

VRYHEIDS FRONT (FF)

23.10.1995

COMMENT ON DRAFT BILL OF RIGHTS (DRAFT OF 19 OCTOBER 1995)

NOTE: Clauses not commented on are (provisionally) approved.

1) Clause 4 (Equality)

Proposal: That the word 'unfairly' in clause 4(3) be retained, and that clause 4(4) be deleted.

Motivation: Clause 4(4) places the burden of proof on the respondent. This is an intolerable burden. In criminal law the accused is presumed to be innocent until proved guilty (see clause 31(3)(f)). Even in civil law the burden of proof is on the plaintiff or applicant (not on the defendant or respondent). The rule for centuries has been that he who alleges, must prove. The effect of clause 4(4) is that a mere-allegation of discrimination places the defendant at a disadvantage, for all conduct that differentiates can be described as 'discrimination', and it is not possible to engage in any human conduct without differentiating between different people and things.

2) Clause 6 (Life)

Proposal: That option 3 be adopted, provided that the right to reproductive health care (clause 22(1)) be phrased in such a manner that it does not detract from the protection of the potential life 'from the moment of conception' (clause 6(1)).

Motivation: The right to life is not one of the 'universally accepted fundamental rights', as it is qualified even in the International Covenant on Civil and Political Rights, 1966, which is the most comprehensive international instrument reflecting fundamental rights.

3) Clause 7 (Freedom and integrity of the person)

Proposal: That the words 'their [that person's] consent' in subsection (3)(c) be deleted and replaced by the words 'the necessary legal consent'.

Motivation: The consent required may be that of the person concerned or that of a guardian or other person in loco parentis. the present wording is too narrow.

4) Clause 9 (Privacy)

Proposal and motivation: The provisions of subsections (1) and (2) should qualified to make possible searches by persons authorised by warrant in accordance with the provisions of legislation relating to criminal procedure.

5) Clause 10 (Freedom of religion, belief and opinion)

Proposal: That the word 'any' in subsection (2)(a) be replaced by the words 'all the'.

Motivation: The amendment will give effect to the obvious intention of the drafter.

6) Clause 11 (Freedom of expression)

Proposal: That the words 'a diversity of opinion' in subsection (3) be deleted and replaced by the words 'a survey of the diverse opinions held'.

Motivation: The existing words do not preclude a selective choice of opinions, which is not fair.

7) Clause 12 (Assembly, demonstration and petition)

Proposal: That the words 'to assemble, to demonstrate, or to present petitions' be deleted and replaced by the words 'to assemble and to demonstrate'.

Motivation: There is no universally recognised fundamental right to present petitions, linked to the right of assembly and the right to demonstrate. If such a right were to be sanctioned it would, by implication, mean that a legal burden rests on the recipient of the petition to consider its contents, however unreasonable or unfounded it may be.

8) Clause 14 (Political rights)

Proposal: The word 'adult' should be inserted in subsections (1), (2) and (3), after the word 'Every' in each of these subsections.

Motivation: Minors are also citizens, and Constitutional Principle VIII requires universal adult suffrage.

9) Clause 16: (Freedom of movement and residence)

Proposal: Subsection (4) should be rephrased to read as follows: 'Subject to the provisions of criminal legislation relating to fugitive offenders, every citizen has the right to a passport'.

Motivation: The law should not assist a person involved in criminal proceedings to leave the country.

10) Clause 17 (Economic activity)

Proposal: The Freedom Front supports option 2, subject to the insertion of the words 'authorised by law' after the word 'measures' in subsection (2).

Motivation: The scope of affirmative measures should be regulated by law and not depend merely on administrative decisions.

11) Clause 18 (Labour relations)

Proposal: The right of workers to strike, conferred by subsection (2)(c), should not extend to workers in essential services. Moreover, the right of employers to lock-out (see subsection (3)(c)) should be retained.

Motivation:

Firstly, the grievances of workers in essential services should be regulated by special legislation adapted to the circumstances of their work, so as to ensure that disruption of essential services does not occur.

Secondly, the rights of workers in labour matters should be balanced by corresponding rights pertaining to employers.

12) Clause 20 (Property)

Proposal: In the first place, that clause 20(2) be deleted. Secondly, the Freedom Front proposes the adoption of the first proposal (dated 16 October 1995) as to the text of section 20(6), viz "Every person and community whose rights or interests in land are legally insecure as a result of discriminatory laws and practices shall be entitled to legally enforceable security of tenure".

Motivation: Firstly, deprivation of property in subclause (2) as presently phrased can take place without compensation (as opposed to expropriation with compensation). Such a deprivation, even if it is in accordance with a law of general application, can amount to arbitrary confiscation by the state, flouting the generally accepted principle in democratic societies that compensation should be paid for deprivation (expropriation) of property.

Secondly, the alternative proposal is not acceptable, as it makes tenure reform dependent on 'any law', which would undermine the guarantees given in this clause of the bill of rights.

13) Clause 21 (Housing and land)

Proposal: That the words 'and the availability of suitable alternative accommodation' in subclause (2)(b) be deleted.

Motivation: A court order for eviction can only be made where the occupation is illegal. To make the eviction subject, inter alia, to the availability of suitable alternative accommodation, is to foster the cause of illegal squatters.

14) Clause 22 (Health)

Proposal: That clause 22(1) be rephrased, to indicate that 'reproductive health care' is limited to sterilisation.

Motivation: Abortion on demand should not be sanctioned under the euphemism 'reproductive health care'.

15) Clause 23 (Social assistance, food and water)

Proposal: That this clause be reformulated in fundamental respects, to reduce the ambit of social assistance from the state.

Motivation: This clause, as presently phrased, reflects a socialist system which contradicts democratic principles. It implies that taxpayers generally should support those 'unable to support themselves and their dependents'.

15) Clause 25 (Education)

Proposal:

In the first instance, that the limitation in subclause (1)(c) relating to instruction in particular languages should be rephrased in order to make mother-tongue education compulsory.

Secondly, that subclause (2) be rephrased in order to place an obligation on the state to finance private educational institutions that are not wholly able to finance themselves.

Motivation:

In the first place, the relevant subclause, as presently phrased, denies possible instruction in languages of choice that are also official languages.

Secondly, the right to education is a universally accepted fundamental right. In so far as private educational institutions that partially finance themselves are not able to fulfil their functions, the state is obliged to supplement the deficiency. In this context the state's obligation is already diminished by the private funds of such institutions.

16) Clause 26 (Academic freedom)

Proposal: That a guarantee of academic freedom be retained in the bill of rights.

Motivation: The omission of such a provision would amount to a negation of a universally accepted fundamental rights, contrary to the spirit of Constitutional Principle II. However, the wording of subclause (2) should be rephrased to make it more specific.

17) Clause 28 (Access to information)

Proposal: Clause 28(a) should be qualified by fundamental rephrasing.

Motivation: It is completely untenable that everyone should have a right to access to 'any information held by the state'. For instance, an accused could not at all times have a right to information relating to him held by a prosecutor in a criminal case. In any event the concluding words of clause 28(b) ('that is required for the exercise or protection of any [his] rights') should be added to clause 28(a).

18) Clause 29 (Administrative Justice)

Proposal: The Freedom Front favours option 3.

Motivation: Option 1 is unacceptable in so far as it is rather cryptic, compared with option 3. Option 2 is even less acceptable, inter alia, because the deletion of the word 'procedurally' from subsection (1) has the result that the subsection would not be in accordance with the generally accepted legal meaning of the words 'procedurally unfair'.

19) Clause 30 (Access to justice)

Proposal and motivation: This clause must be reformulated, in view of the fact that it could be read as implying that a litigant in a civil case or an accused in a criminal case

can insist that that state should pay for such litigation and/or provide legal representation.

20) Clause 31 (Arrested, detained and accused persons)

Proposal: Clauses 31(1)(e), 31(2)(c) and 31(5) should be reformulated, in order to give effect to the points raised in the motivation below.

Motivation: Clause 31(1)(e) places an onerous burden of proof on the state where an accused seeks bail. The burden should rest on the accused to prove that the interests of justice require that he be released. In any event, the court should have a discretion in this regard, which should not be linked to a burden resting on the accused.

As far as clause 31(2)(c) is concerned, the words 'if substantial injustice would otherwise result' should be deleted and replaced by words having a far more restrictive effect, as the present wording will be applicable in virtually all circumstances. (the same objection also applies in the case of clause 31(3)(e).

In subsection 31(5) the words 'would bring the administration of justice into disrepute' should be deleted and should be replaced by the following words: 'would not, be in the interests of justice'.

Motivation: The exclusion of evidence is warranted on far wider grounds than the single ground that the administration of justice would otherwise be brought into disrepute.

21) Clause 32 (Limitation of rights)

Proposal: In the first place, that the words 'reasonable and justifiable' in clause 32(1)(a) should be deleted. Secondly, that clause 32(2) be deleted.

Motivation: In the first instance the argument that an entrenched right should be capable of limitation by an ordinary law of general application on the grounds of reasonableness and justifiability is untenable. It makes a mockery of the concept of entrenchment in so far as any entrenchment can easily be qualified.

Secondly, I clause 32(2) is unnecessary: Clause 4(3) (if adopted in the form proposed by the Freedom Front see above) already provides for this contingency. (Clause 32(2) implies that clause 4(3) is insufficient to prohibit unfair discrimination, and that legislation in that regard is necessary.

22) Clause 33 (State of emergency and suspension)

Proposal: In the first place, that the rights mentioned in clause 33(4)(c) be carefully scrutinised and debated before being included in this provision, as the implications of no derogation from so large a number of rights are not immediately clear.

Secondly, it should be considered whether there are any other rights that should be added to this list.

23) Clause 35 (Application)

Proposal: In the first place, the Freedom Front proposes that the words 'This Bill does not deny the existence of' in subclause (2) be deleted and replaced by the following words: 'This Bill does not detract from'.

Secondly, the Freedom Front prefers option 1 in respect of subclause (3).

Motivation: In the first place, the proposed initial words of subclause (2) are more elegant than the existing initial words. At the same time they are not unduly technical, but are in accordance with the requirements of plain language.

Secondly, option 2 is in our view not feasible, because it would be impossible to determine in advance the various rights juristic persons should be entitled to. This is a matter to be gradually clarified by the courts in interpreting the words of option 1.