IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 23/96

Ex parte: **THE CONSTITUTIONAL ASSEMBLY**

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

THE SUBMISSION TO THE CONSTITUTIONAL COURT ON BEHALF OF
THE WOMEN AND HUMAN RIGHTS PROJECT OF THE
COMMUNITY LAW CENTRE
CENTRE FOR APPLIED LEGAL STUDIES
LAWYERS FOR HUMAN RIGHTS
HUMAN RIGHTS COMMISSION
BLACK LAWYERS ASSOCIATION
INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA

IN RE: SECTIONS 12 (2)(a) and (b) and 27 (1)(a)

1 . This submission is a response to a number of Christian religious organisations who filed submissions with the Constitutional Court arguing that the guarantee of reproductive health and the right to make decisions concerning reproduction violate Constitutional Principles I, II and III[*1]

Interpreting the Constitutional Principles and Reproductive Rights

2. It is submitted that the Constitutional Principles provide a framework for the drafting of the new Constitution which is before the Court. The Principles stand as markers designating the boundaries within which the Constitutional Assembly could exercise a broad range of choice in drafting the Constitutional text. The process of certification is to ensure that the text of the new Constitution adheres to the foundational structure outlined by the Constitutional Principles. The Certification is a judicial process and is not a venue for interest groups to lobby for amendments.

3. In response to the objections to sections 12(2)(a), 12(2)(b) and 27(1)(a) of the new Constitution, it is submitted that the question before the Court is not whether a particular right which *could* have been included in the Constitution has been left out or whether particular objectors disagree with the wording or inclusion of a right in the Constitution. The test is only whether the inclusion of the rights in question are, on their face, *prohibited* by the Constitutional Principles. The task of the Court is only to determine

whether the protection of reproductive decision-making and access to reproductive health care services in the new Constitution *conflicts* with the Constitutional Principles.

4. In addition, the question before the Court is not whether an unlimited right to abortion conflicts with the Constitutional Principles, but whether the broader protection of reproductive rights and reproductive health do. The submissions of the objectors seem to conflate the issue of abortion with the broader protection afforded under sections 12(2)(a), (b) and 27(1)(a).

5. It is submitted that the right of access to reproductive health care and the right to freedom and security of the person which includes the right to make decisions concerning reproduction are in no way prohibited by the Constitutional Principles. Moreover, as will be submitted below, the protection of these rights in the new Constitution accords with the commitment to equality, democracy and fundamental rights set out in the Constitutional Principles.

The Objection to Certification

6. The objection filed to certification of the protection of reproductive decision-making has two bases: (1) that the foetus has a right to life thus violating the guarantee to everyone of all universally accepted fundamental rights in Constitutional Principle II; and (2) that the protection of reproductive decision-making is undemocratic, thus violating Constitutional Principle I. It is submitted that both of these bases for non-certification are unfounded.

7. First, the Reproductive Rights Alliance supports the submission of the Constitutional Assembly that "it can....not be said that the protection of pre-natal life is a universally accepted fundamental right, freedom, or civil liberty. The varied responses of open and democratic societies is based on human dignity, equality and freedom, to the issue of abortion, make it clear that there is no universally accepted standard which demands the constitutional protection of pre-natal life"[*2]. Internationally, courts have deliberately avoided deciding the status of the foetus as a rights bearer or have expressly declared that the foetus is not a bearer of rights[*3].

8. In addition, many jurisdictions with constitutionally entrenched rights protection have interpreted the universally accepted rights to privacy, liberty or the right to freedom and security of the person to include the right to make decisions concerning reproduction[*4]. The protection of reproductive decision-making in South Africa, therefore, does not conflict with any universally accepted fundamental rights or freedoms.

9. Second, it is submitted that the protection of reproductive decision-making in section 12(2)(a) and (b) cannot be seen to conflict with the commitment to democracy in Constitutional Principle I. The submissions objecting to s.12(2)(a) argue that the inclusion of this section (which opens the door to Constitutional protection of permissive abortion legislation) violates Constitutional Principle I since "South Africans have overwhelmingly opposed abortion on demand". Putting aside the contentious nature of this claim, it is

submitted that democracy is not equivalent to majoritarianism and that a democracy committed to fundamental rights must protect the interests of minorities and disadvantaged groups. The anti-democratic objection to the certification of section 12 is, therefore, invalid.

10. *In S v. Makwanyane* Chaskalson P. held that protection of rights in a democratic system based on Constitutional rather than Parliamentary supremacy means that "public opinion may have some relevance ... but, in itself, is no substitute for the duty vested in the Courts to interpret the Constitution without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication"[*5]. Similarly, in the interpretation of the Constitutional Principles, the Court must be guided only by human rights principles and not majoritarian demands. The unpopularity of a particular provision in the new Constitution, does not, therefore, render it undemocratic nor uncertifiable.

11. Moreover, it is submitted that the protection of reproductive rights in the new Constitution in fact complements and furthers the commitment to "a democratic system of government committed to achieving equality between men and women and people of all races" set out in Constitutional Principle I. Democracy is achieved when all citizens equally participate in the democratic process. The barriers to controlling reproduction faced by South African women, and the social consequences flowing from those barriers, result in women's democratic participation being severely diminished. As Wilson J. holds in *R v. Morgentaler*, the struggle for women's reproductive rights, which has been a struggle for women's rights to equality and dignity, is a struggle for *inclusion* in society:

> ... the history of the struggle for human rights from the 18th century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men[*6].

12. In addition, free and informed decision-making, which in the new South African Constitution includes reproductive decision-making, is essential to a democratic system of government. As Dickson C.J.C. held in the Canadian context in *R v. Big M Drug Mart Ltd.*, "an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability and efficacy of our system of self-government"[*7].

13. It is therefore submitted that the right to make decisions concerning reproduction and the right of access to health care services including reproductive health care, are not prohibited by any Constitutional Principle and in fact promote the achievement of fundamental rights and democracy required by the Constitutional Principles.

Reproductive Rights are Fundamental Rights

14. It is further submitted that the right to make decisions concerning reproduction is an internationally recognised fundamental right which, under Constitutional Principle II, must be provided for in the Bill of Rights. The following international documents pronounce as a basic human right, the right to determine freely and responsibly the timing and spacing of children:

(a) The Proclamation of Teheran, 1968[*8];
(b) U.N. General Assembly Declaration on Social Progress and Development, Art.4[*9];
(c) 1974 World Population Plan of Action[*10];
(d) Cairo Programme of Action, 1994[*11];
(e) Beijing Platform of Action, 1995[*12].

15. The right to make decisions concerning reproduction has also been established as a basic human right in international law by the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): a treaty which South Africa has recently ratified[*13]. Article 16(1)(e) of CEDAW requires State Parties to take appropriate measures to eliminate the discrimination against women, and in particular guarantees to men and women, on a basis of equality, the right:

> ... to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

16. The jurisprudence of other jurisdictions has recognised the right to make decisions concerning reproduction as an internationally accepted basic human right. In the Supreme Court of Canada, LaForest J., (Gonthier and L'Heureux Dube concurring), recently held in *Chan v. Canada (M.E.I.)* that Chinese nationals fleeing China's one child policy and threats of forced sterilisation, are protected under Canadian refugee laws on the ground that China is denying them the exercise of a "fundamental human right". Relying on CEDAW and the Cairo Programme of Action he defined the fundamental right in question as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children"[*14]. Although the decision of LaForest was a dissenting opinion, the majority decision assumed that the claimant was a refugee for purposes of Canadian law (therefore assuming that a fundamental right of the refugee was being violated) and dismissed the appeal on other grounds[*15].

17. The right to health is also an internationally recognised basic human right. Articles 10 and 12 of CEDAW, like section 27(1)(a) of the new Constitution, explicitly protect reproductive health. Other health provisions in international law implicitly protect reproductive health since one of the aims of protecting reproductive health is to benefit both women and the children they bear. For this reason Article 12(2) of the Covenant on Economic, Social and Cultural Rights requires State Parties, in the realisation of the highest standard of physical and mental health of its citizens, to make provisions for the

reduction of the stillbirth and infant mortality rates. Similarly, article 12 of CEDAW is both concerned with family planning and with the provision of appropriate services in connection with pregnancy, including adequate nutrition during pregnancy and lactation. The international treaties which protect a right to health therefore include:

(a) Covenant on Economic, Social and Cultural Rights, Art. 12[*16];
(b) CEDAW, Arts. 10(h) and 12;
(c) Convention on the Elimination of All Forms of Racial Discrimination, Art.5[*17];
(d) Convention on the Rights of the Child, Art. 24[*18],
(e) African Charter on Human and People's Rights, Art. 16..

18. It is therefore submitted that the right to make decisions concerning reproduction and the right to reproductive health are universally accepted fundamental rights, the inclusion of which in the new Constitution complements and does not conflict with Constitutional Principle II.

[*1] See submissions of Pro life, South Africa, Christians for Truth, The Dutch Reformed Church, People for Life, Human life International, United Christian Action, Victims of Choice, Africa Christian Action and World Federation of Doctors Who Respect Human Life.

[*2] Submission of the Constitutional Assembly, at 36.

[*3] Courts that have held that the foetus is not a rights bearer include: the Austrian Supreme Constitutional Court in VfSlg 7400/1974-JB1 1975, 310 - EuGRZ 1975, (discussed in Albin Dearing, "Austria" in Frankowski and Cole eds *Abortion and Protection of the Human Foetus (1*987) and Oskar Lehner, "Austria" in Rolston and Eggert eds. *Abortion in the New Europe* (1994)) which held that the protection of life in article 2 of the European Convention on Human Rights does not lay down any rule as to when life begins and that reading the article as a whole it applies only to persons after birth; and the Spanish Court decision of 11 April 1985 that held that the foetus is not a person possessing legal rights (see Richard Stith, "New Constitutional and Penal Theory in Spanish Abortion Law" 35 *The American Journal of Comparative Law 513* (1987) and Rebecca Cook and Bernard Dickens "International Developments in Abortion Laws: 1977-1988" 78 *AJPH* 1305). The European Commission of Human Rights, the Supreme Court of Canada and the Supreme Court of the United States have all explicitly avoided answering the question of when life (legally) begins: *Paton v. United Kingdom* 3 E.H.R.R. 408 (1980), *Tremblay v. Daigle (1*989), 62 D.L.R. (4th) 634 (S.C.C.), *Roe v. Wade 410* U.S. 113 (1973).

[*4] For example, *Morgentaler, Smoling and Scott v. The Oueen* (1988), 44 D.L.R. (4th) 385 (S.C.C.); *Eisenstadt v. Baird,* 405 U.S. 438 *(1972); Roe v. Wade 410 U. S.*113 (1973); *Thornburgh v. American College of Obstetricians and Gynaecologists* 476 U.S. 747 (1986); *Paton v. United Kingdom* 3 E.H.R.R. 408 (1980); *Brugemann v. Scheuten v. Federal Republic of Germany* 3 E.H.R.R. 244 (1977) where although upholding the

restrictive abortion legislation being challenged, the European Human Rights Commission also recognised that the regulation of pregnancy touches on the private life of the woman, (though also holding that not every regulation, however, interferes with her right to private life).

[*5] *S v. Makwanyane* 1995 (3) SA 391, 431C.

[*6] *R v.* Morgentaler, 555.

[*7] *R v.* Big *M Drug Mart* (1985), 18 D.L.R. (4th) 321 (S.C.C.), 361. ,

[*8] U.N. DocA/Conf. 32/41 (April 22 to May 13), reprinted in *Human Rights, A Compilation of International Instruments* (New York: United Nations, 1988), 43.

[*9] Proclaimed by General Assembly resolution 2542 (XXIV) of 11 December 1969, reprinted in supra note 7, 378.

[*10] At the conference, held in Bucharest, representatives of 136 governments stated that "all couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so", cited in B. Hernandez, "To Bear or Not to Bear: Reproductive Freedom as an international Human Right", 1*7 Brooklyn J. Int'l L* 309 (1991), 310, n.9.

[*11] from the 1994 Conference on Population and Development, Platform of Action, VII(a), 7.2.

[*12] from the Fourth World Conference on Women

[*13] Ratified, December 1995.

[*14] *Chan v. Canada* (1995), 128 D.L.R. (4th) 213 (S.C.C.), 249.

[*15] The majority upheld the claimant's deportation order on the basis that he had not sufficiently demonstrated a well-founded fear of persecution in order to qualify as a refugee. The right to procreate was also upheld by the United States Supreme Court in *Skinner v. Oklahoma* 316 U.S. 535 (1942) where the Court characterised the right to reproduce as "one of the basic civil rights of man" and therefore held as unconstitutional the forced sterilisation of convicted felons.

[*16] South Africa is a signatory, 1994.

[*17] South Africa, signatory, 1994.

[*18] Ratified, 1995.

BETH GOLDBLATT
Centre for Applied Legal Studies
DJ Du Plessis Centre
West Campus University of the Witwatersrand

ON BEHALF OF

THE WOMEN AND HUMAN RIGHTS PROJECT OF THE COMMUNITY LAW CENTRE
CENTRE FOR APPLIED LEGAL STUDIES
LAWYERS FOR HUMAN RIGHTS
HUMAN RIGHTS COMMITTEE
BLACK LAWYERS ASSOCIATION
INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA

To: THE REGISTRAR
Constitutional Court of South Africa
BRAAMFONTEIN

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Ex parte: **THE CONSTITUTIONAL ASSEMBLY**

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

SUBMISSION TO THE CONSTITUTIONAL COURT ON BEHALF OF COMMUNITY LAW CENTRE (UNIVERSITY OF THE WESTERN CAPE), THE CENTRE FOR APPLIED LEGAL STUDIES, LAWYERS FOR HUMAN RIGHTS, HUMAN RIGHTS COMMITTEE, BLACK LAWYERS ASSOCIATION, INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA. REPRODUCTIVE RIGHTS ALLIANCE,

IN RE: **TRADITIONAL LEADERS AND CUSTOMARY LAW**

SUBMISSION TO THE CONSTITUTIONAL COURT ON BEHALF OF COMMUNITY LAW CENTRE (UNIVERSITY OF THE WESTERN CAPE), CENTRE FOR APPLIED LEGAL STUDIES, LAWYERS FOR HUMAN RIGHTS, BLACK LAWYERS ASSOCIATION, HUMAN RIGHTS COMMITTEE, INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA REPRODUCTIVE RIGHTS ALLIANCE

1. This submission offers a response to the objections of the Congress of Traditional Leaders of South Africa (CONTRALESA) to aspects of chapters two, seven, eight and twelve of the Constitution. These objections relate to various matters pertaining to customary law, customary courts and the status and role of traditional leaders.

Interpreting the Constitutional Principles

2. Sections 71 (1) and (2) of the Constitution of the Republic of South Africa[*1]("the interim Constitution") provide that the Constitutional Court shall certify that the final Constitution ("the Constitution") complies with the Constitutional Principles ("the Principles") contained in Schedule 4 of the interim Constitution. These Principles have been described by the Constitutional Court as "definitive guidelines for the drafting of the final Constitution" and as providing a "future-directed framework"[*2]. The precise role and status of the Principles in the process of certification is determinative in testing the objections against the text of the Constitution. In this respect, this submission supports those prepared on behalf of the Constitutional Assembly[*3]. In particular, we wish to highlight the following:

2.1 Regard must be had to the origin of the Principles and the interim Constitution;[*4]

2.2 The requirement of a purposive reading of the Principles;[*5]

2.3 The Principles should be seen to allow a range of choice for the Constitutional Assembly to determine the precise nature of the institutions and mechanisms of the Constitution;[*6]

2.4 The Principles should be read collectively and not interpreted in isolation from one another.

> "The (Principles) do not stand apart, but outline in combination the parameters of the new constitutional order .... Reading the (Principles together has the effect of altering their specificity .... Where there are tensions between the Principles, an attempt should be made to balance them in a manner which accords with the Principles as a whole" [*7].

2.5 The Principles determine the parameters of the Constitution. The Constitution may refer to matters which are not specifically dealt with by the Principles as long as they do not conflict with the Principles.

2.6 The certification process by the Court is a judicial task and should not take on legislative task of writing the Constitution, nor should it provide place for lobbying by interest groups for amendments which they have not been able to achieve in the Constitutional Assembly.

Sufficient protection for Traditional Institutions within a democratic framework.

3 This submission will not deal with all of the objections of CONTRALESA in detail. in so far as the objections relating to chapters seven, eight and twelve are concerned, the submission aligns itself with the contention of the Constitutional Assembly that the institution, status and role of Traditional Leaders have been sufficiently protected in the Constitution[*8] and that the delegation of various matters relating to Traditional Leaders to legislation[*9] does not prevent the recognition and protection of the institution.

4 Moreover, it is submitted that the overall commitment to democracy, equality and human rights in the Principles provides both a mandate and a framework for the transformation and democratisation of the laws and institutions of South Africa, including those of traditional communities. The current provisions dealing with Traditional Leaders facilitate these processes by allowing legislation to specify the details of the role of Traditional Leaders, at the same time as they protect the overall institution.

Customary Law and chapter two of the Constitution

5. The balance of this submission will focus on the first objection of CONTRALESA relating to equality and customary law.

6 CONTRALESA objects to the horizontal application of the equality clause, arguing that its application to customary and religious law will contravene Constitutional Principles XIII and XXXIV. It is submitted that this objection is not valid for the following reasons:

6.1 Firstly, horizontality *per se* does not conflict with the Principles.

6.2 Principle XIII requires the recognition and application of indigenous law *subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.* It is submitted that a proper reading of this principle requires, rather than prohibits, the horizontal and vertical application of equality to indigenous law.

6.3 This reading is supported by a collective reading of the Principles and in particular, the impact of the insulation of indigenous law from the equality guarantee on the Principles I, II and III. Principle I provides for the establishment of a *democratic system of government committed to achieving equality between men and women and people of all races.* Principle II states *that everyone shall enjoy universally accepted fundamental rights, freedoms and civil liberties* and Principle III provides that the Constitution *shall promote racial and gender equality.* Read collectively, the commitment to democracy, to fundamental rights and to equality requires the harmonisation of equality and customary law.

6.4 Several aspects of customary law discriminate against women. For example:

6.4.1 Women married in customary law are minors subject to the guardianship of their husbands;[*10]

6.4.2 Women are unable to inherit under customary law.[*11] Furthermore, the caretaker rights of an heir as head of family in respect of family property have been individualised with the effect of extinguishing the claims of non-heirs.

6.4.3 Women are often excluded from access to land. This is partly due to the fact that the chiefs competency in respect of land allocation has been individualised with the effect of excluding women.

To exclude these aspects of customary law from the equality clause would be to deny these women the right to equality and to violate the commitment to democracy. The commitment to democracy in the Constitutional Principles not only prohibits the oppression of individuals or groups by the State, but also requires that groups do not oppress each other or individuals within groups. As a potentially vulnerable and disadvantaged group within customary law, women must have access to human rights, and particularly to equality, to challenge any discrimination or inequality that they suffer.

6.5 It is important to point out that the subjection of customary law to the equality clause will not extinguish the positive and beneficial aspects of customary law. For example, it will not necessarily remove the delictual claim for "deflowering a virgin" as alleged by CONTRALESA. Moreover, the entrenchment of the right to participate in the cultural life of one's choice in section 30 of the Constitution will mean that the harmonisation will be sensitive to cultural claims.

7 The second objection of CONTRALESA is based on Principle XXXIV which refers to the right to self-determination. Without traversing this in any detail, it is clear that the right to self-determination cannot exclude the overall commitments to democracy, human rights and equality in the Principles. The same arguments as those set out above apply to this objection.

[*1] Act 200 of 1993.
[*2] *Executive Council of the Western Cape* 893 I - J and 895 E - F per Chaskalson, P.
[*3] Submissions prepared on behalf of the Constitutional Assembly (hereinafter referred to as CA) at 8 to 18.
[*4] CA at 8 to 12
[*5] CA at 12 & 16
[*6] CA at 12.
[*7] CA at 14 & 15.
[*8] CA at 226 to 228.
[*9] Sections 211 (2), 212 (1) and 212 (2) of the Constitution.
[*10] Section 11(b) of the Black Administration Act no. 38 of 1927.

[*11] Section 23 of the Black Administration Act and the regulations promulgated thereunder.

BETH GOLDBLATT
Centre for Applied Legal Studies

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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Ex parte: **THE CONSTITUTIONAL ASSEMBLY**

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SUBMISSION TO THE CONSTITUTIONAL COURT ON BEHALF OF
COMMUNITY LAW CENTRE (UNIVERSITY OF THE WESTERN CAPE),
THE CENTRE FOR APPLIED LEGAL STUDIES,
LAWYERS FOR HUMAN RIGHTS,
HUMAN RIGHTS COMMITTEE, BLACK LAWYERS ASSOCIATION,
INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA.
REPRODUCTIVE RIGHTS ALLIANCE,

IN RE: SOCIAL AND ECONOMIC RIGHTS:
SECTIONS 26, 27 AND 28 OF THE NEW CONSTITUTION

SUBMISSION TO THE CONSTITUTIONAL COURT ON BEHALF OF
COMMUNITY LAW CENTRE (UNIVERSITY OF THE WESTERN CAPE)
CENTRE FOR APPLIED LEGAL STUDIES, LAWYERS FOR HUMAN RIGHTS
HUMAN RIGHTS COMMITTEE, BLACK LAWYERS ASSOCIATION
INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA
REPRODUCTIVE RIGHTS ALLIANCE

1 . This submission is in response to the submissions of the South African Institution of Race Relations and the Free Market Foundation of Southern Africa who argue that the social and economic rights in sections 26 and 27 and in 28(1)(c) violate Constitutional Principles II and VI.

The interpretation of the relevant Constitutional Principles

2. We endorse the submission made on behalf of the Reproductive Rights Alliance concerning the interpretation of the Constitutional Principles.

3. The particular Constitutional Principles in issue in this submission, viz. II and VI, require that the new Constitution meet certain standards. Provided these standards are met, the Constitutional Assembly has a wide range of choice as to the precise form in which it gives expression to the principles.

4. Constitutional Principle II requires that "all universally accepted fundamental rights, freedoms and civil liberties" are protected in entrenched and justiciable provisions in the Constitution. The Constitutional Assembly is at liberty to include additional rights in its Bill of Rights which are not "universally accepted" as well as to determine the manner in which different rights are made justiciable. Thus, certain rights may be drafted without qualifications whereas others may be subject to internal qualifiers and limitations. The minimum standard to which the Constitution must comply is that those rights which are universally accepted" be entrenched and justiciable. Similarly, the Constitution must ensure that there is a separation of powers between the different branches of government with "appropriate checks and balances". The Constitutional Assembly has discretion regarding the nature of the checks and balances incorporated in the text to ensure "accountability, responsiveness and openness."

5 . It is submitted that the social and economic rights in the new Constitution represent the Constitutional Assembly's commitment to ensuring the substantive protection and realisation of the values of human dignity, equality, freedom and democracy in South Africa.

The Objection to Certification

6. Two main arguments are made in objection to the certification in relation to certain of the sections protecting social and economic rights[*1]:

   6.1 that they contravene Constitutional Principle II in that they are not justiciable;

   6.2 that they contravene Constitutional Principle VI in that they allow judges to assume legislative and executive functions, including the power to determine the budget.

7. It is submitted that both these arguments are without merit. The basic framework for the justiciability of the rights in the Bill of Rights is the duty of the state to "respect, protect, promote, and fulfil" the rights in the Bill of Rights in section 7(2). This provision contemplates a range of negative and positive obligations on the state. The nature and extent of these constitutional obligations in the case of particular rights will depend on the nature of the right and the way it has been drafted.

8. In the case of the social and economic rights protected in sections 26, 27 and 28(1)(c), the state has two primary negative obligations:

8.1 The first is to refrain from interfering in citizen's existing access to the rights. . An example of such an interference would be a law which authorised a municipality to cut off the water supply to an entire area on the ground that it had a bad record of recovering payment of services in the area. An individual resident who is effecting paying for services could apply to have this law declared invalid in that it violates the duty of the state to respect her access to water in terms of section 27(1)(b). The state could attempt to argue that this interference with the right is reasonable and justifiable in terms of the general limitations clause.

8.2 The second negative duty on the state is to refrain from passing laws or engaging in conduct which unjustifiably restricts or denies people's access to the social and economic rights granted in sections 26, 27 and 28(a)(c). An example would be a law which allows existing residents an effective veto over the establishment of a low-income housing project in their area[*2]. This law, it could be argued, amounts to a denial of the right of the low-income community to have access to adequate housing in terms of section 26(1).

9. The positive deities on the state in relation to the social and economic rights are expressly qualified and limited in terms of sections of 26(2) and 27(2). Thus the basis for judicial review in respect of the obligation on the state to ensure that everyone has access to these rights is limited to an enquiry as to whether the state has taken serious, reasonable and targeted steps towards this goal. The state is expressly afforded latitude to achieve access to these rights over time ("progressively") and without exceeding. the limit of its resources ("within its available resource")[*3]. The positive duties on the State in respect of section 28(1)(c) is limited to a particular class of beneficiary (children) and to a restricted level of benefits ("basic" nutrition; shelter, etc.).

10. The argument that these rights breach the separation of powers requirement in Constitutional Principle VI is also not valid. In line with the obligations on the state under international Human rights law, these rights do not necessarily require the state itself to be the provider of the socio-economic benefits. As argued above, the duty of the state is to refrain from an unjustified interference in people's economic and social rights and to take reasonable measures to create the conditions for all to enjoy access to the rights. The State can achieve the latter through direct public provision, through relying on private mechanisms or a combination of both[*4]. The legislature and executive have a wide discretion as to the most effective and appropriate means of giving effect to these rights. The role of the courts is to ensure that the measures adopted conform to the standards imposed by the Constitution. This is the traditional role played by the courts in comparative constitutional law and under international human rights law in relation to all rights. The social and economic rights in the Constitution do not require the courts to usurp legislative and executive functions nor to assume control over the budget. Judicial enforcement of rights such as equality, the right to free, fair and regular elections and to a fair trial also sometimes requires positive conduct. on the part of the organs of state and may have extensive financial implications[*5]. This is an accepted consequence of an entrenched and justiciable Bill of Rights. Finally, it is submitted that the entrenchment of

social and economic rights in the Bill of Rights will promote the values of accountability, responsiveness and openness required by Constitutional Principle VI.

Social and economic rights are universally accepted fundamental rights

11. It is submitted that social and economic rights are an integral part of the general body of universal human rights recognised under international law[*6]. The entrenchment of social and economic rights in the new Constitution accords with trends in international human rights law to provide for review of individual complaints in respect of alleged violations of these rights[*7]. The Vienna Declaration and Programme of Action adopted by consensus by the 171 states participating in the UN World Conference on Human Rights affirms that "all human rights are universal, indivisible and interdependent and interrelated". It calls on the international community to treat human rights "in a fair and equal manner, on the same footing, and with the same emphasis"[*8].

12. It is therefore submitted that social and economic rights are universally accepted fundamental rights. Their protection through entrenched and justiciable provisions in the Constitution is required by Constitutional Principle II. However, even if it is argued that social and economic rights are not universally accepted fundamental rights, the Constitutional Assembly was at liberty to include these rights in the Constitution and determine the manner and form of their adjudication. In conclusion, it is submitted that the inclusion of social and economic rights in the new Constitution does not conflict with the Constitutional Principles, but in fact gives effect to them.

[*1] The submissions make no reference to other clauses protecting social and economic rights, for example, rights relating to the environment (section 24), education (section 29), and detained persons rights (section 35(2)(e)).

[*2] These facts are based on the US Supreme Court decision of James v. Vaitterra 402 U.S. 137 (1971) in which it was held that an amendment to the Californian Constitution to this effect did not violate the Fourteenth Amendment (Justice Marshall dissenting).

[*3] This provision is similar to the duty imposed by article 2(1) on state parties to the International Covenant on Economic, Social and Cultural Rights (1966). In interpreting this provision the UN Committee on Economic and Social Rights (responsible for supervising the performance by states of their obligations under the Covenant) has held that upon ratification a state party is under an obligation to begin immediately to take steps towards the full realisation of the Covenant rights. These steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant [General Comment NO 3 (fifth session, 1990), UN doc. E/1991/23, para. 21. Article 2 of the Covenant gives particular emphasis to the adoption of legislation in the measures adopted to achieve the progressive realisation of the protected rights.

[*4] See General Comment No 3 of the UN Committee on Economic and Social Rights, supra, note 3, para. 8.

[*5] As exemplified in the 1972 judgement of the German Constitutional Court in the Numerus Clausus case BVerfGE 33, 303. The European Court of Human Rights has expressly afforded the State "a choice of means" in the manner it gives effect to its obligations under the European Convention on Human Rights while affirming its competence to scrutinise whether the means chosen adequately fulfils the obligation. See Marck x v. Belgium 31 Eur. Ct. H.R. (ser. A)(1991). These cases concern the obligation on the Belgium government under article 14 of the Convention to put an end to discrimination against illegitimate children in its inheritance law.

[*6] They are explicitly recognised in the Universal Declaration of Human Rights (1948) [articles 22-27]. They are given legal status and protection in a number of international, regional, and specialised human rights treaties. In the regional context they are recognised and protected in the African Charter on Human and Peoples' Rights (1981) [articles 15-18], the European Social Charter (1961), and in an Additional Protocol to the American Convention on Human Rights (the Protocol of San Salvador, 1988). They are also protected through an array of specialised human rights conventions, including International Labour Organisation Conventions, the United Nations Educational and Scientific and Cultural Organisation (UNESCO) - sponsored Convention Against Discrimination in Education (1960), the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1990). The major international human rights treaty protecting economic, social and cultural rights is the International Covenant on Economic, Social and Cultural Rights (1966). It is significant because of the large number of ratifications it has received by states in the international community (approximately 130 states), and the role of the Committee on Economic, Social and Cultural Rights in clarifying the legal status and normative content of economic, social and cultural rights. South Africa signed the Covenant in October 1994.

[*7] A significant international development in the protection of economic and social rights is the preparation of a draft Optional Protocol to the Covenant on Economic, Social and Cultural Rights. Similar developments are underway in relation to the European Social Charter (1961).

[*8] June 1993, UN Doc. A/Conf 157/23, Part I para.5.