

THE PAN AFRICANIST CONGRESS OF AZANIA

SUBMISSIONS ON THE SEVENTH REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION.

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INTRODUCTION

The Committees' approach in emphasising mainly for the Transitional phase on those rights which limit the abuse of power by the state and the restoration of human dignity, is preferable. This area is less controversial. In addition, as South Africa is emerging from a history of violations of individual rights and human dignity, and socio-economic deprivation, curbing abuse of power by the state seems to be a reasonable starting point.

With this in mind, it is important to realise that we are not as yet talking about a Bill of Rights for South Africa. The Bill of Rights would be much more broader in the scope and content of Rights and freedoms to be protected. We highlight this point so that this Chapter on Rights does not serve to delegitimise a future Bill of Rights.

Comments on the Clauses of the Chapter on Rights.

APPLICATION

1 (1) (A) (B) phrases such as "where appropriate" "just and equitable" are very vague. They are difficult even for the courts. South African courts with no history of defending the individual against the power of the state, are less qualified to deal with such loaded phrases.

In addition (B) is important as it deals with the issue of private relations and therefore, the question of private apartheid. We respectfully submit that the courts should be given a clear and unambiguous message as to how to deal with such transgressions.

We suggest that the wording of the sixth chapter be retained.

Our concern in respect of phrases such as, "where appropriate" apply throughout Clause I.

Freedom (Personal Liberty Preferable) and Security of the person.

5 (1) Why is "arbitrarily arrested" left out. This is an important principle. Rights, such as the right to be given reasons for one's arrest and the right to be charged within 48 hours are practical illustrations of this principle. These words should be included.

- (2) We want to introduce the element of proportionality which is crucial in treatment and punishment. We suggest the following reading:, inhuman, degrading or disproportionately severe treatment or punishment.

We also feel that with South Africa opening to the world, there will be a temptation to use our people as guinea pigs for medical and scientific experimentation. We feel that this should be prohibited.

Suggested wording:

- (3) every person shall have the right not to be subjected to medical or scientific experimentation without that person's consent.
- (4) every person shall have the right to refuse to undergo any medical treatment.

FREEDOM OF EXPRESSION

Since we view this chapter as being sui generis and relating to the needs of the Transitional period, one of which is the desire to curb abuse of power by the state. We therefore find the suggestion that the state must ensure "diversity of expression" in state controlled media, acceptable. This will send a clear and correct signal to a future government.

FREEDOM OF MOVEMENT

We are in disagreement with the Technical Committee as to the arrangement of this right. Its elements must be under one clause reflecting the true nature of this right - mainly as a citizen's right to enter, remain or leave one's own country.

We suggest the following formulation:

- 12(1) (a) Every citizen shall have the right to enter or return to South Africa.
- (b) Every person lawfully in South Africa shall have the right of freedom of movement anywhere within South Africa.
- (2) Every citizen and permanent resident shall have the right freely to choose his or her place of residence and pursue a livelihood anywhere in South Africa.
- (3) Every person shall have the right to leave South Africa.

Deprivation of Citizenship

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

ACCESS TO INFORMATION

Comment: We view this clause as being wide enough to cover, not only information relating to instituting legal action, but also to assist citizens to participate effectively in public affairs. In addition as contributing towards good, accountable and open Government.

ADMINISTRATIVE DECISIONS

We suggest the following formulation:

Every person shall have the right to lawful, reasonable and procedurally fair administrative decisions.

Reasonableness or Irrationality is a full ground of review in the English law - see - The Wednesbury and "GCHQ" cases. The South African courts are divided on this. The UNION GOVERNMENT CASE (1928) does not regard unreasonableness as an independent ground for review but the Theron Case (1976) seems to suggest that it is or it can be.

The reluctance of the courts can be understood within the context that all decisions based on race as a criteria may be said to be unreasonable. Most Apartheid decisions are based on racism. However, with a new dispensation, even a transitional one, unreasonableness should be an independent ground.

If the above submission is not accepted, we would like to submit that Section 18(1) should read: Every person shall have the right to apply for Judicial Review of Administrative decisions.

DETAINED, ARRESTED AND ACCUSED PERSONS.

We feel that in terms of rights to be protected, there is little distinction between arrested and detained persons. The suggestions we therefore make in relation to detainees, equally apply to arrested persons.

Detained Persons

We suggest two new clauses:

A new Clause (b) and (c)

- (b) Shall have the right to have the validity of the detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
- (c) must follow the provision of 2(c) below. That the detainee must be brought to court not later than 48 hours.

These two provisions give meaning to the provision against detention without trial, the presumption of innocence and the onus of proof in criminal proceedings.

Arrested Persons

We suggest that the provision on habeas corpus be included here.

Accused Persons

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- (a) add court of law or an independent and impartial tribunal ...
 - (b) informed without unreasonable delay and
 - (c) innocent until proven guilty

We suggest a new provision (d) which protects people from being forced by police to be state witnesses or accused persons confessing guilt.

Suggested wording: every person shall have the right not to be compelled to be a witness or to confess guilt.

We suggest two new provisions on bail and childrens' rights.

- (j) Not to be denied reasonable bail without a just cause.
- (k) In a case of a child, to be dealt with in a manner that takes account of the child's age.

Clause 20

The right to a home is very fundamental. We would support a clause like this one.

Clause 21

We feel subsection (2) is sufficient to stand on its own.

It should read: Nothing in this Chapter on Fundamental Rights shall and democratic South African society. (The addition of "South African" is meant to assist judges to take into account the diversity of the South African society and some of its unique and peculiar features. This will avoid abstract and legalistic interpretations. We suggest "South African" must be added wherever democratic society is used in this text.

PROPERTY

Although this clause is fairly balanced we have some concern about its practicality during the transition.

In 21(2) we are worried about compensation being determined by the court even within the given factors. The courts may be too legalistic and ignore aspects such as, history of acquisition. We feel that compensation should be determined by the Constituent Assembly through Legislation.

21(3) On this restitution clause, we would add ... as a consequence of historical dispossession or any racially discriminatory policy. We do not accept that both restoration and/or compensation may not be feasible. We support restoration as the primary mode of restitution and if it is not possible then compensation. We are worried that (21(3)) as it stands does not introduce the right of persons to claim their land back but merely leaves it to the government.

We feel that the three aspects of the Property Clause are inseparable. This clause can only come into effect when a clear mechanism has been set to deal with the question of Land Claims. Only the Constituent Assembly can do this. This will deal with the question of how far back the claims should go (cut off date) and the aspect of legal aid to claimants. The landowners will have the resources in most cases, to defend themselves. Claimants will be mostly poor disadvantaged persons and will need assistance in order to pursue a credible case.

Suspension

29(3)(c) We suggest that other sections which shall not be suspended, must be added here. They are the sections dealing with Torture (S5(2)), Servitude (S6), Life (S3) except if death results from lawful acts of war.

Act 15 of the European Convention does lend support to the above suggestion.

Interpretation

30(3) We need further clarity on this subsection. The problem is that South African law accords rights and freedoms on the basis of race. It favoured whites. How does this provision deal with that? Secondly, there is the thorny and sensitive issue of indigenous law. Much more research and debate needs to be conducted about indigenous law. We need to check our assumption about it. We would recommend a gradual and incrementalist approach in dealing with it.

30(4) The presumption of constitutionality is understandable. However, what happens then to those people who acted in good faith believing the law to be valid if it is subsequently declared unconstitutional?

30(5) We are not clear about the implications of this section. It is the court's duty to interpret laws. How are ordinary people expected to know the wider and narrow interpretation of a law? One of the characteristics of law is that it must be clear, precise and understandable. Are we not violating this?

Additional Matters

4(a) We recommend that the Black Lawyers Association (BLA) be one of the organisations requested to comment on this report.