

# A Bill of Rights for a New South Africa

Preliminary Revised Text, February 1993

## Introduction

In the light of a vast number of comments received in many forms on the Draft Bill of Rights prepared by the Constitutional Committee of the ANC, this new text has been prepared. The objective is to work out a preliminary revised text for presentation to the Policy Conference. This draft will therefore be finalised after comments have been received from the ANC membership.

NOTE: The words in bold are new, while words in brackets are to be deleted. The notes are intended to draw attention to controversial areas - they do not form part of the text.

## Article 1 EQUALITY

(1) All South Africans are born free and equal in dignity and rights.

(2) No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, or creed, political or other opinion, birth or other status.

(3) All men and women shall have equal protection under the law.

## Article 2 PERSONAL RIGHTS

### The Right to Life

(1) Every person has the right to life.

(2) No-one shall be arbitrarily deprived of his or her life.

(3) Capital punishment is abolished and no further executions shall take place.

NOTE: The question has been raised as to whether the use of the phrase 'right to life' indicates an anti-abortion position in the Constitution. In our view, the issue is left open in this clause. We feel the matter should be left open for legislative action after democratic discussion in future. The issue needs sensitive and informed debate with extensive participation by all interested parties and a respect for differing views. Uninformed debate could be extremely divisive and distract attention from the basic question of equal political rights. The Constitution should not in any way pre-empt proper debate. We regard the issue as of great importance and would recommend that it receive high priority as soon as democratic institutions are in place.

#### The Right to Dignity

(4) No-one shall be subjected to slavery, servitude or forced labour, provided that forced labour shall not include work normally required of someone carrying out a sentence of a court, nor military service or national service by a conscientious objector, nor services required in the case of calamity or serious emergency, nor any work which forms part of normal civil obligations.

(5) The dignity of all persons shall be respected.

(6) No-one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

(7) Everyone shall have the right to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity.

#### The Right to a Fair Trial

(8) No-one shall be deprived of his or her liberty except after due process of law, and the courts shall have the right to order the release of any person held without due legal authority.

(9) There shall be no detention without trial, banishment or house-arrest. Legislation may provide for legitimate restriction of movement in relation to illegal immigrants and persons of unsound mind.

(10) No persons shall be arrested or detained for any purpose other than that of bringing them to trial on a criminal charge.

(11) Arrest shall take place according to procedures laid down by law, and persons taken into custody shall immediately be informed of the charges against them, shall have access to a legal representative of their choice, and shall be brought before court within 48 hours or, where that would be a Sunday or a public holiday, on the first working day thereafter.

(12) Bail shall be granted to awaiting-trial persons unless a court rules that in the interests of justice they should be kept in custody.

(13) No-one shall be deprived of liberty or subjected to other punishment except after a fair trial by an independent court.

(14) Trials shall take place within a reasonable time.

(15) Everyone shall be presumed innocent until proved guilty.

(16) No conduct shall be punished if it was not a criminal offence at the time of its occurrence, and no penalty shall be increased retrospectively.

(17) No-one shall be tried or punished twice for the same offence.

(18) Accused persons shall be informed in writing of the nature of the allegations against them, and shall be given adequate time to prepare and conduct their defence.

(19) Everything that is reasonable shall be done to ensure that accused persons understand the nature and the import of the charges against them and of the proceedings, that they are not prejudiced through illiteracy or lack of understanding, and that they receive a fair trial.

(20) Accused persons shall have the right to challenge all evidence presented against them, to be defended by a legal practitioner of their choice, and if in custody, to have access to a legal practitioner at all reasonable times.

(21) If a person is unable to pay for legal representation, and the interests of justice so require, the State shall provide or pay for a competent defence.

(22) No persons shall be required to give evidence against themselves, nor, except in cases of domestic violence or abuse, shall persons be required to give evidence against their spouses, whether married by civil law or custom, their parents or their children.

(23) No evidence obtained through torture or cruel, inhuman or degrading treatment shall be admissible in any proceedings.

(24) Juveniles shall be separated from adult offenders.

(25) Punishment imposed by any Court shall be humane and any term of imprisonment shall be reviewed periodically.

The Right to Judicial Review

(26) Any person adversely affected in his or her rights, entitlements or legitimate expectations by an administrative or executive act shall be entitled to have the matter reviewed by an independent court or tribunal on the grounds of irregularity, including abuse of authority, going beyond the powers granted by law, bad faith, or such (gross) unreasonableness in relation to the procedure or the decision as to amount to manifest injustice. NOTE: This clause will in all likelihood have to be revised in the light of recommendations of the workshop, held in Cape Town early in 1993, on the future of the Administrative law and also after further discussions.

#### The Right to Home Life

(27) No-one shall be deprived of or removed from his or her home on the grounds of race, colour, language, gender or creed.

(28) The privacy of the home shall be respected, save that reasonable steps shall be permitted to prevent domestic violence or abuse.

(29) People shall have the right to establish families, live together with partners of their choice and to marry.

(30) Marriage shall be based upon the free consent of the partners, and spouses shall enjoy equal rights at and during the marriage and on its dissolution.

NOTE: Many people marry by ante-nuptial contract, and thereby create separate property regimes for the husband and wife. Should this situation be over-ridden by the above clause? Should there be specific reference to possible legislation on matrimonial property taking into account a just distribution on termination of the marriage [union] ?

#### The Right to Privacy

(31) No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be acceptable in an open and democratic society.

(32) Interference with private communications, spying on persons and the compilation and keeping of secret files about them without their consent, shall not be permissible save as authorised by law in circumstances that would be acceptable in an open and democratic society.

#### The Right of Movement

(33) All South Africans shall have the right without discrimination to move freely and reside in any part of the country, to receive a passport, travel abroad and to emigrate if he or she so wishes.

#### The Right to Conscience

(34) The right to conscience shall be inviolate, and no-one shall be penalised for his or her beliefs.

(35) No-one shall be required to bear arms or perform military service against his or her conscientious beliefs.

NOTE: The question of whether there should be conscription is left open. There are strong arguments for and against the concept of serving in the armed forces as a constitutionally acceptable duty. In any case, the right of conscientious objection should be respected.

#### Article 3 POLITICAL RIGHTS

(1) South Africa shall be a multi-party democracy in which all citizens shall enjoy basic political rights on an equal basis.

NOTE: Is it necessary to include the word 'citizens'? Should we not return to the earlier formulation: 'all men and women'?

(2) Government at all levels shall be subject to the principles of accountability to the electorate.

(3) Elections shall be conducted in accordance with an electoral law which shall make no distinction on the grounds of race, colour, language, gender or creed.

(4) Elections shall be regular, free and fair and based on universal franchise and a common voters' roll.

(5) All men and women entitled to vote shall be entitled to stand for and occupy any position or office in any organ of government or administration.

(6) All citizens shall have the right to form and join political parties and to campaign for social, economic and political change, either directly or through freely chosen representatives.

#### Article 4 FREEDOM OF SPEECH, ASSEMBLY AND INFORMATION

(1) There shall be freedom of thought, speech, expression and opinion, including a free press, which shall report and comment fairly and respect the right to reply.

NOTE: Should there be a qualification on honest and fair reporting and comment, or would this appear to open the way for impinging unduly on freedom of the press?

(2) All men and women shall have the right to assemble peacefully and without arms, and to submit petitions for the redress of grievances and injustices.

(3) All men and women shall be entitled to all the information necessary to enable them to make effective use of their rights as citizens, workers or consumers.

#### Article 5 RIGHTS OF ASSOCIATION, RELIGION, LANGUAGE AND CULTURE

## Freedom of Association

(1) There shall be freedom of association, including the right to form and join trade unions, religious, residents, students, and social and cultural bodies, and to form and participate in non-governmental organisations.

(2) Legislation shall provide for the right of such associations to be heard in appropriate cases before any action is taken or measures proposed by any public or private body which could directly affect the interest of members of the association.

NOTE: This is an entirely new constitutional provision designed to give some measure of protection to organs of civil society, such as religious, cultural or language bodies, residents' associations or trade unions.

## Freedom of Religion

(3) There shall be freedom of worship and tolerance of all religions, and no State or official religion shall be established.

(4) The institutions of religion shall be separate from the State, but nothing in this Constitution shall prevent them from co-operating with the State with a view to furthering the objectives of this Constitution, nor from bearing witness and commenting on the actions of the State.

(5) Places associated with religious observance shall be respected, and no-one shall be barred from entering them on grounds of race.

## Language Rights

(6) The languages of South Africa are, in alphabetical order Afrikaans, English, Ndebele, Pedi, Sotho, Swati, Tsonga, Tswana, Venda, Xhosa and Zulu.

NOTE: This proposal has been widely commented on. Many countries do not have an official language or official languages. In some countries, such as Ireland, the official language is hardly ever used, though its existence has considerable meaning for the inhabitants. We feel that language rights should be general, so that languages presently discriminated against shall have a higher status without downgrading English and Afrikaans. Sub-section 9 is intended to deal in a practical way with the practical difficulties associated with multi-lingualism. The essence will be to tailor solutions to concrete situations and give great weight to choice and voluntary agreement in the context of acknowledging basic rights.

(7) The State shall act positively to further the development of these languages, especially in education, literature and the media, to engender the respect for different languages and to prevent the use of any language or languages for the purpose of domination or division.

NOTE: The question of providing proper translation services as well as of encouraging multi-lingualism becomes urgent.

(8) When it is reasonable to do so, one or more of these languages may be designated by the National Parliament as the language to be used for legislation or any other defined purposes at the national level or in any region or area where it is widely used.

(9) Subject to the availability of public and private resources, and limitations of reasonableness, primary and secondary education should wherever possible be offered in the language or languages of preference of the students or their parents.

(10) The State shall promote respect for all languages spoken in South Africa.

Creative Freedom

(11) There shall be freedom of artistic activity and scientific enquiry, without censorship, subject only to such limitations as may be imposed by law in accordance with principles generally accepted in open and democratic societies.

#### The Right to Sporting, Recreational and Cultural Activities

(12) Sporting, recreational and cultural activities shall be encouraged on a non-racial basis, drawing on the talents and creative capacities of all South Africans, and autonomous organisations may be established to achieve these objectives.

#### Article 6 WORKERS' RIGHTS

(1) Workers shall have the right to form and join trade unions and regulate such unions without interference from the State.

(2) Workers shall be free to join trade unions of their choice, subject only to the rules of such unions and to the principles of non-discrimination set out in this Constitution, and no worker shall be victimised on account of membership of a union.

(3) The right to organise and to bargain collectively on any social, economic or other matter affecting workers' interests, shall be guaranteed.

(4) In the furtherance of these rights, trade unions shall be entitled to reasonable access to the premises of enterprises, to receive such information as may be reasonably necessary, and to deduct union subscriptions where appropriate.

(5) No law shall prevent representative trade unions from negotiating collective agreements binding on all workers covered by such agreements.

(6) Workers shall have the right to strike under law in pursuance of their social and economic interests subject to reasonable limitations in respect of the interruption of services such as would endanger the life, health or personal safety of the community or any section of the population.

(7) Workers shall have the right to peaceful picketing, subject only to such reasonable conditions as would be acceptable in a democratic society.

(8) Trade unions shall have the right to participate in lawful political activities.

(9) Trade unions shall have the right to form national federations and to affiliate to international federations.

(10) Employers shall be required by legislation to provide a safe and clean work environment that respects the dignity of the workers, and to offer reasonable pay and holidays.

(11) There shall be equal pay for work of equal value, and equal access to employment, training and advancement.

(12) The State shall make provision by way of legislation for compensation to be paid to workers injured in the course of their employment and for benefits to be paid to unemployed or retired workers.

NOTE: It has been argued that a simple clause would be better guaranteeing trade union autonomy, the right of collective bargaining and the right to strike. By putting in extensive clauses, it is said, we are shifting workers' rights from their base in industry and from being subject to the industrial courts, to the constitutional court, which is far more likely to favour pro-employer nineteenth century ideas of freedom of contract. While there is obviously merit in this argument, we feel it can be addressed by ensuring that in industrial questions judges of the Industrial Court participate alongside the other judges. The whole question of the relationship between workers' rights in the Bill of Rights, a Workers' Charter and a possible Industrial Code embodied in legislation, needs to be looked at globally.

Article 7 WOMEN'S RIGHTS

(1) Men and women shall enjoy equal rights in all areas of public and private life, including employment, education and within the family.

(2) Legislation may provide for reproductive rights, and rights associated with child-birth and child-raising shall be respected.

NOTE: See Note to Article 2. This is an important question that has to be handled in a democratic way, recognising a pluralism of opinions, and with as much sensitivity as possible. The implication of the above formulation is to guarantee child-birth and child-raising rights, and to permit but not to require legislation dealing with reproductive rights, especially rights relating to the control of fertility.

#### Article 8 GENDER RIGHTS

(1) Discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.

(2) Legislation shall provide remedies for oppression, abuse, harassment or discrimination based on gender or sexual orientation.

(3) Educational institutions, the media, advertising and other social institutions shall be under a duty to discourage sexual and other types of stereotyping.

#### Article 9 DISABLED PERSONS

(1) There shall be no discrimination against disabled persons.

(2) Legislation shall provide for measures to promote the progressive opening up of employment opportunities for disabled men and women, the removal of obstacles to the enjoyment by them of public amenities and their integration into all areas of life.

NOTE: This addition is in line with recommendations by the Disabled People of South Africa, which is actively promoting discussion amongst disabled people on their future constitutional rights, and which points out that there are nine million disabled persons in our country.

#### Article 10 CHILDREN

(1) All children shall have the right to a name, to health, to security, education and equality of treatment.

(2) The State shall, to the maximum of its available resources, seek to achieve progressively the full realisation of these rights.

(3) No child shall suffer discrimination or enjoy privileges on the grounds of race, colour, gender, language, creed, legitimacy or the status of his or her parents.

(4) In all proceedings concerning children, the primary consideration shall be the best interests of the child.

(5) Children are entitled to be protected from economic exploitation and shall not be permitted to perform work that is likely to be hazardous or harmful to their education, health or moral well-being.

(6) It shall be unlawful to oblige children to work or perform services for the employers of their parents or other family members.

INTRODUCTORY NOTE TO THE FOLLOWING ARTICLES:

While the basic thinking of the Articles on social, economic and property rights remains the same, the formulations in these areas have been substantially re-worked. The main difference has been to insert an entirely new section on land rights. Coupled with this is a formulation on property rights which gives greater emphasis to the protection of personal possessions.

At the same time, the difficult question of how to give meaningful protection to social or so-called second generation rights, has been dealt with by making their presentation more compact, and spelling out in the Enforcement section how they should be made effective.

#### Article 11 SOCIAL, EDUCATIONAL AND WELFARE RIGHTS

(1) All men, women and children have the right to enjoy basic social, educational and welfare rights.

(2) Legislation shall ensure the creation of a progressively expanding floor of minimum rights in the social, educational and welfare spheres for all in the country.

(3) Such legislation shall take into account national priorities, the availability of resources and the capacity of the beneficiaries of such rights to contribute towards the costs involved.

(4) In order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extension of legislation and minimum standards from area to area.

#### Freedom from Hunger, the Right to Shelter and the Right to Work

(5) Special attention shall be paid to securing freedom from hunger, reducing and where possible eliminating homelessness, unemployment and illiteracy, and to providing basic utilities, such as water, electricity and waste disposal for all.

## Right to Education

(6) Education shall be free and compulsory up to the age of sixteen, and provision shall be made for facilitating access to secondary, vocational and tertiary education on an equal basis for all.

(7) Education shall be directed towards the development of the human personality and a sense of personal dignity, and shall aim at strengthening respect for human rights and fundamental freedoms and promoting understanding, tolerance and friendship amongst South Africans and between nations.

## Right to Health

(8) A comprehensive national health service shall be established linking health workers, community organisations, state institutions, private medical schemes and individual medical practitioners so as to provide hygiene education, preventative medicine and health care delivery to all.

## Right to a Minimum Income and Welfare Rights

(9) Comprehensive schemes of national insurance, funded by general revenue, contributions or such other sources as may be appropriate, shall be established to guarantee the furnishing of old-age pensions, family income benefits, superannuation payments, compensation for industrial injury and disease, unemployment benefits, child benefits and such other welfare entitlements as citizens in a modern state may expect.

NOTE: Normally in a country as developed as South Africa, it would not be necessary to spell out the different forms of social security that would have to be provided. Because the limited forms of welfare started during World War 2 were scrapped by apartheid, we feel it necessary to specify the various schemes so that people understand what is meant by social security.

## Article 12 LAND AND THE ENVIRONMENT

(1) The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.

(2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

#### Rights to Land

(3) South Africa belongs to all who live in it.

(4) Access to land or other living space is the birthright of all South Africans.

(5) No-one shall be removed from his or her home except by order of a Court, which shall take into account the existence of reasonable alternative accommodation.

(6) Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure,

(7) Legislation shall provide for the establishment of a tribunal for land claims which shall have the power to adjudicate upon land claims made on legal or equitable grounds, and in particular shall have:

a) the power to order the restoration of land to people dispossessed by forced removals, or where appropriate to direct that compensation be paid, or other suitable acknowledgment be made, for injury done to them;

b) the power to award particular portions of land, or rights to land, to such claimants, where there are special circumstances arising out of use, occupation or other similar grounds, which make it equitable for such an award to be made.

(8) Legislation shall also make provision for access to affordable land to be given as far as possible, and with due regard to financial and other resources available to the state, to those historically deprived of land and land rights, or deprived of access to land by past statutory discrimination.

(9) All such legislation shall guarantee fair procedures and be based on the principle of achieving an equitable balance between the public interest, including the above objectives, and the interests of those whose existing titles might be affected.

(10) Any redistribution of land or interest in land required to achieve the above objectives shall be subject to just compensation which shall be determined according to the principle of equitable balance between public interest and the interest of those whose existing titles might be affected.

(11) In the case of a dispute regarding compensation, provision shall be made for recourse to an independent tribunal, with an appeal to the courts.

(12) All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not otherwise owned at the time of coming into being of this Constitution, shall be vested in the state acting as trustee of the whole nation.

(13) The State shall have the right to regulate the exploitation of all natural resources, grant franchises and determine royalties subject to payment of just compensation in the event of interference with any existing title, mining right or concession.

NOTE: Do the above provisions cover forced removals under Group Areas Legislation?

#### Environmental Rights

(14) All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.

(15) In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular:

prevent and control pollution of the air and waters and degradation and erosion of the soil;

have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;

promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

ensure that long-term damage is not done to the environment by industrial or other forms of waste;

maintain, create and develop natural reserves, parks and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

(16) Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

(17) The law shall provide for appropriate penalties and reparation in the case of any damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.

## Article 13 PROPERTY

(1) All South Africans shall, without discrimination, have the right to undisturbed enjoyment of their personal possessions, and, individually, in association or through lawfully constituted bodies, be entitled to acquire, hold or dispose of property.

(2) The content and limits of these rights and the rights to inheritance, shall be determined by law.

(3) Property rights impose obligations and their exercise should not be in conflict with the public interest.

(4) The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

(5) Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

(6) In the case of a dispute regarding compensation, provision shall be made for recourse to a special independent tribunal, with an appeal to the Courts.

(7) Legislation on economic matters shall be guided by the principle of encouraging collaboration between the public, private, co-operative, communal and small-scale family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.

NOTE: This kind of clause would fit well into a section called Directives of State Policy. For present purposes we leave it here. There is much argument about whether principles governing economic life should be in a constitution at all. If there is strong insistence on having some constitutional reference, then we would favour a balanced clause such as the above.

(8) The above provisions shall not be interpreted as impeding legislation such as might be deemed necessary in a democratic society with a mixed economy which may be adopted with a view to providing for the regulation or control of property or for its use or acquisition by public or para-statal authorities in accordance with the general interest, or which is aimed at preserving the environment, regulating or curtailing cartels or monopolies or securing the payment of taxes or other contributions or penalties.

NOTE: Reference to a mixed economy may be unnecessarily provocative both to those who favour an extensive free market and those who wish for considerable state intervention. It is not normal to have any constitutional prescription on either issue.

(9) This Article shall be read subject to and in harmony with the provisions of Article 12.

#### Article 14 AFFIRMATIVE ACTION

(1) Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.

(2) Any action taken in terms of the above shall not be deemed to contradict the principle of equal rights for all South Africans as set out in Article 1.

NOTE: The phrasing in the original text was interpreted to mean that the principle of affirmative action would be so powerful as to override all personal rights and freedoms as well as to supersede the specific provisions of the property clauses. The new formulation removes any ambiguity on the subject, and makes it clear that its ambit is to supplement and strengthen the equality clause, not to override other provisions in the Bill of Rights. The property clause has special provisions dealing with affirmative action in relation to land. The following Article deals with special measures that have to be taken to remove inequality.

#### Article 15 POSITIVE MEASURES

NOTE: The word "affirmative action" is used in this document only to deal with cases where in order to overcome past discrimination special support is given to black persons and women. Article 14 makes it clear that such kind of intervention aimed at achieving real equality shall not be regarded as unconstitutional, even if it expressly takes account of race or gender. Article 15 goes beyond merely permitting certain kinds of activity. It actually requires the taking of steps to overcome the imbalances in our society created by apartheid and to promote non-racism and non-sexism.

(1) In its activities and functioning, the State shall observe the principles of non-racialism and non-sexism, and encourage the same in all public and private bodies.

(2) All benefits conferred and entitlements granted by the State shall be distributed on a non-racist and a non-sexist basis.

(3) The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, gender or creed.

(4) With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult,) degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.

(5) All organs of the State at the national, regional and local levels shall pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa.

(6) Such policies shall include the implementation of programmes aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service according to the principles of representativity, competence, impartiality and accountability.

(7) In taking steps to correct patterns or practices of discrimination, special attention shall be paid to rectifying the inequalities to which women in South Africa have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation.

(8) Legislation may be enacted requiring non-governmental organisations and private bodies to conduct themselves in accordance with the above principles.

Article 16 LIMITATIONS

(1) Nothing in the Constitution shall be interpreted as implying for any group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Constitution, or at their limitation or suppression to a degree other than is authorised by the Constitution itself.

(2) Nothing in this Constitution shall be interpreted as impeding the right of the State to enact legislation regulating the manner in which fundamental rights and freedoms shall be exercised, or limiting such rights, provided that such regulation or limitation is such as might generally be deemed necessary in an open and democratic society.

(3) Any restrictions permitted under the Constitution to fundamental rights and freedoms shall not be applied to or used as a cover for any purpose other than that for which they have been expressly or by necessary implication authorised.

(4) Any law providing for any regulation or limitation of any fundamental right or freedom shall:

be of general application;

not negate the essential content of the right, but simply qualify the way that right is to be exercised or the circumstances in which derogation from the right is permitted;

as far as practicable, identify the specific clauses of the Constitution relied upon for the limitation of the right and the specific clauses of the Constitution affected by the legislation;

specify as precisely as possible the exact reach of the limitation and the circumstances in which it shall apply.

NOTE: These provisions follow the basic format of limitation clauses used in the European Convention of Human Rights and other similar documents. A general clause like this is needed so as to avoid cluttering up the Bill of Rights with detailed exceptions to each and every clause. Thus, it would be inconvenient to have to spell out such generally accepted limitations on freedom of speech as restrictions on reporting the names of minors in court proceedings, or on speech designed to put pressure on judges during a trial.

Article 17 ENFORCEMENT

## General

(1) The terms of the Bill of Rights shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons.

(2) The fundamental rights and freedoms contained in this Bill of Rights shall be guaranteed by the courts.

(3) Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

(4) All persons who claim that rights guaranteed them by this Bill of Rights have been infringed or threatened, shall be entitled to apply to a competent court for an order for the declaration or enforcement of their rights, or for the restraining of any act which impedes or threatens such rights.

(5) Any law or executive or administrative act which violates the terms of this Bill of Rights shall be invalid to the extent of such violation, save that the court shall have the discretion in appropriate cases to put the relevant body or official on terms as to how and within what period to remedy the violation.

## Constitutional Court

(6) Provision shall be made for the establishment of a Constitutional Court.

NOTE: We favour a Constitutional Court which will be representative and newly created. We do not support the idea of simply making it a section of the existing Appellate Division. Should this point be made here, or does it belong in the part of the Constitution dealing with the judiciary?

## Human Rights Commission

(7) Parliament shall establish by legislation a Human Rights Commission to promote general observance of the Bill of Rights and in particular to help enforce the right to non-discrimination.

NOTE: This body is conceived of as having the functions similar to those of agencies, boards or commissions established in countries like the USA, the UK and Australia to secure compliance with anti-discrimination legislation.

(8) Such Commission shall have the right to establish agencies for investigating patterns of violation of any of the terms of the Bill of Rights and for receiving complaints, attempting conciliation and bringing proceedings in court where appropriate, with special attention to violation of the principles contained in Article 1.

(9) The Commission shall monitor proposed legislation with a view to reporting to Parliament on its potential impact on the realisation of the rights set out in the Bill of Rights.

(10) The Commission shall also have the right to create agencies to monitor progress being made in the materialisation of basic social, educational and welfare rights, report on and make proposals for the removal of impediments to their achievement, and require the furnishing to Parliament, regional and local authorities and to the public at large of all such information as would assist in bringing about their realisation.

(11) The Courts shall enforce such social, education and welfare rights as are established by legislation, or identified by the Constitutional Court through interpretation of the Constitution and shall pay due regard to social, educational and welfare rights when considering the interpretation of statutes, the validity of subordinate legislation and the reasonableness of administrative actions.

(12) Where justice and the achievement of the objectives of the Bill of Rights so require, the state or any private body or individual may be restrained by the Courts from doing anything which interferes with or reduces enjoyment of these rights or impedes their realisation.

NOTE: This is a form of making social rights justiciable. The courts are given the power to restrain interference with these rights (for example, bulldozing people's houses). They are sometimes referred to social rights in the negative sense, that is, that nothing may be done to diminish them, even though the courts might not have the power to order positive rights, say, that homes and jobs be provided.

Ombud

(13) With a view to ensuring that all functions and duties under the Constitution are carried out in a fair way with due respect for the rights and sentiments of those affected, the office of Ombudsman) shall be created.

NOTE: In Norway, the country that gave us the institution, the person is now called Ombud and not Ombudsman and we follow suit.

(14) The Ombud shall be appointed by the State President subject to confirmation by the Senate.

(15) The Ombud shall be appointed for a term to be determined by Act of Parliament, and may only be removed by the President, acting on the advice of the Senate, on grounds of gross misconduct or mental incapacity.

(16) The Ombud shall be independent in the carrying out of his or her functions and shall serve in a full-time capacity and may open offices in different parts of the country.

(17) The Ombud shall receive and investigate complaints from members of the public concerning abuse of power or unfair, insensitive, capricious, harsh, discourteous or unduly delayed or discriminatory treatment of any person by any official of government at national, regional or local level, or any attempt by such official to extort benefits or corruptly to receive favours.

(18) In accordance with his or her findings, the Ombud may initiate legal proceedings, refer the matter for prosecution, negotiate a compromise, issue a public communication, or make a report to the department or organ concerned containing recommendations with a view to remedying the improper

conduct, preventing repetition, and, where appropriate, making amends, including compensation.  
Jurisdiction

(19) Recourse to the Human Rights Commission or to the Ombud shall not oust the jurisdiction of the courts to hear any matter.

#### Article 18 MEASURES FOR CONTROL AND ACCOUNTABILITY DURING A STATE OF NATIONAL DEFENCE OR EMERGENCY

(1) If there is a threat to the sovereignty of South Africa, which in the opinion of the President calls for such a declaration to be made, the President may by Proclamation declare that a state of national defence exists in South Africa.

(2) At a time of national disaster, or grave public emergency, or danger threatening the life of the nation or the democratic constitutional order and if the ordinary laws of the land are not sufficient to meet the exigencies of such national disaster, public emergency or danger, the President may, by Proclamation, declare that a state of emergency exists in South Africa.

#### Article 19 PROCLAMATION OF DEFENCE AND EMERGENCY MEASURES

(1) When a state of national defence or a state of emergency exists, the President may, by Proclamation, enact defence or emergency measures which are necessary for the protection of the sovereignty of South Africa, national security, or public safety or for the defence of the Constitution.

(2) Defence and emergency measures shall have the force of law and subject to Articles 20, 21, 22, 23, may repeal, amend or suspend the operation of any existing law, including certain provisions of Chapter 2 of the Constitution. Such measures may be proclaimed for the whole of the country, or for any part of it.

#### Article 20 SUPERVISORY POWER OF NATIONAL ASSEMBLY

(1) A declaration of a state of national defence or of a state of emergency shall cease to have effect if it is not ratified within fourteen days by a resolution of the National Assembly. If the National Assembly is not in session when such a declaration is made, the President shall immediately convene a special session of the National Assembly to address this issue.

(2) A state of national defence that has been ratified by the National Assembly under Sub-article (1) shall continue until peace has been declared by the President.

(3) A state of emergency which has been ratified by the National Assembly under sub-article (1) shall continue until terminated by the President: provided that if it has endured for a period of six months from the date of proclamation, it will automatically lapse unless the National Assembly by a resolution taken prior to the expiration of the six month period, approves its extension for a further six months or a shorter period. Any prolongation of the state of emergency thereafter, shall be limited to successive periods of not more than six months which shall on each occasion require the approval of a resolution of the National Assembly passed by a two-thirds majority.

(4) During the period of any state of emergency or state of national defence -

While the National Assembly is in session, the President shall report to it at intervals of not more than one month about the operation of the special emergency and national defence measures and the National Assembly shall receive and promptly consider such reports;

if the National Assembly is not in session, the President shall convene special sessions, of the National Assembly at intervals of not more than three months from the date of the declaration of the state of emergency or state of national defence or from the date on which a report by him on the operation of the special emergency measures was last made to the National Assembly, for the purpose of receiving and considering a report from him about the operation of the special emergency measures and to conduct such other business as the National Assembly may decide.

(5) The National Assembly may at any time by resolution revoke the declaration of emergency or state of defence or restrict the area of their operation or repeal or amend the terms of any emergency measures.

(6) During the period of any state of emergency the power of the President to dissolve the National Assembly and the Senate may not be exercised unless a resolution of the National Assembly is passed authorising him to do so. If the President is required by the Constitution or the electoral law to call for

new elections during an emergency, then such elections shall be held as expeditiously as possible in accordance with the provisions of the existing law and the new National Assembly shall be convened without delay.

#### Article 21 NON-DEROGABLE RIGHTS

Neither the President nor the National Assembly shall have the power to pass a defence or an emergency measure which

(1) derogates from or suspends the rights and freedoms guaranteed by the Bill of Rights other than those referred to in Articles 2(9) [forbidding detention without trial], (10) [no arrest or detention except for trial on criminal charge], (11) [informed of charge, right to legal representation and brought to court timeously], (12) [right to bail], (13) [right to public and fair trial before independent court], (31) [no search or entry to property without reasonable cause], (32) [interference with private communication, spying etc], and (33) [freedom of movement, passport, right to leave and enter country], Article 4 [freedom of speech, assembly and right to information], Article 13(1) [peaceful possession of property and goods], and Article 12 (14), (15), (16) and (17) [environmental rights], provided that the derogation where permissible shall not be greater than is necessary for the purpose of national defence or the emergency; or

(2) suspends or derogates from the provisions of any other chapter of the Constitution; or

(3) establishes special courts or tribunals, other than the review board referred to in Article 21; or

(4) make provision for prospective indemnities; or

(5) is contrary to international law or international obligations.

#### Article 22 DETENTION IN TIMES OF NATIONAL DEFENCE OR EMERGENCY

Where any persons are detained without trial in terms of any defence or emergency measure, the following provisions shall apply:

(1) They shall immediately be informed of the reason for their detention, an adult family member or friend nominated by the detainee shall promptly be notified of the detention and there shall be prompt publication in the Gazette of their names and the legal provisions under which they are held;

(2) They shall have access to a legal representative of their choice at all reasonable times.

(3) Their detention shall be reviewed within one month of their detention, and thereafter if they remain in detention at intervals of not less than three months, by a review board presided over by a judge of the Supreme Court, which shall have the power to order their release from detention if satisfied that it is not reasonably necessary for their detention to be continued for the purpose of national defence or the emergency.

(4) Detainees shall be given opportunity to make representations to the review board in such form as the board may consider to be desirable in the circumstances, taking into account the public interest and their interests, and for that purpose shall be given access to such information as the board may consider to be necessary, with due regard to such interests, and shall also be entitled to be represented before the board at the time when their cases are to be considered by the board.

(5) The decision of the review board shall be made known to the detainee and to the adult family member or friend nominated by the detainee.

(6) The right of the detainee to question the legality or the conditions of detention by recourse to judicial review shall not be affected by the provisions hereof.

Article 23 EXPROPRIATION AND COMMANDEERING OF PROPERTY IN TIMES OF NATIONAL DEFENCE OR EMERGENCY

(1) Notwithstanding the provisions of Article 14 (4), (5) and (6) hereof, a defence or an emergency measure may authorise the expropriation or commandeering of any property for the purposes of national defence or the emergency;

(2) Such defence or emergency measure shall provide:

that the property commandeered, unless it has been consumed for the purpose for which it was commandeered, be restored to the person from whom it was taken when it is no longer required for the purpose of national defence or the emergency;

that compensation shall be paid for property that is expropriated, or property which, having been commandeered, is destroyed or damaged prior to its restoration to the person from whom it was taken; and

that the compensation payable shall be assessed with due regard to the needs and interests of the State which were served by the expropriation or commandeering, and the interests of the person who has suffered loss as a result of the loss of or damage to such property.

(3) The defence or emergency measures may provide that compensation shall not be payable for the temporary loss of the use of property which has been commandeered in terms of such measures, unless the person from which the property was taken used or intended to use the property for the subsistence of his or her family, or for the purpose of producing an income, in which event the compensation payable shall be assessed in accordance with the principles set out in sub-article (2) hereof, provided that the compensation shall in no event be more than is strictly necessary to compensate the persons concerned for the loss they have actually suffered as a result of the property having been commandeered..