

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Ex parte: THE CONSTITUTIONAL ASSEMBLY

**In re: THE APPLICATION BY THE CONSTITUTIONAL TO CERTIFY A
NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF
THE CONSTITUTION OF SOUTH AFRICA, 1993**

**NOTICE BY THE FREE MARKET FOUNDATION OF SOUTHERN AFRICA IN TERMS
OF RULE 15(3) AND DIRECTION 4 OF THE DIRECTIONS ISSUED BY THE
PRESIDENT OF THE CONSTITUTIONAL COURT ON 13 MAY 1996 AS AMENDED BY
THE PRESIDENT'S NOTICE OF 19 MAY 1996**

TAKE NOTICE THAT the FREE MARKET FOUNDATION OF SOUTHERN AFRICA objects to the certification of the constitutional text adopted by Constitutional Assembly on 8 May 1996 ('the text') on the following grounds:

1. Horizontal application of the Bill of Rights

Horizontal application of the Bill of Rights ('horizontality') contradicts the Constitutional Principles of the text in at least two respects:

- 1.1 Section 8(2), which provides for horizontality in uncertain and potentially far-reaching circumstances, contradicts the requirement in Constitutional Principal (CP)II that the Bill of Rights must contain 'universally accepted' rights. Instead it subverts the essence of a bill of rights, which is universally accepted as being to restrict power to protect citizens from abuse by the state. Horizontality increases power and has, appropriately, been universally rejected and excluded from virtually all bills of rights.
- 1.2 Horizontality may contradicts CP II, which requires that fundamental rights must be 'provided for by ... justiciable provisions'. It presents so many p[potential uncertainties, anomalies, contradictions and absurdities as to render it potentially non-justiciable in practise. To be justiciable rights must be specific and clear.
- 1.3 The legal effect of horizontality per se, and especially as drafted, is to generate potentially countless new and unknown causes of action. This contradicts the requirement of a 'separation of powers' in CP VI since it subject the judiciary to an unprecedented (an needlessly politicising) law-making function. The attempt to surmount this inherent problem to by authorising the courts 'where necessary' to 'develop the common law' (section 8(2)) introduces additional ambiguities and uncertainties. It could mean that where a new constitutional cause of action appears to overlap with a common law cause of action, the courts must apply the common law (which they would have had to do anyway) rather

than develop new law. Or it could mean that the courts must develop new law 'where necessary', which would, arguably be whenever horizontality is not identical to common law. If so, the courts could be making ('developing') rather than interpreting and applying law on a potentially vast scale.

- 1.6 Section 8(3) is anomalous since it enjoins the courts to apply common law but not legislation or customary law. Legislation, it seems, can be applied only where it has been framed so as to 'give effect' to a right which applies horizontally. No existing legislation does so for the simple reason that the concept of constitutionalised horizontal rights has been unknown in our law. Section 8(3) thus creates a purely law-making function for the courts. By making no provision for customary law, the section implicitly requires the courts to develop new law where customary law might otherwise apply.

2. Property rights

- 2.1 The right to property in a way that gives unambiguous content and substance to the right is required by CP II since 'everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties'. The right to property is a fundamental right found in almost all international human rights' covenants and bills of rights. The universality of property rights has been acknowledged by all major political parties in South Africa, including the majority ANC in such sources as its 1988 draft bill of rights. 'All (persons) are entitled to ... the right to acquire, own and dispose of property in any part of the country ...'
- 2.2 It is also generally accepted that the property can be expropriated subject to prompt and fair compensation. Section 25, however, deprives the right of all substantive content. It permits expropriation not only for 'public purposes' -- a narrow test based on international and national human rights instruments -- but also 'in the public interest.' The latter is far wider and less certain, which is not only open to abuse, but deprives the courts of clear principles on which to adjudicate property rights disputes.
- 2.3 Section 28(8) negates the limited protection envisaged by other sub-sections. It is so open-ended as to compromise it fatally, further contradicting CP II's demand for everyone to 'enjoy' the benefit of 'universally accepted' freedoms.

3. Socio-economic rights

- 3.1 Sections 26 and 27 provide that everyone has 'the right to have access' to specified benefits, including adequate housing, health care, and sufficient food and water. Section 28(1)(c) states that every child has the right to 'basic nutrition, shelter, basic health care services, and social services'. These sections purport to introduce rights which, given the realities of the state's resources and the country's wealth, are self-evidently not 'justiciable as required by CP II, and they transfer extremely conflict-provoking and politicising law-making functions to the courts in violation of the 'separation of powers' requirement of CP VI.

- 3.2 The rights ostensibly conferred are not justiciable for various reasons: what a ‘right to have access’ means is jurisprudentially vague, perhaps deliberately, in order to escape the absurdity and political dishonesty that uncompromised socio-economic rights imply, both theoretically and in practice (as evidenced by the unhappy experience of the handful of impoverished countries where such rights are constitutionalised).
- 3.3 ‘Second generation’ rights are unprecedented in our law and not governed by existing legal principles. The courts have to decide whether measures that confer ‘access’ to targeted benefits are sufficiently ‘reasonable’ and ‘progressive’ and what the state’s ‘available resources’ are, which means judges may have to determine levels of taxation; budget deficits and allocations; housing, health et al policies; and whether the state must privatise to finance ‘access’ which contradicts CP VI.
- 3.3 The rights of children to basic nutrition and so forth are not justiciable (CP II) since, in order to be enforceable, the state would have to have financial and other resources that are not, nor are likely to be, at its disposal. Again, judges are the adjudicators of last resort on fiscal and budgetary issues in violation of the ‘separation of powers’ injunction in CP VI.

4. Independence of the Reserve Bank

Sections 223, 224 and 225 do not prescribe politically independent mechanisms for the appointment or dismissal of the Governors or the Board of the Reserve Bank as required by CP XXIX, which requires that ‘the independence and impartiality of a Reserve Bank shall be provided for and safeguarded by the Constitution.’

5. Collective bargaining

- 5.1 Section 23 constitutionalises the right to strike without a countervailing employer’s right to lock out striking workers. This omission and consequent imbalance contravenes CP XXVIII, which requires that ‘the right of employers and employees to engage in collective bargaining shall be recognised and protected. Bargaining cannot be said to be ‘collective’ in any meaningful sense under such biased circumstances. It also violates the CP III requirements that (a) the Constitution must ‘prohibit ..all .. forms of discrimination’, and (b) must ‘promote .. national unity’.

6. Appointment of lay people to courts

- 6.1 Section 180(c) contradicts CP VII by stating that ‘national legislation may provide for the participation of people other than judicial officers in court decisions’ whilst omitting any limitation on the extent of participation, or requiring qualification minima. It allows for people untrained in law to be empowered to adjudicate questions of law and fact, whether on the bench, as jurors, or otherwise. There is no provision regarding the qualifications or suitability of appointees to ensure that the impartial administration of justice is not undermined. CP II seeks to secure proper administration of justice to which end the ‘judiciary shall be appropriately qualified, independent and impartial’.

TAKE FURTHER NOTICE THAT THE FREE MARKET FOUNDATION OF SOUTHERN AFRICA, appoints its national head office, at which it will accept notice and service of all documents in these proceedings.