# SOME COMMENTS ON THE 5TH REPORT OF THE TECHNICAL COMMITTEE ON A BILL OF RIGHTS

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## GENERAL COMMENTS

A Bill of Rights in a transitional period should aim at promoting a peaceful and legitimate transition. In this regard, we would see the political and civil rights as central. It would be our view that the following sections should be included 1, 2, 3, 4, 5, 6, 10, 11, 12, 15, 16, 17, 21, 30 and 31. The rest are not essential. The principle should be that of exclusion rather than inclusion.

The Bill of Rights should seek to inform government about its task in the interim. This may assist in the establishment of common goals for a government of national unity. We would suggest that this be clearly articulated in the Bill of Rights.

## Section 1 Enforcement

This section seems to deal with three, broad issues and we think that it would be clearer if this was made immediately apparent by reordering the section.

The issues appear to be:
(a) the applicability or ambit of the Bill,
(b) standing/enforcement including remedies, and
(c) amendment.

### (I) *Applicability (present subsections (1), (2), (4), (7) and (8)).*

Subsec (1) emphasizes that the Bill will bind all branches of government as well as individuals. We wish to raise three issues in this regard. The first relates to the theory of judicial review reflected in the wording, the second to the proposal to cover individuals as well as government and the third to the role of the courts in relation to the constitution in general.

(a) Theory of judicial review

It is accepted in South Africa that the constitution, including the Bill of Rights, will be the supreme law of the land and that, in the final instance, the court system will enforce it. Subsec (1) reflects this. However, in doing so the wording chosen suggests that the legislature and executive will merely be bound by the constitution while the court system will guarantee it. This gives the impression that, while the courts are committed to promoting the Bill of Rights, the executive and legislature are constantly limited by it.

We would argue that it should be clear that the executive and legislature - and all individuals - are committed to promoting the values in the constitution. In other words, a Bill of Rights should

not be offered merely as a brake on government, policed by the courts, but as a set of values to which all branches of government are committed.

Accordingly we suggest that 1(1) should state at the outset that the organs of state should 'respect and uphold' the rights enshrined in the Bill of Rights (see DP Article 1), or words to this effect. We also think that the rider to 1(1)(c) should perhaps qualify the applicability of the Constitution in general and not relate only to the role of the courts.

While this proposal would not change the formal legal position from the point of view of lawyers, the change of emphasis that it involves should signal to South Africans that the Bill of Rights is not intended merely as a constraint on government (policed by an institution of perceived to be undemocratic) but as a manifesto, identifying the type of society to which we are jointly committed.

(b) Ambit

It is particularly appropriate to insist that a South African Bill of Rights covers individuals as well as government as the history of apartheid has made the 'privatization' of apartheid a real threat. Moreover, it has been convincingly argued many times that the perceived dichotomy between the public and private spheres is misleading and that its maintenance leads to considerable injustice. However, by dealing with the ambit of the Bill in two provisions, one covering government, the other covering individuals, this divide is maintained. Because we are so accustomed to thinking in these terms it is probable that its influence cannot be entirely removed. Nevertheless, if the two provisions were combined (as in the ANC and DP drafts) the idea that there are two different issues requiring different approaches might be countered to some degree.

We would also argue that the words 'where appropriate' (and the DP's phrase 'where applicable') are unsatisfactory. Concern about the horizontal application of a Bill of Rights arises only where the enforcement between individuals of one right appears to infringe another fundamental right. For instance, a right to equality or a right to be free from discrimination might, at an extreme, require everyone to ensure that their list of guests to a dinner party is patently non-racist and non-sexist. It might require that in drawing up bequests for a will, it is illegitimate to leave money to institutions that have a history of discrimination. However, insisting on equality and non-discrimination in such situations seems inappropriate <u>because</u> it infringes another basic right, the right to privacy - in entertaining in ones home, in distributing one's estate on death. They are not cases where, as is popularly argued, the application of a Bill of Rights is inappropriate, but cases where rights must be weighed against one another.

Many conflicts of rights will emerge under a Bill of Rights, some relating to the enforcement of rights between individuals and private institutions, some involving government. The legislature,

executive and courts will be required to consider ways of resolving these problems. However, there is no evidence that there are situations in which it is inappropriate to apply the Bill of Rights between individuals. On scrutiny, the examples usually given always involve conflicts of rights.

Finally two technical points: First, it is not clear what is meant by 'social' institutions. To avoid unnecessary litigation this word could, we think, simply be dropped. Secondly, there seems to be no need to add 'statutory bodies and functionaries'. Statutory bodies are either government institutions or social institutions (or an new category which does not auger well for possible interpretative disputes concerning the meaning of social institutions and statutory bodies on the present wording). Functionaries is vague and, we think, redundant.

(c) Courts

It is clear that courts will enforce the Constitution and that its role in enforcing a Bill of Rights will just be part of this endeavour. In particular, if some form of federalism is introduced, a major judicial role will be to clarify the distribution of powers between the central government and federal units. There will, presumably be a provision in the body of the constitution setting out the court's role in this regard and we think that the Constitutional Principles committee should be requested to insert in that chapter a provision requiring the courts to be guided by the principles underlying a free, open and democratic state in all constitutional adjudication.

Proposed draft which seems to encompass your subsections (1)(a), (b) and (c):

(1) The provisions of this Chapter shall be respected and upheld (promoted?) by all organs of the state and government and by all institutions and people and shall be enforceable by the [designated institution].
[possible add clause (2) In interpreting the provisions of this Bill the [designated body] shall promote the values underlying a free, open and democratic society].

Subsections (2), (7) and (8) seem to belong with this. It is worth considering whether the proviso referring to section 30 is necessary in (2) and whether (8) isn't, likewise, redundant.

**(II) *Remedies***

There should be a separate remedies clause. The existing provisions in section 1 which deal with remedies are subsections 3 and 5. They provide first, the right of individuals and associations to seek relief in respect of a threatened or actual infringement of rights; and secondly, the right to put a person on terms to remedy the infringement.

Section 1(5) should not read that the court shall 'have the discretion, where appropriate,' as this seems tautologous. We would suggest the deletion of 'where appropriate'.

There are two other possibilities which could be included here:

* the class action and the representative action. (see article 16.5 of the DP Bill of Rights) Although these have been developed in the USA without constitutional provisions, they have not been adequately developed in other Anglo-American jurisdictions. Their inclusion in a Bill of Rights makes sense.

* a general remedy provision, see DP Bill of Rights clause 16.6.

**(III) *Amendment* (provision 1(6))**

This provision seems to raise different issues and we think that it should be included in a separate section.

**Section 2: Equality**

(1) We are concerned about the open-ended nature of the discrimination clause. Although formally the context implies that discrimination (unlike differentiation presumably) is a bad thing, we think that an express qualification could be useful.

The Charter for Social Justice, for instance, suggest that 'unfair' discrimination should be impermissible. The DP Bill instead outlaws 'unjustified' discrimination. We would argue that the notion of unfairness adds something to the right.

Consider the following topical example: An insurance policy which excludes Aids patients from benefits may be differentiating justifiably, or, in other words, discriminate. The medical costs involved in Aids drive up the costs to the insurer etc. The limit can be defended as rational. It may, however, fail to pass a fairness test. Is it fair to exclude Aids patients but not those undergoing equally expensive heart-bypass surgery, for instance etc. While one may eventually conclude that the differentiation is not only justifiable but also fair, the inquiry into fairness adds an important moral dimension to the decision-making process.

An education policy such as that followed in South Korea in terms of which only students doing Science and Engineering related degrees are funded provides another example. The economic success of S Korea is evidence of the plans rationality and justifiability. We might still wish to argue that it is unfair in that it gives only students gifted in science an opportunity to have tertiary education, for instance. Whether or not one finds this example conclusive, the different nature of the inquiry when one considers fairness seems obvious and it seems that in importing fairness

into our judgments, our constitution would be enriched.

A standard of fairness has been challenged for being vague. We would dispute this. The standard might change with time but it is no more vague than the notion of 'justifiability'. It is an inevitable feature of any Bill of Rights that the rights it enshrines are subject to interpretation against particular, and changing, political and social backgrounds.

(2) Onus of proof

The single largest difficulty in implementing an equality provision in other jurisdiction has been the onus of proof which normally rests on the plaintiff. The DP draft has proposed that, in certain circumstances, the onus should be shifted. Ideally, we think, this shift should occur in all cases but we are uncertain about the kind of wording that would achieve this without becoming very cumbersome.

(3) Affirmative action

We find (3) awkwardly worded (a typical feature of international conventions, reflecting the negotiations and compromises that inevitably preceded their adoption).

(i) The statement 'This section shall include the authorization' does not unamibiguously convey the view that affirmative action is a means of achieving equality rather than an exception to the equality principle. It could be interpreted as adding something not already there. We think that the CSJ wording 'nothing in this article shall prevent measures' is less clumsy and comes closer to asserting that affirmative action is a means to achieve equality.

(ii) The last phrase 'in order to enable their full and equal enjoyment of all fundamental rights and freedoms' seems redundant and could make way for disputes about the contexts in which affirmative action would be legitimate - for instance, is affirmative action in the work place aimed at 'enabling the full enjoyment of fundamental rights and freedoms'. The answer should be 'yes' but it is not a foregone conclusion. The very inclusion of the phrase seems to imply that some methods of affirmative action may fall outside this category - which are they?

Because equality is a value that is central to the Bill of Rights, the possibility of achieving it through proactive (affirmative action) measures should not be accompanied by an apparent limitation.

**Section 3: Life**

It is unclear what the implications of an amendment to either abortion law or the death penalty would be under section 3(2). Would any amendment also be immune from challenge under the Bill, or would the issue become immediately susceptible to challenge. We think that this needs clarification.

is desirable to avoid repeating rights, particularly when the repetition involves different language.

**Section 18: Access to Court**

This provision which is unusual seems to originate in the NP Bill of Rights. It should be excised for the following reasons: it effectively prohibits arbitration which is a growing and important mechanism for dispute settlement; it prevents administrative resolution of disputes, for example, over road licensing or zoning; it undermines the right to strike; and it purports to give courts power to determine disputes whether they have a legal base or not.

**Section 19: Access to Information**

Technical correction: The words 'such' and 'as is' are redundant. The section need only state:

> Every person shall have the right of access to all information necessary for the protection or exercise of his or her rights.

**Section 20: Administrative Decisions**

Review for unreasonableness is left out of the formulation. This is not necessarily a mistake as I do not think that the formulation prevents a court from developing a jurisprudence on reasonableness. The DP reference to 'decisions made in the exercise of public power' seems a clever way of undermining the public/private divide and should be adopted.

The reference in subsection 2 to 'rights' seems too narrow. It should also refer to interests.

**Section 21: Detained, Arrested and Accused Persons**

(a) This section fails to guarantee the general right to a fair trial. In omitting this it departs from the general principle expressed on p4 of the report to the effect that rights should be broadly phrased to allow for evolution. The absence of a right to a fair trial hampers any development in this crucial field and may also limit the usefulness of international standards and precedent. We suggest that section 21(3) read:
Every accused person shall have the right to a fair trial which shall include -
(a) .....

(b) Section 21(1)(d) gives rights for various visitors, including family but excluding a close friend of a person without next-of-kin or who is alienated from his or her next-of-kin and also excluding the partner in a 'common law' marriage, for instance. We think that this should be broadened.

(c) We would prefer section 21(3)(g) to state:
... not to be tried again or punished for any

**Sections 5 & 6: Liberty and Security of the Person**

These clauses seem to be muddled. Guaranteeing the right to liberty without limiting it by due process, may be used in a range of uncontemplated ways particularly to bolster economic power. The limitation in the clause which refers to detention without trial is weak as it does not render a general limitation on liberty. To do this, liberty should be linked with security of the person, as the DP Bill and the British Liberty Bill of Rights do or it should be expressly limited by due process, as the CSJ does.

**Section 8: Privacy**

The use of 'natural person' is inexplicable here, especially as it is not used in the religion clause. The reference to personal privacy is better than simply a reference to privacy as it suggests that the privacy is curtailed. We prefer this formulation to the ECHR formulation of 'private and family life, their home and correspondence', which may be used to prevent state intervention to protect abused wives, for example.

**Section 9: Religion**

The qualifying clause in this article is unsatisfactory. Given that the majority of the population cannot afford private education, it effectively subjects children to religious education in schools. The adjectives 'free, voluntary and equitable' become meaningless in this context. This is not a matter which should be regulated by the Bill of Rights, especially in a transitional phase.

**Section 12: Association**

Other parties have commented on the problem that this section may raise in connection with labour law and, in particular, closed shop. We are concerned that section 12(2) does not achieve its purpose which is to ensure that the right to association will never justify race discrimination. By asserting the generality of section 2(2) it suggests that that section applies to the right to associate in any event. Presumably, in some cases the right to association will trump the equality rights, while in others it won't. But if race is an issue, equality must always prevail. Could this not be put more directly? Perhaps the answer is to move 12(2) into the equality clause in some form or another.

**Sections 15 & 16: Citizenship**

These rights should be amalgamated. The rights of citizens who have been born abroad should be protected. The CSJ too does not protect this, we would recommend the DP formulation (article 7).

**Section 17: Political Rights**

The freedom to make political choices overlaps with the freedom of opinion, conscience, speech etc. If a goal is to have a simple Bill, accessible to people and leading to a clear jurisprudence, it

offence for which he or she has previously been convicted or acquitted.

**Section 22: Eviction**

The reference to the 'lawfulness of the occupation' is confusing in this section. It seeks to provide a factor relevant to the exercise of the court's discretion in relation to an eviction order. A court would have no discretion to evict a person who is in lawful occupation. The ANC and CSJ formulation is clearer. It does not remove the court's discretion to grant eviction but indicates a factor relevant to the exercise of that discretion.

**Section 23: Economic activity**

This clause is ambiguous and open to abuse. In our view, it should be deleted altogether. In particular, the danger exists that the right to "engage in economic activity" will be interpreted to exclude the state's legitimate interest in regulating the forms of economic activity engaged in. The only purpose served by this clause would be to promote and bolster economic practices which would otherwise inevitably conflict with the socio-economic rights entrenched (albeit to a lesser degree) elsewhere in the constitution. Indeed, this clause is all the more dangerous precisely because such socio-economic rights will in all probability not enjoy equivalent constitutional/interpretative weight.

**Section 25: Property**

At the outset, it should be noted that there are a number of arguments against the entrenchment of property rights in any form. Neither the 1982 Canadian constitution nor the recent New Zealand constitution contains a property clause. The dominant view in these two countries is that the concept "property" admits of no easy definition. The entrenchment of private property rights might therefore be seen to confine the state's otherwise legitimate power to legislate on such diverse matters as land-use planning; mining; economic and industrial activity; employment policies; pensions and even taxation. The government of the day, so this argument runs, should be free to determine policy on these issues according to the current balance of social and political power reflected in the composition of the legislature.

If there is already a commitment to a property clause of some kind or another (as seems to be the case) the following broad arguments should be kept in mind:

(a) The history of property relations in South Africa has been one of the denial of property rights for the majority of South Africans. To protect property rights absolutely at this stage in our history would only serve to entrench existing skewed property relations. A formulation must therefore be found which balances existing property owners' legitimate interests in protecting their property against arbitrary confiscation,

on the one hand, and the future South African state's need to correct the abovementioned historical imbalance as quickly and as fundamentally as possible, on the other. Given that a failure to address these issues will simply lead to a situation of lawlessness and anarchy in which no property rights at all will be respected, both property owners and the propertyless ultimately have a long-term interest in ensuring that the constitution does not make this process of reform impossible.

(b) Guaranteeing a "right to own property" is not synonymous with guaranteeing the right to private property in general. Ownership is just one of the many real rights currently recognized in South Africa. This is particularly relevant with regard to real rights in land since the ability to own land has historically been denied to most South Africans. Against this background, the real constitutional need is to protect existing "lesser" tenure forms whilst at the same time opening access to land to all.

(c) The protection of private property should never be so absolute as to require the state necessarily to pay market-value compensation when expropriating property. The constraints on the future budget will be such that a stipulation to this effect will scupper any attempts to redistribute property so as to achieve the equitable balance so fundamental to long-term stability in this country. Massive foreign grants, new internal taxes (including a land tax) and the redirection of present revenues (in competition with the demands of the education and health-care sectors) will be required to fund even a limited property redistribution programme.

In the light of these broad arguments, the property clause contained in the Technical Committee's Fifth Progress Report seems to us to be deficient in the following respects:

(a) The absolute guarantee given to "the right to own property" completely ignores the fact that such rights have been acquired under conditions of gross injustice for the majority of South Africans. Unfortunately, the history of judicial interpretation of such clauses elsewhere in the world has shown that the right to own property is traditionally interpreted as connoting the right of existing owners to retain the property they have already acquired (even though there are at least three other possible interpretations of such a clause: see Jeremy Whaler *The Right to Private Property* (1988) 3-25). It is likely that, whatever Constitutional Forum ultimately decides upon the precise content of this right, it will follow this conservative line, with the result that existing property rights will continue to trump the legitimate expectations of the propertyless.

(b) The first subclause will further entrench the position of ownership as the dominant real right in this country. André van der Walt has written extensively on the negative

consequences of a clause formulated along these lines, including its effect on the security of "lesser" tenure forms and its conceptual shortcomings in the light of international trends with regard to the so-called "socialization" of ownership (by which he means the integration of private- and public-law norms in respect of property). (See his two articles in A J Van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) and 1992 *SAJHR* 431-50.)

(c) The first version of the second subclause to Article 25 will tend to favour market-value compensation because of the inclusion of the term "just and equitable" (which is widely interpreted elsewhere in the world as having this import). The proposed compromise clause is a vast improvement on this formulation in as much as market value appears as just one of the factors to be taken into account by a court when considering the quantum of compensation. To avoid any chance of confusion, however, it is suggested that the term "just and equitable" be replaced with the more neutral term "appropriate" (as in the original ANC formulation).

If there is still scope for reworking the property clause altogether, it is suggested that the German formulation in Article 14 of the Basic Law is an appropriate model to follow. "Property" (as institution) rather than "the right to own property" (a particular tenure form) is guaranteed. The socialization of ownership is promoted both by the provision that the "content and limits [of property] shall be determined by statute" and by the statement that "property should serve the public weal". (Seen together, these two provisions clearly deal with most of the arguments against the constitutionalization of property rights mentioned at the beginning of this section.) In addition, the clause dealing with compensation strikes a clear balance between "the public interest and the interests of those affected" by acts of expropriation.

The peculiar needs of South African society could be served by adding to this basic structure in the following way:

(a) by stipulating the essence of the institution of private property in this country to be the protection of all existing tenure forms coupled with the need to extend access to property to all;

(b) by elaborating the notion of public interest to include the social desirability of land reform in particular;

(c) by the addition of an affirmative action provision specific to historical discrimination with regard to property (the 1913 and 1936 Land Acts, job reservation and so on).

## Sections 27 & 29

These clauses contain 'socio-economic rights'. It does not make sense that these should be prioritized in a Bill of Rights, and rights to health, housing, nutrition and clothing ignored. Either the Bill should opt for socio-economic rights or it should not.

## Section 28: Language and Culture

Many different cultural groups in South Africa discriminate on the basis of race or gender. In family relations this discrimination has real and serious consequences for women. If the initial CODESA commitment to a non-sexist dispensation is to be realized, it seems important to stipulate that the right to cultural life of one's choice shall be subject to the equality clause.

This becomes all the more urgent in a Bill of Rights which, like this one, does not expressly secure equality within the family. For example, for most people cultural life involves choosing a specific form of marriage which may, particularly on dissolution, disadvantage women. Social and economic reality means that it is seldom open to women to avoid such marriages.

In the Bill as presently worded it would be possible to argue that such, unequal marriages are legitimate and that the choice of 'cultural life' should trump the equality right and we think that such arguments might succeed.

As is well documented, culture and tradition is seldom uncontested and what 'counts' as culture is usually a vision promoted by the strongest, most privileged members of society. In these circumstances, it would be unfortunate, to say the least, if a simple claim to cultural right could undermine the basic right to equality.

We would argue that the clause should be amended to include the phrase: Subject to section 2 ...'.

## Section 30: Limitation Clause

We do not want to offer a full argument on this clause but think that it is worth considering the DP proposal that limitation should be subject to our international obligations.

### *Omissions*

There is no clause directly dealing with prisoners' rights.

14 June 1993

Dear Hassen and Zac

Re: Technical Committee Report on Fundamental Rights, here are my observations.

1. Most of my doubts about the earlier version have been eliminated or reduced, or the problems have at least been put on the table.

2. I think the document needs a resonant preamble, which should be agreed to be the Technical Committee, for example:

   "Whereas all South Africans are entitled to enjoy freedom, equality and security, it is necessary to provide a framework of guaranteed rights and freedoms for all covering the transitional period while a new constitution is being drafted."

3. Clause 20 - Administrative Decisions

   The right to lawful and procedurally fair decisions seems to be rather limited. Presumably this will be worked on in the final Bill of Rights.

4. Clause 22 - Eviction

   This might be acceptable if it is clear that the lawfulness of the occupation is only one of the factors to be taken into account and not decisive of the matter on its own.

5. Clause 23- Economic Activity

   I must repeat my strong disquiet about this clause which has been used in other countries to undermine collective bargaining, to prevent the government from requiring persons who have been put through university on government scholarships from being required to work in the public service for a certain period of time, to oppose regulations dealing with maximum hours of work and which could possibly be used to undermine any form of compulsory contributions towards national health or social insurance schemes. It might also act as a brake on environmental policies, redistribution of land and other socially necessary undertaking. Furthermore it is painful to express this freedom in South African without a corresponding right to work and right to be trained and to have credit facilities to take part in economic activity.

6. Clause 25 - Property

   The compromise proposal might be acceptable. There is a meeting of the Land Committee at the Centre for Applied Legal Studies tomorrow and I will discuss it with them.

7. Clause 26 - Environment

   I am not convinced that the phrase "well-being" is strong enough.

8. Clause 27 - Children

   I still think the right to a name and to full personal development should be included.

9. I have skimmed through the clauses on limitation and suspension but not studied them at all.

   With regard to enforcement mechanisms, I feel the Technical Committee should emphasise the importance of a fully legitimate body being ultimately responsible for the application of the interim Bill of Rights. While the current Appellate Division has reasonable standing as A.D.'s go, it is of fundamental importance that once elections have been held and a new foundation for legitimacy of all state structures has been established, a completely new and fully legitimate body be created to control the application of the Bill of Rights. There are a number of judges in the A.D. and in the Provincial Divisions who have the qualities to serve on such a body. However, the whole project of establishing centrality of respect for human rights will be jeopardised if they are being enforced by judicial mechanisms dating from the apartheid days. The key would seem to lie in choosing a good, broadly based and fully South African panel to combine ensuring that the constitutional principles agreed on are embodied in and not violated by the new constitution, with ensuring that the interim constitution is being maintained. It should be possible to distinguish between basic rights which all the courts must uphold from day one of the adoption of the transitional constitution, and declaring acts of the new parliament unconstitutional.

With best wishes.

Albie