IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 23/96

Ex parte: **THE CONSTITUTIONAL ASSEMBLY**

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

SUPPLEMENTARY WRITTEN ARGUMENT BY THE SOUTH AFRICAN INSTITUTE OF RACE RELATIONS IN TERMS OF THE DIRECTIONS OF THE PRESIDENT OF THE CONSTITUTIONAL COURT

The SOUTH AFRICAN INSTITUTE OF RACE RELATIONS hereby submits the following written argument to supplement its written objection to the certification of the constitutional text adopted by the Constitutional Assembly on 8th May 1996 ("the text"):

Horizontal Application of the Bill of Rights

1.1 Horizontal rights are not "universally accepted". Their inclusion as provided for in section 8(2) and other provisions of the text thus infringes constitutional Principle II, requiring that "everyone shall enjoy all universally accepted rights" and thereby implying that rights not so accepted do not belong in the text. (It is axiomatic that if section 8(2) of the text contravenes constitutional Principle II, so too do other provisions of the text (sections 9 and 32, in particular) which expressly provide for horizontal application of the guaranteed rights which they encompass.)

1.1.1 In the Transvaal Provincial Division of the Supreme Court, Van Dijkhorst J, in the case of De Klerk v Du Plessis,#1 reviewed a number of international human rights conventions and national constitutions, and concluded that horizontal application of bills of rights was not common. Traditionally," said Van Dijkhorst J, "bills of rights have been inserted in constitutions to strike a balance between governmental power and individual liberty; to constitute a precaution against state tyranny. That was the reason for its insertion in the United States constitution. That has been their *raison d'être* desire ever since. (Sometimes individual clauses regulating horizontal relationships have slipped in, but that is the exception.)#2

#1 1995 (2) SA 40 (T)
#2 Ibid, at 47

1.1.2 A survey of constitutions around the world, as reflected in Blaustein's Constitutions of the World,#3 confirms this. Various constitutions provide for the values enshrined in the bill of rights to permeate all law, through what is known in

Germany as "drittwerkung" or indirect horizontal application. Direct horizontal application, however, is highly unusual. The constitution of Namibia is virtually alone in the world in expressly providing for horizontal application of its bill of rights "where applicable". Even in Namibia, moreover, according to Van Dijkhorst in Du Plessis v De Klerk, the main thrust of the bill of rights is vertical - for its primary purpose is to "curtail state power"#4

#3 Blaustein A P and Flanz G H, (eds), constitutions of the Countries of the World, Oceana Publications Inc, Dobbs Ferry, New York

#4 De Klerk v Du Plessis, supra n 1, at 48

1.1.3 Various dicta by the judges of the South African constitutional court, in deciding the constitutional issues raised in Du Plessis v De Klerk, are relevant in this regard. The majority decision in the case that the transitional bill of rights is not in general capable of direct horizontal application - is, of course, based on the particular provisions of the 1993 constitution, which are not relevant to the text now before the court. However, the judges of the Constitutional Court, in analysing the questions raised in Du Plessis v De Klerk, made various statements of principle which remain germane to the question whether the text under consideration conforms with the Constitutional Principles.

#5 In the Constitutional Court of South Africa, in the matter of Du Plessis and others and De Klerk and another, Case No CCT 8/95, judgement delivered on 15th May 1996

#6 Ibid, at 54

Various statements in Du Plessis v De Klerk confirm that it is vertical application of a bill of rights that is the norm. 'Entrenched bills of rights,' said Mr Acting Justice S. Kentridge, 'are ordinarily intended to protect the subject against legislative and executive action.' #7 Several jurisdictions, he added, including Canada and Germany, have rejected direct horizontality following long debate both judicial and academics.#8

#7 Ibid, at 33

#8 Ibid, at 30

1.1.4 Mr Justice L Ackermann raised a related issue, in pointing out that the purpose of the bill of rights in the German Basic Law (and other bills of rights) is to confer rights on individuals, while the effect of direct horizontality is to confer duties on individuals instead.#9 To turn a bill of rights into 'a code of obligations for private individuals', he later added, would be 'contrary to the historical evolution of constitutional individual rights' protection'.#10

#9 Ibid, at 75

#10 Ibid, at 82

1.1.5 A survey of constitutions around the world shows that most of those which incorporate bill of rights do so to confer rights, not obligations, on individuals. This underscores the reality that direct horizontal application of guaranteed rights is not 'universally accepted' and should have no place in South Africa's new constitutional text.

1.1.6 In conferring obligations on private persons, direct horizontal application of guaranteed rights - whether in section 8(2) of the text or elsewhere - contradicts Constitutional Principle II. This Principle requires that 'everyone shall enjoy all universally accepted *rights, freedoms and civil liberties*' (emphasis supplied). No authorisation is contained in this Principle for the imposition of constitutional obligations on private persons.

1.1.7 It may be argued that Constitutional Principle II requires merely that 'universally accepted" rights should not be excluded, but does not demand that rights which are not so accepted should be barred from inclusion. In this regard, reliance must be placed on a well-established principle of statutory interpretation which applies no less to the Constitutional Principles than to any other legal instrument. This is summarised in the maxim *'expressio unius est exclusio alterius'*. By expressly stating what rights should be included - all those which are 'universally accepted'. - Constitutional Principle II thereby implies that rights not meeting this criterion should not be incorporated.

1.2 Furthermore, horizontality contravenes Constitutional Principle IV, requiring that the constitution be made binding on "all organs of state at all levels of government', and thereby implying that it is not to be made binding on private persons as well.

1.2.1 The language of Constitutional Principle IV in this regard mirrors that of section 7(1) of the transitional constitution of 1993. It demonstrates, accordingly, the scope that was envisaged and required for the bill of rights in the new text - viz, that it should be binding on the state at all levels of government in the same way as the transitional bill of rights. Were this not the case, there would have been no need for the inclusion of these words at all, for the purpose of every constitution and bill of rights is to bind the state. This aspect of Constitutional Principle IV is tautologous, unless it is given the meaning it was clearly intended to have - that the present text should confine its ambit to the state, and should not extend its purview to private persons through the direct application of guaranteed rights.

1.2.2 Moreover, the *maxim expressio unius est exclusio alterius* supports this interpretation. By expressly requiring the constitution and bill of rights to bind the state, Constitutional Principle IV implicitly excludes the extension of its ambit to private persons through direct application of the bill of rights.

1.3 Furthermore, constitutional Principle II requires that the fundamental rights in the bill of rights be "provided for by... justiciable provisions'. Rights are only justiciable, however, if

they are clear and specific, and if they give rise to remedies which are certain and unambiguously enforceable. Direct horizontality, however, erodes justiciability, making for significant difficulties in interpreting and enforcing law.

1.3.1 This is confirmed by a number of dicta in Du Plessis v De Klerk. Judge Kentridge, having pointed out that direct horizontal application could involve the constitutional court in striking down provisions of the common law regulating private relationships, said this "would be highly unusual and would give rise to much difficulty'. He continued: "If a statute is struck down, the previous common law (or earlier statute) is presumably restored. But what would result from holding a rule of common law to be unconstitutional?" The answer, he said, is that the common law would have to be "reformulated".#11

#11 Ibid, at 38-39

1.3.2 The first of the resulting difficulties identified by Judge Kentridge might not apply under the text now under consideration, for this - unlike section 98 of the transitional constitution - does appear to give the Constitutional Court (under section 8(3)) a "general jurisdiction" to "re-write the common law governing private relations".#12 (Whether this jurisdiction can be reconciled with Constitutional Principle VI is considered below.) The other difficulties outlined by Judge Kentridge, however, remain of full force.

#12 See ibid, at 39

1.3.3 To cite the examples he uses, if the common law rule barring the widow of a customary union from claiming for loss of support was to be found unconstitutional, 'what specific rights [could] be accorded the widow"? In addition, if the marital power at common law were struck down, "how would existing marriages in community of property be dealt with"?#13 Moreover, the complex process of balancing conflicting rights and interests which underlies existing common law rules would have to be reconsidered, with no clear guidance as to how this should be done.#14 Furthermore, where existing common law rules were struck down, some new regime would have to replace the existing law. And the choice as to which law to choose would be complex indeed, for there are many possibilities - ranging (in the context of defamation, for example) from the "actual malice" requirement in New York T Co v Sullivan to the 'negligence' requirement found more appropriate by the Australian High Court.#5 It would not be easy for the Constitutional Court to choose "one among a number of possible rules of common law all of which may be consistent with the Constitution".#16

#13 Ibid, at 39-40
#14 See ibid, at 41
#15 See ibid, at 43-44

#16 Ibid, at 46. Judge Kriegler was, of course, principally concerned in this regard with the limited jurisdiction conferred on the Constitutional Court by section 98 of the 1993 constitution. However, even if the jurisdictional difficulty is removed (as it might have been by section 8(3) of the text), the difficulty of deciding which of different possible rules should be adopted by the Constitutional Court remains

1.3.4 Further problems of justiciability arise from "the legal fiction" that a court, in modifying common n law, has merely 'found' a meaning which has always been inherent within it. This makes judge-made law, in South African practice - echoing that of England retroactive in its operation.#17 If the courts are to start making "radical" changes to law - especially in the wide-ranging circumstances that *direct* horizontal application of guaranteed rights would require - this doctrine would have to be reconsidered, for retroactive changes to common law would be particularly unsettling to long established rights and liabilities. Unless this were done, the effect would be to erode yet further the certainty of rights and remedies upon which justiciability depends. If judge-made law were to be made prospective to cater for this difficulty, however, it would underscore the fact that the courts were being called upon to create rather than apply the law - in contravention of Constitutional Principle VI.

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#17 Du Plessis v De Klerk, supra n 5, at 52

1.3.5 Judge Ackermann, in his separate concurring judgement, was also troubled by the legal uncertainty which direct horizontal application would generate. "Direct application of the basic rights by the judiciary in ordinary civil proceedings would make the law vague and uncertain," he said, "which is contrary to the concept of the constitutional state."#18 He also pointed out that uncertainty, in this context, would be "aggravated by the fact that (in contrast to a dispute between citizen and state) in a dispute between two private individuals both sides can invoke the basic rights, calling for a difficult balancing of conflicting rights which could reasonably lead different courts to different decisions".#19 To compound the problem, he said, there is no "indication in the constitution as to how clashes between rights and duties are to be resolved, or how clashing rights are to be 'balanced'".#20 These considerations are profoundly inimical to justiciability, which requires certainty of rights and remedies.

#18 Ibid, at 73

#19 Ibid

#20 Ibid, at 82. Judge Ackermann was referring to the transitional constitution in this regard, but the point he makes is equally apposite to the text presently under consideration..

1.3.6 In addition, warned Judge Ackermann, direct horizontal application applied to the right to equality - as the text now specifically provides - makes for consequences which are highly "undesirable and unsupportable.#21 Judge Ackermann illustrated

this by referring to two writers on the American "state action" doctrine, Professor Herbert Wechsler and Professor Louis Henkin. (Judge Ackermann submitted that their criticisms, though rooted in US jurisprudence, were "in fact directed at the highly undesirable consequences of the direct horizontal application of [the right to equality] to private legal relations").#22

#21 Du Plessis v De Klerk, supra n 5, at 79. Judge Ackermann was dealing with the question-in the abstract, rather in than the context of the new text which includes an equality clause expressly made horizontal. However, the disquiet he expressed remains entirely relevant.

#22 Du Plessis v De Klerk, supra n 5, at 80

1.3.7 Professor Henkin, said Judge Ackermann, had raised questions of profound importance in teasing out the implications of applying a constitutional right to equality to private law. Could a will leaving money to a group of a particular religious denomination be probated, Professor Henkin had queried. Could any bequest in fact - other than one to a wife or children - be enforced, for it would inevitably be arbitrary in preferring one potential beneficiary above another. Could the law of trespass be enforced, for the owner's reason for to evict one person and not another might also be arbitrary and 'capricious'. Could a "vendor arbitrarily contract to sell to *A* rather than *B*"?#23

#23 See ibid, at 80

1.3.8 These are all questions which direct horizontal application of the equality right would force the courts to entertain. Moreover, warned Judge Ackermann it would not be possible - once the principle of direct horizontal application were endorsed - to confine its operation to the equality clause. Other rights would also be found to have such application - with consequences, said Judge Ackermann, which would be similarly "unsupportable".#24

#24 see ibid, at 79. Judge Ackermann was speaking of the 1993 constitution. 'The point he makes is even more apposite, however, now that section 8(2) of the text expressly provides for wide-ranging direct horizontal application of guaranteed rights.

1.3.9 Mr Justice A Sachs, in a further separate judgement concurring with Judge Kentridge, also adverted to the problems of justiciability which would arise from giving a bill of rights direct horizontal application. It is not clear, he said, "what remedies in the private sphere could be invoked to enforce directly enforceable constitutional rights". "Specific performance", he continued, "would not be appropriate where the complaint is refusal to enter into a contract, rather than failure to fulfil a contract." There would also be problems, he stated, in determining whether damages would be payable. In the United States, he pointed out, civil rights legislation had been necessary to "enable persons to be sued or prosecuted for

violation of civil rights". In general, in the absence of legislation, it would be difficult to see the Constitutional court or any other court "finding in the constitution authority to entertain or develop an action for damages for violation of constitutional rights where the state has not been the offending party". #25

#25 Ibid, at 129. Again, judge Sachs was speaking specifically of the transitional constitution, but the point he makes is equally applicable to the text now under consideration.

1.3.10 All these dicta emphasise the reality that direct horizontal application of the bill of rights - as provided for in section 8(2) and other provisions of the text - serves to:

* unsettle existing law;
* erode clear rights and remedies, leaving potential lacunae in the law;
* require the courts to re-balance conflicting rights and interests without clear guidance as to how this should be done; and
* raise difficult questions as to what remedies might lie for breach - and whether these would include specific performance or the award of damages.

1.3.11 All these considerations underscore the fact that direct horizontal application of guaranteed rights - whether as authorised in general terms in section 8(2) or as expressly envisaged in provisions such as sections 9 and 32 - fundamentally erodes the justiciability required by Constitutional Principle II.

1.4 Moreover, wherever a right applies horizontally, the legal effect is to generate a new constitutional cause of action not governed by existing law. To adjudicate these new causes of action, the courts are obliged to develop new law. This gives the judiciary an unprecedented law-making function and contradicts Constitutional Principle VI, which requires "a separation of powers" between the legislature and the judiciary.

1.4.1 There is a profound difference between indirect horizontal application of guaranteed rights and their direct horizontal application. The former, in requiring the values of the bill of rights to suffuse and irradiate all law, is simply an extension of the well-recognised role judges have always played in using concepts such as "equity" and "*bonos mores*" as aids to interpretation. Making guaranteed rights directly horizontal, through new constitutional causes of action, marks an unprecedented extension of this role. It takes the judges away from their long-established function of "applying the law as neutral arbiters"#26 into a new sphere in which they must first devise the rules whereby they will decide the matter. This takes the judges into the very centre of the legal arena - not simply in ascertaining the facts, which in itself has always been eschewed in jurisdictions applying the adversarial approach to litigation - but in determining the very rules by which the case must be decided.

#26 See the judgement of McIntyre J in Retail, Wholesale & Department Store Union, 580 et al. v Dolphin Delivery Ltd, (1987) 33 DLR (4th) 174, at 196, cited by Judge Kentridge in Du Plessis v De Klerk, supra n 5, at 42

1.4.2 To give the judges this law-making role is to ignore the cogent strictures of Iacobucci J in R v Salituro,#27 that "there are significant constraints on the power of the judiciary to change the law... In a constitutional democracy, it is the legislature and not the courts which has the major responsibility for law reform... The judiciary should confine itself to those incremental changes which are necessary to keep the law in step with the dynamic and evolving fabric of [a] society".

#27 (1992) 8 CRR (2d) 173, at 185 and 189, cited by Judge Ackermann in Du Plessis v De Klerk, supra n 5, at 48

1.4.3 The South African Constitutional Court, in Du Plessis v De Klerk, has also recognised that direct horizontal application of the bill of rights gives its judges a law-making function which erodes the legislative capacity of Parliament and serves thus to blur the separation of powers. Said Judge Ackermann: "What also has to be considered carefully is the impact, on the legislative process, of a directly horizontal application of [guaranteed rights] to private legal relationships. In each case when a final pronouncement of this nature is made through this Court, Parliament will be bound by this Court's judgement. The Court has after all pronounced on the meaning and application of the constitution in a particular context. Should Parliament wish to alter the law, resulting from such a direct application of the [guaranteed] rights by the Court, it will have to amend the Constitution. I consider this to be a most undesirable consequence, needlessly inhibiting the normal piecemeal statutory modification of the common law. It is one which flows directly, however, from an [approach] which in essence constitutionalises the entire body of private law".#128

#28 Du Plessis v De Klerk, supra n 5, at 81

1.4.4 Similar concerns were raised by Judge Sachs. Direct horizontal application, he warned, would make the South Africa a dikastocracy, a country 'ruled by judges', within which Parliament would be confined to the exercise of "certain residual powers". He continued: 'The role of the courts is not effectively to usurp the functions of the legislature, but to scrutinise the acts of the legislature. It should not establish new, positive rights and remedies on its own."#29

#29 Ibid, at 125

1.4.5 Direct horizontal application, he added, would place the Constitutional Court in a profound dilemma. In the context of defamation, for example, if it struck down existing common law rules--- for violating the right to free expression, it would then be faced with the choice of leaving a legal vacuum or reformulating the law. If it

left a legal vacuum, courts in different parts of the country could develop their own rulings on the issue, "with the result that a plaintiff could win in one part of the country and lose in another, the publication being exactly the same in both". By contrast, if the court proceeded instead to reformulate the law, it would "solve the problem of divided decisions but tie the hands of Parliament until death or a constitutional did [them] part".#30

#30 Ibid, at 127

1.4.6 In these circumstances, Judge Sachs continued, "there would be little or no scope for Law Commission enquiry, little chance for subsequent amendments in the light of experience and public opinion. Parliament would have to defer to [the Court's] discretion in the matter, seeking to find some margin of appreciation left in [its] judgement within which it could dot i's, cross t's, and seek alternative, not incompatible, solutions".#31

#31 Ibid, at 127-128

1.4.7 These dicta demonstrate that direct horizontal application - as generally provided for in section 8(2) of the text and specifically envisaged in other sections as well - is incompatible with the separation of powers required by Constitutional Principle VI. Direct horizontal application compels the effective usurpation of the legislative function by the Constitutional Court in wide-ranging spheres of law.

1.5 Section 8(3) of the text is also ambiguous, and could require the courts to "develop" new common law in all instances where reliance is placed on constitutional rights given direct horizontal application. This is because the courts must develop new common law "where necessary". Such development may be necessary even in the face of:

* existing common law rules, since these have never regulated guaranteed rights applied horizontally;
* legislation, unless a statute has expressly been framed so as to "give effect" to a horizontal right; or
* customary law, which the courts have not been directed in section 8(3) of the text to apply at all.

The "development" of new law in this situation goes far beyond the established interpretative role of the courts, and involves the judges in new law. It thus contradicts the separation of powers required by Constitutional Principle VI.

1.5.1 Section 8 (3) of the text expressly gives the Constitutional Courts a law-making role. It thus makes the warnings sounded by Judges Ackermann and Sachs in Du Plessis v De Klerk - that direct horizontal application of guaranteed rights will oust or significantly reduce the legislative capacity of Parliament - even more apposite and cogent (see paragraphs 1.4.3 to 1.4.6).

1.5.2 The consequences for customary law are likely to be particularly far-reaching, especially as the courts have been given no scope (in section 8 (3) of the text) to apply customary law in adjudicating cases based on the direct horizontal application of guaranteed rights. This would be unfortunate for, as Ms Justice Y Mokgoro has stressed, "customary law remains integral to the domestic culture of millions of South Africans [and] must be accorded due respect".#32 As Judge Sachs has pointed out, however, "direct enforceability of [guaranteed rights] would require th[e] Court, if asked to do so, to indulge in a wholesale striking down of customary law because of violation of the equality clause [in the bill of rights]".#33 Having invalidated the existing rules, the Court would then be faced with the same dilemma as earlier described - either to leave a lacuna in the law, with the possibility of different rulings then being given by different courts; or to reformulate the rules itself, with the consequence that Parliament would no longer be able to "throw open the matter to public debate involving all interested parties, secure investigation by the Law Commission, and come up eventually with what it consider[ed] to be appropriate legislation".#34

#32 Ibid, at 122
#33 Ibid, at 130
#34 Ibid, at 131

1.5.3 The position would be the same as regards many existing common law and statutory rules which might in future be found by the Constitutional Court to be inconsistent with guaranteed rights given direct horizontal application.

1.5.6 The effect of section 8(3) of the text is thus to require the court to embark on an extensive reformulation of existing law - and to assume the legislative role in concomitant measure. Section 8(3) is thus contrary to Constitutional Principle VI.

2. Socio-Economic Rights

2.1 Sections 26 and 27 of the text provide that everyone has "the right to have access" to specified socio-economic benefits, including adequate housing, health care, and "sufficient" food and water. These sections introduce into the text rights which are not "justiciable" and which therefore contradict Constitutional Principle II.

2.1.1 Rights are justiciable only if they are clear and specific, and give rise to remedies which are certain and capable of legal enforcement. The "rights" provided for in sections 26 and 27 of the text do not meet these criteria. There is no certainty in law as to what a right "to have a access" means, or what "adequate" housing connotes, or what "sufficient" food and water comprise. There are no clear legal criteria for determining whether the "legislative or other measures" adopted by the state in this context are "reasonable" or sufficiently "progressive". There is no established foundation in law for deciding what the resources "available" to the state

for the purpose of providing access to these benefits comprise. These "rights" fall therefore at the first hurdle required for justiciability.

2.1.2 There is also no legal clarity as to what remedies lie against the state for infringement of these "rights". Is the Constitutional Court to order specific performance of the state's housing or water policy? Is the court to order the payment of damages to an individual because the house provided to him or her is not "adequate", or the food and water supplied not "sufficient"? If the court rules that the government's policy on health care, for example, is not "reasonable" or sufficiently "progressive", is it to order the relevant minister to reformulate policy on criteria of its own choosing?

2.1.3 If these "rights" are found to have direct horizontal application so as to bind private persons as well, is the Constitutional Court then to order specific performance or the payment of damages by individuals and juristic persons who have failed to provide others with "access" to "adequate housing" or to "sufficient food and water"? Would such orders not generate such insurmountable legal and practical problems as to be unenforceable?

2.1.4 Relevant in this regard is a dictum of Mr Justice I Mahomed DP in Du Plessis v De Klerk. (This dictum was made in a different context - the question of direct horizontal application of guaranteed rights - but it remains a relevant description of what constitutes a legal right.) Said Judge Mahomed: 'Inherently there can be no "right" governing relations between individuals *inter se* or between individuals and the state the protection of which is not legally enforceable and if it is legally enforceable it must be part of law..'#35

#35 Ibid, at 63

2.1.5 There is no law, however, governing the issues raised in paragraphs 2.1.1 to 2.1.3. The only "law" to be found within this context is contained in the vague provisions of section 26 and 27 of the text. These formulations do not suffice to generate the legal certainty necessary for justiciability.

2.1.6 Also significant are the dicta of Judge Sachs in the Du Plessis case. (These, too, were given in the context of direct horizontal application of guaranteed rights, but remain apposite to this issue as well.) Judge Sachs stated: "The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic and political questions requires."#36

#36 Ibid, at 124-125

2.1.7 The provision of housing, health care, food, water and other socio-economic benefits are "social, economic and political" questions. The bald assertion of a "right to have access" to them in sections 26 and 27 of the text does not alter their character. Nor does it alter the reality that - being questions of this nature - they fall outside the province of the judges. They raise issues of policy, not of law - and they are not justiciable within the meaning of Constitutional Principle II.

2.2 The "rights" conferred by sections 26 and 27 of the text are, in addition, not commonly found in bills of rights. Their inclusion thus contradicts Constitutional Principle II, which requires the incorporation in the text of those rights which are "universally accepted'.

2.2.1 Many constitutions require the government to which they apply to provide education at primary or secondary levels. Most, however, contain no reference to "rights" to housing, health care, or "sufficient" food and water. Some countries, such as India, Namibia and Nigeria, include within their constitutions separate chapters on the state's role in the provision of housing, health care and other benefits. In terms of these provisions, the state is enjoined to provide these benefits as "fundamental objectives of state policy'" or words to that effect. The provisions in these chapters are not intended to be justiciable. Their status is entirely different from that accorded fundamental guarantees of liberty against governmental abuse. Hence, they have been excluded in these constitutions from the bills of rights which they contain.

2.2.2 It is thus far from "universally accepted' for provisions such as sections 26 and 27 to be included in a bill of rights. Their inclusion in the text in this manner contravenes Constitutional Principle II.

2.3 Section 28 (1) (c) of the text gives every child the right to "basic nutrition, shelter, basic health care services, and social services". These rights are also not justiciable as required by Constitutional Principle II.

2.3.1 The considerations raised in paragraphs 2.1.1 to 2.1.7 apply with equal force in this regard. It is not possible, in practice, for the courts to enforce these rights - and they therefore do not fulfil the criterion of justiciability required by constitutional Principle II.

2.4. Furthermore, the 'rights" conferred by sections 27, 27 and 28 (1) (c) require the judges to assume aspects of the executive role and therefore also infringe Constitutional Principle VI, which requires a "separation of powers" between the judiciary and the executive.

2.4.1 The dictum of Judge Sachs, in paragraph 2.1.6, applies in equal measure in this regard as well. Judge Sachs is effectively describing the considerations with which the executive must grapple in formulating policy. If the judges are to assume such a function - as sections 26, 27 and 28 (1) (c) of the text would require them to do - they would thereby enter the terrain of the executive. This would blur the

separation of powers between judiciary and executive required by Constitutional Principle VI.

2.5. The Constitutional Principles are of fundamental importance in the adoption of the text currently under consideration. In *Executive Council, Western Cape Legislature v President of the Republic of South Africa*,#37 the Constitutional Court cited the Preamble to the 1993 constitution in describing the Principles as a "solemn pact in accordance with which the elected representatives of all the people of South Africa [were] mandated to adopt a new constitution". In terms of section 71 of the transitional constitution, moreover, a new constitutional text - even though passed by the Constitutional Assembly by the requisite majority, as the text now under consideration has been - "shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles".

#37 1195 (4) SA 877 (CC)

2.5.1 The provisions of the text identified above do not comply with certain of the constitutional Principles, for the reasons earlier described. The text now under consideration is accordingly not capable of certification by the Constitutional Court in the manner required by section 71 of the Constitution of the Republic of South Africa, 1993.

THE SOUTH AFRICAN INSTITUTE OF RACE RELATIONS ("the Institute") requests that it be given the opportunity, in due course, to present oral argument to the Constitutional Court regarding the objection it has lodged to the certification of the text. The Institute will accept notice and service of all documents in these proceedings at the address provided in its written objection. (Reference: Dr A J Jeffery)

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS
J S Kane-Berman