

Economic Activity

21. Every person shall have the freedom to engage in economic activity and to pursue a livelihood anywhere in South Africa.

[Explanatory Note: The Council has as yet not agreed on the inclusion of this right. Submissions of the parties on this matter reflect a division of opinion. Should the right be included, the Committee is of the view that a further subsection such as the following may provide a basis for compromise:

"Nothing in this section shall preclude legislation aimed at 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 justifiable in a free, open and democratic society based on the principle of equality."]

Labour Relations

22. (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.

[Comment: The Council must still decide on the inclusion of these rights.]

Property

23. (1) Every person shall have the right to acquire and dispose of rights in property.

- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to 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 acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

[Comment: The Council still has to decide on the inclusion of a property clause.]

Environment

24. Every person has the right to an environment which is safe and not detrimental to his or her health or well-being.

[Explanatory Note: The conservation of the environment is catered for under the concept of "well-being". Further developments of this right are more appropriately within the preserve of the elected constitution-making body.]

Children

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

Language and Culture

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

[Comment: The Council still has to decide on the inclusion of these rights.]

Education

27. 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 Council still has to decide on the inclusion of the rights in this clause.]

Limitation

28. (1) The rights and freedoms entrenched in this Chapter may be limited by law of general application, provided that such limitation -

- (a) shall be permissible only to the extent -
 - (i) reasonable; and
 - (ii) justifiable in a free, open and democratic society based on the principle of equality; and
- (b) shall not negate the essential content of the right or freedom in question.

(2) Notwithstanding the provisions of this Chapter, the provisions of 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 legislature.

[**Comment:** The Committee had added this subsection in the light of the National Manpower Commission's response to this Committee's request (in its Fifth Report) for submissions from appropriate forums on the effect of this Chapter on labour relations.]

Suspension

29. (1) The rights and freedoms 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] and only to the extent demanded by the situation.
- (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 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).
 - (d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and any action, whether a regulation or otherwise, taken under such declaration.
- (3) Neither the enabling legislation 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.

[Comment: The committee has concluded that there is no need to specify further rights and freedoms which are not capable of

suspension in view of the provisions of section 29 (1) above, which will enable a court to make a determination in the light of the prevailing situation.]

- (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 the measures in terms of which they are being detained shall be published in the Government Gazette within five days of their detention;
 - (c) the detention of a detainee shall be reviewed within ten days of his or her detention by a court of law which may order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall 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;
 - (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 to have access to legal representatives of his or her choice at all reasonable times;
 - (f) a detainee shall at all times have access to a medical practitioner of his or her choice; and
 - (g) if detained for longer than ten 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 ten days from the date of the determination of the review procedure provided for in subsection (4)(c).

Duration

30. 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."

ENFORCEMENT MECHANISMS AND PROCEDURES

In its Fifth Report of 11 June 1993, the committee stated as follows:

"The committee is agreed that any person intent upon enforcing any of his or her rights or freedoms should be entitled to proceed in the ordinary courts of the land, provided that the enforcement of these rights does not result in existing legislation being declared invalid.

The committee is also agreed that the procedure appropriate to, and the judicial body empowered to, adjudicate upon any proceeding for a declaration that existing and future legislation is invalid (by reason of inconsistency with the provisions of the proposed Chapter in 3. above) should be the same as the procedure and judicial body which may be recommended for the determination of the validity of legislation in relation to the constitution. We are presently of the view that the question as to the validity of legislation should not be determined by the ordinary courts but by some kind of constitutional forum. A special chamber as part of the Appellate division, an expanded Appellate Division or a forum separate from the existing Supreme Court are three of the options to be considered. On the assumption that the provisions of the proposed Chapter in 3 above will come into existence before the election of a constitution making body we would suggest that a mechanism for the determination of the validity of legislation must be provided for in the interim.

There seems to be widespread support for the facilitative role which can be played in the protection and enforcement of the provisions of the proposed Chapter by a Human Rights Commission and an Ombud. In particular, such a Commission could fulfil a vital educative and mediating function and make the rights and freedoms more accessible, while an Ombud with wide powers could oversee the application of this Chapter in the administrative sphere."

The Committee has as yet received no reaction to these comments, and can proceed with the elaboration and formulation of the powers of and procedure to be followed by a Human Rights Commission or Ombud only if these mechanisms are approved by the Council in principle.

The Committee further suggests that the Constitution should contain a procedure by which an ordinary court, seized of proceedings the determination of which entails questions of the constitutional validity of legislation, may refer such questions to the appropriate constitutional forum.

The committee recommends that the details concerning the mechanisms and procedures for determining the constitutional validity of legislation be referred to it for comment before finalisation.

4. FURTHER RECOMMENDATIONS

The Committee recommends that provisions such as the following be included in another part of the Constitution to deal with certain real concerns which have been brought to its notice.

1. "Nothing in this [Constitution] except [the constitutional principles] shall limit the power of [the elected constitution-making body] to enact a Bill of Rights."
2. "The religious-orientation of or the medium of instruction used in any primary, secondary or tertiary educational institution shall not be altered without the concurrence of the community served by that institution or, in the case of a tertiary educational institution, without the concurrence of the controlling body of that institution."
3. Protection to be accorded to pension benefits. [This issue does not strictly speaking fall within the mandate of this Committee. The Committee is, however, prepared to consider the form and content of such a protection clause if the Council so instructs. In this event parties are requested to submit comments in this regard.]
4. The Committee recommends that the Chapter on Fundamental Rights and Freedoms comes into operation before the election of a constitution-making body.

Prof. H Corder (Acting Convener)

Prof. L M du Plessis (Not present for the last part of the discussion of this Report)

Mr. G Grove

Ms. S Nene

Adv. Z Yacoob

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION
SEVENTH PROGRESS REPORT : 29 JULY 1993**

The Committee has revised the Chapter on Fundamental Rights proposed in its Sixth Progress Report in view of discussions at the meeting of the Negotiating Council on 21 July 1993 and subsequent submissions received up to 26 July 1993. Although many of the formulations in the Chapter have already been approved by the Council, the Chapter is nevertheless included in full in this Report in order to facilitate discussion on the outstanding issues. (Whatever appears between square brackets is not suggested for inclusion).

"CHAPTER [....]

FUNDAMENTAL RIGHTS

Application

1. (1) The provisions of this Chapter shall -

- (a) bind the legislative, executive and, where appropriate, the judicial branches of government at all levels as well as all statutory bodies and functionaries;
- (b) bind, where just and equitable, other bodies and persons; and

[Comment: The Committee thought it best for this section not to be prescriptive as regards the horizontal application of fundamental rights during the transition. Instead the suggested formulation of subclauses 1(1)(a) and 1(1)(b) leaves room for the evolutionary and natural development of the concept of the horizontal enforcement of rights in the jurisprudence of the designated judicial authority.]

- (c) be enforced by the [designated authority].
- (2) In the case of an infringement of any provision of this Chapter, the [designated authority] may, where appropriate, put any body or person

referred to in subsection (1)(a) or (b) on terms as to how and within what period such infringement should be remedied.

- (3) The provisions of this Chapter shall apply to all laws in force and all administrative decisions taken during the period of operation of this Chapter.
- (4) All juristic persons shall be entitled to the rights contained in this Chapter to the extent that the nature of these rights permit.
- (5)
 - (a) Every person who alleges that his or her rights or every association which alleges that its members' rights entrenched in this Chapter, have been infringed or are threatened, shall be entitled to apply to a competent [designated authority] for appropriate relief, which may include a declaration of rights.
 - (b) Nothing in this subsection shall prevent a person from applying for relief on behalf of a group or class of persons whose rights entrenched in this Chapter are alleged to have been infringed or are threatened.

Equality

- 2.
 - (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 the grounds of race, gender, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, creed, culture or language in particular.
 - (3) This section shall permit measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable their full and equal enjoyment of all rights and freedoms.
 - (4) In any action in which unfair discrimination is alleged, prima facie proof of such discrimination shall be sufficient to bring it within the class of conduct contemplated in subsection (2), until the contrary is established.

[Comment: The Ad Hoc Committee appointed by the Planning Committee recommends the non-discrimination clause to be formulated as in subclause (2) above. Subclause (4) has been reformulated by the Technical Committee in view of the discussions in the Council on this clause.]

Life

3. Every person shall have the right to life.

[**Comment:** The Ad Hoc Committee appointed by the Planning Committee recommends the unqualified inclusion of this right in the Chapter. We support this proposal.]

Human Dignity

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

Freedom and Security of the Person

5. (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

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

Privacy

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

Religion and Belief

8. (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.

- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions under rules established by the appropriate authority for that purpose, provided that such observances are conducted on an equitable basis and attendance thereat is free and voluntary.

Freedom of Expression

9. Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

[Comment: One of the parties has once again suggested the inclusion of the following further provision:

"In respect of the exercise of its control, if any, over any public media, the state shall ensure diversity of expression and opinion."

The Committee is still of the view that such a provision would be inappropriate in a Chapter on Fundamental Rights and that the concern should be referred to the Technical Committee on the Media.]

Assembly, Demonstration and Petition

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

Freedom of Association

11. (1) Every person shall have the right to freedom of association.
- (2) Without derogating from the generality of the provisions of section 2(2), nothing in this section shall permit discrimination on the ground of race.

Freedom of Movement

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

Residence

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

Citizen's Rights

14. 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

15. (1) Every person 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 of voting age shall have the right to vote in secret and to stand for election to public office.

Access to Court

16. 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

17. Every person shall have the right of access to all information necessary for the protection or exercise of his or her rights.

Administrative Decisions

18. (1) Every person shall have the right to lawful and procedurally fair administrative decisions.

[Comment: One of the parties suggested the inclusion of the words "reasonable" after the word "lawful". This will have far-reaching consequences for South African Administrative Law and it is for the Council to decide on this issue. The Committee does not support the introduction of this notion at this stage.]

- (2) Every person shall have the right to be furnished with reasons in writing for an administrative decision which affects his or her rights or interests.

Detained, Arrested and Accused Persons

19. (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, including 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 the interests of justice so require, to be provided with the services of a legal practitioner by the State; and
 - (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse, next-of-kin, religious counsellor and a medical practitioner of his or her choice.
- (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; and

- (c) 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;
 - (e) to be represented by a legal practitioner of his or her choice or, where the interests of justice so demand, 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.

[Comment: The question raised by the Council in respect of the voting rights of prisoners does not properly fall within this Chapter according to a recommendation of the Ad Hoc Committee appointed by the Planning Committee. We agree.]

Eviction

20. 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 appointed by the Planning Committee recommends the deletion of this clause. We await further instructions from the Council.]

Economic Activity

21. (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 shall preclude legislation aimed at 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 justifiable in a free, open and democratic society based on the principle of equality.

Labour Relations

22. (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

23. (1) Every person shall have the right to acquire, hold and dispose of rights in property.
- (2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to 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 acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

- (3) Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

[Comment: Subclause (3) was included as a result of a submission by one of the parties and is supported by this Committee.]

Environment

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

Children

25. 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.

Language and Culture

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

Education

27. 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.

Limitation

28. (1) The rights entrenched in this Chapter may be limited by a law applying generally and not solely to an individual case, provided that such limitation -
- (a) shall be permissible only to the extent that it is -
 - (i) reasonable; and
 - (ii) justifiable in a free, open and democratic society based on the principle of equality; and
 - (b) shall not negate the essential content of the right in question.
- (2) Notwithstanding the provisions of this Chapter, 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 legislature.

Suspension

29. (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] and only to the extent demanded by the situation.
- (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 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).

- (d) The Supreme Court shall be competent to enquire into the validity of any declaration of a state of emergency, any renewal thereof, and any action, whether a regulation or otherwise, taken under such declaration.
- (3) Neither the enabling legislation 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.
- (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 Government 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 ten days after his or her detention, be reviewed by a court of law, which may order the release of such a detainee if satisfied that such detention is not necessary to restore peace or order. The State shall 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;
 - (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 ten 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 ten days from the date of determination of the review procedure provided for in paragraph (c).
- (5) 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

30. (1) In interpreting the provisions of this Chapter the [designated authority] shall promote the values which underlie a free, open and democratic society based on the principle of equality.

[Comment: One of the parties suggested the inclusion of the words "liberty and" before "equality". The Committee is of the opinion that the idea of liberty is sufficiently expressed by the words "free, open and democratic" and that the express inclusion of the word "liberty" would in fact limit the scope of the concept and could moreover create tension between the concepts of "liberty" and "equality". Its inclusion is therefore not recommended.]

- (2) Save as provided for in this Chapter, no rule of the common law, custom or legislation shall limit any right entrenched in this Chapter.
- (3) The entrenchment of the rights included in 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.

[Comment: One of the parties raised concerns as to the application of indigenous law in view of the provisions of subclauses (2) and (3). The position is that provisions of indigenous law cannot limit rights entrenched in this Chapter. At the same time, however, rights recognised and conferred by indigenous law and not affected by this Chapter, remain of full force and effect. The cultural life of communities living under indigenous law is furthermore protected by virtue of the provisions of clause 26. The Committee is of the opinion that the position as set out above, complies with Constitutional Principles 2.8 and 2.12 agreed on by the Negotiating Forum.]

- (4) 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 15; or
 - (b) a right entrenched in sections 9, 10, 11, 12, 17 or 18, insofar as such right relates to the expression of free and fair political activity,
- shall be strictly construed for constitutional validity.
- (5) 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 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.

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."

ADDITIONAL MATTERS

1. One of the parties has suggested the inclusion of the following right:

"Family

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

The Council will have to decide on the inclusion of this right.]

2. The same party also submitted a proposal on children's rights which was received too late for consideration by the Committee.
3. **The Council still has to attend to matters raised in paragraph 4 of the**

Committee's Sixth Progress Report.

4. The Committee wishes further to place the following facts and concerns before the Council. The enactment and enforcement of this Chapter will bring fundamental changes to the content and practise of law. To avoid the risk that the legal system as a whole may not be able to cope with the potential demands which could be made of it, and to ensure that the concept of a Bill of Rights remains credible, the Committee recommends as follows:

- (a) A reference of this Report for comment on the legal implications by the following bodies:

- * The Chief Justice
- * The Six Judges President
- * The Association of Law Societies
- * The General Council of the Bar
- * Nadel

and other organisations of lawyers proposed by the Council, for submissions to be made to the Multi-Party Negotiating Process by noon on Monday, 9 August 1993; and

- (b) The taking of preparatory steps to publicise this Chapter among the legal profession and the public generally, immediately after its final adoption in order to promote a culture of respect for the rights it contains.

Prof. L M du Plessis (Convenor)

Prof. H Corder (Not present during the discussion and preparation of this Report)

Mr G Grove

Ms S Nene

Adv. Z Yacoob

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION EIGHTH PROGRESS REPORT : 9 AUGUST 1993

1. INTRODUCTION

This Eighth Progress Report deals with recommendations regarding mechanisms for the enforcement of the rights entrenched in the Chapter on Fundamental Rights (hereafter referred to as the Chapter). These do not include mechanisms at the level of the judicial authority, since a court structure for the transition will be proposed by the Technical Committee on Constitutional Issues, drawing on inputs made by this Committee.

The Committee requests the Council's approval in principle of the mechanisms proposed in this Report. Formulations of the provisions of the Constitution providing for these mechanisms will be proposed in a subsequent report.

2. ENFORCEMENT MECHANISMS

2.1 In order to facilitate the rapid, extensive and meaningful implementation of the Chapter, the Committee proposes that the office of Ombudsman, as it currently exists in South African law, be re-directed and further empowered along the lines set out below. In addition, the Committee proposes the immediate establishment of a Human Rights Commission to fulfil the type of functions envisaged for such a body as described below.

2.2 The Ombud

The Committee proposes that the powers and functions currently vested in the office of Ombudsman be expanded to embrace the following in order to focus her (reference to the feminine hereafter includes the masculine) attention on human rights matters:

2.2.1 the investigation, on own initiative or on receipt of complaints, of alleged violations of rights entrenched in the Chapter on Fundamental Rights by the executive branch of government at all levels as well as statutory bodies and functionaries (for example, maladministration and corruption, the abuse or

unreasonable exercise of administrative power, unfair, unjust, capricious or discourteous conduct and the failure to comply with any of the duties and responsibilities imposed by the Chapter);

2.2.2 the settlement of complaints as referred to in 2.2.1 or rectification of any action complained of by

2.2.2.1 mediation, conciliation or negotiation;

2.2.2.2 recommending to the appropriate (offending) administrative authority the taking of steps to achieve such settlement or rectification; or

2.2.2.3 the initiation of legal proceedings on behalf of a complainant, in the event that the steps contemplated above do not achieve the desired effect;

2.2.3 the recommendation of steps to enhance respect for human rights within the public administration generally.

The Ombud shall be appointed by the National Assembly on the recommendation of the same authority which is to recommend the appointment of judges. She shall in the normal course of events be a lawyer of some experience and standing throughout the community, and shall hold office until retirement or until dismissed by a two-thirds majority of the total number of members of the National Assembly on the ground of misconduct or inability to perform the functions of her office. The Ombud shall be responsible to the National Assembly, to which she shall report on a regular basis, but at least annually.

Deputy Ombuds may be appointed in the same way to assist the Ombud to discharge her functions in regard to any particular sphere of her responsibilities, e.g. gender or disability discrimination or privacy. In addition, Assistant Ombuds may be appointed for each SPR. Where the exercise of exclusively regional powers is concerned, the SPR Legislature may appoint a Regional Ombud to perform the type of functions referred to above in respect of those powers.

Each Magistrate or local Police Commander shall be obliged to receive complaints from the public and to transmit these to the Ombud in areas where

the Ombud herself has set up no specific office to receive complaints. Those alleging misconduct or maladministration may also approach the Ombud (or her Deputies or Assistants) directly, in writing. In discharging her functions the Ombud shall have access to government offices to search for and obtain all relevant information in the possession of the State and to require the answering of questions by any official of the executive branch of government, including a Minister of State. The Ombud shall have all such powers as are necessary and convenient for the adequate and expeditious execution of her functions and duties, including the authority to delegate power.

2.3 Human Rights Commission (HRC)

The chief function of the HRC, a permanent commission, shall be to promote the general observance of human rights and democratic values. To this end the HRC shall

- 2.3.1 initiate educational programmes and information projects aimed at the protection and promotion of human rights and democratic values;
- 2.3.2 investigate patterns of the violation of human rights generally and the entrenched fundamental rights in particular;
- 2.3.3 advise the legislature and executive at all levels as regards the consistency of any governmental law, programme or action with the values contained in the rights entrenched in the Chapter;
- 2.3.4 attempt conciliation between disputing parties on issues with which the Ombud cannot deal, failing which, bring legal proceedings of its own volition for the curtailment of any conduct offensive to human rights;
- 2.3.5 mediate disputes between constitutional authorities;
- 2.3.6 establish agencies or offices to further the above goals; and
- 2.3.7 report annually to Parliament.

The number of members of the HRC shall be not more than [fifteen], appointed by the National Assembly on the recommendation of the same authority which is to recommend the appointment of judges. As a general guide, the HRC should be composed as follows:

- (a) five members of Parliament;
- (b) one each from the Supreme Court judiciary, the magistracy, advocates in private practice, attorneys in private practice and teachers of law; and
- (c) up to five members of the general public, chosen by the National Assembly on the basis of their knowledge of or experience in human rights matters.

The members referred to in (b) and (c) should serve for a period of office of seven years, but should be secure in their tenure for that period. The members of the HRC should meet as often as is required. The HRC should be empowered to appoint a Human Rights Commissioner, who shall be responsible for the overall supervision and administration of the work of the HRC. She shall be appointed on application and shall hold office for a fixed term of five years, but may be eligible for further terms of office at the discretion of the HRC.

The HRC shall be funded from the national budget, and shall be obliged to establish at least one permanent office in each of the SPRs. The HRC shall have its seat in the national legislative capital, and shall have all such powers as are necessary or expedient for the discharge of its functions.

- 2.4 The existence of these mechanisms will naturally complement the courts' role in the enforcement of the rights entrenched in the Chapter.

Prof L M du Plessis (C)
Prof H Corder
Mr G Grove
Ms S Nene
Adv Z Yacoob

EMBARGOED UNTIL DELIVERY/TABLING
IN NEGOTIATING COUNCIL MEETING

**TECHNICAL COMMITTEE ON
FUNDAMENTAL RIGHTS
DURING THE TRANSITION
TENTH PROGRESS REPORT
1 OCTOBER 1993**

Prof. L M du Plessis (Convenor)

Prof. H M Corder

Mr G Grove

Mrs D S Nene

Adv. Z Yacoob

1. INTRODUCTION

The Technical Committee last submitted proposals on the protection of fundamental rights in its Seventh Report on 29 July 1993. Since then it has submitted reports on enforcement mechanisms to the Negotiating Council and the Technical Committee on Constitutional Issues. It has also continued to work on the Chapter on Fundamental Rights, by considering submissions made to it by many bodies and by reacting to requests and instructions from and by deliberating with the Ad Hoc Committee. Most of the provisions which follow have been agreed to by the Ad Hoc Committee, in the form in which they appear, as indicated. Two matters in particular are not yet finalised: the possible horizontal application of the protected rights and the property clause.

The Chapter appears in two forms - one with all additions, deletions and variations of the provisions of the Seventh Report indicated in the customary manner, the other (as an Annexure) in its "final" form, as it would appear in the Constitution.

The Technical Committee deems it advisable to remind the Negotiating Council of some of the major issues with which it has been concerned over the past five months, briefly as follows.

- 1.1 The Technical Committee's initial mandate was to include only those rights fundamental to the process of transition. This was slightly widened when the Council requested the Committee, towards the beginning of June, nevertheless to propose formulations of all the rights the Committee had included within categories one and two (as defined in the first three reports). At no stage has the Committee been mandated to draft a "complete" Bill of Rights, and the Chapter which follows does not represent such an endeavour. Those bodies which have submitted proposals for a Bill of Rights in the fullest sense should direct their representations to the Constituent Assembly, whose task it will be to draft such an instrument.

- 1.2 Any list of protected rights in a constitution will be a matter for contention between competing political groups, the outcome of which represents a compromise between their interests on many issues. The constitutional protection of human rights and freedoms is controversial, both in form and substance, and this is especially so in societies riven by mistrust, inequality and injustice. There are seldom outright "winners" and "losers" in such a process.

South Africa in the early 1990s is no exception in this regard. Thus, while some of the rights and freedoms were widely acceptable, others caused considerable dissension, which had to be resolved by political means, chiefly through the assistance of the Ad Hoc Committee. The following clauses are prime examples of this reality: horizontal versus vertical application; the rights to life, administrative justice, education and culture, property (including eviction and land restoration) and labour relations; and the impact of equality on customary law.

- 1.3 As to enforcement, the Technical Committee's recommendations have been channelled to the Technical Committee on Constitutional Issues. The single point that needs to be stressed here is that constitutionalised rights protection will fail if it is not made widely known and its enforcement made readily accessible to all those affected. Thus it is that the Technical Committee cannot sufficiently over-emphasize the future role of mass public education on human rights and the properly-funded and structured work of an Ombud and a Human Rights Commission. For rights protection to be realised, it must be taken seriously by all, especially those in government. In addition, a special burden rests on the legal profession including the judicial branch of government, as it will have to undertake a thorough-going transformation of its structure and functioning so as to meet the challenge of sensitive, creative and teleological interpretation which a rights-based system demands.

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- * Indicates matters dealt with in deliberation with the Ad Hoc Committee.
- # Indicates provisions which have been reconsidered by the Technical Committee but have not been amended.
-

With these thoughts in mind, the Technical Committee presents its Tenth Report.

2. THE PROPOSED CHAPTER AS IT PRESENTLY STANDS

"CHAPTER 3

+ FUNDAMENTAL HUMAN RIGHTS

Application

7. + (1) The provisions of this Chapter shall bind the legislative and executive ~~and, where appropriate, judicial branches of government~~ organs of the State at all levels of government including ~~as well as~~ all statutory bodies and functionaries;

[Comment: The final formulation of this subsection has been reconciled with the formulation of the presently proposed clause 4(2) of the Constitution. The deletion of the reference to the judicial branch of government is a consequence of the inclusion of clause 36(4) below.]

- * ~~(b) — bind, where just and equitable, other bodies and persons; and~~

[Comment: Limited ~~horizontal~~ application of the Chapter to bodies other than those in clause 7(1) is adequately dealt with as a result of the cumulative effect of clauses 34(2) and 36(4) below. Also see the Comment to clause 36(4) below.]

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~~(e) — be enforced by the [designated authority] any competent court of law in accordance with this Constitution.~~

[**Comment:** The matters previously catered for in the now deleted clause 7(1)(e) are more fully and adequately dealt with in clauses 87(2) and 90(4) of the draft Constitution proposed by the Technical Committee on Constitutional Issues in its Twelfth Report.]

~~(2) — In the case of an infringement of any provision of this Chapter, the [designated authority] may, where appropriate, put any body or person referred to in subsection (1)(a) or (b) on terms as to how and within what period such infringement should be remedied.~~

[**Comment:** The matters previously catered for in the now deleted clause 7(2) are more fully and adequately dealt with in clauses 87(4) and (6) of the draft Constitution proposed by the Technical Committee on Constitutional Issues in its Twelfth Report.]

+ (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.

*must need
to review
previous decisions
now being
acted upon.*

[**Comment:** In view of submissions received, the Committee recommends the indicated widening of the scope of this provision with regard to administrative action.]

* (3) All juristic persons shall be entitled to the rights contained in this Chapter

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check German draft -

where, and to the extent that, the nature of these rights permits.

[**Comment:** This formulation is in substantial conformity with Article 19(3) of the German Basic Law of 1949.]

- + (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.
- check! looks*

[**Comment:** This clause has been reformulated in order to streamline it and to widen the scope for representative actions. The previous formulation - which was clause 1(5) - read as follows:

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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.]

Equality

8. (1) Every person shall have the right to equality before the law and to equal protection of the law.

- generality* [+ (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.

[Comment: The first addition ("one or more") was made in order to ensure that the victims of "double" discrimination would be adequately protected. Further grounds (to wit sex and social origin) have been added to the list in response to submissions. "Social origin" is deemed to encompass "birth", "class" and "status".]

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

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inclusion of "sexual orientation" in the list.]

- †
- + * (3) This section shall ~~permit~~ not preclude measures ~~aimed at reasonably~~ 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.

[**Comment:** The words "not preclude" (instead of "permit") have been used in order to address concerns about the possibly over-broad and inconsistent application of this provision. For the same reason the words "aimed at" were changed to "designed to achieve". In response to a submission expressing the concern that the previous formulation might not permit measures designed to benefit groups or categories of persons, the addition referring to groups or categories of persons was made.]

- †
- + * (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 ~~contemplated in subsection (2), as alleged,~~ until the contrary is established.

[**Comment:** This clause has been agreed on by the Council although it was not contained in this form in the Seventh Report. We restate that its purpose is to limit the well-known difficulties attendant on the proof of unfair discrimination, and that it is proper to include such a provision in a constitution.]

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-

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.

*except in
emergency.*

[Comment: Arbitrary arrest is effectively excluded under clause 25(2). The practical effect of the prohibition of detention without trial, is dealt with by the newly added clause 25(1)(e), which effectively excludes the possibility of detention without trial. Both this Committee and the Ad Hoc Committee are of the opinion that the reference to detention without trial in this clause is not legally necessary. However, it is for the Council to decide whether the explicit reference to it here should remain, for historical reasons.]

- # (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.

[Comment: The Committee is of the opinion that disproportionately severe punishment is catered for under the formulation as it stands.]

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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.

[**Comment:** This formulation read with clause 34(1) does not exclude the adoption of measures for entering a person's private home in order to investigate or prevent the commission of any crime including those crimes relating to domestic violence.]

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.

[**Comment:** The reference to academic freedom is in line with a similar provision in the Namibian Constitution and has been included as a result of several submissions.]

- (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