

42/8/11/8/24

**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**DRAFT REPORT OF DISCUSSIONS  
5 MARCH 1996**

## CONSTITUTIONAL ASSEMBLY

### DRAFT REPORT

#### CONSTITUTIONAL COMMITTEE SUB-COMMITTEE MEETING TUESDAY 5 MARCH 1996

#### 1. OPENING

1.1 Mr. Ramaphosa opened the meeting at 10h25.

1.2 The following documentation was tabled:

*Documentation Tuesday 5 March 1996*

*Additional Documentation Tuesday 5 March 1996*

*Memorandum from Technical Committee 4 on Sections 25 and 26 of the Working Draft - 14 February 1996*

*Memorandum from the Panel of Experts on horizontality dated 20 February 1996*

*National Party Proposal - Bill of Rights - Clause 23 Environment*

1.3 The meeting noted the concerns raised about the overlap between CA meetings and parliamentary work and it was agreed that the Administration would give notice well in advance of the times of meetings.

#### 2. DISCUSSION: BILL OF RIGHTS

2.1 The meeting agreed that discussion would be based on document tabled entitled "*Draft - 26 February 1996 - Chapter 2: Bill of Rights*" contained in the documentation.

##### 2.2 Section 7: State's Duties

2.2.1 The meeting agreed that the Technical Advisors should provide a short memorandum motivating the inclusion of the additional words "*[promote and fulfil]*" which appeared in the section reading as follows:

*The state must respect, protect, [promote and fulfil] the rights in this Bill of Rights.*

2.2.2 The meeting noted the Technical Advisors' explanation that the insertion of these words was based on international scholarship which includes these 4 elements of "*respect, protect, promote and fulfil*" and gives the full range of

what constitutes the state's duty.

### 2.3. Section 8: Equality

2.3.1 Regarding Section 8(1) and (2), the meeting agreed to these sections.

2.3.2 Regarding Section 8(3),

2.3.2.1 The meeting agreed that the Technical Refinement Team and the Technical Advisors should provide a range of possible alternative formulations to address the concerns raised by the parties and to ensure the best way of dealing with the principle of horizontality so that it does not operate in an unstructured way. The possible options would include:

- i To leave the section in the active voice with the inclusion of "*unfairly*".
- ii To place the section in the passive voice and to delete "*unfairly*" and to include an obligation on the state to enact legislation.

2.3.2.2 The meeting further agreed that the words "*nor any person*" should be inserted in brackets.

2.3.2.3 The meeting noted the following:

- i NP stated that it supported the inclusion of "*and affiliation*" but would considering dropping this if "*or any other grounds*" was included. It requested that brackets be placed around the phrase "*nor any person*". The NP was in favour of "structured horizontal application" and was concerned about at total "free for all". It would prefer a formulation in line with the wording of Section 35(4) along the lines of "*Everyone has the right to legislation designed to prohibit discrimination*".
- ii NP stated further that it wished to consider the use of the passive voice. Both the NP and DP proposed the inclusion of an obligation on the state to legislate to combat private discrimination.
- iii The DP supported the inclusion of "*or any other grounds*" and proposed that the section in the limitations clause should be moved to this section.

- iv The ANC stated that it should be clear that this was a right that applied vertically and horizontally and that it should be stated as a positive right and not in the negative. It was not persuaded that "*or any other grounds*" should be included.

## 2.4 Section 9: Human dignity

2.4.1 The meeting agreed to this section.

## 2.5 Section 11: Freedom and security of the person

2.5.1 Regarding Section 11(2), the meeting agreed that the NP would consider the wording by the ANC and would take the matter back to their principals and report back to the subcommittee. The meeting, however, agreed with the explanation of the Technical Advisors that it made no difference which words were used as the matter would ultimately be decided in terms of the general limitations clause.

2.5.2 The ANC proposed the following amendments:

- i insertion of the words "*bodily integrity*" before "*security*"
- ii in 11(2)(c) the deletion of "*reproduction*" and replaced with "*their body*".

2.5.3 The NP proposed the insertion of the words "*physical integrity*" before "*security*". The NP reiterated that it would be against any wording that would constitutionalise the right to abortion on demand and stated that the ANC proposal went too far. The NP stated that it could not accept the wording suggested by the ANC but would take the present wording of Section 11(2)(c) back to its principals for further consideration.

2.5.4 The ANC queried whether their proposed wording would "tilt the balance" in favour of liberalisation of abortion more than the NP's proposed wording.

2.5.5 The Panel expressed the opinion that "*decisions about one's body*" was a more neutral wording and was less of a "tilting" factor than the previous wording of "*control over one's body*".

2.5.6 The Technical Committee 4 Advisors explained that "*reproduction*" goes further than "*their body*" but that whatever words were used, the matter would ultimately be decided in terms of the general limitations clause.

## 2.6 Section 12: Slavery, Servitude and forced labour

2.6.1 The meeting agreed to this section.

## 2.7 Section 13: Privacy

2.7.1 The meeting agreed that the Panel and Technical Advisors would reformulate this section taking into consideration the possible inclusion of the word "*arbitrarily*" to qualify the verbs "*searched*" and "*seized*" and would report back to the Subcommittee.

2.7.2 The ANC proposed the insertion of "*arbitrarily*" to qualify "*searched*" and "*seized*" based on the suggestions in the submission of Nico Steytler contained in the "*Additional Documentation - Tuesday 5 March 1996*".

2.7.3 The DP stated that it was not convinced by Mr Steytler's argument as the concerns expressed in the submission would be covered by the limitations clause.

## 2.8 Section 14: Freedom of religion, belief and opinion

2.8.1 The meeting agreed to Section 14(1).

2.8.2 Regarding Section 14(2)(a), the meeting agreed that the NP would take the matter back to its principals and that the matter would be revisited.

2.8.3 The meeting noted the following proposals for Section 14(2)(a):

- i The ANC proposed the inclusion of the word "*public*" so that the section reads:

*"those observances follow rules made by an appropriate public authority"*

- ii The NP proposed the section be amended to read: "*those observances follow rules made by the authority in immediate control of that institution*". The NP stated that it would be happy with the wording as it stands but did not support the wording proposed by the ANC.

2.8.4 In response to the NP request as to how communities should be approached for further input on this issue, the Chairperson ruled that it was up to the parties themselves to consult with communities.

2.8.5 Regarding Section 14(3), the meeting agreed that the words "*Bill of Rights*" should be deleted and replaced with the words "*provisions of the Constitution*". The section would be amended to read:

*"The legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution."*

## 2.9 Section 15: Freedom of expression

2.9.1 Regarding Section 15(1), the meeting agreed to this section but agreed that Sections 15(1)(c) and (d) would be given further consideration by the NP who wished to ensure that these sections applied to juristic persons.

2.9.2 Regarding Section 15(2)(c), the meeting agreed to the ANC proposal to insert "*cause harm*" at the end of the section and to delete "*discrimination*". It was further agreed that the DP would take the proposal back to its principals for further consideration.

2.9.3 The NP stated that it would prefer to omit Section 15(2) and not to have any specific limitation but rather an unfettered freedom of speech limited only by the general limitations clause. However they noted concerns that had been raised and therefore proposed that the qualification of "*cause harm*" should be inserted in Section 15(2)(a). They further requested the insertion in Section 15(2)(c) of a phrase that would broaden protection against child pornography.

2.9.4 DP expressed the view that there should be no immunisation of the freedom of expression right and that it was opposed to any constitutional limitation of free speech but would take the ANC proposal of the "harms test" back to its principals for further consideration.

2.9.5 The Chairperson asked whether the submissions from the public on this issue, particularly that of Gilbert Marcus on behalf of the Conference of the Editors had been taken into account. The meeting noted that the Technical Advisors would prepare a memorandum on the submissions for presentation to the Subcommittee which would highlight those submissions that should be taken into account.

2.9.6 Regarding Section 15(3),

2.9.6.1 The meeting agreed that the Technical Refinement Team would consider the reformulation of this section in the following ways:

- i Either in the Bill of Rights as a limitation along the lines of "*The State may regulate...*", or
- ii as a general principle to be included in Chapter 7.

2.9.6.2 The ANC proposed that the section be moved to Chapter 7 and be reworded along the lines of *"The State must establish an independent authority to regulate broadcast/electronic media to ensure that they are fair and represent a diversity of opinions."* It expressed the view that this was not a right but an obligation on the State.

2.9.6.3 Mr Surty suggested that Chapter 7 was the ideal place for this section but suggested that it should be along the lines of the principles found in Sections 152(1) and (3) in Chapter 11 dealing with Public Administration.

2.9.6.4 NP stated that they would prefer to have a right in the Bill of Rights and were not certain there should be another institution under Chapter 7. The NP further requested the inclusion of a provision that would ensure that where the State finances media of any kind, a diversity of opinions must be reflected.

## 2.10 Section 16: Assembly, demonstration and petition

2.10.1 The meeting agreed that the NP and DP reserved their positions in order to consult their principals on the ANC proposal that the word *"picket"* be inserted in the section so that it reads:

*"Everyone has the right, peacefully and unarmed, to assemble, demonstrate, picket, or to present petitions."*

2.10.2 The ANC stated that its proposal for the inclusion of *"picket"* was based on strong representation from the unions that this be explicitly stated in the section.

## 2.11 Section 17: Freedom of Association

2.11.1 The meeting agreed to this section.

## 2.12 Section 18: Political rights

2.12.1 The meeting agreed to this section with the following amendments:

- i Section 18(2)(b) should become Section 18(3)(b).
- ii Further clarity would be sought from the law advisors on whether the phrase *"in terms of"* should be replaced with *"in accordance with"*.

2.12.2 The meeting agreed that the age of franchise would be dealt with under a specific franchise clause.

**2.13 Section 19: Citizenship**

2.13.1 The meeting agreed to this section.

**2.14 Section 20: Freedom of movement and residence**

2.14.2 Regarding Section 20(1), the meeting agreed that the Technical Refinement Team should reformulate this section in order to take into account the concerns raised by the ANC that the use of the word "everyone" might give rise to problems regarding "illegal aliens". The ANC proposed that "everyone" should be defined in an appropriate way without curtailing the access of tourists to this country.

**2.15 Section 21: Freedom of occupation**

2.15.1 The meeting agreed to the insertion in brackets of "trade" proposed by the NP so that the section would read:

*"Every citizen has the right to choose freely their [trade], occupation or profession..."*

2.15.2 NP proposed the insertion of "trade" as it was important to encapsulate "entrepreneurial endeavour" in this section. The NP further requested that their option for this section appear in the documentation.?

2.15.3 The meeting agreed that the sentence in brackets "[The practice of an occupation may be regulated by law]" should be retained as it is for the present but noted that the ANC proposed that the brackets be removed.

**2.16 Section 23: Environment**

2.16.1 The meeting agreed to defer the matter to allow parties to consider the proposal by the NP tabled at the meeting entitled "National Party Proposal - Bill of Rights - Clause 23 Environment" which reads:

*"Everyone has the right -*

*(1) to an environment that is not harmful to their health, well-being and quality of life, and*

*(2) to have their environment protected through reasonable*



*legislative and other measures for the benefit of present and future generations -*

- (a) preventing pollution and ecological degradation;*
- (b) promoting conservation;*
- (c) securing the ecologically sustainable use of natural resources;*
- (d) safeguarding the environment while promoting justifiable economic development; and*
- (e) securing the ecological integrity of the environment."*

2.16.2 The meeting noted that the NP further proposed the establishment of an Environmental Commissioner in Chapter 7.

**2.17 Section 25: Housing and land**

2.17.1 The meeting agreed to base the discussion on the "*Proposed Reformulation*" contained in the document tabled at the meeting entitled: "*Memorandum from Technical Committee 4 on Sections 25 and 26 of the Working Draft*"

2.17.2 The Technical Committee spoke to the document.

2.17.3 Regarding Section 25(2), the meeting noted that the ANC supported the first formulation and not the words in brackets but agreed that the NP and DP would take the matter back to their principals.

2.17.4 Regarding Section 25(3), the meeting agreed to this subsection with the deletion of the word "*arbitrarily*".

**2.18 Section 26: Health, food, water and social security**

2.18.1 The meeting agreed to this section subject to the following amendments:

- i The deletion in Section 26(1)(b) of the word "*clean*".
- ii The inclusion in Section 26(2) of the first sentence and not the words in brackets.

**2.19 Section 27: Children**

2.19.1 The meeting agreed to this section and noted that the ANC stated it would sympathetically consider the removal of brackets around "*parental care*" in Section 27(1)(b).

## 2.20 Section 28: Education

- 2.20.1 The meeting agreed that NP would give further consideration to its position on this matter.

## 2.21 Section 30: Language and culture

- 2.21.1 The meeting agreed to this section but agreed that it would be revisited. The meeting noted that the NP favoured deletion of the words after "*choice*" or would prefer an alternative formulation to bring this section in line with Section 14(3) along the lines of "*to the extent that this is consistent with the provisions in the Constitution*". The ANC strongly supported the retention of the wording as it stands.

## 2.22 Section 31: Access to information

- 2.22.1 The meeting agreed that there was broad agreement on the framework but that this matter would be deferred for further consideration and that the proposal by the ANC would be included as an alternative option.
- 2.22.2 The meeting further agreed to DP request that the words "*that is required for the exercise or protection of any rights*" should be placed in brackets.
- 2.22.3 The ANC proposed that Section 31(1) be amended as follows:
- i "*Everyone has the right of access to*" be replaced with "*The state must take legislative measures to provide reasonable access to* -
  - ii "*and that is required for the exercise or protection of any rights*" be separated from subsection 31(1)(b) as this is the qualifier of both (a) and (b)
  - iii Section 31(2) should be deleted.
- 2.22.4 The NP stated it did not support the amendments proposed by the ANC which would be a "watering down" of the right and preferred that the basic right of access to information be listed in the Constitution and not just the right to legislation. The NP supported the DP's view that any limitation should be dealt with in legislation. NP view was that everyone should have the right to access to information from the state and that the inter-person relationships should be regulated by legislation.

- 2.22.5 The NP requested that the wording as it stands should not disappear from the draft and stated that it would be prepared to give the matter further consideration.
- 2.22.6 The DP queried whether the horizontal application under Section 31(1)(b) could be constitutionalised and proposed that the best way would be for government to have regulatory bodies through which the media and public could obtain access to information.
- 2.22.7 The ANC expressed the view that this was not a right that was found in any other constitution in the world.
- 2.22.8 The ACDP endorsed the right as it stands.

**2.23 Section 32: Just administrative action**

- 2.23.1 The meeting agreed to defer discussion on this matter to allow parties to consider the proposal tabled by the ANC entitled "*Proposed Draft: Section 32: Just Administrative Action*" which reads:

*"(1) The state must provide by way of relevant legislation access to just administrative action.*

*(2) The legislation referred to in subsection (1) must -*

*(a) provide for the review of administrative action by a court of law or an independent and impartial tribunal;*

*(b) impose a duty on the state and the organs of state to take lawful, reasonable and procedurally fair administrative action;*

*(c) be justifiable in an open and democratic society based on freedom and equality; and*

*(d) promote an efficient administration"*

- 2.23.2 The NP stated that it would consider the proposal but preferred Option 1 to be retained and requested that this option not be omitted from the documentation.

**2.24 Section 33; Access to courts**

- 2.24.1 The meeting agreed to this section.

2.24.2 The Technical Advisors explained that the DP's concerns about the omission of a "due process" clause were addressed by the fact that procedural fairness is included in the section on administrative justice and that there was thus no need for a residual due process clause.

## 2.25 Section 34: Arrested, detained and accused persons

2.25.1 The meeting agreed to this section subject to the DP giving further consideration to the proposal of the ANC which had arisen out of discussions with the NP. The proposal was that the section should be amended as follows:

- i Section 34(1)(e) - Option 1 should be deleted. It was noted that both the ANC and NP supported Option 2.
- ii Section 34(2)(c) - The word "*provided*" should be deleted and replaced with "*assigned*".
- iii Section 34(3)(e) - This should be divided into two sections:
  - (a) "to choose and be represented by a legal practitioner" and
  - (b) "to have a legal practitioner assigned..."

The words in brackets should be deleted.

- iv Section 34(3)(l). Based on the submission of Mr Steytler, it was proposed that this section be deleted.
- v Section 34(4) - The use of the words "*must be excluded*" should be reconsidered. It was proposed that there not be rigid exclusionary rules but that the fairness be judged in the context of each and every case.

## 2.26 Section 35: Limitations

2.26.1 The meeting agreed that this section be reformulated by the Technical Refinement Team taking into account the following:

- i The meeting agreed to Sections 35(1) and 35(2) but consideration should be given in the reformulation as to whether these sections should be combined in a single clause.
- ii Section 35(4) should be moved to Section 8(3) and that an opinion should be provided on the implications of moving this section to the equality clause.

- iii Section 35(3) should be deleted as this was covered under Section 39(1) of the interpretations clause.

2.26.2 The meeting further agreed that the Technical Refinement Team would report back to the CC Subcommittee on the following two issues :

- i "*demonstrably*"
- ii "*pursuant to*"

### 2.27 Section 36: States of emergency

2.27.1 The meeting agreed to await the memorandum from the Panel of Experts on Section 36(4)(c). The meeting further agreed that the Technical Refinement Team should reformulate the section taking into account the following concerns raised:

- i Whether Sections 36(1) and (2) should be dealt with under the powers of the President.
- ii How the section should be redrafted to deal with states of war.
- iii NP concern that the retrospectivity in Section 35(4)(a) might be retrospective to before the declaration of a state of emergency.
- iv DP concern about the dangers of over-listing in Section 36(4)(c).
- v Section 36(6) - It was agreed that the brackets should be removed but that the Technical Refinement Team should consider tightening up reference to superior court which does not appear in the section on the Judiciary.

### 2.28 Section 37: Enforcement of rights

2.28.1 The meeting agreed to this section.

### 2.29 Section 38: Application

2.29.1 The meeting agreed to Section 38(1)

2.29.2 Regarding Section 38(2), the meeting noted the explanation from Prof Van der Westhuizen that the Memorandum entitled "*Memorandum from the Panel of Experts on horizontality dated 20 February 1996*" was a dated one and had been superseded by numerous discussions

on the matter but that there had been no serious political disagreement on the issue. The meeting further noted that the ANC was still considering use of the word "*appropriate*" or "*applicable*".

2.29.3 The meeting agreed to Section 38(3).

2.29.4 Regarding Section 38(4), the meeting agreed to delete Option 2 and retain Option 1 for consideration. It was further agreed that the Technical Refinement Team should reformulate the section taking into account the ANC proposal that "*permit*" be replaced with "*so require*". The meeting noted that the NP wished to give further consideration to "*so require*".

### 2.30 Section 39: Interpretation

2.30.1 The meeting agreed to this section and agreed that there should be consistent use of the term "*human dignity*" throughout the Bill of Rights.

## 3. ANY OTHER BUSINESS

3.1 The meeting agreed that the Bill of Rights would be given further consideration at the meeting of the CC Subcommittee on Monday 11 March 1996.

3.2 The meeting agreed that the next meeting of the CC Subcommittee would take place on Wednesday 6 March at 10h00 in the Old Assembly Chamber and items on the agenda would be the National Council of Provinces, Provinces and Competencies.

## 4. CLOSURE

4.1 The meeting rose at 16h55.

