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THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE, THE PLANNING COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION. THE MINUTES ARE STILL TO BE RATIFIED BY THE AD HOC COMMITTEE.

DRAFT MINUTES OF THE COMBINED MEETING OF THE AD HOC COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD AT 14h30 ON TUESDAY, 31st AUGUST 1993 AND AT 08h45 ON WEDNESDAY, 1st SEPTEMBER 1993 AT THE WORLD TRADE CENTRE

Ad Hoc Committee:

Mrs S Camerer (Convenor)
Prof H Cheadle

Chief Gwadiso

Mr A Leon

Mr P Maduna

Mr S G Mothibe

Technical Committee:

Prof. L M du Plessis (Convenor)
Prof. H M Corder

Mr G Grove

Mrs D S Nene

Adv. Z Yacoob

Miriam Cleary (Administration)

AGENDA:

1.1 It was agreed that customary law would be discussed as the first item on Wednesday, 1st September 1993.

1.2 Other issues for discussion were as set out in item 3.2 of the Ad Hoc Committeeâ\200\231s Minutes of 25th August 1993.

The Ad Hoc Committee were given copies of the Technical Committeeâ\200\231s proposed amendments and reformulations of the clauses in respect of the issues under discussion. Professor du Plessis briefly advised on each item under discussion.

Application - Clause 1(4) - Juristic Persons:

Prof. Cheadle expressed his concern regarding this clause and although the suggestion of Prof Corderâ\200\231s that this clause not be included at all. Some members supported this. Prof. Cheadleâ\200\231s concern was such that it was agreed that finalisation of this issue should be held over for the next meeting. It was basically agreed that the formulation of this clause was acceptable.

Horizontal and Vertical Application of the Bill of Rights:

3.1 The Technical Committee gave an exposition of the implications of horizontal application and its impact as well as the effect that vertical application would have in relation to a Bill of Rights.

Subject to confirmation, it was agreed that the whole Bill would operate

vertically only. The Ad Hoc Committee would revert to this at the next combined meeting.

Customary Law:

4.1 The reports from the five experts had been received and it would seem that these experts were not in full agreement on certain aspects of customary law and how it could be accommodated.

The Technical Committee could not recommend a compromise on customary law. However Adv. Yacoob suggested a formulation.

Mr Leon asked the Technical Committee how customary law could be shielded. Mrs Nene replied that we were not dealing with a legal issue but a political one, and that as much as South Africa had to change, so customary law must change. She suggested that there be a "sunsetâ\200\235 clause on customary law to accommodate both men and women from traditional communities who are not yet ready to grapple with the changes of society.

Chief Gwadiso stated that as a matter of principle they could not exclude any part of the population from the Bill of Rights. If we excluded customary law we were excluding the women. He went on to state that there must be respect for the values of other communities and this should be reflected in the Bill of Rights.

Mrs Nene wanted to know to what extent the rural women had been consulted and spoke of the tremendous changes in the KwaZulu areas where women have been installed as chiefs in their own right. She went on to state that people must be educated and informed of their rights but there has been no consultation as far as women and children have been concerned.

Chief Gwadiso stated that the whole essence of customary law was that it affected the whole family and the head of a family could not be regarded as the equal of any other member of that family. He went on to emphasize that people should not be forced to abandon the practise of customary laws which had been in force for centuries.

Mr Maduna said that customary law affected the individual and the person on whom this law impacted was the individual. If it was left to consultation and the women were told that they had an option to choose, the women would probably choose not to be under customary law.

On the aspect of choice, Mrs Nene stated that those women who chose not to fall under customary law would be discriminated against in the family and given no protection. It was these women especially who needed to be protected by a Bill of Rights.

Discussion ensued regarding a "sunset clause" and the possibility of a certain time span being given was considered as customary law could not change rapidly. It was agreed that efforts must be made to address the extreme inequalities among rural women.

Chief Gwadiso said that customary law did not impact on women alone, but also property, inheritance and other rights. However, there were women who sought security within the ambit of customary law and under customary law these women would always be protected after the death of the husband or father as the heir would be responsible for them and their familyâ\200\231s upkeep and protection.

There was discussion of a fear of women falling under customary law (as well as women of other groups such as Muslims) was that they would not have freedom of choice when it came to voting and would be forced to vote according to the requests of the head of their family.

Women under customary law could appeal to a higher court, but, according to Mrs Nene, so very many of these women had no access to these courts nor the knowledge of these rights.

After lengthy discussion a list of five principles were drawn up - Annexure D - for the Technical Committee to draft a formulation on this basis for the next meeting.

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Clause 17 – Access to Information:

After discussion, the Technical Committee agreed that they would reconsider their new formulation of this clause and reformulate it.

Clause 18 – Administrative Decisions:

The Ad Hoc Committee gave to the Technical Committee a set of submissions (Annexure A). The amendments and additions to this clause were on the whole acceptable and it was agreed that the Technical Committee adjust this clause in accordance with the discussions and present it at the next combined meeting.

Clause 20 – Eviction:

The Technical Committee presented their motivation for the inclusion of this clause – Annexure B. After discussion it was agreed that this clause be excluded.

Clause 23 – Property:

8.1 The Technical Committee put forward a proposed draft – see Annexure B. The Ad Hoc Committee agreed that the reformulated clause as presented was acceptable.

The Ad Hoc Committee were unhappy about the Comment in subsection (3) as it could raise a problem in the Council and requested that the Technical Committee delete it.

The Technical Committee were requested to formulate a separate clause on restoration of land on the basis of, inter alia, "Restoration where feasible, and failing restoration, compensation to be provided". It was felt that restoration should not be incorporated in the property clause. This clause dealt with property and its expropriation and did not give enough scope to include restoration. The clause was too restrictive. Professor Cheadle would provide a detailed motivation for the Technical Committeeâ\200\231s perusal.

NEXT MEETINGS:

9.1 The Technical Committee advised that they would be meeting on Tuesday and Wednesday, 7th and 8th September 1993.

9.2 The next Ad Hoc Committee meeting would take place on Wednesday, 8th September 1993, at 09h00.

It was agreed that the next combined meeting would thus take place on Wednesday, 8th September 1993 at 11h00.

CLOSURE:

10.1 The meeting of Tuesday, 31st August closed at 16h30.

10.2 The meeting of Wednesday, 1st September closed at 16h00.

10.3 Copies of these minutes would be faxed/delivered to each person of each Committee.

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Administrative decisions

The Ad Hoc Committee agrees that the following principles shall apply:

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No personâ\200\231s rights shall be determined or infringed by public administrative decisions, proceedings or actions which are unlawful, procedurally unfair or not justifiable.

The rights set out in 1 shall only apply to persons with a direct and substantial interest in such decisions, proceedings or actions.

The concept of lawfulness is included in order to address the concern regarding "ouster" clauses. The Ad Hoc Committee asks the Technical Committee to consider whether this issue should be dealt with differently by including a clause to the effect that the courts have inherent jurisdiction to review administrative decisions. Certain members of the Committee feel that it is not necessary as the rights in a bill of rights are always justiciable.

The Ad Hoc Committee supports the proposal made by Judge Olivier (copy attached) that the principle of procedural fairness be contained in a separate sub-clause together with the right to be furnished with reasons. The Committee also supports the inclusion of a reference to the rules of natural justice in the clause. This provides for continuity of concepts in present law.

The concept of justifiability should be included to compel the decision maker to link reason for the decision and the decision itself and to oblige systematic and proper decision making; equally the prerogative of the decision maker to make policy choices in the interests of good governance should not be usurped.

(NB. The Ad Hoc Committee suggests the use of "justifiableâ\200\235 rather than "reasonable" because of the legal uncertainty which could be attached to the use of "reasonable.â\200\235 In contrast "justifiable" has specific meaning with reference to Australian and United States provisions (copies attached).

In principle the onus should rest with the person alleging an unjustifiable administrative decision.

PLANCOMM/SUBCOMM /FRIGHTS . MET
31 August 1993

ep/eviction

EVICTION

South African Law does not require a court to consider the availability of alternative accommodation before making an order of ejectment. It the occupier has no contractual or other right to occupy and the court is asked for an order of ejectment by the owner or any other right holder, the order of ejectment will be granted. Some concern has been expressed concerning the social consequences of such a regime more particularly in the case of

occupiers of state or state owned land.

It is obvious that any law which prevents the court form granting

an order of eviction unless there is alternative accommodation is highly dangerous. The rights of owners of property are rendered non-existent with the result that investors would find it impossible to put their money into property especially where the investment involves the construction of low cost housing. The Committee cannot and does not recommend this because of the chaos

which would probably result.

The alternative drafts of the clause as proposed are new. Depending on which option is chosen the Court dealing with an ejectment case is either obliged or permitted to take into account the availability of alternative accommodation as only one of the factors before reaching a decision as to whether the eviction order should be granted. In doing so the court will need to

arrive at an equitable decision by balancing various factors

against each other. If an occupier has for example paid no rent for many months, is unlikely to pay any rent in the future and has no alternate accommodation, the order will probably be granted because the balance is in favour of the owner. On the other hand if a tenant's occupation has become unlawful because he paid rent a day late and if such a tenant is capable of paying rent in the future and undertakes to do so, the ejectment order may not be granted where there is no alternative accommodation.

Between these two extremes lie a number of factual possibilities. All that the clause does is to give the court a little more latitude by authorising it to take into account a wider range of factors to arrive at a sensitive conclusion. The committee believes this will be of social advantage and that the clause should be retained for this reason.

const.230893.s8b 1

PROPOSED AMENDMENT TO SECTION 29 (PROPERTY) OF THE
REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL
ISSUES COMBINED REPORTS 10 AUGUST 1993

i A PROPOSAL
That the wording of section 29 be changed as follows:

"29. (1) Every person shall have the right to acquire, hold and dispose of rights in property.

(2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the ownerâ\200\231s investment in it and the interests of those affected.

Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

Nothing in this section shall preclude measures aimed at regulating the use and development of property where such regulation is in the public interest.â\200\235
2. EXPLANATION _
The concern that motivates this proposed amendment lies with the wording of Section 29 (Property) in so far as it distinguishes between rights in property (section 29(1)) and property (section 29(2)) and the implications thereof.

2.1 Background

Existing Town Planning or Zoning Schemes allocate specific use and development rights to specific properties. These rights include the right to use the land for a particular purpose and to develop the land to a particular extent, eg permitted height and floor area. :

These rights are protected in all four provinces by the relevant Ordinances. In each Ordinance these rights may only be taken away where compensation is paid to the owner of the land'.

e Land Use Planning Ordinance, 15 of 1985 (Cape) - section 19; Town Planning Ordinance, 27 of 1949 (Natal) - section 60; Townships Ordinance, 9

of 1969 (Orange Free State) - section 34; Town-Planning and Townships

They are further protected by the courtsâ\200\231 interpretation of ownership rights. This approach is clearly shown in the Appellate Divisionâ\200\231s 1988 judgment in Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd 1988 (3) SA 122 (A). The right to use and enjoy land for "all lawful purposesâ\200\235 was held to be one of the "aggregate of distinct and valuable rights inhering in the ownerâ\200\235 (at 129E-H). The taking of such a right - in this case the right to realise the full benefits of land zoned for business purposes in terms of a Town Planning Scheme - was "akin to expropriationâ\200\235 and thus compensation was payable. The Court also held that compensation clauses should not be interpreted restrictively. Quoting from a 1918 Privy Council decision? the Court argued that such clauses should always be interpreted in favour of the holder of the rights. In other words where there is doubt a presumption operates in favour of the individualâ\200\231s economic interests over the broader public interest.

The current position thus with regard to use and development rights is that they enjoy a high degree of protection both through Provincial ordinances and judicial precedent. The effect of this is to cripple planning authoritiesâ\200\231 capacity to influence patterns of development where such rights exist. These rights, initially created by planners up to fifty years ago as planning tools, now enjoy such powerful protection that they effectively block current planning initiatives.

The problems facing our towns and cities today are enormous. Urgent and expeditious restructuring effortsÂ® are needed. Every effort must be made to

facilitate such restructuring. The current status of use and development rights however make this task extremely difficult and often impossible. The cost of compensating landowners is so high that few, if any, planning authorities can afford it. Thus any efforts to redress the impact of apartheid and colonial planning will be crippled by the patterns of development formulated by planners over the last fifty years and the rights they allocated to achieve those patterns.

A primary task of planning in the post-apartheid South Africa will have to be the tackling of this issue. In the interests of creating cities that are equitable and sustainable any constitutional protection, intended or otherwise, afforded to these rights must be avoided at all costs.

2.2 The United Statesâ\200\231 Experience

The experience of the United States is very useful in this regard. The Fifth Amendment of their Constitution states: " ...nor shall private property be taken for

Ordinance, 15 of 1986 (Transvaal) - section 44.

% Minister of Railways and Harbours of the Union of South Africa v Simmer and Jack Proprietary Mines Ltd 1918 AC 591 (PC) at 603 - "general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation"â\200\235.

e What constitutes "urban restructuring"â\200\235 is not simply defined. For

the purposes of this document it is enough to say that it includes the direction of infrastructural and commercial investment to areas previously neglected, the conservation of natural resources and the integration of cities and towns previously divided by apartheid.

public use without just compensation.â\200\235 This clause was originally held by the courts to mean that any loss of or reduction in any rights in property, including use and development rights, required compensation. It took many years before the courts were prepared to hold that the limitation of an ownerâ\200\231s use and development rights did not necessarily constitute a "taking" of property as referred to in the ConstitutionÂ®*. In every case the court has to weigh up the public interest at stake against the economic impact on the property owner to determine whether there is regulation or a taking of rights.

Now in South Africa we have the opportunity to remove any doubts as to the distinction between the regulation of use and development rights and the expropriation of property. By doing so we will avoid the uncertainty and protracted litigation that has vexed the USA for so long. We wiill also substantially facilitate the process of urban restructuring.

2.3 Amendrï¬\201ent of Section 29

There is thus considerable concern over the wording of section 29(1) which entitles people to "acquire, hold and dispose of rights in propertyâ\200\235. This effectively gives Constitutional protection to the holders of use and development rights. Section 29(2) entitles the state to expropriate property with the payment of compensation.

Depending on how Section 29 is interpreted there are two possible consequences, neither of which is desirable. They are either

1) Use and development rights are regarded as falling within the "bundle of rights" that constitute the traditional notion of ownership. Any limitation or regulation of such rights would constitute expropriation of property and compensation would thus be payable in terms of section 29(2).

or

2) Use and development rights are regarded as being distinct from property as contemplated in Section 29(2). As rights in property in terms of Section 29(1) however they are constitutionally protected and thus exempt from any form of limitation or regulation.

Clearly neither of these interpretations is acceptable in a society where land is such an important and contentious resource. In the light of the precedent set by the Sandton Town Council case the former approach is the one most likely to be followed.

â\200\230. For example in the Supreme Court case of Penn Central Transportation

Company v City of New York 438 U.S. 104 (1978)

Use and development rights are not property rights as suchÂ® and thus do not warrant Constitutional protection. They are created by the legislature and thus should be capable of being similarly regulated.

It is therefore critical that a clear and unambiguous statement is made that permits the regulation of use and development rights without incurring an obligation to pay compensation. The distinction must be made between expropriation of property that gives rise to compensation and regulation of the use and development of property that does not give rise to compensation. A massive obstacle to such a goal is Section 29 as it currently stands. Section 29 effectively gives the holders of use and development rights more protection than they currently enjoy at the very time that the needs of our cities and towns dictate that in fact they ought to have less.

South African property law is currently moving, albeit very slowly and dogged by judgments such as that in the Sandton Town Council case, towards a notion of ownership rights that is more concerned with the social and environmental function of land than its commercial value. This move is one that needs all the encouragement that it can get. The current section 29 will have precisely the opposite effect.

2.4 Section 34 - the Limitation Clause

Section 34 of the Draft Constitution does allow the legislature, in certain restricted

cases, to limit the rights granted elsewhere in the Constitution. In order to comply with section 34 though the proposed legislation would have to:

i) apply "generally and not solely to an individual case";

i) be permissible only to the extent that it is a) "reasonableâ\204¢ and b) "justifiable in a free, open and democratic society based on the principle of equalityâ\200\235; and

iii)- not "negate the essential content of the right in questionâ\200\235.

While planners might well believe that the regulation of use and development rights complies with the requirements of section 34 this opinion is unlikely to be universally shared. Until such time as there is a court decision either way there will be considerable uncertainty and confusion. This can only have a negative impact on processes of urban restructuring. Moreover the risk remains that a court will eventually find that the regulation of use and development rights in fact does not fall within the ambit of section 34, thereby further crippling planning endeavours.

Section 34 as it currently stands cannot be seen as more than a last resort for the

i Increasingly the notion that our Common Law gives property owners

the right to do with their land as they please is being challenged.. Not only is such an approach utterly inappropriate in a society such as ours but its historical legal basis has been shown to be erroneous.

problems created by section 29. If the legislature relies on section 34 to justify the regulation of use and development rights it will be opening the way for excessive and costly litigation, giving rise to uncertainty and confusion. These negative consequences can be avoided by the timeous amendment of section 29.

2.5 Conclusion

It is important not to see the proposed amendment as more than it is meant to be. It is not intended to be a full frontal assault on property rights and landowners. It is simply aimed at preventing the entrenchment of rights in the Constitution that

do not belong there. As indicated above these rights are already strongly

protected both by the four planning Ordinances and by judicial precedent. This

existing protection is, from a planning and natural resource protection perspective,

regrettable enough. To elevate this protection to a Constitutional status would

be disastrous. . And surely not a consequence intended by the drafters of section 297

The importance of customary law is recognised.

Fundamental Rights will impact on customary law.

There must be an opportunity for widespread grassroots consultation and necessary legislation to regulate the impact.

The prevailing situation to be dealt with as follows:

4.1 A limited and conditional exemption of some sort to the equality clause to allow the processes in 4 to be implemented

4.2 In the case of any inconsistency within any particular customary law regime itself, the equality clause will prevail

4.3 In the case of any customary law rule conflicting with the equality clause, the rule will prevail until legislation is passed

4.4 Room should be left for free and informed choice in individual cases where feasible

The exemption should be limited in time after which the equality clause shall apply.