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[23]

**GENERAL COUNCIL OF THE BAR  
OF  
SOUTH AFRICA**

**COMMENT ON THE TENTH PROGRESS  
REPORT ( DATED 5 OCTOBER 1993 )**

**OF  
THE TECHNICAL COMMITTEE ON FUNDAMENTAL  
RIGHTS  
DURING THE TRANSITION**

**INTRODUCTION**

1. The General Council of the Bar submitted a memorandum on the Seventh Progress Report of the Technical Committee on Fundamental Rights During the Transition. The present submissions, like those previously made, have been compiled on behalf of the General Council of the Bar under the direction of the chairman. On this occasion, contributions from advocates E Cameron and G J Marcus have been taken into account.
  
2. The report presently under consideration is dated 5 October 1993. It became available to the Bar on Thursday 7 October. These submissions had to be made at the latest by Monday morning 11 October. As in the case of our previous submissions, we record our regret at the haste under which our comments have had to be prepared.
  
3. These submissions are compiled in the recognition that the committee's Tenth Progress Report appears in not insubstantial measure, to have taken into consideration submissions in our previous memorandum. In general, we therefore refrain in this memorandum, from repeating the views we earlier expressed, even where they were either disregarded or in our view insufficiently taken into account. We repeat our earlier submissions only where they appear to us to be of central significance to the task the committee attempted to address - that of constitutional regulation under law.

**APPLICATION OF THE CHAPTER: CLAUSE 7(2)**

4. We noted in our previous memorandum that the chapter on Fundamental Rights is made applicable only to administrative decisions taken during the period of operation of the chapter. The addition in the latest draft, of the words 'or acts performed' does not meet the complaint.
  
5. We repeat that in our view there can be no justification for the exclusion of administrative decisions taken (or acts performed) before the chapter comes into operation, from constitutional scrutiny. It is, after all, the current efficacy and implications of those acts which will be subjected to constitutional challenge. A uniform standard of administrative constitutionality should apply, regardless of when the decision was taken or the act performed.

**ACCESS TO INFORMATION: CLAUSE 23**

6. This clause entitles the citizen only to such information as is 'required for the protection or exercise of any of his or her rights'. Although some limitation is understandable, this one is unduly onerous because it imposes an onus on the person seeking information, to prove that it is 'required' for the protection or exercise of a right. This will often be impossible to do, precisely because the citizen is denied access to the very information he or she requires to prove the point.

7. Citizens should moreover be entitled as of right, to all information held by the State relating specifically to the subject himself or herself. There is no justification for the limitation of the citizen's access to such information. This can be achieved by amending the clause to entitle the citizen 'to all information... insofar as such information concerns himself or herself or is required for the protection or exercise of his or her rights'.

**ADMINISTRATIVE JUSTICE: CLAUSE 24**

8. The present clause has been substantially redrafted. The formulation and the content however remain unacceptable. We infer from the ungrammatical 'is' in sub-clauses (a) and (b) and the incongruent 'action' and 'such actions' in sub-clause (c), that the clause was prepared in extreme haste. Whatever the cause, the product is in our submission not appropriate for inclusion in a constitution.
9. We repeat that a right to 'lawful administrative action' is devoid of meaning. It goes without saying that every person is entitled to "lawful administrative action".
10. We further suggest that the formulation 'rights or interests' be retained throughout (and thus that the substitution of 'legitimate expectations' in relation to the requirement of procedural fairness in sub-clause (b) be removed).

11. But the kernel issue remains the committee's failure to recognise a right to reasonable administrative decisions. We fail to understand why it should be so important to preserve for government, the freedom to act unreasonably to the detriment of the subject. We find ourselves unable to appreciate what conceivable justification there could be for this position. 'Unreasonableness' has a well defined and somewhat narrow meaning in administrative law. It requires proof of an absence of rational warrant, before the administrative decision can be overturned. To require that the administration make only 'reasonable' decisions, will in our view therefore not act as an undue restraint on governmental decision-making.

12. The inclusion of this ground would also bring our administrative law in line with modern systems throughout the world, and would accord with the recommendations of the South African Law Commission in its Working Paper 15 of August 1986.

**PROPERTY: CLAUSE 28**

13. Sub-clause (4) is appreciably clearer and more precise than its predecessor. But we point out that the width of the provision's wording appears to confer a right to restoration or compensation or other remedy, not only on the victims of discrimination but also on those who might have benefitted from it. It might for instance include a white farmer whose land may have been expropriated for black urban or rural development, but who received full and adequate compensation. This is because (a) the words 'any racially discriminatory policy' do not specify that only the victims of that policy are envisaged in the restoration provision and (b) the clause does not say that compensation received for the dispossession suffered, must be taken into account in assessing the relief granted to the dispossessed.

14. Sub-clause (4) should be redrafted along the lines of clause 8(3) (affirmative action) so that it does not itself confer rights, but provides merely that nothing in the clause shall preclude parliament from making provision for the restoration of rights in land as stipulated. The legislation itself can then, in conformity with the proviso and the other directions in the sub-clause, limit its benefits to the properly intended beneficiaries.

**LIMITATION: CLAUSE 34**

15. This is the most important provision of the chapter. It qualifies every other provision. It defines the extent to which it would be open to government to derogate from every other right entrenched in the chapter. Its provisions are accordingly vitally important.
16. The loophole created by the clause should at least be tightened by requiring in subclause 34(1)(a)(ii) that the limitation be 'demonstrably justified', rather than merely 'justifiable', in an open and democratic society based on freedom and equality.

**SUSPENSION AND DETENTION WITHOUT TRIAL: CLAUSE 35**

17. We restate our implacable opposition to any form of detention without trial.
18. We note that the committee has even failed to include an express limitation on the maximum permissible period of detention without trial. We consider that the absence of an expressly stated limit is inexcusable.

**INTERPRETATION: CLAUSE 36**

19. We would point out, regarding sub-clause (2), that a constitutional presumption of validity is quite different from a constitutional enactment specifying a level of scrutiny, and that the conjunction of these two disparate issues is inappropriate. The matter could be remedied simply by constituting the proviso a separate sub-clause.
  
20. Regarding the proviso, we submit that the chapter's equality provision (clause 8) should be included in the first category requiring strict scrutiny. Its omission, given that the the equality guarantee is fundamental to the whole notion of constitutional protection in 'an open and democratic society based on freedom and equality', appears to be insupportable.
  
21. Sub-paragraph (b) of the proviso requires strict scrutiny only insofar as the rights concerned relate to 'free and fair political activity'. The limitation is not warranted. We appreciate that the interim constitution is designed merely to provide for the transition, but we suggest that strict scrutiny should be applicable to derogations from all rights relating to expression, assembly, association and movement, rather than only when political activity is in issue.

**WIM TRENGOVE SC**  
**CHAIRMAN**

Chambers  
JOHANNESBURG  
Monday 11 October 1993