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- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

### **Eviction**

~~\*10. No person shall be removed from his or her home, except by order of a court of law after taking into account all relevant factors, which may include the availability of appropriate alternative accommodation and the lawfulness of the occupation.~~

[**Comment:** The Ad Hoc Committee requested the removal of this provision. In the circumstances it was thought unnecessary to furnish the explanation regarding the implications of this clause as previously requested by the Council.]

### **Economic Activity**

26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.
- \* (2) Nothing in ~~this section~~ subsection (1) shall preclude ~~legislation aimed at~~ measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such ~~legislation is~~ measures are justifiable in a free, an open and democratic society based on ~~the principle of~~ freedom and equality.

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[Comment: See the comment to clause 34(1)(a)(ii).]

## Labour Relations

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

## Property

- + \*28 (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

[Comment: This formulation caters for property rights which are held communally as well as for the rights of individuals held in such property.]

- (2) Expropriation of rights in property by the State shall be permissible in the public interest and shall be subject to the expeditious payment either of agreed compensation or, failing agreement, of compensation to be determined by a court of law as just and equitable, taking into account all relevant factors. ~~including the use to which the property is being put, the history of its~~



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~~acquisition, its market value, the value of the owner's investment in it and the interests of those affected.~~

[**Comment:** The deletion indicated above was requested by the Ad Hoc Committee.]

- (3) Expropriation of rights in property aimed at for the purpose of restoring rights in land to or compensating persons who have been dispossessed of these rights as a consequence of any racially discriminatory policy, shall for the purposes of subsection (2) be deemed to be expropriation in the public interest.

[**Comment:** This subclause was reformulated as a result of discussions with the Ad Hoc Committee.]

- (4) Subject to subsection (2), every person who was dispossessed of rights in land as a consequence of any racially discriminatory policy within a period to be fixed by Parliament shall have the right to the restoration of such rights in land according to law or to compensation or any other remedy according to law where such restoration is not feasible; Provided that Parliament shall first have enacted the conditions under which and the procedures and mechanisms by which this right may be enforced, and the method by which the amount of compensation is to be determined.

[**Comment:** In its deliberations the Ad Hoc Committee arrived at a set of principles to find common ground between the different parties as to the issue of restoration. Alternative ways of wording subclause (4) were submitted and have been considered by the Technical Committee. The proposed subclause (4) as it stands above, meets the majority of the principles arrived at. The

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only issues which remain are whether, in this Chapter:

1. a distinction should be drawn between state and privately owned land;
2. the level of compensation should be determined; and
3. a schedule of legislation pursuant to which rights in land were taken away should be included.

The Technical Committee is of the view that these specific matters ought to be (and can only properly be) dealt with by Parliament within the enabling provisions of subclause (4). Subclause (4) has been drafted accordingly. The Ad Hoc Committee has requested the Technical Committee to record that one party represented on it disagrees with the above view of the Technical Committee.]

## Environment

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

[**Comment:** The deletion has been made as the result of submissions which indicate that the concept of "safety" is inappropriately wide in the environmental context. Within the Technical Committee's terms of reference, it is not possible to accede to the requests of those who have suggested comprehensive treatment of environmental concerns within this Chapter.]



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## Children

+ 30. (1) Every child shall have the right -

- (a) to a name and nationality as from birth;
- (b) to parental care;
- (c) to security, basic nutrition and basic health and social services;
- (d) not to be subject to neglect or abuse; and
- (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

(2) Every child who is in detention shall, in addition to the rights which he or she has under section 25, have the right to be detained under conditions and to be treated in a manner which takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interests shall be paramount.

[**Comment:** Clause 30 was extended as a result of submissions. In the previous draft it read as follows:

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

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## Language and Culture

31. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

## Customary Law

- + \*32 (1) Every person who -

(a) in pursuance of the right entrenched in section 17 belongs to a community which observes a system of customary law; or

(b) of free and informed choice observes the rules and practices of a system of customary law and associates with other persons observing the same rules and practices,

shall have the right to the recognition of such customary law as the legal dispensation governing the internal affairs of the community mentioned in paragraph (a) or regulating his or her interpersonal relationships with the persons mentioned in paragraph (b), as the case may be.

- (2) It shall be competent for any court of law applying a system of customary law as contemplated in subsection (1) and finding certain of its rules and practices to be in conflict with section 8, to determine, to the extent that its jurisdiction allows, conditions on and a time within which such rules and practices can be brought in conformity with section 8.



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- (3) Nothing in this section shall preclude measures designed to assist the development of customary law in accordance with the values embodied in the other provisions of this Chapter.

[**Comment:** This new clause has been introduced as a mechanism facilitating the resolution of possible tension between customary law and the Equality Clause (clause 8). It has been agreed to by the Ad Hoc Committee.]

## Education

33. Every person shall have the right -

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

[**Comment:** The reference to "colour" in the previous draft was mistakenly inserted because legally speaking it is superfluous.]

## Limitation

34. + \* (1) The rights entrenched in this Chapter may be limited by ~~a law applying~~

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~~generally and not solely to an individual case~~ law of general application  
provided that such limitation -

(a) shall be permissible only to the extent that it is -

- (i) reasonable; and
- \* (ii) justifiable in ~~a free~~ an open and democratic society based on freedom and ~~the principle of~~ equality; and

[**Comment:** The underlined formulation was agreed on in consultation with the Ad Hoc Committee, after objections had been raised to the formulation in the Seventh Progress Report.]

(b) shall not negate the essential content of the right in question.

+ \* (2) Save as provided for in subsection (1) or any other provision of this Chapter, no law, whether a rule of the common law, custom or legislation, shall limit any right entrenched in this Chapter.

\* (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised and conferred by common law, custom or legislation to the extent that they are not inconsistent with the provisions of this Chapter.

[**Comment:** Subclauses (2) and (3) were previously included as clauses 36(2) and (3) respectively.]

+ \* (4) Nothing in this Chapter shall preclude measures designed to prohibit unfair



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discrimination by bodies and persons other than those bound in terms of section 7(1).

[Comment: This subclause has been inserted in response to a fear expressed that privatised racial discrimination is not sufficiently prevented by the provisions of the Chapter as they stood.]

- + (5) Notwithstanding the provisions of this Chapter, any legislation ~~a law~~ in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by ~~the~~ a competent legislature.

## Suspension

- 35. (1) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency proclaimed prospectively under an Act of ~~[the legislature]~~ Parliament and only to the extent ~~demand~~ demanded by the situation necessary to restore peace and order.
- (2) Any such suspension shall comply with the following requirements:
  - (a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is necessary to restore peace or order.

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+ \* (b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of it, shall be of force for a period of not more than 21 days unless it is extended for a period or consecutive periods of no longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

~~(b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of that declaration, shall cease to be valid in law unless the declaration is ratified by a majority of the total number of the directly elected members of [the legislature] within fourteen days of the declaration.~~

~~(c) No state of emergency shall endure for longer than six months provided that it may be renewed, subject to the ratification of such renewal in the manner referred to in paragraph (b).~~

[**Comment:** Paragraph (b) was reformulated and (c) deleted in deliberation with the Ad Hoc Committee.]

(c) ~~The Supreme Court~~ Any superior court shall be competent to enquire into the validity of any declaration of a state of emergency, any ~~renewal~~ extension thereof, and any action, whether a regulation or otherwise, taken under such declaration.

[**Comment:** This provision might have to be revisited after Chapter 7 of the Constitution has been agreed to.]



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- + (3) Neither ~~the enabling legislation~~ any law which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -
- (a) the creation of retrospective crimes;
  - (b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency; or
- + (c) the suspension of this section, and sections 7, 9, 10, 11(2), 12, 14, 27(1) and (2), 30(1)(d) and (e) and (2) and 34(1) and (2).
- (4) Any person detained under a state of emergency shall have at least the following rights:
- (a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
  - (b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Gazette within five days of their detention;
  - (c) the detention of a detainee ~~may~~ shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, which shall order the release of such a detainee if it is satisfied that such detention is not necessary to restore peace or order.

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- (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
  - (e) a detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
  - (f) a detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
  - (g) if detained for longer than 10 days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of a period of 10 days from the date of determination of the review procedure provided for in paragraph (c).
- (5) The State shall for the purpose of a review referred to in subsection (4)(c) submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- (6) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such re-detention.



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## Interpretation

36. +\*(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality, shall, where appropriate, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

[**Comment:** See the comment to clause 34(1)(a)(ii).]

- (2) A law limiting a right entrenched in this Chapter shall be presumed constitutionally valid until the contrary is proved: Provided that a law limiting -

+\* (a) a right entrenched in sections 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

+\* (b) a right entrenched in section 15, 16, 17, 18, 23 or 24, insofar as such right relates to ~~the expression of~~ free and fair political activity,

shall be strictly ~~construed~~ scrutinised for constitutional validity.

[**Comment:** The Committee has refrained from identifying illimitable rights in clause 34 in the light of the strict requirements laid down in that clause. Rights which are usually identified as illimitable in similar instruments have, however, been included in this ("strict scrutiny") clause in order to minimise further the possibility of limiting them. Limitations to the rights listed in paragraph (b) are, however, subject to strict scrutiny only in so far as these rights relate to free and fair political activity.]

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+ (3) No law ~~existing at the commencement of this Chapter~~ which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the ~~permissible~~ limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such a law shall be construed as having the said more restricted meaning.

(4) In the interpretation of any law and the application and development of the common and of customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

[Comment: This subclause has been added in order to facilitate the incorporation of the values embodied in this Chapter throughout the legal system. It also allows for judicially controlled "seepage" of the provisions of this Chapter to relationships other than those contemplated in clause 7(1).]

### **Duration**

~~31. This Chapter shall be of full force and effect until a Bill of Rights duly enacted by the elected constitution-making body has come into effect."~~

[Comment: The matters dealt with in the clause previously proposed by this Committee will be dealt with in another clause to be proposed by the Constitutional Committee.]



## CHAPTER 3

### FUNDAMENTAL HUMAN RIGHTS

#### Application

7. (1) The provisions of this Chapter shall bind the legislative and executive organs of the State at all levels of government including all statutory bodies and functionaries.
- (2) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken and acts performed during the period of operation of this Chapter.
- (3) All juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of these rights permits.
- (4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person or association described in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) Applications referred to in paragraph (a) may be brought by -
- (i) a person acting in his or her own name;
  - (ii) a person acting on behalf of any other person who is not in a position to bring such application in his or her own name;
  - (iii) a person acting as a member of or on behalf of a group or class of persons; or
  - (iv) an association acting in its own name or on behalf of its members.

## **Equality**

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating in any way from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language.
- (3) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms.
- (4) Notwithstanding section 36(2), prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as alleged, until the contrary is established.

## **Life**

9. Every person shall have the right to life.

## **Human Dignity**

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

## **Freedom and Security of the Person**

11. (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading



treatment or punishment.

## **Servitude and Forced Labour**

12. No person shall be subject to servitude or forced labour.

## **Privacy**

13. Every person shall have the right to his or her personal privacy which shall include the rights not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

## **Religion, Belief and Opinion**

14. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by an appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance at them is free and voluntary.

## **Freedom of Expression**

15. (1) Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.
- (2) All media financed by or under the control of the State shall be regulated in a manner which ensures the expression of a diversity of opinion.

## **Assembly, Demonstration and Petition**

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

## **Freedom of Association**

17. Every person shall have the right to freedom of association.

## **Freedom of Movement**

18. Every person shall have the right to freedom of movement anywhere within South Africa.

## **Residence**

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

## **Citizens' Rights**

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

## **Political Rights**

21. (1) Every citizen shall have the right -
- (a) to form, to participate in the activities of and to recruit members for a political party;
  - (b) to campaign for a political party or cause; and
  - (c) freely to make political choices.



- (2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

### **Access to Court**

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

### **Access to Information**

- 23 Every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the protection or exercise of any of his or her rights.

### **Administrative Justice**

- 24 Every person shall have the right to -
- (a) lawful administrative action where any of his or her rights or interests is affected or threatened by such action;
  - (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened by such action;
  - (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such actions have been made public; and
  - (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened by such action.

### **Detained, Arrested and Accused Persons**

25. (1) Every person who is detained, including every sentenced prisoner, shall have the right to -
- (a) be informed promptly in a language which he or she understands of the

reason for his or her detention;

- (b) be detained under conditions consonant with human dignity, including at least the provision of adequate nutrition, reading material and medical treatment at State expense;
  - (c) consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the State;
  - (d) be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and
  - (e) challenge the lawfulness of his or her detention in person, in a court of law and to be released if such detention is unlawful.
- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -
- (a) to be informed promptly, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
  - (b) to be brought before an ordinary court of law as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
  - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
  - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;



- (b) to be informed with sufficient particularity of the charge;
- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- (d) to adduce and challenge evidence and not to be a compellable witness against himself or herself;
- (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

## **Economic Activity**

26. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.
- (2) Nothing in subsection (1) shall preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

## Labour Relations

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

## Property

- 28 (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) Expropriation of rights in property by the State shall be permissible in the public interest and shall be subject to the expeditious payment either of agreed compensation or, failing agreement, of compensation to be determined by a court of law as just and equitable, taking into account all relevant factors.
- (3) Expropriation of rights in property for the purpose of restoring rights in land to persons who have been dispossessed of these rights as a consequence of any racially discriminatory policy, shall for the purposes of subsection (2) be deemed to be expropriation in the public interest.
- (4) Subject to subsection (2), every person who was dispossessed of rights in land as a consequence of any racially discriminatory policy within a period to be fixed by Parliament shall have the right to the restoration of such rights in land according to law or to compensation or any other remedy according to law where such restoration is not feasible: Provided that Parliament shall first have enacted the conditions under which and the procedures and mechanisms by which this right may be enforced, and the method by which the amount of compensation is to be determined.



## Environment

29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

## Children

30. (1) Every child shall have the right -
- (a) to a name and nationality as from birth;
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  - (d) not to be subject to neglect or abuse; and
  - (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.
- (2) Every child who is in detention shall, in addition to the rights which he or she has under section 25, have the right to be detained under conditions and to be treated in a manner which takes account of his or her age.
- (3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interests shall be paramount.

## Language and Culture

31. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

## Customary Law

32 (1) Every person who -

- (a) in pursuance of the right entrenched in section 17 belongs to a community which observes a system of customary law; or
- (b) of free and informed choice observes the rules and practices of a system of customary law and associates with other persons observing the same rules and practices,

shall have the right to the recognition of such customary law as the legal dispensation governing the internal affairs of the community mentioned in paragraph (a) or regulating his or her interpersonal relationships with the persons mentioned in paragraph (b), as the case may be.

- (2) It shall be competent for any court of law applying a system of customary law as contemplated in subsection (1) and finding certain of its rules and practices to be in conflict with section 8, to determine, to the extent that its jurisdiction allows, conditions on and a time within which such rules and practices can be brought in conformity with section 8.
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- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.



## Limitation

34. (1) The rights entrenched in this Chapter may be limited by law of general application provided that such limitation -
- (a) shall be permissible only to the extent that it is -
    - (i) reasonable; and
    - (ii) justifiable in an open and democratic society based on freedom and equality; and
  - (b) shall not negate the essential content of the right in question.
- (2) Save as provided for in subsection (1) or any other provision of this Chapter, no law, whether a rule of the common law, custom or legislation, shall limit any right entrenched in this Chapter.
- (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised and conferred by common law, custom or legislation to the extent that they are not inconsistent with the provisions of this Chapter.
- (4) Nothing in this Chapter shall preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).
- (5) Notwithstanding the provisions of this Chapter, any legislation in force at the commencement of this Chapter promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in force until repealed or amended by a competent legislature.

## Suspension

35. (1) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency proclaimed prospectively under an Act of Parliament and only to the extent necessary to restore peace and order.

- (2) Any such suspension shall comply with the following requirements:
  - (a) A state of emergency may be declared only where the security of the State is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if such declaration is necessary to restore peace or order.
  - (b) The declaration of a state of emergency and any action, whether a regulation or otherwise, taken in consequence of it, shall be of force for a period of not more than 21 days unless it is extended for a period or consecutive periods of no longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.
  - (c) Any superior court shall be competent to enquire into the validity of any declaration of a state of emergency, any extension thereof, and any action, whether a regulation or otherwise, taken under such declaration.
- (3) Neither any law which provides for the declaration of a state of emergency, nor any action taken in consequence thereof, shall permit or authorise -
  - (a) the creation of retrospective crimes;
  - (b) the indemnification of the State or persons acting under its authority for unlawful actions taken during the state of emergency; or
  - (c) the suspension of this section, and sections 7, 9, 10, 11(2), 12, 14, 27(1) and (2), 30(1)(d) and (e) and (2) and 34(1) and (2).
- (4) Any person detained under a state of emergency shall have at least the following rights:
  - (a) an adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
  - (b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Gazette within five days of their detention;
  - (c) the detention of a detainee shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, which shall order the release of such a detainee if it is satisfied that such detention is not necessary to restore peace or order.



- (d) a detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
  - (e) a detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
  - (f) a detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
  - (g) if detained for longer than 10 days, the detainee shall be entitled to apply to a court of law for his or her release from detention at any stage after the expiry of a period of 10 days from the date of determination of the review procedure provided for in paragraph (c).
- (5) The State shall for the purpose of a review referred to in subsection (4)(c) submit written reasons to justify the detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- (6) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release, such a person shall not be detained again on the same grounds unless the State shows good cause to a court of law prior to such re-detention.

## Interpretation

36. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality; shall, where appropriate, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.
- (2) A law limiting a right entrenched in this Chapter shall be presumed constitutionally valid until the contrary is proved: Provided that a law limiting -
- (a) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

- (b) a right entrenched in section 15, 16, 17, 18, 23 or 24, insofar as such right relates to free and fair political activity,

shall be strictly scrutinised for constitutional validity.

- (3) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such a law shall be construed as having the said more restricted meaning.

- (4) In the interpretation of any law and the application and development of the common and of customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.



# **DRAFT ELEVENTH PROGRESS REPORT**

## **1. INTRODUCTION**

To date the Negotiating Council has agreed to all the clauses in the Chapter on Fundamental Rights with the exception of clauses 28 (Property rights) and 32 (Customary law).

Since the discussion of the Technical Committee's Tenth Progress Report by the Council on 7 October 1993, certain amendments have been made to the draft Chapter then submitted to the Council. These amendments fall in four categories:

- 1.1 Amendments resulting from the discussion at the Council meeting.
- 1.2 Editorial changes.
- 1.3 Substantive amendments which are not changes in principle but which improves and/or streamlines the draft.
- 1.4 Amendments resulting from agreements reached by the parties.

Provisions which have not been amended at all are marked with an asterisk.

The draft as it presently stands is hereby presented with notes explaining the amendments.

## 2. THE CHAPTER AS IT PRESENTLY STANDS

### CHAPTER 3

#### FUNDAMENTAL HUMAN RIGHTS

##### Application

7. (1) This Chapter shall bind the legislative and executive organs of the State at all levels of government including all statutory bodies and functionaries.
- (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Chapter.
- (3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

**[Explanatory Note:** The amendments in subclauses (1) to (3) are editorial changes.]

- (4) (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) An application referred to in paragraph (a) may be brought by -
- (i) a person acting in his or her own interest;
  - (ii) an association acting in the interest of its members;
  - (iii) a person acting on behalf of another person who is not in a position to bring such application in his or her own name;
  - (iv) a person acting as a member of or in the interest of a group or class of persons; or
  - (v) a person acting in the public interest.

**[Explanatory Note:** The amendments to subclause (4) are substantive but the principles embodied in the previous draft have been left intact. The clause as presently proposed improves the previous draft and is the result of taking



into consideration a submission by the Association of Law Societies.]

## Equality

8.    \*(1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

**[Explanatory Note:** The words "in any way" after "derogating" which appeared in the previous draft have been deleted because they were superfluous. The word "belief" was substituted for "creed" in order to bring this clause in line with clause 14(1).]

- \*(3) This section shall not preclude measures designed ~~to~~ to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms.

**[Explanatory Note:** The clause as it stands was agreed to by the Council at its meeting of 7 October 1993. Some of the parties have however, once again raised the possibility of including the word "reasonable" before "measures" and the Ad Hoc Committee requested the Technical Committee's advice on this.

The Technical Committee has consistently explained that the idea of reasonableness is contained in the draft as it stands. The measures envisaged in subclause (3) must in the first place, be designed to achieve a certain purpose. They must in other words be rational in relation to a clearly defined purpose. The purpose is, in the second place, also defined in rational terms, namely to achieve the adequate protection and advancement of a certain category of persons or groups which, in the third place, is also defined in rational terms: the persons or groups must be disadvantaged by discrimination. In the fourth place, the rational purpose previously stated is further qualified in rational terms, namely that it must enable the category of persons or groups defined to fully and equally enjoy all their rights and freedoms. As it stands this clause in its present "rational" form is a restricted authorisation of affirmative action measures which, for example, definitely excludes the unqualified introduction of quota systems. Its restrictive nature



is understandable in view of the fact that it is the result of political compromise.

To qualify the word "measures" with "reasonable" would mean that a court construing subclause (3) will have to determine what criterion of reasonableness in addition to the criteria of reasonableness already built into the clause itself, will have to be invoked. This will further restrict an already restricted clause and could have the effect of rendering it nugatory.

It has also been suggested that subclause (3) be subjected in explicit terms to the criteria contained in the Limitation Clause (clause 34(1)). Subclause (3) is a specific limitation to the rights entrenched in subclause (1) read with subclause (2). For the purpose of authorising affirmative action measures, criteria other than those in clause 34(1) therefore apply in respect of limiting rights entrenched in subclause 8(1) read with subclause 8(2). Clause 34(1) is in other words not only insufficient to cater for the limitation of rights for the purpose of affirmative action, but is replaced by subclause 8(3) as a limitation clause authorising affirmative action measures of a certain kind. To subject this special limitation to the general limitation would mean that the special limitation is thereby rendered nugatory. Clause 8(3) can then simply be deleted and it can be left to the court to determine whether limitations to the rights entrenched in clause 8(1) for the purpose of affirmative action meet the criteria in clause 34(1). If the Council wishes to include clause 8(3) merely for ornamental purposes, this can be done. There is a further complication however. Not all measures can then be subjected to the criteria in clause 34(1) but only laws. Subclause (3) will then have to be introduced by words such as the following: "This section shall not preclude legislation subject to the criteria in section 34(1) or other measures designed .....".

→ || Another possibility is to limit subclause (3) by inserting the words "and reasonably capable of achieving" after the words "designed to achieve". This means that a rational connection is made between the rationally designed measures which are authorised and the prospects for their success. Apart from the fact that this will further restrict the already restricted authorisation in subclause (3) it will also introduce an element of speculation which is not in stride with the otherwise rational design of the subclause as it presently stands. Of the three undesirable options discussed in this Note, the third is, however, the most preferable.]

- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of discrimination as contemplated in that subsection until the contrary is established.

**[Explanatory Note:** The amendments to this clause are mainly editorial changes. The reference to clause 36(2) has been omitted for a reason which



will be explained in the Explanatory Note to clause 34(1).]

### **Life**

- \*9.** Every person shall have the right to life.

### **Human dignity**

- \*10.** Every person shall have the right to respect for and protection of his or her dignity.

### **Freedom and security of the person**

- \*11.** (1) Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

### **Servitude and forced labour**

- \*12.** No person shall be subject to servitude or forced labour.

### **Privacy**

- \*13.** Every person shall have the right to his or her personal privacy which shall include the rights not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

### **Religion, belief and opinion**

- \*14.** (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance at them is free and voluntary.

### **Freedom of expression**

- 15.** \*(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.
- (2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion.

**[Explanatory Note:** The words "impartiality and" have been inserted after "ensures" as a result of the discussion at the Council meeting of 7 October 1993.]

### **Assembly, demonstration and petition**

- \*16.** Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

### **Freedom of association**

- \*17.** Every person shall have the right to freedom of association.



## **Freedom of movement**

- \*18.** Every person shall have the right to freedom of movement anywhere within South Africa.

## **Residence**

- \*19.** Every person shall have the right freely to choose his or her place of residence anywhere in South Africa.

## **Citizens' rights**

- \*20.** Every citizen shall have the right to enter, remain in and leave South Africa, and no citizen shall be deprived of his or her citizenship.

## **Political rights**

- \*21.** (1) Every citizen shall have the right -
- (a) to form, to participate in the activities of and to recruit members for a political party;
  - (b) to campaign for a political party or cause; and
  - (c) freely to make political choices.
- (2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

## **Access to court**

- \*22.** Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

## Access to information

- \*23. Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the protection or exercise of any of his or her rights.

## Administrative justice

24. Every person shall have the right to -
- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
  - (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
  - (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
  - (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

[**Explanatory Note:** The words "by such action" in paragraphs (a), (b), and (d) have been deleted as a result of the discussion at the Council meeting of 7 October 1993. It has been confirmed with a professor of English that "any of his rights or interest is" as grammatically the correct form.]

## Detained, arrested and accused persons

25. (1) Every person who is detained, including every sentenced prisoner, shall have the right -
- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
  - (b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;



- (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;
  - (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and
  - (e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.
- (2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -
- (a) in a language which he or she understands, to be informed promptly that he or she has the right to remain silent and to be warned of the consequences of making any statement;
  - (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or the first court day thereafter, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
  - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
  - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial by an ordinary court of law within a reasonable time after having been charged;
  - (b) to be informed with sufficient particularity of the charge;
  - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
  - (d) to adduce and challenge evidence, and not to be a compellable witness



against himself or herself;

- (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

**[Explanatory Note:** The amendments to this clause are editorial changes.

In several submissions the Technical Committee was requested to consider the inclusion of a right of an accused person not to be convicted on evidence obtained in violation of rights entrenched in the Chapter, or, alternatively, only in Clause 25. Such a right will then have to be made subject to a discretion of the court to exclude such evidence in instances where its admission would not be in the public interest or would bring, to use the Canadian phraseology, "the administration of justice into disrepute". The reason for this (what has come to be known as the exclusionary rule) is to prevent the state from obtaining evidence in a way which would violate rights entrenched in the Chapter (or in clause 25) and nevertheless be able to adduce it at a criminal trial. It is true that an action can be brought against the state for acts violating rights entrenched in the Chapter but for parties who do not have the means to bring actions of this nature the protection of their rights, especially those in clause 25, will be almost meaningless.

Two members of the Technical Committee support the inclusion of such a right in the following terms:

✓ "Every accused person shall have the right ... to the exclusion during his or her trial of evidence which was obtained in violation any right entrenched in this Chapter/section: Provided that the court must be convinced that the admission of such evidence will bring the administration of justice into

*Unless the court is convinced that to exclude the evidence would result in a miscarriage of justice.*



dispute."

This formulation is in substantial conformity with section 24(2) of the Canadian Charter of Rights and Freedoms.

Two members of the Technical Committee are, however, of the opinion that the constitutionalisation of this right will have a detrimental effect on the prevention and combatting of crime and that it is too controversial to be included during the transition. The Technical Committee could therefore not reach agreement on the issue and it was decided to refer it to the Council in order to determine what the preference of negotiating parties is. The opinion of the fifth member of this Technical Committee could not be obtained.]

### **Economic activity**

- \*26.** (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in South Africa.
- (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

### **Labour relations**

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

## Property rights

28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- ✓ (2) The content and limits of rights in property are determined by legislation.
- (3) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (4) Where any rights in property are expropriated pursuant to a law referred to in subsection (3) such expropriation shall be permissible in the public interest for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

**[Explanatory Note:** The amendments to this clause result from a number of agreements between negotiating parties. First it has been agreed that restoration should not be provided for in the Chapter on Fundamental Rights but elsewhere in the Constitution and the matter has therefore been referred to the Technical Committee on Constitutional Issues. The Technical Committee on Fundamental Rights was requested to consider the inclusion of a "policing clause" in clause 28 and as a result subclause (2) is proposed by the Committee. This subclause is in conformity with a similar provision in Article 14(1) of the German Basic Law. It recognises the authority of the state to regulate the exercise of rights in property. Should such regulation, however, amount to the deprivation of rights in property subclause (3), which is a "due process" clause, comes into operation. This subclause then excludes the possibility that in the state's regulation of rights in property such rights are taken away otherwise than in conformity with the due process required in subclauses (3) and (4). Subclauses (2) and (3) therefore have a reciprocal balancing effect and should both be included.]

## Environment

- \*29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.