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THE ANC'S SUBMISSIONS TO THE 4TH AND THE 5TH REPORTS OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITIONAL PERIOD - 28 June, 1993

1. The ANC is most concerned that what should have been a simple exercise of selecting the rights necessary to ensure a successful transition and limiting them to that process, the committee has put forward an extensive charter of rights. Given the urgency of finding a political settlement and in the event that there is now no time to require the committee to go back to first principles, the ANC makes these submissions. The ANC'S principal concern is that the combination of the general wording, the formulation of certain of the provisions, the counter-balancing of rights, the use of judicial discretion and the application of the limitations clause in the draft chapter will lead to what Professor Tribe has described as a "deluge of constitutional litigation". Although we envisage that the constitutional court will develop its own jurisprudence rather than simply follow North American precedent, the North American experience nevertheless shows just how controversial and litigation-prone the draft text might be. Although it is not conceded that the conservative, pro-property interpretations of the US and the Canadian courts are either appropriate or necessary, the problem is that all government action, even on issues not directly concerned with basic liberties, could be held up while consttitutional challenges are being fought out in the constitutional court. Before dealing with the provisions individually, the following general concerns and solutions are set out for the committee's attention.

2. **GENERAL CONCERN (1) - STATE ACTION ONLY**

1 A fundamental principle underlying the inclusion of rights in a constitution is to limit the government from passing laws or using its executive powers in conflict with those rights. That is the principle on which the US Bill of Rights and the Canadian charter is based. It is also the recommendation of the SA Law Commission and included in the Government's own draft Bill of Rights.

2 The ANC does not accept that this is the only function of a Bill of Rights, but given the lack of full consultation and the uncertainty as to the legal implications that a more expansive role might have on existing law, the ANC believes that the rights for the transition ought to apply to state action only.

3 As an example of the kind of uncertainty that a wider conception might have, consider the following scenario. If the freedom of economic activity (Clause 23) or the right to pursue a livelihood anywhere (Clause 14) are self enforcing (ie not simply giving the

individual the right as against the government not to pass laws or exercise executive power that in an undue way limit a person's right to pursue a livelihood, but also the ability to enforce that right as against other individuals directly), then what will the effect be on restraint of trade covenants? Is it the intention of the committee that that balance, presently monitored by the courts under common law, between the need to train employees and the need to protect the knowledge acquired during training is to be outlawed altogether? Does that mean in every case concerning a challenge to a restraint of trade covenant that the plaintiff can claim an abridgement of a constitutional right? Will the defendant have to prove in each case that the restriction is "necessary", "reasonable" and consonant with a society based on the values of freedom, openness and democracy? Consider the implication of Clause 1 (2)? Does this mean that every clause in every contract that limits the right to economic activity of one of the contracting parties is capable of being subjected to constitutional litigation on the grounds that that contracting party will seek to demonstrate that the limitations imposed by the contract go beyond the limitations permitted by Clause 30?

4 To make matters worse, the draft does not specify which rights are self enforcing and which are not. It leaves that decision to the courts - that appears to be the effect of clause 1(1)(b) which makes the rights binding on individuals and social institutions "where appropriate . The fundamental distinction between constraining government (the inherent function of a Bill of Rights) and conferring rights (normally the role of statute) must be clearly distinguished. To the extent that it is necessary politically that certain rights (which could more properly be dealt with in a statute) have to be included in a Bill of Fundamental Rights and Freedoms, then those rights and freedoms must be explicitly identified. It should not be left to the courts to decide. This will result in opening the floodgates of constitutional litigation in which every litigant will argue that the fact of his or her case is appropriate.

5 One of the foremost constitutional lawyers in the world Professor Lawrence Tribe warned of the failure to distinguish between these two conceptions in response to the 4th report (and nothing substantial has changed in this regard in the 5th report). A copy of the letter is attached marked "A".

6 The clauses that will have to be amended in clause 1 to give effect to the above principle are :

6.1 Clause 1(1)(a) - the phrase "judicial branches should be deleted. If the rights in the chapter are to have vertical effect only, then binding the judicial branches of government will conflict with this. All courts apply the law. The effect of the clause is to do something more. It requires the courts to apply the rights whenever they adjudicate and that will include determining the constitutional validity of rules, contracts etc. other than state action.

6.2 Clause 1(1)(b) - the clause should be deleted. Its effect is to leave it to the discretion of the courts to decide when a right has "horizontal effect.

6.3 Clause 1(2) - this clause should be deleted. The effect of the clause is to amend the common law. It would be an important clause if the rights were to have horizontal effect, but if the rights are to have vertical effect only, then the common law (and custom) ought not be affected. The amendment of the common law and actions and agreements therunder must wait for future legislation in compliance with the rights contained in the chapter.

3. GENERAL CONCERN (2) - HUMAN RIGHTS ONLY

1 It is not clear from the document that it applies to human beings only. Sometimes the draft refers to persons, on others to natural persons. It is also uncertain what the legal implications might be.

2 Take the right to dignity. Are corporations to be the beneficiaries of this right? If so, this will probably give corporations the right to defamation. Is this something that we want, given that the courts have up to date been reluctant to grant such a cause of action? Have all the policy implications been thought through? In respect of every one of the rights?

3 Take another example. In Canada, Big M Drug Mart successfully challenged the restrictions on Sunday trading hours on the grounds that those restrictions offended the right to its freedom of religion. The implications of allowing corporations to use rights as a means to extend their commercial interests ought to be very thoroughly reviewed particularly the effects that this might have on the rights

to culture, language, religion etc.

4 To the extent that all persons natural or artificial are to be protected, the right can be phrased negatively. Take the right not to be expropriated without compensation in clause 25(2) as an example. There the duty is specifically placed on the state and the beneficiaries of the right will be the holders of property whatever their nature.

5 The ANC accordingly submits that for the transition the rights should be limited to natural persons only. Where the right ought to protect corporate interests, then the clause be specifically phrased to avoid some of the difficulties raised above. To leave it to the courts to decide by reference to the nature of the rights will invite litigation and may give rise to unintended consequences. It would be better to err on the side of caution. Unless absolutely necessary, the rights ought to apply strictly to natural persons only. The committee ought to look at each right and consider where the rights of juristic persons require the protection and to specify them and motivate why so that the political parties can properly assess the implications of the extension of those rights.

4. GENERAL CONCERN (3) - INTERPRETATION

1 It is not the intention of the draft rights to prevent the transitional legislature from passing laws, within the framework of rights, for the purpose of socio economic reconstruction. That is clearly one of the criteria that the committee has itself put forward in its 3rd report in Para 4.2.

2 Because there is no record of considered debate over each and every clause and the implications for existing law and the relative powers between the constitutional court and the government, the draft rights will deny the court the kind of interpretational recourses that other constitutional courts have had. Given the uncertainty as to the legal implications of many of the provisions in the draft and exactly how the limitations clause is going to be interpreted, it is essential to provide some guidance to the constitutional court as to the drafters' intentions. Most constitutional courts have recourse to the record of the debates as a guide. Given that there is no record, the criteria identified by the committee ought to be included. It may be most usefully done by employing the US Supreme Court's distinction between laws and executive actions that are strictly scrutinised and state actions

that are treated more deferentially. Any state actions that might affect the elections or the constitution making process must be zealously examined and that laws and executive actions affecting programmes of socio-economic reconstruction be treated with more circumspection. In other words there should be a presumption of constitutional validity in respect of the latter. The following wording is suggested as a basis:"In interpreting the provisions of this chapter, the constitutional panel shall strictly scrutinize any laws or executive actions that may affect free and fair elections or the inegrity of the constitution making process. All other legislation or exective action shall be presumed to be constitutionally valid until the contrary is established .

3 There is a tension between equality and liberty in any Bill of Rights. The formulation by the committee favours liberty. This has to be remedied. Accordingly the values that underlie the Bill should not be limited to 'free, open and democratic' but also include a reference to equality and clause 1(1)(a) must be so amended.

4 The purpose of the rights in protecting the transitional process should be included as an interpretive guide. This may also be a way of tempering judicial activism outside the narrow framework of the transition.

5 The rights should also be subjected to an interpretation that is consistent with South Africa's international law obligations.

5. CLAUSE 1 - ENFORCEMENT

1 The clause will have to be amended in order to accomodate the concerns and proposals referred to above

2 It is not clear whether clause 1(6) seeks to permit the amendment of the Bill during the transition or whether it is an endeavour to limit the terms of reference of the constitution making body in its drafting of the permanent Bill of Rights. The ANC assumes that the committee intended the former. The substitution of "rights and freedoms contained with the word "provisions may achieve this result. It is essential for the Act to have a provision to the effect that it will lapse as a whole once a new constitution is adopted.

CLAUSE 2 - EQUALITY

1 Many of the rights and the manner in which they have been expressed will not only severely limit the transition government in redressing the imbalances of apartheid if the transition period extends beyond present expectations (and one should not forget that it is in the interests of some of the parties to do just that) it will also give the courts the wide powers to shape policy. Take the application of the right to equality provision to education as an example. It commands equal benefit under the law. This will allow an individual to go to court to compel the transition government to provide the same benefits for all without regard to the limits on resources or the governments choice of priorities. Clearly public education should provide the same facilities for everyone, but with short resources the priorities might well be to put all the available money into the training of teachers and leave the building of swimming pools for later. The point is not the commitment to equal benefits but who decides the priorities - the courts or a democratically elected legislature.

2 We are concerned over the formulation in clause 2(2). Unlike the wording in 2(1) which is limited to equality under the law, this clause applies generally to all forms of discrimination. All law differentiates. When does differentiation constitute discrimination? This is the question that the provision does not answer. It is not sufficient to say that the term "discrimination includes a pejorative meaning. In Canada compulsory retirement in a state run pension scheme, which was not only actuarially based but also the product of collective bargaining and therefor agreed to by a majority, was challenged by a law professor and held to be discrimination against old people. A maternity benefit for single mothers was considered to be discriminatory as against men and married mothers. In 600 claims brought under the Canadian Charter, only 44 involved sexual equality. More alarmingly, only 7 of these were initiated by or on behalf of women. The other 37 decisions were based on claims made by men. Instead of being about the equality concerns of the disadvantaged groups, the equality provision has concerned itself with issues such as drunken driving and the manufacture of cooldrink cans.

3 To demonstrate both the potential difficulties of an equality clause that extends to discrimination "on any grounds whatsoever" and regarding corporations as persons, a manufacturer of cooldrink cans argued that a set of environmental regulations outlawing non-

refillable beverage cans was discriminatory on the grounds that certain regulations were made applicable to the manufacture of aluminium cooldrink cans which were not made applicable to other manufacturers of cooldrink cans. The challenge was ultimately unsuccessful but the Canadian wording is more restrictive than the wording in Clause 2 (2).

4 Far from being a charter for the poor, the underprivileged and the historically disadvantaged, an equality clause can, if not phrased carefully, be used by advantaged groups to extend their advantages as both the US and the Canadian experiences demonstrate. For the interim at least, the equality provision should at least identify the disadvantaged groups to be protected in the provision by listing them.

5 The ANC is absolutely opposed to the privatization of apartheid and shares the sentiments of the committee that this evil must be eradicated. The only difference is, given the uncertainties of the effect of making this and other rights self enforcing, the ANC believes that, a this stage, legislation would be the safer and the more effective manner in which to achieve these aims. Accordingly, the provisions should be drafted with an eye to permitting a civil rights statute prohibiting discrimination and redressing the effects of past discrimination rather than conferring such a right directly.

6 Accordingly the ANC proposes that clause 2(2) is amended by qualfying the term "discrimination to indicate to the courts that the object of the right is to prohibit "arbitrary or "unfair discrimination. The concern is that a law may well favour one group of persons over another such as citizens over foreigners for sound economic reasons. That is not simply differentiation. That is favouring one group over another and that might constitute discrimination.

7 Clause 2(3) is also a matter for concern. The clause is necessary to permit the transitional government to pass laws and act administratively to correct historical imbalances. The concern is that the provision is limited to the protection and advancement of disadvantaged persons in respect of fundamental rights and freedoms (i.e. those contained in the Chapter) only. Since the Chapter does not include the right to housing, health, socio-economic rights, etc., it is essential that the clause not be limited in this fashion. The ANC accordingly suggests that the provision

read: "This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination .

7. CLAUSE 3 : LIFE

1 This clause is probably one of the most controversial provisions in the draft chapter. This is not only because of its effect on the social questions of capital punishment and abortion, but also because of the emerging international jurisprudence on the right to an adequate life. It accordingly does not meet the criteria identified by the committee for the inclusion of rights in the transition. It requires a thorough debate before the constitution making body.

2 The difficulty with the committee's suggested compromise is that while it places a moratorium on the implementation of capital sentences, the abortion issue remains regulated by legislation that denies freedom of choice and the manner in which the right is formulated will probably lead to the invalidity of legislation enacted by a majority legislature permitting that choice. In the event that the negotiaiong council insists that this right be included, the committee should consider qualifying the right in such a way that any future law regulating abortion is not unconstitutional.

8. CLAUSE 4 : DIGNITY

This clause must be limited to natural persons only. If the committee accepts that all the rights in the chapter should be restricted to natural persons only then the concern over the wording will fall away.

9. CLAUSE 5 : PERSONAL LIBERTY

This clause is so wide as to be meaningless, if considered on its own. Together with the other individual liberty clauses in the chapter, the freedoms of association, speech, movement, residence, privacy, belief, political choice, property and economic activity, the chapter weighs heavily in favour of liberty and, if other bills of rights are anything to go by, the courts will construe any abridgment strictly unless there are countervailing values emphasized in the chapter. Because of the transitional nature and that many of the social values whether cast in the form of rights or not are missing from the chapter, it is essential to give priority to the equality clause and limit the effect of the liberty clause by qualifying it with procedural and substantive reason requirements.

CLAUSE 6 : SECURITY OF PERSON

Clause 6(1) is meaningless. It is catered for under the liberty clause (as amended) and the privacy clause. Clause 6(2) prohibiting torture, however, must remain.

11. CLAUSE 8 : PRIVACY

The right to privacy is a particularly important right given our history of state interference with private communications, but it has to be limited to natural persons only.

12. CLAUSE 9 : RELIGION AND BELIEF

1 The main statement to the effect that "every person shall have the right to freedom of conscience, religion, thought, belief and opinion" is essential for free and fair elections. The proviso, however, is particularly controversial. It pre-empts the constitution making authority deciding whether or not there should be state sponsored religions or whether there should be an anti-establishment clause in the constitution. Employing the criteria identified by the committee in its Third Report, the proviso ought to be eliminated on the grounds of controversy. It certainly has no justification under the first two criteria.

2 As important as this right is for democratic politics, it does have implications for the labour movement and the current systems of collective bargaining. This right together with the right to freedom of association has been used to attack the right of trade unions to use the union dues of members who do not support the political persuasion or the political work of the union[1]. In Canada the courts have not gone that far but they have required the unions to rebate the dues collected from non union members bound by an agency shop. The resolution of this dilemma should not be the province of a transitional set of rights but left to the constitution making body to exhaustively consider and decide. Again this right may either be limited to guaranteeing the transition process as we have suggested in respect of the freedom of association or that the rights of collective bargaining take precedence.

13. CLAUSE 10 : FREEDOM OF EXPRESSION

1 It is essential to qualify the right to freedom of expression. As it presently stands it is so wide that hate speech, pornography and obscenity may all resist statutory prohibition. The limitations

clause may be insufficient to deal with this problem because the government would have to pass a statute to outlaw these forms of expression which would then have to pass the test contained in the limitations clause which stresses only freedom, openness and democracy. It is for that reason that we propose the amendment of the limitation clause to include equality as one of the values with which to judge the reasonableness or otherwise of a limitation on a right.

2 Another difficulty with the wide nature of the provision is that it does not indicate whether there is any obligation placed upon the media to give other points of view a fair exposure. Accordingly given the state's virtual monopoly over television and radio a clause along the following lines should be included: "In respect of the exercise of its control, if any, over any public media, the state shall ensure diversity of expression and opinion." At the very least the committee should ensure that any law proposed by the Technical Committee on the Media is not open to constitutional attack under this chapter.

3 Freedom of expression has also been used in the US to permit employers to openly campaign against the recognition of trade unions. Here anti-union speech is an unfair labour practice. It must be expected that this right will in the long term permit employers to resist trade union recognition. In the transition, the rights established under collective bargaining laws should remain intact until the issue is thoroughly canvassed by the constitution making authority.

14. CLAUSE 11 : ASSEMBLY, DEMONSTRATION AND PETITION

This right, when read with the right to own property, may be interpreted by the courts so as to limit this right to public property only. The right to assembly is the right to hold meetings. Almost 2 million workers (and voters) reside on the premises of their employers. It is essential that any law proposed by the Technical Committee to give political parties the right to hold political meetings on private premises is not open to constitutional attack on the grounds that the law offends the right to property. The ANC is not certain whether the mere existance of the right to assembly is sufficient to balance the right to property and requests the committee to consider this.

15. CLAUSE 12 : FREEDOM OF ASSOCIATION

1 The explanatory note to the 4th report makes it clear that this

right includes the right to dissociate. This may well be justifiable in the political arena. In collective bargaining it spells the end of the closed shop, which is an essential condition for workers in the clothing, retail and building industries to bargain collectively. The agency shop may survive the attack as it has in other jurisdictions, but if the unions enter into alliances with political parties then the whole issue of subscriptions comes under judicial scrutiny. Workers who do not belong to the union and who do not subscribe to the political affiliations of the union will challenge any compulsory deduction made pursuant to an agency shop and will in all probability succeed. Together with the right to freedom of conscience, the US Supreme Court has required unions to separate their accounts in such a way that the dues collected from members that do not agree with the political persuasion of the union are not used for those purposes. In Canada, the Supreme Court has not gone that far - members are bound by the majority decisions, even if they dissent. It has held, however, that the rights of non union members required by the operation of an agency shop are infringed if their dues contribute to the political work of the union even if it is for the advancement of workers, such as lobbying for changes to the labour law. It is worth bearing in mind that the US and Canadian jurisprudence are going to be the first ports of call for a SA court trying out its hand for the first time in this new area of law.

2 The clause also renders the necessarily compulsory elements of the industrial council system vulnerable to constitutional attack. The fact that there is a right to collective bargaining stated elsewhere in the bill does not go far enough to protect a particular form of bargaining, in this case the industrial council system. Take the example of an employer that refuses to belong to the representative employers' association party to an Industrial Council. That employer and an in-house union enter into a recognition agreement in terms of which they agree to bargain at plant level. Relying on that recognition agreement the employer can challenge the extension of the Industrial Council agreement to non-parties by the Minister under Section 48 of the Labour Relations Act as infringing not only its right to freedom of association, but also its right to bargain collectively with a union of its own choice. Faced with such a claim the court will balance the operation of the freedom of association clause and the right to collective bargaining in the labour relations clause. Interpreting the right to collective bargaining in favour of the Industrial Council system will mean the limitation of freedom of association.

Interpreting in favour of the dissident employer will allow the court to read the two rights as not being in conflict with each other. If the two rights are read together then the meaning most consonant with other rights is the right to bargain collectively on a voluntary basis - in other words that employer and its workers cannot be forced to bargain with other employers and other employees in the industry.

3 The ANC is of the view that it is necessary that a clause be inserted to the effect that no labour relations law ought to be open to constitutional attack during the transition.

16. CLAUSE 14 : RESIDENCE

The concern here is the 'right to pursue a livelihood anywhere'. This might restrict the right of governments, local, regional and national to zone areas for residential purposes. In Canada the courts struck down a law that sought to distribute doctors evenly so that citizens in the rural areas had access to doctors. It is not necessary because most of the laws that prevented blacks from working or doing business have been removed from the statute book. If there are any still remaining they will be unconstitutional under the discrimination clause. In the event that the negotiation council insists on this right , the ANC proposes that the right to pursue a livelihood be qulified in the same way as the right to economic activity or included as an aspect of that right.

17. CLAUSE 17 : POLITICAL RIGHTS

1 This clause is essential to free and fair political process. Rights should not, however, be limited to simply forming and joining political parties but also recruiting members and campaigning for support. Accordingly the wording should read: "Every person shall have the right to form and to join a political party and to the freedom to make political choices. This freedom shall include the right of parties to recruit members and to canvass support."

2 One reason for including the right to recruit is the potential limitation that the right to property will have on the exercise on the right to form and join political parties. Millions of voters are resident on farms and mining hostels owned by employers that might prevent political parties from canvassing support. Maybe, given the short time before the elections, the priority of this right over other rights should be stress.

18. **CLAUSE 18 : ACCESS TO COURT**

The right to access to court seems to allow all disputes to go to court. It will be interpreted so as to limit its ambit to disputes of right, but that is no reason not to be clear - it should be limited to disputes of right. It is also of concern that the clause may be used to undo agreements such as the agreements concluded between NUM and Anglo in respect of unfair dismissals. That agreement specifically waives the workers rights to refer their dismissal disputes to court. Accordingly the clause should also make provision for other forms of third party determination of disputes.

19. **CLAUSE 22: EVICTION**

This clause, given our history of forced removals may well call for inclusion on emotional grounds. But will it mean that wealthy land-owners temporarily strapped for cash will be able to default on their bond payments with impunity? What effect will such a clause have on private investment on public housing schemes if investors fear that they may not be able to evict defaulters?

20. **CLAUSE 23 : ECONOMIC ACTIVITY.**

1 There is no basis for the inclusion of this freedom in a transitional Bill. Firstly, it does not affect free and fair political process. Secondly, it pre-empts the interim legislature from making laws concerning economic reconstruction or removing imbalances. Any socio-economic plan for the reconstruction of South Africa will place certain limits on the freedom of individuals to engage in economic activity. All socio-economic legislation such as minimum wages, occupational health and safety, basic conditions of employment, zoning, etc. all might constitute abridgements of this freedom. In any event it is highly controversial as the explanatory note itself makes evident.

2 If the clause is to remain then it must be qualified in such a way as to permit legislation to improve the quality of life, economic growth, human development, social justice, equal opportunity, basic conditions of employment, fair labour practices etc.

21. **CLAUSE 24 : LABOUR RELATIONS.**

1 For so long as the freedoms of association, belief, speech, and particularly if the freedom of economic activity and the right to property are included in the chapter of transitional rights, there must be provisions entrenching worker rights.

2 But even these may not be enough. The right to collective bargaining may not be sufficient. As it has been argued above the mere existence of the right to collective bargaining will not necessarily protect the industrial council system from constitutional attack. There are different ways to secure the existing collective bargaining institutions such as the industrial council system, the closed shop and the agency shop. Accordingly the ANC proposes that a general rider be included to the effect that nothing in the chapter will affect the laws concerning collective bargaining.

22. CLAUSE 21 : DETAINED, ARRESTED AND ACCUSED PERSONS

1 Notwithstanding clause 5, clause 21(1) seems to permit detention without trial for an indefinite period. The clause should be limited only to those who are detained pursuant to an arrest for an alleged commission of an offence. To the extent that there are detentions other than those pursuant to an arrest, those detentions should be dealt under the due process clause that we have suggested to the right to liberty in order allow courts to monitor detentions other than detention for trial.

2 Clause 21(1)(b) ought to specifically include the provision of reading materials, access to media and educational facilities.

3 It is proposed that the wording in clause 21(2)(c) which requires a detained person to be tried within a reasonable time after arrest also include after being charged.

23. CLAUSE 25 : PROPERTY

1 Clause 25(1) is a controversial right. It ought not to be included particularly during the transition. There has been decades long controversy as to whether property rights should be treated as fundamental rights deserving of constitutional protection. In the most recently adopted bills of rights (Canada, New Zealand, Hong Kong) property rights have been excluded after much debate. This debate will no doubt be repeated in South Africa in relation to the negotiation of abiding constitutional principles. To the extent that parties are concerned in the interim over the nationalisation of property, clause 25(2) should be sufficient guarantee.

2 As clause 25(2) presently stands there is no question that the courts will interpret "just and equitable" to mean nothing more or

less than market value. It is essential therefore that the compromise formulation contained on page 13 ought to supplant 25(2). The price actually paid for the property and the rate of financial return ought to be taken into account and in fairness the investment made in it. The bonds on the property and the state's guarantees in respect of those bonds may also be factors that ought to be taken into account. The justification and the cost of the legislative programme of which the exproriation is part also may constitute an important factor. Provision should also be made to allow legislation for the the esablishment of a tribunal, subject to review of the courts.

24 **CLAUSE 27 : CHILDREN**

The right is too narrowly formulated and should provide at least for the right to grow up in an optimal environment and to have first access to relief in disasters.

25 **CLAUSE 29 : EDUCATION**

Although committed to the right to education, the ANC believes that the right, together with the other socio-economic rights, ought to await the deliberations of the constitution making authority. A further and more detailed submission in this regard will be made at a later stage.

26 **CLAUSE 30 : LIMITATION**

3 The inspiration for this limitation clause comes from the Canadian Charter of Rights. It deviates from it in two important aspects: Firstly it requires limitations to be "necessary" and secondly, it separates the requirement of reasonableness from values of a free, open and democratic society. The requirement of necessity is particularly stiff and an uncertain test. In the present formulation it does not qualify anything - necessary for what and for whom? The same can be said for the requirement of reasonableness. Reasonable to whom? There is no comparator. In the Canadian formulation it is what is reasonable and justifiable <u>in</u> a free, open and democratic society. Accordingly it is our view that the necessity requirement should be dropped and the reasonableness requirement ought to qualify free, open and democratic society.

4 Given our history and the obscene inequalities that characterise this society it is important to include "equal" in the phrase "free, open and democratic society".

5 Another guide to the judiciary in assessing a limitation on rights ought to be the State's international law obligations.

24. CLAUSE 31 : SUSPENSION

Clause 31(3)(c) lists sections that may not be suspended. There is no reason why the right to quality, dignity, the right to vote and the right not to be evicted, labour relations, the right to environment, the right to language and culture and the right to education should be subject to suspension. It is worth noting that even the notorious Public Safety Act exempted labour relations from the reach of the State President in a State of Emergency.

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