SOUTHERN AFRICAN CATHOLIC
BISHOPS' CONFERENCE

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The Technical Committee:
Fundamental Rights
World Trade Centre
Kempton Park

Dear Sirs and Mesdames

In your reworking of the Draft Constitution I would like you to take the enclosed critique into consideration.

Yours faithfully
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PART THREE

A CRITIQUE OF THE FUNDAMENTAL RIGHTS IN THE INTERIM CONSTITUTION

The priority of the Technical Committee on Fundamental Rights has been to produce an interim or provisional Bill of Rights which is focussed upon:

(1) the basic rights and freedoms necessary to ensure democracy during the 1994 - 1996/1997 transition, and those rights and reforms which are directly concerned with the transitional process as a political process;

(2) those rights and freedoms which have cross-party support at Kempton Park and which are aimed at the overall security and well-being of all during the transition; and

(3) those rights which the MPNP insists should be incorporated into the interim Bill of Rights and which are regarded as conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction.

(See the Technical Committee on Fundamental Rights During the Transition: Second Progress Report of 21 May 1993 at 2.1 to 2.3 and the Third Progress Report of 28 May 1993 at 3.1)

What this means in practice is that the interim Bill of Rights is being drafted with a heavy emphasis upon those Human Rights which guarantee free political activity. These rights are usually called Civil and Political Rights or "First Generation Rights". Their origin can be traced back to the late Eighteenth Century when safeguards for civil and political freedom were built into the American Constitution (in 1791). The French attempted a similar project when their National Assembly adopted the Declaration of the Rights of Man and of the Citizen in July 1789, but this ended in failure and revolutionary terror in 1794 - 1795. The French experience 200 years ago provides South Africans with some sobering thoughts in the 1990's. Beautifully crafted paper provisions are one thing, but there is not guarantee of success!

I. Chapter Three of the third draft Interim Constitution: First General Rights

(a) "Preferred Rights"

The Technical Committee on Fundamental Rights has not placed the Civil and Political Rights which are to be protected in any particular order of priority. A careful readying of Chapter Three, however, reveals that the following rights are being given special protection against interference:

(i) Freedom of Expression (Clause 15);
(ii) Freedom of Assembly, Demonstration and Petition (Clause 16);
(iii) Freedom of Association (Clause 17);
(iv) Freedom of Movement (Clause 18);
(v) Specific political rights in Clause 21:

(1) freedom to form, to participate in the activities of, and to recruit members for a political party;

(2) freedom to campaign for a political party or cause;

(3) freedom to make political choices; and

(4) the right of every citizen of voting age to vote in secret and to stand for election to public office.

The following rights are also being given special protection, even though they would not ordinarily be regarded as First Generation Civil and Political Rights. The special status being accorded to the following rights may be attributed to the strong sense of grievance and injustice which many South Africans feel against the "modus operandi" of government administration and bureaucracy:

(vi) Freedom of Access to Information (Clause 23); and
(vii) The right to procedurally fair administrative decisions (Clause 24).

In terms of the Interpretation provision in clause 36, any Act of Parliament or other law which limits any of the abovementioned rights will be strictly construed for constitutional validity. What this means is that the Constitutional Court will only uphold the validity of such a law if the State can demonstrate that it has a "compelling interest" in the restriction of these Fundamental Rights. It is to be expected that the burden of proof on the government to show a "compelling interest" will be so weighted that it will be difficult for authorities to secure a valid restriction or limitation on these rights.

(b) **Other principal First Generation Rights which guarantee free political activity**

The decision of the Technical Committee on Fundamental Rights concerning the content of the "Preferred Freedoms" is open to question. Many of the following Rights could also be regarded as "Foundation Rights" without which there cannot be free political activity. These are:

(i) **The Right to Equality** (Clause 8)

This provision ensures that every person shall have the right to equality before the law and to the equal protection of the law. Furthermore, it prohibits any person from being unfairly discriminated against on a variety of grounds.

Clearly this provision is the lynch-pin on which the whole Bill of Rights and indeed the whole Constitution turns. If the law does not offer similarity of treatment in protecting the rights and freedoms of each citizen, then a situation could soon arise in which some classes of person have greater enjoyment of rights than other categories of citizen. The whole scheme and purpose of the Constitution and the Bill of Rights could be distorted or even defeated as a result;

(ii) **Freedom of Conscience, Religion, Thought, Belief and Opinion** (Clause 14)

This provision is self-explanatory - every person shall have the right to freedom of conscience, religion, etc. This provision should most definitely fall within the class of "Preferred Freedoms". After all, the very basis of free political activity is to enjoy the capacity to think and believe for oneself without interference from external authority;

(iii) **The procedural rights pertaining to Detained, Arrested and Accused Persons** (Clause 25)

This provision is the equivalent of the "Due Process Clause" of the American Constitution. It might not have a direct bearing on political activity as such, but the lack of procedural safeguards for detained, arrested and accused persons in South Africa has had a profound impact upon the political tensions in this land. Draconian security legislation and State of Emergency regulations have often been used to stifle political activity - especially within the Black community. On the other hand, the Technical Committee's decision not to elevate Clause 25 into a "Preferred Freedom" might reflect a widespread sentiment that the democratically elected Interim Parliament must be given sufficient opportunity to draft new crime prevention and security legislation without the fear of constitutional wrangles.

(4) **The Right of Property** (Clause 29)

This provision safeguards the right of every person to acquire, hold and dispose of rights in property. In the United States, the equivalent clauses in Amendments 5 and 14 of the Constitution have held a dominant position in human rights thinking until comparatively recent times. While the rights of property holders may not be regarded with such reverence as in the past, there is little doubt that the capacity to own property is synonymous with political freedom. Without property, a citizen is dependent upon others. In modern society, a person who is bereft of property becomes a dependant of the State. His "client" status in relation to institutions of government could easily impinge upon his capacity to think and act politically on an independent basis.

(c) **Supplementary First General Rights**

The following Fundamental Rights are usually recognised as belonging to the class of First Generation Civil and Political liberties or freedom:

(i) **The Right to Life** (Clause 9)

In many respects this should be regarded as the ultimate "Preferred Freedom", although it is not categorised as such.

It would not be an unfair comment to remark that the right to life is a crucial, "foundation" right without which all other human rights become entirely theoretical and meaningless. Given this fairly simply and obvious fact, the failure of the Technical Committee to categorise Clause 9 as one of the "preferred freedoms" which can only be limited on the basis of a "compelling State interest" is all the more surprising. Perhaps the explanation lies in the failure of the Interim Constitution to address the emotive and contentious issues of Abortion and Capital Punishment. The draft texts are entirely silent about these issues, which means that no one can anticipate with any certainty how the Constitutional Court would view either of these matters in relation to Clause 9's protection of life. The Technical Committee is thus leaving the door open to qualifications or limitations on the right to life provision in the Abortion and/or Capital Punishment context.

(2) **Human Dignity** (Clause 10)

This provision declares that every person shall have the right to respect for and protection of his or her dignity. The exact meaning of this provision remains far from clear, because it is not a concept that is familiar in the English-speaking legal tradition.

(3) **Prohibition on Servitude and Forced Labour** (Clause 12)

(4) **The Right to Privacy** (Clause 13)

Obviously, free political activity would be seriously impaired if citizens were not to be secure in the privacy of their homes, their private possessions (eg diaries) and their private communications. The right to a secret ballot at election time would mean very little if the law-enforcement officers or other representatives of the State could invade the personal and intimate world of specific citizens to acquire information about their private beliefs and opinions.

(5) **Access to Court** (Clause 22)

(6) **Freedom and Security of the Person** (Clause 11)

This provision prohibits detention without trial, torture (whether physical, mental or emotional), or cruel, inhumane or degrading treatment or punishment. These prohibitions might not have a direct bearing on "free political activity" but they do provide some sort of safeguard against the "chilling effect" which a climate of fear would have upon free political processes. No one is suggesting that torture or abuse of citizens will not occur as a result of clause 11, but the prohibitions provide the basis for "a culture of intolerance" of such practices.

II. **Socio-economic or "Second Generation Rights"**

Second Generation Rights emerged after the Second World War and were a response to political pressures which dictated the need to temper personal liberty with economic and social justice. Such rights are not concerned with the safeguarding of free political activity, but with the fair distribution of wealth and economic opportunity throughout all sectors of society. Although the interim Bill of Rights will have a limited lifespan of only 2 or 3 years, the Technical Committee on Fundamental Rights has made provision within it for some of the principal Second Generation rights. At first sight this may seem to be unnecessary, because the main object of the interim constitutional period over the next 2 to 3 years is to establish the foundations of a free political system.

The provision of some socio-economic rights within the interim Bill of Rights is a necessity, however, because enormous pressures will be placed on government over the next few years to implement major economic and social reforms. The interim government must be furnished with sufficient capacity and scope to respond to these pressures with concrete programmes, and the Technical Committee's task has been to ensure that the Bill of Rights does not unnecessarily impede the reform process.

The interim Bill of Rights will "empower" both government and the citizen to strive for economic and social justice through the following provisions:

(1) **Affirmative Action** (Clause 8)

Clause 8 is the provision which guarantees that every person shall have the right to equality before the law and to the equal protection of the law. In effect, this amounts to a prohibition against discrimination. The clause goes on to specify this prohibition on discrimination in the following terms:

> *"No person shall be unfairly discriminated against, directly or indirectly ... on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular."*

This provision would seem to make it clear that the law can make no distinctions between classes or castes of citizen based upon the abovementioned categories. All must be treated alike by the law. An assumption could easily be developed from this line of thinking, that the law and the legal system will have to be "colour-blind". As a reaction against the Apartheid past, protagonists of the "colour-blind" philosophy would argue that the law can no longer take account of the colour or racial origin of the citizen in determining the substance and/or the application of legal rules. In other words, there could no longer be a state of affairs in which different laws are applied to different sets of people with colour or race being the criterion for the distinction or the separate treatment of groups. The simplicity of the "colour-blind" assumption cannot mask potential difficulties with this approach, however.

If the law treats everyone in exactly the same way, it is not possible to develop new legal policies which are specifically framed with the intention of assisting previously disadvantaged groups. The law could not be utilised in a manner that could lead to a quick "levelling of the playing fields" between Black and White South Africans ie the law could not give compensatory advantages to Black citizens to enable them to catch-up with the preponderant social advantages of the White group in this country.

Clause 8 has been drafted to avoid the "colour-blind" mentality in relation to equality and the ending of racial disadvantage. The principle of "non-discrimination" is being enshrined in the Bill of Rights, but an "affirmative action" provision is included to permit compensatory advantage to those who have suffered from systematic discrimination until now. The provision reads:

> *"This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms."*

This means that in order to treat some people equally, it is necessary to treat them unequally. This affirmative action perspective on equality is sometimes referred to as "reverse discrimination".

It is not the purpose of this Report to take issue with affirmative action. The decision to permit "compensatory discrimination" in the interim Bill of Rights has enjoyed wide cross-party support at Kempton Park. It should be pointed out, however, that no time limit is being placed on the duration of affirmative action policies. This omission might be due to the fact that the interim Bill of Rights will have a very short life of 2 to 3 years, while a policy of reverse discrimination would have to operate for a substantially longer period before the "levelling of the playing fields" between Black and White could be realistically achieved. The Constitutional Principles in Schedule 7 are also silent upon this question of time frames, however. This is unfortunate; "Affirmative action" could degenerate into a permanent tool of "punishment" of the White and other groups.

A second point which ought to be made is that affirmative action can become very unpopular among the Black groups it is supposed to help. In the USA there is a backlash against affirmative action within the Black community led by prominent Black thinkers such as Professor Derrick Bell (formerly of the Harvard Law School). Bearing the second point in mind, the temporary and provisional character of "affirmative action" should be acknowledged in some way in the Schedule 7 principles.

(2) **Eviction** (Clause 26)

The provision dealing with eviction is extremely controversial and it has become the subject of extended discussion at the MPNP. The Chief Justice of South Africa has expressed his disquiet with the provision and it is unlikely to survive in its present form. It is useful to quote the provision, however, because something very similar to this could find its way into the permanent, post-1996/1997 Bill of Rights. It reads:

> *"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."*

This provision has major implications for township development and slum clearance. More importantly, it could be the site of major contests between the rights of property holders and squatter communities. As it is framed at the moment, this clause gives very little protection to those who possess title deeds to unoccupied land and rural land in general. The financial implications of this are serious indeed and could result in grave damage to economic confidence on the part of investors.

This clause has a symbolic importance for Black political groupings nonetheless, who can argue with justice that too many people live at the mercy of property holders. Some sort of security of tenure must be granted to the majority of propertyless people - especially to those living in the rural areas. Solutions to the clash of interests over land use and occupation are going to need patience, sensitivity and pragmatism.

(3) **Economic Activity** (Clause 27)

This provision guarantees that every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.

This provision is unusual, but it is justified by reference to South Africa's recent legal past. The entrepreneurial opportunities of the various Black groupings (African, Coloured and Indian) were severely restricted by the operations of the Group Areas Act. In addition to this, Indian South Africans were prevented from exploring economic opportunities in the Orange Free State and northern Natal. The regulations governing "Influx Control" and the "Coloured Labour Preference Policy" of the Western Cape were additional, serious obstacles in the way of Black economic opportunity. In the future, a provision such as this one will protect Indian traders and businessmen against the systematic discrimination which they have suffered in East Africa and Malawi.

This provision is drafted to ensure, however, that laws aimed at protecting or improving the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all shall be constitutionally permissible - if such legislation is justifiable in a "free, open and democratic society based on the principle of equality".

(4) **Rights concerning Labour Relations** (Clause 28)

This provision states quite succinctly:

(a) workers shall have the right to form and join trade unions, and employees shall have the right to form and join employers' organisations;

(b) workers and employers shall have the right to organise and bargain collectively;

(c) workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

Some of this does not have to be reiterated; the right to join trade union or employer organisations is implicit in the First Generation right of Freedom of Association. Clause 28 can therefore be said to have symbolic, political significance for various interest groups and not simply a legal importance.

(5) **Property: expropriation and land restoration** (Clause 29)

The right to acquire, hold and dispose of rights in property has already been examined as a First Generation Civil and Political right. This clause would be open to severe political criticism from many political groupings in this country, however, if it did not also contain limitations or qualifications on rights of property holders. There are two sub-clauses in Clause 29 which set out these limitations:

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

This is an extremely "daring" clause, because it does not give an automatic guarantee of full market value for compulsory acquisitions of property. It is not clear whether this sub-clause is directed with agricultural land primarily in mind, or whether it is meant to apply with equal force to urban properties. There is a danger of instability and insecurity in the property market, but it is to be assumed that the sub-clause is worded with sufficient care to prevent an outright financial loss to current property investors. It could be argued with some force that the right of the State to acquire property below market values should be restricted, explicitly, to properties which had

previously changed hands as a result of Apartheid laws such as the Land Acts of 1913 and 1936, and the Group Areas Acts.

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

This second sub-clause is more clearly directed at the reversal of wrongs caused by Apartheid land policies. It authorises the future government to take measures to restore land to urban and rural communities who were forcibly removed from their homes on racial, ethnic or colour lines. This sub-clause is symbolic in nature, because the substance of what it is empowering the interim government to do has been set out in the other sub-clause of Clause 29 already mentioned above. Perhaps, on the other hand, this second sub-clause should be seen as something quite separate and distinct (as "*sui generis*" in legal parlance). The sub-clause opens with the words "... Nothing in this section shall preclude measures ...". In effect, this phrase "de-couples" sub-clause 3 from the rest of Clause 29 and makes it an independent or autonomous provision. This raises profound questions for property investors, because it leaves the question of compensation for current owners dangerously ambiguous and unclear. It is a recipe for civil unrest and investor insecurity. The Planning Committee of the MPNP is giving thought to problematic clauses such as this one at the moment.

(6) **Childrens Rights** (Clause 31)

This is a short and more or less symbolic provision which declares:

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

This clause is a good example of one of the most distinctive characteristics of Second Generation Rights - the notion of "Positive Rights" as opposed to "Negative Rights".

Most rights have traditionally been understood as "Negative Rights". This is particularly the case with First Generation Civil and Political rights. Rights can be categorised as "Negative" because they amount to a series of prohibitions or restrictions on government and/or the citizen. Thus, "Negative Rights" means being prohibited from restricting free speech, being prohibited from interfering with religion, being prohibited from invading the privacy of the home etc.

Some Second Generation rights can also be understood in terms of "Negative Rights". Thus Clause 31 prohibits or restricts the State or the Citizen from neglecting, or abusing children or subjecting them to child labour.

Unlike First Generation rights, however, some Second Generation rights can give rise to "Positive Rights". These are not prohibitions on certain kinds of action by the State or other persons and institutions. They amount to a call for action - for the doing of something specific and positive by the State. In many countries, for example, the "right to shelter" is a recognised Second Generation "positive" right. It is a "negative" right to the extent that it restrains a government from destroying peoples' homes, but it is primarily a positive, affirmative right which orders a government to adopt housing policies that will ensure adequate shelter for the entire population.

The interim Bill of Rights does not recognise positive rights to shelter. Clause 31 does recognise positive rights for children nonetheless. The clause declares that children have a right to security, basic nutrition and basic health services. The provision of health services is a good example of positive action on the part of the State or the community - the clause compels the State to do something rather than to do nothing.

Positive rights are evolutionary in character - they grow in breadth and strength as the financial and administrative capacities of the government mature sufficiently to enable more effective policies to be implemented. Clearly, if millions of children went to court in May 1994 and demanded security and food, the State would be unable to implement policies that would provide immediate satisfaction for all the litigants. The Courts would recognise that such rights can only emerge over time.

Clause 31 is one of the few examples of "positive rights" in the interim Bill of Rights. More such rights are likely to appear in the post-1996/1997 Bill of Rights for a final Constitution which will be dedicated to social and economic restructuring of the Republic.

(7) **Education Rights** (Clause 33)

This clause is of considerable importance, both legally and politically or symbolically. It states:

> *"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 ... ."*

This is also an example of "Positive" Second Generation rights, and it means that a complete review of education policy will have to take place as soon as the Interim Constitution comes into force in April or May 1994. The language provision is of considerable significance. It means that compulsory integration and assimilation on American lines will not take place in this country. Desegregation of schools in South Africa will mean the abolition of school selection requirements which include racially discriminatory intent, but "*de facto*" one race or predominantly one race schools are legitimated by the language choice provision. Of course, it can be expected that the Courts will give considerable leeway to government policy and legislation in the framing of the new education policy.

III. Third Generation Rights : cultural and "group" rights

Cultural and "group" or minority peoples' rights are the third set of human rights values which have emerged in the last 200 years or so. They began to enter the constitutional arena in the 1960's and 1970's, when there was growing public concern at the persecution of minority peoples for linguistic and cultural reasons. Third Generation rights are now been widened to include environmental concerns, and it is in this environmental context that Third Generation rights have been popularised throughout the world.

The interim Constitution offers very little focus upon cultural and environmental rights, because such concerns have little to do with an interim 2 to 3 year period which is dedicated to the creation of a free political atmosphere throughout the country. The position of Afrikaner and Zulu culture is of primary concern to certain key groups which have been at Kempton Park, however. Accordingly, the following clauses are crucial to the "National Compact" which the MPNP is creating:

(1) **Environment** (Clause 30)

This declares that every person shall have the right to an environment which is safe and not detrimental to his or her health or well-being.

This can be regarded as a negative right eg a litigant could go to court to stop a local petro-chemical complex from polluting the local river. It could also be regarded as a "positive right", which dictates that the government must proceed with the cheap electrification of the townships to reduce wood-smoke and coal-burning air pollution.

(2) **Language and Culture** (Clause 32)

This clause states that every person shall have the right to use the language and to participate in the cultural life of his or her choice.

In effect, this clause gives recognition to the right of "groups" to define themselves in terms of language and culture. Sometimes it is argued that

the right to use the language of one's choice is an individual civil right and not a Third Generation group right. In truth, however, language is without meaning except in a community or group context. Thus, my right to speak and write in the Irish language means very little unless I have the opportunity to be in association with people who also speak and write in the same language.

While it is possible that South Africa will end up with one or a dominant official language, Clause 32 is a safeguard against the oppression or repression of other languages which are spoken in the Republic.

(3) **Education** (Clause 33)

This clause grants basic education rights to everybody. In addition, it recognises a certain cultural autonomy in the education domain by granting everyone the right:

> "... to establish, where practicable, educational institutions based on common culture, language or religion, provided that there shall be no discrimination on the ground of race or colour."

This provision means that it will be constitutionally lawful to operate an Afrikaans-medium high school or a Moslem girls-only college, or a Catholic primary school.

When this clause is read together with Clause 14 - which permits State or state-aided institutions to adhere to religious observances on an equitable, free and voluntary basis - it is not impermissible for Catholic schools to operate with financial assistance from the State. A vigorously Catholic-centred education could only be guaranteed against the intrusions of religious pluralism, however, at private institutions which are entirely independent of the State. It might be argued that "Moslem-only" or "Catholic-only" entry requirements could be responsible for the establishment or perpetuation of single-race schools. Assuming that a racially homogeneous school population is an incidental by-product of religious selection criteria - and not the product of deliberate "segregative

intent" on the part of school administrators - then such "single race schools" would not be constitutionally unlawful.

IV. **The limitation of Fundamental Rights** (Clause 34)

All of the rights contained in Chapter Three of the Interim Constitution may be the subject of restrictions, qualifications or limitations. These restrictions might be introduced by Parliamentary legislation, by Executive order, or by a decision of the Constitutional Court. Clause 34 makes it clear, however, that such limitations shall only be permissible to the extent that they are:

(i) reasonable; and
(ii) justifiable in a free, open and democratic society based on the principle of equality;
(iii) and that they shall not negate the essential content of the right in question.

Thus, freedom of speech or freedom of religion or property rights may be subject to qualifications which are reasonable and compatible with the values of a free, open and democratic society which is committed to the cause of equality.

It can be argued that the limitations clause permits too much leeway to the demands of a "collectivist" and egalitarian political programme, and does not take sufficient account of traditional notions of individual liberty. The fact that a State is "democratic" and committed to social equality does not in itself legitimate intrusion into the realm of personal freedom. The limitations clause is still the subject for much further discussion at Kempton Park.

It will be observed that the phrase "free, open and democratic society" is a vague one. The Preamble and the Schedule 7 Principles will help to evaluate what is meant by this expression. It is striking, however, that no limitations are being granted on grounds of:

(i) public health; or
(ii) public morality.

The absence of any recognition of "Public Morality" means that traditional Christian justifications for restricting free speech - the control of pornography or blasphemy - will no longer have any value. This limitations clause, more than virtually any other clause in the Bill of Rights - sends a message that Human Rights are to be understood in a secular "value free" context. This means that South Africa's "Human Rights culture" will be built without any reference to the Christian values and traditions of the overwhelming majority of the population. It is submitted that this is a serious flaw in the political and social realism of the negotiators at Kempton Park.

Clause 34 has a sub-clause which gives specific protection to current Parliamentary legislation which promotes fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action. It is therefore clear that the material needs of certain sectors of the population are given a priority which the spiritual and social values of the overwhelming majority are not.

The limitation provision in Clause 34 has to be read in conjunction with the Interpretation provision in Clause 36. This latter clause establishes a hierarchy of "Preferred Freedoms" and specifies certain Civil and Political rights which can only be restricted on the basis of a "compelling State interest". This hierarchy of rights has already been explored at the beginning of Part Three of this Report.

V. **The Suspension of Fundamental Rights** (Clause 35)

This clause has much importance in the light of South Africa's recent past. It governs the circumstances in which a State of Emergency may be declared. It also specifies the minimum floor of rights which may not be suspended or abrogated for the duration of the emergency rule.

(1) Rights may only be suspended in consequence of the declaration of a State of Emergency. These suspensions are valid only if:

(a) the State of Emergency is declared because 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 the State of Emergency - and any actions or regulations thereunder - shall cease to be valid unless the declaration is ratified by a majority of the total number of directly elected members of Parliament (ie 201 MPs in the National Assembly) within 14 days of the declaration;

(c) no State of Emergency shall endure for more than 6 months, but it may be renewed subject to the necessary Parliamentary ratification;

(d) the Supreme Court shall be competent to enquire into the validity of any declaration of a State of Emergency, any renewal thereof, and any action, whether by regulation or otherwise, taken under such declaration.

At present, a State of Emergency may be proclaimed for a 12 month period, and it does not require specific Parliamentary ratification to remain in force. Furthermore, the Courts do not have the authority to review the declaration of the State of Emergency on an objective basis. Consequently, Clause 35 represents a considerable improvement on the current position.

(2) No State of Emergency and no legislation governing States of Emergency may permit or authorise:

(a) the creation of retrospective crimes (turning certain forms of conduct into a crime which had not been a crime at the time when the accused committed it); or

(b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the State of Emergency (thus the State and its agents cannot "get away with murder" or other illegal conduct during Emergency rule. This is pertinent in the light of the current Goniwe Inquest in Port Elizabeth).

(3) Persons who are detained during a State of Emergency shall possess the following rights as a minimum:

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

(b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Government Gazette within five days of their detention;

(c) the detention of a detainee shall, as soon as is reasonably possible but not later than ten days after his or her detention, be reviewed by a court of law, which may order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review;

(d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;

(e) a detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;

(f) a detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and

(g) if detained for longer than ten days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of ten days from the decision of any previous review of the detention.

(4) If a court of law orders the release of a detainee, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such redetention.

VI. **Interpretation** (Clause 36)

The following matters should be noted:

(1) the Constitutional Court - in interpreting the Fundamental Rights - shall promote the values which underlie "a free, open and democratic society based upon the principle of equality". This clause therefore discounts any clear role for religion or natural law in attaching objective content to the various rights which are articulated in Chapter Three. In Western legal philosophy generally, there is at present a sense of crisis and a disillusion with the quest for purely "rational" and "value-free" legal systems. The drafters of the South African Interim Constitution are out of touch with current social and intellectual trends elsewhere in the developed world;

(2) common law, custom and legislation will all be understood subject to the Bill of Rights;

(3) the Chapter Three Fundamental Rights are not construed so as to deny the existence of other rights or freedoms which are recognised by common law, custom or legislation;

(4) certain "Preferred Freedoms" are explicitly enumerated in this clause. This matter has already been explained.

VII. **Miscellaneous concerns from a Communitarian perspective**

(1) **Equality and "Homosexual Rights"**

The anti-discrimination provision in Clause 8 specifically prohibits discrimination on grounds of sexual orientation. It is to be assumed that the provision is specifically addressed to the legal and social disadvantages which may be suffered by the Homosexual population. Unfortunately, it is worded so vaguely that at some future stage the clause could be interpreted to authorise adult sexual activity with children, animals and inanimate objects (fetishes).

In the vertical relationship between the State and the citizen, Clause 8 would prohibit laws which criminalise sodomy and other homosexual activities. This clause would also prohibit the State from utilising employment practices which discriminate against Homosexuals. This raises the controversial question as to whether Homosexuals may be hired in the Armed Forces and in the teaching profession. Other laws would also come under review - thus would the State be compelled to recognise "Homosexual marriages"? Would the State have to change laws on adoption of children to permit "Homosexual couples" to adopt children?

In the horizontal relationship between one citizen and another, discrimination against homosexuals would also be illegal. Private employers would not be permitted to refuse employment to an individual on grounds of sexual orientation. This might cause difficulties eg for Catholic schools. Furthermore, landlords would not be permitted to reject an application for a tenancy in rented accommodation on the grounds that the applicants constitute a Homosexual household.

Most disturbing of all is the affirmative action provision in Clause 8. Even if the Interim Parliament does not include Homosexuals in the categories of disadvantaged persons it will favour in detailed affirmative action legislation, there is nothing to stop Homosexuals going to court and demanding special treatment in terms of Clause 8 itself. If the court accedes to the requests of the litigants - which is almost unavoidable - it means that there will be major advantages or privileges granted to those citizens who adopt a Homosexual lifestyle. They will obtain preferences in access to education, employment and other avenues of community life.

(2) **Equality, Gender and Abortion**

The same clause gives recognition to gender equality. Both the State and private citizens will be prohibited from discriminating against individuals because of their sex. Again this raises profound social questions of great significance to all South Africans. The difficulty with the Interim Bill of Rights is that it adopts a view of men and women which is both controversial and the subject of sustained and vigorous dispute. There is

no "open and shut" argument to the effect that men and women are the same. Within feminist intellectual circles at the moment, there is a growing band of women who argue that females are very different from men and that women should not approximate their conduct to those of the male sex if they wish to promote the "dignity of womanhood".

This gender equality dispute reaches its greatest difficulties with the controversy over Abortion. Those Feminists who believe that women must become like men in order to achieve full equality of opportunity will demand that the State provide free "Abortion on demand". They will argue that Abortion on demand is the only means of "levelling the playing fields" between men and women. This is because Abortion enables a woman's body to become like a man's body - the man can never become pregnant and the woman should be able to avoid pregnancy if she so chooses.

"Catholic Feminists" argue that distinctive feminine qualities of nurturing and child-rearing are denigrated by the Feminists who believe that women should be approximated to men. As most women wish to become mothers at some stage during their lives, the dominant and extreme view in Feminist circles results in the denigration and alienation of the vast majority of ordinary women. The Interim Bill of Rights has fallen into this same trap and the principal victims will be ordinary mothers and innocent, unborn children.

Family life and motherhood are not treated with any respect in the Interim Bill of Rights. Notwithstanding the appalling erosion of family structures as a result of Apartheid and pre-Apartheid laws in this country, Chapter Three gives no recognition at all to the integrity of family life or of the rights of mothers to expect laws and social policies which are supportive of personal child-nurturing and child-rearing.

(3) Freedom of Speech: is there a need for "moral ecology"?

Freedom of Speech or Expression is one of those "Preferred Freedoms" which in terms of Clause 36 can only be restricted on the basis of a "compelling State interest". In addition to this, the restriction must be

reasonable and compatible with the values of a free, open and democratic society in terms of clauses 34 and 36. Many societies now place restrictions upon speech which contain racial hatred. Such restrictions are justified on the basis of the need to maintain the civil peace and to promote democratic values. Similar restrictions may be accepted in South Africa and implemented through the initiative of the Constitutional Court or of Parliamentary legislation. There is no guarantee, however, that South Africa will have restrictions on free speech. There is evidence of a strong American influence on the Constitutional drafts, and in the USA virtually no restrictions on speech or expression are tolerated.

In many "free, open and democratic" societies, pornography and blasphemy (or attacks on religious beliefs and practices generally) are tolerated as the necessary price for "democratic pluralism". Demands for a reassessment of this attitude are growing from a variety of groups which embrace both religious traditionalists and radical Feminists. The Chief Rabbi of England - Johnathan Sacks - has called for an awareness of the virtues of "moral ecology". These voices, and others like them are worried that common values, symbols and traditions have been eroded to such a great extent that society is becoming incoherent and increasingly unstable.

Untrammelled free speech in South Africa would certainly do nothing to help conserve the limited pool of shared values which many South Africans still cherish. Attempts at "nation-building" which at best ignore, and at worst explicitly denigrate, the conservative or traditional social and religious values of substantial groups in this country is bound to end in strife and disappointment.

(4) Abortion, Freedom of Conscience, and a "free, open and democratic" society

In Clause 9 of the Bill of Rights, the right to life is recognised in unqualified terms. Clause 34 permits limitations on rights such as this one if the restrictions are reasonable and justifiable in a free, open and democratic society. Abortion is legal in virtually all modern democracies. Therefore the liberalisation of existing Abortion laws in South Africa would be consonant

with free, open and democratic values. Legal Abortion amounts to a limitation or qualification on the right to life, but it is argued that the limitation does not negate "the essential content" of the right in question. For the aborted foetus, however, the limitation on the right to life becomes an absolute negation of Fundamental Rights, but this is a dilemma which legal philosophers and judges are apt to overlook.

Liberalisation of the law might come from two sources. Either a court case before the Constitutional Court will lead to a relaxation of current Abortion law, or the Interim Parliament will introduce a new legislation at the behest of womens' lobby groups and "Pro-Choice" activists.

There is no danger that the Constitutional Court will have to take the unborn child's right to life into account before reaching its decision. The Bill of Rights is drafted in such a way that unborn human life is not accorded any recognition or fundamental rights in terms of the Chapter Three provisions. Clause 7(4) makes it absolutely clear that only "juristic persons" shall be entitled to rights under the Interim Bill of Rights. A foetus is not a juristic person in the Roman-Dutch legal tradition unless the child is born alive of its mother. Consequently, "foetal rights" will not exist.

It has already been explained that Abortion might be justified on the basis of "democratic values". It has also been explained that Abortion might be justified on the basis of gender equality. Thirdly, Abortion might become more readily available on the grounds that each woman is entitled to her privacy and her conscience.

The right to privacy in Clause 13 is a right to "spatial privacy" ie certain places are "off-limits" to the intrusions of the State. This is the traditional means of framing a privacy interest in a Bill of Rights context. Privacy is now also understood to include "decisional privacy". This means that the State has no right to intrude upon decisions concerning intimate personal choices. This more expansive understanding of privacy takes constitutional safeguards against State interference beyond the confines of the home and of the bedroom. It embraces the notion of "personal autonomy" or the "right of self-definition".

While Clause 13 is framed in traditional terms, there can be little doubt that South African courts would extend privacy to include "decisional privacy". Basing its decisions upon similar American court decisions, the South African courts would almost inevitably declare that a woman's decision to have an Abortion is protected by her privacy interest. A woman is free to "define herself" as a mother or as a non-mother as she sees fit. Pregnancy can therefore be terminated on demand.

The concept of "personal autonomy" and a "right of self-definition" is given a further boost by the recognition of "Freedom of Conscience" in Clause 14. The recognition of a constitutional right to "Freedom of Conscience" is novel indeed. Given the lack of moral consensus on the Abortion dilemma, a woman who wishes to abort her unborn child might argue against State interference by asserting that she is free to follow her own conscience.

The prospect that the Abortion and Sterilisation Act of 1975 will continue to survive in its presently restrictive form looks remote to say the least!

(5) The Right to Life and Capital Punishment

The right to life provision in Clause 9 would seem to rule out the possible resumption of capital punishment in this country. The limitations provision in Clause 34 would provide a means through which capital punishment could be re-introduced, however. It is extremely unlikely that the Constitutional Court would take the initiative in this regard, but necessary legislation could be enacted by Parliament. After all, there can be little argument with the fact that some modern democracies still practice capital punishment.

Give the state of party political opinion at the present moment, no restoration of capital punishment is likely in the foreseeable future.

(6) The Right to Conscience: Euthanasia and problems of law-enforcement

The right to freedom of thought, belief and opinion is the recognition of a right to have one's internal mental world free from external invasion and regulation. What goes on inside the privacy of an individual's head is nobody's business but his own. Religion, however, is not a matter which is confined to the internal, intellectual world of an individual and his private thoughts. Religion involves external physical manifestations or conduct such as worship and communal celebration.

It is not unusual for a Bill of Rights to recognise freedom of thought or freedom of religion. Both internal conduct and some forms of external conduct are considered to be "sacrosanct" if liberty and a free society are to be secured against an encroaching government. The recognition of a specific "right to Conscience" is unusual to say the least. Its distinctiveness from thought, belief and opinion is explicable only in terms of external conduct. The consequences of recognising freedom of conscience are disturbing for this very reason. It could lead to bizarre consequences.

An individual may believe that Black people do not have souls. He may walk into Church Square, Pretoria and commence to kill Black citizens at random. While he may commit such heinous crimes with a perfectly clear conscience, there is no way he could appeal to "freedom of Conscience" to justify his activities going unpunished. Constitutional philosophy recognises as one of its most basic rules that no individual may exercise his rights so as to infringe upon or destroy the rights of his fellow citizens.

Suppose, however, that a young man does not wish to suffer the physical pain which is the unavoidable consequence of a particular illness. His disease may be terminal, but it does not have to be so clear cut. He asks his doctor to give him a fatal injection to end his life. He asks for this "remedy" with a clear conscience, and the doctor readily obliges with a clear conscience because he believes in the notion of "personal autonomy" and freedom to make intimate choices without interference. This scenario entails the practice of active Euthanasia. The patient dies, and the doctor is charged with murder in a court of law. In addition, the

General Medical Council institutes proceedings to remove the doctor from the General Medical Practitioners Register. The accused doctor pleads his constitutional right to freedom of conscience in defence. Where does this leave both the law-enforcement agencies and the medical profession's code of ethics? The answer is that it renders all objective norms of conduct in total disarray.

A similar scenario could arise with Abortion. Suppose that the Interim Parliament enacts a law which authorises Abortion on demand within the first twelve weeks of pregnancy. A woman seeks an abortion at eighteen weeks with a clear conscience. Her doctor performs the operation with an equally clear conscience because he rejects the idea that the State has the right to interfere with the patient-doctor relationship on non-medical grounds. Can the law-enforcement agencies take action against the doctor? If not, where does this leave the law?

The truth is that this "Freedom of Conscience" provision has been drafted with absolutely no understanding of its implications. Its elimination is a legal and social necessity if the concept of objective norms which apply to all members of society are going to survive with any real meaning.

(7) A Communitarian perspective: conclusions

The general tenor of the Bill of Rights is disquieting on a number of grounds. It has been constructed without the benefit of any coherent philosophical and moral norms which can be rooted in the spiritual and social traditions of South Africa's various peoples. In many respects, the Bill of Rights is built upon the assumption that society consists basically of only two entities - the individual and the State. It takes no account of intermediary structures such as the family and the clan, while only limited recognition is given to the role of the community or the group in man's "self-expression". The likely result of this approach will be a weakening of those intermediary structures which provide a space for the individual to seek sanctuary from the all-enveloping State. The individual who is unable to seek shelter from the tentacles of the State is likely to be the victim of a creeping "democratic totalitarianism". The alternative scenario is no more

encouraging either. If the Bill of Rights makes a cult out of "personal autonomy" and "self-expression", there will soon be no glue or social bonds to keep the community in place. Structures will dissolve into an anarchy of competing personal interests.

On 4 July 1983, during an interview with Malcolm Muggeridge on BBC 2 television, Alexander Solzhenitsyn observed:

> *"But if the West does not find in itself the spiritual forces, the spiritual strengths to rise again, to find itself again, then, yes, Christian civilisation will disintegrate. We use the same words to describe the same phenomenon - democracy. Democracy was originally developed before the face of God. And the foundation of its concept of equality was equality before God. But then the image of God receded, it was pushed away by Man. And this same democracy changed, and acquired a very strange character. And the responsibility that each person had before God, this concept of responsibility has been lost; whereas the so-called democratic institutions cannot exercise any force, any pressure. And so, having lost any concept of true responsibility, we are, so to speak, free to destroy our institutions and ourselves."*

We ignore insights such as these at our peril.

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