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A Bill of Rights for a Democratic South Africa  
**The Right to Work**

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The South African Law Commission's draft Bill of Rights  
**(Working Paper 25:  
Group and Human  
Rights)**



## The Right to Work

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### Introduction

I have been asked to give a trade union perspective on the right to work. For two years now, since July 1989, COSATU has been engaged in a campaign to determine from our 1,2 million members which rights they seek to have entrenched in the constitution of a post-apartheid South Africa.

From this campaign, we have evolved two propositions which inform our perspective.

*“ We envisage promoting an orientation for the constitution which promotes strong civil society, and an independent trade union movement.”*

**One;** that for democracy to mean something to millions of South Africans beyond a new anthem and flag, it must have more than a political element - it must involve economic transformation and economic democracy.

**Two;** that parliament is not the sole forum through which we can change our conditions of life, but that the mass organisations of ordinary people - trade unions, civic organisations, rural movements - are a significant and legitimate vehicle through which we can articulate our demands in a post apartheid South Africa. A new constitution therefore is not the end of extra parliamentary mass struggle but provides a new framework for that struggle.

In short COSATU's concerns go beyond the right to work, or even the area of rights at the workplace. We envisage promoting an orientation for the constitution which promotes strong civil society, and an independent trade union movement.

At COSATU's Worker Charter Conference 300 shop stewards of COSATU endorsed rights in 5 broad areas.



**They are:**

**1. COSATU wants trade union rights in the constitution:**

*This includes the right to organise, with the facilities of access to workplace, membership dues facilities, the right to meet etc.*

*The right to strike without fear of dismissal, and the right to picket.*

*NO victimisation of or interference in trade union membership or activities by employers.*

*A separate labour court on which trade union nominees sit.*

**2. COSATU wants trade union independence:**

*The right of trade unions to be independent from the state, employers and political parties must be respected. Trade unions should be democratically controlled by their members.*

**3. COSATU wants an accountable government:**

*This must be built into the provisions of the constitution, rather than left to the good intentions of the ruling party of the day.*

- The constitution must give the people the right in a referendum to overturn unpopular laws or to require the passing of certain laws.
- Information kept by government departments should be accessible to the people.
- Public media should be controlled by public committees which include representatives of mass organisations.
- There should be limited terms of office for a state/executive president.
- The government ought not to be able to suspend worker rights protected in a constitution, even during a state of emergency.



- There must be an independent constitutional court to protect the rights of people in the constitution.

4. *COSATU wants a democratically planned economy:*

The constitution should provide that:

- the state can intervene in the economy so that it serves all the people;
- trade unions participate in economic planning.

*"... a new state ought to be committed to the creation of jobs, and to ensure that each citizen has not only the right to free speech and a vote, but the opportunity to earn the means to sustain life at a decent level."*

The constitution should enable the people to fight for:

- collective ownership of enterprises;
- greater worker control of workplaces;
- full employment;
- living benefits for all unemployed people;
- fair distribution of wealth and land.

5. *COSATU demands equality between men and women:*

- The constitution must recognise fundamental equality between women and men in marriage, in employment and in society.
- The state must embark on a programme of affirmative action to correct past discrimination suffered by women.

The right to work

Our concern in regard to the right to work are in two areas.

**First** - the enforceability of a right to a job.

In a society with millions of unemployed, a new state ought to be committed to the creation of jobs, and to ensure that each citizen has not only the right to free speech and a vote, but the opportunity to earn the means to sustain life at a decent level.



The assertion of the right to a job - while commendable - is in itself insufficient, since no citizen will be able to require from the judges of the Constitutional Court a job.

Traditionally, the means of putting meaning to this intention has been for the state to embark on public works programmes, to remove barriers to job entry, to increase the mobility of labour through training or to offer fiscal incentives to employers to create jobs.

**"...a strong civil society ought to find some role for itself in promoting job creation."** In addition to this necessary role for the state we believe that a strong civil society ought to find some role for itself in promoting job creation. The empowering of trade unions to allow them to negotiate macro economic issues with employers is one mechanism through which this can be done. In a few weeks time, COSATU will commence negotiations with SACCOLA on, amongst other things, retrenchment and job creation, which discussions will involve looking at training, an investment and technology policy, industrial restructuring and securing an export orientation to the economy.

**The question to the conference is:**

- Can the right to bargain on macro issues beyond conditions of employment in industry be incorporated in the constitution?
- How are we to solve the tension between the individual and collective notion of the right to work.

Precisely because an individual worker is powerless against his/her employer, trade unions arose to increase the power of workers. It does this through combining their power. Trade unions became the expression of the collective interests of workers and organisers on the basis of majoritarianism - i.e. on securing the support of the majority of workers in a plant or industry. These collective interests or rights will from time to time compete with individual rights.

**Let me give two examples which relate to the right to work.**

- A. *To improve their condition of employment, and the quality of their lives, workers are often compelled to go on strike - to withdraw their labour in order to compel an employer to agree to their proposals.*



*A vital objective during a strike is to ensure that no work is done at the strike hit company. Scab labour weakens trade unionism and workers' collective power.*

*Ought a scab or strike breaker to have the right to invoke the right to work clause of a constitution to interdict pressure activities from striking workers?*

*In Canada, by the way, the Quebec province goes further than merely permitting strikers to pressurise non-strikers. The law prevents an employer from engaging scab labour during a strike.*

- B.** *COSATU has endorsed the demand for the law to permit trade unions to negotiate closed shop agreements, albeit with some major reforms to democratise the closed shop and avoid it being used by a union beauracracy to trap the mass of workers in a union against their will. The closed shop is an important mechanism to build trade union power. Trade union membership is seen by many workers as the equivalent of industrial citizenship, and numerous struggles have taken place on the shopfloor either against employees who do not join the trade union, but enjoys the benefits of collective bargaining, or against the selective employment by employers of anti-trade union employees. At its heart, a closed shop can represent the right of organised workers not to be forced to work with non-members.*

Employers have in recent years been championing the "right to dissociation", a strange notion which seems to be more concerned with weakening the institution of trade unionism than to promote the rights of individuals.

Ought a few non trade union members to have the right to interdict a legitimate strike by union members for the closed shop on the grounds that it prejudices their right to work?

COSATU trade unions regularly enter into collective agreements which covers all workers in a bargaining unit - even the minority of non-members. Should non-members be able to object to the terms of collective agreements on wages and working conditions endorsed by a majority of workers on the grounds that it restricts their freedom to contract?



Trade Unions argue that unless the collective rights of labour are recognised in the constitution, interpretations of individual rights can have the effect of weakening the bargaining power of labour, and diminishing the role of civil society. A good example of a weak and declining labour movement, and of a society where the ideology of individual rights has been used to undermine collective union rights, is the United States of America. So systematic and successful has the attack on collective rights and the notion of collective interest been, that today only 15% of American workers are members of trade unions.

At the end of the day, our members will apply one test to the Bill of Rights and the new constitution. That test is not the extent to which these documents comply with abstract notions of justice. It is simply whether it helps or hinders them in their struggle to improve their lives. A constitution which empowers ordinary people and their organisation will help them to improve their lives, would vindicate their participation and sacrifices in the anti-apartheid struggle, and would represent in the words of one comrade,

*"A fitting autobiography of our nation".*





## Appendix 4

# The South African Law Commission's draft Bill of Rights (Working Paper 25: Group and Human Rights)

### Part A: Fundamental rights

The rights set forth in this Part are fundamental rights to which every person in the Republic of South Africa shall be entitled and, save as provided in this Bill, no legislation or executive or administrative act of any nature whatever shall infringe these rights.

#### Article 1

The right to life: Provided that legislation may provide for the discretionary imposition of the sentence of death in the case of the most serious crimes.

#### Article 2

The right to human dignity and equality before the law, which means that there shall be no discrimination on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic: Provided that such legislation or executive or administrative acts as may reasonably be necessary for the improvement, on a temporary basis, of a position in which, for historical reasons, persons or groups find themselves to be disadvantaged, shall be permissible.

#### Article 3

The right to a good name and reputation.

#### Article 4

The right to spiritual and physical integrity.

#### Article 5

The right to be recognised legally, economically and culturally as having rights and obligations and as having the capacity to participate in legal, commercial and cultural affairs.

#### Article 6

The right to privacy, which shall also mean that a person's property or place of residence or employment shall not be arbitrarily entered, that he shall not be arbitrarily searched, that his property or possessions shall

not be arbitrarily seized and that there shall be no arbitrary interference with or interception of his correspondence or any other form of communication used by him.

#### Article 7

The right not to be held in slavery or subjected to forced labour: Provided that legislation may provide for such labour as may be prescribed to be performed during detention resulting from a person's being sentenced to imprisonment by a court of law, or such compulsory military or civil service as may reasonably be acceptable in a democratic state.

#### Article 8

The right to freedom of speech and to obtain and disseminate information.

#### Article 9

The right freely to carry out scientific research and to practise art.

#### Article 10

The right to freedom of choice with regard to education and training.

#### Article 11

The right to the integrity of the family, freedom of marriage and the upholding of the institution of marriage.

#### Article 12

The right to move freely within the Republic of South Africa and therein to reside, to work, or to carry on any lawful business, occupation, trade or other activity.

#### Article 13

The right of every citizen not to be

- arbitrarily refused a passport
- exiled or expelled from the Republic of South Africa
- prevented from emigrating.

#### Article 14

The right freely and on an equal footing to engage in economic intercourse, which shall include the capacity to establish and maintain commercial undertakings, to procure property and means of production, to offer services against remuneration and to make a profit.

#### Article 15

The right to private property: Provided that legislation may in the public interest authorise expropriation against payment of reasonable compensation which shall in the event of a dispute be determined by a court of law.

#### Article 16

The right to associate freely with other groups and individuals.



**Article 17**

The right of every person or group to disassociate himself or itself from other individuals or groups: Provided that if such disassociation constitutes discrimination on the ground of race, colour, religion, language or culture, no public or state funds shall be granted directly or indirectly to promote the interests of the person who or group which so discriminates.

**Article 18**

The right of citizens freely to form political parties, to be members of such parties, to practise their political convictions in a peaceful manner and to be nominated and elected to legislative, executive and administrative office, and to form and become members of trade unions: Provided that no person shall be compelled to be a member of a political party or a trade union.

**Article 19**

The right to assemble peacefully, to hold demonstrations peacefully and to obtain and present petitions.

**Article 20**

- (a) The right of all citizens over the age of eighteen years to exercise the vote on a basis of equality in respect of all legislative institutions at regular and periodical elections and at referendums.
- (b) Subject to paragraph (a) hereof, the composition of the legislative institutions of the country shall be determined in the constitution.

**Article 21**

The right of every person, individually or together with others, freely to practise his culture and religion and use his language.

**Article 22**

The right of every person to be safeguarded from discrimination against his culture, religion or language and to be safeguarded from preferential treatment of the culture, religion or language of others: Provided that legislation may determine the official languages of a region: Provided further that when in proceedings instituted by an interested person or persons it is alleged that legislation or an executive or administrative act infringes the cultural, religious or linguistic values of any individual or group of individuals, the court shall in adjudicating such allegations have regard to the interests of other individuals or groups of individuals.

**Article 23**

The right to personal freedom and safety, which shall also mean that no person shall be deprived of his freedom, save in the following cases and in accordance with a generally applicable prescribed procedure whereby his fundamental rights to spiritual and physical integrity are not denied:

- (a) Lawful arrest or detention of a person effected in order to cause him

to appear before a court of law on the ground of a reasonable suspicion that he has committed a crime or whenever it may on reasonable grounds be deemed necessary to prevent the commission of a crime.

- (b) Lawful detention upon conviction by a court of law or for non-compliance with a lawful order of the court.
- (c) Lawful detention of a person in order to prevent the spread of infectious diseases.
- (d) Lawful detention of a person whom is mentally ill or one who is addicted to narcotic or addictive substances, with a view to his admission, in accordance with prescribed procedure, to an institution or rehabilitation centre.
- (e) Lawful detention of a person in order to prevent his unauthorised entry into or sojourn in the Republic of South Africa or with a view to the extradition or deportation of a person in accordance with prescribed procedure.

**Article 24**

It shall be the right of every person under arrest —

- (a) to be detained and fed under conditions consonant with human dignity;
- (b) to be informed as soon as possible, in a language which he understands, of the reason for his detention and of any charge against him;
- (c) to be informed as soon as possible that he has the right to remain silent and that he need not make any statement and to be warned of the consequences of making a statement;
- (d) within a reasonable period of time, but not less than forty eight hours or the first court day thereafter, to be brought before a court of law and in writing to be charged or in writing to be informed of the reason for his detention, failing which he shall be entitled to be released from detention, unless a court of law, upon good cause shown, orders his further detention;
- (e) within a reasonable period after his arrest, to be tried by a court of law and pending such trial to be released, which release may be subject to bail or guarantees to appear at the trial, unless a court of law, upon good cause shown, orders his further detention;
- (f) to communicate and to consult with legal representatives of his choice;
- (g) to communicate with and to receive, in reasonable measure, visits from his spouse, family, next of kin or friends, unless a court of law otherwise directs;
- (h) not to be subjected to torture, assault or cruel or inhuman or degrading treatment.

**Article 25**

The right of every accused person —



- (a) not to be convicted or sentenced unless a fair and public trial before a court of law has taken place in accordance with the generally applicable procedural and evidential rules;
- (b) to be treated as innocent until the contrary is proved by the state;
- (c) to remain silent and to refuse to testify during the trial;
- (d) to be assisted by a legal representative of his choice and, if he cannot afford this, and if the case is a serious one, to be defended by a legal representative remunerated by the state;
- (e) not to be sentenced to inhuman or degrading punishment;
- (f) not to be convicted of an offence in respect of an act or omission which did not constitute an offence at the moment when it was done and not to receive a penalty heavier than that which was applicable at the time when the offence was committed;
- (g) not to be convicted of a crime of which he was previously convicted or acquitted, save in the course of appeal or review proceedings connected with such conviction or acquittal;
- (h) to have recourse by appeal or review to a court superior to the court which tried him in the first instance: Provided that if a Division of the Supreme Court of South Africa was the court of first instance it may not be prescribed that leave to appeal shall first be obtained from that court or from the Appellate Division;
- (i) to be informed as to the reasons for his conviction and sentence.

**Article 26**

The right of every person convicted of a crime and serving a term of imprisonment in accordance with a sentence of a court of law —

- (a) not to be subjected to torture, assault or cruel or inhuman or degrading treatment;
- (b) to be detained and fed under conditions consonant with human dignity;
- (c) to be given the opportunity of developing and rehabilitating;
- (d) to be released upon expiry of the term of imprisonment imposed by the court of law.

**Article 27**

The right to cause civil disputes to be settled by a court of law and to appeal to a court of law by way of review against executive and administrative acts and against quasi-judicial decisions.

**Article 28**

the right to have the rules of natural justice applied in administrative and quasi-judicial proceedings and to have reasons furnished for any prejudicial decision.

**Article 29**

The right that the South African law, including the South African international private law, shall apply to all legal relations before a court

of law; Provided that legislation may provide for the application of the law of indigenous groups or the religious law of religious groups in civil proceedings.

**Part B****Article 30**

The rights granted in this Bill may by legislation be limited to the extent that is reasonably necessary in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others or for the prevention of disorder and crime, but only in such measure and in such a manner as is acceptable in a democratic state.

**Article 31**

The Supreme Court of the Republic of South Africa shall have jurisdiction upon application by any interested person acting on his own behalf or on behalf of a group of interested persons to determine whether any legislation or executive or administrative act violates any of the rights herein set forth or exceeds any of the limitations herein permitted and, if so, to the extent that the violation or excess takes place, to declare invalid the legislation in question or to set aside the executive or administrative act in question: Provided that finalised executive and administrative acts by which effect has been given to legislation declared invalid and which are not the subject of the proceedings concerned, shall not automatically become void.

**Article 32**

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

**Article 33**

The provisions of this Bill, including this article, shall not be amended or suspended save by a three-quarter majority of those members who are entitled to vote in each House of Parliament and who have been directly elected by the electorate: Provided that the addition of further fundamental rights or the extension of existing fundamental rights may be effected by a simple majority.