

1/3/3/2/11

EMBARGOED UNTIL DELIVERY/TABLING
IN NEGOTIATING COUNCIL MEETING

TECHNICAL COMMITTEE ON
FUNDAMENTAL RIGHTS DURING THE
TRANSITION

ELEVENTH PROGRESS REPORT
8 NOVEMBER 1993

INTRODUCTION

To date the Negotiating Council has agreed to all the clauses in the Chapter on Fundamental Human 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 Technical amendments which are not changes in principle but which improve and/or streamline 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 to 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 of a technical nature and 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).

The concern was raised that reference to "sexual orientation" in subclause (2) may be construed as an authorisation of practices such as paedophilia, necrophilia and bestiality. There can, however, be no doubt that laws prohibiting these practices will qualify under clause 34(1) as reasonable limitations which are justifiable in an open and democratic society based on freedom and equality. As far as paedophilia is concerned, it should also be noted that its exclusion under clause 34(1) will be strengthened by clause 30 in so far as the latter entrenches children's rights to parental care (clause 30(1)(c)) and to security (clause 30(1)(c)).]

- *(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.

Explanatory Note: The clause as it stands was agreed to by the Council at its meeting of 7 October 1993 with the Democratic Party reserving its position - see Minutes of the Meeting of the Negotiating Council of 7 October 1993, paragraph 5.1.3. The issue of including some specific reference to the reasonableness of the measures envisaged in the subclause has, however, once again been raised in the Ad Hoc Committee. The Technical Committee advised the Ad Hoc Committee that the clause as it stands is a restricted authorisation of affirmative action and that specific reference to "reasonableness" will restrict it further. The Government and the DP has nonetheless insisted on the inclusion of a reference to this effect and it was decided at a joint meeting of the Ad Hoc Committee and the Technical Committee that this political decision should be left to the Negotiating Council.]

- (4) 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 contemplated in that subsection until the contrary is established.

[Explanatory Note: The amendments to this ' clause are technical 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 that "any of his rights or interests is" is 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 to be sentenced within a reasonable time after conviction.

[Explanatory Note: The amendments to this clause are technical changes.]

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.

[Explanatory Note: At the time this Report was prepared, agreement had not been reached on the lock-out provision in subclause (3).]

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) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2) such expropriation shall be permissible 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 have resulted from a series of agreements between negotiating parties. It has also been agreed that restoration should be provided for in an appropriate place in the Constitution and not necessarily in the Chapter on Fundamental Rights. The matter is still being discussed. One of the parties represented

in the Ad Hoc Committee has, however, reserved its position on clause 28 as it presently stands while another party agreed to it subject to further consultation with its constituency.

The Technical Committee has confirmed that the use of the phrase "for public purposes" in subclause (1) is more inclusive than the phrase "in the public interest".

The phrase has also acquired this wider meaning in South African law.]

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;
- (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 in terms of section 25, have the right to be detained under conditions and to be treated in a manner that 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.

[Explanatory Note: Amendments to this clause are editorial changes.]

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, subject to sections 7(2) and 34(2), 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.

[Explanatory Note: The reference to clauses 7(2) and 34(2) have been added in order to make it clear that customary law, like other law, is subject to the provisions of the Chapter.]

- (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 shall be brought in conformity with section 8.
- (3) This section shall not preclude legislation designed to assist the development of customary law in accordance with the values embodied in the other provisions of this Chapter.

[Explanatory Note: The Traditional Leaders, who objected to the inclusion of this clause at the meeting of the Council on 7 October 1993, now want it included subject to confirmation that the reference to clauses 7(2) and 34(2) in subclause (1) is in order. None of the other parties represented on the Ad Hoc Committee are, however, in favour of the inclusion of this clause in its present form in the Chapter on Fundamental Human Rights. They are of the opinion that rights and powers of traditional leaders, the recognition and scope of customary law and the rights of those

living under customary law should be dealt with elsewhere in the Constitution provided that this does not necessarily exclude reference to some of these issues in this Chapter. The matter is referred to the Council for a political decision.]

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.

[Explanatory Note: The words "or colour" in paragraph (c) has once again been added in order to bring this provision in line with clause 8(2).]

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, and provided further that any limitation to -
 - (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

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

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

Explanatory Note: The Technical Committee recommends the deletion of what was clause 36(2) in the previous draft, in other words the "strict scrutiny" clause. The reasons for this are the following:

- I. The reference to the presumption of constitutional validity contained in the previous draft was initially made applicable only to laws in force at the time of the commencement of the proposed Constitution and this Chapter. In the course of the drafting process it was extended to include all laws. This presumption is, however, catered for in what previously used to be clause 36(3) and in this draft is clause 36(2). Apart from being superfluous the reference to constitutional validity can also create confusion if read with (the present) clause 36(2).
2. The notion of subjecting certain rights in the Chapter to strict scrutiny is highly problematic. Firstly, it creates a hierarchy of rights. The Council could of course decide that it wants such an hierarchy to be created and if this is the Council's preference, then the second proviso presently added to clause 34(1) has this effect.

Secondly, the concept of "strict scrutiny" comes from the United States Equal Protection Jurisprudence. Laws limiting equal protection under the Fourteenth Amendment to the United States Constitution are subjected to three tiers of review, namely: strict scrutiny which applies to legislation involving race, fundamental rights (such as voting, speech and privacy) and nationality; intermediate review which applies to laws concerning gender, illegitimacy and alienage; and rationality review in all other cases. To include a reference to strict scrutiny in the South African Chapter on Fundamental Rights without referring to the other levels of review as well is in itself problematic. The matter is further complicated by the fact that the limitation clause (clause 34(1)) proposed by the Technical Committee, relied on the Limitation Clause in Section 1 of the Canadian Charter of Rights and Freedoms as its point of departure. In Canada the test for the review of legislation differs substantially from that in the United States. To include a reference to United States jurisprudence in a Chapter using the Canadian standard of review as its point of departure for the limitation of rights, is bound to create immeasurable confusion. The Technical Committee must therefore warn against the danger of including such a test in this Chapter.

3. If the Council is of the opinion that laws limiting certain rights should be subject to a stricter form of review than laws limiting other rights, the Technical Committee

proposes the inclusion of the second proviso as submitted. This would mean that for the laws limiting rights listed in the proviso, a necessity test will apply in addition to the test of reasonableness already required by clause 34(1)(a)(i). In this way the further (logical) development of principles conceived in Canadian jurisprudence will be possible without creating the danger of confusion with the fundamentally different principles enunciated in U. S. jurisprudence.

The Ad Hoc Committee is in favour of the amendment proposed by the Technical Committee with the inclusion of reference to the rights listed in paragraphs (aa) and (bb).]

- (2) Save as provided for in subsection (1) or any other provision of this Chapter, no law, whether a rule of the common law, customary law 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, customary law or legislation to the extent that they are not inconsistent with the provisions of this Chapter.
- (4) This Chapter shall not 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.

State of emergency and suspension

- 35(1) A state of emergency shall be proclaimed prospectively under an Act of Parliament and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of natural disaster, and if the declaration of a state of emergency is necessary to restore peace or order.
- (2) 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 of no longer than three months 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.

- (3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action, whether a regulation or otherwise, taken under such declaration.
- (4) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.
- (5) 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 of persons acting under its authority for unlawful actions taken during the state of emergency; or
 - (c) the suspension of this section, and sections 7, 8(2), 9, 10, 11(2), 12, 14, 27(1) and (2), 30(1)(d) and (e) and (2) and 34(1) and (2).
- (6) The detention of a person under a state of emergency shall be subject to the following conditions:
 - (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) when rights entrenched in sections 11 or 25 have been suspended -
 - (i) 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, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;
 - (ii) the detainee shall at any stage after the expiry of 10 days of a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;

- (d) the 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) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
 - (f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
 - (g) the state shall for the purpose of a review referred to in paragraph (c)(i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- (7) 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.

[Explanatory Note: The provisions of this clause were rearranged to a considerable extent in order to streamline the clause. The principles contained in the previous draft have, however, been left intact and nothing has been added.]

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 and shall, where applicable, 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.

[Explanatory Note: The word "applicable" was substituted for "appropriate" as a result of the discussion at the Council meeting of 7 October 1993.1

(2) 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 the law shall be construed as having the said more restricted meaning.

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

[Explanatory Note: The deletion of what was clause 36(2) in the previous draft is explained in the Explanatory Note to clause 34(1). Other amendments to clause 36 are editorial changes.]

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