

1/3/3/2/4

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION :
FOURTH PROGRESS REPORT : 3 JUNE 1993**

BACKGROUND

At its meeting of 28 May 1993 the Council accepted, in principle, the Committee's proposals with regard to those fundamental rights and freedoms which should be entrenched during the transition, without endorsing the criteria proposed by the Committee in paragraph 4 of the Third Report (see 7.1.3.4 of the Council's Minutes of 28 May 1993). The Committee hereby submits the requested formulations.

In terms of the Committee's criteria, certain fundamental rights and freedoms were identified as requiring agreement among the members of the Negotiating Council before they could be included. The Council nevertheless instructed the Committee to proceed with the formulation of these rights and freedoms as well as to suggest alternative formulations where necessary (see 7.1.3.4 and 7.1.3.5 of the Council's Minutes). For the sake of convenience "rights and freedoms agreed on" and "rights and freedoms still to be agreed on" will be dealt with under two different headings. A formulation of a general limitation and suspension clause will also be suggested under a subsequent heading.

The formulations below are suggested by the Committee as the most appropriate in the circumstances. The Committee has added Explanatory Notes where necessary. The headings are not proposed for inclusion in a legislative instrument at this stage and have simply been added for the benefit of the Council. Only what appears between inverted commas is suggested for inclusion.

No decision has been made by the Committee concerning the order in which these rights and freedoms should appear in any legislative instrument or about the way in which they ought eventually to be grouped. This will be determined during the next stage of the Committee's work, after there is clarity as to the extent of the final list of rights and freedoms.

The Council will note that alternative formulations in respect of those rights and freedoms on which no agreement yet exists, which are contained in paragraph 3 of this Report, have not been provided. The Committee considered the various contentions of the parties and decided to produce a formulation which might provide a basis for common ground. In any event, the Committee was of the view that the formulation of further alternatives could be meaningfully embarked on only after comments and suggestions have been received from the parties.

Further work by the Committee will be rendered extremely difficult without substantial representations by the parties on all the formulations which follow.

2. RIGHTS AND FREEDOMS AGREED ON

2.1 FREEDOM OF EXPRESSION

"Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media. "

[Explanatory Note: The Committee understands that freedom of speech and expression includes the right to gather information preparatory to its expression. The right to **freedom** of speech and expression, when read together with the equality clause, may include the notion of equal and equivalent use of State-supported electronic media. The Committee has refrained from dealing with this aspect of freedom of expression in any greater detail, in view of the fact that it will be considered by the Technical Committee on the Independent Media Commission and the Independent Telecommunications Commission.]

2.2 ASSEMBLY, DEMONSTRATION AND PETITION

"Every person shall have the right to assembly and demonstrate with others peacefully and unarmed and to present petitions."

[Explanatory Note: This includes the right to hold public meetings and processions.]

2.3 FREEDOM OF ASSOCIATION

"Every person shall have the right to freedom of association."

[Explanatory Note: This clause necessarily implies that no legislation or executive or administrative act shall restrain people from associating nor compel them to associate with others.]

2.4 POLITICAL RIGHTS

"Every person shall have the right to form and to join a political party and the freedom to make political choices."

[Explanatory note: The Committee is of the opinion that particular reference should be made to the freedom to make political choices in the light of the culture of intolerance which appears to prevail and which may result in people being forced to assume certain political positions. This addition also caters for the concern that the majority of women in the country are not in a position to exercise freedom of political choice.]

2.5 FRANCHISE

"Every citizen of voting age shall have the right to vote in secret and to stand for election to public office. "

[Explanatory Note:. The denial of these rights to the majority of the population for so long warrants their specific inclusion in this list of fundamental rights.]

2.6 ACCESS TO INFORMATION

"Even, person shall have the right of access to all such information under the control of any government authority or statutory body as is necessary for the protection or exercise of his or her rights."

2.7 ADMINISTRATIVE DECISIONS

(1) Every person shall have the right to lawful and procedurally proper administrative decisions."

[Explanatory Note: This requires, among other things, compliance with the rules of natural justice, including the right to a fair hearing and to an unbiased decisions.]

(2) Every person shall have the right to be furnished with the reasons for an administrative decision which affects his or her rights.

2.8 HUMAN DIGNITY

"Every person shall have the right to respect for and protection of his or her dignity."

[Explanatory Note: The Committee draws attention to the fact that it has provided further for this right in the context of persons who are detained - see paragraph 2.17. 1 (b) below.]

2.9 RELIGION AND BELIEF

"Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, provided that nothing shall preclude the practice of religion in State or State-aided institutions on a free, voluntary and equitable basis. "

2.10 PERSONAL LIBERTY

"Every person shall have the right to his or her personal liberty."

2.11 RIGHT TO EQUALITY

"Every person shall be equal before the law and entitled to equal protection of the law. No person shall be discriminated against, directly or indirectly, on any ground whatsoever and, without derogating in any way from the generality of this provision, on the basis of race or gender in particular."

2.12 TORTURE AND CRUEL PUNISHMENT

"No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

2.13 FREEDOM OF MOVEMENT

"Every person shall have the right to move freely anywhere within South Africa. "

2.14 ACCESS TO COURT

"Every person shall have the right to have disputes settled by a court of law."

2.15 INDUSTRIAL RELATIONS

- "(1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (2) Workers and employers shall have the right to bargain collectively.

2.16 DEPARTURE FROM AND RETURN TO SOUTH AFRICA

"Every citizen shall have the right to depart from and to return to South Africa. "

2.17 DETAINED, ARRESTED AND ACCUSED PERSONS

2.17.1 Detained Persons:

"Every person who is detained shall have the right -

- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
- (b) to be detained under conditions consonant with human dignity, including the provision of adequate nutrition and medical treatment at State expense;
- (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State, and
- (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse, next-of-kin,

religious counsellor and a medical practitioner of his or her choice."

[Explanatory Note: The above provisions will apply to all persons detained by the State. Apart from accused persons and prisoners, it also pertains to other categories of detainees such as mentally disordered persons and prohibited immigrants.]

2.17.2 Arrested Persons

"Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -

- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- (b) to be brought before a court of law within 48 hours of the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
- (c) to be tried by a court of law within a reasonable time after arrest, and
- (d) upon good cause being shown, to be released from detention with or without bail, unless the interests of justice require otherwise."

2.17.3 Fair Trial

"Every accused person shall have the right -

- (a) to a public trial by a court of law;
- (b) to be informed with sufficient particularity of the charge against him or her;
- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;

- (d) to adduce and challenge evidence;
- (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so require, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be convicted of any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, and to be sentenced within a reasonable time after conviction. "

[Explanatory Note: The Committee has included the right to legal representation, if necessary at public expense, because the move to a rights-based and justiciable constitution emphasises the importance of the legal process. Without legal representation, the accessibility of the court is considerably narrowed.]

2.18 PRIVACY

"Every person shall have the right to his or her privacy and shall not be subject to searches of his or her person or home, seizure of his or her personal possessions and the violation of his or her personal communications. "

[Explanatory Note: The general limitations clause ought to be sufficient to permit action designed, for instance, to prevent crime including child abuse, child neglect and spouse battering.]

2.19 CITIZENSHIP

"Every citizen shall have the right not to be deprived of his or her citizenship. "

2.20 ENVIRONMENT

"Every person has the right to an environment which is safe and not detrimental to his or her health or well-being."

2.21 EVICTION

"No person shall be evicted from his or her lawful home."

2.22 CHILDREN

"Every child shall have the right to a basic education, to basic health services and not to be subject to neglect or abuse."

3. RIGHTS AND FREEDOMS STILL TO BE AGREED ON

3.1 SERVITUDE AND FORCED LABOUR

"No person shall be subject to servitude or forced labour."

3.2 THE RIGHT TO LIFE

"(1) Every person shall have the right to life.

(2) A law in force at the commencement of subsection (1) relating to capital punishment or abortion shall remain in force until repealed or amended by the transitional legislature."

[Explanatory Note: This formulation would result in the retention of the present laws relating to capital punishment and abortion until repealed or amended by the transitional legislature if so decided.]

3.3 LANGUAGE AND CULTURE

"Every person shall have the right to use the language and to participate in the cultural life of his or her choice."

[Explanatory Note. The question of an official language or languages was not addressed, because it does not directly concern fundamental rights.]

3.4 RESIDENCE

"Every person shall have the right freely to choose his or her place of residence and to pursue a livelihood anywhere in South Africa."

3.5 ECONOMIC ACTIVITY

"Every person shall have the freedom to engage in economic activity."

3.6 INDUSTRIAL ACTION

- (1) Workers shall have the right to take collective action, including the right to strike, and
- (2) employers shall have the right to lock out workers.

[Explanatory Note: The general limitations clause ought effectively to cater for qualifications of the right to strike or lock out.]

3.7 PROPERTY

- "(1) Every person shall have the right to own property.
- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable."

3.8 EDUCATION

"Every person shall have the right to -

- (a) equal access to State and State-aided educational institutions, and
- (b) to instruction in his or her mother tongue where this is reasonably practicable. "

4. LIMITATION AND SUSPENSION CLAUSE

4.1 LIMITATION CLAUSE

"With the exception of the rights and freedoms referred to in [still to be finalised], the rights and freedoms entrenched as fundamental may be limited by law of general application, provided that such limitation -

- (a) is permissible only to the extent necessary, reasonable and justifiable in a free, open and democratic society, and
- (b) does not negate the essential content of the right or freedom in question. "

4.2 SUSPENSION CLAUSE

(1) The rights and freedoms entrenched as fundamental may be suspended only to the extent demanded by the situation and in consequence of the declaration of a state of emergency proclaimed prospectively under an act of the transitional legislature.

(2) Any such suspension shall comply with the following requirements:

- (a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or riot or at a time of natural disaster, and if such declaration is reasonably necessary to restore peace and order.
- (b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to have any effect unless the declaration is ratified by a [e.g. 60%] majority of the total number of the directly elected members of the transitional legislature within [e.g. three weeks] of the declaration.

- (c) No state of emergency shall endure for longer than [eg four months] provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in (b) above.
 - (d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and of any action, whether a regulation or otherwise, taken under such declaration.
- (3) Neither the enabling legislation which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -
- (a) the creation of retrospective crimes;
 - (b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency, or
 - (c) the suspension of this clause and of clauses [still to be finalised].
- (4) Any person detained under a state of emergency shall have at least the following rights:
- (a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
 - (b) the names of all detainees and the measures in terms of which they are being detained shall be published in the Government Gazette within seven days of their detention;
 - (c) the detention of a detainee shall be reviewed within [eg. ten days] of his or her detention by the Supreme Court which shall be entitled to order the release of such a detainee if satisfied that such detention is not reasonably necessary to restore peace and order. The State shall submit written reasons to justify the detention of the detainee to the Court, and shall furnish the detainee with such reasons not later than two days before the review;
 - (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against the continuation of his or her detention;
 - (e) a detainee shall be entitled to have access to legal representatives of his or her choice at all reasonable times;
 - (f) a detainee shall at all times have access to a medical practitioner of his or her choice;

- (g) if detained for longer than [eg. ten days] the detainee shall be entitled to the review procedure in (4)(c) before the expiry of each subsequent period of [eg. ten days]."

5. CONCLUSIONS AND RECOMMENDATIONS

This Report has not dealt with the means and mechanisms for the entrenchment of rights and freedoms during the transition mainly because the Committee has received no response to its request for further submissions in this regard (see paragraphs 6.2 and 7.7 of the Third Report).

The Committee recommends to the Negotiating Council that it requests participants, as a matter of urgency, to -

- 5.1 make submissions to the Committee in terms of 7.7 of its Third Report and to do so before 12h00 on 8 June 1993;
- 5.2 submit substantiated comment on formulations in this Report before 12h00 on 8 June 1993.

Prof H Corder

Prof. L M du Plessis (C)

Adv., G Grove

Ms S Nene

Adv. Z Yacoob

CONFIDENTIAL .
THIS REPORT IS EMBARGOED UNTIL 12h00
ON THURSDAY 3 JUNE 1993