

Report prepared by Albie Sachs summarising  
decisions taken by the Constitutional Committee  
on 18/07/93

MAJOR RECOMMENDATIONS OF THE CONSTITUTIONAL COMMITTEE  
RE SIXTH PROGRESS REPORT OF THE TECHNICAL  
COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

A. Re the Applicability of the Declaration

- 1.) Full consideration persuades us of the need to revert to the position that the Chapter applies not just to the State but "*where appropriate*" to social institutions and individuals as well.

Our gravest concern is that privatised apartheid will not only be permitted but actually protected by the Chapter as it stands. A clear example of this would be in relation to the Property Clause (if accepted).

Article 23(i) establishes the right to dispose of property. Can neighbours establish restrictive covenants, and building societies go in for red-lining, in terms of this provision? Would anti-discrimination law forbidding discrimination in terms of race or gender in relation to house sales or flat leases, be invalid on the grounds of interfering with the constitutional right to dispose of property at will?

Another area where the operation of the Bill of Rights would be severely neutered by vertical operation only, is in relation to the right to information. Privacy rights and the right to free economic activity could - if extended to companies - make the major potential producers of pollutants and hazardous products immune to any duty of disclosure.

The environment does not distinguish between state and private despoilers, nor should the Declaration. The same applies to rights of consumers, and rights of workers in collective bargaining. The right to information should extend beyond the sphere of the State to include all information reasonably required from any source for the exercise of other rights.

When an Amendment to the USA Constitution outlawed slavery and the badges of slavery, it interfered directly with the private rights of the slave-owners in order to secure the rights of the slaves and to re-model the character of southern society. We are in the process of getting rid of apartheid and ensuring that fundamental rights and freedoms are enjoyed by all on an equal basis.

While genuine rights of privacy should be respected, the right to deny facilities and opportunities on the grounds of race or sex should not. The fundamental right to equality and dignity should flow directly from the Constitution and not be



dependent on legislation. Anti-discrimination legislation will acknowledge the constitutional right, regulate the manner in which it is to be enforced and establish appropriate cut-off points or limitations.

- 2.) The Declaration operates negatively to bind the State (and other bodies). It does not impose a duty on the State to promote observance of human rights.

We propose that I(i) be amended as follows:

***"I(i) The provisions of this Chapter shall:***

***a.) bind the legislative and executive branches of government at all levels as well as statutory bodies and functionaries, which shall promote the observance of the rights and freedoms set out in this Chapter to the greatest extent possible;***

***b.) bind other bodies and persons where appropriate;***

***c.)....."***

#### **B. Application and Amendment of the Declaration**

We believe that the Declaration should come into force with the creation of a Constitutional Tribunal by the Constituent Assembly, chosen en bloc as soon as possible after the elections. The pre-election revocation of discriminatory legislation and levelling of the political/electoral playing field should be done directly by the Transitional Constitution and supporting legislation, and not by the courts. New legislation to give effect to the rights and establish appropriate limitations where necessary should await the formation of a Government of National Unity rather than be dealt with in an ad hoc manner by the present authorities. It is important that the rights and freedoms have nation-wide extent and coincide with rather than precede re-incorporation. It is also crucial that the testing right and the creation of a new constitutional jurisprudence awaits the creation of a Constitutional Tribunal enjoying the greatest legitimacy and credibility.

We accordingly envisage that the Constitutional Tribunal will have sole jurisdiction to: X

1.) Decide whether agreed constitutional principles have been incorporated in the new Constitution and not violated by the Constituent Assembly; the X

2.) Receive and decide upon requests from the legislature as to the constitutionality of proposed legislation.

X All other matters involving claims by individuals will proceed through the courts in the ordinary way, with the Constitutional Tribunal serving as the final court of appeal. While current members of the Appeal Court would be eligible for nomination to the Constitutional Tribunal, the Constitutional Tribunal should not be a section or division of the Appeal Court, but a separate and superior body with competence in relation to constitutional matters. X



We agree with the Technical Committee's observation that the Chapter is intended to facilitate the transition process, that it is by its nature incomplete and that it will have limited duration. It will accordingly not bind the Constituent Assembly which will, rather, be obliged to respect the general principles set out in another part of the Constitution. We accordingly support the Committee's proposal to delete I(5) and to leave the question of amendment to be treated as part of the amending provisions of the Constitution.

### Equality

We re-affirm our view that the anti-discrimination clause should spell out the kinds of invidious discrimination which should be rendered constitutionally unlawful. Anyone reading the clause should know the kind of cases it is intended to deal with. This is particularly important in respect of vulnerable groups whose rights ought to be respected and who might have difficulty in securing legislative attention. Unless there is express objection to any of the categories mentioned, we see no reason why they should not be listed. They have great significance for persons who stand to be affected and who look to the Declaration for express recognition of their right not to be discriminated against (e.g. disabled persons, gays and lesbians).

### Article 4

#### Human Dignity

### Article 5

#### Freedom and Security of the Person

The rights protected by these two articles are of a special importance for groups who in their daily lives are subjected to various forms of discrimination and oppression. To mention one example: overcoming sexism relates to combating psychological and other forms of day-to-day oppression which are the more pernicious because they are either hidden or disguised as culture or attributed to nature. Protection from oppression should start off from the foundation of a fundamental right to respect for the person in all its dimensions. There are three elements of personhood that should be recognised at a constitutional level. The first relates to physical security, the second to reputational standing in the community and the third to integrity/self-esteem. The first two are well catered for in Articles 4 and 5 respectively. The third, however, is only partially covered by the term "dignity". We accordingly propose that Article 4 be amended to read as follows:

***"Everyone shall have the right to respect for and protection of his or her personal integrity and dignity"***

### Legal Aid

We strongly support Article 19(3)(e) which provides for legal aid, without which the equality principles and the right to make a proper defence to a criminal charge would be greatly diminished. The expense involved to the State will be limited by two factors:



- (i) The governing phase 'where the interests of justice so require' presupposes a balancing out of all factors - the greater the possible punishment, the more would justice require a guaranteed defence. There is no right to legal aid in regard to parking offences. X
- (ii) The general limitations clause could be invoked to impose justifiable limits.

### The Property Clause

If a property clause is necessary at all, we make the following observations:

- (i) 23(i) should be amended by deleting the words 'right<sup>S</sup> in'. X
- (ii) X The factors to be taken into account in determining compensation have been tilted too far in favour of existing title-holders. We can accept the inclusion of market value and the owner's investment, but not the exclusion of question of availability of funds. The true compromise is to achieve an appropriate balance, on a case by case basis, between legitimate claims of titleholder<sup>S</sup> and the need to facilitate access to property by those excluded by past forced removals and race discrimination. The level of compensation, as well as the mode and timing of payment, should take account of available resources. Shortage of funds should not of course become a reason for effectively denying any compensation at all, but it should be a legitimate factor entering the equation. The original text, taken from a provision in the German Constitution, balanced the public interest and the interests of those affected. The present formulation reinforces the interests of those affected while diminishing the weight of the public interest.

We accordingly propose that the factor of availability of financial resources to the State be retained as one of the relevant factors and that the last line read "and the interests of the public and of those affected."

- (iii) X Another important aspect relating to property~~and~~ which has caused us to be concerned about the inclusion of the Property Clause, is how to balance out the just claims of those who were dispossessed by racist statutes and practices in the past, against the claims of present title holders. We accordingly propose that if a property Clause is to be included at all, it should be broadened and balanced out by the addition of the following:

***"Every person who did not receive effective compensation for removal from land when the removal was pursuant to apartheid policies and practices shall be entitled to the restoration of the land in question: provided that where restoration is not feasible such person will be entitled to compensation as set out above."***

The motivation for the above proposal is set out in a document from the Land Claims Court Working Group to the ANC Negotiations Commission annexed hereto.

## EDUCATION AND RELIGION

We strongly support the right to freedom of conscience, religion, thought, belief and opinion.

In our view, such freedom is in no way inconsistent with school prayers. The USA Constitution has a special formulation which forbids religious observance (as opposed to the study of religion) at state schools. It is not even necessary to raise the problem here; doing so introduces unnecessary prescriptiveness. [Article 8 (2)]

As far as Article 27 is concerned, we feel that paragraph (c), particularly by its reference to a common culture, opens the way to indirect discrimination. While being relatively weak on the question of guaranteeing full educational rights for all, Article 27 read as a whole leans heavily in favour of satisfying the interests of a particular cultural/racial group.

## ECONOMIC ACTIVITY

X ~~We regret~~ <sup>re-iterate</sup> that we regard Article 21 as unnecessary, particularly as it is not balanced out by a right to work, rights to the minimum decencies of life, and rights to health and welfare. The proposed sub-section goes some way to meeting concerns we have previously mentioned, but falls far short of justifying a most controversial and little understood provision.

## FURTHER TEXTURAL IMPROVEMENTS

### 1. Enforcement

#### Article 1(7).

We feel that the chapter in its essence defends fundamental human rights and is not directed specifically at artificial persons. There are some circumstances in which artificial persons should be entitled to guaranteed rights, but ~~this~~ <sup>there</sup> should not be an automatic or prima face inclusion of artificial persons. We propose, therefore, that the following clause replace paragraph (7).

***"This chapter applies to natural persons and, where appropriate, to artificial persons"***

### 2. Equality

#### Article 2(3).

X We feel that the intention of this affirmative action provision should be made a little clearer and propose the following formulation:



(3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged on the grounds of sex and race by previous discrimination in order to enable them full enjoyment of all rights and freedoms.

In other words it will not be necessary for individual beneficiaries of affirmative action to prove that they personally are being discriminated against; it will be enough for them to belong to the two specified classes mentioned who have historically been discriminated against.

## Article 2

We have already argued for enumeration and suggest the following amended formulation

***"No person shall be unfairly discriminated against, directly or indirectly, on any ground whatsoever, and without derogating in any way from the generality of this provision on the grounds of race, sex, ethnic origin, colour, sexual orientation, age, disability, religion, belief, conscience, creed, birth or language in particular."***

## Article 3

### Life

We propose that Sub-paragraph (2) be deleted. The issue of abortion should not simply be raised under the question of the right to life. It could also be referred to the right to dignity and the right to privacy. Once it is agreed that no capital punishment shall be carried out until the issue has been finally pronounced upon by the constituent assembly, no further provision is required at this stage.

### Privacy

## Article 7

In view of the fact that the doctrine of privacy has been invoked to prevent reasonable steps from being taken to prevent domestic violence and abuse, we propose an explicit proviso in the following terms:

***"Provided that this section shall not prevent lawful searches based upon reasonable suspicion of the commission of an offence, nor shall it prevent reasonable steps from being taken to prevent domestic violence and abuse."***

### Residence

## Article 13

We support the inclusion of this article.

### Detained, Arrested and Accused Persons

## Article 19

Sub-paragraph 2 - paragraph B, should read as follows:

***"To be brought before an ordinary court of law as soon as reasonably possible and not later than 48 hours after arrest ..... "***

Paragraph 3 (i):

***"To be tried in a language which he or she sufficiently understands for the purposes of a fair trial"***

## Economic Activity

## Article 21

We feel it is dangerous to guarantee to any person anywhere in the world freedom to engage in economic activity in South Africa, possibly to the prejudice of South African citizens. We accordingly propose that if this clause is to be included at all - and we have indicated our objections - then it should read:

***"Every South African shall have the freedom to engage in economic activity and to pursue a livelihood anywhere in the country"***

We also propose that the sub-section include a reference to the following:

***"Reasonable measures for the regulation of the use of property"***

## Children

## Article 25

We propose the addition of the following:

✕ ***"In all proceedings ~~affecting~~ children, the best interest of the child shall be of paramount consideration"***

## COMMENTS ON FURTHER RECOMMENDATIONS

1. Although this statement is implicit in the Chapter, we feel that it would be useful to put it in so as to remove any possible doubt or confusion.
2. We regard this as a highly controversial provision that is not appropriate for a Declaration of Rights. If necessary, a political understanding could be arrived at to ensure that the considerations mentioned would be given full weight.

3. The question of pension benefits is also highly controversial. The matter has to be fully researched and discussed before an agreed and balanced position can be arrived at.
4. We have already indicated why we feel the Chapter should come into operation after and not before the election.



AC1/AC/gp-D-00179

Submission to : THE ANC NEGOTIATIONS COMMISSION  
From : THE LAND CLAIMS COURT WORKING GROUP  
Re : NECESSITY TO INCLUDE LAND RESTORATION  
CLAUSE IN TRANSITIONAL BILL OF RIGHTS

The ANC is committed to a programme of restitution for the victims of forced removals (see Ready to Govern). There is growing South African consensus that restoration for the abrogation of past property rights is necessary, not just in the interests of justice, but to ensure the stability and legitimacy of any future system of any future property rights.

- The South African Agricultural Union - SAAU - has supported the ANC's proposal for a land claims court.
- The Minister of Finance, Derek Keys, has recently said that restitution for forced removals is a political necessity whatever the cost.
- The government has recently empowered its own process of historical restitution through amendments to the law governing the State President's Advisory Commission on Land Allocation.

However, this commitment to restoration is not reflected in the transitional bill of rights. The effect is that any future restoration process is opened up to a host of possible constitutional challenges by the other rights introduced in the new dispensation. These could be on the basis of the property clause, the equality clause, the "due process" provisions and the separation of powers doctrine, to name but a few.

To redress this unintended imbalance it is imperative that a clause providing for restitution for forced removals be included at a constitutional level. It has always been the ANC's policy that such a Land Rights Clause would be included in the final bill of rights to balance the proposed property clause. Because of the unexpectedly inclusive nature of the transitional rights presently being negotiated it is imperative that such a Land Restoration Right be included now.

To this end we propose that the following clause be added to the property clause:

**"Every person who did not receive effective compensation for removal from land when the removal was pursuant to apartheid policies and practices shall be entitled to the restoration of the land in question. Provided that where restoration is not feasible such person will be entitled to compensation as set out in clause ..."**

There are a host of technical reasons why, if this balance is not constitutionally entrenched, any future land claims court or tribunal would be weakened to the point of utter powerlessness.

(Encl documents)