

02/18/1996

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS
12 FEBRUARY 1996**

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DRAFT REPORT

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING MONDAY 12 FEBRUARY 1996

1. OPENING

1.1 Mr. Ramaphosa opened the meeting at 10h15

1.2 The following documents were tabled:

*Documentation pack 12 February
ANC and NP proposal on Section 54: Assent to Bills
Revised draft on Courts and the Administration of Justice prepared by
the Technical Refinement Team dated 9 February 1996
Revised drafts on matters related to Finance prepared by the Ad Hoc
Committee on Finance and the Technical Refinement Team dated 8
February*

2. NATIONAL ASSEMBLY

2.1 Section 41: Composition and election of the National Assembly

The meeting agreed to defer discussion of the electoral system until 19 February 1996 to allow parties to discuss the matter further.

2.2 Section 45: Sittings and recess periods

The meeting recalled the agreement to delete reference to the seat of the National Assembly and to include the DP view in a side bar note.

However, the Chairperson ruled that the NP could revisit section 45(3) after it had clarified its position on whether the seat of the National Assembly should be constitutionalised.

2.3 Section 50: Internal autonomy

The meeting recalled that on 31 January 1996, the Sub-committee agreed to a multi-party formulation on minority participation in the committee system.

2.4 Section 52: Bills

The meeting recalled that this matter would be finalised when the Houses of Parliament were settled.

2.5 Section 53: Constitutional amendments

It was agreed that parties would make submissions on this matter to the Administration by Monday, 19 February 1996, to enable the Technical Refinement Team to prepare a formulation.

2.6 Section 54: Referral of Bills to the Constitutional Court

2.6.1 The ANC and NP tabled a joint formulation at the meeting, that reads:

1. ***An Act of Parliament, once assented to by the President, may be referred to the Constitutional Court by at least one third of the members of the National Assembly if they have good reasons to believe that the Act is unconstitutional.***
2. ***When an Act is referred to the Constitutional Court for a declaration of its constitutionality in terms of this provision, the Constitutional Court shall consider whether a prima facie case exists and further may consider, if requested to do so, whether a stay in the implementation or operation of the Act should be ordered pending a final decision.***
3. ***If no prima facie case exists, the Constitutional Court shall reject the referral and order the individual parties sponsoring the review to pay the costs of the application.***

2.6.2 The meeting agreed to incorporate the joint formulation into section 54. The Technical Refinement Team would refine the formulation and consider, amongst other refinement issues:

- a. The possible replacement of the term *prima facie* with a phrase like, "*reasonable prospects of success*;"
- b. Time limits for referring Bills; and
- c. How the section would be applied to limit the possible damage done when implementing a Bill that was later

struck down.

2.6.3 The ANC and NP said that this formulation met two needs:

- i. The concerns of minority parties that mechanisms were needed to refer Bills to the Constitution Court which a significant number of members believed to be against the Constitution; and
- ii. The ANC concern that parties not use the procedure to block legislation for political purposes. The cost order would convince parties to consider very seriously whether such a referral was truly necessary.

2.6.4 The PAC queried whether this gave minority parties any new powers, given that individuals could already request interdicts to stay the implementation of legislation. The PAC also expressed concern that greater clarity was needed on the meaning of the term *prima facie* in this context.

2.6.5 The DP reserved its position on the new formulations, in order to consult their legal advisers.

3. NATIONAL EXECUTIVE

3.1 Section 78: Powers and functions of the President

The meeting agreed that during their discussions on the national executive, political parties would consider:

- i. Subsections 78(1)(i) and (j); and
- ii. Whether the power to declare states of emergency and war should be dealt with exclusively in the Bill of Rights or included in the chapter on the national executive.

3.2 Section 85: Cabinet

The meeting agreed to delete options 1 and 3 from section 85 and to accept Option 2, with the following amendments:

- a. The term "*Deputy President*" would replace "*Prime Minister*" throughout the section;
- b. Subsection 85(3) would be deleted; and

- c. The old subsection 85(4) would move up to become 85(3).

The meeting noted that the NP would forward new proposals on multiparty participation in the national executive, and that discussion of this matter would continue.

3.3 Section 93: Votes of no confidence

The Panel of Experts reported that although the Subcommittee had asked it to prepare an opinion on snap elections, the Panel believed that the matter required a political decision.

The Panel was unanimous, however, that in the system set out, one could not really distinguish between a vote of no confidence in the President and a vote of no confidence in the Cabinet.

The ANC suggested that the Technical Refinement Team draft formulations for a "*semi-constructive vote of no confidence*," where Parliament would have the option of appointing a new President, and if it did not, it could be dissolved by the President.

The DP said that Parliament could be given a fixed time period for appointing a new President, after which, Parliament would be dissolved, and elections held.

The meeting agreed to defer discussion until 19 February 1996, to give parties time to consider the matter further.

4. COURTS AND THE ADMINISTRATION OF JUSTICE

- 4.1 Mr. Ngcuka spoke for the ad hoc committee on the courts and introduced the document entitled, "*Revised Draft on Courts and Administration of Justice*," tabled at the meeting. Discussions on the new formulations were as follows:

4.2 Section 94: Judicial authority

The meeting agreed to section 94 with two comments:

- i. The meeting agreed that "*in*" would replace "*of*," in subsection 94(1); and
- ii. The meeting agreed to revisit subsection 94(5) to consider its implications.

4.3 Section 95: Judicial system

4.3.1 The meeting agreed to section 95 with the following amendments:

- i. The brackets would be removed from subsection 95(b), to read: "*The Supreme Court of Appeal.*"
- ii. The words "*to hear appeals from the High Court*" would be inserted in subsection 95(c), to read:

"The High Courts, including any high courts of appeal that may be established to hear appeals from the High Court in terms of an Act of Parliament."

4.3.2 The meeting noted that the new formulation made no reference to "*traditional courts,*" and that these would be included in the term "*any other courts.*"

4.3.3 The meeting agreed that transitional mechanisms for traditional courts would be discussed later.

4.4 Section 96: Constitutional Court

4.4.1 Subsection 96(1):

The meeting agreed that the words in brackets would be deleted, to read:

"The Constitutional Court is the highest court in constitutional issues. It consists of a President, a Deputy President and nine other judges."

In addition, the meeting agreed to separate the two aspects of the Constitutional Court contained in this section: namely, its jurisdiction and its composition.

4.4.2 Subsection 96(2)

The meeting agreed to subsection 96(2).

4.4.3 Subsection 96(3)

Mr. Ngcuka reported that this subsection was still under discussion and that the question of jurisdiction still needed clarity.

However, the following comments were made:

- i. The Technical Refinement Team was considering replacing the term "*issues*" with "*powers and duties*" in subsection 96(3)(a);
- ii. The meeting agreed to delete the word "*proclamation*" and the brackets in subsection 96(3)(b), to read:

"declare unconstitutional an Act of Parliament, a provincial Act, and any conduct of the President; and"
- iii. Mr. Ngcuka reported that the ad hoc committee was considering constituting subsection 96(3)(b) as a separate subsection.

4.4.4 Subsection 96(4)

Mr. Ngcuka said that "leapfrogging" had been agreed upon, and the Technical Refinement Team would investigate how to include it in section 96(4).

4.4.5 Subsection 96(5)

The meeting agreed to delete subsection 95(5).

4.4.6 General

The ad hoc committee noted that it had requested expert advice on the use of the words "*constitutional matter*" and "*issue*" throughout the chapter to ensure precision.

4.5 Section 97: Supreme Court [of Appeal]

The meeting agreed to section 97 with the following amendments:

- i. "*With*" would replace "*to*" in subsection 97(1)(b), to read:

"issues connected with appeals; and"
- ii. In subsection 97(1)(c), "*by an Act of Parliament*" would replace "*in exceptional circumstances defined by national legislation,*" to read:

"any other matter that may be referred to it by an Act of Parliament."

- iii. Subsection 97(3) would be deleted.

4.6 Section 98: High Courts

The meeting agreed to section 98 with one amendment: the deletion of subsection 98(2).

4.7 Section 98A: Other courts

The meeting agreed to section 98A with one amendment: the deletion of "*proclamation*" and the brackets, to read:

"but, no Act of Parliament may allow these courts to enquire into or rule on the constitutionality of any legislation or any conduct of the President."

4.8 Section 99: Powers of courts in constitutional matters

The meeting agreed to section 99 with the following amendments:

- i. In subsection 99(1)(a), "*may*" would replace "*must*" and the phrase "*to the extent of its inconsistency*" would be inserted, to read:

"may declare invalid law or conduct that is inconsistent with the Constitution, to the extent of its inconsistency;"

- ii. The Panel of Experts would consider whether all the powers listed in sections 104 and 107 of the Interim Constitution had been included in subsection 99(1)(c); and

- iii. In subsection 99(3), the phrase "*proclamation*" and the brackets would be deleted, to read:

"a Provincial Act or any conduct of the President, but may not declare the Act or conduct invalid;"

- iv. The phrase "*constitutional issue or a*" would be inserted in subsection 99(4). The meeting agreed, however, that this subsection would need to be refined further.

4.9 Section 99A: Inherent power

The meeting agreed to defer discussion of this section, to allow parties to consider it further.

4.10 Section 100: Appointment of judicial officers

The ad hoc committee on the courts reported that there was a deadlock on this issue.

4.11 Section 101: Acting judges

The meeting accepted subsections 101(1) and (2). It agreed to defer consideration of subsection 101(3), however, so that parties could consider it further.

4.12 Section 102: Terms of office and remuneration and Section 103: Removal

The meeting agreed to these sections.

4.13 Section 104: Judicial Service Commission

The meeting accepted this section. It agreed, however, to insert the side bar note in the "*Third Draft*" that set out the NP's concerns with section 104.

4.14 Section 105: Other matters concerning courts

The meeting adopted section 105 with one amendment: the insertion of "*rules for other courts,*" to read:

"including training programmes for judicial officers, procedures for dealing with complaints about judicial officers, rules for other courts, and the participation of people other than judicial officers in decisions"

The meeting agreed, however, that the Technical Refinement Team would consider whether this insertion needed refinement.

4.15 Attorney General

The ad hoc committee on the courts reported that there was still a deadlock on the Attorney General. The meeting agreed to defer discussion of this matter, to give parties time to consider it further.

4.16 Way forward

The meeting agreed that the ad hoc committee on the courts would meet again to discuss these draft formulations and report to the Constitutional Committee Sub-committee on progress made.

5. FINANCE

- 5.1 Mr. Davies spoke to the document entitled, "*Chapter 14: Finance*," tabled at the meeting.

5.2 Section 186: National Revenue

The Ad hoc committee on finance explained that there was a question about whether revenue included loans. The meeting agreed:

- i. To insert, for the moment, "*[and loans]*" in subsection 186(1) to read:

"There is a National Revenue Fund into which all revenue [and loans][as defined in national legislation, received by the national government must be paid," and that

- ii. The Technical Refinement Team would attempt to resolve this when refining the formulation.

The meeting agreed to subsection 186(2).

5.3 Section 187: National and provincial budgets

The meeting agreed to section 187, but noted that the Freedom Front reserved its position on these formulations.

5.4 Section 188: Treasury control

The meeting agreed to subsection 188(1) and 188(2)(b).

Regarding subsection 188(2)(a):

- i. The DP expressed concern that this section did not apply to local government. The ANC responded that these provisions would logically apply to local government and might be extended once local government had been dealt with.
- ii. The DP also expressed concern that this section might deprive local governments of their access to rates. The ANC responded that this section dealt with the National Treasury's disbursement of the money it collected and did not effect other sources of revenue, like rates.
- iii. The ANC added, however, there was a need for common standards, and this section would require provinces and local

governments to create treasury provisions of their own.

- iv. It was agreed that subsection 188(2)(a) would need to be revisited once decisions were made on the second house of Parliament.

Regarding subsection 188(2)(c):

- i. The meeting noted that the DP wanted a sunset clause and special majorities.
- ii. The meeting agreed to retain the brackets around subsection 188(2)(c) because parties needed to agree on the question of quorums. In addition, the power of the second house of Parliament here needed to be considered. The subsection would need to be revisited once the question of the second house of Parliament was decided.

5.5 Section 189: Contracts for goods and services

The meeting agreed to this section.

5.6 Section 190: Guarantees by national government

The meeting agreed section 190 with one amendment: the heading would change to "*Government Guarantees.*"

The meeting noted that this section would be redrafted to extend to every level of government.

5.7 Section 191: "..."

The meeting agreed to delete this section.

5.8 Regarding section 192: Remuneration of persons holding public office

5.8.1 The meeting agreed to section 192(1) but noted that the DP wanted a sunset clause for (b), (c) and (f), because these structures were still in the early phases of transition.

5.8.2 The DP requested that the Panel consider the words "*[and impartial]*" in subsection 192(ii) to ensure consistency with other parts of the constitution.

5.8.3 The DP expressed concern that in subsection 192(ii) the national government would be prescribing the salaries of local

government councillors.

The ANC responded that these provisions sought to balance the salaries paid in different provinces. A system of comparability of payment was needed to avoid conflict between rich and poor provinces.

The NP added that the provisions meant to give the national government the power to set a ceiling on salaries, not to prescribe exact salaries.

The DP agreed to reconsider this subsection on this basis.

In addition, the meeting agreed that the Technical Refinement Team would explore ways of capturing this sense of a ceiling when refining the subsection.

5.9 Regarding section 193: Allocations from national revenue

5.9.1 The meeting noted that the old section 193, entitled "*Persons Holding More than One Office*," had been deleted.

The NP expressed concern that the question of double salaries still needed to be addressed.

The Chairperson ruled that further consideration would be given to the question of whether double salaries should be dealt with here or in section 42.

5.9.2 The ad hoc committee on finance reported that it had not yet finalised its discussions on the new section 193, "*Allocation from national revenue*" and would consider it further.

The following problems were raised, however:

- i. Subsection 193(1)(a), and particularly the term "*equitable share*," needed refinement.
- ii. Subsection 193(1) needed to be harmonised with provisions on provincial powers, once they had been agreed upon;
- iii. The DP had reserved its position on subsection 193(2), arguing that the FFC should make recommendations here; and

- iv. Subsection 193(2)(d) needed to be refined and possibly broken up into different subsections.

The Chairperson ruled that the points made regarding subsection 193(2) would be set out in side bar notes.

5.10 Section 194: Financial and Fiscal Commission, Establishment

The meeting agreed to this section with one amendment: "state" would replace "sate" in subsection 194(2), to read:

"No person or organ or state may interfere with the functioning of the Constitution."

5.11 Section 195: Functions

The meeting agreed to this section, but instructed the Technical Refinement Team to look at the use of "imposts" in subsection 195(1)(d).

5.12 Section 196: Appointment of members

5.12.1 The meeting agreed that the members would be nominated by the provinces, but appointed by the President, as occurs in the Interim Constitution. The Technical Refinement Team would redraft subsection 196(1) to reflect this decision.

5.12.2 The DP expressed concern that nominations for the Fiscal and Financial Commission would not go through the same sifting process as the Auditor General and Public Protector, so it supported the retention of the words in brackets in subsection 196(2). The Chairperson ruled that the Technical Refinement Team would look into this matter.

5.13 Section 197: Reports

The meeting agreed to this section.

5.14 Section 198: Central Bank, Establishment, section 199: Primary Objective and section 200: Powers and Functions

The meeting agreed to these sections.

The Chairperson ruled that the footnotes would be dropped, but that

the DP would be allowed to revisit these provisions, should it so desire.

5.15 "Provincial Finance and Fiscal Matters," "Auditor-General," "Electoral Commission," and "General Provisions"

The meeting agreed to defer discussion of these matters until the Subcommittee meeting on 19 February 1996. In the meantime:

- i. The ad hoc committee on finance would meet to continue discussing the provisions, and
- ii. The Technical Refinement Team would begin working on matters set out in the footnotes.

6. ANY OTHER BUSINESS

The meeting agreed that the Agenda for the Constitutional Committee Subcommittee on Monday, 19 February 1996 would be:

- i. Senate
- ii. Competencies
- iii. Provinces
- iv. National Assembly (sections 41, 53 and 54)

7. CLOSURE

The meeting closed at 16h57.

