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SUMMARY OF INTERIM REPORT

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The present members of the Commission are:

The Honourable Mr Justice H J O van Heerden (Chairman)
The Honourable Mr Justice P J J Olivier (Vice-Chairman)
Advocate G G Smit
Mr J E Knoll
Professor D J Joubert
Dr W G M van Zyl
Professor C R M Dlamini

The Commission's offices are on the 8th Floor, 238 Visagie Street, Pretoria. The postal address is:

The Secretary
South African Law Commission
Private Bag X668
PRETORIA
0001

Telephone: (012) 3226440

The project leader responsible for the project is the Honourable Mr Justice P J J Olivier. The researchers concerned with the project are Advocates G O Hollamby, A W F van Vuuren, J H Potgieter, M F Palumbo, M M Bekker, H C Smuts, P A van Wyk and W F Schroeder.

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SUMMARY OF THE MOST IMPORTANT CONCLUSIONS AND RECOMMENDATIONS OF
THE SOUTH AFRICAN LAW COMMISSION IN ITS INTERIM REPORT REGARDING
GROUP AND INDIVIDUAL RIGHTS, AUGUST 1991

1.1 In March 1989 the South African Law Commission published a working paper on the protection of group and individual rights in South Africa. In that working paper a case was made out for a full, justiciable bill of rights that would protect individual rights in a new South Africa. The whole of South Africa was asked to comment on the proposals contained in the working paper, to submit new or alternative proposals and to join in the work of refining the report that was ultimately to be brought out. The response to this invitation was overwhelmingly positive. The Commission has now completed an interim report, published simultaneously herewith. As the interim report runs to 702 pages, this summary of the main conclusions and recommendations is presented for the convenience of interested persons. The Commission would emphasise, however, that meaningful discussion of and debate on the Commission's conclusions and recommendations will be possible only if the interim report is studied in its entirety, since in that report the supporting facts and arguments are presented in far more detail.

A. GENERAL BACKGROUND

1.2 The idea of the existence of certain fundamental human rights is a recurring theme in most philosophical schools of thought in the world. In the extreme forms of positivism, where moral considerations are excluded from the grounds justifying the law, no place is given to the recognition of human rights.

1.3 The international community has given positive shape in many different ways to the idea that every individual has certain needs which ought to be enacted as positive law and which must then be respected and protected by the state. The demand for the recognition and the enactment of these needs in positive law has become universal and is recognised even where in positive law no enactments, conventions or treaties exist. This has become part

of the modern international legal consciousness and of contemporary international law.

1.4 As regards both group rights and individual rights, this country's constitutional and legal past is characterised by major shortcomings and inequities. From the system of unbridled parliamentary sovereignty, the absence of a bill of rights or any real testing right for the courts and the withholding of the franchise from our black citizens in particular, evolved a political system based on racial discrimination. This system has resulted in there being no proper provision in our legal system or in our constitutional dispensation for the recognition of the legitimate claims of individuals and groups to rights that are recognised and enforced world-wide as human rights.

1.5 In this country today there is a large measure of consensus that drastic reform is essential if a new dispensation is to be created. This consensus suggests that in the field of the law and in other fields such reform should take the shape of a new constitution. This constitution should be aimed at absolute fairness to, and as between, all individuals and groups so as to guarantee peace and stability for the country. By this we do not mean that drastic reforms in other fields, such as the economy, social institutions and education, are not equally essential. The ideal would be that all reform should take place on an integrated and orderly basis.

1.6 The majority of people in this country accepts that the era of apartheid is past and that we are already in the process of transforming our constitutional and socio-economic systems. It is equally true that there are sharp differences when it comes to the questions as to where this process should lead us, which system we are going to adopt, and exactly how the process is going to take place. No one can answer these questions with any certainty. What is certain is that the vast majority of this country's total population is opposed to further discrimination or exclusion or favouring on the ground of race or colour. We are striving for a

system of equality before the law, and therefore justice, for all.

1.7 In spite of conflict and violence, our nation is at present still in a hopeful phase: in the midst of widespread violence there is a commitment to the quest for a peaceful solution. In the process various parties, organisations and individuals are working on proposals for a new constitution which will be able to meet those aspirations, allay those fears and resolve conflict and provide a framework for peaceful co-existence. The Commission's contributions are but one of several efforts in this regard.

1.8 Essentially, what the South African community is engaged in at present is an investigation into ways in which individual and community needs can be recognised and protected in the future. Such an investigation and ultimate consensus are conditions for constitutional reform, because the scope of the recognised and protected individual and group needs will at the same time form the basis of the constitution.

B. THE QUESTION OF INDIVIDUAL RIGHTS

1.9 In Working Paper 25 the Commission dealt fully with the origin of the idea of individual rights as fundamental rights. The different schools of thought in the history and development of the better-known bills of rights were discussed at length and are not repeated here.

1.10 In the numerous submissions to the Commission in response to the publication of Working Paper 25 there was strong general support for the idea, as proposed by the Commission, of the protection of individual rights in this country by means of an entrenched bill of rights justiciable by an independent judiciary, because this involves a new order based on equality before the law, non-discrimination and the safeguarding of the human being's most fundamental needs and liberties.

1.11 However, there were also objections in principle to this idea. These objections are dealt with first.

1.12 The first objection is of a political nature and comes from the ranks of those generally known as conservative whites. The main points of criticism, from inter alia the Conservative Party, the Herstigte Nasionale Party and a number of Afrikaner organisations and numerous individuals, are the following:

- * The granting of universal franchise will result in black domination, which these respondents find unacceptable.
- * The proposed bill contains "political" provisions placing a prohibition on discrimination and clearly also on differentiation, with the result that an express option is exercised in favour of the political ideology on the left of the political spectrum in South Africa. The Commission therefore makes an ideological choice alien to the group-orientated thinking which is characteristic of the vast majority of Afrikaners. The socio-economic and political rights contained in the bill are aimed at the acceptance and establishment of an egalitarian socialist system where there is no protection of group rights. The bill is indifferent to the interests of Afrikaners as a group and makes no attempt to afford protection to the Afrikaners or the whites in general or to any other group.
- * The proposed bill does not protect the right of a people to self-determination.
- * The doctrine of equality in the Commission's approach is unacceptable.
- * It is contended further that the Commission is trying to deny the liberalistic nature and origin of the human rights idea; that clearly a veil is drawn over the Communist nature and origin of the Freedom Charter;

that the Afrikaner nation's rights cannot be protected merely by protecting individual rights; that people cannot be changed by laws; that a group of people (lawyers or others) cannot draw up a set of rules by which a multiracial and multinational society can be ordered; and that no recognition is given to the right to preference for what is one's own.

- * Against the background of the history of other countries in Africa a warning is sounded that black people will stand together in spite of tribal boundaries and political divisions as long as they stand against whites. Once they have seized political power, however, the majority group takes over and subjugates the rest. In Africa, time and again, the leaders of multiracial parties (Muzorewa and Smith in Rhodesia; Welensky and Nkumbula in Zambia; Blundell and Kiano in Kenya) have just prepared the way for the terrorist leaders to gain political power.
- * The Commission's proposed bill is typical of human rights thinking which is rooted in natural law and humanism and which is characterised by the exaltation of man, the glorification of man, the rejection of authority and responsibility, and trust in reason instead of in God.
- * The idea of a unitary state in which peoples can live in peace and stability without dominating one another is unrealistic and far-fetched.
- * The Commission's proposed bill will mean the end of racial differentiation and racial discrimination, and the death of apartheid.
- * Black people are merely using the cry of human rights in order to undermine white rule and seize political power for themselves. Once they have seized political power

they will show no further interest in the rights of others nor will they respect those rights, since that would stand in the way of what every black politician has always had in view, and that is to seize the power to dominate and monopolise the police and the courts of law.

1.13 The Commission carefully considered the political objections to the introduction of a bill of rights in South Africa. Attention was also given to the criticism of the Commission's proposed bill that it would not sufficiently protect the interests of certain communities.

1.14 In contrast with these objections, the Commission received numerous tokens of support for its proposal that a bill of rights be introduced in this country. These came from many South Africans of all population groups, languages and cultures, in the form of personal discussions, letters, telephone calls, memoranda, submissions, oral testimony, newspaper articles and letters to newspapers, and publications in general periodicals and professional journals. Likewise they came from numerous persons in other countries.

1.15 The Commission also noted a general trend in the world, particularly during the past eighteen months, towards greater respect for human rights and the promotion of the effective protection of those rights. This trend is perhaps more striking in Eastern Europe and the USSR, where large-scale democratisation has taken place and is still under way. This includes greater respect for fundamental rights, inter alia, equal participation by all citizens in the government of the country, the recognition of the multiparty system and the abolition of oppressive legislation. But this process is also clearly discernible in South America, where at present, unlike five years ago, there are no longer any military dictatorships and there are now democratic governments. Great changes are taking place as regards the respecting of human rights.

1.16 The same process is taking place in Africa. A considerable number of African states have gone through an evolutionary process and are now ridding themselves of the unworkable ideologies of dictatorship, the one party state, socialism and the denial of the rights of the individual. The reasons for this are many and various and include the raising of the general level of education, the emergence of better qualified lawyers and politicians with wider experience and better insight, and the empirical observation of the failure, particularly in the economic sphere, of the said ideologies in their own states and in the Communist bloc.

1.17 Hitherto in South Africa, lip service has been paid to the norms of democracy. The reality has been that the whites were able to establish and perpetuate their political and economic dominance only by denying some of the most fundamental human rights of other citizens, for example the denial of the right to vote in the highest legislature, restrictions on property ownership, on freedom of economic activity, on freedom of movement, on freedom of political activities, etc.

1.18 The normalisation of this situation and the creation of an honest and full system of human rights are seen as a threat by many whites and indeed as the end of their present privileged position. The institution of a citizenship valid for all in this country and the granting of equal rights to all - inter alia the right to vote in the highest legislature and access to ownership of all land and to all means of production - necessarily mean the disappearance of the statutory privileges of the whites in this country. That there is strong resistance to such a new order is therefore understandable.

1.19 The Commission has no doubt, however, that the old order was not morally or legally justifiable and that it should or could no longer be maintained. From the Commission's study it became clear that the old order must disappear and make way for a full-statured human rights régime in which the fundamental rights of all individuals in this country are protected on a basis of equality.

1.20 There can, after all, be no ethical or juridical objections to a system which offers equal opportunities and equal protection to all citizens and which leaves it to those citizens, each according to his or her own ability and diligence, to realise their full potential.

1.21 The Commission is therefore convinced, and it recommends, that an honest and full-statured bill of rights justiciable by an independent judiciary should be an essential part of a new constitution for this country. The Commission also considers, however, that the fears of minorities in our country should be recognised and addressed, and refers to what will be said below regarding group, community and minority rights.

1.22 The second objection is of a religious nature and also comes mainly from the conservative whites. The gravamen of the objection is that the Commission's bill (like all bills of rights) is humanistic and liberalistic and that it falsely seeks grounds for the doctrine of human rights in the Christian faith.

1.23 On the other hand, the exact opposite arguments came from numerous church circles and academics. The views of those who reject human rights from Christian perspectives were for example refuted by Professor L M du Plessis, a legal philosopher from Stellenbosch:

Reactionary theology ... is nurtured by the fear among South Africans belonging to the privileged minority group of (and gnawing uncertainty about) socio-political transformation in South Africa that inevitably undermines existing certainties of the apartheid dispensation. For example, "eternal Biblical verities" are feverishly sought which can help to entrench the position of the privileged in our society against the claims of the oppressed. For reactionary theologians liberation theology is enemy number one and "liberal theology" is enemy number two. In addition, they not only have close links with far right political groupings but also with the securocracy (especially in the Defence Force). In short, reactionary theology is not an unexpected freak phenomenon in the era of inevitable socio-political transformation that South Africa has entered: it is an altogether predictable backlash of theological filibustering.

This also ultimately explains why the idea of (equal) human rights as such and in particular also the proposals of the SA Law Commission for the more effective protection of human rights have been reacted to with such vehemence. Reactionary theologians rightly appreciate that more effective legal (and politically more honest) protection of human rights in South Africa, inter alia, by means of a charter, must sound the death-knell of the status quo of apartheid - hence their frantic attempts to scuttle initiatives that may result in the more effective recognition of human rights by denouncing these rights theologically and even demonising them. (Translation.)

1.24 It is clear that the majority of South Africans whose views are known and as represented by church denominations support the Commission's proposals regarding human rights protection and a bill of rights as part of a new legitimate constitution. The majority of the major denominations (the Nederduitse Gereformeerde Kerk, the Apostolic Faith Mission, the Methodist Church, the Roman Catholic Church, the Church of the Province of Southern Africa, the Presbyterian Church of Southern Africa) support the principle of the Commission's proposals.

1.25 As regards the objections on religious grounds, the Commission remains convinced that the protection of human rights, even in the form of a bill of rights as part of the constitution, is not unbiblical or unchristian.

1.26 In the Commission's view, the proposed bill contains nothing that conflicts with any religious principles.

1.27 The third objection raised against the Commission's proposal is that in Africa, and therefore also in this country, effective human rights protection cannot be achieved.

1.28 Several respondents contended that in Working Paper 25 the Commission did not devote enough attention to human rights in Africa. More than once it was stated that the protection of human rights in other African states had failed. The suggestion is that that will also be the case in this country. The inference, then, is that the protection of human rights in this country would be

futile and the attempt should be abandoned. The implication is that the whole process of democratisation might just as well be abandoned too.

1.29 The Commission does not accept that because human rights protection has not yet been successful in other African states it will not be successful here either. Circumstances such as the composition of the population, the general level of culture, respect for the law and historical background differ from country to country. As the Commission showed in Working Paper 25, the idea of human rights protection is not foreign to African jurisdictions or to our own citizens.

1.30 Having gone into the reasons for the failure of human rights protection in a number of African states, the Commission considers that this objection does not hold water.

1.31 The Commission is convinced that, given a legitimate process of making a new constitution for this country, which includes a justiciable bill of rights, such a constitution and bill will be respected and upheld by the citizens of this country. Negative experiences in this connection in other parts of the world as well as in Africa might well serve as guidelines in strengthening the constitutional mechanisms to guarantee democracy, but should not bar the way to the introduction of a democratic constitution and a strong, just bill of rights.

1.32 The Commission still recommends that a full, entrenched bill of rights justiciable by an independent judiciary should form part of a new constitution for this country.

C. THE CONTENT OF A SOUTH AFRICAN BILL OF RIGHTS: THE POINTS OF DEPARTURE

1.33 The real, relevant debate concerning a bill of rights for South Africa relates to the content and the coming into being of that bill.

1.34 As regards the content, the difference between the two main schools of thought can be reduced to the question: Are only the first generation rights to be protected, or also the second and third generation rights?

Many South Africans are quite prepared to see the first generation rights protected, but resist the idea of second generation rights and the inevitable correlate thereof, namely affirmative action. To many other citizens, the second generation rights are, however, the very rights that matter in the new South Africa.

1.35 The first generation rights (or the blue rights) are the classical Western civil and political rights.

1.36 These human rights centre upon the individual. Typical examples of these rights are:

- * The right to the protection of life
- * The right to liberty
- * The right to property
- * The right to freedom of movement
- * The right to freedom of speech
- * The right to privacy
- * The right to vote
- * The right to be represented in government
- * The right to assemble and to demonstrate
- * The right to citizenship
- * The right not to be arbitrarily detained
- * The right to legal representation
- * Procedural rights, i.e. rights that operate in the event of arrest, detention, trial and sentencing

1.37 The second generation rights (or red rights) are the socio-economic rights and are identified with a socialist view of the role of the state.

1.38 There are many human rights that may belong under the category of second generation rights. Examples are the following:

- * The right to medical care
- * The right to food
- * The right to housing
- * The right to work and protection against unemployment
- * The right of employees to equal pay for equal work
- * The right of employees to rest and adequate food, clothing, housing and medical care
- * The right to education
- * The right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its attendant benefits
- * The right to the care of the aged

1.39 The third generation rights (or the green rights) are the latest category of rights and include the so-called "peoples' rights", such as the right to peace, the right to self-determination, control over natural resources, the right to development, the right to information, minority rights, and the right to a clean and safe environment.

1.40 The traditional view of the protection of human rights is that these rights must be expressed in negative terms in the sense that they may not be infringed. The mechanism for giving effect to the "negative" human rights is that of a testing right of an independent judiciary in terms of which infringing legislative, executive and administrative acts can be set aside -as for example in the USA. This approach goes hand in hand with the traditional view of human rights as first generation rights.

1.41 However, the rise of the second generation rights (the socio-economic rights) and also the third generation rights creates this problem: the needs concerned apparently call for more than mere negative protection. They call for state action,

positive implementation. But how can this be done and how is such a positive duty upon the state to be enforceable?

1.42 According to traditional Western thinking there are serious conceptual and practical problems in recognising the second and third generation rights as enforceable rights. How are these rights to be enforced against the state? How could a court order the state to provide housing or employment for all citizens on an equal basis? What would happen if the state simply could not afford this?

1.43 The problems concerning the recognition and protection of the second and third generation rights are, therefore, by no means problems of procedure only. What is involved here is a fundamental issue.

1.44 The first generation rights evolved in Western countries during periods when the acquisition of civil and political rights, for example the franchise and property rights, sufficiently enabled citizens to achieve equality and prosperity by using their own initiative and talents in the social and economic spheres. With civil and political rights as common denominator, opposing political parties were able to advocate programmes differing in emphasis for social and economic legislation to secure maximum voter support. Therefore, there was little or no need to view socio-economic needs as fundamental rights or to entrench them in a bill of rights.

1.45 In the Third World, and especially in Africa, the position is quite different. Here the idea of human rights evolved in continents where and in times when there was enormous population pressure, poverty, unemployment and underdevelopment of the infrastructure with regard to housing, medical services and many other necessities of life. The primary needs of citizens in these countries are those of food, housing, work, training, medical services, etc. There is not much point in telling the poor, the jobless or the illiterate that they have freedom of speech if they are dying of hunger or exposure or a treatable disease.

1.46 For this reason, and quite understandably, the citizens of these countries have developed the view that fundamental rights also include claims that the state must be responsible for providing food, housing, employment, training, medical care and other necessities. Thus we find the formulation of second generation rights in many of the new Third World bills of rights, among them the Banjul Charter.

1.47 As has been shown, some Western lawyers and constitutional experts usually argue that these rights are not enforceable by the courts and are therefore not "rights". According to this argument they more properly belong in the programmes of political parties or in a set of non-enforceable guidelines. The response to this is that the argument is formalistic. If there is a need for a right to be recognised, the law should find a procedure for its realisation, even if this means reforming the existing procedure. Ubi ius, ibi remedium is the very principle on which Western legal systems have evolved: where there is a right there is a legal remedy.

1.48 In some Western circles it is also contended that the recognition of the second generation rights is socialist and demands great economic sacrifices, even impoverishment, of the state and of those citizens who are self-supporting. It is feared that the "haves" will have to make great sacrifices to satisfy the socio-economic needs of the "have-nots". This also calls for a completely new view of the role of the state.

1.49 The answer to this is that if we are in earnest about human rights and justice these sacrifices are precisely what is called for and that the stereotyped view of the state is outdated.

1.50 A corollary of the problem referred to is that of affirmative action, i.e. state action aimed at favouring communities that have lagged behind or are underdeveloped so as to achieve equality in real terms more speedily.

1.51 Those who advocate the recognition of socio-economic rights as fundamental rights that must be protected by the constitution naturally also advocate affirmative action to redress existing disadvantage as quickly as possible. The argument is simply that the granting of all first and second generation rights to all citizens of South Africa is going to make little difference to the plight and daily lives of millions of those citizens, because they have no opportunity of enjoying those rights. Action must be taken to erase the disadvantages with which they have to contend at present.

1.52 Opponents of affirmative action argue that it is reverse discrimination, because some citizens would be favoured over others. Because of this, affirmative action would elicit great resistance. It is also said that it would result in a lowering of standards. Further, it is argued that it would exact great sacrifices from the "haves" because they would have to give up disproportionately to advance those that have lagged behind.

1.53 The answer to this is usually that affirmative action may indeed be discriminatory, but then in a healthy sense. It should therefore be accepted in that light, since the elimination of inequalities eventually brings social peace. It is contended that if affirmative action demands great sacrifices to begin with, then such sacrifices are a fair price to pay.

The Commission's view

1.54 The Commission considers that the only correct approach is to take a sympathetic view of our country, its capacities and potential and of our citizens and their needs and aspirations. As far as possible everyone must be given his or her due. This can be done only by trying to identify all needs without being dogmatic and by seeing how those needs can be satisfied in a practical way. Precisely because idealism and enthusiasm for our new South Africa should not be dampened, attempts must be made to create mechanisms for the protection of rights in a practical way, even if this necessitates the creation of new remedies and

new mechanisms. In this lies a wonderful challenge, an opportunity, for everyone in South Africa.

1.55 The Commission has tried to respond to this challenge in this report and in the bill. The proposals contained in the Commission's bill are based on the draft bill contained in Working Paper 25. Those proposals have, however, been amplified, refined, reformulated and rearranged as a result of numerous proposals. It must be stressed again that the Commission invited everyone in this country to react to Working Paper 25 and to take part in the work of fashioning a bill of rights for this country. Nevertheless, the Commission would stress that its proposals are by no means prescriptive and that they merely serve as a basis for further debate and, we hope, the making of an end product which will be acceptable to all South Africans.

1.56 In formulating the articles of the Bill, our approach was to consider fully all proposals and conflicting views and to find the best solution. This often involved reconciling divergent views.

D. SUMMARY OF THE MAIN FEATURES AND PRINCIPLES OF THE NEW PROPOSED BILL

1.57 It would not be practical in this summary to discuss every article of the proposed Bill, because the full Bill is included in this report and for the most part the articles speak for themselves and in most cases they are not controversial. In summing up we therefore merely draw attention to a number of essentials.

(a) Operation of the Bill

1.58 Article 1 attempts to state clearly that the rights set forth in the Bill are aimed at regulating the relation between state and citizen. The legislature, as well as the executive and the administrative authority, therefore has the duty to observe the rights set forth in the Bill. If they fail to do so, a court

of law may set aside the legislation or executive or administrative act in question. We recommend that a Constitutional Court be created which will be a Chamber of the Appellate Division of the Supreme Court and which will adjudicate questions of law regarding human rights and constitutional matters as court of highest authority.

1.59 Article 39 nevertheless clearly states that no one is entitled to exercise the rights set forth in the Bill in such a manner as to infringe the corresponding rights of others. The same article also provides that in the interpretation of all legislation which regulates only the relations between persons, the courts must have regard to the provisions of the Bill and construe them in a manner consonant with the values enshrined in the Bill.

1.60 With this clause the Commission seeks to achieve integration between the Bill and other legislation which regulates only the relations between persons.

1.61 Article 40 provides that the Bill, once it has been placed upon the statute book, shall apply to all existing and future legislation and all future executive and administrative acts.

(b) First generation rights

1.62 As wide a spectrum as possible of civil and political rights is covered. Of particular importance is the prohibition of the state's favouring or prejudicing any person on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or disabilities or other natural characteristics.

1.63 Every citizen over the age of eighteen years has the right to exercise the vote on a basis of equality in accordance with the Constitution. Everyone has the right to form political parties and to be a member of such parties.

1.64 Private ownership is protected, subject to expropriation by the state in the public interest and against payment of just compensation, which in the event of a dispute will be determined by a court of law.

1.65 The following rights are recognised: The right to protection of life, to mental and physical integrity, to personal liberty and safety, to a good name, reputation and dignity, to privacy, to freedom of speech, to freedom to engage in science and art, to perform artistic acts, to protection against forced labour, to freedom of movement, to citizenship and passports, to freedom of association, to freedom of religion, language and culture, to the protection of the integrity of the family, to freedom of economic enterprise, and to freedom to assemble peacefully and unarmed.

1.66 Special provision is made for the rights of children (Article 20) by, for example, imposing a duty of support of indigent children on the state and also imposing on the state a duty to provide free state-aided medical care for every such child and granting a right to free state education up to the end of the primary school phase.

1.67 The right to education and training is set forth in detail.

1.68 Women's rights are protected by a general prohibition on discrimination on the ground of sex, by the right to claim that a marriage entered into as monogamous shall be maintained as such and by the right that women may not be compelled to perform military service.

(c) The second generation rights

1.69 The solution suggested by the Commission regarding the protection of these rights is of a dual nature.

1.70 In the first place, the Commission avoids any attempt to make these rights justiciable and enforceable in a positive way, since this will prove to be juridically futile and may plunge the country into a serious constitutional crisis. Apart from that, such attempts in the Constitution may make it very difficult for any future government to govern and to meet expectations if it lacks the necessary means. Furthermore, such attempts can undermine the credibility of the bill as a whole. In spite of all this, the Commission does feel that there are quite a number of second generation rights which indeed can and must, like the first generation rights, be protected in a "negative" way - so that they cannot be infringed by the state. For example, the Commission suggests that everyone should have the right to form and to be a member of employees' organisations; to obtain a position in accordance with supply and demand and accordingly to avail himself or herself of the employment opportunities that exist; to be allowed to provide against the costs of illness, pregnancy, unemployment, unfitness for work, etc.; to provide for the maintenance of a reasonable standard of living, for education and training; and to claim the available state assistance with regard to support and medical needs that may arise from physical or mental illness or disability where the individual himself or herself cannot meet those needs.

1.71 In addition, a considerable number of employees' rights are protected: to work under safe, acceptable and hygienic conditions; to work reasonable hours; to have sufficient opportunity for rest, recreation and leave; to receive equal pay for equal work; to be protected in his or her physical and mental well-being; to be insured against unemployment and accidents while on duty; to take part in collective bargaining and strikes and to withhold labour; and not to be subjected to unfair labour practices.

1.72 However, a considerable number of employers' rights are recognised as well: to present labour opportunities and to employ persons in accordance with their needs and having regard to the workers' suitability, qualifications and level of training and

competence; to require of the employee adequate production of acceptable quality; to lock out labour; to terminate the services of the employee in a lawful manner; freedom of choice to associate or form groups with others; to apply the principle of no work no pay in accordance with the law; to manage one's business; to make use of alternative labour; to negotiate and bargain collectively or individually; and to be protected from unfair labour practices, including intimidation and victimisation.

1.73 With these provisions the Commission is in fact trying to afford the socio-economic rights a greater measure of practical recognition and protection than they receive under those bills of rights which in a utopian but unenforceable fashion list a number of socio-economic rights, as for example in the ANC's draft bill.

1.74 But the Commission's bill goes further: it lays down that the state must use all the defined rights in the bill - and not just the socio-economic rights - as guidelines in the provision, execution and planning of legislative, executive and administrative programmes.

1.75 This proposal goes further than all those systems - for example the Indian system - which recognise the socio-economic rights only as directive principles. The Commission protects all rights as protected rights, first in the "negative" sense that the state shall not infringe them and secondly in a "positive" manner, in that all rights shall be used as guidelines in the legislative and executive programmes of the state. In the former sense all rights are enforceable by a court of law; in the latter sense they are admittedly not enforceable by a court of law, but the guidelines can in fact be realised through the dynamics of political competition.

(d) The third generation rights

1.76 The Bill recognises that everyone has the right not to be exposed to an environment which is dangerous to human health or

well-being or which is seriously detrimental to the conservation and protection of that environment.

(e) Procedural rights

1.77 The Bill fully sets forth the rights of everyone with regard to arrest, treatment while under arrest, the rights of an accused person and of anyone who has been convicted. In particular, it is provided that everyone who is arrested shall within 48 hours or on the next succeeding court day be brought before a court of law and be charged in writing or informed in writing of the reason for his or her detention, failing which he or she is entitled to be released from detention, unless a court of law orders further detention on good cause shown. Detention without trial at the whim of the state is therefore prohibited. This clause, read with the extended locus standi clause already mentioned, therefore guarantees the habeas corpus remedy in our law.

(f) Administrative justice

1.78 The application of South African law, or, if the parties agree, of the indigenous law or the religious law of religious groups, the retention of the inherent powers of review of the Supreme Court in respect of administrative acts and the application of the rules of natural justice, are guaranteed.

(g) Circumscription or limitation

1.79 In the ordinary course of events and where a state of emergency does not apply, it is customary for the legislature to be able to circumscribe certain rights. Thus for example municipal regulations may provide that an owner may not engage in certain activities on his property which are harmful or constitute a nuisance. The Bill provides that such circumscription is permissible only in so far as it is reasonably necessary (in other words, it is justiciable by a court) for considerations of state security, the public order and interest, good morals, public

health, the administration of the law and the state, or the rights of others or for the prevention or combating of disorder and crime. Circumscription may not derogate from the generality of a right; and some rights, such as those set forth in Article 34(1), may not be circumscribed.

(h) Suspension

1.80 The Bill provides for the temporary suspension of certain rights during a state of emergency. The Bill now lays down clear requirements for this: a state of emergency may be proclaimed only where the security or continued existence of the state is threatened by war, invasion or general insurrection and the proclaiming of the state of emergency is reasonably necessary to bring peace and order. It may not be proclaimed for a period exceeding six months and the proclamation and the rules and regulations that will apply shall within three weeks after proclamation be ratified by not less than two-thirds of the directly elected members of the highest legislature, failing which they lapse. Certain rights may in any event not be suspended and certain kinds of legislation relating to a state of emergency, for example legislation that permits cruel or inhuman treatment or detention without trial or indemnity, is prohibited. Anyone detained under emergency measures shall within seven days be charged in writing in open court and is thereafter entitled to all the normal procedural rights, including those of release and habeas corpus referred to above.

(i) Amendment or repeal

1.81 Article 41 provides that the Bill, including Article 41, shall not be amended or repealed save (a) by a two-thirds majority of the votes of directly elected members entitled to vote in the highest legislature and (b) by a two-thirds majority of the votes cast at a referendum in which everyone entitled to vote in an election in the highest legislature may cast his or her vote.

(j) Affirmative action

1.82 Having considered the different possibilities, the Commission recommends in Article 3(b) that the legislature may by legislation provide for, and make funds available to achieve, equality before the law for all by ensuring that through education, training, employment and financing programmes all citizens are afforded equal opportunities of developing and realising their natural talents and potential to the full.

(k) Private discrimination

1.83 Although the bill is directed against state action, it must necessarily deal with the question of "private discrimination" because it guarantees the right to association. Article 17(c) provides that no legislation or executive or administrative act shall directly or indirectly make available to an individual who or a group which merely on the ground of race or colour refuses to associate with any other individual or group, any public or state funds to foster the creation or maintenance of such discrimination or exclusion. Further, the right to freedom of association is guaranteed, which means that state action may not prevent or restrain anyone from associating with other individuals or groups; nor may the state compel anyone to associate with other individuals or groups.

E. ENFORCEMENT MECHANISMS

1.84 The Commission considers that, if it is to be accepted and retained as credible in this country, a bill of rights must be provided with effective enforcement mechanisms. The Commission suggests the following:

(a) A Constitutional Court

1.85 As already mentioned, the most effective enforcement mechanism is the jurisdiction of an independent judiciary to declare invalid those laws and executive and administrative acts

that violate the bill of rights. The Commission considers that a Constitutional Court, as a court of specialisation, which would not necessarily consist of present judges and which would not necessarily be composed of persons from among the ranks of senior practising counsel, would be the proper tribunal for this purpose. Having considered all the practicalities, such as the saving of time and the avoidance of costs and duplication, the Commission is of the opinion that the proper status for such a court is that of a full-fledged Chamber of the Appellate Division of the Supreme Court. All constitutional questions would therefore be adjudicated in the ordinary manner by the lower courts (magistrates' courts and Provincial and Local Divisions of the Supreme Court) and would find their way to the Appellate Division in the ordinary manner and in accordance with recognised norms. If in the opinion of the Chief Justice an appeal solely or mainly involved a constitutional dispute, it would be placed on the roll of the Constitutional Chamber of the Appellate Division; all other appeals would come before the General Chamber of the Appellate Division.

(b) A Human Rights Commission

1.86 Article 36 provides for the institution of a permanent, full-time Human Rights Commission under the chairmanship of a Judge of Appeal or a retired Judge of Appeal (including, therefore, Judges of the Constitutional Court) to undertake and co-ordinate the education and training of the population in respect of democratic values and human rights, to initiate educational programmes and information projects and to give advice on any question as to the consistency of proposed or existing legislation with the Bill and on any needs that should be met. This Commission may also on its own initiative or on the grounds of complaints lodged inquire into alleged violations of human rights and publicly and in writing report thereon to the highest legislature.

(c) An ombudsman

1.87 The Bill provides, in Article 37, for the institution of a full-time ombudsman who, in addition to any other functions, is assigned certain duties with regard to the protection of human rights, such as, for example, the investigation of complaints of maladministration, including violations of human rights, the investigation of complaints of unreasonable, unfair or discourteous conduct by officials and employees which infringe human rights, action on behalf of groups, mediation, conciliation and negotiation between complainants and bodies complained of regarding the infringement of human rights and reporting thereon to the highest legislature.

F. GROUP RIGHTS

1.88 While there has been a new spirit of reconciliation between important political parties and organisations since February 1990, there are still many South Africans who seek their salvation in the existence and protection of "rights" that are variously referred to as "group rights", "minority rights" or "community rights". The reasons for this are understandable. Our society is characterised by deep divisions - accentuated by the policy of apartheid in the past - between groups along the lines of race, language, religion, culture, ethnicity, class, colour, tribal affiliation, wealth, and political and ideological beliefs. There is no getting away from the fact that feelings of insecurity and fears of domination by an antagonistic majority continue to be an important reason for the emphasis that is placed on the rights in question.

1.89 The Commission is of the opinion that the whole question of "group rights", "minority rights" or "community rights" cannot, in the South African debate, be addressed unless it is viewed in the context of the broad national question and people's perception of that question.

1.90 It would appear that the basic question that is giving rise to so many uncertainties and fears and differences in perception is whether we in this country are really one nation or whether we are a plurality of peoples which simply occupy the same country in loose but competitive association. Are we going to grow together into unity or are the population groups going to continue to fight for the preservation of their own identity at the expense of national unity? On these basic questions there are great differences of opinion and, viewed as a whole, there are three divergent points of view:

- (a) There are those who reject the idea of a national unitary state in which individual rights and minority rights are protected. They first want to see the right to self-determination of their people (e.g. the Afrikaner people) recognised; they want a territory of their own to be granted to them; only then will the question of the rights of individuals and minorities in that territory or state arise. This, for example, is the stand taken by the Conservative Party of South Africa, the official opposition in the white House of Assembly.

- (b) There are those who see this country as a national unitary state in which both individual rights and community rights will be protected. Among those who belong to this school of thought it is generally assumed that individual rights will be protected in a bill of rights, although there is as yet no finality as to which individual rights will be so protected. As regards the question of which community rights will be protected and in what way this will be done, there is no agreement either. The ruling National Party envisages an extensive system: group values, such as language, religion and culture, can be protected as individual rights in the bill of rights; political participation and the communities' say can be protected by constitutional systems of power sharing and checks and balances.

The African National Congress, on the other hand, is averse from power sharing if it means that a minority group will be given disproportionate weight in the political process through, for example, a veto on legislation, but recognises the protection of language, religion and culture in a bill of rights.

- (c) Lastly, there are those, for example the Pan Africanist Congress, who envisage a unitary state in which no rights will be entrenched; at most, a new government will, after a redistribution of wealth, be in a position to decide arbitrarily whether a bill of human rights is wanted. Falling in the same category (as far as human rights are concerned) are also parties and movements to the right of the white political spectrum which wish to retain the status quo of white domination and are opposing a bill of rights tooth and nail.

1.91 The Commission has no hesitation in rejecting the ideas outlined in (c) above. The implementation of the said ideas will inevitably give rise to serious conflict and violations of human rights.

From the reaction the Commission received to Working Paper 25, and from our observations of daily events in this country, it is clear to us that the way to resolve group conflict simply does not lie in ignoring the existence of groups and conflict between them. The answer is not forced assimilation, but balanced accommodation in a real and a just democracy.

1.92 Those advocating the ideas in (a) invoke the right to self-determination of a people as a group right. A significant number of parties, organisations and individuals subscribe to the view that the group that must be protected is the people. To them, every people has a sovereign right to self-determination. In the South African context, this right means that every people is entitled to a territory of its own where it can govern itself as an independent nation and state. Therefore, they strongly object

to the vision of the new South Africa as a unitary state, demanding the recognition of the right to partition and secession.

1.93 Chief among the proponents of the idea of partition are the Conservative Party of South Africa, the Afrikaner-volkswag, the Boere-Vryheidsbeweging and the Afrikaner Weerstandsbeweging, besides which there are also many individuals.

1.94 Those belonging to this school of thought naturally rejected the Commission's recommendations in Working Paper 25 almost without exception, the reason for this being that the rights of the Afrikaner people or whites to govern themselves are not recognised by those recommendations. The essence of the objection is that Working Paper 25 constitutes a threat to whites and in particular to Afrikaners.

1.95 The first "group right" that needs to be considered is, therefore, the right of a people to self-determination, which for the present purposes amounts to the right to secession or partition.

1.96 The Commission has fully and thoroughly studied the legal arguments for and against the recognition and protection of this right, inter alia with reference to the relevant rules of international law and international resolutions as well as the Roman-Dutch writer Hugo de Groot, who is regarded an authority in this country. From all these sources it appears that a right of secession, as a unilateral juristic act, is subject to a plethora of qualifications and prerequisites before it can come into existence and likewise before there can be any just claim to partition as a negotiated infringement of the sovereignty of the state.

1.97 One of these qualifications or prerequisites, according to De Groot, other eminent authors and Resolution 2625 (xxv) of the General Assembly of the United Nations, is that so long as there is a representative, democratic government which represents the whole nation without discrimination on the grounds of race, colour

or descent, the right to self-determination in the form of impairment of the territorial integrity of the state is recognised.

1.98 The Commission's evaluation and recommendations regarding the rights of a people in respect of secession and partition in this country are the following:

- (i) It is clear that there is a need for self-determination for a people (national group) and that this need is recognised as a right by the international community under certain conditions.
- (ii) It is the said conditions for the recognition of a right that create problems for those in favour of partition. Even if we accept that groups such as the Afrikaner people, the Zulu people, the Xhosa people etc., have the right to self-determination (which implies entitlement to partition through negotiated secession through unilateral withdrawal), at least as far as secession is concerned, the conditions (of existing oppression by the state) do not seem to be met. The Afrikaner people, at present the ruling minority, cannot invoke the condition of oppression. So far as any of the black peoples which might have this argument are concerned, a process of democratisation is in progress. Mere unwillingness to become part of a mixed state does not seem to constitute a just claim to secession under international law.
- (iii) In the case of partition, of course, one has to do an agreement and the above-mentioned legal principles relating to secession need not be applied as such, but still cannot be ignored. In negotiations regarding legitimacy, validity and correctness of the claim to partition will inevitably be of major importance. There is little hope of juridically unfounded claims being acceded to.

1.99 The second category of "group rights" to be considered here relate to the protection of groups within a unitary state.

1.100 The question is how the rights of different groups can be protected in a state not divided by partition or secession. The main political parties (e.g. the National Party, the ANC and Inkatha) fall into this category, but differ with one other as regards which rights and which mechanisms are legitimate.

Few of the proponents of this line of thinking have given any clarity as to which rights should be given to which groups and which mechanisms should be used. The debate on these subjects is characterised by vagueness.

1.101 The views of the main parties, organisations and individuals were examined. It is widely accepted that the fears and aspirations of the different communities in this country must be addressed. The question is just how best this can be done.

1.102 One useful guideline which could, with the necessary circumspection, be considered is the internationally recognised rules regarding the protection of minorities.

1.103 From our survey of the international rules regarding minority protection it appears that the common view is that for the purposes of the international treaties a "minority group" includes any group which numerically constitutes a minority within a state, which is not in a dominant position and whose members, although citizens of the state, possess characteristics such as ethnicity, religion or language distinguishing them from the rest of the population and share a common desire to preserve those characteristics.

1.104 In Working Paper 25 the Commission referred to the main international treaties in this connection. Other international documents of importance are the following: the UNESCO Declaration on Race and Racial Prejudice of 1978; the Banjul Charter, 1981,

which recognises the rights of "peoples" to economic, social and cultural development; the Basic (Geneva) Principles of the European Rights of National Groups, 1985, which appear to relate only to geographically concentrated groups; the Draft Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, 1986, which emphasises ethnic, cultural, linguistic and religious freedom; a proposal of the London Minority Rights Group, 1979, which seeks to entrench minority rights over a wide front; and, finally, the Concluding Document of the Vienna Meeting of the Participants in the Helsinki Conference on Security and Co-operation in Europe, 1975, which imposes an obligation on member states "to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory".

A very important development has been the resolutions adopted at the meeting of the Conference on Security and Co-operation in Europe (CSCE) in Copenhagen from 5 to 29 June 1990, at which extensive minority protection was advocated.

A further important point to be borne in mind is the extension of the concept "minority" as used in international law. As is known, Article 27 of the International Covenant on Civil and Political Rights, 1966, referred to "... ethnic, religious or linguistic minorities". In the Helsinki Final Act this concept was extended to include "national minorities".

1.105 Although there is doubt whether the said treaties protect groups or individuals and whether a minority group is a juristic person, the fact remains that the international treaties do indeed stand for the effective protection of minorities.

1.106 Furthermore, many countries have proceeded to implement domestic measures for the protection of minorities. Capotorti, one of the experts in this field, sums up the different measures taken by governments at a national level to improve intergroup relations as follows:

- (a) The representation of members of various ethnic groups in government, in the civil service and in professional associations;
- (b) The establishment of special committees or institutions with a view to ensuring that members of all ethnic groups are in a position to play an active part in the socio-political life of the country;
- (c) Efforts to improve relations between the police and minority groups, such as the recruitment of police members from those groups, the organization of a special training course in the field of race relations, the holding of race seminars and the teaching of minority group languages in police academies;
- (d) The establishment of a system of national service whereby members of different ethnic groups live and work together and perform tasks which cannot but increase racial understanding and produce a spirit of togetherness transcending ethnic and racial differences;
- (e) The organization of activities designed to improve in the economic and social fields the situation of disadvantaged minority groups and increase the educational opportunities offered to them;
- (f) The establishment of educational institutions for the development of national groups with a view to providing training for selected members of various population groups to help in the implementation of the national ethnic policy;
- (g) The creation of special programmes in universities whereby students are required to undertake field study on the customs and social systems of minority groups;
- (h) The reform of the educational system with a view to eliminating any differences in the education provided to members of different ethnic groups and thereby reducing inequalities in income between them;
- (i) The setting up in school of cultural programmes and other similar activities on a regular basis designed to strengthen mutual understanding and friendship among the youth of different nationalities;
- (j) The revision of school textbooks which contain comments or exposition of historical facts that are not conducive to understanding and respect between ethnic or linguistic groups;
- (k) The use in schools of new textbooks and teaching materials stressing the history of minority groups along with that of the majority;

- (l) The organization of activities designed to educate the public on problems of inter-group relationships and on the role played by minority groups in the development of the country;
- (m) The prohibition of exclusive social clubs and the adoption of an uncompromising attitude towards manifestations of racial arrogance;
- (n) The organization under government auspices, both at the national and the local level, of increasing contacts between ethnic groups.

1.107 The Commission considers that the international treaties and measures adopted in many countries to protect minorities point to international acceptance of the legitimacy of such measures, provided, of course, that they are just and reasonable. We, too, do not regard such protection as anti-democratic or undemocratic. We also believe that such protection need not stand in the way of nation-building; on the contrary, if it is done in a fair and just manner, it can play a very positive role, particularly in the initial phase of nation-building, in persuading all ethnic groups to take part in the process of nation-building in a peaceful manner.

1.108 In South Africa it is often argued that community or minority protection is undemocratic or anti-democratic in that it constrains the will of the majority and "true" democracy does not prevail. Specifically in the South African context, it is then argued that such protection is advocated merely to perpetuate white domination under another name; that it merely amounts to mechanisms to ensure that the whites will still have the last say.

The Commission believes that there may in fact be people in this country who may harbour the above-mentioned motives when they speak of group, community or minority protection. The Commission unequivocally dissociates itself from that school of thought. As is evident from all the international treaties and conventions, one can speak of legitimate group, community and minority protection within a nation only where there is full democracy,

where everyone is free to participate in the government of the country, and where there is then - for that very reason - a need for group, community and minority protection. The crux of the matter is that group, community and minority protection aimed at domination or undue preference would not be accepted by the majority and would ultimately be rejected. It should just be remembered, however, that it is also a fact that if a minority is dominated in such a way as to make it feel that its needs are being treated with contempt it will also strive constantly to rid itself of the régime.

The sensible solution would therefore be to steer a course between these two dangers and find a moderate solution.

1.109 The Commission's view is that it is juridically unsound to adopt the standpoint that there are statutorily definable groups with statutorily definable "rights" in this country, particularly if by those groups are meant entities which are to be given relevance for the purposes of human rights protection.

1.110 In the context of human rights protection and a bill of rights - the only subject dealt with in this report - there are in fact certain group, collective or community needs that must be addressed. However, this must be done in a legitimate and juridically accountable manner.

1.111 The first are the needs of certain identifiable groups such as women, children, employers and employees. While the general principles of the Bill apply to all these groups, in practice certain specific needs have emerged that can and must be addressed. In the report and in the proposed Bill the Commission gives attention to the needs of these groups, which have been dealt with in paragraphs 1.66, 1.68, 1.71 and 1.72 above.

1.112 The second are the needs of individuals who are members of different linguistic, cultural and religious groups to have those respective values recognised. This is done internationally, and few people in South Africa object to this. Neither in legal

theory nor in legal practice is it correct or necessary to recognise these values as anything other than individual rights in a bill of rights. After all, every individual member of the group subscribing to those values can enforce them. No convincing juridical arguments have been advanced against this view. The Commission therefore stands by its proposal that these values be given full recognition and protection in the proposed bill of rights as individual rights.

1.113 However, the Commission is not insensitive to objections to the proposals in Working Paper 25 on these aspects on the grounds that they do not afford sufficient individual protection to the said collective values. In particular, three objections were raised that seem to be justified:

- (a) It was argued that the procedural capacity to approach the court for legal relief should also be granted to persons or bodies not directly prejudiced by an infringement of the said values, for example by providing for cases where the party actually prejudiced cannot or does not wish to act, or where other interested parties wish to establish a principle.

The Commission is of the opinion that the granting of such capacity (i.e. wide locus standi) is a necessary and sound mechanism, not only for the said rights but for all the rights contained in the bill of rights.

The Commission therefore proposes a new clause which should be of general force and effect and which should read as follows:

Any individual, juristic person or association has the capacity on behalf of himself or herself or itself or any other individual or any group or class of persons to test, by virtue of the provisions of this Bill, the validity of any legislative, executive or administrative act by applying to the appropriate Division of the Supreme Court for a delaratory order notwithstanding the fact that the applicant is able to prove only an indirect interest or indirect prejudice.

- (b) A considerable number of respondents - not only those who were concerned about collective values - commented on the Commission's view that a bill of rights serves only as a shield against action by the authorities and not as a sword for the enforcement of rights. It was argued that this view is undoubtedly true in the historical context, but that modern developments have pointed to another need, i.e. that a duty should also be imposed on the state to promote positively the rights formulated in the bill, whether by legislation or by executive action. The need for this, it is argued, exists particularly in the case of the above-mentioned collective values, as well as in the case of the second generation rights (socio-economic rights) and the third generation rights (e.g. the right to a clean environment).

The Commission considers that this problem can be addressed by including a promotion clause in the bill of rights encouraging the state to use all the fundamental rights set forth in the bill as guidelines in legislative, executive and administrative planning. Although this is not directly enforceable, it can serve as an inducement to consistent action and pave the way for the development of justiciable provisions binding upon the state.

The Commission therefore proposes a clause which reads as follows:

Apart from the duty of all legislative and executive and administrative institutions of the state not to infringe the fundamental rights set forth in this Bill, all such institutions shall use those fundamental rights as guidelines in instituting and carrying out legislative programmes and executive and administrative planning and action for the promotion of those rights.

- (c) A number of respondents indicated that under many legal systems instruction through the medium of the mother tongue is recognised as a fundamental right and that the Commission's draft bill did not recognise that right.

The Commission has satisfied itself that instruction through the medium of the mother tongue at school level is in fact educationally justifiable and that it is recognised as a fundamental right in certain other multilingual states. However, it should not be made compulsory for the pupil, so that a choice of media of instruction should be recognised. Furthermore, full mother-tongue education, for example for small population groups, is not always practicable or economically possible. The plea of inability on the part of the state to supply this need must not, however, be made arbitrarily; it must be justiciable by the courts in accordance with the Bill. With these considerations in mind the Commission proposes a clause which reads as follows:

Everyone has the right to freedom of choice with regard to the available public educational and training institutions and fields of study: Provided that -

...

- (f) every pupil is entitled, in so far as this is attainable, to be taught all school subjects through the medium of his or her mother tongue or some other language as a language of choice from the first to the last school year.

1.114 This brings us to the end of the Commission's recommendations on group, community or minority rights.

1.115 In the Commission's report on constitutional models and options, to be published later this year, the protection of the needs of individuals and communities will be dealt with under the other institutions and mechanisms of the constitution. These two reports should therefore be read together to form a complete picture of the Commission's recommendations regarding the protection of groups, communities and minorities.

G. THE INTRODUCTION OF A BILL OF RIGHTS IN SOUTH AFRICA

1.116 In conclusion, the Commission deals with the question of the introduction of the proposed bill of rights in South Africa.

1.117 In Working Paper 25 the Commission strongly emphasised the following aspects in this regard:

- (a) The importance of the legitimacy of such a bill.
- (b) The importance of an educational process with regard to human rights.
- (c) The purging of the present statute book of legislation conflicting with the proposed fundamental rights.

1.118 A plan of action consisting of five phases or stages was proposed, namely -

Phase 1: Acceptance in principle by Parliament that a bill of rights be adopted in the future.

Phase 2: The repeal or amendment of legislation conflicting with the fundamental rights contained in the proposed bill.

Phase 3: The launching of a country-wide educational programme to inform the population regarding the role and value of a constitution of which a bill of rights forms part.

Phase 4: The reaching of consensus and finalising the content and wording of the bill of rights.

Phase 5: Legitimation, by referendum, of a new constitution which includes the bill of rights.

1.119 There has been very wide support for the Commission's proposal as summarised above. The only debate has been that on a matter which the Commission has already discussed in Working Paper 25, i.e. the question as to whether, pending the ultimate adoption of a new constitution with a bill of rights, it would not be possible to make a start by introducing an interim limited bill.

1.120 The proponents of this plan consider that such a bill could do much to secure credibility, to foster a human rights culture and to spread knowledge of the application of such a bill. The proposal means that the interim bill could embody all the rights on which there is general agreement and that contentious aspects which also relate to the structures to be created under the new constitution - for instance the franchise - would stand over until the new constitution had been finalised, whereupon they could be incorporated into the bill of rights.

1.121 Particularly after the drastic change that has taken place in this country since the address by the State President, Mr F W de Klerk, on 2 February 1990 and the resultant release of political leaders, the unbanning of a number of political organisations and the commencement of talks on constitutional negotiations, the introduction of a limited or interim bill of rights has become a stronger option and the Commission feels that it merits serious consideration.

1.122 According to the proposals in this regard, there are two ways in which such an interim or limited bill could be introduced:

First, it could be done, step by step if need be, as consensus is reached on specific human rights in the process of negotiation. Legislation to give effect to any consensus agreements reached in this way would have to be passed by Parliament in order to give the principles concerned the force of law.

Secondly, it could be done by unilateral action taken by the government of the day by having legislation passed in Parliament to give effect to the rights concerned.

1.123 Of these two methods, the former is clearly preferable. Particularly since the Commission has already suggested in Working Paper 25 that the actual constitutional negotiating process should preferably begin with the bill of rights, the creation of such a consensual document, including the establishment of a Constitutional Chamber of the Appellate Division, would do a tremendous amount towards building confidence in this country and abroad that reconciliation is possible. This would redound to the credit of all the negotiating parties. This would be real, tangible renewal and improvement. This would lend considerable legitimacy to such a bill.

The Commission's proposed bill

1.124 The bill as proposed by the Commission follows immediately below. When this or any other bill is incorporated into the constitution it will be necessary, apart from the provisions agreed upon, to introduce consequential amendments as well. For instance, for the word "bill" it will be necessary to substitute the expression "chapter" of the constitution, and the provisions relating to the Human Rights Commission and the Ombudsman will have to be inserted in the appropriate parts of the constitution.

THE BILL PROPOSED BY THE SOUTH AFRICAN LAW COMMISSION

Article 1 : Fundamental rights.

The rights set forth in this Bill are fundamental rights to which every individual and, where applicable, also every juristic person in South Africa is entitled in relation to legislative and governmental bodies, and save as otherwise provided in this Bill those rights shall not be circumscribed, limited, suspended or infringed by any legislation or executive or administrative act of any nature.

Article 2 : The right to life.

Everyone has the right to the protection of his or her life.

Article 3 : Equality before the law.

- (a) Everyone has the right to equality before the law, which means, inter alia, that save as permitted in this Article, no legislation or executive or administrative act shall directly or indirectly favour or prejudice any person on the grounds of his or her race, colour, sex, religion, ethnic origin, social class, birth, political and other views or disabilities or other natural characteristics.
- (b) To this end the highest legislative body may by legislation of general force and effect introduce such programmes of affirmative action and vote such funds therefor as may reasonably be necessary to ensure that through education and training, financing programmes and employment all citizens have equal opportunities of developing and realising their natural talents and potential to the full.
- (c) The provisions of Sub-Article (a) hereof shall not be construed as making it compulsory for any female person to perform military service.

Article 4 : The right to mental and physical integrity.

- (a) Everyone has the right to the protection of his or her mental and physical integrity.

- (b) No one shall be subjected to mental or physical torture, assault or inhuman or degrading treatment.
- (c) No exceptional circumstances whatever, whether a state of war or threat of war, internal political instability or any other public emergency or any order given by a superior officer or by any person holding office in government, shall serve as justification for acts mentioned in paragraph (b).

Article 5 : Personal liberty and security.

Everyone has the right to his or her personal liberty and security, which means, inter alia, that no one shall be deprived of his or her liberty save in the following cases and in accordance with a prescribed procedure generally in force by which the fundamental right to his or her mental and physical integrity is not denied:

- (a) Lawful arrest or detention for the purpose of bringing a person before a court of law on the ground of a reasonable suspicion, which shall be justifiable by a court, that he or she has committed or is committing or is attempting to commit a crime;
- (b) lawful detention pursuant upon conviction by a court of law or failure to comply with a lawful order of the court;
- (c) lawful detention in order to prevent the spread of infectious disease;
- (d) lawful detention of a person who is mentally ill or a person addicted to narcotic or addictive substances with a view to his or her admission, in accordance with prescribed procedure, to an institution or rehabilitation centre;
- (e) lawful detention for the prevention of any person's unauthorised presence or sojourn in South Africa or with a view to his or her extradition or deportation in accordance with prescribed procedure.

Article 6 : The rights of an arrested person.

Everyone who is arrested has the right -

- (a) to be detained and to be fed under conditions consonant with human dignity and to receive the necessary medical treatment;

- (b) to be informed as soon as possible in a language which he or she understands of the reason for his or her detention and of any charge against him or her;
- (c) to be informed as soon as possible in a language which he or she understands that he or she has the right to remain silent and the right to refrain from making any statement and to be warned of the consequences of making a statement;
- (d) within a reasonable period of time, but not later than 48 hours or the first court day thereafter, to be brought before a court of law and to be charged in writing or informed in writing of the reason for his or her detention, failing which he or she shall be entitled to be released from detention unless on good cause shown a court of law orders further detention;
- (e) to be tried by a court of law within a reasonable time after arrest and pending such trial to be released, which release may be subject to bail or guarantees to appear at the trial, unless on good cause shown a court of law orders further detention;
- (f) to communicate and to consult with a legal practitioner and a medical practitioner of his or her choice;
- (g) to communicate with and to be visited by his or her spouse, family, next of kin, religious counsellor or friends, unless a court of law otherwise orders.

Article 7 : The rights of an accused person.

Every accused person has the right -

- (a) not to be sentenced or punished unless he or she has had a fair and public trial before a court of law in accordance with the rules of procedure and evidence generally in force;
- (b) to be presumed innocent until the contrary is proved by the state or other prosecutor;
- (c) to remain silent and to refuse to testify at the trial;
- (d) not to be convicted or sentenced on the ground of evidence so obtained or presented as to violate any of the rights under this Bill of the accused person or of the witness concerned or of any other person, unless the court, in the light of all the circumstances and in the public interest, otherwise orders;

- (e) to be represented by a legal practitioner;
- (f) to be informed by the presiding officer -
 - (i) of his or her right to be represented by a legal practitioner;
 - (ii) of the institutions which he or she may approach for legal assistance;

and to be given a reasonable opportunity to endeavour to obtain legal assistance: Provided that failure or neglect so to inform an accused person or to give him or her such opportunity shall not result in the setting aside of the proceedings unless on appeal or review a court finds that justice was not done;
- (g) not to be sentenced to an inhuman or degrading punishment;
- (h) not to be convicted of a crime in respect of any act or omission which at the time when it was committed was not a crime and not to be given a sentence more severe than that which was by law applicable at the time when the crime was committed;
- (i) not to be convicted of any crime of which he or she has previously been convicted or acquitted, save in the course of appeal or review proceedings relating to that conviction or acquittal;
- (j) to have recourse, on appeal or review, to a higher court than the court of first instance: Provided that legislation may prescribe that leave to appeal shall be first obtained;
- (k) to be informed in a language which he or she understands of the reasons for his or her conviction and sentence;
- (l) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;
- (m) to be sentenced within a reasonable time after conviction.

Article 8 : Rights of persons convicted of a crime.

Everyone who has been convicted of a crime and who in accordance with a sentence of a court of law is serving a term of imprisonment has the right -

- (a) to be detained and to be fed under conditions consonant with human dignity and to receive the necessary medical treatment;

- (b) to be given the opportunity to develop and to rehabilitate;
- (c) to be released at the expiry of his or her term of imprisonment as imposed by the court of law.

Article 9 : Good name and reputation and dignity.

- (a) Everyone has the right to the protection of his or her good name and reputation.
- (b) Everyone has the right to the recognition and protection of his or her dignity.

Article 10 : Privacy.

Everyone has the right to the protection of his or her privacy, which means, inter alia, that his or her property or place of residence or employment shall not be entered, that he or she shall not be searched, that his or her property or possessions shall not be seized and that there shall be no interference with or interception of his or her correspondence or other forms of communication.

Article 11 : Forced labour.

Everyone has the right not to be subjected to forced labour: Provided that legislation may provide for -

- (a) such labour as may reasonably be prescribed to be performed during detention pursuant to a sentence of imprisonment imposed by a court of law; and
- (b) reasonable military or civilian national service so that, save during a state of war or the duration of a proclaimed state of emergency, each individual shall have a choice on grounds of religious or conscientious conviction between military and civilian national service of equal duration.

Article 12 : Freedom of speech.

Everyone has the right to freedom of speech and other forms of expression and to obtain and disseminate information.

Article 13 : Science and art.

Everyone has the right freely to engage in science and art.

Article 14 : Legal competence.

Everyone has the right to perform juristic acts and thereby to acquire rights and to incur obligations.

Article 15 : Freedom of movement.

Everyone has the right to move freely within South Africa and to reside, to work or to engage in any lawful business, occupation, trade or like activity at any place therein.

Article 16 : Passports, citizenship, exile or expulsion and emigration.

Every citizen has the right -

- (a) not to be denied a passport or deprived thereof;
- (b) not to be deprived of his or her South African citizenship;
- (c) not to be exiled or expelled from South Africa; and
- (d) not to be prevented from emigrating.

Article 17 : Freedom of association.

Everyone has the right to freedom of association, which means, inter alia, that no legislation or executive or administrative act shall -

- (a) debar or restrain individuals or groups from associating with other individuals or groups;
- (b) compel individuals or groups to associate with other individuals or groups;
- (c) directly or indirectly make available to an individual who or a group which on the ground of race or colour refuses to associate with any other individual or group, any public or state funds to foster the creation or maintenance of such discrimination or exclusion.

Article 18 : Religious, linguistic and cultural rights.

Everyone has the right, individually or in community with others, freely to practise the religion and culture and freely to use the language of his or her choice, so that there shall be no prejudice to or favouring of anyone on account of his or her religion, culture or language.

Article 19 : Family rights.

Everyone has the right to protection of the integrity of his or her family and freedom to enter into marriage with any person of his or her choice, which includes the choice of entering into a monogamous marriage and having entered into that marriage the maintenance of its monogamous character.

Article 20 : Rights of children.

- (a) Every child has the right to live with his or her parents and to be cared for and brought up by them, unless the interests of the child call for some other arrangement.
- (b) Every child has the right to be cared for by the state if there are no relatives with a duty of support towards the child or other persons who are willing or able to care for the child.
- (c) Every indigent child has the right to free state-aided medical care.
- (d) Every child has the right not to be compelled to perform labour or render services harmful to his or her physical or mental health, upbringing or education or amounting to economic exploitation.
- (e) Every child has the right not to be compelled to perform labour or render services for the benefit of the employer of either of his or her parents or any of his or her relatives.
- (f) In all legislative, executive and administrative proceedings the interests of the child shall in all circumstances be paramount.

Article 21 : Public education and training.

Everyone has the right to freedom of choice with regard to the available public educational and training institutions and fields of study: Provided that -

- (a) free state education shall be provided up to the end of the primary school phase;
- (b) no pupil or student shall on educationally irrelevant grounds be excluded from the available public education opportunities from which he or she may benefit with a view to the acquisition of knowledge, skills and values;
- (c) no state school or state-aided school or institution for education and training shall refuse to admit a pupil or student merely on the ground of his or her race, colour, religion or ethnic origin;
- (d) this Article shall not preclude the establishment and maintenance of private schools or institutions in which no state aid is involved, and such schools or institutions shall have autonomy of choice as to whom they admit;
- (e) this Article shall not preclude the granting of state funds in aid of private schools or private institutions which do not discriminate against pupils or students on the grounds of their race, colour or ethnic descent;
- (f) every pupil is entitled, in so far as this is attainable, to be taught all school subjects through the medium of his or her mother tongue or some other language as a language of choice from the first to the last school year.

Article 22 : Right to property.

- (a) Everyone has the right individually or jointly with others to be or to become the owner of private property or to have a real right in private property or to acquire such right or to be or to become entitled to any other right.
- (b) Legislation may authorise the expropriation of any property or other right in the public interest and against payment of just compensation, which in the event of a dispute shall be determined by a court of law.

Article 23: Economic enterprise.

Everyone has the right freely and on an equal footing to engage in economic enterprise, which right includes the capacity to establish, manage and maintain commercial undertakings, to acquire property and procure means of production and to offer or accept employment against remuneration.

Article 24: Political rights.

Every citizen has the right -

- (a) freely to form and to be a member of political parties: Provided that no one shall be compelled to be a member of a political party or to take part in the activities thereof;
- (b) to give expression to his or her political convictions in a peaceful manner; and
- (c) to be appointed and elected to legislative, executive and administrative office.

Article 25: Assemblies, demonstrations and petitions.

Everyone has the right to assemble and to demonstrate peacefully and unarmed and to canvass for and present petitions.

Article 26: Franchise.

Every citizen over the age of eighteen years has the right to exercise the vote on a basis of equality in accordance with the Constitution in respect of legislative and other institutions and other public offices at regular and periodical elections and at referendums.

Article 27: Social security.

Everyone has the right -

- (a) to form employees' or employers' organisations and, if he or she qualifies therefor, to become a member of any such organisation of his or her choice or not to become a member thereof;

- (b) to obtain employment in accordance with the principles of supply and demand and accordingly to make use of the available opportunities of employment;
- (c) lawfully to make provision for any costs that may arise from his or her mental or physical illness and that of his or her dependants, as well as for the costs of pregnancy, loss as a result of unemployment, disability, accident or age;
- (d) lawfully to make provision for the maintenance of a reasonable standard of living for himself or herself and his or her dependants;
- (e) lawfully to provide for his or her proper education and training and that of his or her dependants with a view to the development of each to his or her full potential;
- (f) to claim the available state assistance to provide for his or her own necessary subsistence and medical needs where he or she is unable to provide for such needs by reason of physical or mental illness or disability and where there is no person who may by virtue of a duty of support be compelled to provide for such needs.

Article 28: Employees' rights.

Every employee has the right -

- (a) to work under safe, acceptable and hygienic conditions;
- (b) to work reasonable hours;
- (c) to be given sufficient opportunity for rest, recreation and leave;
- (d) to receive equal payment with other employees for corresponding production of an acceptable quality, due regard being had to such aspects as qualifications, experience, the means of the employer and the forces of supply and demand in the labour field;
- (e) to the protection of his or her physical and mental well-being;
- (f) to make provision against the risk of unemployment and accidents during the course of employment;
- (g) to take part in collective bargaining;
- (h) to take part in strikes and to withhold labour;
- (i) not to be subject to unfair labour practices.

Article 29: Employers' rights.

Every employer has the right -

- (a) to offer employment and to engage employees in accordance with his or her needs, due regard being had to the fitness, qualifications and level of training and competence of the employee;
- (b) to require of an employee adequate production of an acceptable quality and to lock out labour;
- (c) to terminate the service of an employee in accordance with the common law or in accordance with his or her contract of employment with the employee, or in accordance with any relevant enactment, whichever of these or whichever combination thereof applies;
- (d) of his or her free will to associate or to form a group with others, or not to do so;
- (e) in accordance with the law to apply the principle of "no work, no pay";
- (f) to run his or her business, particularly with a view to its economic viability and continued existence;
- (g) where necessary, and in his or her own discretion, to make use of alternative labour to maintain production or service;
- (h) to negotiate and to bargain collectively or individually;
- (i) to be protected from unfair labour practices such as intimidation and victimisation.

Article 30: Environmental rights.

Everyone has the right not to be exposed to an environment which is dangerous to human health or well-being or which is seriously detrimental thereto and has the right to the conservation and protection of that environment.

Article 31: Review of administrative acts and subordinate legislation.

Everyone has the right to have civil disputes settled by a court of law and to have recourse to the Supreme Court to

review, by virtue of its inherent jurisdiction, any subordinate legislation and any executive act and any administrative act.

Article 32: Rules of natural justice.

Everyone has the right to have the rules of natural justice applied in administrative proceedings and actions in which, on the grounds of findings of fact and of law, the rights or legitimate expectations of an individual or a group are infringed or likely to be infringed, and in such cases every person having an interest in the matter has the right to be furnished on demand with the reasons for a decision.

Article 33: Application of South African law.

Everyone has the right to have South African law, including the rules of South African Private International Law, applied in all proceedings before a court of law: Provided that legislation may provide for the application of the choice of legal rules relating to and judicial notice of the law of indigenous groups or the religious law of religious groups: Provided further that in civil proceedings such indigenous or religious law shall be applied only if all the parties agree thereto.

Article 34: Circumscription and suspension.

(1) Circumscription

With the exception of the rights, procedures and institutions referred to in Articles 1; 3; 4(b) and (c); 5; 6(a) to (e) inclusive; 7; 8; 9(b); 11; 16(c) and (d); 17; 18; 19; 20; 21; 22(b); 24(a) and (b); 31; 32; 34; 35; 36; 37; 39; 40 and 41, the rights, procedures and institutions set forth in this Bill may be circumscribed by legislation of general force and effect: Provided that such circumscription -

- (a) shall be permissible only in so far as it is reasonably necessary for considerations of state security, the public order and interest, good morals, public health, the administration of justice, public administration, or the rights of others or for the prevention or combating of disorder and crime; and
- (b) shall not derogate from the general substance of the right in question.

(2) Suspension

- (a) The rights set forth in this Bill may be suspended only in accordance with enabling legislation relating to a state of emergency, such legislation to be passed by the highest legislative body and to be of temporary operation.
- (b) Where such suspension is so effected the following requirements shall be complied with:
- (i) A state of emergency shall be proclaimed only where the security or continued existence of the state is threatened by war, invasion or general insurrection and the proclaiming of a state of emergency is reasonably necessary to bring about peace or order.
- (ii) A state of emergency shall not be proclaimed for a period exceeding six months from a given time.
- (iii) The said legislation relating to the proclamation of a state of emergency shall provide that, within three weeks after the proclamation of the state of emergency, not less than two-thirds of the directly elected members of the highest legislative body shall ratify the proclamation of the state of emergency and the rules and regulations that will apply during the state of emergency.
- (iv) Legislation relating to the state of emergency or regulations made thereunder shall not permit, authorise or sanction the cruel or inhuman treatment of persons, the retroactive creation of crimes, detention without trial, indemnity of the state or any officer of the state for acts done during the state of emergency or the subjective discretionary use of force by any officer of the state or government: Provided that -
- (aa) the foregoing notwithstanding, Articles 1; 2; 3; 4; 5; 6(a), (b), (c), (e), (f) and (g); 7; 8; 9; 11; 14; 16(b) and (c); 17(b) and (c); 18; 19; 20; 21; 22; 24; 26; 31; 32; 33; 34; 35; 36; 37; 39(b); 40 and 41 shall remain of force and effect and shall not be suspended;
- (bb) any person detained under emergency measures shall within seven days or on the first succeeding court day thereafter be brought before a court of law and be charged in writing or informed in writing

of the reason for his or her detention, failing which he or she shall be entitled to be released from detention unless on good cause shown a court of law orders further detention.

Article 35 : Testing right of the courts.

- (a) Any law, enactment or regulation of whatever nature of any legislative body in South Africa or any executive or administrative act which violates any of the rights set forth in this Bill or which exceeds any of the circumscriptions or suspensions herein permitted shall to the extent of such violation or excess be invalid.
- (b) Any court in which an alleged violation or excess as referred to in paragraph (a) hereof is raised shall be competent to pronounce judgment thereon.
- (c) The Constitutional Chamber of the Appellate Division shall hear all appeals before the Appellate Division in which, in the opinion of the Chief Justice, the only or main issue or issues arise from the provisions of the bill of rights, the other provisions of the Constitution Act, the Constitution in general and executive or administrative acts. The Chief Justice shall therefore place all appeals to the Appellate Division on the roll of either the General Chamber or the Constitutional Chamber.
- (d) Any individual, juristic person or association has the capacity on behalf of himself or herself or itself or any other individual or any group or class of persons to test, by virtue of the provisions of this Bill, the validity of any legislative, executive or administrative act by applying to the appropriate Division of the Supreme Court for a declaratory order notwithstanding the fact that the applicant is able to prove only an indirect interest or indirect prejudice.

Article 36 : Human Rights Commission.

- (a) There shall be a permanent, full-time Human Rights Commission under the chairmanship of a Judge of Appeal or retired Judge of Appeal which shall -
 - (i) assume responsibility for and co-ordinate education and information in respect of democratic values and human rights in South Africa and initiate educational programmes and information projects;

- (ii) fulfil an advisory function in respect of -
 - (aa) any question as to the consistency with this Bill of proposed legislation at any level of government;
 - (bb) any question as to the consistency with this Bill of any existing legislation;
 - (cc) any question as to any need that may exist for the extension of the protection of human rights and shall make recommendations to the legislature and the executive and administrative authorities regarding additional measures of any nature whatever;
 - (iii) inquire, on its own initiative or on the grounds of complaints lodged, into alleged violations of human rights and publicly and in writing report thereon to the highest legislative body.
- (b) Further provision shall be made in the Constitution for the composition and additional functions of the said Commission.

Article 37 : Ombudsman

- (a) There shall be a permanent full-time Ombudsman who shall on his or her own initiative or in response to representations made -
 - (i) investigate complaints of maladministration by executive or administrative bodies or persons, including the violation of human rights as contained in this Bill;
 - (ii) investigate complaints against state institutions or administrative bodies or officers or employees thereof regarding unfair, unjust and discourteous conduct which infringes or has infringed human rights as contained in this Bill;
 - (iii) act on behalf of groups of individuals, including patients in hospitals, taxpayers, pensioners, prisoners, children and other groups, whose individual rights have been prejudiced or are likely to be prejudiced by a specific act or acts by the executive authority or the administration;
 - (iv) generally watch over the upholding and respecting of human rights by the executive and administrative bodies and officers, and himself or herself take the initiative in protecting the human rights set forth in this Bill;

- (v) institute enquiry as to whether or not acts done by the executive or administrative authorities under powers conferred by subordinate or delegated legislation and which appear to infringe the human rights set forth in this Bill are unconstitutional;
 - (vi) through investigation, mediation, conciliation and negotiation endeavour to reach a settlement between the complainant and the body or person complained of, which may include obtaining an apology, revoking a decision or ruling, reconsidering the complainant's application or request, or effecting a change in policy or practice;
 - (vii) co-operate with the Human Rights Commission with a view to attaining the aims and objects of the Commission;
 - (viii) in respect of every investigation carried out by him or her report in writing, at least once each year, to the highest legislative body concerning his or her findings relating to the infringement of human rights and the steps and actions taken or recommended by him or her, such report to be published for general information simultaneously with submission thereof to that legislative body.
- (b) Further provision shall be made in the Constitution for the functions of the Ombudsman.

Article 38 : Positive promotion of all human rights.

Apart from the duty of all legislative and executive and administrative institutions of the state not to infringe the fundamental rights set forth in this Bill, all the said institutions shall use those fundamental rights as guidelines in instituting and carrying out legislative programmes and executive and administrative planning and action for the promotion of those rights.

Article 39 : Operation in respect of third parties.

- (a) The rights set forth in this Bill shall be exercised by every individual in such a manner as will not infringe the rights granted under this Bill to any other individual.
- (b) In the interpretation of all legislation, including legislation regulating only the relations between persons, the court shall have regard to the provisions of this Bill and shall as far as may be appropriate

construe the said legislation in a manner consonant with the values enshrined in this Bill.

Article 40 : Application of Bill.

The provisions of this Bill shall apply to all existing and future legislation and to all executive and administrative acts done after the date of the coming into operation of this Bill.

Article 41 : Amendment or repeal.

This Bill, including this Article, shall not be amended or repealed save by a two-thirds majority of the votes of all the directly elected members entitled to vote in the highest legislative body, ratified by the same majority of votes cast in a referendum in which everyone entitled to vote in an election for the said body may cast his or her vote.