21/11/16/57

CONSTITUTIONAL ASSEMBLY

EQUALITY CLAUSE: 8(3)

MEMORANDA

TO: Members attending Multi-lateral
FROM: Executive Director
DATE: 29 March 1996
RE: Additional memoranda on equality clause

We enclose two further memoranda for your consideration, to be inserted with Volume I of the documentation for the multi-lateral. This is an addendum to the documentation for Sub-committee 1 on the Bill of Rights.

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PANEL OF CONSTITUTIONAL EXPERTS AND TECHNICAL COMMITTEE 4

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 28 MARCH 1996

RE: EQUALITY CLAUSE ("AFFILIATION" AND "ANY OTHER GROUNDS" IN SECTION 8(3), BILL OF RIGHTS)

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1. At the CC Subcommittee meeting on Tuesday 5 March the Panel and TC4 Experts were requested to, *inter alia*, put forward alternative formulations of Section 8(3), especially dealing with the word "unfair" and with horizontality. These aspects are dealt with in a separate memo.

2. This memo deals with the related request to consider the inclusion of the references to **affiliation** and **any other grounds** in Section 8(3):

> **Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth [and affiliation or any other grounds].**

3. The inclusion of the words **or any other grounds** is not recommended, for many of the reasons already mentioned in the **Memo of the Panel of Experts on the possible inclusion of the words "but not limited to"**, dated 2 February 1996. (This memo is hereto attached.)

   These words are redundant in view of the earlier phrase **on one or more grounds, including** ... It would furthermore not make sense to state that discrimination may not take place **on one or more grounds, including ... any other grounds**. The vagueness of **any other grounds** may also devalue the grounds already specifically mentioned.

4. The inclusion of **affiliation** is also problematic and as such not recommended. **Affiliation** on its own is vague. What kind of affiliation is envisaged that is not already covered by the mentioning of **religion, conscience, belief** and **culture**? The freedom of religion, belief and opinion clause (section 14) is also relevant, because of the protection it provides in addition to the equality

clause.

5. As stated in the previous memo, the word **including** leaves the "list" sufficiently open for development and the future inclusion of new grounds. The notion that the list is a fixed one, and that those grounds that are included are forever safe and those that are not included left out in the cold, is a false starting point.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 2 FEBRUARY 1996

RE: THE WORDS "BUT NOT LIMITED TO" IN SECTION 8(3) (EQUALITY)

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1. The Panel was asked to express an opinion on the meaning and necessity of the words "but not limited to" in Section 8(3) of the Working Draft of the Bill of Rights, especially with reference to the Canadian **Dolphin** case[1], within the context of the words "one or more grounds" and "including". This memorandum argues that the inclusion of the words is not necessary.

2. The interpretation of Section 8(3), with or without these words, will obviously take place within the context of the rest of Section 8(3), which states that discrimination may not take place, "directly or indirectly", against anyone **"on one or more grounds, including (but not limited to) race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".**

3. As explained during the CC sub-committee meeting on Tuesday 29 January, the words **on one or more grounds** are necessary to ensure that a person who may have been discriminated against on more than one ground does not have to prove to a Court on which specific ground the discrimination took place. (This would be the case if words such as **any ground** or **any of the**

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[1] The **Dolphin** case, **Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd** (DLR (4th) 174) does not deal with equality, but with freedom of expression, secondary picketing and horizontality. Other Canadian cases are discussed though.

following grounds were used. If **any grounds** is used, one would have to prove that discrimination took place on more than one ground or a grouping of grounds.) As happened in the USA, a black woman, e.g, may find it difficult to convince a court that she was discriminated against either because she is black, or because she is a woman, whereas the discrimination probably took place on both grounds.

4. Questions which often come to the fore in equality debates include the following: (a) Should "forbidden grounds" of discrimination be identified and listed? (b) Should all grounds be "listed" and grouped together, or only the most "important" ones? (c) Should such a list be "open" or "closed"? (d) How would specific wording affect the future inclusion of new grounds by judicial interpretation? (e) How open should the list actually be, as far as future interpretation by the Courts is concerned?

5. Some legal philosophers and others might argue that a list is not advisable, and that the question as to which kinds of discrimination should be constitutionally forbidden is a sociological one. Societies develop and change, and whereas certain patterns of discrimination may become less important or vanish, new forms of discrimination may from time to time emerge, not least because of human nature as well as socio-economic and political circumstances. The present wording of the Draft reflects the need in South Africa to mention specifically certain forbidden grounds of discrimination in view of the history of our society.

6. However, in order to allow for changing social patterns, moral perceptions and political realities, the list should not be "closed". Persons who are discriminated against in future, on grounds that are not listed in Section

8(3), should be able to rely on constitutional protection, and it must be clear to the courts and other interpreters of the Constitution that such grounds are not excluded.

7. So, the wording becomes important. The question is (i) whether the word **including** in Section 8(3) makes it sufficiently clear that the list is not closed, and (ii) whether and to what extent the words **but not limited to** would add anything.

8 Section 15(1) of the Canadian Charter of Rights and Freedoms states that every individual is equal before and under the law, etc, "without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

The section thus contains "listed" grounds of discrimination (also sometimes referred to as "enumerated" grounds (Hogg **Constitutional Law of Canada** 1155).

After some earlier differences of opinion on the possibility of extending the list, the Supreme Court of Canada ruled in the **Andrews v Law Society** case ((1989) ISCR 143) that the "discrimination" intended in Section 15 includes only the distinctions listed in Section 15 **and analogous distinctions. Citizenship** was in that case regarded as an analogous ground.

When is a ground **analogous** or **similar** to the listed grounds? This would depend on the specific grounds listed. With regard to Canada commentators argue that the listed grounds are all **personal characteristics** of individuals. It is also argued that (with the possible exception of "religion") they are all **immutable**, in the sense that they **cannot be changed by the choice** of the

individual, or that they are **inherited** rather than **acquired**. They describe what a person **is** rather than what a person **does**. Only discrimination on a ground or a condition over which one has no control requires constitutional remedy.

Section 15 thus does not prohibit laws that make special provision for (or "discriminate against") people who have committed a crime, become insolvent, joined the legal profession, etc. The **singling out of work related accidents** in the Workers Compensation Act did not meet the test (**Workers Compensation Reference** (1989) ISCR 922). In **R v Turpin** ((1989) ISCR 1296) - a case based on a difference in the treatment of accused persons depending on where they were charged - the question whether **place of residence** was an analogous ground was left open. Justice Wilson stated that she would not wish to suggest that a person's place of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination. However, the discussion of factors as to whether those claiming relief are a "discrete and insular minority" or "a disadvantaged group in Canadian society" in cases such as **Turpin** and **Rudolph v Q** ((1990) ISCR 695) indicates that socio-political factors, beyond a very narrow interpretation of "immutable personal characteristics" may play a role in the decision whether to include additional grounds or not.

9. More grounds are included in the list in the present Section 8(3) of the South African draft than in the Canadian Section 15(1), namely **gender, marital status, social origin, sexual orientation, conscience, belief, culture, language** and **birth**. The list is therefore slightly more diverse than the Canadian one.

Some of these grounds, e.g **marital status, belief, gender, culture,** and **language** (and **religion** which is debated in Canada as well) contain at least some elements which would not place them squarely in the Canadian category of **inherent, involuntary, unchangeable personal characteristics** beyond one's control. Perhaps **religion** is an example of something which one could change, but should be able to change without any coercion, because it is more fundamental than e.g. one's purely personal taste as to the colour of a shirt.

It could thus be argued that **even if** South African Courts follow the Canadian line of interpretation by requiring new grounds to be analogous, they would have more scope to include new grounds of discrimination under the umbrella of Constitutional protection, because the list is more diverse and "open" anyway.

10. The "eiusdem generis rule" (of restrictive interpretation) holds that where words which have a limited or particular meaning are followed by a phrase of general application, the meaning of the said phrase is restricted to the generic meaning of the preceding words. Thus if an enactment refers, e.g., to "any place of entertainment, cafe, eating house, race course or premises **or place to which the public are granted to have access,**" the general phrase is understood to include only places of recreation, and not e.g. a court room or police station. This rule is not directly applicable to Section 8(3), which only mentions "one or more grounds" and does not say anything as to the general nature of such grounds. Furthermore, it has been held that the rule may not be applied contrary to the legislature's clear intention that the general phrase must retain its general meaning. In view of the explanation

in paragraph 8 above, this rule could not pose a problem with regard to **including** in Section 8(3).

11. Therefore the word **including,** together with the South African list, seems to be sufficient, and the inclusion of **but not limited to** does not seem to be necessary, nor would it add to anything.

Another factor which has to be kept in mind, should this phrase be added, is **the implications it would** have for other clauses in the bill of rights and the rest of the Constitution. The word **including** is also used in e.g Sections 13 (privacy), 15 (freedom of expression) and 18 (political rights). If **but not limited to** or any similar phrase is added to Section 8 and interpreted as providing for a wider interpretation, the omission thereof in other clauses could have a limiting effect on those rights. It would also encourage a narrow, word-bound interpretation of the Constitution.