

212/11/18/28

**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS  
15 MARCH 1996**

## CONSTITUTIONAL ASSEMBLY

### DRAFT REPORT

#### CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING FRIDAY 15 MARCH 1996

#### 1. OPENING

- 1.1 Mr. Ramaphosa opened the meeting at 10h20.
- 1.2 The meeting agreed to defer discussions on the National Executive and the National Assembly to allow parties to consider these matters further. They were removed, then, from the day's agenda.

#### 2. CHAPTER 5: COURTS AND THE ADMINISTRATION OF JUSTICE

- 2.1 Mr. Ramaphosa introduced the document entitled, "*Chapter 5, Courts and Administration of Justice*," contained in the documentation. Discussion of the chapter was as follows.

##### 2.2 Section 94: Judicial Authority:

2.2.1 The meeting agreed to sections 94(1) and that footnote 1 would fall away.

2.2.2 The meeting accepted section 94(2), (3) and (4).

2.2.3 Regarding section 94(5), the meeting agreed that parties would meet to consider how best to capture the intention in section 95(5).

- i. The Legal Advisors reported that although there was political agreement on this section, there were technical problems trying to capture its meaning. During consultation with the judges, some had expressed concern that the term "*respect*" was too wide and might interfere with matters such as res judicata and stare decisis. To resolve this problem, the Technical Refinement Team had proposed "*Option 2*" that used "*complied with*."
- ii. Political parties agreed to consider the matter further.

## 2.3 Section 95: Judicial System

2.3.1 The NP reported that Judge R. T. van der Walt and others had requested to be heard on the issue of the hierarchy of courts in section 95(c).

- i. The Chairperson reminded the meeting that the matter had been aired at the consultative workshop with judges on 1 February 1996.
- ii. The Panel said that Judge van der Walt's submission was part of the public submissions made.
- iii. Although both parties expressed concern at the way the submission was made, the ANC and DP said they were willing to consider the Judge's submission.

2.3.2 Regarding section 95(e):

- i. The meeting agreed to defer decisions on section 95(e) to let parties consider whether or not the word "*recognised*" should be inserted.
- ii. The ANC opposed the insertion. It preferred that these courts be established by legislation, and believed that further consideration needed to be given to how traditional courts would be recognised.

## 2.4 Section 96: Constitutional Court

2.4.1 The meeting agreed to sections 96(1) and (2).

2.4.2 The NP queried why the word "*heard*" had been deleted from section 96(2). The ANC reported that parties had agreed in multi-lateral discussions that the section did not need both "*heard*" and "*decide*." The meeting confirmed this agreement.

2.4.3 Regarding section 96(3):

- i. The meeting noted that the Technical Refinement Team was considering whether section 96(3)(b) needed further refinement, but that this was a technical and not a political issue.
- ii. The meeting otherwise accepted section 96(3).

- 2.4.4 The meeting agreed that the Technical Refinement Team should consider using the term "*decide*" consistently throughout this section, in the place of "*declare*." The Technical Refinement Team reported that this might require some reformulation.
- 2.4.5 The ANC said that parties did not disagree on section 96(4)(a), but that it had been footnoted to remind members that further technical refinement might be required.
- 2.4.6 The Chairperson ruled that the footnote would fall away from section 96(4)(c).
- 2.4.7 Regarding section 94(4)(d):
- i. There was consensus that section 96(4)(d) was problematic.
  - ii. The ANC said that it appeared to say that the Constitutional Court had exclusive jurisdiction to declare an Act or conduct of the President unconstitutional. In fact, other courts could rule on these matters, but the Constitutional Court would have the final say.
  - iii. The DP said that the section said just this. The main problem was that the section used "Plain Language."
  - iv. The ANC suggested that 94(4)(d) be separated off, to form a new section 94(5). The NP agreed.
  - v. The Technical Advisors responded that they had tried to resolve this problem by using the words "*including any Act or conduct in respect of which the Supreme Court of Appeal or a High Court made a finding of invalidity.*" Splitting the section into two would have problematic effects on other clauses, like section 98(1)(a).
  - vi. The meeting agreed that the Technical Refinement Team would look at the section again, taking into account the comments made.
- 2.4.8 The meeting agreed to defer the question of the Constitutional Court rules in section 96(5), to let parties explore what roles various bodies, like the Rules Board, the Judicial Service Commission and Parliament, should play in approving the court's rules. Otherwise, the meeting accepted the section 96(5).

2.4.9 The NP queried why 96(6) was included here and not in the definitions section. The ANC responded that it was better to spell out what "*constitutional matter*" was in the context of this chapter, for it was only used here and not elsewhere in the constitution.

## 2.5 Section 97: Supreme Court of Appeal

2.5.1 The meeting agreed to delete the footnote in section 97(1).

2.5.2 The NP and DP agreed to take the section 97(1) back to their principals for consideration.

- i. The DP expressed concern that section 97(1) might allow for political interference in the courts.
- ii. The ANC, however, reminded the meeting that the Chief Justice, himself, had proposed these provisions, based on the practical problems he had experienced.

2.5.3 The meeting agreed to sections 97(2) and (3).

2.5.4 The meeting agreed to defer section 97(4) so that:

- i. Parties could explore who should participate in approving the court's rules, as raised in footnote 7; and
- ii. The Technical Refinement Team could consider whether some elements of procedure could be spelled out in national legislation, or whether a sharp distinction had to be made between function and procedure.

## 2.6 Section 98: High Courts

The meeting accepted sections 98(1) and (2), but noted that section 98(2) was also subject to footnote 7, that raised the possibility of the Judicial Service Commission playing a role in approving rules for these courts.

## 2.7 Section 98A: Other Courts

2.7.1 The meeting accepted section 98A(a).

2.7.2 The meeting accepted section 98A(2), but it agreed that the Technical Refinement Team would look into the use of "*declare*" as opposed to "*decide*" here.

## 2.8 Section 99: Powers of courts in constitutional matters

2.8.1 The meeting agreed that the Technical Refinement Team would reconsider and reformulate sections 99 as a whole, and in particular "unpack" and simplify section 99(1).

2.8.2 The following concerns and views were discussed:

- i. The ANC expressed concern that sections 99(1) and 99(3)(a) might appear to be contradictory. The Technical Refinement Team responded that the term "*within its power*" in section 99(1) attempted to cover this. The NP agreed with the ANC, but said the apparent contradiction disappeared when reading related clauses, like 96(4)(b) and 99(1) together.
- ii. The ANC expressed concern at the use of "*must declare*" instead of "*may declare*" in section 99(1). The Technical Refinement Team said this placed a necessary obligation on the court to declare an Act or President conduct unconstitutional if it was inconsistent with the constitution. The ANC said this was too restrictive, but recognised that it was "softened" by section 99(2).
- iii. The DP expressed concern that section 99(1) conflated the powers of the courts.
- iv. Finally, the ANC expressed concern that the concept of "retrospectivity" was not stated clearly enough in section 99(2)(b).

2.8.3 The meeting, however, agreed to sections 99(3)(a), (b) and (c).

## 2.9 Section 99A: Inherent power

The meeting agreed that this section still did not capture the meaning of "*inherent jurisdiction*" in plain language, and that the Technical Refinement Team would consider this matter again.

## 2.10 Section 100: Appointment of Judicial Officers

2.10.1 The meeting noted that judges consulted in the 1 February 1996 meeting expressed a clear preference for Option 1.

2.10.2 The meeting agreed to defer this matter, to allow parties

to consider it further.

## **2.11 Section 101: Acting Judges**

2.11.1 The meeting accepted section 101(1)

2.11.3 Regarding section 101(2):

- i. The ANC expressed clear preference for the term "*after consultation with*" instead of "*on the advice of.*"
- ii. The NP said it had no mandate here and would need to consult its principals.

2.11.2 Consensus emerged that the phrase "*to be determined in law*" should be added to section 101(2) and that section 101(3) be deleted. The DP and NP agreed to take this back to their principals.

## **2.12 Section 102: Terms of office and remuneration**

The meeting accepted sections 102(1) and (2).

## **2.13 Section 103: Removal**

2.13.1 The ANC said it would agree to remove the term "*grossly*" from section 103(1)(a) if other parties agreed to the phrase "*after consultation with*" in section 101(2).

2.13.2 The meeting agreed to defer consideration of section 103(1)(b) until the question of the second house was decided.

## **2.14 Section 104: Judicial Service Commission**

2.14.1 The ANC proposed that section 104(1)(e) be amended, so that the President would appoint one of the advocates; and section 104(1)(f) be amended, so that the President would appoint one of the attorneys.

2.14.2 In addition, the ANC proposed that the term "*two of whom are practising attorneys or advocates*" be deleted from section 104(1)(i), to allow for greater lay participation in the Commission.

- 2.14.2 The DP expressed concern that these amendments might allow the President to "pack" the Judicial Service Commission with "party advocates."
- 2.14.3 The NP requested that the ANC put its proposals in writing, so that the NP could take them back to its principals.
- 2.14.4 The meeting agreed that to defer these matters, to allow parties to discuss them further. The Chairpersons urged, however, that parties seek resolution to these questions before the chapter was next discussed on 25 March 1996.
- 2.14.5 Regarding section 104(1)(g):
- i. The Panel of Experts reported that the Association of Law Teachers requested that section 104(1)(g) be brought in line with the other provisions, allowing law teachers to democratically select their representatives on the Commission.
  - ii. The Chairperson ruled that the Technical Refinement Team would reformulate this section taking this view into account, and the new formulations would be considered thereafter.
- 2.14.6 The NP reserved its position on section 104 as a whole until the question of the second house was settled.

**2.15 Section 105: Other Matters Concerning Courts**

- 2.15.1 The ANC expressed concern that the term "*decisions*" was too narrow in section 105(c).
- 2.15.2 Moreover, the ANC requested that a new section 105(d) be inserted, that would read:

*"(d) The Administration of Justice by institutions other than the courts."*

**2.16 Other Matters:**

- 2.16.1 The DP expressed concern that the question of a prosecuting authority had dropped out of the draft. The NP said this resulted from a particular footnote being

dropped.

2.16.2 The Chairperson ruled that political parties would need to resolve this matter amongst themselves.

2.17.3 The meeting agreed to return to this chapter on 25 March 1996.

### **3. TRANSITIONAL ARRANGEMENTS**

3.1 The meeting noted the document entitled "*Transitional Arrangements*," included in the documentation, but agreed to defer the matter until 25 March 1996 to let parties consider it further.

### **4. CLOSURE**

The Chairperson closed the meeting at 13h10.

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