MCH91-92-4-4

COMMENTS ON 'A BILL OF RIGHTS FOR A DEMOCRATIC SOUTH AFRICA - WORKING DRAFT FOR CONSULTATION'

(Prepared by the Constitutional Committee of the ANC)

Article 1

(1) Suggest the addition of 'all South African citizens ...'

(2) Suggest 'No individual South African citizen or group of such citizens...'

One may not wish to have to grant certain rights to aliens eg the franchise or social security rights such as the old age pension. On the other hand, the rights mentioned in (3) should be enjoyed equally by citizens and aliens and hence the paragraph should be left as it is.

Article 2

(3) I happen to support the rather out-dated (and unpopular) view that capital punishment should be retained for the offence of murder without extenuating circumstances (though for no other offence in peacetime). Though there is little likelihood that my views will be reflected in a future bill of rights I shall nevertheless set them down here. I would re-draft (3) as follows.

'*Capital punishment may not be imposed in peacetime for any offence other than murder committed without extenuating circumstances*'

This would leave the legislature free to decide whether or not at any time murder without extenuating circumstances would be capital. It would also leave the legislature relatively free to legislate in wartime. As far as the methods of inflicting capital punishment are concerned, these would of course be subject to testing under article 2(6).

(11) Suggest '*persons awaiting trial*' for 'awaiting trial persons' as a stylistic alteration.

(20) An *obligation* is imposed on the State to provide or pay for a competent defence. My concern is that if the crime level should rise dramatically this obligation could prove overwhelming. Suggest a redraft as follows

'*... the State shall, to the maximum of its available resources, provide or pay for a competent defence*'.

(21) I do not see why a person should not be required to give evidence against spouse, parent or child. Suggest therefore the inclusion of only the first phrase.

'No person shall be required to give evidence against themselves.'

(22) Presumably this would still allow the rules of evidence to regulate evidence obtained as a result of an involuntary confession obtained by means which did not amount to 'torture or cruel, inhuman or degrading treatment'!

(27) Suggest redraft as follows

'People shall have the right to establish families based on relationship by descent...'

The reason is that it would be inappropriate to give a constitutional right to establish families based on adoption. Many categories of relationship could be considered undesirable from the point of view of an adoptive child eg aged married persons, unmarried persons (including persons of the same sex living together and who have a right to so under article 2(27)), single persons, persons in a poor health etc etc. In short, the establishment of adoptive relationships should be left to be governed by law and no constitutional principle should be established.

(28) I think it essential that the institution of marriage should be a relationship existing between two persons of opposite sexes and that this should be absolutely clear in the Bill of Rights. Suggest redraft

'Marriage shall be based upon the free consent of two partners of opposite sexes...'

Such a definition of marriage would in no way prevent two people of the same sex living together (article 2(27)) but this relationship would not be marriage.

(31) Suggest redraft as follows

'Every South African citizen shall have the right to move freely...'

It may not be desirable to give aliens a constitutional right to move freely and reside in any part of the country. This is a right which might of course develop later if there is regional economic integration but even then rights would be confined to citizens of other member states of the organization which comes into being. In the meantime the legal situation of aliens

should in this respect be capable of being governed by ordinary legislation.

Article 3

(1) Suggest redraft as follows

'South Africa shall be a multi-party democracy in which all men and women who are citizens shall enjoy basic political rights on on equal basis'.

It cannot surely be the intention to grant aliens a constitutional right to equality in the political sphere.

(4) Suggest redraft as follows

'Elections shall be regular, free, fair and by secret ballot and based on universal adult franchise and a common voters' roll'.

While the notion of elections being 'free and fair' may possibly postulate a secret ballot, it is better if this is specifically provided for. I think the confinement of the franchise to those who are regarded as 'adult' would be essential in that there should be a constitutional prohibition on the enfranchising of persons of immature years.

Article 5

(1) Freedom of association should include freedom not to associate in order to be complete. Suggest an addition to the existing paragraph

'Freedom of association shall include the right not to join the abovementioned bodies or any of them without being victimized on account of such non-membership'.

(5) Portugese is widely spoken in South Africa today. It is also a language in two of our neighbours. Should it be included?

(7) It may be that this provision is one which would be more appropriate in the new Constitution than in the Bill of Rights. It could be included with other provisions relating to the official language(s).

Article 6

(2) After article 6(2) I consider that an additional and new paragraph (2(a)) should be added which would read as follows

'*(2)(a) Workers shall be free not to join trade unions and no worker shall be victimized on account of non-membership of a union*'.

This is necessary in order to make the right of association complete.

(8) I am not convinced that this provision should be included. Union power should, in my view, be used for the advancement of the members' economic interests. It is (in my view) a misuse of such power to use it for political ends. While it might be left to legislation to regulate such matters, at the very least unions should not be given an entrenched constitutional right to pursue political objectives. I would therefore favour deletion of paragraph (8).

Article 7

(2) I would delete 'sexual orientation' from this paragraph and insert a new (2)(a) which would read as follows

'*Discrimination on the grounds of sexual orientation shall be unlawful in all areas of public and private life including employment and education*'

When the new 2(a) is read with the existing (1) and (2) (as amended) the difference between discrimination on the grounds of sexual orientation and other forms of gender discrimination (mentioned in (2)) would be that discrimination 'within the family' would be possible in the former but not in the latter. The reason for this would be that some form of discrimination on the grounds of sexual orientation could be appropriate in relation to certain aspects of family life eg adoption, custody of children. On the other hand, it may well be that this is covered by article 9(4). Article 9(4) however refers to 'proceedings' rather than to 'legislation'.

(5) My view is that this goes somewhat too far as an encroachment on freedom of expression, freedom of the press and academic freedom. I would favour deletion rather than the imposition of such a 'duty'.

Article 8

(1) There has to be some element of discrimination here. I consider that the objectives as stated in paragraph (2) together with a slight redrafting of (1) would give an appropriate balance. Paragraph (1) could read as follows

'There shall be no unreasonable discrimination against disabled persons'.

By way of general comment I would read paragraph (2) as being subject to paragraph (1) which enshrines the notion of 'availability of resources' as a prerequisite for action. Paragraph (2) talks of 'Such state action'. In the same way I would read paragraphs (8) and (9) (12) (13) (14) (15) as being subject to paragraph (1) also as these specific rights be subject to the overall 'General' provisions for realisation contained in paragraphs (1) to (6) inclusive. If this is so the state does not have an absolute obligation to attain the various rights and freedoms. Its duties are subject to the availability of resources. I consider it is wise not to impose an absolute duty on the state here.

(10) It would appear that as drafted this paragraph amounts to the 'passing of the buck' by the state of part of its housing task to private landowners upon whom the burden of providing alternative accommodation could then be imposed. In certain cases this may be unjust. In other cases eviction could produce injustice. It is recognised that the whole question is a very sensitive one (on both sides of the spectrum) and in an effort to find a more acceptable balance in which the state's task would not be arbitrarily transferred to the private landowner the following redraft is suggested

'No eviction from homes or from land shall take place without the order of a competent court. In the case of those persons who entered into possession whether under a lease or otherwise with the consent of the plaintiff, the court shall have regard to the availability of alternative accommodation'.

Such a provision would ensure that all compulsory dispossession would take place under a court order. In the case of those who had taken possession of anothers land without obtaining consent, the question of alternative accommodation would not be relevant before the court. If it was, the state's housing task would be indirectly passed to a private landowner who had been in no way involved with the possessors apart from having his land taken over against his will. This would be an unjust situation and one which ultimately encourages anarchy and the taking of the law into one's own hands. On the other hand, where the landowner has previously been a party to transactions with the possessors (even the giving of a minimal and gratuitous consent to be present which could even be tacit) this would create expectations in the possessors which the landowner could not ignore unless alternative

accommodation was available. In such a case 'alternate accommodation' would be a factor which the court should take into account. The landowner should not be able to shelve responsibility lightly in cases where expectations have been created by him.

(10) (*sic*) Two questions simply. Should there be compulsory education to 16 (as opposed to 14)? There should of course be a right to free primary education to 16. Should a bill of rights be involved with pre-school institutions?

Article 11

I agree with this article and only have two comments. The field covered by paragraph (3) is one in which I have some expertize and I would like to complement the drafters on what I consider to be a very well drafted provision and one which is quite ingenious. In paragraph (4) there is a small typographical error. 'Have' should be 'has' (version in the SAJHR 1991 p119).

Article 12

(3) The state might not always be able to ensure the realisation of enviromental rights. I would therefore be cautions about formulating the states obligations in absolute terms. I would suggest a redraft as follows

'... the state, to the maximum of its available resources, acting through appropriate agencies and organs shall conserve ...'

(5) As far as *locus standi* in environmental matters is concerned, I consider that it is not only an interested natural person who should have *locus standi*. An interested company should also have it as where a company sees one of its competitors engaged in an environmentally deleterious practice which gives the latter financial and competitive advantages. I agree totally with the concession of *locus standi* to agencies established for the purpose of protecting the environment, but I consider that such agencies should be required to be legal *persona* and recognised as such by the state. I would therefore redraft (5) and add a new (6) as follows

'(5) ... and permit the interdiction by any interested natural or legal person or by any agency established for the purpose of protecting the environment, recognised as such by the state and being a legal person, of any public or private activity...'

'(6) The law shall provide for the recognition by the state of and enjoyment of legal personality by agencies established for the purpose of protecting the environment'.

Article 13

(1) I would consider that the special measures adopted by public or private bodies envisaged here should be authorised by legislation. Otherwise public and private bodies might be deemed to have a *carte blanche*, (in the form of a constitutional right) to discriminate without being subject to legislative control in so doing. I would suggest a slight reformulation

'... the adoption of any public body of such special measures of a positive kind as may be authorised by legislation designed to produce ...'.

General comment Article 13(1) is a very special article in my view for two reasons. In the first place it authorises discrimination (in order of course to rectify past discrimination). Secondly it amounts to the creation of rights which border on 'group rights', the right holders being those 'men and women who in the past have been disadvantaged by discrimination'.

Given that affirmative action is socially necessary in order to reverse former discriminations, it nevertheless remains an extraordinary measure and something which should be seen as highly exceptional. It should therefore in no way form a permanent feature of a bill of rights. To put it another way, discrimination should not be authorised in perpetuity. In my view a time limit should therefore be established for the operation of what are extradordinary provisions which must surely be of a transitional character. The time set should be long enough to allow affirmative action to be effective but there should be a cut-off date for such measures. I do not think that a period of less than 10 years would be sufficient but I think that a period exceeding 25 years (a generation) would be excessive. Personally, I would favour a period of somewhere between these parameters. I would suggest a new paragraph (1)(a) which would read as follows

'This article shall cease to have effect when the present Bill of Rights has been in operation for a period exceeding 15/20 (?) years'.

An alternative way of avoiding the perpetual entrenchment of discrimination by way of affirmative action would be to apply the provisions of paragraph

(1) on the individual rather than the group level. This could be achieved by a slight redraft.

'... *of* <u>*individual*</u> *men and women who in the past have been disadvantaged by discrimination*'.

This would mean that there could be no affirmative action in favour of persons who come into existence after the Bill of Rights operates (perhaps this may even be the meaning of the paragraph as presently drafted). In that event, the class of persons in whose favour affirmative action could be taken would ultimately disappear and with it (in practice) the authorised discrimination. The paragraph may therefore have an in-built mechanism for the falling into desuetude of affirmative action. It would however be more presentable if the Bill of Rights had a formal provision which would show *ex facie* the Bill itself that at a certain point in time, all discrimination is a thing of the past.

<u>Article 14</u>

(4) The paragraph constitutes of course an infringement of freedom of speech. It must therefore be regarded as an exception such as is envisaged in article 15. That such an exception is warranted is beyond question. The only consideration is the <u>extent</u> to which the permitted exception should go. The fact that a certain viewpoint might provoke a reaction in certain thin-skinned (ie unduly sensitive) persons (eg the bigot) when it would not do so in a reasonable person should not be a ground to prohibit expression of the viewpoint and thus curtail freedom of speech. In order therefore to balance freedom of speech with legitimate objectives, my view would be to introduce both subjective and objective elements into the expressions in question. The presence of <u>either</u> of these elements in an expression would permit the state to enact legislation prohibiting it as in paragraph (4). I would redraft the paragraph as follows

'... *the state may enact legislation to prohibit the circulation or possession of material which* <u>*are intended to*</u> *incite* <u>*or which could be expected to incite in a reasonable person*</u> *racial, ethnic, religious, gender or linguistic hatred, which* <u>*are intended to*</u> *provoke violence* <u>*or which could be expected to provoke violence in a reasonable person*</u>*, which* <u>*are intended*</u> *to insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender, or linguistic group* <u>*or which would be understood by a reasonable person as insulting, degrading, defaming or encouraging*</u>

abuse of any racial ethnic, religious or linguistic group.

(5) My view is that the organs of state should not be given *carte blanche* (in the form of a constitutional right) to practice discrimination without being subject to legislative control. (See comments on article 13(1)). The policies and programmes envisaged in (5) should therefore be authorised by legislation. As positive action here is in fact an aspect of 'affirmative action' my feeling is that there should be a time limit set for the exercise of the discrimnation. (See article 13 *general comment* above).

I would redraft (5) as follows

'*... shall pursue such policies and programmes as may be authorized by legislation aimed at ...*'

In order to set a time limit to positive discrimination I would add a new paragraph (10) to which I shall later return.

(8) Presumably the 'steps' envisaged in paragraph (8) are those contemplated in paragraph (5). If this is so it might be mentioned. I would redraft (8) slightly

'*In taking steps to correct patterns or pratices of discrimination in accordance with paragraph 5 above, special attention shall be paid ...*'.

As positive action in terms of (8) is also an example of 'affirmative action' and thus discriminatroy in character, a time limit should be placed on the discrimination. I would suggest a new paragraph (10) which would read as follows

'*(10) Paragraphs 5 and 8 of this Article shall cease to have effect when the present Bill of Rights has been in operation for a period exceeding 15/20? years*'

(9) NGOs and private bodies will be under a general duty not to discriminate anyway (article 1(2) read with article 16(3). Should the duty to take positive action also be placed on them? This it should be noted would be restrospective in addition to requiring discriminatory action. As the state does not have an obligation to legislate here (but a discretion) perhaps this is indeed a problem which can be left to legislation.

Article 16

(2) I would suggest that a few details should be added relating to the powers of the court. Suggest the following addition

'*... The decisions of the court on all matters relating to the intepretation and application of the Bill of Rights shall be binding on all other courts. While the court shall not be bound by its own previous decisions relating to the Bill of Rights, it shall endeavour to achieve consistency in its jurisprudence and shall normally only depart from its previous decisions where there has been fundamental change of circumstances in the meantime*'.

As the ultimate authority on questions arising out of the Bill of Rights, the Court's decisions should bind all other courts on such matters. As the ultimate authority the court should not be bound by its previous decisions. It should be possible for it to react to new and changing circumstances. It should however be encouraged to adopt a jurisprudental line which is consistent.

(9) I would add a new paragraph (9)(a) giving another power to the Human Rights Commission namely that of referring legislation to the Constitutional Court to test its validity. The draft could read as follows

'*(9)(a) The Commission shall have the right to refer any legislative provision to the Constitutional Court with a view to testing the validty of the provisions in question. Where reference is made within fourteen days of the adoption of the legislation, the operation of the legislative provision in question shall be suspended for a period of six months from the date of adoption or until the Constitutional Court has given a final judgment in the matter whichever shall be the earlier. Should the Constitutional Court deliver judgment invalidating the provision more than six months after the adoption of the legislation, any act done or performed persuant to the provision between the expiry of the said period of six months and the date of the delivery of the judgment of the Constitutional Court shall be deemed to be valid nothwithstanding that the provision in question has been subsequently invalidated by the Constitutional Court. The Constitutional Court may, by a unanimous decision of all its members extend the period of six months previously referred to or any period or periods substituted therefor, on an application in that behalf made by the Commission*'.

The basic idea would be to give the Commission a degree of influence in relation to the legislature. Thus if the Commission had made its views on draft legislation known to Parliament during the legislative process (paragraph 9) and Parliament nevertheless went ahead and adopted legislation which in the view of the Commission was unconstitutional, Parliament could then expect a reference to the court and a suspension of the legislation. This would be an invitation to Parliament to ensure the compliance of legislation with the Bill of Rights. On the other hand, the Commission would be expected to act promptly if the legislation was to be suspended. Hence referral should be within 14 days. The Court would also have to hand down judgement timeously or the suspension would be lifted in 6 months. A further incitation to the court to hand down judgment within 6 months would be the ability to act under the legislation until judgment was delivered. In the unlikely event of the state putting obstacles in the way of a timeous decision by the court (with a view to being able to act under the legislation after 6 months and irretrievably so) the period could be extended and again extended as long as this was necessary. Such a mechanism however would require the cooperation of both the Commission and all the members of the court. As such it would not likely happen.

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