

HUMAN RIGHTS IN THE INTERIM

15/07/1993

As between the ANC and the SAG there is agreement on almost all the rights that are contained in the tentative 6th Report of the Technical Committee. This short report will deal only with the few areas where there are either problems or where there is no agreement yet.

1. Has the ANC abandoned its minimalist position? In other words, is the ANC now accepting that there will be a broader human rights charter in the interim constitution? Tactically, this question should be handled at the Negotiating Council, our delegation being armed with a mandate to abandon our original position if that is advisable.

2. The SAG gleefully accepts the ANC's position that the interim bill of rights should operate **vertically** only and affect only the relationship between the government and the citizen. This position, which is spelt out in paragraphs 2.1 and 2.2 in the ANC's Submission dated the 22nd June 1993, needs to be reviewed.

While the ANC's position may be premised on the assumption that companies ought to be prevented from abusing the interim bill of rights and utilising it against workers, there is a feeling that the ANC's position will prevent the individual from tackling private apartheid through the interim bill of rights. There is virtually nothing an individual can do through the proposed interim bill of rights when a private school, a private club, an individual or a company discriminates against him/her on the basis of gender, race and colour, for instance.

If the ANC's position is maintained, the new clause 1(1)(a) of the bill will read as follows:

"The provisions of this Chapter shall - (a) bind all legislative and executive institutions, bodies and functionaries at all levels of government."

Some element of **horizontality** may have to be accepted in certain respects. Maybe certain rights that will be affected by horizontality may have to be identified in the bill itself. Otherwise people affected may have to wait till appropriate legislation has been passed by the interim Parliament.

3. In paragraph 4.2 of the ANC's Submission of 22 June the ANC says that any state actions that may affect the elections or the constitution-making process must be zealously examined and that laws and executive actions affecting programmes of socio-economic reconstruction must be treated with more circumspection. In other words, there should be a presumption of validity in respect of the latter. While the SAG accepts this, there may be a need for the ANC to take a harder look at the implications of the distinction being made between the two sets of government actions. One of the implications is that some of the laws which we may find offensive and unacceptable may be presumed to be valid till changed by the Legislature.

The best place or forum to change laws will turn out not to be the Courts but the Legislature where the ANC will most probably have a controlling majority. The Legislature is obviously a cheaper, quicker and better mechanism to utilise for this purpose.

4. With regard to paragraph 11.2 of the tentative 6th Report of the Technical Committee, the

Now name Bill & SAG
 - Equality - race + gender (and
 - other things

ANC has suggested a new formulation along the following lines:

"Without derogating from the generality of the provisions of section 2(2), nothing in this section shall preclude legislation preventing or prohibiting discrimination on the grounds of race and gender."

Do we want to wait till appropriate legislation has been passed by the interim Legislature? Can't we have a simple formulation which proscribes discrimination in the bill itself and pass legislation when we eventually have an interim Legislature? It being a fact that the interim constitution will precede the interim Legislature, the ideal is that a clause invalidating existing offensive legislation ought to be incorporated in the bill.

5. In the ANC Submission, paragraph 19, the ANC seems to be much more concerned about the rights of landlords/landladies rather than about the rights of people in informal settlements. This is to be revisited.

6. The ANC has to look harder at the compromise proposed in paragraph 21 of the 6th Report of the Technical Committee with regard to the "freedom of economic activity". The formulation in the compromise is ours, but the starting point is that we reject the inclusion of this so-called right.

7. With regard to property (paragraph 23 of the 6th Report), a formulation is urgently required. The ANC may find it convenient to adapt the German formulation for this purpose. The Constitution Committee must be asked to do this urgently.

8. With regard to Suspension of Rights (see paragraph 29(4)(c) of the 6th Report), policy is urgently required. The Courts may not be able to handle the congestion that will develop if thousands of people are detained in a state of emergency. It may be convenient to provide for an automatic review within the first ten days of a detention and then for longer periods which shall not be more than three months at a stretch. The right of the detainee to move the Courts (**habeas corpus**) any time will not be done away with, however.

9. The education question still has to be resolved. Our Education Department has not as yet had a meeting with us on this as suggested a week ago. The formulation they gave us, although an admirable statement of policy, will create problems for the interim Legislature in effecting the policy.

10. The government wants a clause in the bill on pensions. We are opposed to this idea; they have nonetheless given us a file on the laws governing pensions for the civil service which we are still studying. A policy position is required in this regard.

11. The ANC's position is that the state has to provide legal aid to needy cases. The government has given us a document analysing the fiscal implications of this position. A policy is required.

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