

11/13/7

CONSTITUTIONAL ASSEMBLY

**DRAFT REPORT
MULTILATERAL DISCUSSIONS ON THE
BILL OF RIGHTS**

23 FEBRUARY 1996

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BILL OF RIGHTS**

FRIDAY 23 FEBRUARY 1996

1. OPENING

1.1 Mr Ramaphosa opened the discussions at 10h25 and explained that this was an internal multi-lateral meeting which would not include the media but in which political party advisors would be allowed to speak in order to assist in advancing the discussions.

1.2 The following documentation was tabled:

Multi-lateral discussions - Draft Bill of Rights 23 February 1996
Memorandum from Technical Committee 4 on Sections 25 and 26 of the "Working Draft"

Memorandum from Technical Committee 4 on Section 30 - The Right to Language and Culture

Memorandum from Technical Committee 4 on Section 11 - Freedom and Security of the Person

Draft Report on discussions - 19 February 1996

Errata to CPG Recommendations of 16 February 1996

Democratic Party Formulation - 23 February 1996

NP formulation on Property and Land

NP proposal - Bill of Rights

DP Provisional reformulations on selected contentious issues - 7 February 1996

2. DISCUSSION: BILL OF RIGHTS

Discussion was based on the document *"Multi-lateral discussions - Draft Bill of Rights 23 February 1996"*

2.1 Section 8: Equality

2.1.1 Regarding Section 8(2)

- i The meeting agreed to remove the brackets from *[unfair]*.
- ii DP stated that it preferred the formulation *"other measures protecting*

and advancing persons or categories of persons..."

2.1.2 Regarding Section 8(3)

- i The meeting discussed the possible insertion of two options, one in the active voice and one in the passive voice, and to include obligations on the state to enact legislation.
- ii The meeting agreed to retain the subsection as it is in the active voice and not to insert in the passive but noted that the DP and NP would consult further on the matter.
- iii The meeting agreed to insert the words "*affiliation*" and "*any other grounds*" in Section 8(3), but to flag these matters for further consideration.

2.1.3 Regarding Section 8(4), the meeting agreed to this section.

2.2 Section 9: Human dignity

2.2.1 The meeting agreed to this section.

2.3 Section 10: Life

2.3.1 The meeting agreed that this matter was still outstanding but that parties should begin to consider how this issue could be resolved.

2.3.2 The DP proposed Option 1 which would then leave the decision to the court.

2.3.3 It was agreed that the Administration provide parties with copies of submission of Mr Ian Glauber which had been raised by the NP.

2.4 Section 11: Freedom and security of the person

2.4.1 Regarding Section 11(1)

The meeting agreed to this section.

2.4.2 Regarding Section 11(2)a) and (b)

The meeting agreed to these sections.

2.4.3 Regarding Section 11(2)c)

- i The meeting agreed that the TRT reformulate this section in line with

the wording of the Cedaw, Cairo and Beijing declarations to read:"

"to make decisions concerning reproduction free of coercion."

- ii NP stated they were happy with Sections 11(2)(a) and 112(b) but that Section 11(2)(c) went further than the wording of the Cedaw, Cairo and Beijing Declarations which it supported. The NP reiterated that it could not agree to anything that would open the way for legislation to allow abortion on demand and it was not satisfied that this clause does not do that, but would agree to the wording that had been agreed to at Cairo and Beijing and in both cases reproduction is referred to. This subsection should be broadly in line with those conventions which South Africa had ratified.
- iii The Technical Advisors clarified that the Cedaw Declaration referred not only to decisions regarding reproduction but had broader implications and went further to include *"to make decisions concerning reproduction free of coercion, discrimination and violence"*. The Technical Advisors had extended the clause beyond *"reproduction"* to *"the body"* in order to take into account factors such as burial rites, but had limited it to *"free of coercion"* because it was felt that the element of *"discrimination"* was covered by the equality clause and the element of *"violence"* by Section 11(2)(a).

2.5 Section 12: Slavery, servitude and forced labour

2.5.1 The meeting agreed to this section.

2.6 Section 13: Privacy

2.6.1 The meeting agreed to the word *"infringed"* but agreed that TRT should consider the ANC proposal that the section be amended to qualify the verbs *"searched"* and *"seized"* with the word *"arbitrarily"*. This was in line with international covenants and had been pointed out in a submission from Nico Steytler on the Criminal Justice system.

2.6.2 It was agreed that the Administration would provide parties with copies of the submission from Nico Steytler.

2.7 Section 14: Freedom of religion, belief and opinion

2.7.1 The meeting agreed to substitute Section 14(3) "alternative formulation" in place of existing Section 14(3) and agreed to delete *"recognised"* before *"traditions"*.

2.7.2 The meeting further agreed that the NP would formally raise the submission of Bill Sutton of the Christian Science Monitor on "religious practice" at the next CC Subcommittee meeting. The NP, however, accepted the clarification from the Technical Advisors that "religious practice" would be covered by "freedom of religion."

2.7.3 It was agreed that the Administration would provide parties with the submission of Mr Sutton.

2.8 Section 15: Freedom of Expression

2.8.1 The meeting agreed to defer this section for further consideration, but agreed that political parties would look at the submission from Gilbert Marcus on behalf of the Conference of Editors.

2.9 Section 16: Assembly, demonstration and petition

2.9.1 The meeting agreed to this section.

2.10 Section 17: Freedom of association

2.10.1 The meeting agreed to this section.

2.11 Section 18: Political rights

2.11.1 The meeting agreed that Section 18A would become Section 18(3) and that brackets be removed from *[adult]* which was covered by CPVIII which refers to "*adult suffrage*".

2.11.2 It was agreed that the section may need to be revisited after a decision regarding the matter of the voting age in the franchise section had been made.

2.12 Section 19: Citizenship

2.12.1 The meeting agreed to this section.

2.13 Section 20: Freedom of movement and residence

2.13.1 The meeting agreed to this section.

2.14 Section 24: Property

2.14.1 The meeting agreed to base the discussion on the proposal of the ANC which had been included in the draft as the "*New Tentative Proposal*". It was noted however that the NP tabled an alternative

proposal and would have preferred it to have been included in the draft as well.

2.14.2 The meeting agreed to discuss the *New Tentative Proposal*, assuming, for now, that the term "property" referred to "land".

2.14.3 The DP drew the meetings's attention to their draft proposal on the property clause contained in their document "*DP's provisional reformulations on selected contentious issues on the Bill of Rights*" which had been tabled at the Sub Committee meeting of 7 February 1996.

2.14.4 The meeting agreed that the redrafted formulation entitled "*Tentative Clause Arising from 23 February Deliberations*" would form the basis for further discussions at the CC Sub Committee meeting on Tuesday 5 March and at the Constitutional Committee meeting on Friday 1 March. The previous options would therefore fall away. The formulation reads:

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

- (f) *the level and extent of state investment and subsidy;*
- (g) *[the value of the investment in the property]; and*
- (h) *[the need for effective land reform].*

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

2.14.5 The tentative clause embodied the following changes to the New Tentative Proposal:

- i Section 24(1) - the meeting agreed "*guarantee*" would replace "*respect*"

"The state must guarantee property".

- ii Section 24(2) - the meeting noted that there was contention between the ANC and NP. The ANC favoured "*No-one may be deprived of property except in accordance with a law of general application*" and the NP and DP preferred "*No one may be arbitrarily deprived of property*".

- iii Section 24(3)(a) - it was agreed to remove the brackets.

- iv Section 24(3)(b) - it was agreed that "*[just and equitable]*" remained contentious and should remain in brackets.

- v Section 24(4) - The meeting agreed that "*an equitable balance between the public interest and the interests of those affected, having regard to all the relevant factors, including...*" be replaced with the following:

" ...the Court must determine a fair balance amongst all relevant interests having regard to all the relevant factors, including..."

The NP and DP expressed the view was that "the public interest" and "the interests of those affected" should not be included as interests the court must balance but as factors it would consider when deciding a case.

- vi Section 24(4)(a) - The meeting agreed to this subsection but agreed to insert NP proposal of "*intended use*" in brackets although some parties were of the view that "*intended use*" would be covered by market value.

- vii Section 24(4)(b) - the meeting agreed to this subsection.
 - viii Section 24(4)(c)- The meeting agreed to this subsection but noted the ACDP view that "market value" should refer to the "*market value at the time of the acquisition*".
 - ix Section 24(4)(d) The meeting agreed to insert (d) in brackets noting the reservations of the NP to its inclusion.
 - x Section 24(4)(e) The meeting agreed to this subsection.
 - xi Section 24(4)(f) the meeting agreed to this subsection with the the insertion of the words "*level and extent*" so as to read:

"*the level and extent of state investment and subsidy*"
 - xii The meeting agreed to insert the following two additional factors for further consideration -
 - (a) the ANC proposal of "*the need for effective land reform*"
 - (b) the NP proposal of "*value of the investment in the property*"
 - xiii Section 24(5) - The meeting agreed to insert this subsection in brackets and to note that the NP and DP expressed reservations about the its inclusion.
- 2.14.6 The meeting noted that the PAC supported Option 1.
- 2.14.7 The meeting accepted that there was agreement on a non-absolute form of property rights and that the property clause should not serve to frustrate land reform.
- 2.14.8 The NP stated that in addition there must be reasonable security of tenure for the full range of property rights in this country.
- 2.15 Section 35: Limitation of Rights**
- 2.15.1 The meeting agreed that the TRT and the Technical Advisors reformulate Section 35 along the lines of the TC4 proposal contained on Page 34 of the document entitled "*Memorandum on Section 35*" and would:
- i Take into consideration the DP proposal entitled "*Democratic Party formulation - 23 February 1996*"

- ii Examine where it would be best to insert the element of reasonableness.
- 2.15.2 The meeting noted that it had been previously agreed to insert "*and human dignity*" in Section 35(1).
- 2.15.3 The meeting noted that the ANC supported "*reasonable and justifiable*" in Section 35(1)(a)
- 2.15.4 The NP preferred the section to remain as is but would consider the Technical Advisors' proposals as well as those of the DP. The NP said however that "*reasonable and justifiable*" was an important combination.
- 2.15.5 The ANC queried whether Section 35(1)(c) should be moved to the section on interpretation otherwise it would have the effect of constitutionalising our international obligations.

2.16 Section 38: Application

- 2.16.1 Regarding Section 38(1)
 - i The meeting agreed that the Panel and the Technical Advisors should give further consideration as to whether "*appropriate*" should replace "*applicable*" and should report back on the matter but agreed that there was no serious political disagreement on the issue.
 - ii The meeting noted that the NP reserved its position in relation to horizontality with regard to each right. The NP preferred the word "*appropriate*" to "*applicable*".
 - iii DP reserved its position on 38(1) and would consult its principals with regard to the inclusion of a provision that "*the privacy and autonomy of individuals must be fully respected*". The phrase comes from Section 38 in the DP document "*Provisional reformulations on Selected Contentious Issues, 7 February 1996*".
 - iv The ANC supported "*applicable*". It expressed concern that the DP proposal introduced a double qualifier and that it focused on the private domain which detracted from the social dimension. It stated that it was broadly happy with 38(1) but would consider dividing it into two sections, "(1) applies to all law and (2) binds the legislature, the executive, the judiciary."

- 2.16.2 The meeting agreed to Section 38(2)
- 2.16.3 Regarding Section 38(3)
 - i The NP favoured Option 1.
 - ii The ANC favoured the general formula approach in Option 1 but believed that it should be clarified in some cases within the right itself. Option 1 would be preferable but in regard to juristic persons the ANC wished to qualify it by inserting "*where appropriate*".
- 2.16.4 The meeting noted that the ANC wished to give further consideration to the matter of juristic persons and would propose a different formulation to that of the present Section 38(3).

3. ANY OTHER BUSINESS

- 3.1 The meeting agreed that progress had been made and accepted the suggestion of Mr Wessels that the Panel and the Technical Advisors prepare a draft which would form the basis for further bi-laterals between parties . On the basis of these bi-laterals the parties would submit to the Panel and Advisors before reporting back to the multi-lateral meeting.

4. CLOSURE

- 4.1 The meeting closed at 18h00.

