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# MEMORANDUM

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| TO | : | TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION |
| FROM | : | D H M GIBSON, MP and A J LEON, MP on behalf of the DEMOCRATIC PARTY |
| RE | : | SIXTH PROGRESS REPORT : 15th JULY 1993 |
| DATE | : | 26 July 1993 |

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## 1. BACKGROUND

This submission from the Democratic Party (DP) is a response to the invitation of the Technical Committee on Fundamental Rights during the Transition to make representations concerning certain aspects which arose during the discussion of the Sixth Progress Report.

The DP highlights only those aspects which we consider to be of particular significance and importance. The attention of the Technical Committee is, however, drawn to the Democratic Party preliminary response to the Fifth Progress Report dated 11th June 1993, certain aspects of which cover similar ground. In similar vein, your attention is drawn to the DP response to the Fourth Progress Report dated 3rd February 1993.

## 2. ENFORCEMENT

### 2.1 Ad Paragraph 1(b)

The DP notes with considerable concern the suggestion that because no submissions were received concerning the horizontal operation of the fundamental rights and freedoms, your Committee was considering deleting 1.1(b). We draw your attention to the fact that the submissions of almost all parties,

and more particularly the DP, are predicated on the basis that the fundamental rights and freedoms will have general application horizontally as well as vertically. If they are to operate vertically only, this would have disastrous consequences for the recognition and enforcement of the fundamental rights and freedoms of South African citizens. The DP understands that the South African government is the only body which seems to favour the vertical application on its own.

If your Committee forms the view that horizontality should be excluded, the DP would be obliged to oppose the Bill as being fatally flawed.

2.2 Ad Paragraph 1.7

The DP makes two submissions concerning this sub-clause.

The first is that we propose the insertion, after the word "freedoms" of the words "and made subject to the obligations".

We submit that rights and freedoms are always concomitant with obligations and the reworded clause makes this clear.

The second submission is that it would be unthinkable to exclude "juristic persons" from the Bill of Rights. The effect of doing so would be to prevent the whole spectrum of voluntary associations, as well as commercial entities of all descriptions from the operation of the Bill. The exclusion would enable those seeking, for example, an escape from the consequences of the Bill to form a club or private association, or a corporation. It would also prevent associations such as Cosatu, for example, from acting to protect the interests of members. This is surely not what the Technical Committee is seeking.

2.3 Ad Paragraph 1.9(a)

The DP submits that the proviso to this clause introduces an undesirable vagueness and an unacceptable differentiation between the basic rights included in the Bill. We submit that there should be strict scrutiny of all basic rights contained in the Bill and any potential limitations or violations thereof.

2.4 Ad Paragraph 1.9(b)

2.4.1 We submit that the present formulation of this clause is a little unwieldy and that a more elegant formulation thereof would be as follows :-

"Any Law or action in contravention of this Bill shall be, to the extent of the contravention, invalid".

The implication is clear: that which is not in contravention, is valid.

2.4.2 The Technical Committee requested that submissions be made concerning the question of international obligations and treaties entered into by a future government and the effect thereof on the Bill of Rights.

In this regard, the DP submits that the government should, in general terms, not enter into international obligations and treaties which are inconsistent with the Bill. If major departures therefrom are contemplated, the government must follow the agreed upon procedures to amend the Bill of Rights.

It may be, however, that useful reference could be had to South Africa's obligations in terms of international law in respect of derogations from the Bill of Rights generally

and the Technical Committee may consider inserting the following sub-clause :

"Any restriction on the rights contained in the Bill shall be consistent with South Africa's obligations under international law."

2.5 Ad Paragraph 2.2

The DP prefers a shortened version of this sub-clause with the omission of all the words after the word "indirectly".

If this is unacceptable, the DP submits that the specifying of two grounds of discrimination could limit the application of this provision in respect of other grounds, or suggest that these two grounds rank as more important than all of the others. If it is desired that the clause specify any grounds of discrimination, the DP submits that the full list should be inserted :

"Race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience."

2.5 Ad Paragraph 2.3

The Democratic Party believes that affirmative action programmes should enjoy constitutional protection and it has no quarrel with the general formulation contained in this paragraph. However, we are of the view that such programmes designed to advance persons disadvantaged by prior discrimination should be capable of limitation. We believe the insertion of the word "rational" as a qualifying adjective on the word "measures" will allow the court to determine the scope and reach of a particular programme. This would be particularly important in ensuring that affirmative action programmes do not simply become exercises in reverse discrimination which are launched in

perpetuity at the expense of other groups and interests in society without furthering a rational objective.

2.6 Ad Paragraph 3.2

The DP submits that the formulation of this sub-clause is somewhat vague. The question arises as to whether the legislature may alter its position from time to time. If it is the intention of the Technical Committee that this should be so, we submit that there should be some check in the Bill of Rights upon the vagaries of the legislature.

2.7 Ad Paragraph 3.3

The use of the word "finally" appears to indicate that the legislature will have only one opportunity to deliberate on the abolition or retention of capital punishment and that such decision will thereafter be binding for the duration of the Bill of Rights. Within the boundaries permitted by a Bill of Rights, any parliament should have the sovereign power to amend its own legislation. An attempt such as this to fetter that right may lead to undesirable constitutional crises.

2.8 Ad Paragraph 9

We submit that it is of great importance that any public media controlled by the State should be obliged to live up to the freedom of speech and expression imperatives included in the Bill of Rights. For this reason, the DP submits that the following words should appear after the existing wording :

"In respect of the exercise of its control, if any, over any public media, the State shall ensure diversity of expression and opinion."

2.9 Ad Paragraph 17

We submit that it should be made clear that this right should apply only in respect of the State and any of its organs. It would be an unnecessary and far-reaching intrusion into commercial life and the right to privacy which is provided for elsewhere, to make this of general application.

Because of the nature of bureaucracies, we submit that it is necessary to insert the words "with due expedition" after the word "access".

2.10 Ad Paragraph 18

2.10.1 Administrative Decisions. We contend that the clause as drafted by the Technical Committee is flawed and is unnecessarily restrictive. It does not measure up to modern-day formulations of administrative law. We suggest that the right to administrative justice should be improved by the addition of the word "reasonable" after the word "lawful" in paragraph 18.1.

We understand that certain members of the Technical Committee have taken issue with this formulation on the basis that it would be too invasive of governmental function. The DP is of the view that whether South Africa attains democracy may well depend as much upon the way in which day-to-day government decisions are routinely taken as upon the loftiest and most abstract aspirations expressed in the Bill of Rights. The proposed formulation by the DP entrenches every person's right, when adversely affected by governmental action, to a decision which is lawful, reasonable and procedurally fair.

The effect will be to require public officials thoughtfully and deliberately to consider their decisions, to take due account of the impact of a decision on those whom it affects, to explain the position to those whom it affects, and where fairness so requires, to hear those affected before the decision is taken.

We believe that both the formulation and the jurisprudence which has emanated from modern constitutional regimes, such as that in Canada, tend to support the view that the widest grounds of unreasonableness should be considered when challenging an administrative decision or practice. If South Africa is to enjoy a contemporary Bill of Rights with real and pervasive powers to protect the ordinary citizen against encroachment by government and other organs of state, then we believe that such formulation will certainly advance this desire.

2.10.2 We submit that it is important that the reasons for administrative decisions should be furnished in writing in order to obviate misunderstandings and to enable any subsequent adjudication thereon to be made on clear grounds.

2.11 Ad Paragraph 19

The DP submits that the use of the word "detained" is unfortunate. Given the history of South Africa, we consider it to be vital that it be clearly understood that detention without trial is unacceptable. The only exception should be that pertaining under a state of emergency, which is dealt with separately.

The DP submits that paragraph 19 should be reworded to merge the provisions of 19.1 and 19.2 with a distinction being drawn, if

this is necessary, between those arrested and accused, those awaiting trial and those serving sentences.

2.12 Ad Paragraph 20

The DP cannot support the clause as formulated. The application of this clause would, in our view, undermine property rights, jeopardise the erection of new housing stock and deter financial institutions from granting bonds to prospective homeowners in the lower income category.

The very people this clause aims to help will ultimately be harmed. The provision will constitute a fundamental invasion of the right to private property, because it means, in essence, that no court would be able to evict any tenant or any occupier, lawful or unlawful, unless there is "appropriate" alternative accommodation available.

The famous Goldstone Judgment, relating to the eviction of persons in unlawful occupation in terms of the Group Areas Act, was motivated by the court's desire to ameliorate the extreme discriminatory consequences of the Group Areas Act. It must be pointed out that the learned Judge found that even though such persons were in unlawful occupation, they could not be evicted. The DP supported that Judgment. The effect of the proposed clause in the Bill of Rights, however, would be to invest not those in occupation in contravention of the Group Areas Act, which has now disappeared, but every occupier of property in South Africa, perhaps as a squatter, perhaps as a tenant or as a person who has purchased a property under a mortgage bond, to remain in occupation, perhaps for ever, without payment. The consequences of this situation are simply too appalling to be the intention of the Technical Committee.

The DP submits that every person in South Africa has the inherent right not to be evicted from property on an arbitrary basis and we submit that the following wording will suffice to protect our citizens :

"No person shall be removed from his or her home, except by order of a Court of law."

3. PROPERTY

Ad Paragraph 23.2

The DP submits that no-one should have his or her property expropriated on an arbitrary basis. We submit, furthermore, that many victims of apartheid are entitled to special consideration and in certain instances, to compensation or even restoration of property rights infringed. We submit, however, that the two aspects should be separated.

It is a fact that many people who are "have nots" at present will become economically empowered over the next period and it is important that all people who acquire property, or who own it now, should be protected from arbitrary action.

To give effect to this submission, we propose that the Technical Committee should separate the two aspects and redraft paragraph 23.2 as follows :

"Expropriation of property by the State shall be permissible in the public interest, subject to the proper payment of equitable compensation which, in the event of a dispute, shall be determined by an ordinary court of law."

Thereafter the Technical Committee should insert a new paragraph 23.3 to read as follows :

"Any person who was dispossessed of his or her property as a consequence of an act, decision, or regulation by government or any statutory body acting under its authority, prior to the introduction of this Bill of Rights, which dispossession was a consequence of racially discriminatory legislation, shall be entitled to prosecute a claim for compensation to a special Land Claims Tribunal which the government shall, in terms of this provision, be obliged to establish with the necessary powers and functions to make recommendations to the government and subject to the limitation imposed by resources available to the Government for this purpose, to order compensation if the compensation, if any, paid at the time of dispossession was unfair or unreasonable.