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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL SUB-COMMITTEE

SUBMISSIONS

RECEIVED AS AT 2ND FEBRUARY 1996

VOLUME 11 (ADDENDUM)

ORGANISATIONS

CONSTITUTIONAL ASSEMBLY

REGISTER OF SUBMISSIONS RECEIVED AS AT 2ND FEBRUARY 1996

CONSTITUTIONAL ASSEMBLY

SUMMARY OF SUBMISSIONS RECEIVED AS AT 2ND FEBRUARY 1996

VOL 11	ORGANISATION	SUBJECT	SUMMARY
1	Association of Law Societies	Bill of Rights; Courts and the Administration of Justice	**Courts and the Administration of Justice** - Constitutional Court - Appointment of Judicial officers - Acting Judges The ALS propose that constitutional jurisdiction be given to other courts as well - this will develop our new constitutional democracy, reduce costs and will be far more practical. The exclusive jurisdiction of the CC must be restricted to decisions on the constitutionality of parliamentary Bills. Propose change to clause 96(3) of Working Draft to read: "Only the CC may decide on the constitutionality of any Parliament Bill, but may do so only when the Bill is referred to it in terms of the Constitution."

			The ALS propose that all permanent judges be appointed in the same way as follows:- (a) The Judicial Service Commission must prepare and submit to the Speaker a list of nominees with at least three names more than the number of appointments to be made. (b) The Speaker must submit the list to the leaders of the political parties represented in Parliament, who may by consensus make appointments from the list. (c) If any appointment remains to be made and the leaders agree that the nominees are unacceptable, the Speaker must advise the Judicial Service Commission, with reasons. The Judicial Service Commission must supplement the list with further nominees and the leaders may make the remaining appointments from the supplemented list.

			(d) If the leaders do not refer the list to the Judicial Service Commission but do not all agree on an appointment, the appointment must be made by a majority of at least 75% of the total number of members of Parliament. All acting judges except acting judges of the CC must be appointed for no more than 3 months in total without JSC approval and act for a period of no more than 6 months with JSC approval. The CC judges must be appointed for a fixed term of no more than 7 years. The JSC should also be depoliticised by excluding senators and presidential appointees. **Supremacy of the Constitution - AO2** Entrenchment of the Constitution should be developed along the following lines:- - Constitutional Principles to be entrenched in new constitution. - Constitutional Amendments should comply with Constitutional Principles. - Amendments to Bill of Rights requires special majorities and the CC must certify such amendments; - Entrenchment rules should be entrenched.

			Equality - BO2 - Clause 8(2) of the Working Draft should be amended to allow courts to review ill-conceived affirmative action programmes. - Clause 8(3) of the Working Draft should be amended to clarify that the listed grounds are not exhaustive. Discrimination on any ground should be outlawed. **Freedom of Expression** - Propose deletion of clause 15(2) - This clause should be limited as little as possible. - To ensure a diverse and heterodox media, propose inclusion of Option 1 clause 15(3) [However, this should be amended to exclude from state regulation media merely financed by the state.] **Economic Activity** - The Bill of Rights guarantee occupational freedom, not diffuse economic activity. The freedom to choose one's occupation is a basic human right. - The right to strike should be balanced against the right to lock out. **Property** - Supports property rights that are constitutionally protected against arbitrary interference. - Acknowledges restitution and redistribution, however safeguards governing restitution in

			section 121 to 123 of Interim Constitution should be retained. **Access to Information** - This clause should guarantee a right to a Freedom of Information Act, rather than a direct right of access to information. **Just Administrative Action** - Bill of Rights should entrench lawfulness and rationality as requirements for this clause (including executive action and delegated legislation) and should ensure that administrative procedures are fair. **Limitation Clause** - This clause should be as narrow as possible. - Standard of necessity should be adopted - at least for most important rights. **Access to Courts and enforcement of rights** - These provisions should be recast to make the Bill of Rights challenges less cumbersome & to extend the new, more expansive rules on standing to one and to all legal proceedings. **Juristic Persons** - The specifics of such persons' entitlement to the rights in the Bill of Rights should be left to the courts. **International Agreements** - The Constitution should be fully internationalised. - Amend clause 201 of the Working Draft to allow for International agreements to form part

			our domestic law as soon as they are ratified by Parliament. **Transitional Provisions** - Bill of Rights should become operative as soon as practically possible after adoption of Constitution.

The Association of Law Societies of the RSA

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January 31, 1996

BY COURIER

Mr H Ebrahim
Executive Director
Constitutional Assembly
10th Floor, Regis Building
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

ASSOCIATION OF LAW SOCIETIES' COMMENTS ON FIRST DRAFT OF THE NEW CONSTITUTION

Herewith ten copies of the Association of Law Societies' executive summary and first comments on Chapters 2 and 6 of the Working Draft of the New Constitution.

Please note that this is **embargoed until 12:00 on Friday, February 2, 1996.**

Yours faithfully

CONSTITUTIONAL ASSEMBLY
1 FEB 1996

A L J VAN VUUREN
DIRECTOR-GENERAL

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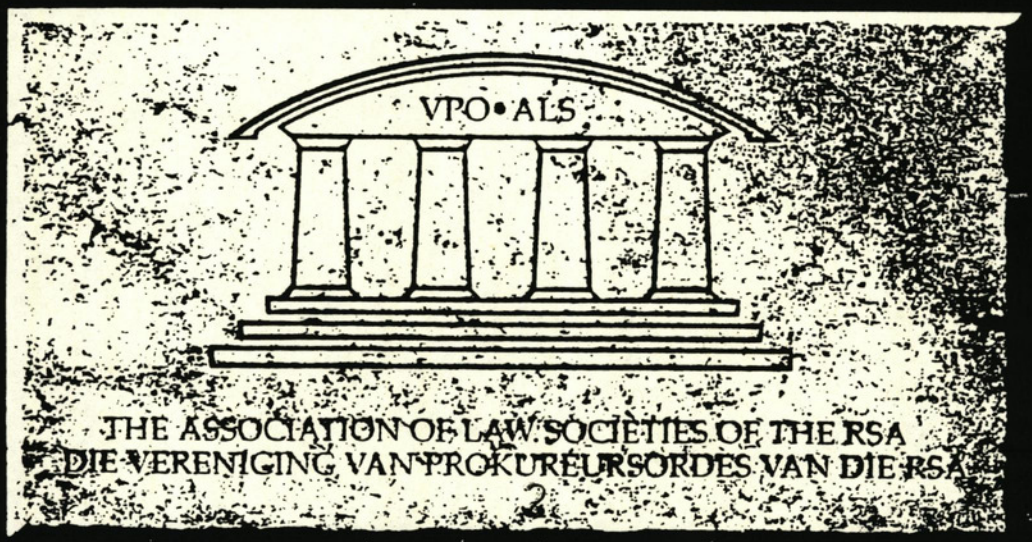
COMMENTS ON THE WORKING DRAFT OF THE NEW CONSTITUTION



COMMENTS ON THE WORKING DRAFT OF THE NEW CONSTITUTION

by

THE ASSOCIATION OF LAW SOCIETIES OF THE RSA

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COMMENTS BY THE ASSOCIATION OF LAW SOCIETIES OF SOUTH AFRICA ON CHAPTERS 2 AND 6 OF THE WORKING DRAFT OF THE NEW CONSTITUTION

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EXECUTIVE SUMMARY

COMMENTS BY THE ASSOCIATION OF LAW SOCIETIES OF SOUTH AFRICA ON CHAPTERS 2 AND 6 OF THE WORKING DRAFT OF THE NEW CONSTITUTION

This is the first of several submissions by the ALS to the Constitutional Assembly.

This submission deals with parts of Chapters 2 and 6 of the Working Draft and several related questions.

The issues canvassed in this submission are: the entrenchment of the Constitution; equality; freedom of expression; freedom of economic activity; labour relations; property; access to information; administrative justice; the limitation of rights; states of emergency; access to courts; enforcement of rights; juristic persons; jurisdiction to enforce the constitution; the appointment of judicial officers; the constitutional status of international agreements; and the applicability of the Bill of Rights to proceedings which are pending upon its commencement.

ENTRENCHMENT

The ALS is concerned that the Working Draft does not deal fully with the issue of entrenchment of the Constitution. The ALS suggests that this aspect of the Working Draft be developed along the following lines: the Constitutional Principles should be carried forward and entrenched in the new Constitution; any amendment to the Constitution should be required to comply with the Constitutional Principles; special majorities should be required to amend the Bill of Rights; the Constitutional Court should be required to certify that such amendments are acceptable in an open and democratic society based on freedom and equality; and the entrenchment rules themselves should be entrenched.

BILL OF RIGHTS

The **equality** clause in the Working Draft is a strong one, as is appropriate in a Constitution which must help to bring about a more equal society. And as befits such a Constitution, the equality clause protects affirmative action programmes. However, the wording of clause 8(2) should be amended to ensure that ill-conceived affirmative action programmes - programmes that do not actually protect and advance disadvantaged people - are reviewable by the courts on the grounds that they do not have an affirmative action impact in practice. The ALS also suggest that the wording of clause 8(3) be amended to make it clear that the grounds listed there are not read as exhaustive. The Constitution should outlaw discrimination on any ground. It should not be confined to particular classes of discrimination.

The right to **freedom of expression** is the lynchpin of a constitutional democracy. The

ALS accordingly urges that freedom of expression be limited as little as possible. In particular, the Constitutional Assembly should avoid weakening the right to freedom of expression by subjecting it to a double limitation, i.e. by making it limitable under both the general limitation clause and an internal limitation clause. We therefore urge the Constitutional Assembly to delete the whole of clause 15(2). In addition, and in order to ensure a diverse and heterodox media - which we regard as essential to a robust democratic culture - option 1 clause 15(3) should be included (but amended to exclude from state regulation media merely financed by the state).

The ALS suggests that the Bill of Rights guarantee **occupational freedom**, not diffuse economic activity. The freedom to choose one's occupation is a basic human right. The same cannot be said of a broad, and potentially open-ended, liberty to engage in economic activity.

The ALS believes that it is important that the Constitution balance the right to strike against the right to **lock out** and that the internal administration of employers organisations and trade unions should not be insulated from constitutional scrutiny.

The ALS supports a **property** clause which guards against arbitrary interference, but does so in a way which does not freeze existing property relations and so perpetuate historical inequities. Property rights are not absolute, but they should be constitutionally protected against arbitrary interference. The ALS acknowledges the need for fair and well-considered programmes for the restitution and redistribution of land. Just compensation should be paid, however, and the safeguards governing restitution in sections 121 to 123 of the interim Constitution should be retained.

The **access to information** clause should guarantee a right to a Freedom of Information Act, rather than a direct right of access to information. The right of access to information requires careful tailoring to protect information from disclosure which, in the legitimate interests of good governance or of third parties, should be withheld. This tailoring cannot be effected by repeated litigation about the meaning of a one-sentence constitutional right to information. A proper access-to-information system can be delivered only through a Freedom of Information Act.

The ALS believes strongly that the Bill of Rights should entrench lawfulness and rationality as requirements for **just "administrative action"** (including executive action and delegated legislation), and should ensure that administrative procedures are fair.

The ALS accepts the need to limit the fundamental rights in Chapter 2, but it would caution against an unduly lax **limitation clause**. Excessive provision for limitation can dilute or even subvert the fundamental rights. The limitation clause should be as narrow as possible: the standard of necessity should be adopted, at least for the most important rights. Moreover, since the Constitutional Assembly seems committed to including a general limitation clause in the Bill of Rights, the ALS urges it to avoid enacting right-specific "internal" limitation clauses unless there is a convincing reason for doing so. The Constitutional Assembly must also avoid immunising unfair discrimination legislation from the Bill of Rights.

The "access to courts" and "enforcement of rights" provisions should be recast to make Bill of Rights challenges less cumbersome and to extend the new, more expansive rules on **standing to sue** to all legal proceedings.

The specifics of **juristic persons'** entitlement to the rights in the Bill of Rights should be left to the courts.

JUDICIARY

Constitutional rights must be integrated into the ordinary law and a wider range of courts should be allowed to participate in interpreting and enforcing the Constitution. The **jurisdictional scheme** should not force people invoking the Constitution to enter the court system at too high and expensive a level. This can be avoided by paring down the exclusive jurisdiction of the Constitutional Court, by extending the appellate powers of the Supreme Court of Appeal and the first-instance powers of the High Court, and by broadening the range of matters within the compass of the magistrates' courts. Specific amendments are suggested.

The ALS believes that all permanent judges, including the judges of the Constitutional Court and the Supreme Court of Appeal, should be appointed in the same way. The Judicial Service Commission should be reduced in size and depoliticised, and Parliament should be more directly involved in the judicial appointments process. A particular **appointments mechanism** is proposed. The system for the appointment of acting judges should be reconsidered and a maximum time limit for acting appointments should be introduced. Constitutional Court judges should be appointed for a maximum period of no more than seven years.

INTERNATIONAL AGREEMENTS

The Constitution should be fully internationalised. In order to do so, clause 201 should be amended. **International agreements** ought to form part of our domestic law as soon as they are ratified by Parliament. There is no reason why, as the clause provides, they should do so only when specifically enacted as law in terms of an Act of Parliament and published in the Government Gazette.

TRANSITIONAL PROVISIONS

The ALS believes that the Bill of Rights should come into force as soon as reasonably practicable after the Constitution is adopted. It is important, however, that the Constitution safeguard the interests and legitimate expectations of parties to **pending proceedings**, particularly parties to civil matters. A transitional provision to deal with this issue is proposed.

COMMENTS BY THE ASSOCIATION OF LAW SOCIETIES OF SOUTH AFRICA ON CHAPTERS 2 AND 6 OF THE WORKING DRAFT OF THE NEW CONSTITUTION

INTRODUCTION

The Association of Law Societies of South Africa ("the ALS") is a representative body of attorneys in South Africa. Through the provincial Law Societies, which constitute its membership, it represents some 13 000 attorneys and candidate attorneys.

The ALS gratefully accepts the invitation to comment on the Working Draft of the New Constitution ("the Working Draft"). The comments in this document relate to the third, refined edition of the Working Draft, dated 18 December 1995.

This is the first of several comments which the ALS intends to submit to the Constitutional Assembly by 20 February 1996. The broad focus of this document is Chapter 2 (the Bill of Rights) and Chapter 6 (Courts and the Administration of Justice) of the Working Draft. The other comments to be submitted by the ALS will focus on clauses 25 to 28 (Social and Economic Rights), clause 36 (States of Emergency), Chapter 7 (State Institutions Supporting Constitutional Democracy) and Chapter 14 (Finance).

ENTRENCHMENT[1]

It is a pillar of a full constitutional order that the Constitution is higher law - that all other law derives its authority from the Constitution, and is subordinate to it. That requires the Constitution to be entrenched. It must be made substantially more difficult to amend than ordinary legislation.

The Interim Constitution complies with this principle only weakly. The general rule is that the Constitution can be amended by a two-thirds majority of a joint sitting of the two houses of Parliament.[2] The rule is subject to certain exceptions - for instance those giving special protection to the provinces' competences and making the Constitutional Principles unalterable[3] - but none of the exceptions requires anything stronger than a two-thirds majority even for so crucial a part of the Constitution as its Bill of Rights (Chapter 3). Contrasted, say, with the United States Constitution, which can be amended only by a two-thirds majority in both houses of Congress plus the ratification of three-quarters of the states, the entrenchment rules in the Interim Constitution are conspicuously easy to satisfy.

The Working Draft of the New Constitution does not deal fully with this issue. It permits any part of the Constitution to be amended by a two-thirds majority in Parliament.[4] This entrenchment rule is weaker even than its equivalent in the Interim Constitution, for two reasons. First, it is unclear

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[1] Clause 53. This is an area on which agreement has been reached, but which should be looked at again.

[2] Section 62 (1).

[3] Sections 62 (2) and 74.

[4] Clause 53.

how many of the Interim Constitution's stronger entrenchments[5] will be retained; and, secondly, the Working Draft leaves open the role of the second house of Parliament in amending the Constitution.[6] A two-thirds majority might be even easier to attain in one house of Parliament than it already is in two. But the Working Draft does acknowledge that its entrenchment rule "requires further development" to comply with the Constitutional Principles.

The ALS suggests the following additions, by way of further development of the Working Draft:

1. Entrench the Constitutional Principles

The new Constitution must comply with the Constitutional Principles, and cannot come into force until the Constitutional Court certifies that it does. The Constitutional Assembly consequently has to draft the new Constitution with a constant eye on the Principles.

It would make no sense for the disciplines imposed by the Principles to disappear the moment the new Constitution comes into force. It would be pointless to spend over a year negotiating constitutional language within the framework of the Principles if Parliament were to become free, with a mere

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[5] In particular sections 62(2) and 74(1).

[6] Clause 53 permits constitutional amendment by two-thirds of "the members of [both Houses of] Parliament", which leaves open the number of houses. This uncertainty flows from abiding controversy about the nature of the second house - in particular whether it should be a Senate or a Council of Provinces (see chapter 4 of the Working Draft). The uncertainty is reflected also in clause 60 (5) (Option 1 (Council of Provinces) for a second house); cf. clause 67 (8), (9) and (10) (Option 2 (Senate)).

two-thirds majority, to override them as soon as the Constitutional Court had certified compliance.

It is consequently **suggested** that the Constitutional Principles be carried forward into the new Constitution, that they be entrenched in it unalterably,[7] and that any amendment to the Constitution be required to comply with them.

2. Entrench the Bill of Rights strongly

The Bill of Rights (Chapter 2 of the Working Draft) is the core of the Constitution's efforts to protect and advance human rights. The Constitutional Principles express a particular concern that this part of the Constitution be entrenched.[8] It is submitted that particular care ought to be taken to protect the Bill of Rights, and the machinery for upholding it, against transitory legislative whims.

To do that effectively, attention has to be paid both to the procedure for amendment, and to the content of the amendment.

2.1 Procedure.

At a minimum, the special majorities required to amend the Bill of Rights, and the machinery for enforcing it (including the mechanisms for appointing the Constitutional Court and its jurisdiction), should be tightened.

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[7] As they are in the Interim Constitution (section 74 (1)).

[8] Entrenchment of the Constitution generally is required by Constitutional Principles XV and IV; it is required specifically for the Bill of Rights also by Constitutional Principle II.

2.1.1 It is **suggested** that the approval of three-quarters of all the members of both the National Assembly and the combined membership of both houses of Parliament sitting jointly be required to amend the Bill of Rights or the machinery for enforcing it (including the mechanisms for appointing the Constitutional Court and its jurisdiction).

2.1.2 It is **suggested**, moreover, that the Constitutional Court be required to certify that any such amendment is constitutional before it can come into force.

2.2 Content

Elsewhere, constitutional courts are beginning to develop core constitutional values - i.e. values so central to the constitution that the courts will refuse to accept a constitutional amendment which violates those values, even if the procedures for amendment have been complied with.[9]

The Bills of Rights in both the Interim Constitution and the Working Draft clearly identify a set of values central to the South African constitutional order - those of an "open and democratic society based on freedom and equality". They are central because the Constitution's fundamental rights must be interpreted to promote those values, and because no law may limit a fundamental right unless it is justifiable under those values.

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[9] The most well-known example of this reasoning is the Indian Supreme Court's assertion in *Kesavananda v State of Kerala* 1973 AIR 1461 (SC) of a power to review the substance of constitutional amendments. The courts of Bangladesh and Sierra Leone have also claimed this power: see generally Cottrell (1990) 30 *ICLQ* 433 at 438 n 28.

It is **suggested** that no amendment of the Constitution be permitted if it clearly violates the values of an open and democratic society based on freedom and equality. [10]

3. Entrench the entrenchment rules

It goes without saying that stronger rules of entrenchment of the kind suggested here will themselves need to be entrenched strongly. It is **suggested** that they be made unalterable, or at least be entrenched in the way that the Bill of Rights and the machinery for enforcing it is.

EQUALITY[11]

The equality clause[12] in the Working Draft is a strong one, as is appropriate in a Constitution which must help to bring about a more equal society. And as befits such a Constitution, the equality clause protects affirmative action programs. But the clause will do the work it is supposed to do only if the correct choices on sensitive questions are made in settling its wording.

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[10] Because those values are so central, they should feature in clause 7 of the Working Draft, the preambular clause which introduces the Bill of Rights. At present that clause says only that the "state must respect and protect the rights in this Bill of Rights". The clause might be reworded along these lines: "The fundamental rights in this chapter are the constituent rights of an open and democratic society based on freedom and equality. The state must therefore respect and protect them."

To safeguard the creative tension between "freedom and equality", and for the sake of cohesion the word "equality" in clause 1 should be replaced with "freedom and equality". The clause would then begin as follows: "The Republic of South Africa is one sovereign democratic state founded on a commitment to achieve freedom and equality ..."

[11] Chapter 2: clause 8. This is an area of contention.

[12] Clause 8.

1. Make affirmative action fully reviewable

Like the Interim Constitution, Option 1[13] in the Working Draft protects, against challenge for inequality, a measure "designed" to protect and advance those disadvantaged by discrimination. A serious problem arises from the fact that the word "designed" is ambiguous. It could be taken to refer (a) to both the aim of the measure and its effect; or (b) to the aim alone.

If (a), a measure could be reviewed either for not having a proper affirmative-action purpose, or for not having a proper affirmative-action impact in practice. If (b), a measure could be reviewed only for lacking a proper affirmative-action purpose, even if it did in fact lack a proper affirmative-action impact in practice. The effect would be to validate ill-conceived affirmative action programs - programs that do not actually protect and advance disadvantaged people - just because they are intended to do so.

In the interest of effective affirmative-action measures, it is essential to resolve the ambiguity, and to eliminate (b) as a possible reading. The solution, it is **submitted**, is to eliminate the word "designed" altogether. The following formulation, based on Option 1, is suggested:

> **"Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, legislative and other measures protecting and advancing persons or groups disadvantaged by**

[13] Of clause 8 (2).

discrimination will not be considered a violation of this section."

The effect of this or similar wording would be to empower the courts to scrutinise not only the aims of measures purporting to be affirmative action programs, but also their effects. The result would be to guard against discriminatory measures which do not have real affirmative-action effects.[14]

2. Make the anti-discrimination principle universal

Like its counterpart in the Interim Constitution, the equality clause in the Working Draft specifically outlaws discrimination[15] on certain enumerated grounds (race, gender, etc.). The Working Draft leaves open, however, whether it should be made as clear as it was in the Interim Constitution that the grounds are not exhaustive, and that the constitutional anti-discrimination principle is universal - that discrimination on a ground not enumerated is also unconstitutional.

On this point the Interim Constitution is clear: it outlaws discrimination "without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender" etc.[16] In contrast, the

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[14] For similar reasons, we would eliminate the word "designed" from clause 35 (2), which saves measures "designed to prevent or prohibit [unfair] discrimination" from challenge under the Bill of Rights, and recast the clause so that it saves "measures preventing or prohibiting [unfair] discrimination".

[15] By which we mean what the Interim Constitution calls "unfair discrimination". It is unclear from the Working Draft whether this expression is to be retained, or whether the new equality clause will talk merely about "discrimination", on the basis that that word is itself pejorative and connotes unfair treatment.

[16] Section 8 (2).

Working Draft merely outlaws discrimination "on one or more grounds, including [but not limited to] race, gender" etc.[17]

To guard against tendencies elsewhere to read the enumerated grounds as exhaustive - as tending to exclude other grounds of discrimination - the square brackets should be removed, i.e. the words "but not limited to" should be included in the final version. It is true that, on the face it, the word "including" should be sufficient. In fact, interpretive tendencies elsewhere to restrict the force of this kind of provision to the grounds enumerated (and those analogous with the grounds enumerated) are so strong - even in the face of clearly inclusive language - as to make this kind of clarification essential.[18]

It is important that the anti-discrimination principle be universal, outlawing discrimination on any ground, and not confined to particular classes of discrimination. To restrict anti-discrimination to discrete categories can be arbitrary, and it can leave important gaps in the principle's coverage. For instance, for many years there has been a struggle in several jurisdictions to bring discrimination on the ground of pregnancy under the protective coverage of statutes which remedy discrimination only on the ground of sex. A general anti-discrimination principle would alleviate this kind of difficulty.

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[17] Clause 8 (3).

[18] See e g *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

FREEDOM OF EXPRESSION[19]

Freedom of expression is clearly foundational to any democracy, and it is essential that it enjoy the strongest protection possible.

1. Limit freedom of expression as little as possible

Because the right to freedom of expression is a lynchpin of a constitutional democracy, it is especially important that it be limited to the minimum extent possible. It follows, as we point out in the section on LIMITATION OF RIGHTS below, that the right should be limited, in the general limitation clause, under the most stringent standard that the Bill of Rights ought to use - the standard of necessity. No law should be permitted to limit freedom of expression unless it is necessary in an open and democratic society based on freedom and equality.

Furthermore, the Constitutional Assembly should avoid weakening this right by subjecting it to double limitation - by making it limitable under both the general limitation clause and an internal limitation clause. This, unfortunately, the Working Draft has done. Clause 15 (2) excludes various kinds of expression from the protection of the freedom.

All of the exclusions in clause 15 (2) are thus problematic. Undoubtedly the most dangerous, however, is the internal limitation in clause 15 (2) (*c*) permitting the banning of hate speech, defined as "advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to discrimination".

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[19] Chapter 2: clause 15. This is an area of contention.

No-one approves of hate speech, and the desire to protect against it is a wholesome one. But this internal limitation, though on the face of it innocuous, lends itself to abuse. It is drawn in indefinite terms, and its boundaries are consequently unclear. The risk of authorising undemocratic censorship laws is substantial.

It is unclear why the drafters believe that the work to be done by this internal limitation is not already done, very satisfactorily, by the general limitation clause. If a law to suppress hate speech is necessary in an open and democratic society based on freedom and equality, then the general limitation clause will validate it, and the internal limitation is superfluous. And if the law is not necessary in an open and democratic society based on freedom and equality, who wants it? It is **urged** that the internal limitation should be deleted, i.e. that *the whole* of clause 15 (2) be deleted.

2. Ensure Media Diversity

In the modern world, a very serious threat to the kind of vigorous debate essential for the full enjoyment of freedom of expression is public broadcasting which is monolithic, whether politically, ideologically or culturally. It undermines the diversity and heterodoxy essential to a robust democratic culture. Very little stultifies democracy more quickly than the impoverishment of the pool of ideas canvassed on radio and television. Option 1 for sub-clause 15 (3) deals with this issue thus:

> **"The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion."**

To place the state under a responsibility to ensure diversity in the media that it *controls* can reduce monolithic media orthodoxy, and help free expression to flourish. But to include media merely *financed* by the state is problematic: it would give the state an incentive to subsidise the media - not necessarily generously - just in order to acquire the power to regulate it. For this reason we would **support** Option 1, but with the **deletion** of the words "finances or".

ECONOMIC ACTIVITY[20]

Guarantee concrete occupational freedom, not diffuse economic activity

The Working Draft discloses considerable controversy about the inclusion of a guarantee of freedom of economic activity or occupational freedom.[21] Option 1 is at one extreme: it proposes to eliminate the guarantee altogether. Option 2 starts off at the other extreme, by trying to protect a broad right to "engage in economic activity"; but it is weakened, like the section in the Interim Constitution on which it is based,[22] by a sweeping internal limitation clause.

Option 3, in our view, occupies the sensible middle ground. It protects not a broad, and potentially open-ended, liberty to engage in economic activity, but a narrower and more concrete occupational liberty. It reads:

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[20] Chapter 2: clause 21. This is an area of contention.
[21] Clause 21.
[22] Section 26.

"Everyone has the right to pursue the livelihood of their choice, including the right to choose freely their occupation or profession, their place of work and their place of training."

The freedom to choose one's occupation is obviously a basic human right. It is a component of every person's dignity, essential to his or her self-realisation. The ALS would consequently **support** this option.

LABOUR RELATIONS[23]

1. Include a right to lock out

Like its counterpart in the Interim Constitution, the labour relations clause in the Working Draft guarantees to everyone the right to fair labour practices and confers on "workers" the right to strike. But unlike the Interim Constitution, the right to strike is not tied to collective bargaining. The Working Draft also leaves open the question whether employers should have the right to lock-out. In the Interim Constitution, employers' "recourse" (not "right") to lock-out "for the purpose of collective bargaining" was entrenched, albeit "subject to section 33(1)".

The ALS believes that it is important that the Constitution balance the right to strike against the right to lock-out. This is particularly important in disputes of interest about matters other than wages. There, the right to lock-

[23] Chapter 2: clause 22. This is an area where, in the main, agreement has been reached, but which should be looked at again.

out is often an employer's only economic counter to the workers' right to strike. Accordingly, the ALS **supports** the inclusion of clause 22 (3) (*c*).

2. Secure the accountability of trade unions and employers organisations

It is unclear why the drafters have included a sub-clause[24] conferring upon employers organisations and trade unions the right to determine their own administration, programmes and activities. This "right" is really no more than a corollary of employers' rights to form and join employers' organisations[25] and workers' rights to form and join trade unions.[26] Moreover, it is possible that this sub-clause will be interpreted as prohibiting laws which "interfere" with the autonomy of such bodies in an attempt to promote democratic and accountable administration and governance.[27] It is unclear why employers' organisations and trade unions should be granted greater immunity from regulation than e.g. banks, non-governmental organisations, close corporations, companies and co-operatives.

It is accordingly **suggested** that sub-clause 22 (4) (*a*) be omitted in order to forestall an unnecessary controversy about whether the constitutional autonomy enjoyed by employers' organisations and trade unions includes an immunity from measures aimed at ensuring financial probity and internal democracy.

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[24] Clause 22 (4) (a).
[25] Clause 22 (3) (a).
[26] Clause 22 (2) (a).
[27] The provisions in the Labour Relations Act, 1995, requiring ballots for elections and the auditing of accounts, for instance, might fall foul of this sub-clause.

3. "Employees" instead of "Workers"

As far as possible, the wording of the labour relations clause should match the wording of the new Labour Relations Act, 1995. Accordingly, unless the intention is to limit the rights conferred in sub-clause 22 (2) to non-managerial employees, it is **suggested** that the word "employees" be used instead of "workers".[28]

PROPERTY[29]

Do not freeze existing property relations, but guard against arbitrary interference

The question of property protection is probably the most divisive issue in the Bill of Rights, and the property clause must be drawn in a way which is sensitive to the deeply-felt aspirations and fears of all South Africans. Two extremes must be avoided.

The one extreme would make the property clause a crude freezing of all existing property relations. In fact no one considers property rights absolute. Hardly anyone doubts that the existing system of property rights reflects grave historical iniquities, and that reform is necessary, especially in the area of land rights.

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[28] Note that in section 213 of the Labour Relations Act, 1995, "employee" is widely defined. The meaning of "worker" is comparable to the more limited definition of "employee" in section 78 of the Act, i.e. all employees other than managerial employees.

[29] Chapter 2: clause 24. This is an area of contention.

The other extreme would eliminate constitutional protection of property altogether. It is clear that a complete absence of property protection could leave the Constitution helpless in the face of interference with property rights so capricious or intrusive as to threaten the economic stability upon which the Constitution itself rests.

Option 3 of the property clause in the Working Draft contains a sub-clause which seeks a principled middle ground that avoids these extremes.[30] It says:

"No one may be arbitrarily deprived of property."[31]

This makes it clear that property rights (a) are not absolute, but (b) are protected against unjustifiable interference. The principle of non-arbitrariness would require the government, if challenged, to justify interference with property rights, but it would not obstruct fair and well-considered restitution or redistribution programs. To require the government to justify its programs is simply to extend a central constitutional value - accountability - to the sphere of property relations. We consequently **support** this provision.

Option 2 makes the property clause altogether inapplicable to "measures aimed at bringing about land reform".[32] The effect is to strip some citizens of protection against arbitrary interference just when they need it most. In contrast, Option 3 tries to integrate land reform considerations into a

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[30] Clause 24, Option 3, sub-clause (1) also guarantees the right "to acquire" property. We welcome this wording, because it proscribes statutes restricting *eligibility* to hold property, a device which characterised e.g. the Black Land Act 27 of 1913 and the Group Areas Act 41 of 1950.

[31] Clause 24, Option 3, sub-clause (2).

[32] Clause 24, Option 2, sub-clause (4).

principled general treatment of property relations. The circumstances under which an expropriation may be permitted, and the factors to be taken into account in determining compensation for expropriation, are worded sensitively to the special considerations which arise when the government needs to embark on law reform. The general approach that Option 3 takes to this question, and the actual wording of Option 3, are **supported**, subject to these caveats:

Caveat 1: Option 3 instructs the court, when it determines compensation for expropriation, to take account of "any beneficial improvements after ... acquisition" of the property expropriated. We would **prefer** something fuller and more specific: that the court be instructed to take account of

> **"the amount invested in the acquisition of the right in the property and in the property; and**
> **the financial loss caused by the expropriation"**

Caveat 2: In order to continue the operation of the criteria and safeguards in sections 121, 122 and 123 of the Interim Constitution,[33] the last line of Option 3 sub-clause (5) should be reworded. [34]

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[33] Assuming, of course, that the process of land restitution will not have been completed by the time the new Bill of Rights comes into force. The Minister of Land Affairs, acting in terms of section 2 (1) (b) of the Restitution of Land Rights Act, 22 of 1994, has specified 30 April 1998 as the cut-off date for lodging claims in terms of the Act. This date can be extended by way of an amendment to the Restitution Act.

[34] One alternative would be to refer to those sections in sub-clause (4), e.g. by replacing the words after "redress" with "subject to and in accordance with this section and sections 121, 122 and 123 of the Constitution of the Republic of South Africa, Act 200 of 1993." On the other hand, because the factors listed in section 28 (3) of the Interim Constitution are not on all fours with those listed in Option 3 sub-clause (4), it might be preferable to repeat the text of sections 121, 122 and 123 of the Interim Constitution in the new Constitution and to replace the reference to section 28 (3) of the Interim Constitution in the section corresponding to 122 (2) with a reference to Option 3 sub-clause (4).

ACCESS TO INFORMATION[35]

Guarantee the right to a Freedom of Information Act

Access to government held information, in those countries which have been at the forefront of developing a conception of democracy deeper than merely electing the government, is now emerging as a basic right. It is a right basic to democracy because it is a key to ensuring that governance is open, which itself is a key to ensuring that government is accountable. In a Constitution in which openness and accountability are core values, it is obviously essential to guarantee freedom of information. And Constitutional Principle IX explicitly requires the new Constitution to provide for "freedom of information so that there can be open and accountable administration at all levels of government".

The question is how best to do that. The interim Constitution grants a direct right of access to state-held information "required for the exercise or protection" of other rights.[36]

This kind of formulation generates at least two kinds of problems. First, the requirement that the information be necessary to exercise or protect one's other rights severely curtails the scope and value of the right of access. This defect the Working Draft cures by dropping that requirement.[37]

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[35] Chapter 2: clause 31. This is an area of contention.
[36] Section 23.
[37] Clause 31 (1) (*a*).

But a second problem is more difficult to solve. The right of access to information, in its nature, requires very careful tailoring to protect information from disclosure which, in the legitimate interests of good governance or of third parties, ought to be withheld. In the most developed access-to-information laws, this is achieved by enacting elaborately crafted rules (usually in the form of exemptions from a general right of access to state-held information) to protect personal privacy, law enforcement, foreign relations, commercial confidentiality, national defence, and so on.

To develop equivalent rules by litigating the contours of a one-sentence constitutional right to information would be extremely inefficient and costly. It would take numerous expensive cases, the outcome of which would be difficult to predict. And the results, after years of litigation, would be much less clear and coherent than if the rules were announced in advance by statute. A proper access-to-information system can be delivered sensibly only through a Freedom of Information Act.

None of this means that there should be no constitutional protection for freedom of information. But it does mean that the Constitution should merely be an anchor for that right, rather than the whole ship. The Constitution should entrench the right to have a Freedom of Information Act, rather than try to be one.[38]

For these reasons we would **suggest** a clause along these lines:

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[38] Clause 31 (2) of the Working Draft, which appears in square brackets, seems to be tending in this direction. It says that the right of access to information must be regulated by national legislation.

"Everyone has the right to reasonable, effective and easily enforceable legislation giving access to all information held by the state or any of its organs at all levels of government which should not be withheld in an open and democratic society based on freedom and equality."

JUST ADMINISTRATIVE ACTION[39]

Entrench lawfulness, fair procedure and rationality

The three great principles of administrative justice are lawfulness, procedural fairness (also called due process) and rationality. Option 1 for the administrative justice clause[40] (now labelled "Just Administrative Action") is worded thus:

"(1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.

(2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published."

So long as the word "reasonable" or "justifiable" is indeed included[41] Option 1 neatly and clearly captures the essential principles - much more neatly than Option 2, which introduces internal limitations to those principles that

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[39] Chapter 2: clause 32. This is an area of contention.

[40] Clause 32.

[41] As the third edition of the Revised Working Draft of the New Constitution now contemplates.

mar its coherence.[42] Reasonableness (or justifiability) is a standard without which officials will not be fully and properly accountable. Since accountability is a central value of the Constitution, it is essential that this standard be included here.

We consequently **support** Option 1, whether the word "reasonable" is chosen or "justifiable", but subject to two important **caveats**:

Caveat 1: The expression "administrative action" in sub-clause (1) is ambiguous. It is not entirely clear that it embraces executive action and delegated legislation. Since those forms of administrative decision-making clearly ought to fall within the reach of the principles of administrative justice, it is **suggested** that the expression "administrative action" be defined (or replaced) to make it clear that executive action and delegated legislation are in fact covered.

Caveat 2: Sub-clause (2), which confers a right to reasons for administrative action "unless the reasons have been published", gives rise to an unwarranted "double limitation" (see LIMITATION OF RIGHTS below). There is no need for an internal limitation of this sort, because a copy of the published reasons can easily be supplied to any person who requests the reasons. It is **suggested**, therefore, that the words "unless the reasons have been published" be **deleted**.

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[42] E.g. it restricts the right to fair procedure to those whose "rights are adversely affected by administrative action". Historically, such language has been construed narrowly by some courts, greatly to the detriment of procedural fairness. In the process of defining the compass of such language, moreover, the courts have introduced arbitrary distinctions.

LIMITATION OF RIGHTS[43]

The ALS accepts the need to limit the fundamental rights, but it would caution against unduly broad limiting provisions. Excessive provision for limitation can dilute or even subvert the fundamental rights. This is an area which requires careful drafting to preserve the integrity of the Bill - to stop the Bill of Rights from taking away with one hand what it has given with the other.

1. Avoid double limitation

There are three dominant models for limiting fundamental rights. The first, the American model, is to say nothing, and leave it to the courts to develop appropriate limitations by the way in which they interpret the rights. The second, the German model, is to limit each right requiring limitation specifically. This is sometimes called internal limitation - the limitation clause appears within the clause declaring the right, rather than outside of it in a separate clause. The third, the Canadian model, is to enact a single general limitation clause, governing (and qualifying) all of the rights.

There is much to be said for and against each method; but we would point to the particular hazards of mixing methods. What can be especially dangerous is to combine the second and the third method - to mix a general limitation clause with specific internal limitations. This kind of mixture dilutes the rights - it lends itself to confusion and to the excessive limitation of the right. If a right is cut down both by its own internal limitation and by the

[43] Chapter 2: clause 35. This is an area of contention.

overriding general limitation clause, a court might be justified in reading it as a particularly weak right.

And even if the court did not do that, it might be very difficult to decide which kinds of considerations should be taken into account under the internal limitation and which under the general limitation clause. It might be very difficult to allocate limiting arguments in a coherent fashion between the two kinds of limitations clauses.

Double limitation of this kind is a trap into which the Working Draft falls by subjecting the guarantee of freedom of expression to both the general limitation clause and an internal limitation.[44] Option 2 of the formulation of the guarantee of free economic activity in the Working Draft[45] also lapses into double limitation. The same can be said of clause 11 (1) (*a*), which confers a right not to be deprived of liberty "arbitrarily or without just cause", as well as of clause 32 (2)[46] which confers a right to reasons for administrative action "unless the reasons have been published". Unquestionably, both these internal restrictions could be advanced as limiting arguments under the general limitation clause.

For these reasons, since the Constitutional Assembly seems committed to including a general limitation clause in the Bill of Rights, we would **urge** it to avoid enacting internal limitation clauses as well unless there is a very convincing case for doing so.

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[44] Clause 15 (2).
[45] The option modelled on section 26 of the Interim Constitution.
[46] Option 1.

2. Tighten the limitation clause.

Because of the dangers of excessive limitation, the Constitutional Assembly is **urged**, in the interest of entrenching vigorous fundamental rights, to opt for as narrow a general limitation clause as possible.

The Working Draft suggests some consensus about the proposition that a law limiting a right should have to be acceptable in an open and democratic society based on freedom and equality, but it discloses dissensus about the standard of acceptability: should a limiting law have to be "necessary", or is it sufficient that it be "reasonable" or "justifiable"?[47]

The general limitation clause ought to be as narrow as possible. Accordingly, the Constitutional Assembly is **urged** to adopt the standard of necessity, at least for the most important rights - the rights already protected under that standard in the Interim Constitution,[48] plus the rights of freedom of expression and privacy.[49]

The Interim Constitution already recognises that the former rights merit this degree of protection, and it would be a serious retrogression if the new Constitution were not to do the same. It seems clear, moreover, that freedom of expression and privacy merit at least the same degree of

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[47] Clause 35 (1) (*a*).

[48] I.e. those listed in section 33 (1) (*aa*) of the Interim Constitution. The rights subject to the stricter limitation test in terms of this section are the rights to human dignity, to freedom and security of the person (including freedom from torture or cruel, inhuman, or degrading treatment or punishment), not to be subject to servitude or forced labour, to freedom of religion, belief or opinion, and to vote and participate in political activities. Also included in this list are the rights of detained, arrested and accused persons and children's rights not to be subject to neglect or abuse or to exploitative labour practices and, if detained, to be treated in a manner that takes account of their age.

[49] Clauses 15 and 13 of the Working Draft.

protection as the rights already protected under the necessity standard in the Interim Constitution.

Freedom of expression is plainly foundational to any democracy, and the centrality to a democratic order of the right to privacy - which protects citizens against unjustified searches and seizures and the violation of their communications - is becoming increasingly well established. If these two rights could be limited easily, censorship and wiretapping might become routine. Like the rights already protected under the necessity standard in the Interim Constitution, they should be protected against a limiting law which is not necessary in an open and democratic society based on freedom and equality.[50]

3. Avoid immunising "Civil Rights Acts" from constitutional scrutiny

It is **submitted** that clause 35 (2), which saves measures "designed to prevent or prohibit [unfair] discrimination" from challenge under the Bill of Rights, should expressly be made subject to the general limitation clause.[51] If this is not done, there is a risk[52] that clause 35 (2) will be construed as an alternative limitation clause, operating in parallel with clause 35 (1), and validating measures which are not acceptable (whether acceptable means necessary, reasonable or justifiable) in an open and democratic society based on freedom and equality. That would plainly be an intolerable result.

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[50] The ALS supports clause 35 (1) (*b*) of the Working Draft, which requires a limitation on a right to be "compatible with the nature of the right that it limits"; this seems to be an improvement on section 33 (1) (*b*) of the Interim Constitution, which requires a limitation not to negate the "essential content" of the right.

[51] Clause 35 (1).

[52] Matters are further complicated by clause 35 (3), which provides: "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."

4. Replace "designed to prevent or prohibit"

For reasons similar to those given under EQUALITY above, it is **submitted** that the word "designed" should be removed from clause 35 (2), and the clause recast so that it saves "measures preventing or prohibiting [unfair] discrimination".

STATES OF EMERGENCY[53]

States of war

It is clear from the marginal notes to clauses 36 (1) to (3)[54] that the operation and adequacy of the "States of Emergency" clause in a "state of war" is currently being investigated. The ALS is preparing a further submission in which these issues as well as other questions arising from the clause 36 will be addressed.

Do not limit detainees to two applications for judicial review

For the present, the ALS notes one narrow point. Sub-clauses 36 (7) (*e*) and (*f*) create the impression that once a detainee has made two unsuccessful applications for release, he or she may be detained indefinitely without any further opportunities to apply for judicial review. It is accordingly suggested that the words "after 10 days" in sub-clause 36(7)(*f*) be replaced with "at intervals of at least 10 days".

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[53] Chapter 2: clause 36. This is an area on which agreement has been reached, but which should be looked at again.

[54] In the third edition of the revised working draft.

ACCESS TO COURTS; ENFORCEMENT OF RIGHTS[55]

1. Make Chapter 2 challenges less cumbersome

The words "to apply" and "may apply" in clause 37 will undoubtedly cause problems in the courts.[56] As the clause is presently formulated, judicial officers might decide that proceedings to enforce the Bill of Rights should be application proceedings, i.e. proceedings instituted by way of notice of motion. This would unnecessarily complicate many cases, not least because civil litigants and defendants in criminal proceedings might be unable to invoke the Bill of Rights as a "shield" in those proceedings; they would have to bring interlocutory applications, perhaps even entirely separate applications.

2. Extend standing to sue

Further problems might arise from the fact that the broad standing conferred by clause 37 applies only to Bill of Rights proceedings. As matters stand, ordinary litigants must prove that they have a "direct", "sufficient" or "personal" interest in any matter before they can litigate about it. But what about the case brought by someone acting in the public interest, who, in addition to an infringement of a fundamental right entrenched in Chapter 2, relies on a cause of action arising from another part of the Constitution[57] as

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[55] Chapter 2: clauses 33 and 37. This is an area on which agreement has been reached, but which should be looked at again.

[56] Clause 37 embodies a right "to apply" to a competent court for appropriate relief for infringements of rights declared in the Bill of Rights, and specifies the persons who "may apply" for that relief.

[57] E.g. Chapter 9 (Provincial and National Legislative and Executive Competencies).

well as a cause of action arising from, say, administrative law? Might that person have standing to sue in relation to the cause of action based on the fundamental right only? Is it realistic to liberalise standing in relation in relation to one branch of the law and not the rest? Should one rely on the courts to "develop" the relatively settled common law on standing to sue, as some have suggested, to "promote the spirit, purport and objects of the Bill of Rights"?[58]

The best way to avoid these problems[59] is to extend the reach of the second sentence in clause 37 to all legal proceedings. The easiest way to achieve this result, it is submitted, would be to re-position the sentence as the second part of clause 33 ("access to courts").

3. Amend both clause 33 ("access to courts") and clause 37 ("enforcement of rights")

It is accordingly **suggested** that the problems discussed in 1 and 2 above should be addressed by rewording clauses 33 and 37 as follows:

33. Access to Courts

"(1) **Everyone listed in this section has the right to have any dispute that can be resolved by law decided in a fair, public hearing in a court of law or, where appropriate or necessary, another independent or impartial forum.**

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[58] Cf clause 39 (3).

[59] Without scuttling the broader requirements for standing to sue in Bill of Rights proceedings.

(2) The persons who may seek relief 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 interests of, a group or class of persons;

(*d*) anyone acting in the public interest; and

(*e*) an association acting in the interests of its members."

37. Enforcement of Rights

"Anyone listed in section 33 (2) has the right to approach a competent court, alleging that a right declared in the Bill of Rights has been infringed or threatened, or to raise that allegation as a defence or in rebuttal, and the court may grant appropriate relief, including a declaration of rights."[60]

JURISTIC PERSONS[61]

Section 7 (3) of the Interim Constitution provides that juristic persons are entitled to the rights contained in the Chapter on Fundamental Rights, provided that, and to the extent that, they can be exercised by artificial

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[60] A "plainer English" version of this clause might be: "Anyone listed in section 33 (2) is entitled to appropriate relief from a competent court to enforce the rights in this Bill of Rights [, including a declaration of rights]."

[61] Chapter 2: clause 38(3). This is an area of contention.

persons. This provision is repeated[62] in the Working Draft in Clause 38 (3), Option 1.

Option 2, by contrast, provides that juristic persons are entitled only to the rights enumerated in a special list.

We have serious reservations about the desirability of including in Chapter 2 a list of this sort, whether exhaustive or otherwise. Sooner or later any such list will be found wanting. It is accordingly submitted that the specifics of juristic persons' entitlement to the rights in the Bill of Rights should be left to the courts. We consequently **support** Clause 38 (3), Option 1.

INTERPRETATION OF THE BILL OF RIGHTS[63]

The "seepage" provision: "foster" instead of "promote"

The word "promote" in clause 39 (3) replaces the archaic "have due regard to" in section 35 (3) of the Interim Constitution. It is **submitted**, however, that "foster" better describes the courts' role when interpreting legislation and developing the common law and customary law.

[62] Albeit in "plain English".

[63] Chapter 2: clause 39. This is an area on which agreement has been reached, but which should be looked at again.

WHICH COURTS SHOULD HAVE CONSTITUTIONAL JURISDICTION AND WHAT SHOULD THE EXTENT OF THAT JURISDICTION BE?[64]

If constitutionalism is to take root in South Africa, the Constitution as a whole, but particularly the Bill of Rights, should become part of the legal mainstream. The only way to achieve this result is to integrate constitutional rights into the ordinary law and to allow a wider range of courts to participate in interpreting and enforcing the Constitution.

One of the positive features of the new system of courts established by Chapter 6 is that the Supreme Court of Appeal[65] is brought into the chain of courts with constitutional jurisdiction. The most negative feature of the new jurisdictional scheme, however, is that it forces people to enter the court system at too high and expensive a level. We submit that the enterprise of developing a constitutional democracy would be better served by paring down the exclusive jurisdiction of the Constitutional Court, by extending the appellate powers of the Supreme Court of Appeal and the first-instance powers of the High Courts, and by broadening the range of constitutional matters within the compass of the magistrates' courts.

In view of the desirability of a devolution of constitutional jurisdiction, as well as the practical difficulties and costs which attend first-instance proceedings in an unwieldy and expensive forum like the Constitutional Court, we suggest that the exclusive jurisdiction of the Constitutional Court be restricted to decisions on the constitutionality of parliamentary Bills.[66] In

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[64] Chapter 6. This is an area in which agreement has been reached, but which should be looked at again.

[65] At present, the Appellate Division.

[66] Provincial Bills are better dealt with provincially.

the past, the various provincial and local divisions decided disputes in constitutional matters involving organs of state at all levels of government as a matter of course. There is no compelling reason why they should not continue to do so. They have also declared invalid nationally and provincially-applicable primary and subordinate legislation,[67] and the acts and decisions of the President.[68] Accordingly, we suggest that clause 96 (3) be altered to read:

> **"Only the Constitutional Court may decide on the constitutionality of any parliamentary Bill, but may do so only when the Bill is referred to it in terms of the Constitution."**

If this change is implemented, both the Supreme Court of Appeal and the High Court will have the power to rule on the constitutionality of Acts of Parliament, Provincial Acts and the "conduct" of the President. We **suggest**, however, that although the High Courts be granted the power to decide on the constitutionality of provincial Bills,[69] their decisions in such matters should be appealable directly, and as of right, to the Constitutional Court.

Most people's experience of the courts is at the level of the magistrates' courts. It is vitally important, therefore, that the Bill of Rights in particular is applicable in those courts and accessible to the persons using them. Complex restrictions and involved mechanisms for the referral of constitutional questions from the "other courts" to the High Court or the

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[67] Including, in the few "manner and form" cases, Acts of Parliament: see e.g. *Harris v Minister of the Interior* 1952 (4) SA 153 (C).

[68] See e.g. *United Democratic Front v State President* 1987 (3) SA 296 (N), a case in which a provincial division invalidated subordinate legislation made by the State President.

[69] Which have been referred to them in terms of the Constitution.

Constitutional Court should be avoided, if at all possible.[70] Moreover, while there may be persuasive arguments against allowing presiding officers in e.g. the magistrates' courts to rule on the constitutionality of national and provincial legislation, there is no reason why they should not do so in respect of local legislation. Accordingly, while it is accepted that in view of the wide range of "other courts", the drafters have been compelled in clause 98 (3) to leave the conferment of constitutional-law jurisdiction upon those courts to ordinary legislation, we do not understand why *all* legislation should be beyond their compass.[71] For one thing, local litigation on e.g. municipal bye-laws will enhance the accountability of local government. We **suggest**, therefore, that the word "legislation" in clause 98(3) be replaced with "nationally or provincially-applicable primary or subordinate legislation".

THE APPOINTMENT OF JUDICIAL OFFICERS[72]

1. Appoint all permanent judges in the same way

The ALS **supports** Clause 100, Option 1, save for clauses (2), (3) and (5).[73]

The reasons for the proliferation of procedures for the appointment of judges are hard to understand. In keeping with the drive to simplify the Constitution wherever possible, we suggest a single, simple, and generally-applicable appointments procedure. The main role-players in our mechanism would

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[70] Section 103 of the Interim Constitution has proved unworkable.

[71] Clause 98 (3) provides: "All other courts have jurisdiction as determined by an Act of Parliament; but, no Act of Parliament may grant jurisdiction to enquire into or rule on the constitutionality of any legislation or any conduct of the President."

[72] Chapter 6. This is an area of contention.

[73] A provision along the lines of clause 100 (9), Option 2 should also be included.

comprise a pared-down and depoliticised Judicial Service Commission, the leaders of the political parties represented in Parliament and, if those leaders are unable to reach consensus, a special majority of members of Parliament. We accordingly **suggest** that the appointment of all permanent judges, including the President and Deputy President of the Constitutional Court, the Chief Justice and Deputy Chief Justice, and the judges of the Constitutional Court, should be dealt with as follows:

(a) The Judicial Service Commission must prepare and submit to the Speaker a list of nominees with at least three names more than the number of appointments to be made.

(b) The Speaker must submit the list to the leaders of the political parties represented in Parliament, who may by consensus make appointments from the list.

(c) If any appointment remains to be made and the leaders agree that the nominees are unacceptable, the Speaker must advise the Judicial Service Commission, with reasons. The Judicial Service Commission must supplement the list with further nominees and the leaders may make the remaining appointments from the supplemented list.

(d) If the leaders do not refer the list to the Judicial Service Commission but do not all agree on an appointment, the appointment must be made by a majority of at least 75% of the total number of members of Parliament.

2. Acting judges

The ALS feels that there is room to improve both the present system for the appointment of acting judges and the system proposed in clause 101. Amongst other things, for no apparent reason the Judicial Service Commission is entirely excluded from the appointments process. We are also concerned about the lack of transparency in the present and the proposed system for the appointment of acting judges to all courts, as well as the lack of any maximum time limit. We accordingly **suggest:** (a) that acting judges, other than acting judges of the Constitutional Court, be appointed for no more than three months in total without Judicial Service Commission approval; and (b) that acting judges of the Constitutional Court be permitted to be appointed only with the prior approval of the Judicial Service Commission, and then for no more than six months in total. Of course, after the expiry of those periods, acting judges must continue in office until they have finished hearing all part-heard matters.

3. The tenure of Constitutional Court judges

The ALS **suggests** that, as is the case at present, Constitutional Court judges should be appointed for a fixed term of no more than seven years.

We also **submit** that the transition between the Interim Constitution and the new Constitution should be dealt with by: (a) retiring the existing judges of the Constitutional Court five years after the date of their inauguration, (b) holding a lottery for six of those judges who will be entitled to serve for a further period of two years, and (c) appointing five new judges to the remaining places. There are two reasons why the transition should be

administered in this way. First, as all of the incumbents were appointed for a period of seven years, it may safely be assumed that even the oldest among them were considered capable of serving a total of seven years. Secondly, it would be unfair to remove judges solely on the grounds of their age who are both willing and able to continue.

4. De-politicise the Judicial Service Commission

If the procedure for the appointment of judges outlined in 1 above is adopted, the political input in the appointments process will be channelled through the leaders of the political parties represented in Parliament and, if necessary, through Parliament itself. It is accordingly **submitted** that the Commission should be reduced in size by excluding the senators and presidential nominees. This would serve not only to de-politicise the Commission, but to reduce it to manageable proportions. It is suggested, therefore, that clauses 104 (1) (*h*) and (*i*) be omitted, and a consequential amendment to clause 104 (3) be made.

INTERNATIONAL AGREEMENTS[74]

Internationalise the Constitution fully

A major theme of the Working Draft is the internationalisation of the Constitution. Great importance is attached to harmonising the Constitution with international law and practice.

Thus the interpretation clause instructs the courts, when interpreting the Bill of Rights, to consider all applicable international law, and it goes out of its way expressly to empower the courts to do something that they would inevitably do - consider foreign law.[75] Again, the state-of-emergency clause permits laws to derogate from the Bill of Rights in a national emergency only if they are "consistent with the Republic's obligations under international law".[76] And the limitation clause canvasses the possibility of outlawing any limitation of a right that is not consistent with our international law obligations.[77] Clause 202 of the Working Draft, moreover, makes customary international law part of South African domestic law unless it is overridden by the Constitution or an Act of Parliament.

This consistent thread of internationalisation, which is to be welcomed because it facilitates South Africa's full re-integration into the international community, is supported also by Constitutional Principle II, which requires

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[74] Chapter 15: clause 201. This is an area in which agreement has been reached, but which should be looked at again.

[75] Clause 39 (1).

[76] Clause 36 (3) (*b*)

[77] Clause 35 (1) (*c*), which appears in square brackets.

the new Constitution to guarantee "all universally accepted fundamental rights, freedoms and civil liberties".

All this makes it very surprising that clause 201 of the Working Draft makes international agreements part of our domestic law only when they are specifically "enacted as law in terms of an Act of Parliament" and gazetted.

In countries such as the United Kingdom, such a rule would make sense, because there the executive has unfettered power, without reference to Parliament, to contract international obligations that bind the state. If such obligations were automatically to become domestic law, the executive would be usurping Parliament's democratic prerogative to make the laws. It would put the executive in a position to repeal an Act of Parliament merely by entering into an international agreement.

This important consideration, however, is not applicable in South Africa to international agreements requiring ratification or accession. That is because the Working Draft vests the exclusive power to ratify or accede to an international agreement in Parliament itself.[78] So the executive can no longer foist an international agreement requiring ratification or accession on an unwilling Parliament. Without Parliamentary approval, the agreement will not bind the state at international law.

But once Parliament has expressed its approval of an international agreement sufficiently to ratify it or accede to it, it is difficult to see why the agreement should not automatically become part of South Africa's domestic law, at

[78] Clause 201 (1).

least if Parliament refrains expressly from legislating to exclude it from domestic law.

In the contemporary world, international agreements are a major source of human rights protection. The Working Draft invites South Africa to engage in inconsistent behaviour. It empowers Parliament to ratify or accede to an international human rights agreement, and make it binding on the state, but to withhold the rights in the agreement from South Africans as part of domestic law. If Parliament were to do that very often, South Africa would risk being seen as a hypocrite. We would be inviting the perception that we enjoy the acclaim to be gained from ratifying or acceding to an international human rights agreement, but are unwilling to grant its benefits to our own citizens as domestic rights.

It would be anomalous if a Constitution with human rights protection as strong as ours were to permit the important contribution to be made by international human rights agreements to be thwarted in this way. It would be equally anomalous if a Constitution so committed to internationalisation were to facilitate parliamentary practices that might jeopardise our international standing. To take one stance in the international arena, and a quite different one at home, might well jeopardise that standing. The Constitutional Assembly is urged to reconsider this aspect of the Working Draft.

TRANSITIONAL PROVISION: COMMENCEMENT OF THE BILL OF RIGHTS / APPLICABILITY TO PENDING PROCEEDINGS[79]

It is a matter of concern that no transitional provisions have been included in the Working Draft.

The transitional provisions regulating (a) the date of commencement of the Bill of Rights and (b) the applicability of the Bill of Rights to pending proceedings, should be clear. There must be no repeat of the confusion and uncertainty surrounding section 241(8) of the Interim Constitution.

Nothing in the interim Constitution precludes the commencement of the Bill of Rights before 30 April 1999: the Bill of Rights has no bearing upon the life-span of either the Parliament constituted after the general election of 27 - 29 April 1994 or the Government of National Unity.[80]

Safeguard the interests of parties to pending proceedings

Ideally, the Bill of Rights should come into force as soon as possible after the Constitution is adopted. However, any decision about the date of commencement of the Bill of Rights is inextricably linked to a decision about its application to pending proceedings. We feel that the Constitution should safeguard the interests and legitimate expectations of parties to pending proceedings, particularly parties to civil matters which commence at a time when the contents and wording of the Bill of Rights have not been settled.

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[79] This is an area which has been omitted.

[80] Cf section 38 (1) of the interim Constitution, as well as Constitutional Principles *XXXII* and *XXXIII* in Schedule 4.

It is **suggested** that one way in which legal certainty can be promoted while, at the same time, the interests of litigants can be adequately safeguarded, would be to fix a date for the commencement of the Bill of Rights, and to advertise that date well in advance. This could be done by e.g. stating in the Constitution that the Bill of Rights will come into force with full force in all matters 1 year after a notice embodying the wording of the Bill and the date of commencement has been published in a special issue of the national *Government Gazette*.

If at all possible, the new court structure envisaged by Chapter 6 should become operational on the same date as the Bill of Rights. At the very least, the new jurisdictional scheme embodied in Chapter 6 must commence on that date.

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