

2/2/13/15

CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

**WEDNESDAY
2ND OCTOBER 1996**

Room V16

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

NOTICE OF MEETING

Please note that a meeting of Sub-Committee One will take place as indicated below:

Date: Wednesday, 2nd October 1996

Time: 9h00

Venue: Room V16

Agenda

- 1 Opening and welcome
- 2 Issues to revisit:
 - (i) States of Emergency
 - (ii) Labour Relations
 - (iii) Truth & Reconciliation
 - (iv) Auditor General & Public Protector
 - (v) Public Service Commission
- 3 Any other business
- 4 Closure

CONSTITUTIONAL ASSEMBLY SUB-COMMITTEE ONE

MINUTES OF MEETING HELD ON TUESDAY,
1ST OCTOBER, 1996
AT 10H00 IN ROOM V16

Chairperson: Myakayaka-Manzini, M

PRESENT:

Camerer, S
De Beer, S
Dexter, P
Ebrahim, AG
Graaff, D
Green, L

Hofmeyr, WA
Love, J
Mulder, CP
Pandor, N
Radue, R
Skweyiya, Minister ZST

Technical Experts / Panel

Liebenberg, S
Ncholo, Adv P
Kruger, Prof J
Van der Westhuizen, Prof J

1. OPENING

- 1.1 The meeting was opened by the Chairperson, Ms Myakayaka-Manzini at 10h12. Time was given to await the arrival of the IFP but they, however, did not arrive and the meeting proceeded as follows:

2. STATES OF EMERGENCY

- 2.1 Ms Liebenberg took the meeting through the memorandum prepared by the Technical Committee on the State of Emergency, drawing particular attention to the amendments made to the following issues:-
- i) Non-derogability of the right against discrimination on certain grounds;
 - ii) Children's rights;
 - iii) The general right to a fair trial;

- iv) Delay in trial proceedings
- v) The Exclusionary Rule

- 2.2 The ANC reported that they were almost in total agreement but had a slight concern with regard to point 3.1 - the general right to a fair trial - and would consult further with their principles in this regard.
- 2.3 The National Party did not have a problem with the memorandum but would want to see the final draft before making any further comments.
- 2.4 All parties agreed to the amendment made to the Exclusionary Rule.
- 2.5 Ms Liebenberg agreed to refine the draft formulations and report back to the Sub-committee by the following day.

3. LABOUR RELATIONS

- 3.1 It was agreed to hold over this matter as discussions were taking place at bi-lateral meetings and solutions were imminent. The issue would be revisited later in the day or the following day.

4. TRUTH & RECONCILIATION

- 4.1 Prof Van der Westhuizen reported that a memo was in the process of being drafted and would be circulated later in the day. The issue was non-controversial.

5. AUDITOR GENERAL & PUBLIC PROTECTOR

- 5.1 The ANC reported that progress was being made in bi-lateral meetings and that issues should be resolved by the following day.

6 PUBLIC SERVICE COMMISSION

- 6.1 Prof Kruger presented the memo prepared by the Panel on the protection and independence of the Public Service Commission and answered questions on clarification.
- 6.2 Prof Kruger followed with the memorandum on the proposed redraft of provisions on the Public Service Commission which he said attempted to incorporate the various options called for by the various political parties.
- 6.3 Due to the fact that parties were not given enough time to study the document in detail, it was agreed that the meeting adjourn and that parties report back at 2.30 the same day.

7 ADJOURNMENT

The meeting adjourned at 10h55

8 RECONVENING

The meeting reconvened at 15h45. Chairperson Ms Myakayaka-Manzini welcomed the IFP's Mr Ben Skosana to the meeting.

9 PUBLIC SERVICE COMMISSION

9.1 Prof Kruger presented the new draft to the meeting, discussing each clause in turn and explaining the changes and reasons for making them. Some of the changes and additions were from the submission by the Public Service Commission while others were done at the request of the parties.

9.2 Mr Skosana said the IFP had some brief comment. He thanked the executive director Hassen Ebrahim for allowing the party to take part in the sub-committee. He said some of the comments might refer to matters that fell outside the ambit of the discussions of the sub-committee. The chairperson said the sub-committee was following the mandate given to it by the Constitutional Assembly. If issues were raised that were outside of the matters being dealt with by the committee, these would be noted. She suggested that they could be referred to the Management Committee which had been responsible for deciding the agendas of the sub-committees. Mr De Beer said the IFP should be given a chance to state their views.

9.3 It was decided to go through the draft with parties giving their views on each of the clauses.

9.4 Ms Love reported that a bilateral had been held with the National Party at which certain agreement had been reached. On 196(1) she said it was agreed that the clause should read as follows: "There is a single Public Service for the Republic." The numbers could be dealt with elsewhere and the latter part in square brackets was captured elsewhere in the draft.

9.5 On 196(1), Mr Skosana said the IFP wanted the word "single" replaced by "national" and the words for the Republic and the numbers to be deleted. The clause would read: "There is a national Public Service Commission to promote the values and principles of public administration in the public service." He said this was tied in with an alternative proposal for 196(3) and he also wished to delete 196(4). He was requested, and agreed, to provide the sub-committee with a written copy of the IFP's proposed changes.

- 9.6 The NP asked the Panel to clarify whether the question of a provincial public service commission fell outside the ambit of the sub-committee's work, considering the Constitutional Court had not addressed the issue. Prof Van der Westhuisen said the absence of a provincial commission was not a reason for non-certification. Adv Ncholo added that the Constitutional Court would have to assess the powers and functions of the commission and what the members appointed by the provinces could do in their provinces.
- 9.7 The ACDP, the DP and the PAC supported the proposed changes suggested by the ANC and the NP.
- 9.8 Ms Love said that there had been lengthy discussions for months on the unification process that was needed and the ANC felt that the formulation adequately captured this. Mr De Beer agreed that the Theme Committee had decided in favour of a single Public Service Commission.
- 9.9 On 196(2) Ms Love said the ANC preferred the submission made by PSC on page 13 of the 27 September document. There was a lengthy discussion about whether or not the phrase "without fear, favour or prejudice" was necessary or appropriate. It was decided that it would be left in square brackets but that the Panel would give an opinion on whether it was needed in addition to "independent and impartial". It was agreed that "as regulated by national legislation" would be included.
- 9.10 On 196(3), the ANC felt that much of the detail was unnecessary. The party submitted an alternative draft which Ms Love said would clarify the distinction between the way the National Assembly dealt with the five nationally appointed commissioners and the provincial legislatures with the ones nominated by the provinces. She asked the Panel to look at the proposed (a), (b), (c) and (e) and to consider whether they would satisfy the court. She said there was agreement in principle on (d) with the inclusion of "as regulated by national legislation".
- 9.11 The NP underlined its view that the Constitutional Principles and the court judgment required clear stipulations on appointment and dismissals. On 196(3)(d), he said it had finally been decided that there should not be nine provincial commissions of highly paid people. However, having members nominated by premiers and exercising powers and functions in the provinces actually meant each province had a one-member commission. By adding clause 197(4), the needs of the court would be addressed. Mr Skosana replied that the IFP was looking at the political rather than the monetary implications and took a wider view of the matter.

- 9.12 The NP also registered a query for the Panel on the use of may and must in sub (d) dealing with the powers in the provinces.
- 9.13 Dealing with 196(4)(a), Ms Love said the ANC had no problem. However, alternative proposals were made for (b) and (c) because there was not an adequate distinction made between the national and provincially appointed members. The ANC proposed deleting reference to the National Assembly committee because it was understood that, in referring the matter to the National Assembly, a committee would deal with it and that this committee would be a proportional one. She requested the view of the Panel on this in the light of other chapters. Ms Love also reported that there was disagreement on having a larger majority for removals. The ANC was not in favour of this.
- 9.14 The NP said it was in favour of having a committee of the National Assembly similar to the ones for the Auditor-General and the Public Protector. The NP favoured a larger majority for removals.
- 9.15 It was agreed that the brackets in 196(4) (b) and (c) would be retained.
- 9.16 196(5) was agreed to.
- 9.17 The ANC proposed that 196(6)(i) and (ii) be deleted and replaced by the following: "The Commission must report to each of the provincial legislatures on its activities in that province at least once a year." This was agreed to.
- 9.18 It was agreed that 196(7) should be deleted as this could be covered in legislation.
- 9.20 In 196(8) two options were presented. It was agreed that the "or" would be changed to "and" and both options combined.
- 9.21 196(9) was agreed to. There was some discussion about the bracketed phrase "good governance" and what this meant and it was decided to delete it.
- 9.22 The ANC were happy to accept 196(10) (a), (b), (c) and (e). They were unhappy with "and make recommendations" in (d) as this contained a notion of executive power which was not intended. The NP requested the Panel's view on whether the recommendations would be binding or not.
- 9.23 It was agreed to delete 196(11).
- 9.24 It was agreed that the previous draft of 197(4) would be included and that the "the" before employment would be deleted.

9.25 That concluded discussion on the Public Service Commission.

10 THE NATIONAL UNITY AND RECONCILIATION PROVISIONS

10.1 Prof Van der Westhuisen presented the contents of a memorandum from the Panel of Experts. Parties would consider the matter and discuss the issue on Wednesday morning.

11 ADJOURNMENT

11.1 It was decided that the sub-committee would discuss the Bill of Rights issues from 9h00 on Wednesday and a new draft and Panel opinion on the Public Service Commission at 14h00. The meeting adjourned at 17h45.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

To: Chairpersons & Executive Director
Date: 1 October 1996
Re: National Unity and Reconciliation Provisions

1. THE TEXT AND THE JUDGMENT

1.1 At the meetings of the sub-committee on 25, 26 and 27 September 1996 experts were requested to again look at the proposed wording of Item 22, Schedule 6. Schedule 6 of the New Constitutional Text (NT) deals with transitional arrangements. Under the heading "National unity and reconciliation", Item 22 states:

"22. (1) Notwithstanding any other provisions of the new Constitution and despite the repeal of the previous Constitution-

(a) all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution; and

(b) the provisions of the Promotion of the National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended by the Promotion of National Unity and Reconciliation Amendment Act, 1995 (Act 87 of 1995), are valid.

(2) Subitem (1)(b) does not prevent any further amendments to the Promotion of the National Unity and Reconciliation Act, 1995."

1.2 The relevant part of the Interim Constitution (IC) occurs at the end of Chapter 15, before Schedule 7, and reads:

"This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights,

democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South African and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God seën Suid-Afrika

Morena boloka sechaba sa heso. May God bless our country

Mudzimu fhatutshedza Afrika. Hosi Katekisa Afrika

[See also sec 232(4)]" (The reference to sec 232(4) seems to make little sense.)

- 1.3 In its certification judgment the Constitutional Court ruled that 22(1)(b) does not comply with CP's II, IV and VII, read together, because it seeks to exempt a statute (the promotion of National Unity and Reconciliation Act 34 of 1995) from constitutional review. The reasoning applicable to Item 241 of Schedule 6 also applies here, according to the judgment. The Court ruled

that 22(1)(a) is not in breach of the CP's. It adds the text of the "epilogue" of the IC to the final Constitution. As such, this provision is part of the NT and subject to constitutional amendments in the ordinary course. The epilogue could not have been argued to be in breach of the CP's.

- 1.4 The proposed solutions in the draft formulations put forward by the technical experts convened by the Executive Director of the CA envisage the retention of 22(1)(a), but the deletion of 22(1)(b) and, consequently, 22(2).

2. POSSIBLE PROBLEMS

Possible problematic questions which could arise include the following:

- 2.1 The entire "epilogue" or "post-amble" is carried over into the NT. Where exactly does the epilogue of the IC fit into the NT if it is deemed to be part of the NT? Can it be assumed that it fits in only under Item 22 of Schedule 6, or could it be argued that it is an epilogue to the NT? Furthermore, are the contents of the epilogue only relevant to the specific Act and Truth Commission, or also in a wider context, eg with regard to the interpretation of other provisions of the NT? The epilogue eg also includes phrases such as "a historic bridge between the past ... and a future" and states that the pursuit of national unity and the well being of South African citizens "require reconciliation between the people of South Africa..." It also mentions the need for "reconstruction." If the meaning of the epilogue is not restricted to the Truth and Reconciliation Act and its process, it could arguably have unforeseen consequences eg for the later interpretation of various clauses of the Constitution, which were not agreed on or drafted with such an epilogue in mind.
- 2.2 For how long must it be deemed to be part of the NT - only for as long as the relevant Act and Commission is in operation, or also thereafter? Could its possible wider implications and influence on other clauses of the Constitution depend on the duration of the Truth and Reconciliation Commission process?

3. CUT-OFF DATE

Some concern was expressed as to the cut-off date for amnesty. The entire epilogue of the IC is deemed to be part of the NT. This includes details such as the dates. The date is thus part of the NT.

4. PROPOSALS

- 4.1 Schedule 6 deals with the arrangements necessary for the transition from the IC to the NT. The Promotion of National Unity and Reconciliation Act was passed as a direct consequence and in terms of the IC. Its constitutionality should be tested in terms of the IC, as has already happened with regard to one or more aspects, in the AZAPO-case. The idea behind Item 22 was simply to ensure that if the Act, or parts of it, cannot be challenged under the NT and perhaps found to be unconstitutional in view of the absence of constitutional provisions for unity, reconciliation amnesty etc, whereas it was drafted and passed to comply with the IC. (The insertion of 22(1)(b) went unnecessarily far and would mean that the Act was valid, even if found to be invalid in terms of the IC by the Constitutional Court. Therefore the Court declined to certify.)
- 4.2 One possible way to achieve the above aim, was to make the relevant IC provisions part of the NT. Another is the earlier formulation put forward by the technical drafter(s) of Schedule 6, which was more or less the following: "The... Act...is valid to the extent that it is consistent with the Interim Constitution."

5. POSSIBLE FORMULATIONS

Option 1

The present proposal, namely Item 22(1)(a) of Schedule 6, renumbered as 22.

Option 2

"The ...Act... is valid to the extent that it is consistent with the Interim Constitution."

Option 3

"For the purpose of the validity of the Promotion of the National Unity and Reconciliation Act... all the provisions of the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution, notwithstanding any other provision of the new Constitution and despite the repeal of the previous Constitution..."
(perhaps subject to further technical refinement).

6. CLOSING REMARK

Option 3 is recommended. It would make it clear that the contents of the IC epilogue become part of the NT only for purposes of the Truth and Reconciliation process, regulated by the relevant Act, and would thus prevent any unforeseen and unintended consequences. It provides more clarity than Option 1. It is closer to the formulation already scrutinized and approved by the Court, than Option 2.

PUBLIC SERVICE COMMISSION
Third draft - 2 October 1996
(subject to further refinement)

- 196 (1) There is a single Public Service Commission for the Republic.
- (2) The Commission is independent and must be impartial [and must exercise its powers and perform its functions without fear, favour or prejudice] and regulated by national legislation in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.
- (3) Other organs of state must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.
- (4) (a) The President must appoint five commissioners with the approval of the National Assembly, one of whom must be designated by the President as Chairperson of the Commission.¹
- (b) The President must appoint a commissioner for each province nominated by the Premier of that province after approval by the respective provincial legislatures.
- (c) Members of the Commission referred to in (b) [may/must] exercise the powers and perform the functions of the Commission in the provinces as prescribed by national legislation.
- (d) An Act of Parliament must regulate the procedure of all 14 appointments.
- (e) Commissioners must be appointed for a term of five years, which is renewable for one additional term.
- (f) A person is qualified to be appointed to the Commission if he or she,
- (i) is a South African citizen;
- (ii) is a fit and proper person who has knowledge or experience of rendering public services, administration or management.
- (5) A member of the Commission may be removed from office only -
- (a) on the grounds of misconduct, incapacity or incompetence;
- (b) after a finding to that effect by the National Assembly in the case of section 3 (a), or the provincial legislature in respect of members recommended by it in terms of 3 (b) in accordance with national

¹The NP reserves its position.

legislation.

- (6) The Commission is accountable and must report on its activities to the National Assembly at least once a year.
 - (7) The Commission must report to each of the provincial legislatures on the activities of the Commission in that province at least once a year.
 - (8) The Commission must -
 - (a) promote the values and principles of public administration in the public service, as set out in section 195.
 - (b) monitor and evaluate the organisation, administration and personnel procedures of the public service; and
 - (c) propose measures to ensure effective performance within the public service.
 - (9) The Commission may of its own accord or at the request of the executing authority, including a provincial executing authority -
 - (a) investigate the application of personnel and public administration practices and procedures;
 - (b) investigate and evaluate any matter relating to the application of the basic values and principles of public administration in the public service;
 - (c) deal with complaints and grievances of public service employees concerning official acts or omissions;
 - (d) render advice to the executing authorities regarding personnel practices in the public service, including recruitment, appointments, promotions, transfers, discharge and other career incidents of employees in the public service;
 - (e) render advice to executing authorities in the determination of norms and standards applicable to the public service.
- 197 (4) Subject to national norms and standards governing employment in the public service, provincial governments are responsible for the appointment, promotion, transfer and dismissal of members of the public service in their administrations.

Limitation of rights

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency

37. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -
- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and
 - (b) the declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and

Table of Non-Derogable Rights

Section Number	Section Title	Extent to which the right is non-derogable
9	Equality	With respect to <u>unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.</u>
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subsections (1)(d) and (e) and (2)(c) [only].
13	Slavery, servitude and forced labour	With respect to slavery and servitude [only].
28	Children	With respect to subsection (1)(d) and (1)(e). <u>The rights in subparagraphs [(1)(g)](i) and (ii) of subsection (1)(g); and subsection (1)(l) in respect of children of 15 years and younger.</u>
35	Arrested, detained and accused persons	With respect to: [the following] Subsections [only] (1)(a), (b) and (c); (2)(d); <u>The rights in subparagraphs (a) to (e) of subsection (3), excluding (d); Subsection (4); and subsection (5) with respect to the admission of evidence that would render the trial unfair.</u>

