A CHARTER FOR SOCIAL JUSTICE

A contribution to the South African Bill of Rights debate

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May 13, 1993

The Secretary
Technical Committee on Fundamental Rights
Multi-Party Negotiating Process
KEMPTON PARK

B Y H A N D

Dear Mrs Cleary,

I submit herewith a copy of a publication, A Charter for Social Justice, for the consideration of the Committee.

Yours faithfully,

CM Murray

CHRISTINA M MURRAY
Associate Professor

Encl.

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Published by
Department of Public Law, University of Cape Town
Department of Public Law, University of the Western Cape
Legal Resources Centre, Cape Town

December 1992

ISBN 0 7992 1440 X

The printing of this publication has been sponsored by Shell SA Ltd

DTP conversion by Tim James
Printed by UCT Printing Dept, Observatory, Cape Town

CONTENTS

Preface 1

Proposed Bill of Rights and Directives 3

Introduction 13

I Constitutional Review and the Bill of Rights 13
II Clauses not included in this Bill 23
III Conclusion 25

Discussion of the proposed Bill of Rights and Directives 27

Preamble 27
Article 1 Circumscription 27
Article 2 Dignity 30
Article 3 Equality 30
Article 4 Life 33
Article 5 Slavery, servitude and forced labour 35
Article 6 Security of person and torture 36
Article 7 Freedoms including religion, expression and association 37
Article 8 Freedom of movement 38
Article 9 Political participation 39
Article 10 Liberty 40
Article 11 Rights on detention 41
Article 12 Legal representation 41
Article 13 Bail 42

Article 14 Fair trial 42
Article 15 Double jeopardy 43
Article 16 Presumption of innocence 43
Article 17 Prisoners' rights 45
Article 18 Privacy 46
Article 19 Family and marriage 48
Article 20 Workers' rights 50
Article 21 Limitations on evictions 51
Article 22 Environmental rights 52
Article 23 Administrative justice 53
Article 24 Access to information 54
Article 25 Derogation 55
Article 26 Enforcement 56
Article 27 Scope 58
A possible property clause 60

Directives of state policy 65

Bibliography 68

PREFACE

These proposals for including rights in a South African Constitution and brief arguments for their adoption are the product of the deliberations of a group of Western Cape lawyers. The primary objective of the exercise was to produce a statement of basic rights and freedoms to be accorded to all South Africans, and respected, implemented and enforced by all three branches of government. Our starting point was the revised *ANC Bill of Rights for a New South Africa* (1992) and the *Interim Report on Group and Human Rights* (1991) of the South African Law Commission (SALC) but our discussions were informed by the formulation and experience of charters of rights in other jurisdictions, particularly Canada, Europe, (West) Germany, India, Namibia and the United States of America. In addition, we were influenced by international covenants such as the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and the European Convention on the Protection of Human Rights and Freedoms.

The group was initiated by Kate O'Regan (of UCT) and Geoff Yost (a visiting American student attached to the Community Law Centre, UWC). Besides these two, the group consists of: Steve Kahanovitz and Henk Smith (Legal Resources Centre, Cape Town); John Murphy, Jeremy Sarkin and Nico Steytler (UWC Faculty of Law); and Hugh Corder and Christina Murray (UCT Faculty of Law). David Beatty (University of Toronto Faculty of Law, and a visitor to UCT's Department of Public Law) participated in some of the discussions. Many other people have also contributed by discussing various specific provisions and by commenting on the draft. These include members of the Caucus on Law and Gender, particularly Denise Meyerson and Ilze Olckers, as well as Steph van der Merwe (University of Stellenbosch), Wallace Mgoqi (Legal Resources Centre), and Clive Thompson, Dirk van Zyl Smit and Jan Glazewski (University of Cape Town). Although this draft is very much a 'team effort', it is inevitable that each person involved has reservations about particular points. This caveat notwithstanding, the general thrust and framework are supported by the whole group.

Our working method was to consider the need for each article in the ANC draft, compare other proposals, and discuss the formulation we preferred. Notes were taken, a draft bill was drawn up, and each member of the group was asked to write a short justification of the group's approach and wording in respect of a particular clause or set of clauses. These drafts were then discussed by the group

as a whole, and the reworking and final editing was performed by Hugh Corder, John Murphy, Christina Murray and Kate O'Regan. A generous donation from Shell (SA) Ltd made this publication possible, for which we are very grateful.

The task was far more challenging than we had initially envisaged, and many of the issues we raised touched on enduring legal and philosophical debates which we, needless to say, have been unable to resolve. However, we feel that the Charter for Social Justice we have proposed should contribute positively to the current debate about rights protection and the establishment of a 'rights culture' in South Africa. It is in this spirit that we offer these thoughts.

BILL OF RIGHTS

Preamble

We, the people of South Africa, declare for all our country and the world to know that this Bill of Rights lays down the rights, corresponding duties, and standards of conduct for our democratic society. We will promote, safeguard and develop all of our fundamental human rights and the well-being of our people.

This Bill of Rights, which has been achieved as the result of years of struggle, seeks to achieve peace and welfare for the benefit of all of us, our children and future generations.

Article 1

This Bill of Rights guarantees the rights and freedoms set out in it subject only to such limits as can be demonstrably justified in a free and open social democracy.

Article 2

The dignity of all people shall be respected.

Article 3

(1) Everyone shall have the right to the equal protection and equal benefit of the law.

(2) No one shall be directly or indirectly discriminated against unfairly.

(3) Nothing in this article shall prevent measures which have as their object the improvement of the conditions of disadvantaged people.

Article 4

(1) Everyone has the right to life.

(2) Nothing in this article shall prevent legislation permitting abortion.

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

Article 5

No one shall be subject to slavery, servitude or forced labour.

Article 6

(1) Everyone has the right to security of the person.

(2) No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment.

Article 7

Everyone has the following freedoms:

(1) freedom of conscience and religion;

(2) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication;

(3) freedom to refuse to perform military service or to bear arms;

(4) freedom of peaceful assembly;

(5) freedom of association; and

(6) freedom to submit petitions for the redress of grievances and injustices.

Article 8

(1) Everyone has the right to move freely, to reside, and to pursue a livelihood, anywhere within South Africa.

(2) Every citizen has a right to a passport, to leave the country and to return to it.

Article 9

(1) All citizens have the right to vote and to stand for election to public office.

(2) Election for public bodies shall be regular, free and fair and based on universal franchise and a common voters' roll.

Article 10

No one shall be deprived of liberty for any purpose other than the interests of justice, public health or immigration, provided that no one shall be detained for the purposes of interrogation or the prevention of the commission of a crime.

Article 11

(1) No one lawfully deprived of liberty shall be held for more than 48 hours unless further detention is ordered after a fair hearing by a court of law.

(2) Anyone deprived of liberty shall be held in conditions consonant with human dignity.

(3) Anyone deprived of liberty shall be informed immediately of the reason for the detention, of the right to remain silent and of the right of access to a lawyer.

Article 12

(1) Anyone deprived of liberty shall have a right of access to a lawyer of his or her choice.

(2) Accused persons shall have the right to be defended by a lawyer of his or her choice.

(3) The State shall provide a lawyer to detained or accused persons when the interests of justice so require.

Article 13

Every accused person awaiting trial shall be entitled to be released on bail unless a court orders, on good cause shown, that he or she should be kept in custody in the interests of justice.

Article 14

Everyone charged with a criminal offence or involved in a civil dispute in law is entitled to a fair trial, within a reasonable time, in public, by an independent and impartial court.

Article 14

Everyone charged with a criminal offence or involved in a civil dispute in law is entitled to a fair trial, within a reasonable time, in public, by an independent and impartial court.

Article 15

(1) No act shall be punished if it was not a crime at the time it was committed, and no penalty shall be increased retrospectively.

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

Article 16

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

(2) No one shall be required to give evidence against himself or herself.

(3) No evidence obtained in violation of the provisions of this Bill of Rights or any other legal provision whatsoever shall be admissible in any court of law.

Article 17

Everyone who has been convicted of a crime and who in accordance with the sentence of a court of law is serving a term of imprisonment has the right:

(1) to be held under conditions consonant with human dignity;

(2) to be given the opportunity to develop and rehabilitate themselves;

(3) to be released at the expiry of his or her term of imprisonment as imposed by the court of law; and

(4) to have a court of law decide at an appropriate time whether he or she should be released before the expiry of his or her term of imprisonment.

Article 18

Everyone has the right to the protection of his or her privacy.

Article 19

(1) Everyone shall have the right to live with partners of their choice.

(2) Everyone shall have the right to found a family.

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

Article 20

Workers shall have the right

(1) to form and join trade unions and to regulate such unions without interference from the State;

(2) to organize and bargain collectively;

(3) to take collective action under law in pursuance of their social and economic interests subject only to reasonable limitations in respect of the interruption of services such as would endanger the life, health or personal safety of the population or any section of the population;

(4) to a safe and healthy working environment; and

(5) to equal pay for work of equal value.

Article 21

(1) No one shall be removed from his or her home except in terms of an order of court.

(2) No court shall make an order authorising the removal of a person from his or her home unless it has taken into account the existence of appropriate alternative accommodation.

Article 22

Everyone has the right to an environment which is safe and not harmful to health.

Article 23

Anyone adversely affected by an improper or unreasonable administrative act shall have the right to seek redress from an independent court and any other body or tribunal established for such purpose.

Article 24

(1) Everyone has the right of access to information held by any authority performing governmental functions.

(2) Everyone has the right of access to that information which is necessary for the implementation of his or her rights.

Article 25

(1) The rights and freedoms contained in this Bill may be derogated from by the declaration of a state of emergency only where the safety or existence of the State is threatened by war, invasion, general insurrection or natural calamity and the implementation of emergency measures is necessary to bring about peace or order and is demanded by the situation.

(2) Emergency measures enacted in terms of article 25(1) shall derogate from this Bill only to the extent demanded by the situation.

(3) This article shall permit derogation only from the fundamental rights and freedoms contained in articles 7(2), 7(4), 7(5), 7(6), 8, 9(2), 10, 11, 12, 13, 18, 20, 22, 23 and 24 of this Bill of Rights.

(4) No state of emergency shall be proclaimed for longer than three months at any given time.

(5) The declaration of any state of emergency shall be ratified within two weeks by not less than three-fifths of the elected members of the legislature.

(6) Any measures that will apply during a state of emergency shall be ratified within two weeks of their adoption by not less than three-fifths of the elected members of the legislature;

(7) No emergency measure shall grant immunity to officers of the state in respect of their conduct during a state of emergency.

Article 26

(1) The rights and freedoms contained in this Bill of Rights shall be enforced by the courts.

(2) In interpreting this Bill, the courts shall promote the values which underlie a free and open social democracy.

(3) Subject to article 1, no rule of the common law, custom or

legislation shall limit any right or freedom contained in this Bill.

(4) Everyone who claims that his or her rights, or associations which claim that their members' rights, guaranteed by this Bill of Rights have been infringed or threatened, shall be entitled to apply to a competent court for appropriate relief, which may include a declaration of rights.

(5) The guarantee of certain rights and freedoms in this Bill shall not be construed as denying the existence of any other rights or freedoms that exist in South Africa.

Article 27

(1) This Bill of Rights applies to any act or omission by or on behalf of:

(a) the legislative, executive or judicial branches of the government of South Africa including legislation enacted before the adoption of this Bill of Rights; and

(b) any person or body in the performance of any function, power or duty which relies for its effect on a rule of the common law, custom or legislation;

including a failure by government to take appropriate steps to secure compliance with any provision of the Bill of Rights.

(2) The courts shall have the discretion in appropriate cases to put the relevant body or official on terms as to how and within what period to remedy the infringement of the Bill of Rights.

A possible property clause

(1) Everyone has the right to the enjoyment of his or her property.

(2) No one shall be deprived of his or her rights and interests in property unless such action is taken in the public interest, in which case it shall be with due process of law and subject to the payment of appropriate compensation, which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

(3) No law enacted within seven years of the commencement of this Constitution with the purpose of affirmatively reforming land ten-

ure and access to land shall be declared invalid for a period of ten years after its enactment on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by this Bill of Rights nor shall any such declaration of invalidity operate retrospectively.

(4) No one shall be removed from his or her home except in terms of an order of court.

(5) No court shall make an order authorising the removal of a person from his or her home unless it has taken into account the existence of appropriate alternative accommodation.

DIRECTIVES OF STATE POLICY

The State shall be guided by the following Directives in the formulation and implementation of its policy, and the courts shall take them into account in interpreting legislation and reviewing executive action.

1. The State shall conduct its affairs in a public and accountable fashion and shall create mechanisms for the achievement of open government.
2. The State shall endeavour to achieve the highest attainable standards of enjoyment of all basic social, cultural and educational aspects of life by all men, women and children.
3. The State shall seek to ensure just conditions of work for all men and women. In particular it shall seek to secure
   - reasonable hours of work;
   - annual paid holidays;
   - the improvement of industrial safety and health;
   - reasonable rates of remuneration;
   - creation of job opportunities for all; and
   - the provision of vocational training for all.
4. The State shall seek to provide everyone with an adequate health service, in particular
   - accessible and affordable health care which promotes the mental and physical well-being of all;

- advisory and educational facilities for the promotion of health;
- services which will contribute to the welfare and development of individuals and groups in the community; and
- measures to prevent as far as possible epidemic, endemic and other diseases.

5. The State shall seek to ensure that all have access to education and, in particular, that
   - all children are provided with primary and secondary education;
   - a tertiary education system which provides the necessary vocational and professional skills for the community is developed; and
   - literacy programmes are available for those who require them.
6. The State shall seek to ensure that all have an adequate standard of living and, in particular, that
   - housing is provided;
   - nutrition is provided for those who cannot provide for themselves; and
   - social security is provided for those who need it.
7. The State shall not act in a discriminatory fashion and shall discourage discrimination in all spheres. In particular it shall
   - undertake positive action to overcome the disabilities and disadvantages suffered on account of past and continuing discrimination; and
   - take steps to place social, commercial and like institutions under a duty to discourage discrimination and stereotyping based on sex, race, colour, religion, language, sexual orientation, nationality and other unfair grounds.
8. The State shall seek to provide appropriate protection by law against violence, harassment and abuse, and the impairment of the dignity of any person.
9. The State shall seek the progressive improvement of employment opportunities for disabled men and women, for the removal of obstacles to the enjoyment of public and private amenities and for their integration into all areas of life.
10. The State shall act positively to secure the well-being and development of every child.

11. The State shall encourage sporting, recreational and cultural activities on a non-discriminatory basis, drawing on the talents and creative capacities of all South Africans.
12. The State shall act positively to further the development of the languages of South Africa, especially in education, literature and the media, to facilitate the understanding of different languages, and to prevent the use of any language for the purpose of domination or division.
13. The State shall ensure that natural resources are utilized by the State, corporations and individuals in a manner which
    - benefits both present and future generations;
    - promotes the ideal of sustainable development;
    - maintains ecosystems and related ecological processes, in particular those important for food production, health and other aspects of human survival and sustainable development;
    - maintains biological diversity by ensuring the survival of all species of fauna and flora, particularly those which are endemic or endangered;
    - takes into account the environmental impact of such use, preferably by a scientifically based method of environmental evaluation; and
    - enhances the development of areas of cultural, historic and natural interest.
14. The State shall, in so far as waste management and pollution control are concerned, actively promote policies for
    - the treatment of waste at source;
    - the reduction, re-use and recycling of waste; and
    - the promotion of clean technologies.

INTRODUCTION

In drafting this document our method has been to work from the basic tenets in the revised but unpublished Bill of Rights proposed by the ANC and to formulate a bill which we believe will promote democracy in South Africa.

We have departed from the ANC Bill in three important ways. First, we have rearranged and replaced its very detailed enumeration of rights with a shorter list of broad entitlements. Secondly, we have removed various provisions which, for reasons we shall describe, seem to us to be out of place in a judicially enforceable bill of rights. Thirdly, we have introduced a general circumscription clause at the beginning of the Bill of Rights which provides that limitations of rights contained in the Bill will be legitimate if such limitation would 'be justified in a free and open social democracy'. The result is a Bill of Rights which, we think, is more accessible and will best achieve the protection of human rights without entrenching social inequality.

I Constitutional Review and the Bill of Rights

Although constitutions vary substantially in form, it is generally accepted that their purpose is to organize the structure and relations of government. Constitutions, including bills of rights, define the procedures and institutions by which law is made and influence the substance of legislation and government action.

Therefore, although at times a bill of rights will regulate the relationship between individuals (see discussion of article 27(1)(b)), the primary function of bills of rights is to regulate the relationship between individuals and the State through seeking to ensure that, in exercising State power, concern and respect will be shown to all members of the community. The key institution for enforcing the provisions of a bill of rights is the judiciary. The intention in enacting a bill of rights as the supreme law of the land is to give the judiciary the power both to strike down legislation and to overturn executive action. Giving the judiciary this power has led to an extended debate about the anti-democratic nature of constitutional review. A discussion of the debate is beyond the scope of this Introduction, but we think that the anti-democratic character of constitutional review is often overstated. Many of the provisions in a bill of rights contribute to the creation of

an environment necessary for democracy to flourish, and we are persuaded that the formal independence of the judiciary allows it to check breaches of the bill of rights by the other two branches of government.

Nevertheless, we felt it necessary in drafting this Bill of Rights to articulate the model of constitutional review we think would best strike the balance between democracy and the protection of human rights. We think that the absence of a clearly enunciated model of review makes it impossible to reach reasoned decisions about the content of a bill of rights. On the other hand, we acknowledge that, even with an articulated model of constitutional review underpinning a bill of rights, that model may not always be used by the courts. The circumstances in which a court will choose to invalidate legislative or executive action are determined only in part by the language of the bill of rights and the constitution.

The approach that we suggest follows that of many constitutional courts, but it is derived directly from the practice of the Canadian Supreme Court, as expressly articulated in *R v Oakes* (1986) 26 DLR(4th) 200. Accordingly, we propose that judges approach constitutional review matters with two questions in mind.

- *Has there been an infringement of a right protected by the Bill of Rights?*

To answer this question, the claimants impugning the constitutionality of the law or other action bear the onus of showing that a right guaranteed by the Bill has been infringed. Thus the violation will have to be established as a matter of law and fact. Petitioners will need to demonstrate that the interest or activity sought to be protected falls within the guarantee, and that the impugned measure violates that guarantee. A prima facie case should be sufficient. If no prima facie case is established, the review application will fail.

It should be noted that it is not only direct infringements of individual rights by the State that will be subject to constitutional review. Any action by a private individual which relies on law for its efficacy and which has the effect of violating a right protected by the Bill could also be the subject of a successful constitutional challenge. This does not mean that all private relationships will be subject to the Bill of Rights, but it does mean that private individuals and institutions cannot rely on the law to enforce conduct which is in conflict with rights protected by the Bill (see the discussion of article 27(1)(b)).

A key issue in determining whether an act constitutes an infringement of a protected right, is the question of whether courts should have recourse to the working materials used in the preparation of the bill of rights (the travaux preparatoires). We think that in the South African context this may cause more

problems than it resolves, because the South African Bill of Rights will be the result of negotiation and political compromise. The political compromises of the 1990s should not bind courts in the twenty-first century although, of course, the language adopted will.

- *Is the policy underlying the act or omission which caused the infringement demonstrably justifiable in a free and open social democracy and has an acceptable method been used in its implementation?*

In answering this question, the objectives and means of the impugned law or action will be evaluated in order to establish that the limit on freedom is reasonable and demonstrably justified in a free and open social democracy. The onus of proving that a restriction on a guarantee is reasonable and demonstrably justified will rest on the respondent. This question entails two enquiries: first, whether the objective which the measure is designed to serve is of sufficient importance to warrant overriding the guarantee and, secondly, whether the means adopted was proportional to the stated objective.

To ensure that judges are guided as to what will constitute justifiable legislative policy, the Constitution should contain Directives of State Policy (see p. 18 below). These Directives enunciate legitimate aims for government policy and where the policy underlying the government action is one specified in the Directives, the court will immediately be referred to the second issue, that is whether the government has found an acceptable means to balance the policy with the fundamental rights of the Bill.

If the government policy is not one specifically listed in the Directives, the court will have to consider the circumscription contained in article 1 of the Bill which states:

> This Bill of Rights guarantees the rights and freedoms set out in it subject only to such limits as can be demonstrably justified in a free and open social democracy.

All the substantive entitlements in the Bill of Rights are subject to this circumscription. Accordingly, as a matter of interpretation, once judges have held that there has been an infringement of the Bill of Rights, they will have to consider whether the infringement would be justified in a free and open social democracy. However, some rights are specifically circumscribed where this is felt to be imperative.

Once the objective sought by the impugned measure is found to be legitimate, the party defending it must show that the means chosen are proportional to the attainment of the objective – i.e., they are reasonable and demonstrably justified.

Important indicators of proportionality were identified in *R v Oakes*: the measures adopted must be carefully designed to achieve the objective in question, so they must not be arbitrary, unfair or based on irrational considerations and they must be rationally connected to the objective; the means should impair the right or freedom in question as little as possible; and there must be a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance. The more invasive a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and open social democracy.

This model of constitutional review sees the primary function of bills of rights as the mediation between collective social interests and individual dignity and freedom, and suggests that the principle of proportionality is the best means to that end. Because the proportionality principle is the core of review, the approach allows for a wide range of activities or interests to fall within the spheres of rights and freedoms guaranteed in the language of a bill of rights. Greater emphasis is placed on justification of government action and less on seeking the alleged 'true' content of inherent rights. It follows that the courts can be less demanding about the evidentiary and interpretative requirements during the first phase of constitutional review, and a balancing of the collective interest against the recognised individual rights can take place in accordance with the principles of proportionality. General human rights standards concede a spectrum of choices for implementing social policies. The task facing government is to select the means least burdensome to human rights.

The focus in this model is thus on finding the least intrusive means of giving effect to government policies. Only laws which restrict rights unnecessarily are constitutionally invalid. As such, the model is sensitive to the tension that exists between the judiciary and other branches of government. When a court is faced with the task of determining the legitimacy of a measure's objective, the model expects some respect for the popular legislative will. Proportionality prompts government to justify the means it employs to effect its policy and asks whether other policy means might have achieved the desirable objectives in a less intrusive fashion.

Three key structural elements of our proposed Bill of Rights seek to ensure that a model of constitutional review similar to the one we are proposing is adopted. These three elements are the style and language in which the constitution is phrased, the recognition of independent Directives of State Policy and the general circumscription clause contained in article 1. Each of these contributes to ensuring that judges will adopt the model of constitutional review we propose. Each of these three structural elements will be discussed separately.

(a) The style of the Bill of Rights

We think that the entitlements contained in the Bill of Rights should be expressed as general standards, as broadly as possible. There are four reasons for preferring broad entitlements to long lists of detailed and specific guarantees. First, broad entitlements expressed in simple language are more accessible to all citizens: they can be easily understood and can become part of everyday usage. More complex formulations will remain the province of lawyers.

Secondly, the more complex the wording of specific entitlements the more likely it will be that constitutional review will be concerned with whether an applicant has demonstrated an infringement of a right. As we have argued, it is better for constitutional review to be concerned with determining whether the government action or omission which has led to the infringement is justifiable. Complicated wording will eventually lead to technical disputes about the 'real' meaning of individual words. This would tend to obscure the democratic principles that the Bill of Rights embodies and upon which article 1 focuses.

Thirdly, as paradoxical as it may first appear, itemizing constitutional rights and freedoms as very specific and particular guarantees may have the unintended effect of actually limiting the protection they will provide. Many of the key principles of statutory interpretation, which would almost certainly inform judicial approaches to constitutional review, require judges to give texts a limited meaning. One example of these principles of interpretation is the rule 'expressio unius est exclusio alterius - the thing that is expressed excludes the other (that is not)' which requires judges faced with a long list of entitlements to assume that that list is exhaustive and that entitlements not mentioned in the list are not protected. This problem can arise in anti-discrimination clauses. For example, article 15(1) of the Canadian Charter of Rights and Freedoms provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

At first sight this seems to be an extensive equality clause: it is noticeable, however, that it does not mention all possible grounds of unacceptable discrimination. The Canadian Supreme Court has been unwilling in some instances to extend the protection of the clause to other groups, such as workers.

Another principle of interpretation which could have a similar effect is the 'eiusdem generis' rule which requires judges faced with an open-ended list to ensure that only categories similar to those contained in the list should be protected. A good example can be found in the SALC's article 3:

> Everyone has the right to equality before the law, which means, inter alia, that save as permitted in this Article, no legislation or executive or administrative act shall directly or indirectly favour or prejudice any person on the grounds of his or her race, colour, sex, religion, ethnic origin, social class, birth, political and other views or disabilities or other natural characteristics.

Whether groups not identified in the clause would enjoy its protection would, according to the eiusdem generis rule, depend on whether they could show that their group characteristic arose from their shared 'views' or from 'natural characteristics'. There may be extensive debate as to whether, for example, homosexuality constituted a 'natural characteristic' or not. Accordingly, as a matter of interpretation, the use of a very lengthy and detailed enumeration of rights makes it more difficult for the courts to infer that other entitlements and a wider protection are implicit in the constitution.

Fourthly, broadly phrased clauses allow for evolutionary interpretation and constitutional growth. This is perhaps best illustrated by the experience of the United States of America whose constitution is extremely brief. De Tocqueville's observation that no country has shown more respect for people's freedom of association in all spheres of their lives - political, social, family, economic etc - remains true, notwithstanding that the US Bill of Rights nowhere expressly recognizes this constitutional guarantee.

Accordingly, we think that the Bill of Rights should be expressed in broad and inclusive terms, rather than in specific language. It can be argued against this position that, in certain circumstances, courts have shown great reluctance to recognise certain rights as falling within the scope of fundamental entitlements. Where we have been convinced of this we have used specific language in the substantive entitlements, to ensure that proper recognition is given to these rights. For example, freedom of association has rarely been held to include the right to strike, and substantial limitations on the right to strike itself have often been held to be justified by courts. For this reason we have included an express recognition of the right to strike in the following form (article 20(3)):

> Workers shall have the right to take collective action under law in pursuance of their social and economic interests subject only to reasonable limitations in respect of the interruption of services such as would endanger the life, health or personal safety of the population or any section of the population.

(b) Directives of State Policy

A set of Directives of State Policy is appended to this Bill of Rights for inclusion

in the Constitution. Directives have been adopted in at least three countries: India, Ireland and Namibia. In India, the directives fix tangible goals to bring about a non-violent social revolution aimed at the attainment of a welfare state. Among them are directives to the State to adopt policies that will ensure:

- the right to an adequate means of livelihood for citizens (article 39(a));
- that the ownership and control of the material resources of the community are so distributed as best to subserve the common good (article 39(b)); and
- that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment (article 39(c)).

Other provisions oblige the State, within the limits of its economic capacity and development, to make provision for the right to work, education, health and social security (articles 40-45).

The key to understanding the role of Directives of State Policy in the Indian Constitution is to be found in article 37, which reads:

> The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

Much debate has centred on which norms hold primacy when there is conflict between the fundamental rights and the directive principles or the legislation enacted to give effect to them. As a general rule the fundamental rights have prevailed. However, this has not always been so, and there have been times when the courts have upheld legislation which seeks to meet policy goals stipulated in the directive principles but which infringes fundamental rights.

In the Namibian Constitution, article 95 provides Principles of State Policy which require the State to promote and maintain the welfare of the people by adopting policies aimed at, for example:

- ensuring equality of opportunity for women (article 95(a));
- the provision of pensions to senior citizens (article 95(f));
- social benefits for the unemployed, incapacitated, indigent and disadvantaged (article 95(g));
- planning for the achievement and maintenance of acceptable levels of nutrition and standards of living (article 95(j)); and
- the maintenance of essential ecological processes and biological diversity (article 95(l).

These Principles have yet to be considered by the courts in Namibia.

The SALC rejects the idea of incorporating such Directives in the constitution on the grounds that to do so is tantamount to admitting that such interests are unenforceable and of little legal significance. As we argue later, we consider that Directives will play a useful role in our constitutional framework. On the other hand, the ANC makes no separate provision for Directives, but includes a wide range of instructions to the legislature in its proposals. We think that this approach will cause unnecessary confusion between the justiciable and non-justiciable provisions of the bill of rights.

Accordingly, we have proposed the adoption of Directives of State Policy. Our draft provides that:

> The State shall be guided by the following Directives in the formulation and implementation of its policy, and the courts shall take them into account in interpreting legislation and reviewing executive action.

We think that Directives can serve four purposes. First, they will infuse the legislative and executive spheres with the substantive values that the process of constitution-making has identified. They will impose a political and moral obligation on the legislature and executive to seek to meet these goals.

Secondly, Directives will act as aids in interpreting the constitution. In cases concerning constitutional review, one of the questions judges will consider will be whether legislation that infringes individual rights is legitimate. In answering this question, judges should look to the Directives of State Policy in order to determine whether the objective of the measure squares satisfactorily with the social objectives of the constitution identified in the Directives. In brief the Directives identify legitimate ends of legislative power.

Thirdly, Directives will assist judges in the process of interpreting legislation where it is ambiguous, uncertain or contradictory. The normative values expressed in the Directives are presumptions of legislative purpose.

Fourthly, Directives will act as justiciable standards for structuring the exercise of administrative discretion. By broadening the basis of review they ensure coherence in policy. If executive decision-making is to cohere with the social purposes of the constitution, administrative discretion must be fettered by considerations conforming to policy preferences such as those in the Indian Directives. Decision-makers will be required to take the Directives into account as relevant considerations.

Social and economic guarantees

In our constitutional scheme, most social and economic guarantees – such as rights to health-care, education, food, clothing and housing – are included in the

Directives of State Policy, not as expressly enforceable rights. This contrasts directly with the ANC's draft, which places socio-economic or second-generation rights in the body of the Bill of Rights. The SALC's draft contains some socio-economic rights including the right to primary education and the right to health-care for indigent children, but in principle rejects the incorporation of socio-economic rights in a justiciable bill of rights.

There are three main objections to giving judges the power to enforce social and economic guarantees. First, the attainment of social and economic guarantees is very expensive and it is constitutionally inappropriate for judges to determine how government budgets should be allocated and spent; secondly, enforcing social and economic rights requires a range of complex policy decisions that judges are unsuited and thus reluctant to make; and, thirdly, enforcing social and economic rights requires judges to order positive forms of relief rather than merely to strike down legislation.

Although all these arguments have force, we think that the first two are the most powerful. It is appropriate that the elected legislature should determine how budgets should be spent. There is no doubt that the South African economy will not, in the short term, be able to provide all South Africans with adequate housing, food, clothing, education and health-care, and that policy decisions will have to be made to determine which of these social and economic goals should be favoured. We have departed from this only where the decision affects the administration of justice in its essence, such as the provision of legal representation by the State (article 12(3)).

In addition, however, we think that the process of adjudication is ill-suited to the policy processes which the enforcement of social and economic guarantees entails. Lon Fuller argues convincingly that judges are not good at solving 'polycentric disputes' — disputes which give rise to many separate issues, each of which is linked to the others. Although many disputes which are resolved by adjudication contain polycentric features, disputes concerning the failure to provide social and economic benefits will generally be entirely polycentric. For example, the right to primary education could give rise to a range of disputes: whether classrooms are adequate; whether the right includes the provision of free textbooks; whether primary education includes computer training; whether primary education includes one, two or three years of pre-primary education, and so on. Though a court could adjudicate upon these problems, each would be better dealt with by a legislature and an accountable bureaucracy. For a court to rule that every child should have two years of pre-primary education or computer training would impact fundamentally on how primary education as a whole could operate, and may well prejudice the proper functioning of State education.

Again, courts are generally presented with specific sets of facts from which it is logically impossible to generalise: the individualised nature of legal disputes will often render general decision-making ill-informed and potentially harmful. For this reason, few judges will be willing to make judgments that will enforce socio-economic rights. If one looks at the few socio-economic rights courts have been willing to enforce, they are generally in areas intimately linked to equality or the administration of justice, such as the right to counsel. We think that there are two reasons for this: first, judges feel that legal representation is required in order for the adversarial process to function justly; secondly, judges feel that they have the necessary information on the effect on the administration of justice to make the decision. In other areas of government, judges lack that confidence.

Furthermore, including social and economic rights in the Bill of Rights will raise expectations falsely, and will probably give rise to expensive and generally unsuccessful litigation. This should be avoided at all costs. In addition to wasting financial resources and political energy, it may well promote public cynicism about the real contribution which constitutions and bills of rights can provide.

Although we do not think that social and economic guarantees should be expressed in a bill of rights as substantive entitlements, we do think that it is important that social and economic guarantees be contained in Directives to indicate that legislative or executive policies aimed at achieving social and economic justice are legitimate and desirable government policies.

Directives of the type we propose enhance second- and third-generation rights as moral values by absorbing them into positive law. More particularly, they act as organizational norms directing the public power to the creation of public services for the promotion of an egalitarian society. Either they impose discretionary obligations on the State in the exercise of its law-making function or they articulate assumptions of principle to direct the process of administration, including the interpretation of laws.

(c) General circumscription clause

Article 1 of our Bill of Rights contains a general circumscription clause applicable to all the substantive entitlements. It provides that the fundamental rights may be infringed only if that infringement would be justified in a free and open social democracy.

This provision is similar to section 1 of the *Canadian Charter of Rights and Freedoms* which reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by

law as can be demonstrably justified in a free and democratic society.

That the circumscription clause enjoys first place in the Canadian Charter indicates its centrality to the whole scheme of review. The section has two functions: first, it guarantees the rights and freedoms set out in the provisions which follow; and, secondly, it outlines explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured. Any inquiry under the circumscription clause proceeds on the basis that the impugned interference violates one of the guaranteed rights and freedoms. From this it follows that constitutional review in Canada generally involves the two-stage inquiry that we have described above: it has to be established, first, that the guaranteed right or freedom has been violated and, secondly, that the violation is reasonably justifiable in terms of the foundational values of a free and democratic society. As we have argued, we think that this is a sound approach to constitutional review.

We also think that article 1 assists in the problem of harmonising rights. Substantive guarantees in a constitution do not operate in isolation. Frequently they may contradict each other. Sometimes they overlap and supplement each other. Consequently, a model of constitutional review has to address the issue of ranking rights without resorting to a mechanistic hierarchical arrangement. Constitutional review does not operate in the abstract but generally in the context of particular legislative or administrative acts which are challenged. The court will always consider whether there is an infringement of the constitution, whether the policy underlying the impugned action is legitimate, and will then have to consider the proportionality question. In answering the last question, the court will be informed by the objective considerations implicit in the language of the circumscription clause, the preamble and the Directives.

II Clauses not contained in our Bill of Rights

Both the ANC and the SALC propose to protect rights that we do not expressly cover. Our decision to omit these rights is usually based on one of the following grounds: the right concerned may be adequately protected in more broadly conceived provisions in our Bill; it may be covered by our Directives of State Policy; or we consider that it should be dealt with elsewhere in the constitution or in legislation. For example, the ANC's article 2(9) specifically prohibits house arrest or banishment, but we think that these issues are adequately covered by our article 8 (freedom of movement) and article 10 (liberty). Similarly, we consider that ANC article 2(7), which prohibits abuse and harassment, is covered by our article 6(1) (security of the person) as well as Directive 8. Again, ANC article

2(26), which provides a right not to be removed from one's home on the ground of race, colour, language, gender or creed, is sufficiently covered by our equality clause, article 3. The SALC proposes a right to engage freely in science and art (article 13) which we consider is dealt with in our article 7(2), and a right to perform juristic acts (article 14) which would be dealt with by our article 2 (dignity) and article 3 (equality).

Most noticeably, however, we have not included specific protection clauses in relation to gender, sexual orientation (ANC article 7), or disability (ANC article 8). We think that our article 3 is sufficient to ensure that there will be no discrimination against such groups. However, we do include Directives which specifically refer to gender, sexual orientation (Directive 7), and disability (Directive 9).

In article 14 the ANC imposes obligations on the State to introduce positive measures to combat racism and sexism. The SALC includes a similar, but less detailed, provision in its article 38. We think that such provisions are more appropriately cast as Directives and we have done so. However, we reject ANC article 14(4), which permits the State to enact legislation prohibiting the circulation of degrading materials, as it may allow too great an inroad on freedom of expression. SALC article 17(c) proposes a qualification on the freedom of association, permitting the State to refuse support for bodies which discriminate on the grounds of race or sex. Such a provision is unnecessary in the light of article 3 (the equality provision) read with article 26 and Directive 7.

We have also not included any provisions concerning employer's rights such as those found in article 29 of the SALC proposal. We think that only one of the rights found in article 29 is appropriately included in a bill of rights, namely, freedom of association, which is in article 7 of our Bill. The remaining rights referred to by the SALC should be dealt with in legislation.

Finally, we have not included provisions specifically to establish enforcement procedures, such as human rights commissions and ombuds (ANC article 16, SALC articles 36 and 37). We feel that such institutions are more properly included in another part of the constitution.

III Conclusion

A bill of rights should protect and promote the dignity, freedom and equality of all members of our society. Furthermore, we have argued that a model of constitutional review must focus both on the infringement of individual rights and on the legitimacy of the challenged infringement. This model of review will provide the best method for balancing individual rights with other democratic ideals.

In drafting the Bill of Rights which follows, we have sought to inscribe within it the principles of constitutional review which we support. Accordingly, all the substantive rights are expressed in clear, simple and general language. Unless there are cogent reasons for specific circumscription clauses, the rights are not circumscribed other than by article 1. We believe that this will lead to an effective and democratic form of constitutional review, that it will ensure that the Bill of Rights can easily be understood by all South Africans, and that it will contribute to the development of a shared vision of a more egalitarian society.

DISCUSSION OF THE PROPOSED BILL OF RIGHTS AND DIRECTIVES

Preamble

We, the people of South Africa, declare for all our country and the world to know that this Bill of Rights lays down the rights, corresponding duties, and standards of conduct for our democratic society. We will promote, safeguard and develop all of our fundamental human rights and the well-being of our people.

This Bill of Rights, which has been achieved as the result of years of struggle, seeks to achieve peace and welfare for the benefit of all of us, our children and future generations.

Article 1

This Bill of Rights guarantees the rights and freedoms set out in it subject only to such limits as can be demonstrably justified in a free and open social democracy.

This article will operate as a general circumscription clause. Every fundamental right and freedom is subject to it. It plays a key role in the Bill of Rights and is central to the model of constitutional review described in the Introduction. The circumscription clause is placed first, to make it clear that all the entitlements following it are potentially limited.

As the Introduction indicates, our clause is modelled on a similar provision in the Canadian Charter of Rights and Freedoms. The effect of the circumscription clause will be to require defendants to show that infringements of the Bill of Rights are justifiable in a free and open social democracy. The precise description of the society against which infringements can be measured could be varied. For example, in the Canadian Charter legislation has to be shown to be justifiable in a 'free and democratic society'.

We have chosen the formulation 'free and open social democracy' for two main reasons. First, we wish to stress the value system which underlies our

approach to this Bill of Rights, as well as to the Directives of State Policy which follow it. The choice of this value system, which is described as a 'social democracy', clearly indicates our belief in a substantial role for the State in its regulation of the market, the provision of social welfare services (such as health, housing and education), and its guardianship of the institutions and mechanisms of political democracy. Thus the State is seen as providing an enterprising and caring administration of the social market, much along the lines of several West European democracies of the post-war period, such as Sweden, the Netherlands, and (West) Germany. Indeed, our adoption of the phrase 'social democracy' mirrors the use by the drafters of the German Basic Law (of 1949) of the 'Sozialstaatsprinzip' in article 20. The 'social state principle' implies a direct role for the State authorities in guiding the socio-economic life of the country towards social-democratic ideals. This has been interpreted by the German courts in such a way that a modern constitutional text can claim with confidence:

> The state is responsible for shaping and developing the social and especially the economic order. The state the Basic Law has in mind is more than the law-guarding state that a number of theoreticians of economic liberalism had in mind. It grants, forms, guides and burdens in areas that formerly belonged to the society, not the state. The set of instruments available to this 'welfare state' is impressive, especially on the economic side. (Dürig at 20-21)

Our underlying purpose, therefore, is to avoid the disastrous effect on human rights that could result from an approach by a future South African Constitutional Court along the lines of the American Supreme Court in *Lochner v New York* 198 US 45 (1905). In this case, the constitutionality of a New York law which set a maximum number of daily and weekly working hours for bakery employees was challenged by an employer who had permitted an employee to work beyond such limits. His challenge was based on the 14th Amendment to the US Constitution which provides that no State shall 'deprive any person of life, liberty or property, without due process of law'.

The Court's majority decision was that Lochner's 'substantive due process' rights had been infringed by this measure, and the law was invalidated. Judge Peckham held that the goal of the legislation was illegitimate and was a 'mere meddlesome interference with the rights of the individual'. The judge's reasoning was based on the values inherent in the economic fundamentals of a liberal, laissez-faire State. It took more than thirty years for this approach to yield to socio-political reality in the United States. Such an outcome would not have been possible had the judges been constrained by the kind of reference to social-

democratic values which we have included. The purpose, thus, is to indicate firmly the political-economic context in which all the rights which follow should be read.

Secondly, our decision to add the word 'open' is not only a reaction to the pervasive secrecy which has characterised political life in South Africa, but also reflects a belief that freedom of information is a prerequisite for democratic accountability in any constitution. Without such openness, any government will soon slide into the corrupt and unjust practices seen so widely at all levels of the present South African administration.

In addition to the general circumscription clause, we have included a derogation clause which relates to states of emergency (see article 25 below).

The alternative to a general circumscription clause is specific (and often different) limitation of each right, which can render tortuous the task of interpretation and ranking of the rights. In certain circumstances, however, we think it appropriate to include specific circumscription provisions within individual clauses (see, for example, article 20(3)). In such cases, the general circumscription clause is a further qualification on the individual rights.

The ANC adopts both a general circumscription clause (article 15(2)) and specific circumscription clauses in almost every substantive article. We think that this will lead to difficulties of interpretation, particularly as the specific limitations are very detailed in many cases. The SALC, on the other hand, proposes a circumscription clause (article 34) which excludes certain articles from circumscription altogether (including, for example, freedom of association) and then stipulates that other rights may be circumscribed in so far 'as it is reasonably necessary for considerations of state security, the public order and interest, good morals, public health, the administration of justice, public administration, or the rights of others, or for the prevention or combating of crime'. In addition, no circumscription may derogate from the 'general substance of the right'.

It is our view that there are several problems with the SALC's approach. First, excluding certain rights entirely from circumscription fails to recognise that there are circumstances in which a court may be willing to limit the operation of rights, no matter how fundamental. A common example is where fundamental rights conflict. A general circumscription clause such as ours makes it clear that the circumstances when circumscription will be legitimate should be tested against the express standard of 'a free and open social democracy'. Secondly, the SALC specifically rejects the standard of what is acceptable in a democracy on the ground that it is too vague and may open the door to excessive infringements of fundamental rights. We agree that the reference to democracy may be vague, but we think that the list of requirements referred to in article 34, though more specific, will create difficulties of textual interpretation and mask the policy issues that

underlie constitutional review. We prefer to qualify democracy, and refer to a 'free and open social democracy' to allow a broader, policy-based analysis by the courts. Thirdly, the SALC's reference to the 'general substance of the right' seems to us to be philosophically unsound. If, as we propose, a court seeks to balance the protection of the fundamental right with the (legitimate) policy underlying the impugned action, it must ensure that the right is infringed as little as possible.

Article 2

The dignity of all people shall be respected.

The principle that one's dignity should be respected underlies the very notion of protecting human rights and it is a value which directly informs many of the more detailed provisions in this Bill of Rights. As South Africa's history is one of gross disregard for human dignity, however, it is particularly appropriate to include an article dealing with dignity as the first substantive right. In including a right to dignity, we follow both the ANC (article 2(5)) and the SALC (article 9), as well as many international human rights instruments, including the Universal Declaration of Human Rights (article 1) and the African Charter on Human and Peoples' Rights (article 5).

Article 3

(1) Everyone shall have the right to the equal protection and equal benefit of the law.

(2) No one shall be directly or indirectly discriminated against unfairly.

(3) Nothing in this article shall prevent measures which have as their object the improvement of the conditions of disadvantaged people.

The equality clause is a central provision in the Bill of Rights. The ANC proposes a series of provisions which provide for equality (article 1 – general equality provision; article 7 – gender equality; article 8 – equality for disabled people; article 9 – children's equality). The SALC suggests one clause (article 3).

There are often two components to an equality clause – a provision which states that 'Everyone shall be equal before the law' (see for example, article 7 of the Universal Declaration of Human Rights, and article 3(1) of the Basic Law of the Federal Republic of Germany), and a provision that 'there shall be no discrimination' usually followed by a list of specific grounds, including race, sex and creed, on the basis of which discrimination is prohibited. Like the ANC and

SALC we have followed this approach and include both components.

In dealing with the first part of the right, the ANC (in article 1(3)) has used the formulation 'equal protection under the law' which is different from the traditional formulation. We think that this formulation is inadequate as it has no clear meaning. The traditional formulation has been used by the SALC in its article 3.

We use wording that is different from that appearing in either the ANC or the SALC provision. Instead of referring to people being 'equal before the law', we have stated that people shall have the right to 'the equal protection and equal benefit of the law'. The reason for this is that 'equal before the law' has been interpreted, in one jurisdiction at least, to confer a right to equal protection only and not to equal benefit (see *Attorney-General, Canada v Lavell* (1974) SCR 1349). Accordingly, discriminatory state welfare benefits were held not to be in breach of the provision. The present wording avoids this difficulty.

In providing expressly that everyone shall have the right to the equal benefit of the law we hope also to show that the Bill of Rights does not protect only formal equality. The formal view of equality, which entails treating similarly those who are similarly situated, would ensure, for instance, that people with similar qualifications have an equal chance to get particular jobs. In terms of this approach disadvantaged people would have no claim against the guarantees in the Bill of Rights – their disadvantage would be justified because they are different, because they are women and may become pregnant, because they are disabled, and so on.

The concept of substantive equality provides an alternative view by which an equality provision is included in a bill of rights to help redress injustice. This means that disadvantaged people have access to a remedy for the inequality that stems from their disadvantage. Parental leave, for example, would be given to employees not as some sort of 'special benefit' but to give them the same access to employment as people without family responsibilities. In the same way, ramps provided for disabled people would achieve equal access and mobility for people who are disabled and those who are not. In other words, a concept of substantial equality means that measures taken to redress inequality are not perceived as some kind of special treatment for people who do not fit the norm and thus as exceptions to an equality provision; instead, they are a way of achieving equality.

We have departed from the traditional approach in another way by not listing prohibited grounds of discrimination. Instead we prohibit 'unfair discrimination'. As we argue in the Introduction (see p. 17), even open-ended lists often exclude categories of people. There are two reasons why this is particularly problematic in the context of discrimination. First, it is impossible to identify all groups who suffer discrimination, especially as social norms develop. For example, disabled

people, and gay men and lesbians are rarely mentioned in lists of prohibited discrimination, but there is growing acknowledgement that they should be protected from discrimination.

Secondly, lists are inadequate even as a protection for groups which they may appear to protect. For example, were legislation to permit the dismissal of pregnant women, it could well be argued that this is not discrimination on the grounds of sex or gender, but on the grounds of pregnancy, and therefore an anti-discrimination clause which referred only to sex or gender would not strike down such legislation. (For cases in which this has happened, see *Bliss v Attorney-General, Canada* (1979) 1 SRC 183 and *Gedulig v Aiello* 417 US 484 (1974).)

Almost all legislation involves some form of discrimination, and this is usually unproblematic (such as the requirement that blind people may not drive cars). The concept of 'unfair discrimination' accommodates this. Unfairness may be a broad criterion, but it is assumed that the role of constitutional judges will be to apply the concept in the light of the values enshrined in the Constitution and, more particularly, in the Bill of Rights and Directives of State Policy.

We are aware that our decision to omit any specific grounds on which discrimination is unacceptable is contrary to the trend in South Africa, as many different interest groups lobby for their inclusion in the equality clause. But we feel that these attempts to 'get into' the equality clause strengthen rather than weaken our argument. Unfair discrimination in South Africa should not be outlawed only when it involves those who have managed to persuade some influential group in the negotiating process that they deserve special mention. While we acknowledge that judges are in any case likely to draw up their own list, we think that an open-ended clause will enhance the possibility of ending discrimination against groups which, for whatever reason (including the degree of prejudice against them), have not managed to 'get onto' the list.

Express reference to indirect as well as direct discrimination in the discrimination provision also seems important. For instance, the US Supreme Court has excluded indirect discrimination from the ambit of the 14th Amendment and requires a discriminatory purpose to be shown before actions which affect groups unequally can be successfully challenged. This approach effectively limits the usefulness of a bill of rights in challenging structural inequalities. The American approach thus means that any requirement by an employer of prospective employees which tends to exclude all or most women or all or most black people cannot be challenged unless a discriminatory intent can be shown. The prohibition of indirect discrimination (following the example of the US civil rights legislation and race and sex discrimination legislation in the United Kingdom) would outlaw

such requirements unless they were shown to be directly related to the work concerned. As Pannick (*Sex Discrimination Law* p 40) points out, 'the concept of indirect discrimination recognizes that the problem is not merely isolated acts of malevolence but also systems which, often unintentionally, result in disadvantage' to groups, such as women, black people and the disabled.

The third part of this article contains the affirmative action provision. It states that nothing in article 3 shall prevent affirmative action programmes. The ANC's article 13 contains an affirmative action clause which states that nothing in the constitution shall prevent affirmative action. We think that this is unnecessarily broad. All that is necessary is an indication that the equality provision should not be interpreted to prevent affirmative action. The SALC also proposes an affirmative action clause (article 3(b)), but it does not refer to past or continuing discrimination, and it is our view that the scope of affirmative action policies should be clear. In addition, the SALC proposal appears to refer to affirmative action in the public sector only. It could be interpreted to prevent affirmative action programmes in the private sector, which would be unacceptable.

Article 4

(1) Everyone has the right to life.

(2) Nothing in this article shall prevent legislation permitting abortion.

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

The concept of the protection of life is very broad and, as a constitutional doctrine, has implications for a number of highly controversial issues, such as the death penalty, euthanasia and abortion.

At the outset we should note that we have deliberately limited this clause to issues that arise in the context of a right to life. For a number of reasons we do not follow the Universal Declaration, for instance, in protecting life, liberty and security of person in the same provision. First, it seems appropriate to group right to life issues together. Secondly, we have dealt with liberty in the context of detention (in articles 10 and 11) only, indicating that we do not intend a general right to liberty to operate as a clause allowing wide economic freedoms and so on. Other aspects of the right to liberty are encompassed by other provisions of this Bill. For instance, article 7 expressly protects many of the freedoms that may be associated with liberty – freedom of religion, expression, association and so on. Thirdly, security of the person is guaranteed in article 6, which also deals with torture, and cruel, inhuman and degrading treatment or punishment.

The issue of the death penalty has been much debated in South Africa over the last few years. The controversy surrounding the issue is reflected in the SALC's approach to the issue. For, while the ANC calls for the abolition of the death penalty (article 2(3)), the SALC has vacillated. Its 1989 Bill allowed for capital punishment in the most serious cases (article 1), but its 1991 version suggests that the issue be left for the courts to decide (paras 7.19 – 7.41, article 2).

In different jurisdictions, constitutional courts have reached different conclusions on the acceptability of the death penalty, usually considering its constitutionality under a clause prohibiting cruel and inhuman treatment. The death penalty is not inevitably prohibited by the protection of the right to life. Moreover, international experience has shown that, where the legislature or the courts abolish the death penalty, changes in the mood of the public might lead to its reimposition. As it is our view that judicial executions cannot ever be justified in a democracy, we state this expressly in article 4(3).

Euthanasia, or the merciful killing of an individual who is suffering, also falls within the scope of the right to life clause, challenging our notions of what it is we intend to protect when we guarantee a right to life. It is clearly not possible for a bill of rights to stipulate the circumstances in which an individual's wish to die overrides the constitution's commitment to protecting life. Nor can one stipulate under what particular circumstances such a decision may be taken on behalf of a patient. The right to life enshrined in the Bill of Rights simply means that such actions raise constitutional problems and must be resolved by a process of balancing the values in securing a right to life and other values (such as dignity and privacy, perhaps) that may conflict with the right to life in certain circumstances.

Perhaps the most controversial issue that can arise in the context of the right to life is that of abortion. We believe that a foetus which is not viable does not have a 'right to life' and that the word 'everyone' in article 4(1) should not be extended to cover such a foetus. Instead, following the line of argument accepted in the well-known American case of *Roe v Wade* 410 US 113 (1973), we would argue that the State has some interest in potential life, particularly in the later stages of the pregnancy, and that that interest may be asserted. However, the interests of the mother, whose rights are infringed by any limit on abortion, would have to be considered in establishing the limits of the State's interest. Article 4(2) secures this position. It ensures that the legislature can regulate abortion without challenges based on the right to life. It does not remove the abortion issue from the ambit of the Bill of Rights entirely, however, because abortion legislation may be challenged under other provisions. For instance, in *Morgentaler v The Queen* 44 DLR(4th) 385 (1988), the Canadian Supreme Court found Canadian abortion

legislation to offend against the Charter protection of security of person.

This position on abortion differs from that implicit in the ANC draft which, in article 7(3) under gender rights, protects reproductive rights. We do not follow this approach because, first, the ANC phrasing might be interpreted to cover only the right *to* reproduce and not the important right to choose not to have children. More importantly, in implicitly granting reproductive rights to both parents, the ANC clause disregards the imbalance of power and interests between men and women and makes it too easy for men to block decisions relating to reproduction taken by women by, for instance, vetoing a decision to have an abortion or even a decision to be sterilized or use contraception. This is inappropriate, because women carry the full burdens of pregnancy and childbirth, and they bear an unequal responsibility in rearing children. In addition, research has shown that an increasing number of families is headed by single women and that these families are the poorest in our society. It is for these reasons that we think it inappropriate to weigh the interests of women and men equally in the context of reproduction.

Article 5

No one shall be subject to slavery, servitude or forced labour.

This article elaborates on the principle that the dignity of all people must be respected, expressed in article 2, and the right to security of person contained in article 6.

Although slavery has been officially abolished around the world for many years it continues to be practised. Most recently, the press has alerted us to a trade in women from Mozambique to the Witwatersrand and in children from the Boland to Cape Town. The idea of slavery and servitude covers traffic in human beings, including the temporary sale of children for their work, the exploitation of child labour, as well as bondage until a debt is paid off. A prohibition on slavery and servitude may cover 'economic slavery', where someone is paid an extremely low wage or receives only accommodation and food in return for labour.

Forced labour can take many forms, but always involves work done without consent and often without fair and just compensation. Examples of forced labour might include compulsory military conscription or employment without fair and just compensation. What is determined as falling within the parameters of this article will be determined by article 1 and may change as social and economic values change.

In article 2(4) the ANC expressly excludes 'work normally required of someone carrying out a sentence of a court', 'military service or national service

by a conscientious objector', 'services required in the case of calamity or serious emergency' and 'work which forms part of normal civil obligations' from the definition of forced labour. The SALC provides for similar exceptions to its prohibition of forced labour. Our wording does not automatically exclude these practices. If they could be shown to be demonstrably justified in a democracy in terms of article 1 they would be permitted. However, the structure of our Bill does mean that it might be possible to argue that in some circumstances some (or all) of the proposed exceptions would not be legitimate. Our formulation also avoids the vague concept of 'work which forms part of normal civil obligations' found in the ANC draft.

Article 6

(1) Everyone has the right to security of the person.

(2) No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment.

Article 6(1) protects security of the person. This broad right is basic to any system in which human rights are protected. It has been claimed by people in struggles against oppression throughout the world and underpins many of the specifically described rights that follow.

Torture, which is prohibited in article 6(2), is widely used around the world by governments and other authorities. Nevertheless, its express prohibition in international law is binding on all states. Cruel, inhuman or degrading treatment or punishment is prohibited in similar terms in all the national bills of rights of which we are aware. This wording, taken from the ANC draft, is virtually identical to that contained in the Universal Declaration of Human Rights (article 5) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 3).

Various attempts have been made to define torture and to clarify the relationship between torture and inhuman or degrading treatment or punishment. In spite of the difficulties inherent in producing a precise definition, the definitions contained in various international documents and the decisions of commissions and courts (in particular the European Court of Human Rights) provide us with a fairly clear indication of the kind of treatment that falls within the concept. As torture and inhuman and degrading treatment or punishment are all prohibited, the precise distinctions between them are irrelevant.

In other jurisdictions prohibitions similar to the one contained in this article have been held to outlaw not only bodily assault but also the infliction of mental

suffering through techniques such as solitary confinement, the use of insulting language, stripping, and being forced to witness the torture or degrading treatment of friends or relatives. The European Committee on Crime Problems has declared life imprisonment without any hope of release to be inhuman punishment. Degrading treatment covers serious invasions of the dignity of people, and it has been suggested that degrading treatment could arise if a State denies exercise to prisoners or uses unnecessary physical force in escorting an arrested person, and even if it refuses to recognise a sex-change operation.

The Namibian Supreme Court has already provided two examples of the implications of a similar provision in their Constitution. It has held that corporal punishment inflicted either as a result of the sentence of a court or in schools is in conflict with article 8 of the Namibian Constitution (*Ex Parte Attorney-General, Namibia: In re Corporal Punishment* 1991 (3) SA 76 (NmSC)) and that the interrogation of a suspect through a process 'calculated to terrorise and degrade' him contravened the provision (*S v Minnies* 1991 (3) SA 364 (NmHC)). In the latter case six policemen had taken a handcuffed suspect to an empty shed, put him on a chair under a spotlight, and subjected him to four hours' questioning without food or water all day and without the suspect knowing where he was or why he had been removed from the police station.

Article 7

Everyone has the following freedoms:

(1) freedom of conscience and religion;

(2) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication;

(3) freedom to refuse to perform military service or to bear arms;

(4) freedom of peaceful assembly;

(5) freedom of association; and

(6) freedom to submit petitions for the redress of grievances and injustices.

We prefer this concise expression of the fundamental freedoms. As with all substantive rights, this article is qualified by article 1, which will allow the constitutional court to develop a jurisprudence on the scope of the freedoms. Most of these freedoms are so widely accepted as to need little motivation.

We have not included the limitation on press freedom, which requires the press to 'respect the right to reply', referred to in the ANC's article 4(1). While we

recognise the urgent necessity to take steps to curb oligopolistic cross-holdings in the media and to provide real channels whereby the presently powerless can express their views, we do not view such a 'right of reply' as an appropriate means to achieve these objectives. We think that there would be too many practical difficulties attendant on the interpretation and enforcement of such a 'right', as well as a considerable risk of its being hijacked by those whose power it is intended to curb, to the detriment of the powerless.

Nor have we adopted the specific empowerment of the legislature to 'prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group' contained in the ANC's article 14(4). We regard this provision as too sweeping a curtailment of free expression, and prefer to stress freedom while allowing any legislative restrictions to be tested against the general circumscription in article 1. In this context one should remember that Rushdie's *Satanic Verses* could be legitimately suppressed under such a provision and that a documentary film on Nelson Mandela was one of the first items embargoed under this type of provision in Canada. In addition, Directives 7, 8 and 12 indicate the desirability of moving towards a legal system which would disapprove of 'hate speech'.

Article 7(3) recognises the struggle through much of South Africa's history of those who have been unwilling, for a range of deeply-held convictions, religious or otherwise, to perform military service or to bear arms. It should be noted that this sub-article does not grant the freedom to refuse to render (non-military) national service, and is similar to the ANC's article 2(34).

The reference to the submission of petitions stresses the historical importance of ensuring direct access of groups of people to their political representatives between elections to present a statement of their grievances. This right has been asserted repeatedly in our political history.

Article 8

(1) Everyone has the right to move freely, to reside, and to pursue a livelihood anywhere within South Africa.

(2) Every citizen has a right to a passport, to leave the country, and to return to it.

This article reformulates the present ANC article 2(32) which limits the right of movement to citizens only. We think that once a person has entered South Africa lawfully, this right should be accorded to him or her subject only to the general

circumscription contained in article 1.

The article also provides a right to pursue a livelihood. The SALC proposes two provisions which are similar to this one: article 15 which refers to the 'right to engage in any lawful business' and article 23 which confers the 'right to engage in economic enterprise'. This seems to be an unnecessary duplication.

We have also adopted the formulation 'to leave the country and to return to it' as preferable to 'travel abroad and to emigrate' because it more clearly entitles everyone who has left (including all exiles) to return. This accords with the Strasbourg Declaration on the Right to Leave and Return adopted by the International Institute of Human Rights in November 1986, which recognises justifiable restrictions on the right to leave a country but which provides for an absolute right to enter one's country of nationality or citizenship.

The right to leave a country may conflict with another constitutional guarantee. The matter received attention in a recent decision of the Irish Supreme Court in *Attorney-General v X* (5 March 1992). The case concerned the right of a woman bearing a foetus to terminate a pregnancy which resulted from a rape. The Attorney-General, acting on behalf of the unborn foetus, sought an injunction restraining the young woman from leaving the Republic of Ireland to procure an abortion in the United Kingdom (article 40.3.3 of the Irish Constitution expressly protects the unborn child's right to life). The appeal court held that there was a real and substantial risk to the life of the mother which could be avoided only by termination of the pregnancy and it held that the mother's right to life trumped that of the foetus. The Appeal Court also noted obiter that the right to leave the country was absolute and could not be restricted by the constitutionally guaranteed right of the unborn child.

In article 8(2) we refer to 'every citizen' as opposed to 'everyone'. This is to make it clear that only citizens will enjoy the rights conferred by article 8(2). Article 9(1) similarly confers the right to vote on citizens, not 'everyone'.

Article 9

(1) All citizens have the right to vote and to stand for election to public office.

(2) Election for public bodies shall be regular, free and fair and based on universal franchise and a common voters' roll.

This article contains the substance of the clauses on political rights proposed both by the SALC (article 24) and the ANC (article 3). Although this article is much briefer than the provision contained in the ANC draft bill, we think that it provides

the same substantive protection.

General principles concerning elections should be dealt with in the Constitution, not in the Bill of Rights, and detailed provisions governing elections and referenda (including qualifications for voters and candidates) should be dealt with in legislation. Once again, any limitations on the general rights conferred by article 9 will have to be justifiable in a free and open social democracy (article 1).

The right to form political parties and to participate in political activities is guaranteed by article 7(5).

Article 9 should be read with Directive 1, which places a duty on the State at all levels to conduct its affairs in an open and accountable fashion, and create appropriate mechanisms (such as the recall of elected officers, referenda and regular reports to the electorate) to ensure open and accountable government.

Article 10

No one shall be deprived of liberty for any purpose other than the interests of justice, public health or immigration, provided that no one shall be detained for the purposes of interrogation or the prevention of the commission of a crime.

Article 10 safeguards the right to personal liberty by specifying the only purposes for which such liberty may be curtailed. These purposes are stated broadly, and it will be necessary for the courts to determine their precise ambit. The article states clearly that such purposes do not, however, include interrogation or the prevention of the commission of crimes. While it may be argued that detention for such purposes would in any event not be in 'the interests of justice', in our view the history of such practices in South African 'security' legislation requires this explicit exclusion.

The ANC's proposed article 2(10), permitting arrest only for the purpose of standing trial on a criminal charge, is too narrow, as it would exclude arrest for prevention of spreading of infectious diseases, illegal immigration, extradition, etc. On the other hand, the SALC's article 5 errs on the side of too much particularity. In line with our general approach, we have attempted to set out the broad purposes for which liberty may be curtailed, while retaining sufficient flexibility to allow circumscription in line with the strictures of article 1. It must further be stressed that the specific circumscription contained in the latter half of article 10 is subject to the general circumscription formula in article 1.

Article 11

(1) No one lawfully deprived of liberty shall be held for more than 48 hours unless further detention is ordered after a fair hearing by a court of law.

(2) Anyone deprived of liberty shall be held in conditions consonant with human dignity.

(3) Anyone deprived of liberty shall be informed immediately of the reason for the detention, of the right to remain silent and of the right of access to a lawyer.

Article 11 contains safeguards to regulate procedures on and after detention, and ensures that arrest and detention infringe only the right to liberty. Article 11(1) limits initial detention to 48 hours. The hearing required for any extension beyond this limited period would be to establish whether continued detention is necessary for the pursuit of the lawful purpose for which the person was held initially. The only competent authority to make such a decision is a judicial body. The inflexibility of the time limit means that there may have to be provision for court hearings after normal hours on weekdays and on weekends and public holidays. We reject the exceptions to the 48-hour rule contained in the ANC's article 2(11).

Article 11(2) emphasizes that a detainee retains all his or her rights other than the right to liberty, but including the right to dignity, on being arrested.

Article 11(3) contains the well-known protection against self-incrimination prior to trial, and requires certain information to be given to the detainee, without which the other procedural rights in this Bill would be practically unenforceable.

Article 12

(1) Anyone deprived of liberty shall have a right of access to a lawyer of his or her choice.

(2) Accused persons shall have the right to be defended by a lawyer of his or her choice.

(3) The State shall provide a lawyer to detained or accused persons when the interests of justice so require.

The principle of legal representation is of such cardinal importance that it merits a separate article. The entrenchment of the right of access to a lawyer in articles 12(1) and 12(2) is crucial in ensuring that the procedural rights contained in this Bill generally are enforced.

Article 12(3) establishes an accused or detained person's entitlement to State-funded legal representation. The qualification 'when the interests of justice so require' is deliberately open-ended so that the courts are able to develop criteria in terms of which the entitlement is expanded over time. It is therefore unnecessary to state, for example, that the entitlement applies to indigent accused in serious or complex cases. This approach is similar to that in the ANC's article 2(21).

The SALC's approach to the matter is unsatisfactory. It rejects the inclusion of such an entitlement and limits the court's duty to informing the accused about the right to a lawyer. It simply reflects the decision in *S v Rudman* 1992 (1) SA 343 (A) which has been widely criticised as being too restrictive.

Article 12(3) deliberately encompasses detainees other than accused persons. This may include accused not yet in court, as well as people falling outside the criminal justice process, such as those in mental institutions. Again, the courts would have to develop criteria to determine the ambit of the entitlement.

Article 13

Every accused person awaiting trial shall be entitled to be released on bail unless a court orders, on good cause shown, that he or she should be kept in custody in the interests of justice.

Article 13 establishes the exclusive jurisdiction of the courts to determine bail. The power of the Attorney-General to oust the court's jurisdiction to consider bail in terms of the Criminal Procedure Act 51 of 1977 (s 61) and the Internal Security Act 74 of 1982 (s 31) would be unconstitutional (see *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (B)). Article 13 further creates a presumption in favour of bail; unless the court is convinced that it is not in the interests of justice, bail should be granted. Flowing from this presumption, the onus to show good cause why bail should be denied falls on the prosecution. It reverses the present position where the onus lies on the accused to prove, on a balance of probabilities, that his or her release on bail will not prejudice the administration of justice.

Article 14

Everyone charged with a criminal offence or involved in a civil dispute in law is entitled to a fair trial, within a reasonable time, in public, by an independent and impartial court.

Article 14 reflects the following principles: first, a broad right to a fair trial. This right implies many of the common-law rules pertaining to a fair trial and thus obviates the need to mention these rules explicitly. Our formulation also allows the courts to develop the principles of a fair trial as social circumstances permit.

Secondly, recognizing the frequency with which lengthy delays in the trial process occur, article 14 requires such proceedings to be expeditiously concluded.

Thirdly, article 14 confirms the right to trial in public which is an established principle. Present exceptions to the rule (for example, in regard to juvenile accused or rape victims) would have to be tested in the light of the general limitation contained in article 1 above.

Fourthly, article 14 stresses that independence and impartiality are fundamental aspects of the judicial process. The effect of this requirement on the magistracy will be most noticeable – it may be that the administrative and judicial functions of this office will have to be separated (as was recommended by the Hoexter Commission Report of 1984).

Article 15

(1) No act shall be punished if it was not a crime at the time it was committed, and no penalty shall be increased retrospectively.

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

Both parts of this article entrench long-standing and widely-respected rules of the common law. Their violation (for example, by the retrospective operation of the Terrorism Act of 1967) in South Africa's immediate past makes their inclusion as non-derogable rights (see article 25(3) below) all the more significant. The prohibition of 'double jeopardy' in article 15(2) also seeks to guard against the abuse of the criminal process for political purposes.

Article 16

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

(2) No one shall be required to give evidence against himself or herself.

(3) No evidence obtained in violation of the provisions of this Bill of Rights or any other legal provision whatsoever shall be admissible in any court of law.

Article 16(1) states the general principle that the onus is on the prosecution to prove the guilt of an accused person. This means that there is a general prohibition

on the use of presumptions to assist the prosecution in its task. The prohibition is not absolute, however, and courts in other countries have held that certain presumptions may well be regarded as constitutional (when successful prosecutions would be impossible without their use) in terms of a general circumscription clause (such as article 1 above).

Article 16(2) states the common-law rule that accused persons may not be required to incriminate themselves in court. We are persuaded that the same protection should not be given to spouses in the Bill of Rights because it is anomalous when juxtaposed with the equivalent position of children, more distant family relations, etc.

Article 16(3) seeks to establish a general exclusion of evidence obtained in violation of the law. This is an important departure from the common-law position. The indirect aim is to combat police abuses in the gathering of evidence. Thus evidence obtained through torture or cruel, inhuman or degrading treatment, or in violation of the privacy provision of this Bill, will be inadmissible. We deliberately refer both to evidence that has been obtained in a manner that violates the Bill of Rights and to evidence obtained in contravention of other laws because reference to the Bill of Rights alone is too narrow. For instance, relying on their earlier case law, Canadians are concerned that confessions obtained by a trick (for instance by a police officer impersonating a fellow prisoner or a priest) could be held not to violate their Charter and would thus be admissible. Our provision broadens the scope of excluded evidence. It also allows the legislature some flexibility in extending the scope of the exclusionary rule.

Both the ANC and the SALC propose a provision excluding illegally obtained evidence. However, the ANC's article 2(23) deals only with the first ground of exclusion and is thus too narrow. The SALC's version in article 7(d) is substantially similar to ours, but the attempt to frame it as a right of accused people makes it a great deal more cumbersome. In addition the SALC proposes a specific circumscription which we do not.

The SALC circumscribes the right granted in article 7(d) of its Bill by providing that evidence 'obtained in violation of any right under this Bill' will be inadmissible 'unless the court in the light of all the circumstances and in the public interest otherwise orders'. The SALC has chosen the criterion 'public interest' because it is 'a firmly established and familiar element of our law' (para 7.331). We are not persuaded either by the standards purportedly introduced by the SALC's circumscription, or by the reasons for adopting that wording, as the notion of 'the public interest' has a had a dubious history in our law. Instead, we think that article 1 will provide a clear guide to circumscription, particularly because, as a general circumscription clause, its meaning can be developed consistently

through our entire constitutional jurisprudence.

In excluding all illegally obtained evidence our clause starts from a very different position from the one that the Canadians, for instance, have chosen. Whereas the Canadian Charter (article 24(2)) allows all evidence unless its admission would bring the administration of justice into disrepute, we would exclude all illegally obtained evidence unless it can be shown that its admission can be 'demonstrably justified in a free and open social democracy' (article 1). We think that this shift in approach is important as it makes it clear that, as a rule, illegally obtained evidence should not be admissible. It should also mean that the burden to prove that such evidence should be admitted falls on the party seeking to use such evidence (usually the State) whereas, if we follow the Canadian formulation, the burden may fall on the party seeking to exclude the evidence. It seems appropriate to deal with the burden of proof in the way we have as it will usually mean that the party that has resorted to illegal means of obtaining evidence will be required to justify the illegality.

The effect of an exclusionary rule limited in the way that we suggest will mean, for example, that an object that may afford evidence of the commission of a crime will not necessarily be excluded simply because it was seized unlawfully as a result of a technical defect in the search warrant. The question would be whether the admission of evidence obtained in this way would be justified in a free and open social democracy. It is, of course, unthinkable that evidence obtained through torture would ever be admissible. The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, which should influence the interpretation of a South African Bill of Rights, is absolute in this regard (article 15).

Article 17

Everyone who has been convicted of a crime and who in accordance with the sentence of a court of law is serving a term of imprisonment has the right:

(1) to be held under conditions consonant with human dignity;

(2) to be given the opportunity to develop and rehabilitate themselves;

(3) to be released at the expiry of his or her term of imprisonment as imposed by the court of law; and

(4) to have a court of law decide at an appropriate time whether he or she should be released before the expiry of his or her term of imprisonment.

The key part of the proposed article is the right of sentenced prisoners to be given the opportunity to rehabilitate themselves. (The formulation is borrowed from the Bill proposed by the SALC.) It places a positive duty on the State to attempt to do something for prisoners; they may not merely be warehoused. At the same time, the emphasis on the opportunity which sentenced prisoners must be given, excludes the danger of rehabilitation as a 'coerced cure', for it recognizes that prisoners retain the right to choose whether to participate or not. A positive approach to rehabilitation fits well in a constitution protecting the dignity of all people and seeking to develop the capacities of all citizens to the full. Experience in Germany in particular has shown that the recognition of a positive constitutional right to rehabilitation has had a salutary impact on the development of a humane system for dealing with sentenced prisoners.

The guarantee of release at the end of a term of imprisonment is an aspect of the habeas corpus doctrine and requires no further elaboration.

Article 17(4) extends judicial control to cover the minimum length of the sentence as well. A proposal to ensure such control over parole alone is inadequate, as other forms of early release are probably more significant. The phrase 'at an appropriate time' will give a constitutional court an instrument to compel the legislature to introduce a legal framework for early release. Both the German Federal Constitutional Court and the European Court of Human Rights have, in the case of prisoners sentenced to life imprisonment, effectively compelled the introduction of such legislation on constitutional grounds.

Article 17(1) repeats the protection contained in article 11(2), emphasising that it applies to convicted prisoners.

Article 18

Everyone has the right to the protection of his or her privacy.

The SALC and the ANC include reference to privacy in their draft Bills. However, our provision differs from both. In its direct guarantee of a right to privacy it is broader than the ANC provisions which protect home life and private communications and prohibit unlawful entry and search but do not allow for a general right of privacy (see articles 2(27), 2(30) and 2(31)). It departs from the SALC's approach in omitting the descriptive list of circumstances in which a right to privacy could apply.

A right to privacy is controversial for a number of reasons. One is that the notion of privacy is prone to misuse. This is evident from the SALC report itself which effectively constructs a wide sphere of privacy in its insistence that a bill

of rights should not regulate relations between individuals. The notion of privacy has also been invoked to limit what is termed 'interference' in the home and, in this way, has deprived women of effective remedies for abuse they may suffer at the hands of their partners. When the private sphere is defined as the domestic sphere it is implied, for instance, that forced sexual relations within marriage are not rape. It is this interpretation of privacy that underlies the ANC's decision to add an express limitation to its provision protecting the privacy of the home to the effect that 'reasonable steps shall be permitted to prevent domestic violence or abuse'.

In spite of these difficulties, we propose a general, unqualified right to privacy. We do this because we feel that the ANC list of three areas in which privacy should be protected is too limited and potentially excludes areas in which we believe that a right to privacy might be important. For instance, a court may interpret a right to home life to exclude the protection of intimate practices outside the home which in no way intrude on any other individual's rights. Similarly, the right to privacy may explain why we should respect people's fully voluntary requests for euthanasia, whereas the ANC wording provides no scope for this. In addition, the abortion debate has proceeded on the basis that women have a right to privacy in making decisions about reproduction, whereas this is not covered by the notion of home life.

At the same time we are uneasy about the list that the SALC provides to illustrate what might be protected under its broad privacy provision. (The Commission states: 'Everyone has the right to the protection of his or her privacy which means, inter alia , that ...'(article 10).) It suggests that property and places of residence and employment shall not be entered, that people should not be searched and that communications should not be intercepted. While we agree that people should generally be free from interference in these areas, the examples seem to us to reassert a concept of privacy which is dependent on identifying certain, almost geographical, areas and which reinforces the notion, say, that intervention in domestic matters should be limited.

Although we think that it is vital to protect privacy, we do not support the development of a concept of privacy on this basis. Instead we propose that we take our lead from JS Mill's notion of privacy. He defines the private sphere as that sphere in which one's conduct does not harm others. He gives the example that no person ought to be punished for being drunk, but that a soldier or policeman ought to be punished for being drunk on duty. If we were to build on this understanding of privacy, it seems that we could develop a coherent notion of privacy which would contribute to the realization of the basic commitment of this Bill of Rights, which is to respect the dignity of all people.

Article 19

(1) Everyone shall have the right to live with partners of their choice.

(2) Everyone shall have the right to found a family.

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

The right to live together with partners of one's choice asserted in article 19(1) recognises a crucial aspect of the right to freedom from interference in decisions relating to personal life. It is a direct expression of an aspect of the rights of freedom of expression and association and of the right to respect for dignity and privacy. It requires separate treatment, however, as societies have repeatedly limited this right – either by dictating the type of gender relationship that is permitted or by ignoring the right altogether. (This was one direct effect of the South African system of migrant labour.)

This article confirms that everyone has the right to choose partners whether or not they institutionalize their relationships by marriage. Expressly including the right to live together with partners of one's choice is also consistent with the approach taken under the European Convention on Human Rights, for example, which has broadened the notion of family life to include the relationship of unmarried couples (*X and Y v Switzerland* application 7289/75).

In addition, but subject to the provisions of article 19(3), this wording does not exclude the possibility of polygamous relationships.

Protection of the right to found a family recognises the principle found in article 2(d) of the Genocide Convention which states that 'genocide' includes 'imposing measures intended to prevent births within the group'. It may also prove useful where, in programmes directed at limiting population growth, the impact of taxation measures and the distribution of social security benefits are more severe for disadvantaged members of the society. It would not – at present, at least – provide a general obstacle to such programmes.

It has been argued that providing protection for the family is inimical to the interests of women because traditionally accepted family structures oppress women. There is substantial evidence of this, and the role of the man as head of the family and the level of violence against women within families provide just two examples. Furthermore, it may be argued that it is in the family that gender stereotyping, which forms the very basis of the oppression of women, occurs. In spite of these arguments we believe that the right to found a family should be protected. The provision does not imply that only certain family forms are

legitimate (see the *Marckx Case* European Court of Human Rights Series A Vol 31, June 13, 1979 in which it was asserted that while Belgian law protected traditional family forms satisfactorily its discrimination against an illegitimate family was a violation of the right to found a family contained in article 8 of the European Convention on Human Rights). Our phrasing also avoids the pitfalls of the African Charter on Human and Peoples' Rights in which the family is protected as 'the custodian of morals and traditional values recognised by society'. While the version in the African Charter may be read to protect only certain, traditional (and possibly oppressive) family forms, this wording does not.

Article 19(3) articulates the rights contained in international human rights instruments such as the Universal Declaration and the International Covenant on Civil and Political Rights. In its insistence that spouses should be treated equally it incorporates, in a condensed form, the rights listed in article 16 of the 1980 United Nations Convention on the Elimination of All Forms of Discrimination Against Women. It may be argued that the broad provisions contained in article 3 of this Bill of Rights make a specific provision stipulating equality within marriage unnecessary. However, widespread resistance to implementing guarantees of equality within a marriage makes it appropriate to spell out this application of the equality clause.

Child marriages and arranged marriages are outlawed by the requirement of full consent. Moreover, should polygamous marriages continue to exist, this requirement would ensure that existing spouses must consent before additional partners are introduced into a relationship. (This is consistent with the law in countries such as Indonesia which have attempted to end inequality within polygamous relationships.)

By specifying that spouses shall enjoy equal rights at, during, and in respect of the dissolution of, marriage the sub-article ensures that inequality within the family is not justified by reference to the different roles that each spouse may traditionally assume. For instance, it ensures that parties will have equal rights in matters relating to their children, in choosing an occupation and in respect of property. This article does not dictate any particular matrimonial property regime nor a particular distribution of assets on divorce, with the single qualification that any regimes prescribed by legislation should not undermine the substance of the requirement that parties to a marriage should have equal rights. (It would not be appropriate to decree in the Bill of Rights, for instance, that a single estate is created on marriage as, in different situations, different regimes may be appropriate and just.)

Article 19(3) does have implications for existing forms of marriage, particularly if it is interpreted (as it should be) to encompass all marriages recognised as

such by the community and not only those concluded in conformity with the existing Marriage Act of 1951. For example, where customary forms of marriage impose limitations on a wife's legal capacity changes will be necessary, and civil marriage law will no longer be able to designate the father as the head of the household and sole guardian of the children. In this regard our Bill differs significantly from the SALC proposal which seeks to protect 'traditional rules' (para 7.216). It is our position that, as long as provisions which treat women unequally within the family are retained (whether or not they are claimed to be part of a particular group's 'cultural' heritage), assurances of equality between the sexes are empty and the Bill of Rights would be guaranteeing the basic human rights of only a section of our society.

Article 20

Workers shall have the right

(1) to form and join trade unions and to regulate such unions without interference from the State;

(2) to organize and bargain collectively;

(3) to take collective action under law in pursuance of their social and economic interests subject only to reasonable limitations in respect of the interruption of services such as would endanger the life, health or personal safety of the population or any section of the population;

(4) to a safe and healthy working environment; and

(5) to equal pay for work of equal value.

We think that the ANC's article 6 on workers' rights is too broad. Several of the clauses (for example, the right to information, the right to deduct union dues) belong more properly in specific labour legislation, while others (for example, the duty of employers to offer reasonable pay and holidays) fit more appropriately in Directives of State Policy (Directive 3). The same comments may be made with respect to the SALC's proposals contained in article 28. These provisions are particularly vague (for example, 'Every employee has the right ... to the protection of his or her ... mental well-being').

Identified in the revised article above are the key rights for workers and workers' organizations, each of which, it is felt, deserve distinct mention: freedom of association; the right to organize (necessary to balance property rights); the right to bargain collectively (necessary to balance property rights and, more specifically, managerial prerogative); the right to take collective action ('collec-

tive action' is a wider notion than 'strike action', encompassing demands which reach beyond the narrow employment context, and encompassing self-defence action in the case of threats to health and safety); adequate health and safety protection; and equality in benefits.

The right to take collective action is specifically limited. This provision is derived from the jurisprudence of the Freedom of Association Committee of the International Labour Organization (ILO). We think that our article 1 is not sufficient to make it clear that the right to take collective action should be limited only in the specific circumstances identified here. By using the ILO formulation we hope that judges will be more likely to draw upon the established jurisprudence of the ILO in this regard.

Article 21

(1) No one shall be removed from his or her home except in terms of an order of court.

(2) No court shall make an order authorising the removal of a person from his or her home unless it has taken into account the existence of appropriate alternative accommodation.

Over three million South Africans were removed from their homes to give effect to apartheid policy. These removals rendered many people homeless. Many of the removals took place without court orders, but even where a court was approached to issue an eviction order it was not until the landmark decision of *S v Govender* 1986 (3) SA 969 (T) that courts considered the availability of alternative accommodation in deciding whether to issue an eviction order or not. In the light of the history of forced removals, a provision of this nature must be contained in the Bill of Rights.

The availability of alternative accommodation cannot be a decisive factor in the exercise of the discretion, because there will be circumstances in which it will be appropriate for a court to make an eviction order even where alternative accommodation is not available, for example, where a financially secure tenant is refusing to pay rent.

The ANC proposes a similar clause in article 11(5), but the SALC does not propose such a provision.

Article 22

Everyone has the right to an environment which is safe and not harmful to health.

In essence, concern for the environment has two aspects: first, natural resources should be used in a manner which takes cognizance of the country's limited and diminishing resources as well as the needs of future generations. This is reflected in the internationally accepted notions of 'sustainable utilization of resources' and 'sustainable development' as well as in the global concern for biodiversity. The second aspect of concern for the environment is that the degree of pollution generated in the course of pursuing legitimate economic development and other activities should be contained and limited as far as possible.

The first aspect calls for the encouragement of positive, proactive action, while the second is negative in that it requires the mitigation of certain harmful consequences of human activity. We think that these two aspects require different treatment in a bill of rights.

Like most socio-economic rights, the first is not suitable for judicial protection as a fundamental right (see the discussion in the Introduction at p. 20). Just as a court should not become involved with the question of whether primary education should include computer-training, it is not appropriate for a court to decide whether the environment of an endangered species should be destroyed to provide housing. On the other hand, it is appropriate for a court to prevent pollution that renders an environment unsafe and harmful to health.

Accordingly, we propose two sets of provisions concerning the environment. The first, contained in article 22, creates a fundamental, justiciable right to a safe environment that is not harmful to human health. The right is deliberately phrased negatively (and is similar to the SALC's article 30). The use of the negative indicates that a minimum standard is set and that people are not immediately entitled to an environment that promotes health. However, the wording leaves scope for courts to be responsive to evolving – and improving – standards. The provision will assist in the maintenance of a safe environment for people and conforms with the principle of human dignity that is fundamental to our bill. In addition, the right is clearly anthropocentric rather than biocentric, in that it does not protect natural objects themselves but only in so far as they have utilitarian value to people. Granting rights to natural objects has been mooted in some quarters (for example, by the 'Deep Ecology' movement) but we do not think that it is appropriate in a bill of rights. The article refers to safety and health, not cleanliness, to provide a clearer standard linked specifically to human living

conditions.

Article 1 (the general circumscription clause) will probably, and quite appropriately, limit the open-ended right to a safe environment and we think it is unnecessary to include further circumscription within the clause itself.

The second set of provisions concerning the environment is contained in Directives of State Policy 13 and 14. These Directives relate to resource control (which article 22 does not) and to pollution control (in a more detailed way than article 22 does). The former takes into account the need for sustainable development and the maintenance of biodiversity. The latter includes generally accepted norms relating to pollution control and waste management.

Article 23

Anyone adversely affected by an improper or unreasonable administrative act shall have the right to seek redress from an independent court and any other body or tribunal established for such purpose.

The purpose behind this formulation of the 'right to administrative justice' is to establish a broad and basic right for all those whose interests are affected by an administrative action or decision to seek relief from an appropriate body. The suggested formulation achieves the following objects: a relaxation of the present approach to standing to sue in administrative law (which requires an applicant to show a 'direct and substantial interest') to enable a wider group of people to challenge administrative action; a recognition of the desirability of the establishment of independent tribunals and other bodies, besides the courts, for the hearing and redress of complaints about administrative action; and the creation of a right to seek redress of grievances caused by administrative action, the grounds for such relief clearly encompassing both procedural and substantive matters.

It will be noticed that the grounds mentioned have been broadly expressed. The purpose is to prompt the legislature to enact statutes which will give greater particularity to such grounds, along the lines, perhaps, of the Australian Administrative Decisions (Judicial Review) Act of 1977. Failing such legislation, the phrase 'improper or unreasonable' quite clearly authorizes a reviewing body (be it a court or any other institution) to consider the procedural propriety and the substantive reasonableness of the administrative action (including a decision) that is disputed. This breaks the present restrictive mould of judicial review of administrative action, without moving completely into the field of appeals on the merits. This approach is not only consistent with our general model of constitu-

tional review, but also avoids the pitfalls attendant on the attempted inclusive definition of grounds of review and the operation of the 'expressio unius' rule of interpretation. The notion of 'unreasonableness' covers a wide range of possible grounds of review.

The proposal incorporates aspects of the provisions contained in the Namibian Constitution (article 18), the ANC's article 2(25) and the SALC's articles 31 and 32. It is, however, less specific than any of the above. In particular, the following aspects are viewed as problematical: the ANC proposal is too narrow, providing only a right of 'review' on certain restricted grounds; and the SALC provides only for review on the basis of the Supreme Court's inherent jurisdiction (article 31) and then only (apparently) on the basis of the current, restricted grounds of review.

Article 24

(1) Everyone has the right of access to information held by any authority performing governmental functions.

(2) Everyone has the right of access to that information which is necessary for the implementation of his or her rights.

A crucial aspect of any effective human rights protection is the capacity on the part of those whose rights have been infringed to establish who has acted to their detriment, under what legal authority, and for what reason. This is reflected in the reference to 'open' government in article 1. There is at present no common-law duty on administrators to disseminate information, which impedes government accountability, particularly in the executive sphere.

The SALC proposal in article 12 is that: 'Everyone has the right ... to obtain and disseminate information'. The ANC proposes in article 4(3) that: 'All men and women shall be entitled to all the information necessary to enable them to make effective use of their rights as citizens, workers or consumers'. We feel that these formulations lack the completeness and specificity needed to achieve the purpose served by a right to freedom of information, and could lead to restrictive interpretation by the legislature and judiciary.

We prefer to emphasize two aspects of this right of access to information. Article 24(1) identifies the type of body which will be bound to divulge information, the notion of 'performing governmental functions' being potentially wide. Article 24(2) stipulates the type of information which will be subject to disclosure, a provision which might, of course, contradict the rights to dignity (article 2) and to privacy (article 18) protected by this Bill. This clash will be a matter for the courts to resolve, in all the circumstances of each case.

It is clear that a future legislature will need to give greater particularity to this right by way of statute, as has been done in several other jurisdictions. Indeed, we feel that such amplification of these general provisions in freedom of information legislation would be imperative.

Article 24(2) is particularly necessary for the realization of rights against private bodies whose functions are unlikely to be deemed 'governmental'. For example, the enforcement of an environmental right (pursuant to article 22) may be impossible without the right to obtain information from a company as to its industrial practices. Similarly, the provision prohibiting discrimination in employment (in article 3(2)) might depend for its implementation on obtaining information about the racial origins of employees from an employer

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Article 25

(1) The rights and freedoms contained in this Bill may be derogated from by the declaration of a state of emergency only where the safety or existence of the State is threatened by war, invasion, general insurrection or natural calamity and the implementation of emergency measures is necessary to bring about peace or order and is demanded by the situation.

(2) Emergency measures enacted in terms of article 25(1) shall derogate from this Bill only to the extent demanded by the situation.

(3) This article shall permit derogation only from the fundamental rights and freedoms contained in articles 7(2), 7(4), 7(5), 7(6), 8, 9(2), 10, 11, 12, 13, 18, 20, 22, 23 and 24 of this Bill of Rights.

(4) No state of emergency shall be proclaimed for longer than three months at any given time.

(5) The declaration of any state of emergency shall be ratified within two weeks by not less than three-fifths of the elected members of the legislature.

(6) Any measures that will apply during a state of emergency shall be ratified within two weeks of their adoption by not less than three-fifths of the elected members of the legislature.

(7) No emergency measure shall grant immunity to officers of the state in respect of their conduct during a state of emergency.

Clear rules for the operation of emergency measures need to be set out in the Bill of Rights. Although it could be argued that the general circumscription provision

contained in article 1 is sufficient, international experience shows that judges will rarely question a statement made by the executive that emergency legislation is necessary. The limits that we propose reflect internationally accepted principles for the control of emergency legislation.

The ANC Bill contains no general derogation article of this nature. On the other hand, the SALC proposes a detailed derogation provision in article 34(2), from which we do not differ substantially. However, the SALC Bill does not contain a provision equivalent to our article 25(2), which requires emergency measures that derogate from the Bill of Rights to do so only so far as is required by the circumstances of the emergency. We have added this provision because we do not think that it is acceptable to allow untested emergency measures merely because a state of emergency is found to exist. In this regard our provision follows the example of article 15(1) of the European Convention on Human Rights and various other international human rights conventions.

Articles 25(5) and 25(6) refer rather broadly to a requirement that both the proclamation of a state of emergency and any measures enacted in terms of it shall be ratified by 'three-fifths of the elected members of the legislature'. This provision is obviously imprecise in one important way – it does not specify the structure within which this ratification should occur. As we do not know what the structure of our legislature will be this is something that we cannot specify. However, if a bicameral legislature is established we would propose that emergency measures should be ratified by a three-fifths majority of each house sitting separately, to provide a double check and to respond to the different constituencies that these houses would no doubt represent.

It should be noted that article 25(3) permits derogation from only a limited number of the fundamental rights. This mirrors closely the provisions of the Namibian Constitution. (The articles from which derogation is permitted are: article 7(2) – freedom of thought, belief, etc; article 7(4) – peaceful assembly; article 7(5) – association; article 7(6) – freedom to submit petitions; article 8 – movement; article 9(2) – regular elections; article 10 – liberty; article 11 – rights on detention; article 12 – legal representation; article 13 – bail; article 18 – privacy; article 20 – workers' rights; article 21 – limitations on eviction; article 22 – environmental rights; article 23 – administrative justice; and article 24 – access to information.)

Article 26

(1) The rights and freedoms contained in this Bill of Rights shall be enforced by the courts.

(2) In interpreting this Bill, the courts shall promote the values which underlie a free and open social democracy.
(3) Subject to article 1, no rule of the common law, custom or legislation shall limit any right or freedom contained in this Bill.
(4) Everyone who claims that his or her rights, or associations which claim that their members' rights, guaranteed by this Bill of Rights have been infringed or threatened, shall be entitled to apply to a competent court for appropriate relief, which may include a declaration of rights.
(5) The guarantee of certain rights and freedoms in this Bill shall not be construed as denying the existence of any other rights or freedoms that exist in South Africa.

Article 26(1) emphasizes that the courts (including any Constitutional Court) are the principal and ultimate mechanism of enforcing those rights contained in the Bill of Rights. Important subsidiary mechanisms, such as Human Rights, Equal Opportunity and Social Rights Commissions, and Directors of Administrative Accountability (ombuds), which are provided for in the SALC and ANC proposals and which are regarded as vital means of making human rights real for the citizen, are considered to be more appropriately included in another part of the Constitution (for example, in the section dealing with the administration of justice, the constitutional court, etc. – see Namibian Constitution chs 9 and 10).

Article 26(2) endeavours to provide the courts with a political and socio-economic framework within which they ought to discharge their interpretive function. This is, of course, the same norm against which any legislative limitation of protected rights and freedom must be measured (see article 1 above).

Article 26(3) serves to remind the courts that the provisions of this Bill apply to the law in all its forms, and not only to statutes or subordinate legislation. While acting primarily as a guide to interpretation of this Bill, this sub-article also emphasizes the extent to which article 27(1)(b) below provides for the 'horizontal' application of the Bill of Rights.

Article 26(4) provides for an appropriately expanded notion of standing to sue for relief from the harm caused by an infringement of protected rights, as well as for legal action to be taken by associations on behalf of their members. The proposed formulation once again includes the substance of the Law Commission and ANC proposals, but in a simplified, more direct and tighter form. The SALC's proposal (article 35), while very wide in ambit, is paradoxically narrow in remedy, while the ANC (article 16) suggests too limited a range of remedies. The present proposal provides for 'appropriate relief' while specifically mentioning that a

'declaration of rights' may be part of such relief.

Article 26(5) is a provision taken directly from the Canadian Charter of Rights. It is included to make it clear that the Bill should not be construed as a complete catalogue of all the entitlements available to South Africans, taking away any existing rights and freedoms that are not included. In particular, it would defeat the operation of certain presumptions of statutory interpretation which suggest that the failure to include rights and freedoms protected by the common law or statute means that these rights and freedoms are abolished. It does not mean, however, that such rights are elevated to constitutional principles, permanently binding on all branches of government. Nor does it mean that they could override an entitlement granted by the Bill of Rights. As before, entitlements granted by statute or the common law could be altered or abolished by competent legislative bodies.

Article 27

(1) This Bill of Rights applies to any act or omission by or on behalf of:

(a) the legislative, executive or judicial branches of the government of South Africa including legislation enacted before the adoption of this Bill of Rights; and

(b) any person or body in the performance of any function, power or duty which relies for its effect on a rule of the common law, custom or legislation;

including a failure by government to take appropriate steps to secure compliance with any provision of the Bill of Rights.

(2) The courts shall have the discretion in appropriate cases to put the relevant body or official on terms as to how and within what period to remedy the infringement of the Bill of Rights.

This proposal attempts to achieve the following objectives:

i) the application of the standards, duties and protections contained in the Bill of Rights to the acts or omissions of all three branches of government;

ii) the application of the same provisions to all other actions and omissions whose efficacy depends on any form of legal rule, even if the acts or omissions are the responsibility of private individuals or associations;

iii) the imposition of a general duty on the government to ensure widespread compliance with the Bill of Rights both from its own officials and the public at large; and

(iv) the provision of a measure of flexibility so that courts can accommodate the constraints under which the legislature and executive operate (in article 27(2)).

As we indicate in the Introduction, the primary role of a constitution is to regulate the relationships between various organs of government and the relationship between State and subject. This has been interpreted to mean that private individuals and institutions can arrange their affairs without regard to the values enshrined in a Bill of Rights. Following this line of argument, once a bill of rights has been incorporated into the South African constitution, a restaurant would still be able to refuse to serve black people and private schools to exclude black children. In the United States, it was only after extensive litigation and through strained constitutional interpretation that the Supreme Court could refuse to enforce a restrictive covenant which attempted to prevent black people from acquiring property in a 'white' neighbourhood. The Canadian adherence to the approach that a bill of rights should not regulate the relationship between private individuals has been even more vigorous. Their Supreme Court has held that common-law rules which infringe rights protected in their Charter of Rights are not annulled by the Charter. So, for instance, the constitutional protection of freedom of expression did not override a common-law rule which the court recognised as limiting expression.

We believe that this approach would be totally unacceptable in South Africa. It seems obvious to us that were courts able to hide behind the 'private' nature of actions and to uphold racist practices, for instance, the legitimacy of a new constitutional order would be seriously threatened. It has been argued that the specific application of the Bill to the judicial branch imposes an obligation on the courts to apply its provisions in all its judgments, even those between private parties, and this is what we propose in article 27 to remedy the shortcomings of the American and Canadian systems.

In order to place this important issue beyond doubt, however, article 27(1)(b) is so formulated that a range of decisions and actions not directly involving the 'State-citizen' or 'vertical' relationship is brought within the ambit of the Bill. This does not mean that every 'horizontal' relationship between private individuals or bodies will be subject to the requirements of the Bill of Rights, the limiting factor being the reliance on the law for the effective discharge of rights and duties. The provision does, nonetheless, mark an important extension of the traditional sphere of operation of a bill of rights.

Article 27, then, addresses the issues raised by the ANC in articles 16(2) and 16(4) and the SALC in articles 33, 35(a), 39 and 40. It uses as its model the appropriate provision of the New Zealand Bill of Rights (1990).

Finally, the formulation tries to come to terms with the vexed questions raised when courts place an obligation on government to bring legislation and official practices into line with the requirements of the Bill. The device recommended in article 27(2) would allow a court to give the government some time to correct matters, and thus avoids requiring courts to 'legislate' on the legislature's behalf. For instance, the constitutional court may find that legislation relating to the guardianship of children infringes the equality provision in the Bill of Rights. Rather than immediately nullifying the legislation and thus leaving a gap in the law, our provision would allow the court to stipulate that the problem should be remedied within two years, perhaps, leaving scope for the legislature to design appropriate legislation. This requires the legislature to formulate a new policy rather than placing that legislative function on the courts. This device is also proposed by the ANC (article 16(4)).

A possible property clause

(1) Everyone has the right to the enjoyment of his or her property.

(2) No one shall be deprived of his or her rights and interests in property unless such action is taken in the public interest, in which case it shall be with due process of law and subject to the payment of appropriate compensation, which shall be determined by establishing an equitable balance between the public interest and the interest of those affected.

(3) No law enacted within seven years of the commencement of this Constitution with the purpose of affirmatively reforming land tenure and access to land shall be declared invalid for a period of ten years after its enactment on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by this Bill of Rights nor shall any such declaration of invalidity operate retrospectively.

(4) No one shall be removed from his or her home except in terms of an order of court.

(5) No court shall make an order authorising the removal of a person from his or her home unless it has taken into account the existence of appropriate alternative accommodation.

We think that there should be no property clause in a South African Bill of Rights. There are two main reasons for this position: first, enshrining property rights in the Constitution will finally render legitimate the unjust distribution of land which

is the result of the process of dispossession commenced by colonisation and continued under apartheid. This would be a tragic irony. Secondly, it is well recognised that property rights do not necessarily belong in a bill of rights. One of the reasons for this is that the right to private property is extremely controversial because conceptions of it differ so widely. One conception would state that the right to property means that everyone has a right to enjoy some private property even if this required existing property rights to be undermined to ensure a programme of redistribution. Another would suggest that existing property-owners should have all their rights to property protected.

We support the former conception, but there is no guarantee that the judiciary, in interpreting a right to property in the constitution, would adopt this approach. Accordingly, given its controversial content, we think that a right to property should not be included in a Bill of Rights. We are not alone in this view: countries which have recently adopted bills of rights, such as Canada and New Zealand, have deliberately not protected property rights because of their intensely controversial nature. In this regard, Canada and New Zealand follow the precedent set by the UN Covenants on Civil and Political Rights and on Economic, Cultural and Social Rights which are amongst the human rights documents that are completely silent on the right to property.

We do not think that the failure to include a right to property will mean that the State has untrammelled powers to invade property rights. Unfair State action can be challenged under other provisions of the constitution for example article 3 (equality) and article 23 (administrative justice).

However, the draft bills of both the SALC and the ANC include a property clause (articles 22 and 12 respectively) and we believe that it is very unlikely that the Bill of Rights that is finally accepted for this country will not follow suit. The article preceding this discussion proposes a formulation of property rights that we think would be appropriate for South Africa.

The constitutional protection of property rights raises a range of issues. First, the concept 'property' is itself open to different interpretations. Secondly, there are circumstances in which the invasion of property rights by the State is justified. These must be circumscribed and the situations in which compensation is payable determined. Thirdly, a standard must be established for the assessment of compensation where property is expropriated.

Property in the constitutional and human rights sense is generally not confined to corporeals and the protection of property rights in a constitution could extend protection to incorporeal property, including the incidents of ownership. The range includes real estate, intellectual property, goodwill, labour power, rights of action, participation in social insurance schemes and other welfare entitlements.

In determining the extent of a right to property, courts would be able to turn to various theories of property. What is important, in our opinion, is that we should not freeze our understanding of property by providing a rigid definition. Instead the Bill of Rights must be able to respond to changing social needs.

The second issue is under what circumstances a right to property may be limited or overridden by other State interests. One uncontroversial criterion is that any limitation must be in the public interest (see both the SALC and ANC drafts). A more complex question is when the invasion of a right to property becomes 'deprivation' and thus requires compensation. The major distinction used in constitutional jurisprudence in this context is one between the limitation or restriction of property rights on the one hand, and their removal, on the other. Thus, it is recognised that, under the power of eminent domain, the State may take property for public purposes against payment of compensation.

However, in exercising the police power (or powers to ensure peace, order and good government) in other contexts, the State may invade property rights but would not be required to pay compensation. Examples of a limitation of a property right in terms of the police power that fall short of deprivation include zoning regulations and restrictions on use made by legislation protecting the environment. The demolition of a building that presents a health hazard would also usually be construed as an exercise of the police power that does not amount to a taking for which compensation would be payable. (German constitutional lawyers describe these cases as involving a limitation of property rights rather than 'taking' or expropriation.) Clearly, the lines between these categories are not sharp and whether or not an act is found to fall under the power of eminent domain, and thus attract compensation or under the police power, and thus not give rise to a right to compensation, may be disputed.

The taxing power also involves the invasion of property rights but, again, does not give rise to a right to compensation. However, in a system in which law is subject to scrutiny under a bill of rights, legislation imposing new taxes would be subject to constitutional review and would have to be justifiable in terms of article 1.

Courts overseeing the new Bill of Rights will have to define precisely the ambit and scope of these categories and to draw the dividing line between the restriction of property rights and an exercise of the power of eminent domain. Because our property provision would be circumscribed by article 1, any limitation of a property right without compensation would have to be demonstrably justifiable in a free and open social democracy. It is likely that the examples of the exercise of the police power, such as those given above and with which we are familiar, would be acceptable in terms of this test. An invasion of property rights which

falls into the American category of an exercise of the power of eminent domain, on the other hand, will not as easily escape the requirement that appropriate compensation should be paid. In addition, such action would have to be shown to be in the public interest.

A third difficult issue to arise under a property clause in a bill of rights is the measure of compensation. The ANC requires 'just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected' (article 12 (5) and, with an unimportant change in phrasing, article 11 (9)). The SALC merely requires 'just' compensation.

We follow the ANC's approach but propose that the term 'just' should be replaced by 'appropriate'. This is the standard developed over the last three decades in international law and, as it is used there, it allows weight to be given both to the fiscal means and the interests and needs of the party whose property is taken. It thus reinforces the notion of an equitable balance introduced later in the provision. By moving away from the term 'just' we distance ourselves from a great deal of American case law which has rigidly interpreted 'just' to mean 'measured by the market value'. In addition the term 'appropriate' brings with it an established body of law guiding its application.

The concept of compensation which establishes 'an equitable balance between the public interest and the interest of those affected' is borrowed from article 14 of the German Basic Law. This phrase spells out the interests that should be weighed in assessing compensation and has proved satisfactory in Germany.

Fears about including a protection of property rights in a bill of rights have been eloquently expressed by Judge Didcott who draws attention to the danger of the overzealous protection of property rights:

> What a bill of rights cannot afford to do here, I put it to you, is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African Government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably. The pressure to tackle the problem is likely to prove irresistible. No government which ignores it has much chance of retaining popular support. Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights itself as a whole and the survival of constitutional government itself.
> (*'n Mensereghandves vir Suid Africa*)

As we indicate above, we do not think that a property clause is necessarily

incompatible with social reform. However, we do recognise that a new government in South Africa will be required to implement an effective and speedy programme of land reform if it is to retain legitimacy. In addition, the credibility of the Bill of Rights itself would be undermined if it were seen to impede such reform.

There are various ways in which one could seek to protect programmes of land reform. First, one could introduce a clause which would qualify a property clause stipulating that property rights obtained in breach of the rights protected by the bill of rights would not enjoy its protection. There are several difficulties with such an approach. The meaning of 'rights obtained in breach of rights protected by the bill of rights' is unclear and it would be very hard to determine with any certainty what property was not protected. It would be necessary to determine whether or not such a provision extended to successive owners. As most property which was expropriated in terms of apartheid legislation has been transferred to new owners, this is an important issue which should not be left unsettled. However, it is unlikely that the courts would be willing to extend the ambit of the proviso to cover successive owners, because of the economic uncertainty which would arise.

A second method of protecting land reform would be for the property clause to protect only personal property, not productive property. Personal property would be defined as a home, clothing, personal possessions, whereas productive property would refer to land over a certain size, factories and machinery. The problem with this approach is that it would be very difficult to draw the line between personal and productive property. A third approach would be to insulate land reform programmes from the provisions of the bill of rights for a limited period of time. Although this will have the disadvantage of excluding the operation of the bill of rights in a very controversial area, it is nevertheless the approach we recommend. We feel that the need for land reform is well established, particularly in the light of the injustices of the past, and that such a clause would be relatively clear and straightforward in application. It is interesting to note that, although a similar solution was adopted in India, in many cases compensation was paid even though the constitution did not compel the payment of such compensation.

For these reasons we propose that a property provision should be qualified by a clause (sub-article (3) in our proposal) which exempts from judicial scrutiny land reform legislation enacted within seven years of the commencement of the Bill of Rights. It means that, for a limited period of time, the process of land reform would be controlled by the legislature and executive. It is important to recognise that the clause we propose does not automatically remove from the court's

jurisdiction any legislation which the executive or legislature may care to label 'land reform'. The question whether legislation is, in fact, land reform legislation is one that would be subject to constitutional review. We have chosen a period of seven years to ensure that at least two parliaments will have an opportunity to introduce land reform legislation. In addition, we have imposed a limit of ten years on the period in which such legislation may be implemented.

A discussion of sub-articles (4) and (5) appears with article 21 above.

Directives of State policy

The State shall be guided by the following Directives in the formulation and implementation of its policy, and the courts shall take them into account in interpreting legislation and reviewing executive action.

1. The State shall conduct its affairs in a public and accountable fashion and shall create mechanisms for the achievement of open government.
2. The State shall endeavour to achieve the highest attainable standards of enjoyment of all basic social, cultural and educational aspects of life by all men, women and children.
3. The State shall seek to ensure just conditions of work for all men and women. In particular it shall seek to secure
   - reasonable hours of work;
   - annual paid holidays;
   - the improvement of industrial safety and health;
   - reasonable rates of remuneration;
   - creation of job opportunities for all; and
   - the provision of vocational training for all.
4. The State shall seek to provide everyone with an adequate health service, in particular
   - accessible and affordable health care which promotes the mental and physical well-being of all;
   - advisory and educational facilities for the promotion of health;
   - services which will contribute to the welfare and development of individuals and groups in the community; and

- measures to prevent as far as possible epidemic, endemic and other diseases.

5. The State shall seek to ensure that all have access to education and, in particular, that
   - all children are provided with primary and secondary education;
   - a tertiary education system which provides the necessary vocational and professional skills for the community is developed; and
   - literacy programmes are available for those who require them.
6. The State shall seek to ensure that all have an adequate standard of living and, in particular, that
   - housing is provided;
   - nutrition is provided for those who cannot provide for themselves; and
   - social security is provided for those who need it.
7. The State shall not act in a discriminatory fashion and shall discourage discrimination in all spheres. In particular it shall
   - undertake positive action to overcome the disabilities and disadvantages suffered on account of past and continuing discrimination; and
   - take steps to place social, commercial and like institutions under a duty to discourage discrimination and stereotyping based on sex, race, colour, religion, language, sexual orientation, nationality and other unfair grounds.
8. The State shall seek to provide appropriate protection by law against violence, harassment and abuse, and the impairment of the dignity of any person.
9. The State shall seek the progressive improvement of employment opportunities for disabled men and women, for the removal of obstacles to the enjoyment of public and private amenities and for their integration into all areas of life.
10. The State shall act positively to secure the well-being and development of every child.
11. The State shall encourage sporting, recreational and cultural activities on a non-discriminatory basis, drawing on the talents and creative capacities of all South Africans.
12. The State shall act positively to further the development of the languages of South Africa, especially in education, literature and the media, to facilitate the understanding of different languages, and to prevent the use of any language for the purpose of domination or division.

13. The State shall ensure that natural resources are utilized by the State, corporations and individuals in a manner which
    - benefits both present and future generations;
    - promotes the ideal of sustainable development;
    - maintains ecosystems and related ecological processes, in particular those important for food production, health and other aspects of human survival and sustainable development;
    - maintains biological diversity by ensuring the survival of all species of fauna and flora, particularly those which are endemic or endangered;
    - takes into account the environmental impact of such use preferably by a scientifically based method of environmental evaluation; and
    - enhances the development of areas of cultural, historic and natural interest.
14. The State shall, in so far as waste management and pollution control are concerned, actively promote policies for
    - the treatment of waste at source;
    - the reduction, re-use and recycling of waste; and
    - the promotion of clean technologies.

This list of Directives is incomplete. We consider that broad consultative discussions should be held to determine their content. Many of our provisions are modelled on the European Social Charter adopted in 1961 by the Council of Europe as a complement to the European Convention on Human Rights. Unlike the Convention, the provisions of the Social Charter are not binding on the member states. A detailed discussion of the purposes of Directives of State Policy is contained in the Introduction.

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