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ECONOMICS DEPARTMENT

Your Ref:

Our Ref: constit/sub/rwb

16 September 1993

Dr Theuns Eloff
Administration
Multi-Party Negotiation Process
World Trade Centre
Jones Street
Jet Park
Kempton Park

Dear Dr Eloff,

SUBMISSION IRO DRAFT CONSTITUTION

You will find enclosed four copies of a submission relating to the draft Constitution of the Republic of South Africa dated 20 August 1993. This submission takes the form of a redraft of Chapter 3 - Fundamental Rights and a suggested draft for Chapter 11 entitled Economics and Finance. It will be recalled that in the draft of the Constitution dated 20 August 1993, Chapter 11 is entitled Finance and is as yet unwritten.

The four copies of the submission are for the following:

1. Yourself
2. The Planning Committee
3. The Negotiating Council
4. The Technical Committee on Constitutional Matters.

The submission is made independently of the Report, also put up to the Technical Committee, entitled Multi-tier Fiscal Relations: Financing Regions in South Africa. The two, therefore, need to be read in conjunction with one another. They

are not mutually exclusive but in many respects mutually supporting. This submission, however, contains novel features not covered by the other document.

In chapter form, this submission provides no discussion of its suggestions. The following comments concerning it, therefore, need to be borne in mind:

1) Chapter 3 - Fundamental Rights

This provides a suggested restructuring for Chapter 3 of the original 20 August 1993 draft in order to give it greater logical coherence and clarity, and to place more emphasis on the matter of Liberty in contrast to the matters of Security and Equality. The draft of 20 August, while appearing to give greater powers to regions, still allows for an ultimate Central Government override on critical issues.

A particular problem with the 20 August draft concerns the inclusion of sections relating to the economy which would be better dealt with in a separate chapter relating to economic matters (see the following section for further comment).

One or two novel features which cater for important deficiencies in the 20 August draft are also introduced. For example, section 29, under the title *Language and Culture*, gives every person the right to identify with the *ethnic group* of his or her choice subject to specific constraints. Such a right, anyway, would be covered by the *freedom of association* (section 10. vii) and therefore does not represent a departure from the original draft. However, its specific inclusion would be meaningful to right-wing groups whose support of the Constitution is considered to be vital.

The redraft of this submission makes the essential distinction between rights which can be and those which cannot be enforced by a court of law and includes a number of the latter noting their non-justiciability (see sections 30 to 34). Again the purpose relates to the need to carry particular political constituencies along. In including these sections, the justiciable dimensions of the redraft are not compromised.

Finally, the following should be noted concerning this submission's redraft of Chapter 3:

- i) Changes that are completely new have been underlined for ease of reference.
- ii) In other cases, very substantial changes occur, but these are more in the nature of a restructuring of the original 20 August text.

2) Chapter 11 - Economics and Finance

The 20 August draft incorporates a chapter (11) on finance although it is blank at present. It seems essential to the undersigned that the new Constitution should deal in particular with provisions necessary to underpin a mixed market economy. The new Government that will operate under the Constitution can be expected to be subject to heavy pressure to intervene in the economy directly. The Government should be constrained in its intervention to ensure that the economy is not destabilised.

In the submission text, the liberty has been taken to introduce some interesting features. For example, the Government is specifically prevented (section 11) from defeating the objectives of the Reserve Bank which has independent responsibility for the formulation and implementation of monetary policy. Likewise, the Reserve Bank is prevented from undermining fiscal policy (section 24). In the event of a conflict between fiscal policy (the Government) and monetary policy (the Reserve Bank), provision is made for a deadlock-breaking mechanism in the form of an *Economic Policy Commission* (sections 25 to 26).

3) Direct Election of the President (Comment not relating to the draft chapters.)

The 20 August draft of the Constitution provides for the indirect election of the President through the National Assembly. The reasons favouring the direct election of the President are the following:

i) Direct election would give him an authority stemming directly from the people and would, therefore, add to his independence and moral authority.

ii) It would open the way for the election of a President having a party affiliation different from that of the majority party in Parliament (note the US example). This would contribute further to a control of centralised power.

iii) It would provide the people with a more meaningful relationship with the President.

It is realized that some who support direct election are backing off from it because they see difficulties in getting it accepted for the election set for April 1994. This argument cannot be sustained against the above considerations because:

I) This is likely to prove the last opportunity the public will have to influence such a provision. After April next year, the writing of the final Constitution will be taken over by the 'Constitutional Assembly', ie will come wholly to reside in the hands of politicians.

II) Once the practice of the direct election of the President has been established, it will be difficult, even for the 'Constitutional Assembly', to change it.

Submitted by:

DR R W BETHLEHEM

in his personal capacity.

CHAPTER 3

Fundamental Rights

(Redraft)

Introduction

7. Given the indivisibility of human rights along lines of race, colour, creed or sex, and given also the history of the violation of such rights in the history of South Africa prior to the promulgation of this Constitution, this Chapter specifies the fundamental rights that all persons, citizens and non-citizens, living or resident in the Republic of South Africa, or visitors to the Republic, shall enjoy.

Such rights are:

- i) the right to *life*:
- ii) the right to *liberty*:
- iii) the right to *security*:
- and
- iv) the right to *equality*.

The Right to Life

8. Every person shall have the right to life and human dignity.

9. This right shall be inviolable.

The Right to Liberty

10. Every person shall have the following basic rights:

- i) *The right to seek happiness* in the way of his or her own choosing without interference from the State or anyone else subject only to the constraint that such pursuit of happiness should not compromise the similar pursuit of others.
- ii) *The right to own property*, both moveable and immoveable, and not to be dispossessed thereof by the State without the payment of adequate compensation which, in the event of disagreement, shall be determined by a court of law.
- iii) *The right to privacy*, not to be subject to searches of his or her person, home or property, or to the seizure of private possessions, or the violation of private communications.
- iv) *The right to the freedom of movement* within the boundaries of the Republic of South Africa.
- v) *The right to the freedom of conscience, religion, thought, belief and opinion.*
- vi) *The right to the freedom of speech and expression* which freedom shall include the freedom of the press and other communications media.
- vii) *The right to the freedom of association.*
- viii) *The right to participate in political activities* which right shall include the right to campaign for party political causes and, generally, to exercise political choices.

- ix) *The right to assembly* and to demonstrate with others peacefully and unarmed, and to present petitions.
11. The right to liberty may be compromised by a court of law only with respect to the commission of an offence punishable by a period of imprisonment specified in terms of statutory law.
12. Every person detained in respect of such statutory law, including every sentenced prisoner, shall nonetheless have the right:
- i) to be informed promptly in a language which he or she understands of the reason for his or her detention;
 - ii) to be detained under conditions consonant with human dignity, including at least the provision of adequate nutrition, reading material and medical treatment at State expense;
 - iii) 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
- iv) 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.
13. 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:
- i) 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;

- ii) to be brought before an ordinary court of law as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

and

- iii) to be released from detention with or without bail, unless the interests of justice require otherwise which interests shall be determined by a court of law.

14. Every accused person shall have the right to a fair trial by which is meant:

- i) a trial held by an ordinary court of law open to the public;
- ii) a trial held within a reasonable time after the person accused has been charged;
- iii) a trial heard by a Judge qualified to sit in judgement and assisted by either a) two qualified Assessors, or b) a Jury drawn from the voters' roll of persons possessed of a matriculation qualification and who are thirty-five years of age or older, dependent on the choice of the accused;
- iv) a trial in which the charge is clearly and unambiguously formulated;
- v) a trial where the accused is presumed innocent until proved otherwise beyond all reasonable doubt;
- vi) a trial in which equal opportunity is given to the prosecution and the defence to present their cases, to cross-examine witnesses and, generally, to challenge evidence;
- vii) a trial conducted in a language understood by the accused or, failing this, a trial in which the proceedings are interpreted for the accused;

- viii) a trial in which the accused is either represented by a legal practitioner of his or her choice or, where the interests of justice so demand, by a legal practitioner paid for by the State.
15. No person shall be tried again for any offence or alleged offence of which he or she has been previously convicted or acquitted.
16. All persons found guilty of an offence shall have the right of appeal or review to a higher court than the court of first instance.
17. All persons found guilty of an offence shall be sentenced within a reasonable time of conviction.

The Right to Security

18. Every person shall have the right to security which shall include:
- i) the right not to be detained without trial;
 - ii) the right not to be denied occupation of his or her home except by the order of a court of law which court of law shall be bound to consider the lawfulness of the occupation and the availability of suitable alternative accommodation before issuing its order;
 - iii) the right not to be subject to torture of any kind whether physical, mental or emotional;
 - iv) the right not to be subject to cruel, inhuman or degrading treatment or punishment.
19. No person shall be subject to servitude or forced labour.

The Right to Equality

20. Every person shall have the right to equality before the law and to equal protection of the law.
21. No person shall be unfairly discriminated against, directly or indirectly, on the grounds of race, colour, creed, gender, sexual orientation, language, conscience or age.
22. Notwithstanding section 21 above persons disadvantaged by past discrimination shall be permitted special assistance by the State or by a private sector employer to enable their full and equal enjoyment of common rights and freedoms.

Other Rights

23. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, by another independent and impartial tribunal.
24. Every person shall have the right to access to official and other information necessary to the protection or exercise of his or her fundamental rights.
25. Every person shall have the right to lawful and procedurally fair administrative decisions.
26. Every person shall have the right to be furnished with reasons in writing for administrative decisions which affect his or her rights or interests.

Language and Culture

27. Every person shall have the right to use the language of his or her choice.

28. Every person shall have the right to participate in the cultural life of his or her choice and to ensure its perpetuation.
29. Every person shall have the right to identify with the ethnic group of his or her choice and to organise so as to ensure the group's survival provided that action in this regard shall not infringe the fundamental rights of others or threaten the integrity of the Republic of South Africa.

Beyond the fundamental rights mentioned in section 7 above are second tier rights which although they may not be enforceable by a court of law in certain circumstances nevertheless remain important as overriding guidelines for official, business or other action. These second tier rights are the following:

Environment

30. The right of every person to an environment which is safe and not detrimental to his or her health or well-being.

Child Rights

31. The right of every child to security, basic nutrition and basic health services and not to be the subject of neglect, abuse or child labour.

Basic Education

32. The right of every person to basic education and equal access to publically owned educational institutions.

Basic Health Services

33. The right of every person to basic health services.

Basic Housing

34. The right of every person to basic housing which housing shall include the provision of water, sanitation and electrical services.

Limitation

35. (1) The rights entrenched in this Chapter may be limited by a law applying generally and not solely to an individual case, provided that such limitation -
- (a) shall be permissible only to the extent that it is -
 - (i) reasonable; and
 - (ii) justifiable in a free, open and democratic society based on the principle of equality; and
 - (b) shall not negate the essential content of the right in question.
- (2) Notwithstanding the provisions of this Chapter, a law in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by (the legislature) Parliament.

Suspension

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

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

(5) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such re-detention.

Interpretation

37. (1) In interpreting the provisions of this Chapter the designated authority shall promote the values which underlie a free, open and democratic society based on the principle of equality.

(2) Save as provided for in this Chapter, no rule of the common law, custom or legislation shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights included in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised and conferred by common law, custom or legislation.

(4) A law limiting a right entrenched in this Chapter shall be presumed constitutionally valid until the contrary is proved: Provided that a law limiting -

(a) a right entrenched in sections 8 and 9 shall have no constitutional validity.

and

(b) a right entrenched in sections 10, 24 or 25, insofar as such right relates to the expression of free and fair political activity.

shall be strictly construed for constitutional validity.

(5) No law existing at the commencement of this Chapter which limits any of the rights entrenched in this Chapter shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the permissible limits imposed in this Chapter, provided such a law is capable of a more restricted interpretation which does not exceed such limits, in which event such a law shall be construed as having the said more restricted meaning.

Duration

38. This Chapter shall be of full force and effect until a Bill of Rights duly enacted by the (elected constitution-making body) Constitutional Assembly has come into effect.

CHAPTER 11

Economics and Finance

(Draft)

Introduction

1. A number of factors determine this Constitution's position regarding the economy and government finance. These are:
 - i) the necessity that the Constitution be as promotive as possible of economic growth;
 - ii) the necessity that the Constitution facilitates policies aimed at a greater equality in the distribution of the national income and wealth given the inequities inherited from the apartheid past;
 - iii) the necessity for the maintenance of monetary and financial stability especially during a period of economic restructuring;and
 - iv) the necessity to strike the right balance, given in particular the above, between the tax raising and spending powers of the central, regional and local governments of the Republic of South Africa.

Property and Contract

2. The economy of the Republic of South Africa shall be based on a system of private and public property ownership and the sanctity of contract.

3. All persons shall have the right to engage in economic activity freely and to pursue a livelihood anywhere in the Republic.

Mixed Market Economy

4. Implicit in sections 2 and 3 is a mixed market economy which it shall be the role of the State to protect through the encouragement of competition and the discouragement and/or control of monopoly.
5. The encouragement of competition and the discouragement and/or control of monopoly shall apply equally to the private and public sectors of the economy.

The Role of the State

6. In addition to the above, the State shall have the following five roles:
 - i) the role of economic referee, as a determiner of social rules and as a regulator of the social process;
 - ii) the role of provider of certain public services, such as defence, which cannot be provided by private sector agents;
 - iii) the role of entrepreneur in its own right in special circumstances, ie where nation strategic interest dictate and private sector agents are unwilling to assume the risk;
 - iv) the role of formulating and implementing fiscal policy;
 - v) the role of managing and administering the external economic relations of the Republic of South Africa.

Fiscal Policy

7. Fiscal policy shall have the following three dimensions:
 - i) the collection of taxation, directly and indirectly;
 - ii) the budgeting and control of State expenditure;
 - and
 - iii) the financing of any deficit arising from an excess of State expenditure over taxation collected.
8. Any deficit arising from an excess of State expenditure over taxation collected shall be financed by State borrowing.
9. However, the State shall not borrow to finance current government expenditure.
10. The concerns of fiscal policy shall be:
 - i) macroeconomic stabilization;
 - ii) income and wealth redistribution;
 - and
 - iii) the relationship between fiscal policy and monetary policy given the interdependence that exists between the two.
11. Fiscal policy shall not be used by the State to defeat the objectives of the South African Reserve Bank as specified in section 20 below in its formulation and implementation of monetary policy.

Income and Wealth Redistribution

12. Poverty and inequality, both concerning individuals and regions, are at the time of the promulgation of this Constitution key sources of social injustice and instability.
13. As long as they remain so, the State shall be bound to take steps to reduce them.
14. Such steps *may* include measures designed to assist individuals and communities disadvantaged by discrimination towards a full and equal enjoyment of common rights and freedoms.
15. However, nothing done by the State with regard to income and wealth redistribution shall put at risk the economic and financial stability of the Republic.

The Role of the Reserve Bank

16. The South African Reserve Bank shall be the central bank of the Republic of South Africa.
17. As such it shall have the exclusive right to issue legal tender, both coins and bank notes.
18. The currency of the Republic of South Africa shall be the rand.
19. The primary goal of the South African Reserve Bank shall be to protect both the internal and external value of the rand.
20. In the pursuit of this goal the Reserve Bank shall have exclusive responsibility for the formulation and implementation of monetary policy in the Republic.

21. Monetary policy shall have the following five dimensions:
- i) acting as lender of last resort to the banking system;
 - ii) determining the cost of lender of last resort accommodation through the fixing of Bank rate;
 - iii) influencing other interest rate levels through open market operations;
 - iv) determining the reserve and other requirements of banking institutions;
- and
- v) influencing the exchange rate of the rand through direct intervention in foreign exchange markets.
22. The Reserve Bank shall be the main custodian of the gold and foreign exchange reserves of the Republic of South Africa.
23. The Reserve Bank shall be independent of the State and the appointment of the Governor of the Bank shall be made by an independent panel of judges drawn from different sectors of the South African community. The Chairman of the panel shall be the Chief Justice of the South African Supreme Court. The panel shall comprise six members including the Chairman whose casting vote shall be conclusive in the event of deadlock.
24. In formulating monetary policy, the Reserve Bank shall not attempt to undermine the Government's formulation and implementation of fiscal policy.

Conflict Between Fiscal and Monetary Policy

25. In the event of there being a conflict between the Government and the Bank with regard respectively to fiscal and monetary policy, such conflict shall be put to the arbitration of an Economic Policy Commission comprising:

- i) the Minister of Finance and his/her deputy;
 - ii) the Governor of the Reserve Bank and his/her deputy;
 - and
 - iii) a former judge of the Supreme Court of South Africa who shall serve as Chairman of the Commission. The Chairman shall have a casting vote in the Commission for the purposes of breaking deadlock.
26. A meeting of the Economic Policy Commission shall be called at the request of either the Government or the Reserve Bank. The request shall be made formally to the Chairman, and the Commission shall meet within fourteen days of a request having been lodged.
27. The Chairman of the Economic Policy Commission shall have a deputy both of whom shall serve for a period of five years. Should the Chairman be indisposed, the deputy Chairman shall serve as Chairman in his place.

Labour Relations

28. Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
29. Individual workers shall not be coerced to join trade unions, and individual employers shall not be coerced to join employers' organisations.
30. Workers and employers shall have the right to organise and bargain collectively.
31. Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers in the event of deadlock in a dispute.
32. Procedures regarding the declaration of a dispute and the reaching of deadlock shall be determined by each industry in advance.

Economic Policy and Regional Autonomy

(Wait for final report of CBM
report concerning regional financing.)