

EMBARGOED UNTIL TABLED IN THE NEGOTIATING COUNCIL**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION
SEVENTH PROGRESS REPORT : 29 JULY 1993**

The Committee has revised the Chapter on Fundamental Rights proposed in its Sixth Progress Report in view of discussions at the meeting of the Negotiating Council on 21 July 1993 and subsequent submissions received up to 26 July 1993. Although many of the formulations in the Chapter have already been approved by the Council, the Chapter is nevertheless included in full in this Report in order to facilitate discussion on the outstanding issues. (Whatever appears between square brackets is not suggested for inclusion).

"CHAPTER [...]"**FUNDAMENTAL RIGHTS****Application**

1. (1) The provisions of this Chapter shall -
 - (a) bind the legislative, executive and, where appropriate, the judicial branches of government at all levels as well as all statutory bodies and functionaries;
 - (b) bind, where just and equitable, other bodies and persons; and

[Comment: The Committee thought it best for this section not to be prescriptive as regards the horizontal application of fundamental rights during the transition. Instead the suggested formulation of subclauses 1(1)(a) and 1(1)(b) leaves room for the evolutionary and natural development of the concept of the horizontal enforcement of rights in the jurisprudence of the designated judicial authority.]

- (c) be enforced by the [designated authority].
- (2) In the case of an infringement of any provision of this Chapter, the [designated authority] may, where appropriate, put any body or person

referred to in subsection (1)(a) or (b) on terms as to how and within what period such infringement should be remedied.

- (3) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken during the period of operation of this Chapter.
- (4) All juristic persons shall be entitled to the rights contained in this Chapter to the extent that the nature of these rights permit.
- (5)
 - (a) Every person who alleges that his or her rights or every association which alleges that its members' rights entrenched in this Chapter, have been infringed or are threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.
 - (b) Nothing in this subsection shall prevent a person from applying for relief on behalf of a group or class of persons whose rights entrenched in this Chapter are alleged to have been infringed or are threatened.

Equality

2.
 - (1) Every person shall have the right to equality before the law and to equal protection of the law.
 - (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular.
 - (3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.
 - (4) In any action in which unfair discrimination is alleged, prima facie proof of such discrimination shall be sufficient to bring it within the class of conduct contemplated in subsection (2), until the contrary is established.

[Comment: The Ad Hoc Committee appointed by the Planning Committee recommends the non-discrimination clause to be formulated as in subclause (2) above. Subclause (4) has been reformulated by the Technical Committee in view of the discussions in the Council on this clause.]

Life

3. Every person shall have the right to life.

[**Comment:** The Ad Hoc Committee appointed by the Planning Committee recommends the unqualified inclusion of this right in the Chapter. We support this proposal.]

Human Dignity

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

Freedom and Security of the Person

5. (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.
(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

Servitude and Forced Labour

6. No person shall be subject to servitude or forced labour.

Privacy

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

Religion and Belief

8. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.

- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by the appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance thereat is free and voluntary.

Freedom of Expression

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

[Comment: One of the parties has once again suggested the inclusion of the following further provision:

"In respect of the exercise of its control, if any, over any public media, the state shall ensure diversity of expression and opinion."

The Committee is still of the view that such a provision would be inappropriate in a Chapter on Fundamental Rights and that the concern should be referred to the Technical Committee on the Media.]

Assembly, Demonstration and Petition

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

Freedom of Association

11. (1) Every person shall have the right to freedom of association.
- (2) Without derogating from the generality of the provisions of section 2(2), nothing in this section shall permit discrimination on the ground of race.

Freedom of Movement

12. Every person shall have the right to freedom of movement anywhere within South Africa.

Residence

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

Citizen's Rights

14. Every citizen shall have the right to enter, remain in and leave South Africa, and no citizen shall be deprived of his or her citizenship.

Political Rights

15. (1) Every person shall have the right -
- (a) to form, to participate in the activities of and to recruit members for a political party;
 - (b) to campaign for a political party or cause; and
 - (c) freely to make political choices.
- (2) Every citizen of voting age shall have the right to vote in secret and to stand for election to public office.

Access to Court

16. Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

Access to Information

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

Administrative Decisions

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

[Comment: One of the parties suggested the inclusion of the words "reasonable" after the word "lawful". This will have far-reaching consequences for South African Administrative Law and it is for the Council to decide on this issue. The Committee does not support the introduction of this notion at this stage.]

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

Detained, Arrested and Accused Persons

19. (1) Every person who is detained, including every sentenced prisoner, 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 at least the provision of adequate nutrition, reading material 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.

- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -

- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- (b) to be brought before an ordinary court of law 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

- (c) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;
 - (b) to be informed with sufficient particularity of the charge;
 - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - (d) to adduce and challenge evidence;
 - (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so demand, to be provided with legal representation at State expense, and to be informed of these rights;
 - (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
 - (g) not to be tried again for 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.

[Comment: The question raised by the Council in respect of the voting rights of prisoners does not properly fall within this Chapter according to a recommendation of the Ad Hoc Committee appointed by the Planning Committee. We agree.]

Eviction

20. No person shall be removed from his or her home, except by order of a court of law after taking into account all relevant factors, which may include the availability of appropriate alternative accommodation and the lawfulness of the occupation.

[Comment: The Ad Hoc Committee appointed by the Planning Committee recommends the deletion of this clause. We await further instructions from the Council.]

Economic Activity

21. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.
- (2) Nothing in this section shall preclude legislation aimed at the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such legislation is justifiable in a free, open and democratic society based on the principle of equality.

Labour Relations

22. (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (2) Workers and employers shall have the right to organise and bargain collectively.
- (3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

Property

23. (1) Every person shall have the right to acquire, hold and dispose of rights in property.
- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and

equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

- (3) Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

[**Comment:** Subclause (3) was included as a result of a submission by one of the parties and is supported by this Committee.]

Environment

24. Every person shall have the right to an environment which is safe and not detrimental to his or her health or well-being.

Children

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

Language and Culture

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

Education

27. Every person shall have the right -
- (a) to basic education and to equal access to educational institutions;
 - (b) to instruction in the language of his or her choice where this is reasonably practicable; and
 - (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination

on the ground of race or colour.

Limitation

- 28.** (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.

Suspension

- 29.** (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] 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] 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 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 it 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

30. (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.

[Comment: One of the parties suggested the inclusion of the words "liberty and" before "equality". The Committee is of the opinion that the idea of liberty is sufficiently expressed by the words "free, open and democratic" and that the express inclusion of the word "liberty" would in fact limit the scope of the concept and could moreover create tension between the concepts of "liberty" and "equality". Its inclusion is therefore not recommended.]

- (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.

[Comment: One of the parties raised concerns as to the application of indigenous law in view of the provisions of subclauses (2) and (3). The position is that provisions of indigenous law cannot limit rights entrenched in this Chapter. At the same time, however, rights recognised and conferred by indigenous law and not affected by this Chapter, remain of full force and effect. The cultural life of communities living under indigenous law is furthermore protected by virtue of the provisions of clause 26. The Committee is of the opinion that the position as set out above, complies with Constitutional Principles 2.8 and 2.12 agreed on by the Negotiating Forum.]

- (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 section 15; or
- (b) a right entrenched in sections 9, 10, 11, 12, 17 or 18, 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

31. This Chapter shall be of full force and effect until a Bill of Rights duly enacted by the elected constitution-making body has come into effect."

ADDITIONAL MATTERS

1. One of the parties has suggested the inclusion of the following right:

"Family

Every person shall have the right to the protection of the integrity of his or her family."

The Council will have to decide on the inclusion of this right.]

2. The same party also submitted a proposal on children's rights which was received too late for consideration by the Committee.
3. The Council still has to attend to matters raised in paragraph 4 of the

Committee's Sixth Progress Report.

4. The Committee wishes further to place the following facts and concerns before the Council. The enactment and enforcement of this Chapter will bring fundamental changes to the content and practise of law. To avoid the risk that the legal system as a whole may not be able to cope with the potential demands which could be made of it, and to ensure that the concept of a Bill of Rights remains credible, the Committee recommends as follows:
- (a) A reference of this Report for comment on the legal implications by the following bodies:
- * The Chief Justice
 - * The Six Judges President
 - * The Association of Law Societies
 - * The General Council of the Bar
 - * Nadel
- and other organisations of lawyers proposed by the Council, for submissions to be made to the Multi-Party Negotiating Process by noon on Monday, 9 August 1993; and
- (b) The taking of preparatory steps to publicise this Chapter among the legal profession and the public generally, immediately after its final adoption in order to promote a culture of respect for the rights it contains.

Prof. L M du Plessis (Convenor)
Prof. H Corder (Not present during the discussion and preparation of this Report)
Mr G Grove
Ms S Nene
Adv. Z Yacoob