on this section.

4.25 Section 35: Limitation of rights

4.25.1 It was agreed to defer this matter until the multi-lateral consultation of 23 February 1996. It was noted that proposals were being exchanged and that parties were being given the opportunity to consider this further.

4.26 Section 36: States of emergency

Regarding Subsection (4)

- 4.26.1 It was noted that the Technical Refinement team had been requested to draft a reformulation.

4.27 Section 37: Enforcement of rights

- 4.27.1 This was agreed.

4.28 Section 38: Application

- 4.28.1 It was agreed to defer discussion on this to the consultation of 23 February.

4.29 Section 39: Interpretation of Bill of Rights

- 4.29.1 This section was agreed, and to add to the end of the sentence in subsection (1)(a) "*and human dignity*".

5. CLOSURE

- 5.1 The meeting closed at 15h40.

