

THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE, THE PLANNING COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION. THE MINUTES ARE STILL TO BE RATIFIED BY THE AD HOC COMMITTEE.

DRAFT MINUTES OF THE COMBINED MEETING OF THE AD HOC COMMITTEE AND THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION HELD AT 14h45 ON TUESDAY, 14th SEPTEMBER 1993, AT THE HENDRIK VERWOERD BUILDING, PLEIN STREET, CAPE TOWN.

PRESENT: Ad Hoc Committee:

- Mrs S Camerer (Convenor)
- Chief Gwadiso
- Mr A Leon (left meeting at 15h45)
- Mr P Maduna
- Mr S G Mothibe

Technical Committee:

- Prof. L M du Plessis
- Mr G Grove
- Adv. Z Yacoob

MINUTES: Miriam Cleary (Administration)

- APOLOGIES:**
- Prof. H Cheadle - Ad Hoc Committee
 - Prof. H M Corder - Technical Committee
 - Mrs D S Nene - Technical Committee

1. Prof. du Plessis, on behalf of the members of the Technical Committee, thanked Mrs Camerer for the excellent luncheon she hosted for them at the Houses of Parliament.

2. Agenda:

2.1 Customary Law

2.2 Mrs Camerer asked Prof. du Plessis to take the Ad Hoc Committee through the additions and amendments to the proposed draft Chapter 3 arising from discussions at previous joint Ad Hoc/Technical Committee meetings.

3. Customary Law:

- 3.1 Chief Gwadiso said that the proposed formulation given at the previous meeting was acceptable but required certain changes to be made. After discussion **it was agreed that the Technical Committee reformulate this subsection on the following lines and that this be faxed to the Ad Hoc Committee before their next meeting:**
- 3.1.1 Subsection (1)(a) - the clause to be amended by the deletion of all words after "customary law" in line 2.
- 3.1.2. Subsection (3) to have the words "assisting with the growth of customary law and" inserted between the words "..aimed at" and "adapting ..." substituted for "adapting customary law to".
- 3.2 Regarding subsection (2), Chief Gwadiso said there was a feeling that this should not be left solely to the courts but there should also be access to the Human Rights Commission. Prof. du Plessis gave assurance that the Human Rights Commission would have jurisdiction over matters of customary law.
- 3.3 The reason for referring only to Section 8 was the fact that the Technical Committee was mainly looking at customary law in connection with the Equality clause. **It was agreed that the Technical Committee should test all the other provisions in the draft proposed Chapter to ascertain whether the clause as drafted also impacted on other clauses.**
- 3.4 Mrs Camerer asked the Technical Committee to go through the Bill as requested by the Ad Hoc Committee and ascertain any problems that could arise.

4. Application - Clause 7:

- 4.1 Discussion ensued regarding placing a duty on the executive and judiciary to facilitate and expedite access to the legal process for the purposes of enforcing the Chapter. **It was agreed that the Technical Committee note and scrutinise references to this in other Bills of Rights and build this into the structure of Administration of Justice. This provision could not be put into the Bill of Rights due to the fact that it did not qualify as a "right".**

- 4.2 Subsection 7(1)(b) - Mr Maduna requested that this be reinstated as previously formulated by the Technical Committee. Mrs Camerer said that this would go against not only the agreement reached in the Ad Hoc Committee (as minuted) that the Bill should have vertical application only but would also go against the recommendation of the Chief Justice. Mr Maduna replied that the Chief Justice's recommendation was that the choice be left to the politicians. Mr Grove stated that this formulation had not been incorporated in a Bill in any other country in the world except for Namibia which had not yet had occasion to test whether or not it would work. Mrs Camerer said that this would lead to horizontal application of the Bill which would strike at the root of customary law and reopen the whole debate on it just when the matter appeared to have been settled.

Prof du Plessis suggested that the Technical Committee reformulate this subsection, and requested the Ad Hoc Committee to bear in mind the problems that the inclusion of this clause would have on a vertical Bill of Rights.

5. **Chief Justice's Recommendations:**

Mrs Camerer and Mr Leon suggested **and it was agreed that** if the Technical Committee disagreed with the Chief Justice's recommendations it would be appropriate for them to give detailed reasons and the Technical Committee was requested to do such a draft.

6. **Equality - Clause 8:**

Subsection 8(3). After discussion **it was agreed that** the wording of this clause and particularly the reference to "disadvantaged persons" be debated by the Ad Hoc Committee at their next meeting in the light of points raised by Mr Leon and the Chief Justice's reservations. Adv. Yacoob said he felt it was a political decision and not one for the Technical Committee to decide upon.

7. **Detained, Arrested and Accused Persons - Clause 25:**

- 7.1 Mr Mothibe said he had a problem with the words in relation to medical practitioners namely "communicate" and "be visited by" - subsection (1). The Technical Committee would reconsider the use of these words.

7.2 Adv. Yacoob enquired whether the Ad Hoc Committee had discussed the political issues regarding State expenses mentioned in subsection (1)(b) and certain other clauses such as Children - Clause 30(2).

7.3 Amendments were suggested to 25(1)(c) and the Technical Committee would redraft and resubmit to the Ad Hoc Committee.

7.4 Detention without trial has also been excluded from clause 11(1) which will be reformulated to read:

"(1) Every person shall have the right to freedom and security of the person."

as this is dealt with fully in clause 25.

8. Freedom of Expression - Clause 15:

Subsection 15(2) - the words "public media" would be reformulated by the Technical Committee for the next Ad Hoc Committee meeting.

9. Administrative ~~Decisions~~ Acts - Clause 24:

9.1 Discussion on the words "decisions" and "acts" ensued. Prof. du Plessis said that he was still uncertain about the matter and would like to consider it further. Due to the fact that neither Prof Cheadle nor Prof Corder were present it would be held over for the next meeting.

9.2 It was agreed that subclause 24(1)(a) be reformulated and presented to the Ad Hoc Committee at their next meeting.

10. Further reformulations already done by the Technical Committee would be held over to the next meeting.

11. Next Meeting:

11.1 The Ad Hoc Committee would meet on Monday, 20th September 1993 at 08h30 in the Marks Building, Conference Room D (on the site of the Parliament Buildings) Cape Town.

11.2 The formulations from the Technical Committee would be faxed to

each member of the Ad Hoc Committee as soon as they had been typed.

- 11.3 Travel arrangements etc. would be arranged for those Ad Hoc Committee members who have to return to Cape Town. It was generally agreed that these members travel down on Sunday night. Mrs Cleary would be remaining in Cape Town in order to act as minute taker /secretary.

12. Closure:

- 12.1 The meeting closed at 16h00 as members had to catch their flights back to Johannesburg.
- 12.1 Copies of these minutes would be faxed/delivered to each person of each Committee.

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1. INTRODUCTION

The Technical Committee last submitted proposals on the protection of fundamental rights in its Seventh Report on 29 July 1993. Since then it has submitted reports on enforcement mechanisms to the Negotiating Council and the Technical Committee on Constitutional Issues. It has also continued to work on the Chapter on Fundamental Rights, by considering submissions made to it by many bodies and by reacting to requests and instructions from the Ad Hoc Committee. Most of the provisions which follow have been agreed to by the Ad Hoc Committee, in the form in which they appear, as indicated. Two matters in particular are not yet finalised: the possible horizontal application of the protected rights and the property clause.

2. THE PROPOSED CHAPTER AS IT PRESENTLY STANDS

"CHAPTER 3

+ FUNDAMENTAL HUMAN RIGHTS

Application

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

[Comment: The final formulation of this subsection will need to be reconciled with the formulation of the presently proposed clause 4(2)

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of the Constitution. The deletion of the reference to the judicial branch of government is a consequence of the inclusion of clause 1(5) below.]

- * (b) bind, where just and equitable, other bodies and persons; and

[Comment: The Technical Committee proposes the above formulation if it is decided that the Chapter should have horizontal application. The Ad Hoc Committee, however, requested the Technical Committee to consider alternatives, and the following other options are hereby submitted for consideration:

1. "(b) bind other bodies and persons where substantial injustice would otherwise result;"

This formulation is somewhat more restrictive than the existing one, but may be susceptible to some criticism in relation to its interpretability.

2. "(b) bind other bodies and persons where the application of any law would negate/frustrate/undermine the objects of this Chapter;"

This formulation is wider than the one presently proposed by the Technical Committee and leaves more room for horizontal operation. It carries the danger of creating more uncertainty in private law but can be said to be less confusing and difficult to interpret.

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3. "(b) bind other bodies and persons in the performance of public functions;"

This formulation introduces a narrow element of horizontality - mittelbare Drittwirkung as it is referred to in German Constitutional Law. This also coincides with a similar provision (Article 20) in the proposed Constitution of the United Kingdom produced by the Institute for Public Policy Research in 1991.

If it is decided that this clause should not expressly provide for the horizontal application of the Chapter, a separate provision should be considered to cater for concerns related to private discrimination. This provision can be added as clause 1(5) (the present clause 1(5) will then become clause 1(6)). The following formulation is proposed:

"(5) Nothing in this chapter shall preclude legislation designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of subsection 1(a)."]

- (c) be enforced by ~~the [designated authority]~~ any competent court of law in accordance with this Constitution.

~~(2) In the case of an infringement of any provision of this Chapter, the [designated authority] may, where appropriate, put any body or person referred to in subsection (1)(a) or (b) on terms as to how and within what~~

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~~period such infringement should be remedied.~~

[Comment: The matters catered for in clause 7(2) are more fully and adequately dealt with in clauses 87(4) and (6) of the draft Constitution proposed by the Technical Committee on Constitutional Issues in their Twelfth Report.]

- # (2) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken and acts performed during the period of operation of this Chapter.

[Comment: In view of submissions received, the Committee recommends the indicated widening of the scope of this provision with regard to administrative action.]

- * (3) All juristic persons shall be entitled to the rights contained in this Chapter where and to the extent that the nature of these rights permits.

[Comment: This formulation is in substantial conformity with Article 19(3) of the German Basic Law of 1949.]

- + (4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person or association described in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) Applications referred to in paragraph (a) may be brought by -

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- (i) a person acting in his or her own name; or
- (ii) a person acting on behalf of any other person who is not in a position to bring such application in his or her own name; or
- (iii) a person acting as a member of or on behalf of a group or class of persons; or
- (iv) an association acting in its own name or on behalf of its members.

[Comment: This clause has been reformulated in order to streamline it and to widen the scope for representative actions. The previous formulation - which was clause 1(5) - read as follows:

- "(5) (a) Every person who alleges that his or her rights or every association which alleges that its members' rights entrenched in this Chapter, have been infringed or are threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.
- (b) Nothing in this subsection shall prevent a person from applying for relief on behalf of a group or class of persons whose rights entrenched in this Chapter are alleged to have been infringed or are threatened."]

- + (5) In the interpretation of any law and the application and development of the common and of customary law, a court shall have due regard to

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the spirit, purport and objects of this Chapter.

[Comment: This subclause has been added in order to facilitate the incorporation of the values embodied in this Chapter throughout the legal system.]

Equality

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

+ (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language.

[Comment: The first addition ("one or more") was made in order to ensure that the victims of "double" discrimination would be adequately protected. Further grounds (to wit sex and social origin) have been added to the list in response to submissions. "Social origin" is deemed to encompass "birth", "class" and "status".]

+ (3) This section shall ~~permit~~ not preclude measures ~~aimed at~~ reasonably designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.

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[**Comment:** The words "not preclude" (instead of "permit") have been used in order to address concerns about the possibly over-broad and inconsistent application of this provision. For the same reason the words "aimed at" were changed to "designed to achieve". The word "reasonably" was included at the insistence of the Ad Hoc Committee. The Technical Committee remains of the opinion that the rationality of the measures is sufficiently catered for by the qualification which follows the words "in order to ..". In response to a submission expressing the concern that the previous formulation might not permit measures designed to benefit groups or categories of persons, the addition referring to groups or categories of persons was made.]

- + (4) Notwithstanding section 36(4), prima facie proof of discrimination shall be presumed to be sufficient proof of unfair discrimination contemplated in subsection (2), until the contrary is established.

[**Comment:** This clause has been agreed on by the Council although it was not contained in this form in the Seventh Report. We restate that its purpose is to limit the well-known difficulties attendant on the proof of unfair discrimination, and that it is proper to include such a provision in a constitution.]

Life

- 9. Every person shall have the right to life.

Human Dignity

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

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Freedom and Security of the Person

11. # (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.

[Comment: Arbitrary arrest is effectively excluded under clause 25(2). The practical effect of the prohibition of detention without trial, is dealt with by the newly added clause 25(1)(e).]

- # (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

[Comment: The Committee is of the opinion that disproportionately severe punishment is catered for under the formulation as it stands.]

Servitude and Forced Labour

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

Privacy

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

[Comment: This formulation read with clause 34(1) does not exclude the adoption of measures for entering a person's private home in order to investigate or prevent

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the commission of any crime including those crimes relating to domestic violence.]

Religion, Belief and Opinion

14. + (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by an appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance at them is free and voluntary.

Freedom of Expression

15. + (1) Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.

[Comment: The scope of clauses 14(1) and 15(1) was extended as a result of submissions from various quarters.]

- + (2) All media financed by or under the control of the State shall be regulated in a manner which ensures the expression of a diversity of opinion.

[Comment: The Ad Hoc Committee has requested the inclusion of subclause (2). The meaning of a previously used phrase "public media" has become

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contentious in view of developments in the area of public broadcasting, hence the reference in this formulation to "media financed or controlled by the State".]

Assembly, Demonstration and Petition

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

Freedom of Association

17. (1) Every person shall have the right to freedom of association.
- * (2) Without derogating from the generality of the provisions of section 8(2), nothing in this section shall permit discrimination on the ground of race.

[**Comment:** If the inclusion of a new clause 1(5) is agreed to - see Comment under 7(1)(b) - subclause 2 can fall away.]

Freedom of Movement

- #18. Every person shall have the right to freedom of movement anywhere within South Africa.

Residence

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

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Citizens' Rights

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

[Comment: One of the parties suggested a combination of clauses 18, 19, 20 and a portion of clause 26. After due consideration the Committee was compelled to the conclusion that the clauses deal with distinct categories of rights and should be left as they are presently formulated. Clause 5(3) of the proposed Constitution is inconsistent with Clause 20 and should be deleted or redrafted so as to be subject to clause 20.]

Political Rights

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

[Comment: The qualifications for the franchise are to be found in clause 6 of the proposed Constitution.]

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Access to Court

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

Access to Information

- *23. Every person shall have the right of access to all information held by the State or any of its organs or agencies and which is required ~~necessary~~ for the protection or exercise of any of his or her rights.

[**Comment:** The Ad Hoc Committee requested the insertion as indicated above.]

Administrative ~~Decisions~~ Justice

24. * ~~Every person shall have the right to lawful and procedurally fair administrative decisions:~~

Every person shall have the right to -

- (a) lawful administrative decisions and acts where any of his or her rights or interests is affected or threatened by such a decision or act;
- (b) a procedurally fair administrative decision or act where any of his or her rights or legitimate expectations is affected or threatened by such a decision or act;
- (c) be furnished with reasons in writing for an administrative decision or act which affects any of his or her rights or interests unless the reasons for such

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decision or act have been made public; and

- (d) an administrative decision or act which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened by such a decision or act.

[**Comment:** The Ad Hoc Committee has requested that reference throughout be made to both administrative decisions and acts. The Technical Committee is of the view that reference to acts only will suffice. In the alternative the equally inclusive word "action" could be considered. If both "acts" and "decisions" are used in this clause the courts interpreting the clause will be faced with the difficulty of distinguishing the two concepts. This interpretation problem is exacerbated if one takes into account that even if both words are used, reference will probably have to be made to decisions only in paragraphs (c) and (d).]

Detained, Arrested and Accused Persons

- 25. # (1)** Every person who is detained, including every sentenced prisoner, shall have the right -
- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
 - (b) to be detained under conditions consonant with human dignity, including at least the provision of adequate nutrition, reading material and medical treatment at State expense;
 - + (c) to consult with a legal practitioner of his or her choice, to be informed

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of this right promptly and, where ~~the interests of justice so require,~~ substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the State;

[Comment: As a result of further submissions expressing concern at the financial implications of this right as previously formulated, the Committee now proposes the above formulation. This comment also applies to clause 25(3)(c).]

(d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and

+ (e) to challenge the lawfulness of his or her detention in person, in a court of law and to be released if such detention is unlawful.

[Comment: Paragraph (e) has been included as a result of discussions at a previous meeting of the Council. See also the Comment under clause 11(1). The Technical Committee once more brings to the attention of the Ad Hoc Committee that the constitutionalisation of a specific remedy in the event of unlawful detention (e.g. compensation) is inappropriate, since this will necessitate the inclusion of similar provisions in respect of the breach of all the other rights in the Chapter. It could also limit the scope of clause 7(4).]

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

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- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
 - (b) to be brought before an ordinary court of law as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
 - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
 - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;
 - (b) to be informed with sufficient particularity of the charge;
 - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - + (d) to adduce and challenge evidence and not to be a compellable witness

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against himself or herself;

[**Comment:** The latter part of paragraph (d) has been included as a result of discussion at a previous meeting of the Council.]

- + (e) to be represented by a legal practitioner of his or her choice or, where ~~the interests of justice so demand,~~ substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

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Eviction

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

[**Comment:** The Ad Hoc Committee agreed to the removal of this provision. In the circumstances it was thought unnecessary to furnish the explanation regarding the implications of this clause as requested by the Council.]

Economic Activity

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

[**Comment:** See the comment to clause 34(1)(a)(ii).]

Labour Relations

27. (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

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- (2) Workers and employers shall have the right to organise and bargain collectively.
- (3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

Property

- *28. (1) Every person shall have the right to acquire and hold rights in property and to dispose of such rights ~~where~~ to the extent that the nature of the rights permits.

[**Comment:** This formulation caters for property rights which are held communally as well as for the rights of individuals held in such property.]

- (2) Expropriation of rights in property by the State shall be permissible in the public interest and shall be subject to the expeditious payment either of agreed compensation or, failing agreement, of compensation to be determined by a court of law as just and equitable, taking into account all relevant factors; ~~including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.~~

[**Comment:** The deletion indicated above was agreed on by the Ad Hoc Committee. The Technical Committee has reservations about it.]

- (3) Expropriation of rights in property aimed at restoring rights in land to ~~or~~

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~~compensating~~ persons who have been dispossessed of these rights as a consequence of any racially discriminatory policy, shall for the purposes of subsection (2) be deemed to be expropriation in the public interest.

[**Comment:** This subclause was reformulated as a result of discussions with the Ad Hoc Committee. The new formulation does not provide for the possibility of payment of compensation to persons who have been dispossessed. The Ad Hoc Committee still has to decide on an appropriate way of dealing with this issue in a restoration clause.]

Environment

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

[**Comment:** The deletion has been made as the result of submission which indicate that the concept of "safety" is inappropriately wide in the environmental context. Within the Technical Committee's terms of reference, it is not possible to accede to the requests of those who have suggested comprehensive treatment of environmental concerns within this Chapter.]

Children

- +30. (1) Every child shall have the right -
- (a) to parental care;
 - (b) to security, basic nutrition and basic health and social services; and
 - (c) not to be subject to neglect, abuse or child labour.

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(2) Every child who is in detention shall, in addition to the rights which he or she has under section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

[**Comment:** Clause 30 was reformulated as a result of a submission by one of the parties. In the previous draft it read as follows:

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

Language and Culture

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

Customary Law

32. (1) Every person who -

- (a) in pursuance of the right in section 17 belongs to a community which observes a system of customary law or
- (b) of free and informed choice observes the rules and practices of a system of customary law and associates with other persons observing the same rules and practices,

shall have the right to the recognition of such customary law as the legal dispensation governing the internal affairs of the community mentioned in

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paragraph (a) or regulating his or her interpersonal relationships with the persons mentioned in paragraph (b), as the case may be.

- (2) It shall be competent for any court of law applying a system of customary law as contemplated in subsection (1) and finding certain of its rules and practices to be in conflict with section 8, to invoke the powers granted to the Constitutional Court by section 87(4) and (6) in order to determine conditions on and a time within which such rules and practices can be brought in conformity with section 8.
- (3) Nothing in this section shall preclude measures designed to assist the development of customary law in accordance with the values embodied in the other provisions of this Chapter.

Education

33. Every person shall have the right -

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

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Limitation

34. + (1) The rights entrenched in this Chapter may be limited by law of general application provided that such limitation -

(a) shall be permissible only to the extent that it is -

- (i) reasonable; and
- * (ii) justifiable in an open and democratic society based on freedom and equality; and

[**Comment:** The underlined formulation was agreed on in consultation with the Ad Hoc Committee, after objections had been raised to the formulation in the Seventh Progress Report.]

(b) shall not negate the essential content of the right in question.

(2) The rights entrenched in sections 10, 11(2), 25(1)(a), 25(1)(b), 25(2)(a), 25(2)(c), 25(3)(b), 25(3)(c), 25(3)(d), 25(3)(f), 25(3)(g), 25(3)(i), 25(3)(j), 30(1)(c), 30(2) and 35 shall not be capable of limitation in terms of this section.

[**Comment:** The Technical Committee suggests the addition of sub-clause (2) in response to a request from the Ad Hoc Committee to provide a list of illimitable rights. The Technical Committee was also requested to provide a further restriction on clause 34(1), in the form of a reference to South Africa's obligations in public international law. This matter has been considered several times in the past, and the Technical Committee remains of the view that it is inadvisable to include such a provision at this stage of the transition.]

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- (3) Notwithstanding the provisions of this Chapter, a law in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by the legislature.

Suspension

35. (1) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency proclaimed prospectively under an Act of [the legislature] and only to the extent necessary to restore peace and order.
- (2) Any such suspension shall comply with the following requirements:
- (a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is necessary to restore peace or order.
- (b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to be valid in law unless the declaration is ratified by a two thirds majority of the total number of the directly elected members of [the legislature] within fourteen days of the declaration.
- (c) No state of emergency shall endure for longer than six months provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in paragraph (b).

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(d) Any superior court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and any action, whether a regulation or otherwise, taken under such declaration.

[Comment: This provision might have to be revisited after Chapter 7 of the Constitution has been agreed to.]

(3) Neither the enabling legislation which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -

(a) the creation of retrospective crimes;

(b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency; or

+ (c) the suspension of this section, and sections 7, 8(2), 9, 10, 11(2), 12, 14, 27(1) and (2), 30(1)(c), 30(2) and 34.

(4) Any person detained under a state of emergency shall have at least the following rights:

(a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;

(b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Government

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Gazette within five days of their detention;

- (c) the detention of a detainee shall, as soon as it is reasonably possible but not later than ten days after his or her detention, be reviewed by a court of law, which shall order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review;
 - (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
 - (e) a detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
 - (f) a detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
 - (g) if detained for longer than ten days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of a period of ten days from the date of determination of the review procedure provided for in subsection 4(c).
- (5) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior

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to such re-detention.

Interpretation

36. * (1) In interpreting the provisions of this Chapter the ~~[designated authority]~~ a competent court of law shall promote the values which underlie an open and democratic society based on freedom and equality and may have regard to the norms of comparable foreign case law or customary international law applicable to the protection of the rights entrenched in this Chapter.

[Comment: See the comment to clause 34(1)(a)(ii).]

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

* (3) The entrenchment of the rights included in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised and conferred by common law, custom or legislation to the extent that they do not limit any right entrenched in this Chapter.

[Comment: The status of indigenous law vis-a-vis the Chapter is still under consideration.]

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

(a) a right entrenched in section 21; or

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(b) a right entrenched in sections 15, 16, 17, 18, 23 or 24, insofar as such right relates to the expression of free and fair political activity,

shall be strictly construed for constitutional validity.

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

Duration

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

[Comment: The matters dealt with in the clause previously proposed by this Committee will be dealt with in another clause to be proposed by the Constitutional Committee.]