# CONSTITUTIONAL ASSEMBLY

# CONSTITUTIONAL COMMITTEE

# SUPPLEMENTARY MEMORANDUM ON *BILL OF RIGHTS AND PARTY SUBMISSIONS*

## SECTION 7: STATE DUTY TO RESPECT AND PROTECT RIGHTS

Technical Committee was asked to consider whether this clause this clause should be separated from the rest of this chapter.

1. The sentence "Human Dignity is the foundation of a just society", can indeed form part of a preamble.

2. Since the *Preamble to the Constitution* will most probably refer to various aspects of the Bill of Rights, including human dignity, as the key elements of the constitutional order, a separate preamble to the Bill of Rights seems unnecessary.

3. In view of the consensus that all rights should be *respected and protected by the state* (see **Explanatory Memoranda of 9 October 1995**, p 264), the second sentence of the previous formulation should be retained as a substantive provision of the Bill of Rights. The Technical Committee regards it as an appropriate first provision preceding the provisions on separate rights.

## SECTION 8: EQUALITY

The Constitutional Sub-Committee requested the Technical Committee to consider the following matters in relation to this clause:

1.1 whether the clause conformed to Constitutional Principle V;

1.2 the proposals of the DP regarding subsection (3);

1.3 the use of the qualifier, “unfair” discrimination in subsection (3);

1.4 the NP and DP proposal to add the words, “without derogating from the generality of” or “but not limited to...” in (3);

1.5 objections by the ACDP to “sexual orientation” and “gender” in (3).

1.6 the possible reformulation of (4).

## 2. Compliance with Constitutional Principle V

The Technical Committee interprets Constitutional Principle V to mean that affirmative action measures are included in the obligation of the legal system to achieve equality. Such measures do not violate the principle of equality, and may in certain circumstances be required to achieve equality (see Explanatory Memorandum of 9 October 1995 on the right to equality at paras. 4.1.5 and 6.4)

We have therefore suggested the inclusion of the phrase in ss.(2), "equality includes the full and equal enjoyment of all rights and freedoms" which complements the rights in ss.(1). This replaces the wording in section 8(3)(a) of the interim Constitution which suggests that affirmative action is an exception, and not part of the principle of equality: "This section shall not preclude measures..."

Subsection (2) of the new draft then goes on to expressly allow for legislative and other measures to achieve equality in this full sense. This would also include, where applicable, affirmative action programmes undertaken by private businesses etc.

The proposed wording does not imply that affirmative action measures are "an end in themselves" (a concern expressed by the NP). It clearly says that it is one of the means by which equality can be achieved.

The Technical Committee is of the view that this draft formulation gives full effect to Constitutional Principle V.

## 3. The DP's suggestion of "...measures likely to protect..." in section 4(2)

The Technical Committee is of the view that the present wording allows for the review of measures which are not rationally connected to their object, i.e. the full and enjoyment of all rights and freedoms (see Explanatory Memorandum of 9 October 1995 on the right to equality at para. 6.5).

Section 15(2) of the Canadian Charter of Rights and Freedoms allows for "any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups..." Similarly article 23 (2) of the Namibian Constitution allows for laws, policies and programmes "aimed at redressing social, economic or educational imbalances in Namibian society arising out of past discriminatory laws or practices..."

## 4. The use of the term, "unfair discrimination"

The ANC proposed the deletion of "unfair", qualifying discrimination in ss.(2) and (3) because it is not found in any of the international human rights instruments. The Freedom Front has indicated that they favour its retention, but propose the deletion of ss.(4).

According to Du Plessis and Corder, this qualification was introduced to meet the concern of the DP that not all forms of differentiation/dissimilar treatment were unjustified. The DP negotiators were of the view that 'discrimination' was a generic term which could include both justified and unjustified differential or dissimilar treatment.[1] Legislation providing for special job protection for pregnant women would be an example of justified dissimilar treatment. Certain authors have also supported the use of "unfair" in section 8 (Explanatory Memorandum, para 5.3).

Certainly in the international human rights instruments and in the Canadian Charter of Rights and Freedoms and other national Constitutions, the term, "discrimination" is unqualified. In international human rights law "discrimination" has the pejorative meaning of an unsanctioned distinction.

Thus the Human Rights Committee has said that the term, 'discrimination' in the International Covenant on Civil and Political Rights (1966) should be understood to imply,

**"... any distinction, exclusion, restriction or preference which is based on any ground <u>such as</u> race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose <u>or effect</u> of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[our underlying]** [2]

The relationship between the qualifier "unfair" and the general limitations clause is also problematic: What is required to prove the unfairness of a discriminatory measure in section 8 vis a vis the justifiability of the discrimination in terms of the general limitations clause ?

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1. Du Plessis and Corder, <u>Understanding South Africa's Transitional Bill of Rights</u>, p. 141.

2. General Comment 18, 1989, para. 7.

In the light of the above, the Technical Committee recommends both that the positive formulation in ss.(2) to the effect that “equality includes the full and equal enjoyment of all rights and freedoms” is retained and that the use of the qualifier, “unfair” be reconsidered. If the qualifier is deleted, the wording of subsection (4) would have to be reconsidered.

**5. The addition of the words, “without derogating from the generality of” or “but not limited to...” in ss.(3)**

The Technical Committee is of the view that the proposed added words are unnecessary, and are undoubtedly part of the phrase, “including”.
Other examples are:

(1) the phrase used in Canadian Charter of Rights and Freedoms, “...and, in particular, without discrimination on the grounds of...” (section 15); or

(2) the phrase in article 26 of the International Covenant on Civil and Political Rights: ...on any ground such as race, colour, sex...”

(See also paras. 4.2.2 and 5.4 of the Explanatory Memorandum on equality).

**6. Non-discrimination on the grounds of sexual orientation and gender**

Regarding ‘sexual orientation’ as a ground of non-discrimination: see para. 4.2.3. of the Explanatory Memorandum on equality.

The term, ‘gender’ as a ground of discrimination refers to the roles and expectations that society imposes on persons as a result of their biological sex. It is thus important that neither women nor men should suffer discrimination because of the social belief that they should play certain roles e.g. the belief that all mothers should not work, but should stay at home and look after children. At the Beijing Conference this commonly accepted meaning of the word, ‘gender’ was accepted by all the states of the world who signed the Platform for Action.

**7. Subsection (4)**

As stated above if the term ‘unfair discrimination’ is not used, the wording of this section would have to be adjusted accordingly.

The ANC has indicated that they prefer the wording of s.8(4) of the interim Constitution. The new formulation is a plain language version of the present (4) which is preferred for its clarity and simplicity. There has been no change of meaning between the two subsections.

## SECTION 11: FREEDOM AND SECURITY OF THE PERSON

1. The Technical Committee was requested to redraft this clause to incorporate the new ANC proposal for the consideration of the parties (see the draft formulation).

2. As suggested at the Constitutional Sub-Committee meeting of 9 October 1995, the various elements have been grouped together under the “umbrella” rights of ‘freedom of the person’ and ‘security of the person’ respectively.

3. The ANC proposal has been incorporated as a new subsection (2). The right to be free from all forms of violence can obviously be limited through the general limitations clause to cater for the reasonable use of force by the state to effect arrests, prevent damage to persons or property etc.

4. The Technical Committee recommends that the concept, “bodily and psychological integrity” be retained in ss.(2) as it relates to the physical <u>and</u> psychological violation of personal integrity.

5. The rights not to be subjected to torture and other forms of degrading treatment and medical experimentation without consent can be regarded as part of the right to security of the person and bodily integrity. However, they are so important in human rights law that we recommend that they be expressly prohibited in a separate sub-section.

6. The matter of the consent of children and others incapable of giving consent on their own behalf in ss.(3)(c) has been dealt with in the manner proposed by the Freedom Front.

## SECTION 13: PRIVACY

1. The DP propose that the right not to have communications violated ought to expressly include the right not to have communications intercepted. The Technical Committee remains of the view that interception of communications constitutes a violation and that the express addition of the word is unnecessary.

2. The FF proposes that subsections (1) and (2) be qualified to make "searches by warrant in accordance with the provisions relating to criminal procedure". It is not necessary to include the qualification. That is a function of the general limitations clause. Searches under warrant properly regulated by statute constitute a universally accepted limitation to the right to privacy.

**3. Proposed reformulation to deal with juristic persons as bearers of rights:**

***"Everyone has the right to privacy, including the right not to have -***

***(a) their person or home searched;***

***(b) their property searched;***

***(c) their possessions seized; and***

***(d) the privacy of their communications violated".***

(Juristic persons the bearers of subsection (b), (c) and (d)).

**SECTION 14: FREEDOM OF RELIGION, BELIEF AND OPINION**

1. The ANC proposed that "*including freedom to change religion or belief, and freedom to practise religion alone or in community, in private or in public*" in section 14(1) be deleted.

   Although the first part of the section will undoubtedly be interpreted to include the matters referred to in the second part, the second part is contained in most international instruments (see **Explanatory Memoranda of 9 October 1995**, p 57, no 1). The Technical Committee recommends the retention of the phrase.

2. The ANC proposed that consideration be given to the inclusion of "ideology" in section 14(1). The Technical Committee is of the opinion that "ideology" is covered by "thought, opinion and belief".

3. The Technical Committee supports the FF proposal that "any" in section 14(2)(a) be replaced with "all".

4. The Technical Committee was requested to investigate a change in the formulation of section 14(3) to the effect that (as in the case of customary law) only the **recognition** of the systems concerned be insulated from the provisions of the Bill of Rights, **but not** the rules comprising the contents of these systems.

   The Technical Committee recommends that the NP proposal be followed to add the phrase "to the extent consistent with this Bill of Rights" to the opening sentence.

## SECTION 15: FREEDOM OF EXPRESSION

### 1. Subsection 15(2)

This section is largely based on section 20 of the International Covenant on Civil and Political Rights (1966). However, unlike section 20 is does not in itself prohibit this type of speech. It simply says that this type of speech is not deserving of constitutional protection.

The suggested of the DP and ANC to delete the words, "... and that is based on race, ethnicity, gender or religion" is supported by the Technical Committee. It avoids protracted disputes as to which of the grounds of discrimination should be included.

The ANC's point is that incitement to imminent violence (without any further qualification) should not enjoy constitutional protection.

A possible compromise formulation could be:

***"(2) the protection in subsection (1) does not extend to -***

> ***(a) propaganda for war;***
>
> ***(b) the incitement of imminent violence; or***
>
> ***(c) advocacy of hatred that constitutes incitement to discrimination [that is prohibited in section 4(3)]."***

### 2. Subsection (3)

The concern about this subsection was that it is too broad, and may cover all forms of government-produced media (e.g. AIDS education media produced by the Department of Health).

The DP proposes the following clause -

***"Any public media financed directly or indirectly by the state must be imperial and present a diversity of option."***

The Technical Committee is of the view that this suggestion addresses the concerns referred to above, and can be recommended.

The Freedom Front's suggestions of 'a survey of the diverse opinions held' is too stringent. It seems to imply that every programme must present 'a survey' of all possible opinions on the particular topic. The purpose of this section is rather to ensure that a public broadcaster or newspaper fairly reflects the general range of public opinion.

## SECTION 16: FREEDOM OF ASSEMBLY, DEMONSTRATION AND PETITION

1. The FF proposed that "to present petitions" be deleted.

   The fact that the right to petition is not included in international instruments and most bill of rights, does not preclude its inclusion in the new Constitution - CP II does not prescribe that only internationally recognised rights be included. A duty on recipients of petitions to consider petitions can, even in the case of frivolous petitions, not to be regarded as an unreasonably onerous duty.

## SECTION 18: POLITICAL RIGHTS

1. The FF proposed that "adult" be inserted in subsection (1), (2) and (3) of the word "Every".

   CP VII does not apply to section 18(1). To the extent that the word "adult" affects the voting age, this matter was considered by Theme Committee 1.

## SECTION 20: FREEDOM OF MOVEMENT AND RESIDENCE

1. The FF proposed that the right to a passport in section 20(4) be guaranteed subject to criminal legislation relating to fugitive offenders.

   The Technical Committee does not support the proposal because restrictions of the right to a passport of fugitive offenders can be adequately dealt with in terms of the general application clause.

## SECTION 21: ECONOMIC ACTIVITY

The Technical Committee was instructed to :

- further examine international instruments, taking into account the views expressed by political parties at the Sub-Committee meeting;
- report on its understanding of the term "economic activity" and why it considered the term to be problematic, in the present context; and
- to consider the inclusion of a German type clause as an option.

1. International law and foreign law

"Freedom of economic activity" is *as such* not guaranteed in international instruments.

The right to freedom of occupation is contained in :

- article 23(1) of the Universal Declaration of Human rights: :"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment"; and

- article 6(1) of the International Covenant on Economic, Social and Cultural Rights: "The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take the appropriate steps to safeguard this right."

Few foreign constitutions guarantee a "right to freedom of economic activity" in so many words. Exceptions are:

- section 31(1) of the Swiss Constitution: "Freedom of trade and industry is guaranteed throughout the territory of the Confederation, subject to such limitations as are contained in the federal Constitution and the legislation enacted under its authority."

- section 4(1) of the 1994 Ethiopian constitution: "Every Ethiopian citizen has the right to engage freely in economic activity and pursue a livelihood anywhere in the national territory".

The absence of a specific right to freedom of economic activity in foreign constitutions has been ascribed to the partial overlap of such a general right with various other rights, for example, the rights to freedom of occupation, freedom of movement, freedom of association, property, free development of personality (s2(1) of the German Constitution), and in fact, every other right that can exercised to pursue a livelihood (De Meyer "Human Rights in a Commercial Context", 1984 *Human Rights Law Journal* 139-140).

2. Problems relating to the term "economic activity" in section 26 of the interim Constitution

The same partial overlap with other rights, mentioned in the previous paragraph, exists between the right to "free economic activity" and other rights in the interim Constitution. The interim Constitution does, however, not contain a separate right on freedom of occupation. This right is presently covered by the freedom of economic activity in section 26. The omission of the present section 26 from the new Bill of Rights would therefore leave the freedom of occupation constitutionally unprotected. The substitution of section 26 of the interim

Constitution by a right to freedom of occupation in the new Bill of Rights as a third option, could solve this problem.

3. <u>The German provision on the right to freedom of occupation</u>

Section 12 of the German Constitution reads:

"(1) All Germans shall have the right to freely choose their occupation, their place of work, and their place of training. Occupational practice may be regulated by or pursuant to a law.

(2) Nobody may be forced to do a specific work, except within the framework of a traditional general public service that applies equally to all.

(3) Forced labour is only permissible in the case of deprivation of liberty imposed by a court."

The second sentence of subsection (1) does not provide the state with an unlimited power to regulate the exercise of the right. Limitations of the right must be "by or pursuant to law", and must conform to the proportionality principle which the courts have refined by distinguishing different degrees of state intervention to which different standards of review are applied. The same effect can be achieved by applying the general limitation clause in the South African Bill of Rights.

The Technical Committee recommends the DP proposal be included as Option 3.

## SECTION 22: LABOUR RELATIONS

1. **Section 22(2)(c) - " Workers have the right ... to strike".**

1.1 The DP proposes that the right to strike be limited to collective bargaining purposes only and accordingly propose the addition of the words "for the purposes of collective bargaining" after the word "strike".

1.2 The DP proposed wording is drawn from section 27(4) of the interim Constitution.

1.3 The Republic has recently ratified Conventions 87 and 98 of the International Labour Organisation. The Freedom of Association Committee of the ILO Governing Body monitors compliance of those Conventions by member states. It has definitively held that the right to strike extends beyond the narrow horizon of collective bargaining and embraces the purposes of promoting and defending the socio-economic interests of workers.

1.4 The Freedom of Association Committee has held that the right to strike for the purpose of promoting and defending the socio-economic interests of workers does not (a) include purely political strikes; and (b) may be limited. The limitations contained in the new Labour Relations Act (LRA), 85 of 1995 are consonant with limitations found to be acceptable by the Committee. They are in summary: (i) no strikes until pre-strike conciliation and notification procedures have been exhausted; (ii) no strikes over disputes of the right; (iii) no strikes in essential services; (iv) no strikes during a collective agreement; (v) no strikes during a state of emergency; (vi) no strikes for purely political purposes; and (vii) special limitations on the nature and duration of sympathy and protest strikes.

1.5 Constitutions that include a right to strike in their Bill of Rights, do not limit the right in the manner proposed by the DP. Their respective courts, have, however, followed the profile of limitations described above.

1.6 The addition of the phrase "for the purpose of collective bargaining" will mean that provisions permitting protest action, such as those envisaged in section 77 of the LRA, will not be subject to constitutional scrutiny under section 22.

2. **Section 22(2)(c) - "Workers have the right .. to strike"**

2.1 The FF proposes the specific exclusion of essential services from the right to strike.

2.2 There is no need to specifically exclude essential services because it is a universally accepted limitation on the right to strike. The Freedom of Association Committee has held that no person may partake in a strike in a service the "interruption of which endangers the life, personal safety or health of the whole or any part of the population". Read with section 39(1)(b) which requires every court when interpreting the Bill of Rights to consider all applicable international law.

2.3 The specific exclusion may invite unnecessary constitutional litigation over what constitutes an essential service. Without the specific exclusion, the constitutional court engages in the proper constitutional enquiry namely whether any limitation to the right to strike in respect of essential services complies with section 35 (the limitations clause).

3. **Section 22(4)(a) - "Every trade union and every employer's organisation has the right ... (a) to determine its own administration, programmes and activities".**

3.1 The DP proposes a proviso to the subsection along the following lines: "provided that nothing in this Constitution shall preclude laws and measures designed to promote honest, efficient democratic and accountable governance".

3.2 The object of a "nothing shall preclude" clause is to immunise certain laws from and the limitations clause in particular. This may be motivated by considerations such as the importance of recognising systems of religious personal and family law (section 14(2)); or the importance of social and economic regulation (section 21(2)); and the outlawing of unfair discrimination (section 35(2)) in a context where such laws are vulnerable to attack under other provisions of the Bill of Rights. Important as democratic and financially accountable trade unions and employers organisations are, there is no provision in the Constitution that would render a law designed to promote those objectives especially vulnerable to constitutional attack.

3.3 The Freedom of Association Committee has held that laws that promote democratic and financially accountable trade unions and employer organisation do not infringe the right to freedom of association ( ). The combined effect of section 34 (the limitations clause) and section 39(1)(b) (the interpretation clause) will ensure that laws that promote such practices in trade unions and employer organisations are constitutional.

3.4 It also bears stating that the new LRA requires ballots for the election of leadership, ballots for the calling of a strike, the auditing of accounts and the submission of the auditors certificate to the register of labour relations.

## SOCIAL AND ECONOMIC RIGHTS

### 1. Grouping of social and economic rights

The Constitutional Sub-Committee requested the Technical Committee to consider:

1.1 the grouping of certain of the social and economic rights; and

1.2 to use a consistent qualifying phrase for the state’s obligations e.g. “reasonable and appropriate/reasonable and progressive measures.”

### 2. The Grouping of the Social and Economic Rights

2.1 Having considered this matter carefully the Technical Committee wishes to bring to the attention of the Sub-Committee the following issues which are pertinent to the “grouping” of the rights:

- **The grouping of the social and economic rights holds the danger that the various rights which involve different obligations and policy considerations are treated in a uniform way**. The measures which the state must take has different objectives in the case of each right. In the case of housing, the measures are designed eventually to secure housing for all. In the case of heath, the measures are designed to improve the quality and accessibility of health care services. A distinctive body of international jurisprudence has built up on each of the rights included in the draft Bill of Rights. We are of the view that it would be a mistake to invite judges and legislators to overlook the diverse dimensions of each of these rights.

- Many of the rights involve elements which can and should be protected immediately whereas others are only realisable progressively over time. In the case of housing, the government it will take time for everyone to have access to housing. However, the obligation not to evict persons from their home arbitrarily and without a court order is an immediate obligation which is part of the right to adequate housing. Similar considerations apply in the case of education - the state must take immediate steps to secure access to basic education by all, whereas the right to further education must be progressively realised over time. The right to education in the language of choice “where reasonably practicable” is also immediately applicable. **It is easier and clearer to demonstrate the different nature of the obligations on the state in respect of the various rights where, as far as possible, they are dealt with in separate clauses.**

- On a **symbolic level**, it will also diminish the importance of each right to include them in one clause, entitled ‘social and economic rights’. This may have the effect of devaluing the rights, and making them seem like some special species of rights. The additional social and economic rights which the parties have supported for inclusion in the Bill of Rights are an integral part of international human rights law. Many of the other rights in the Bill of Rights are also social and economic in character: the right to property, economic activity, labour relations, environment, language and culture etc. It would not be a correct reflection to include only a selected group of these rights under one social and economic rights clause.

- It has also not been **the style of the draft Bill of Rights** to group various rights together. For example, the Namibian Constitution groups so-called fundamental freedoms together, such as freedom of speech, religion, assembly, association, movement rights, the right against forced labour. This is combined with a specific limitations clause (article 21).

**For the above reasons, we recommend that the grouping of certain social and economic rights be kept to a minimum.**

## 2.2 Health, food, water and social security (Section 26)

We have suggested a draft clause which groups together the rights to health, food, water and social security.

## 2.3 The right to education (Section 28)

Because of the various elements of **the right to education** and the fact that it has existed as an independent right in the interim Constitution, we recommend that it be retained as a separate right.

## 2.4 The right to adequate housing, and equitable access to land (Section 25)

We recommend that the right to adequate housing and equitable access to land should also be in a separate section because of its political importance. The denial of housing rights and access to land to millions of South Africans was an important part of our history. A large number of public submissions have motivated strongly for the inclusion of the right to adequate housing in the final Constitution.

## 2.5 Children's rights (Section 27)

Because of their vulnerable position in society, children are guaranteed certain **basic** social and economic rights. Unlike the broader category of social and economic rights (to which they are also entitled) the state must take immediate steps to secure these rights, and they are not subject to progressive realisation over time. However, the level of the obligation is restricted to **basic** nutrition, health and social services.

The National Party in their supplementary submission have proposed the addition of the words, **"and shelter"** to ss.1(c) of the children's rights section. This suggests to the Technical Committee the provision of shelters to street children and other homeless children, as well as children removed from the family home because of abuse or neglect. This is an

important protection for a particularly vulnerable category of children, and we recommend the inclusion of this further right.

The National Party has also proposed that ss.(1)(d) should end with the words, **"...all forms of abuse and degradation."** The additional words are probably unnecessary, but the Technical Committee does not have any objections in principle to the proposed change.

The **right to basic social services** is an important right for children. It implies the provision of social workers and other services necessary to the welfare of children. Such services should be provided to deal with children with family problems, neglected and abused children, children with physical and learning disabilities etc. Social services should be distinguished from social security. Social services are based on social work and contribute to the welfare and development of both individual and groups in the community.[3]

The social rights in ss.(1)(c) are also protected in the Convention on the Rights of the Child (1989) which South Africa has ratified.

Finally, children's rights should be in **a separate section**, and not part of a general social and economic rights clause. The children's rights clause has various different elements, comprising an integration of both civil and political, and economic and social rights. For example, ss.1(f), deals with the special guarantees applicable to detained children; and ss.(2) lays down a general standard applicable to all proceedings concerning children. A number of submissions from the public have supported a separate children's rights clause.

## 3. Matter arising from the re-formulation of the social and economic rights in the draft Bill and the supplementary party submissions.

[See also the Explanatory Memorandum on the Right to Adequate Housing]

### 3.1 The use of the general qualifying phrase, "reasonable and progressive legislative and other measures"

After careful consideration by the Technical Committee, the above phrase has been used in the following sections: housing and land [section 25]; health, food, water and social security [article 26]; and the right to further education [section 28(1)(b)].

3. The right to benefit from social welfare services is protected as a separate right in article 14 of the European Social Charter (1961). The Charter is a regional human rights treaty, protecting economic and social rights.

It implies that the measures adopted by the state can be reviewed both for their reasonableness and the extent to which they make progress in the implementation of the various rights. It is similar to the obligation which will in any event be incumbent on South Africa when it ratifies the International Covenant on Economic, Social and Cultural Rights (1966). The Covenant attaches particular importance to the adoption of **legislative measures** in the progressive realisation of the rights.[4] Legislative measures are also needed to establish the framework and to regulate judicial supervision of these rights. "Other measures" include administrative, financial, educational and social measures. The word, "appropriate", is no longer used as it is included in the concept of "reasonable" measures.

The qualifying phrase also allows for **sufficient flexibility on the part of the state** to take progressive steps towards realising the various rights based on its capacity and the effective use of its available resources. Any reduction or 'going backwards' in the level of provision of a particular social and economic right motivated by a shortage of resources or the general welfare in a democratic society could be justified by the state in terms of **the general limitations clause**.

We do not recommend the National Party proposal that the words, **"in accordance with resources and priorities of the state"** be added. Their implications are that the state could simply allocate no money in its budget to health services one year, and say that this is "in accordance with its resources and priorities". This amounts to a 'claw-back' clause which would effectively undermine the constitutional protection of these rights. The reasonableness of the measures will be judged against capacity and resources of the state at a particular time.

### 3.2 Housing and Land (Section 25)

The phrase, "everyone without adequate resources..." has been replaced with , "everyone has **the right to have access to adequate housing** which..." The reason for this change is that the it is consistent with the phrasing used in the other social and economic rights, and achieves the same effect. Those with sufficient resources will have the means of access to adequate housing (rental, ownership, etc.) and so will not need state assistance to secure housing.
The phrase, " adequate housing" was chosen over the term shelter in for two main reasons:

- It is consistent with the right as it appears in international human

4. See article 2 of the Covenant which was signed by South Africa in October 1994.

rights instruments. A body of international standards have developed on the right to 'adequate housing'.[5]

- The state may take all reasonable measures towards the progressive attainment of the right. This means that it is not under an immediate obligation to supply everyone with a house on demand. On the other hand, neither should the state be allowed to provide a shack for the homeless, and then claim that it has fulfilled its obligation to ensure access to shelter.

The word, 'home' in ss.(2) refers to the dwelling where a person and his or her family is ordinarily resident.

The right in ss.(3) is not dissimilar to the one proposed by the DP in ss.(1) of their supplementary submissions on property (25 October 1995). It places a duty on the state to adopt legislation and other measures to facilitate fair access to land in South Africa.

### 3.3 Access to Health Care

The right to health and access to medical treatment is recognised in a number of international human rights instruments, including the -

- Universal Declaration of Human Rights (1948): article 25
- International Covenant on Economic, Social and Cultural Rights: article 12
- International Convention on the Elimination of All Forms of Racial Discrimination (1966): article 5(e)(iv)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): article 12 and article 14(2)(b)
- Convention on the Rights of the Child (1989): article 24
- European Social Charter (1961): articles 11 and 13
- the African Charter on Human and Peoples' Rights (1981): article 16
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 10.

In addition the rights related to health and medical services are protected in various forms in a number of national constitutions. These include the Constitutions of the Netherlands, Greece, Italy, Portugal, Turkey, Spain,

5. See particularly article 11 of the International Covenant on Economic, Social and Cultural Rights (1966), and the General Comment thereon by the Committee on Economic, Social and Cultural Rights [annexure to the Explanatory Memorandum on Housing].

Namibia, Angola, El Salvador.

The obligation of the state in the reformulated clause is to take progressive measures to ensure that everyone has access to health care services of the highest attainable standard. This formulation seeks to combine the elements of expanding access to health care services, and the continuous improvement of the health care system (see the ANC submission to Theme Committee 4 on further social and economic rights). The right of access to health care services should not be restricted to those without adequate resources. It also applies to persons who live in areas where health care services are underdeveloped (e.g. rural areas), and those with special needs (e.g. the elderly, persons with disabilities and HIV patients. Those who are able to secure access to appropriate health care services through their own resources would not be able to demand state assistance as of right. This right (as is the case with the right to basic education) does not imply a right to free medical treatment. The right not to be refused emergency medical treatment is an obligation which is immediately enforceable, and is dealt with in a separate subsection.

The right to reproductive health care warrants special consideration because of its central role in the health and well-being of women. Lack of information and services relating to fertility regulation and other aspects of reproductive health has severe social and economic consequences for women. This right receives special protection in the Convention on the Elimination of All Forms of Discrimination against Women (1979). It is also among the obligations undertaken by governments in the Beijing Declaration and Platform for Action.[6] This right is neither a euphemism for abortion on demand, nor is it restricted to sterilisation as suggested by the Freedom Front. It rests on the “recognition of the basic right of all couples and individuals to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”. It also implies special care and services in connection with pregnancy.[7]

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6. Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, Beijing, 15 September 1995, paras 96 and 96bis.

7. Article 16(1)(e) and article 12 of the Convention on the Elimination of All Forms of Discrimination against Women.

## 3.4 Access to sufficient food and clean water

The right to food (or adequate nutrition) is recognised in many international human rights instruments -

- Universal Declaration of Human Rights (1948): article 25
- International Covenant on Economic, Social and Cultural Rights: article 11
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): article 12(2); article 14(2)(h) -adequate water supply to rural women
- Convention on the Rights of the Child (1989): article 24(c)
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 12.

These rights are also subject to the obligation of progressive fulfilment by reasonable legislative and other measures.

## 3.5. Access to social security, including social assistance

### 3.5.1 Public international law

The right of everyone to social security and an adequate standard of living is also recognised in most of the major international human rights instruments -

- Universal Declaration of Human Rights (1948): articles 22 and 25
- International Covenant on Economic, Social and Cultural Rights (1966): articles 9 ("the right of everyone to social security, including social assistance") and 11 ("the right of everyone to an adequate standard of living for himself and his family...")
- International Convention on the Elimination of All Forms of Racial Discrimination (1966): article 5(e)(i) and (iv)
- International Convention on the Elimination of All Forms of Discrimination against Women (1979): articles 11(1)(e), 11(2)(b), 14(2)(c)
- Convention on the Rights of the Child (1989): articles 26 and 27
- European Social Charter (1961): articles 12 (social security) and article 13 (the right to social and medical assistance)

- International Labour Organisation Convention (No. 102) Concerning Minimum Standards of Social Security (1952)
- the African Charter on Human and Peoples' Rights (1981): article 18
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988-not yet in force): article 9

### 3.5.2 Comparative Constitutions

Contrary to the Freedom Front's claim that these rights necessarily imply a socialist economic system the right to benefit from various forms of social security and assistance are protected in a variety of national Constitutions. These include: Germany [article 6(4) - social protection for mothers]; Denmark; Greece; Italy; Japan; Netherlands; Spain; Portugal; Switzerland and Turkey.

Some examples of these provisions are:

**Spain**

"The public authorities shall maintain a public system of social security for all citizens which will guarantee social assistance and services which are sufficient in cases of need, especially unemployment." [article 41]

**Denmark**

"Any person unable to support himself or his dependants shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance, provided he comply with the obligations imposed by statute in such respect." [article 75(2)]

**Portugal**

1. Everyone shall be entitled to social security.

2. It shall be the duty of the State to organise, co-ordinate and subsidise a unified and decentralised social security system, with the participation of the trade union associations, other organisations representing the workers and associations representing other beneficiaries.

...

4. The social security system shall protect citizens in sickness, old

age, disability, widowhood, orphancy, unemployment and all other situations in which the means of subsistence or capacity to work are lost or reduced.

... [article 63]

**Japan**

"All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health. [article 25]

### 3.5.3 The scope of social security and social assistance

A distinction is often made between the earned benefits of workers and their families (social insurance), and need-based assistance received from public funds (social assistance). Social security is sometimes used synonymous to social insurance. In a strict sense, social insurance refers only to contributory social security benefits which are earnings-related with a direct connection between the amount paid and the benefit received.[8] However, many schemes involve an overlap between contributory and non-contributory benefits, and there is also an overlap between these benefits and needs based social assistance. The general tendency is to give the concept of social security a wider interpretation [9] to accord with international trends to develop comprehensive systems of social protection in response to factors such as the increased mobility of labour and changing global work patterns (the growth of the informal sector, home-based work, temporary work, self-employment etc.).

For these reasons, the right is formulated as the right of **"access to a social security system, including appropriate social assistance where they are unable to support themselves and their dependants."** (see ANC and NP submission to Theme Committee four on other social and economic rights).

This covers both contributory and non-contributory social security benefits, including appropriate social assistance from the state. It

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8. These form of benefits usually also enjoy protection under the right to property: see, C. Krause, 'The Right to Property', in Eide et al (eds), Economic, Social and Cultural Rights - A Textbook (1995), 143, 154.

9. M. Scheinin, 'The Right to Social Security' in Eide et al (eds), Economic, Social and Cultural Rights - A Textbook (1995), 159.

accords with the general scope of the right in the international human rights instruments referred to above.

This right is subject to the usual qualification that it must be progressively realised by the state through all reasonable measures, including legislation. The right has been deliberately broadly framed to give the legislature a discretion as to what forms of social protection it wishes to adopt, the level of benefits, and the conditions and period subject to which they will be paid. Any lowering of the amount and standard of social security due to resource or other constraints would fall to be justified in terms of the general limitations clause. This is also consistent with international jurisprudence on the limitations of these rights.

**SECTION 24: PROPERTY**

1. The draft property clause in the second edition of the Refined Working Draft gives effect to the tentative understanding that emerged in the CC Subcommittee on 10 October 1995 (page 9 of the Minutes). It was drafted jointly by Theme Committees 4 and 6.3.

2. Subsection (1): "Property is guaranteed".

 2.1 The formulation is drawn from the German Basic Law. It guarantees the institution of property, which includes the right to acquire, hold and dispose of property and the duties of holders towards others.

 2.2 The phrase "the right of inheritance" is not included. There are at least two rights involved in this phrase: the right to dispose of property by testamentary succession and the right to interstate succession. The intention behind the inclusion of the phrase was not to constitutionalise the Roman Dutch and customary law of intestate succession but to guarantee the right to right to dispose of property in a will. We are of the view that the constitutional guarantee of property incorporates the right to dispose of it whether by way of contract, gift or testament.

3. Option to subsection (1): "The State must respect property and foster the conditions for everyone to acquire, hold and dispose of property on an equitable basis".

 3.1 This is an edited version of the proposal made by the DP in it comments and input dated 25 October 1995.

 3.2 This formulation is similar to the proposed subsection (1) in that it treats property as an institution and can be incorporated in the draft based on the tentative understanding.

4. Subsection (2): "The content and limits of property, including its deprivation, may be determined only by law of general application".

   4.1 The subsection reflects a combination of parts of the German Basic Law formulation and subsection 28(2) of the interim Constitution.

   4.2 This was done to ensure that the determination of the "content" and "limits" by law was not a separate class from "deprivation". It also ensures that determinations of content, limit and deprivation are not achievable by bills of attainder.

   4.3 The DP propose that the subsection be qualified to the effect that deprivation not be arbitrary. The Technical Committee supports the qualification.

**SECTION 29: ACADEMIC FREEDOM**

1. The Technical Committee was called upon to reformulate the draft clauses on academic freedom applying their minds to the wording of Article 5(3) of the German Basic Law. That article, freely translated, reads:

   `Art and science, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the Constitution'.

2. There are a number of points to make in respect of the German formulation:

   2.1 It does not resolve the issue of whether the freedom to teach is exercisable as against the educational institution itself. This is clearly desirable in the case of a university, but is it desirable for a teacher in an Islamic school to claim a constitutional freedom to teach doctrines that are an anathema to Islam ?

   2.2 Does "loyalty to the constitution" mean that no-one may criticise the constitution? or does it mean that no-one may exercise the freedom to teach by promoting the overthrow of the constitutional order ? What is the relationship then between a clause of this nature and the right to freedom of expression ?

3. The Technical Committee recommends that the formulation in section 29 properly gives effect to the concept of academic freedom and the original submissions of the parties.

4. The concern expressed in the deliberations of the Sub-Committee on the August 1995 and reflected in the proposal to introduce the "loyalty" concept in the German Basic Law is the possible use of the right to academic freedom to

obstruct the transformation of our universities. This can be addressed by the inclusion of a new sentence to subsection (1) to the effect that nothing in this subsection precludes the State from introducing measures to ensure that the universities comply with the Bill of Rights where relevant. This would include the rights equality, human dignity, privacy, freedom of religion, belief and opinion, freedom of expression, assembly, demonstration and petition, freedom of association, political rights, language and culture, access to information, administrative justice etc.

**A proposed wording is as follows:**

***"(1) Every institution of higher learning and everyone within these institutions has the right to academic freedom. This right does not prevent legislative and other measures designed to ensure that institutions of higher learning comply with the Constitution."***

**SECTION 31: ACCESS TO INFORMATION**

The Technical Committee was asked to give an opinion on possible qualifications to the right, taking into account the comparative analysis on p197 of the Explanatory Memorandum of 9 October 1995 and a suggestion that the Constitution instructs Parliament to pass a law providing access to information providing for limitation.

1. Few other Constitutions contain general guarantees on access to information. Exceptions are the Swedish Freedom of Press Act (which is a constitutional document) and section 5 of the German Constitution ("Everyone has the right ... to inform himself from generally accessible sources"). CP IX however provides that the new South African Constitution "shall provide for freedom of information so that there can be open and accountable administration at all levels of government".

2. Like, for example, the right to vote and to do so in free, fair and general elections, a constitutionally guaranteed right to access to information can only be exercised meaningfully if the detail of how and when it is to be exercised, is provided for in legislation. Johannessen, Klaaren and White ("A Motivation for Legislation on Access to Information" 1995 *South African Law Journal* 45, 51) state: "In order that the courts not be swamped with constitutional issues, statutory measures should be taken to serve as guidelines to assist courts, prosecutors and defence lawyers in the areas of both the limitation and the implementation of such a right of access. As is done in other jurisdictions, South Africa should regulate these matters by statute". Examples of such statutes in other jurisdictions are the United States Freedom of Information Act 5 USC 552; the Canadian Access to Information Act, 1982; the Australian Freedom of Information Act, 1982; and the New Zealand Official Information Act, 1982.

3. Freedom of information statutes, apart from regulating the procedure and enforcement of requests for information, always contain provisions for denying

requests, for example, on the grounds of national security, international relations, law enforcement, personal privacy, and confidential commercial information (see Klaaren et al 51-60). All these matters are covered extensively in the Open Democracy Bill which is being prepared by the special task force in the office of Deputy President Mbeki. To the extent that this Bill will limit the right of access to information in the Bill of Rights, it will have to comply with the provisions of the general limitation clause. In the view of many comparative precedents, the concern raised by the ANC and FF could be dealt with as permissible limitations in terms of the general limitation clause.

## SECTION 32: ADMINISTRATIVE JUSTICE

1. The Technical Committee was instructed to try and draft a clause for publication that incorporated all three options in the draft forwarded to the Sub-Committee on 9 October 1995. The difficulty of incorporating the different options into one clause is that aspects of the different options are mutually exclusive. We have tried to resolve this by isolating the core elements of the three options.

2. This approach conforms with the proper approach to the right to administrative justice in a Bill of Rights. It should not constitute a mini-statute regulating the right to administrative justice as the interim Constitution tries to do, but be a core standard against which a statute regulating administrative justice must be judged. The statute may carve narrower rights to administrative justice (provided it complies with the limitations clause) and it may grant more extensive rights. It is not necessary to include all limitations on the right to administrative justice in the Bill of Rights nor is it necessary to go beyond the core of the right.

3. The core elements of the right to administrative justice to be included in a Bill of Rights are, we suggest, the following:

    3.1 The prohibition of ouster clauses.

    3.2 The right to lawful administrative action.

    3.3 The right to [justifiable/ reasonable] administrative action.

    3.4 The right to procedural fairness where a person's rights are affected and where the administrative action is applicable to a particular person.

    3.5 The right to written reasons where the administrative action affects a person's rights or materially affects a person's interests, unless the reasons for such action have been made public.

4. The elements of the three options are not included in the proposed core are as follows:

    4.1 Option 1 on page 19 of the 2nd edition provides for procedural fairness in

respect of all administrative action. This is extraordinary wide. Firstly administrative action includes the promulgation of delegated legislation. Secondly it includes persons whose interests may be affected (something not even the interim Constitution contemplates). There are good arguments for the *development* of the right to administrative justice in respect of aspects of the above but this should be achieved by statute and the common law, in precisely the way the courts have developed the doctrine of "legitimate expectations".

4.2 In options 1 and 3, it is not necessary to qualify the right to written reasons with the phrase "unless the reasons have been published" because the publication itself constitutes compliance with the duty to supply reasons.

4.3 Option 3 on page 19 of the n edition limits procedural fairness to administrative action that affects rights and "legitimate expectations". There are two reasons for not including "legitimate expectations" in the core elements. Firstly, the inclusion of the doctrine of legitimate expectations will constitutionalism a doctrine that is by its very nature both fact specific and open to wide application. This will have the effect that a definition in the statute, if that is indeed possible, will not prevent the constitutionalising of every case involving the doctrine. If the object of the right is to provide a standard against which to test any administrative justice statute then the constitutionalising of the doctrine will have the effect of transforming the standard into a constitutional cause of action. Secondly, the doctrine has emerged without a constitutional mandate and the limited formulation proposed in the core elements of a right to administrative justice will not impede the further development of the doctrine.

5. The ANC proposed the qualification of the right to administrative justice by subjecting it to the "practicalities and interests of good governance". These concerns can be adequately addressed by the general limitation clause and do not have to be included specifically in a right that is limited to its core elements.

6. The DP proposals concerning the right to administrative justice are contained in their revised submission dated 19 September 1995. During the course of the deliberations the DP amended those submissions. The Technical Committee has considered the revised submissions and has adopted certain proposals in its draft. The main submissions made by the DP are as follows:

6.1 There should be no internal limitations on the scope of the rights. The Technical Committee accepts that should be the case in respect of the right to lawful and reasonable administrative action because these are the core elements of the right. The Technical Committee is of the view however that internal limitations are necessary in respect of procedural fairness because (a) a right to procedural fairness in respect of all types of administrative action is substantially wider than the US "due process" clause, which, even with its limited purview has "flooded state and federal courts with a torrent of difficult and context-specific litigation that has

never abated since the due process revolution began in the 1970's" (Professor Michael Asimow "Administrative Law under South Africa's interim Constitution", unpublished draft article, 11/2/95).; (b) it is necessary to narrow the *constitutional* right to procedural fairness. It is just not possible to grant hearings in the hundreds of thousands of low level discretionary decisions that a government constantly makes. It is not an answer to say that this difficulty is capable of being addressed by the limitations clause because administrative burden and costs may not constitute a justification for a limitation of a fundamental right (Re Singh and Minister of Employment and Immigration & 6 Other Appeals 17 DLR 422:

> "I have considerable doubt that the type of utilitarian consideration brought forward by Mr Bowie [counsel for the Attorney General of Canada] can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the Charter would be illusory if they could not be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument in my view misses the point of the exercise under s.1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s.7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s.1, it seems to me that the basis of the justification for the limitation of the rights under s.7 must be more compelling than any advanced in these appeals". (At 218-219)

6.2 The reach of the rights should be a function of the "exercise of public power" rather than "administrative action". It is the view of the Technical Committee that this is too widely formulated for a *constitutional* right. The development of the right to administrative justice in respect of holders of public power ought to be left to common law or legislative development.

6.3 The express invalidation of other clauses. It is the view of the Technical Committee that the provisions of subsection (a) and the provisions of section 33, Access to Justice, will invalidate any ouster clause.

7. In order to give effect to the injunction to forge one proposal from the three options and after considering the ANC and DP proposals, the Technical Committee proposes the following as a basis for discussion:

***"(1) No one may be adversely affected by administrative action that is unlawful or unreasonable.***

***(2) Everyone whose rights are affected adversely by administrative***

***action has the right to fair procedure unless the administrative action is of general application.***

***(3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons."***

**SECTION 33: ACCESS TO JUSTICE**

1. The FF proposed a rewording to exclude the possibility that litigants in civil cases or accused in criminal cases can insist that the State should pay for such litigation and\ or provide legal representation.

 1.1 The right of an accused "to have a legal practitioner provided at state expense if substantial injustice would otherwise result [where the interests of justice require it]", is guaranteed in section 31(3)(e) and should be retained.

 1.2 Article 6(1) of the European Convention guarantees a right to a "fair trial" in both civil and criminal cases, whereas article 6(3)(c) provides for legal assistance in criminal cases "when the interests of justice so require". On the position in *civil cases* Van Dijk and Van Hoof *Theory and Practice of the European Convention of Human Rights* (1990) 316-317 state: "In the Aire case [Commission Report 1987; Court Judgement 1982] it was held that the right of access to court of Article 6(1) although it does not imply an automatic right to free legal aid in civil proceedings, does not involve the obligation for the contracting States to make access to court possible in either giving the accused a compensation for his legal costs if he is unable to pay, or reducing the costs of the suit, simplifying the proceedings or the conditions of the suit, or providing for free legal aid, all this under the condition that these costs were necessary for instituting the proceedings and\ or for an adequate presentation of the case of the defence." On 332 they state: "[T]he Strasbourg organs make an independent examination of the complexity of the case and other relevant factors such as the applicable rules of evidence and emotional involvement of the applicant in the outcome of the proceedings." The Technical Committee recommends that the implications of the section 30 "fair trial" guarantee in civil cases be left to the courts to develop, and that limitations to the right be dealt with in ordinary legislation subject to the general limitation clause.

2. The NP proposed as an alternative option the insertion of the word "where appropriate or necessary" between the words "or" and "another".

 The change in wording could be considered for inclusion as an option.

**SECTION 34: DETAINED, ARRESTED AND ACCUSED PERSONS**

## 1. The right to be released on bail [section 34(1)(e)]

Both the Freedom Front and ANC had reservations about this clause. The wording of section 25(2)(d) of the interim Constitution is confusing. Firstly, the section refers to the right to be released without bail, that is, with no limitations on the accused's freedom of movement or property). Secondly, an accused has a right to be released with bail, that is, with limitations of varying degrees (and often very severe) on the accused's rights to movement and property. When is the accused the holder of the unconditional right to be released and when not? Thirdly, when the interests of justice so requires, there is no right to be released at all.

The core elements of the right are:

- that the infringement of the accused's right to freedom pending the outcome of the criminal proceedings should be decided by a court of law;
- the court of law should consider the accused's freedom at his or her first compulsory court appearance until finality is reached in the case; and
- a court of law should decide the issue in accordance with the interests of justice.

In short, an accused has a right to have all elements of his or her release considered by a court of law in accordance with the interests of justice.

The objective of pre-sentence release is to avoid anticipatory punishment. The issue at bail proceedings is not the guilt or innocence of the accused, but whether the interest of justice will be prejudiced by his or her release subject to conditions.

The absolute content of the right is that the release decision should be taken by a court of law. The accused has the right to have a court determine what the interests of justice require. In South Africa the court's jurisdiction to consider bail has in the past been ousted with respect to serious offenses by bestowing on the Attorney-General the power to make the release decision.

From the above, it is clear that the interests of justice are not limited to the question whether the accused should be detained, but are relevant to all aspects of the bail decisions.

For these reasons, the Technical Committee recommend that section **34(1)(e)** be revised to read as follows:

***Everyone who is arrested for allegedly committing an offence has the right -***

***...***

***(e) to be released from detention subject to reasonable conditions if the interests of justice so permit.***

This formulation clearly indicates that the court has a discretion concerning the release of the accused. This discretion must be exercised in accordance with the interests of justice.

**2. The right to a legal practitioner at state expense [sections 34(2)(c) and 34(3)(e)]**

The Freedom Front have proposed more restrictive wording to these sections. It should be noted that the International Covenant on Civil and Political Rights (1966) which has been signed by South Africa requires that the state ensure to every accused person the right, amongst others -

**" ...to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.** [10]

The test of substantial injustice both in the interim Constitution and in the present draft formulation is a more restrictive test than the international standard referred to above.

**3. The right of an arrested person to be placed under judicial authority [Section 34(1)(d)]**

Although not raised by any of the parties, the Technical Committee wishes to recommend further changes to this subsection.

**3.1 Objectives of the right**

The aim of the right is to place an arrested person as soon as possible under the authority of a court. The rationale is twofold: firstly, to minimise the possibility of an arbitrary arrest and detention, and secondly, to protect the arrestee from the possibility of police abuse.

**3.2 Structure of the right**

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10. Article 14(3)(d). A similar provision is found in article 6(3)(c) of the European Convention on Human Rights.

Section 25(2)(b) of the interim Constitution relates to two situations, affording the accused two separate rights.

**(a) Right in respect of the police to be brought to court**
The arrestee has a right enforceable and unqualified right against the police to be brought promptly (48 hours) before a court of law.

**(b) Rights in respect of the court**
The second situation relates to where the arrested person is before the court. The arrestee has a qualified right to liberty: if there is no charge against him or her, then he or she has a right to immediate release. Any further detention would be arbitrary and contrary to other provisions of the Bill. The absence of a charge indicates that there is no reason why the arrestee should be further detained, and then he or she is entitled to be released.

If there is a charge then the proceedings may be postponed for the purposes of trial. The question then is whether the detention of the accused should continue. The court should thus consider pre-trial release in terms of s 25(2)(d). Unless the court denies pre-trial release in the interests of justice, the accused should be release with or without bail.

### 3.3 The Charge

The fact that the arrestee has not been released by the police, assumes that there is a pending charge. The first task of the court is to determine whether the arrestee is indeed an accused person. Unless the prosecutor proffers at the first appearance a charge against the accused, the court is obliged to terminate the proceedings there and then and release the accused.[11] A charge at the first appearance need not comply with the constitutional requirements of s 25(3)(b).[12] All that is required is a clear indication of the nature of the offence and an outline of the incriminating facts. More than a nominal charge is required. There seems little point in a court conducting a thorough bail inquiry, yet the basis of the case remains untested.

The essence of the proceedings is to determine whether the further detention of the accused, or even interference with his or her freedom of movement is not arbitrary.

### 3.4. The phrase, “informed of the reason of further detention”

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11. Ex parte Prokureur-Generaal, Transvaal 1980 (3) SA 516 (T) 518 H.

12. S v Simango 1979 (3) SA 189 (T) 191 C, requiring such detail, was overruled by Ex parte Produreur-Generaal, Transvaal, supra.

This phrase to the effect that the accused has the right "to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be release," is confusing. The right to pre-trial release is determined by s.25(2)(d) and it arises at the first court appearance of the accused. Where a court denies pre-trial release, the interests of justice would require that the accused be given a reasoned decision, including the reason for the further detention. The right of appeal would be dependant thereon. It is thus submitted that the only meaning to be given to this phrase is an adjunct to the pre-trial release provision, informing the accused of the reasons for the refusal of bail. This is a right incidental to the right to a bail hearing, and does not warrant to be included in this provision.

**3.5 Revised proposed formulation**

**Section 31(1)(d)**

***Everyone who is arrested for allegedly committing an offence has the right -***

***(d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention.***

## SECTION 35: LIMITATION OF RIGHTS

1. The minutes of the Sub-Committee on 10 October 1995 and the sidenotes to the section reflect a divergence of opinion over the wording of s35(1)(a). The ANC proposed "reasonable" and the DP, FF and the NP insist on "reasonable and necessary". While the words "reasonable" and "necessary" themselves carry different meanings in ordinary use, the terms are really codewords for proportionality when use in the limitations clauses of the Bill of Rights.

2. The European Court of Human Rights and the German courts, in summary, identify the following principles of proportionality"

   2.1 The limitation must be capable of achieving the purpose of the limitation.

   2.2 The purpose of the limitation may not be realised as effectively by means of a less drastic measure.

   2.3 An appropriate relationship must exist between the nature and extent of the limitation and the nature and importance of the rights and public interests protected or promoted by the limitation. "Appropriate" is

determined by taking into account the nature and extent of the limitations; nature and importance of the right that is limited; and the nature and importance of the public interest concerned.

3. The Canadian Supreme Court has identified similar criteria:

   3.1 The objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. It must bear on a pressing and substantial concern.

   3.2 The means chosen to attain those objectives must be proportional or appropriate to the ends. "Proportional or appropriate includes the following components: (a) the measure adopted must be carefully designed to achieve the object in question; (b) they must not be arbitrary, unfair or based on irrational considerations ie they must be rationally connected to the objective; (c) the means, even if rationality connected to the objective in this first sense, should impair `as little as possible' the right or freedom in question; (d) there must be a proportionality between the effects of the measures and the objective which has been identified as `sufficiently important'.

   See R v Oaken 26 DLR (4th) and R v Edward Books and Art Ltd 35 DLR (4th)

4. In S v Makwanyane, Chaskalson P draws on these criteria and fashions an approach which the Technical Committee proposes should form the basis of a limitations clause:

   > The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality ... The fact that different rights have different implications for democracy ... means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done by on a case by case basis. This is inherent in the requirement of proportionality, which calls for a balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question"

5. It is evident from the above that what is central to any evaluation of limitation of a right is the balancing of the different interests. In order to resolve the divergence

of opinion, the Technical Committee proposes the words "reasonable" and necessary" be dispensed with and that the limitations clause spells out the approach adopted by Chaskalson P.

6. The Technical Committee accordingly proposes the following draft as a basis for discussion:

***"(1) The rights in this Bill of Rights, except the rights in section 37, may be limited by or pursuant to a law of general application only to the extent that the limitation is justifiable in an open and democratic society based on freedom and equality which must be determined taking into account -***

***(a) the nature and importance of the right that is limited;***

***(b) the nature and importance of the purpose of limitation;***

***(c) the nature and extent of the limitation;***

***(d) whether the limitation can achieve its purpose; and***

***(e) whether the limitation can achieve the purpose of the limitation through less restrictive means.***

***(2) Any limitation in terms of subsection (1) must be consistent with the Republic's obligations under international law".***

**SECTION 38: APPLICATION**

1. The NP seeks clarity on the inclusion of the "judiciary" in Subsection (1), in view of the provisions of section 7(1) of the interim Constitution, as well as clauses 39(3) and 38(2) of the draft.

1.1 The inclusion of the "judiciary" is motivated in the Explanatory Memoranda of 9 October 1995 on pp 272-274. Note should be taken of the following explanation on p273: "Including the judiciary in the binding clause does not imply that it is bound to apply the bill of rights in a totally unqualified way. The judiciary in deciding on matters concerning relationships between private parties (like the legislature in making laws, and the executive in administering their execution) can only be bound by the bill of rights to the extent that the bill of rights can be applied to such relationships." See also par 3.4.4 on p274.

1.2 Section 39(3) contains an interpretational directive. It is an incident of the judiciary being bound by the bill of rights. It can furthermore not serve as a substitute for the fact that the judiciary must inevitably by bound by the bill of rights, as explained in the Explanatory Memorandum of 9 October

1995.

1.3 Section 38(2) also applies to the legislature and the executive - it is neither in conflict with the inclusion of the judiciary in section 39(1), nor does its provision reflect on the question whether the judiciary should be included in section 39(1).

2. The FF proposes that subsection (2) starts with the words: "This Bill of Rights does not detract from.........".

   The Technical Committee does not agree that the proposed phrase is more accurate and less technical than: "This Bill does not deny the existence ..."

3. The Technical Committee were requested to draw up a list indicating those rights that have as bearers human beings only and those which clearly include legal persons.

4. The Technical Committee was able to agree on a minimum of rights that clearly include legal persons. Some members of the Technical Committee included additional rights. These are reflected in brackets [ ]:
   **Rights which include juristic persons as bearers:**

| | |
|---|---|
| Section 13(b), (c), (d) | Privacy |
| Section 14(2) | Freedom of Religion, Belief and Opinion |
| Section 15 | Freedom of Expression |
| [Section 17 | Freedom of Association] |
| Section 21 | Economic Activity |
| Section 22 | Labour Relations |
| Section 23 (b) | Environment |
| Section 24 | Property |
| Section 28 (2) | Education |
| Section 29 (1) | Academic Freedom |
| Section 31 | Access to Information |
| Section 32 | Administrative Justice |
| Section 33 | Access to Justice |
| [Section 34 (3) | Arrested, Detained and Accused Persons] |

5. There was disagreement over whether the balance of the rights ought to be restricted to human beings only. One view was that they should. **The other viw was that legal persons can be the bearers of the following rights depending on the nature of the juristic persons concerned**:

| | |
|---|---|
| Section 8(3) | Equality -[ excluding the right not to be unfairly discriminated against on the grounds listed in subsection (3)] |
| Section 14(1) | Freedom of Religion, Belief and Opinion |
| Section 16 | Assembly, Demonstration and Petition |

| | |
|---|---|
| Section 17 | Freedom of Association |
| Section 20 | Freedom of Movement and Residence |
| Section 29 (1) | Academic Freedom |
| Section 34 (1), (3) | Arrested and Accused Persons |

**The following party submissions were received following the Constitutional Committee meeting of 19 October 1995, where it was agreed that:**

> *"[The meeting would] .... hold Chapter 3 over until the next meeting of the Constitutional Committee. This would allow the technical experts to complete their revision of the draft formulations to reflect discussions in the Constitutional Committee Subcommittee.*
>
> *.... that if political parties were unhappy with the existing sidebar notes in Chapter 3, they could forward submissions to the Administration for consideration by the technical experts. The deadline for these submissions would be 17h00, Monday 23 October 1995."*

## *ERRATA SHEET*

1. Equality [s.8(2)]: "measure" should be "measures"

2. Freedom and Integrity of the Person [s.11] should be Freedom and Security.

3. Housing and Land [s.25]: Subsection (2) should read:

   "No one may be evicted from their home or have their home demolished -

   (a) arbitrarily; and

   (b) without an order [made after considering the circumstances under which such home is occupied, the duration of the occupation and the availability of alternative suitable accommodation]."

4. Education [s.28]: NP Option should be 1(c).

5. Arrested, Detained and Accused Persons [s.34(3)(e)] add: "in a language that the accused person understands."

6. Section 35(1) Limitation of Rights: the reference to section 36 in this section should be section 37 (Enforcement of Rights).