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REPUBLIC OF SOUTH AFRICA

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# GOVERNMENT'S PROPOSALS

ON A

CHARTER OF FUNDAMENTAL  
RIGHTS

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2 February 1993

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### Introductory remarks

South African constitutional law is based on parliamentary sovereignty. This means that the legislative powers of the South African Parliament is almost unlimited. Parliament has the power to amend or repeal the common law. It can make any law which it in its wisdom finds fit. It can grant rights and privileges or take them away. In the present system Parliament is supreme.

Our history has shown that a constitutional system which grants such wide powers to Parliament cannot guarantee the protection of basic rights. In the past rights have been infringed and unless the system is adjusted fundamentally, there can be no guarantees against future infringements. For this reason the Government is totally committed to a new constitutional dispensation in which the powers of the various branches of state authority, including those of Parliament, will be limited by and subject to certain basic, universally accepted legal norms. A Charter of Fundamental Rights must and shall be one of the most important elements of the new system. A Charter is essential to protect the rights of the citizen against the arbitrary and discriminatory use of Parliamentary and political power. In the new system the Law must reign supreme.

The text of a draft charter with explanatory notes accompanying each provision is contained in this document. The text of the draft charter appears in bold and the notes in ordinary print. The provisions of the draft charter are the Government's proposals of what should be contained in a comprehensive Charter of Fundamental Rights. It must not, however, be seen as the Government's final proposals. It is published to stimulate and to serve as a basis for coming negotiations on the contents of a charter. Obviously comments and proposals aimed at improvement of the proposals will be welcomed. The Government, however, strongly believes that a negotiated charter of fundamental rights must be in place already during the transitional phase.

The draft charter sets out a number of defined rights which persons will enjoy against the State. This list of rights also serves as a standard of values which may not be infringed by the State, whether by legislation or administrative action. In order to grant effective protection to persons, these rights will be entrenched constitutionally so that the State cannot curtail or erode them. The entrenching provisions will be contained in the Constitution.

The draft charter is based on four principles.

*Firstly*, the principle of verticality. This means that the charter primarily regulates legal relations between the State and the subject. It does not directly regulate legal relations among subjects themselves, although the charter will have an "over-flow" effect on such horizontal legal relations. For instance rights are required by the charter to be exercised responsibly with due regard to the rights of others. Also, the principles of the charter will serve as guide-lines in the interpretation of statutes dealing with legal relations among subjects. These principles will also materially influence the substance of future laws.

*Secondly*, the principle of negative enforcement. This has the effect that the Charter will apply to the State in a prohibitive rather than in a mandatory sense. That is to say, the State is primarily prohibited from infringing fundamental rights. In certain specified cases the State is, however, required to fulfil particular needs.

*Thirdly*, the principle of curtailment or limitation of rights. In terms of this principle the State is authorized to curtail rights within reasonable limits.



Chaos will follow if the rights of persons should prevail absolutely. In order to regulate society in the general interest, the State must have the power to delimit such rights in accordance with specific democratic values and norms.

*Fourthly*, the principle of justiciability. The protection and enforcement of fundamental rights can only be ensured by a strong and independent judiciary. The provisions with regard to the judicial and administrative application of the Charter (and other constitutional measures) are not contained in the draft charter. These provisions dealing with a constitutional court and an ombudsman will be dealt with separately. As a consequence of the Government's proposal that a negotiated charter of fundamental rights should be implemented already during the transitional phase, provision for the constitutional court will have to be made as part of the transitional arrangements.

The fundamental rights set out in the draft charter are based largely on the proposed Charter of Human Rights of the South African Law Commission as published in its Interim Report on Group and Human Rights. Most of the adaptations result from an intensive study of the application of the recommendations of the Commission against the background of practice, the existing statute book and certain policy considerations.

The provisions of the draft Charter of Fundamental Rights follow hereunder with a short explanatory note accompanying each.

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## **DRAFT CHARTER OF FUNDAMENTAL RIGHTS**

### **Operation of Charter against the State**

1. (1) Every person, including, where appropriate, every legal person and every entity or body or group of persons which can be the bearer of rights, shall have against the State the rights set out in this Charter.

(2) The rights which a person has against the State in terms of subsection (1) are fundamental rights, and the limitation or suspension of these rights shall be permissible only—

- (a) under the common law or by way of a law of a competent legislature; and
- (b) to the extent provided for in section 35 or 36 or where otherwise expressly authorized.

(3) The provisions of this Charter shall—

- (a) bind all legislative, executive and judicial institutions, bodies and functionaries at central, regional and local government level; and
- (b) apply to all laws whether made before or after the commencement of this Charter, and to all executive and administrative actions performed after such commencement.

### **Note**

This clause deals in general terms with the rights recognized in the Charter.

Firstly, a special status is given to these rights insofar as they are entrenched. As fundamental rights the State accepts them as a limitation of its former sovereign power over its subjects. Together with the other provisions of the Constitution, the Charter forms the supreme law in the Republic. Other laws, and acts performed under such laws, may not be at variance with it, and in this sense parliamentary sovereignty is now replaced by the rule of law guaranteed by a testing right vested in the courts.

Secondly, clause 1 refers to the limitation and suspension of fundamental rights. The limitation and suspension of the Charter are explained under clauses 35 and 36.

Thirdly, room is left to the courts to extend the protection of the Charter in appropriate cases to persons other than natural persons, for example, the property and trading rights of companies.

Fourthly, clause 1 provides that all branches of the State at all levels of government are bound by the Charter so that it will not be permissible for any State authority to act in conflict with it. The Charter will apply to both existing and future laws.

### **Operation of Charter against third parties**

2. (1) No provision of this Charter shall be construed so as to create or regulate legal relations other than those between the State and a person as contemplated in section 1.



(2) In the interpretation of any law regulating legal relations among persons *inter se*, the spirit, objects and purport of this Charter shall be taken into account.

(3) Where a person exercises or enjoys a right recognized by this Charter, such person shall do so in a manner which will not infringe the rights of any other person.

#### Note

Clause 2 makes it clear that the object of the Charter is not to create or regulate legal relations among persons themselves. The main purpose of the Charter is to protect individuals against abuse of power by State authorities. It is not intended as a direct source of rights or obligations among individuals themselves, for example, to enable a dissatisfied employee to sue his employer on the ground of alleged infringement of his fundamental rights. The Charter is a standard with which the acts of state authorities towards the citizen must comply. The provision also makes it clear that where the Charter grants rights, such rights must be exercised in a responsible manner so that the rights of others are not thereby infringed.

#### Human dignity

**3. The State shall in its legislative, executive and judicial acts respect and protect the human dignity of every person.**

#### Note

The recognition by the State of the human dignity of every individual is regarded as one of the corner stones of justice in a democratic society. All state authorities are charged with the duty to respect the human dignity of the individual in all their acts.

#### Protection of life

**4. (1) Every person shall have the right to life.**

**(2) No person shall be deprived of his or her life intentionally save in the execution of a death sentence imposed in accordance with section 6 of the International Covenant on Civil and Political Rights.**

#### Note

These provisions entrench the life of a person as a fundamental right of which he may not be deprived. His right to life also entails that the State must provide effective legal protection against murder and homicide by means of appropriate criminal sanctions.

The death penalty is retained as a permissible form of punishment. According to section 6 of the International Covenant on Civil and Political Rights the death penalty may be imposed only for the most serious crimes, but not upon persons under 18 years of age. The death penalty may only be carried out pursuant to a final judgment by a competent court. Every person sentenced to death has the right to seek commutation of the death sentence.



As far as the death penalty is concerned, the Charter leaves the position as it is at present, that is, in the hands of Parliament. A future Parliament can, if it so wishes, abolish the death penalty. And if it has abolished it, it will be free to re-impose the death penalty should public opinion later demand it.

The matter of abortion does not only affect the right to life, but also the right to physical integrity in so far as one school of thought is of the opinion that every woman has the right to make her own decisions regarding her body. At present the matter is regulated by statute, and because of the contentious nature of the problem it is left to the future Constitutional Court to decide on the permissibility of abortion under given circumstances.

### Physical and mental integrity

**5. Every person shall have the right to physical and mental integrity.**

#### Note

This provision confirms the inviolability of a person's physical and mental integrity. This principle is deeply rooted in our law and protects a person against the unlawful violation of his body and mind by another.

### Equality before the law

**6. (1) All persons shall be equal before the law and entitled to equal protection by the law.**

**(2) No person shall be favoured or prejudiced solely by reason of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other convictions, or disabilities or other natural characteristics.**

**(3) A law shall be deemed not to be contrary to subsection (2) if such law provides for special measures for the sole purpose of furthering the development and advancement of specific communities, groups and individuals to enable them to develop and realize their natural talents and potential to the full and to exercise and to enjoy their fundamental rights on a basis of equality with, and with due regard to the interests of, other communities, groups and individuals.**

#### Note

The object of this prohibition against any form of discrimination is that all shall have equal access to the courts, that all shall be entitled to equal legal remedies if their rights are infringed and that general laws bind all in equal measure. It should be borne in mind that the statute book of the Republic still contains provisions in conflict with this right, for example, laws regarding the present constitutional dispensation, since the latter is based upon race. Suitable measures will have to be taken to provide for the orderly phasing out of remaining inequalities.

In subclause (3) provision is made for so-called "affirmative action". This provision is considered necessary to ensure that, for example, development programmes for disadvantaged communities can be continued and extended. The provision has been formulated to ensure that it does not open the door for the introduction of marxist trends of policies under the ideologically neutral and popular banner of "affirmative action".



**Citizen's rights**

7. Every citizen shall have the right not to be—
- (a) deprived of his or her citizenship;
  - (b) exiled or expelled from the Republic;
  - (c) prohibited from returning to the Republic;
  - (d) prevented from leaving the Republic, whether temporarily or permanently;
  - (e) denied a passport or deprived thereof.

**Note**

Citizenship as proof of the subject's membership of a specific state forms the basis of his political rights in that state. Through citizenship he obtains a say in the election of his government and the management of the country. Clause 7 protects this important right. While the issue of a passport was previously an indulgence on the part of the authorities, it now becomes a right upon which the citizen may insist.

**Political rights**

8. (1) Every citizen shall have the right to—
- (a) form a political party;
  - (b) join a political party of his or her choosing or not to join a political party;
  - (c) participate or not to participate in the activities of a political party;
  - (d) give expression to his or her political convictions in a peaceful manner;
  - (e) make himself or herself available for nomination for and election to any legislative, executive or administrative office for which he or she qualifies.

(2) Subsection (1) shall not preclude the prohibition or regulation of participation in politics by persons in the service of the State.

**Note**

Political rights, which in the nature of things must be confined to citizens of the Republic, include the right to form a political party, to take part in politics and to be nominated for and elected to legislative, executive and administrative posts.

To ensure sound public administration, it may be necessary to prohibit or regulate the participation in politics by persons in the service of the State.

Participation in elections on the basis of universal adult franchise will be dealt with in the Constitution itself.



### Freedom of speech

9. (1) Every person shall have the right to freedom of speech and other forms of expression, and the right to obtain and disseminate information.

(2) Subsection (1) shall not preclude the registration and licensing of newspapers and other forms of communication.

#### Note

It is accepted that freedom of speech forms the foundation of a free, open and democratic society. By acknowledging freedom of speech abuse of power, corruption and maladministration in official and other circles may be exposed. In this manner public debate on policy matters and disputed issues is promoted and so contributes to the search for peaceful solutions.

As in the case of most other rights this right may sometimes have to be limited, for example, where it will amount to defamation of others or where it will be contrary to good morals. Clause 35 provides for the limitation of fundamental rights on account of general considerations.

### Meetings, demonstrations and petitions

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

#### Note

Freedom of meeting is a basic principle of democracy. In this way grievances of the community or a part thereof may be articulated and brought to the attention of the authorities. However this right is only recognized in so far as it is exercised peacefully and unarmed. Violent meetings and demonstrations are not protected by the Charter.

### Freedom of worship

11. (1) Every person shall have the right to profess and practise the religion of his choosing.

(2) Subsection (1) shall not preclude ministration to the forces, the public service and other state institutions, religious instruction or exercise in schools, and religious broadcasts by an entity instituted by or under any law.

#### Note

In a society where the majority professes religious beliefs, it is considered necessary to make express provision for the rendering of, for example, chaplaincy services to persons in the service or care of the State, and for religious broadcasts by a body instituted by law, for example, the SABC. In view of the provision in clause 14 for religion-orientated education in schools where such education is required by a particular community, clause 11 protects religious instruction or exercise in schools where it is so desired.

### Family

12. Every person shall have the right to the protection of the integrity of his or her family.



**Note**

The family forms the natural and fundamental unit of society and deserves protection by the State.

**Children**

13. (1) Every parent shall have the right to have his or her child live with him or her and to care for and bring up such child, unless the interests of the child require some other arrangement.

(2) Every child shall have the right—

- (a) not to be compelled to perform work or to render services harmful to his or her physical or mental health, upbringing, education or moral or social development, or which amounts to economic exploitation;
- (b) not to be compelled to perform work or to render services for the benefit of the employer of the parents of the child or any other person;
- (c) to protection against physical or mental violence, injury, neglect or abuse, including sexual abuse.

(3) Every child in need of care shall have the right to medical treatment by medical personnel in the service of the State or at medical institutions managed by the State in so far as such medical treatment is provided or can be provided by the the State with available personnel and facilities.

(4) This Charter shall not be construed so as to affect the powers of the Supreme Court as upper guardian of all minors.

**Note**

The supreme need of a child, namely, to be cared for and brought up by his parents, is recognized. The child is also protected against exploitation whether for the benefit of his parents or for that of others. Children in need of care acquire the right to receive medical care at public expense.

**Education and Training**

14. (1) Every pupil or student who is a citizen shall have the right of equal access to state or state-aided educational institutions.

(2) Every pupil who is a citizen shall have the right to religion-oriented education in so far as it is reasonably practicable.

(3) Every pupil who is a citizen shall have the right to tuition in his mother tongue, including the right to take his mother tongue as a subject, in so far as it is reasonably practicable.

(4) (a) Every state-aided tertiary educational institution shall have the right to determine the medium of instruction and the religious and general character of such educational institution.

(b) The parent community of every state or state-aided school shall have the right to determine the medium of instruction and the religious and general character of the school.



**(5) (a) Every pupil who is a citizen shall have the right to at least primary education for which the State with due regard to its financial means shall be responsible.**

**(b) All pupils at a particular level in a state or state-aided school shall have the right to equal state assistance in respect of compulsory education at such level.**

**(6) Every person shall have the right to establish and operate a private educational institution.**

#### **Note**

The following principles are laid down.

Every pupil or student, irrespective of race or colour, is entitled to equal access to state and state-aided educational institutions.

Pupils acquire the right to mother tongue education if it is feasible.

A state-aided tertiary educational institution itself determines its medium of instruction and its religious and general character.

The parent community of a state or state-aided school determines the school's medium of instruction and its religious and general character.

Every pupil is entitled to at least primary education at public expense in so far as it is financially feasible, but parents are not thereby relieved of financial contributions. Pupils at a particular level in such institutions have the right to equal state assistance in respect of compulsory education at that level.

A right to operate private schools is acknowledged.

#### **Participation in the economy**

**15. Every person shall have the right freely and on an equal footing to engage in economic enterprise, including the right to establish, manage and maintain commercial undertakings, to acquire property and means of production, and to offer and accept employment against remuneration.**

#### **Note**

This clause entrenches the common law freedom of the subject to participate in the economy. The recognition of this right will not prevent measures to prohibit monopolies and restrictive practices and to protect consumers against exploitation.

#### **Legal competence**

**16. Every person shall have the right to perform juristic acts, and to acquire rights and incur obligations.**

#### **Note**

This clause guarantees the right of a person with the necessary legal capacity to perform legal acts and to enter into contracts with others in the exercise of his rights and for the advancement of his interests.



**Freedom of movement**

17. Every citizen shall have the right—

- (a) of freedom of movement and residence in the Republic;
- (b) to work, to establish and operate any undertaking, to exercise any profession or trade and to carry on any other lawful activity in any part of the Republic.

**Note**

Every citizen of the Republic may move freely in the Republic and elect where he wishes to reside and work. This right does not detract from legal requirements regarding travel in the Republic and residence in certain areas. Nor does it permit any person to infringe the rights of others by, for example, unlawful squatting or trespass.

**Private ownership**

18. (1) Every person shall have the right, individually or with others, to acquire, possess, enjoy, use and dispose of, including disposal by way of testamentary disposition or intestate succession, any form of movable and immovable property.

(2) Subject to the provisions of subsection (3) no person shall be deprived of his property otherwise than under a judgment or order of a court of law.

(3) Property may be expropriated for public purposes, subject to the payment within a reasonable time of an agreed compensation or, failing such an agreed compensation, of compensation in cash determined by a court of law according to the market value of the property.

(4) Every person shall have the right not to be subjected to taxes on property which will have a confiscatory effect or will make unreasonable inroads upon the enjoyment, use or value of such property.

**Note**

The prospect of acquiring property is the principal incentive to hard work, thrift, responsibility and the development of the individual's full potential. Hence the need to protect his right to acquire property for himself.

Apart from the instances where someone may be deprived of his property by order of a court of law according to the existing law, deprivation can in terms of the Charter only take place through expropriation for public purposes and against payment of an agreed compensation, or of compensation in cash determined by a court of law according to market value. Although reasonable taxes will be permissible, excessive taxation which may force an owner "voluntarily" to abandon his property will be prohibited.

**Employees**

19. (1) Every employee shall have the right—

- (a) to form an employees' organization, to join such an organization or



not to join such organization, to participate or not to participate in the activities of such an organization, or otherwise to associate or not to associate or to organize;

- (b) to negotiate or bargain, collectively or individually;
- (c) to take part in strikes and to withhold labour;
- (d) not to be subjected to unfair labour practices including intimidation and victimization;
- (e) to work under safe, hygienic and healthy conditions;
- (f) to work reasonable hours;
- (g) to be given a reasonable opportunity for rest, recreation and holiday;
- (h) to receive reasonable remuneration for his or her labour;
- (i) to be protected in his or her physical and mental well-being.

(2) Subsection (1) shall not preclude the prohibition of strikes in strategic industries and essential services or by persons in the service of the State, or the levying of contributions for and the management of provident funds.

#### Note

A number of principles aimed at the protection of employees and complying with internationally recognized norms of labour law are laid down here.

The right of the State to prohibit in the public interest strikes in strategic industries or by persons in the service of the State is retained.

For the avoidance of doubt it is stated that the levying of contributions for and the management of provident funds are not precluded by the rights in question.

#### Employers

20. (1) Every employer shall have the right—

- (a) to form an employers' organization, to join such an organization or not to join such organization, to participate or not to participate in the activities of such an organization, or otherwise to associate or not to associate or to organize;
- (b) to offer employment and to engage employees according to his or her needs with due regard to the fitness, qualifications, level of training and competence of the employees;
- (c) to require of an employee adequate service of an acceptable quality and to lock out labour;
- (d) to terminate the services of an employee under the common law, the contract of employment with the employee or legislation, as the case may be;
- (e) to apply the principle of "no work, no pay";



- (f) to manage his or her business with a view to its economic viability and continued existence;
- (g) to make use of alternative labour when necessary to maintain production or service;
- (h) not to be subjected to unfair labour practices, including intimidation and victimization.

(2) Subsection (1) shall not preclude the prohibition of labour lock-outs in strategic industries and essential services, or the levying of contributions for and the management of provident funds.

#### Note

The comments under clause 19 also apply in respect of employers. All the rights in question are in harmony with modern labour law.

#### Social security

21. (1) Every person shall have the right to safeguard his or her existence or the existence of his or her dependants in the best possible manner by means of pension, medical, assurance or other providence.

(2) The State shall not in any manner make any inroad upon the benefits of such providence.

(3) Every person shall have the right to claim available state assistance to provide for essential subsistence and medical needs where he or she is unable to provide for such needs because of physical or mental illness or disability and where there is no person who is legally liable or who can legally be compelled, to provide for such needs.

#### Note

This clause deals with the satisfying of certain socio-economic needs. In drafting the Charter the principle was adhered to that only those rights which can legally be enforced, that is, those which a court can compel the State to give effect to, should be included in the Charter. Rights which are merely an expression of ideals, have been avoided since the inclusion of such "rights" would only result in the legitimacy of the Charter as an enforceable and effective instrument being undermined.

Consequently the social security rights were not framed as claims which the individual has against the State, but as freedoms of the individual upon which the State may not encroach whether by legislation or otherwise. There is no obligation upon the State to realize these claims, but an obligation not to violate or endanger them. On the other hand there is nothing in the Charter that prevents the State from fulfilling its social obligations towards its citizens. These obligations the State must fulfil. But the extent to which the State provide social assistance to its citizens must be a political and not a legal matter.

#### Free association

22. (1) Every person shall have the right of free association.



(2) No person shall be prohibited or prevented from associating with any other person.

(3) No person shall be compelled to associate with any other person.

**Note**

Certain objectives can better be achieved if a person organizes himself with others in groups, for example, societies. The right to do so is recognized.

The freedom of the individual who prefers not to associate with a particular group is expressly protected.

**Personal freedom**

23. (1) Every person shall have the right to personal freedom.

(2) Subject to the provisions of section 37 a person may be deprived of his or her freedom only in the following instances and only in accordance with the procedure prescribed by a law of a competent legislature—

- (a) detention of a person for investigation and trial on the ground of a reasonable suspicion that he or she has committed an offence;
- (b) detention of an accused for or during his or her trial or for sentencing;
- (c) detention of a person after conviction under a sentence or by order of a court of law;
- (d) detention of a child by order of a children's court;
- (e) detention of a person because of non-compliance or alleged non-compliance with the terms of process issued by or under the authority of a court of law, or of a condition or order of a court of law regarding attendance at such court, bail with or without conditions, any sentence or punishment, or any related matter;
- (f) detention of an accused released on bail and who is about to flee or of a witness evading service of a subpoena or who is about to flee;
- (g) detention of a recalcitrant witness or of a witness who refuses to divulge information regarding an alleged offence;
- (h) detention of a witness by order of a judge with a view to the protection of the witness or the proper administration of justice;
- (i) detention of a person for the prevention of the spreading of infectious diseases constituting a threat to public health;
- (j) detention of a mentally disordered or suspected mentally disordered person for observation or treatment;
- (k) detention of a person alleged to be addicted to a narcotic substance or alcohol, for the purpose of an enquiry whether he is so addicted, or of a person who is so addicted, for the purpose of his rehabilitation;



- (l) **detention of a person in connection with his or her unauthorized or alleged unauthorized presence or sojourn in the Republic or for the purpose of his or her deportation;**
- (m) **detention of a person for the purpose of extradition;**
- (n) **detention of a person by order of a court of law in connection with civil proceedings.**

### Note

This clause deals with the right of every person not to be deprived of his freedom and not to be subjected to coercive measures. Because deprivation of freedom by the authorities must surely rank as one of the most serious infringements of a person's fundamental rights, it was regarded as necessary to spell out in detail the grounds upon which the authorities may detain someone. The other circumstances under which a person may be deprived of his freedom are subject to the proviso that such a person may not be detained for more than 10 days without leave or an order of a court of law (see clause 37(d)). This proviso will apply also in the case of detentions under a state of emergency.

### Detainees

- 24. (1) Every person who is detained shall have the right—**
- (a) **as soon as is reasonably possible to be informed 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, adequately to be fed by the State and, when necessary, to receive medical treatment at public expense;**
  - (c) **to be given a reasonable opportunity to communicate and consult with a legal practitioner and, when necessary, a medical practitioner of his or her choosing;**
  - (d) **to be given a reasonable opportunity to communicate with, and to be visited by, his or her spouse, family, next-of-kin and religious counsellor, unless a court of law orders otherwise;**
  - (e) **to be released when the reason for detention falls away or, in the case of a person detained for a specific period, at the expiry of the term of detention.**
- (2) During detention persons awaiting trial shall, in so far as it is practicable, be separated from convicted persons, and juveniles from adults.**

### Note

The rights contained in clause 24 are given to all persons detained by the State. Apart from accused persons and prisoners, it also pertains to other categories of detainees such as mentally disordered persons and prohibited immigrants. This clause provides for certain minimum rights for detainees which are calculated to prevent the abuse of power and inhuman treatment on the part of the authorities during detention.



Accused

25. (1) Every person arrested for the alleged commission of an offence shall have the right—

- (a) as soon as is reasonably possible, to be informed in a language which he or she understands that he or she has the right to remain silent and that he or she is not obliged to make any statement, and to be warned of the consequences of making a statement;
- (b) within a reasonable time, but not later than 48 hours or the first court day thereafter, after arrest, to be brought before a court of law, and to be charged or to be informed of the reason for his or her detention, failing which he or she shall be entitled to be released from detention;
- (c) to be tried by a court of law within a reasonable time after arrest;
- (d) upon good cause being shown, to be released from detention with or without bail.

(2) Any infringement of the rights of an accused mentioned in subsection (1) shall not result in the setting aside of the proceedings unless on appeal or review the court finds that justice has not been done.

Note

The purpose of clause 25 is to ensure that the right to personal freedom of accused persons who are detained, will be affected to the minimum extent compatible with the needs of the administration of justice. The point of departure is that a person arrested must be brought before a court within 48 hours after which the court may watch over his freedom.

Fair trial

26. (1) Every accused shall have the right—

- (a) to a public trial by a court of law;
- (b) to be presumed innocent until the contrary is proved;
- (c) to remain silent during plea proceedings or trial and not to testify during trial;
- (d) where he or she is not assisted by a legal practitioner, to an explanation of the possible consequences of any applicable presumptions and of his or her election to exercise his or her right to remain silent or not to testify;
- (e) to examine witnesses testifying against him or her, to testify himself or herself, to call witnesses and to offer other rebutting evidence;
- (f) to be represented by a legal practitioner at own expense;
- (g) to be informed by the presiding officer regarding—
  - (i) his or her right to be assisted by a legal practitioner; and
  - (ii) the institutions that he or she may approach for legal assistance.



and to be given a reasonable opportunity to attempt to obtain legal assistance:

- (h) not to be sentenced to inhuman punishment;
- (i) 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;
- (j) not to be convicted of any offence of which he or she previously been convicted or acquitted on the merits;
- (k) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (l) to be informed in a language which he or she understands of the reasons for conviction and sentence;
- (m) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;
- (n) to be sentenced within a reasonable time after conviction.

(2) Any infringement of the rights of an accused referred to in subsection (1)(d) or (g) shall not result in the setting aside of the proceedings unless the court on appeal or review finds that justice has not been done.

#### Note

The clause guarantees certain procedural rights aimed at ensuring that with the trial of an accused person justice is not only done, but can manifestly and undoubtedly be seen to be done. It may fairly be stated that the rights in question have been formulated more comprehensively in this provision than in most existing charters.

These rights also provide that inhuman punishment may not be imposed upon anyone. In the light of prevailing conceptions in other legal systems this will probably entail that corporal punishment, which at present is still a permissible form of punishment in the Republic, will be in conflict therewith and will have to fall away.

Recognition is also given to the internationally accepted principle that an accused should have the right to appeal against his conviction and sentence to a higher court than the court of first instance.

#### Forced labour

27. (1) Every person shall have the right not to be subjected to forced labour.

(2) For the purposes of subsection (1) "forced labour" shall not include the following—

- (a) the performance of labour by a person serving imprisonment;
- (b) the performance of community or other service by a person in terms of a sentence or an order of a court of law;



- (c) **the performance of compulsory military service;**
- (d) **the performance of civilian service in the place of compulsory military service.**

### Note

By "forced labour" is meant labour which someone is compelled to perform under threat of punishment and to which he has not bound himself voluntarily.

For the avoidance of possible doubt subsection (2) provides that labour performed under a sentence of a court, as well as compulsory military service or civilian service in the place thereof, is not regarded as forced labour.

### Litigation

**28. (1) Every person shall have the right to have any dispute settled by a court of law.**

**(2) Every person shall have the right that the South African law, including the rules of the South African private international law, be applied in all proceedings before a court of law.**

**(3) Subsection (2) shall not prevent—**

- (a) judicial notice of the law of indigenous groups;**
- (b) the application in civil proceedings of the law of indigenous groups or the religious law of religious groups.**

### Note

Subclause (1) recognizes a person's basic right of access to the courts. This right may result in certain statutory provisions in terms of which the authorities may recover damages from someone in a summary manner and without the intervention of a court being invalid. It will also invalidate provisions in terms of which the jurisdiction of the courts is ousted.

Subclause (2) confirms the application of the South African law. Subclause (3) authorizes the application by the courts in appropriate cases of the law of indigenous groups or the religious law of religious groups.

### Rules of natural justice

**29. Every person shall have the right—**

- (a) to have the rules of natural justice applied in administrative proceedings where, on the ground of findings of fact or of fact and law, his or her rights or reasonable expectations are or may be infringed;**
- (b) that in such a case the reasons for any decision be furnished on demand to him or her.**



**Note**

It has already been held that the two rules here under discussion ("no one may be a judge in his own cause", and, "also hear the other side") form part of our law. In short, the latter rule means that before an administrative organ comes to a decision that may affect the interests of a citizen adversely, such organ must allow that citizen an opportunity to put his side of the case. These rules now become fundamental rights.

**Privacy**

**30. (1) Every person shall have the right to privacy.**

**(2) A person's right to privacy is infringed also by entering or entering upon his or her property or place of residence or employment, by searching him or her, by seizing his or her property or possessions and by intercepting or obtaining information about his or her correspondence or other forms of communication.**

**(3) The interception of, or the obtaining of information concerning, the correspondence or other forms of communication of a person shall be permissible only in so far it is authorized by a law of a competent legislature for the purpose of preventing and combating foreign intelligence operations, the illegal trade or trafficking in narcotics and weapons, serious economic offences and the organized sexual exploitation of women and children.**

**Note**

The civil law protects the right to privacy of people among themselves. But the authorities should also respect this right.

The definition of this right in the clause is not exhaustive, but refers only to certain aspects thereof where the danger of infringement is greater, for example, the search of private property and the interception of post.

The latter is permissible only for the prevention and combating of foreign intelligence operations, the unlawful trade in drugs and weapons, serious economic offences and the organized sexual exploitation of women and children.

**Art and science**

**31. Every person shall have the right to practise the arts and science.**

**Note**

The State may not place any obstacle in the way of any person who wants to participate in the arts or science.

**Environment rights**

**32. Every person shall have the right not to be exposed to an environment which is dangerous or seriously detrimental to the health or well-being of man, and the right to conservation and protection of the environment.**



**Note**

In today's world these so-called green rights are considered important enough also to be included. The vertical application of this right will ensure that this right can only be enforced against the State, which will prevent a witch-hunt against private entrepreneurs. However the recognition of this right will have an inhibiting side-effect on private entrepreneurs who disregard the importance of conservation and protection of the environment.

**Women's rights**

**33. (1) All women shall be entitled to equal rights with men.**

**(2) No law shall in any matter relating to women discriminate, distinguish or restrict on the basis of sex if it has the effect of denying or limiting women's right to equality with men in the political, economic, social, cultural, civil or any other sphere.**

**(3) Without derogating from the generality of the foregoing every woman shall have the right—**

- (a) to be elected to any public office for which she qualifies;**
- (b) to receive equal remuneration with men for work of equal value;**
- (c) not to be discriminated against solely by reason of her marital status or pregnancy;**
- (d) to perform juristic acts, to acquire rights and incur obligations, and to acquire and dispose of property;**
- (e) to her physical and mental integrity and in particular to legal protection against rape and sexual harassment.**

**(4) A law shall be deemed not to be in conflict with the right to equality before the law if the object of the said law is—**

- (a) to bring about equality between women and men;**
- (b) to protect women in certain types of work in the case of pregnancy or for other reasons inherent in their physical nature;**
- (c) to exempt women from compulsory military service, excluding service in a non-combatant or supporting capacity.**

**Note**

Although the right to equality before the law is wide enough to protect women's rights inasmuch as it prohibits discrimination also on the ground of sex, a specific provision on women's rights may nonetheless be justified. It must be pointed out, however, that some of these rights, for example, an unqualified right to contract and to deal with property will be in conflict with aspects of the law, culture and customs of indigenous minorities and tribes, and that it is not be intention to force alien values upon them.

The inclusion of these provisions regarding women's rights must be seen against the background of the conventions relating to women and to which the Government subscribes. It is the Government's intention to ratify these conventions in due course. Women's rights are formally settled in separate draft laws in which the remaining statutory discrimination against women is abolished and provision is made for the promotion of equal opportunities for women and the combating of domestic violence.



### Culture and language

34. (1) Every person shall have the right to use the language of his or her choosing and to participate in the cultural life of his or her choosing.

(2) Every person shall have the right of communication with the State in the official language of his or her choosing.

### Note

Underlying this right is the existence of more than one language and culture group in the Republic. This right will therefore mainly be enjoyed in group connection.

### Limitation of fundamental rights

35. (1) A law referred to in section 1(2)(a) in terms of which a fundamental right is limited or the limitation thereof is authorized, shall be permissible only to the extent in which such limitation is reasonably necessary—

- (a) by virtue of state security, the safety of the public, the public order and interest, good morals, public health, the administration of justice or public administration;
- (b) to uphold the rights and freedoms of others;
- (c) to prevent or combat disorder, violence, intimidation or crime; or
- (d) to counter or deal with a threatening or actual natural disaster or the consequences thereof.

(2) The question whether the limitation of a fundamental right is reasonably necessary shall be justiciable by the Constitutional Court.

### Note

In a modern society where it is the task of the law to strike and maintain a balance between the interests of citizens among themselves, as well as between the interests of citizens on the one hand and those of the State on the other hand, certain rights must necessarily be limited or must yield *pro tanto*. For example, while the object of my right to privacy is that no one may enter my home without my permission, the needs of the administration of justice may require that a police officer search my house in a specific instance to trace a criminal in hiding.

The purpose of section 35 is to prescribe standards against which it can be determined if a particular limitation of a fundamental right is permissible. The legislature is strictly bound inasmuch as any limitation must be **reasonably necessary** on the ground of one or more of the considerations mentioned in paragraphs (a) to (d). The Constitutional Court is expressly authorised to determine if any limitation is justified. Should the court find that a limitation is not **reasonably necessary**, the court will declare the law imposing the limitation invalid.



### Suspension of fundamental rights

**36. (1) A law referred to in section 1(2)(a) in terms of which a fundamental right is suspended of the suspension thereof is authorized, shall be of force only during a state of emergency in which—**

- (a) the continued existence of the State or the safety of the public in the Republic or in a part of the Republic is threatened by an actual or threatening war or invasion, an insurrection or general riotousness; and**
- (b) the suspension of that fundamental right is reasonably necessary to ensure the continued existence of the State or the safety of the public.**

**(2) The question whether a state of emergency as contemplated in subsection (1) exists, shall be justiciable by the Supreme Court.**

### Note

The suspension of a fundamental right is only at issue during a state of emergency.

A first requisite is that there must be a state of emergency as defined in section 36(1)(a). Whether such a state of affairs exist, does not end with the opinion of the State President, as is the case at present. The Supreme Court is expressly authorized to verify the factual existence thereof. To this extent the existing law will be invalid or will be interpreted otherwise by the court.

The other requisites of clause 36 can likewise be tested by the court. Thus it must be a fact, objectively seen, that the continued existence of the State is threatened, and that the suspension of the right in question is reasonably necessary to ensure the continued existence of the State.

### Absolute prohibitions

**37. Notwithstanding anything contained in this Charter no law contemplated in section 1(2)(a) shall regulate or authorize—**

- (a) the physical or mental torture or inhuman treatment of persons;**
- (b) the creation of offences with retrospective effect;**
- (c) the indemnification of the State or a person in the service of the State for the unlawful killing or injuring of any person;**
- (d) the detention of any person in circumstances other than those authorized in the specific instances set out in section 23 for a period longer than 10 days without leave or an order of a court of law.**

### Note

Notwithstanding provision in clauses 35 and 36 for the limitation or suspension of a fundamental right the legislature is in terms of this clause absolutely prevented from authorizing or permitting the above-mentioned matters. Here it is of importance to note that during a state of emergency a person may not be detained for more than 10 days without leave of an order of a court.



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26 March 1993

The Chairman  
Management Committee  
Multi-Party Forum  
P O BOX 307  
ISANDO  
1600

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

With further reference to the above matter I enclose herewith my letters of the 30th March 1992 and 16th October 1992 for ease of reference, copies of which should, however, be in your file.

My letter of the 30th March 1992 was written in response to an invitation for the members of the public to address Codesa on issues relating to the Constitution and Bill and Rights. Unfortunately, whilst I asked that copies of my letter be circulated to all the delegations, I never received confirmation that this was, in fact, done. If it was done, then I was studiously ignored by all the delegations. I trust that this will not be the case when "Codesa 3" commences and that we can expect that the Constitution and Bill of Rights be negotiated from the bottom up rather than from the top down. Unless this is done, and seen to be done, it is unlikely that a democracy, other than in name, will be the result.

Other than control of the security forces, my main concern is with control of finances in the new South Africa. It would seem that control of expenditure to prevent corruption needs a complete overall. In this regard, Ministers of State must be made personally accountable for the performance of their departments. This, however, will be insufficient on its own. Internal and external auditors should be appointed to continuously monitor the financial performance of each department on a continuous basis and productivity incentives and bonuses should be given to civil servants where performance audits show that they have, not only performed within their budget but, in fact, have reduced the department's expenditure or, alternatively, have achieved more than was required of them within the budget. If goals are not

set/.....



set and productivity incentives are not given, we can expect the same, if not worse, inefficiencies and corruption in a new government as exists in the present one. The Ministers for the Budget and of Finance should be made more accountable for their respective portfolios and, in particular, the expenditure side of the budget should be carefully monitored throughout the year. Deficits should not be allowed to reach anything above 3% of Gross Domestic Product and these matters should be covered in the Constitution (cf. the Gramm Bill in the USA). The money supply should similarly be controlled within certain parameters and the Reserve Bank should totally independent of State control. These measures should prevent inflation ever occurring again. Inflation is, after all, a fraud on the public.

Insofar as corruption, fraud and gross negligence within any state department is concerned, state officials should be treated harshly. Ministers of State should be made to resign immediately, whether or not they were personally aware of any corruption, fraud or gross negligence within their own departments. The principle of delegation of authority but not of responsibility must be made to apply. The sanction for allowing such matters to occur should be, not only the loss of office, but the loss of, at least, the state's contribution towards such party's pension and, where the Minister and/or State Official is personally involved in any act or omission which causes loss to the State, such person should be prosecuted and made to make recompense, where possible.

The above measures are necessarily harsh, as they must be, in order to cope with the rampant corruption which is a bedevilling our society.

The whole tax system must be reviewed to encourage universally accepted moral and ethical values and geared to discourage the baser instincts of man. In this regard, I need only mention as an example, the high taxes and strict laws on the distribution of alcohol in countries like Norway and Swedan. There are, obviously, many areas in which the tax laws can be used to uplift society and not pander to man's greed and fear and other countries tax laws should be studied and, if possible, improved on to nurture more civilised values.

I/....



I trust that the man in the street is not going to be ignored when deliberations on these matters recommence and would be happy to address any of the relevant committees further on the various matters raised.

In the circumstances, I look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a smaller 'A' and a surname that is partially obscured by the signature's flourish.

M A McLOUGHLIN




could be truly proud and, would insure that the politicians and servants of the state can truly say "I serve". Regrettably, human nature still seems to be guided by greed, fear and power, and as long as this is the case, the checks and balances, set out herein, will be necessary to insure evenhandedness down to the weakest member of society. If such a constitution can be agreed to at CODESA, I, for one, would be happy to accept my new destiny with pride and to serve under any President, no matter what his race, colour or creed. I would then push for elections to be held as soon as possible.

I do not think that it would be in the interest of the people as a whole for a transitional government to be installed before agreement, in principle, has been reached on what kind of democracy every one is talking about.

I shall be glad if you would confirm that my letter will be brought to the attention of all the interested parties within working group three and look forward to hearing from you.

Yours faithfully



M. A. McLOUGHLIN

encl:



HEALTH

The emphasis here should be on preventative medicine and not curative medicine. The State should provide basic clinics throughout the country, together with the necessary education on preventative medicine, to change the whole culture of health care. Thought should be given to creating incentives for people to encourage them to lead healthy life styles. A National Health Scheme for curative medicine should be based on no claim bonuses being granted to those who do not utilise or abuse the system.

REGIONAL AND LOCAL GOVERNMENT

These tiers of Government should be obliged to run their levels of Government, incorporating the same principles, as outlined above for National Government within the framework of the Constitution/Bill of Rights.

LANGUAGE

I believe that the best way of ensuring National identity, cohesion and communication within a Nation is through a National language. The only language which would seem to fit the bill from a practical point of view would be English. If all the people speak one language, they can identify with each other more easily. The United States of America is an example of peoples of diverse Nations coming together and being unified through the use of one language. This in no way means that a particular ethnic or cultural group should not be proud of and continue to speak their own language within their own communities but it is impractical to expect the Nation as a whole to speak a number of languages.

Naturally, I would expect that in a democracy, a justiciable Bill of Rights would be a sine qua non, together with the division of powers as outlined above in national, regional and local politics. I would be pleased to hear that the above matters, if not specifically on the agenda for the debate within working group three, should be placed thereon. If, however, you do not feel that the issues raised are of sufficient importance to warrant discussion, would you kindly let me know. I would be happy to appear before your working group, if required, to expand on the themes outlined above.

I truly believe that a Constitution and a justiciable Bill of Rights, incorporating all the checks and balances set out above, would be something of which all South Africans

could /...



EDUCATION

In a free enterprise society, the State should merely set the minimum standards and principles to meet overall objectives and leave it, thereafter, to private enterprise to provide, in whatever form, the needs of various communities. This is well illustrated in Nobel Prize winning economist MILTON FRIEDMAN'S BOOK "FREE TO CHOOSE" where he suggests that a voucher system be implemented in American schools, in terms of which, each student is subsidised by the State up to a certain amount, depending on the level of education being sought. These vouchers can be cashed in at any institution, which may charge, either more or less, than the amount of the voucher. The institution then obtains payment for the amount of the vouchers received by it from the State and the parent then pays the difference, if any. The better institutions will then sell education at a premium, and in accordance with their results and facilities, will receive more vouchers than a school which does not meet the standards required by the community. Such a competitive base for an institution, can only be of benefit to the community as a whole. It will also give freedom of choice for different types of education as may be required by parents for their children. In a democracy, it should not be the prerogative of the State, to tell parents how their children should be educated other than by way of setting minimum standards!

AGRICULTURE

It must be accepted that a redistribution of land will have to occur, to correct the imbalances created by an apartheid society. The 1913 and 1936 Land Acts protected the interests of the white man alone and, obviously, these imbalances must be redressed. Some expropriation will be necessary, but farmers should be adequately compensated by the State. Such compensation should, however, take into account the tax breaks received by the farmer in terms of Schedule 1 of the Income Tax Act in setting the level of compensation to be paid. Thereafter, the farmer should be treated as any other businessman whose success or failure depends on his own ability and ingenuity. Farmers have in the past been too protected by the State, at the expense of the other citizens of the country who do not receive the same tax breaks. As a result, farmers have been allowed to build up substantial capital assets which other citizens have not and, although, their income may be relatively small, the capital value of their assets have increased substantially through the years. Any farmer who has not set aside sufficient reserves from good years, to cover bad years, has only himself to blame in most cases, for the dire straits in which he may now find himself. The market place must be the final arbiter of who should be a farmer or who should not.

HEALTH/...



POLICE

A democratic society needs a dedicated, professional and impartial Police Force which is seen to be such by all its people, in order to be respected. To achieve this, high standards and high pay are necessary.

HEALTH, EDUCATION AND HOUSING

In principle, the Government should act merely as a facilitator and catalyst setting down the principles and standards to be met and applied in each of these areas. It is not, or should not be, the function of Government to act as the bonus paterfamilias providing all the peoples needs. The people need to be taught how to catch fish not merely be given th fish. If one is merely given hand outs one never learns and a Nation should have enough pride in itself for each of its citizens to learn to stand on his or her own two feet. Provided this principle is accepted, it may be necessary for the State to assist in providing the initial impetus, for instance, by bearing the bulk of primary education. Parents should, however, be asked to contribute a reasonable amount out of their own pockets in accordance with their means. This would not relieve a citizen of his own self-respect and pride as well as his obligation for his own family. It builds character and can only improve the work and responsibility ethic in a Nation. To say that it is the States responsibility to provide housing, education, health and social welfare for its people is nonsense. The state should merely stand as a back stop to help the really needy and those who cannot, under any circumstances, help themselves. As stated previously, a conditional period may be necessary before this principle of self-help can be fully implemented, because of historical imbalances, but the principle should still be accepted and implemented, in a phased manner.

I have the following additional comments to make on various portfolios.

HOUSING

This should be financed over a number of generations and bonds granted at the finest rate of interest possible, excluding subsidies, and over a period of 50 years through banks, building societies and insurance companies. This finance should be seen as some form of retribution to our fellow citizens, who have been legally deprived from entering the housing market for so many years. By the same token, these communities must bear their responsibility for payment of bond instalments, lights, water and other services.

EDUCATION/....



I believe these qualities should be the cornerstone of all legislation in the new South Africa and, in this regard, I particularly refer to the last two sentences of the paragraph headed "Promulgated", to wit, legislation which is made to apply to actions that were committed in the past, and which changes the law, is called retrospective or ex post facto legislation. It is, obviously, unfair and is almost universally condemned. Is the question of retro active legislation on the agenda at CODESA? If not, I suggest that it should be placed thereon and, hopefully, condemned, in line with a democratic constitution.

#### 8. APPOINTMENT OF JUDGES

If the powers of the Executive, Legislative and the Judicial arms of Government are, hopefully, to have equal powers of veto against each other in a new constitution then the appointment of Judges is an important issue and should not be controlled, directly or indirectly, by the Executive and/or Legislative arms alone. At best, I believe that these other arms of government should be given a maximum of a 50% right to the appointment of judges and that the balance should rest with the legal profession as a whole or, possibly, it and other relevant constituencies. In the event of an impasse, the Appellate Division or the Constitutional Court should act as the final arbiter.

#### CARTELS AND MONOPOLIES

The proliferation of cartels and monopolies in the South African economy exist despite Legislation under the Monopolies Act and the existence of the Competitions Board. These seem to be ineffective, essentially, against the continuance of these cartels and monopolies. They are essentially undemocratic, if not immoral, and have been allowed to develop by virtue of the historical, undemocratic nature of our society. The argument that they need to exist to fund multi-million or multi-billion Rand contracts is not acceptable. If a need for such financial muscle is necessary, this can always be achieved by various big companies forming consortia to part-take in joint ventures. The cartels and monopolies should be broken up in an ordered manner over a period of, say, 10 years. Only in this way will free enterprise be seen to be working, in practice, as well as theory.

#### CONTROL BOARDS

These bloated bureaucracies have outlived any usefulness they may have had, which is doubtful. They should be disbanded as soon as possible to allow the market to regulate itself. They tend to act as another cost burden to the economy which is unnecessary. If the farmer wants, or needs a marketing arm and a mechanism for smoothing out fluctuations in price, he can formulate his own strategies through co-operatives and the like.



EXCHANGE CONTROL

This is an iniquitous control brought in by the Finance Minister of the Nazi Regime in Germany in 1930's. It is undemocratic, and should be outlawed in a new Constitution. All arguments for retention of exchange control should be seen for what they are - spurious! A citizen who has paid his taxes, should be allowed to invest his money, wherever he wishes, particularly, as the world is now becoming a global village. The country's currency will initially depreciate but, if exchange control is banned in the Constitution, this would be short term and investment will pour into the country, when investors realise that their investments are safe, and may be repatriated, without any intervention by whatever government of the day is in power. Similarly, citizens of the country will not be inclined to remove their capital as they will be secure, in the knowledge that their money can be moved, without let or hindrance from the government. If we call ourselves a free enterprise economy, we must not only pay lip service to the concept, but show this clearly by protecting it within the Constitution/Bill of Rights.

6. THE CALLING OF REFERENDA

In any truly democratic country, where the will of the people is to be given expression to, the right to call referenda on various issues, local, regional or national, should be encouraged, provided, of course, any person or group, wishing to call a referendum, has sufficient support for the issue to be aired. None of the delegates at CODESA who truly believe in a full democracy, should object to the constitution and bill of rights encompassing this matter.

7. POSTULATES OF JUSTICE : AND RETRO-ACTIVE LEGISLATION

Enclosed is an extract from Wille's Principles of South Africa Law, 8th edition, pages 14, 15 and 16 which clearly set out the qualities required by the rule of positive Law namely, that, all Laws should be :-

- (1) Reasonable
- (2) Impartial
- (3) Certain
- (4) Comprehensive
- (5) Publicly promulgated
- (6) In accordance with public opinion.

I believe/.....



State are advised by Committees in their respective areas of responsibility. These committees are made up of the best brains in the country, whatever the political persuasion of the individuals on committees are. The Minister may reject the committees' advice on any particular matter, but does not do so lightly. This is just another check against the taking of arbitrary decisions by politicians.

#### 4 THE AUDITOR GENERAL

Although the Auditor-General is only responsible to Parliament, his position would be greatly strengthened and, as a civil servant, he would be free from political manipulation, if his report to parliament was given jointly, with a report from an independent team of auditors, made up of respected firms within the auditing profession. This would cost extra but, would be more than adequately compensated, by the prevention of corruption within the Government and Civil Service. I was recently shocked to read that in one of the provinces, less than 50% of the municipalities had balanced their books for the year or submitted their balance sheets to the Province. Some apparently were more than one year in arrears. This should not be allowed. If a Municipality is more than 6 months in arrear, a team of auditors, should immediately be sent in and the management committee suspended until the results of the audit is known.

#### 5 RESERVE BANK

As in the case of the Bundesbank, the Reserve Bank should be completely free from political manipulation and the constitution should incorporate provisions similar to those in the German Constitution on this point.

#### DEFICIT FINANCING AND MONEY SUPPLY

I believe that deficit financing is wrong in principle and, if resorted to, should be limited to a maximum of 3% of the gross domestic product and then only for short periods when an economy is in a recession/depression. An Act similar to the Gramm Act in the United States, forcing the government to reduce the deficit, if this is not done voluntarily, should be included in the Legislative armoury. This type of Legislation would not be necessary, if deficit financing is covered by the Constitution/Bill of Rights. Similarly, money supply should be controlled, and put within limits, insofar as increases are concerned. In this regard, the money supply should be covered by the Gold and Foreign Exchange Reserves to a certain percentage, say, 25%. This discipline is necessary, to avoid inflation, which impoverishes the Nation, and is a fraud on its citizens.



I suggest that one way of insuring that a new government is not overthrown by the military, would be to decentralise security on a regional basis, so that no military council can take over the government by way of a Coup d'etat unless such regional military power has the support of the generals from all the other decentralised regions. This may lead to a more expensive military establishment but, will be well worth the cost if democracy is to be ensured. I have, to date, not heard any of the leaders of the various political parties at CODESA comment on control of the military in a new South Africa and, as Africa has a poor record of democracy and a good record for military takeovers, whatever constitution is in place, I feel that this important issue needs to be addressed publicly as well as being debated at CODESA. After all, if the Armed Forces are to be the guardians of the constitution and the bill of rights who, in turn, is to control the Armed Forces? They should be subject to even more stringent checks and balances than Parliament, to avoid any abuse of power.

2. "THE NATIONAL INTEREST"

This concept, which is used by governments world wide, including the great democracies, to cover up embarrassing actions and misdemeanors on their part, needs to be subject to scrutiny within a true democracy. Accordingly, will provision be made in the constitution or the Bill of Rights, for all information under the government's control, to be subject to scrutiny by the courts, (in camera, if necessary), to ensure that "the national interest" is not subject to the perverted subjective whim of the state or its officials. I believe that it is necessary that all state information and documents be freely accessible to the people, unless the government or its officials, themselves, apply to a constitutional court for such information or documents to be held secret, in the national interest. The inconvenience, to the government and its officials, of having to take positive action, will be far less than the damage caused to democracy if "the national interest" is to be left to the discretion of some politician, who may have something to hide. The US Freedom of Information Act, is a precedent which should be looked at by CODESA as a starting point and could be adapted, in its scope to suit local conditions.

3. ADVISORY COMMITTEES

I understand that in Germany the Ministers of  
State/....



# M.A. McLOUGHLIN

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Docex: DX66  
Johannesburg

The Chairman  
Group 3 (Constitutional Affairs)  
CODESA  
P O Box 307  
ISANDO  
1600

30 March 1992

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

Members of the public were requested and invited to make representations to CODESA over the deliberations for a new constitution and bill of rights. In accordance with the said invitation and in an effort to make a possible contribution to the debate over a truly democratic dispensation whereby the new constitution will truly be of the people, for the people and by the people and, in terms of which, the rulers are truly the servants of the people and not the reverse, I have the following points to make which I feel need to be addressed, namely :-

## 1. CONTROL OF THE ARMED FORCES

It has been suggested, that elements within either the SADF or the police are, with or without the connivance of their superiors, actively attempting to destabilize the negotiating process towards a just dispensation for all. Alternatively, that different factions amongst the blacks are jockeying for position and that a "third force" is assisting one or other element in this regard. These are not idle allegations and one has only to look at recent press reports with regard to TV producer, John Drury, of the BBC's "Assignment" programme and, the continued local perception of such a third force, to realise that certain people are definitely trying to destabilize the democratic, negotiating process. Whoever is responsible, and it could, into alia, be the elements in the security forces referred to, power needs to be controlled in a new South Africa. No Constitution, or Bill of Rights, whether justiciable or not, will be of any force or effect, if the Armed Forces are controlled, effectively, by one man or, a small clique of Generals. One shudders when a whole band of ex-Generals, publicly advocated a No vote to the deliberations at CODESA. As Groucho Marx once said "Military intelligence is a contradiction in terms!"

I suggest/.....



M A McLOUGHLIN/W11 MAM-M66  
MR M PHILLIPS

The Chairman  
Management Committee  
CODESA  
P O BOX 307  
ISANDO  
1600

16 October 1992

Dear Sir,

re : CONSTITUTION AND BILL OF RIGHTS

I am in receipt of your letter of the 21st September 1992. I have still not received any confirmation that the points raised in previous correspondence will be specifically addressed point for point. If and when Codesa or its successor reconvene and I would like to have an assurance that all the issues raised will be submitted to its delegations and that I will receive, as an ordinary citizen, the same courtesy as those afforded to the invited participants with regard to the issues raised. Insofar as these issues are concerned, I would also add that the right to privacy in its widest form be afforded to all citizens as this is a very important issue in a world in which the State intrudes more and more into the private lives of its citizens. The right to privacy must be incorporated both in the Constitution and the Bill of rights.

I look forward to hearing from you.

Yours faithfully



M A McLOUGHLIN