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**REPORT TO THE MANAGEMENT COMMITTEE : OVERSEAS WORKSHOPS  
ATTENDED BY THE PANEL OF CONSTITUTIONAL EXPERTS:  
24 NOVEMBER - 1 DECEMBER 1995**

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The Panel was granted permission by the MC to attend workshops in Britain and Germany for the period 24 November - 1 December 1995, with a view to exchange ideas with acknowledged international experts regarding certain intricate technical issues pertaining to the Second Working Draft.

The workshop in Britain was hosted by Prof. Jeffrey Jowell QC and the Commonwealth Secretariat and was attended by the following participants:

**Justice Austin Amissah:** President of the Botswana Court of Appeal.

**Hon Justice P N Bhagwati:** a former Chief Justice of India.

**Ronald Dworkin** holds both the Chair of Jurisprudence at the University of Oxford and the chair of Law and Philosophy at the New York University School of Law.

**Jochen Frowein** is one of the leading experts in German constitutional law and was Vice President of the European Commission of Human Rights. He is one of the Directors of the Max-Planck-Institute in Heidelberg.

**Yash Ghai** is Sir Y K Pao Professor of Public Law at the University of Hong Kong, and visiting professor at Warwick University and the Indian National Law School.

**Jeffrey Jowell QC** is Professor of Public Law and Vice Provost at University College London.

**Lord Lester of Herne Hill QC** is a practising barrister, specialising in constitutional and administrative law and international human rights law.

**Cheryl Saunders** is Professor in the Faculty of Law at the University of Melbourne where she is Deputy (and at present Acting) Dean.

**Richard Simeon**, a political scientist, is Professor of Political Science and Law, University of Toronto, Canada.

**Sir Franklin Berman QC** is Senior Legal Adviser in the British Foreign and Commonwealth Office.

**Dr L M Singhvi** is a former Indian MP and President of the Indian Bar Association and President of the World Congress on Human Rights.



**James Cornford** is a former Professor of Political Science at Edinburgh University and Director of the Nuffield Foundation. He is now Director of the Hamlyn Trust.

**Professor Reg Austin** was Dean of the Faculty of Law at Zimbabwe University and is now Legal Director of the Commonwealth Secretariat.

The international participants were provided with the text of the Second Working Draft as well as brief summaries prepared by the Panel, setting out the main areas of technical difficulty and concern. These summaries are attached.

The following main topics were discussed:

- The Constitutional Principles; their role and function and how they must be interpreted and understood.
- Various issues pertaining to the Bill of Rights e.g. limitation of rights, the protection/non-protection of property rights, the principle of equality, the protection of social and economic rights, access to information, application of the Bill of Rights.
- The executive; votes of no-confidence, presidential executive powers, separation of powers, introduction of Bills, control by Parliament over the executive.
- Various options regarding a possible Second House or a COP; how it could be structured, its relationship with the provinces, its functions, how its members could be elected.
- Provinces and their competencies, framework legislation, asymmetry, homogeneity, subsidiarity, ancillary powers, conflict of laws, administrative authority, financial and fiscal issues, taxes.
- The judiciary and the court system; access, various aspects of constitutional adjudication, jurisdictional issues, referral procedures, appointment mechanisms, abstract review of Bills.
- Parliament; its control over the executive, the role of parliamentary committees.
- The public administration and institutions supporting constitutional democracy.

From 28 - 30 November 1995 the Panel attended workshops hosted by the Frederich Naumann Foundation in Bonn. The format of these workshops differed from the British part of the tour in the sense that individual experts addressed the Panel during the various sessions, whereafter discussion took place.



The following people took part in discussions with the Panel:

- Dr Christian Hillgruber : Institute for International Law and Foreign Public Law, University of Cologne.
- Prof Dr Tomuschat : Professor of Constitutional Law, Humboldt University, Berlin
- Prof Dr Dieter Grimm : Judge of the Federal Constitutional Court
- Dr Hubert Weis : Ministry of Justice
- Dr Fiedler : Head of Financial Relations between the Federation and the Länder.
- Dr Christian Dästner, a senior administrative officer attached to the Bundesrat.
- An informal session/dinner with Prof dr Lücke, University of Mainz.

During the German part of the tour the emphasis fell more on the German system and its possible relevance for the current process. As was the case in Britain, a wide variety of topics were discussed including:

- various aspects regarding constitutional adjudication
- fundamental rights, their application and in particular, "Drittwirkung", social and economic rights and the welfare state
- the provinces and their competencies
- the role of the Bundesrat
- financial and fiscal relations between federation and Länder
- the principles of homogeneity, subsidiarity and asymmetry

Members of the Panel are agreed that the exercise was worth while in every respect and that invaluable insights and information had been gained.

The fresh and objective way in which the experts, coming from various parts of the globe, approached the Working Draft and came up with possible solutions to complicated technical problems, greatly contributed to broaden our own perspectives and enhance our lateral thinking. We are confident that the experience we have gained will be put to good use during the months of technical refinement and advice - when required - which lie ahead.

We thank both our British and German hosts for what has proved to be a very enriching experience. We also owe gratitude to the Management Committee for allowing us the opportunity. We are convinced that the experience we have gained will contribute to our being able to properly and meaningfully assist the CA in the finalization of the new constitution.



**QUESTIONS TO BE RAISED DURING INTERNATIONAL CONSULTATION  
CONCERNING COMPETENCIES**

1. CPXVIII - XXIII are relevant.
2. The following questions arise:
  - 2.1 Does the draft comply with CPXIX requiring provinces and the national government to have both exclusive and concurrent powers?
  - 2.2 Does CPXXII require that the power of national intervention in the circumstances described in the principle should be available only in respect of functional areas in regard to which the nation and the provinces have concurrent powers or should the power of national intervention be available even where they are necessary in a functional area where the province has exclusive?
  - 2.3 Does the draft text comply with that portion of CPXXXI(2) requiring a national power of intervention by means other than legislation?
  - 2.4 How should the constitution define the respective areas of exercise of national and provincial legislative and executive powers where the nation and the provinces have concurrent power?
  - 2.5 Does sub-section 3(a) of the third option in respect of S. 143 of the draft comply with the CP to the extent that it seeks to limit the power of the Constitution Court?
3. The Panel will find it useful to discuss other ways in which the allocation of exclusive and concurrent powers to the nation and the provinces and the question of overrides can be dealt with because the allocation of these powers is so contentious that a deadlock breaking role might ensue.



**QUESTIONS TO BE RAISED DURING INTERNATIONAL CONSULTATION  
CONCERNING THE JUDICIAL SYSTEM**

1. Constitutional Principles VI and VII are relevant.
2. Is the demand for "an equitable legal process" properly and satisfactorily reflected by and encapsulated in the possibilities of appeal (i.e. to the ordinary courts) or application to the Constitutional Court in the event of a finding of the unconstitutionality of an Act or conduct by a High Court. How will these procedures affect indigent litigants? Should there not be an automatic referral by the court a quo to the Constitutional Court?
3. What are the likely problems that might arise from the hybrid court system with regard to questions such as the choice of the proper forum on appeal, or the development of the common law as is envisaged in section 39(3)?
4. In what way should the requirement that the judiciary must be "appropriately qualified" be dealt with in the Constitution? Should it be coupled with a mechanism (such as e.g. the Judicial Service Commission) to decide when a person is "appropriately qualified"?
5. What are the advantages and disadvantages of the current appointment mechanism for Constitutional Court judges? Does the involvement of the JSC necessarily render the process less political than, say, a procedure where parliament would be involved? Should the obvious political sensitivity of these appointments not rather be given recognition to by involving parliament?
6. (a) At what stage of the legislative process should abstract judicial review of Bills take place? Should such review be allowed to obstruct or prevent the promulgation or implementation of the Bill?  
(b) Should provision be made for the abstract review of Acts? And, if so, what type of standing provision should be included?

A further, very technical question has been troubling us:  
Does the notion of "disputes in constitutional matters" between provincial organs of state include the possibility of disputes between intra-provincial organs of state i.e. within the same province?

**T.J. KRUGER  
09/11/1995**



**QUESTIONS TO BE RAISED DURING INTERNATIONAL CONSULTATION  
CONCERNING BILL OF RIGHTS**

**1. THE RIGHT TO LIFE**

- 1.1 The way in which this right is to be provided for in the new Constitution has become highly controversial by reason of a view taken by a significant minority that the Constitution should specifically provide that the death penalty is competent.
- 1.2 The question which arises is whether any clause providing that the death penalty is competent can be said to be constitutional and to comply with CP II more particularly in the light of the reasoning of the Constitutional Court in its judgment declaring the death penalty to be unconstitutional in South Africa in relation to the interim Constitution.

**2. THE LIMITATION CLAUSE**

- 2.1 Certain questions arise out of the way in which the limitation clause has been framed in S. 35 of the existing draft.
- 2.2 What is the meaning of the phrase encapsulated in S. 35(1)(b) of the draft?
- 2.3 What is the meaning and import of a phrase to the effect that the limitation shall not negate the essential content of the right?
- 2.4 Is there any difference between the formulation in 35(1)(b) of the draft and the phrase contained in the preceding sub-paragraph?
- 2.5 Is it necessary or desirable to render certain rights constitutionally illimitable in the light of the circumstance that rights can only be limited to the extent that the limitation passes the test laid down in the constitution?
- 2.6 Is there a material difference between the situation in which any limitation has to be:
  - 2.6.1 Reasonable and justifiable in an open and democratic society based on freedom and equality;
  - 2.6.2 Reasonable in such a society or
  - 2.6.3 Reasonable and necessary in such a society?



**3. THE RIGHT TO PROPERTY**

- 3.1 Does the current formulation (S. 24) effectively reflect a balance between the need to protect property owners and the need to ensure effective redistribution of land?
- 3.2 Are there other ways in which a more effective balance between the two needs described above can be achieved?
- 3.3 This is likely to be controversial and it is necessary for the Panel to have knowledge of sufficiently varying ideas on the matter to facilitate the breaking of deadlocks should they arise.

**4. THE RIGHT TO ECONOMIC ACTIVITY**

- 4.1 To what extent does the way in which this right has been encapsulated in the draft limit or prevent economic reconstruction and affirmative action aimed at achieving equality as described in S. 8 of the draft?
- 4.2 What is the effect of the special limitation clause contained in this section? How will the special and general limitation clauses interrelate in the interpretative process?



## **COMMUNITY LIAISON DEPARTMENT**

### **REPORT TO MANAGEMENT COMMITTEE**

**5 DECEMBER 1995**

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During 1995, the Community Liaison (CL) Department planned and implemented the face-to-face component of the Public Participation Programme (PPP).

Over 80 000 people participated in the following 3 programmes:-

1. Constitutional Public Meetings (CPMs)
2. National Sector Hearings
3. Constitutional Education Programme (CEP)

The organisations which participated have received copies of the Working Draft. In addition, the CL Department has regularly liaised with all 9 Provincial Legislatures in relation to the PPP with particular reference to CPMs and the CEP.

#### **CL WORK PROGRAMME FOR 1996**

In line with our approach of reaching the people who reach the people, the CL Department will be implementing the following programmes:

1. CEP
2. National Issue based hearings.

#### **CEP**

The CEP will be holding workshops on the Working Draft between 15 January 1996 and 17 February 1996. These workshops will be held in all Provinces and the brief is to educate the public on the Working Draft and inform them that they may make their comments in writing.

The primary objective is to honour pre-existing obligations by going back to Civil Society structures which were contacted by CEP Co-ordinators during the Pre-Draft phase. Additional structures and communities will be accessed if time permits.

The workshops will cover the following:-

1. Constitutional issues broadly
2. Working Draft

Members of the CA will be sent fortnightly programmes so that they may attend workshops in their areas. CA members who attend workshops, may assist the Co-ordinators by answering questions of clarity and providing further information. The



Chairperson will write to all CA members in order to encourage them to attend these workshops. A briefing document explaining the workshop process and the role of CA members will be enclosed with the Chairperson's letter.

The CL department has completed a summary of the Working Draft in all official languages and this will be distributed at the workshops together with the tabloid version of the Working Draft. After 20 February 1996, the CEP will be involved in a process of educating Civil Society Structures for ownership of the New Constitution. This will involve the training of Civil Society Structures so that they may continue the process of Constitutional Education after the conclusion of CA work. Appropriate education resources will be developed.

### **NATIONAL ISSUE BASED HEARINGS**

Hearings must take the process of discussion forward and not re-open areas where agreement has been reached. Hearings will consequently be held only where there are areas of **contention** and **outstanding** matters which have not been resolved.

The Agendas should be focused on those areas of **contention** that are of concern to the participants. These Hearings will be limited in duration and participants will be asked to submit their comments in writing before the hearing.

The Stakeholders which need to be considered for a Hearing as well as the content of the Agenda, will need to be determined by both an assessment of the submission process and the process of discussion at the level of the Constitutional Committee.

In the light of the above, Hearings must be seen as only one of the vehicles for Public Participation. In the context of the Working Draft, the primary vehicle for Public Participation for both individual and Civil Society Structures will be the process of making written comments.