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CHAPTER 2 OF THE REPUBLIC OF SOUTH AFRICA CONSTITUTIONAL BILL:
A COMPARISON WITH THE INTERIM CONSTITUTION

by

Members of the Centre for Applied Legal Studies D M Davis (ed)

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CHAPTER 2 OF THE REPUBLIC OF SOUTH AFRICA CONSTITUTION BILL:

A COMPARISON WITH THE INTERIM CONSTITUTION

by **Members of the Centre for Applied Legal Studies**

D M Davis (ed)

July 1996

OCCASIONAL PAPER 25

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA BILL, 1996

INTRODUCTION

On 8 May 1996, the Constitutional Assembly approved the text of the Constitution of the Republic of South Africa. In the event that this text is certified by the Constitutional Court as being in compliance with the constitutional principles contained in Schedule 4 of the 1993 Constitution, it shall become the constitution of our country.

This paper, which has been prepared by members of the Centre for Applied Legal Studies, attempts to evaluate the differences between the Bill of Rights contained in the 1993 Constitution and Chapter 2 of the 1996 Bill.

It does not purport to be a comprehensive legal commentary on Chapter 2 of the 1996 Constitution but rather to provide a basis for comparison of those human rights guaranteed in the interim document and those, which pending certification, will become the cornerstone of democracy in South Africa.

Thanks are thus due to the following members of the Centre who contributed to this booklet: Cathi Albertyn, Joana Birenbaum, Matthew Chaskalson, Carole Cooper, Dennis Davis, Ian Dutton, Shadrack Gutto, Lene Johannessen, Jonathan Klaaren, Likhapha Mbatha, and in particular to Ms Tahera Timol for having typed the bulk of this manuscript and ensured that it was in a format which was ready for publication .

D M DAVIS
Director
1 July 1996

8. APPLICATION

8. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.

(2) A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right.

(3) In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply or, where necessary, develop the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1).

(4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

Pursuant to the Constitutional Court decision in Du Plessis & Others v De Klerk & Others (unreported decision of the Constitutional Court Case No CCT 8/95, 15 May 1996) the Interim Constitution has been held to apply to all law involving an organ of government but not to law invoked by one private litigant against another. The Court also held that although Chapter 3 applied to the common law, this only extended to governmental acts and omissions. Accordingly a private litigant could rely on Chapter 3 to argue that the role of the common

law was unconstitutional but only in a dispute with an organ of government.

Section 8 now leaves little room for ambiguity. Unlike the Interim Constitution, the 1996 Bill of Rights will apply not only to the legislature and the executive but also to the judiciary. It also seeks to bind natural and juristic persons although this provision is limited by the proviso that the Bill of Rights will only bind natural and juristic persons, if applicable, after taking into account the nature of the right in question and of any duty imposed by such right.

This will require a court to treat each case on its own merits and decide whether the right which allegedly was breached by private action should be given a horizontal interpretation. Notwithstanding these provisos, however, it is clear that Chapter 2 now applies to the following circumstances:

a) any dispute brought by a private litigant against an organ of government irrespective of whether such governmental act or omission is in reliance on the common law or statute;

b) a dispute involving private litigants where the former alleges that the latter is unable to rely on a principle of common law to justify his or her action. Thus in a case such as Du Plessis v de Klerk (supra) an action for defamation launched by a private individual against a newspaper can be met by the constitutional defence that every person shall have the right to freedom of speech and expression;

c) a dispute between two private litigants where the alleged action or omission is not grounded on a principle of common law. Thus if A refuses to hire B who submits that A's hiring policy is in breach of s 9, (the equality provision) the matter is constitutionally

relevant even though A's refusal to hire B is not itself based directly on the principle of common law.

On the interpretation given to the scope of the Interim Constitution in Du Plessis v De Klerk, the inclusion of the word 'judiciary' would mean that the Bill of Rights applies to all law and to all parties who invoke the law. Only where the law is not invoked (that is in category (c) situations) does the court have a discretion to apply the Bill of Rights.

Owing particularly to this third category, namely where the law is undefined, s 8(3) enjoins a court to develop a common law in areas where it is presently silent. In short, the court would in a case of hiring policy have to develop the common law to provide a rule which would govern an employer's decision to hire employees. On its own this could have a number of unintended consequences. Assume for example that an airline refuses to hire people over the age of 55. On the strength of the equality provision, a potential employee could argue that such a policy is in breach of discrimination on the grounds of age. If the doctrine of fairness does not curtail the scope of the protection, s 8(3)(b) enjoins the court to develop the common law so as provide for a rule which would justify the limitation of equality in the circumstances of this case.

The courts will be heavily involved in the development of all law particularly when it comes to constitutional causes of action which fall outside the present ambit of legislation and common law. As the section refers to the Constitution applying to private relations where applicable, the Courts will have a large measure of discretion. The question arises as to whether the Constitutional Court now becomes the highest Court for all cases given the wide scope of the Constitution.

The further question arises as to the possibility of an award of damages in situations where a constitutional right is breached. In interpreting a provision of the New Zealand Bill of

Rights which also seeks to bind the judiciary, the New Zealand Court of Appeal has held that:

> 'We would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed. In a case such as the present the only effective remedy is compensation.' (Simpson v Attorney General (Baigent's case) (1994) 3 NZLR 667 at 676).

Much of the difficulty with respect to the horizontal application of the Bill of Rights in the area of equality could well be reduced by the introduction of a Civil Rights Act and an Anti Discrimination Act of a kind which operates in many countries and which is mandated by the Constitution.

9. THE EQUALITY GUARANTEE

9. **(1)** Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more

grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

1. What is Equality?

Equality together with freedom and dignity are the governing principles of the Constitution.

"Equality" does not have one singular meaning and protection of equality rights can take many different forms. Section 9 of the final Constitution can be seen to protect formal equality and substantive equality, equality of opportunity and equality of result. It is therefore necessary to briefly define these concepts of equality.

1.2 Formal and Substantive Equality

The question underlying the distinction between formal and substantive equality asks: "is equality achieved by treating everyone the same, or is equality in fact achieved by recognising that not everyone is the same and that, therefore, same treatment can in fact result in severe inequalities?" The formal notion of equality is one of sameness of treatment. Formal equality assumes that the existing society is fair and just and that difference in treatment means inequality in treatment. It ignores social and economic disparities between groups and individuals. Substantive equality, on the other hand, examines differences between individuals and groups. Substantive equality challenges the existing distributions, which are often preserved under formal equality, and requires that the sources of disadvantage that cause disparities between such groups and individuals in South African society be rectified. The difference between formal and substantive notions of equality can best be illustrated as follows: A seemingly neutral

government rule which requires all citizens to fill out a job application on the premises of employment seems to treat all prospective applicants equally. Everyone in the "class" or "group" of prospective applicants is equally subject to the rule. However by not accounting for substantive differences between prospective applicants the rule can result in inequalities. What if an applicant has a broken arm and cannot write and needs to take the form home for assistance? What if the applicant is physically disabled and relies on a special voice activated computer to complete application forms? What if the application form requires two hours to fill out and many women applicants cannot leave their child care responsibilities for that amount of time? Equal treatment of these individuals, therefore, results effectively in inequality, making it impossible for certain individuals to apply for the job. In this example, it is assumed that the rule does not screen applicants for a job related requirement (ie. literacy, can they fill the application form out on their own).

1.2 Equality of Opportunity and Equality of Result

The example illustrates the distinction between equality of opportunity and equality of result. Equal treatment of all job applicants can create an inequality of opportunity. Certain prospective applicants are denied the opportunity of applying for the job. An approach based upon substantive equality would require that the seemingly neutral accommodate differences: it would require that the mother or the individual with the broken arm be permitted to take the application form home. It would insist that all applicants have an equal opportunity of applying for the position.

2. Changes from the Interim to the Final Constitution - What will be the impact?

2.1 Equal "benefit" of the law

Section 8(1) of the Interim Constitution guarantees that "everyone shall have the right to equality before the law and to

equal protection of the law". Section 9(1) of the Final Constitution has added "equal benefit of this law" to the list. The addition of "equal benefit of the law" is likely to have a minor impact on the interpretation of s 9(1) since the concept of equal benefit should have been encompassed by equal protection and equality before the law. The Canadian experience, however, explains what kinds of judicial interpretation of equality the concept of equal benefit of the law seeks to prevent. In Canada, the addition of equal benefit of the law to the constitutional protection of equality was in response to a pregnancy benefits case wherein a complainant, Stella Bliss challenged an unemployment benefits scheme which required that all persons under the scheme be available for work while receiving benefits. (Bliss v. Attorney General of Canada (1979), 92 D.L.R (3rd) 417). Bliss, who required the benefits because of childbirth, was, of course, unavailable for work. The Supreme Court of Canada dismissed the claim on the grounds that "equality before the law" ensured that the law did not treat any one group in society more harshly than another, but did not require that additional benefits be provided for a certain class, here the class of pregnant women. The court did not acknowledge that excluding women from a particular set of benefits constitutes discrimination on the basis of sex. The addition of "equal benefit of the law" in the s 9 might prevent the use of disingenuous distinction between unequal distribution of benefits and unequal allocation of burdens in South African society. Both forms of unequal treatment can violate a guarantee of equality before the law and equal protection of the law, as well as the guarantee of equal benefit of the law.

2.2 The affirmative action provision

Section 9(2) of the Final Constitution and s 8(3)(a) of the Interim Constitution both address the means the government may use to fulfil it's obligations under the equality guarantee. The wording of s 9(2), however, is positive whereas the wording under s 8(3)(a) is negative. Section 9(2) states that "equality includes the full and equal enjoyment of rights" and

therefore provides that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, who are disadvantaged by unfair discrimination may be taken". Section 8(3)(a) provides that the government is not precluded from "measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination". The positive wording of s 9(1), as opposed to the negative formulation of s 8(3)(a), makes it clear that affirmative action is a means of achieving equality rather than an exception to the equality guarantee. The positive wording firmly establishes substantive equality as central to the equality guarantee. The appearance of the affirmative action provision before the non-discrimination provision in the Final Constitution emphasises that the provision is part of the equality guarantee, rather than an exception to it.

2.3 The list of grounds of non-discrimination

The wording of the non-discrimination provision in the Interim Constitution is more cumbersome than the new formulation in s 9(3)of the Final Constitution. The Interim Constitution prohibited direct or indirect discrimination, and "without derogating from the generality of the foregoing", prohibited discrimination on the basis of a list of grounds. The Final Constitution simply prohibits direct or indirect discrimination "on one or more grounds, including...". The more cumbersome wording of the Interim Constitution was intended to prevent a restrictive approach to the listed grounds, but the openness of the list should be equally protected through the more simple language of "including".

More importantly, the list of grounds under the Final Constitution has been expanded to include pregnancy and marital status. The inclusion of pregnancy as a listed ground provides an important protection for women since, as discussed under the explanation of "equal benefit of the law", discrimination against women on the basis of reproduction has been overlooked in other jurisdictions. Different treatment on

the basis of pregnancy has been held, for example in the United States, not to violate equality since the biological differences between men and women have been seen to justify different treatment. (See Geduldig v Aiello (1973) 417 US 484, where the court held that pregnancy based discrimination was not sex-discrimination because "the (impugned) programme divides potential recipients into two groups - pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes" (at 496). This ignores the fact, of course, that only women become pregnant and only women suffer the social consequences of pregnancy.) The inclusion of pregnancy in the listed grounds in South Africa constitutionally recognises that, although women and men are biologically different with respect to reproduction, the social consequences of pregnancy which profoundly impair women's ability to participate as full and equal citizens in South African society, are not biologically determined. The inclusion of pregnancy in the listed grounds recognises that eliminating the socially constructed burdens associated with women's child-bearing role is essential to women's equality.

The inclusion of marital status as a listed ground could have a significant effect on the kinds of cases that will be brought before the Court. Non-discrimination on the basis of marital status affects the rights of gays and lesbians and the rights of unmarried women and men as spouses and as unmarried mothers and fathers. Present South African law privileges heterosexual marriage over other forms of family groupings. Hence the protection of equality on the basis of marital status will move South Africa in the direction of recognising, legitimating and supporting a more diverse range of family forms. In addition, together with the rights to custom and religion, the equality provision will form part of the basis for a more comprehensive and coherent legislative recognition of customary unions.

The inclusion of marital status as a listed ground, in addition to the prohibition of discrimination on the basis of sex and gender, accounts for the many different ways in which

women experience discrimination. All three categories affect women in specific ways, since women experience discrimination on the basis of their marital status, gender and sex. Although sex and gender are sometimes considered to be synonymous, there is value in citing these categories separately. Sex is generally understood of in biological terms and gender in psychological terms. Therefore, legislation which discriminates against women in the context of pregnancy would be a sex-based discrimination, while discrimination against men or women in the context of their parenting roles, would be gender-based discrimination. The value of the distinction between sex and gender is that it emphasizes that not all differences between men and women cab be reduced to the biological differences between them. The inclusion of both sex and gender makes it clear that it is impermissible to discriminate against men or women whether on the basis of biological features or patterns of behaviour. The inclusion of marital status is also beneficial to women since it recognises that discrimination against women can take many forms and occurs on many levels. A woman may therefore experience discrimination as a woman AND as a married woman. For example, laws which prevent married women from owning property discriminate against women (as women) in relation to men, since married men are able to own property, and discriminate against married women in relation to unmarried men and women, who are also permitted to own property.

2.4 Horizontal application

Section 8(3) of the Interim Constitution the non-discrimination provision, provides that "no person shall be unfairly discriminated against". Section 9(4) at a glance appears to be similar, but the change in wording has far reaching consequences. Section 9(4) provides that "no person shall unfairly discriminate...". This shifts the focus from a protection of the discriminated person in s 8(2) to a prohibition of discrimination from the starting point of the perpetrator of the discrimination. "No *person* shall unfairly *discriminate*". What s 9(4) means is that the non-discrimination provision has a

horizontal application: a rights-bearer can bring an action not only against the government for discrimination but against his or her fellow citizens. A horizontal application of equality rights provides a more complete protection of equality than the protection offered under the Interim Constitution since much of the discrimination that people experience occurs in relationships between citizens rather than as a result of government action. A horizontal application of equality rights means that a black citizen can take her employer to Court for racial discrimination, or a lesbian couple can take their landlord to Court for a discriminatory eviction. A horizontal application of equality rights is particularly important for women's equality since women's oppression is notoriously hidden within the private sphere. Although s 9(4) provides for horizontal application, it mandates a more concrete application thereof by means of legislation. Unlike s 32 and 33 (freedom of information and just administrative action), where provision for legislation is also envisaged, there is no similar provision whereby the formulation of s 9(4) l;apses if the legislation is not introduced within 3 years.

10. HUMAN DIGNITY

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

This right was protected in the Interim Constitution. The reason for comment, however, is that dignity has joined the principles of equality and freedom as a *leitmotif* of a Constitution. Accordingly it has become one of the governing principles by which to interpret the Constitution. A national constitution which has placed the greatest emphasis upon dignity is the German Basic Law, article 1 (1) of which provides that human dignity is inviolable. In a 1977 opinion the German Constitutional Court defined the essence of dignity as follows: 'It is contrary to human dignity to make the individual the mere tool of the state. The principle that "every person must always be an engine himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in

acknowledging him as an independent personality'. Accordingly, the German Constitutional Court has held that life imprisonment is only permissible on condition that the possibility of release is left open for 'the state strikes at the very heart of human dignity if it treats the prisoner without regard to the development of his personality and strips him of all hope of ever regaining his freedom' but the court has also warned that the meaning of human dignity may change over time. Thus it held that 'any decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity'. On the basis of this principle, the German Constitutional Court invoked the dignity clause to permit a government limitation of the artistic freedom guaranteed in the Constitution by issuing an injunction against publication of a novel impugning the memory of a deceased actor.

11. LIFE

11. Everyone has the right to life.

As this provision has not been altered from that of the Interim Constitution, it is unlikely that government will be re-able to introduce the death penalty without it being rendered unconstitutional.

12. FREEDOM AND SECURITY OF THE PERSON

12. **(1)** Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from both public and private sources;

(d) not to be tortured in any way; and

(e) not to be treated.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

1. Introduction

Section 12 of the draft Final Constitution protects the right to "freedom and security of the person." The concepts of freedom and security of the person should not be confused with personal freedom and security. Section 12 protects the human being's bodily existence, which includes emotional, psychological and mental attributes. A human being's spiritual existence will however be protected by other rights, e.g. the right to freedom of expression (Section 16) and the right to freedom of conscience, religion, thought, belief and opinion (Section 15). It is clear that the spheres of human existence protected by various rights do overlap, thus mental attributes are protected by both sections 12 and 15. The right to freedom and the right to security of person are usually interpreted as being separate rights. What are "freedom" and "security?"

2. Freedom

Comparative constitutional instruments include "liberty" instead of "freedom", but it is widely accepted that the two

concepts are interchangeable. The first issue to be decided is how broadly our courts will interpret the concept of "freedom". In the United States, the approach has been to give the term a broad meaning, and will include the right to contract, to marry, to engage in the common occupations of life, to acquire useful knowledge, to establish a home and bring up children and to worship God according to the dictates of one's conscience and generally to enjoy those privileges long recognised as essential to the orderly pursuit of happiness by free men. (Meyer v Nebraska (1923) 262 US 390 at 399). The German interpretation is more restrictive, and is understood to mean "merely the impairment of physical freedom of movement, excluding the freedom of personal development and activity." [Van Wyk et al *Rights and Constitutionalism (1996)* at 173]. It seems that the South African approach is to favour the narrower interpretation. This is because the right is a "substantive entitlement in its own right" [Van Wyk et al at 236]. "Freedom" will moreover be covered by the words "of the person" and the right will then be restricted to a person's bodily existence, as discussed above. An issue which has been the focus of much debate is whether this right includes only physical liberty or all forms of liberty. The right to "freedom" is closely related to the rights of arrested, detained and accused persons, which are dealt with in s 35. Provision is made for the circumstances in and conditions on which a person may be detained. Although arrest, detention and a criminal charge comprise important aspects of the right to freedom, they are not exhaustive. Mental and psychological aspects of the personality are also protected.

3. Bodily and Psychological Integrity

The guarantee of bodily and psychological integrity falls within the more general guarantee of freedom and security of the person. Bodily integrity is a more specific description of the kinds of interests protected under security of the person. Medical consent requirements which fall under security of the person are aimed at protecting an individual's bodily integrity. The prohibition of torture and violence also protects individuals

against violations of the bodily and psychological integrity. The protection of psychological integrity is specifically listed in order to clarify the scope of the right to freedom and security of the person. A broad and vague guarantee of 'freedom and security of the person', without any further indications of the content of the right could lead courts to a more restrictive rather than liberal interpretation of the right. It is important to have the subset of 'bodily and psychological integrity' in order to make it clear to the interpreting courts that the right to freedom and security of the person encompasses more than due process concerns. Constitutionally entrenching psychological integrity ensures that freedom and security be given the broader meaning described; it includes notions of self-development and self-determination. This understanding of freedom and security of the person is in line with other jurisdictions like Germany, which specifically protects the development of personality, and Canada and the United States whose Supreme Courts have interpreted the liberty provisions to include personality rights. In Canada, the Supreme Court in R v Morgentaler (1988), 44 D.L.R (4th) 385, although not determining expressly whether the right to security of the person extends to interests central to personal autonomy, held that the abortion legislation violated the right to security of the person since it forced a woman, upon threat of criminal sanction, 'to carry foetus to term, unless she meets certain criteria unrelated to her own priorities and aspirations' (at 402, per Dickson C.J.C.).

4. Control over the body and the right to make decisions concerning reproduction

The guarantee of security of the person is an extremely important right for the achievement and protection of women's rights. Women's subjugation in society is directly related to women's lack of control over their bodies, whether it be in the context of violence as discussed above, or the way society controls and oppresses women through women's reproductive capacity. Pregnancy in South Africa impacts on many areas of women's lives: education, employment, physical and mental health, and socio-economic status. The societal consequences

of pregnancy prevent women's full and equal participation in South African society. The right to freedom and security of the person and bodily integrity, which encompasses the right to make decisions concerning reproduction, is central to women enjoying a meaningful right to freedom.

The right to make decisions concerning reproduction is not simply concerned with women's access to abortion. Reproducing decision-making concerns the nature of sexual activity, whether the sex was consensual, the availability of sex education and contraceptives, the availability of prenatal and postnatal care and the overall social, economic and physical consequences of motherhood. It concerns sterilization and access to fertilization technologies and is affected by factors including economic, environmental, legal, political, emotional and ethical considerations.

A right to make decisions concerning reproduction would be an empty right if the government had no responsibility to ensure that the conditions for exercising that choice or decision, were not fulfilled. It cannot be argued that a woman's right to reproductive decision-making has been fulfilled if once she has 'decided' to terminate a pregnancy, abortion is either illegal or too expensive for a woman to afford. Similarly, a woman's decision to undergo a hysterectomy is not respected or protected if the government supports hospital policies which require the consent of that woman's husband before the operation will be performed. A right to reproductive decision-making must, therefore, make the result of the decision-making process real for women. It must mean that abortion will be an accessible and affordable procedure, that family planning information and contraceptives will be easily accessible and affordable, that government and society will support a woman's decision to bear a child through health care and social services, and that government and society will protect women against the forms of sexual abuse and coercion that many South African women experience.

5. Security

Section 12 of the Final Constitution contains the heading "Freedom and Security of the Person." The section contains two sub-clauses: the first confers the right to freedom and security of the person, the second confers the right to bodily and psychological integrity. As discussed above, security of the person includes bodily and psychological integrity. The concept of security includes both mental and physical integrity. Security relates to "all forms of clinical intervention or all acts which result in physical or mental psychological injury." [Van Wyk et al at 238.] The particular injunctions against "all forms of violence from both public and private sources (s 12(1)(c)), torture (s 12 (1)(d)) and cruel, inhuman or degrading treatment (s 12(1)(e)) are all specific safeguards of security of the person. Similarly, the provisions of s 12(2)(a),(b) and (c) are again specific safeguards of the broader right to security of the person.

The types of issues which will be dealt with in terms of the right to freedom and security are whether a woman has a right to an abortion, whether a terminally ill patient or a patient in a vegetative state has a "right to die", and whether people should be tested for HIV without their informed consent?

6. The right not to be tortured in any way (Section 12(1)(d)) and the right not to be treated or punished in a cruel, inhuman or degrading way

The difference between torture and cruel, inhuman or degrading treatment seems to be one of degree dependant upon the intensity of the pain suffered.

The United Nations General Assembly regards torture as having the following elements:-

1. Torture can have a punitive or any other purpose.

2. There is no "good reason" for torture.

3. Torture can be physical, mental or emotional.

4. A public official or a person acting in an official capacity must consent, acquiesce or participate in the torture. (Dinstein "The Right to Life, Physical Integrity, and Liberty" in A Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights (1981)* at 123).

The following acts have been held to comprise torture by the European Commission on Human Rights:

> Solitary confinement, isolation in a police cell without food, water or access to toilets, mock executions, threats to throw a person out of a window, the use of insulting language, rubbing the head with vomit, being forced to strip naked, being forced to be present at the torture or inhuman or degrading treatment of relatives or friends, all constitute torture because they are forms of intimidation and humiliation designed to destroy a person's will and conscience. (Denmark et al v Greece 3321-3/67; 3344/67; YB 12 bis).

Cruel punishment would consist of punishment which does not accord with the inherent dignity of human beings. Inhuman treatment would cover at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable. Degrading treatment would consist of treatment which grossly humiliates an individual or drives the person to act against their will or conscience.

14. THE RIGHT TO PRIVACY

14. Everyone has the right to privacy, which includes 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 infringed.

1. What does privacy mean?

In the context of civil rights, the right to privacy generally means a right to be free from governmental interference in one's personal life and affairs. This can include the right not to have one's property, home or possessions searched, as listed in section 13 of the current draft. It often also refers to the privacy of communications and disclosure of and access to information. Government contact need not, however, be as direct as these examples suggest. Privacy may also be invoked to challenge governmental regulation that impacts on one's private choices or personal life. In this respect, privacy concerns overlap with concerns around autonomy, dignity and control. It was this notion of privacy, a notion of a "zone" of privacy in which each individual should be "let alone" to make his or her personal decisions free of governmental regulation, which was used by the United States Supreme Court to strike down restrictive abortion legislation in the famous case of Roe v. Wade 410 US 113 (1973).

2. Privacy under the Interim and Final Constitution

The right to privacy has not substantially changed in the Final Constitution from its formulation under the Interim Constitution. The formal structuring of the right has changed in that the areas of a person's life (person, home, possessions, private communications) which are protected from unwarranted government interference are now set out under specific subsections. However, the content of the area of governmental non-interference remains substantively the same.

The change in the content of the right to freedom and security of the person in the Final Constitution will have an

impact on how the right to privacy is interpreted, or at least how it will be used in argument. The expanded formulation of freedom and security of the person under the Final Constitution to include notions of self-determination and personal development may mean that the privacy right will be relied on to a lesser extent in the pursuance of liberty rights. The broader conception of freedom and security of the person expressed under section 12 of the Final Constitution should mean that it will be unnecessary to follow the American equation of self-determination as "privacy".

It is submitted that the right to self-determination is more properly argued and placed under the right to freedom and security of the person than under the right to privacy since privacy has a conservative connotation which is absent from the right to freedom and security of the person. Traditionally, "privacy" has signified the private sphere of the home as opposed to the public sphere of the market and has been a source of women's subordination. The dichotomy between the public and the private has corresponded with stereotypical and polarised gender roles: the man's world in the marketplace is the public and the woman's world in the home is the private. The "public" sphere is conceived of as the area of legitimate governmental intervention while the "private" sphere, where autonomous individuals are assumed to interact freely and equally, should not be interfered in by government. The difficulty, of course, is that groups within society, like women and people of colour, are not free, autonomous and equal either in the public or private spheres.

Government non-interference in the private realm is seen to be "neutral". The neutrality presumed by privacy doctrine is problematic for both women and other subjugated groups in society, particularly racial groups, since government neutrality is fundamentally about preserving existing distributions (see Cass Sunstein, "Neutrality in Constitutional Law, with special reference to pornography, abortion and surrogacy) (1992) 92 *Columbia Law Review*. A protection of privacy which precludes government regulation could serve to

perpetuate the discrimination and subjugation of blacks and women in South African society. Rights to self-development and freedom are therefore better protected under a right which is initially more open to challenges to underlying societal structures, rather than a right which is founded upon a conception of governmental non-interference.

16. FREEDOM OF EXPRESSION

16. **(1)** Everyone has a right to freedom of expression, which includes-

(a) freedom of the press and other media;

(b) freedom to receive and impart information and ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

1. Introduction

Freedom of expression has been internationally recognised as one of the cornerstones of a democratic society. All major international human rights instruments as well as all major national Bills of Rights in various countries define and

guarantee the freedom of expression as a universal human right and contain provisions for the exercise of this right. (See *inter alia* Article 19 of the Universal Declaration on Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 10 of the European Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights; Article 13 of the Inter-American Convention on Human Rights; Section 2 of the Canadian Charter on Fundamental Rights; the First Amendment of the Constitution of the United States of America.)

Freedom of expression as a human right means that every individual has the right to:-

- hold opinions and to express them without fear and it includes the right of everyone;

- 'receive and impart information and ideas.'

Freedom of expression therefore entails:-

- press freedom and freedom of all media as one of its principal guarantees. Censorship is any interference with the individual or means of communication that denies these basic rights and freedoms or arbitrarily encroaches upon them.

Besides the international mechanisms that protect the right of freedom of expression, courts around the world have further entrenched the right by interpreting it as deserving of particular protection. In Palko v Connecticut 302 US 319 at 326-7 (1973), Cardozo J said:

> "(Freedom of thought and speech) is the matrix, the indispensable condition, of nearly every other form of freedom." (At 326-7)

The European Court of Human Rights has repeatedly expressed similar views, namely that-

> '(f)reedom of expression ... constitutes on of the essential foundations of a democratic society and one of the basic conditions for progress ... it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". (Handyside v UK Judgment of 7 December 1976, Series A no. 24, para.49. See also *inter alia* Lingens v Austria, Judgment of 8 July 1986, Series A no. 103 at para. 41, and Jersild v Denmark, Judgment of 23 September, Series A no. 298.)

In recent South African jurisprudence, following the introduction of the Bill of Rights in the Interim Constitution, the importance and meaning of the right to freedom of expression has been described as follows:

> "The history of liberty shows that the currency of every free society is to be found in the marketplace of ideas where, without restraint, individuals exchange the most sacred of all their commodities. If the market is sometimes corrupt or abused or appears to serve the interests of the wicked and unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature." In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all other depend; it is the freedom without which the others would not long endure. (Mandela v Falati 1994 (4) BCLR 1 (W) at 8D-F.)

With particular reference to freedom of the press it has been said:

> "(t)he role of the press in a democratic society cannot be understated. The press is in the front line of the

battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed." (Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another 1995 (2) SA 221 (T) at 227I-228A.)

2. Comparison of the Protection of Freedom of Expression in the Interim - and the Final Constitution

The new freedom of expression clause differs in substantial ways to its counterpart in the Interim Constitution. In some areas the new clause provides a more comprehensive protection of freedom of expression than the Interim Constitution, while in other areas it constitutes a serious denigration of the right.

The freedom of expression clause in the Interim Constitution guarantees the right to freedom of speech and expression. Section 16(1) of the final Constitution only speaks of the right to freedom of expression. However, 'expression' is considered to be a wider concept than 'speech' and would embrace far more than the written or spoken word; for example, it would also include symbolic acts intended to convey an idea like flag burning or wearing a symbolic armband. (Tinker v Des Moines Independent Community School District (1969) 393 US 503 and United States v O'Brien (1911) 391 US 367; Cachalia et al *Fundamental Rights in the New Constitution* (1994) 54.) Thus, the fact that the wording of the final clause has left out specific reference to 'speech' does not mean that the ambit of the clause has been limited.

The inclusion of the freedom to receive and impart information and ideas is a welcome addition to the freedom of expression clause. Section 15 did not make clear whether 'the right to gather information preparatory to its expression', was included. Without an explicit guarantee of the right to receive and impart information the right to freedom of expression, and particularly the right of the media, can be seriously restricted.

To have included the right to receive and impart information and ideas in the right to freedom of expression brings the provision more in line with a number of international human rights provision which include this aspect. (See for example Article 19 of the universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 9(1) of the African Charter on Human and Peoples' Rights (which provides every individual with the right to receive information), Article 13 of the American Convention on Human Rights and Article 10 of the European Convention on Human Rights.) It would have been desirable to have included the right to 'seek' information and ideas, as provided for in some of the international instruments, notably the International Covenant on Civil and Political Rights, which South Africa has signed.

The right to academic freedom has been strengthened by moving it from the freedom of opinion clause in the Interim Constitution to the freedom of expression clause in the final draft Constitution. It is submitted that it is a more valuable way of exercising academic freedom to express academic findings than by merely holding academic and scientific opinions.

Apart from the general limitation clause in s 36, the right to freedom of expression in s 16 contains an internal limitation clause. In other words, the right to freedom of expression is not simply subject to the general limitations clause like any other right, but in addition it is subject to its own limitations clause contained in s 16(2). This subsection provides that the right to freedom of expression does not extend to propaganda for war; incitement of imminent violence;

or advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. This main limitation of the right to freedom of expression may reduce the protection compared to that granted in the Interim Constitution (s 16(2)).

It is submitted that although specific exclusion of these categories of speech from the ambit of the freedom of expression clause accords with international human rights law, it is unnecessary. The same results could be achieved simply by an appropriate application of the general limitations clause. If someone's speech 'incited to imminent violence' and she relied on her right to do so under s 16(1) she could certainly be restricted by the general limitation clause, without recourse to subsection (2).

Similarly, if someone want to rely on s 16(1) to advocate and incite to racial or other forms of discrimination, one could limit this either by a competing rights analysis and/or a value-based approach to rights analysis in order to achieve the aim of subsection (2). Furthermore, at least during a state of emergency, as provided for in s 36 of the draft Constitution, it would be easy to limit s 16 to exclude the right propagate war.

It is important that South Africa should send a strong symbolic message that the days of racial discrimination are finally over and the era of equality and dignity has begun. This however, seems to have been done adequately in the preamble as well as in the strong protection granted to the right to equality and dignity. By including this essentially superfluous provision in subsection 16(2) there exists the risk inevitably associated with explicitly regulating hate speech, namely the risk of 'overbreadth' and wrongful, even abusive application of the regulation, whilst not necessarily achieving any enhanced protection against hate speech.

If the Constitution did not include the subsection 16(2), the state would not be precluded from passing laws regulating

hate speech. It would mean that any such law would be susceptible to constitutional challenge and would only survive if the state were able to justify the law in terms of the requirements of limitation. Section 16(2), on the other hand, means that a law which introduced excessive sanctions, such as a fine of R50 000,00 and/or up to five years imprisonment for advocating hatred based on race, ethnicity, gender or religion which constitutes incitement to cause harm will essentially be immune from constitutional attack. In other words, if any person were to be prosecuted under a law with such excessive sanctions, it would not be open to him or her to raise as a defence that the law was unconstitutional as unjustifiably and unreasonably violating the guarantee of freedom of expression. All that would be open to the accused would be to argue that the words in question did not advocate hatred based on one or more of the listed grounds.

The effect of the final draft s 16(2) would probably insulate from constitutional attack laws which facilitated the banning of publications and films that advocated hatred based on, for example, race.

Section 15(2) of the Interim Constitution which provided that all media financed by or under the control of the state should be regulated in a manner which ensured impartiality and the expression of a diversity of opinion, has been omitted from the final draft section on freedom of expression. This means that any law regarding media regulation by the State which does not reflect impartiality or the expression of a diversity of opinion is not directly subject to constitutional review, at least in so far as its impartiality is concerned. Even in respect of the Interim Constitution s 15(2), no provision was made to ensure independence of media financed by or under the control of the State. The guarantee of impartiality and the expression of a diversity of opinion did not include an express constitutional guarantee against government interference with publications. The final draft omits all of these guarantees.

3. Certain Areas of Law to be Affected by the Introduction of the New Clause

3.1 Defamation

Defamation cases which have been heard by the courts after the entering into force of the Interim Constitution have had vastly different outcomes, depending largely on whether or not the sitting judge believed in the so-called horizontal application of the Bill of Rights (that is, whether or not the Bill of Rights applies to disputes between private individuals in addition to its undisputed application between the State and a citizen), and thus making the common law of defamation subject to direct constitutional scrutiny. The Constitutional Court decided on a vertical application with regard to freedom of expression. However, this decision has been rendered somewhat irrelevant by the extension of the application to be binding on 'all natural and juristic persons if applicable" (s 8(2)). This means that future defamation actions will be subject to constitutional scrutiny and that the development of the common law must directly take cognisance of the right to freedom of expression in s 16.

3.2 Hate speech regulation

With or without the hate speech clause in s 16(2), hate speech could be prohibited or curbed in a number of ways, including criminal sanctions to provide for the indictment, conviction and punishment of speakers or publishers and censorship legislation in terms of which publications and films could be controlled or banned. The final draft s 16(2) does, however, not in itself create a criminal offence.

4. Censorship Legislation

The existing Publications Act of 1974 clearly fails to comply with the requirements of s 16.

The Film and Publications Bill which is due to repeal the old Publications Act and take over the regulation and, in some instances, the censoring of certain types of material will probably be in accordance with s 16, if the Bill were to be passed in its most recent form. It remains to be seen, however, to what extent the intensive lobbying by various interest groups which want to limit access to pornographic material will be successful in limiting the provisions in the Bill further, when it is finally tabled in parliament.

22. FREEDOM OF TRADE, OCCUPATION AND PROFESSION

22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

The Interim Constitution contained a detailed provision which protected every persons right to engage freely in economic activity in pursue of a livelihood any where in the national territory.

Concern for the laissez-faire nature of this provision entailed that an internal limiter was included so as to oust from constitutional scrutiny those measures which were designed to promote the protection or the improvement of quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all provided that these measures are justifiable in an open and democratic society based on freedom and equality.

This cumbersome provision appeared to satisfy nobody. Furthermore although invoked fairly often, applicants generally did not meet with success. Section 22 represents a right to freedom of vocation; and hence has simplified and narrowed the scope of the provision. The practice of a trade, occupation or profession may be regulated by law such that

professional qualifications or examinations as prescribed by law will be able to pass constitutional muster. Such laws will be subject to constitutional scrutiny in that the right in terms of s 22 can be regulated but not denied. In addition the right can be further limited in terms of s 36.

23. LABOUR RIGHTS

23. (1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise;

(c) to bargain;

(d) to form and join a federation.

(5) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements.

The new section introduces 3 major changes to the provisions of s 27 of the Interim Constitution.

The rights contained in the section are divided into individual and collective rights. Thus only employer organisations and trade unions enjoy the right to organise and bargain collectively. Hence the Constitution protects the rights to bargain collectively but only when exercised by the collectivities of labour and capital and not when exercised by individual workers or employers (for example, plant level bargaining). That the Constitution seeks to afford effective protection to industry level bargaining does not exclude legislative recognition of plant level bargaining but it does not provide an independent, constitutional cause of action to enforce such a right.

Section 23(5) seeks to place beyond constitutional scrutiny the kind of closed and agency shop arrangements contained in the Labour Relations Act 66 of 1995. This clause is aimed primarily at the possible attack against closed or agency shop agreements based upon the constitutional protection of freedom of association. Similar challenges have been launched in both Canada and the United States.

Section 27 of the Interim Constitution recognised an employer's recourse to a lockout and provided that it should not be impaired by the provisions of the Constitution. In effect the provision prevented a constitutional challenge to a lockout without actually granting employers an independent constitutional right. This provision has been deleted and is replaced by s 241 which ousts the provisions of the Labour Relations Act (LRA) from constitutional challenge. As Chapter 4 of the LRA gives content to an employer's recourse to a lockout, such 'right' cannot be challenged constitutionally and

can only be removed by an amendment or repeal of the applicable provisions of the LRA and then after consultation as required by s 241.

An interesting possibility arises by virtue of the inclusion of s 23(1), the right to fair labour practices. As the 1995 LRA has abolished the residual right to an unfair labour practice, the possibility emerges of a parallel labour law dispensation, namely that contained in the LRA and an independent constitutional body of labour law in terms of which an applicant might proceed constitutionally to insist that the offending conduct breaches the residual constitutional right to fair labour practices.

24. ENVIRONMENT

24 Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

In the Interim Constitution, the environmental rights provision in the Bill of Rights chapter was minimalist and narrow. It simply stated that every person shall have the right

to an environment which is not detrimental to his or her health or well-being.

The far more detailed nature and scope of the environmental rights provision in the 1996 Constitution brings a new life into the constitutional and human rights jurisprudence in South Africa, and it is likely to spread its influence much more widely in the African region and internationally.

Why Section 29 of the Interim Constitution is historic but narrow

The linkage to "health and well-being" in s 29 invoking the provision would appear to require proof of a present or imminent threat to the health or the well-being of an existing human person or group of persons. In other words, the wording under Section 29 is an expression of a narrow "pollution-oriented" or damage-oriented view of the environment. It is influenced more by a common law delictual understanding rather than by a modern international knowledge and awareness regarding the entire environment in its present and potential future status.

It is not surprising that the first Supreme Court case to deal exhaustively with environmental rights issues in the new constitutional era has not even mentioned the existence of the provision but has elaborated on constitutional provisions regarding *locus standi*, access to information and procedural justice (Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others, 1995 (9) BCLR 1191 (C)). It would be unfair to attribute failure to make use of s 29 in the case in point solely to the wording of the section. A careful reading of the arguments presented in the case and the court's judgement indicates the present poverty of rigour in the jurisprudential approach to such constitutional litigation. There appears to be a dominance of pragmatism in dealing with constitutional litigation, especially where new conceptions introduced by the Constitution are concerned and more particularly where international legal conceptions are essential

elements. Thus, the lawyers in the case were able to cite some international convention (treaty), to which South Africa is a party, but failed to link this to applicable "public international law" provision on interpretation, or to binding treaties' provisions in the Constitution (s 231 (1)).

This missed opportunity of developing a clear jurisprudence under s 29 of the Interim Constitution is unlikely to continue. The 1996 Constitutional provision on environmental rights is sufficiently broad and clear to be easy to comprehend and to develop environmental rights.

Section 24 of the 1996 Constitution and Other Associated Provisions

The new s 24 is an appropriate environmental rights and obligations provision for a newly found democracy. The section incorporates that contained in the earlier s 29, and much more. Having restated what is contained in Sec.29 of the Interim Constitution (s 24(a)), it proceeds to,

- assert that the new environmental right is not only to be enjoyed by the current generation but "for the benefit of present and future generations" (Sec.2(b));

- provide for prevention of pollution and ecological degradation and promotion of conservation (Sec. 2 (b)(i) and (ii)); and

- require that in the process of use of natural resources and in the promotion of economic and social development, the principles of sustainable ecological balance and development be factored into the processes (S 24 (b)(iii)) **(emphasis added)**.

At the municipal (national) law and policy level, the new provision captures the essence of what the founding legislation on the environment, the Environmental Conservation Act 73 of

1989, incorporates and envisages in itself and in the large body of regulations and policies made under it. Of course, this environmental legislation is not comprehensive in itself but is augmented by dozens of other national legislation (Geneva Environmental Policy, Notice No 51 of 1994 (published in Government Gazette 15428 of 21 January 1995), and thousands of provincial and local government legislations, regulations and by-laws. In addition, there exist a rich, though "hidden" or unrecognised body of common law and customary law norms, principles and rules relevant to the subject.

The new environmental rights provision is a particularly suitable expression in the new Constitution if viewed from an international environmental law and rights' context. The most recent restatement of internationally recognised legal and other non-legal principles regarding the growing environmental rights awareness is the Rio Declaration on Environmental and Development (Adopted on 14 June 1992 by the UN Conference on Environment and Development, 3-14 June 1992, at Rio de Janeiro). From a legal context, Principles 3 on the right to development in the context of meeting environmental needs, Principle 11, which requires States to enact effective environmental legislation and standards and Principle 13, which requires that development of national environmental law should provide adequate standards of liability for pollution and environmental damage, are all relevant. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights (14 - 25 June, 1993), echoed the spirit and letter of Rio Summit by asserting that the right to development "should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations".

Laudable as the new Constitutional provision might be, it cannot be emphasised too strongly that a creative reading of the whole Constitution in a holistic manner and purposive interpretation will be required if environmental rights, is to gain equal prominence with other basic rights recognised in the Bill of Rights. As stated already, the Supreme Court in the Van

Huyssteen case (supra) made a spirited, purposive interpretation of sections 7, 23, 24 and 35(1) and (3) of the Interim Constitution to forestall blind "developmentalist" schemes from being implemented without clear environmental impact assessment at Yzervarkensrug at Saldanha, near the West Coast National Park and the Langebaan Lagoon, in the Western Cape Province. The Court even heard arguments to the effect that allowing the development to proceed in the manner it was conceived would have violated South Africa's obligations under the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 1972), which South Africa has ratified.

In interpreting the new s 24, the courts will be expected not only to deal with questions of *locus standi* (Sec.38), right of access to information (Sec.32), right to lawful, reasonable and procedurally fair administrative action (Sec.33), and the development of common law (Secs. 8 and 39), but also to take careful account of relevant international law (Secs. 39, 231-233). International environmental law and rights principles and norms are clearly reflected in the new formulation and it is to be expected that this rich body of knowledge will find more informed direct recognition and application through the interpretation of the Bills of Rights.

There are other provisions in the Constitution which ought to be interpreted together, to deal with the problem of "balancing of rights". The "public purposes" and "public interest" under the Property clause (s 25(2)) can now be satisfied by considerations under s 24. The housing (s 26) and water (s 27) provisions are closely related to the environment.

It is important to note that environmental issues are recognised in the new Constitution as falling within national, provincial and local governmental competencies, (Schedules 4 and 5 of the 1996 Constitution).

25. PROPERTY

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for public purposes or in the public interest; and

(b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court.

(3) The amount, timing, and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsections (6).

1. Introduction

Section 25 deals with property and land and is apparent from the text, is somewhat different from s 28 of the Interim Constitution. The section can broadly be divided into two: subsections (1) to (4) deal with the rights of people who already own property and gives them certain protection from actions of the state which interfere with their rights as property owners; subsections (5) to (9) deal with people whose access to land and to property is not currently protected by law and obliges the state to assist them to obtain secure property rights.

2. The protection given to existing property rights

Subsections (1) and (2) draw a distinction between deprivation of property and expropriation of property. The former is competent if authorised by a law of general application which is not arbitrary. For the validity of the latter there are two added requirements: the expropriation must be performed pursuant to a public purpose or in the public interest and must be followed by the payment of compensation which is agreed or determined by a court of law. The effect of this distinction is that, in the absence of an expropriation, compensation need not, as of constitutional right, be paid to a party who is deprived of property rights by state action. The purpose of the distinction appears to be to enable the state to regulate the use of property without the fear of incurring liability to property owners whose rights are infringed in the course of regulation. The word "expropriate" refers to actions by the state which involve the taking of property for itself or the transfer of property from one private party to another. Any interference with property rights which falls short of an "expropriation" in these terms is treated as a "deprivation" of property by s 25 and is not compensable, irrespective of the extent of the interference.

What then is the protection granted against deprivations which are not expropriations? In term of

subsection (1) these deprivations must be authorised by a law of general application which may not be arbitrary. A law of general application is a law which does not unfairly single out any individual or individuals for particular treatment. The prohibition against arbitrary laws means that the state must have a rational basis for enacting the law which permits the deprivation of property. The court will not strike down a law as arbitrary merely if it does not agree with it, but only if it is satisfied that no reasonable person would approve of it.

Where the state actually expropriates property, it is subject to the ordinary safeguards against deprivations of property as well as the additional safeguards against expropriation: the expropriation must be for a public purpose or in the public interest and must be accompanied by acceptable compensation. The terms "public purpose" and "public interest" prevent the state from expropriating property for the private ends of state functionaries or their supporters. They do allow the state to expropriate whenever there is any conceivable public benefit which will flow from the expropriation. Examples of expropriations for a public purpose or in the public interest would include expropriations to build public institutions like schools or hospitals. They would also include expropriations to further land reform programmes.

The fact that an expropriation is for a public purpose or in the public interest does not relieve the state of its obligation to compensate the victims of the expropriation. Subsection (3) provides that they must be paid an amount of compensation to which they agree, or, if agreement is impossible, an amount which is determined by a court of law to be just and equitable. In determining what is just and equitable a court will have regard to the market value of the property as well as any other relevant factors, including those listed in subsection (3)(a) to (e). Thus owners who acquired their property in dubious circumstances, or whose acquisition and ownership of their property was heavily subsidised by the state, might not be paid full market value compensation if

that property is expropriated. Similarly, owners who are not using property but are holding it for speculative purposes might not be compensated at market value if they are expropriated.

3. The extension of access to secure property rights and the restitution of land

Subsections (5) to (9) place duties on the state to extend access to secure property rights and to provide restitution or compensation to victims of forced removals under apartheid. Subsection (5) obliges the state to take steps, within its resources, to enable citizens to gain access to land on an equitable footing. This subsection is fortified by subsection (8) which provides that the protection of existing property owners in s 25 cannot be allowed to prevent the state from introducing land reform measures which are justifiable in an open and democratic society.

Subsections (6) and (9) oblige Parliament to pass legislation to secure the land tenure of persons or communities whose position was left vulnerable by the racially discriminatory laws and practices of the past. Subsection (7) confirms that victims of forced removals have a statutory right to restitution or equitable compensation.

26. HOUSING

26. **(1)** Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the

relevant circumstances. No legislation may permit arbitrary evictions.

A number of the socio-economic rights have been included in Chapter 3, all drafted in a similar manner. Thus the right to have access to adequate housing as set out in subsection (1) is qualified by the provision in subsection (2) that the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation in this right. In short, the right does not impose an immediate duty upon the state to provide each individual with a house. The obligation is placed upon the state to achieve the progressive realisation of the right of access to housing. The state is obliged to introduce a reasonable legislative programme and to adopt other measures to ensure sufficient housing is available to ensure that the right can be translated in to practice, that reasonable financial programme be introduced by the state in order to ensure that a lack of finance will not prevent implementation of the right guaranteed in terms of subsection (1). Subsection (3) is a clear response to the group areas jurisprudence of the apartheid era which allowed many people to be evicted from their home by arbitrary ministerial decision.

This provision would appear to allow a South African court to follow some of the Indian jurisprudence whereby pavement dwellers could not be evicted by the municipality until the end of the monsoon season and in the case of those who had been given a permit, until such time as alternative accommodation had been provided to them. It might have a significance for the use of a summary judgment procedure used to evict a tenant who has breached particular obligations under a lease. A tenant might have to be heard before eviction takes place.

27: HEALTH, FOOD, WATER AND SOCIAL SECURITY

27. (1) Everyone has a right to have access to -

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

1. The right to health in the Final Constitution

Section 27 is a new "socio-economic" right in the Final Constitution which did not appear in the Interim Constitution. Section 27(1)(a) provides that everyone has the right to access to health care services, including reproductive health care. Section 27(2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to health services. Section 27(3) holds that no one may be refused emergency medical treatment.

2. Health within a right to food, water and social security

The right to access to health care services is not a guarantee of health to the citizens of South Africa. However, setting the right within the context of rights to food, water and social security demonstrates a concern for the overall health of South African citizens. The status of health is determined to a greater extent by factors outside of the health sector than by public health and clinical medicine. Poverty, adequate water and sanitation facilities, environmental protection and social status impact directly on health. Therefore, under section 27, if South African citizens have access to basic nutrition, clean water and social security for those who are unable to afford basic social services and necessities of life, the overall health of South African citizens will improve.

3. International protection of health

The South African protection of access to health services is supported by provisions within a number of international treaties which protect health. Article 12(1) of the Covenant on Economic, Social and Cultural Rights requires State Parties to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2) sets out the ways in which State parties shall realise the right to health, including making provision for the reduction of stillbirth and infant mortality rates and for the health development of the child and to create conditions in order to assure medical services to citizens in times of sickness. Article 10(h) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires State parties to provide equal access to educational information to help to ensure the health and well-being of families, including information and advice on family planning. Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination requires State Parties to undertake and prohibit discrimination in the right to public health, medical care, social security and social services. Article 24 of the Convention of the Rights of the Child requires State Parties to

recognise the right of the child to the enjoyment of the highest attainable standard of health, to facilities for the treatment of illness and rehabilitation of health and to strive to ensure that no child is deprived of his or her right of access to such health care services.

In terms of guarantees concerning reproductive health, Article 12 of CEDAW addresses women's reproductive health by prohibiting discrimination in the field of health care and by requiring states "to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation". The Proclamation of Teheran (1968), the General Assembly Declaration on Social Progress and Development (1969), Article 16 of CEDAW, as well as the International Women's Health Conference in Cairo, all guarantee either to parents or to women the right to determine freely the timing and spacing of their children. Article 16 of CEDAW, which South Africa has ratified, requires State Parties to take appropriate measures to eliminate discrimination against women in the area of family relations and to guarantee to women "the same right 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".

4. Reproductive health services

It is important that the right to access to reproductive health services is specifically entrenched within the right to access to health care generally, since the far reaching impact of reproduction on women's health is often overlooked. The World Health Organisation has estimated that each year 500,000 women die from pregnancy-related causes. (Rebecca Cook, "International Human Rights and Women's Reproductive Health", in *Women's Rights; Human Rights* J. Peters and A. Wolper (eds) (1995) 256.) In South Africa in 1990 the Department of Health and Population Development

reported that the number of deaths per 100,000 live births in the African population was 24. (Klugman and Weiner, "Status of Women's Health in South Africa", Paper no.28, Centre for Health Policy, University of Witwatersrand, 1992, 49). However, the real estimate, given the number of unreported deaths is almost double. Maternal mortality is only the severest health risk associated with pregnancy. Pregnancy can have a serious negative impact on women's health, particularly if the pregnancies occur too close together or if they occur at too young or too old an age. Given the fact that factors which affect overall health like socio-economic conditions, sanitation, nutrition and access to health care services also affect women's reproductive health, South African rural women's health is at greatest risk. The right to determine the timing and spacing of children is stressed in international documents partly because it has been proven that "reproductive health services can reduce maternal mortality and morbidity and can contribute significantly to women's reproductive health".

As noted above in the section dealing with Freedom and Security of the Persons, access to reproductive health services includes access to information and education on sex and family planning, to contraceptives, to prenatal and postnatal care, and to abortion and sterilization services.

5. Women's rights and access to health services

There is no doubt that the basic human rights to heath, food, water and social security are fundamental to all individuals, regardless of gender, and that many of the other rights enshrined in the Constitution will be impossible to fulfil if individuals do not maintain a basic level of sustenance and an adequate standard of health. The African Charter recognises the connection between political rights and socio-economic rights stating that:

> "civil and political rights cannot be dissociated from economic, social and cultural rights in their

> conception as well as universality and that satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

However, given that women tend to have a lower standard of living than men, and a guarantee of these basic conditions of human living is critical for the achievement of gender equality. The preamble to the United Nations Convention on the Elimination of all Forms of Discrimination Against Women addresses the heightened impact of women's suffering in conditions where basic needs are not met by stating that:

> "in situations of poverty, women have the least access to food, health, education, training and opportunities for employment and other needs...".

The right to health, food, water and social security is, therefore, particularly a woman's right because women have greater difficulty obtaining access to health services, food, water and social security than do men.

6. What kind of right is a right to access to health care?

The question is, what does a right to *access to* health care mean? What kind of affirmative obligations on government to provide health care services are entailed? In a country with limited resources like South Africa, what services, if any, should be publicly funded under this right?

As argued under the right to make reproductive decisions guaranteed by the general right to freedom and security of the person, a right to access to health care services would be empty and meaningless if it meant that a well equipped clinic placed in a rural area which charged high prices for its services could be seen to fulfil an right to "access" to health care services. A right of access to health

care services must, in some sense, be attainable by all. It need not mean that all health care services are nationally or provincially funded, but it must mean that poor and rural citizens can in fact receive health care in their communities or communities nearby.

The balance between the social and economic reality in South Africa and the obligation on government to provide substantive content to the right is evident in the wording of subsections (2) and (3). The government must take reasonable measures to achieve the realisation of the right. However, the measure need only be "reasonable", which is likely to be assessed within the context (of the government's assessment) of "available resources". The deference to government and to socio-economic reality is not unlimited. The right to access to health services must mean that everyone receive emergency medical treatment. This would seem to mean that indigence can never be a barrier to access to emergency health services. The argument would also suggest, that health services which can directly affect mortality rates, like primary health care, reproductive health care like contraception, abortion and maternity care, and community based health education, should receive government priority.

The international conventions cited suggest a positive obligation on government to actively provide health services to the best of its ability. For example the Convention on the Rights of the Child, requires State Parties to ensure that no child is deprived of his or her right of access to health care. This seems to suggest that States are required to pay for health care services for children who are unable to pay for needed services.

The right to access to health care in South Africa must entail an initial minimal and basic provision of funded health care, an ongoing programme to provide more specialised forms of health care at a reasonable cost and ideally, a policy, within the context of a larger policy which is

aimed at changing the socio-economic and environmental conditions which negatively impact on health, to provide constantly increasing levels of health care to all communities in a way that "access" to these services is real.

28. CHILDREN

28. (1) Every child has the right-

(a) to a name and a nationality from birth;

(b) to family care, parental care, or appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services, and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that-

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the chid be the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in tomes of armed conflict.

(2) A child's best interest is of paramount importance in every matter concerning the child.

(3) In this section, "child" means a person under the age of 18 years.

This provision follows fairly closely upon s 30 of the Interim Constitution. There are, however, certain expansions of the rights which were contained in s 30. In particular, the qualified prohibition against children under the age of 18

being detained has now been a subject of more explicit conditions namely:

a) that the child may be detained only for the shortest appropriate period of time;

b) must be kept separately from detained persons over the age of 18;

c) the right to have a legal practitioner assigned to the child at state expense in stall proceedings which effect the child as substantial injustice would otherwise result; and

d) not to be used directly in arm conflict and be protected in times of armed conflict.

Section 28 is an expansive socio economic right. Since women proportionately bear the physical, social and economic burden of caring for and raising children in South African society, the child's right to basic nutrition and shelter, basic health care services and social services which are guaranteed in terms of s 28(1)(c) can be considered not only a right which benefits children but also the women who bear such children.

Doubtless the meaning of a childs right to basic health care services will be subject to the justifiable contention that such health care services should be linked to the mother. In South Africa maternal deaths due to pregnancy have an impact on peri-natal mortality (Klugman and Weiner, *Women Health Status In South Africa*: Paper No 28, Centre for Health Policy, University of Witwatersrand (1992)). Comparative data demonstrates that inadequate prenatal care is one of the most important determinants of health problems for children born to teenage mothers. The socio economic status of the mother which affects the mothers nutrition and overall health has been determined to be the most important factor in explaining both prematurity

and low birth weight of new borns (Ruth Colker, *Abortion and Dialogue* (1992) at 65).

29. EDUCATION

29. (1) Everyone has the right-

(a) to a basic education, including adult basic education; and

(b) to further education, which the state must take reasonable measures to make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory law and practice.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

1. The Rights to Basic and Further Education

This section which was the subject of intense negotiations is significantly expanded from its predecessor in the Interim Constitution. Section 29(1)(a) gives every person, whether a child or an adult, a right to basic education. Unlike the rights conferred by s 29(1)(b) and 29(2), this right is unqualified and is the core of the right to education protected in s 29. It therefore takes precedence over the other rights conferred by the section. The principle educational obligation of the state is to provide basic education; the sectional educational claims against the state of language groups and of people claiming further education can be accommodated only in so far as they do not materially impede general claims to basic education.

Basic education should not be equated with primary school education. Although the term "basic education" is not readily defined, it must include whatever skills are necessary to function effectively within South African society. These would obviously extend to literacy and numeracy but would cover a wider range of skills as well. "Basic education" is not a static concept. As society develops, the skills necessary to operate within it change as well and with them, the requirements of basic education.

In terms of s 29(1)(a) every person can claim basic education from the state. The state is not, however, placed under an unlimited obligation to provide education beyond

the "basic" level. Section 29(1)(a) provides only that the state must take reasonable measures to make such education available and accessible.

2. Language Rights in Education

Section 29(2) gives every person a right to receive education in public educational institutions in the official language of their choice where this is reasonably practicable. The right applies to all educational institutions and not just to schools. The "reasonably practicable" qualification to this right suggests that it is not a right that can ordinarily be invoked against individual institutions. Individual institutions cannot reasonably be expected to provide instruction in all eleven official languages. However, the education system can be expected to do this. Thus s 29(2) suggests that the state must play a role in co-ordinating the language policies of schools within a particular area if the language needs of all of the students living in that area are not adequately met by the existing language policies of the schools concerned. An approach which left language policies to be determined only at the level of individual schools without regard to the language needs of students in an educational district or region would be in breach of the state's constitutional obligation to those students who were not accommodated by the individual school language policies so chosen. Similarly, the state may be placed under an obligation to co-ordinate language policies of tertiary institutions nationally so that the particular language needs of higher education students can be accommodated by some colleges, technikons and universities within the country.

In deciding how to provide for language rights in education, the state must consider all alternatives including single medium institutions. The assessment of alternatives must be guided by considerations of equity and practicability and by the need to address the results of past racial discrimination. The state is not obliged to create single language institutions, but it may do so where this would not

entrench the privileges created by apartheid or promote inequality in some other way.

3. Independent Schools

Section 29(3) prevents the state from interfering with the establishment or maintenance of independent educational institutions but these institutions may not discriminate on grounds of race. The state may fund these institutions (subsection (4) but is under no obligation to do so. Moreover, the state can insist that independent institutions are registered with the authorities and that they provide acceptable standards of education. Thus there is no constitutional protection of 'fly-by-night' schools and similar institutions.

32. ACCESS TO INFORMATION

32. (1) Everyone had the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The right of access to information is a very important right for all South Africans. It allows one to obtain information from government and, once legislation is passed, from other people such as employers, trade unions, or the banks.

For instance, one could use this right to find out in what areas is the municipality planning to build a road. Or one could use this right to find out whether anyone in a government department has been putting comments into a person's file. Journalists can use this right to try to find out what is happening inside of government and report it.

Like any right, the right of access to information can be limited. For instance, criminals cannot have access to the information that the police are looking for them!

The Final Constitution provides for a right of access to information in two stages.

Upon approval of the Final Constitution by the Constitutional Court, there will be little change from the present right in the Interim Constitution. The changes are merely grammatical. Compare s 23 ("Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.") with s 31 (read with Schedule 5) ("Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."). See s 191(2)(g).

At the present time, one can obtain any information from government on one condition: that it is reasonably required for the use of another of one's rights. For instance, if property rights in one's house or a right in one's own health is going to be threatened by the province approving putting a coal-fired power plant next to one's home, the property owner can get information about the safety risks of the plant.

The information that the government gives should be "timely, accessible and accurate". (Section 191(2)(g) (basic values and principles governing public administration)).

At the present time, one can only acquire information from government (any government: municipality, province, or national as well as public bodies like the SABC or TELKOM). But a person cannot get any information from non-government persons like one's employer or the bank.

This first stage continues from now until the time when Parliament passes a law that will expand the right to access to information. Parliament has to pass this law within three years of the start of the Final Constitution. Schedule 5, 19(1): "National legislation envisaged in sections 9(4), 31(2), and 32(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect." So by about mid-1999, South Africa should have a democratic law on access to information.

Once this law is passed, the right to access to information will be broader but still within limits. (Section 31 reads:

(1) Everyone has the right of access to -

(a) any information held by the state; and

(b) any information that is held by another person that is required for the exercise or protection of any rights.

(2) The state must give effect to the rights in subsection (1) by way of national legislation. This legislation may provide for reasonable measures to alleviate the administrative and financial burden on the state.)

While the right of access to information will still be in the Constitution, the law will try to put this right into real effect.

This law should ensure that a person has access to all information held by the state without showing that you

need that information. The law has to include private persons like employers, trade unions, and the banks. But with private persons, to get access to information, one will have to show a need for such information.

The law will have to strike a balance between giving people as much information as possible and letting government do its job cheaply and efficiently.

33. JUST ADMINISTRATIVE ACTION

33. **(1)** Everyone had the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1(and (2); and

(c) promote an efficient administration.

The right of just administrative action is about government officials being fair and giving good reasons for their actions. It is also about people participating in the decisions of government more often than simply voting every few years.

The Final Constitution begins a two part process with the right to just administrative action. It is thus a right under construction.

At first, the right looks almost exactly like the present right in the Interim Constitution.

Compare s 24 ("Every person shall have the right to -- (a) lawful administrative action where any of his or her rights or interests is affected or threatened; (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.") with s 32 (read with Schedule 5) ("Every persons has the right to -- (a) lawful administrative action where any of their rights or interests is affected or threatened; (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened; (c) to be furnished with reasons in writing for administrative action which affects any of their rights or interest unless the reasons for that action have been made public; and (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.").

This means that government officials have to act fairly in their decisions and actions. Often this means giving a hearing before taking a decision. For instance, if the government is going to deny a liquor license to someone because that person has a criminal record, the person has to be given a chance to say that there is a mistake and that she or he has never in fact committed a crime.

Sometimes acting fairly will mean that people must be consulted while a decision is being made. For instance, if

a high school is being built in a rural area where several groups of people live, people in each group must be consulted about an appropriate location for the school.

Officials also have to give reasons for their decisions and action if they are asked for those reasons. If an official denies an application for a pension, the applicant can ask why the pension was not granted. The official needs to respond either directly or in a statement of public reasons.

State officials have to make decisions that are reasonable. It is not enough to simply give reasons. The reasons must be good ones. For instance, a decision by the town clerk to deny a permit to hold a parade on a Saturday afternoon because it would make too much noise and prevent people from working would not be a good reason if most people do not work on Saturday afternoon.

In the second stage, within three years from the start of the Final Constitution, the Parliament must pass a democratic law that will fill in the details of these commands. Schedule 5, 19(1): "National legislation envisaged in section 9(4), 31(2), and 32(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect."

This law will provide for access to a court or to an independent body, help make the government administration more efficient and will try to make sure that all officials follow these rules.

Once this law is passed, the right to just administrative action will become more simple in language but will contain essentially the same rights: that official act fairly, allow persons to participate in decisions, give reasons, and take well-reasoned decisions.

35. ARRESTED, DETAINED AND ACCUSED PERSONS

35. (1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest, but if that period expires outside ordinary court hours, to be brought before a court on the first court day after the end of that period;

(e) at the first court appearance after being arrested, to be released unless charged and the court orders further detention; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right-

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state, and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material, and medical treatment; and

(f) to communicate with, and be visited by, that person's-

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused has a right to a fair trial, which includes the right-

(a) to be informed of the charge with sufficient details to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial in an ordinary court;

(d) to have their trial begin and conclude without reasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right;

(g) to have a legal practitioner assigned to the accused by the state, and at state expense, if substantial injustice would otherwise result, and to be informed of this right;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the

proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The comprehensive set of rights contained in s 25 of the Interim Constitution are essentially reproduced in s 35 save that the provisions has been redrafted into plain language. However, some significant changes have been

made. In the Interim Constitution every person arrested for allegedly committing an offence had the right to consult with a legal practitioner of his or her choice, to be informed of this right promptly and where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state. This right was derived from the interpretation of s 25(1) which granted every person who is detained, including every sentenced prisoner such a right. Section 25(2) provided that every person arrested for the alleged commission of an offence shall have certain rights in addition to the rights which he or she enjoys as a detained person. Accordingly the right of consultation with a legal practitioner was enjoyed by implication by arrested persons. There is no similar provision in s 35(1) of the Constitution, such that there is no automatic right to consult with a legal practitioner of choice upon arrest.

Section 25(2)(d) provides that every person arrested for the alleged commission of an offence shall be released from detention with out without bail unless the interest of justice require otherwise. Section 35(1)(f) provides that every one who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permit subject to reasonable conditions. It appears that the **onus** has reverted to the arrested person to prove that the interest of justice do permit such a release whether on bail or otherwise. This certainly represents a substantial reversal from the position guaranteed in the Interim Constitution.

There are two important insertions with regard to the rights of arrested, detained and accused persons in general. Section 35(5) provides that evidence obtained in a manner that violates and right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

This provision must be read together with s 35(1)(c) namely that an arrested person has a right not to be

compelled to make any confession or admission that could be used in evidence against that person. The comparable provision in s 25(3)(b) of the Interim Constitution is that every accused person shall have the right to advice and challenge evidence, and not to be a compellable witness against himself of herself.

Section 35 thus cuts down on the rights of an accused, for it seeks to render inadmissible only confessions or admissions which have been induced through compulsion. As to any other evidence which could be induced against an arrested person in circumstances where that evidence was not given in a voluntary fashion, the new provision follows certain of the judgments of the Constitutional Court, namely that the discretion as to whether to admit or exclude evidence obtained unconstitutionally should be exercised on the basis that the administration of justice will be brought into disrepute by admitting or excluding such evidence. The Constitutional Court had thus followed an approach adopted by the Canadian Supreme Court in R v Collins 1987 (28) CRR 122, namely, will the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully appraised of the circumstances of the case.

36. LIMITATION OF RIGHTS

36. **(1)** The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

There has been a substantial change between the provisions of the limitation clause contained in s 33 of the Interim Constitution and that provided in with s 36 of the final Constitution.

The provision is much simplified. All the rights in the Bill of Rights can be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Accordingly the two tier system of scrutiny which was adopted in the Interim Constitution whereby certain rights could only be limited by a law of general application if they were reasonable and justifiable in an open and democratic society based on freedom and equality as well as necessary has been scrapped. To the extent that there is now a general test for justifying the limitation of a right contained in the Bill of Rights, it could be argued that the new limitation clause gives parliament a wider scope to pass legislation limiting Constitutional rights than was previously the case.

It is however likely that a court will make the words 'reasonable and justifiable' do more work than was previously the case. Accordingly, that which is reasonable and justifiable in limiting one particular right will not necessarily be

sufficient when dealing with another right. Rights of equality, human dignity and freedom and security of the person, which represent the core of fundamental principles of the Bill of Rights will probably prove far more difficult to limit than some of the other rights contained in the Constitution.

A unique feature of the limitation clause is that it enjoins the court to take into account a number of different factors in making a determination as to whether a right may be justifiably limited. These factors appear to have been taken from the judgment of Chaskalson P in S v Makwanyane & Another 1995 (6) BCLR 665 (CC) where the President stated 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 on a case by case basis. This is inherent in the requirement of proportionality, which calls for the 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 for such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether its desired ends could reasonably be achieved through other means less damaging to the right in question' (at para 436).

These requirements have now been spelt out in s 36. It remains to be seen whether the specific nature of the limitation will in any way deter the court from exercising a similar measure of discretion in the determination of the limitation test.

38. ENFORCEMENT OF RIGHTS

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in

the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) anyone acting in their own interests;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or a class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

1. Interpretation of rights

Rights do not have a fixed meaning and can rarely be understood by exclusive reference to a dictionary. While there may be a commonly recognised core meaning to a right, the meaning of a right is often dependent upon many factors, including norms and values of a particular society.

Many Bills of Rights contain an interpretation clause which assists the courts in interpreting human rights. Section 38, the interpretation clause in the Final Constitution; replaces s 35 of the Interim Constitution.

2. International law

Section 38(1) like its predecessor in the Interim Constitution, requires Courts to interpret the Bill of Rights in a way that promotes the values underlying an open and democratic society based on freedom, equality, and in the Final Constitution, human dignity. The Interim Constitution holds that courts "shall, where applicable, have regard to

public international law". This formulation provides only a weak duty on the part of the Court to adhere to international rights protecting instruments. They "shall" look to international law, but only where they deem that law "applicable" and then, they are not bound by the law but must "have regard" to that body of law. Section 38(1)(b) affords the courts a flexibility in their reliance on international law and provides that "every Court must consider international law". It is unfortunate that the stronger wording which had appeared in earlier drafts of the limitations clause requiring courts to ensure that any limitation on a right be "consistent with the Republic's obligations under international law" did not make it to the Final Constitution.

It is important that South African courts take international rights protecting documents seriously. South Africa has ratified a number of important international conventions which are aimed at eliminating discrimination and improving the lives of individuals in South Africa and worldwide. For example, South Africa has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on Consent to Marriage, Minimum Age for and Registration of Marriage. South Africa is also a signatory to a number of important conventions like the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and the Convention on the Political Rights of Women. South Africa is bound by the treaties which it has ratified and the Court's interpretation of rights in South Africa, should, therefore, be consistent with those Conventions. Interpretation should also be consistent with the treaties to which South Africa is a signatory. Despite the more open wording in s 38(1)(b) requiring Courts only to "consider" international law, given South Africa's international obligations and the underlying values promoted by the international treaties, South African Courts should not only "consider"

international law but should, to a large extent, apply international human rights norms within South Africa.

39. INTERPRETATION OF CUSTOMARY LAW AND COMMON LAW IN A CONSTITUTIONAL CULTURE OF RIGHTS PROTECTION

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

(4) Notwithstanding the provisions of the Constitution, a provision of the Labour Relations Act, 1995 (Act No. 66 of 1995) will remain valid until that provision is amended or repealed by national legislation, after consultation with representatives of national federations of employer and employee organisations.

Both the Interim Constitution (s 35(3)) and the Final Constitution (s 39(2)) provide that when Courts interpret the common law or customary law, the interpretation should promote the spirit, purport and objects of the Bill of Rights. In addition, s 39(3) of the Final Constitution provides that "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill". Section 39(2) and (3) will be controversial in relation to equality and customary law. Some defenders of particular interpretations of customary law will object to customary law being developed in a way that promotes women's equality rights. Section 39(3) places an additional limit on customary or common law rights, which was not expressed in the Interim Constitution, and which will also have an impact on customary law. Not only must customary law be developed in the spirit of the Bill of Rights, but existing customary law rights will only be recognised to the extent that they conform to the Bill of Rights. A man's right to an inheritance under intestacy in customary law would likely be an example of a right that would not be consistent with the Bill of Rights and which, therefore, could be challenged or denied due to the rights protection offered by the Bill of Rights.

Section 39(2) will have a more limited role than did s 35(3) of the Interim Constitution as the wider scope of the Final Constitution will mean that the section will only be relevant to those areas of law where the constitutional guarantee of Chapter 2 is silent.