

**EMBARGOED UNTIL DELIVERY/TABLING  
IN NEGOTIATING COUNCIL MEETING**

**TECHNICAL COMMITTEE ON  
FUNDAMENTAL RIGHTS  
DURING THE TRANSITION**

**TWELFTH PROGRESS REPORT**

**15 NOVEMBER 1993**

**1. INTRODUCTION**

This Report deals with issues which have not yet been finalised by the Negotiating Council. The whole draft Chapter on Fundamental Human Rights is not included and reference is made only to the particular issues. This Report should therefore be read with cross-reference to the draft of the Chapter in the Eleventh Progress Report and, where appropriate, the comments made in the Explanatory Notes in that Report.

**2. LIMITATION CLAUSE**

The addition of paragraphs (aa) and (bb) to clause 34(1) must still be considered and agreed to by the Negotiating Council. In view of the Explanatory Note to clause 34 in the Eleventh Progress Report the proposed amendment is not controversial.

**3. RESTITUTION OF RIGHTS IN LAND**

Clause 28(1) - (3) (**Property rights**) has been agreed to in principle by the

Negotiating Council and the parties referred to in the Explanatory Note who expressed reservations, have in the meantime also agreed to the clause. Final agreement to this clause has, however, been made subject to the finalisation of provision for a procedure whereby rights in land which had been taken away as a result of racially discriminatory legislation, can be restored. This procedure which has also been agreed to bilaterally is hereby proposed.

First, the addition of the following paragraph to clause 8(3) is proposed (the present 8(3) becoming 8(3)(a)):

8. (3) (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with the provisions of subsection (2) shall be entitled to claim restitution of such rights subject to and in accordance with Chapter ....

The following provisions will then have to be inserted somewhere else in the Constitution either as a separate Chapter or a separate clause:

#### **CHAPTER "Y" : RESTITUTION OF LAND RIGHTS**

- (1) Any person who, or any community which, at any time after a date fixed by an Act of Parliament (which date shall not be earlier than 1913), was dispossessed of a right in land under, or for the purpose of furthering the object of, any law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession, shall be entitled to claim restitution in a court of law in respect of such right from the state.
- (2) Any claim under subsection (1) shall be subject to such conditions, limitations and exclusions as may be prescribed by the said Act and shall not be

justiciable by a court of law unless processed in accordance with such Act by a Commission established for the purpose by such Act.

- (3) The Commission referred to in subsection (2) shall at least be competent -
  - (a) to investigate the merits of any claims;
  - (b) to mediate and settle disputes arising from such claims; and
  - (c) to draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence before the court.
  
- (4) Where an unsettled claim is lodged with a court of law and the land in question is -
  - (a) in the possession of the state, the court may, subject to subsection (7), order the state to restore the relevant right to the claimant if the state certifies that such restoration is feasible; or
  - (b) in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (7), order the state to purchase or expropriate such land and to restore the relevant right to the claimant.
  
- (5) The court shall not issue an order under subsection (4)(b) unless it is just and equitable to do so, taking into account all relevant factors including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of the acquisition by the owner, the interest of the owner and others affected by any expropriation, and the interests of the dispossessed: Provided that any expropriation under the said subsection (4)(b)

shall be subject to the payment of compensation calculated in the manner provided for in section 28(3).

- (6) If the State certifies that any restoration in terms of subsection (4)(a) or any acquisition in terms of subsection (4)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (7), order the state in lieu of the restoration of the said right -
- (a) to grant the claimant an appropriate right in available alternative state-owned land designated by the State to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land;
  - (b) to pay the claimant compensation; or
  - (c) to grant the claimant any alternative relief.
- (7) (a) The compensation referred to in subsection (6) shall be determined by the court as just and equitable, taking into account the circumstances which prevailed at the time of dispossession and all such other factors as may be prescribed by the said Act, including any compensation that was paid upon such dispossession.
- (b) If the court grants any claimant relief contemplated in subsection (4) or (6) it shall take into account, and, where appropriate, make an order with regard to, any compensation that was paid to the claimant upon the dispossession of the right in question.
- (8) (a) This section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law

incorporating the Expropriation Act, 1975, or its provisions with regard to compensation, if just and equitable compensation as contemplated in subsection (6) was paid in respect of such expropriation.

(b) In this section "Expropriation Act, 1975" shall include any expropriation law repealed by that Act.

(9) No claims under this section shall be lodged before the passing of the Act of Parliament contemplated herein.

#### **4. LABOUR RELATIONS**

As a result of the dispute which arose in relation to the inclusion of the rights to lock-out in clause 27(3) of the previous draft, intense negotiations between representatives of organised labour and of employers' organisations has taken place. Certain amendments to clauses 27 and 34 were agreed to in principle. A wording was also proposed by the parties negotiating the issue. The wording they proposed for clause 25(5) is problematic from a technical point of view as will be explained in the Explanatory Note to that clause. In the case of clause 34(5)(b) the Technical Committee also adapted the originally proposed wording for technical reasons. It was furthermore agreed that the right to fair labour practices be constitutionalised. The proposed amended clauses, which have also been agreed to bilaterally, now read as follows:

##### **Labour Relations**

- 27 (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers'

organisations.

- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 34(1).

**[Explanatory Note:** For technical reasons the Technical Committee proposes the following wording for clause 27(5):

"(5) Employers' recourse to lock-out for the purpose of collective bargaining shall not be circumscribed save by law of general application which is reasonable and justifiable in an open and democratic society based on freedom and equality and which does not negate the essential content of such recourse."

The wording as proposed by the parties who negotiated the issue is problematic in two respects:

1. Clause 34(1) refers to the limitation of entitlements which are entrenched as rights in very specific terms. Recourse to lock-out is not couched in similar terms. Reference to clause 34(1) in the context of recourse to lock-out can therefore create confusion with regard to the interpretation of clause 34(1) which is a key clause in the Chapter pertaining to more issues than just the settlement of labour disputes. It is therefore desirable rather to repeat in clause 27(5) the criteria enumerated in clause 34(1) in specific terms if the intention is that they

should also qualify recourse to lock-out. For the same reason it is also desirable to refer to a circumscription rather than a limitation of recourse to lock-out.

2. The word "impaired" as proposed by the parties who negotiated the issue implies that somewhere recourse to lock-out is already defined. This incorporate relevant provisions of the Labour Relations Act by reference which means that lock-out procedures provided for in the Act are constitutionalised. A court may therefore feel constrained in attaching a particular constitutional meaning to the phrase "recourse to lock-out" and may simply rely on the provision which is made for it in the Labour Relations Act. The Technical Committee is not sure whether it was the intention of the parties to entrench the present procedure in this way since clause 34(5)(a) already provides for but a restricted entrenchment of existing labour legislation.]

34. (5) (a) The provisions of a law in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and regulating industrial action shall remain of full force and effect until repealed or amended by the legislature.
- (b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 24 of the Labour Relations Act 1956, or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament

unless the Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

## 5. CUSTOMARY LAW

The Negotiating Council still has to decide on the inclusion of clause 32 (**Customary law**). Should the Council decide that the clause be deleted the inclusion of the following clause (which has been agreed to bilaterally) in the Chapter of the Constitution dealing with Traditional Authorities should be considered:

### **Choice of customary law**

The parties to a dispute may at any stage during proceedings aimed at settling such dispute agree to the application of a system of customary law for the purposes of settling their disputes.

**[Note:** At a late stage of the negotiating process representatives of the Muslim community made submissions to the Technical Committee to the effect that the religious laws observed by certain communities as distinct to customary law or indigenous law, should also be recognised constitutionally in explicit terms. They have also contended for the recognition of the religious courts specifically applying this form of law. The Technical Committee is of the view that due to the predominantly vertical operation of the Chapter on Fundamental Rights these specific concerns need not be addressed in specific terms for purposes of the transition. If the Council is, however, of the opinion that this matter needs to be investigated further, the possible inclusion of specific references to religious laws and religious courts in the Chapter on Traditional Authorities should also be considered.]