

# **TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION : EIGHTH PROGRESS REPORT NEGOTIATING COUNCIL MEETING : 12 AUGUST 1993**

**Mr Rowan Cronje in the Chair.**

**Chairperson:**

We have Adv. Yacoob and Mr Grove as the only two members of the Technical Committee who could be here today, you are most welcome thank you very much. Would you like to proceed with your Report, do you wish to introduce it or do you want us to go into debate straight away. Maybe you should present what you have done first.

**Mr Grove:**

Mr Chairman I think we will give a brief outline of it. Now unfortunately our colleagues, Prof. du Plessis, Prof. Corder and Mrs Nene, they cannot attend today's meeting and to extend their apologies to you. Mr Chairman, the Eighth Report deals only with Enforcement Mechanisms which relate directly to the enforcement of fundamental rights. The Report does not deal with the main enforcement mechanisms such as the courts, especially the Constitutional Court, because that is a matter which will be dealt with by the other committee, the Technical Committee on Constitutional Issues and this Committee will only make recommendations to that Committee insofar as the court structures are concerned. Now, Mr Chairman, we propose two instruments here. An Ombud and a Human Rights Commission. The Council already agreed to the inclusion of these two mechanisms but they haven't dealt with any particulars of it. So I will, in our next Report we will give you more specific recommendations on the details of these two instruments and we'd just like to have your brief views on the thinking in the Council today.

Now firstly Mr Chairman the Ombud. We already have an Ombudsman in the country, it's been instituted, and what we suggest here is that the present office of the Ombudsman, the powers be extended to, at least to include the following. To deal with complaints of all violations of fundamental rights by the executive at all levels, the settlement of complaints through mediation between the complainants and the alleged offending authority, the settlement of complaints through the recommendations to superior authorities including reports to Parliament and the initiation of legal proceedings on behalf of complainants where this may be appropriate.

Now the Committee proposes that the Ombud, by the way we are using now the term "Ombud" and no longer "Ombudsman" to make it gender neutral. What we propose is that the Ombud be appointed by the National Assembly on the recommendation of the same authority that will be recommending the appointment of judges. Now that mechanism will also be a matter for the other Committee and they might make a proposal to you in this regard. We also propose, Mr Chairman,

that the Ombud should have Deputy Ombuds and also assistants and then we also feel that a Regional Ombud should be appointed for each of the SPRs to deal with complaints at SPR level. The Ombud should have power to, at least have access to Government offices and also to question officials on the complaints that the Ombud may receive, and, then secondly, we propose a Human Rights Commission. This will be altogether a new institution and it will have general powers to promote Human Rights, the human rights culture, to investigate violations of human rights and democratic values, not specific complaints but more a pattern of violations that might occur and to advise the legislature and the executive on human rights in general, say for instance whether any particular proposed legislation will be within the ambit of fundamental rights, to mediate between disputing parties, also to mediate between constitutional authorities for instance where there is a dispute between the Regional, Executive and the Central Executive, the Human Rights Commission can also try to resolve any differences in that regard, and then to report to Parliament on matters affecting human rights in general.

Mr Chairman we recommend that the Commission consist of fifteen members also to be appointed by the National Assembly on the recommendation of the same authority that recommends the appointment of judges. Now of the fifteen, we propose that five be members of parliament, then there should also be a judge, a magistrate, an advocate, an attorney and a teacher of law, and then five members of the general public.

Mr Chairman, in conclusion, I just want to point out that the idea of the Ombud and the Human Rights Commission will only compliment the role of the courts and the courts will remain as the main enforcers of fundamental rights. Thank you Mr Chairman.

**Chairperson:**

Thank you Mr Grove. Mr Desai.

**Mr Desai:**

Mr Chairman I notice in this Report that the Technical Committee refers to “she” as if it is an accomplished fact that the Ombud would be a woman. Now I’m not sexist or anti-sexist, is this a typographical error?

**Adv. Yacoob:**

Mr Chairman, if I can just deal with that quickly. We thought that we should try and initiate some change being the Committee of Fundamental Rights and usually Bills and Drafts indicate that the masculine includes the feminine, and then refers to everybody as “he”. You will see that the first point where the word “she” is used we make it quite clear that in this Report the feminine will include the masculine. That’s all it is.

(Laughter etc.)

**Chairperson:**

It depends whether the feminine is expectant or not. Any further comment? Mrs Smuts.

**Mrs Smuts:**

Chairperson, I speak on behalf of the Democratic Party and including Mr Leon who cannot be with us at this moment. May I express our support, sir, for the Report as far as it goes and may I ask that the Committee consider going slightly further. I would like to propose for example that it looks at the possible function for the Ombud of looking after class actions if you like. If you look at the proposals of the Law Commission in this respect that they make a very creative suggestion that the Ombud could, on behalf of groups of people, and the examples they use are hospital patients, taxpayers, pensioners, one might add squatters, various parts of our community who experience specific difficulties, like having their lights and water switched off for example, whether the Committee would consider including in the ambit of the Ombud the task of acting in the manner of a class action on behalf of such groups of people - there seems to me to be merit in looking at this proposal. I hope that the Technical Committee has in any case looked at the other proposals from the Law Commission, that is the suggestion from our side. Then we would like to ask a question would the members be so kind as to motivate in order to help us to make up our minds, the inclusion of members of parliament in the Human Rights Commission. We are not sure that there are not disadvantages in including legislatures in what is effectively an arm of the executive branch, there may of course be advantages, and we would like to hear argument.

**Chairperson:**

Do you wish to respond now?

**Mr Grove:**

Yes, Mr Chairman, the suggestion about the class action, the idea of the Law Commission, we will certainly consider that. That might be a very good idea. Now the sole reason we proposed the five members of parliament to be part of the Human Rights Commission was to have a very strong connection with Parliament between the Human Rights Commission and the Legislature. I think that was the main reason why we suggested that.

**Adv. Yacoob:**

Sir, if I can add, you will see that the Human Rights Commission is not constituted like the Ombud as a full time body. What the Commission will do is appoint a Commissioner and it is that Commissioner then who will be responsible for the full time executive function. It may well be that some members of the Commission will be full time but the way it is envisaged is that the Commission will be that body which will appoint the Commissioner and do supervisory work at that level, whereas a day to day executive work will actually be done by the Commissioner and her staff.

**Chairperson:**

Mr Landers.

**Mr Landers:**

Mr Chairman in further response to Adv. Yacoob we want to say that we are a little bit concerned about the Commission's independence and so we also question the existence of five members of Parliament on the Commission and we would like to see a strongly independent Commission notwithstanding the fact that the Commission will be appointed by Parliament or the National Assembly, or that it has to report annually to Parliament and so we would like to see that strong independence included in the proposals of the Technical Committee and therefore we would like to say to the Technical Committee that they must please give serious reconsideration to the question of the five members of Parliament and also to the actual appointment, the transparency in the appointments process, but as to the rest of the proposals by the Technical Committee at this stage we don't seem to have much difficulty with them. In fact they're in line with the Labour Party's position, but we want to stress that the Commission must be as independent of Parliament as possible. Thank you.

**Chairperson:**

Mr Maduna.

**Mr Maduna:**

Mr Chairperson, on page one of the document, paragraph 2.1 lines two and three - there is a phrase "as it currently exists in South African law". Mr Chairperson is it being assumed that the current office of the Ombud as it currently exists under South African law, is our modum of the office of the Ombud and if so, is it being assumed Mr Chairperson, that all we need to do is to improve on that? Because if that is the position we can't accept it. The current Ombud was appointed by the State President and therefore is an executive appointee. The document suggests, Mr Chairperson, quite rightly that that is a task to be performed by the National Assembly and want to believe that that is a more democratic route to do it. I would expect that in fact, though there is an Ombud and most probably there are Ombuds in many other parts of this country of ours, for this purpose, we would essentially be starting from scratch because there are those of us who will be participating hopefully, in the National Assembly, for the first time and exercising the right to participate in the creation of this essential human rights enforcement machinery for the first time. So we can't assume Mr Chairperson, with all due respect, that as it currently exists, all we need to do is to improve upon it.

**Chairperson:**

Response?

**Mr Grove:**

Mr Chairman, may I point out that we only refer here to the redirection of the powers and not the appointment of the Ombud. As we have it the Ombud will have to be appointed by the National Assembly.

**Chairperson:**

Adv. Thismer (?spelling)

**Adv. Thismer:**

Chairperson, in connection to the suggestion by the Democratic Party, just a remark, and although one can support that the possibility then exists that it can overlap with what the Human Rights Commission will be doing, where it is stated in 2.3.2. that the Human Rights Commission will investigate patterns of the violation of human rights generally and if they consider including class under the auspices of the Ombud, I would just like to suggest that they do it in such a way that the distinction will still be clear between the duties of the Ombud and the duties of the Human Rights Commission.

**Mr Grove:**

Mr Chairman, yes, this is only a broad outline of what we propose, but when we work out the provisions for inclusion in the Constitution then surely it will be dealt with in more explicit terms and we'll try to avoid the problems Mr Thismer raised.

**Mr Thismer:**

Chairman, I have another question. May I follow? Just a remark also, that an impression can be created in this document that it will be obligatory for an individual to first approach the Ombud and just a suggestion that it should also be made clear in a final document that an individual must have the right to directly approach court and that he should not be forced to first approach the Ombud before he can approach the court. I think it flows naturally but one would just have to stretch the point. And then, just another question if I can conclude with that, on the last page where it says "members of Parliament can be included in the Human Rights Commission" shouldn't some reference be made to either proportional representation in the selection of those five members or another mechanism to ensure that all five of them don't come from one party only. I think it needs some qualification to ensure a more representative delegation from Parliament in that Commission.

May we just in a lighter vein, in referring to the Ombud as a "she" I would like to ask that on page 2 where it says that "she will also be able to investigate gender discrimination" - if she will also look at discrimination against men.

**Chairperson:**

It appears we are moving in that direction. Mr Rajbansi.

**Mr Rajbansi:**

Mr Chairman, may I suggest to the members of the Technical Committee to examine their effectiveness, or the ineffectiveness, of the present Ombudsman. I notice that there is a suggestion that a Deputy Ombud may be appointed, an assistant and regional Ombuds could also be appointed, because in addition to the workload which the present Ombudsman has, the workload of the new Ombuds will be very, very heavy, and I believe, from personal knowledge, that even with the limitations imposed by the present Ombudsman he is not able to satisfactorily attend to reasonable complaints to the extent that just in order to give his findings in respect of some important disputes it is taking him as long as nine months. So I suggest that the whole structure where lodging complaints to the Ombuds shall be streamlined and made easy and within the reach of people and the structures may be such that there should be very speedy resolution to disputes and in respect of the Human Rights Commission, Mr Chairman we are very strongly opposed to the involvement of any members of the Legislature. There has been a golden rule, not because the Nats or the United Party imposed it, but I think it is a good rule, not to have any members of the Legislature or executive in any boards or commission. That's a tried and tested issue and I think we should accept it.

**Adv. Yacoob:**

Mr Chairman, if I may respond to the first point made by Mr Rajbansi, you'll notice on page 3 immediately before we begin with 2.3 that the Ombud is to have the power of delegation. What is in fact perceived here is not a single Ombud, but rather the office of an Ombud which would exist regionally, which would exist nationally, with powers of delegation and a large number of people performing these functions as a result of delegation at various levels, so that we certainly don't foresee an Ombud with certain deputies and certain assistance in the region. These would be in fact the top people who have delegated their powers to a whole range of other people who would be in structures below them and who would perform certain functions. What is envisaged insofar as ease of complaints is concerned you will have noticed from the document that the person concerned lodges his complaint to the office of the Ombud, if one exists, or to the office of the magistrate, and from there the complaint gets taken forward. So the procedures are going to be simple and what one foresees at this stage is a large office of an Ombud and one just needs to point that out, so that that is a sort of political commitment that the Technical Committee is having in mind in making these proposals.

**Chairperson:**

Mr Pienaar.

**Mr Pienaar:**

Mr Chairman at the bottom of page 3 the recommendation as a general guide that the HRC should be composed as follows, and then the five members of Parliament, I would like to ask two questions arising from this. The one is that it is not perfectly clear from the recommendation whether the taking into consideration the lifespan of seven years of the HRC whether the lifespan of

the membership of the five members of Parliament should actually coincide with the lifespan of the Assembly which appoints them, that's my first question, and secondly, why at all was it considered to have five members of Parliament there. What was the rationale behind that?

**Mr Grove:**