

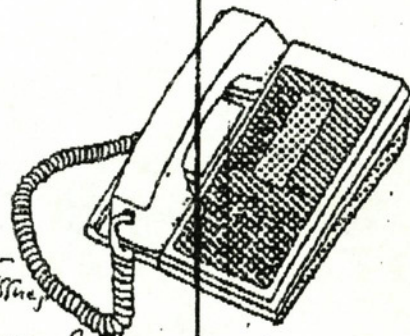
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**Attention:** *Technical Committee on Constitutional Issues*  
**From:** *Lobbying Commission, Independent Forum for Electoral Education*



FOR: AD HOC WORKING GROUP ON FUNDAMENTAL RIGHTS during the transition  
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# independent forum for electoral education

MEMORANDUM TO THE TECHNICAL COMMITTEE/ADHOC WORKING GROUP  
ON FUNDAMENTAL RIGHTS DURING THE TRANSITION.

FROM THE LOBBYING COMMISSION OF THE INDEPENDENT FORUM FOR  
ELECTORAL EDUCATION

RE: FUNDAMENTAL RIGHTS DURING THE TRANSITION.

1. We are exceedingly alarmed at the Chapter on Fundamental Rights set out in the Combined Reports of the Technical Committee on Constitutional Issues dated 20th August 1993.

We urge that this chapter be scrapped in its entirety and that a much clearer and more basic Bill of Rights be drafted for the transitional period.

We do not believe that the present draft would be either justiciable or explainable to ordinary people.

Basic human rights for all South Africans have been violated consistently for many decades and the violations have been cloaked in the guise of laws passed by a minority regime. If we are to have any hope of building a human rights culture in South Africa our first Bill of Fundamental Rights must be absolutely clear, easily understood and readily enforceable.

2. We suggest that this first Bill of Rights should deal only with the "first generation" rights and that the so-called "second" and "third" generation rights need to be worked through by an elected constitution-making body and not rushed through unrepresentative structures. It may take many years before we can achieve a properly debated and widely accepted Bill of Rights dealing with all the desirable Rights.

2.1. The present draft reflects the difficulties inherent in trying to reconcile conflicting rights. In this complex society there are many such conflicts; for example a prohibition on discrimination on grounds of gender versus the right to religious freedom, or the protection of customary law and practice.

2.2. The draft also reflects the impossibility of putting political policies into a Bill of Rights - which is not the

proper place for them. It is a recipe for disaster to try to prevent a future elected government from effecting the policies on which it has won an election. This just means a total disrespect and disregard for a Constitution.

2.3. Of course, all of us want to breath clean air and to ensure that all children should have basic nutrition and health services, basic education and that all persons should have "equal" access to educational institutions - whatever that means.

But it is dangerous to create a right which cannot be justiciably enforced because the money to provide it will not be available.

Declarations of intent to provide these basic socio-economic rights belong in the manifestos of political parties which will be called to account by the electorate when they fail to fulfill their promises.

2.4. The right to freedom of association will conflict with a prohibition on discrimination.

It is agreed that the State and its various organs must be prohibited from discriminating between persons on the grounds set out in 8.(2) but where does the public domain end?

Freedom of association has to mean that in the private domain it is possible for some persons to set up an exclusive private club or association. This is a discussion that has not yet taken place in the general society in South Africa.

Academic conferences have been held but these have not been accessible to most people and the conclusions have not been widely published.

2.5. Property rights are another inadequately debated subject. Existing laws in South Africa protect private property efficiently - for those who have the money and the influence and the knowledge to protect their property. The poor have been dispossessed of their land, in particular since 1952, by the policies and laws of the National Party Government but prior to that by the 1913 and 1936 Land Acts.

The Property Clause in the draft Chapter means nothing.

29(1) reflects the existing position since freehold rights were allowed to black persons in recent years;

29(2) also restates the existing position;

29(3) is rendered completely useless in protecting the rights of the dispossessed by the phrase "where such

restoration or compensation is feasible."

Any clause purporting to protect property should be omitted at this stage. It is too controversial to become part of a Bill of Rights which will not be respected by the citizens unless it contains only agreed principles - by the people, not the politicians.

3. For the above reasons we believe that this first Bill of Rights for South Africa should be designed to control actions of the State and the legislatures at all levels but should leave the more complicated debates for the future and an evolutionary process of discussion and acceptance. That is the way in which rights have been established in the older democracies.

We are aware that it is not fashionable or up-to-date to frame Bills of Rights in the negative but we believe that this is necessary for us in the light of our history and experience of the way in which the South African Government has violated human rights in recent decades by passing laws which have not been capable of correction by the Courts.

3.1. We therefore urge that this Bill of Fundamental Rights for the transitional period should begin with a prohibition:

The legislatures at National, Regional or Local levels of Government shall make no Law or Regulation which denies or limits the following rights in any way which negates the essential content:

of liberty and equality;

of security of person, privacy, religion and belief, speech and expression, and association, peaceably to assemble and to petition;

to move freely within the borders of South Africa including between SPRs;

to engage in political activity (clause 21 needs to add a provision for elections to be held at intervals of not less than five years;)

(as stated in our previous submissions to the Technical Committees on Constitutional Issues and on the Electoral Act the definition of South African citizens must include citizens of the TBVC states even if they are presently resident in one of those States. To do less is to deny to them a basic Right of which they were deprived together with their citizenship when their respective States decided to take independence.)

3.2. The prohibitions should include a blanket prohibition on detention without trial except in the case of

declaration of a State of Emergency. We reluctantly agree with the necessity of including a clause which places limitations on the powers of the State in declaring a State of Emergency but the proposals in clause 35 need to include the rights of access to detainees by family and also to stipulate in what circumstances a person may be detained. e.g. if the purpose is a "cooling off" period or preventative detention there must be no allowance of detention from a person's home or private place. There needs to be a compulsion on the security forces to justify the reasons for the detention in terms of immediate threat in public places. Everything else such as accusations of conspiracy to overthrow the government must be dealt with in terms of criminal law.

3.3. Existing laws should be capable of challenge in the proposed Constitutional Court if they violate the above rights. e.g. declaration of Unrest Areas in terms of the Internal Security Act, and other laws which may escape the immediate attention of the committee on the removal of discriminatory legislation.

All existing legislation should become subject to the Interim Bill of Fundamental Rights.

3.4. There needs to be a prohibition on the use of excessive force by members of the security forces in combatting crime.

It has been suggested that the inclusion of a "right to life" can be used to prevent the shooting of people who are "escaping arrest."

A right to life is still very controversial because the national debates about capital punishment and abortion are as yet unresolved.

We believe that the laws relating to self defence and the circumstances in which police officers may shoot to kill need to be urgently revised to prohibit the present killing of persons who may or may not be suspects in serious criminal investigations but we do not see that a right to life clause will necessarily accomplish this.

4. There also needs to be included rights to freedom of information and to the review of administrative decisions by the Courts.

4.1. Clause 23. is a nonsense. Who is to decide what information is "necessary for the protection or exercise of his or her rights?"

This also needs to be phrased in the negative in our present circumstances: "No administrative body of the State at National, SPR, or local levels may withhold information

....." It probably needs a saving clause to protect information relating to national security but such a limitation must also be subject to the scrutiny of the Constitutional Court.

4.2. The Bill of Rights must provide for the review of administrative decisions on the grounds of "reasonableness." This is one of the areas in which the greatest deprivation of basic rights has occurred in the past and the present proposals for Regulations in terms of the Social Assistance Act are just one illustration of the way in which an uncontrolled bureaucracy can violate human rights and will continue to do so if unchecked.

The proposed Clause 24 is not at all helpful in this regard.

5. We have not attempted to provide a new draft of a Bill of Fundamental Rights. The Technical Committee and the ad hoc working group have a whole body of documents relating to human rights available to them.

We just want to urge more careful thought of what is being proposed and to insist that no Bill of Rights will be respected unless it has been thoroughly debated, with all its difficult ramifications, by the citizens.

Cecille van Riet  
Convener, IFEE Lobbying Commission