

2/21/11/2/40

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**TUESDAY
12 MARCH 1996
E249
(10h00)**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

DATE: Tuesday, 12 March 1996

TIME: 10h00 - 18h00

VENUE: E249

DRAFT AGENDA

1. Opening
 2. Bill of Rights
 3. Provinces
 4. Competencies
 5. National Council of Provinces
 6. AOB
 7. Closure
-

N.B. *Additional documents will be distributed when available*

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries: Ms M M Sparg, Tel 245-031



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 11 March 1996
SUBJECT: DRAFT BILL OF RIGHTS

We enclose for your consideration the latest draft formulations produced by the Technical Refinement Team on the (Draft) *Bill of Rights*.

H EBRAHIM
EXECUTIVE DIRECTOR

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

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Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: comp@sa-ccpa.org.za

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12 March 1996



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THE NEW CONSTITUTION

DRAFT - 9 MARCH 1996

Status: For discussion by Constitutional Committee Sub-committee in preparation for report-back to Constitutional Committee.

**CHAPTER 2
BILL OF RIGHTS**

State's duties

7. The state must respect, protect [promote and fulfil]¹ the rights in this Bill of Rights.

Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures that are designed for the protection and advancement of persons or categories of persons disadvantaged by unfair discrimination may be taken.²
- (3) Neither the state [nor any person] may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth [and affiliation or any other grounds].³

¹ Submission from the public propose using the accepted international wording in respect of the State's obligations. See TC4 advisers/Panel memo.

² As agreed.

³ Words in brackets are still in contention. Panel and Technical Committee to provide alternative formulations.

- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.⁴

Human dignity

9. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

10.

Option 1

Everyone has the right to life.

Option 2

Everyone has the right to life and the death penalty is hereby abolished.

Option 3

Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament.

Freedom and security of the person

11. (1) Everyone has the right to freedom of the person, including the right not to be -
- (a) deprived of liberty arbitrarily or without just cause; or
 - (b) detained without trial.
- (2) Everyone has the right to security of the person, including the right -
- (a) to be free from all forms of violence;
 - (b) to [bodily / physical] and psychological integrity; and
 - (c) to make decisions concerning [reproduction / their body] free from coercion, discrimination and violence.
- (3) No one may be -
- (a) tortured in any way;
 - (b) treated or punished in a cruel, inhuman or degrading way; or
 - (c) subjected to medical or scientific experiments without that person's consent.

Slavery, servitude and forced labour

12. No one may be subjected to slavery, servitude or forced labour.

⁴ Agreed. May need to be revisited if "unfair" and "unfairly" fall out.

Privacy

13. Everyone has the right to privacy, including the right not to have⁵ -

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

Freedom of religion, belief and opinion

14. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that -

- (a) those observances follow rules made by an appropriate authority;⁶
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising -
(i) marriages concluded under any tradition or a system of religious, personal or family law; and
(ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
(b) The legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution.

Freedom of expression

15. (1) Everyone has the right to freedom of expression, including -

- (a) freedom of the press and other media;
- (b) freedom to receive and impart information and ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.⁷

(2) The right in subsection (1) does not extend to -

⁵ See Panel/TC4 memo on inclusion of 'arbitrarily'.

⁶ ANC proposes insertion of 'public' to read 'public authority'. NP proposes 'those observances follow rules made by the authority in immediate control of that institution, and does not support ANC proposal. NP agrees to present wording.

⁷ NP wants to be sure provision applies to juristic persons.

- (a) propaganda for war;
- (b) the incitement of imminent violence; or
- [(c) advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to cause harm.]⁸

(3) **Option 1**

The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

Option 2

The state must regulate any newspapers and electronic media that it finances or controls to ensure that they are impartial and represent broadly the views of society.⁹

Assembly, demonstration and petition

16. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, [picket,] or to present petitions.

Freedom of association

17. Everyone has the right to freedom of association.

Political rights

18. (1) Every citizen is free to make political choices, which includes the right

- (a) to form a political party;
- (b) to participate in the activities of, or to recruit members for, a political party; and
- (c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms¹⁰ of the Constitution.

(3) Every adult citizen has the right:

- (a) to vote, in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.

⁸ Section 15(2)(c) still under discussion.

⁹ Possible formulations for this provision and similar provision in Chapter 7 are being prepared by the TRT.

¹⁰ NP questioned the correctness of the words "in terms of". TRT confirms there are the right words.

Citizenship

19. No citizen may be deprived of citizenship.

Freedom of movement and residence

20. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.¹¹

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter and to remain in the Republic.

(4) Every citizen has the right to a passport.

Freedom of occupation

21. Every citizen has the right to choose freely their [trade,] occupation or profession, their place of work and their place of training. [The practice of an occupation may be regulated by law.]

Labour relations¹²

22. (1) Everyone has the right to fair labour practices.

(2) Workers have the right -

(a) to form and join trade unions;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Employers have the right -

(a) to form and join employers' organisations;

(b) to participate in the activities and programmes of an employers' organisation; and

[(c) to lock-out.]

(4) Every trade union and every employers' organisation has the right -

(a) to determine its own administration, programmes and activities;

(b) to organise;

(c) to bargain collectively; and

¹¹ Panel/TC4 memo on use of word 'everyone'.

¹² Section 22 still under discussion.

- (d) to form and join a federation.¹³

Environment¹⁴

23. Everyone has the right -

- (a) to an environment that is not harmful to their health or well-being;
- (b) to have their environment protected through reasonable legislative and other measures designed to -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure sustainable development and use of natural resources.

Property

24. (1) The state must guarantee property [and it must foster conditions which enable people to gain access to property on an equitable basis].

(2) [The nature, content and limits of property may be determined by law.] No one may be deprived of property except in accordance with a law of general application [but no one may be arbitrarily deprived of property].

(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 to address the results of past racial discrimination; and
- (b) subject to the payment of [just and equitable] compensation within a time period and in a manner as agreed or decided by a court.

(4) When a court decides the amount of compensation, timing or manner

Section 22 still under discussion.

¹⁴ NP proposes the following clause:

"Everyone has the right -

(1) to an environment that is not harmful to their health, well-being and quality of life, and

(2) to have their environment protected through reasonable legislative and other measures for the benefit of present and future generations -

(a) preventing pollution and ecological degradation;

(b) promoting conservation;

(c) securing the ecologically sustainable use of natural resources;

(d) safeguarding the environment while promoting justifiable economic development; and

(e) securing the ecological integrity of the environment."

by which payment must be made, the court must determine a fair balance between all relevant interests having regard to all the relevant factors, including -

- (a) the current [and intended] use;
- (b) the history of its acquisition;
- (c) its market value;
- (d) [the ability of the state to pay];
- (e) the purpose of expropriation;
- (f) the level and extent of state investment and subsidy;
- (g) [the value of the investment in the property]; and
- (h) [the need for effective land reform].

[(5) This section does not invalidate reasonable legislative and other measures that are designed to bring about land reform to redress the results of past racial discrimination.]

Housing and land

25. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures [, within its available resources,] to achieve the progressive realisation of this right.

(3) No one may be evicted from their home or have their home demolished without an order of court made after considering the relevant circumstances.

[(4) Everyone has the right to have equitable access to land. The state must take reasonable legislative and other measures [, within its available resources,] to facilitate this access.]¹⁵

Health, food, water, and social security

26. (1) Everyone has the right to have access to -

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures [, within its available resources,] to achieve the progressive realisation of each

¹⁵ Agreed to insert reference to available resources for consideration. Agreed to consider dealing with land in separate clause.

of these rights.

- (3) No one may be refused emergency medical treatment.

Children

27. (1) Every child has the right -

- (a) to a name and a nationality from birth;
- (b) to family care, [parental care], or appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services, and social services;
- (d) to be protected from maltreatment, neglect, abuse, or degradation;
- (e) to be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and
- (f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest period of time and has the right to be -
 - (i) kept separately from other detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.

(2) The child's best interest is of paramount importance in every matter concerning the child.

(3) In this section, "child" means a person under the age of 18 years.

Education

28. *Option 1*

(1) Everyone has the right -

- (a) to a basic education, including adult basic education, in a state or state-aided institution;
- (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
- (c) to choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.

(2) Everyone has the right to establish and maintain, at their own

expense, private educational institutions that -

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Option 2

Subsections (1) and (2) above and the following:-

- (3) Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there must be no discrimination on the ground of race and provided further that the state may not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion.

29. ...¹⁶

Language and culture

- 30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.¹⁷

Access to information

31. *Option 1*

- (1) Everyone has the right of access to -

- (a) any information held by the state; and
- (b) any information that is held by another natural or juristic person [and that is required for the exercise or protection of any rights].

[(2) This right must be regulated by national legislation.]¹⁸

Option 2

- (1) The State must take legislative measures to provide reasonable access to any information that is -

- (a) required for the exercise and protection of any rights; and

¹⁶ Agreed that Section 29 on academic freedom would be incorporated under Section 15.

¹⁷ TRT has considered the formulation and believes it is appropriate. NP wants deletion of words after 'choice'.

¹⁸ Section 31 to be reconsidered when horizontality and juristic persons discussed.

[(b) held by the State or a natural or juristic person.]¹⁹

Just administrative action²⁰

32 Option 1

- (1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.
- (2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published.

Option 2

- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.
- (2) Everyone whose rights are adversely affected 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.

Access to courts

- 33.** Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in a court of law or, where appropriate or necessary, another independent and impartial forum.

Arrested, detained and accused persons

- 34.** (1) Everyone who is arrested for allegedly committing an offence has the

¹⁹ The words in brackets seem unnecessary.

²⁰ ANC proposes the following formulation:

"(1) *The State must provide by way of relevant legislation access to just administrative action.*

(2) *The legislation referred to in subsection (1) must -*

(a) *Provide for the review of administrative action by a court of law or an independent and impartial tribunal;*

(b) *impose a duty on the state and the organs of state to take lawful, reasonable and procedurally fair administrative action;*

(c) *be justifiable in an open and democratic society based on freedom and equality; and*

(d) *promote an efficient administration."*

right -

- (a) to remain silent;
- (b) to be informed, promptly and in a language that the arrested person understands -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court of law as soon as reasonably 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; and

Option 1

to be released with or without bail, unless the interests of justice require that person to be detained [... if the interests of justice permit that person to be released].

Option 2

to be released from detention subject to reasonable conditions if the interests of justice permit.²¹

- (2) Everyone who is detained, including every sentenced prisoner, has the right-
 - (a) to be informed, promptly and in a language that the detained or imprisoned person understands, of the reason for being detained;
 - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly and in a language that the detained person understands;
 - (c) to have a legal practitioner [provided / assigned]²² by the state if substantial injustice would otherwise result, and to be informed of this right promptly and in a language that the detained person understands;
 - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human

²¹ ANC and NP support option 2 and propose deletion of option 1. DP to consider the matter.

²² NP and ANC support 'assigned'. DP to consider.

- dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and
- (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused has a right to a fair trial, which includes the right -
- (a) to be informed of the charge with sufficient details to answer the charge;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial that begins and concludes without unreasonable delay in an ordinary court of law;
 - (d) to be present when being tried;
 - (e) to choose and be represented by a legal practitioner and to be informed of this right in a language the accused understands;
 - (f) to have a legal practitioner assigned to the accused person at state expense if substantial injustice would otherwise result [if the interests of justice require it], and to be informed of this right in a language the accused person understands;
 - (g) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
 - (h) to adduce and challenge evidence;
 - (i) not to be compelled to give self-incriminating evidence;
 - (j) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (k) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (l) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - [m] to be sentenced within a reasonable time after being convicted;²³ and
 - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (o) of appeal to, or review by, a higher court.

²³ NP and ANC propose deletion. DP to consider.

- (4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.²⁴

Limitation of rights

35. (1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation is [demonstrably] justifiable in an open and democratic society based on human dignity, equality and freedom and limits the right as little as is reasonably possible.
- (2) Any limitation in terms of subsection (1) must take into account the nature of the right and -
- (a) the importance of the purpose of the limitation;
 - (b) the nature and extent of the limitation; and
 - (c) whether the limitation can achieve its purpose.
- [(3) The provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit [unfair] discrimination.]²⁵
- (4) Except as provided in subsections (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

States of emergency²⁶

36. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -
- (a) the life of the nation is threatened by war, invasion, [general] insurrection, disorder, [national] disaster, or other public emergency; and
 - (b) the declaration is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and

²⁴ See TC4 Panel memo.

²⁵ This section may be moved to section 8. Panel/TC4 will propose formulation.

²⁶ TRT to draft reformulation.

- (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two thirds of its members, may resolve to extend a declaration of a state of emergency for a period of up to three months, or for consecutive periods of up to three months each [for no more than 14 days ... up to 60 days, or for consecutive periods of up to 60 days each].
- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) (i) is strictly required by the emergency;
 - (b) it is consistent with the Republic's obligations under international law;
 - (c) it conforms to subsection (4); and
 - (d) it is published in the national Government Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
- (a) the creation of retrospective crimes or the imposition of retrospective penalties except for an act or omission that, at the time it was committed, was criminal in terms of international law;
 - (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
 - (c) any derogation from this section or any of the sections listed below.

Section 8	Equality
Section 9	Human dignity
Section 10	Life
Section 11(3)	Freedom from torture and degrading treatment
Section 12	Freedom from slavery and servitude (excluding forced labour)
Section 14	Freedom of religion, belief and opinion
Section 22(1)	Fair labour practices
Section 22(2) and (3)	Right to form and join trade unions or employers' organisations
Section 27(1)(d)	Right of children to not be maltreated, neglected or abused
Section 27(1)(e)	Right of children to freedom from exploitative labour practices
Section 27(1)(f)	Rights of children who are detained

Section 33	Access to courts
Section 34(1)(a) and (b)	Right to remain silent, and to be informed of that right
Section 34(1) (c)	Right not to be compelled to confess or make statements
Section 34(2) (d)	Right to challenge detention and be released
Section 34(3) and (4)	Fair trial
Section 35	Rights contained in limitation section
Section 38	Application of the Bill

(5)...

[(6) Any superior court may enquire into the validity of

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, under a declaration of a state of emergency.]

(7) Whenever anyone is detained in consequence of a declaration of a state of emergency, the following conditions must be observed -

- (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
- (b) a notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and referring to the emergency measures under which that person has been detained;
- (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
- (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
- (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless the detention is necessary to restore peace and order;
- (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
- (g) the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
- (h) the state must present written reasons to the court to justify

the detention or continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

- (8) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

Enforcement of rights

37. Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. The persons who may apply for relief are:

- (a) anyone acting in their own interests;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.

Application

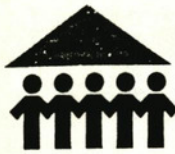
38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state.
- (2) The Bill of Rights binds all natural and juristic persons if applicable.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.
- (4) *Option 1*
Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.²⁷

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, every court -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

²⁷ NP to consider wording.

- (2) When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with the Bill of Rights over any alternative interpretation of the legislation that is inconsistent with the Bill.
- (3) When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 11 March 1996
SUBJECT: Memoranda relating to the *DRAFT BILL OF RIGHTS*

We enclose for your consideration three memoranda produced by Technical Committee 4 and the Panel of Experts relating to the draft *Bill of Rights*. These memoranda are:

- * Panel of Constitutional Experts and Technical Committee 4 Memorandum on *Section 7: "The State Must Respect, Protect, Promote and Fulfil the Rights in This Bill of Rights"*
- * Panel of Experts Memorandum on *Freedom of Movement*; and
- * Technical Committee 4 Memorandum on *Section 20(1) - Restricting the Right to Freedom of Movement and Residence ... to Citizens or Persons Lawfully within the Territory*

H EBRAHIM
EXECUTIVE DIRECTOR

P. O. Box 15, Cape Town, 8000
Republic Of South Africa
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Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: communications@ca.gov.za

Embargoed until 10h00
12 March 1996



You've made your mark



Now have your say

THE NEW CONSTITUTION

PANEL OF CONSTITUTIONAL EXPERTS AND TECHNICAL COMMITTEE 4

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee

DATE: 8 March 1996

SUBJECT: Section 7: *"The State Must Respect, Protect, Promote and Fulfil the Rights in This Bill of Rights"*

1. Certain public submissions have recommended that section 7 be amplified with the words 'promote' or 'promote and fulfil' [See submissions by the Centre for Applied Legal Studies Gender Project (...); Verbruikerstiging (27.26).]
2. **The additions of the words, "promote and fulfil" to section 7 of the Working Draft is recommended by the Technical Committee.** The framework, 'respect, protect, promote and fulfil' is used by scholars to describe the nature of the duties on the state required by human rights instruments.²⁸ These entail a combination of negative and positive duties, and apply to all rights whether they are classified as civil and political or economic, social and cultural. Thus article 2 of the International Covenant on Civil and Political Rights (1966) requires States "to respect and to ensure" the rights in the Covenant to all individual within their territory. It also requires States to adopt legislative and other measures "to give effect" to the rights recognised in the Covenant. The European Convention on Human Rights (1950) requires States "to secure" to everyone within their jurisdiction the rights in the Convention. The American Convention on Human Rights (1969) refers to the obligations of states "to respect and... to ensure" the rights to all persons subject to their jurisdiction. Under the African Charter on Human and Peoples' Rights (1981) States Parties undertake "to adopt legislative and other measures to give effect" to the rights.
3. The obligation 'to respect' the rights requires that States refrain from infringing the right. The obligation 'to protect' the rights requires States to

²⁸H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 5 (1980); A Eide, 'Economic, Social and Cultural Rights as Human Rights' in Eide A, Krause C., and Rosas A. (eds) *Economic Social and Cultural Rights - A Textbook*, (Martinus Nijhoff Publishers: Dordrecht, 1995).

take positive steps to prevent a right from being infringed by both State and private actors. The obligation 'to promote' the rights refers to the duty on the State to take steps to create the necessary culture and social conditions in which the full enjoyment of human rights is possible. Finally, the obligation 'to fulfil' the rights refers to the duty of the State to take measures to ensure the full enjoyment of the recognised rights.

4. The exact scope and extent of the duty in respect of each right will depend on both the nature of the right and the way it has been drafted. Some rights must be realised immediately (e.g. the obligation not to torture) whereas others may be fulfilled progressively over time (the obligation of 'progressive realisation' in respect of the social and economic rights). However, even the right against torture requires states to take positive steps to secure the right. Thus article 2 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) requires States Parties "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Conversely, the social and economic rights cannot only be reduced to a positive duty on the state to secure access to the rights over time. The State also has the duty to respect people's social and economic rights. For example, the State will violate the duty 'to respect' the right to access to food if it interfered, without justification, with the normal means by which a community procures food.
5. Certain public submissions also requested that reference be made to the concept of 'duties' in the Bill of Rights [see submission of the Muslim Assembly (2.33) and of Dr. D. Cowen (...)]. However, the Technical Committee is of the view that the extent to which the provisions of the Bill of Rights impose duties on private individuals is governed by the sections in the Bill of Rights dealing with application.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

To : CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA
DATE : 07 MARCH 1996
RE: : FREEDOM OF MOVEMENT

1. INTRODUCTION

- 1.1 At the meeting of the CC Sub-Committee held on 5/3/96 a concern was raised that the right to freedom of movement and residence as reflected in Section 14 of the Draft Text may be too broad in that it was available to "everyone" without qualification.
- 1.2 The Panel and the technical advisors were asked to consider an amendment to the section which would exclude those persons who are unlawfully within the country as bearers of the right. Reference was made to the provisions relating to freedom of movement and residence in the Canadian Charter of Rights.
- 1.3 We have come to the conclusion that it is neither necessary nor desirable to make any qualification as to who the bearers of the right should be and that the concerns raised are adequately covered by the limitation clause.

2. DESIRABILITY OF QUALIFYING THE RIGHT

- 2.1 CP II provides that "everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution".
- 2.2 None of the international instruments confine the right to citizens as distinct from aliens however, only the Universal Declaration of Human Rights encapsulates the right as available to everyone without qualification. All the international treaties, however, qualify the right in some or other way as

follows:

- 2.2.1 The African Charter on Human and People's Rights - article 12 of 1981 restricts the right to every individual "provided he abides by the law".
 - 2.2.2 Article 22 of the American Convention on Human Rights (1969) obliges the Parties to it to make the rights available to "every person lawfully in the territory of a State Party ..." subject to the provisions of the law".
 - 2.2.3 The parties to the European Convention on Human Rights Protocol 4 - article 2(1950) and the International Covenant on Civil and Political Rights - article 2(1966) have agreed that the right can be availed by everyone who is lawfully in the territory.
- 2.3 The fact that the right is defined in a limited way in these agreements is explained by the circumstance that each agreement reflects the minimal basis upon which all the parties thereto were prepared to be bound. Each of the rights is therefore limited in the course of defining its extent with the result that a general limitation clause in these treaties is both inappropriate and absent.
- 2.4 The Canadian Charter of Rights makes the right available to citizens and permanent residents alone even though the Charter contains a limitation clause. The effect of this is to exclude temporary residents and others who do not qualify as permanent residents in terms of Canadian Law from the protection offered by the right.

We have not been able to find any explanation as for why the Canadians chose this route in any of the literature consulted. It is however true that the adoption of the Canadian Charter was the result of a process which spanned over several years during which the support of the different provinces for such an instrument was explored and negotiated and that the province of Quebec nevertheless refused to be bound. It may therefore be that the relevant article of the Canadian Charter represents a minimal position which all the provinces except the province of Quebec were prepared to accept. The decision to exclude certain persons from being bearers of this right does appear to have been based on policy considerations.

- 2.5 Qualification of the right by limiting the bearers thereof in any way would necessarily mean that a category of persons are excluded and cannot enjoy the right at all. Two examples will suffice. If we follow the Canadian example and limit the bearers of the right to citizens and permanent residents, temporary residents and holiday makers will not be the bearers of the right at all. If bearers are limited to those lawfully in the country, those

unlawfully within the country (because their residence permit may have expired one day earlier on the account of oversight) cannot bear the right.

If any category of persons is excluded from being bearers of this right by definition, it will be impermissible to enquire whether the exclusion passes the test of the limitation Clause. It is preferable to limit the right by legislation which caters for specific circumstances and which must comply with the broad provisions of the limitation clause.

- 2.6 Consideration has been given to whether it may be appropriate to deal with freedom of movement and residence separately in such a way that everyone bears the right to freedom of movement and that the bearers of the right to residence can perhaps be now restricted. This is not considered advisable in the light of the contexts of the relevant international instruments.

3. EFFECT OF THE LIMITATION CLAUSE

- 3.1 As pointed out in the supplementary memo prepared by Technical Advisors to Theme Committee 4 to CC Sub-Committee (Page 97 par 5.2.8) "the freedom of movement of persons not lawfully within the state could be limited by employing the limitations clauses".
- 3.2 Any legislation may need to provide for the immediate detention and deportation of those not lawfully within the country in certain defined circumstances. Legislation might also limit the rights of residence of aliens to those who have been granted rights of residence after complying with certain requirements.
- 3.3 The possibility that such legislation will be held not to comply with a limitation clause is far too remote to warrant any qualification of the right itself.
- 3.4 The decision is one of policy. The CA must determine whether any category of person should be excluded from protection irrespective of the provisions of the limitation clause. Such an exclusion however could have unfair consequences because it cannot, like the limitation clause, accommodate the variety of circumstances in which an alien may be inside SA and which are relevant for determining the extent to which it is proper to limit the rights of such a person. These rights are more appropriately limited by legislation.

TECHNICAL COMMITTEE 4

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee

DATE: 11 March 1996

SUBJECT: Memorandum on Section 20(1) of the *Working Draft* (22/11/1995) - Restricting the Right to Freedom of Movement and Residence within the Republic to Citizens or Persons Lawfully within the Territory

1. INTERNATIONAL INSTRUMENTS

The bearers of the right to freedom of movement within the borders of the state are described as - "everyone" in article 13 of the *Universal Declaration of Human Rights*; - "every individual" in article 12 of the African Charter on Human and Peoples' Rights; and - "everyone lawfully within the territory of the state" in article 2 of the *European Convention Protocol 4*, article 12 of the *International Covenant on Civil and Political Rights*, and article 12 of the *American Convention*.

2. CONSTITUTIONS

- 2.1 United States of America: Although the exact level of judicial scrutiny applied to the limitation of the rights of non-citizens has varied from time to time (Tribe *American Constitutional Law* (1988) 1544-1553), and although it is generally recognised that a variety of governmental concerns could justify less favourable treatment of non-citizens (*Truax v Raich* (1915) 239 US 39 40), non-citizens do enjoy constitutional protection. In principle this also applies to restrictions to their free movement and residence within the state (*Mathews v Diaz* 426 US 67 81-84).
- 2.2 The right to freedom of movement in section 11 of the German Constitution refers only the "Germans". The free mobility of non-Germans is covered by the right to the free development of personality in section 2(1) of the Constitution (Jarass and Pieroth *Grundgesetz* (1992) 235).
- 2.3 Section 6(2) of the Canadian Charter: "Every Citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and to take up residence in any province; and (b) to pursue the gaining of a livelihood in any province."

- 2.4 Section 21 (1) of the Namibian Constitution: "All persons shall have the right to .. (j) move freely through Namibia ..."
- 2.5 Section 19(1) of the Indian Constitution: "All citizens shall have the right ... (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India;"
- 2.6 Sections 18 and 19 of the South African Interim Constitution refer to "every person".

3. **CONSIDERATIONS TO BE TAKEN INTO ACCOUNT IN RECONSIDERING SECTION 20(1) OF THE WORKING DRAFT**

- 3.1 **Replacing "everyone" with "everyone lawfully within the republic"**
Measures dealing with aliens' entering and remaining in the state is not subject to constitutional scrutiny in terms of section 20(3). Once they have passed the hurdle of being lawfully allowed to enter and to stay, they are "lawfully within the Republic". Replacing "everyone" with "everyone lawfully within the Republic" would therefore not change anything vis a vis the present formulation.

It could possibly be argued that the present formulation of section 20(1) accords aliens who are not lawfully in the country constitutionally protected freedom of movement and residence. It is, however, most unlikely that any "illegal immigrant" will ever assert this right. In order to do so they will have to reveal their unlawful entry and residence which can then be terminated. In terms of section 20(3) they are not constitutionally protected when their "remaining" in the Republic is terminated.

3.2 **REPLACING "EVERYONE" WITH "EVERY CITIZEN"**

Measures restricting the free movement and residence of non-citizens could entail restricting them to, or excluding them from particular provinces, districts or other localities. (Their entry and the duration of their stay is not constitutionally protected (section 20(3)) and their physical apprehension by means of arrest and detention is covered by sections 11 and 25 which apply to "every person".) In terms of the present formulation such restrictions can be imposed if the general limitations clause is complied with. Although the need to impose such restrictions on a variety of non-citizens (tourists, temporary residents, permanent residents, etc) who have been admitted to the Republic and permitted to stay for a longer or shorter period, basically requires a policy decision, it is submitted that if the need for such restrictions should arise, it could be dealt with in terms of the general limitations clause.

I.M. RAUTENBACH
8 March 96



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee

FROM: Executive Director

DATE: 11 March 1996

SUBJECT: National Party Proposal on *Section 23 - Environment*

We include for your consideration the National Party Proposal on *Clause 23 - Environment*, tabled at the Constitutional Committee Sub-committee meeting on Tuesday, 5 March 1996.

H EBRAHIM
EXECUTIVE DIRECTOR

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

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Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: conf@sa.gov.za

**Embargoed until 10h00
12 March 1996**



You've made your mark



Now have your say

THE NEW CONSTITUTION

NATIONAL PARTY PROPOSAL - BILL OF RIGHTS

Clause 23 - Environment

"23. Everyone has the right -

(1) to an environment that is not harmful to their health, well-being and quality of life, and

(2) to have their environment protected through reasonable legislative and other measures for the benefit of present and future generations -

- (a) preventing pollution and ecological degradation;**
- (b) promoting conservation;**
- (c) securing the ecologically sustainable use of natural resources;**
- (d) safeguarding the environment while promoting justifiable economic development; and**
- (e) securing the ecological integrity of the environment."**



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee

FROM: Executive Director

DATE: 11 March 1996

SUBJECT: African National Congress Proposal on *Section 24 - Property Clause*

We enclose for your consideration a document from the African National Congress entitled, *Further ANC Proposals on Property Clause (28 Feb 1996)*.

H EBRAHIM
EXECUTIVE DIRECTOR

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

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Embargoed until 10h00

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: comsec@jacobs 12 March 1996



You've made your mark



Now have your say

THE NEW CONSTITUTION

FURTHER ANC PROPOSALS ON PROPERTY CLAUSE (28 FEB 1996)

- (1) Everyone has the right to have equitable access to land. The state must take reasonable and progressive legislative and other measures to secure this access.
- (2) The institution of property shall be respected. Its nature, use, content and limits shall be determined by law.
- (3) No one may be deprived of property except in accordance with a law of general application.
- (4) Property may be expropriated only in terms of a law of general application -
 - (a) for public purposes or in the public interest;
 - (b) subject to the payment of compensation within a time period and in a manner as agreed or decided by a court.
- (5) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine an equitable balance between the public interest, which includes land reform, and the interests of those affected, having regard to all relevant factors, including -
 - (a) the current use of the property;
 - (b) the nature of the property;
 - (c) the history of its acquisition, occupancy and use;
 - (d) its market value;
 - (e) the ability of the state to pay;
 - (f) the extent of state investment and subsidy;
 - (g) purpose of expropriation;
 - (h) the nation's commitment to land reform and measures to bring about equitable access to water.
- (6) This section shall not invalidate reasonable legislative and other measures that are designed to redress the results of past racial discrimination in respect of access to land, water and other natural resources.
- (7) Every person and community dispossessed of land after 19 June 1913 as a result of any law or practice which would have been inconsistent with the provisions of section 8 of this Constitution had that section been in operation at the time of the dispossession, shall be entitled to restitution of that land or alternatively, an equitable redress in the manner described by legislation.*
- (8) Every person and community whose existing rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to legally secure rights to that land or comparable redress as prescribed by legislation.

* Should provision for the restitution of mineral rights be included in this clause?

