

## VOLKSTAAT COUNCIL

### THE NATURE AND APPLICATION OF A BILL OF RIGHTS

- 1) A bill of fundamental rights must provide for the diversity of rights arising within a multi-national society.
- 2) Within the multi-national society as it exists within the Republic of South Africa, fundamental rights differ from those encountered within a homogeneous society.
- 3) The Republic of South Africa is made up of different peoples some of whom, such as the Afrikaner peoples, are actively pursuing their right to self-determination.
- 4) Today it is internationally accepted that in addition to individual rights, group and peoples' rights also enjoy protection and that states have a duty to create circumstances which encourage and promote the individual identity of peoples. (See, for example, the General Assembly's *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of 1 December 1992.)
- 5) For this reason, a bill of fundamental rights must provide for both individual rights and minority and peoples' rights.
- 6) Individual rights must be delimited and balanced against peoples' and minority rights to ensure harmonious coexistence.
- 7) The state in its various manifestations and through all its organs, bears the duty to ensure the maintenance of individual, minority and peoples' rights.

#### PROPOSAL FOR CONSTITUTIONAL WORDING : SECTION 7

- 1.1 The rights in this Bill of Fundamental Rights shall bind all legislative and executive organs of state at all levels of government.**

- 1.2 The state shall create conditions within which both the self-determination of peoples and the realisation of individual rights are possible.**
- 2. The right of the individual in terms of this Bill exists only to the extent that it does not impinge upon the right of a people to self-determination, or cannot be reconciled with such a right.**
- 3. Individual rights and the right to self-determination in terms of this Bill shall as far as possible be reconciled in such a way that the essence of the individual right is not denied.**
- 4. For the purposes of this Bill of Fundamental Rights, a people's right to self-determination means the right of a people to be governed in accordance with its own nature, and to protect, develop and realise its individual identity, culture and language within its individual context.**
- 5.1 The people entitled to self-determination in terms of this Bill of Fundamental Rights, is a group of people living in a specific country or territory who share a common religion, language, culture, tradition, history and origin and who feel united in the protection, realisation, maintenance and promotion of their common language, culture, religion, traditions and history and who wish to educate their descendants in accordance with these principles.**
- 5.2 The Afrikaner people represents one of the peoples entitled to self-determination in terms of this Bill.**
- 6. In the delimitation and enforcement of individual rights, a court shall have account of the right of a people to self-determination.**
- 7. Peoples, juristic persons, associations and individuals shall be entitled to the rights embodied in this Bill of Fundamental rights where such rights apply to them *mutatis mutandis*.**

8.1 When an infringement of or threat to any right entrenched in this Chapter is alleged, **any people, body or person** referred to in paragraph 8.2 shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

8.2 The relief referred to in paragraph 1 may be sought by:

- (a) a person acting in his or her own interest;
- (b) an association acting in the interest of its members;
- (c) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
- (d) a person acting as a member of or in the interest of a group or class of persons;
- (e) a person acting in the public interest; or
- (f) **a person or body acting by means of an *actio popularis* as an elected or proper representative of a people, or a government organ, cultural body or association, a religious association or church, a language association or educational board made up of members of a specific people.**

## EQUALITY

### PRINCIPLES

1. The principle of equality before the law as embodied in section 8(1) of the Interim Constitution is accepted.
2. **The principle of no-discrimination underlying section 8(2) of the Interim Constitution is accepted but subject to the principle of the self-determination of peoples, the right of free association, and the right of the individual to his own language, culture and education.**

3. **Note is taken of group interests and rights underlying the provisions of section 8(3)(a) of the Interim Constitution. If group rights already enjoy protection, it is only logical the peoples' rights should similarly enjoy protection.**
4. **So-called "affirmative action" which is aimed at replacing one racial group in the public service or public posts with another racial group without consideration of individual circumstances and qualifications, is regarded as a violation of the prohibition on discrimination embodied in the Interim Constitution.**
5. Affirmative action is regarded as justified only if a specific individual is able to show that another individual has been preferred above him/her on the basis of his/her membership of a different racial group. Affirmative action may only be implemented to redress the position of a specific individual who can show that he/she has suffered personal discrimination. The test relates to the circumstances of individuals, namely, the person against whom and the person to whose benefit discrimination has been practised. It does not apply to past discrimination against a specific racial group. The replacement of one racial group with a different racial group on a quota-basis amounts to blatant racial preferment and discrimination and conflicts with the essence of the principle of non-discrimination as a fundamental right.
6. As an organised programme, affirmative action is irreconcilable with fundamental rights and can be only temporary. Because it threatens the individual rights of other persons, the program should be completed within one year. Affirmative action should not be included in the final Constitution.
7. Individual cases of affirmative action shall take place by legal process and may not be effected by discretionary government authority.
8. Section 8(3)(b) should not be included in the final Constitution as the process envisaged therein must already have been completed by the time the final Constitutions comes into operation.

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, sex, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture or language.**
3. **The principle of non-discrimination in par 2 shall be subject to the principle of the self-determination of peoples, the right to free association and the right of the individual to exercise his own language, culture, traditions and education within group context.**
4. **In the event of unfair discrimination a court shall, in addition to any other remedy, be competent to issue an order compelling affirmative action against the state.**
5. *Prima fade* 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.

## LIFE

## PRINCIPLES

1. The current formulation of this right is too wide and creates uncertainties and is vague. This is evidenced by the question of whether or not the death penalty should be allowed.
2. It is even conceivable that emergency resulting in the death of an individual could be questioned.
3. In our view, these problems could be resolved by a wording which emphasises the protection of life. This would also underline the duty of the state to protect the lives of the innocent in preference to those of criminals.

## PROPOSALS FOR CONSTITUTIONAL WORDING : SECTION 9

- 1 . Every person has the right to the **protection of his** life.

## **HUMAN DIGNITY: SECTION 10**

### PROPOSAL FOR CONSTITUTIONAL WORDING : THAT THE WORDING IN THE INTERIM CONSTITUTION BE RETAINED

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

## **FREEDOM AND SECURITY OF THE PERSON: SECTION 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: SECTION 12**

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

## **PRIVACY: SECTION 13**

1. Every person shall have the right to his or her personal privacy, which shall include the right 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: SECTION 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 religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
3. Nothing in this Chapter shall preclude legislation recognising-
  - (a) a system of personal and family law adhered to by persons professing a particular religion;
  - (b) the validity of marriages concluded under a system of religious law subject to specified procedures; and
  - (c) educational and religious principles and parental say in religious observance in state aided institutions.

#### **FREEDOM OF EXPRESSION : SECTION 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. **This freedom is subject to the principle that an individual may not be libelled through the exercise of the right to freedom of speech and expression.**
3. **The freedoms in paragraph 1 do not include the freedom produce or distribute sexually violent, degrading or child pornography, or to portray the human body as an object or in a degrading or bestial manner.**
4. 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.

#### **ASSEMBLY, DEMONSTRATION AND PETITION: SECTION 16**

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

## **FREEDOM OF ASSOCIATION: SECTION 17**

1. Every person shall have the right to freedom of association **which shall include the right freely to associate, live, attend school, practice religion and find political expression within their own group context.**

## **FREEDOM OF MOVEMENT: SECTION 18**

1. Every person shall have the right to freedom of lawful movement.

## **RESIDENCE: SECTION 19**

1. Every person shall have the right to lawful residence in an area within which his right to free association and cultural coherence may be exercised.

## **CITIZENS' RIGHTS: SECTION 20**

1. Every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.

## **POLITICAL RIGHTS :SECTION 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: SECTION 22**

1. 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: SECTION 23**

1. 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 exercise or protection of any of his or her rights.

## **ADMINISTRATIVE JUSTICE: SECTION 24**

1. 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.

## **DETAINED, ARRESTED AND ACCUSED PERSONS :SECTION 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) promptly to be informed, 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) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, 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 before an ordinary court of law within a reasonable time after having been charged;
- (b) to be informed with sufficient particularity of the charge;
- (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
- (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
- (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction.

**4. Every detained person including every sentenced prisoner shall have the right to be detained in group context together with individuals sharing his language, culture, sex and sexual orientation.**

## **ECONOMIC ACTIVITY: SECTION 26**

- 1. Every person shall have the right freely to engage in domestic and international economic activity.**
- 2. No measures shall be adopted which will have the effect of excluding certain persons or a class of persons from certain careers, appointments, professions, specific posts, employment opportunities or promotion, or discriminating against such persons, in particular for historical reasons or for purposes of the maintenance of quotas based on race or colour.**
- 3. No arbitrary or non-essential measures shall be adopted to limit an individual's right to participate in domestic or international trade.**
- 4. The above provisions shall not preclude measures designed to promote the protection of 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, equality and merit.**

## **LABOUR RELATIONS: SECTION 27**

1. Every person shall have the right to fair labour practices.
2. Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
3. Workers and employers shall have the right to organise and bargain collectively or individually.
4. Workers shall have the right to strike for the purpose of collective bargaining.
- 5. Employers' shall have the right to lock-out for the purpose of collective bargaining.**

## **PROPERTY: SECTION 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 direct or indirect deprivation, reduction or reduction in the use 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, to 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.

## **ENVIRONMENT: SECTION 29**

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

## **CHILDREN : SECTION 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;
  - (f) **to attend school in his or her own cultural and language milieu and also not to be discriminated against on the basis of group-specific tuition;**
  - (g) primary education.
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.

#### **LANGUAGE AND CULTURE: SECTION 31**

1. Every person shall have the right to use the language and to participate in the cultural life of his or her choice.
2. **Every person shall have the right to receive instruction in his own language and within his own cultural context at primary, secondary and tertiary levels.**
3. **Every person shall have the right to receive university training in his own language.**
4. **Every person shall have the right to be served in his own language by the state and public institutions, and in particular by the public media.**
5. **Every individual and people shall have the right that no discrimination shall be practised against his or its individual education, language and cultural institutions through state financial support on the basis that the specific institution provides only for a specific language and cultural group.**

## **EDUCATION: SECTION 32**

1. Every person shall have the right-
  - (a) **to basic education and to equal access to educational institutions provided that the exercise of this right may not prejudice or undermine the right of a language or cultural group to an individual education;**
  - (b) **to instruction in his own language and within the cultural context of his or her choice; and**
  - (c) **to establish educational institutions based on a common culture, language or religion, provided that there shall be no discrimination against such institutions by the state on grounds of race or colour.**

## **LIMITATION: SECTION 33**

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;
  - (b) **is in accordance with the right to self -determination of peoples which forms the basis of this Constitution. and**
  - (c) 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, 24, **31 and 32** in so far as such right relates to free and fair political **and cultural activities**,

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

2. Save as provided for in subsection (1) or any other provision of this Constitution, 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 or conferred by common law, customary law or legislation to the extent that they are not inconsistent with 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), provided that such legislation may not impinge upon any rights conferred by this Chapter.

**[(5) Omitted]**

#### **STATE OF EMERGENCY AND SUSPENSION: SECTION 34**

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 national 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 taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not 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 taken, including any regulation enacted, 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, including any regulation enacted, 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 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 33(1) and (2).
  - (d) the deprivation of private law rights with retrospective effect.**
6. Where a person is detained under a state of emergency the detention 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 section 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) a detainee shall at any stage after the expiry of a period of 10 days after 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 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.

#### **INTERPRETATION : SECTION 35**

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.
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 fade* exceeds the limits

imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

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.