

TECHNICAL COMMITTEE ON FUNDAMENTAL
RIGHTS DURING THE TRANSITION
SECOND PROGRESS REPORT - 21 MAY 1993

1. BACKGROUND

This Report endeavours to take into account submissions received by the Committee up to 12h00 on 19 May 1993. The Committee has also given due weight to sentiments expressed at the meeting of the Negotiating Council on 18 May 1993.

The Committee has received some helpful and creative submissions, many of which will have to be considered once again when a "final" Bill of Rights is drafted by an appropriate constitution-making authority. The Committee is, however, acutely aware of the fact that its proposals will have to be restricted, as far as possible, to the transitional period only and that it is not its task to draft a Bill of Rights for South Africa. At the same time the Committee remains convinced that the way in which fundamental rights and freedoms are entrenched during the transition (and the degree of success with which this could be done) will inevitably impact on the legitimacy of the means and mechanisms for the protection and enforcement of these rights and freedoms in the eventual dispensation.

The rights and freedoms identified in this Report will therefore have to be formulated with the necessary circumspection and will have to be contained in an instrument (albeit transitional in nature) which will ensure their effective protection and enforcement without pre-empting the right of a constitution-making authority to draft the eventual Bill of Rights.

In this Report the committee has not yet embarked upon the precise formulation of relevant rights and freedoms, since it appeared from the Negotiating Council meeting on 18 May that there was not yet agreement amongst delegates on which types of rights and freedoms should be included during the transition. A methodology for deciding on the inclusion of rights and freedoms is proposed and the rights and freedoms are once again listed and classified. If the Negotiating Council reaches agreement on this general approach, the Committee will proceed to formulate these rights and freedoms and submit its formulations to the Negotiating Council.

At the Negotiating Council Meeting of 18 May it also became clear that some members of the Council did not fully envisage all the implications of the way in which the rights and freedoms which were listed in the First Report were to be protected. Some members, for example, expressed concern about the apparent exclusion of references to the protection of gender rights. In this instance, the Committee opted for a general reference to "equal protection and equal benefit of the law" which would, in its view, more effectively outlaw discrimination of all types than if a list of possible grounds of discrimination is specifically included. The Committee has therefore decided to

add explanatory notes to certain rights and freedoms listed in this Report.

2. CATEGORISATION OF RIGHTS

In its First Report the Committee, as a guide to its deliberations, distinguished the following three categories of rights and freedoms in the context of the entrenchment of fundamental rights and freedoms during the transitional period:

- (i) minimal or essential rights and freedoms which must be accommodated;
- (ii) desirable rights and freedoms, i.e. those which ought to be accommodated, and
- (iii) debateable rights and freedoms, the inclusion of which is uncertain at this stage.

The First Report reflected the Committee's initial position on the accommodation of the first category of rights and freedoms only.

In view of suggestions made at the meeting of the Negotiating Council on 18 May, the Committee has refined the above classification and is now also including more precise criteria for classification. What follows is the result of this endeavour.

In the Committee's view the fundamental rights and freedoms which may be regarded as relevant to the transitional process can be categorised by reference to the process itself. The Committee understands that for its purposes the "transitional period" extends up to the commencement of Rights adopted by a constitution-making authority and includes the period up to the election for that authority.

It should, however, be emphasised firstly that the categorisation which follows is not intended as a prioritisation of rights and freedoms. Some rights and freedoms are, in other words, not "more important" than others. Secondly, although rights and freedoms directly relevant to the process of transition constitute a point of reference, it is very difficult to entrench these rights without duly recognising other rights which constitute a foundation upon which the first-mentioned class of rights can be realised.

Finally, it must be borne in mind that although there are various criteria for the classification of rights and freedoms, the classification suggested in this report is merely a practical one for purposes of the transition. In this context the following categorisation is proposed and used in this Report:

- (I) **Basic rights and freedoms necessary to ensure democracy during the transition.** These include:

- (i) rights and freedoms directly concerned with the transitional process as a political process, and
- (ii) rights and freedoms which will have to be entrenched in order to ensure the meaningful realisation of the rights and freedoms directly concerned with the transition itself.

The rights and freedoms belonging to this First Category are also time-honoured and not controversial, and are widely recognised in national and international human rights literature and thinking.

Since rights referred to in (ii) above may also be seen as general rights vital to the exercise of the rights referred to in (i) above, the former rights will, in the Committee's exposition, be dealt with first and will be referred to as the "First Sub-Category". Rights referred to in (i) above will, in the Committee's exposition, constitute the "Second Sub-Category".

- (II) Rights and freedoms aimed at achieving the overall security and well-being of all during the transition.
- (III) Rights and freedoms conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction.

2.1. FIRST CATEGORY

The basic rights and freedoms necessary to ensure democracy during the transition.

2.1.1. FIRST SUB-CATEGORY

The following rights and freedoms will have to be entrenched in order to ensure the meaningful realisation of the rights and freedoms directly concerned with the transition itself:

- 2.1.1.1. The right to dignity which includes the right of detained and convicted persons to be treated with dignity.
- 2.1.1.2. Freedom of conscience, religion, thought, belief and opinion.
- 2.1.1.3. The right to personal freedom, including the right not to be detained without trial.

[Comment: Attention may have to be given to the terms of Section 29 of the Internal Security Act 74 of 1982 in this context during the

transition.)

2.1.1.4. The right to equal protection and equal benefit of the law.

[**Explanatory Note:** This right is to be qualified by the affirmative action provision mentioned in 2.3. below. It furthermore includes the right not to be subjected to direct or indirect discrimination on any ground whatsoever including race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience. The Committee at this stage prefers a general formulation of the right to equality since specific reference to the particular grounds for non-discrimination may have a restrictive rather than extensive effect or the prohibition of discrimination.]

2.1.1.5. Freedom from servitude and forced labour.

2.1.1.6. Freedom from physical, mental or emotional torture or inhuman or degrading treatment or punishment.

2.1.1.7. The right to move freely.

2.1.1.8. The right to have disputes settled by a court of law or other independent forum.

2.1.1.9. The right to life.

[**Explanatory Note:** This right itself is not controversial but rather its interpretation and the extent to which it should be applied. The Committee recommends that for purposes of the transition the present situation with regard to the death-penalty and abortion be maintained.]

2.1.2. SECOND SUB-CATEGORY

The following rights and freedoms are directly concerned with the transitional process as a political process:

2.1.2.1. Freedom of speech and expression which shall include freedom of the press and other media.

2.1.2.2. The right to assemble and demonstrate with others peacefully and unarmed and to submit petitions.

2.1.2.3. Freedom of association.

- 2.1.2.4. The right to form and join political parties and the freedom to make political choices.
- 2.1.2.5. The right to vote and to stand for election to public office.
- 2.1.2.6. The right of access to that information which is necessary for the implementation of a person's rights.
- 2.1.2.7. The right to reasonable, procedurally proper and lawful administrative decision-making.
- 2.1.2.8. The rights to reasons for administrative action which affects a persons's rights.

[**Explanatory Note to 2.1.2.7 and 2.1.2.8:** The inclusion of these rights under this category justified, since actions of the administration relevant to, for instance, the election process should be open to scrutiny.]

2.2. SECOND CATEGORY

The following rights and freedoms are aimed at achieving the overall security and well-being of all during the transition:

- 2.2.1. Language and cultural rights.
- 2.2.2. The right to form trade unions and employers' organisations and to engage in collective bargaining.
- 2.2.3. Freedom of choice of residence and to pursue a livelihood anywhere in South Africa.
- 2.2.4. The right to leave and to return to South Africa, including the right to a passport.
- 2.2.5. The right of arrested or detained persons:
 - to be informed of the reasons for arrest or detention;
 - to be detained under conditions consonant with human dignity;
 - to be given access to a legal and a medical practitioner, and
 - to visits by family, friends and religious counsellors.

The right of accused persons:

- to remain silent and not to be obliged to make statements before or during trial;
- to be brought before a court of law within 48 hours of arrest;
- to a lawyer provided by the State where the interests of justice so require;
- to a fair trial in public within a reasonable period;
- to be presumed innocent until the contrary is proved;
- to be informed of the consequences of electing to remain silent or not to testify;
- to examine witnesses and to testify;
- not to be sentenced to inhuman punishment;
- not to be convicted of an offence of which he or she has been convicted or acquitted previously;
- to have recourse to a higher court by way of appeal or review;
- to be tried in a language he or she understands or to have the proceedings interpreted to him or her;
- to be sentenced within a reasonable time after conviction, and
- not to be tried for the commission of an act which was not an offence at the time when it was committed.

2.2.6. The right to privacy, including the integrity of the home as well as freedom from search and seizure and violation of personal communications.

[**Explanatory Note:** The Committee expresses reservations about too absolute a protection of the integrity of the home, since this may unduly restrict investigations into complaints of spouse battering and child abuse.]

2.2.7. Freedom to participate in economic activity.)

2.2.8. The rights to strike and to lock out.

[**Explanatory Note:** The Committee can see no theoretical justification for the inclusion of one of these rights while the other is excluded.]

2.2.9. The right to own property.

[**Explanatory Note:** This right will be subject to the general limitations clause. A strategy for dealing with specific limitations to this right is also suggested - see 3. below.]

2.2.10. The right not to be deprived of citizenship.

2.2.11. The right to an environment which is safe and not detrimental to the well-being of the population.

[**Explanatory Note:** The inclusion of this right in the present category will at this stage only be warranted if it is formulated negatively and therefore restrictively. If formulated positively and extensively it will have to be considered for inclusion in the Third Category.]

2.2.12. Freedom from eviction from a person's lawful home.

2.2.13. The right of children to a basic education and basic health services and not to be subject to neglect, abuse or forced labour.

[**Comment:** The urgency of entrenching certain basic children's rights during the transition was highlighted in a submission from the National Children's Rights Commission.]

2.2.14. The right of equal access to State or State-aided educational institutions.

[**Explanatory Note:** The Committee deems explicit reference to this right necessary in view of the urgent need to redress the present inequalities in the educational sector.]

2.3. THIRD CATEGORY

Examples of rights which are conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction are:

2.3.1. the right to the basic essentials of life, including the right to food and water necessary for survival, shelter from the elements and basic health care:

2.3.2. marriage and family rights:

2.3.3. the right to a basic nutrition:

- 2.3.4. social security rights, including the rights of aged and disabled people:
- 2.3.5. children's rights other than those listed under Category 2, including the right of a child to be cared for by his or her parents:
- 2.3.6. educational rights other than those listed under Category 2:
- 2.3.7. employers' and employees' rights other than those listed under Category 2:
- 2.3.8. rights and freedoms related to the arts, science and recreation:
- 2.3.9. women's rights promoting substantive equality (over and above the formal equality provided for in 2.1.1.4. above);
- 2.3.10. the right to invoke customary international law in determining disputes, etc.

Apart from considering inclusion of the above (and other) rights and freedoms in an eventual Bill of Rights, the designated constitution-making authority will also have to consider:

- qualifying the right to equal protection by providing for affirmative action (see 2.1.1.4. above);
- including a specific reference to the retention or abolition of capital punishment (see 2.1.1.9. above);
- dealing with abortion in specific terms (see 2.1.1.9. above);
- specifically limiting the right to own property (see 2.2.9. above), and
- formulating environmental rights more positively and extensively (see 2.2.11. above).

[**General Comment:** The Committee is of the opinion that the rights and freedoms listed in Categories 1 and 2 above should be included for protection during the transitional period while rights in Category 3 can be considered for inclusion in an eventual Bill of Rights. It would be highly undesirable to subject the rights and freedoms listed in Category 1 to compromise. This is not true to the same extent of all the rights and freedoms listed in Category 2.]

3. LIMITATION AND SUSPENSION

Very few rights and freedoms are unlimited. The Committee is therefore of the opinion that during the transition provision will have to be made for the limitation of the rights and freedoms mentioned in 2.

The Committee suggests the following points of principle for the consideration of the Council in relation to including the following matters in a legislative instrument providing for the entrenchment of fundamental rights and freedoms during the transition:

3.1. A general Limitations/Circumscriptions Clause.

Any limitation placed upon the fundamental rights during the transition shall:

- 3.1.1. only be valid if authorised by law of general application;
- 3.1.2. only be valid if necessary, reasonable and justifiable in a free, open and democratic society;
- 3.1.3. not derogate from the general substance of the right in question;
- 3.1.4. be proportional to the danger sought to be addressed: and
- 3.1.5. not limit certain stipulated rights and freedoms e.g. freedom of conscience, freedom from torture.

It should, furthermore, be emphasised that due to the controversy surrounding the right to own private property, a specific limitations clause for this right (if it is included) might well be desirable. This, however, will have to be considered at the stage when rights and freedoms in the Third Category above are debated with a view to their inclusion constitutional instrument of some sort.

3.2. A Suspension Clause.

- 3.2.1. Suspension of a fundamental right is only to be allowed as a result of a declared state of emergency and only where the existence of the State or the safety of the public generally is threatened by war, invasion, general insurrection/riot or natural disaster.
- 3.2.2. The implementation of emergency measures shall be necessary to restore peace or order and shall permit suspension of the protected rights and freedoms only to the extent demanded by the situation.
- 3.2.3. Any declaration of a state of emergency shall be for a limited period of time.
- 3.2.4. Any declaration of a state of emergency shall be ratified within a limited period of time by a specified majority of the directly elected members of the highest legislative authority.

3.2.5. Any measures that will apply during a state of emergency shall be ratified within a limited period of time after their adoption by a specified majority of the directly elected members of the highest legislative authority.

3.2.6. No emergency measure shall grant immunity to officers of the State in respect of their unlawful conduct during a state of emergency.

4. ENFORCEMENT

At this stage the Committee is not proposing particular enforcement mechanisms. This will be dealt with in a later Report. The Committee would, however, be assisted were the Council to agree in principle to the justiciability of any legislative instrument regulating the transitional period at least to the extent that it entrenches fundamental rights and freedoms.

5. RECOMMENDATIONS AND CONCLUSION

The Committee recommends to the Negotiating Council that it:

- 5.1. agrees in principle to the inclusion, in a legislative instrument of some sort, of the rights and freedoms listed in the First and Second Categories together with a general limitations clause;
- 5.2. agrees in principle to the justiciability of the legislative instrument referred to in 5.1. above at least to the extent that it entrenches fundamental rights and freedoms;
- 5.3. instructs the Committee to submit formulations of the rights and freedoms listed in the First and Second Categories to a subsequent meeting of the Negotiating Council;
- 5.4. agrees that the inclusion of the rights in the Third Category is open to further debate and cannot be taken further by the Committee in the absence of express instructions.

The committee wants to emphasise its view that the most viable Bill of Rights for South Africa in the eventual dispensation will not necessarily be any particular Bill proposed by any individual, organisation, expert body or any one of the parties to the Negotiating Process. It will rather have to be one to which all parties substantially agree and with which they and their constituencies will feel comfortable.

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