

PAGES  
**192**  
BLADSYE

**Croxley**<sup>®</sup>

**COUNTER BOOK      TOONBANKBOEK**

Quire 2 Katern

CC Subcommittee  
February 23 - 29 1996  
5 March **(3)**

**JD 161**



6 001396 002207



Ramaphosa

Multi laterals 23 February 1996

Ramaphosa

Ruled  
Political party advisors <sup>could</sup> to speak?

Ramaphosa

Agenda

Camerer

Need today to consider property clause & other contentious issues 1st.

Agreed

Property

Camerer

New proposal in draft on p. 9, from ANC. Have been discussing it informally. Said not table their (NP) proposal at this meeting. & surprised to see ANC prop in doc. - if they had known they would have tendered one for inclusion, too.

Ramaphosa

Note this

Camerer

NP to table its proposal?

Amats

Concern:  
Expropriation & redistribution aspects should be through taxation  
"ability of state to pay" handicaps property owner, who wouldn't be given fair payment - market value & who not take on the burden of redistribution.

Moving land to separate clause sensible.

Ramaphosa

Don't begin aggressively - but on what all agree on & where differ.

Nessel

PAC supports Option 1

Amal

ANC NEC does not support Option 1

Hymeyr

Need agreement on 2 fundamentals re land

1) If to guarantee property in constit.,  
of (non-absolute form) property,  
is from NP proposals

If not, wd support no clause.

2) Ed not serve to frustrate land  
reform.

Clauses (3) + (4) needs formula w/ lets  
court of law say wont always compensate  
at market value, given particular  
circumstances. Do allow

Courts to deviate from market value ~~occasionally~~

Cameras

Re pts of agreement: Agree Across the board:  
Property rights should not stand in way of  
land reform.

Re absolute rights: none absolute. Let  
limitations clause cope w/ this & other rights,  
but need security of tenure for all  
property rights.

Wording in 1st clause of NP proposal/  
from ANC's tentative proposal. on land

Differences to

Ramaphosa

7 Feb subcomm agreed that new tentative ANC proposal to be used as a basis for further discussion.

Still note what Sheila said. But use tentative proposal as a basis.

Camerer

Still would have liked to have been included in document

Smuts

Agreed, not absolute right  
no problem w/ not frustrating land reform.  
Need reformulation.

Re Section 1 New formulation

Camerer

Talking of land, not all forms of prop.

Hofmeyr

Intended to see it as land as property, & see later if other forms of property sd. be seen differently.

Principle: form of prop. protected in constit. sd not be absolute.

{ German formulation does not protect all rights normally assoc w/ property, but institution of property, so courts can determine decide.

{ In trenches form of property: nonabsolute.

LAND

Radue

Since land the vital aspect to ANC, wd it  
object in principle to separating ~~property +~~  
land (reforms) into sep. clauses

Asmal

If agree on land wd agree on property.  
but

① Shareholding democracy - DP view of  
property - cd. be included.

② Cant remove land from Bill of Rights

Discuss land clauses + rest to fall into  
line.

Agreed

Smuts

DP doesn't like concept that property wd be  
determined by law.

Hofmeyr

Neither does ANC.

Smuts

Need to look at endless list of property,  
shares, copyright, etc. as well as land.

Cameron

Concerns from COSATU e.g. deal largely w/  
land

Land

Tenta. props (1)

Hofmeyr

Issues raised:

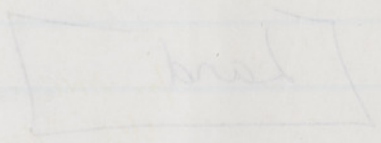
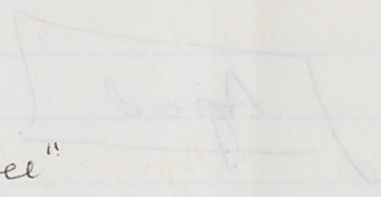
DP doesn't ful "respect" strong  
enough

DP/NP (2) needs to be qualified

Refer

Asset

"Guarantee"



Tests props (1)

Hypoth

If asset or land not registered  
 but  
 ① Statutory doctrine - Dr. Manoj  
 property - not included  
 ② Can't remove land from bill of rights  
 Discuss land classes not to fall in  
 this

Dr. Manoj the concept that property is  
 determined by law  
 Water, Gas etc.  
 Not a list of real estate list of property  
 shares, copyright, etc. as well as land  
 (comes from Section 2) but copyright  
 land

Issues raised  
 - Dr. Manoj's report shows  
 arising



Hofmeyr

state can "guarantee" in (1)

but (1) + (2) go together.

So depends on how (2) formulated.

Queried why SA sd have stronger form of property than anywhere in the world.

Smuts

NP not substantially different from DP tabled earlier

"the nature & extent"

"no one may be arbitrarily" — DP

looked at "respect"

Agrees "guarantee" the answer

is compromise b/t ANC respect & NP

Cammer

Moved away from "guarantee" b/c ANC said didn't like it. German constit guarantees

Want:

(1) Property guaranteed +

(2) Guaranteed there be no arbitrary deprivation

for ANC - linked (1) + (2)

Use "guarantee" in (1) + in (2) ?

Ramaphosa

Hofmeyr

(2)

"No one may be deprived of prop. except in a law of general application"

How is this diff. from  
"No one may be arbitrarily deprived..." ?

Asmal

← Uni Declara of Legal Rights : w/ no  
limitations clause

Ramaphosa

(1) "guarantee"  
(2) "No one may be deprived <sup>tho</sup> application"

ANC

doesn't like arbitrary

Camerer

~~NP:~~

Sizani

Re. (1) & (2) come from Germany; property  
as land: how do you guarantee  
property whose title is still in doubt?

In certain areas, most of land subject to  
land claims on basis of taking of land  
by force. Legitimises conquest of land;  
or titles where taken by force.

Camerer

Re (1) "guarantee" good - wd  
rest of clause be reformulated in terms  
of land clause.

Hofmeyr

Thought tentative proposal was way  
wanted to deal w/ land.

Smuts

"No one ... application" too wide.  
arbitrariness key; wd rather sacrifice  
guarantee + keep respect + keep arbitrary.

Need guarantee vs. arbitrariness, so prefer

~~the nature of extent of.~~

Ramaphosa

Trade off - guarantee / respect  
general application & arbitrariness

Camerer

No - OR to "but"

Hofmeyr

Won't move beyond <sup>former</sup> formulation  
Worried about "arbitrary" as not engender  
individual actions vs each admin action  
taken.

General law of application goes far in  
ensuring against arbitrariness.

Re PAE.

Abmal

How does arbitrary assist in this?

Re PAE: "all property is theft" Original taking  
of land based on conquest, but continuity the  
basis of titles now, & allows for vested interests.

No  
^ Disjuncture b/t vested rights that exist &  
new poli. order. except land claims -  
1913 & land reform.

Need to address this in moderate way.

Camerer

Arbitrariness: Bill to protect people vs  
deprivation of state, & state can pass legisla-  
w / 51% majority. Need to protect people vs.

Paragraph

General

History

Answer

Answer

Not possible to answer, as paper

to many of which

Task 11 - general / report

general application - substance

1p - OK to put

What more logical foundation

What about "reality" as an answer

individual action is that action is

Factor

General level of application for the  
Generalizing against substance

Re the

How does writing about it?

3(a)

Re the: all of a diff. - Original being  
of last level on computer, but certainly the  
base of history, a flow for tested

(b)

to Professor: the right that exist  
and get, other - except hand classes -  
1912 + last reform

Ask to explain the in notebook

Answer: Bill & first paper is

Application of the - also on page

this.

Need protection vs "arbitrary deprivation"

Cheadle

Read whole.

Why concern re 'law of general application' + 'limitations clause'

Camerer saying is specific application + catered for in admin justice clause, w/ wd require reasonable, lawful + procedurally fair actions.

Camerer

Need clarity in what wd happen to admin justice clause.

Ramaphosa

Differences clear -

'law of general appli'  
'arbitrarily deprived'

Keep talking in it.

Ramaphosa

(3)(a), remove brackets

DP - NP okay

Hofmeyr

Okay if solve other problems

Smuts

(b)  
DP: remove brackets

Green

"Just & equitable": past people deprived unjustly + inequitably - might mean there wd be no justice.



Hofmeyr

Test to be used to determine compensation.

"Just & equitable" oversees means market value compensation.

Same, as in 4, an "equitable balance... those affected"

DP has gone back on this + NP too.

Smuts

conceded last time, but believe "just + equitable" sd be there.

Ramaphosa

But wd look at other stuff as well b/c (3) to be read w/ (4).

(4)

Cameron

But NP's posi. is not "equitable balance b/t the public interest", etc  
So Willie wrong

Radu

NP proposal:

Ramaphosa

(4)

Surtz

Need balance b/t person effected + public interest.  
Both

Ramaphosa

(4)

Camerer

Agree balance public + private interests  
just + equitable - mean courts shd be fair

Smuts

List them as numbers 1 + 2 (public + private interests.) in list of factors

Cheadle

Hofmeyr

Court must determine balance b/t public + private w/ regard to ... - factors  
(public + private interests)  
no NP/DP: put them in as factors

Sutty

// in Criminal Act: + how bail set for ex. so public + private interests competing.

Rama

What being balanced?

Cheadle

Interests: public vs person claiming land

1) normal exprop. - e.g. build

public + private

2) land reform: owner vs people who wd acquire land

Diff b/t interests + factors.

Ramaphosa

German land owner whose land is being expropriated.

Raubenheimer

Interests are factors

Ramaphosa

But court wd only look for the balance, the equity



Canerov

But in ex. is land owner vs landless, not the public interest; w/ is wider.  
Public interest - the balance, the equity.

v.d. Westhuizen

interest can be a factor  
Public is a wide range of things - need for stable soc.,  
homeless,

Wessel

Who is prejudiced if leave it as it is?

Schib - Nchodo

If clause dealing w/ land, need to be  
very succinct about factors to be considered

Canadian land disputes involving Indians -  
seen in terms of public int. be giving land  
back to Indians so interests of private land  
owners.

→ See ←

Hofmeyr

Just & equitable difficult b/c encourages  
court to look at interests of person  
being expropriated.

Use formulation that balances those interests  
w/ wider interests of society.

Can't be reduced to simple factors. Need to  
be seen as interests.

Effects tests w/ gives coherence to what  
trying to do.

Yacobs

"fair" determination, dislikes "equitable"  
Answer: court determining fair amongst all  
relevant interests (don't list public +  
private)  
[Cd case german, pertinent, ]

& then list the factors

Cammer

Is helpful. Not against "equitable".  
Helpful in that - recognizes <sup>NP stands:</sup> court  
needs to make 'fair' decision

But if introduce factors

"an equitable balance, taking into  
account"

Ramaphosa

"A fair balance amongst all the relevant  
interests affected, having regard to"  
[list factors]

Hofmeyr

Can live w/ it

Cammer

Okay

Sonuts

Okay

Green

Accept, but "market value" has impact  
on market value.

Ramaphosa

Broad agreement on This new wording.

Factors  
w/w

"Market value at the time of acquisition"

"for character, better quality"  
...  
[C. ...]

...  
...  
...

"... account"  
...  
...  
"

(a)

(b)

(c)

Hand  
Censor  
Paragraph  
Paragraph  
Paragraph  
Paragraph  
Paragraph

Look at public & private

Ramaphosa

When a court decides ... "including" - list factors

(a) current use of the property

what of "intended use" in NP proposal  
No -

Kader

"Current use" - developmental aspects,  
But "intended use" - how remote? contingent interests. Nd be "prospect of future use"; elusive b/c about intentions, & disconnected from property.

Future use included in "current use"

Sury

Intended use also included in "market value" aspect.

No agreement on intended use - revisit when reach end of list

Ramaphosa

Agreed

(a) current use

(b) cost of acquisition

(c) NP/DP yes.

~~DP~~  
Moshel Jean

Don't support (c) b/c wd support injustice. Nd be inflated market value. Nd to look at market value of improvements, not land,

& market value when land originally expropriated & now.

"Market value at the time of acquisition"

Respectfully

(b)

Karen

Step

Respectfully

Stephanie

+ would like to see but currently  
appreciate a read

"Market value at the time of acquisition"

Ramaphosa

Note ACP reservation on market value

(d) "Ability of state to pay"

NP, DP — No.

Mdladlana

Why "w/in its available resources" in socio-  
eco. rights & not "ability of state to pay" here.  
What is the difference?

Gibson

In edu., wd entail billions of rand. Here:  
1 fair acquisition of property.

Ramaphosa

But what if state did large scale  
land reform & entailed billions & billions?

Smuts

Must be done 'w/in available resources'

Stemmer

State cd. always pay. (d) —  
Introduces arbitrariness

Surty

But state ability to pay is a qualifying  
factor

State not final arbiter, courts are, so  
state's ability should be included as a factor  
to be considered.

Green

If ability of state to pay excluded, cd not  
have significant land reform.

If talk about tax, should be land tax,  
not broad tax wd hurt the poor.

Radue Very opposed to (d). Court in invidious position.

Gibson In preceding part of 4, refer to "timing + manner of payment" -

state cd. give staggered payment etc., w/ cater for ability of state to pay.

Asmal Noted, Gibson agreed to "timing"

"timing + manner"

Ramaphosa (?) or flag (d)

Carrerev Agreements w/ other countries re. effective payment - giving foreigners more rights than citizens.

Asmal ad bilaterals raised "~~effect~~ prompt, adequate, effective"; from internat'l agreements.

But want to customise to our own use - to take into account real history here.

Otherwise just raising new obstacles.

Note Sheila's concerns for (d)

(e)  
NP agreed ✓

(+)

Camerer

If look at (F) look at value of investment by those affected

Gibson

or level of "state + private investment"

Hofmeyr

Thought covered in list of acquisition.  
Need to check up on that

Azmal

But "market value" covers private investment.

Context of state subsidies - e.g. state guarantees for loans

But longer the list, the longer the provisions

See (F) as "state gifts to private land owners"

Camerer

But private capital invested, too.

Remove brackets if make addition.

Kader

Why refer just to "investment" - not also electrification etc. Diminishes role of (F).

Private investment covered in market value.

Cheadle:

Market value - what of foolish investments or small investment w/ makes huge returns.

Ramaphosa

What of overcapitalisation. Should this be considered + taken into account?

Camerer

Law now takes market value into account + improvement



Yacob

if put in or not, court wd take into account improvement, b/c say "all relevant factors; including..."

Hofmeyr

State investment sd be mentioned b/c part of market value b/c of state investment.  
\* isn't always thought of otherwise.

wd exclude (c) + insert "private" in (f)

Gibson

Hofmeyr

(5) "(g) the  
Add: "need for effective land reform"  
as new factor."

Cameron

Included in definition of public interest

Hofmeyr

But 3(a) + 4 distinguished; listed in 3(a) but isn't considered in compensation otherwise.

Smuts

Add

"the purpose of appropriate" ... including

Asmal

Add "the purpose of land expropriating  
including land reform

Sutty

Land reform an issue sd. stand in its own as a factor, not subsumed under another factor.

Ramaphosa:

Is New factor to be considered.

Don't need

Hofmeyr

Delete the purpose - just leave this.

Jonuts

Overrides all that went before.

Camerer

Don't need (5)

Shd be right of equitable access to land.

Ramaphosa. So (5) problematic.

> June <

Redraft Tabled

Ramaphosa

Wd be the one draft to work on.  
Options fell away.

To be revisited 5 March

Multilateral to Ben.

CC Fri. 1st, discussion of the new draft +  
included in 4th edition.

535 Limitations

35(1)

Hofmeyr

ARC "reasonable & justifiable"

35(1)(c) not appropriate to deal w  
here but under interpretation.

Othursi constitutionalises all our  
international obligations

Smuts

DP "reasonable + necessary";  
Response to Sub & clause, DP clause on p 34.

New DP proposal used:

Caner

NP: Use clause as it stands, using  
Necessary

requires Rautenbach's version, particularly  
through means less damaging to the

Will consider DP prop + Rautenbach's

Smuts

Had need to add (2).

Refer "less restrictive means" too, so right  
restricted as little as possible.

Cheadle

DP Proposal: 2 differences:

1. "Demonstrably"
2. In list of issues, order is diff.  
• (a) of T24 proposal  
missing

Could capture it in the "nature of the  
right" - as each right wd have  
different implications.

Smuts

Omitted (a), b/c "compatibility" in (2)(b)  
dealt w/ it.

But cd insert T24 provision (a)

v.d. Westhuizen

No strong preferences.

But sd not be additional tests

y to retain 35(1)(b) - ~~known to~~  
not sure what "compatible w/ the nature of  
the nature" means

Chadler

y change 35(1), 35(2) to longer necessary.

v. d. Westhuizen

Against explicit bifurcation (like necessary + reasonable)

Cameron

~~But~~  
?

Hofmeyr

Need to look at DP proposals, looked at TC4 - broadly happy w/ that. DP proposals: differ demonstrably + omit (a)

~~XXXXX~~ different formulation for (e)

Re NP pt: address three: (a) - (c) defining what reasonable is.

+ "justifiable" the main word in contention

Sheila

Defines 'justifiable'. Want to retain 'justifiable' + 'reasonable' - an imp. combination

Rautenbach

listed (a) - (c) to avoid using 'reasonable' + 'necessary'

Radue

ANC added words "and human dignity" - should be added.

Sinty

Agrees, add "+ human dignity"  
DP proposal - "less restrictive mean" better than earlier proposals.

Sarty

'purpose' an imp element to include here.  
Asked

'demonstrably + justifiable' - wd be onus on person who is challenging limitation

Demonstrable almost tautology in some cases.

Yacob

2 different approaches

1) Define test broadly

2) List certain factors - DP + TZ4

"reasonableness" broad & courts can develop it in time.

① "reasonable + necessary" only early stage development by Constit Court. To use it here wd stultify it.

② "reasonable + justifiable" Hg + all factors mentioned by DP + TZ4 - each covered by term "reasonable" by mentioning specific factors, one limit "reasonable".  
~~reason~~

Dene

DP draft does more than unpack meaning. Lies to set standards as well.

Raubenheimer

But

TZ4 proposal (e); potentially insert  
① "reasonably achieved"

②

(a)(b)(c) dont stultify b/c above say  
"taken into account..."

Cheadle

Need broad agreement to get out of conflict b/t  
'reasonable' & 'necessary'

These 2 formulations begin to let parties meet.

Look at implications of bimodally & see when to insist  
'reasonable'

Lighten it up, refine it.

Hofmeyr

Agrees w/ Zac

v d Wathuizen Combine T24 + DP proposals & add reasonable to  
make it more flexible - so courts not stultify.

Agreed Reformulate Tech Comm + TRT

## Application

Ramaphosa

2 Options

38(1) ✓

38(2) ✓

38(3) Two options

Cameron

applicable or appropriate contested in 38(1)  
NP: replace appropriate w/ applicable

v.d. Wathuizen

p. 23 of doc.

Chandler

Consider  
also "binds"; w/ wd apply too.

"Applicable" vs appropriate

Force: applies w/ 3 meanings & is slightly  
stricter than appropriate

meaning

① Applies: text oriented: wd interpret it in terms of  
text.

② 'Capable of being applied' - Applicable  
Lack of case law in this word.

③ Suitable & appropriate

NP hesitant w/ horizontalization, but  
So many rights horizontal by virtue of common law.

Canover

Errors in draft: asked for brackets w/ "no any  
person may", b/c don't believe it should apply horizontally

In addition to (3) to have it apply to natural &  
juristic persons.

Shrute

DP tabled version of 38(1) 7 Feb.

~~39(3)~~

Powell

distinction castituti - right, ...  
not only then guided by the interpretative.

Chandler

(looking at DP document...)

concern that seems to bind the state, but  
have to respect... direct products.

to try to find appropriate meaning --

just assume that applies - what applies is  
it is the right - between primary / Brennan is  
express

you'll lose the boundary between the rights, because  
you're qualifying it with rights itself...  
problem notice now, seem to mix up... (two things)  
2: think balancing takes place within rights  
being itself...  
have sense that we are mixing 2 things

Cameron

in other words if there was legislation it  
would have to be looked at with (not really)  
right. seem to be tending on the ends  
of discussion, not with rights

Hofmeyer

AWC feels is getting into with rights  
~~the~~ AWC supports <sup>(Subsect.)</sup> 38 (1) broadly  
question to what extent do all things  
broadly could <sup>consider</sup> ~~have~~ of splitting it  
first section ends applies law

Chair

just split it to make distinction

AWC

Bill of rights not only to protect  
of private individuals; detracts  
from social nature of bill rights

Pauline Yacobs

diff is ... could also mean  
"brids" goes rise to confusion.  
Also in its secondary meaning...  
could be narrower... if interpret it  
as being able to apply... able to apply  
and possible to apply quite diff.  
interpretation



Panel would like people to reconsider and appear

Technical Committee

Thought that is exactly what it reads; some judges very wisely replied, and others not... will force every judge to give attention to context in which it is used before the lot.

∴ this test of can it be applied is quite correct.

Chair

Unless leave (2) go to (3)

Chair

... only apply to all persons where it's appropriate..

Cheadle

let's deal with concept of duty... state cannot escape fact that just puts duty on it, but when comes to employer, church, etc, do these fit a duty? ditto words applicable and appropriate... just some other question is about what applicable ~~words~~ do mean "applicable" do mean "appropriate" common law already does this job...

Chair

Cheadle's part agree... do we want to intrude -

Hofmeyr

Law applicable - in balancing wd not  
not decide how far they extend.

Lamaglossa

Decide at tea break. Panel can discuss this then  
Legal advisors disagree & need to come back to us.

Hofmeyr

Some rights, e.g. socio-economic rights, need to  
state it is horizontally applicable.

Favour general approach, but w/ those rights  
need to frame it w/ in right itself.

Sutty

ANC favours Bill applying to 'natural persons'  
~~But~~ Appr Qualify use of "appropriate" -  
to allow juristic persons to hold some  
rights, where appropriate.

Hofmeyr

Courts can decide where.

≡ → ← ≡

v.d. Westhuizen

Panel + Tech Comm talked about terms & decided  
if no serious pol. difference on  
'applicability' vs 'appropriate'  
They'll come up w/ best word.

Lamaglossa

Panel + Tech Comm to resolve their differences &  
come up w/ appropriate formulation.

Sutty

DP <sup>privacy</sup> of the individual...  
w/ take "autonomy" back & will come back to  
us.

Amerer

Reserve pos. re horizontality re each  
right, e.g. clause 8.

History

... of the ...

History

... of the ...

History

... of the ...

History

... of the ...

85

History

...

...

... of the ...

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... of the ...

July

Look at appropriate construction for justice person. Look at matter again & consider new formulation. [38(3)]

Appropriate to contentions

Will try to draw up new formulation -

Ranaphosa

W's advanced discussion. Leave it for now. Experts will reformulate & come back. Parties to consult.

Concerned to discuss State of Emergency, Arrested & Accused Person come back to them.

§ 8

Smuts

DP: In line 3 <sup>Proposed</sup> "protecting & advancing" to replace text.

In draft - NP/ANC agreement.

Willie

3(2) DP said want structure said; other parties not. ANC disagrees w/ that formulation. DP to red party out.

Remove brackets in [unfair]"

3(3)

NP alternative formulation:

(3)(a) "The state may not ... insert affiliation or any other grounds."

(b) new clause

Smuts DP reformulation in doc. tabled 7/2 for 8(3)(b)

Audy Attempt to exclude equality at social level. Process of transforming society.

Smuts Legisla like this should have been passed.

Hjirney That's not the pt. This a central right & other parties trying to slide out of it.

Smuts Look horizontal position in application.

Cammerer No each individual right to civil rights legisla, + applications clause

Ramaphosa What's wrong w/ saying "Neither the state nor any person"

Cammerer Create a free for all. Civil rights legislation will create the horizontality.

Ramaphosa And clear statement that no one cd. discriminate against him for those various reason reasons.

Smuts Don't want courts to perpetually intervene in conflicting rights

Raubenteiner Originally in passive; turned to active - & created problems, b/c implies complete horizontality -

Hofmeyr

Agrees a bit, but even earlier formulation, parties were in agreement sd. apply horizontality.  
e.g. individuals can't discriminate  
But different standards to be used w/ state than w/ citizens.

Smuts

Here sd be legisla. & there sd be a right to legis here.

Sauty

Different: right to info & right to equality.  
Can see difficulty in application of horizontality here.

Willy agreed to "unfairly" - generously.

How the clause be revisited

Caneris

Need to see this clause in terms of application clause. Will be appropriate & applicable where legis. exists.

Chadler

Inclusion of "unfair" has particular force if applied horizontally. Understand OP & NP wanted "unfair" b/c wd be applied horizontally.

Nchoku - Ndibe

why add "unfair" to discrimination. b a value we don't want to see in our society.

Raubenheimer

Effect of "unfair" — ~~It's so right~~  
put back in passive  
Nobody may be [unfairly] discriminated  
w/ ...  
horizontality dealt w/ in applications.

Radue

Agrees put back in passive

Cheadle

Discrimination means "adverse differentiation"

Can have positive aspects.

Can be solved at technical level

To clarify Dis, courts wd. look at definition  
+ courts wd examine the balance.

So won't change situation if use discrimination or differentiation

Words need to capture 3 senses

\* balance b/t the 2 parties

\* adverse effects

\* difference that causes

v. d. Westhuizen

Palisa didn't suggest use differentiation.

Oppose use of unfair

1 - wd be odd to normal person

2 - sd be awkward: wd.

force court to weigh unfairness  
to reasonableness (in applications  
clause)

Comer

Rautenbach's proposal - agrees: passive.

Don't buy argument about unfair - Black  
Lawyers Assoc.

Hofmeyr

There was a package of agreement to settle this clause  
Falling apart

Ramaphosa

Balance: use unfair if 3 things as is  
now

Look at Rautenheimer's proposal - passive.

Liebenberg

Go to passive

Put obligation on state to enact legislation

Ramaphosa

2 options emerging.

Not pleased to take back. Thought 8(3) wasn't so contentious.

NP has changed pt. of view.

Passive form; applications clause  
Obligation of state to pass legisla.

Mfulder

Brought in 'unfair' to differentiate in some cases

Sizani

Liebenberg's proposal, or as drafted.

Ramaphosa

① Wd both options achieve same objective?

Liebenberg's

as is

What to do w/ [unfair] discrimination

② Other issue: keep unfair in 8(2) but not 8(3).

Smuts

Clarity needed

Chadler

Differentiate b/t 8(3) as horizontal clause.



Cheadle

Discrimination: unfair, adverse differentiation  
This terminological

Effect of 8(3):

Common law rules: ~~none~~ give rights

80% of work done in word "discrimination"  
20% in ~~horizontal~~ applications clause.

Ramaphosa  
Cheadle

Effects

In active: Onus on state + persons.

In passive: decisions w/ courts, + applications clause "applicable" or "appropriate" wd become imp.

Ramaphosa

Given our history, 8(3) needs to be clear,  
Neither the ~~Act~~ state nor any person may not discriminate

Canerer

Agrees w/ Cheadle in passive: Courts to decide

Perhaps reassess when applications clause finalised.

Propose add right to legislation, too.

Hofmeyr

Don't understand Canerer's argument -  
happy if (in passive) court finds  
discrimination happened; ~~does~~ sd court  
have the discretion to say is not horizontally  
applicable.

Sub (3) as it stands still gives courts  
discretion.

So passive + active ideally let courts determine; extent of courts discretion.

Liebenberg

"Neither the state nor any person" greater clarity beyond doubt; in passive, less clear.

Rauberheimer

Unfair - cut down on judicial discretion

Sixty

If have "unfairly" used, even if person discriminated against to show is unfair.

Camerer

Wants to go back to principals. But not convinced.

Smuts

Will consult as well

Camerer

Address "affiliation" + NP reformulate

:

:

3(b) to fall into same category as other option.

Sixty

I

① Affiliation too broad; cd be to sports org. or  
nli. org.

② Affiliation covered in freedom of assoc + freedom of  
assoc.

II

"any other ground" - covered by "including" -

Ramaphosa

How does any other grounds differ

Radue

None except last 3 words

Coner

Affiliation

Hofmeyr

The term is too broad & general. Not on same level: club member vs. core values of democratic society.

Smuts

Has to do w/ state not discrimination; e.g. a business b/c has IFR affiliation.

Raubenheimer

But for implications on (4), probably no reason to include affiliation or not. Included in "include" <sup>must</sup>

Ramaphosa

What is the characteristic of "affiliation"

Coner

Cd call it 'association'

Ramaphosa

In other instrument?

Cheadle

No. The list developed b/c history of discrimination against part-groups.

But flexible to give it capacity to develop new grounds, e.g. Aros.

Where in hist. has affiliation affected people.

Coner

Means & Broadband.

Cheadle

Is religion & culture.

Coner

Period when heteroens excluded.

Ramaphosa

10. has to have power?

Radie

Unanimously agree to freedom of assoc.

Why not use associations a insert this.

Hogmyer

Distinguish purpose of the list - to operate in conjunction w/ (4) - Certain forms of discrimination presumed to be unfair sd. not be tolerated.

Doesn't mean can discriminate on other grounds.

Suty

"Affiliation" attempts to promote group rights.

Ramaphosa

Wont reach agreement.

Flag.

new formulation should insert

"affiliation" + "any other grounds"

Cheadle

to protect "assoc. of paedophiles"

(4) Adopted

Sizani

But rela. b/t unfair here - if added unfair in 8(2)

Cheadle

onus on employer to show was fair.

(4) wd have to be recast if inserted

"unfair" inserted above.

9 ✓

Ramaphosa

10 how to move forward?

John

Management system for long term

Why not use computer a long time

Hoping

Outstanding papers of the last - a great  
a collection of (A) - a collection of

be the best  
115

Doesn't seem so dramatic in the  
grounds

25

"Affiliated" change to front group  
with

Paragraph

Not too significant  
Flag

How far back shall we

"affiliated" a "very thin group"

Check

A group "use of guidelines"

(4) Adopted

2 items

But not the surface here - (12)

Check

Does an employer have to show

(4) not have to be recent if

"verbal" recorded show

✓

Paragraph 10 how to more forward?

Radue

Requested ~~whether~~ Glauker cd. address  
Subcomm.

Ramaphosa

Admin to find his submission

Said no, b/c where do we draw the line.

§ (11) Redraft

Camerer

NP happy w/ 2(a) + 2(b)

object to 2(c) - goes too far.

Use CEDO wording - memo pp2+3:

Sandy:

CEDO, Cairo & Beijing similar: have  
broader meaning than abortion:

"free of discrimination, coercion & violence"

Adapted it for here, as violence  
dealt w in (a) & discrimination in  
§ 8.

Camerer

Agrees but can't agree to anything that not  
open way for legisla to allow abortion on  
demand.

Sandy

if NP

"reproduction free of coercion"

Tech Comm to redraft if ANVC agrees.

Hofmeyr

Don't have mandate to change wording, but if  
is in tune w/ what <sup>women</sup> agreed to in other

forums of the world.

s12 ✓

s13 ✓ agreed

s14(3)(a)(b)

Murray Radue

Why in freedom of reli. is legislation allowed to recognise reli. marriages.

Now, discussion b/t (a)(b) ~~that~~ makes ~~that~~ interpretive not permissive.

How does one test recognition here, too. What test would be used to see if went according to tradition & religion.

Radue

NP agrees w/ alternative formulation.

Murray

Go for alternative & remove "recognised" before tradition.

Agreed. Parties will study & if have concerns will come back to it.

Privacy Act

Willie

Styler's memo on criminal justice rights. On pt trade under search & seizure provisions is out of line w/ international criteria, which say "reasonable"

Hofmeyr

searches "

Experts to look at.

Proposed use "arbitrary" - not subjected to "arbitrary searches"

Ramaphosa

Agreed Experts to look at

Just Radue

Insert religious practise in 14(1): "conscience, religion, ~~religious practise~~, "

Justy

Existing list absolute; their manifestations, open to limits - way practise one's religion ed. ~~disparage~~ or others.

Raubenheimer

No, no problem w/ it.

Ramaphosa

Radue

Hold on to it (submission) + ~~discuss~~ <sup>raise</sup> it <sub>more</sub> formally [in open subcomm].

s15

Justy

See Gilbert Marcus' submission

Return to s15

16 ✓

17 ✓

18(1) ✓

18(2)

Raubenheimer

Headings problematic, b/c totality sep. - but 18A b/c 18(3) => 18



ANC

Make it B(1)

Agreed

Ramaphosa

Remove brackets from [18A]

Agreed to

Murray

Keep same order.

Ramaphosa

Agreed 18A → B(3)

19 ✓

21 ✓ B

Camerer

But revisit after deal w/ voting age in franchise section

Ramaphosa

Check on whether agreed to remove (4)?  
No, wasn't agreed upon.

Sutty

Appearance of [adult] only in B(3) -  
not needed here. Don't deal w/ age.  
Internat'l covenant don't use them.

Muller

from  
CP VIII

Sutty

Conced.

Ramaphosa

Need 1 more day multi lateral

Woods

Panel + experts - announce selves on basis  
of what asked of them in form of report.

Nessels

Parties to engage their experts to talk in bilateral, or submit reports to expert before next multilaterals.

Onus then on parties & their advisors to act on this.

Caneser

Int doc. be inclusive. eg. NP proposal on Property rights / Land

2.2. Concurrence process

But require approval of general  
Mediation Comm. to find  
formula not as acceptable as  
+ Nat'l Assembly

If agreement not found in a Bill,  
legislation to lapse

2.2.5 Options 2. 1/2 rule resolution  
But should not have veto power  
here. Only concurrent power

2d Amendment of qual. const. - 2/3  
majority there - to

2.2.6 Direct voting in absence  
of persons whose date of presence

4.2 Voting 7 permanent members  
determined by previous, or specific meeting  
over when their respective national parliaments  
required 5 votes. Provision  
the vote is that. The same 7 sh.  
be able to attend process, & required to do

26 February 1996

Gordhan  
DP

Introduction of DP/NP doz.  
Procedures  
Schedule 5 or Non Schedule 5

Joint portfolio committee

2.2. Concurrent powers:

It require approval of Senate /  
Mediation Comm. to find  
formulas w/ are acceptable to senate  
& Nat'l Assembly.

If agreement not found in a Bill,  
Legisla. to lapse.

2.2.5 Options: Needs resolution  
But should not have veto powers  
here. Only concurrent powers.

2.1 Amendment of prov. constit. -  $\frac{2}{3}$   
majority there - to

2.2.6 ~~govt~~ Direct say in nomination  
of persons where deals w/ provinces.

4.2 Voting of permanent members  
elected by provinces, specific members of  
exco where their expertise in their portfolios  
required - 5 others. Provinces  
Wd vote as block. The same 7 sh.  
be able to attend provinces, & required to do

so, where instructed by prov. legisla.  
to mandate - Legislature, not the  
individual view of those attending

Akersman

Agreement

1.1

1.2 Problem "owned", sd be "steered"

1.4 CPO sd be part of Parliament,  
included in it as a term.

2.27. After mediation, bill returned  
back to Nat'l Assem. COP for  
approval.

Votes  $\frac{2}{3}$  majority

2.26 Appt. 5 : provinces have role to play  
in appt. of Const. Court judges

Appt.

Include in 3.1 principle of proportionality

Not in favour of 3.3 (prefer Option 1)

Debating voting, part. where deadlock  
occurs in provinces

5. Agree members of Senate sd be able to  
speak in prov. legisla.

PAC

Currency look - concept interesting

PAC submission:

Concerns: Cost -

House of review: not needed; but current proposal, not a mirror image & that b/c more useful.

(1) But not enquired, yet, is needed.

(2) Need for clarity on provincial powers. Delay in current system to reach major decisions.

Second house, mediation committee and make it worse

(3) Composition: seek a SA<sup>n</sup> model not German. ∴ want to look at African models or experiences here; e.g. traditional leaders.

Wissel

Ngwenya

May need to take up some of proposals at a bilateral level - to report back

Ramaphosa

No, take it further

1.1

du Toit

1.1 use 'reject' not veto

1.2 steer not "owned"

du Toit

1.4 Inclusion in Parliament  
Wd be a Parliament of Parliaments  
Brother or sister of Nat'l Assembly.

Related to

2.1 - review. Problems of complete review. Only category sd be allowed - where provincial competencies engaged - e.g. role of SANDF in disasters - cd. build roads anywhere they want.

It sd be a review possibility.

Gordhan

Don't debate this detail here.

1.4 - get expert opinion, look at options, let party look at.

Also differences in composition & voting -

Pass doc. on to Tech Experts, but make them aware of where new developments wd happen.

Wessels

To assist Tech drafters to say exactly what their brief is.

Ahermann

NP holds strongly should be included in defi. of Parlia

"Parlia consists of the Nat'l Assembly + the C.P. as structured in chapter..."

Eglin

Why shouldn't it be part of Parliament. Cd have 2 houses of diff functions - can collectively form the supreme legis.

Sd not be assumed then it cd elect the executive or get rid of exec by vote of no confidence.

de Lange

Before finalised 1.4, details of rest need to fall into place. Concept clarity in legislature + legislative process

"Parliaments shall participate in the legislative process <sup>at the highest level</sup>  
through the Senate"

Once have composition, mandate, process, it will all fall into place.

Let this doc. (framework doc.) be drafted as a constitutional text

Note sensitivities ~ 1.4

Davis

No formal provision in German constitution on Senate

du Toit

Resolution: Nat'l Assembly + National Council.  
B/c controversial when trying to define whether are both part of parliament.

Eglin

Again, why not call it part of parliament.

du Toit

B/c ① Nat'l Council intergovernmental, gives it a certain nature. Not a body formulated by democratic elections.

Give it an image of House of Lords.

Horsley

Debate would be resolved today. Move forward.

(2)

2.1 Broad agreement

Akermann

2.1.2 "cooling off" Build in/period - once Bill introduced in Nat'l Assembly, must be approved w/ in X days.

Gordhan

Agreed Leave gap in # of days

Akermann

2.2.2 Referred back to Senate as well after mediation

Zylin

OP agrees for 2.2.2.

2.2.3 If mediation doesn't bring agreement, Bill to lapse

Sizani

What is the provision for? Don't see need.

du Toit

2.2 Competencies to legislate w/ Parliam + prov. legislatures.

if add

All need in 2.2: when override, Council and Gov support.

Woods

Draft this but clearly the section (2.2.) requires further discussion / negotiation / bilateral on what it "brings down to"

de Lille

No, just want to understand the thinking

Gordhan

If matter goes to mediation b/c of difference b/t Council + Assembly, and if no resolution found, then answers 2.2.3.

Gordhan

If process fails, bill lapses, but if Nat'l Assembly wishes to proceed, needs 2/3 majority



Jordan

Should it just lapse? on balance then 2/3 majority

Zylin

Let Tech Comm include the 2 views either in footnote  
or Options

~~Noted~~ 2.2.5 Amendment of provincial constitutions -  
Let it be 2/3 of provinces ~~constitution~~ affected.  
(Bills of impact on competencies of provinces)

2.2.5: Deals w/ FFC

Note: Work being done on ~~that~~ FFC, recognises Act.

Andrews

Last sentence: Members of Cabinet - as stands  
~~should~~ <sup>should</sup> have right to address Nat'l Council, but  
not to committees - last doesn't exist w/  
Nat'l Assembly.

Ackermann  
Nussel

2.2.6 - Include appt. of Const. Court judges  
Include as option a bracketed when draw up  
draft

In last sentence of 2.2.6 on p. 4.

Act for finalisation just to mention.

### Section 3

Requires a lot of further

- (1) Broad agreement 2 groups  
1 permanent 1 floating

(2) Be comp. of these 2 -  
differences - numbers, proportionality +  
who oppo them

Godhan

part. in sub(2). Built those options in

Sizni

Can prov. exec.s be members of the Nat'l Council?

Godhan

Yes

Akemann

Clarify - <sup>just</sup> options in Godhan's statement or changing position?

Godhan

Options

Sizni

Will exec. comm. be floating members or permanent

Wessels

floating

Godhan

Tech Adv. to note that re sit disagreements re. Block vote, individual votes, mandate ← individ? or exec? or legislature.

Let drafters take these differences into account

Eglin

Optim.

for legis. fully under competencies -  
block vote ← <sup>mandate ← prov.</sup> legislature

Renew - less tight mandate

Ngamba

Yes, tech advisors to note

Akemann

Take on board - members can part. in provincial sessions

Eglin

4.2. "Commit" to replace "Assembly"

(Agreed)

Jordan

3.3. Option 1

Experts to explore how Local Govt,  
join approach in Ch. 10 is separate tier,  
how can we give effect to representation  
of local Govt

Eglin

Include as two options

(Agreed)

Queries - Jack Experts

Davis

Who is being instructed?

Wessels

Davis, Majors, Venter + Basson. Do it in  
consultation w/ CA Law Advisors

de Lange

Panel drafting all different parts of constit + have  
an overview.

Wessels

Jack Experts have been involved w/ this specific  
aspect. After their draft, we'd engage TRT +  
possibly Law Advisors, too.

Eglin

28 Feb

Let Tech Advisors who drafted the doc. be brought into the drafting team.

Ramphouse

Adjourn

Tomorrow:

If begin of the doc., wd be subcommittee.

Murray

Apologies: T. King

Ramphouse

Begin w/ matter Hhoo.

Eglin

Adjourn subcomm lunch time. Meet as multilateral Hhoo?

Wissell

Will think it over.

Chelove

10 Local govt

" Volkstaat

Wissell/Sigurd

2 Multilateral fashion.

Good

let attempt to deal w/ complicated issues. It may not work.

Can find yet - conditions of go on right with the end.

Can discuss general matters + action by action.

28 February 1996

Ramaphosa

Opened 10h20.

Agenda

- Referred Chapter 15 until later date.  
b/c parties have not come back to us on  
internat'l agreements  
Customary internat'l law +  
internat'l law.

Murray

Dept of For. Affairs to come back to CA on  
questions of internat'l law.

Ramaphosa

Preambles: parties reminded to submit  
their preamble

Murray

Discussions w/ ANC, churches & IFP -  
asked for extension of 1 week.

Chalase

Need deadline. Considering the matter

Dizgi Sizzi

PAC's:  
In by lunch time

### Transitional Arrangements

Grovi

1st attempt to deal w/ complicated  
issue: IC  $\Rightarrow$  new constit.

Can finalise yet - consideration sd  
go on right until the end

Can discuss general matters +  
section by section

28 February 1972

Paraphrase

General 10, 20.

Chapter

- Chapter 12 is well done but  
the parts are not very clear to me  
interest & arguments  
Concomitant interest & law  
interest & law.

Summary

Page of Dr. Affair is very good to read  
question of interest & law.

Paraphrase

Paraphrase: parts revised to subject

# General Introduction

Summary

Discussion of Art, Chapter 177  
with reference to work.

Chapter

The doctrine concerning the water

Chapter 219

Part 2  
in by law

## Introduction

Chapter

It should be clear of complexity  
there: IT → and correct.

in fact it - contribution of  
go for rights with the law

in the case general rights &  
with an order

Woods

Parties need a clear view of what entails  
& let them pose questions & then let them  
focus on this.

?

NP: let Grové pt out where is same &  
where diff. from IC

Grové

Will try.

CP 32 & 33

CP 32: provides for continuation of  
GNU - new consti. must make  
provision for cont. of system ~  
same

CP 33: disallows elections until April 99  
unless vote of no confidence

Also provides for  
cont. of existing law & all legisla,  
exec., judicial, admin. & other  
structures

Transitional provisions in a sep. doc. - 20  
wd be plus

Constitution Complementary Bill/Act

for all intensive purposes not be regarded  
as part of consti, enjoy same  
status, & be entrenched.

Provisions, however, temp & unnecessary

Handwritten text at the top right of the page.

Handwritten text in the upper left quadrant, including the phrase "from the".

Handwritten text in the middle left quadrant, including the phrase "from IC".

Handwritten text in the middle left quadrant, possibly "W.M. J.".

Handwritten text at the top right of the middle section.

Handwritten text in the middle left quadrant, possibly "CP 32 = 33".

Handwritten text in the middle left quadrant, including the phrase "provision for...".

Handwritten text in the middle left quadrant, including the phrase "values...".

Handwritten text in the middle left quadrant, including the phrase "The provision for...".

Section by Section description

Handwritten text in the lower left quadrant, including the phrase "provision...".

Handwritten text in the lower left quadrant, possibly "Construction...".

Handwritten text in the lower left quadrant, including the phrase "for all...".

Handwritten text at the bottom left of the page, including the phrase "provision...".



Grac

to burden new constit. w/ "temp. baggage"

to phased out, Act cd be repealed.

- (4) Implementation: ① Wait until 30 Apr 97 or  
② Implement ASAT after adoption.  
Repealing of IC comes after adop.  
This  
Draft based on the 2nd Option

But then need to make prov., similar to Ch. 6  
of IC, to deal w/ exec. structures

wd be Schedule 1 to this doc.

(2) Continuation of Nat Assembly up until

(3) Assumes Senate will be replaced by a  
new structure - its nature wd change  
& wd serve provincial interests,  
specifically

### Bill

(1)

Definitions "key phrases" -  
'homeland', 'new constit.', 'old order  
legisla', 'previous constit.'

(2) Need here spec. provision - see fn (4)  
to entrench against amendment.

(3) Continuations - also in IC

(4) Repeal of laws

(5)

(6) References to specific titles & entities needs to be clarified

(7) Transition of Parliament

Assumes Senate wd be replaced w/  
new structure w/ is different.

for 15: Options:

① 2 Chambers  $\Rightarrow$  30 Apr 1996  
suspension of ch 3 + 4 of  
new constt.

Might be difficult b/c that is  
heart of the new constt.

Might as well wait until '99

② Immed. implementation of ch. 3 + 4 w/  
<sup>existing</sup> Senators being members of prov. legislatures  
to provide for new Senate.

③ Immed implementation of ch. 3 + 4  
Senators  $\Rightarrow$  Nat'l Assembly.

④ If present Senate retained, providing  
for its continuation

(8) Wd suspend ch. 5 of new Constt  
until '99, implement instead  
Schedule 1 - substantially same as  
GNU

(9) fn 23: error Schedule 2  $\Rightarrow$  Schedule 1

(10)

(11) Don't know whether there wd be gov. constit. before new constit.; if so, need provisions for transition there - e.g. they must comply w/ new constit.

(12) Difficult task: to assign laws to provinces or nat'l in 5235 of IC. Cd be done as set out here.

(13) Need provisions for courts.

NB 13(2): Consti. Court: judges appointed for 7 yrs. new constit, up to 9 yrs.

Suggestion: the 4 youngest continue for 9 years.

Not a proposal, simply an idea, a "kick off pt"

(14) Retain 5237 of IC as far as relates to nationalisation. Technically that wd be the simplest way & wd be only section of IC to continue.

Delete

{ (2) Public Service Comm. - } Delete b/c of decision  
[by cabinet] to do  
away w/ the  
Public Serv Comm  
{ (3)

~~(15)~~  
(15) Continuation of the GNU

Queries

(1)

(10)

(1) This line states that the work is completed before the contract; if so, the contract for demolition shall be - c.g. the work is completed before the contract.

(2) Difficult to say; to say it is to say that the work is not completed. It is not out of the question.

(3) The contract is for work.

(4) (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100)

(11) It is not a contract, but a "bill of lading" or a "receipt" for goods.

(12) It is not a contract, but a "bill of lading" or a "receipt" for goods.

Delete

(13) It is not a contract, but a "bill of lading" or a "receipt" for goods.

Green

Legal status of prov. constit. drafted in terms of Act 200 of 1994.

Grove

Is a poli. issue & requires poli. decisions.  
But believes prov. constit-s will have to comply w/ new constit.

Ebrahim

Clause on Supremacy of the Constit - obligatory all laws consistent w/ it.

Green

Option 2: ACPD prefers this.  
Negotiations for II: did parties decide on any of these options?

Grove

Answer in CPs: 33 & 34 - ~~Anticipatory~~  
Anticipatory implementation before 1999

NP

p.15 fn 39 Comm <sup>PG</sup> ~~on representation of representatives~~  
Why not provided for?

Ebrahim

Judges poli. agreement, but in discussions & submissions no view that they sh. be continued.

Wissels

Major implications - get parties to begin seriously considering this

Chelane

Option 2 Sec 7: Senators

7(7): Implications? Implies they weren't elected but appointed.

Vacancies - assumes would be filled

Grové

Vacancies: only to provide for present Senators;  
electd/appt. ed for 5 yrs. Hence, limits them  
to prov. legisla. . No reason to fill vacancies.

fr 21 - so wd not upset proportionality in  
legislatures

Wissal

Judic major poli. decision

Chalane

Ward focusing on proportionality, but on the  
status of the proposals

Wissal

Grové trying  
Just to draw attention to the poli. implications  
of options available.  
All 3 options w/ poli. implications.

v. Breda

Other options ed since as structure of Senate further  
negotiated.

Green

Optim 2: Wd it provide parties option to ask  
Senators if they wd be deployed, or get new ones  
there?

Grové

Can't deal w/ all ramifications now. Just principles.  
Judge this as a 1st attempt.

Wissal

Thanked Grové  
No clear poli. instructions given.  
Options way forward  
Refer to TRT  
Urge parties  
Abeyance

Good

Remember: only to finish for present situation  
abstractly/eff. as for 2 yrs. time, but then  
to the future. The reason for this is

for 21 - do not wait until...  
! together

for each day. discussion

What

What is being - programming, but on the  
status of the projects

Chapters

What is the...  
of...  
All 3 phases...  
Schedules

How

Other options are...  
registered.

v. Peter

Option 2: All 3 phases...  
Schedules if they are...  
then?

Open

Can deal w/ all...  
They are in a...  
to work.

Can

Thanks for...  
Option now...  
before...  
the...  
Morgan

How

Ebrahim

Get parties thinking about issues

Agreement Team to continue considering matters as party discuss agreements occur in ongoing way  
Poli. parties to undertake consideration of these matters, as each agreement, provide instructions. But finally only one major issues agreed upon for text  
~~Parties to give instructions~~

Ramaphosa

Appeal - some of provisions very sensitive  
Raises it so don't conversationalist options.

Can raise a lot of emotions nationally.  
All to take great care about how report it to parties, to media

Can be terribly misinterpreted.

### 3 Schedules

Ebrahim

MC asked that approp experts to be consulted re definition of boundaries

Referred to Min of Justice +  
Dept of Foreign Affairs.

Issue: whether entitled to use magisterial districts for definition,

Nextster Comm presently considering Magisterial Districts

If use mag. districts as defi., not need to provide for amendment

In view of poss. changes in definitions,  
cd. just say prov. boundaries stay as



are, so clear legislation. cd define the boundaries.

Alternative: pt - to pt., extremely lengthy.

Wesley

Call for questions

Adjourned 11h06

... 8(3) ...

... ..

... ..

...

Algebra 11/05

brackets " nor any person "

5 March

Hagmeys

8(1) ✓

8(2) ✓

8(3)

Remaining issue

i NP and drop" and affiliation  
- if "any other grounds" stay in

ii Remove bracket ~ unfairly

iii "No any person" contentious

Cameer

Queried passive form.

Not happy to drop "and affiliation", but not consist  
of "any other ground" retained.

Minutes: reservation "no any person" - want brackets

Smuts

Drop "and affiliation" ~ "Keep or any other grounds"  
Prefer  
Passive form + state to pass legislation

Experts said last time experts working on new definition  
for passive.

Let there be 2 options

(1) Active

(2) Passive + state to pass legisla

to see which is best way to achieve horizontality -

a. d. Wetherizer

TZ4 + Panel considered this Hg of party rep. 5  
1) leave in active + unfairly

ii' Passive, drop unfairly,

Seemed reverting to passive didn't solve problem about applicability. Decided to have in Active

Asked

If parties want advisors to continue to explain passive, but give it a wider mandate.

du Toit

2nd sentence in 8(2)

"promote" the achievement

Ramaphosa

No -

Taking discussion back.

Pandor

Wd agree to consider a passive formulation, but not happy w/ this, <sup>①</sup> nor persuaded that "and any other grounds" good; wd. render clause meaningless.

Proposed

But, let RT come up w/ a range of formulations to address the concerns raised.

Rodue

1. Depends partly on wording of applications clause. Experts to keep that in mind.

2. "Or any other grounds": not certain that the list is exhaustive w/o this inclusion.

⇒ Propose:

"against any one . . . or any other ground"

Manzini

Going in circles.

NP say wouldn't want this clause to be applied horizontally; want right to private discrimination entrenched somewhere.

Manzini

Otherwise, why do they oppose "for any person";  
to "backward discrimination"

Ramaphosa

But consensus exists - got range of formulations -  
experts

Manzini

But if principle not agreed upon, any # of formulations  
won't help

Carer

This argument has happened umpteen times. No,  
worried about a free-for-all in horizontal  
application; want "structured horizontal  
application"

Proposed: (insert

~~Based on clause 35(4)~~ to be brought in here

"Everyone has the right to legislation  
designed to prohibit discrimination"

Sudry

~~Proposed~~ Multilateral discussions realised

1) Affiliation: too wide  
1) Let experts look at this

2) Let experts look at inclusion of  
\* "and any other grounds"

\* 8(3) to be read w/ 8(4)

8(4) wd b/c tautologous.

Hofmeyr

Agrees w/ Sudry's request for info.

NP + DP say don't want const't to  
deal w/ private discrimination + rather  
that it should be dealt w/ in legisla.

Hogmeyer

They seem to fear the courts not apply this to individuals in the same way they would to state.

But when deals w/ individuals, the court would balance this right w/ the other rights of the individual.

Request from advisors some sense of application. Would it be applied in a "fee for all way"?

Links to DP concern w/ "private autonomy"

Question is there a factual basis to this fear. If not, could agree more easily?

v d Westhuizen

Will try to draft 1 or more formulations addressing concerns, Hg w/ Tech Comm 4

Chapple

Is it - no opposi. in principle w/ hor. appli. Concerns - might lead to "fee for all"?, want surety that would not operate in an "unstructured way".

Cameras

Yes

Streets

legislation re  
Yes. Proposal to move private discrimination here, originally at Kempton Park. Courts now not bound, & seepage happens.

But can properly deal w/ horizontalisation properly here, as didn't at Kempton Park.

But legislation filled gap; but shouldn't be that civil rights built on a case by case basis.

Panda

Not writing the of assumption that majority of people w/ direct access to courts. Must indicate clearly what rights are protected; & could not lead to just for all.

Rama.

(9) ✓

(11)

~~Rama~~ / Hymey

Dispute in 11(2)

ANC: insert

ANC "to bodily integrity and"

NP "physical integrity"

11(2)(c)

ANC proposal

(c) "reproduction" → "their body"

Canerav

Thought parties wd forward draft formulations to Panel to consider whether or not they would allow abortion on demand

NP wd say "physical or psychological integrity" for 11(2)

Taking (2)(c) back to principles, but believes present wording goes too far.

Hymey

Refer to Panel whether it would or would not allow for abortion on demand.

Ramaphosa

Referred to Panel

v d Westhuizen

Laird's opinion "control of one's body"

But "decisions" - neutral - "tilts balance" less than  
"control of" one's body.

Agnew

But panel views discarded if parties don't like them.  
↳ NP agreed that cd go for other formulation of  
opinion shows does not tilt the balance.

Caner

Will ~~be in favour~~ <sup>consider seriously</sup> if <sup>opinion said</sup> didn't tilt the balance.

Ramaphosa

Recognise NP integrity.

Rautenbach

Tilting  
"Bodily" = "physical" - only slight difference; wouldn't  
tilt the ~~balance~~ balance.

"Exprod" going further than "the boxes"; but

but matter to be ultimately decided in General  
Limitations clause.

Caner

Will take it back on the basis

Ramaphosa

NP will take it back & report back. Close to  
resolution.

Agnew

(13) insertion of arbitrary b/w "searched" & "seized"

Wd be addressing scope of right, b it needed?  
Rather, let this be limited by the limitations  
Clause

Smuts

Not convinced by Stygler's memorandum.

Liebenberg

Wd be dealt w/ in limitations clause. But Stygler's  
concern was about searches w/o warrants



Camerer

Minutes said RT was going to consider "arbitrarily"  
Onus wd be on the homeowner or person being searched.

Lubirberg

No, don't change the binder; reserved for exceptional cases  
where happening w/o a search warrant.

Murray

Let Panel + Tech Comm consider it further -

Ramaphosa

Agree + formulation that would reflect the experts'  
decisions.

Hofmeyr

H(2)(a)

Insert "public" "appropriate public authority"

- Seek advice on scope of what this wd mean.

- NP want to consult gps effected.

Camerer

Or could use

^ "an authority in control of that immediate institution"

Could CA rather consult?

Ramaphosa:

No let NP consult

Senty

Want "public" for purposes of uniformity -  
so don't have different principles operating  
for different institutions.

Camerer

This motivation alarming - wd bring religious  
observances under state control.

ANC's case met by (b) + (c)

Ramaphosa

Wouldnt

could "public" mean the church council, etc?

Rautenbach

IC: religious authorities or groupings deciding, would limit their autonomy.  
If referring to that don't need the clause.

Should insert "public" to make it abundantly clear.

Hjmeuz

View has never been that authorities in charge of institutions were involved. Relates to schools, defence force.

This is in a sense a limitation; religious can use state buildings, but conform to rules set down.

Ramaphosa

"Appropriate" is the appropriate word.

Canerer

Happy w/ IC + w/ wording as stands; NP advisors proposed alternative wording; wd take new proposal back.

Allow further consideration: NP to take back insertion, & revisit.

Hjmeuz

14(B)(b) Proposed remove Bill of Rights + replace w/ "Provisions of the constitution"

Wants technical view

v. d. W. Steyn

Agreed to the amendment

Ramaphosa

Agrees Amend it -

Cameroon.

15  
15(1)(d) - do they apply to juristic persons

15(2)(c)

ANRC to forward new formulation to address DP concern that needs harm test

Delete inattention to discrimination & replace w/  
"cause ~~harm~~ or harm"

① NP: wants to insert something like "that constitutes inattention to cause harm"

② to insert in 15(2)(c) phrase re. child pornography.

Cameroon

Wd prefer to see no limitations in clause - let limitation clause application ~~then~~ do it

But see ANRC concerns re "hate speech"

In addition child porn. legis. not working, needs to be constitutionalised

Talking about principle, & not details.

Re "propaganda for war": DP concern - needs to be better defined, so isn't just against loose talk

Ramaphosa

Conference of Editors Submission - what does it say? Shouldn't it be taken account of.

Cheadle

Will prepare memo on submissions, highlighting those w/ should be taken account of.

Smuts

Wd prefer no limitation of freedom of expression;  
Conference of Editors. Wd protect e.g. Tony Yengeni -  
his right to free expression to be balanced against  
dignity of white people.

Recognition, required by international covenants agrees to  
pass "race hate" legislation

to look at  
Nazi / a harm test.

But precise insertion of "degradation" - would reintroduce  
censorship.

— Jca —

Camerer

"Degradation" : in principle, if all to  
restrict freedom of speech, look at  
all examples. But "degradation" is not her word.

Prefer to omit 15(2) - would prefer  
general limitations than statutes of Parliament.

Swily

ANC based on International covenants on Rights

Ramaphosa:

~~to delete~~

Insert "cause harm"  
mm

Do to consider ANC's amendment to its

~~amendment~~  
mm

Hogmeyer

15(3)

In principle agreement; tentative formulation:

"The state must establish an independent body to regulate broadcast/electronic media to ensure that they are fair + represent a diversity of opinion"

NP however wants to add, too, that "Citizen" type newspapers should come within the ambit of the clause.

Have had difficulty achieving formulation; NP undertook to come up w/ it.

Don't need to establish a specific institution in ch. 7; rather insert a fairly bland statement along these lines in ch. 7.

Cameroon:

Adjusted wording

NP wd like a right in the BGR

Don't want another inst. added in ch. 7.

Could panel suggest where such a clause cd go.

State must ensure where it finances or controls media of any kind.

So let panel consider how question of newspapers cd be addressed (w/ public believes is impartial)  
v. Departmental pamphlets.

v.d. A. A. A. A. A.

Need guidance re placement of clause

v d Westhuizen

Doesn't seem to fit into structure of Ch. 7, otherwise.

Ngweny

But fits more strongly into BGRs - sort a right; is obligation on state.

Could be in end section on "other institutions" - as in line w/ concept of Ch. 7 - semi-indep. institutions

Ramaphosa

Is it needed

Smuts

Fit in Ch. 7: IBA would parallel ITA. Could be in BGR as ~~because is~~ because is infringing freedom of expression thru licensing.

Only exceptions, Sweden may subsidise new newspapers to increase the diversity of voices.

v d Westhuizen

Why is it necessary in the 1st place? IC different, for historical reasons - & hist. of SA broadcasting in past.

But what exactly would be targeted? When is something controlled & financed by the state? & what is "diversity"?

Cheadle / Rauterkah

Agrees w/ Smuts. IC <sup>state</sup> may control some of public media, & is inherent. This then a kind of limitations clause, necessary.

Cheadle

And if the otherwise state could finance media w/o limitation except under freedom of expression.

Chiodle

need  
But depends on state policy.

Smuts

Digital technology - IBA doesn't issue licenses  
so gov't + private co.s lose money.

To regulate this, you need provisions allowing this.

Radue

NP believes some restriction needs to be recorded in the  
B of R, not as a ch. 7 body. IBA covered in  
legisla. Only to cover position re. state financing  
media.

Smuty

Building on Smuts

01 Punishment enshrined - B of R not appropriate  
place.

ch. 11 - deals w/ principles & regulators  
of Public Admin. - 5152(D)(3) as  
guideline.

Need to do same for this in ch. 7 -  
set out principles & regulate.

Radue

Smut believes Expert should formulate a right  
in the B of R  
now.

Hofmeyer

Agrees w/ Smuts as found in instruments not  
as right but a limitation for state to regulate.

Liebenberg

Art 10 Euro convention w/ says speaks of  
state licensing of broadcasting.

Hofmeyer

ANC not unympathetic to include licensing  
clause in B of R but need advice of  
wd include as a limitation elsewhere.

Other B of R - is a limitation, not conferring  
right

but add diversity of opinion to deepen the demo.

W. d. Wusthuizer

Expects to  
formulate 2 Options

i. In BGR as limitation "the state may regulate"

ii. General paragraph for ch. 7

Then meeting to consider which is closest to De mark

Hofmeier

(16)

ANC: insert "picket" : "demonstrate, picket, or to present ..."

Radue

Don't agree to this insertion; covered in "to assemble + to demonstrate"; to reserve position, consult principles, + come back

Smuts

DP to reserve position, consult principles, + come back.

Pandor

Strong representations from workers to include this.

(17) ✓  
(18)

Hofmey

Broad agreement on 18 -

NP proposed 18(2)(b) to become 18(3)(b)

So falls under "adult"

Ramaphosa

Agree.

Radue

NP wants expert advice on "in terms of"; concerned b/c advisors say sd be



Radue

"in accordance w/"; otherwise, wd only apply to legisla bodies established already in constt.

Rambertheimer

"In accordance w/" is safer.

Murray

Consult Mr. Gove

"in accordance w/": procedural

"in terms of": procedure + principle

Ramaphosa

Older than this agreed to, except for need for clarity re "in accordance w/" or "in terms of"

Hafmeyer

20(1) Shifts to "Everyone" from "citizen"

Concerned w/ illegal aliens.

Use "citizens", or include "lawfully in the country"

Ramaphosa

"Every citizen"?

Pandor

Let experts consider whether "every citizen" or another term?

Yusuf

Does need to qualify 20(1); wd be perfectly justifiable in terms of limitations clause.

Radue

(reservation re. 20(1) b/ing applicable to "citizens", what wd implication be for tourists & people legally in country.

Pandor

Not proposing "every citizen"; but in Canada have ways to test limitation of the clause &

who should have access to this right.

Ramaphosa

Get report - Tech Advisors

de Tante

Cluster needs further investigation. Needs a lot more attention - by comparison. Can only do what we can do. Further adjustments in ch. 9.

Request for more information. Logic, or space to make your contribution.

Good comment - for users + for logic - except for small points.

de Lange

All about a structural arrangement that affect those - other next part.

Logic

Based on that - not dependent on comparison.

de Lange

Go ahead of the Blue report then delay. What will the other be like. After that.

Ramaphosa

Report

Reis

Logic and to give further attention to how much of the ad process of it.

6 March 1996

Ramaphosa

Mr. Wessels & Mr. Ebrahim to ensure we get a permanent venue or are not displaced.

Agenda.

1) Provinces: Ch. 8; 3rd Working Draft

du Toit

Chapter needs further investigation. Needs a lot more attention - esp. competencies. Can only do when reach further agreements on Ch. 9.

Request that some discussion begins on power to make prov. constitutions.

Broad agreement on prov. exec's & prov. legisla's except for small points.

de Lange

Add s154 + transitional arrangements that affect these - when next meet.

Eglin

Proceed w/ Ch. 8 - isn't dependent on competencies.

de Lange

Go ahead w/ the three agenda items today, but add the other 2 later matters later.

Ramaphosa

Proceed

Robb

Experts need to give further attention to prov. constit's, but cd proceed w/ rest.

Competencies

de Lange

ANC accepts it, if it remains as to w/ certain words in brackets removed.

If at any other stage it would change, ANC wd revert to its earlier position.

In favour that

Remove

52(3) matters: sd be competencu

s3 essential

3(2)(b) including minimum norms & standards

(c) Remove The implementation...

which includes

(e) + options

Add

section 154 + transitional arrangements

in package of considerations

Agree to TRT comments on 5 & 7

Schedule 5:

Remove Police & Local Gov't + correct footnote

Agree: sd be principle in const. w/ set out principle of co-operative gov't - in terms of legisla & executives

Marais Meyer

Could not consult w/ Put Marais - major negotiator on this matter. So in difficult pos in commenting on specific

Meyer

points. So, don't conclude discussions on this today, but follow up w/ multilateral

Propose: general principle should be included on rel. b/w various levels of govt - nat'l, prov. & to a certain extent local govt - an overall approach of co-operative governance - so way sd interact in competences.

Wd be mutually effective; provinces → central, + central govt → provinces

Ramaphosa

Hears still some work to be done, but this must be lifted out of secrecy - bilaterals & sd began to be discussed more openly. For other parties, + to allow us to go thru it quite a few times.

(1)

Eglin

fn 12: makes it clear that DP doesn't support this

In favour of overrides, clearly defined; if nat'l & prov. legislatures can all legislate on same matters, wd lead to massive conflict.

Say prov. can legislate on Schedule 5 + nat'l govt sd override

Rather than letting them both legislate broadly.

Ramaphosa

Noted

Mayor

Kempton Park specified Schedule 5 as areas where there wd be concurrent powers.

One finds this internationally, too.

Otherwise, wd be almost impossible to divide powers so there wd be exclusive competencies.

So agreed in 1993 - regard these as concurrent powers.

So, don't make exclusive powers, look for ways to deal w/ conflict, w/ clause 3 tries to do.

Trying to achieve

- (1) Provinces have original powers
- (2) These sh be dealt w/ at exec. + legisla. level
- (3) Accept fact wd always be area of vagueness, concurrency or competition
- (4) Co-operative governance.

A resolution of conflict outside of court.

Central gov't however sh have right to override.

Functional areas where provinces

could legislate, except areas where overrides occur

\* Override areas shd be clearly defined.

Eglin

In overrides: why should ~~not~~ legisla. ~~There be a clear definition of areas where~~ the nat'l legislature be able to pass legislation outside the override areas.

du Toit

Because of South Africa's historical situation. + the need for transformation.

de Lange

Agrees w/ a lot of what Meyer said. Re. Eglin - created a list of concurrent legisla. where nat'l + prov. had equal right to legisla. Why limit nat'l legisla. to override areas.

If there were exclusive competencies, wd. create distrust, disputes + court cases. Nd strip prov. gov'ts of right to legisla.

Prof Davis

① Nat'l parlia can pass legisla. on any issue in Schedule 5, + do overrides, but not limited to that.

So long as provinces legislate, kicks in to overrides.

② In order for schedule 5 legisla. to pass, would need to go to the Nat C of P.

Hayson

Practical considerations & much of  
legisla. operative in provinces  
in Schedule 5, nat'l.

Provinces have option to leave it  
or replace it.

At end of day, even w/ this  
formula, provinces wd have  
occupied the area left over for  
them & nat'l legisla wd  
occupy the area of override.

This close to Eglar's view.  
But in between there might be  
conflict.

Eglar

Understand there would be a  
transitional period.

What if provinces all pass different  
legisla. on education.

Does it allow for <sup>full</sup> legislation

\* Will take back to party for consideration

Ramaphosa

DP to take back to principles.

Nat'l Council of Provinces

Ramaphosa

Will return to 1(1)(b)

(2) broad support

2(1)(a) need to look at Nat



du Toit satisfied w/ state at here.

Ramaphosa Will revisit the agenda w/ 5/5/17

2.(b)(i)

fama NP - concept of framework legisla.

Eglin DP too not like framework legisla., not provide a list.

de Lange Oppose this

Ramaphosa Yes, but parties still need to reflect.

du Toit Best, framework legisla. not nec. b/c of nature of overrides.

2(1)(b)(ii)

Ramaphosa Matter to be looked at, says (fn)

de Lange "any matter" — not prefer "any legislative competence"

Ramaphosa TRT to look at this.

2(2)

Ramaphosa Straightforward, but noted fn. To be looked at, w/ those pros. that deal w/ passing the const.

2(3)

de Lange

Techn aspects - TRT to look at  
"an" is it the only exclusive competence -  
"matter"

Ramaphosa

Yes

2(4)

(fn)

de Lange

ANC satisfied.

Ramaphosa

Agreed to

(3) Conflict between

Ramaphosa

DP's position clear

Eglin

Want to be discussed in overrides, b/c  
wd effect either the ANC/DP or the  
DP options =

Ramaphosa

de Lange's concerns re "essential". Want  
it deleted.

3(1)(b)

Eglin

Were under impression

"Nat'l legis, must be regarded as  
necessary"

But not so.

5.  
Eglin New override says anything to achieve nat'l objective becomes an override. This degrades the rights of the provinces unless qualify strictly how you define nat'l objective.

How wd you define nat'l override.

de Lange Eglin correct until comes to end. Override w/ high test - necessity test: only if necessary for nat'l objectives.

There wd be a residue outside of (2) - but then the necessity test kicks in.

Andrew But wd be necessity to achieve it, not the necessity of the nat'l objective, itself.

de Lange Wd be necessary to achieve the nat'l objective - there must be no other alternative to achieve it.

Andrew Apply necessity not to achieve it, but to objective.

du Toit "necessary" or "indisposible".

If nat'l objective set by process of national co-operation, thru council of provinces, so made w/ provinces,

Why shouldn't that nat'l objective be valid.

Andrew Don't accept that provinces acting jointly sd be in posi. to remove the right of a nat'l gov't province - esp. if province controlled by party not in

Andrew

majority in the nat'l assembly.

IC entitles provinces to certain powers.  
They must be given them.

Nat'l overrides are necessary, but should  
be narrowly defined.

Can revisit. Move on.

3(2)(a)

Ramaphosa

Straightforward.

Ruled -

Delete fn. 14

3(2)(b)(i)

de Lange

NP wants to include  
" [including minimum... ] "  
b/c in CPs, ANC believes  
unnecessary.

Ramaphosa.

Let NP think about it.

Rest of 3(2)(b) straightforward

3(2)(c)

de Lange

" [implementation, which includes]  
ANC prepared to drop it, if (c)  
if rest remains the same.

Meyer

Exclude those words to ensure  
overrides cannot be interpreted as  
an unlimited set of overrides.

Ramaphosa Delete + look at ~~is~~ Them again

[Read list]

Andrew Re (C)(iv): similar phrase in finance chapter  
"the promotion of eco. rela.s across provincial boundaries"

to widen to include agric., tourism  
Include here.

de Lange ANRC will consider

Meyer NP will look at.

Asked Tech Ad. s whether (iii) & (iv) necessary. Should be in schedule.  
& (v) nec. given Fundamental Rights + overriding const.

Grove From IC; (v) negotiated b/t parties + added here.

Meyer Is part of Cls. CP XXI (5) - cd be allocated as functions for provinces in the Schedule.

Haysom (iii) (iv) emphasis on notion of common market in a federal system  
Federal centre wd be provided to see to to oversee the "common market"

Ramaphosa Queried (v) give B of R - given equality clause

de Lange

Distinguish clearly areas where you can legislate + areas for overrides.

So, retains (iii) + (iv) - for ensure there is interprovincial commerce etc.

If remove to Schedule, need still to instruct court in case conflict occurs b/w nat'l + prov.

Gravé

(iii) (iv) : 126(3)(d) - comes from IC

But we can improve this, in light of what Andrew said.

Rama

We'll look at that

"Economic relations" might be closer to intended meaning than "economic relations"

Andrew

Doesn't know

Gravé

"Activities" is more appropriate for (iv)

Chabane

"rules" suggests a formal relas;  
"activities" w/ suggest not a formal relas

Rama

"eco relas/ activities" : experts will reformulate

Andrew

DP has problems w/ the  
Whole of 3.

7

1) Where using this in interest of country,  
provides little protection. As a political idea,  
& if sought to contest it, court wd say  
nat'l assembly would determine what's  
in the interest of the country.

2) Believes in contravention of CPs, esp.  
XVIII(2).

Yacoub

Small problem - queried

If legislatively want to prevent 1 prov. from  
doing certain things, wd apply uniformly  
thru out country.

du Toit

Ex: Granting casino across from Pamp.

Make nat'l law limiting where cd place casinos -  
& wd apply uniformly.

de Lange

Agrees. But needs further consideration.

(1) (or) "uniformly)

(2) lists areas

But may want to direct actions to a province

(d) comes from CP.

Solutions -

① Look at equivalent in IC

② Create a (3) + say in that part,  
instances this + that wd apply.

Ramaphosa

To Yacoub, that prov. is in The IC

7A

Eglin

It has been agreed that (2)(d) wd be deleted.

3(1)(a) - emphasis on, you have to prove necessity.

(2) as stands now - nat'l legisla. must be regarded as necessary, if it establishes nat'l policy.

Removes the objective test.

de Lange

It lists a set of exhaustive issues that wd be necessary to achieve a nat'l objective.

Must be a nat'l policy aimed at achieving...

if meets that criterion, doesn't need test; otherwise there's an exhaustive list w/ court wd adjudicate.

Applies

Hayson

If nat'l legisla passed - e.g. making windscreens dark - if challenged by private, wd be incumbent upon nat'l gov't to prove was legisla. necessary for self defense.

T King

Replace is presumed the necessary "must be regarded as" w/ "is presumed necessary"



du Toit

not "presumed" but "deemed"

Need objective tests in our courts of law.

Reduction of (e) w/ said clause w/ apply w/ require approval of senate. ~~Majority~~ Now deleted.

Haysom

Last version, (e) as alternative category - Senate cd deem law as strategic necessity. Was a free standing override.

As such was dropped.

Assumes that all legis. w/ have support of House of Provinces.

de Lange

(e) w/ have been a total override, even to courts adjudication of whether laws were nat'l objectives.

When (2) applies, whatever Senate does, doesn't override (a)(b)(c) or (d).

Senate's perspective out in (3).

Eglin

At previous meeting said protection for provinces w/ be that provinces w/ have to determine that the override was necessary. That removed now.

de Lange

Options 1 + 2 + (c) was ~~never~~ never agreed to by ANC or NTP (c) was an or.

Caro

Would have been a safeguard. But  
harm - waters down justifiability of  
(a)(b)(c) + (d) - so ANC + NP objected.

Naysom

Eglin's position was catered for in 1st  
draft. But since then has taken new  
shape. Now requires unanimous  
agreement ← provinces in (3)  
re. defining legisla as a nat'l  
objective.

Eglin

In (3) test falls away, b/c says  
"must be regarded"

du Toit

(c) was included to establish "rule  
of law"

Ramaphosa

3(3), fn 19

King

NP concerns proposed  
(3) 4th line insert "unanimously"

← ~~excluded~~ Mediation Committee

de Lange

Marais didn't mention "unanimously";  
ANC opposes this.

King

If don't have it this way will be  
difficult to meet CP XVIII

(4)

de Lange

ANC supports (4)

Eglin What is the legal opinion  
does "prevail" convey the original sense of  
"any legislation"

(5)

Eglin

DP accepts (5)

(6)

(7)

King

Refn 26 - asked to look at indep body to  
decide when a province is ready to take on  
certain functions

Eglin

DP submission also raises the question of  
how to determine when a province has the  
capacity to take on functions

de Lange

NP raising new issues - Objects -

No - leave that out.

Ramaphosa

Schedule 5

Minister

King

Letter - Mr. Krisner asks for the  
insertion in Sec 5:

"excluding lotteries + sports pools"

Ramaphosa

~~luted~~: approve important.

Ramaphosa

~~Don't~~ Deal w/ Schedule later.

Noted progress on this difficult question

---

 Nat'l Council of Prov.

Gordhan

ANC/NP agree to  
leave membership at 5/5; Noted proposal

DP: 3/7.

8 issues outstanding  
1) Membership

1.

2.

s 2(d)

3.

s 2(e); needs further bilateral discussion

4.

s 4(2); need further discussion

5.

s 6(1): Tech problem -

"in accordance w/ Re mandate

given by"

need to carefully think Re

what "mandate" is & how it is  
obtained

Can be negotiated here now

6.

6(2) DP option: ANC/NP comfortable w/ it.

7.

7(1) slight error

want "and also to the

Council itself"

8.

(8) Needs more consideration

Believes for 14 provides a mechanism

9.

(10) too early to decide.

Ackermann

Additional remarks

Concept: N Co P: whether or not sd be part of Parliament, outstanding

Composition: a lot of work to be done. Agreed equal # of reps per province  
20

Principle of proportionality

Members of exco + legis. cd participate

Comfortable w/ new name "Chamber of Provinces"

But problems w/ practicality of composition -  
to of proportionality [to include minority parties]

Suspension power: need for technical advice. Substantially okay.

Agreement re voting

kept a mandate

Notion of censure + summons ministers possibly as rules.

Add: Local govt - ANC said local govt sd participate & will forward suggestions.

Zylin

Discussions w/ NP - This draft close to DP view.

Raised specific issues:

Composition: 7 senators + undetermined # of exco members of their portfolios being discussed.

Eglin

Representatives should represent minority parties, too.

Permanent members

7 + rotating exco members

→ Appointed by prov. legisla, \* from provincial exco

5

Problems, too, w/ Mediation Committee. Want

1) That it should not involve decision making; its proposals must go back to the legislatures both houses

2) Financial bills - Col may have special role to play in proposals from FFC on ~~finance~~ allocations

4

Option 4(2); require a  $\frac{2}{3}$  majority so incorporate him.

6

Re "mandate" - ~~the~~ vote should be based on mandate - prov. legisla.

7

Powers to summon ministers -

Minister should not have right to attend Col; if there, by invitation

8

Consider appt procedure in Institutes  
Supporting Demo.

9

After issue of how championism i.d. and what function of Col is clearer

Ramaphosa

Noted dramatic progress.

# Rescheduling

~~B of R 11th  
Lang 12  
Competencies~~

Response of 11th meeting

12th: B of R, am ] Competencies in pm ]

in DAC

→ 12th →  
Provinces

Rabie

membership

Voting age 18 yrs. - Nat'l Assembly + prov. legisla.

5/28 - amendments to 46

broadly acceptable, except for  
dissolutions, should require 2/3  
majority

Add dep. speaker

Assent to vote

include 54(A)

157(A)(1) At least 1/3 of the members or  
90% of those members from the  
seniority parties ...

du Toit

Did not agree to ~~assent~~ <sup>could occur w/</sup> to Bill ~~would~~ <sup>90% of minority parties.</sup>

Does NP mean

90% of minority from each province

Provincial homogeneity

ANC: Proposed it

More to b/t 117 & 118 & Non application

Prv. const. s. 5 f. B

ANC: must be certainty about what power to pass a constitution is.

What wd const. for a province be?

Has far wider interpretation than must be. Believe this was intended by II.

Want more certainty on this.

Homogeneity clauses must say what constitutional principles must be actualised.

This must be one of legal limits.

Eglin

Only 2 problems

(1) Lib dissolution from vote of no confidence follow these in Nat'l Assembly

(2) 90% vote? Should be same as Nat'l Assembly.



Provincial homogeneity: need some way, too,<sup>12</sup>  
of allowing provinces to be distinct.  
These clauses seem to be promising nothing.

This section ill advised.

Also, reserve position until Meyer's work on  
Co-operative governance available.

Hayson

Bilateral agreed all needed was  
section on co-operative governance - as  
covering clause, applying to 3 levels of  
gov't.

Integrate that sentiment into <sup>what called a</sup> provincial  
homogeneity or as preamble to  
all chapters that deal w/ provinces.

du Toit

Homogeneity clause need to be  
reworked.

Rabie

### Executive Authority

de Lange

Take back to parties to consider

Ramaphosa

Yes, but look at it briefly.

Zglin

Discrepancy b/t 1(1) Pres. & 1(2)  
Att'n nat'l executive

Panel in process of producing memo on residual powers. Will address Eglar's query.

Rabie

Leave discussion over until receive memo.

Hayson

Clause 1 only here b/c introduces question of exec. auth. of provinces. Recall w/ elsewhere.

### Problems

Hayson:

2(1)(a): the 1st attempt to suggest - to depart from II - so in provinces this exec. auth. will be wider than legisla. authority.

Needs to be developed further once receive feedback from party

One option -

All legisla. in Schedule 5 will devolve to provinces unless provided for otherwise

CPXXI (2): expressed in 34, but changes the basis of Nat intervention

du Toit

2(1)(a) \* (d) other functions could be assigned by legislatures - let this be looked into.

Eglar

JP wants to consider phrasing of 2(a) except last words "or Act of Parliament" - not qualified what that Act covers.

Eglin

13  
to consider national intervention clause,  
w/ seems to allow severe intrusion.  
Want to look at legal consequences.

du Toit

Heading for 3 - means more than the  
substance in the clause. Revisit.

de Lange

Queried: in next draft, include transitional  
arrangements relevant to Pts, + s154:  
to be considered as a package, holistically

Agreed

To reconsider & revisit.

Closed 17h30.



