

EMBARGOED UNTIL TABLED IN THE NEGOTIATING COUNCIL**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION
SIXTH PROGRESS REPORT : 15 JULY 1993****1. BACKGROUND**

This Report contains refinements of the formulation of certain of the rights and freedoms dealt with in the draft Chapter which the Committee (in paragraph 3 of its Fifth Report) recommends for inclusion in the transitional constitution. These refined formulations resulted from the Committee's own further deliberations. The Committee has taken into consideration concerns raised during the meeting of the Negotiating Council on 22 June 1993 and in further submissions to the Committee since the completion of its Fifth Progress Report.

The Committee has been requested by one of the negotiating parties to advise the Council on the inclusion of minority rights in the proposed Chapter, in view of the United Nations General Assembly's Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Furthermore the issue of indigenous law was recently raised in the Negotiating Council by one of the parties. These matters raise new issues with which the Committee will deal in a subsequent report. The Committee invites submissions from negotiating parties on these matters.

The Committee wishes to reiterate that the Chapter which follows contains only those rights and freedoms (and measures for their interpretation and enforcement) which are regarded as essential for or facilitative of a transition to democracy in South Africa. The protection accorded these rights and freedoms will be of limited duration, until the elected constitution-making body has pronounced finally on the form and content of a Bill of Rights. These entrenched rights and freedoms do not represent the full range of rights and freedoms which a complete Bill of Rights for South Africa is likely to encompass. The exclusion of certain rights and freedoms from this Chapter is not necessarily to be regarded as an indication of their lesser worth as protected human rights in the future.

2. THE PROPOSED CHAPTER AS AMENDED

(Whatever appears between square brackets is not suggested for inclusion in the Chapter)

"CHAPTER [...]"

FUNDAMENTAL RIGHTS AND FREEDOMS

Enforcement

1. (1) The provisions of this Chapter shall -

- (a) bind the legislative and executive branches of government at all levels as well as all statutory bodies and functionaries;
- (b) bind other bodies and persons to the extent expressly provided for in this Chapter; and

Open -

[Comment: On 2 July 1993, the Committee requested the parties to submit comments on the horizontal operation of this Chapter. No submission has been received to the effect that any of the provisions of this Chapter should operate horizontally. It follows that subparagraph (b) will be deleted if this situation persists.]

- (c) be enforced by the [designated authority] which, in interpreting such provisions, shall promote the values which underlie a free, open and democratic society based on the principle of equality.
- (2) Save as provided for in this Chapter, no rule of the common law, custom or legislation shall limit any right or freedom entrenched in this Chapter.
- (3) The entrenchment of the rights and freedoms included in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised by South African law.
- (4) In the case of an infringement of any provision of this Chapter, the [designated authority] may, where appropriate, put any body or person

referred to in subsection (1)(a) and (b) on terms as to how and within what period such infringement should be remedied.

[Comment: The Committee recommends that this subsection be included in that part of the Constitution dealing with procedures for enforcement.]

- (5) The rights and freedoms contained in this Chapter may be added to or amended by an enactment of the [elected constitution-making body], provided that such enactment does not detract from the essence of any of the rights and freedoms included in this Chapter.

Comment: This subsection was recommended for inclusion in this Chapter in a previous report, but the Committee now recommends its deletion on the assumption that provisions for the amendment of any part of the Constitution for purposes of the transition will apply to this Chapter and be included elsewhere in the Constitution.]

- (6) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken during the period of operation of this Chapter.

- Open* (7) All juristic persons shall be entitled to the rights and freedoms contained in this Chapter to the extent that the nature of these rights and freedoms permit.

- (8) (a) Every person who alleges that his or her rights or freedoms, or every association which alleges that its members' rights or freedoms, entrenched in this Chapter have been infringed or are threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.

- (b) Nothing in this subsection shall prevent a person from applying for relief on behalf of a group or class of persons whose rights or freedoms entrenched in this Chapter are alleged to have been infringed or are threatened.

- More or less* (9) (a) A law limiting a right or freedom entrenched in this Chapter shall be presumed constitutionally valid until the contrary is proved: Provided that a law limiting a political right or freedom shall be strictly scrutinized for constitutional validity.

Some
attention

- (b) No law shall be constitutionally invalid solely by reason of the fact that the wording used exceeds the limits specified in this Chapter, provided that such a law is capable of a narrower interpretation which does not exceed such limits, and such a law shall be interpreted accordingly.

Comment: The Committee is considering the inclusion of this subsection somewhere in the Chapter, and would appreciate comments from the parties.]

Equality

2. (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, on any ground whatsoever and, without derogating in any way from the generality of this provision, on the ground of race or gender in particular.
- (3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.
- (4) In interpreting this section it shall be presumed that any condition or circumstance under which a person is unfairly discriminated against is included in subsection (2) until the contrary is established.

[Explanatory Note:

1. The inclusion of subsection (4) was suggested in a submission by The Equality Foundation. Its effect is to shift the interpretive onus once a person alleging discrimination has in fact made out a prima facie case of discrimination. In other words, if conduct which, on the face of it, appears to be discriminatory has been proved, the person against whom discrimination is alleged is charged with the onus of proving that his or her conduct does not amount to a violation in terms of subsection (2) because it falls within the ambit of a recognised limitation to subsection (2) (in terms of section 28 below) or because it is provided for by subsection (3).

2. In the submission referred to in 1. above it was also suggested that the list of specific grounds on which discrimination is prohibited in subsection (2) should be extended.

The Committee has previously stated its reasons for not enumerating all the grounds of discrimination in question (see e.g. Second Report, paragraph 1 and 2.1.1.4; Fifth Report paragraph 2). Should the Council, however, opt for enumeration, the following formulation of subsection (2) is suggested:

"No person shall be unfairly discriminated against, directly or indirectly, on any ground whatsoever and, without derogating in any way from the generality of this provision, on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular."

*Accepted
Further
grounds possible*

Life

3. (1) Every person shall have the right to life.

Right delete (2) A law in force at the commencement of subsection (1) relating to capital punishment or abortion shall remain in force until repealed or amended by [the legislature].

delete (3) No sentence of death shall be carried out until [the elected constitution-making body] has pronounced finally on the abolition or retention of capital punishment.

[Comment: The Council still has to decide on the inclusion of this right, and, if so, whether its formulation should admit of qualification of the type suggested above. The unqualified inclusion of the right will result in the [designated authority] having to decide on the validity of any law relating to capital punishment or abortion.]

Human Dignity

4. Every person shall have the right to respect for and protection of his or her dignity.

Freedom and Security of the Person

5. (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

[Explanatory Note: Clauses 5 and 6 of the previous version of the draft have been combined.]

Servitude and Forced Labour

6. No person shall be subject to servitude or forced labour.

[Comment: The Council still has to decide on the inclusion of this right.]

Privacy

7. Every person shall have the right to his or her personal privacy and not to be subject to searches of his or her person, home or property, seizure of private possessions or the violation of private communications.

Religion and Belief

8. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by the appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance thereat is free and voluntary.

Freedom of Expression

9. Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

[Comment: One of the parties has suggested the inclusion of the following further provision:

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

The Committee is of the view that such a provision would be inappropriate in a Chapter on Fundamental Rights and Freedoms and that the concern should be referred to the Technical Committee on the Media.]

Assembly, Demonstration and Petition

10. Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

[Comment: One of the parties has raised the following concern:

"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 two million workers (and voters) reside on the premises of their employers. It is essential that political parties have the right to hold political meetings where the employees are far removed from a public meeting place on private premises."

The Committee is of the view that the accommodation of this concept in a chapter on fundamental rights and freedoms would give rise to too many difficulties and that the matter should be referred to the Technical Committee on Elections.]

Freedom of Association

11. (1) Every person shall have the right to freedom of association.
- (2) Without derogating from the generality of the provisions of section 2(2), nothing in this section shall permit discrimination on the ground of race.

Freedom of Movement

12. Every person shall have the right to freedom of movement anywhere within South Africa.

Residence

13. Every person shall have the right freely to choose his or her place of residence anywhere in South Africa.

[Comment: The Council still has to decide on the inclusion of this right.]

Citizen's Rights

14. Every citizen shall have the right to enter, remain in and leave South Africa, and no citizen shall be deprived of his or her citizenship.

[Explanatory Note: Clauses 15 and 16 of the previous version of the draft have been combined.]

Political Rights

15. (1) Every person shall have -
- (a) the right to form, to participate in the activities of and to recruit members for a political party;
 - (b) the right to campaign for a political party or cause; and
 - (c) the freedom to make political choices.
- (2) Every citizen of voting age shall have the right to vote in secret and to stand for election to public office.

Access to Court

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16. Every person shall have the right of access to a court of law or, where appropriate, another independent and impartial forum.

Access to Information

17. Every person shall have the right of access to all information necessary for the protection or exercise of his or her rights.

Administrative Decisions

18. (1) Every person shall have the right to lawful and procedurally fair administrative decisions.
- (2) Every person shall have the right to be furnished with the reasons for an administrative decision which affects his or her rights or interests.

Detained, Arrested and Accused Persons

19. (1) Every person who is detained, including every sentenced prisoner, shall have the right -
- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
 - (b) to be detained under conditions consonant with human dignity, including at least the provision of adequate nutrition, reading material and medical treatment at State expense;
 - (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State; and
 - (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse, next-of-kin, religious counsellor and a medical practitioner of his or her choice.
- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -
- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
 - (b) to be brought before an ordinary court of law within 48 hours of the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released; and
 - (c) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;

[Explanatory Note: The latter part of subparagraph (a) deals with what was contained in clause 21(2)(c) of the previous version of the draft.]

- (b) to be informed with sufficient particularity of the charge;
- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- (d) to adduce and challenge evidence;
- (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so demand, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

Eviction

20. No person shall be removed from his or her home, except by order of a court of law after taking into account all relevant factors, including the availability of appropriate alternative accommodation and the lawfulness of the occupation.

Economic Activity

- 21.1) Every person shall have the freedom to engage in economic activity and to pursue a livelihood anywhere in South Africa.

[Explanatory Note: The Council has as yet not agreed on the inclusion of this right. Submissions of the parties on this matter reflect a division of opinion. Should the right be included, the Committee is of the view that a further subsection such as the following may provide a basis for compromise:

- (2) "Nothing in this section shall preclude legislation aimed at the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such legislation is justifiable in a free, open and democratic society based on the principle of equality."

Labour Relations

22.

- Accepted*
- (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
 - (2) Workers and employers shall have the right to organise and bargain collectively.
 - (3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

[Comment: The Council must still decide on the inclusion of these rights.]

Property

23.

- (1) Every person shall have the right to acquire and dispose of rights in property.

Accepted

- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

[**Comment:** The Council still has to decide on the inclusion of a property clause.]

Open sub-clause 3 - rest / compens

Environment

24. Every person has the right to an environment which is safe and not detrimental to his or her health or well-being.

[**Explanatory Note:** The conservation of the environment is catered for under the concept of "well-being". Further developments of this right are more appropriately within the preserve of the elected constitution-making body.]

Children

25. Every child shall have the right to security, basic nutrition and basic health services and not to be subject to neglect, abuse or exploitative child labour.

Language and Culture

- ✓ 26. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

[**Comment:** The Council still has to decide on the inclusion of these rights.]

Education

27. Every person shall have the right -

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable, and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race or colour.

[Comment: The Council still has to decide on the inclusion of the rights in this clause.]

Limitation

28. (1) The rights and freedoms entrenched in this Chapter may be limited by law of general application, provided that such limitation -

(a) shall be permissible only to the extent -

(i) reasonable; and

(ii) justifiable in a free, open and democratic society based on the principle of equality; and

(b) shall not negate the essential content of the right or freedom in question.

(2) Notwithstanding the provisions of this Chapter, the provisions of a law in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by the legislature.

[Comment: The Committee had added this subsection in the light of the National Manpower Commission's response to this Committee's request (in its Fifth Report) for submissions from appropriate forums on the effect of this Chapter on labour relations.]

Suspension

29. (1) The rights and freedoms entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency proclaimed prospectively under an act of [the legislature] and only to the extent demanded by the situation.
- (2) Any such suspension shall comply with the following requirements:
- (a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is necessary to restore peace or order.
 - (b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to be valid in law unless the declaration is ratified by a majority of the total number of the directly elected members of [the legislature] within fourteen days of the declaration.
 - (c) No state of emergency shall endure for longer than six months provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in paragraph (b).
 - (d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and any action, whether a regulation or otherwise, taken under such declaration.
- (3) Neither the enabling legislation which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -
- (a) the creation of retrospective crimes;
 - (b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency; or
 - (c) the suspension of this section.

[Comment: The committee has concluded that there is no need to specify further rights and freedoms which are not capable of

suspension in view of the provisions of section 29 (1) above, which will enable a court to make a determination in the light of the prevailing situation.]

- (4) Any person detained under a state of emergency shall have at least the following rights:
- (a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
 - (b) the names of all detainees and the measures in terms of which they are being detained shall be published in the Government Gazette within five days of their detention;
 - (c) the detention of a detainee shall be reviewed within ten days of his or her detention by a court of law which may order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review;
 - (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
 - (e) a detainee shall be entitled to have access to legal representatives of his or her choice at all reasonable times;
 - (f) a detainee shall at all times have access to a medical practitioner of his or her choice; and
 - (g) if detained for longer than ten days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of a period of ten days from the date of the determination of the review procedure provided for in subsection (4)(c).

Duration

30. This Chapter shall be of full force and effect until a Bill of Rights duly enacted by the elected constitution-making body has come into effect."

*Functions, powers - H Rts Com
Ombud*

3. ENFORCEMENT MECHANISMS AND PROCEDURES

In its Fifth Report of 11 June 1993, the committee stated as follows:

"The committee is agreed that any person intent upon enforcing any of his or her rights or freedoms should be entitled to proceed in the ordinary courts of the land, provided that the enforcement of these rights does not result in existing legislation being declared invalid.

*Enforcement
of H Rts*

The committee is also agreed that the procedure appropriate to, and the judicial body empowered to, adjudicate upon any proceeding for a declaration that existing and future legislation is invalid (by reason of inconsistency with the provisions of the proposed Chapter in 3. above) should be the same as the procedure and judicial body which may be recommended for the determination of the validity of legislation in relation to the constitution. We are presently of the view that the question as to the validity of legislation should not be determined by the ordinary courts but by some kind of constitutional forum. A special chamber as part of the Appellate division, an expanded Appellate Division or a forum separate from the existing Supreme Court are three of the options to be considered. On the assumption that the provisions of the proposed Chapter in 3 above will come into existence before the election of a constitution making body we would suggest that a mechanism for the determination of the validity of legislation must be provided for in the interim.

There seems to be widespread support for the facilitative role which can be played in the protection and enforcement of the provisions of the proposed Chapter by a Human Rights Commission and an Ombud. In particular, such a Commission could fulfil a vital educative and mediating function and make the rights and freedoms more accessible, while an Ombud with wide powers could oversee the application of this Chapter in the administrative sphere."

The Committee has as yet received no reaction to these comments, and can proceed with the elaboration and formulation of the powers of and procedure to be followed by a Human Rights Commission or Ombud only if these mechanisms are approved by the Council in principle.

The Committee further suggests that the Constitution should contain a procedure by which an ordinary court, seized of proceedings the determination of which entails questions of the constitutional validity of legislation, may refer such questions to the appropriate constitutional forum.

The committee recommends that the details concerning the mechanisms and procedures for determining the constitutional validity of legislation be referred to it for comment before finalisation.

4. FURTHER RECOMMENDATIONS

The Committee recommends that provisions such as the following be included in another part of the Constitution to deal with certain real concerns which have been brought to its notice.

1. "Nothing in this [Constitution] except [the constitutional principles] shall limit the power of [the elected constitution-making body] to enact a Bill of Rights."
2. "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. Protection to be accorded to pension benefits. [This issue does not strictly speaking fall within the mandate of this Committee. The Committee is, however, prepared to consider the form and content of such a protection clause if the Council so instructs. In this event parties are requested to submit comments in this regard.]
4. The Committee recommends that the Chapter on Fundamental Rights and Freedoms comes into operation before the election of a constitution-making body.

Prof. H Corder (Acting Convener)
Prof. L M du Plessis (Not present for the last part of the discussion of this Report)
Mr. G Grove
Ms. S Nene
Adv. Z Yacoob

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