

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

DRAFT BILL OF RIGHTS

**VOLUME TWO
FORMULATIONS**

NOTE:

Constitutional Assembly

As a matter of courtesy for readers this document has the following special features:

- Parallel pages on the left-hand page expounds the relevant sections of the draft prepared by the Technical Committee.
- Number notes showing the status of the drafts at the time of printing, cross references to the other sections of the draft, to the interim Constitution and the Technical Committee's Explanatory Memorandum.
- The Explanatory Memoranda that accompany the text are included in the document entitled:

Draft Bill of Rights

TABLE OF CONTENTS OF DRAFT BILL OF RIGHTS

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As a matter of courtesy for readers this document has the following special features:

- Parallel provisions from the Interim Constitution on the left-hand page opposite the relevant sections of the draft prepared by the Technical Committee.
- Sidebar notes showing the status of the drafts at the time of printing, cross references to the other sections of the draft, to the Interim Constitution and the Technical Committee's Explanatory Memorandum.
- The Explanatory Memoranda that accompany the text are contained in the document entitled:
"Draft Bill of Rights - Volume One: Explanatory Memoranda"

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SECTION 8

EQUALITY

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

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

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

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

It is proposed that the clause parallel to Section 8(3)(b) relating to land restitution be placed in section 18 - Property. Since that seemed more appropriate, it appears in that section, on page 19 of this text.

BILL OF RIGHTS

SECTION 1

STATE DUTY TO RESPECT AND PROTECT RIGHTS

Human dignity is the foundation of a just society; the state therefore must respect and protect the rights declared in this Bill.

Status: Not yet considered by CC

See explanatory memorandum - page 1

SECTION 2

EQUALITY

- (1) Everyone is equal before the law and is entitled to equal protection [and benefit] of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, any legislative body may enact laws and the state may engage in other measures designed to protect and advance groups or categories of persons disadvantaged by unfair discrimination.
- (3) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth. [,or marital status.]
- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless a fair reason for the discrimination is established.

Status: Not yet considered by CC

See explanatory memorandum - page 2

SECTION 10

HUMAN DIGNITY

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

SECTION 10

LIFE

Every person shall have the right to life.

SECTION 3

HUMAN DIGNITY

Everyone has inherent dignity and the right to have their [that] dignity respected and protected.

Status : Considered by CC who asked Tec Com to redraft.

See explanatory memorandum - page 14

SECTION 4

LIFE (4 OPTIONS)

Option 1

- (1) Everyone has the right to life.
- (2) No law permitting a penalty of death is valid.
- (3) Parliament may make laws to provide for and regulate termination of pregnancy.

Status: Not yet considered by CC

See explanatory memorandum - page 22.

Option 2

Everyone has the right to life.

Option 3

Everyone has the right to life which must be respected by others and protected by law from the moment of conception.

Option 4

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

SECTION 11

FREEDOM AND SECURITY OF THE PERSON

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

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

SECTION 12

SERVITUDE AND FORCED LABOUR

No person shall be subject to servitude or forced labour.

SECTION 5

FREEDOM AND INTEGRITY OF THE PERSON

- (1) Everyone has the right to physical and psychological integrity and to freedom of the person.
- (2) No one may be -
 - (a) deprived of liberty arbitrarily or without just cause; or
 - (b) detained without trial.
- (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 their [that person's] consent.

Status: Considered by CC who asked Tec Com to redraft.

See explanatory memorandum - page 29.

physical and psychological integrity: This change of wording is suggested as it more clearly expresses the scope of the right to security of the person. See paragraphs 4.1.6. on page 31, and 6.3 on page 33, in the memorandum.

SECTION 6

SLAVERY, SERVITUDE AND FORCED LABOUR

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

Status: Considered by CC who asked Tec Com to redraft.

See explanatory memorandum - page 37

The word *slavery* has been added. See paragraph 4.1 on page 41 of the memorandum.

SECTION 13

PRIVACY

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

SECTION 14

RELIGION, BELIEF AND OPINION

- (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
- (3) Nothing in this Chapter shall preclude legislation recognising-
 - (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

SECTION 7

PRIVACY

- (1) Everyone has the right to privacy, including the right not to have -
 - (a) their person, home, or property searched;
 - (b) their possessions seized; or
 - (c) their communications violated.
- (2) Every legal person has the right not to have -
 - (a) their property searched;
 - (b) their possessions seized; or
 - (c) their communications violated.

Status: Not yet considered by CC

See explanatory memorandum - page 44

Subsection (2) will not be necessary if it is decided to accept the option of a general clause dealing with the rights of juristic persons.

That option is set out in a note to Section 33(4) - Application on page 45, and it is discussed at paragraph 4 on page 46 of the memorandum.

SECTION 8

FREEDOM OF RELIGION, BELIEF AND OPINION

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion, including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public.
- (2) Religious observances may be conducted at state or state-aided institutions provided -
 - (a) that those observances follow any rules established by an appropriate authority;
 - (b) that they are conducted on an equitable basis; and
 - (c) that attendance at them is free and voluntary.
- (3) Nothing in this Bill of Rights precludes legislation recognising -
 - (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

Status: Considered by CC who asked Tec Com to redraft.

See explanatory memorandum - page 51

The CC should give special consideration to sub-section 8(3) as it may render certain aspects of religious personal law immune from attack under the Constitution, even if aspects violate fundamental rights by being unfairly discriminatory on the grounds of sex. See footnote 2 of paragraph 6 on page 57 of the memorandum.

The Constitutional Committee will have to take a decision on this matter. If necessary, this sub-section can then be re-formulated.

Some options for dealing with Academic Freedom could result in additional clauses being added to this section. Please see section 24 on page 25 of this text, and the discussion on pages 184 to 188 of the memorandum on Academic Freedom.

SECTION 15

FREEDOM OF EXPRESSION

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

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

SECTION 16

ASSEMBLY, DEMONSTRATION AND PETITION

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

SECTION 17

FREEDOM OF ASSOCIATION

Every person shall have the right to freedom of association.

SECTION 9

FREEDOM OF EXPRESSION

Option 1

- (1) Everyone has the right to freedom of speech and expression, including -
 - (a) freedom of the press and other media; and
 - (b) freedom to receive and impart information and ideas.
- (2) The speech and expression protected in subsection (1) does not include either -
 - (a) propoganda for war; or
 - (b) advocacy of hatred that constitutes incitement to discrimination, hostility or violence, and that is based on race, ethnicity, gender, or religion.
- (3) 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

As Option 1 but without subsection (2).

SECTION 10

ASSEMBLY, DEMONSTRATION AND PETITION

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, or to present petitions.

SECTION 11

FREEDOM OF ASSOCIATION

Everyone has the right to freedom of association.

Status: Considered by CC who asked Tec Com to redraft.

See explanatory memorandum - page 58

The impact of sub-section (3) on media produced by the state is not clear, for example, whether it extends to the government printers and educational material.

The following option based on article 10 of the European Convention on Human Rights could be considered in the place of this section -

Nothing in this section may prevent the state from requiring the licensing of broadcasting and other media.

Some options for dealing with Academic Freedom could result in additional clauses being added to this section. Please see section 24 on page 25 of this text, and the discussion on pages 184 to 188 of the memorandum on Academic Freedom.

Status: Not yet considered by CC

See explanatory memorandum - page 67

Status: Not yet considered by CC

See explanatory memorandum - page 72

SECTION 21

POLITICAL RIGHTS

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

SECTION 20

CITIZENS' RIGHTS

Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.

SECTION 18

FREEDOM OF MOVEMENT

Every person shall have the right to freedom of movement anywhere within the national territory.

SECTION 19

RESIDENCE

Every person shall have the right freely to choose his or her place of residence anywhere in the national territory.

SECTION 12

POLITICAL RIGHTS

- (1) Every citizen is free to make political choices which includes the rights -
 - (a) to form a political party;
 - (b) to participate in the activities of, or to recruit members for, any political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to vote in secret in free, fair, and regular elections.
- (3) Every citizen has the right to stand for election to public office and, if elected, to hold office.
- [(4) Every citizen has the right to equal access to public service.]

Status: Not yet considered by CC

See explanatory memorandum - page 77

The right in sub-section (4) is guaranteed in a number of international instruments, except the European Convention. It is unclear, however, exactly what scope it has. It is offered here for consideration.

SECTION 13

CITIZENS' RIGHTS

No citizen may be deprived of their citizenship.

Status: Not yet considered by CC

See explanatory memorandum - page 84

SECTION 14

FREEDOM OF MOVEMENT AND RESIDENCE

- (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.
- (2) Every citizen has the right to remain in the Republic.
- (3) Everyone has the right to leave the Republic and every citizen has the right to return to the Republic.
- [(4) Every citizen has the right to a passport.]

Status: Not yet considered by CC

See explanatory memorandum - page 93, for *Movement*.

See explanatory memorandum - page 100, for *Residence*.

Sub-section (4) is bracketed as it is being offered by the technical committee for consideration. See footnote 2 of paragraph 6 on page 105 of the memorandum.

SECTION 26

ECONOMIC ACTIVITY

- (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
- (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

SECTION 27

LABOUR RELATIONS

- (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1).

SECTION 15

ECONOMIC ACTIVITY

Option 1

Omit the present provision s 26 entirely.

Option 2

- (1) Everyone has the right to pursue a livelihood and engage in economic activity anywhere in the Republic.
- (2) Subsection (1) does not preclude measures that are designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices, or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

Status: Not yet considered by CC

See explanatory memorandum - page 106

SECTION 16

LABOUR RELATIONS

- (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; and
 - (b) to participate in the activities and programmes of an employers' organisation.
 - [(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;
 - (d) to form and join a federation.

Status: Not yet considered by CC

See explanatory memorandum - page 107.

The right to lock-out in subsection (3)(c) has been bracketed as its inclusion is contentious. Please see paragraphs 7.2.2 on page 113, and 7.3.2 on page 114 of the memorandum.

SECTION 29

ENVIRONMENT

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

SECTION 17

ENVIRONMENT

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 measures designed to -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure sustainable development and use of natural resources.
- [(c) to access any information about the environment-
 - (i) that is held by the state; or
 - (ii) that is held by another person and that is required for the exercise or protection of any rights in this section.]

Status: Not yet considered by CC

See explanatory memorandum - page 117

Paragraph (c) is not required if option 3 of the general clause dealing with the right of Access to Information is accepted.

That option is presented under Section 26 on page 27, and is discussed at paragraph 5.5 on page 124 of the memorandum.

SECTION 28

PROPERTY

- (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

SECTION 18

PROPERTY

OPTION 1

- (1) Everyone has the right to acquire, hold, and dispose of property.
- (2) No one may be deprived of property except in accordance with a law of general application.
- (3) Property may be expropriated in terms of a law of general application -
 - (a) for a public purpose or in the public interest; and
 - (b) subject to payment of compensation which has been either -
 - (i) agreed, both in terms of the amount and the payment schedule; or
 - (ii) decided by a court of law to be just and equitable.
- (4) When any court decides either the amount or payment schedule of compensation in terms of subsection (3)(b)(ii), the court must consider all relevant factors, including, with respect to the amount of compensation -
 - (a) the current use of the property;
 - (b) the history of its acquisition;
 - (c) its market value;
 - [(d) the value of the investment in the property by those affected]; and
 - [(e) the interests of those affected].
- (5) Anyone who, or any community that, was dispossessed of land before 27 April 1994 under any law that would have been inconsistent with subsection 2 had this Bill of Rights been in effect at the time, has a right to claim restitution of that land, subject to and in accordance with section {land restitution provisions}.

Status: Not yet considered by CC

See explanatory memorandum - page 126

The Technical Committee of Theme Committee 6.3 has proposed an additional section dealing with *land rights*. Please see pages 138 and 139 of the memorandum.

There is a dispute as to which phrase - *public purpose* or *public interest* - gives the State wider powers of expropriation. To avoid protracted disputes as to which phrase has the broader meaning, and to avoid an interpretation which limits the concept, the following phrase is suggested:

"... for a public purpose or in the public interest".

Subsection (5) relating to land restitution parallels Section 8(3)(b) of the Interim Constitution which appears on page 2 of this text. Its inclusion in the Property section seemed more appropriate.

OPTION 2

No property clause at all.

- (1) Everyone has the right to acquire, own, dispose of, lease, use, control, and dispose of property in accordance with the law.
- (2) No one may be deprived of property except in terms of a law of general application and subject to the payment of compensation as provided in this section.
- (3) A law that permits the deprivation of property in terms of this section must be reasonable and just in the circumstances.
- (4) A law that permits the deprivation of property in terms of this section must also provide for the payment of compensation.
- (5) When any court decides upon the amount of payment of compensation in terms of subsection (3) or (4), the court must consider all relevant factors, including, with respect to the amount of compensation -
 - (a) the current use of the property;
 - (b) the history of its acquisition;
 - (c) its market value;
 - (d) the value of the investment in the property by those affected; and
 - (e) the interests of those affected.
- (6) Anyone who or any community that was dispossessed of land before 27 April 1994 under any law that would have been inconsistent with subsection 2, has a right to claim. Rights in respect of the land, subject to and in accordance with section 2, shall be determined in accordance with section 2.

SECTION 19

ADEQUATE HOUSING

- (1) Everyone in need [whose own efforts or resources are inadequate to provide housing] has a right to reasonable and appropriate assistance from the state to secure adequate housing.
- (2) Everyone has the rights not to be evicted from home, or have their home demolished -
 - (a) arbitrarily or unlawfully; and
 - (b) without an order from a court made after considering whether suitable alternative housing is available.

Status: Not yet considered by CC

See explanatory memorandum - page 141, and note in particular, the footnotes to paragraph 7, on page 155.

SECTION 20

HEALTH

- (1) Everyone has the right to -
 - (a) health care which the state must take reasonable and progressive measures to improve and make accessible to all; and
 - [(b) reproductive health including the right to have information and access to safe and affordable methods of contraception.]
- (2) Any measures taken by the state in terms of subsection (1) must include at least necessary medical treatment for anyone without adequate resources.

Status: Not yet considered by CC

See explanatory memorandum - page 156, and note in particular, the footnotes.

SECTION 30

CHILDREN

- (1) Every child shall have the right-
 - (a) to a name and nationality as from birth;
 - (b) to parental care;
 - (c) to security, basic nutrition and basic health and social services;
 - (d) not to be subject to neglect or abuse; and
 - (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well- being.
- (2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.
- (3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

SECTION 21

SOCIAL ASSISTANCE, FOOD AND WATER

- (1) Everyone who is unable to support themselves and their dependants has the right to receive reasonable and appropriate social assistance from the state.
- (2) Everyone has the right to clean water and sufficient food which the state must take reasonable and appropriate measures to make accessible.

Status: Not yet considered by CC

See explanatory memorandum - page 156, and note in particular, the footnotes.

SECTION 22

CHILDREN'S RIGHTS

Every child has the right to -

- (a) a name and a nationality from birth;
 - (b) family care, or appropriate alternative care when removed from the family environment;
 - (c) basic nutrition and health and social services;
 - (d) be protected from maltreatment, neglect, or abuse;
 - (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 and for the shortest possible period of time and, if detained, 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.

Status: Not yet considered by CC

See explanatory memorandum - page 157

SECTION 32

EDUCATION

Every person shall have the right-

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

The right of *equal access to educational institutions* does not appear to add anything to the general prohibition on unfair discrimination in the equality section. It may lead to confusing interpretations of both the education and the equality sections. It has accordingly been omitted from the proposed draft formulation.

SECTION 23

EDUCATION

- (1) Everyone has the right to -
 - (a) a basic education, including adult basic education, in a state or state-aided institution;
 - (b) further education, which the state must take reasonable and progressive measures to make generally available and accessible; and
 - (c) 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.

SECTION 24

ACADEMIC FREEDOM

- (1) Every institution of higher learning and everyone within these institutions has the right to academic freedom.
- (2) Everyone has the right to freedom of artistic creativity and scientific research [activity].

Status: Not yet considered by CC

See explanatory memorandum - page 165, noting in particular, the footnotes to paragraph 7 on page 173.

Some options for dealing with Academic Freedom could result in additional clauses being added to this section. Please see section 24 on page 25 of this text, and the discussion on pages 184 to 188 of the memorandum on Academic Freedom.

Status: Considered by CC and CC Sub-Committee, who asked Tec Com to redraft.

See explanatory memorandum - page 178

There are a number of options for placement of this section. They are discussed at length on pages 184 to 188 of the memorandum.

SECTION 31

LANGUAGE AND CULTURE

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

SECTION 23

ACCESS TO INFORMATION

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

SECTION 25

LANGUAGE AND CULTURE

Option 1

Everyone has the right to choose a language and a culture, and to use that language and participate in the life of that culture but no one exercising this right may violate the rights of anyone else.

Option 2

Everyone has the right to choose a language and a culture, and to use that language and participate in the life of that culture.

SECTION 26

ACCESS TO INFORMATION

Option 1

Everyone has a right to access any information held by the State.

Option 2

Everyone has the right to access any information held by the State or any other body exercising public power.

Option 3

Everyone has a right to access -

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

Status: Not yet considered by CC

See explanatory memorandum - page 189, noting in particular the footnotes to paragraph 7 of the memorandum, on page 195.

Status: Considered by CC who asked Tec Com to redraft.

See explanatory memorandum - page 196

If option three is not accepted, consideration should be given to retaining the bracketed paragraph (c) of section 17 - Environment, on page 17.

SECTION 24

ADMINISTRATIVE JUSTICE

Every person shall have the right to-

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

SECTION 22

ACCESS TO COURT

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

SECTION 27

ADMINISTRATIVE JUSTICE (3 OPTIONS)

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

The same as Option 1, except delete the words "lawful" and "procedurally" from subsection 1.

Option 3

- (1) Anyone whose rights or interests are affected or threatened by administrative action has the right -
 - (a) to have that administrative action be fair, reasonable, and justifiable; and
 - (b) to be given written reasons for that administrative action, unless those reasons have been published.
- (2) Anyone whose rights or legitimate expectations are affected or threatened by administrative action has the right to have that administrative action be reasonably fair.

SECTION 28

ACCESS TO COURTS/JUSTICE

Option 1

Everyone has the right to have justiciable disputes decided in a fair, public hearing in either a court of law or another independent and impartial forum.

Option 2

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

Status: Not yet considered by CC

See explanatory memorandum - page 202, noting in particular pages 207 - 208.

Status: Not yet considered by CC

See explanatory memorandum - page 209

The phrase, *in a fair, public hearing* has been inserted to bring this section into line with international human rights instruments.

SECTION 25

DETAINED, ARRESTED AND ACCUSED PERSONS

(1) Every person who is detained, including every sentenced prisoner, shall have the right-

(a) to be informed promptly in a language which he or she understands of the reason for his or her detention;

(b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;

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

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

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

(a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and

(d) to be released from detention with or without bail, unless the interests of justice require otherwise.

SECTION 29

DETAINED, ARRESTED AND ACCUSED PERSONS

- (1) Everyone who is arrested for allegedly committing an offence has the right -
 - (a) to remain silent;
 - (b) to be informed, promptly and in a language that the accused person understands -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of giving up that right;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) within 48 hours of being arrested, either to be released or to be brought to a court of law and, while there, to be either charged or informed of a reason for the detention to continue; but, if no court is in session within 48 hours of an accused person being arrested, that person may be detained until the next day that a court is in session; and
 - (e) 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.]
- (2) Everyone who is detained or imprisoned has the right -
 - (a) to be informed, promptly and in a language that the detained or imprisoned person understands, of the reason for being arrested or 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 or imprisoned person understands;
 - (c) to have a legal practitioner provided at state expense if substantial injustice would otherwise result [if the interests of justice require it];
 - (d) to challenge the lawfulness of the detention in

Status: Not yet considered by CC

See explanatory memorandum - page 214, in particular the notes on pages 227 to 229.

The ordering of the various subsections, as they appear in section 25 of the Interim Constitution, has been altered to better reflect the actual sequence that events would follow.

- (3) Every accused person shall have the right to a fair trial, which shall include the right-
- (a) to a public trial before an ordinary court of law within a reasonable time after having been charged;
 - (b) to be informed with sufficient particularity of the charge;
 - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
 - (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
 - (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
 - (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
 - (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
 - (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
 - (j) to be sentenced within a reasonable time after conviction.

- 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 dignity, including at least the provision of adequate 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 defense;]
 - (c) to a public trial that begins, and concludes, without delay in an ordinary court of law;
 - [(d) to be present when being tried;]
 - (e) to choose and be represented by a legal practitioner, to have a legal practitioner provided at state expense if substantial justice would otherwise result, [where the interests of justice require it,] and to be informed of both of these rights;
 - (f) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
 - (g) to adduce and challenge evidence;
 - (h) 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;
 - (i) not to be convicted for any act or omission which was not an offence under [either] national

(1) Every person has the right to a fair trial in a court of law, and to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(2) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(3) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(4) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(5) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(6) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(7) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(8) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(9) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

(10) Every person has the right to be tried in a language that he or she understands and can participate in. If a person is not able to understand or participate in the proceedings, the court must provide an interpreter.

[or international] law at the time it was committed or omitted;

(j) not to be tried on any charge for which that person has previously been either acquitted or convicted;

(k) to be sentenced within a reasonable time after being convicted;

(l) not to be sentenced to a more severe punishment than that which was applicable when the offence was committed; and

[(m) to the benefit of the least severe of the prescribed punishments, if the prescribed punishment for the offence has been changed during the period between the time that the offence was committed and the time of sentencing;]

(n) of appeal to, or review by, a higher court.

(4) No one may be compelled to give self-incriminating evidence.

[(5) Any evidence obtained in a manner that violates any right in this Bill must be excluded if the admission of that evidence would bring the administration of justice into disrepute.]

Since certain parties expressed support for a clause establishing the right to have tainted evidence excluded, a formulation has been proposed in subsection (5). The placement of this clause would have to be carefully considered. It could be added as a subsection of this section, as proposed here. Alternatively, it could stand as an independent right. This might be preferable as the exclusionary clause covers both civil and criminal proceedings while this section is concerned only with proceedings in criminal trials.

SECTION 33

LIMITATION

- (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
- (a) shall be permissible only to the extent that it is-
 - (i) reasonable; and
 - (ii) justifiable in an open and democratic society based on freedom and equality; and
 - (b) shall not negate the essential content of the right in question, and provided further that any limitation to-
 - (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
 - (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.
- (2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.
- (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
- (4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1).
- (5) (a) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.
- (b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

The bifurcated approach to the requirement of *necessity* in the present clause is not supported by political parties in its present form.

The parallel section has been placed in the section 33 - Application, on page 45 of the draft Bill.

There is no parallel to this subsection in the draft Bill because it was intended as an interim provision, pending the adoption of new labour legislation.

SECTION 30

LIMITATION OF RIGHTS

- (1) Any law of general application may limit any of the rights declared in this Bill, except the rights in section 30, only to the extent that the limitation of a right is -
 - (a) [reasonable \ necessary] in an open and democratic society based on freedom and equality; and
 - (b) compatible with the nature of the right that it limits.
- (2) The provisions of this Bill of Rights do not prevent the state from adopting any measures designed to prevent or prohibit unfair discrimination.
- (3) Except as provided in subsection (1) or in any other provision of this Constitution, no law may limit any right entrenched in this Constitution.

Status: Not yet considered by CC

See explanatory memorandum - page 230, in particular, the notes on pages 240 to 242.

Since support was expressed both for *reasonable* and for *necessary*, the text includes both as options. A decision will have to be made whether to include both requirements or, if only one, which one.

The phrase, *whether a rule of the common law, customary law, or legislation*, has not been included in this draft because it is now addressed in the proposed application section on page 45.

SECTION 34

STATE OF EMERGENCY AND SUSPENSION

- (1) A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary to restore peace or order.
- (2) The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.
- (3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.
- (4) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.
- (5) Neither any law which provides for the declaration of a state of emergency, nor any action taken, including any regulation enacted, in consequence thereof, shall permit or authorise-
- (a) the creation of retrospective crimes;
 - (b) the indemnification of the state or of persons acting under its authority for unlawful actions during the state of emergency; or
 - (c) the suspension of this section, and sections 7, 8 (2), 9, 10, 11 (2), 12, 14, 27 (1) and (2), 30 (1) (d) and (e) and (2) and 33 (1) and (2).
- (6) Where a person is detained under a state of emergency the detention shall be subject to the following conditions:
- (a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
 - (b) the names of all detainees and a reference to the

SECTION 31

STATES OF EMERGENCY

- (1) An Act of Parliament may provide that a State of Emergency may be declared whenever -
 - (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, national disaster, or other public emergency; and
 - (b) declaring a state of emergency is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and every regulation enacted or other action in consequence of that declaration, may be effective only -
 - (a) prospectively from the date of the declaration; and
 - (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 all its members, may resolve to extend a declaration of 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 laws or regulations enacted in consequence of a declared state of emergency may derogate from this Bill only to the extent that -
 - (a) is strictly required by the emergency;
 - (b) they are consistent with the Republic's obligations under international law;
 - (c) they conform to subsection (4); and
 - (d) they are published in the Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no regulation enacted or other action in consequence of that Act, may permit or authorise -
 - (a) the creation of retrospective crimes or the

Status: Not yet considered by CC

See explanatory memorandum - page 243, noting in particular the footnotes to paragraph 7 on pages 254 to 258.

measures in terms of which they are being detained shall be published in the Gazette within five days of their detention;

(c) when rights entrenched in section 11 or 25 have been suspended-

(i) the detention of a detainee shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;

(ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;

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

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

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

(g) the state shall for the purpose of a review referred to in paragraph (c) (i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.

(7) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the state shows good cause to a court of law prior to such re-detention.

imposition of retrospective penalties;

- (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 2	Equality
Section 3	Human Dignity
Section 4	Life
Section 5(2)	Freedom from torture and degrading treatment
Section 6	Freedom from servitude (excluding forced labour)
Section 8	Freedom of Religion, Belief and Opinion
Section 16.1	Right to fair labour practices
Section 16.2&3	Right to form and join trade unions or employers' organisations
Section 22.1.d	Right of children to not be abused or neglected
Section 22.1.e	Right of children to freedom from exploitative labour practices
Section 22.1.f	Rights of children who are detained
Section 28	Right of access to the courts
Section 29.2.d	Right to challenge detention and be released
Section 29.1.a&b	Right to remain silent, and to be informed of that right
Section 29.1.c	Right not to be compelled to confess or make statements
Section 29.3&4	Right to a fair trial
Section 30	Rights contained in limitation section.
Section 33	Application of the Bill

Certain of the rights in section 29 of this draft are proposed to be non-derogable. The reasons for this are discussed at length in paragraph 4.7 on page 250 of the memorandum, and in footnote 20, on page 255.

- (5) Despite subsection (4)(a), nothing in this section prevents the state trying and punishing anyone for an act or omission that, at the time it was committed, was criminal according to the general principles of law recognised by the community of nations.
- (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 regulation enacted, or other action taken, under a declaration of a state of emergency.

(a) a declaration of a state of emergency;
(b) any extension of a declaration of a state of emergency;
(c) any regulation enacted or other action taken under a declaration of a state of emergency.

(7) Despite subsection (6)(a) nothing in this section prevents the state from this pending enquiry for an act or omission that at the time it was committed, was essential according to the general principles of law recognised by the community of nations.

(8) Any law that purports to confer on the validity of

- (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 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, and 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 unless the state first shows the court good cause for re-detaining that person.

SECTION 7 APPLICATION

- (1) This Chapter shall bind all legislative and executive organs of state at all levels of government.
- (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.
- (3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.
- (4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by-
 - (i) a person acting in his or her own interest;
 - (ii) an association acting in the interest of its members;
 - (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
 - (iv) a person acting as a member of or in the interest of a group or class of persons; or
 - (v) a person acting in the public interest.

The parallel treatment of sub-section (4) appears as the separate section 32 - Enforcement of Rights.

SECTION 32

ENFORCEMENT OF RIGHTS

- (1) Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in this Bill 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; and
 - (d) anyone acting in the public interest.
- (2) If anyone, acting as a member of, or in the interests of, a group or class of persons, applies for relief and the court makes an order that may prejudice the members of that group or class, that order is not binding on the members of that group or class unless they have received notice of the action and have had an opportunity to exclude themselves from the group or class.

Status: Not yet considered by CC

See explanatory memorandum - page 259

SECTION 33

APPLICATION

- (1) This Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs, institutions, and agencies of the state at every level and, where applicable, binds all natural and juristic persons.
- (2) This Bill of Rights applies to -
 - (a) all law that is in force and all proceedings pending before any court of law, tribunal or reviewing authority, when this Constitution takes effect; and
 - (b) all executive and administrative decisions and acts that are performed after this Constitution takes effect.
- (3) This 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 this Bill.

Status: Not yet considered by CC

See explanatory memorandum - page 264

Several options have been suggested for dealing with the entitlement of juristic persons to the rights in the Bill. One option is to include the following in this section -

Juristic persons are entitled to the rights in the Bill of Rights, to the extent that the nature of the rights, and of the juristic persons, permit.

Other options are discussed at length in paragraph 5 on pages 275 to 277 of the memorandum.

SECTION 35

INTERPRETATION

(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

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

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

SECTION 34

INTERPRETATION OF THE BILL OF RIGHTS

- (1) When interpreting this Bill of Rights, every court -
 - (a) must promote the values that underlie an open and democratic society based on freedom and equality;
 - (b) must consider all applicable public international law; and
 - (c) may consider comparable foreign case law.
- (2) When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that results in it being consistent with this Bill of Rights over any alternative interpretation that results in the legislation being inconsistent with this 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.

Status: Not yet considered by CC

See explanatory memorandum - page 278, in particular, the notes at pages 284 and 285.

