MCHGL-77-1-3

TO: ANC NEGOTIATIONS COMMISSION

011- 3307119

FROM: ALBIE SACHS

Dear Secretariat to the Negotiations Commission

Herewith a brief explanatory note which I was asked to prepare to explain the confusion over ANC submissions. It should accompany the extensive text which follows.

Please note that in the light of our discussions yesterday, I have worked out a plan of work with Halton and Dennis. It was agreed that I would do the three sections of the reply that are enclosed. I have sent them to Halton and he will integrate his section, run through the whole thing and consult with others before submitting a final text tonight.

I am sending you this in the meanwhile because it contains some delicate formulations, particularly one relating to pension rights. It also proposes a simplified scheme for dealing with fundamental rights which can be looked at before Halton's section is received.

Regards

Albie. Cape Town 21/6/93

Albie

FAX
TO: ANC NEGOTIATIONS COMMISSION
FAX NO: 011-3307119 PAGE: OF: 12
ATTENTION OF: HASSEN EBRAHIM
FROM: ALBIE SACHS
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TO: HALTON CHEADLE
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ANC RESPONSE TO THE FOURTH AND FIFTH REPORTS OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION.

This is the ANC response to the Fourth and Fifth Reports of the above Technical Committee. We understand that a document containing technical comments prepared by the ANC Constitutional Committee was inadvertently submitted as an ANC response to the Fourth Report. We wish to make it plain that the document enclosed herewith is the only formal ANC response and apologise if any inconvenience has been caused.

ANC RESPONSE TO THE FOURTH AND FIFTH REPORTS OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITIONAL PERIOD

PART ONE: TAILORING AND SIMPLIFYING THE REPORT TO MEET ITS OBJECTIVES

The objective behind establishing a set of binding and justiciable fundamental rights in the transitional period was to encourage a sense of security amongst all those directly and indirectly involved in the negotiation process.

The intention was to formulate an agreed foundation of non-controversial principles that would serve as a generally accepted guarantee to all South Africans against abuse of power during the phase when a full and definitive constitutional order was being established.

The result of the work of the Technical Committee has, unfortunately, been the opposite. The trade union movement has expressed deep alarm in that far from guaranteeing rights to workers, the present formulation could be used to weaken rights which already exist.

Sections of the women's movement have spoken out strongly against what they consider to be a lack of expressed gender awareness. Persons involved in questions of land reform have been up in arms about the property clause.

Constitutional experts who have been fighting all their professional lives for an entrenched Bill of Rights in South Africa, have manifested alarm rather than joy at the document which has emerged. They point out that its terms open the way to endless litigation on social and economic questions that have nothing to do with fundamental rights in their most basic sense.

Instead of being greeted with joy and satisfaction, it has aroused controversy and polarised opinion.

We in the ANC must share in the responsibility for not having anticipated the problems that would arise. We wish to acknowledge the hard, sincere and creative work the members of the Committee have done. The fact that we feel that a thorough re-think and simplification of the work of the committee is necessary, arises not from any failure on their part, but from the fact they never received a clear mandate nor were they given appropriate responses to the queries they raised.

How should the question of fundamental rights in the transitional stage be approached?

It is not the function of the interim measures to serve as a mini- Bill of Rights, nor should they be envisaged as a kind of dress rehearsal for a fully fledged charter.

It will be the function of the constitution-making body to draft a full and enduring Bill of Rights. A meaningful Bill of Rights must be part of a total constitutional package. Interested parties must be given an opportunity to express their views in relation to each and every clause. Such a document must be carefully drawn and well balanced so that all the distinctive parts cohere in a meaningful whole. International experience must be carefully analysed. Special attention must be paid to the mechanisms of enforcement, so that citizens can make effective use of their rights.

The Technical Committee's function is of a different order altogether. The objective is quite specific. It is to give such guarantees as are necessary to enable the constitution-making process to proceed in a free and democratic manner, without anyone fearing that their fundamental rights will be violated in the interim. To work well, the transitional measures must be neatly tailored to their purpose, which is twofold.

The first relates to ensuring that civil liberties will be fully respected during the election period. In common parlance, it is a crucial part of guaranteeing that there will be a level playing field. Not only must there be an electoral law directly governing the elections; fundamental freedoms, such as freedom of speech, assembly, movement and political organisation, must be protected.

Fundamental rights at this stage do not stand on their own. They form part of a basket of measures designed to give legitimacy to the elections. It is thus not the function of the fundamental rights chapter alone to carry the whole process and ensure fairness. It connects up with and reinforces agreed provisions relating to a Transitional Executive Council, to an Independent Electoral Commission and to an independent body governing access to the electronic media.

To have clauses dealing with workers' rights or children's rights at this stage makes no sense, no, for that matter, clauses dealing with language, cultural or property rights.

All the above points refer to the inappropriateness of having an extensive set of rights set out for the period up to the elections. Many of the problems confronting the Technical Committee arose from the fact that a general right, which we all support, namely freedom of association, can be used to undermine important specific rights, such as the right to engage in collective bargaining. Thus, in order not to weaken existing rights, we called for express recognition of the right to collective bargaining, and coupled this with the right to strike, which in turn led to a demand for the inclusion of the employers' right to lock-out. And so the document grew.

If the purpose of guaranteeing basic civil liberties in the electoral period had been kept in mind, the phrase freedom of association could have been subordinated to general political purposes associated with the elections. The mutiple other implications of the term could then have been left to full consideration by the constitution-making body. The document would have been simpler and cleaner. It would also have been less controversial, and more successful in its objective of building confidence.

Another example of inappropriateness based on prematurity might be given, and that relates to the clause on equality. As is well known, we have always been the organisation that stood for equality. Yet we cannot support placing the fundamental right to equality in a document that presupposes the continuing existence for some time into the future of institutions based on inequality. Two examples are the Tricameral Parliament and the structures of own affairs administration [unless, that is, the Tricameral institutions want themselves to be declared unconstitutional before the electors have given their verdict].

Once you have an equality clause, you have to couple it with a clause that permits special measures in favour of disadvantaged groups, and so the bits-and-pieces growth of the document continues beyond its true function.

In fact, what is needed in relation to equality at this stage is the removal of statutes which impose discrimination, particularly if they impinge negatively on the election process. A special technical committee has dealt with this matter, and delivered what it has confidently called its final report.

A proper equality clause will in due course be central to a proper Bill of Rights. Its phrasing will have to be just right, the product of much consultation and analysis.

What about the second phase, namely after elections but before a new constitution has been adopted? Here again, the terms of the document must be tailored to the situation it is intended to deal with. Here, too, it must be seen not in isolation but as part of a basket of measures designed to instil confidence and prevent abuse of power.

After the elections, respect for the basic civil liberties must, of course, continue. There will be a government of national unity [if proposals of the Technical Committee are accepted]. The constitution-making body will be bound by generally agreed principles relating to fundamental rights. Regional administrations will come into being. The rights of opposition and freedom of the press will be guaranteed.

These are substantial guarantees against abuse of power.

All that will be further needed at this stage is a prohibition on the National Assembly in its legislative capacity from passing any laws, and the executive from taking any action, that diminishes any of the rights contained in the agreed principles.

The focus at the present stage of negotiations, then, should be on the wording of these general principles, rather than on the detail of the document on fundamental rights in the transitional period.

Concentrating on the inviolable general principles would have a major additional advantage. It will enable the same body that ensures that the new constitution does not depart from the agreed principles, to see to it that the National Assembly does not pass any laws that violate these principles. In other words, instead of having a multiplicity of judicial bodies dealing with questions relating to the validity of Parliamentary decisions, there will be only one.

It should be pointed out here that the clauses dealing with fundamental human rights in the general constitutional principles are the result of nearly two years of intense debate and consultation. They are consistent with the Declaration of Intent that preceeded and initiated the first large multi-party negotiations, namely that at CODESA ONE. They have now been refined with attention to the exact phrasing. Issues on which there is no agreement have been left out.

Furthermore, the document setting out general principles is meant to be binding as a set of underlying principles, and

not as a formalised text. The actual wording of the rights referred to will be left to the drafters of the new constitution, who will take account of the full implications of each clause, their interconnectedness with each other and with the constitution as a whole, and the overall balance achieved.

The document proposed by the Technical Committee on Fundamental Rights, on the other hand, will not be a framework for future drafting, but a constitutional text itself. These are the very formulations that will have to be interpreted by the courts.

The judges will have immense responsibilities, for which they will not have been prepared. Their role will be a new one. They will be required by active litigators - many not noted for their civil libertarian zeal - to pronounce on all sorts of highly controversial social and economic matters. The only text to guide them will be the one produced by the Technical Committee, a text which has been put together without clear guidelines or support from members of the Negotiating Council, and the implications of which have not been fully thought through.

Legislation could be held up by anyone seeking to frustrate the work of the Government of National Unity. The already difficult task of governing in new conditions will be made even more complicated. Mass court action could be used to make the country ungovernable.

Once a proper constitution has been adopted and a proper constitutional court established, then, of course citizens will be entitled to approach the court whenever they wish in relation to any matter affecting their constitutional rights.

Constitutionalism cannot, however, be greater than the constitution it defends. Full constitutional protections cannot precede a full constitution, they flow from it. What needs to be protected in advance is the constitution-making process, not the anticipated outcome of that process.

To sum up: the function of a document dealing with fundamental rights in the transitional period is essentially twofold, to ensure that basic civil liberties are respected throughout, and to see to it that nothing is done that undermines agreed general principles relating to rights in a new constitution.

Transitional constitutional arrangements need go no further than set out the basic civil liberties in general terms that will guarantee an open and democratic society both before and after elections, and declare that no legislative or executive action may be taken which undermines, negates or in any way diminishes the general rights which must be included in the final constitution.

PART TWO: OTHER MEANS OF ALLAYING ANXIETIES IN PARTICULAR FIELDS

It is not the function of a document dealing with fundamental rights in the interim period to resolve major political questions or allay all anxieties. Thus important questions such as those relating to property or pensions should be dealt with in a considered and balanced way that takes into account the legitimate claims of all interested parties, but not through an interim charter of fundamental rights.

Even less so should any attempt be made to assert any particular economic ideology in a constitutional document. Constitutions can outlaw arbitrariness but not stupidity. No constitution in the world has succeeded in abolishing the right to be wrong. It is ironical that people who in general are the most vociferous in objecting to being told how to be politically correct, are usually the first to try to compel us all to be economically correct.

It is the national economic forum and the hard realities of job and wealth creation that will guide future economic policy, not judges far removed from the actual processes of production attempting to give their own interpretations of open-ended terms in a constitution.

Similarly, while it would be appropriate for judges to ensure that fair procedures and equitable and reasonable principles were followed in relation to any questions affecting property rights, it would be quite wrong for them to be called upon to pronounce on complex substantive questions involved in land reform. Their doing so would be particularly invidious if their only guide was an un-nuanced, generalised property clause that took no account of how present titles were acquired, the availability of resources to fund re-allocation of land and agricultural training, and other relevant factors.

Agreement in advance on a formula that balances out all relevant interests would indeed provide the security that

all desire. It presupposes that there will be meaningful change, but ensures that such change proceeds in an orderly and principled manner, taking into account all appropriate factors.

The pensions issue is an equally complicated one that merits an agreed and broadly acceptable formula worked out in advance. To some extent, a formula dealing with compensation for expropriation of property would cover pension rights. A more specific formulation based on the concrete issues relating to pensions, however, needs to be considered.

While there will be general agreement that legitimately accumulated and nurtured nest-eggs should have a high degree of protection, the same cannot be said of golden handshakes, particularly if they have been in effect offered to themselves as tax-free gratuities by those already well-off.

It might well be unconscionable to deprive a person of pension rights acquired by means of actual moneys put aside into investment funds, which then fully cover the payments to be made. The position is not the same, however, with regard to special tax benefits to those comfortably off. Nor does the same constitutional sympathy extend to payments promised to political figures by themselves, without appropriate or adequate contributions or investment cover.

What would be unconscionable here would be for the government of national unity to be so saddled with huge payment obligations out of public funds to the already well-off, that it has insufficient funding for investment in economic growth and for payment of minimum pensions to the desperately poor. The legitimate national interest in promoting economic growth and producing a less divided and more stable society must be part of the equation.

What is needed, then, is an agreed formula that is manifestly fair, and that balances out the legitimate interests of all those concerned. Any possible interference with or diminution of existing pension rights would have to be effected according to due process of law in terms of predetermined criteria. These would have to take into account the abovementioned factors as well as any others that persons expert in the field would regard as crucially relevant.

Unlike land reform, where the onus must be in favour of facilitating just re-allocation of access to affordable land, subject to appropriate compensation, the onus here could well be in favour of upholding existing pension rights

where certain conditions of reasonableness and legitimacy are met.

Another area where an appropriate formula agreed to in advance could provide for an all-round alleviation of concern, would be in respect of language and religious rights, particularly in relation to education. This is another field, together with the clause for compensation for expropriated property, where we feel that the Technical Committee has done creative work and produced balanced formulations. In our view, they should not be classified as fundamental rights, but rather as appropriately protected guarantees in relation to matters of special concern.

The proposal, then, would be to separate out formulae dealing with special and appropriate protections in relation to compensation for expropriated property, pension rights, and language and religious rights and rights to education. The formulations developed by the Technical Committee in three of these areas could serve as a textual basis for this purpose.

These special measures might or might not be included in the transitional constitutional arrangements. What is important is that the guarantees are regarded as appropriate by all those most directly involved.

PART THREE: THE FLOOD OF POLARISING LITIGATION THAT COULD FOLLOW FROM ADOPTION OF THE TEXT AS PROPOSED

[Insert the piece being prepared by Halton, emphasising that we envisage our courts developing their own jurisprudence rather than simply following North American or other precedent, but that nevertheless North American experience shows just how contoversial and litigation-prone the text would be. Similarly, we do not concede that the conservative, pro-property, pro-rich interpretations would be the appropriate ones - the problem is that all government action, even on issues not directly concerned with basic liberties, could be held up while the disputed matters were being fought out before the judges.]

PART FOUR: A PROPOSED RE-FORMULATION TO MEET THE INTERESTS OF ALL CONCERNED

1. DECLARATION OF FUNDAMENTAL RIGHTS DURING THE TRANSITIONAL PERIOD

1. Until such time as a comprehensive new Bill or Charter of Fundamental Rights has been adopted by the constitution-making body:

1. All fundamental civil liberties necessary for free political campaigning, debate, criticism and opposition shall be respected.

These shall include but not be limited to freedom of speech, association, movement, political mobilisation and conscience.

2. No laws shall be passed at any level of government, nor shall any executive or administrative action be taken, which violates, undermines or dimishes any of the rights and freedoms agreed upon as part of the general principles which will be binding on the constitution-making body.

II SPECIAL GUARANTEES DURING THE TRANSITIONAL PERIOD

In order to provide for balanced and orderly change during the transitional period, the following principles shall be binding on the state:

1. Expropriation of property

Expropriation of property by the state shall be permissable 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, the investment made in it, its market value, the availability to the state of resources and the interests of those affected.

2. 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.

3. 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;

c) To establish where practicable educational institutions based on a common culture, language or religion, provided that there shall be no racial discrimination.

4. Pension rights

Legitimate and reasonable pension rights based on contributions made either to private or state schemes shall be respected. This protection shall not automatically extend to gratuities paid or special tax benefits made available. No diminution of the amount or level of pension payments owing in terms of contracts duly entered into and complied with, shall be permissible except according to due process of law and where, in the public interest, it would be just and equitable to make such diminution. The extent of any such diminution shall be determined by a court of law, taking into account all relevant factors, including the level of contributions paid and interest accrued, the availability of secured or other funds for the repayment, and the broad national interest in ensuring that funds are available for stimulating economic growth and meeting the basic pension entitlements of those most in need.

FAX TO: ANC - NEGOTIATIONS COMM.
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Dear comrades on the administrative committee of the Negotiations Commission, or whatever you call yourselves,

This is the second and last assignment I have completed for you. Just to confirm, I sent to you and to Halton my text on Fundamental Rights during the Transitional Period. He was to add a section and do the final editing.

The present document is the text I propose in the light of discussion in the NEC and yesterday at the Negotiation Commission, on the question of regional constitutions and asymmetry.

As I explained on the telephone, I was unable to manage within the available time the third assignment, namely, a text of our response to the document on the constitution-making body. If tomorrow [Tuesday] it still needs doing, contact me.

Albie.

Albie.

Monday 23/6/93
p.m.

ANC RESPONSE TO THE TECHNICAL COMMITTEE ON CONASTITUTIONAL MATTERS

THE QUESTION OF CONSTITUTIONS FOR THE REGIONS AND REGIONAL ASYMMETRY

The crucial question is who decides on the constitutional framework for regional government. We are firmly of the opinion that it should be the constitution-making body that makes this determination. It will do so subject to two major conditions: the regions will be directly heard through their representatives elected to the constitution-making body, and, secondly, it will be bound by the agreed constitutional principles relating to the powers and functions of regions.

It will then be up to the cmb to decide whether, within this framework, the constitutional framework for regions should be identical or not. In other words, the question of total symmetry or possible divergence is not one of principle to be agreed definitively one way or the other in advance. Argument will have to be heard at the cmb and the issue decided in the light of the total configuration of the constitution.

Our general approach will be to avoid the following:

The perpetuation of anything reminiscent of the divisions of the past, of the marginalisation of certain zones, or the creation of what in effect would be a league of first, second and third division regions;

The facilitation of competitive economic policies that would undermine national macro-economic discipline, especially in relation to inflation, the public debt and balance of payments;

The encouragement of wasteful public expenditure on unnecessary governmental structures intended to promote regional grandeur;

The elimination of institutions designed to protect democracy and the observance of fundamental rights throughout the country;

The undermining of a sense of shared national citizenship, and with it, a feeling of shared rights and responsibilities throughout the land;

The creation of impediments to the free movement of capital, labour and goods throughout the country;

The establishment of mechanisms that would permit the perpetuation of inequality and racial domination in any part of the country;

The existence of separate armed formations that could be used for purposes of ethnic tyranny, ethnic cleansing and seccession.

Outside of these negative parameters, and within the framework of the agreed principles of three-tiered government applicable to the whole country, as well as of the principles in the Bill of Rights, we could consider some degrees degrees of flexibility and a certain measure of particularity in relation to the exact character of each region.

Thus we accept that a certain amount of demographic, cultural and economic diversity between the regions is inevitable. Indeed, the fact that each region has its own particularities and characteristics is a source of richness for the country as a whole.

Yet poverty provided that poverty and lack of infra-structure should never be accepted as part of this distinctive character.

Diversity should in no circumstances be equated with inequality. Though in South Africa we have both what are called first world and third world features, we do not envisage any constitutional arrangement that perpetuates any supposed division of our citizens into so-called first world and third world peoples. We are all South Africans, and all equally entitled to share in the bounty of the country.

Economic inequality between regions therefore calls for urgent constitutional attention, rather than constitutional re-inforcement or constitutional neglect. It requires express acknowledgement both of the principle of regional equalisation and of the principle that every person is entitled to the same basic necessities of life, independently of where he or she is born or lives. These concepts, which are found in the German and Japanese constitutions, amongst others, reflect themselves in fiscal measures which ensure that the disadvantages suffered by persons in poorer regions are progressively attended to.

Language and cultural diversity, on the other hand, are to be respected rather than eliminated. Our policy on language rights - that is, the right to use and develop one's language, and to understand and be understood by speakers of other languages - is that they should be available to all South Africans wherever they might be in the country.

It could well be that for practical purposes, certain languages are designated as the languages of record at national, regional and local levels. We are, however, against restricting the free use of the African languages to the regions only. There is no reason, for example, why Zulu or Sotho should not be spoken in the national Parliament as well as in regional assemblies. Why should English and Afrikaans be the only South African languages permitted in Parliament?

The question of asymmetry in relation to powers and functions is of another order. The reasons that we have seen advanced in favour of such an approach are so weak that we wonder whether the actual motivation is not different.

We have difficulty in seeing how different powers and functions can be given to different regions. Where the regions may indeed differ is in respect of how best to exercise their powers. That is what elections are all about.

To give an example: a matter that will have to be carefully considered is the question of who exercises control over natural resources that are found in any particular region. Our general approach is that natural resources such as minerals, water and the riches of the sea belong to the nation as a whole but are managed within the framework of national policy by the regions.

There is therefore no question of attributing different powers to different regions, depending on whether they have a coastline or possess hydrocarbons in their soil. Rather, each region will have the same general powers of economic management, but will exercise them differently according to the nature of the concrete activities to which they relate, and in line with the mandate given by the local electors.

As far as institutional diversity or asymmetry is concerned, our general standpoint is that the basic institutions of democratic government should be the same throughout the country. We do not favour the invention of institutions just to prove that regions are different. Furthermore, and it worth repeating, we are totally against the wasteful pomp associated with the proliferation of unnecessary regional

institutions intended to promote an artificial regional grandeur.

What could be considered, on the other hand, would be institutions of a genuinely local character that could be integrated into the structures of regional government. Their objective would be to enhance rather than dilute democracy and promote rather than interfere with good government.

Thus, in certain areas there might be a special role for traditional leaders assisted by elected councillors. In others, trade unions, community bodies and other organs of civil society could have a significant position [without, of course, losing their autonomy].

A highly industrialised region like the PWV might have special structures relevant to urban development, while a more rural one might have special bodies more directed towards developing policies on agricultural land use. We would certainly not insist that if Natal has a Shark Board, a region in the Transvaal has one as well.

We can envisage that regions will decide for themselves where their capitals should be sited, and, within the framework of constitutionally acceptable criteria, where the boundaries of sub-regions or other administrative zones should be.

To sum up: The crucial test facing the cmb in relation to whether or not regional variations should be accepted will accordingly be whether or not, on the one hand, in a negative sense they avoid the evils and dangers referred to above, and whether or not in a positive way, they promote democracy, development and respect for human rights. Our final position in relation to any concrete proposal will, accordingly, be determined by how it measures up against these concrete criteria rather than by any absolute and abstract stance established in advance.