

MINUTES OF MEETING OF THE EXTENDED ANC CONSTITUTIONAL COMMITTEE  
HELD IN JOHANNESBURG ON 13 AUGUST 1993

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1. PRESENT

Bulelani Ngcuka, Albie Sachs, Kader Asmal, Essa Moosa, Dullah Omar, Zola Skweyiya, Chris Dlamini, Enver Daniels, Frik Haysom, Mac Maharaj, Penwell Maduna, Bridgitte Mabandla, Ebrahim Hassen, Masemola.

2. AGENDA

- 2.1 Progress Report on Negotiations by Mac Maharaj.
- 2.2 Transitional Executive Council by Frik Haysom.
- 2.3 Independent Electoral Commission by Penwell Maduna.

3. ON NEGOTIATIONS

Mac Maharaj's report on progress of negotiations at Multi-Party Talks.

- 3.1 He highlighted problems of time limits as the various agreements must be passed as legislation by Parliament which is to be convened in September and October 1993.
- 3.2 On the question of Presidency we need to look at formulation for the Interim Constitution.
- 3.3 On Symbols - a Special Commission has been set up.
- 3.4 On Language - this can be an emotive issue and needs to be handled sensitively.
- 3.5 On Enforcement Mechanisms - one structure possibly needed to enforce IEC, IBA and TEC.
- 3.6 On TEC and Sub-Council - not sufficient thought given to the interaction of the two Councils.
- 3.7 On Joint Peace Keeping Force - the quest of representation on command structure and the question of decision-making process to be clarified.

3.8 On Civil Service - problems raised with the Independent Reserve Bank. Balance to be struck between continuity of current staff and representativity. Government wants guarantees for Civil Service. We need to look at proper formulation - namely representativity, accountability and impartiality.

3.9 On Regions - Commission wants further consultations.

4. TRANSITIONAL EXECUTIVE COUNCIL .

Fink Haysom reported on this matter and raised problems concerning control and peace-keeping force and command structure, declaration of emergency and criticism that powers are vested in Sub-Council and not TEC. It was however submitted that TEC would have "Veto" power. Provision should be made for levelling of the playfield, sub-council for traditional leaders and National Security proposed.

5. FUNDAMENTAL RIGHTS

Penuel Maduna speaks on fundamental rights and raises concerns which was previously raised like the application whether vertical or horizontal, particularly the question of traditional rights. Proposed that clauses on eviction, economic activity and property clause to be deleted including clause 28(3) on labour relations.

The meeting adjourned at 6.30 p.m. for the following day at 8.30 a.m.

THE MEETING RECONVENED AT 9.00 a.m. ON 14 AUGUST 1993 AND JOINED BY COMRADES FROM THE REGIONS COMMISSION.

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A. Commissions on regions gave report on Regions Technical Committee.

- B. The Constitutional Committee entrusted the Cape Town team comprising Dullah Omar, Bulelani Ngcuka, Albie Sachs, Kader Asmal and Bridgett Mbandla to draft a position paper on the following issues:
1. The Impact of Indigenous Law on a Bill of Rights in the Constitution and the Participation of Traditional Leaders on Different Levels of Government.
  2. Regional Constitutions.
  3. The process of the Appointment of the Judiciary During the Interim Phase.
  4. The government of national unity setting out:
    - 4.1 The number of government departments.
    - 4.2 How cabinet portfolios will be allocated.
    - 4.3 Who will allocate such portfolios.
    - 4.4 Decision-making process of the cabinet.
    - 4.5 Broad policy principles of the functioning of the cabinet.
    - 4.6 The powers and functions of the vice presidency.
  5. Some of the comments on the above issues are set out for purpose of including in the position papers.
  6. On The Impact of Indigenous Law on the Bill of Rights in the Constitution and Participation of Traditional Leaders at Different Levels of Government.
    - 6.1 The traditional leaders are asking for a sub-council on traditional leaders/indigenous law.
    - 6.2 The issue of vertical or horizontal application of fundamental rights not resolved, it could impact on indigenous law.
    - 6.3 A response should be worked out for submissions made by traditional leaders in relation to the impact of traditional rights on the Bill of Rights.
    - 6.4 The question was raised whether there could be an over-arching law to deal with indigenous law and how such law could impact on clause 118 3(c) of the Interim Constitution.

- 6.5 What role is given to the traditional leaders. The institutions, status and role of traditional leaders to be recognised and protected.
- 6.6 Democratic principles of government should apply at all levels.
- 6.7 Provision can be made at local level of government, where they could have advisory powers, some judicial and execution functions, for example they could serve as ex-officio members of the Village Councils.
- 6.8 At regional level there could be a Council of Chiefs with advisory powers.
- 6.9 There could be no argument of them playing a role on the national level, although they want some sort of senate. This has been rejected. If they want to play a political role, they must participate in the normal political process.
- 6.10 They could be given an adjudicating role on indigenous law as guardians of customs.
- 6.11 It was also submitted that regions could decide on the role of traditional leaders. One needs to develop customary law in accordance with a Bill of Rights.
- 6.12 The traditional leaders made the following submissions:
  - 6.12.1 They are non partisan and apolitical.
  - 6.12.2 They want to be restored to their original and traditional role and not be creatures of statutes.
  - 6.12.3 Indigenous law should apply and they should not be subjected to fundamental rights.
  - 6.12.4 They want powers on local levels both urban and rural. They want fiscal powers at all levels of government. They want all people living under their jurisdiction to be subject to indigenous law.
  - 6.12.5 On regional level they want reserved seats on the regional legislatures.
  - 6.12.6 On national level they want House of Chiefs or one-third of the seats on the senate.
- 6.13 Central to the struggle is the overriding principle of equality. One should take a political decision and be careful of trade-offs.

6.14 The Bill of Rights must override indigenous law.

6.15 House of Chiefs should not be entertained.

7. On Regional Constitutions:

There are three options and they are as follows:

7.1 That there be no regional constitutions.

7.2 That a prototype constitution be included in the national constitution.

7.3 That there be regional constitutions with minimum uniformity.

It should have the following features:

7.4 It should conform to the national constitution.

7.3 It should set out the minimum set of requirements such as constitutional principles, size of legislature and democratic representation.

7.4 Dead-lock breaking mechanism.

7.5 Powers, functions of regions.

7.6 Role of traditional leaders.

7.7 Regional citizenship and voting qualifications.

7.8 One should guard against the re-introduction of apartheid at regional levels.

8. On the appointment of the judiciary during the interim phase:

8.1 What is to be done from now to the constituent assembly. Does one retain the existing system.

8.2 Does one have a special constitutional court prior to the constituent assembly and how is it appointed.

8.3 A judicial service commission comprising representatives from the legal profession and from parliament is required.

- 8.4 It was proposed that the appointment of the constitutional court be left to the constituent assembly and that the existing system of appointments to the judiciary be retained.
- 8.5 There was however another view that there should be some intervention on the appointment of judges from now to the election of the constituent assembly.
- 8.6 Provision has to be made in the interim constitution for a constitutional court. Provision could be made for a judicial commission to be appointed on proportional representation.
- 8.7 A constitutional provision is required. It could be a general clause and be regulated by a Supreme Court Act.
- 8.8 One needs to establish what additional courts are required.
- 8.9 The real transformation will only come after the new democratic constitution.
- 8.10 A comprehensive policy on the restructuring of all public structures should be worked out.
- 8.11 One needs to entrench lay assessors to democratise the bench.
- 8.12 One could get a lot of pressure to appoint a constitutional court before the elections.
- 8.13 The composition of the bench is important and an assessor should not replace representativity of the judiciary.
- 8.14 A firm proposal to the Technical Committee on the process of appointment of a judiciary is required.
- 8.15 Instead of the chief justice serving as Chairperson of the judicial commission, the speaker of the National Assembly could fulfill that function.
- 8.16 The constitutional court should not only be appointed from advocates, but also from attorneys, legal academics.
- 8.17 The first task of the Constituent Assembly would be to appoint a judicial commission.
- 8.18 The Chief Justice should be appointed by the President.

8.19 The seat of the Constitutional Court still to be decided.

9. On Government of National Unity:

9.1 The following questions were raised:

9.1.1 Who decides on the allocation of portfolios.

9.1.2 How are decisions taken.

9.1.3 What are the Presidential powers.

9.1.4 What are the Vice Presidential powers.

9.2 One needs to work out how many State departments there should be and identify such departments.

9.3 One needs to go for a simple majority in decision-making.

9.4 The portfolios should be allocated by the State President after consultation with the parties in Parliament.

9.5 One should work out broad policy principles for the function of the cabinet.

9.6 The Vice Presidency should not automatically succeed the Presidency.

9.7 The constitutional court should not interfere with decisions of the cabinet.

9.8 The powers of the State departments to be looked at very creatively.

10. Time Frames:

10.1 On Traditional Leaders, the document to be submitted by Monday 16 August 1993.

10.2 On Judiciary, the document to be submitted by Wednesday 18 August 1993.

10.3 On Government of National Unity, document to be submitted by Monday 16 August 1993.

10.4 On Regional Constitutions, to be done as soon as possible.

THE MEETING TERMINATED AT 13H30.