[6]

# TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION : TENTH PROGRESS REPORT NEGOTIATING COUNCIL MEETING : 7th OCTOBER 1993

Extract from debates of the Negotiating Council - Dr D de Villiers in the Chair:

**Clause 8. Equality**:

**Prof. du Plessis:**
8(2) - all grounds of discrimination have been inserted as a result of the discussion in the Council previously. The one is "sex" together with "gender" - I think we had that debate here that sex and gender could actually mean two different things, and then we included "social origin" in order to cater for the concern that birth, class and status are not mentioned in particular and we are of the opinion that "social origin" would cater for that need and we also said "on one or more of the following grounds". One or more of the following grounds is just to create the possibility that people can also allege discrimination on, not only on account of one of the grounds, but on a combination of the grounds. For instance, a black woman would be able to say "We constitute a class for the purposes of the discrimination clause."

**Chairperson:**
Thank you, does the Council approve of "sex" being inserted in (2)? Minister Coetsee.

**Minister Coetsee:**
Just for the sake of clarification and not for the sake of revisiting a topic that's always worthy of a revisit, sex - could I have clarification on the reason for finding a difference between "gender" and "sex"?

**Prof du Plessis:**
Chairperson, the people who are well-versed in feminist literature tells us that in other parts of the world it has come to, it has become clear that "sex" is usually used as a reference to the biological differences whereas "gender" includes also the social constructs surrounding those biological differences. In other words it would be, the issue would be "sex" if one would refer to the biological ability of a woman to give birth, but if added to that there's a social construct saying that women are less intelligent than men, for argument sake, then that's a social prejudice which belongs more appropriately in the category of "gender".

**Chairperson:**
Thank you - its not to make sex more complicated? Can we agree to - Minister Coetsee?

**Minister Coetsee:**
I know this is a matter that has been settled but having applied my mind of course now again to the whole clause with the improvements, the question is whether the concept of sexual orientation does not perhaps give room for interpretations and consequences that are unintended?

**Chairperson:**
Professor?

**Prof. du Plessis:**
Chairperson, I don't know what Minister Coetsee has in mind but should I once again draw attention to the fact that that is limitable in terms of the Limitation Clause and if there are undesirable consequences I don't know what he is referring to but it will have to be argued in front of the Constitutional Court and say that in order to avoid, well if they are real undesirable consequences then the Limitations Clause could provide for their limitation and their exclusion.

**Minister Coetsee:**
Especially since the Limitations Clause in subclause 34(2) also draws into the debate the concept of any rule of common law, it seems to me that we may meandering in an area which perhaps we should not complicate if we could perhaps relieve the duty of the court by being more specific. For that reason I was wondering whether it would be possible for the Technical Committee to review and just address the question of perhaps unintended consequences with too wide a definition.

**Chairperson:**
Mr Gordhan.

**Mr Gordhan:**
Mr Chairperson I don't want to get into the debate about unintended consequences because I still dont understand what they are in relation to that particular phrase, but what I do have pre-lunch qualms about is revisiting an aspect that has been now contained for the tenth time in a sense in a report because we might have some qualms which could have been raised in the Ad Hoc Committee, which could have been raised in previous discussions in the Council and with the greatest of respect, endurance and tolerance, I think it would be difficult for this House to now entertain debate on a matter that has been put forward on a number of occasions and perhaps it may be something to think about over lunch without dwelling on it

too much so that we can find a constructive way of moving forward. But I think we need to express that concern at this stage.

**Chairperson:**
I think that by the nature of the point raised by Minister Coetsee is of such a nature that its a legal technicality that could be discussed with the Technical Committee and its input could be considered should the consequences that he has in mind affect the wording surely the Technical Committee can as such advise us subsequently. Thank you.

Further extract from debate: (Tape 3 Side A)

**Clause 33. Education:**

**Prof. du Plessis:**
Chairperson, it is 33(c) the words "or colour" were scrapped and really it was just inadvertently added at a certain stage, because "race" includes colour, and it will actually create problems to insert colour there, it was just a technical thing.

**Chairperson:**
No colour in this clause, only black and white. Thank you - agreed to? Mr Wessels.

**Mr Wessels:**
Mr Chairman I go along with this colourless amendment, but I hope I don't solicit some spirited debate. I need your guidance as far as procedure is concerned on this clause. I would like to add a subclause and I see the matter will not in terms of the agenda before us, not come up for discussion. Is it permissable to maybe submit an additional subclause to the Committee to come back to us on Monday for debate or how should I approach you and the Technical Committee Mr Chairman?

**Chairperson:**
I think it is permissable to approach the Technical Committee and make whatever further recommendation you would wish to make to them for their consideration.

**Mr Wessels:**
I may just add that it is not an amendment to any of the three subclauses, it is an additional point.

**Chairperson:**
Mr Gordhan?

**Mr Gordhan:**
Mr Chairperson, I think with respect it would be more expeditious if we consider that as an amendment to clause 33 is annunciated before the Council, we get some initial feel for it and decide what's the appropriate way of dealing with it. We might for example, all agree with it and then it is dispensed with; if it is contentious then we can decide how to deal with it as well, so it might be advisable if we have notice of it now.

**Chairperson:**
Fine Mr Gordhan we can follow that route, I'm always a bit cautious that it might lead us into an entirely new debate, but just to get a feel of the proposal and air some views Mr Wessels can you.....

**Mr Wessels:**
Mr Chairman I can do so right now, or I can hold it over until you have completed this agenda.

**Chairperson:**
No, 33 I think we have completed, and is it in connection with 33?

**Mr Wessels:**
It has everything to do with 33.

**Chairperson:**
Then I think you should do it now.

**Mr Wessels:**
Thank you. Mr Chairman I would like to add a subclause (d) which would read as follows, namely then:

> "Every person shall have the right - (d) subject to section 8(3) to equal State financial assistance in the exercise of his or her rights in terms of this clause."

That is what I was going to propose for consideration.

**Chairperson:**
Everyone is quiet I do not get an initial reaction. Would you take us slowly through that again, explain it again.

**Mr Wessels:**
Mr Chairman, I will read it again. It will read as:

"(d) subject to section 8(3) to equal State financial assistance in the exercise of his/her rights in terms of this section."

I will concede it is not neatly drafted, but that I think encapsulates what I have in mind and what I have in mind sir, is that anybody who actually exercises his rights in terms of section 33(c) should have access to equal State financial assistance.

**Chairperson:**
Mr Sisane.

**Mr Sisane:**
I tell you when I read 33 I had the question what about the financial implication of (c) and now with that amendment I feel very worried now, because I wanted to ask that from the Technical Committee but I decided since its talking about "every person" probably there are no financial implications, but if you are going to say now that the Government must fund private schools for common cultures that is dangerous and I don't think the PAC will support that.

**Chairperson:**
Any other reactions? Mr Rajsbansi, then Mr Landers.

**Mr Rajsbansi:**
Mr Chairman, Mr Wessels proposal will of course cause a big debate. The promotion of culture to a large extent recently was an exclusive right of white people then it was extended to others, but if this is restricted to the promotion of language and culture it needs a lot of thinking, Mr Chairman, and one cannot decide upon this easily because to have an institution to promote religion and get straight finances, something which is not done in this country.

**Chairperson:**
It needs a lot of thinking Mr Rajsbansi, I don't think we should do our thinking here, we could ask Mr Wessels to make his submission but he gets the first reactions and argue it with the Technical Committee. Mr Landers do you still want to .....?

**Mr Landers:**
Yes, Mr Chairperson, I think Mr Wessels must either argue his point with the Ad Hoc Committee or the Technical Committee. Off the bat here I'm inclined to think that Mr Wessels and the National Party are trying to protect State funding for Model C schools, and if that is truly the case, then I would have serious difficulties with this amendment.

**Chairperson:**
Advocate Yacoob?

**Adv. Yacoob:**
Mr Chairperson I'm sorry there is little point in passing it onto the Technical Committee because the question to be answered sir, is a straight forward political one. Technically there is not problem about drafting it, depending on the political conclusion to which this Council comes. What the proposal means as put up by Mr Wessels, is this, that whatever the financial position of the party might be who has his or her child at the school or whatever that position may be, that party is entitled to equal financial assistance, and fundamentally that's the political decision which needs to be made by the parties. So if that political decision is made and we are given an instruction that that is clearly a political decision drafting is not a problem. So I would suggest that this proposal of Mr Wessels be not left to mere mortal technicians, Mr Chairman, but be actually put to a political sub-committee to deal with it and make appropriate recommendations, because it is only when the politicians decide what they want that we can start exercising such little skills as we might have.

**Chairperson:**
I think ladies and gentlemen, if Mr Wessels wishes to pursue this further he should air it with the Ad Hoc Committee. And he finds that in order. Agreed to, can we leave it there? Mrs Kruger.

**Mrs Kruger:**
Could I just ask Mr Chairman, parties like ourselves also feel very strongly about the fact that the State should not be in a position to fund certain private schools and not fund others and I think that is the crux of what Minister Wessels is saying. So we would like to know if the Afrikaner Volksunie could please be on the Ad Hoc Committee on an adhoc basis when this is discussed.

**Chairperson:**
You can have a bilateral with Mr Wessels and together you can formulate something that could be passed onto the Ad Hoc Committee and make an input there. Thank you that deals with 33 and concludes the clauses under the category "Minor Reformulations". We now turn back to the more substantial issues, we have dealt with 7, we have dealt with 14(1) and if I have it correct then, we turn to Clause 15.

Further extract from debate.

**Clause 15(2):**

**Prof du Plessis:**
Chairperson, 15(2) I have not raised because that could be a bit more controversial. That was suggested by one of the parties, we discussed it at length with the Ad Hoc Committee and eventually its inclusion was agreed upon but that is something new. It wasn't in the previous draft so I think the Council will have to consider that a bit more carefully than the other one.

**Chairperson:**
Council, have you looked at that - one sentence. Minister Coetsee.

**Minister Coetsee:**
Chairperson, once a clause of this nature is introduced the question arises whether its normative value is addressed completely and I would submit that one would look for a value such as impartiality and objectivity, and my question would be whether the clause as phrased here does cater for values such as impartiality and objectivity, and my submission is that it does not.

**Chairperson:**
Professor du Plessis.

**Prof. du Plessis:**
We could consider that, Chairperson. The point just is that this clause's particular concern here is not the impartiality and objectivity - that's catered for in other places, but the diversity. That was a particular concern with which it was submitted to us but we could consider that.

**Chairperson:**
Fine, thank you, and if Minister Coetsee has any particular input to make in this regard it can be considered by the Technical Committee. With that qualification noted, can we then go on to 24. We have agreed as it stands with that qualification that the Technical Committee will consider the point raised by Minister Coetsee. Agreed to? agreed then. 24 - Administrative Justice. Professor du Plessis.

**Further extract from debate:**

Clause 24 - Administrative Justice:

**Prof. du Plessis:**
Chairperson I would like to ask Prof. Corder who is our administrative law expert to explain this one.

**Chairperson:**
Thank you, Professor Corder.

**Prof. Corder:**
Thank you Mr Chair. You will see the very short formulation which this clause formerly enjoyed - "Every person shall have the right to lawful and procedurally fair administrative decisions". This is a very contentious area and occupied a lot of the time of the Ad Hoc Committee, both on their own and in joint session with the Technical Committee. Effectively I think that what you have here under 24(a), (b), (c) and (d) is a finely tuned attempt to ensure justice in the bureaucratic activities of the State. Under (a) what is guaranteed there is that every member of the executive branch of Government must stay within the powers granted to him, her or it by law and everybody would have the right to challenge the validity of that administrative action if his or her rights or interests were affected. Secondly, if your rights or legitimate expectations are affected you are also entitled to a procedurally fair administrative decision which normally would incorporate a reference to the rules of natural justice, a right to a hearing and the right to an impartial process. Thirdly a very important factor in the exercise of any questioning of the validity of the administrative action, is that you, as an individual have the right to be furnished with the reasons in writing for administrative action and that is catered for under (c), and finally, under (d) we had to strike a bargain. There were strongly held opinions that the concept of reasonableness of an administrative action should be introduced, that was argued for strongly by one, from one point of view. On the other hand there was the resistance to that along the same lines that there was resistance to the incorporation to the concept of reasonableness in relation to affirmative action which we discussed before lunch. This is a compromise here. It is interesting introducing the noted notion of justifiability, but justifiability one has to ask in relation to what? And here it is in relation to the reasons given so that the potential proceedings here is that if your rights were affected by an administrative action, you could demand reasons in writing for that decision and then test in court the justifiability of that decision, in relation to the reasons given for it, and this will certainly advance administrative justice in the common law as it presently exists and if one considers that in the future, the executive is going to play a very important role in implementing the policy of the legislature as it has done in the past it is, in my view, and the view of this Committee, and the Ad Hoc Committee, considerably advance the level of justice in relation to the civil service and bureaucracy. Thank you.

**Chairperson:**
Thank you. We take note also of Prof. Corder's remarks that this has been a compromise to a certain extent and I understand that the Ad Hoc Committee and Technical Committee devoted a lot of time to find this agreement on this wording. So if we keep that in mind when we enter the debate. Dr Rajah.

**Dr Rajah:**
Mr Chairman, as 24(c) stands this is also a question of clarity, does it mean that every action must be accompanied by a reason or is it envisaged that the reason will only be provided when it is a question?

**Prof. Corder:**
Through you, Mr Chair, that is every person shall have the right to be furnished with reasons, it will only be on request.

**Dr Rajah:**
Mr Chairman, I would like to suggest then that the words should be included in subclause to read "be furnished with the reasons in writing when requested".

**Prof. Corder:**
We would answer Dr Rajah, and say that that was certainly implicit in that it is doubtful whether a court of law would require every administrative act to be accompanied by reasons on every occasion - it would place an insurmountable burden, it would gum up the wheels of the State.

**Adv. Yacoob:**
I think that by adding the words we have been requested, we unduly limit the rights because if the State administrator reads the Bill of Rights which says I am only obliged to provide reasons when requested, then the administrator would probably provide them only when requested to do so. This way one would hope that the culture will develop in terms of which reasons would be provided for decisions, but in any event if no reasons are provided the request would necessarily have to meet with success otherwise the person would go to court. If we leave it open like this, we leave it open to the development of a culture in terms of which administrative decision makers begin to develop the habit of providing these reasons for their actions.

**Chairperson:**
Mr Landers. (Interjection by Dr Rajah).

**Dr Rajah:**
Excuse me, just a brief follow up there. Mr Chairman the intentions of developing that culture is a very laudable one, but it must also be judged in the context of frustrating administrative action by requiring as Prof. Corder said, giving reasons for every executive action. Now if you look at executive actions at three levels of government where decisions are taken on hundreds of matters, and if that level of government were to give reasons then government will really bog down in administrative details.

**Chairperson:**
Professor du Plessis.

**Prof. du Plessis:**
Chairperson to become really technical on a point of interpretation, the clause ends by saying "unless the reasons for such actions have been made public". Now it appears clearly from the clause itself, if reasons are provided then the person need not be furnished with the reasons. The only option that then remains is persons requesting the reasons, its the rule *inclusion unio ses alterious exclusio* and it can't be interpreted in another way. It will only have to be reasons on request, but at the same time as Adv. Yacoob pointed out, it will be open to the administration to provide reasons of its own accord.

**Dr Rajah:**
Mr Chairman, just one point, the present practise is that no decisions, no reasons are given for administrative decisions.

**Chairperson:**
Professor Corder.

**Prof. Corder:**
Under the common law - there is no duty to give reasons for a decision unless statutes specifically requires it, but then adverse inference can be drawn if reasons are not given in circumstances when they would be expected to be given. I might also draw Dr Rajah's attention to the fact that not anybody can go and ask for reasons, somebody whose rights or interests must be affected or threatened, its limited in that way as well.

**Chairperson:**
Thank you. Mr Landers.

**Mr Landers:**
Correction Mr Chair in subsection (a) the verb should be changed to "are" after the word

"interests" which is plural. Am I correct?

**Prof. Corder:**
No you are not correct Mr Landers, with respect, "when any of his or her rights is affected" - so any is a singular and is consistently used throughout "when any is" when any one of his interests is threatened in other words.

**Chairperson:**
Legal jargon. Mr Rajsbansi.

**Mr Rajsbansi:**
Mr Chairman, in respect of 24(b) I need a clarity because bulk of the administrative actions that affect people are those who are lessees in State-controlled or State-financed housing estates where there are one sided lease agreements, where either party can give you fifty days notice. Now, some people might interpret that because there is an agreement, any decision in terms of that agreement is fair administrative action, and that's a legitimate expectation because a tenant can expect a notice to get out of your house within thirty days. Now what protection would such people have in terms of 24(b) etc.

**Chairperson:**
Prof. Corder.

**Prof. Corder:**
The answer to that is first of all, that the phrase "legitimate expectations" has got a particular legal meaning, it was developed in Britain and it has been incorporated in our law since the late 1980s and the phrase, the courts will give the content to the motion of procedural fairness depending on the circumstances, and in other words, on the failure to pay rent, for instance, summary eviction would, the fairness of summary eviction would depend upon the circumstances, and it is likely that the courts would insist that the person be given an opportunity to explain why they haven't paid the rent in the circumstances. But the actual content - the difficulty in drafting something like a chapter of protected rights is that it is impossible to lay down detail for every single circumstance and one therefore tries to put things in as broad and general a term as possible and give the courts the opportunity to give precise content to that.

**Chairperson:**
A brief follow up to that Mr Rajsbansi?

**Mr Rajsbansi:**
Chairman, may I make a suggestion to the Technical Committee to consider including what Professor had indicated the *audio ad alterum partrium* clause because this is happening daily, I mean to give an example of rent, we have in housing schemes people's electricity disconnected, about a hundred per day, so that if they had some protection, I know there has been some Appellate Division ruling in respect of this recently favour of tenants, but why should people go to Appellate Division on small issues like this when we can just reformulate this to provide this very protection.

(Debate on this clause goes on for a further 190 units on the tape counter. The last portion below is the request from Minister Coetsee and the decision of the Council.)

**Minister Coetsee:**
Without taking the debate further, I'll get in touch with the Technical Committee and see whether a redraft may be considered.

**Chairperson:**
Legal terminology - can we leave it there. In essence as far as the principles are concerned do we agree? Agreement on this clause then? Thank you. We now turn to Clause 28. I have been, it has been indicated to me that there is a request that this is the one clause which parties would still like to pursue through the Ad Hoc Committee in consultation with the Technical Committee and it should come back when we discuss the Bill of Rights again on Monday. Agreed to?

(Debate on Clause 30 - Children - agreed to. Tape 3, Side A from near the end and continuing to Side B up to 112 on tape counter.)

Further extract from debate. (Tape No. 3 Side B, from 112 on tape counter)

**<u>Clause 32. Customary Law</u>:**

**Prof. du Plessis:**
Chairperson, this was discussed at great length with the Ad Hoc Committee and with the representatives of the Traditional Leaders on the Ad Hoc Committee and this is also the result of compromise to a very large extent. What this clause does is to start off by constitutionalising the right to have customary law applied to certain relationships and we contemplate two kinds of relationships. In the first place, people who belong to a

community which observes a system of customary law and who belong to that community pursuance of the right to freedom of association. Those persons shall have the right to have customary law applied as a legal dispensation governing the internal affairs of the community of which they are members. There is a second category of people and note the "or" it is not an "and" so it is either one of the two, the second category would be people who of free and informed choice observes the rules and practises a system of customary law and who associates with others observing the same rules and practices. These people shall have the right to have customary law recognised and applied in regulating their inter-personal relationships with those people. Then the section goes on to say that if, now perhaps I must just explain the origin of subsection (2). Subsection (2) addresses the concern that certain of the provisions of customary law may be in conflict with the Equality Clause, that is clause 8, and the question is whether those customary laws should be then struck down, left right and centre. Now the compromise there is to say that those provisions of customary law is subject to the Equality Clause but a court in applying the provisions of section 8, can determine within to the extent of its jurisdiction, could determine conditions on and a time within which the rules and practises of customary law can be brought into conformity with Section 8. So that takes care of the concern that if, in an individual instance the striking down of rules of customary law may be disruptive, then the court would have the discretion to say, we give you six months or we lay down certain conditions which will have to be met within a certain period of time, and then the third subclause provides for nothing in this section shall preclude measures, any measures, legislative measures, administrative measures, designed to assist the development of customary law in accordance with the values embodied in the other provisions of this Chapter. And this is a statutory that was followed in many other societies who found themselves in the same situation in which we find ourselves to use this authorization in terms of subclause (3) to gradually adopt customary law to the provisions of the instrument for the protection of fundamental rights.

**Chairperson:**
Thank you. Chief Gwadiso.

**Chief Gwadiso:**
Thank you Mr Chair. Mr Chair it is very true that this matter has been discussed at length in the Ad Hoc Committee and the Technical Committee, but may I then crave the indulgence of this House to allow us to make an amendment. I know I am taking the Technical Committee by surprise at this stage and I would like to apologise for that.

**Chairperson:**
Not only the Technical Committee. Sorry Chief.

**Chief Gwadiso:**
Mr Chair, this is because of consultations that have taken place and advices and what have

you, that to start with we submit this amendment and allow parties to sleep over this and then we can dispose of this matter on Monday. The amendment we are proposing here is that in this document we are dealing with rights, but this clause is now dealing with customary law. There are rights which are derived as a result of customary law and this is what my constituency would like protected in this Bill of Rights. We have circulated the proposed amendment but for the purpose of record I can quickly read, I'm happy .....

**Chairperson:**
They have it in front of them, thank you, Chief Netchibumpe (?spelling)

**Chief N.:**
Thank you Mr Chairperson for according me this opportunity. First I would like to thank the Technical Committee for having made this input and also to support the amendment which you have before you on the following reasons. Mr Chairperson, indigenous law is a system of law on its own right which can also confer rights according to indigenous law on the people who are governed by indigenous law. Indigenous law has also a doctrine which affords rights which has been for instance inhibited by modern jurisprudence so according to this doctrine people are conferred rights. This emanates from the history, philosophy of life and cultures and also the culture of that people in views of other cultures. So to say that now here we are saying we are creating some Bill of Rights which protects fundamental human rights - according to whose standards? Is it according to the western thinking or is it according the African thinking as seen through the lengths of the indigenous law. So we are saying we must adopt this doctrine which is of Roman-Dutch law origin (... latin ...) which means you must use your own rights which do not infringe other people's rights. So if here are two people, some are ready to exercise their rights according to this modern jurisprudence, and here is another group of persons who are ready to exercise their rights according to indigenous law - we must afford all these groups that chance to exercise those rights. That's what we are saying. Thank you Mr Chairperson.

**Chairperson:**
Thank you, ladies and gentlemen, before Professor du Plessis responds I just want to suggest to the Council as Chief Gwadiso indicated that we should not have a very lengthy debate on this matter today. This is a new wording, even the Technical Committee has not had an opportunity to look at this. We have Property outstanding, we will have to come back to that on Monday and unless any of the members now have an urgent need to speak on this matter I think the appropriate way would be to refer it to the Technical Committee in consultation with the Chiefs and any other input in this regard to try and marry, as Professor du Plessis has indicated has already been a clause that was formulated after lengthy debates, perhaps they could still marry some of it, I don't know, I'm going to give Professor du Plessis an opportunity, but nevertheless we can't take it much further here this afternoon. I'm going to allow Professor du Plessis to respond to this, Mr Gordhan, unless you want to speak before I'm going to ask him to respond now. Mr Gordhan.