

2/1/72

CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE

**SUPPLEMENTARY MEMORANDUM
ON *BILL OF RIGHTS*
*AND PARTY SUBMISSIONS***

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SECTION 7: STATE DUTY TO RESPECT AND PROTECT RIGHTS

Technical Committee was asked to consider whether this clause this clause should be separated from the rest of this chapter.

1. The sentence "Human Dignity is the foundation of a just society", can indeed form part of a preamble.
2. Since the *Preamble to the Constitution* will most probably refer to various aspects of the Bill of Rights, including human dignity, as the key elements of the constitutional order, a separate preamble to the Bill of Rights seems unnecessary.
3. In view of the consensus that all rights should be *respected and protected by the state* (see *Explanatory Memoranda of 9 October 1995*, p 264), the second sentence of the previous formulation should be retained as a substantive provision of the Bill of Rights. The Technical Committee regards it as an appropriate first provision preceding the provisions on separate rights.

SECTION 8: EQUALITY

The Constitutional Sub-Committee requested the Technical Committee to consider the following matters in relation to this clause:

- 1.1 whether the clause conformed to Constitutional Principle V;
- 1.2 the proposals of the DP regarding subsection (3);
- 1.3 the use of the qualifier, "unfair" discrimination in subsection (3);
- 1.4 the NP and DP proposal to add the words, "without derogating from the generality of" or "but not limited to..." in (3);
- 1.5 objections by the ACDP to "sexual orientation" and "gender" in (3).
- 1.6 the possible reformulation of (4).

2. Compliance with Constitutional Principle V

The Technical Committee interprets Constitutional Principle V to mean that affirmative action measures are included in the obligation of the legal system to achieve equality. Such measures do not violate the principle of equality, and may in certain circumstances be required to achieve equality (see Explanatory Memorandum of 9 October 1995 on the right to equality at paras. 4.1.5 and 6.4)

We have therefore suggested the inclusion of the phrase in ss.(2), "equality includes the full and equal enjoyment of all rights and freedoms" which complements the rights in ss.(1). This replaces the wording in section 8(3)(a) of the interim Constitution which suggests that affirmative action is an exception, and not part of the principle of equality: "This section shall not preclude measures..."

Subsection (2) of the new draft then goes on to expressly allow for legislative and other measures to achieve equality in this full sense. This would also include, where applicable, affirmative action programmes undertaken by private businesses etc.

The proposed wording does not imply that affirmative action measures are "an end in themselves" (a concern expressed by the NP). It clearly says that it is one of the means by which equality can be achieved.

The Technical Committee is of the view that this draft formulation gives full effect to Constitutional Principle V.

3. The DP's suggestion of "...measures likely to protect..." in section 4(2)

The Technical Committee is of the view that the present wording allows for the review of measures which are not rationally connected to their object, i.e. the full and enjoyment of all rights and freedoms (see Explanatory Memorandum of 9 October 1995 on the right to equality at para. 6.5).

Section 15(2) of the Canadian Charter of Rights and Freedoms allows for "any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups..." Similarly article 23 (2) of the Namibian Constitution allows for laws, policies and programmes "aimed at redressing social, economic or educational imbalances in Namibian society arising out of past discriminatory laws or practices..."

4. The use of the term, "unfair discrimination"

The ANC proposed the deletion of "unfair", qualifying discrimination in ss.(2) and (3) because it is not found in any of the international human rights instruments. The Freedom Front has indicated that they favour its retention, but propose the deletion of ss.(4).

According to Du Plessis and Corder, this qualification was introduced to meet the concern of the DP that not all forms of differentiation/dissimilar treatment were unjustified. The DP negotiators were of the view that 'discrimination' was a generic term which could include both justified and unjustified differential or dissimilar treatment.¹ Legislation providing for special job protection for pregnant women would be an example of justified dissimilar treatment. Certain authors have also supported the use of "unfair" in section 8 (Explanatory Memorandum, para 5.3).

Certainly in the international human rights instruments and in the Canadian Charter of Rights and Freedoms and other national Constitutions, the term, "discrimination" is unqualified. In international human rights law "discrimination" has the pejorative meaning of an unsanctioned distinction.

Thus the Human Rights Committee has said that the term, 'discrimination' in the International Covenant on Civil and Political Rights (1966) should be understood to imply,

"... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[our underlying] ²

The relationship between the qualifier "unfair" and the general limitations clause is also problematic: What is required to prove the unfairness of a discriminatory measure in section 8 vis a vis the justifiability of the discrimination in terms of the general limitations clause ?

1. Du Plessis and Corder, Understanding South Africa's Transitional Bill of Rights, p. 141.

2. General Comment 18, 1989, para. 7.

In the light of the above, the Technical Committee recommends both that the positive formulation in ss.(2) to the effect that "equality includes the full and equal enjoyment of all rights and freedoms" is retained and that the use of the qualifier, "unfair" be reconsidered. If the qualifier is deleted, the wording of subsection (4) would have to be reconsidered.

5. The addition of the words, "without derogating from the generality of" or "but not limited to..." in ss.(3)

The Technical Committee is of the view that the proposed added words are unnecessary, and are undoubtedly part of the phrase, "including".

Other examples are:

- (1) the phrase used in Canadian Charter of Rights and Freedoms, "...and, in particular, without discrimination on the grounds of..." (section 15);
or
- (2) the phrase in article 26 of the International Covenant on Civil and Political Rights: ...on any ground such as race, colour, sex..."

(See also paras. 4.2.2 and 5.4 of the Explanatory Memorandum on equality).

6. Non-discrimination on the grounds of sexual orientation and gender

Regarding 'sexual orientation' as a ground of non-discrimination: see para. 4.2.3. of the Explanatory Memorandum on equality.

The term, 'gender' as a ground of discrimination refers to the roles and expectations that society imposes on persons as a result of their biological sex. It is thus important that neither women nor men should suffer discrimination because of the social belief that they should play certain roles e.g. the belief that all mothers should not work, but should stay at home and look after children. At the Beijing Conference this commonly accepted meaning of the word, 'gender' was accepted by all the states of the world who signed the Platform for Action.

7. Subsection (4)

As stated above if the term 'unfair discrimination' is not used, the wording of this section would have to be adjusted accordingly.

The ANC has indicated that they prefer the wording of s.8(4) of the interim Constitution. The new formulation is a plain language version of the present (4) which is preferred for its clarity and simplicity. There has been no change of meaning between the two subsections.

SECTION 11: FREEDOM AND SECURITY OF THE PERSON

1. The Technical Committee was requested to redraft this clause to incorporate the new ANC proposal for the consideration of the parties (see the draft formulation).
2. As suggested at the Constitutional Sub-Committee meeting of 9 October 1995, the various elements have been grouped together under the "umbrella" rights of 'freedom of the person' and 'security of the person' respectively.
3. The ANC proposal has been incorporated as a new subsection (2). The right to be free from all forms of violence can obviously be limited through the general limitations clause to cater for the reasonable use of force by the state to effect arrests, prevent damage to persons or property etc.
4. The Technical Committee recommends that the concept, "bodily and psychological integrity" be retained in ss.(2) as it relates to the physical and psychological violation of personal integrity.
5. The rights not to be subjected to torture and other forms of degrading treatment and medical experimentation without consent can be regarded as part of the right to security of the person and bodily integrity. However, they are so important in human rights law that we recommend that they be expressly prohibited in a separate sub-section.
6. The matter of the consent of children and others incapable of giving consent on their own behalf in ss.(3)(c) has been dealt with in the manner proposed by the Freedom Front.

SECTION 13: PRIVACY

1. The DP propose that the right not to have communications violated ought to expressly include the right not to have communications intercepted. The Technical Committee remains of the view that interception of communications constitutes a violation and that the express addition of the word is unnecessary.
2. The FF proposes that subsections (1) and (2) be qualified to make "searches by warrant in accordance with the provisions relating to criminal procedure". It is not necessary to include the qualification. That is a function of the general limitations clause. Searches under warrant properly regulated by statute constitute a universally accepted limitation to the right to privacy.

3. Proposed reformulation to deal with juristic persons as bearers of rights:

"Everyone has the right to privacy, including the right not to have -

- (a) their person or home searched;*
- (b) their property searched;*
- (c) their possessions seized; and*
- (d) the privacy of their communications violated".*

(Juristic persons the bearers of subsection (b), (c) and (d)).

SECTION 14: FREEDOM OF RELIGION, BELIEF AND OPINION

1. The ANC proposed that *"including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public"* in section 14(1) be deleted.

Although the first part of the section will undoubtedly be interpreted to include the matters referred to in the second part, the second part is contained in most international instruments (see **Explanatory Memoranda of 9 October 1995**, p 57, no 1). The Technical Committee recommends the retention of the phrase.

2. The ANC proposed that consideration be given to the inclusion of "ideology" in section 14(1). The Technical Committee is of the opinion that "ideology" is covered by "thought, opinion and belief".
3. The Technical Committee supports the FF proposal that "any" in section 14(2)(a) be replaced with "all".
4. The Technical Committee was requested to investigate a change in the formulation of section 14(3) to the effect that (as in the case of customary law) only the **recognition** of the systems concerned be insulated from the provisions of the Bill of Rights, **but not** the rules comprising the contents of these systems.

The Technical Committee recommends that the NP proposal be followed to add the phrase "to the extent consistent with this Bill of Rights" to the opening sentence.

SECTION 15: FREEDOM OF EXPRESSION

1. Subsection 15(2)

This section is largely based on section 20 of the International Covenant on Civil and Political Rights (1966). However, unlike section 20 it does not in itself prohibit this type of speech. It simply says that this type of speech is not deserving of constitutional protection.

The suggestion of the DP and ANC to delete the words, "... and that is based on race, ethnicity, gender or religion" is supported by the Technical Committee. It avoids protracted disputes as to which of the grounds of discrimination should be included.

The ANC's point is that incitement to imminent violence (without any further qualification) should not enjoy constitutional protection.

A possible compromise formulation could be:

"(2) the protection in subsection (1) does not extend to -

(a) propaganda for war;

(b) the incitement of imminent violence; or

(c) advocacy of hatred that constitutes incitement to discrimination [that is prohibited in section 4(3)]."

2. Subsection (3)

The concern about this subsection was that it is too broad, and may cover all forms of government-produced media (e.g. AIDS education media produced by the Department of Health).

The DP proposes the following clause -

"Any public media financed directly or indirectly by the state must be impartial and present a diversity of opinion."

The Technical Committee is of the view that this suggestion addresses the concerns referred to above, and can be recommended.

The Freedom Front's suggestions of 'a survey of the diverse opinions held' is too stringent. It seems to imply that every programme must present 'a survey' of all possible opinions on the particular topic. The purpose of this section is rather to ensure that a public broadcaster or newspaper fairly reflects the general range of public opinion.

SECTION 16: FREEDOM OF ASSEMBLY, DEMONSTRATION AND PETITION

1. The FF proposed that "to present petitions" be deleted.

The fact that the right to petition is not included in international instruments and most bill of rights, does not preclude its inclusion in the new Constitution - CP II does not prescribe that only internationally recognised rights be included. A duty on recipients of petitions to consider petitions can, even in the case of frivolous petitions, not to be regarded as an unreasonably onerous duty.

SECTION 18: POLITICAL RIGHTS

1. The FF proposed that "adult" be inserted in subsection (1), (2) and (3) of the word "Every".

CP VII does not apply to section 18(1). To the extent that the word "adult" affects the voting age, this matter was considered by Theme Committee 1.

SECTION 20: FREEDOM OF MOVEMENT AND RESIDENCE

1. The FF proposed that the right to a passport in section 20(4) be guaranteed subject to criminal legislation relating to fugitive offenders.

The Technical Committee does not support the proposal because restrictions of the right to a passport of fugitive offenders can be adequately dealt with in terms of the general application clause.

SECTION 21: ECONOMIC ACTIVITY

The Technical Committee was instructed to :

- further examine international instruments, taking into account the views expressed by political parties at the Sub-Committee meeting;
- report on its understanding of the term "economic activity" and why it considered the term to be problematic, in the present context; and
- to consider the inclusion of a German type clause as an option.

1. International law and foreign law

"Freedom of economic activity" is *as such* not guaranteed in international instruments.

The right to freedom of occupation is contained in :

- article 23(1) of the Universal Declaration of Human rights: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment"; and
- article 6(1) of the International Covenant on Economic, Social and Cultural Rights: "The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take the appropriate steps to safeguard this right."

Few foreign constitutions guarantee a "right to freedom of economic activity" in so many words. Exceptions are:

- section 31(1) of the Swiss Constitution: "Freedom of trade and industry is guaranteed throughout the territory of the Confederation, subject to such limitations as are contained in the federal Constitution and the legislation enacted under its authority."
- section 4(1) of the 1994 Ethiopian constitution: "Every Ethiopian citizen has the right to engage freely in economic activity and pursue a livelihood anywhere in the national territory".

The absence of a specific right to freedom of economic activity in foreign constitutions has been ascribed to the partial overlap of such a general right with various other rights, for example, the rights to freedom of occupation, freedom of movement, freedom of association, property, free development of personality (s2(1) of the German Constitution), and in fact, every other right that can be exercised to pursue a livelihood (De Meyer "Human Rights in a Commercial Context", 1984 *Human Rights Law Journal* 139-140).

2. Problems relating to the term "economic activity" in section 26 of the interim Constitution

The same partial overlap with other rights, mentioned in the previous paragraph, exists between the right to "free economic activity" and other rights in the interim Constitution. The interim Constitution does, however, not contain a separate right on freedom of occupation. This right is presently covered by the freedom of economic activity in section 26. The omission of the present section 26 from the new Bill of Rights would therefore leave the

freedom of occupation constitutionally unprotected. The substitution of section 26 of the interim Constitution by a right to freedom of occupation in the new Bill of Rights as a third option, could solve this problem.

3. The German provision on the right to freedom of occupation

Section 12 of the German Constitution reads:

- "(1) All Germans shall have the right to freely choose their occupation, their place of work, and their place of training. Occupational practice may be regulated by or pursuant to a law.
- (2) Nobody may be forced to do a specific work, except within the framework of a traditional general public service that applies equally to all.
- (3) Forced labour is only permissible in the case of deprivation of liberty imposed by a court."

The second sentence of subsection (1) does not provide the state with an unlimited power to regulate the exercise of the right. Limitations of the right must be "by or pursuant to law", and must conform to the proportionality principle which the courts have refined by distinguishing different degrees of state intervention to which different standards of review are applied. The same effect can be achieved by applying the general limitation clause in the South African Bill of Rights.

The Technical Committee recommends the DP proposal be included as Option 3.

SECTION 22: LABOUR RELATIONS

1. **Section 22(2)(c) - "Workers have the right ... to strike".**

- 1.1 The DP proposes that the right to strike be limited to collective bargaining purposes only and accordingly propose the addition of the words "for the purposes of collective bargaining" after the word "strike".
- 1.2 The DP proposed wording is drawn from section 27(4) of the interim Constitution.
- 1.3 The Republic has recently ratified Conventions 87 and 98 of the International Labour Organisation. The Freedom of Association Committee of the ILO Governing Body monitors compliance of those Conventions by member states. It has definitively held that the right to strike extends beyond the narrow horizon of collective bargaining

and embraces the purposes of promoting and defending the socio-economic interests of workers.

1.4 The Freedom of Association Committee has held that the right to strike for the purpose of promoting and defending the socio-economic interests of workers does not (a) include purely political strikes; and (b) may be limited. The limitations contained in the new Labour Relations Act (LRA), 85 of 1995 are consonant with limitations found to be acceptable by the Committee. They are in summary: (i) no strikes until pre-strike conciliation and notification procedures have been exhausted; (ii) no strikes over disputes of the right; (iii) no strikes in essential services; (iv) no strikes during a collective agreement; (v) no strikes during a state of emergency; (vi) no strikes for purely political purposes; and (vii) special limitations on the nature and duration of sympathy and protest strikes.

1.5 Constitutions that include a right to strike in their Bill of Rights, do not limit the right in the manner proposed by the DP. Their respective courts, have, however, followed the profile of limitations described above.

1.6 The addition of the phrase "for the purpose of collective bargaining" will mean that provisions permitting protest action, such as those envisaged in section 77 of the LRA, will not be subject to constitutional scrutiny under section 22.

2. Section 22(2)(c) - "Workers have the right .. to strike"

2.1 The FF proposes the specific exclusion of essential services from the right to strike.

2.2 There is no need to specifically exclude essential services because it is a universally accepted limitation on the right to strike. The Freedom of Association Committee has held that no person may partake in a strike in a service the "interruption of which endangers the life, personal safety or health of the whole or any part of the population". Read with section 39(1)(b) which requires every court when interpreting the Bill of Rights to consider all applicable international law.

2.3 The specific exclusion may invite unnecessary constitutional litigation over what constitutes an essential service. Without the specific exclusion, the constitutional court engages in the proper constitutional enquiry namely whether any limitation to the right to strike in respect of essential services complies with section 35 (the limitations clause).

3. **Section 22(4)(a) - "Every trade union and every employer's organisation has the right ... (a) to determine its own administration, programmes and activities".**
- 3.1 The DP proposes a proviso to the subsection along the following lines:
- "provided that nothing in this Constitution shall preclude laws and measures designed to promote honest, efficient democratic and accountable governance".
- 3.2 The object of a "nothing shall preclude" clause is to immunise certain laws from and the limitations clause in particular. This may be motivated by considerations such as the importance of recognising systems of religious personal and family law (section 14(2)); or the importance of social and economic regulation (section 21(2)); and the outlawing of unfair discrimination (section 35(2)) in a context where such laws are vulnerable to attack under other provisions of the Bill of Rights. Important as democratic and financially accountable trade unions and employers organisations are, there is no provision in the Constitution that would render a law designed to promote those objectives especially vulnerable to constitutional attack.
- 3.3 The Freedom of Association Committee has held that laws that promote democratic and financially accountable trade unions and employer organisation do not infringe the right to freedom of association (). The combined effect of section 34 (the limitations clause) and section 39(1)(b) (the interpretation clause) will ensure that laws that promote such practices in trade unions and employer organisations are constitutional.
- 3.4 It also bears stating that the new LRA requires ballots for the election of leadership, ballots for the calling of a strike, the auditing of accounts and the submission of the auditors certificate to the register of labour relations.

SOCIAL AND ECONOMIC RIGHTS

1. Grouping of social and economic rights

The Constitutional Sub-Committee requested the Technical Committee to consider:

- 1.1 the grouping of certain of the social and economic rights; and
- 1.2 to use a consistent qualifying phrase for the state's obligations e.g. "reasonable and appropriate/reasonable and progressive measures."

2. The Grouping of the Social and Economic Rights

2.1 Having considered this matter carefully the Technical Committee wishes to bring to the attention of the Sub-Committee the following issues which are pertinent to the "grouping" of the rights:

- **The grouping of the social and economic rights holds the danger that the various rights which involve different obligations and policy considerations are treated in a uniform way.** The measures which the state must take has different objectives in the case of each right. In the case of housing, the measures are designed eventually to secure housing for all. In the case of health, the measures are designed to improve the quality and accessibility of health care services. A distinctive body of international jurisprudence has built up on each of the rights included in the draft Bill of Rights. We are of the view that it would be a mistake to invite judges and legislators to overlook the diverse dimensions of each of these rights.
- Many of the rights involve elements which can and should be protected immediately whereas others are only realisable progressively over time. In the case of housing, the government it will take time for everyone to have access to housing. However, the obligation not to evict persons from their home arbitrarily and without a court order is an immediate obligation which is part of the right to adequate housing. Similar considerations apply in the case of education - the state must take immediate steps to secure access to basic education by all, whereas the right to further education must be progressively realised over time. The right to education in the language of choice "where reasonably practicable" is also immediately applicable. **It is easier and clearer to demonstrate the different nature of the obligations on the state in respect of the various rights where, as far as possible, they are dealt with in separate clauses.**
- On a **symbolic level**, it will also diminish the importance of each right to include them in one clause, entitled 'social and economic rights'. This may have the effect of devaluing the rights, and making them seem like some special species of rights. The additional social and economic rights which the parties have supported for inclusion in the Bill of Rights are an integral part of international human rights law. Many of the other rights in the Bill of Rights are also social and economic in character: the right to property, economic activity, labour relations, environment, language and culture etc. It would not be a correct reflection to include only a selected group of these rights under one social and economic rights clause.

- It has also not been the style of the draft **Bill of Rights** to group various rights together. For example, the Namibian Constitution groups so-called fundamental freedoms together, such as freedom of speech, religion, assembly, association, movement rights, the right against forced labour. This is combined with a specific limitations clause (article 21).

For the above reasons, we recommend that the grouping of certain social and economic rights be kept to a minimum.

2.2 Health, food, water and social security (Section 26)

We have suggested a draft clause which groups together the rights to health, food, water and social security.

2.3 The right to education (Section 28)

Because of the various elements of **the right to education** and the fact that it has existed as an independent right in the interim Constitution, we recommend that it be retained as a separate right.

2.4 The right to adequate housing, and equitable access to land (Section 25)

We recommend that the right to adequate housing and equitable access to land should also be in a separate section because of its political importance. The denial of housing rights and access to land to millions of South Africans was an important part of our history. A large number of public submissions have motivated strongly for the inclusion of the right to adequate housing in the final Constitution.

2.5 Children's rights (Section 27)

Because of their vulnerable position in society, children are guaranteed certain **basic** social and economic rights. Unlike the broader category of social and economic rights (to which they are also entitled) the state must take immediate steps to secure these rights, and they are not subject to progressive realisation over time. However, the level of the obligation is restricted to **basic** nutrition, health and social services.

The National Party in their supplementary submission have proposed the addition of the words, "**and shelter**" to ss.1(c) of the children's rights section. This suggests to the Technical Committee the provision

of shelters to street children and other homeless children, as well as children removed from the family home because of abuse or neglect. This is an important protection for a particularly vulnerable category of children, and we recommend the inclusion of this further right.

The National Party has also proposed that ss.(1)(d) should end with the words, "...all forms of abuse and degradation." The additional words are probably unnecessary, but the Technical Committee does not have any objections in principle to the proposed change.

The right to basic social services is an important right for children. It implies the provision of social workers and other services necessary to the welfare of children. Such services should be provided to deal with children with family problems, neglected and abused children, children with physical and learning disabilities etc. Social services should be distinguished from social security. Social services are based on social work and contribute to the welfare and development of both individual and groups in the community.³

The social rights in ss.(1)(c) are also protected in the Convention on the Rights of the Child (1989) which South Africa has ratified.

Finally, children's rights should be in a separate section, and not part of a general social and economic rights clause. The children's rights clause has various different elements, comprising an integration of both civil and political, and economic and social rights. For example, ss.1(f), deals with the special guarantees applicable to detained children; and ss.(2) lays down a general standard applicable to all proceedings concerning children. A number of submissions from the public have supported a separate children's rights clause.

3. Matter arising from the re-formulation of the social and economic rights in the draft Bill and the supplementary party submissions.

[See also the Explanatory Memorandum on the Right to Adequate Housing]

3.1 The use of the general qualifying phrase, "reasonable and progressive legislative and other measures"

After careful consideration by the Technical Committee, the above phrase has been used in the following sections: housing and land

3. The right to benefit from social welfare services is protected as a separate right in article 14 of the European Social Charter (1961). The Charter is a regional human rights treaty, protecting economic and social rights.

[section 25]; health, food, water and social security [article 26]; and the right to further education [section 28(1)(b)].

It implies that the measures adopted by the state can be reviewed both for their reasonableness and the extent to which they make progress in the implementation of the various rights. It is similar to the obligation which will in any event be incumbent on South Africa when it ratifies the International Covenant on Economic, Social and Cultural Rights (1966). The Covenant attaches particular importance to the adoption of **legislative measures** in the progressive realisation of the rights.⁴ Legislative measures are also needed to establish the framework and to regulate judicial supervision of these rights. "Other measures" include administrative, financial, educational and social measures. The word, "appropriate", is no longer used as it is included in the concept of "reasonable" measures.

The qualifying phrase also allows for **sufficient flexibility on the part of the state** to take progressive steps towards realising the various rights based on its capacity and the effective use of its available resources. Any reduction or 'going backwards' in the level of provision of a particular social and economic right motivated by a shortage of resources or the general welfare in a democratic society could be justified by the state in terms of the **general limitations clause**.

We do not recommend the National Party proposal that the words, "**in accordance with resources and priorities of the state**" be added. Their implications are that the state could simply allocate no money in its budget to health services one year, and say that this is "in accordance with its resources and priorities". This amounts to a 'claw-back' clause which would effectively undermine the constitutional protection of these rights. The reasonableness of the measures will be judged against capacity and resources of the state at a particular time.

3.2 Housing and Land (Section 25)

The phrase, "everyone without adequate resources..." has been replaced with, "everyone has **the right to have access to adequate housing** which..." The reason for this change is that it is consistent with the phrasing used in the other social and economic rights, and achieves the same effect. Those with sufficient resources will have the means of access to adequate housing (rental, ownership, etc.) and so will not need state assistance to secure housing.

4. See article 2 of the Covenant which was signed by South Africa in October 1994.

The phrase, "adequate housing" was chosen over the term shelter in for two main reasons:

- It is consistent with the right as it appears in international human rights instruments. A body of international standards have developed on the right to 'adequate housing'.⁵
- The state may take all reasonable measures towards the progressive attainment of the right. This means that it is not under an immediate obligation to supply everyone with a house on demand. On the other hand, neither should the state be allowed to provide a shack for the homeless, and then claim that it has fulfilled its obligation to ensure access to shelter.

The word, 'home' in ss.(2) refers to the dwelling where a person and his or her family is ordinarily resident.

The right in ss.(3) is not dissimilar to the one proposed by the DP in ss.(1) of their supplementary submissions on property (25 October 1995). It places a duty on the state to adopt legislation and other measures to facilitate fair access to land in South Africa.

3.3 Access to Health Care

The right to health and access to medical treatment is recognised in a number of international human rights instruments, including the -

- Universal Declaration of Human Rights (1948): article 25
- International Covenant on Economic, Social and Cultural Rights: article 12
- International Convention on the Elimination of All Forms of Racial Discrimination (1966): article 5(e)(iv)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): article 12 and article 14(2)(b)
- Convention on the Rights of the Child (1989): article 24
- European Social Charter (1961): articles 11 and 13
- the African Charter on Human and Peoples' Rights (1981): article 16
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 10.

5. See particularly article 11 of the International Covenant on Economic, Social and Cultural Rights (1966), and the General Comment thereon by the Committee on Economic, Social and Cultural Rights [annexure to the Explanatory Memorandum on Housing].

In addition the rights related to health and medical services are protected in various forms in a number of national constitutions. These include the Constitutions of the Netherlands, Greece, Italy, Portugal, Turkey, Spain, Namibia, Angola, El Salvador.

The obligation of the state in the reformulated clause is to take progressive measures to ensure that everyone has access to health care services of the highest attainable standard. This formulation seeks to combine the elements of expanding access to health care services, and the continuous improvement of the health care system (see the ANC submission to Theme Committee 4 on further social and economic rights). The right of access to health care services should not be restricted to those without adequate resources. It also applies to persons who live in areas where health care services are underdeveloped (e.g. rural areas), and those with special needs (e.g. the elderly, persons with disabilities and HIV patients). Those who are able to secure access to appropriate health care services through their own resources would not be able to demand state assistance as of right. This right (as is the case with the right to basic education) does not imply a right to free medical treatment. The right not to be refused emergency medical treatment is an obligation which is immediately enforceable, and is dealt with in a separate subsection.

The right to reproductive health care warrants special consideration because of its central role in the health and well-being of women. Lack of information and services relating to fertility regulation and other aspects of reproductive health has severe social and economic consequences for women. This right receives special protection in the Convention on the Elimination of All Forms of Discrimination against Women (1979). It is also among the obligations undertaken by governments in the Beijing Declaration and Platform for Action.⁶ This right is neither a euphemism for abortion on demand, nor is it restricted to sterilisation as suggested by the Freedom Front. It rests on the "recognition of the basic right of all couples and individuals to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights". It also implies special care and services in connection with pregnancy.⁷

6. Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, Beijing, 15 September 1995, paras 96 and 96bis.

7. Article 16(1)(e) and article 12 of the Convention on the Elimination of All Forms of Discrimination against Women.

3.4 Access to sufficient food and clean water

The right to food (or adequate nutrition) is recognised in many international human rights instruments -

- Universal Declaration of Human Rights (1948): article 25
- International Covenant on Economic, Social and Cultural Rights: article 11
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): article 12(2); article 14(2)(h) -adequate water supply to rural women
- Convention on the Rights of the Child (1989): article 24(c)
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 12.

These rights are also subject to the obligation of progressive fulfilment by reasonable legislative and other measures.

3.5. Access to social security, including social assistance

3.5.1 Public international law

The right of everyone to social security and an adequate standard of living is also recognised in most of the major international human rights instruments -

- Universal Declaration of Human Rights (1948): articles 22 and 25
- International Covenant on Economic, Social and Cultural Rights (1966): articles 9 ("the right of everyone to social security, including social assistance") and 11 ("the right of everyone to an adequate standard of living for himself and his family...")
- International Convention on the Elimination of All Forms of Racial Discrimination (1966): article 5(e)(i) and (iv)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): articles 11(1)(e), 11(2)(b), 14(2)(c)
- Convention on the Rights of the Child (1989): articles 26 and 27
- European Social Charter (1961): articles 12 (social security) and article 13 (the right to social and medical assistance)

- International Labour Organisation Convention (No. 102) Concerning Minimum Standards of Social Security (1952)
- the African Charter on Human and Peoples' Rights (1981): article 18
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 9

3.5.2 Comparative Constitutions

Contrary to the Freedom Front's claim that these rights necessarily imply a socialist economic system the right to benefit from various forms of social security and assistance are protected in a variety of national Constitutions. These include: Germany [article 6(4) - social protection for mothers]; Denmark; Greece; Italy; Japan; Netherlands; Spain; Portugal; Switzerland and Turkey.

Some examples of these provisions are:

Spain

"The public authorities shall maintain a public system of social security for all citizens which will guarantee social assistance and services which are sufficient in cases of need, especially unemployment." [article 41]

Denmark

"Any person unable to support himself or his dependants shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance, provided he comply with the obligations imposed by statute in such respect." [article 75(2)]

Portugal

1. Everyone shall be entitled to social security.

2. It shall be the duty of the State to organise, co-ordinate and subsidise a unified and decentralised social security system, with the participation of the trade union associations, other organisations representing the workers and associations representing other beneficiaries.

...

4. The social security system shall protect citizens in sickness, old age, disability, widowhood, orphanage, unemployment and all other situations in which the means of subsistence or capacity to work are lost or reduced.

... [article 63]

Japan

"All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health. [article 25]

3.5.3 The scope of social security and social assistance

A distinction is often made between the earned benefits of workers and their families (social insurance), and need-based assistance received from public funds (social assistance). Social security is sometimes used synonymous to social insurance. In a strict sense, social insurance refers only to contributory social security benefits which are earnings-related with a direct connection between the amount paid and the benefit received.⁸ However, many schemes involve an overlap between contributory and non-contributory benefits, and there is also an overlap between these benefits and needs based social assistance. The general tendency is to give the concept of social security a wider interpretation⁹ to accord with international trends to develop comprehensive systems of social protection in response to factors such as the increased mobility of labour and changing global work patterns (the growth of the informal sector, home-based work, temporary work, self-employment etc.).

For these reasons, the right is formulated as the right of "access to a social security system, including appropriate social assistance where they are unable to support themselves and

8. These form of benefits usually also enjoy protection under the right to property: see, C. Krause, 'The Right to Property', in Eide *et al* (eds), Economic, Social and Cultural Rights - A Textbook (1995), 143, 154.

9. M. Scheinin, 'The Right to Social Security' in Eide *et al* (eds), Economic, Social and Cultural Rights - A Textbook (1995), 159.

their dependants." (see ANC and NP submission to Theme Committee four on other social and economic rights).

This covers both contributory and non-contributory social security benefits, including appropriate social assistance from the state. It accords with the general scope of the right in the international human rights instruments referred to above.

This right is subject to the usual qualification that it must be progressively realised by the state through all reasonable measures, including legislation. The right has been deliberately broadly framed to give the legislature a discretion as to what forms of social protection it wishes to adopt, the level of benefits, and the conditions and period subject to which they will be paid. Any lowering of the amount and standard of social security due to resource or other constraints would fall to be justified in terms of the general limitations clause. This is also consistent with international jurisprudence on the limitations of these rights.

SECTION 24: PROPERTY

1. The draft property clause in the second edition of the Refined Working Draft gives effect to the tentative understanding that emerged in the CC Subcommittee on 10 October 1995 (page 9 of the Minutes). It was drafted jointly by Theme Committees 4 and 6.3.
2. Subsection (1): "Property is guaranteed".
 - 2.1 The formulation is drawn from the German Basic Law. It guarantees the institution of property, which includes the right to acquire, hold and dispose of property and the duties of holders towards others.
 - 2.2 The phrase "the right of inheritance" is not included. There are at least two rights involved in this phrase: the right to dispose of property by testamentary succession and the right to interstate succession. The intention behind the inclusion of the phrase was not to constitutionalise the Roman Dutch and customary law of intestate succession but to guarantee the right to right to dispose of property in a will. We are of the view that the constitutional guarantee of property incorporates the right to dispose of it whether by way of contract, gift or testament.
3. Option to subsection (1): "The State must respect property and foster the conditions for everyone to acquire, hold and dispose of property on an equitable basis".

- 3.1 This is an edited version of the proposal made by the DP in its comments and input dated 25 October 1995.
- 3.2 This formulation is similar to the proposed subsection (1) in that it treats property as an institution and can be incorporated in the draft based on the tentative understanding.
4. Subsection (2): "The content and limits of property, including its deprivation, may be determined only by law of general application".
 - 4.1 The subsection reflects a combination of parts of the German Basic Law formulation and subsection 28(2) of the interim Constitution.
 - 4.2 This was done to ensure that the determination of the "content" and "limits" by law was not a separate class from "deprivation". It also ensures that determinations of content, limit and deprivation are not achievable by bills of attainder.
 - 4.3 The DP propose that the subsection be qualified to the effect that deprivation not be arbitrary. The Technical Committee supports the qualification.

SECTION 29: ACADEMIC FREEDOM

1. The Technical Committee was called upon to reformulate the draft clauses on academic freedom applying their minds to the wording of Article 5(3) of the German Basic Law. That article, freely translated, reads:

'Art and science, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the Constitution'.
2. There are a number of points to make in respect of the German formulation:
 - 2.1 It does not resolve the issue of whether the freedom to teach is exercisable as against the educational institution itself. This is clearly desirable in the case of a university, but is it desirable for a teacher in an Islamic school to claim a constitutional freedom to teach doctrines that are an anathema to Islam ?
 - 2.2 Does "loyalty to the constitution" mean that no-one may criticise the constitution? or does it mean that no-one may exercise the freedom to teach by promoting the overthrow of the constitutional order ? What is the relationship then between a clause of this nature and the right to freedom of expression ?

3. The Technical Committee recommends that the formulation in section 29 properly gives effect to the concept of academic freedom and the original submissions of the parties.
4. The concern expressed in the deliberations of the Sub-Committee on the August 1995 and reflected in the proposal to introduce the "loyalty" concept in the German Basic Law is the possible use of the right to academic freedom to obstruct the transformation of our universities. This can be addressed by the inclusion of a new sentence to subsection (1) to the effect that nothing in this subsection precludes the State from introducing measures to ensure that the universities comply with the Bill of Rights where relevant. This would include the rights equality, human dignity, privacy, freedom of religion, belief and opinion, freedom of expression, assembly, demonstration and petition, freedom of association, political rights, language and culture, access to information, administrative justice etc.

A proposed wording is as follows:

"(1) Every institution of higher learning and everyone within these institutions has the right to academic freedom. This right does not prevent legislative and other measures designed to ensure that institutions of higher learning comply with the Constitution."

SECTION 31: ACCESS TO INFORMATION

The Technical Committee was asked to give an opinion on possible qualifications to the right, taking into account the comparative analysis on p197 of the Explanatory Memorandum of 9 October 1995 and a suggestion that the Constitution instructs Parliament to pass a law providing access to information providing for limitation.

1. Few other Constitutions contain general guarantees on access to information. Exceptions are the Swedish Freedom of Press Act (which is a constitutional document) and section 5 of the German Constitution ("Everyone has the right ... to inform himself from generally accessible sources"). CP IX however provides that the new South African Constitution "shall provide for freedom of information so that there can be open and accountable administration at all levels of government".
2. Like, for example, the right to vote and to do so in free, fair and general elections, a constitutionally guaranteed right to access to information can only be exercised meaningfully if the detail of how and when it is to be exercised, is provided for in legislation. Johannessen, Klaaren and White ("A Motivation for Legislation on Access to Information" 1995 *South African Law Journal* 45, 51) state: "In order that the courts not be swamped with constitutional issues, statutory measures should be taken to serve as guidelines to assist courts, prosecutors and defence lawyers in the areas of

both the limitation and the implementation of such a right of access. As is done in other jurisdictions, South Africa should regulate these matters by statute". Examples of such statutes in other jurisdictions are the United States Freedom of Information Act 5 USC 552; the Canadian Access to Information Act, 1982; the Australian Freedom of Information Act, 1982; and the New Zealand Official Information Act, 1982.

3. Freedom of information statutes, apart from regulating the procedure and enforcement of requests for information, always contain provisions for denying requests, for example, on the grounds of national security, international relations, law enforcement, personal privacy, and confidential commercial information (see Klaaren et al 51-60). All these matters are covered extensively in the Open Democracy Bill which is being prepared by the special task force in the office of Deputy President Mbeki. To the extent that this Bill will limit the right of access to information in the Bill of Rights, it will have to comply with the provisions of the general limitation clause. In the view of many comparative precedents, the concern raised by the ANC and FF could be dealt with as permissible limitations in terms of the general limitation clause.

SECTION 32: ADMINISTRATIVE JUSTICE

1. The Technical Committee was instructed to try and draft a clause for publication that incorporated all three options in the draft forwarded to the Sub-Committee on 9 October 1995. The difficulty of incorporating the different options into one clause is that aspects of the different options are mutually exclusive. We have tried to resolve this by isolating the core elements of the three options.
2. This approach conforms with the proper approach to the right to administrative justice in a Bill of Rights. It should not constitute a mini-statute regulating the right to administrative justice as the interim Constitution tries to do, but be a core standard against which a statute regulating administrative justice must be judged. The statute may carve narrower rights to administrative justice (provided it complies with the limitations clause) and it may grant more extensive rights. It is not necessary to include all limitations on the right to administrative justice in the Bill of Rights nor is it necessary to go beyond the core of the right.
3. The core elements of the right to administrative justice to be included in a Bill of Rights are, we suggest, the following:
 - 3.1 The prohibition of ouster clauses.
 - 3.2 The right to lawful administrative action.
 - 3.3 The right to [justifiable/ reasonable] administrative action.

- 3.4 The right to procedural fairness where a person's rights are affected and where the administrative action is applicable to a particular person.
- 3.5 The right to written reasons where the administrative action affects a person's rights or materially affects a person's interests, unless the reasons for such action have been made public.
4. The elements of the three options are not included in the proposed core are as follows:
 - 4.1 Option 1 on page 19 of the 2nd edition provides for procedural fairness in respect of all administrative action. This is extraordinary wide. Firstly administrative action includes the promulgation of delegated legislation. Secondly it includes persons whose interests may be affected (something not even the interim Constitution contemplates). There are good arguments for the *development* of the right to administrative justice in respect of aspects of the above but this should be achieved by statute and the common law, in precisely the way the courts have developed the doctrine of "legitimate expectations".
 - 4.2 In options 1 and 3, it is not necessary to qualify the right to written reasons with the phrase "unless the reasons have been published" because the publication itself constitutes compliance with the duty to supply reasons.
 - 4.3 Option 3 on page 19 of the n edition limits procedural fairness to administrative action that affects rights and "legitimate expectations". There are two reasons for not including "legitimate expectations" in the core elements. Firstly, the inclusion of the doctrine of legitimate expectations will constitutionalise a doctrine that is by its very nature both fact specific and open to wide application. This will have the effect that a definition in the statute, if that is indeed possible, will not prevent the constitutionalising of every case involving the doctrine. If the object of the right is to provide a standard against which to test any administrative justice statute then the constitutionalising of the doctrine will have the effect of transforming the standard into a constitutional cause of action. Secondly, the doctrine has emerged without a constitutional mandate and the limited formulation proposed in the core elements of a right to administrative justice will not impede the further development of the doctrine.
5. The ANC proposed the qualification of the right to administrative justice by subjecting it to the "practicalities and interests of good governance". These concerns can be adequately addressed by the general limitation clause and do not have to be included specifically in a right that is limited to its core elements.

6. The DP proposals concerning the right to administrative justice are contained in their revised submission dated 19 September 1995. During the course of the deliberations the DP amended those submissions. The Technical Committee has considered the revised submissions and has adopted certain proposals in its draft. The main submissions made by the DP are as follows:

6.1 There should be no internal limitations on the scope of the rights. The Technical Committee accepts that should be the case in respect of the right to lawful and reasonable administrative action because these are the core elements of the right. The Technical Committee is of the view however that internal limitations are necessary in respect of procedural fairness because (a) a right to procedural fairness in respect of all types of administrative action is substantially wider than the US "due process" clause, which, even with its limited purview has "flooded state and federal courts with a torrent of difficult and context-specific litigation that has never abated since the due process revolution began in the 1970's" (Professor Michael Asimow "Administrative Law under South Africa's interim Constitution", unpublished draft article, 11/2/95).; (b) it is necessary to narrow the *constitutional* right to procedural fairness. It is just not possible to grant hearings in the hundreds of thousands of low level discretionary decisions that a government constantly makes. It is not an answer to say that this difficulty is capable of being addressed by the limitations clause because administrative burden and costs may not constitute a justification for a limitation of a fundamental right (Re Singh and Minister of Employment and Immigration & 6 Other Appeals 17 DLR 422:

"I have considerable doubt that the type of utilitarian consideration brought forward by Mr Bowie [counsel for the Attorney General of Canada] can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the Charter would be illusory if they could not be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument in my view misses the point of the exercise under s.1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s.7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s.1, it seems to me that the basis of the justification for the limitation of the rights under s.7 must be more compelling than any advanced in these appeals".

(At 218-219)

- 6.2 The reach of the rights should be a function of the "exercise of public power" rather than "administrative action". It is the view of the Technical Committee that this is too widely formulated for a *constitutional* right. The development of the right to administrative justice in respect of holders of public power ought to be left to common law or legislative development.
- 6.3 The express invalidation of other clauses. It is the view of the Technical Committee that the provisions of subsection (a) and the provisions of section 33, Access to Justice, will invalidate any ouster clause.
7. In order to give effect to the injunction to forge one proposal from the three options and after considering the ANC and DP proposals, the Technical Committee proposes the following as a basis for discussion:
- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.**
- (2) Everyone whose rights are affected adversely by administrative action has the right to fair procedure unless the administrative action is of general application.**
- (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons."**

SECTION 33: ACCESS TO JUSTICE

1. The FF proposed a rewording to exclude the possibility that litigants in civil cases or accused in criminal cases can insist that the State should pay for such litigation and\ or provide legal representation.
- 1.1 The right of an accused "to have a legal practitioner provided at state expense if substantial injustice would otherwise result [where the interests of justice require it]", is guaranteed in section 31(3)(e) and should be retained.
- 1.2 Article 6(1) of the European Convention guarantees a right to a "fair trial" in both civil and criminal cases, whereas article 6(3)(c) provides for legal assistance in criminal cases "when the interests of justice so require". On the position in *civil cases* Van Dijk and Van Hoof *Theory and Practice of the European Convention of Human Rights* (1990) 316-317 state: "In the Aire case [Commission Report 1987; Court Judgement 1982] it was held that the right of access to court of Article 6(1) although it does not imply an automatic right to free legal aid in civil proceedings, does not involve the obligation for the contracting States to make access to court possible in either giving

the accused a compensation for his legal costs if he is unable to pay, or reducing the costs of the suit, simplifying the proceedings or the conditions of the suit, or providing for free legal aid, all this under the condition that these costs were necessary for instituting the proceedings and\ or for an adequate presentation of the case of the defence." On 332 they state: "[T]he Strasbourg organs make an independent examination of the complexity of the case and other relevant factors such as the applicable rules of evidence and emotional involvement of the applicant in the outcome of the proceedings." The Technical Committee recommends that the implications of the section 30 "fair trial" guarantee in civil cases be left to the courts to develop, and that limitations to the right be dealt with in ordinary legislation subject to the general limitation clause.

2. The NP proposed as an alternative option the insertion of the word "where appropriate or necessary" between the words "or" and "another".

The change in wording could be considered for inclusion as an option.

SECTION 34: DETAINED, ARRESTED AND ACCUSED PERSONS

1. The right to be released on bail [section 34(1)(e)]

Both the Freedom Front and ANC had reservations about this clause. The wording of section 25(2)(d) of the interim Constitution is confusing. Firstly, the section refers to the right to be released without bail, that is, with no limitations on the accused's freedom of movement or property). Secondly, an accused has a right to be released with bail, that is, with limitations of varying degrees (and often very severe) on the accused's rights to movement and property. When is the accused the holder of the unconditional right to be released and when not? Thirdly, when the interests of justice so requires, there is no right to be released at all.

The core elements of the right are:

- that the infringement of the accused's right to freedom pending the outcome of the criminal proceedings should be decided by a court of law;
- the court of law should consider the accused's freedom at his or her first compulsory court appearance until finality is reached in the case; and
- a court of law should decide the issue in accordance with the interests of justice.

In short, an accused has a right to have all elements of his or her release considered by a court of law in accordance with the interests of justice.

The objective of pre-sentence release is to avoid anticipatory punishment. The issue at bail proceedings is not the guilt or innocence of the accused, but whether the interest of justice will be prejudiced by his or her release subject to conditions.

The absolute content of the right is that the release decision should be taken by a court of law. The accused has the right to have a court determine what the interests of justice require. In South Africa the court's jurisdiction to consider bail has in the past been ousted with respect to serious offenses by bestowing on the Attorney-General the power to make the release decision.

From the above, it is clear that the interests of justice are not limited to the question whether the accused should be detained, but are relevant to all aspects of the bail decisions.

For these reasons, the Technical Committee recommend that section 34(1)(e) be revised to read as follows:

Everyone who is arrested for allegedly committing an offence has the right -

...

(e) to be released from detention subject to reasonable conditions if the interests of justice so permit.

This formulation clearly indicates that the court has a discretion concerning the release of the accused. This discretion must be exercised in accordance with the interests of justice.

2. The right to a legal practitioner at state expense [sections 34(2)(c) and 34(3)(e)]

The Freedom Front have proposed more restrictive wording to these sections. It should be noted that the International Covenant on Civil and Political Rights (1966) which has been signed by South Africa requires that the state ensure to every accused person the right, amongst others -

" ...to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he

does not have sufficient means to pay for it.¹⁰

The test of substantial injustice both in the interim Constitution and in the present draft formulation is a more restrictive test than the international standard referred to above.

3. The right of an arrested person to be placed under judicial authority [Section 34(1)(d)]

Although not raised by any of the parties, the Technical Committee wishes to recommend further changes to this subsection.

3.1 Objectives of the right

The aim of the right is to place an arrested person as soon as possible under the authority of a court. The rationale is twofold: firstly, to minimise the possibility of an arbitrary arrest and detention, and secondly, to protect the arrestee from the possibility of police abuse.

3.2 Structure of the right

Section 25(2)(b) of the interim Constitution relates to two situations, affording the accused two separate rights.

(a) Right in respect of the police to be brought to court

The arrestee has a right enforceable and unqualified right against the police to be brought promptly (48 hours) before a court of law.

(b) Rights in respect of the court

The second situation relates to where the arrested person is before the court. The arrestee has a qualified right to liberty: if there is no charge against him or her, then he or she has a right to immediate release. Any further detention would be arbitrary and contrary to other provisions of the Bill. The absence of a charge indicates that there is no reason why the arrestee should be further detained, and then he or she is entitled to be released.

If there is a charge then the proceedings may be postponed for the purposes of trial. The question then is whether the detention of the accused should continue. The court should thus consider pre-trial release in terms of s 25(2)(d). Unless the court denies pre-trial release in the interests of justice, the accused should be release with or without bail.

10. Article 14(3)(d). A similar provision is found in article 6(3)(c) of the European Convention on Human Rights.

3.3 The Charge

The fact that the arrestee has not been released by the police, assumes that there is a pending charge. The first task of the court is to determine whether the arrestee is indeed an accused person. Unless the prosecutor proffers at the first appearance a charge against the accused, the court is obliged to terminate the proceedings there and then and release the accused.¹¹ A charge at the first appearance need not comply with the constitutional requirements of s 25(3)(b).¹² All that is required is a clear indication of the nature of the offence and an outline of the incriminating facts. More than a nominal charge is required. There seems little point in a court conducting a thorough bail inquiry, yet the basis of the case remains untested.

The essence of the proceedings is to determine whether the further detention of the accused, or even interference with his or her freedom of movement is not arbitrary.

3.4. The phrase, "informed of the reason of further detention"

This phrase to the effect that the accused has the right "to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be release," is confusing. The right to pre-trial release is determined by s.25(2)(d) and it arises at the first court appearance of the accused. Where a court denies pre-trial release, the interests of justice would require that the accused be given a reasoned decision, including the reason for the further detention. The right of appeal would be dependant thereon. It is thus submitted that the only meaning to be given to this phrase is an adjunct to the pre-trial release provision, informing the accused of the reasons for the refusal of bail. This is a right incidental to the right to a bail hearing, and does not warrant to be included in this provision.

3.5 Revised proposed formulation

Section 31(1)(d)

Everyone who is arrested for allegedly committing an offence has the right -

(d) to be brought before a court of law as soon as reasonably

11. Ex parte Prokureur-Generaal, Transvaal 1980 (3) SA 516 (T) 518 H.

12. S v Simango 1979 (3) SA 189 (T) 191 C, requiring such detail, was overruled by Ex parte Prokureur-Generaal, Transvaal, supra.

possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention.

SECTION 35: LIMITATION OF RIGHTS

1. The minutes of the Sub-Committee on 10 October 1995 and the sidenotes to the section reflect a divergence of opinion over the wording of s35(1)(a). The ANC proposed "reasonable" and the DP, FF and the NP insist on "reasonable and necessary". While the words "reasonable" and "necessary" themselves carry different meanings in ordinary use, the terms are really codewords for proportionality when use in the limitations clauses of the Bill of Rights.
2. The European Court of Human Rights and the German courts, in summary, identify the following principles of proportionality"
 - 2.1 The limitation must be capable of achieving the purpose of the limitation.
 - 2.2 The purpose of the limitation may not be realised as effectively by means of a less drastic measure.
 - 2.3 An appropriate relationship must exist between the nature and extent of the limitation and the nature and importance of the rights and public interests protected or promoted by the limitation. "Appropriate" is determined by taking into account the nature and extent of the limitations; nature and importance of the right that is limited; and the nature and importance of the public interest concerned.
3. The Canadian Supreme Court has identified similar criteria:
 - 3.1 The objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. It must bear on a pressing and substantial concern.
 - 3.2 The means chosen to attain those objectives must be proportional or appropriate to the ends. "Proportional or appropriate includes the following components: (a) the measure adopted must be carefully designed to achieve the object in question; (b) they must not be arbitrary, unfair or based on irrational considerations ie they must be rationally connected to the objective; (c) the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question; (d) there must be a proportionality between the effects of the measures and the objective

which has been identified as 'sufficiently important'.

See R v Oaken 26 DLR (4th) and R v Edward Books and Art Ltd 35 DLR (4th)

4. In S v Makwanyane, Chaskalson P draws on these criteria and fashions an approach which the Technical Committee proposes should form the basis of a limitations clause:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality ... The fact that different rights have different implications for democracy ... means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done by on a case by case basis. This is inherent in the requirement of proportionality, which calls for a balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question"

5. It is evident from the above that what is central to any evaluation of limitation of a right is the balancing of the different interests. In order to resolve the divergence of opinion, the Technical Committee proposes the words "reasonable" and "necessary" be dispensed with and that the limitations clause spells out the approach adopted by Chaskalson P.
6. The Technical Committee accordingly proposes the following draft as a basis for discussion:

“(1) The rights in this Bill of Rights, except the rights in section 37, may be limited by or pursuant to a law of general application only to the extent that the limitation is justifiable in an open and democratic society based on freedom and equality which must be determined taking into account -

- (a) the nature and importance of the right that is limited;***
- (b) the nature and importance of the purpose of limitation;***
- (c) the nature and extent of the limitation;***

- (d) *whether the limitation can achieve its purpose; and*
 - (e) *whether the limitation can achieve the purpose of the limitation through less restrictive means.*
- (2) *Any limitation in terms of subsection (1) must be consistent with the Republic's obligations under international law".*

SECTION 38: APPLICATION

1. The NP seeks clarity on the inclusion of the "judiciary" in Subsection (1), in view of the provisions of section 7(1) of the interim Constitution, as well as clauses 39(3) and 38(2) of the draft.
 - 1.1 The inclusion of the "judiciary" is motivated in the Explanatory Memoranda of 9 October 1995 on pp 272-274. Note should be taken of the following explanation on p273: "Including the judiciary in the binding clause does not imply that it is bound to apply the bill of rights in a totally unqualified way. The judiciary in deciding on matters concerning relationships between private parties (like the legislature in making laws, and the executive in administering their execution) can only be bound by the bill of rights to the extent that the bill of rights can be applied to such relationships." See also par 3.4.4 on p274.
 - 1.2 Section 39(3) contains an interpretational directive. It is an incident of the judiciary being bound by the bill of rights. It can furthermore not serve as a substitute for the fact that the judiciary must inevitably be bound by the bill of rights, as explained in the Explanatory Memorandum of 9 October 1995.
 - 1.3 Section 38(2) also applies to the legislature and the executive - it is neither in conflict with the inclusion of the judiciary in section 39(1), nor does its provision reflect on the question whether the judiciary should be included in section 39(1).
2. The FF proposes that subsection (2) starts with the words: "This Bill of Rights does not detract from.....".

The Technical Committee does not agree that the proposed phrase is more accurate and less technical than: "This Bill does not deny the existence ..."
3. The Technical Committee were requested to draw up a list indicating those rights that have as bearers human beings only and those which clearly include legal persons.

4. The Technical Committee was able to agree on a minimum of rights that clearly include legal persons. Some members of the Technical Committee included additional rights. These are reflected in brackets []:

Rights which include juristic persons as bearers:

Section 13(b), (c), (d)	Privacy
Section 14(2)	Freedom of Religion, Belief and Opinion
Section 15	Freedom of Expression
[Section 17	Freedom of Association]
Section 21	Economic Activity
Section 22	Labour Relations
Section 23 (b)	Environment
Section 24	Property
Section 28 (2)	Education
Section 29 (1)	Academic Freedom
Section 31	Access to Information
Section 32	Administrative Justice
Section 33	Access to Justice
[Section 34 (3)	Arrested, Detained and Accused Persons]

5. There was disagreement over whether the balance of the rights ought to be restricted to human beings only. One view was that they should. **The other view was that legal persons can be the bearers of the following rights depending on the nature of the juristic persons concerned:**

Section 8(3)	Equality -[excluding the right not to be unfairly discriminated against on the grounds listed in subsection (3)]
Section 14(1)	Freedom of Religion, Belief and Opinion
Section 16	Assembly, Demonstration and Petition
Section 17	Freedom of Association
Section 20	Freedom of Movement and Residence
Section 29 (1)	Academic Freedom
Section 34 (1), (3)	Arrested and Accused Persons

The following party submissions were received following the Constitutional Committee meeting of 19 October 1995, where it was agreed that:

"[The meeting would] hold Chapter 3 over until the next meeting of the Constitutional Committee. This would allow the technical experts to complete their revision of the draft formulations to reflect discussions in the Constitutional Committee Subcommittee.

.... that if political parties were unhappy with the existing sidebar notes in Chapter 3, they could forward submissions to the Administration for consideration by the technical experts. The deadline for these submissions would be 17h00, Monday 23 October 1995."

PARTY SUBMISSIONS

AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUPPLEMENTARY SUBMISSION TO THE
CONSTITUTIONAL COMMITTEE

THE EQUALITY CLAUSE

The ADCP hereby supplements its submission on the "equality clause" especially as far as the so-called "sexual orientation" provision is concerned.

PARTY SUBMISSIONS

The ADCP is of the opinion that the proposed "sexual orientation" provision is a clear violation of the equality clause and should be deleted.

It is a well-established principle of equality that requires protection. The homosexual community has not every constitutional protection afforded to other groups, like-handed persons, the physically disabled and the mentally disabled. None of these groups have "special" clauses in the constitution to protect them and so should homosexuals be treated equal with all of these groups and minorities.

Of further concern in the "sexual orientation" debate is the aspect of the negation of freedom of speech. Under the "sexual orientation" provision, homosexuals will be able to effectively silence all groups and minorities.

The ADCP is of the opinion that the proposed "sexual orientation" provision is a negation of the essential content of the right to freedom of speech as well as the right to freedom of religion.

ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY SUPPLEMENTARY SUBMISSION TO THE CONSTITUTIONAL COMMITTEE

THE EQUALITY CLAUSE

The ACDP wishes to supplement its submission on the "equality clause" especially as far as the so called "sexual orientation" provision is concerned.

Freedom of Association implies the right not to associate and, as such, private individuals and organisations should have the right to not associate with certain other individuals and organisations. Should the current clause remain, it would mean that a church and a religious school respectively, may be taken to court if it refuses to violate its religious and/or moral principles by employing respectively pastors or church staff and teachers who engage in sexual behaviour that would be contrary to the belief systems of such churches or schools. Surely it cannot be said that any "rights" are violated when such an individual is not employed. Rights will however be very severely violated and negated if the individual could force his or her behaviour based "rights" onto an organisation who find such behaviour irreconcilable with their religious norms and principles. This is akin to allowing an alcoholic to enforce his right to be employed by a religious organisation that has teetotaling as a basic tenet and principle. It is submitted that good enough reasons have simply not been advanced to promote behaviour-based rights to the same level as true status-based rights such as race or birth.

The further truth of the matter is that the homosexual community is using the atmosphere of liberation - especially black liberation - to promote their cause. In the process they are effectively negating the essential content of just about every established notion of status that requires protection. The homosexual community has got every constitutional protection afforded to heterosexuals, left-handed persons, the physically disabled and the mentally disabled. None of these groups have "special" clauses in the constitution to protect them and so should homosexuals be treated equal with all of these groups and minorities.

Of further concern in the "sexual orientation" debate is the aspect of the negation of freedom of speech. Under the "sexual orientation" provision, homosexuals will be able to effectively silence churches and like organisations who denounce their behaviour on religious-ethical grounds. Again this would mean a negation of the essential content of the right to freedom of speech as well as the right to freedom of religion.

It simply is unconscionable to enable any individual and/or group, to abuse the constitution and the provisions of a Bill of Human Rights that are meant for protection through special privileges to actually violate the established foundations of morality and ethics of other individuals or organisations - in this instance religious organisations or individuals.

Taking away special privileges or special enhanced protections, such as with the "sexual orientation" clause - in this instance not including the "sexual orientation" provision constitutionally - still leaves the homosexuals completely protected with all the other provisions of the equality clause. Effectively taking away, however, the rights of religious freedom and freedom of speech or association through the inroads that the "sexual orientation" clause will no doubt have, creates a position of inequality akin to what the black population had (i.e. race) under the apartheid dispensation. A chapter in our history worthy of not being repeated.

Similarly, Freedom of Conscience, belief or opinion will be reduced to meaninglessness every time a homosexual couple demand that their "right" of "sexual orientation" entitles them to be joined together by religious ministers in "marriage". Suddenly, this right will be reduced to nothingness despite provisions being made for principles of law seemingly aimed at protecting religion or belief. A right to freedom of religion is worthless if that right is exclusive of the corollary enabling those adhering to a particular religious belief system of spreading such beliefs and sharing it with others of different faiths who are interested. The right is worthless without giving the right to engage in the practicalities of such a right or conversely to refrain from engaging in activities that are precluded by the particular belief system.

The minister who may be forced to engage in an act of "marrying" a homosexual couple, is effectively being forced to renege on his or her faith - this can not be what the global community had in mind when it formed the convention known as a Bill of Rights as a contract aimed at protecting those worthy of protection and not at falling away the protection afforded to all - that is inequality and not equality neither can it be the goal of the Houses when they sit as a Constitution - writing machinery.

For this exact same reason, the ACDP is against the inclusion of the "gender" provision in the equality clause. We feel that discrimination on the basis of maleness or femaleness is efficiently prohibited by the term "sex" which is also included.

During the Beijing Conference it was noted on the gender issue that women (and, it follows logically) men should not be bound by or restricted to their biological beginnings, meaning the physical parts that makes men different from women.

For the ACDP this term should therefore either be clearly defined to mean the existence of woman and man as the two sexes of human beings or dropped.

This was not done at the Beijing Conference where documentation was handed out that suggested that male and female are the two sexes in their opposite extremes and that in-between were the mixtures of bisexual, transsexual and homosexual.

If this is the definition given to the term gender, the ACDP will oppose its inclusion as strenuously as the "sexual orientation" provision and for exactly the same reasons.

23 OCTOBER 1995

ANC

ANC COMMENTS ON ISSUES FOR INCLUSION IN REPORT ON BILL OF RIGHTS

Section 1: Clause to be re-drafted bearing formulation of preamble and section 3 in mind.

Section 2: Technical experts to give particular attention to affirmative action in this clause. Subsection (4) of the Interim Constitution is preferred.

Section 4: Only options 1 and 2 to be set out in draft. Debate on ACDP option to continue.

Section 5: ANC supports return to use of word "security".

Section 7: ANC proposed a list of rights of juristic persons be drawn up.

Section 8: Subsection (1) should be amended to read: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion." The remainder of the clause is unnecessary. Consideration should be given to inclusion of "ideology" in this clause.

Section 9: Freedom of Expression: The ANC supports the inclusion of academic freedom within this section.

Subsection 2(a) should be amended to read: "propaganda for war or imminent violence". Technical experts should consider a possibly amending subsection 2(b) to read: "advocacy of hatred that constitutes incitement to discrimination, hostility or violence."

Section 15: ANC proposed that technical experts consider inclusion of a German-type clause as an option. Decision on this clause was deferred.

Section 19, 20, 21: Technical experts to consider uniform phrase to be used with in respect of socio-economic rights

Section 22: Overlap with other socio-economic rights to be considered.

Section 24: German basic law option to be considered by technical experts

Section 26: Some qualification may be necessary (eg. In respect of docketts and other information). ANC to consider further. Requested technical experts to consider.

Section 27: Clause should include a right to REQUEST reasons. Such right may however require qualification. Technical experts to consider further.

Section 29: ANC to further consider subsection 1(e). Subsection (2)(b) and © to be considered further. Subsection (5) is to be considered further by the ANC (may need an interim provision).

Section 31: ANC is giving consideration to the necessity of including subsections (1) - (3) in the Bill of Rights.

Subsection 7(a) - "a friend of the detainee" - may need to be considered.

ANC COMMENTS ON THE PROVISION IN ARTICLE 20 ON THE RIGHT

Section 1: Clause to be revised having limitation of protection and section 2 to be revised.
Section 2: Technical experts to give particular attention to alternative action in the clause.
Subsection (a) of the interim Constitution is retained.

Section 3: Only options 1 and 2 to be set out in draft. Create an ACP option to continue.

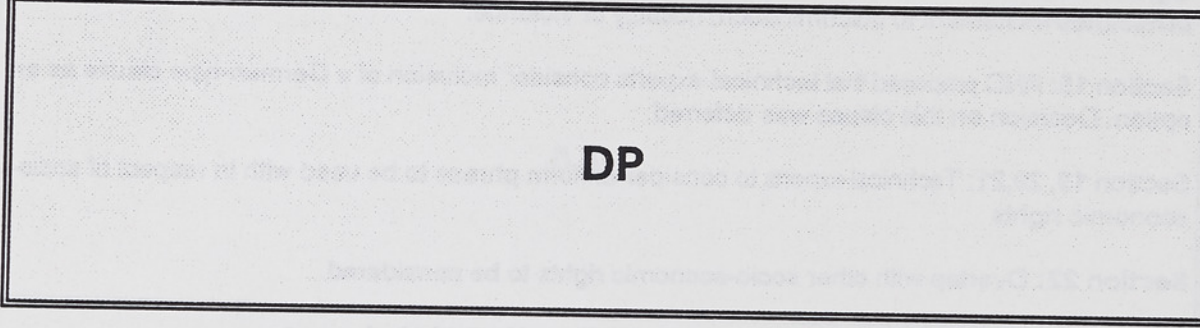
Section 4: ANC supports term in use of word "person".

Section 5: ANC proposes a list of rights of which persons be drawn up.

Section 6: Subsection (1) should be amended to read: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion." The remainder of the clause is unnecessary. Consideration should be given to inclusion of "ideology" in the clause.

Section 7: Freedom of Expression. The ANC supports the inclusion of academic freedom within the clause.

Section 8: Subsection (1) should be amended to read: "propaganda for war or incitement to war." Technical experts should consider a possible amending subsection (2) to read: "propaganda of hatred that



Section 9: Section 9(a) should be amended to read: "propaganda for war or incitement to war."

Section 10: Some qualifications may be necessary, eg. in respect of debate and other information. ANC is consulted further. Technical experts to consider.

Section 11: Clause should include a right to REQUEST reasons. But right may have to require qualification. Technical experts to consider further.

Section 12: ANC is further consulted. Subsection (1)(b) and (c) to be considered further. Subsection (2) to be considered further by the ANC (may need an interim provision).

Section 13: ANC is giving consideration to the necessity of including subsection (1) - (c) in the Bill of Rights.

Section 14: "in front of the tribunal" - may need to be considered.

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PARLEMENT
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Demokratiese Party
Democratic Party

DP COMMENT AND INPUT ON REFINED WORKING DRAFT, BILL OF RIGHTS
25 OCTOBER, 1995

4. Equality

4.2 The DP proposal "...and likely to protect" is noted in the margin, but our first choice remains "reasonable legislative and other measures. A third choice offered was "reasonably likely".

4.3 In addition to present margin notes, we indicated that we must insist on the concept "and without derogating from the generality of this provision" before listing grounds in particular. The plain language version would be acceptable.

9. Privacy

9.(1)(c) The DP noted that communications should be neither intercepted nor violated.

11. Freedom of Expression

The DP amendment is to (1)(b) not (a) and includes deletion of discrimination, hostility and the words that follow violence.

The option to delete the whole (2) should remain.

We attach public media proposal again.

17. Economic Activity

We attach our proposed new clause.

18. Labour

The DP did not agree to this. We attach our proposed changes in addition to the amendment to 4 (a).

20. Property

We attach a proposed clause. We do not accept the German subclause (1).

We do not believe the proposed clauses on insecure rights/tenure belong in the property clause at all.

- 2 -

Sections 21, 22, 23

In addition to our reservations as noted in the margin, we have reservations about social assistance. The key to making the socio-economic rights workable is the phrase "reasonable and appropriate measures".

We re-attach the original DP section which emphasizes need, survival, and review for rationality.

24. *Children*

DP expressed concern about (c).

25. *Education*

DP objected to (b) and assumes clause is still in flux.

26. Although it is correct that a redraft was requested, we reiterate our support for the section.

32. *Limitation*

DP revised submission dated 19 September to be included in the further submissions from political parties on the basis of which Technical Committee is reformulating. The result would be:

32 (1) (a) Reasonable and necessary in an open and democratic society based on freedom and equality of the kind envisaged by the Bill of Rights read as a whole;

(b) as is;

(c) consistent with SA's obligations under international law.

SEE ATTACHED MALAWI Constitution raised in discussion.

33. *Emergency*

(2) (b) DP noted that the section is potentially ambiguous as regards the two thirds majority required for declaration of emergency.

(5) Query.

SECTION 9 - FREEDOM OF EXPRESSION

The State shall ensure that any media or media authority which it finances, controls or supervises shall be impartial and present or promote a diversity of opinion; provided that the State may establish and finance a communication service which fairly promotes government policy.

OR :

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

OR :

SECTION 2 - FREEDOM OF EXPRESSION

The State shall ensure that any media or media authority which is financed or otherwise shall be impartial and present a diversity of opinion.

Any public media financed directly or indirectly by the State must be impartial and present a diversity of opinion.

ECONOMIC ACTIVITY - REVISED SECTION 15

Everyone shall have the right to pursue the livelihood of their choice and, to this end, freely choose their trade, occupation or profession, their place of work and their place of training.

SECTION 16 - LABOUR

1. Right to strike for purposes of collective bargaining.
2. Clause must reflect the appropriate constitutional principles : particularly CP XXV111 : right to fair labour practices.
3. Clause 4 must be qualified by reference to union/employer organization democracy :

Provided that it promotes honest, efficient democratic and accountable governance, every trade union and every employers' organisation has the right :

(a)

PROPERTY - DP

1. Everyone has the right to acquire, hold and dispose of property.
OR: The State shall respect property, and it shall foster conditions which enable persons to hold, acquire and dispose of property on an equitable basis.

2. No one may be arbitrarily deprived of property.
OR: The State may not deprive anyone of property except by means which are fair and justifiable.

3. Property may be expropriated only in terms of a law of general application:
 - (a) for public purposes or in the public interest which includes land reform
 - (b) subject to payment of just compensation which has been either
 - (i) agreed, or
 - (ii) determined by a court of law which must take into account all relevant factors including the current use of the property, the history of its acquisition, its market value, the value of the investment in the property and the interests of those affected.

4. 1913 restitution clause.

SOCIO - ECONOMIC

circumstances and economic conditions permit. Therefore, the Democratic Party proposes the following clause under the heading -

"Entitlement to the Essentials of Life."

- (1) Every citizen shall be entitled to the food and water necessary for survival; to shelter from the elements; to basic health care; to a basic education; and to a clean and healthy environment;
- (2) It is the province of parliament, and of any other authority lawfully exercising power for the purpose, to decide how these entitlements are to be realised. Consequently, any such a decision which is justifiable shall be considered to comply with this article. A decision which is reasonable and practicable and which respects the limitations on the resources available to realize the relevant entitlement, shall be considered justifiable."

A Bill of Rights enacting such a clause, would acknowledge also that the manner in which that entitlement is realized is a matter for the legislature and the executive: to make the choices necessary to realize the entitlement calls for a kind of expertise that only those branches of government, and not the judiciary, command, and for electoral accountability which only those branches enjoy. The Bill of Rights should therefore recognize all such legislative and executive choices, as long as they are justifiable; which is to say, that they are made honestly and rationally.

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

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
 (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests if those interests are known.

on rights

44. (1) There shall be no derogation, restrictions or limitation with regard to -
- ✓ (a) the right to life;
 - ✓ (b) the prohibition of torture and cruel, inhuman or degrading treatment or punishment;
 - ✓ (c) the prohibition of genocide;
 - ✓ (d) the prohibition of slavery, the slave trade and slave-like practices;
 - ✓ (e) the prohibition of imprisonment for failure to meet contractual obligations;
 - ✓ (f) the prohibition on retrospective criminalization and the retrospective imposition of greater penalties for criminal acts;
 - ✓ (g) the right to equality and recognition before the law;
 - ✓ (h) the right to freedom of conscience, belief, thought and religion and to academic freedom; or
 - ✓ (i) the right to habeas corpus.

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1995

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.

(4) Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.

(5) Wherever it is stated in this Constitution that a person has the right to the services of a legal practitioner or medical practitioner of his or her own choice, that right shall be without limitation, save where the State is obliged to provide such services of a legal practitioner or medical practitioner, in which case an Act of Parliament may prescribe that the choice of the legal practitioner or medical practitioner should be limited to those in Government service or employment.

operation and public emergency

45. (1) No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

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NATIONAL ASSEMBLY
PO BOX 15
CAPE TOWN
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Ref No.

To: John Tsalmandris

From: Dene Smuts

Date: 27 October

Dear John

ERRATUM

I have just noticed an error in my fax of 25 October.

25. Education should read:

DP objected to 2 (b) (registration with the State).

ALTERNATIVE : LABOUR

Instead of the amendment to the Labour Clause's sub. 4 I already faxed:

- (4) Every trade union and every employers' organisation has the right -
- (a) to determine its own administration, programmes and activities provided that nothing in this constitution shall preclude laws or measures designed to promote honest, efficient, democratic or accountable governance.

ALTERNATIVE : LIMITATION

Instead of 32 (c) reading:

"Consistent with SA's obligations under international law" we suggest
"consistent with international human rights standards".

Dene Smuts

DENE SMUTS



CONSTITUTIONAL COMMITTEE OF CONSTITUTIONAL ASSEMBLY
(1) and to the extent that the Commission is not satisfied with the
provisions of the Constitution, it may recommend to the Government
to amend the Constitution in such manner as it may see fit.
NOTE: Clause not commented on as (provisionally) approved.

FF



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CONSTITUTIONAL COMMITTEE OF CONSTITUTIONAL ASSEMBLY
COMMENT ON DRAFT BILL OF RIGHTS (DRAFT OF 19 OCTOBER 1995)

NOTE; Clauses not commented on are (provisionally) approved.

1) Clause 4 (Equality)

Proposal: That the word 'unfairly' in clause 4(3) be retained, and that clause 4(4) be deleted.

Motivation: Clause 4(4) places the burden of proof on the respondent. This is an intolerable burden. In criminal law the accused is presumed to be innocent until proved guilty (see clause 31(3)(f)). Even in civil law the burden of proof is on the plaintiff or applicant (not on the defendant or respondent). The rule for centuries has been that he who alleges, must prove. The effect of clause 4(4) is that a mere allegation of discrimination places the defendant at a disadvantage, for all conduct that differentiates can be described as 'discrimination', and it is not possible to engage in any human conduct without differentiating between different people and things.

2) Clause 6 (Life)

Proposal: That option 3 be adopted, provided that the right to reproductive health care (clause 22(1)) be phrased in such a manner that it does not detract from the protection of the potential life 'from the moment of conception' (clause 6(1)).

Motivation: The right to life is not one of the 'universally accepted fundamental rights', as it is qualified even in the International Covenant on Civil and Political Rights, 1966, which is the most comprehensive international instrument reflecting fundamental rights.

3) Clause 7 (Freedom and integrity of the person)

Proposal: That the words 'their [that person's] consent' in subsection (3)(c) be deleted and replaced by the words 'the necessary legal consent'.

Motivation: The consent required may be that of the person concerned or that of a guardian or other person in loco parentis. The present wording is too narrow.

4) Clause 9 (Privacy)

Proposal and motivation: The provisions of subsections (1) and (2) should be qualified to make possible searches by persons authorised by warrant in accordance with the provisions of legislation relating to criminal procedure.

5) Clause 10 (Freedom of religion, belief and opinion)

Proposal: That the word 'any' in subsection (2)(a) be replaced by the words 'all the'.

Motivation: The amendment will give effect to the obvious intention of the drafter.

6) Clause 11 (Freedom of expression)

Proposal: That the words 'a diversity of opinion' in subsection (3) be deleted and replaced by the words 'a survey of the diverse opinions held'.

Motivation: The existing words do not preclude a selective choice of opinions, which is not fair.

7) Clause 12 (Assembly, demonstration and petition)

Proposal: That the words 'to assemble, to demonstrate, or to present petitions' be deleted and replaced by the words 'to assemble and to demonstrate'.

Motivation: There is no universally recognised fundamental right to present petitions, linked to the right of assembly and the right to demonstrate. If such a right were to be sanctioned it would, by implication, mean that a legal burden rests on the recipient of the petition to consider its contents, however unreasonable or unfounded it may be.

8) Clause 14 (Political rights)

Proposal: The word 'adult' should be inserted in subsections (1), (2) and (3), after the word 'Every' in each of these subsections.

Motivation: Minors are also citizens, and Constitutional Principle VIII requires universal adult suffrage.

9) Clause 16: (Freedom of movement and residence)

Proposal: Subsection (4) should be rephrased to read as follows: 'Subject to the provisions of criminal legislation relating to fugitive offenders, every citizen has the right to a passport'.

Motivation: The law should not assist a person involved in criminal proceedings to leave the country.

10) Clause 17 (Economic activity)

Proposal: The Freedom Front supports option 2, subject to the insertion of the words 'authorised by law' after the word 'measures' in subsection (2).

Motivation: The scope of affirmative measures should be regulated by law and not depend merely on administrative decisions.

11) Clause 18 (Labour relations)

Proposal: The right of workers to strike, conferred by subsection (2)(c), should not extend to workers in essential services. Moreover, the right of employers to lock-out (see subsection (3)(c)) should be retained.

Motivation:

Firstly, the grievances of workers in essential services should be regulated by special legislation adapted to the circumstances of their work, so as to ensure that disruption of essential services does not occur.

Secondly, the rights of workers in labour matters should be balanced by corresponding rights pertaining to employers.

12) Clause 20 (Property)

Proposal: In the first place, that clause 20(2) be deleted. Secondly, the Freedom Front proposes the adoption of the first proposal (dated 16 October 1995) as to the text of section 20(6), viz "Every person and community whose rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to

legally enforceable security of tenure'.

Motivation: Firstly, deprivation of property in subclause (2) as presently phrased can take place without compensation (as opposed to expropriation with compensation). Such a deprivation, even if it is in accordance with a law of general application, can amount to arbitrary confiscation by the state, flouting the generally accepted principle in democratic societies that compensation should be paid for deprivation (expropriation) of property.

Secondly, the alternative proposal is not acceptable, as it makes tenure reform dependent on 'any law', which would undermine the guarantees given in this clause of the bill of rights.

13) Clause 21 (Housing and land)

Proposal: That the words 'and the availability of suitable alternative accommodation' in subclause (2)(b) be deleted.

Motivation: A court order for eviction can only be made where the occupation is illegal. To make the eviction subject, inter alia, to the availability of suitable alternative accommodation, is to foster the cause of illegal squatters.

14) Clause 22 (Health)

Proposal: That clause 22(1) be rephrased, to indicate that 'reproductive health care' is limited to sterilisation.

Motivation: Abortion on demand should not be sanctioned under the euphemism 'reproductive health care'.

15) Clause 23 (Social assistance, food and water)

Proposal: That this clause be reformulated in fundamental respects, to reduce the ambit of social assistance from the state.

Motivation: This clause, as presently phrased, reflects a socialist system which contradicts democratic principles. It implies that taxpayers generally should support those 'unable to support themselves and their dependents'.

15) Clause 25 (Education)

Proposal:

In the first instance, that the limitation in subclause

(1)(c) relating to instruction in particular languages should be rephrased in order to make mother-tongue education compulsory.

Secondly, that subclause (2) be rephrased in order to place an obligation on the state to finance private educational institutions that are not wholly able to finance themselves.

Motivation:

In the first place, the relevant subclause, as presently phrased, denies possible instruction in languages of choice that are also official languages.

Secondly, the right to education is a universally accepted fundamental right. In so far as private educational institutions that partially finance themselves are not able to fulfil their functions, the state is obliged to supplement the deficiency. In this context the state's obligation is already diminished by the private funds of such institutions.

16) Clause 26 (Academic freedom)

Proposal: That a guarantee of academic freedom be retained in the bill of rights.

Motivation: The omission of such a provision would amount to a negation of a universally accepted fundamental rights, contrary to the spirit of Constitutional Principle II. However, the wording of subclause (2) should be rephrased to make it more specific.

17) Clause 28 (Access to information)

Proposal: Clause 28(a) should be qualified by fundamental rephrasing.

Motivation: It is completely untenable that everyone should have a right to access to 'any information held by the state'. For instance, an accused could not at all times have a right to information relating to him held by a prosecutor in a criminal case. In any event the concluding words of clause 28(b) ('that is required for the exercise or protection of any [his] rights') should be added to clause 28(a).

18) Clause 29 (Administrative justice)

Proposal: The Freedom Front favours option 3.

Motivation: Option 1 is unacceptable in so far as it is

rather cryptic, compared with option 3. Option 2 is even less acceptable, inter alia, because the deletion of the word 'procedurally' from subsection (1) has the result that the subsection would not be in accordance with the generally accepted legal meaning of the words 'procedurally unfair'.

19) Clause 30 (Access to justice)

Proposal and motivation: This clause must be reformulated, in view of the fact that it could be read as implying that a litigant in a civil case or an accused in a criminal case can insist that that state should pay for such litigation and/or provide legal representation.

20) Clause 31 (Arrested, detained and accused persons)

Proposal: Clauses 31(1)(e), 31(2)(c) and 31(5) should be reformulated, in order to give effect to the points raised in the motivation below.

Motivation: Clause 31(1)(e) places an onerous burden of proof on the state where an accused seeks bail. The burden should rest on the accused to prove that the interests of justice require that he be released. In any event, the court should have a discretion in this regard, which should not be linked to a burden resting on the accused.

As far as clause 31(2)(c) is concerned, the words 'if substantial injustice would otherwise result' should be deleted and replaced by words having a far more restrictive effect, as the present wording will be applicable in virtually all circumstances. (the same objection also applies in the case of clause 31(3)(e).

In subsection 31(5) the words 'would bring the administration of justice into disrepute' should be deleted and should be replaced by the following words: 'would not be in the interests of justice'.

Motivation: The exclusion of evidence is warranted on far wider grounds than the single ground that the administration of justice would otherwise be brought into disrepute.

21) Clause 32 (Limitation of rights)

Proposal: In the first place, that the words 'reasonable and justifiable' in clause 32(1)(a) should be deleted. Secondly, that clause 32(2) be deleted.

Motivation: In the first instance the argument that an entrenched right should be capable of limitation by an

ordinary law of general application on the grounds of reasonableness and justifiability is untenable. It makes a mockery of the concept of entrenchment in so far as any entrenchment can easily be qualified.

Secondly, clause 32(2) is unnecessary: Clause 4(3) (if adopted in the form proposed by the Freedom Front see above) already provides for this contingency. (Clause 32(2) implies that clause 4(3) is insufficient to prohibit unfair discrimination, and that legislation in that regard is necessary.

22) Clause 33 (State of emergency and suspension)

Proposal: In the first place, that the rights mentioned in clause 33(4)(c) be carefully scrutinised and debated before being included in this provision, as the implications of no derogation from so large a number of rights are not immediately clear.

Secondly, it should be considered whether there are any other rights that should be added to this list.

23) Clause 35 (Application)

Proposal: In the first place, the Freedom Front proposes that the words 'This Bill does not deny the existence of' in subclause (2) be deleted and replaced by the following words: 'This Bill does not detract from ...'.

Secondly, the Freedom Front prefers option 1 in respect of subclause (3).

Motivation: In the first place, the proposed initial words of subclause (2) are more elegant than the existing initial words. At the same time they are not unduly technical, but are in accordance with the requirements of plain language.

Secondly, option 2 is in our view not feasible, because it would be impossible to determine in advance the various rights juristic persons should be entitled to. This is a matter to be gradually clarified by the courts in interpreting the words of option 1.

bofright
23.10.1995

CONSTITUTIONAL COMMITTEE

NP NOTES ON THE REFINED WORKING DRAFT OF THE BILL OF RIGHTS

The NP requests that all its comments raised during the previous meetings in respect of the Bill of Rights be noted in the sidebar notes. In addition, the NP requests that the following be added to or noted in the sidebar notes:

Add Clause 4(2)

The NP does not agree with the present formulation of the second sentence of this clause. It does not accurately reflect the intention of the NP. The NP does not view a definitive action measure as an end in themselves, but

NP

Add Clause 7(1)

The NP proposes the insertion of 'security of the person'. We suggest that 'plain language' would indicate that this should be preferred over 'physical and psychological integrity'.

CONSTITUTIONAL COMMITTEE

NP NOTES ON THE REFINED WORKING DRAFT OF THE BILL OF RIGHTS

The NP requests that all its concerns raised during the previous meetings in respect of the Bill of Rights be noted in the sidebar notes. In addition, the NP requests that the following be added to or noted in the sidebar notes;

Add Clause 4(2)

The NP does not agree with the present formulation of the second sentence of this clause. It does not accurately reflect Constitutional Principle V. The NP does not view affirmative action measures as an end in themselves, but as a means to an end. The NP suggests the following alternative:

"This section shall not preclude measures likely to achieve the adequate protection and advancement of persons or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights, freedoms and liberties".

Add Clause 4(3)

For the sake of certainty the NP suggests the inclusion of the words "without derogating from the generality" or "but not limited to" after the word "including", in line 3, as is done in Clause 33(3) where reference is made to "derogation".

Add Clause 7(1)

The NP proposes the insertion of "security of the person". We suggest that "plain language" would indicate that this should be preferred over "physical and psychological integrity".

Add Clause 7(3)(c)

The problems associated with the withholding of consent to medical treatment by guardians of minors has not yet been addressed.

Add Clause 7

The NP opposes the ANC proposal referred to in the sidebar.

Add Clause 9

Provided that option 1 in clause 35(3) is retained, subclause 9(2) will not be necessary.

Add Clause 10(3)

This clause must be qualified by the addition of the words "to the extent consistent with this bill" to bring it into line with the bill's treatment of customary law.

Add Clause 11(2)

The NP opposes the inclusion of this subsection and proposes its deletion in toto as an alternative option.

Add Clause 17

The NP proposes the inclusion as a further option, the relevant clause in the German constitution in respect of economic activity for consideration, as discussed in the CC. The NP is opposed to option 1.

Add Clause 20

The NP requests that the property rights clause reflected as option 1 on page 19 of the draft bill of rights published on 9 October 1995 be included as an alternative option. The NP is opposed to much of the clause as it stands.

Add Clauses 21, 22, 23 and 24

The NP proposes that access to land be separated from the right to housing/shelter. The NP opposes the provision of clause 21(2)(b). The NP wishes to propose the reconsideration of this section in relation to the regrouping and rewording of all socio-economic rights. The NP seeks clarity on the word "home".

The following proposal is made:

"In recognising and protecting human dignity, the state must provide for reasonable, appropriate and progressive measures in accordance with its resources and priorities for the promotion of the following rights:

- (1) Everyone has a right to adequate housing/shelter.
- (2) Everyone has the right not to be evicted from his or her housing/shelter or to have that housing/shelter demolished without an order from a court of law.
- (3) Everyone without adequate resources has the right of access to health care, including reproductive health care, which must at least include the necessary medical treatment.

- (4) Everyone who is unable to support himself or herself has the right to receive reasonable and appropriate social assistance for a reasonable period.
- (5) Everyone has the right of access to clean water and sufficient food.
- (6) Every child has the right ---
 - (a) [retain text]
 - (b) family and parental care etc.
 - (c) basic nutrition, health and social services and shelter
 - (d) be protected from maltreatment, neglect and all forms of abuse and degradation.
 - (e) etc

Add Clause 25

The alternative wording is suggested for subclause (1)(c), not (2)(c) - typing error.

The NP supports the alternative wording.

Add Clause 27

The NP proposes the retention of section 31 of the interim constitution and proposes that be inserted as an alternative option.

Add Clause 30

The NP proposes as an alternative option the suggested wording of the draft with the words "where appropriate or necessary" between the words "or" and "another" in line 3 of this section.

Add Clause 31(5)

The NP supports the inclusion of the proposed subclause (5).

Add Clause 32

1. In respect of subclause (1)(a), the NP favours "reasonable and necessary"
2. The NP opposes the inclusion of subclause (2), because a provision for affirmative action is already adequately catered for in clause 4(2).
3. The NP proposes the inclusion after the words "no law" in line 2 of subclause (3) of the words 'including the common law, customary law or legislation or any other measure with legal effect or impact.
4. The NP seeks clarity on the words "or in any other provision of the constitution" in subclause (3), especially in regard to the possibility of such other provisions being amended by a majority of 50% plus 1.

Add Clause 33

The NP opposes the inclusion of subclause (5).

Add Clause 35

1. The NP seeks clarity on the inclusion of "the judiciary" in subclause (1), in view of the provisions of section 7(1) of the interim constitution as well as clauses 36(3) and 35(2) of this draft.
2. The NP supports subclause (3) of option 1.

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Ntobeko 27 October

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