

CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12h00
ON FRIDAY 28 MAY 1993

SUMMARY OF THE THIRD PROGRESS REPORT OF THE
TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION

At the request of the Planning Committee this Report - amplifying and supplementing the Committee's Second Report - deals with the following matters:

1. Criteria for determining which fundamental rights and freedoms are to be entrenched during the transition.
2. Further elucidation of the criteria for the limitation and suspension of rights; and
3. Means and mechanisms for the adjudication of fundamental rights and freedoms.

The Committee draws particular attention to paragraph 4 of this Report in which criteria are proposed to help determine which rights and freedoms should be entrenched during the transition.

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TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION : THIRD PROGRESS REPORT
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1. BACKGROUND

The Committee was requested by the Planning Committee on 25 May 1993 to formulate specific criteria for the identification of rights and freedoms which are "fundamental" or "directly relevant" to the transitional phase, to explicate the criteria for the limitation and suspension of entrenched rights and freedoms and to recommend means and mechanisms for the adjudication of such rights and freedoms during the transition.

The Committee would like to point out that the identification of rights and freedoms for the purpose on entrenchment during the transition was seen by the Committee as its primary task from the outset. In its First Report it identified different categories of rights. In its Second Report the Committee refined its initial approach by categorising rights and freedoms according to certain practical criteria formulated by reference to the nature and anticipated course of the transitional process.

For this purpose the Committee distinguished between three categories of rights and freedoms, namely:

- * Those necessary to ensure democracy during the transition;
- * Those aimed at the overall security and well-being of all during the transition; and
- * Those conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction.

The Committee recommends that only the First and Second Categories be considered for inclusion during the transition, because rights in the Third Category are bound to be generally regarded as too controversial to be entrenched during the said period.

In view of the Planning Committee's request for further elaboration, this Report is to be read as an amplification of and indeed - to a large extent - a supplement to the Committee's Second Report. Attention will be paid to:

- * The explication of criteria for determining which fundamental rights and freedoms are to be entrenched during the transition.
- * The explication of criteria for the limitation and suspension of the rights and freedoms referred to above; and
- * Means and mechanisms for the adjudication of such rights and freedoms during the transition.

To begin with, the Committee also suggests minor amendments of formulations in the Second Report.

2. AMENDMENTS TO FORMULATIONS IN THE SECOND REPORT

2.1 Editorial Changes

- 2.1.1 On page 2 of the Report, at the end of the third line of the seventh paragraph from the top, "a Bill of" should be inserted before "Rights".
- 2.1.2 In paragraph 5.1 where reference is made to "a general limitations clause" the words "and a suspension" should be inserted before "clause".

2.2 Substantive Changes

2.2.1 "Upliftment"

In formulating the criteria for its Third Category of rights the Committee refers to the "upliftment of all people". The word "development" should be substituted for "upliftment" throughout the Report.

2.2.2 "Well-being"

Delete the words "and well-being" where they occur in the second asterisk on page 1 of this report and the introduction to 2.2. The reason for this amendment will be explained in 3.4

below.

2.2.3 References to Affirmative Action

In its Second Report the Committee expresses the view that an affirmative action clause could qualify the equality clause (see e.g. 2.1.1.4). The word "qualify" (or expressions to a similar effect) must be replaced by "amplify" (or expressions to a similar effect) throughout the Report.

2.2.4 Customary Law

Insert after 2.3.10 on page 8 of the Second report the following:

"2.3.11 The recognition of the rights arising out of customary law and the extent to which they should be limited, etc."

Delete "etc" at the end of this sentence in 2.3.10 and replace the comma with a semi-colon.

3. CRITERIA

3.1 Introductory Remarks

The period of transition is generally perceived as coinciding in time with the movement towards full democracy in South Africa. With this in mind, the Committee's point of departure has been, and still is, that in order to facilitate the democratisation of society during the transition, at least those rights and freedoms which are inseparable from what is generally understood by "democracy" will have to be entrenched. The rights and freedoms which obviously come to mind here are the so-called first-generation rights and freedoms, i.e. the civil and political rights and freedoms which, although "Western" in origin, are generally recognised in the constitutions and/or common law of most democracies throughout the world.

The Committee did not simply compile a list of these first-generation rights, because it thought that a single comprehensive list would not facilitate negotiation amongst the parties, given their divergent views on the entrenchment of fundamental rights and freedoms during the transition. For

some parties such a list would be too wide, while for others it would be too narrow. This is also the reason why the Committee (with the three generations of rights in mind) opted for a practical categorisation.

In the Committee's view, negotiation should first be focused on rights and freedoms listed under the First Category in the Second Report and parties should endeavour to agree on the entrenchment of these rights and freedoms during the transition. They should then proceed to the Second Category and eliminate the rights on which no agreement can be reached. Rights listed under the Third Category should not be considered for inclusion during the transition, unless there is express agreement that they ought to be included.

As and when agreement is reached on specific rights, the Committee will immediately start formulating such rights in specific terms and submit its formulations to the Council.

- 3.2 To return now to the Planning Committee's request. If the transitional dispensation is to be based on democratic principles, a wide spectrum of first-generation rights will inevitably have to be regarded as "fundamental" or "directly relevant" to the transition. This will be the position regardless of the criteria which may be employed. The Committee recommends that the Council bases its deliberations on the categories as suggested by the Committee in the Second Report, because these allow for a practical and therefore more flexible approach.

In formulating practical criteria to help determine which rights and freedoms will have to be entrenched during the transition, the Committee assumes that the transitional process:

- * Will have to be as democratic as possible; and
- * Must be aimed at achieving full democracy.

- 3.3 Rights and freedoms ensuring democracy as such during the transition will therefore have to be included. This general proposition must, however, be qualified:

- 3.3.1 Democracy of a particular type (e.g. "liberal" or "social" or "African" democracy) should not be decided on for purposes of the transition. An elected and legitimate constitution-making authority will have to exercise this particular choice. Rights aimed at promoting democracy of a particular type should therefore be excluded during the transition.

3.3.2 It follows from 3.3.1 above that only "neutral rights and freedoms" ensuring minimum standards of democracy as such should be included. For this purpose their universal acceptance in international human rights declarations, instruments, literature and thinking must be taken into account: they must be time-honoured and non-controversial.

3.3.3 Paragraph 3.3.2 by itself does not constitute a sufficient criterion since not all universally accepted, time-honoured and non-controversial fundamental rights and freedoms need to be entrenched during the transition. The transition as a process and, in particular, a political process of a peculiar kind, has to be understood and honoured in order to help determine which rights and freedoms should be entrenched during its limited lifetime. With this in mind, certain rights and freedoms enjoy priority over others. This does not imply that the former rights and freedoms are, generally speaking, more fundamental or more important than the latter ones. A classification or categorisation of rights and freedoms for purposes of the transition will not and need not reflect the process of rights-determination in the long term.

3.3.4 During the transition, everyday life for all people in the country will go on. Provision will therefore have to be made for the overall security of all. Social, economic and political stability during the transition will depend on the extent to which the population experiences a sense of security and identity. Fundamental rights and freedoms which will help instill and promote this sense of security and identity will therefore have to be entrenched to a sufficient degree.

In its Second Report the Committee refers to rights and freedoms aimed at achieving the overall security and well-being of all during the transition. For purposes of this Third Report the words "and well-being" have been deleted (see 2.2.2 above). This has been done because the term "well-being" can also be understood as referring to the socio-economic development of people - a process which will have to be set in motion by a legitimate constitution-making authority and which can be fully attended to only after (or in the later stages of) the transition. The words "and well-being" were therefore deleted in order to avoid misunderstanding.

3.3.5 The entrenchment of rights and freedoms during the transition will inevitably impact on their entrenchment in an eventual

dispensation. If the exercise of a sufficient minimum of rights and freedoms cannot successfully be secured during the transition, the citizenry will lose faith in the value and even the relevance of the means and mechanisms for the entrenchment of rights and freedoms. Endeavours to entrench rights and freedoms during the transition should therefore not be over-ambitious, but at the same time they should also not be meaningless. A balance must be struck between protecting, on the one hand, too many and, on the other, too few fundamental rights and freedoms. This balance has to be reflected in the selection of rights and freedoms to be entrenched during the transition.

4. SUMMARY AND PROPOSED APPLICATION OF THE CRITERIA SUGGESTED IN THIS REPORT

All the considerations raised in paragraph 3 above are of considerable importance and need to be weighed in relation to one another in order to arrive at a carefully balanced decision as to whether or not certain rights and freedoms should be included during the transition. Without derogating from the importance of each of the said considerations, the Committee is constrained to propose a practical working summary of the criteria and to propose a way in which they could be applied. Of the three sets of criteria mentioned below, the Committee suggests that rights and freedoms would qualify as fundamental if they meet the criteria described in 4.1 and 4.2. If they do not meet the criteria in 4.1 and 4.2 they must meet the criteria described in 4.3 before they qualify for inclusion.

4.1 Rights and freedoms will, of necessity, qualify for entrenchment during the transition if:

4.1.1 Their inclusion would facilitate:

4.1.1.1 Free and fair elections; and

4.1.1.2 Free, fair and full consultation amongst people and groups of people in regard to all matters relevant to the transition; or

4.1.2 Their exclusion would limit or detrimentally affect the freedom, fairness or completeness of the processes described in 4.1.1.

and

- 4.2 The inclusion of these rights and freedoms do not pre-empt or unduly limit the right or power of a constitution-making authority to:
- 4.2.1 eventually draft a full Bill of Rights; or
 - 4.2.2 determine laws or constitutional provisions aimed at the socio-economic reconstruction of society; or
 - 4.2.3 remove or correct the imbalances which exist and which have been brought about by unfair or undemocratic practices.
- 4.3 Alternatively, rights and freedoms which do not qualify for entrenchment in terms of 4.1 and 4.2 will have to be included during the transition if they are nevertheless so fundamental that:
- 4.3.1 A constitution-making authority will not exclude or substantially limit them; or
 - 4.3.2 It would be highly undesirable for such an authority to exclude or unduly limit them;

Rights and freedoms are "fundamental" for purposes of 4.3 either because they are universally accepted and beyond debate or because the negotiating parties agree that 4.3.1 or 4.3.2 apply to them.

It is the Committee's view that the acceptance of these working criteria would mean that all the rights in the First and Second Categories of this Second Report would be non-controversial, except that the rights described below and mentioned in the Second Report will have to be subject to agreement in terms of the criteria described in 4.3.3 before they qualify for inclusion. These are the following rights and freedoms (numbered as in the Second Report):

- "2.1.1.5 Freedom from servitude and forced labour.
- 2.1.1.9 The right to life.
- 2.2.1 Language and cultural rights.
- 2.2.3 Freedom of choice of residence and to pursue a livelihood anywhere in South Africa.

- 2.2.7 Freedom to participate in economic activity.
- 2.2.8 The rights to strike and to lock out.
- 2.2.9 The right to own property.
- 2.2.14 The right of equal access to State or State-aided educational institutions."

The rights included in the Third Category of the Committee's Second Report do not qualify for inclusion, unless there is express agreement that they ought to be included during the transition. The Committee is - in terms of the criteria in 4.1 to 4.3 above - unable to provide any argument in support of the proposition that they should be included.

5. EXPLICATION OF THE NEED AND CRITERIA FOR THE LIMITATION AND SUSPENSION OF FUNDAMENTAL RIGHTS AND FREEDOMS INCLUDED IN ANY BILL OR CHARTER OF RIGHTS.

5.1 Limitation

- 5.1.1 It is commonly accepted in most countries of the world, in the international sphere, and in every human rights instrument today, that very few rights and freedoms are unlimited in scope and application. Typical among those which are regarded as absolutely inviolable, are freedom from torture and freedom of conscience, religion, belief, thought and opinion. The vast majority of rights and freedoms, however, are necessarily limited by the basic duty (which is the counterpart of every right) to respect the rights of others. Thus, for example, freedom of speech generally does not include the right to defame another person, nor the right to shout "Fire!" in a crowded theatre when no such fire exists, and freedom of movement does not envisage unauthorised access to property or premises controlled by another legal occupant.
- 5.1.2 Every formulation for the protection of rights and freedoms must, therefore, allow for the limitation or circumscription of most rights, unless it wishes to run the risk of irrelevance through lack of enforceability. This limitation must, however, occur under close supervision and on relatively restrictive and precisely-defined terms.

Again, typically, the legislature is viewed as the appropriate body to lay down the circumstances (in law) in which limitation may legally occur, and the judiciary is seen to provide the forum in which any such apparent limitation can be tested against the formula used in the Bill of Rights itself. In other words, the Bill must contain the circumstances of its own limitation.

- 5.1.3 Limitation (the preferred term here) can take one of three forms: a general limitations clause applicable to each and every protected right and freedom (with a few exceptions); a series of specific limitations clauses, each qualifying a specific right or freedom; or a combination of these two categories. The last-mentioned approach is the one adopted in the Committee's Second Report. It has the advantages, in our view, of providing a common standard against which all purported limitations can be measured, thus enabling the legislature and judiciary rapidly to develop an understanding of what is viewed as an acceptable curtailment in respect of the protected rights and freedoms, while also allowing for a degree of flexibility by the subjection of certain rights and freedoms to further grounds upon which legislative curtailment may be justified.
- 5.1.4 For example, a general limitations clause might approve curtailment of rights and freedoms "where reasonably necessary in the public interest" while a specific limitation in regard to the right to liberty may provide that liberty may be deprived in the interests of "justice, public health or immigration". Again, once liberty has been lawfully deprived a specific limitations clause may stipulate a maximum period of detention "unless further detention is ordered after a fair hearing by a court of law".
- 5.1.5 In a sense, the specific limitation spells out unambiguously how the general limitation ought to be applied in specific circumstances, or elaborates on the general limitation.
- 5.1.6 Limitation clauses are normally justiciable by the courts (or the highest court alone). In choosing the exact formulation for such clauses, most human rights instruments attempt to define with a fair degree of precision the guidelines which the judges should follow in fulfilling their duty in this respect. This is particularly so as the judges are generally secure in their tenure (in order to ensure independence) and so therefore less democratically accountable than the legislature, on whose laws they sit in judgment. such guidelines may be all the more

necessary in a legal system moving into judicial review of legislative action for the first time.

5.1.7 The Committee proposes a series of principles in its Second Progress Report (see paragraph 3.1 on page 9) which function cumulatively to define the judicial task quite narrowly, without eliminating judicial discretion to exercise the court's important controlling function. In particular, the Committee draws attention to:

- * The overall goal that limitations must be consonant with the needs of a free, open and democratic society (paragraph 3.1.2);
- * The fact that limitation should not have the effect of destroying the essence of the right (paragraph 3.1.3); and
- * The fact that any limitation should not be more drastic than the circumstances require (paragraph 3.1.4).

5.2 Suspension

5.2.1 While limitation clauses are regarded as necessary and long-lasting, a suspension clause is aimed at ensuring the survival of a Bill of Rights after a temporary period of national crisis or natural disaster. For the duration of such a state of affairs, it may be necessary to suspend the operation of most or some of the rights and freedoms entrenched in the Bill of Rights, in order to allow the State to restore order and peace. Thus, for example, people may have their freedom of movement and association removed during a flood or in war time. Without providing for such suspension, a Bill of Rights runs the risk of inviting ignorance (and thus disrespect) in such calamitous circumstances.

5.2.2 The drastic nature of suspension, however, demands that the most stringent procedural safeguards be followed before suspension of rights and freedoms can occur legally, such as are set out in paragraph 3.2 (page 9) of the Committee's Second Report. In particular, the following principles should be noted:

- * Suspension should only occur in the form of a state of emergency declared by the executive under specific conditions, which would be reviewable by the courts (paragraph 3.2.1);
- * Legislative ratification of both the declaration and any

emergency measures would be required within a certain time (paragraphs 3.2.4 and 5); and

- * That the suspension of rights and freedoms would not imply immunity of State officials for their unlawful conduct during such emergency (paragraph 3.2.6).

5.2.3 As with the limitations clause, there are certain rights which would be regarded as absolute in all circumstances, and therefore as not being capable of suspension. These would include freedom from torture and freedom of conscience, belief, thought and opinion.

6. AN INSTITUTION TO ADJUDICATE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

6.1 General Observations

6.1.1 South Africa's legal history does not know the concept of judicial review in a constitutional sense, nor the entrenchment of certain rights and freedoms as fundamental. It is widely acknowledged that litigation and judicial decision-making in the constitutional sphere are substantially different from conventional legal practice to this point. Some South African judges and legal practitioners and many academics have, however, been exposed to human rights theory and practice, especially as neighbouring states (such as Namibia and Zimbabwe) have adopted Bills of Rights and written constitutions. It is instructive that, after some initial hesitancy and shortcomings in the judicial process, most lawyers (including judges) schooled in the common law tradition (which characterises South African law in this respect) have adapted quite quickly to the new legal dispensation. This process of adaption is reflected at the popular level - it is universally recognised that the successful implementation of any Bill of Rights depends largely on the development of a "human rights culture" among the population generally. It is noteworthy that this process was emphasized by the South African Law Commission in its Working Paper on Group and Human Rights in 1989, and has been a feature of the programmes of most organisations and movements which resisted apartheid. Programmes of basic education in the human rights field are now widespread in non-governmental organisations, and the South African Government has announced a similar programme this year.

6.1.2 There is a second major factor which must be borne in mind here. South Africa's courts, through their implementation of unjust laws, particularly over the past 45 years, have suffered considerably in reputation and legitimacy among the majority of the population. There has been much disquiet about the effects of the manner in which judges are appointed, a system which has led to a Bench which is, with two exceptions, white and male. The patent political profile and power of the courts will inevitably heighten under a system of entrenched rights and judicial review of the Constitution. This means that the appointment of judicial officials as well as measures to enhance their democratic accountability and independence from the legislature and executive during tenure of office, are matters which need urgent attention. These are matters, however, of the utmost political contention, which demand the widest level of consultation and consideration by a representative governing authority.

6.1.3 With these realities in mind, the Committee is required to consider the desirable mechanism for the adjudication of fundamental rights during the transition. The Committee has no doubt that an eventual constitutional dispensation (drafted by a democratic constitution-making authority) should seriously contemplate a full package of adjudication mechanisms, including at least:

- * A Constitutional Court, with appellate and well-defined original jurisdiction, as the final arbiter on constitutional and rights issues;
- * A Human Rights Commission, with advisory, mediating, investigative and educational functions, to promote knowledge about and implementation of fundamental rights and freedoms;
- * An Ombud with substantially expanded powers of investigation and review of the regularity and legality of administrative actions; and
- * An extended notion of standing to sue in constitutional matters, and financial and logistical support for litigants who wish to challenge the constitutionality of Government action which infringes on rights and freedoms.

6.1.4 The legitimacy of such institutions will depend on the manner of their establishment and the legitimacy of the body which creates them. These are matters to which, in the view of the Committee, a constitution-making authority would have to give the most urgent

attention.

6.2 Considerations Pertaining to the Transition

- 6.2.1 The Committee at this stage finds itself in a difficult position in respect of making specific recommendations for the transition. While the South African Government has submitted (on 25 May 1993) its "Preliminary Views and Proposals regarding the Independence of the Judicial Authority" in which it states that certain changes to judicial structures are necessary, even during the transition, it has not motivated such a proposition, and no other party or body has to date (27 May 1993) submitted any definite proposals in this respect.
- 6.2.2 In addition, the Committee's view on this matter is very likely to be influenced by the proposals of at least the Technical Committees on Constitutional Matters, Independent Electoral Commission and Repeal of Discriminatory Legislation, as each of these bodies could potentially propose codes of protected rights and means and mechanisms for their enforcement.
- 6.2.3 This Committee therefore earnestly requests all participants in the Negotiating Council to inform it of their views as to:
- 6.2.3.1 The appropriate adjudicative institution(s) to enforce fundamental rights during the transition;
 - 6.2.3.2 Reasons for adopting such a course and for the timing of its introduction;
 - 6.2.3.3 Methods of constituting any new bodies suggested, and of selecting their members;
 - 6.2.3.4 Supplementary mechanisms to make the functions of the adjudicative institution effective and accessible.

7. RECOMMENDATIONS

On the understanding that the recommendations in 7.2 to 7.4 below replace the recommendations in 5.3 and 5.4 of the Committee's Section Report, the Committee recommends to the Council that it:

- 7.1 Accepts the Committee's recommendations in 5.1 and 5.2 of the Second Report subject to 7.3 below;
- 7.2 Agrees in principle to the criteria proposed by the Committee in paragraph 4 of this Report;
- 7.3 Advises the Committee as to whether the rights and freedoms listed in 2.1.1.5, 2.1.1.9, 2.2.1, 2.2.3, 2.2.7, 2.2.8, 2.2.9, and 2.2.14 of the Committee's Second Report are to be entrenched during the transition;
- 7.4 Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, formulations of all the rights and freedoms listed under the First and Second Categories in the Committee's Second Report, with the exception of those rights and freedoms referred to in 7.3 above;
- 7.5 Instructs the committee to submit to a subsequent meeting of the Negotiating Council, formulations of those rights and freedoms mentioned in 7.3 above which according to the Council should be entrenched during the transition;
- 7.6 Accepts the general principles laid down for the limitation and suspension of fundamental rights and freedoms during the transition in paragraph 3 of the Committee's Second Report and explicated in paragraph 5 of this Report, and instructs the Committee to submit a formulation of a general limitations and suspension clause to a subsequent meeting of the Negotiating Council;
- 7.7 Requests all Negotiating Council participants to make submissions to the Committee with regard to the matters raised by this Committee in paragraph 6.2 of this Report before 12h00 on 1 June 1993;
- 7.8 Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, recommendations with regard to the means and mechanisms for the adjudication of fundamental rights and freedoms during the transition after considering the submissions made in terms of 7.7 above.

Prof. H Corder
Prof. L du Plessis (C)
Mr G Grove
Ms S Nene
Adv. Z Yacoob