The proposed Bill on Human Rights: The practical implications

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Introduction

The practical implications of a Bill on Human Rights are far-reaching but are at this stage not that easily discernible. The Government has in principle accepted protection of individual rights in the form of a Bill of Rights. This acceptance, however, also means that a new constitution be prepared for South Africa on the principle of universal franchise for all its citizens. The realisation of such a constitution will necessarily involve a consensual solution. The philosophy underlying a Bill of Human Rights will be of importance in practice. It is therefore important to briefly deal with such philosophy inasmuch as it would point to the practical implications for lawyers. The SA Law Commission has pointed out that as far as the advantages for South Africa of such a Bill are concerned, it will, amongst others, create a respect for human rights and therefore of mutual respect among individuals. It is also envisaged that it can serve as an economic stimulus. However, I have little doubt, and I am supported by a number of more knowledgeable people in this regard, that there is a real danger that the respect that the populace of this country will have for such a Bill will not materialise until and unless the climate of respect for human rights already exists. In the same vein, the whole object of a Bill of Human Rights will, in my view, be defeated, unless and until there is a stable economy with proper enforcement of law and order. There is therefore no doubt that any proposed Bill of Rights must have unimpeachable legitimacy with the highest possible degree of national consensus. Amongst others, and apart from any political considerations, the Law Commission has proposed that a Bill of Rights would be doomed to failure.

It is hardly necessary to stress the importance of the proposed Bill of Human Rights, not only to the country and its people generally but more particularly also to the legal profession. The Pretoria Bar Council therefore delegated one of its senior members, HJ Fabricius SC, to attend a seminar on the practical implications of human rights for legal practice held at RAU, Johannesburg, from 22 March until 9 May 1992. In view of the knowledge so gained and further research undertaken by him, Fabricius SC has very kindly prepared the article appearing below for Consultus. It is trusted that this contribution will serve to stimulate the interest of advocates and other lawyers in human rights.
if it is not preceded by a process of active education. It is clear that the legislature, the legal draftsman and all those concerned with legislation would have to get used to the idea that parliamentary sovereignty is limited and that not laws, but the law, rules. The judiciary would have to control and interpret the new constitutional document and obviously advocates, attorneys and law students would have to become acquainted with a whole new field. The courts would be able to declare laws contrary to the Bill of Rights invalid. It is, however, clear that a court does not have the capacity to put anything in the place of the law that is declared invalid. The implications are obvious. Uncertainty and confusion will reign. There may also be a perception that there is a large-scale conflict between the legislature and the courts in this respect. It was therefore proposed that a so-called purging of the statute book take place. According to the Law Commission, therefore, a Bill of Rights should be brought into operation only after such legislation is likely to be inconsistent with the Bill, has been removed from the statute book or amended appropriately. The idea then is that the formulation of a Bill of Rights and the purging of the statute book of conflicting provisions, should go hand in hand with the process of negotiation. As consensus is reached on each clause of the Bill, legislation conflicting therewith should be reviewed, and consensus should also be reached on the repeal or amendment of such legislation. This would obviously have to be a patient process. It is also clear that consensus cannot be expected to be reached on every point. In such cases the Bill of Rights would have to be modified and it would have to be left to the normal political process to point the way for the future. Finally, having taken these legitimising steps, the Law Commission proposes that a referendum be held on the new constitution which includes a Bill of Rights. In the light of all this, an Interim Bill of Rights has dangerous implications and could irreparably defeat all good intentions.

Types or categories of human rights

First generation rights

The rights included in this group are the political, civil and procedural rights. Typical examples are the following (obviously not being exhaustive): The right to life; the right to property; the right to freedom of movement; the right to freedom of speech; the right to privacy; the right to vote; the right to be represented in government; the right to assemble and to hold demonstrations; the right to citizenship; the right not to be arbitrarily detained; the right to legal representation and certain procedural rights. The German constitution and the Amendments to the American constitution contain the relevant examples of such Bills of Rights. The so-called first generation rights have gained international recognition and acceptance in the United Nations International Covenant on Civil and Political Rights of 1966 which came into operation during 1976.

Second generation rights

These rights are generally social, economic and cultural rights. First generation rights are negative in nature. The civil and political rights prohibit the authorities from doing something to the individual. Second generation rights (as well as third generation rights) impose obligations on the authorities to provide for a certain basic need. Their satisfaction depends on the resources the government has at its disposal; therefore the great controversy regarding the second generation rights concerns their enforceability. A number of jurists consider that these rights do not belong in a Bill of Rights because a government with insufficient means simply cannot fulfil its duties or comply with the created expectations. This, of course, can create strife, uncertainty, dissatisfaction and disrespect for the law and the courts.

In regard to the enforceability of these rights the emphasis must be on the fact that they are rights, alternatively that there is a duty on the State to provide these services. Legal philosophical or even moral debate on this point is, in my view, one aspect. The other aspect is, whether the necessary funds will now or in the future exist to satisfy expectations in this regard. In the present context of events in South Africa, and in the at least foreseeable future, no government is likely to be able to fulfil its duties in this regard. Examples of second generation rights are the following: The right to work and protection against unemployment; the right to equal pay for equal work; the right to rest, to adequate food, clothing, housing and medical care; the right to education and the right to freely participate in the cultural life of the community. There is obviously no clear and decisive dividing line between the first and second generation rights.

Third generation rights

Again there is no clear and decisive division and therefore one cannot absolutely categorize these rights. They do, however, not fit comfortably into either the first or second generation right schemes. The third generation rights include such rights as the right to peace, the right to self-determination, the right to have control over resources, the right to development and the right to a clean environment. There is, of course, also an argument that these third generation rights are not really rights at all. The argument in this regard is that these vague, poorly defined and non-implementable rights undermine the respect for genuine rights and therefore end up diminishing rather than augmenting human freedom. It should, however, be accepted, and especially by those lawyers active in the field of contract and delict, that rights have always evolved over a period of time, both in terms of their substance and their modes of enforcement. The traditional view of the protection of human rights is that protection should be expressed in negative terms in the sense that these rights may not be infringed. The difficulty arising with second and third generation rights, however, is the following: They call for action by the State – for positive implementation. The questions then are: How is this to be done? In what way is such a positive duty enforceable upon the State? The amalgamation of different logical categories of rights in one Bill of Rights will, according to a well-known jurist, have the following adverse effect:

... to push or talk human rights out of the clear realm of the morally compelling into the twilight world of the utopian aspiration.

Another jurist put it as follows:

It is only too easy to include all manner of aspirations within the category of rights and thereby to reduce practicable set of precepts, that may be given legal effect, into a vision of pie in the sky.
How then, and by whom, and in what way will these rights be enforced? It has been shown that the law simply lacks remedy for the enforcement of these kinds of rights. One of the possible legal means is a mandamus, but then again: How can a court issue a mandamus against a government to pass a particular law assuming that the wherewithal is at hand? How can a court ensure that a parliamentary majority will be obtained for the passage of such a law and will such a law, which is enforced upon parliament, in any event be legitimate? Mr Justice Didcott is of the following view:

Our society would be much improved, without a doubt, were these goals to be attained, and one cannot imagine anybody quarrelling for a moment with their pursuit. But the place where the commitment to these principles is a political programme, I venture to suggest, not a Bill of Rights. I say this because I have great difficulty in seeing how the commitment could be enforced and its enforcements supervised by legal processes, as distinct from those political . . . To expect from a Bill of Rights goods which it cannot deliver, goods which the likes of such are not designed to deliver, will not merely be futile but will be subjected to strains damaging perhaps to its capacity to perform the work it can do well . . . What matters most to the men and women living in Soweto, in Guguleto, in Kwamashu, is a full stomach, employment and training. It is there only the law should find a procedure for its realization, even if this entails reforming existing procedure.

The principles of State policy herein contained shall not of and by themselves be legally enforceable by any court but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The courts are entitled to have regard to the said principles in interpreting any laws based on them.

The Law Commission has, however, also pointed out, and in my view quite rightly, that the problems concerning the recognition and protection of the second and third generation rights are not problems of procedure only. What is involved here is a fundamental issue. In the Third World, and especially in Africa, the idea of human rights has consistently been evolving in times of enormous population pressure, poverty, unemployment and the under-development of infrastructure as regards housing, medical services, and so on. The primary needs of citizens are those of food, housing, employment and training. It is therefore somewhat pointless to tell the poor, the unemployed or the illiterate that they have freedom of speech when they are dying of hunger or exposure. For this reason the citizens of these countries have developed the view that fundamental rights include claims that the State must provide food, housing, employment and medical care. According to so-called western lawyers and constitutional experts, second and third generation rights belong more properly in the programmes of political parties or in a set of “directive principles”. The Law Commission was of the view that if there is a need for the recognition of a right, the law should find a procedure for its realization, even if this entails reforming existing procedure.

The stereotyped view of the State therefore becomes outdated once one accepts, in earnest, that certain sacrifices need to be made. This line of thought brings one to the question of affirmative action. The argument is that the granting of all second and third generation rights today to the black population of South Africa, would make little difference to the plight and lives of millions of citizens, since they have no opportunity to enjoy these rights. Action must therefore be taken “to bring them to their starting blocks or else nothing is going to be achieved, at any rate not in the foreseeable future”. Opponents of affirmative action then argue that it amounts to reverse discrimination because some would be favoured over others. One must, however, in this context realistically accept that the elimination of inequalities eventually leads to social peace. If affirmative action initially requires great sacrifices, that then is a fair price to pay. I personally must, however, add that realistic expectations in this regard must not be allowed to be sacrificed by a state of economy which simply cannot legitimately comply with such expectations.

Locus standi to approach the court

In South African law a litigant must prove direct interest or else he cannot litigate. Where the legislature prohibits an act that is clearly in the interest of persons or class of persons, anyone that is a member of that class may bring an action without it being necessary to prove specific injury. Where a prohibition is in the general interest, however, only those members of the public who can prove that they have suffered damage, may lay claim to a remedy. In order to protect human rights to the full, the Commission was of the view that a locus standi in terms of which any interested individual may act on his own behalf or on behalf of a particular group or class of persons without having to prove actual injury, should be recognised in the Bill of Rights. Such locus standi would not, however, be restricted, but should apply to all fundamental human rights. Because of its practical implications for the profession, the relevant clause (article 35(d)) is quoted in full:

Any individual, juristic person or association has the capacity on behalf
A general implementation clause

In a general historical context it is correct to state that a Bill of Rights serves only as a shield against government action and not as a sword to define rights. However, in the area of second and third generation rights, the traditional view is outdated and these rights in fact point to the State having a duty. This point has been briefly mentioned above. The deficiency in this context lies in the failure to declare that the State also has a duty to promote these rights. According to the Namibian model, for instance (as well as the Indian model), a set of "directive principles" are laid down in the constitution to serve as a guide to the administration of the State. The Commission's view on the so-called "promotion clause" is that it reminds the legislature of the duty not only to respect and tolerate human rights but also to promote them. Such a clause will therefore apply to all human rights and not only to the so-called socio-economic rights. Such a clause will then also not exclude the possibility of later development in which positive and justiciable duties are in fact imposed on the State with regard to certain important human rights. Such a clause can therefore prepare the way and create the right climate for such a development. The following clause was thereupon recommended and -- again because of its practical implications for lawyers -- it is quoted below in full as the new article 38 of the proposed Bill of Rights:

Apart from the duty of all legislative and executive and administrative institutions of the State not to infringe the fundamental rights set forth in this Bill, all the said institutions shall use those fundamental rights as guidelines in instituting and carrying out legislative programmes and executive and administrative planning and action for the promotion of those rights.

Certain specific clauses

It is of course not practicable to comment on each and every clause suggested in the proposed Bill of Rights, even inasmuch as it might be of assistance to colleagues and other legal practitioners. Certain clauses and their implications will, however, be dealt with as briefly as possible without indicating any personal preference or that others deserve less debate. Certain objectors to the Commission's original draft Bill were of the view that it should formulate fundamental rights in more detail, whilst others considered that it should be shortened to establish only broad and general principles. It is, however, not possible or even desirable to formulate a Bill of Rights that does not contain flexible criteria to a greater or lesser extent.

Fundamental rights

The intention of the Law Commission was clearly to create a valid statutory provision. If it is intended to avoid confusion between human rights and civil rights, the ground rules must be laid down in a substantive article. The rights mentioned apply against the State and it is on that basis that they are justiciable. The Bill itself must set the parameters for limitation and suspension. The preamble was therefore reformulated and incorporated as a substantive article (new article 1) as follows:

Fundamental rights

The rights set forth in this Bill are fundamental rights to which every individual, and where possible, also every juristic person in South Africa is entitled in relation to legislative and governmental bodies, and save as otherwise provided in this Bill, those rights shall not be circumscribed, limited, suspended or infringed by any legislation or executive or administrative act of any nature.

The right to life

The Commission has proposed as the new article 2 that:

Everyone has the right to the protection of his or her life.

This article, of course, involves the question of the death penalty. The question is always, and has always been, highly controversial. The view of the Commission in this respect is, to me, inexcusable. What is at issue is not the personal conviction of any particular jurist or member of the public or member of the team negotiating the constitution, but the question of establishing what is in the general interest of this country. Having considered all relevant aspects, the Commission was of the view that a Solomonic solution was necessary: A middle course of the retention of capital punishment and its abolition should be chosen in the proposed Bill of Rights. Simply doing away with capital punishment seemed to be inappropriate unless convincing proof was produced that this was the proper course to take. It was therefore considered that the following solution would best serve the national interest:

☐ The right to life must be recognised as a fundamental right;
☐ Normally all rights referred to in the Bill are subject to limitation or circumscription;
☐ The circumscription mechanism which may be used by the legislature to limit rights, must be contained in legislation of general force and effect.

Circumscription should only be permissible in so far as it is reasonably necessary for considerations of State security, the public order and interest, good morals, public health, the administration of justice, public administration, and the rights of others for the prevention and combating of disorder and crime. Circumscription must also be made justiciable by the courts. It must therefore be possible for legislation involving this question to be tested against the criteria laid down. The proposed constitutional court would then be able to decide whether the death penalty in any particular case is justifiable on the facts. It could then very well happen, according to the decision of the court, that the death penalty is ruled to be completely unconstitutional, or that it is unconstitutional in the case of certain forms of crimes only. The solution suggested was that the question of capital punishment should be seen in the correct perspective, namely as a limitation to the right of life, and that the court must exercise its proposed testing competence in accordance with the limitation clause which is of general force and effect. The draft Bill
therefore does not express itself for or against capital punishment, but leaves it to the court to deliver a finely balanced judgment in the light of inter alia empirical evidence. What has been said about capital punishment on this point of course also applies to other legislation which justifies the taking of a human life, ie section 49 of the Criminal Procedure Act, which provides that a fugitive who resists arrest or tries to escape may justifiably be killed in certain circumstances. (The same criteria should also apply to the taking of a life for reasons of self-defence of body or property.)

Abortion

The present position in our law is stated in the Abortion and Sterilization Act 2 of 1975. Again there are certain moral, religious and legal problems surrounding the issue of abortion and the literature is extensive, especially in German and American law. The same considerations which apply to capital punishment should then also apply to abortion. The United States Supreme Court has recently again delivered a judgment on this point with specific reference to the landmark decision of Roe v Wade 410 US 113 and this is a useful judgment to read on the varying points of view that were considered. It is interesting to note that the German Constitutional Court recently interdicted Parliament from passing a new "liberal" statute concerning abortion, until it (the Court) had fully considered the legality thereof vis-a-vis the German Basic Law. The question arises whether our proposed Constitutional Court should not be given similar powers.

The equality clause

Again, because of its undoubted practical implications in litigation, the proposed new clause (a new article 3) is quoted in full:

(a) Everyone has the right to equality before the law, which means inter alia, that save as permitted in this Article, no legislation or executive or administrative act shall directly or indirectly, favour or prejudice anyone on the ground of his or her race, colour, sex, religion, ethnic origin, social class, birth, political or other views or disabilities or other natural characteristics.

(b) To this end the highest legislative body may, by legislation of general force and effect, introduce such programmes of affirmative action and vote such funds therefor as may reasonably be necessary to ensure that through education and training, financing programmes and employment all citizens have equal opportunities of developing and realising their natural talents and potential to the full.

(c) The provisions of Sub-Article (a) hereof shall not be construed as making it compulsory for any female person to perform military service.

The General Council of the South African Bar was not opposed in principle to affirmative action, but is against it if affirmative action is aimed at promoting unqualified or semi-qualified persons to important posts simply because they are members of population groups that have been discriminated against in the past. It was amongst others also proposed that a court should be granted powers to order affirmative action as happens in the USA. The Commission declined to follow this invitation. The most important reason being that it is not normally the function of the court to recommend positive action, and that the draft Bill of Rights is in any case intended only to provide negative protection for individuals; ie the fundamental rights may not be infringed by the authorities. The Commission also had little doubt that the greater part of the South African population would not be in favour of a Bill of Rights in which no provision was made for affirmative action. Again a balance had to be maintained between the potentially negative consequences of affirmative action and its potentially positive effects. The Commission carried out extensive research on affirmative action in various countries. It appeared that programmes of affirmative action evoked strong resistance and have in fact not succeeded in noticeably improving the position of minority groups in the USA. In international law affirmative action is recognised as not being discriminatory, as long as it is temporary and as long as it is not enforced against the will of the minority. Affirmative action programmes must therefore be implemented very carefully if reverse discrimination is to be prevented.

In the United States affirmative action has the following facets:

Actions by the State: The question is whether legislative or executive programmes launched by the State are valid. The problem is that such programmes may be seen as reverse discrimination which in itself is contrary to the non-discrimination injunction. The United States Supreme Court held in 1978 that no such programme could be valid unless it stemmed from proven discrimination past, present or future.

Actions by individuals and non-State organisations: It is interesting to note that the United States Supreme Court in 1979, in a case where a private employer instituted an affirmative action in terms of which one-half of the available vacancies were reserved for members of a minority group, ruled the programme to be lawful. The court ruled that the programme was valid provided that it does not unnecessarily infringe the rights of the group of employees who do not benefit by them, for example by terminating or by withholding their promotion.

Educational preparation: In certain circumstances, and in accordance with the Civil Rights Act of 1964, the Federal Government may prescribe that contractors implement affirmative action programmes. One of their phenomena is the following: Both governmental and privately sponsored activity designed to remedy the absence of needed educational preparation by special, even if costly, primary, and/or secondary school level preparatory programmes or occupational skill development, always provided that access to these programmes is not bottomed upon race or related group criteria or characteristics, but upon educational or economic need.

Indian constitution

The Indian constitution provides for affirmative action in favour of women, children, schedule castes and scheduled tribes. The main affirmative action programmes of India deal with the quotas for employment in the civil service and quotas for admission to educational institutions. One of the most serious criticisms of the Indian system is that such a programme has given rise to large-scale economic abuse. Even the well-to-do and already protected members of a caste share in the benefits of a programme...
 whilst they do not need those benefits. There is little doubt too that affirmative action programmes more often than not are of doubtful success. Such action has often also given rise to deep divisions in society.

The Commission therefore considered the lessons to be learned from the application of affirmative action under other constitutional systems, being that it can only be justified in so far as it is aimed at the realisation of the principle of equal opportunities for all. The object, therefore, ought to be that legislation authorise special programmes to guarantee that all members of society are afforded equal opportunities of realising their potential. One should therefore view affirmative action not as one of reverse discrimination or retribution but a vigorous programme of upliftment and guarantees of equal opportunities.

The right of an arrested person
Because of its practical implications, the following proposal of the Law Commission (article 6) is quoted in full:

Everyone who is arrested has the right –
(a) to be detained and to be fed under conditions consonant with human dignity and to receive the necessary medical treatment;
(b) to be informed as soon as possible in a language which he or she understands of the reason of his or her detention and of any charge against him or her;
(c) to be informed as soon as possible in a language which he or she understands that he or she has the right to remain silent and the right to refrain from making any statement and to be warned of the consequences of making a statement;
(d) within a reasonable period of time, but not later than 48 hours or the first court day thereafter, to be brought before a court of law and to be charged in writing or informed in writing of the reason for his or her detention, failing which he or she shall be entitled to be released from detention unless a good cause shown a court of law orders further detention;
(e) to be tried by a court of law within a reasonable time after arrest and pending such trial to be released, which release may be subject to bail or guarantees to appear at the trial, unless on good cause shown a court of law orders further detention;
(f) to communicate and consult with a legal practitioner and a medical practitioner of his or her choice;
(g) to communicate with and to be visited by his or her spouse, family, next of kin, religious counsellor or friends, unless a court of law otherwise orders.

It needs little imagination to realise that this proposed clause will open the door to far-reaching amendments to the present Criminal Procedure Act and other legislation infringing a person’s rights vis-à-vis the State under circumstances where he is suspected of an offence. The Department of Correctional Services especially will have to pay urgent attention to sub-clause (a). Again the Department of Justice must pay urgent attention to sub-clause (f) as regards the availability of a legal practitioner and a medical practitioner should the accused be indigent.

The right of an accused person
The Commission’s proposed article 7 reads as follows:

Every accused person has the right –
(a) not to be sentenced or punished unless he or she has had a fair and public trial before a court of law in accordance with the rules of procedure and evidence generally in force;
(b) to be presumed innocent until the contrary is proved by the State or other prosecutor;
(c) to remain silent and to refuse to testify at the trial;
(d) not to be convicted or sentenced on the ground of evidence so obtained or presented as to violate any of the rights under this Bill of the accused person or of the witness concerned or of any other person, unless the court, in the light of all the circumstances and in the public interest, otherwise orders;
(e) to be represented by a legal practitioner;
(f) to be informed by the presiding officer –
(i) of his or her right to be represented by a legal practitioner;
(ii) of the institutions which he or she may approach for legal assistance;
and to be given a reasonable opportunity to endeavour to obtain legal assistance: Provided that failure or neglect so to inform an accused person or to give him or her such opportunity shall not result in the setting aside of the proceedings unless on appeal or review the court finds that justice was not done;
(g) not to be sentenced to an inhuman or degrading punishment;
(h) not to be convicted of a crime in respect of any act or omission which at the time when it was committed was not a crime and not to be given a sentence more severe than that which was by law applicable at the time when the crime was committed;
(i) not to be convicted of any crime of which he or she has previously been convicted or acquitted, save in the course of appeal or review proceedings relating to that conviction or acquittal;
(j) to have recourse, on appeal or review, to a higher court than the court of first instance: Provided that the legislature may prescribe that leave to appeal shall be first obtained;
(k) to be informed in a language which he or she understands of the reasons for his or her conviction and sentence;
(l) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her;
(m) to be sentenced within a reasonable time after conviction.

Again it needs little imagination to realise that the present text books on criminal procedure and the law of evidence relating to an accused person will be of little, if any, assistance after the coming into operation of the Bill of Rights. As far as the exclusionary rule (d) is concerned, the Commission was of the view that judging by the American/Canadian experience, the qualified rule appeared to be sound. The test for admissibility, however, should be “public interest”. The right to legal representation per se does not require much comment. It does, however, become of extreme importance in the case of an indigent accused. It is clear that it is of no use to the unsophisticated undefended accused merely to be informed of his right to legal representation. Although it is a salutary move, I have serious doubts whether it is in fact sufficient that the accused is informed that he can approach certain instances for State paid or other legal aid unless his legitimate expectation that such assistance would, from a financial point of view, in fact be available, is reasonably satisfied. It seems to be uncontroversial amongst legal practitioners that there is a definite and pressing need for real – and not illusory – legal aid in South Africa.

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The Commission stated that the form
legislation or administrative or executive
likely to have adverse consequences
Administrative law
visions will have to be purged so as
well as the Investigation of Serious
entrenched. This means that the
court for review is therefore
other interrogations which are most
likely to have adverse consequences
for the person involved, are also
intended to be covered.

Administrative law
The Law Commission has proposed
the following provision as article 31:
Everyone has the right to have civil
disputes settled by a court of law and
to have recourse to the Supreme
Court to review, by virtue of its inhe­
rent jurisdiction, any subordinate
legislation and any executive act and
any administrative act.
The Commission stated that the form
of review to which the article relates
is the inherent right of review of the
Supreme Court and not the right of
review flowing from a statute. The
inherent right of review of the Supreme
Court is also unconnected with the
testing right relating to legisla­tion
or administrative or executive
acts by virtue of a Bill of Rights. The
right of a citizen to approach the
court for review is therefore
entrenched. This means that the
legislature or executive may not
infringe this right, otherwise than
under the legislative powers of limi­
tation and suspension which apply in
the case of all the other fundamental
rights. Legislation which therefore
excludes, by exclusionary clauses, the
right of review as it exists at present,
or limits it, will be invalid in terms of
the Bill of Rights. If in future the
legislature wishes to introduce further
grounds for review which will extend
the rights of the citizen, such legisla­tion
will not infringe the said funda­
mental rights and it will be possible
to do this without having to amend
the Bill of Rights. The so-called
quasi-judicial acts are now included
under the genus “administrative acts”.
Certain grounds for review in the Bill
of Rights as the only grounds for
review are not enumerated, as this
would “freeze” the legal position in a
field where healthy development
through decisions of our courts is
taking place regularly and where such
development is essential. One only
has to read the decision of the Appeal
Court in Administrator, Transvaal v
Traub 1989 (4) SA 731 (A) to appreci­
ate this point.

The rules of natural justice
The Law Commission has proposed
the following article (32) in this
regard:
Everyone has a right to have the rules
of natural justice applied in adminis­
trative proceedings and actions in
which, on the grounds of findings of
fact and of law, the rights or legitimate
expectations of an individual or a
group are infringed, or likely to be
infringed, and in such cases every per­
son having an interest in the matter
has the right to be furnished on
demand with the reasons for a
decision.
It is the view of the Commission that
the present valid rules of positive law
be incorporated into the Bill of Rights
as a fundamental right. The Com­
mission has as its project 24 an inves­
tigation into the courts’ powers of
review in respect of administrative
acts. The question whether the rules
of natural justice should be extended
to other categories of administrative
acts will therefore find attention
therein. For present purposes the
fundamental right of the rules of
natural justice being applicable in
quasi-judicial proceedings is estab­
lished. The proposed article of the
Law Commission follows the judg­
ment of the Appeal Court in Adminis­
trator, Transvaal v Traub (Supra).

Limitation or
circumscription clause
The Law Commission has proposed
a new article which reads as follows:
34(1) With the exception of the rights,
procedures and institutions referred to
in articles 1; 3; 4(b) and (c); 5; 6(a) to
(e) inclusive; 7; 8; 9(b); 11; 16(c) and
dy); 17; 18; 19; 20; 21; 22(b); 24(a)
and (b); 31; 32; 34; 35; 36; 37; 39; 40
and 41, the rights, procedures and
institutions set forth in this Bill may
be circumscribed by legislation of
general force and effect: Provided that
such circumscription –
(a) shall be permissible only in so far
as it is reasonably necessary for
considerations of State security,
the public order and interest,
good morals, public health, the
administration of justice, public
administration, or the rights of
others or for the prevention or
combating of disorder and crime;
and
(b) shall not derogate from the
general substance of the right in
question.
By way of summary the present views
of the Commission are as follows:
A separate article should be in­
cluded for circumscription of the
fundamental rights by legislation of
general force and effect.
Circumscription is appropriate to
legislation of general force and
effect exclusive of a state of emer­
gency or a state of war with which
article 34(2) is dealing.
Circumscription is permissible
only for considerations of state
security, public order, the public
interest, good morals, public
health, the administration of
justice, public administration,
the rights of others or the prevention
of disorder or crime.
Certain rights cannot be circumscried
in this way at all, namely
the right to physical integrity, the
right to non-discrimination, the
right not to be subjected to forced
labour, the right to protection of
the integrity of the family, the
right to freedom of choice with
regard to education and training,
the right relating to passport and
exile or expulsion from South
Africa and the right to emigrate,
the right to private property, the
right to vote, the right to freedom
of religion, language and culture,
the testing right of the courts, as
well as the procedural rights.
Circumscription may not affect
the general validity of these or
other circumscribable rights. A
fundamental right may therefore
be circumscribed in particular
respects. But the existence of the
right as a general invalid right
may not be extinguished. All cir­
cumscription must be testable by
the courts in the manner pres­
cribed in the Bill.
What is reasonably necessary is to
be a criterion used in such testing.
It is clear that the courts will again
have substantially new litigation before them, especially as regards the question whether circumscription is permissible in view of the considerations mentioned.

**State of emergency**

The Law Commission has proposed a new provision as article 34(2) dealing with the suspension of rights set forth in the Bill of Rights and prescribing how such suspension shall come into force. It is interesting to note that the ANC draft Bill on Human Rights makes no provision for a state of emergency, nor does it provide, if a state of emergency is declared in terms of article 15(2) of that draft, for control thereof in limitation of the powers of the State. This was the Law Commission completely unacceptable. Article 34(2)(b)(v)(bb) makes provision, albeit on a limited basis, for detention without trial. This principle has on numerous occasions been debated in every possible forum and I do not intend referring thereto. I am as a matter of principle totally opposed to detention without trial, be it on the limited seven day period as proposed by the Law Commission, or be it by way of an order of court. Will we ever learn from history?

**Violation of the rights and the role of the courts**

The new article 35 proposed by the Law Commission makes provision for a declaration invalidating any law, enactment or regulation of whatever nature which exceeds any of the circumscriptions or suspensions permitted by the Bill of Rights or which violates any of the rights set out in the Bill. It is proposed that any court in which an alleged violation or access is raised shall be competent to pronounce judgment thereon. The constitutional chamber of the Appellate Division shall hear all appeals before the Appellate Division in which, in the opinion of the Chief Justice, the only or main issue or issues arise from the provisions of the Bill of Rights, the other provisions of the Constitution Act, the constitution in general and executive and administrative acts. The Chief Justice shall therefore place all appeals to the Appellate Division on the roll of either the general chamber or the constitutional chamber. It is further provided that any individual, juristic person or association has the capacity to test the validity of any legislative, executive or administrative act by applying to the appropriate division of the Supreme Court for a declaratory order notwithstanding the fact that the applicant is able to prove only an indirect interest or indirect prejudice.

A number of proposals were made to the Law Commission in regard to the establishment of a constitutional court. The views were that the various divisions of the Supreme Court, as presently constituted, consisted solely of whites and that, for the foreseeable future, there will not be a significant representation of other groups on the Bench. That would mean that a large part of the population would not have full confidence in the interpretation and application of the Bill by any division of the Supreme Court. However, the suggestion was raised that a constitutional court be established that can be constituted in such a way that one or more members of other groups are also represented. It was therefore proposed that the idea of the constitutional court be retained, but that that court form part of the Appellate Division in all respects, so that all the rules of the law of procedure which at present apply to the Appellate Division would also apply to the said court. It was suggested that the Appellate Division be constituted of two chambers, namely a general chamber and a constitutional chamber. The constitutional chamber would deal with all issues arising from the Bill of Rights, the Constitution and the field of administrative law. The Chief Justice would be given a discretion to sit in either of the two chambers. A Deputy Chief Justice would be appointed for each chamber and some judges of appeal to the general chamber only, others to the constitutional chamber only and some to serve in both. In exceptional cases it could happen that the general chamber rules on a subsidiary constitutional matter or that the constitutional chamber rules on a subsidiary general matter. This would seem to be unavoidable but would not present any practical problems because each judgment would be a judgment by the Appellate Division.

A controversial proposal was the following: Judges who will serve in the constitutional chamber would be appointed in the same manner as the other judges of appeal but not from the ranks of practising advocates or existing judges only. It has been suggested that it is an arrogant affront to be of the view that only practising advocates or existing judges can properly rule on constitutional matters, or in fact, that only they should in any event be appointed to the Bench. I do not intend entering into a debate on this point. I will limit myself to the following observations: It is my experience and those of others who have practised law all of their adult life that it takes a certain training – including practical training – in the profession and by life (not that one excludes the other) that enables one, irrespective of one’s personal views, to arrive at a decision objectively, and this can only be to the advantage of society. I do, however, agree that a judicial committee be established that will appoint judges in the future and that this committee will also appoint judges of appeal, be it to the general division or the constitutional division. I do, however, not wish to be heard to say that I support the notion of a constitutional chamber of the Appellate Division. (See the first editorial in (1992) 5 Consultus 2 and Gilbert Marcus’s letter under “Letters” in this edition.) In my experience and provided that appointments to the Appeal Court are made strictly on merit, the Appeal Court with its vast experience in every facet of law, is clearly capable and competent enough to rule on issues of a constitutional nature.

It is further proposed that although the constitutional chamber would be an integral part of the Appellate Division, it would not be possible to lodge an application with that chamber in the first instance. Each application, action or appeal would have to follow the normal course through the existing structure of the courts.

A further crucial point seems not to have been debated: it need first to be decided whether the present hierarchy of courts would function in a unitary or federal State. In the United States, under the federal system, every State is the final authority on the meaning of its own laws. The United States Supreme Court (in South Africa it would be the Constitutional Court/Appeal Court) has no authority whatsoever to alter the definitive interpretation of state law by a state court. It may only evaluate its constitutionality as it has been interpreted by the state court. (See also the article “The courts in the new South Africa” by V G Hiemstra.
elsewhere in this edition. The executive and legislative branches of government should not be considered in isolation; indeed it is of vital importance that the third branch of government—the judiciary—should be considered in conjunction with the other two branches at Codesa or other constitutional talks.—Editor)

The Human Rights Commission

It is proposed that because Parliament has a special responsibility for ensuring that the basic, social, educational, economic and welfare rights set out in the Bill of Rights are respected, it should establish by legislation a Human Rights Commission to promote observance of the Bill of Rights. Such Commission shall have the right to establish agencies for investigating patterns of violation of any of the terms of the Bill of Rights and for receiving complaints and bringing proceedings in court where appropriate. The Commission shall also monitor proposed legislation with a view to reporting to Parliament on its impact on the realisation of the rights set out in the Bill of Rights. It is obvious that such a Human Rights Commission can play a major role in ensuring that the ideals aimed at by a Bill of Rights are attained. It is therefore of crucial importance that however the Commission is constituted, its members should have the respect of the community at large. It is equally important that the community should be properly represented on the Commission. It would, however, have to be ensured that the Commission does not become a ponderous and bureaucratic arm of the civil service but that it can act efficiently, with speed and incisively. Again the necessary funding in this respect should be available and seen to be available. It should also not be seen as an organ of the State but rather as an organ of the public. Hopefully, it is envisaged that the Human Rights Commission will consist of a small body of lay people with however appropriate qualifications and experience. In this regard it is my proposal that a lawyer of the highest integrity and standing be appointed as a permanent legal adviser to the Human Rights Commission. The Commission should possibly also have the power to approach the Appellate Division for an order interdicting the passing of legislation which prima facie seems to encroach upon the Bill of Rights.

The operation of the Bill of Rights as between individuals (German: Drittwirkung)

The question is: What effect do the provisions of a Bill of Rights have on the relations between individuals or what effect should be given to them? The traditional view is that a Bill of Rights operates vertically only, in that it regulates the relation between the State and the individual. Many of the basic rights recognised in the Bill of Rights are well-known existing rights. However, certain particular rights, once brought within the ambit of positive law in a Bill of Rights, will also operate in some form or another in relations as between citizens. The practical question is whether or not such operation should be regulated or limited in the Bill of Rights. The Bill of Rights in the German constitution does only have mediate (indirect) but not immediate (direct) "Drittwirkung". The restraints emanating from the constitutional rights and freedoms of the individual apply to the powers of governmental administration and legislation only, and do not govern the rights and duties of a person in private law relations. When, however, interpreting all legislation, including Acts regulating matters of private law, the courts are required to take cognisance of the provisions of the Bill of Rights and as far as possible to give such legislation the interpretation that coincides with the juridical values embodied in the constitution. The premise in the Commission's proposed Bill of Rights regulates the "vertical" relation between State and subject. The affirmative action which was suggested specifically provides for the central legislature to enact specific laws in various fields that influence relations between individuals. It has also foreseen the possibility of the legislature, if so advised, introducing legislation in the form of a Civil Rights Act, by which relations between individuals would be brought in line with provisions of the Bill of Rights. The proposed Bill of Rights therefore leaves the same latitude as that provided for in the USA Bill of Rights: According to current American opinion not all provisions of the Bill of Rights are aimed against "State action". It was held in 1968 (392 US 409) that the Thirteenth Amendment was free from this "obstacle" and could therefore be implemented in private law relations; and although the Thirteenth Amendment simply prohibited slavery and involuntary servitude, the courts subscribe to the view that its provisions could be extended to cover almost all instances of racial discrimination as manifestations of the badges and incidents of slavery. The Thirteenth Amendment has provided the avenue for outlawing racial discrimination practised by public authority as well as by private persons. The SA Law Commission was therefore of the view that a court should be given the opportunity to develop its own approach with regard to the question of the "private" implications that a Bill of Rights will have. The German rule, namely that the courts must have regard to the Bill of Rights in the interpretation of all other legislation, and must bring the interpretation into agreement with the Bill of Rights as far as possible, is, however, a sound one and an essential principle. The Commission also considered that such an interpretation rule was sound because harmony and uniformity should prevail in the field of law. The legislature cannot in the same breath, protect and not protect human rights. Such an interpretation rule was further essential since there would probably be a good deal of legislation on the statute book after the adoption of the Bill of Rights, which would regulate only the relations between people, but which would then have to be re-interpreted in the light of the entirely new approach. There is also no denying that everyone who is affected by the Bill of Rights and who acquires rights under it, must at the same time incur the obligation in respect of the similar rights of others. The Commission's proposal in this regard (article 39) reads, therefore, as follows:

(a) The rights set forth in this Bill shall be exercised by every individual in such a manner as will not infringe the rights granted under this Bill to any other individual.

(b) In the interpretation of all legislation, including legislation regulating only the relation between persons, the court shall have regard to the provisions of this Bill and shall as far as may be appropriate construe the said legislation in a manner consonant with the values enshrined in this Bill.
The second generation rights and directive principles

The second generation rights are inter alia the right to work, the right to social security, the right to an adequate standard of living, the right to the enjoyment of the highest possible standards of physical and mental health, the right to the protection and assistance of the family and maternity and the right to education, and the right to participate freely in cultural life. The question has briefly been touched upon as to how the socio-economic rights should be enforced in practice. The so-called socio-economic rights can be systematized as follows:

- Social security rights;
- Employees' rights;
- Employers' rights.

Social security rights are those rights to which everyone is entitled, whether as an employee or not. Generally accepted social security rights are the following: the right to work in accordance with the rules of supply and demand and the freedom to avail oneself of the available employment opportunities; to be allowed to make provisions for expenses arising from mental or physical illnesses, maternity expenses, unemployment, unfitness and old age; to be allowed to make provision for the maintenance of a reasonable standard of living; to make provision for his proper training and education, and so on.

In the present context of South African law, it is noteworthy that one of these so-called rights is the right to take part in strikes and to withhold labour. An employer's rights will include (having drawn a balance between the rights of the employer and those of the employee) the right in accordance with the common law or a relevant statute, whichever applies, to terminate the services of an employee. It would also include the right to lock out employees from the workplace. Again, how are these conflicting rights, or even where they do not conflict, to be enforced? I have referred to the view of Mr Justice Didcott in this regard. The Commission was opposed to a so-called chapter on directive principles. The main objection lies in practical politics. It is rather unlikely that consensus is going to be reached on socio-economic ideals and principles between even the main negotiating political parties and organisations. This could wreck the whole process of negotiation and plunge the country into chaos, while the matter need not have been the subject of dispute in the first place. Therefore, much as one would like to see a compromise, the compromise of directive principles is no compromise because it poses a great danger for South Africa. The option open to the Commission would be to recognise certain fundamental socio-economic entitlements as human rights in the stereo-typed familiar sense, i.e. that the individual has certain liberties which the State may not infringe, save as provided for in the Bill. There is no obligation on the State to fulfil the entitlement, but there is an obligation not to violate it or put it in jeopardy. Where a "right to work" is referred to, there would be no obligation on the State to provide work for a particular individual, but the State would not be able to pass any law which unreasonably makes it impossible or difficult for the individual to obtain employment. Viewed in this way, the "right to work" would be treated in exactly the same way as the so-called first generation right, namely the "right to a good name". The State cannot give anyone a good name if she or he does not have a good name, but the State may not damage anyone's good name or his or her potential for securing a good name. Viewed in this way, therefore, all the fundamental rights are placed on an equal legal basis. The Commission, therefore, incorporated certain socio-economic rights into the Bill. It is of interest to note that in terms of this proposal every employee has a right to take part in strikes and to withhold labour and not be subject to unfair labour practices. The employer on the other hand, has the right to terminate the services of the employee in accordance with the common law or in accordance with his or her contract of employment with the employee, or in accordance with any relevant enactment, whichever of these or whichever combination thereof applies. The employer would also have the right in accordance with the law to apply the principle of "no work no pay". The employer would furthermore have the right to run his or her business, particularly with a view to its economic viability and continued existence. The employer would also have the right to be protected from unfair labour practices such as intimidation and victimization. It is obvious that a fine balancing act would have to be performed by any court should a dispute arising from the contents and extent of these rights come before it. I must mention in this context that not even the International Labour Organization recognizes or promotes "a right to strike" in essential services, provided such services are properly but restrictively defined. In this context, the recent hospital strikes would simply have been unlawful ab initio. I therefore recommend that the Commission's proposal in this regard be reconsidered.

Protection of the environment

A subject of particular importance to me would be the protection of the environment in a new constitution – a so-called third generation right. I am limited by space but the following can briefly be put: There is no numerus clausus of human rights. Human needs and aspirations have developed so strongly that their denial evokes moral outrage, and society is therefore obliged to enact them in positive law as justiciable rights. There is no doubt that man's need for the protection and conservation of the environment is far advanced. Ad hoc legislation in this regard is only half-hearted and does not fulfil the human aspirations. There is therefore little doubt that the right to the environment should be enshrined as a human right in the proper sense of the word in the constitution. The lack of competence to compel the legislature to pass sensible and effectual laws does not warrant denying the existence of this right. Obviously, unlike other rights, the right to the environment as a human right cannot exist without some limitation.

The formulation of the right should also present no difficulty: Firstly, there is a present need. Our statute book contains 68 Acts of Parliament dealing with environmental matters which are administered by twelve departments of State. Secondly, there is a compelling need to protect and conserve the environment for future generations and for the continued existence of a planet that is environmentally more secure. The Commission has therefore proposed a clause that reflects both needs:

Everyone has the right not to be exposed to an environment which is dangerous to human health or well-
The right to be taxed in an equitable manner

It is obvious that there is great potential for conflict not only as to how the future economic cake would be divided amongst the South African people, but also as to where the ingredients to bake the cake would come from. According to the socialist approach of redistribution of wealth, everyone who is liable to tax progressively pays tax to the State in accordance with his means and all subjects receive State services in accordance with their needs. The capitalist approach again provides that the person liable to tax may also claim the extent of State services that he can afford. According to this approach the prosperous tax payers will receive a higher level of services than the poor ones. According to the "horizontal equality" approach, those liable to tax who earn the same income are obliged to pay the same amount of tax, if the criterion used is the taxpayer's income base. According to the "vertical equity" approach, taxpayers who are economically unequal should have unequal tax obligations and those who have higher incomes would have a higher degree of tax liability. The Law Commission has recognized that taxpayers cannot be burdened with a drastic tax obligation without this resulting in conflict. Although there are calls for the redistribution of wealth, it can hardly be imagined that the present progressive rate of taxation should be increased even more drastically so as to generate higher revenue for redistribution, without sacrificing harmony. The Commission suggests therefore that it be constitutionally provided that taxes may be levied only by the highest legislature, such legislature to have the power to delegate certain kinds of taxes to other bodies, for example tax on property. As regards general income tax, the legislature must have the choice between equal proportional taxation or progressive taxation, with a set limit in both cases. The Commission does, however, not consider that this matter belongs in a Bill of Rights but rather in the chapter of the constitution dealing with fiscal policy. It will, however, be interesting to see whether a general constitutional proposal dealing with fiscal policy will conflict with any specific human right as contained in the Bill of Rights.

A screening process

The question has been raised as to whether a Bill of Rights should not provide for a screening process to limit or select human rights litigation. Most of the jurists that discussed this question are in fact of the view that such a screening process was desirable. It has been stated that because the Commission gave the courts testing rights regarding legislation and executive and administrative acts, there was a real danger of the courts, particularly during the initial years after the commencement of the new constitution, being swamped or even incapacitated by the number of applications, hearings and appeals arising from the Bill of Rights. Should there, therefore, not be some sort of screening process to ensure that only cases of genuine merit and general importance come before the courts? In Britain it has been proposed that a three member panel of a nine member constitutional court should consider the following:

- Are there sufficient grounds for bringing the application?
- Does the court consider the enactment wholly or partly invalid?
- Does the court consider the enactment to have ceased to be of force?
- Has the applicant a sufficient interest in the proceedings?

According to this proposal, the granting of leave by the constitutional court is a prerequisite for deciding the issue, unless another court has referred the issue to the constitutional court for a decision. In the United States there is a mandatory Appellate jurisdiction of the Federal Supreme Court under which any party may bring a case concerning a constitutional issue before the Supreme Court. This right of appeal is, however, limited to important constitutional disputes such as:

- cases in which a federal court, including a district court, has held an act of congress to be unconstitutional, so long as the Federal Government is a party;
- cases in which a federal court of appeal has held a statute to be invalid on the ground of being repugnant to the constitution, treaties or laws of the United States;
- cases in which the Supreme Court of a State has drawn into question the validity of a treaty or an act of congress and found it to be invalid;
- cases decided by special federal district courts, consisting of three judges, when a proceeding has been initiated to enjoin either a federal or a State's statute on the ground of its unconstitutionality.

In all cases where there is no right of appeal or mandatory right of appeal, cases may reach the Federal Supreme Court by way of petitions for certiorari to review a case. The courts do not automatically hear petitions for certiorari. This jurisdiction is discretionary — when there are special and important reasons for granting review. Certiorari is allowed in the following circumstances:

- When an important question of
federal law is involved in regard to which the Federal Supreme Court has not previously given a decision;

☐ When lower courts have given conflicting interpretations of a federal law;

☐ When lower court decisions conflict with previous Federal Supreme Court decisions;

☐ When lower courts have departed from the accepted customary course of judicial proceedings.

The Commission was of the view that the procedural principles established over the years in our law of civil procedure still ought to apply, for example that the court should have jurisdiction, that the claimant or applicant should have locus standi and, in an application for leave to appeal, that there are reasonable prospects that the appeal will succeed. It has already been mentioned that the locus standi requirement has to be relaxed to some extent in order to facilitate access to the courts in matters pertaining to human rights. The Commission is against the notion of the legislature prescribing the principle of the separation of powers and the right of an individual or group to appeal to the courts, as this may be undermined. The proposal that a constitutional point arising in the course of any proceedings will be heard by the court in which it originates then has the implication that there is an appeal to the Supreme Court. There is therefore no reason why the normal procedure in this regard should not be followed. The Appeal Court has also pointed out (1962 (3) SA 803 at 807) that there is a difference between civil and criminal cases when leave to appeal is sought. A twofold test applies in civil cases. Firstly, there must be a reasonable prospect of the appeal succeeding and secondly, the case must be of substantial importance to the applicant or to him and the respondent. Both tests must be satisfied before leave to appeal will be granted in civil matters. In criminal cases the applicant must show that there is a reasonable prospect of the appeal succeeding. The Commission was therefore of the view that there is no need or justification for endeavouring to hinder or limit access to the courts by means of screening mechanisms. In practice it must, however, not be lost sight of that a lower court may refuse an application for leave to appeal for a number of reasons and that such is later granted by the Appellate Division on petition. This in itself can be an expensive and time consuming process. The question, therefore, arises whether there should not be an automatic right of appeal from a decision of a lower court to the Appellate Division in a matter where the Bill of Rights is directly and undoubtedly relevant and where a decision by that Division on similar facts has not yet been given.

The effect of invalidation in terms of the Bill of Rights

The Namibian Constitution provides that in adjudicating upon an act or legislation a court has the discretion and power in appropriate cases to give Parliament, other legislatures and the executive or government bodies the opportunity to remove any shortcoming in the relevant legislation before the order of invalidation comes into operation. (See article 25(1)(a).) This concession is granted in the circumstances and subject to the time limit set by the court. Until such time as the period has expired and the necessary amendments have been introduced, the legislation concerned is deemed to be valid. If a competent court is of the opinion that legislation is unconstitutional, it may either set the legislation aside or afford Parliament the opportunity to remove the defect. In South Africa however the Commission was of the view that the legislature must take sound legal advice before passing laws, and that itself will have to devise procedures that will enable it to take action where there is a real, urgent need for remedial legislation. (See however (1992) 3 Consultus 76. The Canadian example referred to, in appropriate circumstances, seems to be sound.)

Role of the State

A binding court order declaring legislation or an executive act invalid, is of course in the first place, binding upon the parties to the litigation. But because the State will always be a party to such litigation and because of the binding force of court orders countrywide, as well as the operation of the system of precedents, such an order will acquire general force and effect in an indirect manner. On the point of the State always being a party to such litigation, the question arises as to what exact practical role the State envisages in this regard. In my view, the perception amongst the population that any such litigation automatically involves an individual versus the State with all the powers and finances at its disposal should be avoided. To that extent the present system by which the State Attorney briefly invites counsel to appear for the State must, by necessity, be changed. The present custom of the government to only brief certain counsel for state matters should similarly be strictly avoided. Human values involve the perceptions of the community and so do human rights. Any practical system in this regard which creates the perception amongst the community that it is a battle between individuals and State, albeit vis-à-vis a Bill of Rights, in my view needs to be strictly avoided. It is therefore proposed that a system be developed by which the Human Rights Commission appoints an amicus curiae on behalf of the State to make such submissions as could, in its view, reasonably be made on the facts. Such proceedings will have greater legitimacy in the eyes of the community. If this is not acceptable, and I doubt whether it has ever been debated, at the very least the problem posed should be addressed.

Practical implications for legal practitioners in the light of the above

It should be clear from the foregoing that future litigation will be fundamentally and irreversibly affected by a Bill of Rights. Legal practitioners and those wishing to practise in future, should at the very least, and as a matter of some urgency, consider the following:

☐ Whether I have sufficient knowledge of the philosophy and law underlying a Bill of Rights;

☐ Can I find my way around comparative law in this regard?

☐ Can I read a foreign language, for argument sake French or German?

☐ Do I have the necessary comparative law literature at hand, be it in my library or at least elsewhere available?
The rules of evidence and of Similarly, textbooks on the legislature must be gleaned from the very least, and in so far as human administrative law need to be appraised and revised. At the extent that the underlying principle is that the intention of the Government or not, every practitioner should of course also have the Interim Report on Group and Human rights legislation. Textbooks on the Statutory Law Commission at hand. Nothing in the field of human rights must be taken for granted or at face value. Irrespective of whether statutory purging of all legislation is done by the Government or not, every practitioner in his or her own field should examine each and every statute and consider its provisions *vis-a-vis* those contained in a Bill of Rights.

The rules of evidence and of procedure must be critically examined in the light of human rights legislation. Textbooks on administrative law need to be critically re-examined (if they are going to be of any relevance at all in future).

Similarly, textbooks on the interpretation of statutes to the extent that the underlying principle is that the intention of the legislature must be gleaned from the statute, must be critically reappraised and revised. At the very least, and in so far as human rights are concerned, a totally new perception and argument must come to the fore. See for instance the Privy Council judgment of *Minister of Home Affairs (Bermuda) and Another v Fisher and Another* 1980 AC 319 (1979) 3 All ER 21 (PC) 328-9 per Lord Wilberforce:

> When therefore it becomes necessary to interpret "the subsequent provisions of" chap I - in this case s 11 - the question must inevitably be asked whether the appellant's premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the Court to accept as a starting point the general presumption that "child" means "legitimate child", but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law. It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the tradition and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

In *Ex Parte Attorney-General Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 NSC, Mahomed AJA said the following at 86H:

> The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court. (*S v Ncube and Others* (supra at 7171).)

It is however a value judgment which required objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

Judges (and other judicial officers) should urgently examine all the implications of a Bill of Rights and even (now and in the future) enter into a public debate in this regard. This can only stimulate public confidence in the Courts, a factor which, rightly or wrongly, needs urgent addressing. Their commitment to Human Rights must be clearly and unequivocally expressed wherever appropriate. There is no reason why they should not hold their own workshops to acquaint themselves fully with all practical, philosophical, moral, legal and economic implications. The ivory tower must now become the tree. I am told that Justice Brandeis of the United States Supreme Court was concerned about the waning public respect for law, for lawyers and for judges. This had happened many times before in history. The lawyers' failure to keep up with social and economic progress, Brandeis said, was as old as the profession itself - it was inherent in the very process of erecting a working law for today upon the precedents of yesterday and the day before. Brandeis attributed this to the fact that the judge came to the bench unequipped with the necessary knowledge of economic and social science, and his judgment suffered likewise through lack of equipment in the lawyers who presented the cases to him. Unless the legal profession performed its task adequately in this regard and could meet contemporary economic and social demands, the blind would be led by the blind and existing deficiencies and prejudices would be made part and parcel of the Constitution (read: the Bill of Rights) itself.