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The
Bill of Rights

Â® African National Congress
Â® National Party

Â® Democratic Party

Â® KwaZulu

A BILL OF RIGHTS
FOR A
NEW SOUTH AFRICA

PRELIMINARY REVISED TEXT, FEBRUARY 1993

Introduction

In the light of a vast number of comments received in many forms on the Draft Bill of Rights prepared by the Constitutional Committee of the ANC, this new text has been prepared. The objective is to work out a preliminary revised text for presentation to the Policy Conference. This draft will therefore be finalised after comments have been received from the ANC membership.

NOTE: The words in bold are new, while words in brackets are to be deleted. The notes are intended to draw attention to controversial areas - they do not form part of the text.

Article 1
EQUALITY

- (1) All South Africans are born free and equal in dignity and rights.
- (2) No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, or creed, political or other opinion, birth or other status.
- 3) All men and women shall have equal protection under the law.

Article 2
PERSONAL RIGHTS

The Right to Life

- (1) Every person has the right to life.
- (2) No-one shall be arbitrarily deprived of his or her life.
- 3) Capital punishment is abolished and no further executions shall take place.

NOTE: The question has been raised as to whether the use of the phrase "right to life" indicates an anti-abortion position in the Constitution. In our view, the issue is left open in this clause. We feel the matter should be left open for legislative action after democratic discussion in future. The issue needs sensitive and informed debate with extensive participation by all interested parties and a respect for differing views. Uninformed debate could be extremely divisive and distract attention from the basic question of equal political rights. The Constitution should not in any way pre-empt proper debate. We regard the issue as of great importance and would recommend that it receive high priority as soon as democratic institutions are in place.

The Right to Dignity

- 4) No-one shall be subjected to slavery, servitude or forced labour, provided that forced labour shall not include work normally required of someone carrying out a sentence of a court, nor military service or national service by a conscientious objector, nor services required in the case of calamity or serious emergency, nor any work which forms part of normal civil obligations.
- (5) The dignity of all persons shall be respected.
- (6) No-one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

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Everyone shall have the right to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity.

The Right to a Fair Trial

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No-one shall be deprived of his or her liberty except after due process of law, and the courts shall have the right to order the release of any person held without due legal authority.

There shall be no detention without trial, banishment or house-arrest. Legislation may provide for legitimate restriction of movement in relation to illegal immigrants and persons of unsound mind.

No persons shall be arrested or detained for any purpose other than that of bringing them to trial on a criminal charge.

Arrest shall take place according to procedures laid down by law, and persons taken into custody shall immediately be informed of the charges against them, shall have access to a legal representative of their choice, and shall be brought before court within 48 hours or, where that would be a Sunday or a public holiday, on the first working day thereafter.

Bail shall be granted to awaiting-trial persons unless a court rules that in the interests of justice they should be kept in custody.

No-one shall be deprived of liberty or subjected to other punishment except after a fair trial by an independent court.

Trials shall take place within a reasonable time.
Everyone shall be presumed innocent until proved guilty.

No conduct shall be punished if it was not a criminal offence at the time of its occurrence, and no penalty shall be increased retrospectively.

No-one shall be tried or punished twice for the same offence.

Accused persons shall be informed in writing of the nature of the allegations against them, and shall be given adequate time to prepare and conduct their defence.

Everything that is reasonable shall be done to ensure that accused persons understand the nature and the import of the charges against them and of the proceedings, that they are not prejudiced through illiteracy or lack of understanding, and that they receive a fair trial.

Accused persons shall have the right to challenge all evidence presented against them, to be defended by a legal practitioner of their choice, and if in custody, to have access to a legal practitioner at all reasonable times.

If a person is unable to pay for legal representation, and the interests of justice so require, the State shall provide or pay for a competent defence.

(22) No persons shall be required to give evidence against themselves, nor, except in cases

of domestic violence or abuse, shall persons be required to give evidence against their spouses, whether married by civil law or custom, their parents or their children.

(23) No evidence obtained through torture or cruel, inhuman or degrading treatment shall be admissible in any proceedings.

(24) Juveniles shall be separated from adult offenders.

(25) Punishment imposed by any Court shall be humane and any term of imprisonment shall be reviewed periodically.

The Right to Judicial Review

(26) Any person adversely affected in his or her rights, entitlements or legitimate expectations by an administrative or executive act shall be entitled to have the matter reviewed by an independent court or tribunal on the grounds of irregularity, including abuse of authority, going beyond the powers granted by law, bad faith, or such (gross) unreasonableness in relation to the procedure or the decision as to amount to manifest injustice.

NOTE: This clause will in all likelihood have to be revised in the light of recommendations of the workshop, held in Cape Town early in 1993, on the future of the Administrative Law and also after further discussions.

The Right to Home Life

(27) No-one shall be deprived of or removed from his or her home on the grounds of race, colour, language, gender or creed.

(28) The privacy of the home shall be respected, save that reasonable steps shall be permitted to prevent domestic violence or abuse.

(29) People shall have the right to establish families, live together with partners of their choice and to marry.

(30) Marriage shall be based upon the free consent of the partners, and spouses shall enjoy equal rights at and during the marriage and on its dissolution.

NOTE: Many people marry by ante-nuptial contract, and thereby create separate property regimes for the husband and wife. Should this situation be over-ridden by the above clause?

Should there be specific reference to possible legislation on matrimonial property taking into account a just distribution on termination of the marriage [union] ?

The Right to Privacy

(31) No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be acceptable in an open and democratic society.

(32) Interference with private communications, spying on persons and the compilation and keeping of secret files about them without their consent, shall not be permissible save as authorised by law in circumstances that would be acceptable in an open and democratic society.

The Right of Movement

(33) All South Africans shall have the right without discrimination to move freely and reside in any part of the country, to receive a passport, travel abroad and to emigrate if he or she so wishes.

The Right to Conscience

(34) The right to conscience shall be inviolate, and no-one shall be penalised for his or her beliefs.

(35) No-one shall be required to bear arms or perform military service against his or her conscientious beliefs.

NOTE: The question of whether there should be conscription is left open. There are strong arguments for and against the concept of serving in the armed forces as a constitutionally acceptable duty. In any case, the right of conscientious objection should be respected.

Article 3

POLITICAL RIGHTS

(1) South Africa shall be a multi-party democracy in which all citizens shall enjoy basic political rights on an equal basis.

NOTE: Is it necessary to include the word 'citizens'? Should we not return to the earlier formulation: 'all men and women'?

(2) Government at all levels shall be subject to the principles of accountability to the electorate.

(3) Elections shall be conducted in accordance with an electoral law which shall make no distinction on the grounds of race, colour, language, gender or creed.

(4) Elections shall be regular, free and fair and based on universal franchise and a common voters' roll.

5) All men and women entitled to vote shall be entitled to stand for and occupy any position or office in any organ of government or administration.

(6) All citizens shall have the right to form and join political parties and to campaign for

social, economic and political change, either directly or through freely chosen representatives.

Article 4

FREEDOM OF SPEECH, ASSEMBLY AND INFORMATION

(1) There shall be freedom of thought, speech, expression and opinion, including a free press, which shall report and comment fairly and respect the right to reply.

NOTE: Should there be a qualification on honest and fair reporting and comment, or would this appear to open the way for impinging unduly on freedom of the press?

(2) All men and women shall have the right to assemble peacefully and without arms, and to submit petitions for the redress of grievances and injustices.

3) All men and women shall be entitled to all the information necessary to enable them to make effective use of their rights as citizens, workers or consumers.

Article 5

RIGHTS OF ASSOCIATION, RELIGION, LANGUAGE AND CULTURE

Freedom of Association

(1) There shall be freedom of association, including the right to form and join trade unions, religious, residents, students, and social and cultural bodies, and to form and participate in non-governmental organisations.

(2) Legislation shall provide for the right of such associations to be heard in appropriate cases before any action is taken or measures proposed by any public or private body which could directly affect the interest of members of the association.

NOTE: This is an entirely new constitutional provision designed to give some measure of protection to organs of civil society, such as religious, cultural or language bodies, residents's associations or trade unions.

Freedom of Religion

3) There shall be freedom of worship and tolerance of all religions, and no State or official religion shall be established.

(4) The institutions of religion shall be separate from the State, but nothing in this Constitution shall prevent them from co-operating with the State with a view to furthering the objectives of this Constitution, nor from bearing witness and commenting on the actions of the State.

(5) Places associated with religious observance shall be respected, and no-one shall be barred from entering them on grounds of race.

Language Rights

(6) The languages of South Africa are, in alphabetical order Afrikaans, English, Ndebele, Pedi, Sotho, Swati, Tsonga, Tswana, Venda, Xhosa and Zulu.

NOTE: This proposal has been widely commented on. Many countries do not have an official language or official languages. In some countries, such as Ireland, the official language is hardly ever used, though its existence has considerable meaning for the inhabitants. We feel that language rights should be general, so that languages presently discriminated against shall have a higher status without downgrading English and Afrikaans. Sub-section 9 is intended to deal in a practical way with the practical difficulties associated with multi-lingualism. The essence will be to tailor solutions to concrete situations and give great weight to choice and voluntary agreement in the context of acknowledging basic rights.

(7) The State shall act positively to further the development of these languages, especially in education, literature and the media, to engender the respect for different languages and to prevent the use of any language or languages for the purpose of domination or division.

NOTE: The question of providing proper translation services as well as of encouraging multi-lingualism becomes urgent.

(8) When it is reasonable to do so, one or more of these languages may be designated by the National Parliament as the language to be used for legislation or any other defined purposes at the national level or in any region or area where it is widely used.

9) Subject to the availability of public and private resources, and limitations of reasonableness, primary and secondary education should wherever possible be offered in the language or languages of preference of the students or their parents.

(10) The State shall promote respect for all languages spoken in South Africa.
Creative Freedom

(11) There shall be freedom of artistic activity and scientific enquiry, without censorship, subject only to such limitations as may be imposed by law in accordance with principles generally accepted in open and democratic societies.

The Right to Sporting, Recreational and Cultural Activities

(12) ~~ Sporting, recreational and cultural activities shall be encouraged on a non-racial basis, drawing on the talents and creative capacities of all South Africans, and autonomous organisations may be established to achieve these objectives.

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Article 6

WORKERS' RIGHTS

Workers shall have the right to form and join trade unions and regulate such unions without interference from the State.

Workers shall be free to join trade unions of their choice, subject only to the rules of such unions and to the principles of non-discrimination set out in this Constitution, and no worker shall be victimised on account of membership of a union.

The right to organise and to bargain collectively on any social, economic or other matter affecting workers' interests, shall be guaranteed.

In the furtherance of these rights, trade unions shall be entitled to reasonable access to the premises of enterprises, to receive such information as may be reasonably necessary, and to deduct union subscriptions where appropriate.

No law shall prevent representative trade unions from negotiating collective agreements binding on all workers covered by such agreements.

Workers shall have the right to strike under law in pursuance of their social and economic interests subject to reasonable limitations in respect of the interruption of services such as would endanger the life, health or personal safety of the community or any section of the population.

Workers shall have the right to peaceful picketing, subject only to such reasonable conditions as would be acceptable in a democratic society.

Trade unions shall have the right to participate in lawful political activities.

Trade unions shall have the right to form national and federations and to affiliate to international federations.

Employers shall be required by legislation to provide a safe and clean work environment that respects the dignity of the workers, and to offer reasonable pay and holidays.

There shall be equal pay for work of equal value, and equal access to employment, training and advancement.

The State shall make provision by way of legislation for compensation to be paid to workers injured in the course of their employment and for benefits to be paid to unemployed or retired workers.

NOTE: It has been argued that a simple clause would be better guaranteeing trade union autonomy, the right of collective bargaining and the right to strike. By putting in extensive clauses, it is said, we are shifting workers' rights from their base in industry and from being subject to the industrial courts, to the constitutional court, which is far more likely to favour pro-employer nineteenth century ideas of freedom of contract. While there is obviously merit in this argument, we feel it can be addressed by ensuring that in industrial questions judges of the Industrial Court participate alongside the other judges. The whole question of the

relationship between workers's rights in the Bill of Rights, a Workers's Charter and a possible Industrial Code embodied in legislation, needs to be looked at globally.

Article 7

WOMEN'S RIGHTS

(1) Men and women shall enjoy equal rights in all areas of public and private life, including employment, education and within the family.

(2) Legislation may provide for reproductive rights, and rights associated with child-birth and child-raising shall be respected.

NOTE: See Note to Article 2. This is an important question that has to be handled in a democratic way, recognising a pluralism of opinions, and with as much sensitivity as possible. The implication of the above formulation is to guarantee child-birth and child-raising rights, and to permit but not to require legislation dealing with reproductive rights, especially rights relating to the control of fertility.

Article 8

GENDER RIGHTS

(1) Discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.

(2) Legislation shall provide remedies for oppression, abuse, harassment or discrimination based on gender or sexual orientation.

(3) Educational institutions, the media, advertising and other social institutions shall be under a duty to discourage sexual and other types of stereotyping.

Article 9

DISABLED PERSONS

1) There shall be no discrimination against disabled persons.

2) Legislation shall provide for measures to promote the progressive opening up of employment opportunities for disabled men and women, the removal of obstacles to the enjoyment by them of public amenities and their integration into all areas of life.

NOTE: This addition is in line with recommendations by the Disabled People of South Africa, which is actively promoting discussion amongst disabled people on their future constitutional rights, and which points out that there are nine million disabled persons in our country.

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Article 10
CHILDREN

All children shall have the right to a name, to health, to security, education and equality of treatment.

The State shall, to the maximum of its available resources, seek to achieve progressively the full realisation of these rights.

No child shall suffer discrimination or enjoy privileges on the grounds of race, colour, gender, language, creed, legitimacy or the status of his or her parents.

In all proceedings concerning children, the primary consideration shall be the best interests of the child.

Children are entitled to be protected from economic exploitation and shall not be permitted to perform work that is likely to be hazardous or harmful to their education, health or moral well-being.

It shall be unlawful to oblige children to work or perform services for the employers of their parents or other family members.

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INTRODUCTORY NOTE TO THE FOLLOWING ARTICLES: While the basic thinking of the Articles on social, economic and property rights remains the same, the formulations in these areas have been substantially re-worked. The main difference has been to insert an entirely new section on land rights. Coupled with this is a formulation on property rights which gives greater emphasis to the protection of personal possessions.

At the same time, the difficult question of how to give meaningful protection to social or so-called second generation rights, has been dealt with by making their presentation more compact, and spelling out in the Enforcement section how they should be made effective.

Article 11

SOCIAL, EDUCATIONAL AND WELFARE RIGHTS

(1) All men, women and children have the right to enjoy basic social, educational and welfare rights.

2) Legislation shall ensure the creation of a progressively expanding floor of minimum rights in the social, educational and welfare spheres for all in the country.

(3) Such legislation shall take into account national priorities, the availability of resources and the capacity of the beneficiaries of such rights to contribute towards the costs involved.

(4) In order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extension of legislation and minimum standards from area to area.

Freedom from Hunger, the Right to Shelter and the Right to Work

(5) Special attention shall be paid to securing freedom from hunger, reducing and where possible eliminating homelessness, unemployment and illiteracy, and to providing basic utilities, such as water, electricity and waste disposal for all.

Right to Education

(6) Education shall be free and compulsory up to the age of sixteen, and provision shall be made for facilitating access to secondary, vocational and tertiary education on an equal basis for all.

(7) Education shall be directed towards the development of the human personality and a sense of personal dignity, and shall aim at strengthening respect for human rights and fundamental freedoms and promoting understanding, tolerance and friendship amongst South Africans and between nations.

Right to Health

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A comprehensive national health service shall be established linking health workers, community organisations, state institutions, private medical schemes and individual medical practitioners so as to provide hygiene education, preventative medicine and health care delivery to all.

Right to a Minimum Income and Welfare Rights

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Comprehensive schemes of national insurance, funded by general revenue, contributions or such other sources as may be appropriate, shall be established to guarantee the furnishing of old-age pensions, family income benefits, superannuation payments, compensation for industrial injury and disease, unemployment benefits, child benefits and such other welfare entitlements as citizens in a modern state may expect.

NOTE: Normally in a country as developed as South Africa, it would not be necessary to spell out the different forms of social security that would have to be provided. Because the limited forms of welfare started during World War 2 were scrapped by apartheid, we feel it necessary to specify the various schemes so that people understand what is meant by social security.

Article 12

LAND AND THE ENVIRONMENT

(1)

The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.

(2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

Rights to Land

(3) South Africa belongs to all who live in it.

(4) Access to land or other living space is the birthright of all South Africans.

(5) No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.

(6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure,

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Legislation shall provide for the establishment of a tribunal for land claims which shall have the power to adjudicate upon land claims made on legal or equitable grounds, and in particular shall have:

a) the power to order the restoration of land to people dispossessed by forced removals, or where appropriate to direct that compensation be paid, or other suitable acknowledgment be made, for injury done to them;

b) the power to award particular portions of land, or rights to land, to such claimants, where there are special circumstances arising out of use, occupation or other similar grounds, which make it equitable for such an award to be made.

Legislation shall also make provision for access to affordable land to be given as far as possible, and with due regard to financial and other resources available to the state, to those historically deprived of land and land rights, or deprived of access to land by past statutory discrimination.

All such legislation shall guarantee fair procedures and be based on the principle of achieving an equitable balance between the public interest, including the above objectives, and the interests of those whose existing titles might be affected.

Any redistribution of land or interest in land required to achieve the above objectives shall be subject to just compensation which shall be determined according to the principle of equitable balance between public interest and the interest of those whose existing titles might be affected.

In the case of a dispute regarding compensation, provision shall be made for recourse to an independent tribunal, with an appeal to the courts.

All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not otherwise owned at the time of coming into being of this Constitution, shall be vested in the state acting as trustee of the whole nation.

The State shall have the right to regulate the exploitation of all natural resources, grant franchises and determine royalties subject to payment of just compensation in the event of interference with any existing title, mining right or concession.

NOTE: Do the above provisions cover forced removals under Group Areas Legislation?

Environmental Rights

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All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.

In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular:

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- a) prevent and control pollution of the air and waters and degradation and erosion of the soil;
- b) have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;
- c) promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.
- d) ensure that long-term damage is not done to the environment by industrial or other forms of waste;
- e) maintain, create and develop natural reserves, parks and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

The law shall provide for appropriate penalties and reparation in the case of any damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.

Article 13 PROPERTY

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All South Africans shall, without discrimination, have the right to undisturbed enjoyment of their personal possessions, and, individually, in association or through lawfully constituted bodies, be entitled to acquire, hold or dispose of property.

The content and limits of these rights and the rights to inheritance, shall be determined by law.

Property rights impose obligations and their exercise should not be in conflict with the public interest.

The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

(6) In the case of a dispute regarding compensation, provision shall be made for recourse to a special independent tribunal, with an appeal to the Courts.

(7) Legislation on economic matters shall be guided by the principle of encouraging collaboration between the public, private, co-operative, communal and small-scale family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.

NOTE: This kind of clause would fit well into a section called Directives of State Policy. For present purposes we leave it here. There is much argument about whether principles governing economic life should be in a constitution at all. If there is strong insistence on having some constitutional reference, then we would favour a balanced clause such as the above.

(8) The above provisions shall not be interpreted as impeding legislation such as might be deemed necessary in a democratic society with a mixed economy which may be adopted with a view to providing for the regulation or control of property or for its use or acquisition by public or para-statal authorities in accordance with the general interest, or which is aimed at preserving the environment, regulating or curtailing cartels or monopolies or securing the payment of taxes or other contributions or penalties.

NOTE: Reference to a mixed economy may be unnecessarily provocative both to those who favour an extensive free market and those who wish for considerable state intervention. It is not normal to have any constitutional prescription on either issue.

(9) This Article shall be read subject to and in harmony with the provisions of Article 12.

Article 14 AFFIRMATIVE ACTION

(1) Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.

(2) Any action taken in terms of the above shall not be deemed to contradict the principle of equal rights for all South Africans as set out in Article 1.

NOTE: The phrasing in the original text was interpreted to mean that the principle of affirmative action would be so powerful as to override all personal rights and freedoms as well as to supersede the specific provisions of the property clauses. The new formulation removes any ambiguity on the subject, and makes it clear that its ambit is to supplement and strengthen the equality clause, not to override other provisions in the Bill of Rights. The property clause has special provisions dealing with affirmative action in relation to land. The following Article deals with special measures that have to be taken to remove inequality.

Article 15
POSITIVE MEASURES

NOTE: The word "affirmative action" is used in this document only to deal with cases where in order to overcome past discrimination special support is given to black persons and women. Article 14 makes it clear that such kind of intervention aimed at achieving real equality shall not be regarded as unconstitutional, even if it expressly takes account of race or gender. Article 15 goes beyond merely permitting certain kinds of activity. It actually requires the taking of steps to overcome the imbalances in our society created by apartheid and to promote non-racism and non-sexism.

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In its activities and functioning, the State shall observe the principles of non-racialism and non-sexism, and encourage the same in all public and private bodies.

All benefits conferred and entitlements granted by the State shall be distributed on a non-racist and a non-sexist basis.

The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, gender or creed.

With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which promote violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.

All organs of the State at the national, regional and local levels shall pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa.

Such policies shall include the implementation of programmes aimed at achieving a balanced structuring in non-racial form of the public service, defence and police forces and the prison service according to the principles of representativity, competence, impartiality and accountability.

In taking steps to correct patterns or practices of discrimination, special attention shall be paid to rectifying the inequalities to which women in South Africa have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation.

Legislation may be enacted requiring non-governmental organisations and private bodies to conduct themselves in accordance with the above principles.

Article 16
LIMITATIONS

(1) Nothing in the Constitution shall be interpreted as implying for any group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Constitution, or at their limitation or suppression to a degree other than is authorised by the Constitution itself.

2) Nothing in this Constitution shall be interpreted as impeding the right of the State to enact legislation regulating the manner in which fundamental rights and freedoms shall be exercised, or limiting such rights, provided that such regulation or limitation is such as might generally be deemed necessary in an open and democratic society.

(3) Any restrictions permitted under the Constitution to fundamental rights and freedoms shall not be applied to or used as a cover for any purpose other than that for which they have been expressly or by necessary implication authorised.

(4) Any law providing for any regulation or limitation of any fundamental right or freedom shall:

a) be of general application;

b) not negate the essential content of the right, but simply qualify the way that right is to be exercised or the circumstances in which derogation from the right is permitted;

c) as far as practicable, identify the specific clauses of the Constitution relied upon for the limitation of the right and the specific clauses of the Constitution affected by the legislation;

d) specify as precisely as possible the exact reach of the limitation and the circumstances in which it shall apply.

NOTE: These provisions follow the basic format of limitation clauses used in the European Convention of Human Rights and other similar documents. A general clause like this is needed so as to avoid cluttering up the Bill of Rights with detailed exceptions to each and every clause. Thus, it would be inconvenient to have to spell out such generally accepted limitations on freedom of speech as restrictions on reporting the names of minors in court proceedings, or on speech designed to put pressure on judges during a trial.

Article 17
ENFORCEMENT

General

(1) The terms of the Bill of Rights shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons .

(2) The fundamental rights and freedoms contained in this Bill of Rights shall be guaranteed by the courts.

(3) Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

4) All persons who claim that rights guaranteed them by this Bill of Rights have been infringed or threatened, shall be entitled to apply to a competent court for an order for the declaration or enforcement of their rights, or for the restraining of any act which impedes or threatens such rights.

5) Any law or executive or administrative act which violates the terms of this Bill of Rights shall be invalid to the extent of such violation, save that the court shall have the discretion in appropriate cases to put the relevant body or official on terms as to how and within what period to remedy the violation.

Constitutional Court

6) Provision shall be made for the establishment of a Constitutional Court.

NOTE: We favour a Constitutional Court which will be representative and newly created. We do not support the idea of simply making it a section of the existing Appellate Division.

Should this point be made here, or does it belong in the part of the Constitution dealing with the judiciary?

Human Rights Commission

(7) Parliament shall establish by legislation a Human Rights Commission to promote general observance of the Bill of Rights and in particular to help enforce the right to non-discrimination.

NOTE: This body is conceived of as having the functions similar to those of agencies, boards or commissions established in countries like the USA, the UK and Australia to secure compliance with anti-discrimination legislation.

(8) Such Commission shall have the right to establish agencies for investigating patterns of violation of any of the terms of the Bill of Rights and for receiving complaints, attempting conciliation and bringing proceedings in court where appropriate, with special attention to violation of the principles contained in Article 1.

Â©) The Commission shall monitor proposed legislation with a view to reporting to ament on its potential impact on the realisation of the rights set out in the Bill of Rights.

(10) The Commission shall also have the right to create agencies to monitor progress being made in the materialisation of basic social, educational and welfare rights, report on and make proposals for the removal of impediments to their achievement, and require the furnishing to Parliament, regional and local authorities and to the public at large of all such information as would assist in bringing about their realisation.

(11) The Courts shall enforce such social, education and welfare rights as are established by legislation, or identified by the Constitutional Court through interpretation of the Constitution and shall pay due regard to social, educational and welfare rights when considering the interpretation of statutes, the validity of subordinate legislation and the reasonableness of administrative actions.

(12) Where justice and the achievement of the objectives of the Bill of Rights so require, the state or any private body or individual may be restrained by the Courts from doing anything which interferes with or reduces enjoyment of these rights or impedes their realisation.

NOTE: This is a form of making social rights justiciable. The courts are given the power to restrain interference with these rights (for example, bulldozing people's houses). They are sometimes referred to social rights in the negative sense, that is, that nothing may be done to diminish them, even though the courts might not have the power to order positive rights, say, that homes and jobs be provided.

Ombud

(13) With a view to ensuring that all functions and duties under the Constitution are carried out in a fair way with due respect for the rights and sentiments of those affected, the office of Ombudsman) shall be created.

NOTE: In Norway, the country that gave us the institution, the person is now called Ombud and not Ombudsman and we follow suit.

(14) The Ombud shall be appointed by the State President subject to confirmation by the Senate.

(15) The Ombud shall be appointed for a term to be determined by Act of Parliament, and may only be removed by the President, acting on the advice of the Senate, on grounds of gross misconduct or mental incapacity.

(16) The Ombud shall be independent in the carrying out of his or her functions and shall serve in a full-time capacity and may open offices in different parts of the country.

(17) The Ombud shall receive and investigate complaints from members of the public concerning abuse of power or unfair, insensitive, capricious, harsh, discourteous or unduly delayed or discriminatory treatment of any person by any official of

government at national, regional or local level, or any attempt by such official to extort benefits or corruptly to receive favours.

(18) In accordance with his or her findings, the Ombud may initiate legal proceedings, refer the matter for prosecution, negotiate a compromise, issue a public communication, or make a report to the department or organ concerned containing recommendations with a view to remedying the improper conduct, preventing repetition, and, where appropriate, making amends, including compensation.

Jurisdiction

(19) Recourse to the Human Rights Commission or to the Ombud shall not oust the jurisdiction of the courts to hear any matter.

Article 18

MEASURES FOR CONTROL AND ACCOUNTABILITY DURING A STATE OF NATIONAL DEFENCE OR EMERGENCY

(1) If there is a threat to the sovereignty of South Africa, which in the opinion of the President calls for such a declaration to be made, the President may by Proclamation declare that a state of national defence exists in South Africa.

(2) At a time of national disaster, or grave public emergency, or danger threatening the life of the nation or the democratic constitutional order and if the ordinary laws of the land are not sufficient to meet the exigencies of such national disaster, public emergency or danger, the President may, by Proclamation, declare that a state of emergency exists in South Africa.

Article 19

PROCLAMATION OF DEFENCE AND EMERGENCY MEASURES

1) When a state of national defence or a state of emergency exists, the President may, by Proclamation, enact defence or emergency measures which are necessary for the protection of the sovereignty of South Africa, national security, or public safety or for the defence of the Constitution.

2) Defence and emergency measures shall have the force of law and subject to Articles 20, 21, 22, 23, may repeal, amend or suspend the operation of any existing law, including certain provisions of Chapter 2 of the Constitution. Such measures may be proclaimed for the whole of the country, or for any part of it.

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Article 20

SUPERVISORY POWER OF NATIONAL ASSEMBLY

A declaration of a state of national defence or of a state of emergency shall cease to have effect if it is not ratified within fourteen days by a resolution of the National Assembly. If the National Assembly is not in session when such a declaration is made, the President shall immediately convene a special session of the National Assembly to address this issue.

A state of national defence that has been ratified by the National Assembly under Sub-article (1) shall continue until peace has been declared by the President.

A state of emergency which has been ratified by the National Assembly under sub-article (1) shall continue until terminated by the President: provided that if it has endured for a period of six months from the date of proclamation, it will automatically lapse unless the National Assembly by a resolution taken prior to the expiration of the six month period, approves its extension for a further six months or a shorter period. Any prolongation of the state of emergency thereafter, shall be limited to successive periods of not more than six months which shall on each occasion require the approval of a resolution of the National Assembly passed by a two-thirds majority.

During the period of any state of emergency or state of national defence -

(a) While the National Assembly is in session, the President shall report to it at intervals of not more than one month about the operation of the special emergency and national defence measures and the National Assembly shall receive and promptly consider such reports;

(b) if the National Assembly is not in session, the President shall convene special sessions, of the National Assembly at intervals of not more than three months from the date of the declaration of the state of emergency or state of national defence or from the date on which a report by him on the operation of the special emergency measures was last made to the National Assembly, for the purpose of receiving and considering a report from him about the operation of the special emergency measures and to conduct such other business as the National Assembly may decide.

The National Assembly may at any time by resolution revoke the declaration of emergency or state of defence or restrict the area of their operation or repeal or amend the terms of any emergency measures.

During the period of any state of emergency the power of the President to dissolve the National Assembly and the Senate may not be exercised unless a resolution of the National Assembly is passed authorising him to do so. If the President is required by the Constitution or the electoral law to call for new elections during an emergency, then such elections shall be held as expeditiously as possible in accordance with the provisions of the existing law and the new National Assembly shall be convened without delay.

Article 21

NON-DEROGABLE RIGHTS

Neither the President nor the National Assembly shall have the power to pass a defence or an emergency measure which

(1)

(2)

3)

derogates from or suspends the rights and freedoms guaranteed by the Bill of Rights other than those referred to in Articles 2 (9) [forbidding detention without trial], (10) [no arrest or detention except for trial on criminal charge], (11) [informed of charge, right to legal representation and brought to court timeously], (12) [right to bail], (13) [right to public and fair trial before independent court], (31) [no search or entry to property without reasonable cause], (32) [interference with private communication, spying etc], and (33) [freedom of movement, passport, right to leave and enter country], Article 4 [freedom of speech, assembly and right to information], Article 13 (1) [peaceful possession of property and goods], and Article 12 (14), (15), (16) and (17) [environmental rights], provided that the derogation where permissible shall not be greater than is necessary for the purpose of national defence or the emergency; or

suspends or derogates from the provisions of any other chapter of the Constitution; or

establishes special courts or tribunals, other than the review board referred to in Article 21; or

make provision for prospective indemnities; or

is contrary to international law or international obligations.

Article 22

DETENTION IN TIMES OF NATIONAL DEFENCE OR EMERGENCY

Where any persons are detained without trial in terms of any defence or emergency measure, the following provisions shall apply:

(1)

(2)

(3)

They shall immediately be informed of the reason for their detention, an adult family member or friend nominated by the detainee shall promptly be notified of the detention and there shall be prompt publication in the Gazette of their names and the legal provisions under which they are held;

They shall have access to a legal representative of their choice at all reasonable times.

Their detention shall be reviewed within one month of their detention, and thereafter if they remain in detention at intervals of not less than three months, by a review board presided over by a judge of the Supreme Court, which shall

(4)

(5)

have the power to order their release from detention if satisfied that it is not reasonably necessary for their detention to be continued for the purpose of national defence or the emergency.

Detainees shall be given opportunity to make representations to the review board in such form as the board may consider to be desirable in the circumstances, taking into account the public interest and their interests, and for that purpose shall be given access to such information as the board may consider to be necessary, with due regard to such interests, and shall also be entitled to be represented before the board at the time when their cases are to be considered by the board.

The decision of the review board shall be made known to the detainee and to the adult family member or friend nominated by the detainee.

The right of the detainee to question the legality or the conditions of detention by recourse to judicial review shall not be affected by the provisions hereof.

Article 23

EXPROPRIATION AND COMMANDEERING OF PROPERTY IN TIMES OF NATIONAL DEFENCE OR EMERGENCY

Notwithstanding the provisions of Article 14 (4), (5) and (6) hereof, a defence or an emergency measure may authorise the expropriation or commandeering of any property for the purposes of national defence or the emergency;

Such defence or emergency measure shall provide:

a) that the property commandeered, unless it has been consumed for the purpose for which it was commandeered, be restored to the person from whom it was taken when it is no longer required for the purpose of national defence or the emergency;

b) that compensation shall be paid for property that is expropriated, or

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property which, having been commandeered, is destroyed or damaged prior to its restoration to the person from whom it was taken; and

c) that the compensation payable shall be assessed with due regard to the needs and interests of the State which were served by the expropriation or commandeering, and the interests of the person who has suffered loss as a result of the loss of or damage to such property.

The defence or emergency measures may provide that compensation shall not be payable for the temporary loss of the use of property which has been commandeered in terms of such measures, unless the person from which the property was taken used or intended to use the property for the subsistence of his or her family, or for the purpose of producing an income, in which event the compensation payable shall be assessed in accordance with the principles set out in sub-article (2) hereof, provided that the compensation shall in no event be more than is strictly necessary to compensate the persons concerned for the loss

they have actually suffered as a result of the property having been commandeered.

REPUBLIC OF SOUTH AFRICA

GOVERNMENT'S PROPOSALS
ON A

CHARTER OF FUNDAMENTAL
RIGHTS

2 February 1993

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Introductory remarks

South African constitutional law is based on parliamentary sovereignty. This means that the legislative powers of the South African Parliament is almost unlimited. Parliament has the power to amend or repeal the common law. It can make any law which it in its wisdom finds fit. It can grant rights and privileges or take them away. In the present system Parliament is supreme.

Our history has shown that a constitutional system which grants such wide powers to Parliament cannot guarantee the protection of basic rights. In the past rights have been infringed and unless the system is adjusted fundamentally, there can be no guarantees against future infringements. For this reason the Government is totally committed to a new constitutional dispensation in which the powers of the various branches of state authority, including those of Parliament, will be limited by and subject to certain basic, universally accepted legal norms. A Charter of Fundamental Rights must and shall be one of the most important elements of the new system. A Charter is essential to protect the rights of the citizen against the arbitrary and discriminatory use of Parliamentary and political power. In the new system the Law must reign supreme.

The text of a draft charter with explanatory notes accompanying each provision is contained in this document. The text of the draft charter appears in bold and the notes in ordinary print. The provisions of the draft charter are the Government's proposals of what should be contained in a comprehensive Charter of Fundamental Rights. It must not, however, be seen as the Government's final proposals. It is published to stimulate and to serve as a basis for coming negotiations on the contents of a charter. Obviously comments and proposals aimed at improvement of the proposals will be welcomed. The Government, however, strongly believes that a negotiated charter of fundamental rights must be in place already during the transitional phase.

The draft charter sets out a number of defined rights which persons will enjoy against the State. This list of rights also serves as a standard of values which may not be infringed by the State, whether by legislation or administrative action. In order to grant effective protection to persons, these rights will be entrenched constitutionally so that the State cannot curtail or erode them. The entrenching provisions will be contained in the Constitution.

The draft charter is based on four principles.

Firstly, the principle of verticality. This means that the charter primarily regulates legal relations between the State and the subject. It does not directly regulate legal relations among subjects themselves, although the charter will have an over-flow effect on such horizontal legal relations. For instance rights are required by the charter to be exercised responsibly with due regard to the rights of others. Also, the principles of the charter will serve as guide-lines in the interpretation of statutes dealing with legal relations among subjects. These principles will also materially influence the substance of future laws.

Secondly, the principle of negative enforcement. This has the effect that the Charter will apply to the State in a prohibitive rather than in a mandatory sense. That is to say, the State is primarily prohibited from infringing fundamental rights. In certain specified cases the State is, however, required to fulfil particular needs.

Thirdly, the principle of curtailment or limitation of rights. In terms of this principle the State is authorized to curtail rights within reasonable limits.

Chaos will follow if the rights of persons should prevail absolutely. In order to regulate society in the general interest, the State must have the power to delimit such rights in accordance with specific democratic values and norms.

Fourthly, the principle of justiciability. The protection and enforcement of fundamental rights can only be ensured by a strong and independent judiciary. The provisions with regard to the judicial and administrative application of the Charter (and other constitutional measures) are not contained in the draft charter. These provisions dealing with a constitutional court and an ombudsman will be dealt with separately. As a consequence of the Government's proposal that a negotiated charter of fundamental rights should be implemented already during the transitional phase, provision for the constitutional court will have to be made as part of the transitional arrangements.

The fundamental rights set out in the draft charter are based largely on the proposed Charter of Human Rights of the South African Law Commission as published in its Interim Report on Group and Human Rights. Most of the adaptations result from an intensive study of the application of the recommendations of the Commission against the background of practice, the existing statute book and certain policy considerations.

The provisions of the draft Charter of Fundamental Rights follow hereunder with a short explanatory note accompanying each.

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DRAFT CHARTER OF FUNDAMENTAL RIGHTS

Operation of Charter against the State

1. (1) Every person, including, where appropriate, every legal person and every entity or body or group of persons which can be the bearer of rights, shall have against the State the rights set out in this Charter.

(2) The rights which a person has against the State in terms of subsection (1) are fundamental rights. and the limitation or suspension of these rights shall be permissible onlyâ\200\224

(a) under the common law or by way of a law of a competent legislature; and

(b) to the extent provided for in section 35 or 36 or where otherwise expressly authorized.

(3) The provisions of this Charter shallâ\200\224

(a) bind all legislative, executive and judicial institutions, bodies and functionaries at central, regional and local government level: and

(b) apply to all laws whether made before or after the commencement of this Charter. and to all executive and administrative actions performed after such commencement.

Note

This clause deals in general terms with the rights recognized in the Charter.

Firstly. a special status is given to these rights insofar as they are entrenched. As fundamental rights the State accepts them as a limitation of its former sovereign power over its subjects. Together with the other provisions of the Constitution. the Charter forms the supreme law in the Republic. Other laws. and acts performed under such laws. may not be at variance with it. and in this sense parliamentary sovereignty is now replaced by the rule of law guaranteed by a testing right vested in the courts.

Secondly, clause 1 refers to the limitation and suspension of fundamental rights. The limitation and suspension of the Charter are explained under clauses 35 and 36.

Thirdly. room is left to the courts to extend the protection of the Charter in appropriate cases to persons other than natural persons. for example. the property and trading rights of companies.

Fourthly. clause 1 provides that all branches of the State at all levels of government are bound by the Charter so that it will not be permissible for any State authority to act in conflict with it. The Charter will apply to both existing and future laws

Operation of Charter against third parties

2. (1) No provision of this Charter shall be construed so as to create or regulate legal relations other than those between the State and a person as contemplated in section I.

(2) In the interpretation of any law regulating legal relations among persons inter se, the spirit, objects and purport of this Charter shall be taken into account.

(3) Where a person exercises or enjoys a right recognized by this Charter, such person shall do so in a manner which will not infringe the rights of any other person.

Note

Clause 2 makes it clear that the object of the Charter is not to create or regulate legal relations among persons themselves. The main purpose of the Charter is to protect individuals against abuse of power by State authorities. [tis not intended as a direct source of rights or obligations om individuals themselves, for example. to enable a dissatisfied employee to sue his employer on the ground of alleged infringement of his fundamental rights. The Charter is a standard with which the acts of state authorities towards the citizen must comply. The provision also makes it clear that where the Charter grants rights, such rights must be exercised in a responsible manner so that the rights of others are not thereby infringed.

Human dignity

3. The State shall in its legislative, executive and judicial acts respect and protect the human dignity of every person.

Note

[ihe recognition by the State of the human dignity of every individual is regarded as one of the corner stones of justice in a democratic society. All state authorities are charged with the duty to respect the human dignity of the individual in all their acts.

Protection of life

4. (1) Every person shall have the right to life.

(2) No person shall be deprived of his or her life intentionally save in the execution of a death sentence imposed in accordance with section 6 of the International Covenant on Civil and Political Rights.

Note

These provisions entrench the life of a person as a fundamental right of which he may not be deprived. His right to life also entails that the State must provide effective legal protection against murder and homicide by means of appropriate criminal sanctions.

The death penalty is retained as a permissible form of punishment. According to section 6 of the International Covenant on Civil and Political Rights the death penalty may be imposed only for the most serious crimes. but not upon persons under 18 years of age. The death penalty may only be carried out pursuant to a final judgment by a competent court. Every person sentenced to death has the right to seek commutation of the death sentence.

As far as the death penalty is concerned, the Charter leaves the position as it is at present, that is, in the hands of Parliament. A future Parliament can, if it so wishes, abolish the death penalty. And if it has abolished it, it will be free to re-impose the death penalty should public opinion later demand it.

The matter of abortion does not only affect the right to life, but also the right to physical integrity in so far as one school of thought is of the opinion that every woman has the right to make her own decisions regarding her body. At present the matter is regulated by statute, and because of the contentious nature of the problem it is left to the future Constitutional Court to decide on the permissibility of abortion under given circumstances.

Physical and mental integrity

5. Every person shall have the right to physical and mental integrity.

Note

This provision confirms the inviolability of a person's physical and mental integrity. This principle is deeply rooted in our law and protects a person against the unlawful violation of his body and mind by another.

Equality before the law

6. (1) All persons shall be equal before the law and entitled to equal protection by the law.

(2) No person shall be favoured or prejudiced solely by reason of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other convictions, or disabilities or other natural characteristics.

(3) A law shall be deemed not to be contrary to subsection (2) if such law provides for special measures for the sole purpose of furthering the development and advancement of specific communities, groups and individuals to enable them to develop and realize their natural talents and potential to the full and to exercise and to enjoy their fundamental rights on a basis of equality with, and with due regard to the interests of, other communities, groups and individuals.

Note

The object of this prohibition against any form of discrimination is that all shall have equal access to the courts, that all shall be entitled to equal legal remedies if their rights are infringed and that general laws bind all in equal measure. It should be borne in mind that the statute book of the Republic still contains provisions in conflict with this right, for example, laws regarding the present constitutional dispensation, since the latter is based upon race. Suitable measures will have to be taken to provide for the orderly phasing out of remaining inequalities.

In subclause (3) provision is made for so-called "affirmative action". This provision is considered necessary to ensure that, for example, development programmes for disadvantaged communities can be continued and extended. The provision has been formulated to ensure that it does not open the door for the introduction of marxist trends of policies under the ideologically neutral and popular banner of "affirmative action".

Citizen's rights

7. Every citizen shall have the right not to be

- (a) deprived of his or her citizenship;
- (b) exiled or expelled from the Republic;
- (c) prohibited from returning to the Republic;

(d) prevented from leaving the Republic, whether temporarily or permanently;

(e) denied a passport or deprived thereof.

Note

Citizenship as proof of the subject's membership of a specific state forms the basis of his political rights in that state. Through citizenship he obtains a say in the election of his government and the management of the country. Clause 7 protects this important right. While the issue of a passport was previously an indulgence on the part of the authorities, it now becomes a right upon which the citizen may insist.

Political rights

8. (1) Every citizen shall have the right to

- (a) form a political party;
- (b) join a political party of his or her choosing or not to join a political party;
- (c) participate or not to participate in the activities of a political party;
- (d) give expression to his or her political convictions in a peaceful manner;
- (e) make himself or herself available for nomination for and election to any legislative, executive or administrative office for which he or she qualifies.

(2) Subsection (1) shall not preclude the prohibition or regulation of participation in politics by persons in the service of the State.

Note

Political rights, which in the nature of things must be confined to citizens of the Republic, include the right to form a political party, to take part in politics and to be nominated for and elected to legislative, executive and administrative posts.

To ensure sound public administration, it may be necessary to prohibit or regulate the participation in politics by persons in the service of the State.

Participation in elections on the basis of universal adult franchise will be dealt with in the Constitution itself.

Freedom of speech

9. (1) Every person shall have the right to freedom of speech and other forms of expression, and the right to obtain and disseminate information.

(2) Subsection (1) shall not preclude the registration and licensing of newspapers and other forms of communication.

Note

It is accepted that freedom of speech forms the foundation of a free, open and democratic society. By acknowledging freedom of speech abuse of power, corruption and maladministration in official and other circles may be exposed. In this manner public debate on policy matters and disputed issues is promoted and so contributes to the search for peaceful solutions.

As in the case of most other rights this right may sometimes have to be limited. for example. where it will amount to defamation of others or where it will be contrary to good morals. Clause 35 provides for the limitation of fundamental rights on account of general considerations.

Meetings, demonstrations and petitions

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

Note

Freedom of meeting is a basic principle of democracy. In this way grievances of the community or a part thereof may be articulated and brought to the attention of the authorities. However this right is only recognized in so far as it is exercised peacefully and unarmed. Violent meetings and demonstrations are not protected by the Charter.

Freedom of worship

11. (1) Every person shall have the right to profess and practise the religion of his choosing.

(2) Subsection (1) shall not preclude ministration to the forces, the public service and other state institutions, religious instruction or exercise in schools, and religious broadcasts by an entity instituted by or under any law.

Note

In a society where the majority professes religious beliefs. it is considered necessary to make express provision for the rendering of. for example. chaplaincy services to persons in the service or care of the State, and for religious broadcasts by a body instituted by law. for example. the SABC. In view of the provision in clause 14 for religion-orientated education in schools where such education is required by a particular community. clause 11 protects religious instruction or exercise in schools where it is so desired.

Family

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

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Note

The family forms the natural and fundamental unit of society and deserves protection by the State.

Children

13. (1) Every parent shall have the right to have his or her child live with him or her and to care for and bring up such child. unless the interests of the child require some other arrangement.

(2) Every child shall have the rightâ\200\224

(a) not to be compelled to perform work or to render services harmful to his or her physical or mental health, upbringing, education or moral or social development, or which amounts to economic exploitation;

(b) not to be compelled to perform work or to render services for the benefit of the employer of the parents of the child or any other person:

(c) to protection against physical or mental violence, injury, neglect or abuse, including sexual abuse.

(3) Every child in need of care shall have the right to medical treatment by medical personnel in the service of the State or at medical institutions managed by the State in so far as such medical treatment is provided or can be provided by the the State with available personnel and facilities.

(4) This Charter shall not be construed so as to affect the powers of the Supreme Court as upper guardian of all minors.

Note

The supreme need of a child. namely. to be cared for and brought up by his parents. is recognized. The child is also protected against exploitation whether tor the benefit of his parents or for that of others. Children in need of care acquire the right to receive medical care at public expense.

14. (1) Every pupil or student who is a citizen shall have the right of equal access to state or state-aided educational institutions.

(2) Every pupil who is a citizen shall have the right to religion-oriented education in so far as it is reasonably practicable.

(3) Every pupil who is a citizen shail have the right to tuition in his mother tongue, including the right to take his mother tongue as a subject, in so far as it is reasonably practicable.

(4) (a) Every state-aided tertiary educational institution shall have the right to determine the medium of instruction and the religious and general character of such educational institution.

(b) The parent community of every state or state- aided school shall have the right to determine the medium of instruction and the religious and general character of the school.

(5) (a) Every pupil who is a citizen shall have the right to at least primary education for which the State with due regard to its financial means shall be responsible.

(b) All pupils at a particular level in a state or state-aided school shall have the right to equal state assistance in respect of compulsory education at such level.

(6) Every person shall have the right to establish and operate a private educational institution.

Note

[he following principles are laid down.

Every pupil or student, irrespective of race or colour, is entitled to equal access to state and state-aided educational institutions.

Pupils acquire the right to mother tongue education if it is feasible.

A state-aided tertiary educational institution itself determines its medium of instruction and its religious and general character.

The parent community of a state or state-aided school determines the school's medium of instruction and its religious and general character.

Every pupil is entitled to at least primary education at public expense in so far as it is financially feasible. but parents are not thereby relieved of financial contributions. Pupils at a particular level in such institutions have the right to equal state assistance in respect of compulsory education at that level.

A right to operate private schools is acknowledged.

Participation in the economy

15. Every person shall have the right freely and on an equal footing to engage in economic enterprise, including the right to establish, manage and maintain commercial undertakings, to acquire property and means of production, and to offer and accept employment against remuneration.

Note

This clause entrenches the common law freedom of the subject to participate in the economy. The recognition of this right will not prevent measures to prohibit monopolies and restrictive practices and to protect consumers against exploitation.

Legal competence

16. Every person shall have the right to perform juristic acts, and to acquire rights and incur obligations.

Note

This clause guarantees the right of a person with the necessary legal

capacity to perform legal acts and to enter into contracts with others in the exercise of his rights and for the advancement of his interests.

Freedom of movement

17. Every citizen shall have the rightâ\200\224

(a) of freedom of movement and residence in the Republic;

(b) to work, to establish and operate any undertaking, to exercise any TU profession or trade and to carry on any other lawful activity in any part of the Republic.

Note

Every citizen of the Republic may move freely in the Republic and elect where he wishes to reside and work . This right does not detract from legal requirements regarding travel in the Republic and residence in certain areas. Nor does it permit any person to infringe the rights of others by, for example, unlawful squatting or trespass.

Private ownership

18. (1) Every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of, including disposal by way of testamentary disposition or intestate succession, any form of movable and immovable property.

(2) Subject to the provisions of subsection (3) no person shall be deprived of his property otherwise than under a judgment or order of a court of law.

(3) Property may be expropriated for public purposes, subject to the payment within a reasonable time of an agreed compensation or, failing such an agreed compensation, of compensation in cash determined by a court of law according to the market value of the property.

(4) Every person shall have the right not to be subjected to taxes on property which will have a confiscatory effect or will make unreasonable inroads upon the enjoyment, use or value of such property.

Note

The prospect of acquiring property is the principal incentive to hard work, thrift, responsibility and the development of the individual's full potential. Hence the need to protect his right to acquire property for himself.

Apart from the instances where someone may be deprived of his property by order of a court of law according to the existing law, deprivation can in terms of the Charter only take place through expropriation for public purposes and against payment of an agreed compensation, or of compensation in cash determined by a court of law according to market value. Although reasonable taxes will be permissible. excessive taxation which may force an owner â\200\234voluntarilyâ\200\235 to abandon his property will be prohibited .

Employees

19. (1) Every employee shall have the rightâ\200\224

(a) to form an employeesâ\200\231 organization, to join such an organization or

not to join such organization, to participate or not to participate in the activities of such an organization, or otherwise to associate or not to associate or to organize;

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(b) to negotiate or bargain, collectively or individually:

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(Â¢c) to take part in strikes and to withhold labour:

(d) not to be subjected to unfair labour practices including intimidation and victimization:

(e) to work under safe, hygienic and healthy conditions;

(fi to work reasonable hours:

(Â¢) to be given a reasonable opportunity for rest, recreation and holiday:

S

(h) to receive reasonable remuneration for his or her labour;

(i) to be protected in his or her physical and mental well-being.

(2) Subsection (1) shall not preclude the prohibition of strikes in strategic industries and essential services or by persons in the service of the State, or the levying of contributions for and the management of provident funds.

Note

A number of principles aimed at the protection of employees and complying with internationally recognized norms of labour law are laid down here.

The right of the State to prohibit in the public interest strikes in strategic industries or by persons in the service of the State is retained.

For the avoidance of doubt it is stated that the levying of contributions for and the management of provident funds are not precluded by the rights in question.

Employers

20. (1) Every employer shall have the rightâ\200\224

(a) to form an employersâ\200\231 organization, to join such an organization or not to join such organization, to participate or not to participate in the activities of such an organization, or otherwise to associate or not to associate or to organize;

(b) to offer employment and to engage employees according to his or her needs with due regard to the fitness, qualifications, level of training and competence of the employees:

(cj) to require of an employee adequate service of an acceptable quality and to lock out labour:

(d) to terminate the services of an employee under the common law, the contract of employment or with the employee or legislation, as the case may be:

(e) to apply the principle of **no work, no payâ\200\231:

wD)

(f) to manage his or her business with a view to its economic viability and continued existence;

(g) to make use of alternative labour when necessary to maintain production or service;

(h) not to be subjected to unfair labour practices, including intimidation and victimization.

(2) Subsection (1) shall not preclude the prohibition of labour lock-outs in strategic industries and essential services, or the levying of contributions for and the emangements of provident funds. By SHR RE Sr Rpm

Note

The comments under clause 19 also apply in respect of employers. All the rights in question are in harmony with modern labour law.

Social security

21. (1) Every person shall have the right to safeguard his or her existence or the existence of his or her dependants in the best possible manner by means of pension, medical, assurance or other providence.

(2) The State shall not in any manner make any inroad upon the benefits of such providence.

(3) Every person shall have the right to claim available state assistance to provide for essential subsistence and medical needs where he or she is unable to provide for such needs because of physical or mental illness or disability and where there is no person who is legally liable or who can legally be compelled, to provide for such needs.

Note

This clause deals with the satisfying of certain socio-economic needs. In drafting the Charter the principle was adhered to that only those rights which can legally be enforced, that is, those which a court can compel the State to give effect to, should be included in the Charter. Rights which are merely an expression of ideals, have been avoided since the inclusion of such rights would only result in the legitimacy of the Charter as an enforceable and effective instrument being undermined.

Consequently the social security rights were not framed as claims which the individual has against the State, but as freedoms of the individual upon which the State may not encroach whether by legislation or otherwise. There is no obligation upon the State to realize these claims, but an obligation not to violate or endanger them. On the other hand there is nothing in the Charter that prevents the State from fulfilling its social obligations towards its citizens. These obligations the State must fulfil. But the extent to which the State provide social assistance to its citizens must be a political and not a legal matter.

Free association

22. (1) Every person shall have the right of free association.

(2) No person shall be prohibited or prevented from associating with any other person.

(3) No person shall be compelled to associate with separ piig

Note

Certain objectives can better be achieved if a person organizes himself with others in groups, for example. societies. The right to do so is recognized.

The freedom of the individual who prefers not to associate with a particular group is expressly protected.

Personal freedom

23. (1) Every person shall have the right to personal freedom.

(2) Subject to the provisions of section 37 a person may be deprived of his or her freedom only in the following instances and only in accordance with the procedure prescribed by a law of a competent legislatureâ\200\224

(a) detention of a person for investigation and trial on the ground of a reasonable suspicion that he or she has committed an offence;

(b) detention of an accused for or during his or her trial or for sentencing;

(c) detention of a person after conviction under a sentence or by order of a court of law;

(d) detention of a child by order of a childrenâ\200\231s court;

(e) detention of a person because of non-compliance or alleged non-compliance with the terms of process issued by or under the authority of a court of law, or of a condition or order of a court of law regarding attendance at such court, bail with or without conditions, any sentence or punishment, or any related matter;

(f) detention of an accused released on bail and who is about to flee or of a witness evading service of a subpoena or who is about to flee;

(g) detention of a recalcitrant witness or of a witness who refuses to divulge information regarding an alleged offence:

(h) detention of a witness by order of a judge with a view to the protection of the witness or the proper administration of justice;

(i) detention of a person for the prevention of the spreading of infectious diseases constituting a threat to public health;

(Jj) detention of a mentally disordered or suspected mentally disordered person for observation or treatment;

(k) detention of a person alleged to be addicted to a narcotic substance or alcohol, for the purpose of an enquiry whether he is so addicted,

or of a person who is so addicted, for the purpose of his rehabilitation;

(l) detention of a person in connection with his or her unauthorized or alleged unauthorized presence or sojourn in the Republic or for the purpose of his or her deportation;

(m) detention of a person for the purpose of extradition;

(n) detention of a person by order of a court of law in connection with civil proceedings.

Note

This clause deals with the right of every person not to be deprived of his freedom and not to be subjected to coercive measures. Because deprivation of freedom by the authorities must surely rank as one of the most serious infringements of a person's fundamental rights, it was regarded as necessary to spell out in detail the grounds upon which the authorities may detain someone. The other circumstances under which a person may be deprived of his freedom are subject to the proviso that such a person may not be detained for more than 10 days without leave or an order of a court of law (see clause 37(d)). This proviso will apply also in the case of detentions under a state of emergency.

Detainees

24. (1) Every person who is detained shall have the rightâ\200\224

(a) as soon as is reasonably possible to be informed 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, adequately to be fed by the State and, when necessary, to receive medical treatment at public expense;

(c) to be given a reasonable opportunity to communicate and consult with a legal practitioner and, when necessary, a medical practitioner of his or her choosing;

(d) to be given a reasonable opportunity to communicate with, and to be visited by, his or her spouse, family, next-of-kin and religious counsellor, unless a court of law orders otherwise;

(e) to be released when the reason for detention falls away or, in the case of a person detained for a specific period, at the expiry of the term of detention.

(2) During detention persons awaiting trial shall, in so far as it is practicable, be separated from convicted persons, and juveniles from adults.

Note

The rights contained in clause 24 are given to all persons detained by the State. Apart from accused persons and prisoners. it also pertains to other categories of detainees such as mentally disordered persons and prohibited immigrants. This clause provides for certain minimum rights for detainees which are calculated to prevent the abuse of power and inhuman treatment on the part of the authorities during detention.

Accused

25. (1) Every person arrested for the alleged commission of an offence shall have the rightâ\200\224

(a) as soon as is reasonably possible, to be informed in a language which he or she understands that he or she has the right to remain silent and that he or she is not obliged to make any statement, and to be warned of the consequences of making a statement:

(b) within a reasonable time, but not later than 48 hours or the first court day thereafter, after arrest, to be brought before a court of law, and to be charged or to be informed of the reason for his or her detention, failing which he or she shall be entitled to be released from detention;

(c) to be tried by a court of law within a reasonable time after arrest;

(d) upon good cause being shown, to be released from detention with or without bail.

(2) Any infringement of the rights of an accused mentioned in subsection

(1) shall not result in the setting aside of the proceedings unless on appeal or review the court finds that justice has not been done.

Note

The purpose of clause 25 is to ensure that the right to personal freedom of accused persons who are detained. will be affected to the minimum extent

compatible with the needs of the administration of justice. The point of departure is that a person arrested must be brought before a court within 48 hours after which the court may watch over his freedom.

Fair trial

26. (1) Every accused shall have the rightâ\200\224

(a) to a public trial by a court of law;

(b) to be presumed innocent until the contrary is proved;

(c) to remain silent during plea proceedings or trial and not to testify during trial:

(d) where he or she is not assisted by a legal practitioner, to an explanation of the possible consequences of any applicable presumptions and of his or her election to exercise his or her right to remain silent or not to testify;

(e) to examine witnesses testifying against him or her, to testify himself or herself, to call witnesses and to offer other rebutting evidence:

(f) to be represented by a legal practitioner at own expense;

(g) to be informed by the presiding officer regardingâ\200\224

(i) his or her right to be assisted by a legal practitioner; and

(ii) the institutions that he or she may approach for legal assistance,

and to be given a reasonable opportunity to attempt to obtain legal assistance;

(h) not to be sentenced to inhuman punishment;

(i) 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;

(j) not to be convicted of any offence of which he or she previously been convicted or acquitted on the merits:

(k) to have recourse by way of appeal or review to a higher court than the court of first instance:

(l) to be informed in a language which he or she understands of the reasons for conviction and sentence;

(m) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;

(n) to be sentenced within a reasonable time after conviction.

(2) Any infringement of the rights of an accused referred to in subsection (1) (d) or (g) shall not result in the setting aside of the proceedings unless the court on appeal or review finds that justice has not been done.

Note

The clause guarantees certain procedural rights aimed at ensuring that with the trial of an accused person justice is not only done, but can manifestly and undoubtedly be seen to be done. It may fairly be stated that the rights in question have been formulated more comprehensively in this provision than in most existing charters.

These rights also provide that inhuman punishment may not be imposed upon anyone. In the light of prevailing conceptions in other legal systems this will probably entail that corporal punishment, which at present is still a permissible form of punishment in the Republic, will be in conflict therewith and will have to fall away.

Recognition is also given to the internationally accepted principle that

an accused should have the right to appeal against his conviction and sentence to a higher court than the court of first instance.

Forced labour

27. (1) Every person shall have the right not to be subjected to forced labour.

(2) For the purposes of subsection (1) "forced labour" shall not include the following:

(a) the performance of labour by a person serving imprisonment;

(b) the performance of community or other service by a person in terms of a sentence or an order of a court of law;

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(c) the performance of compulsory military service;

(d) the performance of civilian service in the place of compulsory military service.

Note

By "forced labour" is meant labour which someone is compelled to perform under threat of punishment and to which he has not bound himself

voluntarily.

For the avoidance of possible doubt subsection (2) provides that labour performed under a sentence of a court, as well as compulsory military service or civilian service in the place thereof, is not regarded as forced labour.

Litigation

28. (1) Every person shall have the right to have any dispute settled by a court of law.

(2) Every person shall have the right that the South African law, including the rules of the South African private international law, be applied in all proceedings before a court of law.

(3) Subsection (2) shall not prevent

(a) judicial notice of the law of indigenous groups;

(b) the application in civil proceedings of the law of indigenous groups or the religious law of religious groups.

Note

Subclause (1) recognizes a person's basic right of access to the courts. This right may result in certain statutory provisions in terms of which the authorities may recover damages from someone in a summary manner and without the intervention of a court being invalid. It will also invalidate provisions in terms of which the jurisdiction of the courts is ousted.

Subclause (2) confirms the application of the South African law.

Subclause (3) authorizes the application by the courts in appropriate cases of the law of indigenous groups or the religious law of religious groups.

29. Every person shall have the right

(a) to have the rules of natural justice applied in administrative proceedings where, on the ground of findings of fact or of fact and law, his or her rights or reasonable expectations are or may be infringed;

(b) that in such a case the reasons for any decision be furnished on demand to him or her.

Note

It has already been held that the two rules here under discussion (â\200\230no one may be a judge in his own causeâ\200\231, and, â\200\234also hear the other sideâ\200\235) form part of our law. In short, the latter rule means that before an administrative organ comes to a decision that may affect the interests of a citizen adversely, such organ must allow that citizen an opportunity to put his side of the case. These rules now become fundamental rights.

Privacy

30. (1) Every person shall have the right to privacy.

(2) A person's right to privacy is infringed also by entering or entering upon his or her property or place of residence or employment, by searching him or her, by seizing his or her property or possessions and by intercepting or obtaining information about his or her correspondence or other forms of communication.

(3) The interception of, or the obtaining of information concerning, the correspondence or other forms of communication of a person shall be permissible only in so far it is authorized by a law of a competent legislature for the purpose of preventing and combating foreign intelligence operations, the illegal trade or trafficking in narcotics and weapons, serious economic offences and the organized sexual exploitation of women and children.

Note

The civil law protects the right to privacy of people among themselves. But the authorities should also respect this right.

The definition of this right in the clause is not exhaustive, but refers only to certain aspects thereof where the danger of infringement is greater, for example, the search of private property and the interception of post.

The latter is permissible only for the prevention and combating of foreign intelligence operations, the unlawful trade in drugs and weapons,

serious economic offences and the organized sexual exploitation of women and children.

Art and science

31. Every person shall have the right to practise the arts and science.

Note

The State may not place any obstacle in the way of any person who wants to participate in the arts or science.

Environment rights

32. Every person shall have the right not to be exposed to an environment which is dangerous or seriously detrimental to the health or well-being of man, and the right to conservation and protection of the environment.

Note

In today's world these so-called green rights are considered important enough also to be included. The vertical application of this right will ensure that this right can only be enforced against the State, which will prevent a witch-hunt-against private entrepreneurs. However the recognition of this right will have an inhibiting side-effect on private entrepreneurs who disregard the importance of conservation and protection of the environment.

Women's rights

33. (1) All women shall be entitled to equal rights with men.

(2) No law shall in any matter relating to women discriminate, distinguish or restrict on the basis of sex if it has the effect of denying or limiting women's right to equality with men in the political, economic, social, cultural, civil or any other sphere.

(3) Without derogating from the generality of the foregoing every woman shall have the right

- (a) to be elected to any public office for which she qualifies;
- (b) to receive equal remuneration with men for work of equal value:

(4) not to be discriminated against solely by reason of her marital status or pregnancy:

(d) to perform juristic acts, to acquire rights and incur obligations, and to acquire and dispose of property:

fe; to her physical and mental integrity and in particular to legal protection against rape and sexual harassment.

(4) A law shall be deemed not to be in conflict with the right to equality before the law if the object of the said law is

(a; to bring about equality between women and men:

(b) to protect women in certain types of work in the case of pregnancy or for other reasons inherent in their physical nature;

(4) to exempt women from compulsory military service, excluding service in a non-combatant or supporting capacity.

Note

Although the right to equality before the law is wide enough to protect women's rights inasmuch as it prohibits discrimination also on the ground of SEX, a specific provision on women's rights may nonetheless be justified. It must be pointed out, however, that some of these rights, for example, an unrestricted right to contract and to deal with property will be in conflict with aspects of the law, culture and customs of indigenous minorities and tribes, and that it is not the intention to force alien values upon them.

The inclusion of these provisions regarding women's rights must be seen against the background of the conventions relating to women and to which the Government subscribes. It is the Government's intention to ratify these conventions in due course. Women's rights are formally settled in separate draft laws in which the remaining statutory discrimination against women is abolished and provision is made for the promotion of equal opportunities for women and the combating of domestic violence ;

Culture and language

34. (1) Every person shall have the right to use the language of his or her choosing and to participate in the cultural life of his or her choosing.

(2) Every person shall have the right of communication with the State in the official language of his or her choosing.

Note

Underlying this right is the existence of more than one language and

culture group in the Republic. This right will therefore mainly be enjoyed in group connection.

Limitation of fundamental rights

35. (1) A law referred to in section 1(2)(a) in terms of which a fundamental right is limited or the limitation thereof is authorized, shall be permissible only to the extent in which such limitation is reasonably necessaryâ\200\224

(a) by virtue of state security, the safety of the public, the public order and interest, good morals, public health, the administration of justice or public administration;

(b) to uphold the rights and freedoms of others;

(c) to prevent or combat disorder, violence, intimidation or crime; or

(d) to counter or deal with a threatening or actual natural disaster or the consequences thereof.

(2) The question whether the limitation of a fundamental right is reasonably necessary shall be justiciable by the Constitutional Court.

Note

In a modern society where it is the task of the law to strike and maintain a balance between the interests of citizens among themselves, as well as between the interests of citizens on the one hand and those of the State on the other hand. certain rights must necessarily be limited or must yield pro tanto. For example. while the object of my right to privacy is that no one may enter my home without my permission. the needs of the administration of justice may require that a police officer search my house in a specific instance to trace a criminal in hiding.

The purpose of section 35 is to prescribe standards against which it can be determined if a particular limitation of a fundamental right is permissible. The legislature is strictly bound inasmuch as any limitation must be reasonably necessary on the ground of one or more of the considerations mentioned in paragraphs (a) to (d). The Constitutional Court is expressly authorised to determine if any limitation is justified. Should the court find that a limitation is not reasonably necessary. the court will declare the law imposing the limitation invalid.

2)

Suspension of fundamental rights

36. (1) A law referred to in section 1(2)(a) in terms of which a fundamental right is suspended or the suspension thereof is authorized, shall be of force only during a state of emergency in which—

(a) the continued existence of the State or the safety of the public in the Republic or in a part of the Republic is threatened by an actual or threatening war or invasion, an insurrection or general riotousness; and

(b) the suspension of that fundamental right is reasonably necessary to ensure the continued existence of the State or the safety of the public.

(2) The question whether a state of emergency as contemplated in subsection (1) exists, shall be justiciable by the Supreme Court.

Note

The suspension of a fundamental right is only at issue during a state of emergency.

A first requisite is that there must be a state of emergency as defined in section 36(1)(a). Whether such a state of affairs exists, does not end with the opinion of the State President, as is the case at present. The Supreme Court is expressly authorized to verify the factual existence thereof. To this extent the existing law will be invalid or will be interpreted otherwise by the court.

The other requisites of clause 36 can likewise be tested by the court. Thus it must be a fact, objectively seen, that the continued existence of the State is threatened, and that the suspension of the right in question is reasonably necessary to ensure the continued existence of the State.

Absolute prohibitions

37. Notwithstanding anything contained in this Charter no law contemplated in section 1(2)(a) shall regulate or authorize—

(a) the physical or mental torture or inhuman treatment of persons;
(b) the creation of offences with retrospective effect:

(c) the indemnification of the State or a person in the service of the State for the unlawful killing or injuring of any person;

(d) the detention of any person in circumstances other than those authorized in the specific instances set out in section 23 for a period longer than 10 days without leave or an order of a court of law.

Note

Notwithstanding provision in clauses 35 and 36 for the limitation or suspension of a fundamental right the legislature is in terms of this clause absolutely prevented from authorizing or permitting the above-mentioned matters. Here it is of importance to note that during a state of emergency a person may not be detained for more than 10 days without leave of an order of a court.

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FREEDOM
UNDER THE
RULE OF LAW:

Advancing Liberty
in the New

South Africa.

Democratic Party

Draft Bill of Rights.
May, 1993.

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The views expressed in this paper do not necessarily represent firm policy. If you would like further information about the Democratic Party or wish to make comments on this draft Bill of Rights, write to The Chairman, National Policy Advisory Committee, P O Box 1475, Cape Town, 8000.

"F O O W:
ADVANCING LIBERTY IN THE NEW SOUTH AFRICA"

DEMOCRATIC PARTY DRAFT BILL OF RIGHTS

INTRODUCTION

In February 1993, Dr Z.J. De Beer MP (Leader) and Mr K.M. Andrew MP (then Chairman of the Policy Advisory Committee) appointed a committee to formulate a Draft Bill of Rights for the Democratic Party.

The core committee consisted of Mr H.J. Bester MP, Mr D.H.M. Gibson MP, Mr P.S.G. [leon and myself.

This committee met with a group of leading legal academics and practitioners, over a two-month period, to draft this Bill of Rights. This party owes a considerable debt of gratitude to these expert consultants. They are:

e Professor Dennis Davis: Director, Centre for Applied Legal Studies, University of Witwatersrand, Johannesburg;

Â® Mr Gilbert Marcus, Advocate, Johannesburg Bar;

@ Professor Etienne Mureinik, School of Law, University of Witwatersrand, Johannesburg;

* Mr David Unterhalter, Advocate, Johannesburg Bar.

The input from our consultants was immense, but the final draft is the responsibility o f the Democratic Party committee.

Immediately on publication, this Draft Bill will be referred to a further group of emin ent South Africans and key DP members for their consideration and comment. Those who have agreed to undertake this task are:

Professor Edwin Cameron; Professor C.J.R. Dugard; Mr Colin Douglas; Professor Gerhard Erasmus; Mr Thaka Seboka; Professor Charles Simkins; Ms Dene Smuts MP; Mrs Helen Suzman; and Professor Richard van der Ross.

Certain of our consultants and commentators are members of the Democratic Party, others are not. But due to their different perspectives, expertise and identification with the principles of liberal democracy, they will assist in our task of producing a distinctiv e Bill of Rights which does not pander to narrow sectional or party political prejudices.

This Bill of Rights is so drawn: it has accounted for the latest developments in

constitutional jurisprudence - but has attempted to remain true to the philosophy pione ered

in our cause by, for example, Jannie Steytler, Colin Eglin, Zach de Beer, Donald Molten o

QC and Mrs Helen Suzman, and countless others who nurtured the flame of liberty in dark times. The draft Bill in this document is an attempt to give body and content to the pa rty's

commitment to equal justice, the Rule of Law and the advancement of liberty. We have

not attempted to cram the policy proposals of the Democratic Party into this document.

We do not believe that every, or even most, policy claims qualify as constitutional rig hts. We

have, rather, formulated a core of essential rights which attempt to harmonise the quest for equality, so assiduously denied to our citizenry by apartheid, and the preservation of individual liberty, which must be the lodestar of a new democratic South Africa.

This Bill of Rights, drawn to be at the heart of a new constitution, commits our country to equality, and sets its face against discrimination, especially against racial discrimination. Equally, this Bill recognises - and preserves - spheres of individual privacy immune from encroachment by any government, authority or neighbour. It does not do so, however, in a manner which will give legal recognition to attempts to privatise apartheid.

While most of the rights contained in this Bill are terse and simple, several are elaborate and detailed. We make no apologies in this regard. Such sections detail, with precision, the civil liberties and procedural safeguards necessary to secure individual freedom against oppression.

A distinctive feature of our Bill is its enforceability mechanisms. These too are detailed in this charter, including novel provisions to secure information from the organs of State, innovative rights to administrative justice and ease of procedures to allow the poor and inarticulate to approach the courts for relief. Fundamental to our Bill is recognition of the fact that without effective means of enforcement, legal rights will become little more than moral claims, readily ignored when the forces of government find it convenient to do so. In every clause, the drafters of this Bill took heed of the warning of United States Supreme Court Justice William J. Brennan against creating "paper promises whose enforcement depends wholly on the promisor's goodwill, rarely worth the parchment on which they were inked".

Our Bill takes the view that policy formulation - from the detailed provision of health services to the allocation of housing - is the preserve of parliament, not the constitution.

We hope that governments - and their policies - will change to meet changing circumstances. But because the promises of a Bill of Rights could be empty, cruel words echoing in a wasteland of deprivation and denial, we provide for a standard of justification which empowers the citizen to obtain from government the entitlements to the means of survival. This article, together with associated provisions relating to equality and affirmative action, is tightly drawn. This Bill does not, therefore, provide a laundry list offering the panoply of human happiness or perfection. It demands of government rational, honest justifications for policy decisions providing such entitlements. "Rationality" or "reasonableness" are therefore the standards of justification provided for in this Bill.

Our document also provides the legal building blocks for honest, accountable government located in the framework of a participatory democracy. It is an attempt to foster democratic decision-making, the surest guarantee of good government.

It is not the province of this Bill to determine the hierarchy of the future court structure. However, the committee was unanimously of the view that the constitution should allow

the Bill of Rights to be enforceable through the existing Supreme Court structure, with
a
final appeal lying to the Appellate Division which might, in turn, provide for an exper
t
constitutional appeal court. We do, however, warn of the significant danger of vesting
sole

power for constitutional interpretation in one, specially created court. Such a device could become too contentious, powerful and politicised.

It is also the Constitution and not the Bill of Rights itself which must provide the detailed mechanisms for entrenching this Bill (and for crucial companion rights such as the regularity of elections, the division of legislative competencies and the form of the State itself). However, the drafting committee is of the view that the Bill of Rights merits special protection against easy amendment or encroachment. The constitution must specify super-majorities (in various legislatures if necessary) to inoculate the Bill against interference by a simple parliamentary majority.

It is hoped that this draft Bill of Rights which the Democratic Party will do without amend and perfect offers the reality of an open, democratic society governed by principles of personal freedom and simple justice, anchored in the Rule of Law.

AJ. LEON MP
CHAIRMAN: DRAFTING COMMITTEE
MAY 1993

N.B. Explanatory notes on certain Articles of this Bill of Rights appear at the back of this document on the pages indicated in the text.

FREEDOM UNDER THE RULE OF LAW:
ADVANCING LIBERTY IN THE NEW SOUTH AFRICA

PREAMBLE

Arising from a history in which the values of dignity and equality have been violated by the State and the policies of Apartheid;

Recognising the inherent dignity and the inalienable human rights and fundamental freedoms of the individual,

Believing in the need to secure democracy, liberty, justice and prosperity for all; Desiring peace and reconciliation;

In the conviction that the rights recognised in this Bill of Rights are the essential conditions of democracy;

We hereby commit ourselves to these rights as the foundation a society governed by the Rule of Law.

ARTICLE 1: GUARANTEE OF RIGHTS

i. This Bill of Rights guarantees the rights enshrined in it. They shall be respected and upheld by all organs of the State and government, whether legislative, executive or judicial and, where applicable, by all persons in South Africa, and shall be enforceable by the Supreme Court of South Africa.

ARTICLE 2: RIGHT TO EQUALITY

21 Every person shall have the right to equal treatment, and there shall consequently be no discrimination, whether direct or indirect.

22 Discrimination means unjustified differentiation. Differentiation on the ground of race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience shall be presumed unjustified unless it is part of a rational programme intended to remedy substantial inequality.

23 Differentiation shall be considered justified when it is the result of a decision made in the exercise of the type of private choice which preserves personal autonomy.

[The explanatory note on clause 2 appears on page 9 of this document.]

to

ARTICLE 3: RIGHT TO LIFE

3 Every person shall have the right to life, and no person shall be deprived arbitrarily of his or her life.

[The explanatory note on clause 3 appears on page 11.]

ARTICLE 4: RIGHTS TO DIGNITY AND PRIVACY

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

ARTICLE 5: RIGHT TO LIBERTY

5.1 Every person shall have the right:

5.1.1 to liberty and security of person and shall not be deprived of such rights except in accordance with the law;

5.1.2 to be secure against unreasonable searches and seizures;

5.1.3 not to be arbitrarily arrested, detained or imprisoned;

5.1.4 not to be subject to torture or to cruel, inhuman or degrading treatment or punishment.

5.2 Every person who is arrested or detained shall have the right to:

5.2.1 be promptly informed, in a language which he or she understands, of the reasons for the arrest and of any charge;

5.2.2 retain and instruct a legal practitioner of his or her choice, to be advised of this right without delay and, where the interests of justice so require, to be provided with legal representation by the State;

5.2.3 be released or charged and tried within a reasonable time, before an ordinary court of law;

5.2.4 pending trial, save for good cause shown, be released on bail which is not excessive, or on reasonable guarantees to appear at trial;

5.2.5 challenge the validity of his or her detention, in person, in a court of law and be released if such detention is unlawful;

5.2.6 compensation in the event that such arrest or detention is unlawful.

[The explanatory note on clause 5.2 appears on page 12.]

53 Every accused person shall have the right:

53.1 to be informed, with sufficient particularity, of the offence with which he or she is charged and to be tried without unreasonable delay, in a language which such person understands;

5.3.2 not to be a compellable witness against himself or herself;

5.3.3 to be presumed innocent, until proven guilty, according to law, in a procedurally fair trial, before an ordinary court of law;

5.3.4 to a public trial;

5.3.5 to be represented by a legal practitioner of that person's choice and, where the interests of justice so require, to be provided with legal representation by the State and to be advised of this right at the earliest opportunity;

53.6 not to be convicted, unless, when committed, the offence charged was an offence under South African law, and not to be sentenced more severely

than would have been permissible when the offence was committed;

5.3.7 not to be tried again for an offence of which he or she has been finally acquitted or convicted.

[The explanatory note on article 5.3 appears on page 12.]

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6. Every person shall have the right to:

6.1 freedom of conscience and religion and, consequently, the State shall not favour one religion over another;

6.2 freedom of speech, thought, belief, opinion and expression, including freedom of the press and the other media of communication. In respect of the exercise of its control, if any, over any public media, the State shall ensure diversity of expression and opinion;

6.3 freedom of peaceful and unarmed assembly;

6.4 freedom of peaceful association, subject, however, to the provisions of article 2.

7.1 Every citizen and permanent resident shall have the right to enter, remain in and leave South Africa;

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no citizen may be deprived of his or her citizenship.

ARTICLE 8: VOTING RIGHTS

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Every citizen of voting age shall have the right to:

8.1 vote in elections for public office;

8.2 stand as a candidate in such elections;

8.3 form, and/or be a member of, any political party.

ARTICLE 9: RIGHT TO PROPERTY

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Every person shall have the right, in any part of South Africa, to acquire, own, or dispose of any form of immovable and movable property, individually or in association with others;

legislation may authorise the expropriation of property in the public interest, subject to the proper payment of equitable compensation which, in the event of a dispute, shall be determined by an ordinary court of law.

ARTICLE 10: RIGHT TO FAMILY LIFE

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Every person of full age shall have the right to marry a person of his or her choice and to establish a family.

ARTICLE 11: ENTITLEMENT TO THE ESSENTIALS OF LIFE

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Every citizen shall be entitled to the food and water necessary for survival; to shelter from the elements; to basic health care; to a basic education; and to a clean and healthy environment.

It is the province of Parliament, and of any other authority lawfully exercising power for the purpose, to decide how these entitlements are to be realised. Consequently, any such decision which is justifiable shall be considered to comply with this article. A decision which is reasonable and practicable and which respects the limitations on the resources available to realise the relevant entitlement shall be considered justifiable.

[The explanatory note on article 11 appears on page 2]

ARTICLE 12: FREEDOM OF LEARNING AND EDUCATION

12.1 The freedom to study, learn and teach shall be guaranteed.

12.2 The State shall not try to shape education or culture in accordance with any particular political or ideological commitment.

12.3 The academic freedom of every university and similar institution of higher learning shall be guaranteed.

[The explanatory note on article 12 appears on page 13.]

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13. Subject to clause 2, every person shall have the right to practise, profess, enjoy, maintain and promote his or her language and culture.

ARTICLE 14: RIGHT TO ADMINISTRATIVE JUSTICE

14.1 No person shall be affected adversely by a decision made in the exercise of public power which is unlawful, unreasonable or procedurally unfair;

14.2 every person adversely affected by a decision made in the exercise of public power shall be entitled to be given reasons, in writing, for the decision.

[The explanatory note on article 14 appears on page 13.]

ARTICLE 15: RIGHT TO INFORMATION

15. Every citizen shall have the right to obtain from the State, and from any organ of State or Government, with due expedition, all information:

15.1 concerning the organisation of such organ, its decisions and decision making procedures, its rules and policies;

15.2 held by the State concerning such citizen.

N.B. This article must be specifically read together with the derogation clause contained in article 18.

[The explanatory note on article 15 appears on page 14.]

16.1.1 Any law or action in contravention of this Bill shall be, to the extent of the

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contravention, invalid;

a court of competent jurisdiction shall have the discretion to allow any organ of Government or State, at any level, whether legislative, executive or judicial, to correct any defect in the impugned law or action within a reasonable period and subject to such conditions as might be specified by it;

until such correction, or until the expiry of the time limits set by such court, whichever be the shorter, the court may direct that the impugned law or action be deemed valid.

Any person who asserts that a right contained in this Bill has been infringed or curtailed shall be entitled to approach a court to enforce or protect such right.

The courts and the executive shall be under a duty to ensure that the rights contained in this bill shall be capable of being exercised and protected effectively

and expeditiously without unnecessary formality or constraint.

In determining disputes concerning the rights contained in this Bill a court shall adopt procedures which ensure the full ventilation of the issues in dispute.

The rights contained in this Bill shall be capable of enforcement, in the discretion of a court:

16.5.1 by an interested person acting on behalf of a class to which such person belongs;

16.5.2 by a person acting on behalf of an interested person or class not reasonably able to enforce the rights contained in this Bill.

Subject to the provisions of this Bill, a court shall have the power to make all such orders as shall be appropriate to protect and secure the rights contained in this Bill, as well as appropriate orders to compensate persons or to make restitution to persons who have suffered an infringement to their rights.

[The explanatory note on article 16 appears on page 14.]

ARTICLE 17: PRISONERS' RIGHTS

17. Save to the extent necessary to carry out the proper purposes of punishment, no prisoner shall be deprived of the rights contained in this Bill solely by reason of his or her imprisonment.

ARTICLE 18: DEROGATION

18. The rights contained in this Bill may not be restricted except by law having general application, provided that:

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such restriction is permissible only to the extent demonstrably necessary in a free, open and democratic society:

such restriction may in no case nullify the essential content of the right;

such restriction is consistent with South Africa's obligations under international law;

subject to article 19, this article (18) and the following articles may not, in any manner be restricted: articles 1,2,5 (save for 5.3.4), 6.1, 6.4, 7, 9.2, 11, 12,973.14, 15,17.

[The explanatory note on article 18 appears on page 15.]

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The rights in this Bill may be suspended only in consequence of the declaration of a state of emergency made under an Act of Parliament, provided that:

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a state of emergency may be declared only where the security of the State is threatened by war, invasion or general insurrection or at a time of natural disaster, and if the declaration of a state of emergency is demonstrably necessary to restore peace and order;

no action, whether a regulation or otherwise, may be taken under that declaration, unless it is demonstrably necessary to restore peace and order;

the declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to have any effect unless the declaration is ratified by a two-thirds majority of the total number of the directly elected members of parliament within two weeks of the declaration;

a state of emergency shall endure for no longer than three months, provided that it may be renewed, if it is ratified by at least two-thirds of the total number of the directly elected members of parliament;

no declaration of a state of emergency shall have retrospective effect;

the Supreme Court shall be competent to enquire into the validity of any

declaration of a state of emergency, any renewal thereof, and of any action, whether a regulation or otherwise, taken under such declaration.

Neither the enabling legislation providing for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise:

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the creation of retrospective crimes;

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the indemnification of the State, or its officials, for unlawful actions taken during the state of emergency;

the suspension of this clause (19) and of clauses 1, 3, 5.1.4, 5.3, 6.1, 10, 14, 16, 17 of this Bill.

Any person detained under a state of emergency shall have the following rights:

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an adult family member or friend of the detainee shall, as soon as reasonably possible, be notified of the detention;

the names of all detainees and the measures in terms of which they are being detained shall be published in the Government Gazette within seven days of their detention;

the detention of a detainee shall be reviewed within seven days of his or her detention by the Supreme Court which shall be entitled to order the release of such a detainee if satisfied that such detention is not demonstrably necessary to restore peace and 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;

a detainee shall be entitled to appear before the Court in person, and be represented by legal counsel, and to make representations against the continuation of his or her detention;

a detainee shall be entitled to have access to legal representatives of his or her choice at all reasonable times;

a detainee shall at all times have access to a medical practitioner of his or her choice;

under no circumstances shall a person detained under emergency regulations:

(1) be detained for longer than 14 days;

(2) be detained again upon or subsequent to his or her release, for substantially the same reasons submitted in justification of the original detention.

Of the conditions necessary to permit democracy to flourish, equality is one of the most fundamental. But the most prominent feature of the South African social order has been discrimination; most conspicuously, racial discrimination. The new Constitution must commit itself to equality, and set its face against discrimination, especially against racial discrimination. This Bill of Rights, drawn to be the heart of that Constitution, so commits itself.

But what is discrimination? No society can function without making distinctions. Indeed, it is a characteristic of successful societies that their means of differentiation are precise: that they succeed accurately in distinguishing the meritorious from the unmeritorious; the just from the unjust; the productive from the unproductive. When is differentiation permissible and when ought it to be outlawed? The answer of this Bill of Rights is that differentiation is permissible when it is justified, and impermissible when it is not (article 2.2). Only when differentiation is not justified does it merit the pejorative discriminationâ\200\231.

The effect of that answer is to permit the court that enforces this Bill to condemn as discrimination an arbitrary exercise of power which may be thought to fall outside of the best known categories of discrimination, such as racism or sexism. One effect, for instance, might be to empower a court to outlaw a particular differentiation made on the ground of pregnancy without reaching the controversial question whether it constitutes sex discrimination. If differentiation on the ground of pregnancy is unjustified, it is discrimination, and therefore unconstitutional. The court need not engage in complex debates about whether differentiation that prejudices only women, but not all women, discriminates against women.

Despite the generality of this approach, in article 2.2 the Bill recognises that differentiation on the specific grounds of race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed and conscience are generally arbitrary, and therefore generally unjustified. But discrimination has created pervasive inequality in this country, and if we are to take the commitment to equality seriously, we have to acknowledge the need for affirmative programmes to undo existing inequalities.

However unpalatable it may be, we have to acknowledge, too, that if such programmes are to benefit their legitimate beneficiaries and no one else, they will have to use the same criteria for differentiation as those which brought about the inequality. Article 2.2 authorises such programmes, provided that they are rational. A programme would not be rational if, say, it was not focussed to reach its intended beneficiaries, or if it continued to operate after it had done its work.

Article 2.2 recognises also that, although differentiation on any of the grounds there listed, unless it is part of an affirmative programme to undo inequality, is usually abhorrent, sometimes it may be desirable. It may be desirable, for instance, to educate members of different religious persuasions separately about their religions, and for that reason it may

be necessary to differentiate on the ground of religion. Or it may be necessary to segregate lodgings by gender, in order to protect women residents from sexual harassment or assault.

These are justified differentiations, and they are not discrimination. Article 2.2 consequently recognises that differentiation, even on one of the grounds listed and not for the sake of countering inequality, may be justified. It is for this reason that differentiation on one of the grounds listed is only presumed unjustified. The presumption can be rebutted by demonstrating a justification of the kind just outlined. This formulation is flexible enough to permit a court to require a more compelling justification to legitimise some types of differentiation (e.g. racial differentiation) than others (e.g. religious differentiation).

Some favour a Constitution which seeks to outlaw discrimination only in the public sector: only when the State may be considered responsible for the discrimination. But there is an important sense in which the State is always responsible for discrimination: it can always legislate to outlaw discrimination (unless the Constitution forbids it to legislate, in which case the State is responsible because of the Constitution).

Despite that, it remains true that few would argue for State intervention against all discrimination anywhere. Almost everyone recognises the need for some sphere of privacy in which the choices that individuals make can be made on any ground whatever, however arbitrary, without any liability to justify them. The choice of whom to invite into our homes, for instance, falls into that category. So does the choice of whom to favour with our charity, and so does the choice of whom to marry.

Rather than trying to confine equality to the public sector, understood as the area in which the State is responsible, it seems better to recognise that there is a sphere of privacy within which decisions to differentiate need not be justified. Article 2.3 recognises that the constitutional commitment against discrimination should not intrude into the sphere of privacy.

But to recognise a sphere immune from intervention against discrimination is to invite racists and other discriminators to take shelter there. Many will try improperly to exploit the shelter given to discrimination by the need to protect privacy; immunity invites abuse. To guard against this danger, article 2.3 confines immunity to decisions made in the exercise of the kind of private choice necessary to preserve personal autonomy.

There are many in this country now who are anxious to retain the privileges bestowed by apartheid. Many of them hope to achieve that goal by removing activities hitherto in the public domain to the private, expecting that there those activities will be insulated from the commitment of the new social order to root out discrimination.

The Constitution must not be party to those efforts, and this Bill of Rights will not be. Its recognition of a sphere of privacy immune from any need for justification, something essential to protect against Orwellian State intervention, cannot be permitted to become a

shield for private apartheid. Article 2.3 is drawn narrowly to guard against that possibility.

For the same reason, freedom of association, a vital ideal, but one to which many are now appealing as a shelter for private apartheid, is in article 6.4 expressly made subject to the

guarantee of equality.

What society considers to belong within the sphere of privacy, of course, changes with time. At one stage it was commonly accepted that the terms of private employment were a matter for the employer and the employee, and that the State should not intrude. Now the legal regulation of private employment is pervasive and commonplace. At one stage it was generally accepted that social clubs fell into the core of the sphere of privacy, and that if such clubs chose to exclude blacks or Jews or women, that was their prerogative. There is now a growing body of opinion that such clubs often supply public goods - such as business opportunities - to which all should enjoy equal access.

These developments require us to recognise that the boundaries of privacy are constantly shifting, and that the Constitution, or its Bill of Rights, cannot, therefore, finally define them. The court entrusted with interpreting article 2.3 will have to define and redefine the boundaries of privacy from time to time, as society's conception of that idea matures and develops.

Note that the prohibition on discrimination in article 2.1 outlaws both direct and indirect discrimination. Direct discrimination is overt discrimination. The concept of indirect discrimination hits at apparently neutral practices which have differential impact; for instance, a recruitment policy which requires all mathematics teachers to be six feet tall. Such a policy, although it made no reference to race or sex, would favour men over women and some races over others. Since the policy would not be justified as fostering good mathematics teaching, it would be discriminatory.

Note, finally, that the prohibition on discrimination in article 2.1 is expressed to be a consequence of the right to equal treatment; it does not exhaust the content of that right. It can be as much of a denial of equal treatment to fail to differentiate as to differentiate. It has been observed, for instance, that some of the most serious denials of equality to women take the form of expecting women to be the same as men, or treating them as though they were. Article 2.1 is framed widely enough to strike at inequality in that shape.

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This Bill of Rights has adopted the South African Law Commission's formulation (Project 58: August 1991) of a so-called 'Solomonic solution' to the vexed question of capital punishment. Thus, article 3 is a middle course between the retention of capital punishment and the abolition thereof.

and the abolition thereof.

Accordingly, this Bill recognises the right to life as fundamental and does not express itself for or against capital punishment. It leaves it to the court to deliver (in the words of the SA Law Commission: 1991 at 277) "a finely balanced judgment in the light of inter alia, empirical evidence". The General Council of the Bar of South Africa has also, recently, endorsed this approach (May 1993).

Parliament will be able to legislate on the issue and it will be for the Court to deter

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whether such laws comply with, or infringe, this Bill.

The court will also be able to consider whether or not judicial hangings transgress the provisions of article 5.1.4 which prohibits, inter alia, "cruel, inhuman or degrading treatment or punishment" of persons.

Consistent also with the SA Law Commission, this Bill considers the legality of abortion (and any limitations thereon) to be the province of the courts as the final determinant. This will enable Parliament to enact legislation to liberalise the current position in our law as stated in the Abortion and Sterilisation Act 2 of 1975. But the courts would then have to adjudicate upon the constitutionality of such a measure with due regard to the provisions of this Bill which will include a balancing of the various rights provided in it and the demands of society at the time of the judgment. These include gender equality (article 2); the right to life (article 3); the right to dignity and privacy (article 4) and the fundamental freedoms contained in article 6.

This article states a person's rights on arrest. The article creates fundamental rights for an arrested person, including the right to be charged and tried within a reasonable time and the right to bail pending trial except for good cause. Although certain of the rights are common to most Bills of Rights, the clause is novel in that it provides a constitutionally entrenched right to compensation in the event of unlawful arrest, and, by implication, prohibits Parliament from ousting the jurisdiction of the courts to pronounce upon the validity of any person's detention.

EXPLANATORY NOTE ON ARTICLE 5.3: ACCUSED PERSONS

This clause entrenches a number of significant rights in a criminal trial. Among the most significant are an accused's right to remain silent and the right to legal representation at State expense, where the interests of justice so require. The clause, by implication, outlaws the use of tainted evidence and expressly prohibits the use of cruel and unusual punishment. In common with most Bills of Rights, it also prohibits the enactment of retrospective offenses or punishments and constitutionally protects a person's right against double jeopardy.

0 ~ : E ~g ESSENTIALS OF LIFE

A Constitution, and especially its Bill of Rights, must aspire to guarantee the conditions necessary for democracy. Without the basics of life, it may be impossible to properly exercise one's democratic rights. Entitlement to the means of survival must, therefore, be protected by the Constitution.

This Bill of Rights, however, acknowledges also that the manner in which that entitlement is realised is a matter for the legislature and the executive: to make the choices necessary to realise the entitlement calls for a kind of expertise that only those branches of government command, and for electoral accountability, which only those branches enjoy.

The Bill consequently respects all such legislative and executive choices, as long as they are justifiable; which is to say, that they are made honestly and rationally.

But where the choice is not justifiable, the court enforcing this Bill will conclude that its authors are not taking the entitlement to the essentials of life affirmed here seriously, and it will set aside the decision. That does not require or permit the court to make policy choices. It requires the court to review policy choices made by legislators and officials; a function comfortably within the judicial province, and one that good judges are well qualified to discharge. The necessity that such review imposes upon the legislature and the executive to justify their decisions, moreover, will also foster thoughtful decision-making and good government.

The light of learning is also the torch of democracy. True learning, independent of political control, is the nemesis of tyranny. Recognising that, the authors of apartheid twisted education into a means of repression. Never again can that be permitted. Democracy means that decisions are taken by persuasion, rather than coercion. True persuasion can take place only in a culture which respects learning. Unless learning flourishes, therefore, democracy cannot be attained. And without freedom, learning cannot flourish. This Bill of Rights seeks to guarantee the freedom and independence of learning,

During apartheid, among those who most constantly kept alive the idea of democracy, and indeed the values affirmed in this Bill of Rights, were the independent universities. They became, in consequence, targets for repression. This Bill seeks to put them, and all institutions of higher learning like them, beyond further interference.

EXPLANATORY NOTE ON ARTICLE 14: ADMINISTRATIVE JUSTICE

Whether South Africa attains democracy may well depend as much upon the way in which day-to-day government decisions are routinely taken as upon the loftiest and most abstract aspirations in the Bill of Rights. This article entrenches every person's right, when adversely affected by governmental action, to a decision which is lawful, reasonable and procedurally fair. It also guarantees the right to be given reasons for a governmental decision.

The combined effect will be to require public officials thoughtfully and deliberately to consider their decisions, to take due account of the impact of a decision on those whom it affects, to explain the decision to those whom it affects, and, where fairness so requires, to hear those affected before the decision is taken.

The article will therefore foster governmental processes that are both accountable and participatory: accountable because decisions will have to be justified to those governed by them, and participatory because those governed will have had an opportunity to influence them. In short, the article will foster democratic decision-making. It will also require the kind of decision-making processes that tend to yield well justified decisions. It will

therefore nurture both democracy and good government.

Since the rights given by this article will, like all the other rights conferred by this Bill, be entrenched, it will be impossible to legislate them away. That will put an end to the legislative practice of excluding the jurisdiction of the Supreme Court to review governmental decision-making, a pernicious practice by which the government has in the past attempted to insulate its decisions from judicial scrutiny, particularly under the security laws.

EXPLANATORY NOTE ON ARTICLE 15: INFORMATION

We have included this article to secure the citizen's right of access to information. That information includes information used in the governance of the people and specific information that the State possesses in respect of individual citizens. We have not sought to capture all the relevant considerations that would ordinarily form part of a detailed statute, but rather have stated the broad principle, and again left further development to the courts. We regard this right as fundamental and are doubtful that government would have sufficient incentive to pass the required legislation to give citizens proper access to information held by the State in which they have a legitimate interest.

Like many other provisions in this Bill, article 15S may be subject to derogation. Naturally, article 18 (the derogation clause) entitles the State not to provide access to all information on demand should it not be in the public interest to do so. However, government would then have to demonstrate that such non-disclosure was consonant with the requirements of an open, democratic society.

The courts are given powers to adopt procedures so that issues in dispute are fully ventilated. This provision, *inter alia*, permits the court to allow for the filing of an *amicus* brief, and to admit evidence and argument in a generous fashion so that fundamental issues of principle may be fully argued and considered by the courts.

The rights and freedoms contained in the constitution may be enforced by way of a class action, and furthermore standing is given to a person to approach the court for relief on behalf of an interested person who, or class of persons which, cannot reasonably enforce their rights. These provisions are intended to allow a wide class of persons to have access to the courts, whilst giving no licence to public busybodies.

The courts and the executive have a duty to ensure that the rights in the Bill are capable of being exercised expeditiously and without unnecessary formality or constraint. This provision is intended to grant access to the court with a minimum of legal formality. For example, it is envisaged that the powerless and impecunious may secure access to the courts even by way of a letter of complaint sufficiently specific to raise a question as to whether rights guaranteed under this Bill have been infringed.

EXPLANATORY NOTE ON ARTICLE 18: DEROGATION

Every Bill of Rights is capable of derogation, since most rights are not absolute or entirely without qualification. Thus, one person's free speech is limited by another person's right to his or her good name and reputation. The citizen's right to vote is, in any democracy, limited by the right of the State to restrict the franchise to persons of sane mind and those not serving terms of imprisonment, etc.

In this Bill, rather than attempting to define the limitations of each right (which would be almost impossible to codify due to our extensive common law), we have provided a general derogation clause to govern most of the rights contained in this Bill, subject to very strictly formulated principles. Thus, in article 18.1, no derogation is permissible unless the courts are satisfied that such is "demonstrably necessary in a free, open and democratic society". This formulation - in part borrowed from the Canadian Constitution - will oblige the law-giver (be it Parliament or the courts themselves) to satisfy the test that the circumscription of any right contained in the Bill is fundamentally consonant with the practices of a free country, governed as an open society according to universally accepted democratic principles.

Furthermore, no such limitation of any right in this Bill may destroy its fundamental content (18.2). For example, while a local authority (in article 6.3) may require certain formalities to be met before a peaceful march may proceed, it may not forbid such a procession from occurring.

Finally, there are certain rights which may not - in any sense or circumstances - be limited. These are listed in article 18.4.

DIRECTIVE PRINCIPLES OF STATE POLICY

Some favour the inclusion in the Bill of Rights of what are known, following the Indian Constitution, as Directive Principles of State Policy. Directive Principles would be part of

the Bill (or at least of the Constitution), but they would not be fundamental rights, and

they would in consequence not annul Acts of Parliament with which they were in conflict.

The category of Directive Principles is therefore a halfway station which can accommodate values thought important enough to merit recognition in the Bill of Rights, but not important enough to merit the force of a fundamental right. Recognition of a value

as a Directive Principle is a compromise often suggested to resolve conflict between those

in favour of elevating a value to the status of fundamental right and those altogether against including it in the Bill of Rights.

But what is the content of the compromise? The point of relegating a value to the Directive Principles is to deny it the force of a fundamental right. But the inclusion of a

value in the Bill of Rights (or elsewhere in the Constitution), however that is done, sooner

or later generates demands for it to be given some legal effect. In India, one effect given

to Directive Principles is a power to restrict the fundamental rights. Entailed in that power

is a capacity to immunise from legal challenge government action which is repugnant to a

fundamental right, just because it pursues a goal postulated by one of the Directive Principles. In the name of pursuing democratic ends, the power of restriction given to Directive Principles may consequently be used to sanction undemocratic means.

The best known theory of Directive Principles is the Indian one. To include Directive Principles in our own Bill of Rights would invite the adoption of the ideas that have grown up in India about Directive Principles, including the idea that they have the power

to restrict fundamental rights. It may be that the Indian courts have somehow avoided the

worst dangers inherent in that idea. But because the dangers are inherent in the idea, there

can be no assurance that our own courts would do the same. No one can restrain the internal logic of an idea. To import Directive Principles, therefore, would be to import

their capacity to erode the fundamental rights.â\200\231

In India, moreover, fundamental rights were given years to establish themselves before the

courts started invoking the Directive Principles to restrict them. It may be that when fundamental rights are established and flourishing, the harm done by permitting their restriction is less than fatal. In South Africa, however, fundamental rights are still struggling for their constitutional birth. If we allow them liberally to be restricted before

they exist, they may well be stillborn.

Furthermore, although Directive Principles may be thought a useful way of remedying the deficiencies of a weakly drafted Bill of Rights, it is far from clear what they can contribute to a carefully considered one. A value is sometimes consigned to Directive Principles to avoid the hard work of resolving a dilemma about whether it should be

! Justice Bhagwati, former Chief Justice of India, once went so far as to say that it is only in the framework of the socio-economic structure envisaged in the Directive Principles

that the Fundamental Rights are intended to operateâ\200\231 (Minerva Mills 14d v Union of India 1980 AIR 1789 SC at 1847).

included in the fundamental rights, and, if so, in what way. The Directive Principles may consequently become the rubbish bin of the Bill of Rights. Proper attention to difficult values can avoid this consequence, and produce a far more coherent Constitution.

The rights to shelter and health care, for instance, obvious candidates, since they are so problematic, for relegation to Directive Principles, are dealt with in article 11 of this Bill in a way which gives them real content without usurping the proper province of the legislature or the executive. The guarantee of equality in article 2 is likewise so much stronger than conventional alternatives (see the explanatory note) as to make the recognition of gender rights as Directive Principles pointless.

We consequently believe that, in a thoughtfully drafted Bill of Rights, Directive Principles are unnecessary, that they can ruin the coherence of the Bill, and that they could undermine its fundamental rights. In short, that they would weaken rather than strengthen the Bill of Rights. This Bill therefore contains no Directive Principles.

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Individual and Collective
Rights

Fundamental rights are recognised and shall be protected both in their individual as well as in their collective exercise, and they imply the right to establish institutions, adopt rules of conduct and regulate interests which are instrumental to the collective exercise of such rights. All powers established and recognised under this constitution shall protect and nourish the exercise of these rights and respect and foster their collective exercise.

Justiciability of rights

All rights and freedoms recognised and guaranteed under this constitution shall be justiciable to the fullest practical and reasonable extent. In case of a violation of the rights and freedoms recognised and guaranteed under this constitution any aggrieved party shall be entitled to be heard by a court of record on the basis of urgency and, upon showing a prima facie violation of rights, shall be granted preliminary relief pending the final disposition of the case.

Limits on the exercise of the rights

The law may impose reasonable restrictions on the exercise of the rights set forth in this constitution to protect the rights of others and for compelling reasons of public interest. However, in such a case the law must respect the essential content of the rights, and the limitation on the exercise of the right must not have the practical effect of preventing or deterring the free exercise of the rights in their reasonable manifestations.

Physical and psychological
Integrity

The physical and psychological integrity of any individual shall be inviolable. No one shall be

authorised to inflict any type of violence on another individual or to take a life. Capital punishment and any form of physical or psychological torture and punishment shall not be allowed.

No one shall be submitted to unusual or cruel punishment and all punishments shall aim at the personal and social rehabilitation of the person. During imprisonment juvenile delinquents shall be kept separate

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from other delinquents and so shall men from women. Failure by a public official to report any and all instances of physical or psychological violence on a person deprived of his or her liberty shall be a criminal offence.

Freedom of communication

All persons shall be free to express and communicate their thought in private and in public, in oral, written, visual or any other fashion, and to establish institutions for such a purpose. All forms of censorship or limitation on the contents of such communications shall be prohibited.

Limitations on the contents of commercial speech may be imposed to guarantee the truth and the fairness of the representations made to consumers and to ensure fair competition, provided that there shall be no prohibition of comparative advertising.

Limitations on the form of communication may be imposed as to time, place and manner so as to protect and respect the rights of others and compelling public interests; but not to the extent that the limitation on the form of communication becomes a limitation on the contents thereof.

No one shall be compelled directly or indirectly to disclose or express his or her ideology, creed, religious belief, or political

cal opinions.

Freedom of Religion

Religious freedoms are recognised and shall be guaranteed. Everyone shall have the right to profess and promote his or her religion or belief, and to establish institutions and organize activities for this purpose. The State of KwaZulu/Natal shall not take any action supporting or endorsing any particular religious belief or confession or conditioning the exercise of religious freedom to any requirement, and shall promote conditions for the equal and free exercise of all religions and beliefs in the State.

Uberty

No one shall be deprived of his liberty without cause and due process of law. Unwarranted arrest and detention shall be allowed only on the basis of probable cause related to an offence punishable by imprison-

ment. Anyone arrested or detained shall be informed of his or her rights in a language that he or she understands, shall be informed of the reasons for the arrest and detention with an indication of the charges, and shall have a court hearing within twenty four hours from the time of his or her arrest, after which the detention may continue only by court order based on factually corroborated allegations.

Anyone detained or accused has the right to remain silent. Anyone detained or charged with an offence punishable by imprisonment has the right to consult counsel, and if he or she can not afford one the court shall appoint one at government expense. There shall be a right to counsel in any and all proceedings in which the accused participates.

Detention prior to sentencing shall be limited to cases established by law and shall not exceed three months.

Anyone detained, arrested or condemned unlawfully shall

have the right to be rehabilitated, to receive indemnification and other rights determined by law.

Any government authority shall inform anyone who is the subject of an investigation for any reason.

No one may be tried twice for the same conduct. No one shall be charged for a conduct which at the time was not an offence, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed. There shall be no analogical or retroactive interpretation of criminal law.

Anyone has the right to a speedy, open and public trial and to confront his or her accusers at trial. All trials shall be based on the accusatory principle and shall be subject to the right to appeal on the grounds of error of law.

No one shall be removed from the authority of the judge with jurisdiction over the specific offence at the time the offence was committed. There shall be no special or post facto judges. Any accused person has the right to be tried in an impartial, independent and competent

â\200\234court. Anyone shall be presumed not guilty until proven guilty.

Travel and movement

Everyone shall have the right to travel, move and reside within or outside the State. No government policy forcing the relocation of people shall be allowed. Any citizen of the Federal Republic of South Africa shall have the right to take domicile in the State.

Privacy

Everyone shall have the right to the protection of privacy, of his or her personal life, of his or her domicile, and to protection of his or her personal dignity and reputation. All private communications and all aspects of private life shall be protected. Search and seizure may be allowed only on the basis of a warrant issued on the basis of corroborated allegations, and in the cases and with the guaran-

tees established by the law. Personal search shall be allowed as an incident to a legitimate arrest and detention.

Anyone has the right to access the information collected on him or her by the Government or by private data or information banks.

Freedom of the Media

Anyone has the right to publish and distribute printed materials. The press and the media of mass communication shall have the right to inform the public on matters of public interest provided that they do not publish erroneous information as a result of gross professional negligence or malice. The media have the duty to rectify all erroneous information they publish which damages the reputation of others.

Assembly and Association

Everyone has the right of peaceful assembly. No notice shall be required for assembly in a private place or in a place open to the public. For assembly in

a public place prior notices shall be given to the competent authority which may prohibit the assembly only for reasonable apprehension of public security and safety. Everyone has the right to associate for any legal purpose. Associations pursuing directly or indirectly political purposes by means of military training or association operating in a para-military fashion shall be prohibited.

Family rights

A man and a woman have the right to join in marriage in accordance with the rituals and with assumption of the obligations and privileges of their choice. However, both spouses shall have equal rights, obligations and dignity. Both parents shall have responsibility for the upbringing, formation and education of the children, even if born outside wedlock. The law shall ensure that comparable rights and social protection shall be extended to children born outside wedlock as they shall be recognised to children born in wedlock. Both parents have the right and the duty to exercise joint custody of the children unless a court otherwise decides in the interest of the children and on the basis of the specific circumstances of the case. Both parents have the right and the duty to choose an acceptable formation and education for their children.

Procreative Freedom

All people who so desire shall enjoy the freedom of procreative choice, including the right to receive sexual education, to use contraception and terminate unwanted pregnancy when safe. Anyone who finds these practices objectionable shall have the right to protect his or her own sphere of interests from any of these practices and from the exposure thereto.

Cultures and Traditions

Everyone shall have the right to enjoy, practice, profess, maintain and promote any culture, languages, tradition or religion.

Human rights in the Constitution

All fundamental human rights and all those other rights which are inherent to fundamental human needs and aspirations as they evolve with the changes and growth of society, and as they will be recognisable on the basis of the principles underlying the provisions of this constitution, are hereby entrenched in this constitution and in their essential content shall not be modified by virtue of constitutional amendments.

ECONOMIC, SOCIAL AND POLITICAL RIGHTS

Economic rights:

30. Free Enterprise

The right to free economic initiative and enterprise shall be recognised, protected and en-

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couraged by the State. The State shall assist small businesses and provide other incentives to encourage access to economic opportunities. Within the limits set forth by the law to protect the public interest each enterprise shall be free to choose and organise the means of production as it best sees it.

Contractual autonomy

Within the limits set forth by the law to protect the public interest, the State shall recognise and protect the right of individuals to self regulate and organise their interests in economic and other matters by means of legally enforceable contracts and by establishing legal entities to carry out their purposes and objectives.

Commercial and Insolvency Law

The State shall promote uniformity of its commercial and insolvency laws with those of other states and countries.

Permits and Licensing

requirements

The State shall not subject human conduct to unreasonable or unnecessary licensing and permitting requirements. Permits and licences shall be issued on the basis of objective and reasonable standards and criteria.

Private Property

Private property shall be guaranteed and protected. Limitations on the use and enjoyment of private property may be imposed so as to satisfy social, environmental and collective needs. The right to convey one's own property by contract or inheritance shall be protected subject to the reasonable exercise of the State's power of taxation.

Expropriation

The State or another entity authorised by law may expropriate property for public necessity subject to the prompt payment of a fair market value compensation.

Property of the State and the Regions

The State and the Regions may own property as private or public property. Public property shall not be alienated or encumbered and is related to the exercise of public functions or is held by the State or the Regions in the public interest. The law shall set forth the principles for the acquisition, administration and declassification of public property. The General Assembly shall publish a yearly

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report on the property owned by the State and the Regions indicating their current and planned use and their maintenance and carrying Costs.

Public Enterprise

No enterprise shall be acquired or conducted by the State or the Regions either as a monopoly or as a free competition enterprise, and no service shall be provided to the public unless so authorised by a law demonstrating a public need and the inadequacy of the private sector to satisfy such need with comparable efficiency and

reliability. When these requirements no longer exist the enterprise or the service shall be privatised.

Property of the Federal Republic of South Africa

All tangible and intangible properties of the Federal Republic of South Africa in the State of KwaZulu/Natal shall be subject to the same rules and limitations set forth in this constitution for the properties of the State.

Communal Property

Communal property is recognised and shall be protected. Communal property shall be administered and regulated by traditional and customary Rules.

Practices In restraint of trade

All monopolies and practices and agreements in restraint of trade and free market competition shall be prohibited.

Agriculture

The State of KwaZulu/Natal shall encourage agriculture, the socially just and responsible use and distribution of land and the access of citizens to land ownership. The State shall promote agricultural cooperation and assist farmers on a cooperative basis.

Local Rights:

Right to Education

All citizens shall have the right to receive a basic education and professional training. The law shall determine the period and the minimum educational requirements for compulsory education. The State shall support the citizen's aspiration to higher education by means of scholarship and by promoting the highest standards of excellence in education.

Both private and public schools shall ensure open and equal access to educational opportu-

nities. Parents shall be entitled to participate in the administration and operation of their children's schools.

Right to Work

Everyone shall have the right to access any job opportunity for which he or she is qualified. As a matter of priority, the State shall promote the full employment of all citizens. No one's employment shall be terminated for political reasons or in violation of his or her constitutionally protected rights. Everyone shall have the right to receive a fair compensation for his or her work, shall be entitled to at least one vacation day a week, to a period of paid vacations during the year and to severance payment upon termination. All workers shall be entitled to social security, pensions, invalidity and unemployment benefits as determined by law.

Protection of Women

The law shall extend special protection to women. The law shall guarantee maternity leave and provide assistance to mothers in the work force. Until

. such time when the social sta-

tus of women in the State has significantly improved, the law shall recognize special privileges for women in all programmes and measures aimed to ensure equal access to political, social and economic opportunities, shall establish and

maintain a Ministry for Women's Affairs, and reserve a portion of the available public offices to women.

Senior Citizens

The law shall promote the economic sufficiency of senior citizens and provide social services to assist them in relation to their housing, care, wealth, cultural and leisure needs.

Youth

The law shall promote conditions for the free and effective participation by the youth in political, social, economic and cultural developments

Schools

Everyone shall have the right to establish private schools. Private schools shall have the power to determine their own curricula and syllabi within the general parameters set forth by law for the purposes of recognition and equipollence of degrees.

Universities

All public universities and institutes of higher education in the Sh

State shall be entitled to regulate their organization and operations within the general parameters set forth by law.

49. Health Care

All citizens shall have the right to receive medical attention and care in case of need. The law shall determine the implementation of this right. The law shall develop policies of prevention, treatment, rehabilitation and integration of those who are physically, sensorially and mentally handicapped, including those who are substance addicted.

Job Conditions

The law shall ensure safe job conditions and shall provide

special protection for women,
minors and untrained labour.

Housing

The law shall promote conditions to ensure that all citizens have the possibility of living in a dignifying habitation and shall facilitate the purchase of residences through credit facilitation and other programmes. All citizens have the right to receive shelter and shall have equal access to housing opportunities.

Research, Arts and Teaching

The freedom of scientific research, artistic expression in all its forms and teaching is recognised and shall be guaranteed.

Right to a Pleasant and Clean Environment

The State shall recognise the rights of present and future generations of citizens to live in and enjoy a pleasant and clean environment. The law shall determine the cases and the limits in which citizens may bring legal actions on behalf of the community against those who cause environmental damages.

Labour Rights

Everyone shall have the freedom to form and join trade unions and employers' associations. The State shall respect and protect the right to strike but may limit its exercise in cases determined by the law for reasons of public security and safety. Labour organizations shall have the right to negotiate and execute collective bargaining agreements to be effective with force of law vis-a-vis the category of workers covered by their provisions. During these negotiations the labour organization shall be represented on the basis of the number of their members. Trade unions shall have the right to conduct reasonable activities in the work place.

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â\200\230ce aimed at improving labour conditions. The State may impose requirements on the trade unions only to ensure that they â\200\234are organised and operated with full internal democracy.

itical Rights:
. Right to Vote

All citizens of eighteen years or older shall have the right to vote. The vote shall be personal, secret, free, and equal. The right to vote may be suspended by a judicial adjudication of incompetence, or by an irrevocable sentence for major crimes specified by the law.

The law recognizes, and the State shall facilitate, the exercise of the right to vote by citizens who are outside the State.

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Right to Petition and to
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Any citizen has the right to petition the General Assembly, the Regional Congresses and any branch or level of government. A citizens legislative proposal signed by five hundred citizens may submitted to the General Assembly.

Freedom of information

Any citizen has the right to access and receive any information or document which is in the possession of the State or

Regional governments or of any of the commissions or agencies established in this constitution, provided that such document or Information is not privileged as established by law to protect privacy, commercial secrets or national and State security. During the process of judicial review of the government's decision to withhold information, the court shall have the power to examine in camera the information withheld. ~~

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Political Parties

The citizens of the State have the right to form political parties to participate in all levels of democratic life. No one shall be directly or indirectly compelled in any way to join a political party or shall be penalised for not belonging to one. Political parties shall ensure internal democracy in their organisation and operations.

Media of Mass Communication

Anyone shall have the right to establish media of mass communication, including newspapers, cable, radio and television stations. The law shall regulate the rights of citizens and political parties to access media of mass communication under the control of the government or in situations of virtual hegemony or monopoly.

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