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GENERAL COUNCIL OF THE BAR

OF SOUTH AFRICA

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

SEVENTH PROGRESS REPORT : 29 JULY 1993

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INTRODUCTION : THE NATURE OF THESE SUBMISSIONS

The submissions that follow were compiled under the direction of the chairman of the General Council of the Bar taking into account the disparate contributions of advocates H J Fabricius SC, E Bertelsman SC, J J Gauntlett SC, E Cameron, G J Marcus and D N Unterhalter and prof J van der Westhuizen.

We note that the Seventh Progress Report of the Technical Committee on Fundamental Rights, is dated 29 July 1993 and that submissions were sought from the Chief Justice, the six Judges President, the Association of Law Societies, the National Association of Democratic Lawyers and the General Council of the Bar by noon on Monday 9 August 1993. We regret the relative brevity of the period made available to us to prepare these submissions.

In formulating our submissions, we have borne in mind that the Technical Committee has engaged in a painstaking and arduous process, involving cumulative progress reports, each successively adapted in response to representations received from the members' principals and other political parties. We acknowledge that a chapter in a constitution enumerating fundamental rights is necessarily the product of a political process and that it unavoidably embodies political choices.

Nonetheless, in the end a constitution is a legal document which falls to be interpreted by the judicial arm of government and is ultimately enforced under the supervision of the courts. Our submissions address the Technical Committee's Seventh Progress Report on this basis. The comments we make necessarily impinge from time to time on the political and social values the committee has sought to enshrine in its report, but we have sought throughout to base our submissions on considerations which bear on the administration of justice and on the preservation of values which are fundamental to the legal process.

PHILOSOPHICAL SETTING

We are aware that it is envisaged that the constitution of which the chapter on fundamental rights forms a part, will operate only in the interim. Some of the paraphernalia of grand constitution-making may therefore be inappropriate to this chapter. Nevertheless, in our view, it is a defect of the proposed chapter that, notwithstanding the provisions of clause 30, it lacks any form of preamble or introductory clause which sets out the postulates upon which it was drafted.

Thus, for example, article 20 of the German Constitution sets out the following premises :

"(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.

(3) Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice."

This is not in our view merely an element of style. A preamble or postulate-setting clause sets the basis upon which the courts will interpret the constitution. It is a commonplace of constitutional interpretation that, in contrast with the strict rules of statutory construction, the preamble is relevant to the interpretation of constitutional provisions.

INTERPRETATION AND ENFORCEMENT : WHICH COURT?

It is obvious that the nature of the body that will ultimately be responsible for giving legal meaning to the provisions of the constitution would be of fundamental importance to its success. We consider the following points of significance in this regard.

Firstly, it is essential to the creation of an integrated constitutional jurisprudence and to the nurturing of a culture of fundamental rights, that the ordinary courts of the land and not only a specialist constitutional tribunal, should be engaged in the interpretation and protection of the fundamental rights enshrined in the constitution.

Secondly, the court ultimately charged with final decision-making powers in constitutional matters, whether it is to be a separate constitutional court or a division of the highest court of appeal, must be a court constituted by men and women selected for their absolute independence, legal competence, and integrity.

Thirdly, the composition of that court, the skills, the vision and the integrity of its members and their ability to give a coherent, humane and practicable vision to the provisions of the chapter on fundamental rights, will determine the success or failure of our country's constitutional venture.

THE "REACH" OF THE CONSTITUTION - "VERTICALITY" AND "HORIZONTALITY"

The reach of the fundamental rights provisions, is a critical and unavoidable issue.

Whether the provisions of the chapter on fundamental rights should only bind the organs of government (that is, whether they should only operate vertically) or whether non-governmental bodies and persons should also be included within their ambit (that is, whether they should also operate horizontally) is fundamentally a decision of political and social policy. It is not, in our view, a matter which the political and policy decision-makers engaged in the present negotiations can leave to the courts. A measure of "horizontal" application of the provisions of the fundamental rights chapter is socially desirable, particularly because private institutions are capable of manipulation in such a way as to render nugatory many of the most basic values enshrined in the chapter. It can not, however, be left to the courts to decide the critical but political issue of the nature and extent of the horizontal application of the provisions of the chapter on fundamental rights.

We draw attention in this regard to the clear formulation of article 5 of the Namibian Constitution :

"The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the government and its agencies, and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed ..." (emphasis added).

The present formulation of clause 1(1)(b) is entirely inappropriate. It suggests that "other bodies and persons" - apart from governmental and state bodies and functionaries - will be bound "where just and equitable." The Technical Committee envisages that an "evolutionary and natural development of the concept of the horizontal enforcement of rights" will emerge "in the jurisprudence of the designated judicial authority." This is a deferment of an issue upon which difficult political decisions have to be made now. It is moreover deferred by a provision so vague as to create wholly unacceptable uncertainty.

THE LIMITATION AND SUSPENSION PROVISIONS

Our last general comment relates to the provisions empowering statutory limitation and suspension of the rights entrenched. This issue is so fundamental to the very nature of legal regulation and constitutionality, that we do not consider it to involve a mere question of drafting.

Our concern is general. It is that the derogations from the constitutional enforceability of the fundamental rights entrenched in the chapter, are insufficiently stringently expressed. Thus, clause 28(1)(a)(ii) permits limitations on fundamental rights, provided only that they are reasonable and "justifiable in a free, open and democratic society based on the principle of equality". The suspension provision in clause 29(1), permits suspension of rights in consequence of certain contingencies "only to the extent demanded by the situation".

The formulation of these requirements for limitation and suspension are not only abstract, but ambiguous and are at variance with the European Convention on Human Rights and Fundamental Freedoms, the International Covenant on Human Rights and Fundamental Freedoms and the Constitution of Namibia. It is clear that value

judgments are unavoidable in the interpretation of almost all constitutional provisions. But in the limitation and suspension provisions of the fundamental rights chapter, those value judgments should, as far as possible, be confined within narrow ambit, tending to the sustained enforceability of fundamental rights, rather than their derogation.

Modifying words restricting derogation to that which is "strictly" or "demonstrably" necessary, should therefore be introduced both in clause 28(1)(a)(ii) and clause 29(1).

Our view that this is not merely a matter of drafting, but one fundamental to the conception of constitutionality which the fundamental rights chapter should embody, is borne out by recent events in Ciskei and Bophuthatswana. Situations construed by the executive authorities as emergencies, gave rise to extensive derogation from the written constitutions of both entities. This had the consequence of bringing not only the documents themselves, but indeed the concept of legal regulation and legally protected rights, into disrepute.

SUBMISSIONS ON SPECIFIC CLAUSES

Clause 1(1)(a) : Application (judiciary)

The present formulation makes the provisions of the chapter binding, not only on the legislative and executive branches of government and statutory bodies and functionaries, but also "where appropriate on the judicial branches of government at all levels."

But judges are required to apply the law by virtue of the office they have sworn to uphold. The reference to the judicial branch therefore seems superfluous. Moreover, binding judges to apply the fundamental rights contained in the chapter may imply, regardless of the intended scope of the chapter's "horizontal" application, that they are bound to adjudicate all disputes before them, even between private parties, on the basis of the entrenched fundamental rights. The vague words "where appropriate" do not cure the superfluity or eliminate the potential for confusion.

Better in our view, would be a statement that the provisions of the chapter, together with the other provisions of the constitution, "shall constitute the fundamental law of the land" and shall "bind the legislative and executive branches of government ..."

Clause 1(3) : Application (administrative decisions)

The present formulation makes the provisions of the chapter applicable only to "all laws in force and all administrative decisions taken during the period of operation" of the chapter. It excludes administrative decisions taken before the chapter on fundamental rights comes into operation. It is not clear why prior decisions are omitted. There can be no justifiable reason from the point of view of the administration of justice or the attainment of fairness and equality as envisaged in the chapter, for prior decisions to remain sacrosanct. Where such administrative decisions remain in force after the chapter has come into operation, they ought to be subject to the principles of the chapter.

The formulation "administrative decisions" is also too narrow. It might be argued that certain executive decisions forming part of the traditional executive prerogative, fall outside its scope. The formulation "administrative" should be replaced by "executive and administrative".

Clause 1(5)(a) : Application (access)

The clause restricts the right to apply for appropriate relief, including a declaration of rights, to those persons or associations which allege that their rights entrenched in the chapter "have been infringed or are threatened". This is more restrictive than the present doctrines of jurisdiction applied by the supreme court, which empowers parties to a dispute to seek declaratory relief even where there is no infringement of or threat to, a right. The restriction is undue. A litigant should be entitled to approach the court to obtain a declaration of right even where there has been no infringement of, or threat to, a litigant's rights.

Clause 2 : Equality

We note from the prior reports of the Technical Committee that it was a matter of debate whether there should be a specific enumeration of conditions expressly protected against discrimination by the equality clause such as is now included in clause 2(2). In our view, an express enumeration is desirable. This will not only eliminate interpretative uncertainty when the clause is adjudicated, but will serve the educative purpose of enunciating clearly and unequivocally those grounds of discrimination which are constitutionally disapproved.

Clause 3 : Life

We adopt no position on the contested moral and social questions of the death penalty, abortion and euthanasia. We merely point out that the unqualified entrenchment of "the right to life" may, depending upon judicial interpretation, arguably preclude all three. According to our Roman-Dutch common law, a foetus is in certain circumstances deemed already to be born and thus a "person" for the purposes of the law. This doctrine which emanated from the Roman law of succession, has been extended by our courts to other areas. This may have profound implications for a woman's freedom to choose to abort her foetus if it were to be deemed a "person" for purposes of this clause.

Clause 7 : Privacy

The word "personal" in the phrase "personal privacy", constitutes an undue limitation of the protection of the right to privacy.

Secondly, after "privacy", a phrase such as "without limiting the generality of this right" should be introduced. Otherwise, the formulation may suggest that its terms constitute the only protected area of privacy.

Clause 8 : Religion and belief

The two subclauses of clause 8 do not appear to be congruent. Clause 8(2) seeks to enshrine governmental liberty to permit religious observances at state or state-aided institutions. This entrenchment presumably seeks to avoid the effect such as that of the American jurisprudence which prohibits prayers in state schools. But the latter prohibition is based on an express disestablishment clause in the United States Constitution which forbids the state from establishing any religion. Clause 8(1) does not purport to be a disestablishment clause. The chapter on fundamental rights does not contain such a clause. The "non-derogation" phrase introducing clause 8(2) therefore appears to be misplaced, as indeed the whole of subclause 8(2) might be.

If it is considered desirable for religious observances at state institutions to be expressly protected in the constitution, an expressly permissive formulation would be more appropriate : "It shall be permissible for the state or state-aided institutions to conduct or permit religious observances, provided that such observances are conducted on an equitable basis and that attendance at them is free and voluntary."

Clause 11 : Freedom of association

If the constitution applies or is in due course held to apply to private persons and institutions, practices such as the admissions policies of Jewish schools or Afrikaans cultural organisations, may be held to constitute unconstitutional "discrimination on the ground of race". Whether this is a desirable outcome, is a political decision, but it should be understood that the present wording may entail these consequences.

Clause 17 : Access to information

The protection of this clause is too narrow. Its prerequisite for access to information, is that one is able to show that the information is "necessary" for the protection or exercise of one's rights. That would often be an impossible onus to discharge precisely because one does not have access to the information necessary to do so.

There are two categories of information to which one ought, as a matter of right, to have access. The first is information in the possession of the state (or other entities to which the chapter applies) which directly relates to the subject himself or herself. The second is

information concerning the manner in which the state (or other body to which the chapter applies) operates, and exercises its powers.

Neither class of information is necessarily required only for "the protection or exercise" of a person's other rights. Access to information should be an independent, and not an instrumental, right. Knowing what is on record about him or her, and knowing how and on the basis of what information or premises, a state or other body operates, should be an independently entrenched right.

Clause 18 : Administrative decisions

The clause as presently drafted is not acceptable. In the first instance, to entrench a "right" to "lawful" administrative decisions, is without content. The "right" to "lawful" administrative decisions, appears to be simply the right to decisions that do not stand to be impugned by way of review. The formulation therefore gives no content to the grounds of review that may vitiate an administrative decision.

The suggested requirement that administrative decisions be reasonable, should in our view be included. This would indeed extend our administrative law (which at

present permits the courts to overturn administrative decisions on the basis of reasonableness only where the unreasonableness is gross). But this is an extension which is amply justified on grounds of principle. It is supported by most experts in the field of administrative law. It would bring our law into line with other respected systems of administrative law.

One of the basic aspirations of a charter of fundamental rights, should be to provide for rights consonant with a free and democratic society. The requirement that administrative decisions be reasonably made, forms an essential part of what a citizen may expect of officialdom in such a society. We would therefore redraft clause 18(1) as follows :

"Every person shall have the right to administrative decisions that are fairly taken and reasonably made".

Clause 20 : Eviction

We support the recommendation of the Ad Hoc Committee that this clause be deleted. The reasons for including a provision of this kind, issue from laudable objectives of social policy. In particular, the express reversal of the former legislative policy as embodied in the

prevention of illegal squatting legislation, must be welcomed. Nonetheless, we take the view that this clause ought not to form part of a chapter on fundamental rights. One of the socio-economic consequences of such a provision may indeed be to restrict the stock of housing available to the most disadvantaged sectors of our community. The protection of vulnerable persons and their homes, should be dealt with by ordinary legislation adaptable to meet changing socio-economic circumstances.

Clause 23 : Property

We subscribe to the principle that the state should retain the freedom and ability to redress past injustice in the allocation and ownership of land. We do not consider it appropriate however to comment upon the political and social debate which has preceded the inclusion of this clause, characterised at times by vehemently opposing philosophies and interests.

We deem it appropriate however to comment on clause 23(3) because we are not sure that its meaning and effect is sufficiently clear. It may in our view permit expropriation or confiscation of property without compensation or any of the protection provided for in clause 23(2). As the subclause now stands, the state

would be permitted to take any measures to restore or compensate "persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy" and would arguably be entitled to do so free of the restrictions of subclauses 23(1) and (2). If so, the state would be at liberty to confiscate or expropriate any land - whether or not it was acquired pursuant to or in consequence of a racially discriminatory policy - without the just and equitable compensation that would otherwise be payable in terms of clause 23(2).

It is possible that the phrase "rights in land" may be read as permitting restoration or compensation of those dispossessed, only in regard to the land taken from them "as a consequence of any racially discriminatory policy". Even on this reading, however, the clause will have a radical effect since so much of existing land tenure in our country was, directly or indirectly, the historical results of "racially discriminatory" policies.

Clause 24 : Environment

This clause, more than any of the other "second generation" rights entrenched, opens the question whether the right to a "safe and non-detrimental environment" is capable of juridical regulation and judicial enforcement.

Specific and detailed statutory provisions directed at identified environmental threats and hazards, may serve the purpose better than the ample statement presently made in clause 24. But, even if such a right is to be included, the present terms are too broadly phrased. It will thus be difficult, to say the least, for the courts to give content to a right to an environment which is "not detrimental" to a person's "wellbeing". The purpose of the provision may thus be defeated.

Clause 25 : Children

To enshrine a socio-economic right to "basic nutrition and basic health services" in a chapter on fundamental rights, will similarly involve the courts in a role to which they are ill-suited. While such a provision may be desirable, especially in the cause of the country's children, the judicial arm of government is not the most appropriate agency for enforcement of rights of this nature. On the contrary, a childrens' commission or other regulatory agency in the social welfare domain, should rather be statutorily founded to serve the purpose sought to be achieved by clause 25.

Clause 28 : Limitations

We have already made observations at the outset of these submissions, on the requirement in clause 28(1)(a)(ii) that limitations be "justifiable in a free, open and democratic society based on the principle of equality". We concur with the Technical Committee that the concept of liberty is contained in the word "free". The principle of equality is similarly captured in the formulation "free, open and democratic society" as a necessary and fundamental feature of any such society. The Canadian supreme court has adopted this position on reasoning which appears to be persuasive.

Thus, however, if "a free, open and democratic society", captures the concepts of liberty and equality, there is no need to repeat that such a society is "based on the principle of equality." If, however, an express restatement of this notion is desired, we submit that "the principle of liberty" should also be expressly stated, so that the formulation reads "based on the principles of equality and liberty."

We have given some thought to the force of the word "justifiable". It suggests a somewhat abstract enquiry, and we are concerned that abstract conceptions of what may be justifiable in a free, open and democratic

society, may differ radically and may therefore create undue risk of distortion. The core features of such a society may be contested at an abstract level, with radical consequences for the scope of the limitation clause. We think that such abstract or ideal constructions of a free, open and democratic society ought to be checked against some more empirical view of actual societies that are widely taken to be free, open and democratic. The formulation in the Canadian charter requires that any limitation be "demonstrably justified in a free, open and democratic society" (our emphasis). This wording captures both the ideal and empirical aspects of determining what is justifiable.

We suggest the following formulation : "demonstrably justified in a free, equal, open and democratic society."

It is not clear whether clause 28 applies to clause 29. This matter is of the first importance and the drafters should make their intentions on this point clear.

Clause 29 : Suspension

This clause addresses two issues : **when** may the state suspend entrenched rights; and **to what extent**?