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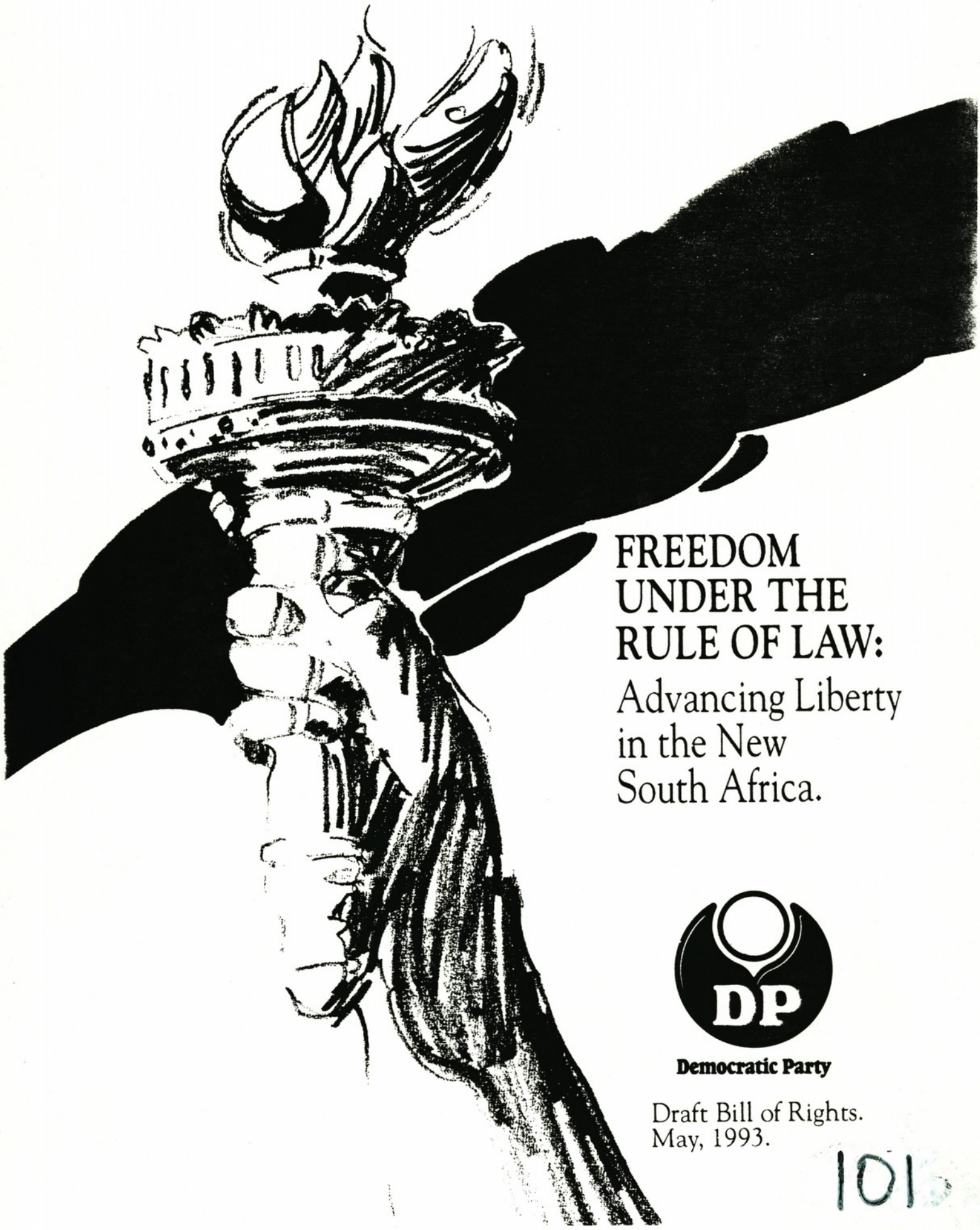
Demokratiese Party
Democratic Party

SUBMISSION BY THE DEMOCRATIC PARTY
TO THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION



FREEDOM UNDER THE RULE OF LAW:

Advancing Liberty in the New South Africa.

Democratic Party

Draft Bill of Rights.
May, 1993.

101

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Demokratiese Party
Democratic Party

12 May 1993

PER COURIER

The Convenor
Technical Committee on
"Fundamental Rights During Transition"
Multiparty Negotiation Forum
World Trade Centre
KEMPTON PARK

Dear Sir

DEMOCRATIC PARTY PROPOSALS : SECURING FUNDAMENTAL HUMAN RIGHTS DURING TRANSITION

1. On behalf of the Democratic Party, I have pleasure in enclosing a copy of our draft Bill of Rights entitled "Freedom Under the Rule of Law" : Advancing Liberty in the New South Africa", published for information and comment on 11 May 1993.

2. The Democratic Party believes that our working document should form the basis of a rights' charter during both the interim and finalised phases of constitution making. The articles in it are elaborated upon in both the introduction (Pi-iii) and in the explanatory notes (P9-17).

3. Although our document is a working draft, which might be amended at a later stage, we submit it now on the basis that it contains the core of essential rights and values which merit constitutional protection. It also provides the detailed mechanisms for enforcement procedures.

4. We also draw your Committee's attention to the Interim Report on Human Rights of the SA Law Commission (Project 58 : August 1991). Although our proposals differ in several respects from the Law Commission report, we do believe their document contains many carefully formulated proposals which are the product of disinterested analysis. We further believe that the important work of

99

your Technical Committee would be greatly assisted by the appointment as an expert advisor, of Mr Justice P J J Olivier, the project leader responsible for the SA Law Commission's Draft Bill of Rights.

Yours sincerely

A J LEON MP
DEMOCRATIC PARTY SPOKESMAN ON JUSTICE

INDEX

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.

"FREEDOM UNDER THE RULE OF LAW: 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:

- Professor Dennis Davis: Director, Centre for Applied Legal Studies, University of Witwatersrand, Johannesburg;
- 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 of the Democratic Party committee.

Immediately on publication, this Draft Bill will be referred to a further group of eminent 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 distinctive 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 pioneered in our cause by, for example, Jannie Steytler, Colin Eglin, Zach de Beer, Donald Molteno 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 party'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 rights. 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 expert 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 doubtless 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.

A.J. 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

1. 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

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

2.2 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.

2.3 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.]

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.]

5.3 Every *accused* person shall have the right:

5.3.1 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;

5.3.6 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.]

ARTICLE 6: RIGHT TO FUNDAMENTAL FREEDOMS

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.

ARTICLE 7: CITIZENSHIP RIGHTS

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

7.2 no citizen may be deprived of his or her citizenship.

ARTICLE 8: VOTING RIGHTS

8. 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

9.1 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;

9.2 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

10. 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

11.1 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.

11.2 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 12.]

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.]

ARTICLE 13: RIGHTS TO LANGUAGE AND CULTURE

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.]

ARTICLE 16: RIGHT TO REMEDIES

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

contravention, invalid;

16.1.2 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;

16.1.3 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.

16.2 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.

16.3 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.

16.4 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.

16.5 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.

16.6 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:

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

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

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

18.4 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, 13, 14, 16, 17.

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

ARTICLE 19: SUSPENSION DURING A STATE OF EMERGENCY

19.1 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:

19.1.1 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;

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

19.1.3 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;

19.1.4 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;

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

19.1.6 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.

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

19.2.1 the creation of retrospective crimes;

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

19.2.3 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.

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

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

19.3.2 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;

19.3.3 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;

19.3.4 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;

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

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

19.3.7 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.

EXPLANATORY NOTES

EXPLANATORY NOTE ON ARTICLE 2: EQUALITY

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 'discrimination'.

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 expand 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.

EXPLANATORY NOTE ON ARTICLE 3: RIGHT TO LIFE

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.

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 determine 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 determinator. 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.

EXPLANATORY NOTE ON ARTICLE 5.2: ARRESTEES/DETAINEES

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.

EXPLANATORY NOTE ON ARTICLE 11: ENTITLEMENT TO THE 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.

EXPLANATORY NOTE ON ARTICLE 12: FREEDOM OF LEARNING AND EDUCATION

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 15 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.

EXPLANATORY NOTE ON ARTICLE 16: REMEDIES

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 or 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.[1]

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

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[1] 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 operate' (Minerva Mills Ltd 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.