

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION :
SIXTH PROGRESS REPORT : JUNE 1993**

(Whatever appears between square brackets is not suggested for inclusion in Chapter)

CHAPTER [....]

FUNDAMENTAL RIGHTS AND FREEDOMS

1 Enforcement

- (1) The provisions of this Chapter shall -
 - (a) bind the legislative, executive and judicial branches of government at all levels as well as statutory bodies and functionaries;
 - (b) bind, where appropriate all social institutions and persons, and
 - (c) be guaranteed and enforced by the [designated authority] which, interpreting such provisions, shall promote the values which underlie a free, open and democratic society.

- (2) Subject to section 30 no rule of the common law, custom or legislation shall limit any right or freedom contained in this Chapter.
- (3) Every person who alleged that his or her rights or freedoms, or associates which claim that their members' rights or freedoms, guaranteed in this Chapter have been infringed or threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.
- (4) The entrenchment of certain rights and freedoms in this Chapter shall not be construed as denying the existence of any other right or freedoms recognised by South African law.
- (5) The [designated authority] shall, in the case of an infringement of any provision of this Chapter, have the discretion, where appropriate, to put any body or person referred to in subsection (1)(a) and (b) on terms as to how and within what period such infringement should be remedied.
- (6) The rights and freedoms contained in this Chapter may be added to or amended by an enactment of the [elected constitution-making body], provided that such enactment does not detract from the essence of any of the rights and freedoms included in this Chapter.

- (7) The provisions of this Chapter shall apply to all existing and future legislation.
- (8) The rights and freedoms contained in this Chapter shall be subject to the provisions of section 30.

2 Equality

- (1) Every person shall have the right to equality before the law and to equal protection and equal benefit of the law.
- (2) No person shall be discriminated against, directly or indirectly, on any ground whatsoever and, without derogating in any way from the generality of this provision, on the ground of race or gender in particular.
- (3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable the full and equal enjoyment of their rights and freedoms.
- (4) In interpreting this section it shall be presumed that any conditions or circumstances under which a person is discriminated against is included within subsection (2) until the contrary is established.

[Explanatory Note:

1. The inclusion of subsection (4) was suggested in a submission by The Equality Foundation. Its effect is to shift the interpretive onus once a person alleging discrimination has in fact made out a prima facie case of discrimination. In other words, if conduct which, on the face of it, appears to be discriminatory has been proved, the person against whom discrimination is alleged with the onus of proving that his or her conduct does not amount to a violation of subsections (1) and (2) because it falls within the ambit of, for example, a recognised limitation to subsections (1) and (2) in terms of section 28 below or because it is provided for by subsection (3).

2. In the submission referred to in 1. above it was also suggested that the list of specific grounds on which discrimination is prohibited in subsection (2) should be extended. Among the reasons advanced in favour of this suggestion are the following:
 - 2.1 Such conditions are enumerated in all the bill of rights proposals submitted to this Committee.
 - 2.2 Specific enumeration will remove any doubts as to whether a court will rule that a particular discriminatory condition is protected or not.

- 2.3 Enumeration has the virtue of establishing binding conditions in the nation's founding documentation.
- 2.4 Enumeration would enhance the educative role that a bill of rights would play in underpinning a culture of tolerance and understanding.
- 2.5 Enumeration will not operate as a limiting mechanism and no major new clauses are likely to emerge during the limited lifetime of a transitional instrument for the entrenchment of fundamental rights and freedoms.
- 2.6 While it is true that race and gender have been at the epicentre of discriminatory conduct, both those sectors of the community are now able to counter discrimination effectively.

The Committee previously stated its reasons for not enumerating all the grounds of discrimination in question. (See e.g. Second Report, paragraph 1, Fifth Report paragraph 2). Should the Council, however, opt for enumeration, the following formulation of subsection (2) (for which there is some support in the Committee) is suggested: "No person shall be discriminated against, directly or indirectly, on any ground whatsoever and, without derogating in any way from the generality of this provision, on the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, creed or conscience in particular".]

3 Life

- (1) Every person shall have the right to life.
- (2) A law in force at the commencement of subsection (1) relating to capital punishment or abortion shall remain in force until repealed or amended by the [legislature].
- (3) No sentence of death shall be carried out until [the elected constitution-making body] has pronounced finally on the abolition of capital punishment.

4 Human Dignity

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

5 Liberty and Security of the Person

- (1) Every person shall have the right to liberty 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.

6 Servitude and Forced Labour

No person shall be subject to servitude, forced labour to exploitative labour practices.

7 Privacy

Every person shall have the right to his or her personal privacy and no person shall be subject to searches of his or her person, home or property, seizure of private possessions or the violation of private communications.

8 Religion and Relief

Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, provided that nothing shall preclude the practice of religion in State or State-aided institutions on a free, voluntary and equitable basis.

9 Freedom of Expression

Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

10 Assembly, Demonstration and Petition

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

11 Freedom of Association

- (1) Every person shall have the right to freedom of association.

- (2) Without derogating from the generality of the provisions of section 2(2), nothing in this section shall permit discrimination on the ground of race.

12 Freedom of Movement

Every person shall have the right to move freely anywhere within South Africa.

13 Residence

Every person shall have the right freely to choose his or her place of residence and pursue a livelihood anywhere in South Africa.

14 Citizen's Rights

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

15 Political Rights

- (1) Every person shall have
 - (a) the right to form, participate in the activities of a political party,
 - (b) the right to campaign for a political party or cause, and
 - (c) the freedom to make political choices.

- (2) Every citizen of voting age shall have the right to vote in secret and to stand for election to public office.

16 Access to Court

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

17 Access to Information

Every person shall have the right of access to all such information as is necessary for the protection or exercise of his or her rights.

18 Administrative Decisions

- (1) Every person shall have the right to lawful and procedurally fair administrative decisions.
- (2) Every person shall have the right to be furnished with the reasons for an administrative decision which affects his or her rights or interests.

19 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, including the provision of adequate nutrition 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 the interests of justice so require, to be provided with the services of a legal practitioner by the State, and
 - (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse, next-of-kin, religious counsellor and a medical practitioner of his or her choice.
- (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) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

- (b) to be brought before an ordinary court of law within 48 hours of arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
 - (c) to be tried by an ordinary court of law within a reasonable time after arrest or charged, and
 - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial by an ordinary court of law;
 - (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;

- (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so demand, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted or 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 an offence or which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review too 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.

20 Eviction

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

21 Economic Activity

Every person shall have the freedom to engage in economic activity.

[Explanatory Note The Council has as yet not agreed on the inclusion of this right. One party contended that the inclusion of this right was unnecessary, while another objected strongly to its inclusion. The latter preferred a formulation which placed a duty on the constitution to provide for the promotion of the improvement of the quality of life, enabling economic growth, human development, social justice and equal opportunity for all. The Committee is unable to produce an acceptable alternative formulation, in the absence of agreement or further debate in the Council which might indicate common ground among the parties.

The Committee is furthermore concerned about possible racial and gender discrimination in the economic sphere which might not be excluded by this right as presently formulated.]

22 Labour Relations

- (1) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (2) Workers and employers shall have the right to organise and bargain collectively.
- (3) Workers shall have the right to take collective action, including the right to strike, and employers shall have the right to lock out workers.

23 Property

- (1) Every person shall have to own property.
- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable.

[Alternative formulation:

- "(2) Expropriation of property by the State shall be permissible in the public interest and shall be subject to either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just

and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the availability to the State of resources and the interests of those affected."]

24 Environment

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

[Explanatory Note: The conservation of the environment is catered for under the concept of "well-being". Further developments of this right are more appropriately within the preserve of the elected constitution-making body.]

25 Children

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

26 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.

27 Education

Every person shall have the right -

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

28 Limitation

With the exception of the rights and freedoms referred to in [Section 6(2), 7 (excepting the right not to be subject to forced labour), 9 excepting freedom of religion) 21 and 27] the rights freedoms entrenched in this Chapter may be limited by law of general application, provided that such limitation -

- (a) shall be permissible only to the extent
 - (i) necessary and reasonable, and

- (ii) justifiable in a free, open and democratic society, and
- (b) shall not negate the essential content of the right or freedom in question.

29 Suspension

- (1) The rights and freedoms entrenched as fundamental may be suspended only to the extent demanded by the situation and in consequence of the declaration of a state of emergency proclaimed prospectively under an act of [the legislature].
- (2) Any such suspension shall comply with the following requirements:
 - (a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is reasonably necessary to restore peace and order.
 - (b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to have any effect unless the declaration is ratified by a majority of the total number of the directly elected members of [the legislature] within fourteen days of the

declaration.

- (c) No state of emergency shall endure for longer than six months provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in paragraph (b).
 - (d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and of any action, whether a regulation or otherwise, taken under such declaration.
- (3) Neither the enabling legislation which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -
- (a) the creation of retrospective crimes;
 - (b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency or

- (c) the suspension of this section and of sections 3, 6(2), 7 (excepting the right not to be subject to forced labour), 9, 16, 18 and 27.
- (4) Any person detained under a state of emergency shall have at least the following rights:
- (a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
 - (b) the names of all detainees and the measures in terms of which they are being detained shall be published in the Government Gazette within five days of their detention;
 - (c) the detention of a detainee shall be reviewed within ten days of his or her detention by [a court of law] which shall be entitled to order the release of such a detainee if satisfied that such detention is not reasonably necessary to restore peace and order. The State shall submit written reasons to justify the detention of the detainee to the [court], and shall furnish the detainee with such reasons not later than two days before the review;