

**SOUTH AFRICAN GOVERNMENT OFFICE
- WORLD TRADE CENTRE -**

9 June 1993

Head of the Administration
Multi-Party Negotiating Process
World Trade Centre

Dear Dr Eloff

**SUBMISSION BY THE SOUTH AFRICAN GOVERNMENT FOR THE
ATTENTION OF THE TECHNICAL COMMITTEE: FUNDAMENTAL
RIGHTS DURING THE TRANSITION**

1. Attached is a submission by the South African Government entitled ***COMMENTARY ON FUNDAMENTAL RIGHTS AS FORMULATED BY THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS.***
2. Kindly transmit the document for immediate attention to the Technical Committee.

Yours sincerely


GOVERNMENT OFFICE: WORLD TRADE CENTRE

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MINISTERIE
VAN JUSTISIE



MINISTRY
OF JUSTICE

REPUBLIEK VAN SUID-AFRIKA

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Verwysing/Reference 8 June 1993

Dear Mr Van der Merwe

**COMMENTARY ON FUNDAMENTAL RIGHTS AS FORMULATED BY THE TECHNICAL
COMMITTEE ON FUNDAMENTAL RIGHTS**

I enclose herewith the Government's comments on the Fundamental Rights as formulated by the Technical Committee on Fundamental Rights during the Transition for submission to the said Committee, please.

With kind regards


HEAD: MINISTERIAL SERVICES

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CJ070693

COMMENTARY ON FUNDAMENTAL RIGHTS AS FORMULATED BY THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

As requested by the Technical Committee in paragraph 5.2 of its Fourth Progress Report the South African Government hereby submits the following comment and suggestions on the formulations of the rights and limitations as proposed by the Committee.

1. INTRODUCTION

The Government is of the opinion that a so-called interim Bill of Rights should not differ substantially from a final Bill of Rights. Human Rights are not interim or final in nature, but are universal and inherent. It is therefore essential in an interim and transitional phase to put on the Statute Book a Bill of Rights which is visionary, which will inspire confidence and hope in all communities and individuals, and which would be as full and complete as possible. Experience in other countries has convinced us that one should not start off with the formulation of a minimum of basic rights, in the hope that further rights would be added from time to time. The Government's comment must therefore be seen in the light of the above.

2. The list of rights, agreed upon in paragraph 2 and those rights still to be agreed on in paragraph 3 is not a comprehensive list. The Government is of the opinion that the following rights and formulations thereof, even if arguably covered by the various

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formulations of the Technical Committee, are uncontroversial and should also be included:

(a) **Family rights**

"Every person shall have the right to the protection of his or her family."

(b) **Physical and mental integrity**

"Every person shall have the right to physical and mental integrity."

(c) **Pension rights**

"Every person shall have the right not to be deprived of his or her rights and interests in any state or private person fund or scheme."

(d) **Art and science**

"Every person shall have the right to practice the arts and science."

(e) **Freedom of employment**

"Every person shall have the right to work, to establish and operate any undertaking, to exercise any profession or trade and to carry on any other lawful activity in any part of the Republic."

3. FORMULATION

Introduction

In general the Government is of the opinion that those rights on which agreement has not as yet been reached should be included in a Bill of Rights during the transition. In this regard the Government is of the opinion that the rights reflected in its proposed CHARTER OF FUNDAMENTAL RIGHTS should in principle be included and reserve the right to elaborate on this principle at a later stage.

3.1 Ad par 2.1

The issue of freedom of speech at present in South Africa is whether there is a right to equal and equivalent use of the electronic media controlled by the State and whether groups or parties should have access to the airwaves. Especially in the transitional phase this issue is a vital one, because political parties must have the opportunity to present their views to the voters in the run-up to the election. Although it may be argued that the Technical Committee's formulation may cover this right, the Government recommends that the following formulation should be added as subsection (2) in order to avoid any uncertainty:

"Everyone has the right to equal and equivalent use of the airwaves and to equal and equivalent utilization of the State supported electronic media."

In the Government's proposals (section 9(2)) provision is also made for some measure of regulation for public media without derogating from the freedom of speech. The Government is therefore of the opinion that a subsection (3) should be added to read as follows:

"Subsection (1) shall not preclude the registration and licensing of newspapers and other forms of communication."

3.2 Ad par 2.11: The phrase "Every person shall be equal before the law" appears to be grammatically incorrect. One person cannot be equal. It is suggested that it be rephrased to "All persons shall be equal ..." or "Every person shall have the right to equality before the law."

3.3.1 Ad par 2.17.1(c): The expression "legal practitioner", where it appears the second time, could in the context be understood to be limited to a practitioner in private practice, which is apparently not the intention. The expression "legal consultant" is preferred.

3.4.1 Ad par 2.17.3(b): The words "against him or her" are superfluous and should be deleted.

3.4.2 Ad par 2.17.3(e): The Technical Committee's proposal is in our opinion too wide. A court of law will never decide that it is not in the interest of justice that an accused be legally represented. Therefore the formulation will result in the appointment of legal representation at the State's expense in virtually every

case, because hardly any accused will admit that he can afford a legal practitioner if he can get one for free. In S v Rudman and Another; S v Mthwana 1992 (1) SA 343 on page 392 Chief Justice Corbett remarked as follows:

"The ideal for which Didcott J (and the Judges who agreed with him) strove in the cases of S v Khanyile and Another 1988 (3) SA 795 (N) and S v Davids; S v Dladla 1989 (4) SA 172 (N), viz the provision of free legal representation to all indigent persons accused of serious crimes who desire such representation, is unquestionably a most worthy one. Indeed it is *sine quo non* of a complete system of criminal justice; and any system which lacks it is flawed.

As Nicholas A J A has explained, however, it is an ideal which under present circumstances in South Africa is not capable of attainment."

The position is that the State cannot afford to supply legal representation in all these cases at this stage, but that does not preclude Parliament from passing legislation relating to certain serious offences where it is of the opinion that an accused should be legally represented.

3.5 Ad par 2.18: The words "his or her" in the first line may be deleted.

3.6 The Government is of the opinion that the words "and the right to conservation and protection of the environment" should be added to the Technical Committee's formulation.

3.7 Ad par 3.2: The word "transitional" is superfluous and may be deleted.

3.8 Ad par 3.3: This right should include the right of citizens to establish educational and other institutions reflecting their language, culture and religion as set forth in the Kodesa Working Group 2 draft principle on the accommodation of the diversity of languages, cultures and religions.

3.9 Ad par 3.8: It is proposed that the following provision be added:

"The religious-orientation of or the medium of instruction used in any primary, secondary or tertiary educational institution shall not be altered without the concurrence of the community served by that institution or, in the case of a tertiary educational institution, without the concurrence of the controlling body of that institution."

3.10 Ad par 4.1: It is suggested that the Committee reconsider whether the words "necessary" and "reasonable" in paragraph (a) of the general limitations clause should be qualified by the phrase "in a free, open and democratic society". It seems to be more logical for the qualification to be confined to "justifiable".

It is difficult to comment on the limitation clause as the Technical Committee's formulation has yet to be finalized. The general approach appears, however, to be acceptable.

H J COETSEE, MP
MINISTER OF JUSTICE