

MEH 91-30-1-6

**EMBARGOED UNTIL DELIVERY/TABLING IN
NEGOTIATING COUNCIL MEETING****TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION :
FIFTH PROGRESS REPORT : 11 JUNE 1993****1. BACKGROUND**

The Committee received helpful submissions from some of the negotiating parties in response to its requests in paragraph 5 of its Fourth Progress Report. Two of the parties argued that "human rights are not interim or final in nature, but are universal and inherent" and that "[i]t is therefore essential in an interim and transitional phase to put on the Statute Book a Bill of Rights which is visionary, which will inspire confidence and hope in all communities and individuals, and which would be as full and as complete as possible". From statements such as these the said parties concluded that the list of fundamental rights and freedoms contained in the Committee's Fourth Report is incomplete and one of the parties demanded "that the Technical Committee applies its skills and expertise to determine how the full list of human rights can be entrenched in the next constitution of South Africa."

The Committee cannot of its own accord accede to the request to expand the list of rights contained in its Fourth Report (see the resolutions of the Negotiating Council in paragraphs 7.1.3.4 and 7.1.3.5 of its minutes of 28 May 1993). The Committee would have to receive express instructions from the Council to consider the inclusion of rights and freedoms in addition to those contained in its Fourth Report. One of the parties who appealed to the Committee to expand the list of rights moreover reacted to the Committee's Third Report which has already been dealt with by the Negotiating Council (at its meeting of 28 May 1993). The Committee is therefore uncertain whether this party's submission has taken into account the full implications of the Council's resolutions at its meeting of 28 May 1993.

Furthermore, the recognition of the "final nature" of fundamental rights and freedoms as well as their universality and fundamentality, need not be dependent on the fullness and completeness of the list of rights and freedoms which is entrenched in a legislative instrument during the transition. While there are those who are of the opinion that a transitional bill of rights which does not contain an exhaustive list of fundamental rights and freedoms will not be respected by the population, no empirical evidence supporting this assumption has been placed before the Committee. The

MCH 11-30-1-6

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

Committee was instructed at the outset that it was not its task to draft a final bill of rights for South Africa and nothing contained in any of the instructions of the Negotiating Council has indicated the contrary.

An evolutionary phasing in of the entrenchment of fundamental rights and freedoms in South Africa will probably enhance their legitimacy and their effective protection in an eventual dispensation. Rights and freedoms not entrenched in a bill of rights during the transition are of course not by that reason undermined, for they will continue to exist under rules of the common law and statute until altered by a competent legislature (see clause 1(4) of the proposed Chapter in 3. below).

The Negotiating Council has already agreed, in principle, that a further constitution (including a bill of rights) will have to be drafted by an elected constitution-making body (see paragraph 2.3 of the Resolution of 3 June 1993). Work done at this stage by this Committee could assist that body in its deliberations but is not an attempt to pre-empt its final decisions. The Committee is therefore of the opinion that it would be competent for that body to add to and amend the rights and freedoms entrenched during the transition without, however, detracting from their essence (as provided for in clause 1(6) of the proposed Chapter in 3. below).

For these reasons the Committee has refrained from adding more rights and freedoms to those contained in its Fourth Report. At the same time, however, the Committee suggests amplified formulations of some of these rights and freedoms in view of submissions received from negotiating parties. The Council's resolutions of 28 May 1993 do not preclude such amplifications since the Committee had this authority in suggesting formulations in its Fourth Report.

In the present Report the Committee lists the rights and freedoms in a preferred order for the first time, and has begun to frame the proposals as a coherent set, including an enforcement provision (clause 1). While the Committee has compiled as full a report as possible, it regards it as imperative that it has the opportunity further to revise its recommendations in the light of discussion in the Negotiating Council, any subsequent submissions from the parties and further deliberations of the Committee itself.

2. STYLE OF FORMULATION

The Committee has opted for a style of formulation which has resulted in the fundamental rights and freedoms included for entrenchment during the transition being expressed as general norms as broadly as possible instead of relying on lists of

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

specific and detailed guarantees and conditions. There are four reasons for this preference:

- 2.1 It allows for the use of simple language more readily accessible to the people of this country. The rights and freedoms can therefore be relatively easily understood and the formulations can become part of everyday usage instead of remaining the province of lawyers.
- 2.2 In constitutional review proceedings, complicated formulations will likely focus attention on the "true meaning" of words and phrases rather than the question whether a right or freedom has been infringed.
- 2.3 Detailed provisions containing elaborate itemisations may actually limit the protection they profess to provide. This may result from the application of techniques of restrictive interpretation currently recognised in South African law.
- 2.4 Broadly phrased provisions allow for the evolutionary interpretation and the growth of the instrument which entrenches fundamental rights and freedoms.

The Chapter proposed in 3. below is therefore expressed in broad and inclusive terms, rather than in specific language. Specific language is only used to cater for particular concerns or to provide for certain peculiarities in the South African context to which the Chapter for the entrenchment of fundamental rights and freedoms is addressed.

3. FORMULATIONS SUGGESTED FOR INCLUSION IN THE TRANSITIONAL CONSTITUTION

The Committee recommends that the following Chapter be included in the transitional Constitution (whatever appears between square brackets is not suggested for inclusion):

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

CHAPTER [...]

FUNDAMENTAL RIGHTS AND FREEDOMS

1 Enforcement

- (1) The provisions of this Chapter shall -
 - (a) bind the legislative, executive and judicial branches of government at all levels as well as statutory bodies and functionaries;
 - (b) bind, where appropriate, all social institutions and persons, and
 - (c) be guaranteed and enforced by the [designated authority] which, in interpreting such provisions, shall promote the values which underlie a free, open and democratic society.
- (2) Subject to section 30 no rule of the common law, custom or legislation shall limit any right or freedom contained in this Chapter.
- (3) Every person who alleges that his or her rights or freedoms, or associations which claim that their members' rights or freedoms, guaranteed in this Chapter have been infringed or threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.
- (4) The entrenchment of certain rights and freedoms in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised by South African law.
- (5) The [designated authority] shall, in the case of an infringement of any provision of this Chapter, have the discretion, where appropriate, to 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.
- (6) The rights and freedoms contained in this Chapter may be added to or amended by an enactment of the [elected constitution-making body].

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

provided that such enactment does not detract from the essence of any of the rights and freedoms included in this Chapter.

- (7) The provisions of this Chapter shall apply to all existing and future legislation.
- (8) The rights and freedoms contained in this Chapter shall be subject to the provisions of section 30.

2 Equality

- (1) Every person shall have the right to equality before the law and to equal protection and equal benefit of the law.
- (2) No person shall be 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 include the authorisation of measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all fundamental rights and freedoms.

[Explanatory Note: For its formulation of subsection (3) the Committee drew on Article 2 of the International Convention on the Elimination of all Forms of Racial Discrimination, 1965.]

3 Life

- (1) Every person shall have the right to life.
- (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].
- (3) No sentence of death shall be carried out until the commencement of a Bill of Rights enacted by [the elected constitution-making body].

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

[**Explanatory Note:** One of the parties suggested that the present subsection (3) be substituted for the present subsection (2). The Committee is of the opinion that the inclusion of both (2) and (3) might provide a basis for compromise.]

4 Human Dignity

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

5 Personal Liberty

Every person shall have the right to his or her personal liberty, which shall include the right not to be detained without trial.

6 Security of the Person

- (1) Every person shall have the right to the security of his or her person.
- (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.

7 Servitude and Forced Labour

No person shall be subject to servitude, forced labour or to exploitative labour practices.

[**Explanatory Note:** The Council has not yet explicitly agreed on the inclusion of this right, but it appears to be acceptable to all the parties since no objections have been raised.]

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

8 Privacy

Every natural person shall have the right to his or her personal privacy and no person shall be subject to searches of his or her person or home, seizure of private possessions or the violation of private communications.

9 Religion and Belief

Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, provided that nothing shall preclude the practice of religion in State or State-aided institutions on a free, voluntary and equitable basis.

10 Freedom of Expression

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

11 Assembly, Demonstration and Petition

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

12 Freedom of Association

- (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.

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

13 Freedom of Movement

Every person shall have the right to move freely anywhere within South Africa.

14 Residence

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

[Explanatory Note: The Council has not yet explicitly agreed on the inclusion of this right, but it appears to be acceptable to all the parties since no objections have been raised.]

15 Departure from and Return to South Africa

Every citizen shall have the right to depart from and to return to South Africa.

16 Deprivation of Citizenship

Every citizen shall have the right not to be deprived of his or her citizenship.

17 Political Rights

- (1) Every person shall have the right to form and to join a political party and 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.

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

18 Access to Court

Every person shall have the right to have disputes settled by a court of law.

19 Access to Information

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

20 Administrative Decisions

- (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.

21 Detained, Arrested and Accused Persons

- (1) Every person who is detained 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 the provision of adequate nutrition 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.

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

- (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;
 - (c) to be tried by an ordinary court of law within a reasonable time after arrest, and
 - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right -
- (a) to a public trial by an ordinary court of law;
 - (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;

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

- (g) not to be convicted of 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.

22 Eviction

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.

23 Economic Activity

Every person shall have the freedom to engage in economic activity.

[Explanatory Note: The Council has as yet not agreed on the inclusion of this right. One party contended that the inclusion of this right was unnecessary, while another objected strongly to its inclusion. The latter preferred a formulation which placed a duty on the constitution to provide for the promotion of the improvement of the quality of life, enabling economic growth, human development, social justice and equal opportunity for all. The Committee is unable to produce an acceptable alternative formulation, in the absence of agreement or further debate in the Council which might indicate common ground among the parties.

The Committee is furthermore concerned about possible racial and gender discrimination in the economic sphere which might not be excluded by this right as presently formulated.]

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

24 Labour Relations

- (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.

[Explanatory Note: The Council has not yet explicitly agreed on the inclusion of the rights in subsection (3) but they appear to be acceptable to all the parties since no objections have been raised. One of the parties recommended that an appropriate labour forum be consulted in connection with the inclusion of labour relations rights in general. There are apparent concerns that the entrenchment of some of the rights in this Chapter will adversely affect the rights presently enjoyed by workers under existing legislation. Comment from the appropriate forums in this regard is a prerequisite to the Committee's dealing with the matter.]

25 Property

- (1) Every person shall have the right to own property.
- (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.

[Note: The Council has as yet not agreed on the inclusion of this right. There is no difference of opinion as to the inclusion of the right in general, but subclause (2) of the Committee's present proposal is controversial. One of the parties suggested the following formulation:

"Legislation should be adopted which provides that there shall be no compulsory acquisition of property by the state, except in the public interest and according to lawful procedures. Such procedures shall provide for appropriate compensation, to be calculated taking into account the history of

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

the acquisition of the property, the use to which it is being put, the availability to the state of resources and the interests of those affected. The determination shall be made by an independent Tribunal, subject to review by the courts."

The Committee is of the opinion that the following alternative formulation of subclause (2) might provide a basis for compromise:

"(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 availability to the State of resources and the interests of those affected."]

26 Environment

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.]

27 Children

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

28 Language and Culture

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

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

29 Education

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 racial discrimination.

[Explanatory Note: The Council still has to agree to the inclusion of educational rights in the present Chapter of the transitional Constitution. One of the parties proposed the inclusion of the following provision:

"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."

The Committee recognises the need for the protection of this type of interest, but not in this Chapter.]

30 Limitation

With the exception of the rights and freedoms referred to in [Section 6(2), 7 (excepting the right not to be subject to forced labour), 9 (excepting freedom of religion) 21 and 27] 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) necessary and reasonable, and
 - (ii) justifiable in a free, open and democratic society, and
- (b) shall not negate the essential content of the right or freedom in question.

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

[Explanatory Note: The Committee is not in a position to finalise the list of rights and freedoms to be included as exceptions to section 30. The matter is still under investigation. Among other things the Committee is also considering whether it is necessary or proper to determine now whether section 30 should be applicable to certain clauses in the Chapter.]

31 Suspension

- (1) The rights and freedoms entrenched as fundamental may be suspended only to the extent demanded by the situation and in consequence of the declaration of a state of emergency proclaimed prospectively under an act of [the legislature].
- (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 reasonably necessary to restore peace and 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 have any effect 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 of 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 -

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

- (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 and of sections 3, 6(2), 7 (excepting the right not to be subject to forced labour), 9, 16, 18 and 27.

[Explanatory Note: The Committee is not in a position to finalise this list of rights and freedoms to be included as exceptions to section 31. The matter is still under investigation. Among other things the Committee is also considering whether it is necessary or proper to determine now whether section 31 should be applicable to certain clauses in the Chapter.]

- (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 shall be entitled to order the release of such a detainee if satisfied that such detention is not reasonably necessary to restore peace and 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 the continuation of his or her detention;

[Explanatory Note: The Committee could not reach

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

agreement on the reviewing mechanism and will investigate the matter further.]

- (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;
- (g) if detained for longer than ten days the detainee shall be entitled to the review procedure in subsection (4)(c) before the expiry of each subsequent period of ten days.

4. ENFORCEMENT MECHANISMS

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.

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 its 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

EMBARGOED UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

accessible, while an Ombud with wide powers could oversee the application of this Chapter in the administrative sphere.

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