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MEMORANDUM SUBMITTED ON BEHALF OF THE JUDICIARY

OF SOUTH AFRICA

ON THE DRAFT INTERIM BILL OF RIGHTS

1. We have been requested to comment on the draft Interim Bill of Rights now under consideration. We do so, but with the following reservations:

1.1 Our remarks are based on the Interim Bill published in the Seventh Progress Report of the Technical Committee on Fundamental Rights, dated 29 July 1993.

1.2 Our comments and remarks are of an apolitical nature. As far as possible we do not comment on the principles adopted in the interim Bill, but draw attention to practical problems, conundrums of interpretation and the legal consequences of the draft under discussion.

2. Clause 1(1)(a)

2.1 The words "executive ... branch of government" are ambiguous, since they can be taken to refer to ministerial actions only, or also to all actions by civil servants, government officials, etc.

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In our view, it should be made clear that the latter actions - those of civil servants - are included so as to bring clause 1(1)(a) into line with clause 18.

2.2 We note that the Bill is intended to bind the judicial branch of government. There can be no objection to this principle in so far as it requires the judiciary to apply the provisions of the Bill in disputes between the government and the individual. However, we foresee difficulties arising from the consequences of the Bill being applied to judicial activities themselves, e g the judgments and sentences of the courts. Is it the intention that a new ground of appeal or review be created, viz non-compliance by the court with the provisions of the Bill of Rights? If so, the floodgates would be opened to a spate of appeals or reviews. For example, those who are convicted and sentenced would, presumably, always be able to rely on this clause read with clause 2 (Equality) in appealing against a sentence. Previous judgments of the courts relating to comparable cases would be minutely examined in an endeavour to show that the present accused was treated "unequally". In the light of

clause 2(2), would a judge still be able to take into account the criminal record of the accused when considering sentence? What would remain of a judge's discretion in sentencing?

We propose that reference to the judicial branch should be deleted in clause 1(1)(a), since clause 1(5) clearly imposes an obligation on the Bench to apply the Bill of Rights in disputes between the government and individuals.

2.3 The reference to "functionaries" is ambiguous and confusing. Is it intended to refer to functionaries of statutory bodies only? If so, the word is superfluous; if not, who or what are the "functionaries"?

3. Clause 1(1)(b)

This clause will create great uncertainty and confusion.

The reference to the application of the Bill to "other bodies and persons" implies horizontal operation of the Bill. This entails application of the Bill to, inter alia, the actions of companies and corporations (whether public or private), partnerships, societies and clubs, and all individuals. In consequence all private relationships

will be governed by the Bill of Rights. The phrase quoted above can, and notionally will, be interpreted to mean that the provisions of the Bill override the common law. For example, clause 9 entrenches freedom of speech. If clause 1(1)(b) remains, it may be construed as meaning that A can defame B freely; B's common law protections and remedies are nullified by A's constitutional right. Is this the intention? If so, it must be realised that the effect of the Bill may be to supersede large parts of our established common law, and that it may well lead to great legal uncertainty and social insecurity.

We suggest that what the drafters of the interim Bill probably had in mind was to eliminate privatised discrimination, i e unfair discrimination by legal entities and individuals in private affairs. If so, it is necessary to demarcate, clearly and unambiguously, the precise field of impermissible discrimination (e g employment) from those areas of highly personal affairs where one should be free to choose one's associates (e g religion, cultural organisations, private home life, etc).

It is, in our view, highly undesirable to leave an unsolved problem, such as horizontal application of the Bill, to be solved by the courts, or any other designated authority, under cover of a wide and imprecise phrase such

as "just and equitable". Where given a discretion by law, courts do not hesitate to apply the general and imprecise notions of justice and equity. But that is a far cry from requiring a court or any other tribunal to decide a policy issue, such as the very question of the operation of the Bill on a horizontal level.

4. Clause 1(1)(c)

4.1 Our views as to the correct designated authority to enforce the Bill of Rights are contained in a separate memorandum dealing with the Administration of Justice and the Constitutional Court.

5. Clause 1(2)

5.1 The usual remedy for a breach of the principles of a Bill of Rights is an order setting aside the legislation or action in question. Nowhere in the proposed chapter is this remedy clearly defined and entrenched.

5.2 There may be a theoretical argument for giving a court the power to put a body or person on terms as to how and within what period an infringement should be remedied. It is difficult, however, to

envisage how this remedy will operate in practice. In the ordinary course, application is made for the setting aside of legislation or a particular section of a statute. The applicant must either succeed or fail in the application, depending on whether he or she has made out a cause of action. If successful, the applicant is entitled to an order setting aside the provision in question. Once the court finds that the provision is unconstitutional, how can it still allow a legislature to operate under the statute or the section of the statute in question? Furthermore, the same argument holds true for executive or administrative actions which are scrutinized by a court of law: they are either constitutional or unconstitutional, and the application for the setting aside of such actions either fails or succeeds. Once again there is no room for putting the relevant authorities on terms.

5.3 Once again, even if the remedy provided for in the subclause now under discussion was a feasible one, the clause itself is vague. It is left to the "designated authority" to decide when the said remedy is appropriate and what the particular terms for remedying the infringement should

be. Further consideration of the remedy itself, and also as to whether it is necessary, could, perhaps, result in clarity as to what powers the "designated authority" should have.

6. Clause 1(3)

6.1 The provisions of this clause appear to be ambiguous and do not address the problem of the retrospective application of a Bill of Rights properly.

6.2 First, a distinction should be made between the application of the Bill of Rights to legislation, on the one hand, and to executive and administrative actions on the other.

6.3 As far as legislation is concerned, it should be provided either that the Bill of Rights will apply to all existing and future legislation or that it will only apply to future legislation.

6.4 As far as executive and administrative actions are concerned, it is impractical if not impossible to make the Bill of Rights applicable to actions that have been completed fully. The reason for this is that it is difficult to see

how one can nullify an executive or administrative act which was lawful at the time of its completion, in the light of subsequent legislation. Then there is the question of how far back one can go in nullifying such actions? And what compensation must be paid to those who have acquired vested interests or legitimate expectations under such actions? The only solution seems to be to state clearly that the provisions of the Bill will not apply to executive and administrative actions completed at the date on which the new constitution comes into operation.

7. Clause 1(4)

7.1 It would be preferable to state that a juristic person is entitled to such rights contained in the chapter as can vest in such a person.

8. Clause 1(5)(a)

8.1 The words "... which may include a declaration of rights" are inadequate. If it was intended to state that the designated authority shall have particular powers, inter alia setting aside legislation or administrative or executive actions, this should be stated clearly, as has

been indicated above. Further remedies should be provided for in explicit terms; for example, provision can be made for an interdict, a mandamus, an action for damages or compensation, etc. Failing such provision the "designated authority", especially if it is not an established court of law, may be at a loss to know the proper parameters of "appropriate relief".

9. Clause 1(5)(b)

The intention to create a class or group action might well be laudable, but the formulation of the clause under discussion is inadequate. The subclause opens the door to busybodies who, having no interest in a matter at all, nevertheless seek to instigate litigation. At least the requirements should be that the applicant or plaintiff should be a member of the particular group or class of persons and that he or she should have the consent of the group or class to act on its behalf, as well as its agreement to be bound by the decision of the designated authority.

10. Clause 2(2)

10.1 The reference to "unfair" discrimination may be

described as tautologous or as a contradiction in terms. By definition discrimination in the sense of action based on prejudice, as here intended, is unfair; differentiation, however, can be either fair or unfair. Furthermore the word "unfair" is unnecessary in the light of the provisions of clause 28 which empowers a legislative body to adopt differentiating laws.

10.2 The effect of the clause as presently worded implies a drastic change to systems of customary law which differentiates between men and women as regards marriage, matrimonial property, the law of succession, etc. It also drastically affects the position of traditional chiefs and their powers.

11. Clause 2(3)

11.1 It is clear that the intention was to deal with the thorny subject of affirmative action in this clause. In our view, however, the clause is so vaguely worded that it will give rise to protracted and costly litigation.

11.2 Take, for example, the word "measures". Usually, in the context of a Bill of Rights, the

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prerogative of permitting affirmative action is vested in the highest legislature. If the power to take actions of an affirmative nature is given to subordinate legislatures, to the executive and to civil servants, the chaos that will ensue is easy to foresee.

11.3 Likewise, the words "the adequate protection and advancement of persons disadvantaged by discrimination" are so wide as to include virtually everyone in society. What are adequate protection and advancement? Who are the persons disadvantaged? What sort of discrimination will be relevant? Do the words "... all rights and freedoms" refer to the rights and freedoms set out in this chapter, or to all other statutory and common law rights and freedoms also?

12. Clause 2(4)

12.1 The clause presumably intends to state that prima facie proof of discrimination raises a rebuttable presumption of unfairness. As was pointed out above "unfair discrimination" is a tautology, and this is illustrated by the clause under discussion.

12.2 It is furthermore, in our view, unjustified to introduce a rule stating that mere proof of differentiation raises a rebuttable presumption of discrimination. We do not think that a Bill of Rights should tamper with the law of evidence and the well established rules of the incidence of the burden of proof.

12.3 The clause under discussion appears to be in conflict with clause 30(4)

13. Clause 3

13.1 If the right to protection of life is stated in unqualified terms, as appears to be the intention of the clause in question, it should be appreciated that the imposition of a death penalty is outlawed. This is so because clause 28 provides that the legislative limitation of the right may not negate the essential content of that right. If it was indeed the intention to outlaw the death sentence, many may not quarrel with it. But the same argument holds true in the case of abortion, for it is part of our law that the foetus is entitled to the protection of its life. An unqualified protection of life will rule out abortion even in those cases which are

now, by law, lawful. Is this the intention? If not, the question of abortion must be dealt with separately and explicitly.

14. Clause 5(2)

14.1 We suggest that the wording of this subsection should follow the formulation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) which has now been adopted by South Africa, because it will eliminate many problems of interpretation.

15. Clause 6

Was it intended to prohibit forced labour also in the case of lawful imprisonment for a criminal offence? We ask this question because it may well be that clause 28 does not justify legislation permitting such labour.

16. Clause 7

16.1 Once again, the question arises whether this clause is not too wide and unspecified. Was it, for example, really meant to place an absolute prohibition on the seizure of private possessions, also by virtue of a lawful warrant of

execution after judgment in a civil matter? If it is argued that the limitation clause, clause 28, will permit legislation authorising such seizure, we must, again, express serious doubt whether that clause can properly be used to qualify clause 7. In particular, clause 28(1)(b) permits only laws which do not negate the essential content of the right in question. The seizure of private possessions will always negate the right in question, namely possession of a movable. Does this not outlaw the seizure of private possessions absolutely?

17. Clause 10

See our comments under para 30.3.

18. Clause 12

See our comments under para 30.3.

19. Clause 15

19.1 Was it intended to give to every person the right to form a political party, thus also to non-citizens?

20. Clause 16

It is conceded that the State is under a duty to provide a system of courts of law to settle disputes. The section, however, implies a similar duty in respect of other "independent and impartial forums" (where appropriate). What are these forums? And when are they appropriate? The matter should be clarified.

21. Clause 17

The wording is too vague and will cause endless problems of interpretation. For example, can an individual professing to exercise his freedom of speech, and in order to enable him to do so, insist on access to information in possession of another citizen, a department of state, the police, or a hospital? The argument will be that such a person needs the information for the exercise of his or her right of freedom of speech. But surely the right of access to all information must be qualified and circumscribed, and we entertain doubts whether this is adequately expressed in clause 28.

22. Clause 18

(i) Subclause (1)

Subclause (1) of clause 18 is drafted in wide terms. The proposed right relates to "lawful and procedurally fair administrative decisions". The term "lawful" is very wide and is closely related to the concept of "legality", upon which the validity of administrative decisions are based. In other words, the term "lawful" can refer to and include all the requirements for a valid administrative decision. The phrase "procedurally fair" is in essence a formulation of what is termed "the duty to act fairly" which is the modern formulation of the principles of natural justice developed by the courts, that is the "audi alteram partem" and "nemo iudex in sua causa" maxims. Nevertheless, it should be noted that the right to procedurally fair administrative decisions is not qualified. This implies that all administrative decisions must comply with the requirements of procedural fairness. However, at present the principles of natural justice are applicable only where an individual's rights, interests or legitimate expectations are affected. In other words, the proposed formulation appears to extend the application of the principles of natural justice to all administrative decisions irrespective of whether such decisions affect an individual's rights, interests or legitimate expectations. It follows that all decision-makers, who make administrative decisions, will be obliged to give notice of all impending administrative decisions and to give the individual concerned an opportunity to be heard either

orally or in writing. This may well not be warranted.

The following comment is appended to clause 18(1) of the Draft Interim Bill of Rights:

> One of the parties suggested the inclusion of the words (sic) "reasonable" after the word "lawful". This will have far-reaching consequences for the South African Administrative Law and it is for the Council to decide on this issue. The Committee does not support the introduction of this notion at this stage. (Our underlining.)

Unfortunately, the Committee does not give reasons for its proposition that the introduction of the standard of reasonableness will have far-reaching consequences for our administrative law. It also does not explain why it does not support the introduction of the said standard at this stage.

It might be argued that the standard of reasonableness could give the courts an almost unlimited power to interfere on review with administrative decisions. However, an appropriate test may be that an administrative decision can be set aside if no reasonable organ or tribunal could have arrived at it.

(ii) Moreover, clause 18(1) of the Draft Interim Bill of Rights does not explicitly provide for the entrenchment of the Supreme Court's inherent jurisdiction to review administrative decisions. This is absolutely essential if one wishes to outlaw the so-called ouster clauses.

A provision relating to the entrenchment of the Supreme Court's inherent jurisdiction and the provision of reasonableness and lawfulness as standards for valid administrative decisions should be included in a subclause relating to an individual's right of access to the courts.

(iii) It is further recommended that the standard of procedural fairness or the principles of natural justice should be accommodated in a separate clause in the Interim Bill of Rights.

(iv) Subclause 18(2) of the draft Interim Bill of Rights grants an individual the right to be furnished with reasons in writing for an administrative decision that affects his or her rights or interest. Such a right is indeed vitally important for the development of rational and informed decision-making. Nevertheless, the restriction of the application of the right to every person whose rights or interest are affected by an administrative decision is too limited. What about the

case where a person has a legitimate expectation? A more acceptable approach may be to link the right to be furnished with reasons with the right to the application of the principles of natural justice.

23. Clause 19

23.1 This clause deals with the rights of detained, arrested and accused persons. From a practical point of view, we consider these rights to be of fundamental importance. In our view, the clause under discussion does not deal adequately with the procedural rights.

23.2 The basic objection is that it does not even reflect the rights to personal liberty, the rights of an arrested person, of an accused, and of those convicted of a crime which have been developed in our positive law. The danger of an incomplete list of rights in a Bill of Rights is that it may be interpreted in accordance with the principle of inclusio unius exclusio alterius, thus taking away existing rights.

23.3 In particular we note with concern that clause 19 does not make provision for the rule excluding evidence obtained in violation of the rights of

others, a rule recognised abroad and supported by prominent South African legal writers.

23.4 We also note with concern the vague and wide wording of subclause (3)(e) which makes provision for legal representation at State expense 'where the interest of justice so demands'. Surely it can be argued that in principle the interests of justice demand legal presentation in <u>all</u> criminal cases. Equally certain is that the State cannot afford the provision of such a service. And if provision for the necessary funds has to be made, the budgets of which departments - e g health or education - will have to be slashed to cope with increased funding for legal aid? On the other hand, if representation need be provided only in certain cases, the criterion will be very difficult to apply and will no doubt lead to a proliferation of litigation.

It is also observed that clause 19.1(c) enjoins the State to provide legal assistance at the stage of detention. How is the station commander of a small rural town to determine whether the interests of justice require such assistance?

24. <u>Clause 20</u>

24.1 In our view this clause has the potential of creating great uncertainty. The reference to "... his or her home" includes not only owners, but also all tenants and other occupiers. On the basis that the Bill of Rights will have vertical application only, this could well mean that the State would not be able to evict a defaulting tenant, a buyer of state land or a state house, or any other unlawful occupier, if, inter alia, it cannot prove that appropriate alternative accommodation is available. It is likely that this clause will be counter-productive. It will inhibit the State in selling or letting properties.

24.2 If the Bill of Rights is to have horizontal effect, the consequences of the clause under discussion will be even more drastic. It will inhibit the entire property market and may lead to an immediate slump in property values.

24.3 We suggest that a Bill of Rights is not the proper instrument in which to reform a very basic part of our common law, viz the right of an owner (including the State) to evict those who do not have an indefeasible right to occupation. If

there is an urgent need for special provision in the case of squatters - and we accept that there may be such a need - that should be dealt with explicitly and unambiguously.

25. Clause 21

25.1 Subsection (2) appears to be vague and tautologous. It is vague, not only in its terms, but also as regards its impact. For example, to what extent should the protection of "social justice" be legitimately used to limit the rights of a person to engage in economic activity or to pursue a livelihood? What is meant by "social justice"? How far should "equal opportunity for all" be permitted to limit the rights of another person to pursue a lawful livelihood?

25.2 In any event, it is not clear why the rights described in subclause (1) should be limited expressly by subclause (2) in view of the fact that a general limitation clause is imported by clause 28. Why should there be a specific limitation clause in this case, and not in all other cases? Does this mean that the rights set out in clause 21(1) (freedom of economic activity and to pursue a livelihood) are to be interpreted

more restrictively than all other rights?

26. Clause 23

26.1 One of the main incidents of property rights is that the owner or occupier has the right to defend his or her ownership or occupation and even to call on the assistance of the State in such defence. We suggest that subclause (1) should make provision for the protection of ownership and occupation and, in the case of movables, of possessions.

26.2 As far as subclause (2) is concerned, we have from a purely interpretational point of view reservations about the words "taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected".

(a) In the first place, the "designated authority" will be asked to take into account and to compare factors which are incomparable. In the end, compensation must be calculated in monetary terms.

Market value, the use to which the property is being put and the value of the owner's investment in it all relate to a monetary component. But how does one calculate, in terms of monetary compensation, the history of the acquisition of the property? How does one calculate, in terms of money, the interests of those affected?

(b) In any event, what is meant by the history of its acquisition? Is it intended that one should have regard to all previous transactions relating to the acquisition of the property or the history of the legal regimes under which the property was acquired? If either of the two was intended, what is the relevance of that history - and how can it affect the present market value? Likewise, how will "the interests of those affected" be interpreted? Who are they, and what are their interests?

(c) As far as the criterion of "the use of the property" is concerned, it may lead to unfair differentiation - e g to give less

compensation to the owner who uses his farm for game farming or merely as a conservation area, or the owner of a holiday cottage, vis-à-vis a full-time occupier.

In short, we are of the view this subclause will cause serious problems of interpretation and application.

26.3 As far as subclause (3) is concerned, we are of the view that the question of the restoration of rights and the compensation of persons dispossessed of rights in land as a consequence of policies of the past should be dealt with as a specific topic. In the first place, we doubt whether that topic should be dealt with under a clause dealing with property rights, expropriation and compensation in the case of expropriation. Dealing with both subjects in one clause creates the impression that restoration is a factor to be taken into account when dealing with compensation in the case of expropriation, and that no compensation need be paid when the aim of expropriation is restoration. Moreover, the question of restoring rights and compensating those who have been dispossessed in the past not

only merits the introduction of special mechanisms, for example a Land Claims Court, but also necessitates the development of rules of substantive law to deal with the matter. What, for example, is the criterion for establishing the identity of lawful claimants? How far back does one go in history? What is the measure of compensation - market value then or now? Who is entitled to the compensation - those dispossessed, say, forty years ago, or their descendants, or a tribe or group as such? We do not consider it correct to leave it to the courts to develop rules of substantive law to deal with these matters when the constitutionality of legislation has to be tested.

27. Clause 26

27.1 We note that the clause does not provide for an official language. We presume that this matter will be dealt with in the other chapters of the Constitution.

27.2 Does the right to use the language of one's choice also imply an obligation on the State's part to receive communications in that language? Does this clause empower, for example, a Greek-

speaking citizen to use his language in all communications with civil servants?

28. Clause 28 (Limitation)

28.1 We have serious doubts as to the practicability of subclause (1). The formula "justifiable in a free, open and democratic society" has been used in international and national documents dealing with human rights, but it has not proved to be a recipe for unqualified success. The basic problem is that it is too wide and vague. Furthermore, views differ radically on what a democratic society is. The USSR always claimed that it was a democratic society.

28.2 We also note that the clause under discussion does not provide for the non-circumscription of certain rights.

28.3 It may well be sufficient to provide that the limitation measure should be reasonably necessary to protect named interests, such as State security, public health, the administration of justice, etc.

29. Clause 29

29.1 Does "natural disaster" include an epidemic? We suggest that it be included explicitly.

30. Clause 30

30.1 It is, in our view, inadvisable to lay down any rules for interpretation in the Bill of Rights. Interpretation is a question of common sense based on judicial experience. Well-known rules for the interpretation of Constitutions and Bill of Rights have been developed world wide. They have been applied in our courts and by South African judges sitting in other divisions, for example, in the Supreme Court of Namibia, and we have full confidence in the courts to apply just and equitable rules of interpretation. One of the great disadvantages of having a tribunal, other than a court of law, to interpret and apply the Bill of Rights is precisely that such a tribunal may well, under the guise of interpretation, import political doctrines.

30.5 Furthermore, the formula, "values which underlie a free, open and democratic society based on the principle of equality" appears at the same time vague and redundant. It is, moreover, not the

only criterion to be applied in interpreting a Bill of Rights. And once again there is an inherent danger in mentioning one criterion to the exclusion of others.

30.3 (a) Subparagraphs 2 and 3 appear to be contradictory. Subparagraph 2 implies that the Bill of Rights has precedence over common law, custom or legislation. Subclause 3 implies the opposite. A more precise expression of intention is required.

(b) As far as subclause (2) is concerned, we comment as follows:

This subclause is unacceptable. Very often common law rules limit one fundamental right for the very purpose of protecting another such right. This is, for example, the case as regards the law of defamation. Where the common law provides that defamation is as a rule actionable, it imposes limitations on freedom of speech. But, apart from the horizontal relationship between individuals, rules of the common law may also

impose limitations in the interest of, for example, state administration and the administration of justice. By way of example, reference may be made to the rules which make contempt of court an offence. As clause 30(2) reads at present, those rules will be invalid because they impose a limitation on freedom of speech. The subclause therefore fails to take account of the limitations which the common law places on a fundamental right for the very purpose of protecting other rights or community interests. Rules of the common law are in 'conflict' with any number of the fundamental rights enshrined in the draft. We mention only the following:

(i) A right to assemble or freedom of movement may conflict with the right of an owner to prevent others from obtaining unauthorized access to his property.

(ii) The right of access to information may conflict with the right to privacy or of ownership of a document.

We accordingly strongly recommend that clause 30(2) be deleted."

(c) Subclause (4) is extremely vague and ambiguous and creates insoluble problems of interpretation, especially as far as the proviso ("shall be strictly construed for constitution validity") is concerned.

(d) As far as subclause (5) is concerned the phrase "provided such a law is capable of a more restricted interpretation" should read "provided such a law is reasonably capable" etc.

M M CORBETT

CHIEF JUSTICE

3 SEPTEMBER 1993

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