

To: MPNP ADMINISTRATION

FAX (011) :

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From: DEMOCRATIC PARTY

19 PAGES

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PRELIMINARY DEMOCRATIC PARTY RESPONSE TO TECHNICAL COMMITTEE
ON FUNDAMENTAL RIGHTS DURING THE TRANSITION:
FOURTH PROGRESS REPORT DATED 3 JUNE 1993

Hereunder follows the preliminary Democratic Party response to your fourth progress report.

1. In general we welcome the formulation of rights and freedoms contained in the document. We also agree with the removal of the previously stated criteria (in the third report) of rights being phased in at various stages. We are strongly of the view that a Bill of Fundamental Rights should be introduced as soon as possible, and that while its content may be altered through amendment, and indeed the Bill itself should be ratified through popular expression (eg through affirmation in the Constituent Assembly or a referendum) it is neither practicable nor desirable for the Bill of Rights to delineate certain rights as operating at a certain stage to the exclusion of other, properly so-called, fundamental rights and freedoms. ✓

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2. We believe, however, that although your report does not deal with the means and mechanisms for the entrenchment of rights and freedoms during the transition due to the lack of response by interested parties, it is critically important that the legislative instrument agreed upon not only guarantees the rights enshrined in it, but creates a positive obligation on all organs of state and government, and on all persons in the country, where applicable, to uphold and respect such rights.
3. The Democratic Party also believes, subject to the comments which follow hereunder, that all the rights stated in your document should be contained in the Bill of Rights for the transition. This would then include those rights in paragraph 2 and those contained in paragraphs 3 (subject to the comment hereunder), plus certain other rights omitted in your draft which we believe imperative to create a minimum core of rights to defend individual liberty in the transition.
4. RESPONSE TO RIGHTS FORMULATED IN PARAGRAPH 2
- 4.1 AD ARTICLE 2.1: FREEDOM OF EXPRESSION

This article is similar, in substance, to article 6.1

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in the DP Bill. We agree with your submission that an obligation on the State to ensure diversity of expression and opinion will properly be dealt with by the Technical Committee on the Independent Media Commission etc. However, should they fail to deal with this issue then we strongly believe that article 4.2, as formulated in the DP Bill, should be included in article 2.1.

4.2 AD ARTICLE 2.2: ASSEMBLY ETC

We agree with the formulation.

4.3 AD ARTICLE 2.3: FREEDOM OF ASSOCIATION

We believe that the Freedom of Association Clause should be made subject to your article 2.11 ("Right to Equality"). In other words it should be amended to read : "Subject to article 2.11, every person should have the right to freedom of association."

We believe that a Freedom of Association clause competing for equal recognition with the Equality clause, could lead to a jurisprudential nightmare. It is preferable, that equality be advanced as the

significant right which, in the limited case of association, should prevail where there is a dispute. Should this not be the case then all types of privatised apartheid will be possible to the detriment of the public good. We believe that while a zone of privacy and personal autonomy should be invoked, in terms of article 2.3 of the DP Bill, that some limitation should exist on a Freedom of Association clause of the type proposed. We do not believe that this should in any way compel people to associate with others, but equally it would not allow the formation of racist shelters behind which individuals could seek refuge.

4.4 AD ARTICLES 2.4 AND 2.5: POLITICAL RIGHTS AND FRANCHISE

We agree with the formulation.

4.5 AD ARTICLE 2.6: ACCESS TO INFORMATION

While we agree with the content of this article, we believe that a concerted effort should be made to engage the populace in government decision making. We would therefore commend to your attention articles 15.1 and 15.2 of the DP Bill

In addition we believe that article 2.6 will be improved with the words "due expedition" the omission of which could lead to unconscionable delays in the granting of such rights of information.

4.6 AD ARTICLE 2.7: ADMINISTRATIVE DECISIONS

We respectfully refer your attention to article 14.1 of the DP Bill. We believe our formulation will prevent the entrenchment of the currently archaic system of classification of administration justice in South Africa. We are not entirely confident that the formulation you have devised in article 2.7 will address the same need. We believe that the concepts of unreasonableness and irrationality need to be specifically enshrined in a right to challenge administrative decisions, otherwise the courts might fall back of unfortunate and anachronistic precedents - such as the Chetty case of 1972. We believe that a Bill of Rights should, of necessity, entail a much wider grounds of review than those which currently exist in South African law.

4.7 AD ARTICLE 2.8: HUMAN DIGNITY

We agree with the formulation.

4.8 AD ARTICLE 2.9: RELIGION AND BELIEF

We assume that the formulation in article 2.9 is similar, in essential aspects, to article 6.J of the DP Bill.

4.9 AD ARTICLE 2.10: PERSONAL LIBERTY

We are in agreement with this formulation.

4.10 AD ARTICLE 2.11: RIGHT TO EQUALITY

We believe the formulation in article 2.11 is highly problematic. We believe there are grounds of discrimination which are rational and justifiable and perfectly sensible for the functioning of a democratic society. This will be as valid in the transition as in the period thereafter. In this regard we would refer you to article 2 of the DP Bill and, specifically, to pages 9 - 11 of the document which

contains a detailed explanatory memorandum setting out the difference between justified and unjustified differentiation. It is possible that the limitation clause (in your article 4.1) will cater for such a situation. However this might be very problematic and unwieldy.

We also believe that while a Bill of Rights should not provide for mandatory affirmative action, it should make such programmes permissive, even in transition. Since the Bill of Rights for the interim period could last for a significant period of time it will be most unfortunate if positive programmes to ameliorate the effects of systemic and systematic discrimination are not given constitutional protection.

4.11 AD ARTICLE 2.12: TORTURE AND CRUEL PUNISHMENT

We agree with the formulation.

4.12 AD ARTICLE 2.13: FREEDOM OF MOVEMENT

We agree with the formulation.

4.13 AD ARTICLE 2.14: ACCESS TO COURT

While we agree with this formulation we think it is largely unnecessary to state same in a Bill of Rights, particularly if you provide a "Guarantee of Rights" clause at the commencement of the Bill.

4.14 AD ARTICLE 2.15: INDUSTRIAL RELATIONS

While we have no objection whatsoever to the provisions of this particular article relating to Industrial Relations, we are not entirely certain whether its proper place is in a Bill of Rights, or preferably in Labour Relations legislation. However, in order to meet the legitimate anxiety of certain persons and classes that the omission of same could lead to diminution of such rights, we have no objection to its inclusion.

4.15 AD ARTICLE 2.16: DEPARTURE FROM AND RETURN TO SOUTH AFRICA

We believe this could be more rationally and elegantly dealt with under the rubric of "Citizenship Rights". We also believe that article 2.19 (relating to

citizenship) should be properly included together with 2.16.

4.16 AD ARTICLE 2.17: DETAINED, ARRESTED AND ACCUSED PERSONS

We do not agree with the distinction between detention and arrest. We strongly believe that detention without trial should be abolished forthwith, or at the latest by the commencement of the transition. Our specific comments on your draft formulation are:

2.17.1 DETAINED PERSONS

Articles 2.17.1 (a - c) is consistent with the wording of article 5.2 of the DP Bill and article 2.(d) represents an improvement and we therefore welcome its inclusion in your proposals. However we do not believe that detention without trial outside a State of Emergency should operate for more than 48 hours regardless of the circumstances. In this regard the phrase in article 5.2.3 of the DP Bill, "within a reasonable time" although ~~is~~ ^{having} international application should probably be reformulated to make the 48 hours provision mandatory and explicit. We

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believe that article 7 17.1 needs to be similarly reformulated.

2.17.2 ARRESTED PERSONS

We believe that the insertion of the word "ordinary" needs to appear before the phrase "court of law". The omission of this could lead to the constitution of all sorts of special tribunals and in-camera proceedings.

2.17.3 FAIR TRIAL

Subject to the remarks addressed in respect of article 2.17.2 we are in agreement with the provisions of this article.

4.17 AD ARTICLE 2.18: PRIVACY

We agree with this article but are uncertain as to whether the elaboration of it in the detail provided for in your article is required. Presumably the courts would interpret the Right to Privacy in exactly the same manner as the article provides.

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4.18 AD ARTICLE 2.19: CITIZENSHIP

We are in agreement ^{with} ~~of~~ this article save and accept for the remarks stated under article 2.16.

4.19 AD ARTICLE 2.20: ENVIRONMENT

We are in agreement with this article, except we question whether an environmental right should not appear with a general entitlements clause in line with the proposals contained in the DP Bill (article 11). Since this is not addressed at all in your document we are uncertain as to why the environment has been specifically included to the exclusion of rights to shelter, basic health care and education.

4.20 AD ARTICLE 2.21: EVICTION

We are uncertain as to the meaning of the phrase "lawful home". Provided that this will in no way interfere with the owner or landlord's right to repossession of a home pursuant to a court order following on proving ~~in~~ unlawful occupation or ~~in~~ a breach of agreement of lease or other contract which governs the relationship between the parties, then

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this formulation can be supported. We believe that an explanatory note in this regard is essential.

4.21 AD ARTICLE 2.22: CHILDREN

We do not understand why children have been especially differentiated in respect of basic health services whereas the rest of the population has been excluded. We believe that this provision should be made generally applicable to the population and that the neglect and abuse elements of the formulation of your article would best appear in specific legislation relating to children.

5. RESPONSE TO RIGHTS FORMULATED UNDER PARAGRAPH 3

5.1 AD ARTICLE 3.1: SERVITUDE AND FORCED LABOUR

We agree with this formulation.

5.2 AD ARTICLE 3.2: THE RIGHT TO LIFE

We agree with the formulation contained in article 3.1 but we do not agree with article 3 (2). The courts

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must be given a discretion to interpret the Bill of Rights at the earliest possible opportunity. If the court is of the view that the Right to Life clause prohibits the imposition of capital punishment (or indeed abortion) then the courts must be empowered to so decree. We do not believe that certain items of legislation are sacrosanct while others are not.

5.3 AD ARTICLE 3.3: LANGUAGE AND CULTURE

We agree with this formulation. It is similar in all essential respects to article 13 of the DP Bill.

5.4 AD ARTICLE 3.4: RESIDENCE

We agree with this formulation.

5.5 AD ARTICLE 3.5: ECONOMIC ACTIVITY

We agree with this formulation but are uncertain as to the necessity of its inclusion in a Bill of Rights.

5.6 AD ARTICLE 3.6: INDUSTRIAL ACTION

The remarks contained in respect of article 3.5 refer here aswell.

5.7 AD ARTICLE 3.7: PROPERTY

We believe that article 9 of the DP Bill deals with the property question in a more equitable basis. In the first instance there should be no restriction on ownership and the acquisition of property in any part of South Africa, and any Bill of Rights should so declare. This substantially addresses the history of Group Areas removals. Secondly we believe the concept of property must explicitly include movable property and must also cater for co-ownership, partnerships and other co-operative arrangements.

We believe it is vital that the words "proper payment" appear before the word "compensation" in the penultimate line of the clause. The failure to so state, could lead to the imposition of all types of deferred payment mechanisms which would rob the property owner of his or her entitlement under this clause. We believe that the ordinary courts of law must be used as a process of adjudication. While the

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omission of the word "ordinary" from your formulation might not be critical, we believe that the continuing uncertainty over property rights in South Africa require the clearest possible formulation.

5.8 AD ARTICLE 3.8: EDUCATION

While we have no objection, per se, to this formulation we believe that the right to education should more properly be contained in a general entitlements clause and that the question of mother tongue education is catered for under the language provision.

6. RESPONSE TO RIGHTS FORMULATED UNDER PARAGRAPH 4.

4.1 AD ARTICLE 4.1: DEMOCRATIC SOCIETY

We are in general agreement herewith but would prefer the adjective "demonstrably" to govern the provisions of article 4.1(a) relating to the requirements of a free, open and democratic society. We believe this will provide even stronger protection against the

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encroachment of fundamental rights contained in the Bill of Rights.

We further believe that article 18.3 of the DP Bill should be included since this will further subject the limitation, to South Africa's obligation under international law, particularly its obligations consequent to its signature on various internationally accepted conventions relating to human rights.

We further believe that the illimitability of certain rights, contained in paragraph 18.4 of the DP Bill, could serve as a useful guide in the delimitation of the list of non derogable rights.

6.2 AD ARTICLE 4.2: SUSPENSION CLAUSE

We agree with the general thrust of the provisions under this article save and except for the following:-

- 4.2.(a) We do not believe that a "riot" should constitute a sufficient ground for a declaration of a State of Emergency. This should be removed from the draft.

4.2.(c) We would suggest the review period of the Supreme Court be mandatory within seven days of the detention.

We further believe that article 19.3.7 of the DP Bill must be included to safeguard against the detention provisions being abused. In other words, no detention be allowed for longer than 14 days and that there will be no subsequent detention for substantially the same reason as the first period of detention.

7. RESPONSE TO RIGHTS FORMULATED UNDER PARAGRAPH 5

7.1 AD ARTICLE 5: CONCLUSIONS AND RECOMMENDATIONS

We believe that the Bill of Rights should be subject to the strictest possible entrenchment. We believe "super majorities" are required for its protection. We therefore believe that a minimum of two-thirds majority in the national legislature be required for its amendment provided that other legislatures (such as regional governments) also agree by a similar margin (or at least two-thirds of them so do).

Failing the installation of such regional government formations, and for the purposes of the interim phase,

the required majority should be levelled up to, say, 75% for any amendment. Furthermore the requirement should be strengthened by the provision that it be ^{APPROVED BY} 75% of the total number of members of parliament for the time being.

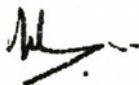
7.2 AD ARTICLE 5.1:

Our remarks at the commencement of this response (paragraphs 1, 2, 3) are applicable to the third report of the Working Committee.

8. We further believe that the Supreme Court of South Africa, in all its provincial and local divisions, should be the courts of competent jurisdiction of the first instance, for the enforcement of the Bill of Rights. Appeals will then lie to the Appellate Division. However, our preliminary view is that the A.D. be sub-divided with the creation of a "Constitutional Appeal Chamber", with Appellate jurisdiction only.

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We believe that special constitutional mechanisms for the appointment of competent judges to the latter chamber will have to be formulated.



A J LEON MP (ON BEHALF OF THE DEMOCRATIC PARTY): 8 JUNE 1993

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