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FUNDAMENTAL RIGHTS DURING THE TRANSITION

NOTE: See also Technical Committee on Constitutional Issues

Date

✓ First progress report	14 May 1993
Second progress report	21 May 1993
Third progress report	28 May 1993
Fourth progress report	3 June 1993
Fifth progress report	11 June 1993
Sixth progress report	15 July 1993
Seventh progress report	29 July 1993
Eighth progress report	9 August 1993
Ninth report	not published
Tenth report	1 October 1993
Tenth report	5 October 1993
Eleventh report	8 November 1993
TWELFTH REPORT	15 NOVEMBER 1993 +

CHAPTER ON ADMINISTRATION OF JUSTICE

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITIONS

FIRST PROGRESS REPORT - 14 MAY 1993

1. Introductory remarks

The Committee first met on 10 May 1993 at The World Trade Centre ("the first meeting") and thereafter on 13 May 1993 in Cape Town ("the second meeting"). It has also scheduled a meeting for 18-20 May 1993 at The World Trade Centre ("the third meeting"). Dates for further meetings will be determined at the third meeting. Meetings with other Technical Committees, such as the Committees on Constitutional Matters and the Repeal of Discriminatory Legislation, may also be necessary, since this Committee envisages that it will, from its particular perspective, somehow have to address concerns such as the mechanisms for the enforcement of fundamental rights and freedoms, and constitutional principles to be embodied in an interim constitution which will serve as guidelines for the eventual drafting of the final bill of rights by a constituent assembly.

2. Guiding considerations

At its first meeting the Committee, after having appointed Prof LM du Plessis as its convener, agreed that the following consideration--which could in due course still be amplified--should guide it in its further deliberations:

- 2.1 The means and mechanisms for the entrenchment of fundamental rights and freedoms in the transitional period should enjoy legitimacy among the vast majority of the population so as to facilitate the legitimacy of similar means and mechanisms in a final dispensation.
- 2.2 Apart from identifying fundamental rights and freedoms which are to be protected in the transitional period, their enforceability and the enforcement mechanisms invoked to this end, are vital questions which will have to receive the Committee's serious attention. The said mechanisms should also be accessible and practicable.
- 2.3 The Committee should start off by exploring "common ground", i.e areas of agreement on minimal or essential fundamental rights and freedoms which can simply not be excluded in the transitional period. To this end the Committee ought to start by comparing bill of rights proposals for South Africa which have already been published.

of a person's rights.

27. The right to reasons for administrative action which affects a person's rights.
28. The right to an environment which is safe and not detrimental to health.
29. Freedom from eviction from a person's lawful home.
30. The right of children not to be subject to neglect, abuse or forced labour.
31. The right of equal access to State or State-aided educational institutions.

Almost all these rights will have to be subject to a limitations clause which will be provided for by this Committee in a later Report. The Committee will also attend to the circumstances in which these rights may be legitimately suspended.

Prof H Corder
Prof LM du Plessis (C)
Mr G Grove
Ms S Nene
Adv Z Yacoob

**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 non-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 on 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 in a 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.

Prof. H. Corder
Prof. L. M. du Plessis (C)
Mr. G. Grove
Ms. S. Nene
Adv. Z. Yacoob

CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12h00
ON FRIDAY 28 MAY 1993

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION : THIRD PROGRESS REPORT 28 MAY 1993
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1. BACKGROUND

The Committee was requested by the Planning Committee on 25 May 1993 to formulate specific criteria for the identification of rights and freedoms which are "fundamental" or "directly relevant" to the transitional phase, to explicate the criteria for the limitation and suspension of entrenched rights and freedoms and to recommend means and mechanisms for the adjudication of such rights and freedoms during the transition.

The Committee would like to point out that the identification of rights and freedoms for the purpose of entrenchment during the transition was seen by the Committee as its primary task from the outset. In its First Report it identified different categories of rights. In its Second Report the Committee refined its initial approach by categorising rights and freedoms according to certain practical criteria formulated by reference to the nature and anticipated course of the transitional process.

For this purpose the Committee distinguished between three categories of rights and freedoms, namely:

- * Those necessary to ensure democracy during the transition;
- * Those aimed at the overall security and well-being of all during the transition; and
- * Those conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction.

The Committee recommended that only the First and Second Categories be considered for inclusion during the transition, because rights in the Third Category are bound to be generally regarded as too controversial to be entrenched during the said period.

In view of the Planning Committee's request for further elaboration, this Report is

to be read as an amplification of and indeed - to a large extent - a supplement to the Committee's Second Report. Attention will be paid to:

- * The explication of criteria for determining which fundamental rights and freedoms are to be entrenched during the transition;
- * The explication of criteria for the limitation and suspension of the rights and freedoms referred to above; and
- * Means and mechanisms for the adjudication of such rights and freedoms during the transition.

To begin with, the Committee also suggests minor amendments of formulations in the Second Report.

2. AMENDMENTS TO FORMULATIONS IN THE SECOND REPORT

2.1 Editorial Changes

2.1.1 On page 2 of the Report, at the end of the third line of the seventh paragraph from the top, "a Bill of" should be inserted before "Rights".

2.1.2 In paragraph 5.1 where reference is made to "a general limitations clause" the words "and a suspension" should be inserted before "clause".

2.2 Substantive Changes

2.2.1 "Upliftment"

In formulating the criteria for its Third Category of rights the Committee refers to the "upliftment of all people". The word "development" should be substituted for "upliftment" throughout the Report.

2.2.2 "Well-being"

Delete the words "and well-being" where they occur in the second asterisk on page 1 of this report and the introduction to 2.2. The reason for this amendment will be explained in 3.4 below.

2.2.3 References to Affirmative Action

In its Second Report the Committee expresses the view that an affirmative action clause could qualify the equality clause (see e.g. 2.1.1.4.). The word "qualify" (or expressions to a similar effect) must be replaced by "amplify" (or expressions to a similar effect) throughout the Report.

2.2.4 Customary Law

Insert after 2.3.10 on page 8 of the Second Report the following:

"2.3.11 The recognition of the rights arising out of customary law and the extent to which they should be limited, etc."

Delete "etc" at the end of this sentence in 2.3.10 and replace the comma with a semi-colon.

3. CRITERIA

3.1 Introductory Remarks

The period of transition is generally perceived as coinciding in time with the movement towards full democracy in South Africa. With this in mind, the Committee's point of departure has been, and still is, that in order to facilitate the democratisation of society during the transition, at least those rights and freedoms which are inseparable from what is generally understood by "democracy" will have to be entrenched. The rights and freedoms which obviously come to mind here are the so-called first-generation rights and freedoms, i.e. the civil and political rights and freedoms which, although "Western" in origin, are generally recognised in the constitutions and/or common law of most democracies throughout the world.

The Committee did not simply compile a list of these first-generation rights, because it thought that a single comprehensive list would not facilitate negotiation amongst the parties, given their divergent views on the entrenchment of fundamental rights and freedoms during the transition. For some parties such a list would be too wide, while for others it would be too narrow. This is also the reason why the Committee (with the three generations of rights in mind) opted for a practical categorisation.

In the Committee's view, negotiation should first be focused on rights and freedoms listed under the First Category in the Second Report and parties should endeavour to agree on the entrenchment of these rights and freedoms during the transition. They should then proceed to the Second Category and

eliminate the rights on which no agreement can be reached. Rights listed under the Third Category should not be considered for inclusion during the transition, unless there is express agreement that they ought to be included.

As and when agreement is reached on specific rights, the Committee will immediately start formulating such rights in specific terms and submit its formulations to the Council.

- 3.2 To return now to the Planning Committee's request. If the transitional dispensation is to be based on democratic principles, a wide spectrum of first-generation rights will inevitably have to be regarded as "fundamental" or "directly relevant" to the transition. This will be the position regardless of the criteria which may be employed. The Committee recommends that the Council bases its deliberations on the categories as suggested by the Committee in the Second Report, because these allow for a practical and therefore more flexible approach.

In formulating practical criteria to help determine which rights and freedoms will have to be entrenched during the transition, the Committee assumes that the transitional process:

- * Will have to be as democratic as possible; and
- * Must be aimed at achieving full democracy.

- 3.3 Rights and freedoms ensuring democracy as such during the transition will therefore have to be included. This general proposition must, however, be qualified:

3.3.1 Democracy of a particular type (e.g. "liberal" or "social" or "African" democracy) should not be decided on for purposes of the transition. An elected and legitimate constitution-making authority will have to exercise this particular choice. Rights aimed at promoting democracy of a particular type should therefore be excluded during the transition.

3.3.2 It follows from 3.3.1 above that only "neutral rights and freedoms" ensuring minimum standards of democracy as such should be included. For this purpose their universal acceptance in international human rights declarations, instruments, literature and thinking must be taken into account: they must be time-honoured and non-controversial.

3.3.3 Paragraph 3.3.2 by itself does not constitute a sufficient criterion since not all universally accepted, time-honoured and non-controversial fundamental rights and freedoms need to be entrenched during the transition. The transition as a process and, in particular, a political process of a peculiar kind, has to be understood and honoured in order

to help determine which rights and freedoms should be entrenched during its limited lifetime. With this in mind, certain rights and freedoms enjoy priority over others. This does not imply that the former rights and freedoms are, generally speaking, more fundamental or more important than the latter ones. A classification or categorisation of rights and freedoms for purposes of the transition will not and need not reflect the process of rights-determination in the long term.

- 3.3.4 During the transition, everyday life for all people in the country will go on. Provision will therefore have to be made for the overall security of all. Social, economic and political stability during the transition will depend on the extent to which the population experiences a sense of security and identity. Fundamental rights and freedoms which will help instill and promote this sense of security and identity will therefore have to be entrenched to a sufficient degree.

In its Second Report the Committee refers to rights and freedoms aimed at achieving the overall security and well-being of all during the transition. For purposes of this Third Report the words "and well-being" have been deleted (see 2.2.2 above). This has been done because the term "well-being" can also be understood as referring to the socio-economic development of people - a process which will have to be set in motion by a legitimate constitution-making authority and which can be fully attended to only after (or in the later stages of) the transition. The words "and well-being" were therefore deleted in order to avoid misunderstanding.

- 3.3.5 The entrenchment of rights and freedoms during the transition will inevitably impact on their entrenchment in an eventual dispensation. If the exercise of a sufficient minimum of rights and freedoms cannot successfully be secured during the transition, the citizenry will lose faith in the value and even the relevance of the means and mechanisms for the entrenchment of rights and freedoms. Endeavours to entrench rights and freedoms during the transition should therefore not be over-ambitious, but at the same time they should also not be meaningless. A balance must be struck between protecting, on the one hand, too many and, on the other, too few fundamental rights and freedoms. This balance has to be reflected in the selection of rights and freedoms to be entrenched during the transition.

4. SUMMARY AND PROPOSED APPLICATION OF THE CRITERIA SUGGESTED IN THIS REPORT

All the considerations raised in paragraph 3 above are of considerable importance and need to be weighed in relation to one another in order to arrive at a carefully balanced decision as to whether or not certain rights and freedoms should be included during the transition. Without derogating from the importance of each of the said considerations, the Committee is constrained to propose a practical working summary of the criteria and to propose a way in which they could be applied. Of the three sets of criteria mentioned below, the Committee suggests that rights and freedoms would qualify as fundamental if they meet the criteria described in 4.1 and 4.2. If they do not meet the criteria in 4.1 and 4.2 they must meet the criteria described in 4.3 before they qualify for inclusion.

4.1 Rights and freedoms will, of necessity, qualify for entrenchment during the transition if:

4.1.1 Their inclusion would facilitate:

4.1.1.1 Free and fair elections; and

4.1.1.2 Free, fair and full consultation amongst people and groups of people in regard to all matters relevant to the transition; or

4.1.2 Their exclusion would limit or detrimentally affect the freedom, fairness or completeness of the processes described in 4.1.1.

and

4.2 The inclusion of these rights and freedoms do not pre-empt or unduly limit the right or power of a constitution-making authority to:

4.2.1 eventually draft a full Bill of Rights; or

4.2.2 determine laws or constitutional provisions aimed at the socio-economic reconstruction of society; or

4.2.3 remove or correct the imbalances which exist and which have been brought about by unfair or undemocratic practices.

4.3 Alternatively, rights and freedoms which do not qualify for entrenchment in terms of 4.1 and 4.2 will have to be included during the transition if they are nevertheless so fundamental that:

4.3.1 A constitution-making authority will not exclude or substantially limit them; or

4.3.2 It would be highly undesirable for such an authority to exclude or unduly limit them;

Rights and freedoms are "fundamental" for purposes of 4.3 either because they are universally accepted and beyond debate or because the negotiating parties agree that 4.3.1 or 4.3.2 apply to them.

It is the Committee's view that the acceptance of these working criteria would mean that all the rights in the First and Second Categories of this Second Report would be non-controversial, except that the rights described below and mentioned in the Second Report will have to be subject to agreement in terms of the criteria described in 4.3.3. before they qualify for inclusion. These are the following rights and freedoms (numbered as in the Second Report):

- "2.1.1.5 Freedom from servitude and forced labour.
- 2.1.1.9 The right to life.
- 2.2.1 Language and cultural rights.
- 2.2.3 Freedom of choice of residence and to pursue a livelihood anywhere in South Africa.
- 2.2.7 Freedom to participate in economic activity.
- 2.2.8 The rights to strike and to lock out.
- 2.2.9 The right to own property.
- 2.2.14 The right of equal access to State or State-aided educational institutions."

The rights included in the Third Category of the Committee's Second Report do not qualify for inclusion, unless there is express agreement that they ought to be included during the transition. The Committee is - in terms of the criteria in 4.1. to 4.3. above - unable to provide any argument in support of the proposition that they should be included.

5. EXPLICATION OF THE NEED AND CRITERIA FOR THE LIMITATION AND SUSPENSION OF FUNDAMENTAL RIGHTS AND FREEDOMS INCLUDED IN ANY BILL OR CHARTER OF RIGHTS.

5.1. Limitation

5.1.1 It is commonly accepted in most countries of the world, in the international sphere, and in every human rights instrument today, that very few rights and freedoms are unlimited in scope and application. Typical among those which are regarded as absolutely inviolable, are freedom from torture and freedom of conscience, religion, belief, thought and opinion. The vast majority of rights and freedoms, however, are necessarily limited by the basic duty (which is the counterpart of every right) to respect the rights of others. Thus, for example, freedom of speech generally does not include the right to defame another person, nor the right to shout "Fire!" in a crowded theatre when no such fire exists, and freedom of movement does not envisage unauthorised access to property or premises controlled by another legal occupant.

5.1.2 Every formulation for the protection of rights and freedoms must, therefore, allow for the limitation or circumscription of most rights, unless it wishes to run the risk of irrelevance through lack of enforceability. This limitation must, however, occur under close supervision and on relatively restrictive and precisely-defined terms. Again, typically, the legislature is viewed as the appropriate body to lay down the circumstances (in law) in which limitation may legally occur, and the judiciary is seen to provide the forum in which any such apparent limitation can be tested against the formula used in the Bill of Rights itself. In other words, the Bill must contain the circumstances of its own limitation.

5.1.3 Limitation (the preferred term here) can take one of three forms: a general limitations clause applicable to each and every protected right and freedom (with a few exceptions); a series of specific limitations clauses, each qualifying a specific right or freedom; or a combination of these two categories. The last-mentioned approach is the one adopted in the Committee's Second Report. It has the advantages, in our view, of providing a common standard against which all purported limitations can be measured, thus enabling the legislature and judiciary rapidly to develop an understanding of what is viewed as an acceptable curtailment in respect of the protected rights and freedoms, while also

allowing for a degree of flexibility by the subjection of certain rights and freedoms to further grounds upon which legislative curtailment may be justified.

- 5.1.4 For example, a general limitations clause might approve curtailment of rights and freedoms "where reasonably necessary in the public interest" while a specific limitation in regard to the right to liberty may provide that liberty may be deprived in the interests of "justice, public health or immigration". Again, once liberty has been lawfully deprived, a specific limitations clause may stipulate a maximum period of detention "unless further detention is ordered after a fair hearing by a court of law".
- 5.1.5 In a sense, the specific limitation spells out unambiguously how the general limitation ought to be applied in specific circumstances, or elaborates on the general limitation.
- 5.1.6 Limitation clauses are normally justiciable by the courts (or the highest court alone). In choosing the exact formulation for such clauses, most human rights instruments attempt to define with a fair degree of precision the guidelines which the judges should follow in fulfilling their duty in this respect. This is particularly so as the judges are generally secure in their tenure (in order to ensure independence) and so therefore less democratically accountable than the legislature, on whose laws they sit in judgment. Such guidelines may be all the more necessary in a legal system moving into judicial review of legislative action for the first time.
- 5.1.7 The Committee proposes a series of principles in its Second Progress Report (see paragraph 3.1. on page 9) which function cumulatively to define the judicial task quite narrowly, without eliminating judicial discretion to exercise the court's important controlling function. In particular, the Committee draws attention to:
- * The overall goal that limitations must be consonant with the needs of a free, open and democratic society (paragraph 3.1.2.);
 - * The fact that limitation should not have the effect of destroying the essence of the right (paragraph 3.1.3.); and
 - * The fact that any limitation should not be more drastic than the circumstances require (paragraph 3.1.4.).

5.2. Suspension

- 5.2.1 While limitation clauses are regarded as necessary and long-lasting, a suspension clause is aimed at ensuring the survival of a Bill of Rights after a temporary period of national crisis or natural disaster. For the duration of such a state of affairs, it may be necessary to suspend the operation of most or some of the rights and freedoms entrenched in the Bill of Rights, in order to allow the State to restore order and peace. Thus, for example, people may have their freedom of movement and association removed during a flood or in war-time. Without providing for such suspension, a Bill of Rights runs the risk of inviting ignorance (and thus disrespect) in such calamitous circumstances.
- 5.2.2 The drastic nature of suspension, however, demands that the most stringent procedural safeguards be followed before suspension of rights and freedoms can occur legally, such as are set out in paragraph 3.2. (page 9) of the Committee's Second Report. In particular, the following principles should be noted:
- * Suspension should only occur in the form of a state of emergency declared by the executive under specific conditions, which would be reviewable by the courts (paragraph 3.2.1.);
 - * Legislative ratification of both the declaration and any emergency measures would be required within a certain time (paragraphs 3.2.4. and 5); and
 - * That the suspension of rights and freedoms would not imply immunity of State officials for their unlawful conduct during such emergency (paragraph 3.2.6.).
- 5.2.3 As with the limitations clause, there are certain rights which would be regarded as absolute in all circumstances, and therefore as not being capable of suspension. These would include freedom from torture and freedom of conscience, belief, thought and opinion.

6. AN INSTITUTION TO ADJUDICATE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

6.1. General Observations

6.1.1 South Africa's legal history does not know the concept of judicial review in a constitutional sense, nor the entrenchment of certain rights and freedoms as fundamental. It is widely acknowledged that litigation and judicial decision-making in the constitutional sphere are substantially different from conventional legal practice to this point. Some South African judges and legal practitioners and many academics have, however, been exposed to human rights theory and practice, especially as neighbouring states (such as Namibia and Zimbabwe) have adopted Bills of Rights and written constitutions. It is instructive that, after some initial hesitancy and shortcomings in the judicial process, most lawyers (including judges) schooled in the common law tradition (which characterises South African law in this respect) have adapted quite quickly to the new legal dispensation. This process of adaptation is reflected at the popular level - it is universally recognised that the successful implementation of any Bill of Rights depends largely on the development of a "human rights culture" among the population generally. It is noteworthy that this process was emphasized by the South African Law Commission in its Working Paper on Group and Human Rights in 1989, and has been a feature of the programmes of most organisations and movements which resisted apartheid. Programmes of basic education in the human rights field are now widespread in non-governmental organisations, and the South African Government has announced a similar programme this year.

6.1.2 There is a second major factor which must be borne in mind here. South Africa's courts, through their implementation of unjust laws, particularly over the past 45 years, have suffered considerably in reputation and legitimacy among the majority of the population. There has been much disquiet about the effects of the manner in which judges are appointed, a system which has led to a Bench which is, with two exceptions, white and male. The patent political profile and power of the courts will inevitably heighten under a system of entrenched rights and judicial review of the Constitution. This means that the appointment of judicial officials as well as measures to enhance their democratic accountability and independence from the

legislature and executive during tenure of office, are matters which need urgent attention. These are matters, however, of the utmost political contention, which demand the widest level of consultation and consideration by a representative governing authority.

6.1.3 With these realities in mind, the Committee is required to consider the desirable mechanism for the adjudication of fundamental rights during the transition. The Committee has no doubt that an eventual constitutional dispensation (drafted by a democratic constitution-making authority) should seriously contemplate a full package of adjudication mechanisms, including at least:

- * A Constitutional Court, with appellate and well-defined original jurisdiction, as the final arbiter on constitutional and rights issues;
- * A Human Rights Commission, with advisory, mediating, investigative and educational functions, to promote knowledge about and implementation of fundamental rights and freedoms;
- * An Ombud with substantially expanded powers of investigation and review of the regularity and legality of administrative actions; and
- * An extended notion of standing to sue in constitutional matters, and financial and logistical support for litigants who wish to challenge the constitutionality of Government action which infringes on rights and freedoms.

6.1.4 The legitimacy of such institutions will depend on the manner of their establishment and the legitimacy of the body which creates them. These are matters to which, in the view of the Committee, a constitution-making authority would have to give the most urgent attention.

6.2. Considerations Pertaining to the Transition

6.2.1 The Committee at this stage finds itself in a difficult position in respect of making specific recommendations for the transition. While the South African Government has submitted (on 25 May 1993) its "Preliminary Views and Proposals regarding the Independence of the Judicial Authority" in which it states that certain changes to judicial structures are necessary, even during the transition, it has not motivated such a proposition, and no other party or body has to date (27 May 1993) submitted any definite proposals in this respect.

- 6.2.2 In addition, the Committee's view on this matter is very likely to be influenced by the proposals of at least the Technical Committees Constitutional Matters, Independent Electoral Commission and Repeal of Discriminatory Legislation, as each of these bodies could potentially propose codes of protected rights and means and mechanisms for their enforcement.
- 6.2.3 This Committee therefore earnestly requests all participants in the Negotiating Council to inform it of their views as to:
- 6.2.3.1 The appropriate adjudicative institution(s) to enforce fundamental rights during the transition;
 - 6.2.3.2 Reasons for adopting such a course and for the timing of its introduction;
 - 6.2.3.3 Methods of constituting any new bodies suggested, and of selecting their members;
 - 6.2.3.4 Supplementary mechanisms to make the functions of the adjudicative institution effective and accessible.

7. RECOMMENDATIONS

On the understanding that the recommendations in 7.2 to 7.4 below replace the recommendations in 5.3 and 5.4 of the Committee's Second Report, the Committee recommends to the Council that it:

- 7.1. Accepts the Committee's recommendations in 5.1 and 5.2 of the Second Report subject to 7.3 below;
- 7.2. Agrees in principle to the criteria proposed by the Committee in paragraph 4 of this Report;
- 7.3. Advises the Committee as to whether the rights and freedoms listed in 2.1.1.5, 2.1.1.9, 2.2.1, 2.2.3, 2.2.7, 2.2.8, 2.2.9, and 2.2.14 of the Committee's Second Report are to be entrenched during the transition;
- 7.4. Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, formulations of all the rights and freedoms listed under the First and Second Categories in the Committee's Second Report, with the exception of those rights and freedoms referred to in 7.3 above;

- 7.5 Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, formulations of those rights and freedoms mentioned in 7.3 above which according to the Council should be entrenched during the transition;
- 7.6 Accepts the general principles laid down for the limitation and suspension of fundamental rights and freedoms during the transition in paragraph 3 of the Committee's Second Report and explicated in paragraph 5 of this Report, and instructs the Committee to submit a formulation of a general limitations and suspension clause to a subsequent meeting of the Negotiating Council;
- 7.7 Requests all Negotiating Council participants to make submissions to the Committee with regard to the matters raised by this Committee in paragraph 6.2 of this Report before 12h00 on 1 June 1993;
- 7.8. Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, recommendations with regard to the means and mechanisms for the adjudication of fundamental rights and freedoms during the transition after considering the submissions made in terms of 7.7 above.

Prof. H. Corder
Prof. L. du Plessis (C)
Mr. G. Grove
Ms. S. Nene
Adv. Z. Yacoob

CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12h00
ON THURSDAY 3 JUNE 1993

<p>TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION : FOURTH PROGRESS REPORT 3 JUNE 1993</p>
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1. BACKGROUND

At its meeting of 28 May 1993 the Council accepted, in principle, the Committee's proposals with regard to those fundamental rights and freedoms which should be entrenched during the transition, without endorsing the criteria proposed by the Committee in paragraph 4 of the Third Report (see 7.1.3.4 of the Council's Minutes of 28 May 1993). The Committee hereby submits the requested formulations.

In terms of the Committee's criteria, certain fundamental rights and freedoms were identified as requiring agreement among the members of the Negotiating Council before they could be included. The Council nevertheless instructed the Committee to proceed with the formulation of these rights and freedoms as well as to suggest alternative formulations where necessary (see 7.1.3.4 and 7.1.3.5 of the Council's Minutes). For the sake of convenience "rights and freedoms agreed on" and "rights and freedoms still to be agreed on" will be dealt with under two different headings. A formulation of a general limitation and suspension clause will also be suggested under a subsequent heading.

The formulations below are suggested by the Committee as the most appropriate in the circumstances. The Committee has added Explanatory Notes where necessary. The headings are not proposed for inclusion in a legislative instrument at this stage and have simply been added for the benefit of the Council. Only what appears between inverted commas is suggested for inclusion.

No decision has been made by the Committee concerning the order in which these rights and freedoms should appear in any legislative instrument or about the way in which they ought eventually to be grouped. This will be determined during the next stage of the Committee's work, after there is clarity as to the extent of the final list of rights and freedoms.

The Council will note that alternative formulations in respect of those rights and freedoms on which no agreement yet exists, which are contained in paragraph 3 of this Report, have not been provided. The Committee considered the various contentions of the parties and decided to produce a formulation which might provide a basis for common ground. In any event, the Committee was of the view that the formulation of further alternatives could be meaningfully embarked on only after comments and suggestions have been received from the parties.

Further work by the Committee will be rendered extremely difficult without substantiated representations by the parties on all the formulations which follow.

2. RIGHTS AND FREEDOMS AGREED ON

2.1 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."

[Explanatory Note: The Committee understands that freedom of speech and expression includes the right to gather information preparatory to its expression. The right to freedom of speech and expression, when read together with the equality clause, may include the notion of equal and equivalent use of State-supported electronic media. The Committee has refrained from dealing with this aspect of freedom of expression in any greater detail, in view of the fact that it will be considered by the Technical Committee on the Independent Media Commission and the Independent Telecommunications Commission.]

2.2 ASSEMBLY, DEMONSTRATION AND PETITION

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

[Explanatory Note: This includes the right to hold public meetings and processions.]

2.3 FREEDOM OF ASSOCIATION

"Every person shall have the right to freedom of association."

[Explanatory Note: This clause necessarily implies that no legislation or executive or administrative act shall restrain people from associating nor

compel them to associate with others.]

2.4 POLITICAL RIGHTS

"Every person shall have the right to form and to join a political party and the freedom to make political choices."

[Explanatory Note: The Committee is of the opinion that particular reference should be made to the freedom to make political choices in the light of the culture of intolerance which appears to prevail and which may result in people being forced to assume certain political positions. This addition also caters for the concern that the majority of women in the country are not in a position to exercise freedom of political choice.]

2.5 FRANCHISE

"Every citizen of voting age shall have the right to vote in secret and to stand for election to public office."

[Explanatory Note: The denial of these rights to the majority of the population for so long warrants their specific inclusion in this list of fundamental rights.]

2.6 ACCESS TO INFORMATION

"Every person shall have the right of access to all such information under the control of any government authority or statutory body as is necessary for the protection or exercise of his or her rights."

2.7 ADMINISTRATIVE DECISIONS

"(1) Every person shall have the right to lawful and procedurally proper administrative decisions."

[Explanatory Note: This requires, among other things, compliance with the rules of natural justice, including the right to a fair hearing and to an unbiased decision.]

"(2) Every person shall have the right to be furnished with the reasons for an administrative decision which affects his or her rights."

2.8 HUMAN DIGNITY

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

[Explanatory Note: The Committee draws attention to the fact that it has provided further for this right in the context of persons who are detained - see paragraph 2.17.1(b) below.]

2.9 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."

2.10 PERSONAL LIBERTY

"Every person shall have the right to his or her personal liberty."

2.11 RIGHT TO EQUALITY

"Every person shall be equal before the law and entitled to equal protection of the law. 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 basis of race or gender in particular."

2.12 TORTURE AND CRUEL PUNISHMENT

"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."

2.13 FREEDOM OF MOVEMENT

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

2.14 ACCESS TO COURT

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

2.15 INDUSTRIAL 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 bargain collectively."

2.16 DEPARTURE FROM AND RETURN TO SOUTH AFRICA

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

2.17 DETAINED, ARRESTED AND ACCUSED PERSONS

2.17.1 Detained Persons:

"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."

[Explanatory Note: The above provisions will apply to all persons detained by the State. Apart from accused persons and prisoners, it also pertains to other categories of detainees such as mentally disordered persons and prohibited immigrants.]

2.17.2 Arrested Persons

"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 a 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 a court of law within a reasonable time after arrest, and
- (d) upon good cause being shown, to be released from detention with or without bail, unless the interests of justice require otherwise."

2.17.3 Fair Trial

"Every accused person shall have the right -

- (a) to a public trial by a court of law;
- (b) to be informed with sufficient particularity of the charge

against him or her;

- (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 require, 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 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."

[Explanatory Note: The Committee has included the right to legal representation, if necessary at public expense, because the move to a rights-based and justiciable constitution emphasises the importance of the legal process. Without legal representation, the accessibility of the court is considerably narrowed.]

2.18 PRIVACY

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

[Explanatory Note: The general limitations clause ought to be sufficient to