Technical Committee [13]

Cons 3413

MEMORANDUM

TO: The Planning Committee

FROM: Technical Committee

7th September 1993

FUNDAMENTAL RIGHTS DURING THE TRANSITION : PROPOSED RESOLUTION

That the draft Chapter 8 on the Ombud and the Human Rights Commission as formulated by the Technical Committee on Fundamental Rights and included in its Ninth Progress Report, be referred to the Technical Committee on Constitutional Issues for further attention and inclusion in the draft Constitution.

L M DU PLESSIS
Convenor

Prof. du Plessis :

The sub-committee will arrange accordingly.

1/9/93

MEMORANDUM

TO: The Convenor
Technical Committee on
Fundamental Rights During
the Transition

FROM: Planning Committee

9th September 1993

c.c. Constitutional Issues

DRAFT CHAPTER 8 : OMBUD AND THE HUMAN RIGHTS COMMISSION : NINTH PROGRESS REPORT : 7 SEPTEMBER 1993

With reference to your memorandum dated 7th September 1993, the Sub-Committee agrees to refer the abovementioned draft to the Technical Committee on Constitutional Issues for further attention and inclusion in the draft Constitution.

MMcleary.

MELODY EMMETT
Secretary

MEMORANDUM

TO: The Convenor
Technical Committee on
Fundamental Rights During
the Transition

FROM: Planning Committee

9th September 1993

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TO ALL NEGOTIATING PARTIES

The Technical Committee on Fundamental Rights has been moved by a proposal that such rights and freedoms should be enforceable during the transition against the State only. It is considered, however, that it may be prudent to make this general rule subject to certain exceptions.

The Committee accordingly requires input from negotiating parties in regard to whether there should be circumstances in which fundamental rights and freedoms ought to be available against non-state bodies and persons and, if so, what these circumstances should be. The avoidance of privatised apartheid and preventing interference with citizens' political rights could be two such areas. One of the parties submitted that, as a general rule, the rights and freedoms entrenched during the transition ought to apply to state action only and contended that exceptions to the rule should be considered with circumspection.

Negotiating Parties are kindly requested to comment before 12th July 1993 so that their comments can be properly considered for purposes of the next Report.

2nd July 1993

MAC

MEMORANDUM

TO: The Planning Committee **FROM: Miriam Cleary**

16 August 1993

The Technical Committee on Fundamental Rights During the Transition attaches hereto a Draft Chapter dealing with the Judiciary pursuant to a Resolution of the Planning Committee which has been drawn to our attention.

The Committee recommends the inclusion of this Chapter but points out that the Chapter was drafted without any submissions having been received from any parties, except for one.

You will note that two Options are suggested. Option One preferred by the Committee, contemplates a separate Constitutional Court which is under the control of the Chief Justice only to some extent. Option Two proposes a Constitutional Court as a chamber of the Appellate Division.

(F) FHRC CC TE ME

FAX TO: (011) 387-2211 (MIRIAM CLEARY)
(02231) 6235 (PROF LOURENS DU PLESSIS)

MEMORANDUM

TO: FELLOW MEMBERS OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

FROM: HUGH

DATE: July 26, 1993

STRICTLY CONFIDENTIAL

After leaving on Wednesday evening, I spent a day and a half at a gathering of lawyers at Aloe Ridge near Johannesburg. There were thirteen judges present, among them H J O van Heerden, Goldstone, Didcott, Ackermann, Howie, Smallberger and Olivier.

On Thursday evening, at an after-dinner session, our 6th Progress Report was discussed, and this discussion continued on Friday morning for another 40 minutes. Despite the fact that there may have been factors which contributed to the reaction of those present, which have very little to do with our Report as such, I must report to you that the general reaction was one of extreme criticism, verging on hysteria, on some points. I think that some part of this reaction is to do with the fact that many of those present have long been involved in human rights work and were dismayed, if not shocked, at seeing only the sixth version of our Report. Although our first five Reports have been public knowledge for some time, and although the professional societies of lawyers could have taken the initiative to get hold of our Reports and comment thereon, and although there is no express duty on us to seek comment from these quarters, in the light of what follows below, I think that it is imperative, both politically and from the point of view of the technical quality of our work, that we urgently seek comment from the different branches of the legal profession. In other words, I would suggest that we fax our 6th Report immediately to the following bodies:

The Association of Law Societies
The General Council of the Bar
NADEL
The Black Lawyers' Association
Each of the six Judges President and the Chief Justice

I would suggest that we give them not more than a week to respond in writing on the practical consequences of the formulations that we have chosen. In addition, I would strongly urge that we require the Multi-Party Negotiating Process to facilitate a small day-long seminar at which we can present our Report to about 15 or 20 senior practitioners and academics in the human rights field, in order to obtain their oral comment.

The politicians need to understand unambiguously that even an interim bill of rights, should it become unworkable in the hands of the judiciary and practising lawyers, and should it lead to chaos in the courts and the legal system generally, will do irreparable harm to the whole idea of a bill of rights and the legitimacy of the judiciary as a whole. I am not suggesting that such calamitous consequences will follow the suggested formulations in our 6th Report, but I think that we need to guard against that possibility, which we may have overlooked. I cannot express these views strongly enough - one of the most senior appeal judges present expressed the fear that a bill of rights in the form of our 6th Report would lead to the collapse of the judicial system. We need to meet that challenge legally and politically before this Report becomes a chapter in the transitional constitution.

These are my general reactions, which I think you ought to take into account and which I have discussed with Lourens. I wish, furthermore, to raise some specific points:

1. Section 1 needs a relatively substantial re-ordering and some changes, I would suggest. In section 1(1)(a) we must include a reference to the judicial branch if any of the following sections is to be implemented horizontally. I would suggest a formulation along the following lines: "bind the legislative, executive and, where appropriate, judicial branches of government ...".

   As to 1(1)(b), I would suggest it be made applicable to sections 2(2), 2(3), 8, 10?, 15 and 17. I would suggest that we call section 1 Application, and have a new section somewhere towards the end which is headed Interpretation. I would then remove our current sections 1(3) and 1(9) and include them under the Interpretation section.

   As regards 1(7), I think that we need to think very carefully about when juristic persons will be entitled to claim the rights and freedoms detailed - I believe that the political parties will make representations on this matter.

2. The Equality clause drew massive critical comment. As regards our alternative of 2(2), as we have now included so many factors in the list, I would suggest the deletion of the words "on any ground whatsoever and, without derogating in any way from the generality of this provision", replacing the last two words "in particular" with "or other such grounds". I would also suggest the addition of the ground "sex" because I am assured that gender and sex do not connote the same things in law.

   As regards 2(3), I would suggest we add the two words "laws and" before "measures", to make it quite clear that laws can be made. Secondly, the presence of the word "adequate" was questioned, and we should consider whether it is necessary.

Thirdly, the view was expressed and endorsed that the words "by discrimination" are unnecessary as the purpose of the subsection is to help disadvantaged people generally. Fourthly, we should make allowance for affirmative action to be available to groups of people as well as individual persons. Please consider these points of criticism. I am persuaded by at least the last two.

As regards 2(4), there were strong reservations concerning formulation. We need to spell it out in clear terms, and I would suggest something like the following: "In any action in which unfair discrimination is alleged, prima facie proof of such discrimination shall be sufficient to bring it within the class of conduct contemplated in subsection 2 until the contrary is established".

Finally, the point was made that the issue of abortion has more to do with the Equality clause than the Right of Life clause. Therefore, we might consider making a 5th subsection as follows: "A law in force at the commencement of this Chapter relating to abortion shall remain in force until repealed or amended by the [legislature]." As a consequence, the two words "or abortion" in section 3(2) should be deleted.

3. In section 5(1) I think that we should add these words at the end "... trial, subject to section 19(1)".

4. As regards section 16, our present formulation fails to specify the purpose for which a person has the right of access to a court. I would propose the following formulation: "Every person shall have the right to take a justiciable dispute either to a court of law ..." or "Every person shall have the right to take a dispute of right either to a court of law ...".

5. You will remember the DP's suggested addition of the words "with due expedition" after the word "access" in section 17, and of the words "in writing" after the word "furnished" in section 18(2). I do not have a problem with those suggestions.

6. In regard to section 19(1)(c), the question has been raised for what purposes a prisoner, for example, may claim the services of a legal practitioner - could he do so in order to sue his wife for divorce? If section 19(1)(c) is only to operate vertically, as I think is implied, then this won't be a problem, but perhaps you could just think about it.

In section 19(2)(b), you will remember the suggested addition after the word "law" in line 1 of the words "as soon as reasonably possible but not later than 48 hours ...", and the addition in section 29(4)(c) of the words "as soon as possible but not more than 10 days ..." after the word "reviewed" in line 1. I have no problem with those additions.

7. In section 20, we should change the word "including" to "which may include", as was suggested in the Negotiating Council, and in section 21(1) we should add the words "right of" between the words "the" and "freedom" in line 1. Further, I think that we should warn government of the consequences for regulation of the economy of this section.

8. In section 23(1), I am concerned that our present formulation does not protect ownership as such. My suggestion would be to add the word "hold" in between the words "acquire" and "and", so that it will read "... the right to acquire, hold and dispose ...". Remember here, too, the possible addition of subsection 3 on the right to restoration of land.

9. In section 28, although I am a strong supporter of the words "of general application", they seem to confuse more than elucidate, and perhaps we could delete them. We might also consider adding subsection (c) in the following terms: "shall not conflict with international law obligations". In section 28(2,) line 1, on a point of drafting I think that we should delete the three words "the provisions of".

10. In section 29(3)(c), I think that it should read as follows: "The suspension of this section and sections 3(1), 5(2) and 8(1)". I think that we should make these subsections non-suspendable.

Finally, we might consider adding the additional subsection (h) to 28(4) as follows: "If a review court orders a detainee's release, he or she shall not be detained again on the same grounds unless the State shows good cause to the court prior to such re-detention".

There is one additional point which was brought up which we might consider, and that is that the right not to be convicted on the basis of illegally obtained evidence seems to be a notable omission from section 18(3) - this has been mentioned to me by several people. In the end result, my feeling is that much of the furious resistance to our Report is caused by a feeling of exclusion in the process of its drafting which, to an extent, has been the result of the process and has been slightly alleviated by the fact that at least those people present at Aloe Ridge have had a chance to comment and will take the Report back to their constituencies. Nevertheless, I strongly believe that it will make very good sense politically and for the eventual legitimacy and workability of the chapter on Fundamental Rights if we give the organised legal profession an urgent opportunity to comment. I do not think that we can lose by this process, and the politicians must understand that this is a serious step and we cannot afford to play games.

All best wishes with your work. See you next Monday.

Yours sincerely,

HUGH