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The South African Bill of Rights: Lessons for Australia

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Introduction

When the tall and imposing figure of President Nelson Mandela emerged from prison in February 1990, the issue of political transformation in South Africa, for that brief historical moment, moved to the epicentre of global politics. Until then a pariah in the global community of nations, South Africa and its racially distorted political system had symbolised the antithesis of human rights endeavours pursued by the United Nations. Since 1948, with the establishment of the United Nations and particularly the drafting of the Universal Declaration of Human Rights and its progeny, the legal system in South Africa was continually at odds with the evolving, albeit flawed, world order of human rights. The political and legal transformation of South Africa, culminating in the first ever democratic elections in the country in 1994, and the embodiment of human rights principles in the most comprehensive Constitution and Bill of Rights, in many ways represents a vindication of the previous 50 years of global human rights activism.

The South African Constitution contains a most detailed listing of rights, incorporating the classic collection of civil and political rights, but embracing as well a panoply of social, economic and cultural rights. The Constitution radically rearranged the administration of justice, placing at its pinnacle the Constitutional Court as the highest court in all constitutional matters. In particular, the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of the state.¹ Discarding the cloak of executive fiat and administrative abuse typical of apartheid South Africa, the Constitution provides for the independence of the courts, subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.² The Constitution also establishes a list of state institutions to support the new constitutional democracy and to enforce human rights, including a Human Rights Commission, Gender Commission, Public Protector, and a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities.

Those responsible for drafting the Bill of Rights were clear about the purpose of the Constitution, namely, that it was to generate a transformative agenda with human rights at the core. Chapter One lists several values on which the new South African state is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism, and non-sexism.³ The Constitution was designed to be a key instrument in moving the country from one steeped in minority privilege to one embracing rights for all. This approach may in time come to illustrate both the symbolic and substantive possibilities of human rights as a mode of political transformation.

In this paper I will outline the most significant features of the South African Bill of Rights, its major provisions, and the interpretation of some of these rights by the

Constitutional Court. I will point to the transformative possibilities of the South African Constitution as well as the limitations of the Bill of Rights in redressing the enormous social, economic, and political challenges facing South Africa. Finally I will raise some comments about possible lessons or insights for Australia.

Contemporary South Africa provides a most compelling case for considering the constitutional incorporation of rights. South Africa also provides fertile legal terrain for considering not just the adjudication and review of civil and political rights, but social and economic rights as well. As mentioned earlier, the shift from the status of a global pariah to one of a symbol of democracy and a model for other developing countries, particularly for those in Africa, has been quite remarkable.⁴

Rights embodied in the Bill of Rights

The South African Constitution centres equality as its primary principle, stating that 'everyone is equal before the law and has the right to equal protection and benefit of the law.'⁵ The section outlining equality explicitly shields affirmative action, by providing:

To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.⁶

The Bill of Rights outlaws both direct and indirect discrimination on several grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.⁷ The Bill also recognises the intersectionality of various forms of discrimination by unambiguously proscribing discrimination 'on one or more grounds'.⁸

The prohibition against discrimination on the grounds listed, and particularly those referring to race, gender, and sex, suggests that discrimination against women is just as constitutionally suspect as discrimination on the basis of race. Those familiar with American constitutional jurisprudence will know that sexual discrimination is subject to intermediate scrutiny whereas racial discrimination is subject to strict scrutiny—a much harder burden to overcome.⁹ The South African Constitution places sex or gender on the same footing as race for the purpose of eliminating discrimination.¹⁰

The section on equality also sets out a two-part test for discrimination by stating that 'discrimination on one or more of the grounds listed is unfair unless it is established that the discrimination is fair.'¹¹ Once an individual or group of individuals falling within the outlawed grounds of discrimination allege discrimination, there is a presumption that the discrimination is unfair and the burden therefore shifts to the discriminator to demonstrate that the discrimination is not unfair.

A fairly novel inclusion in the Bill of Rights is the recognition of human dignity. This section states very clearly that, 'Everyone has inherent dignity and the right to have their dignity respected and protected.'¹² One of the earliest cases heard by the Constitutional Court, which outlawed the death penalty, referred extensively to the concept of dignity, and particularly 'ubuntu', an African concept literally translated to mean 'humanness'.¹³ This notion of dignity has also been raised by the Constitutional Court in its analysis of equality, one which expands the principle of equality to embrace not just individual political freedoms, but also freedom from want, hunger, and deprivation.¹⁴

In a section that addresses the issue of violence against women, children, and other vulnerable individuals, the Bill of Rights provides that:

Everyone has the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources.¹⁵

Similarly there is the provision that:

Everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.¹⁶

This section allows for the legality of abortion (outlawed under Apartheid), a fairly controversial issue in a religious society like South Africa.¹⁷ The Constitution also protects freedom of expression, but only insofar as it does not involve 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.¹⁸

The listing of socio-economic rights in the South African Constitution is extensive. Included are environmental rights, and rights of access to land, housing, health care services, food, water, and social security (repetitive). Also included are provisions for educational (to avoid repetition of 'rights') and children's socio-economic rights.¹⁹ These rights are not available on demand. Instead the state is required to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.²⁰

What is particularly profound about the social and economic rights in the Constitution is that they are subject to judicial review and enforcement. This places the South African Constitution in a unique position. Whereas most constitutions provide for the justiciability of classic civil and political rights, such as the right to vote or free speech, the South African Constitution rejects this bifurcated approach to rights. What those responsible for framing the South African Constitution recognised is that all rights are interconnected and in fact depend on one another in mutually reinforcing ways. So, for example, the argument that access to food and shelter are more important than the right to vote rings hollow. As several commentators have pointed out, and as demonstrated in the work of Nobel laureate Amartya Sen, the existence of democratic institutions plays an indispensable part in the creation of access to life's basic necessities.²¹ In making socio-economic rights subject to judicial review and enforcement, litigation is an important tool. The Bill of Rights has jettisoned the historically stringent standing requirements in favour of more access to individuals and groups, thereby laying the foundation for class actions.²²

Interpretation of rights by the Constitutional Court

Since 1995 the Constitutional Court has generated an impressive jurisprudence signalling a clear break from South Africa's ignominious legal past to one forged on principles of equality and non-discrimination. I will discuss very briefly a few cases, several of which focus on equality, and which demonstrate a thoughtful articulation by the Court of the need to eradicate the vestiges of discrimination against women.

The first case deals with the issues of gender equality and unfair discrimination.²³ In 1996 the Constitutional Court considered the constitutionality of an executive order signed by President Nelson Mandela, which sought to pardon all mothers in prison with minor children (under the age of 12 years) on 10 May 1994. This section of the Presidential Act was challenged by a male prisoner who argued that the remission of sentences applicable only to mothers violated the constitutional rights of fathers. The basis of his challenge was that the provision in question unfairly discriminated against him on the grounds of sex or gender, and indirectly against his son because the latter's incarcerated parent was not female. The lower court agreed with the complainant and found that the Presidential Act discriminated

against him on the grounds of sex and gender and that the presumption of unfairness had not been rebutted by the President. After hearing the case on appeal, the Constitutional Court reversed the lower court's decision. In a lengthy deliberation, the Court first considered the nature of the power granted to the President under the Interim Constitution to pardon individuals or groups. The Court concluded that the presidential power to pardon is guided by the principle of equality as articulated in the Constitution, even though its origins lie in the royal prerogative. Justice Goldstone, writing for the majority, first found that the presidential pardon discriminated against the complainant. Addressing the presumption of unfairness that is triggered by the discrimination, the Court evaluated the rationale underlying the Presidential Act in allowing the special remission for mothers of minor children. The Court noted the apparent contradiction between the contemporary reality in South Africa that mothers bear the greatest burden of childrearing and the constitutional imperative that everyone be treated equally. Distinguishing between the idealised situation in which fathers and mothers equally share childrearing functions, and the South African situation of unequal childrearing, the Court found that children would substantially benefit from the Presidential Act.

The Court acknowledged that the generalisation about women bearing the greater proportion of the burden of childrearing has historically been used to justify the unequal treatment of women. They specifically referred to an earlier court decision in South Africa in which women were denied entry to the legal profession in part because of their childrearing responsibilities.²⁴ The Court, however, distinguished between the burden flowing from the generalisation as opposed to an opportunity such a stereotype may spur. The Constitutional Court considered the likely outcome if equal treatment were applied and concluded that no public benefit would be gained by releasing fathers because they were not the primary caretakers of children. Pointing out that the Presidential Act provides for individual application for remission of sentences by male prisoners where special circumstances can be shown, the Court therefore found the discrimination to be fair.²⁵

The majority and concurring opinions in this judgment indicate the broad contours of equality that the Constitutional Court is prepared to embrace. The Court is concerned not just with formal equality (equal treatment), which can at times lead to inequality, but also with substantive equality, which contextualises the actual experiences and reality of women within the formal impediments to equality.

The issue of traditional gender roles was also the focus in a challenge to the constitutionality of a section of the Child Care Act which did not require the consent of the father to give a child up for adoption where the child was born outside of marriage.²⁶ The Court held that the provision violated the right to equality, but held further that the equality analysis required more than a simple consideration of the fact that the legislation made a distinction based on gender. Whilst allegations had been raised about the general problem of reliability of unmarried fathers, Judge Mahomed, writing for the court, considered the special biological relationship of the mother and child during and soon after pregnancy which cannot be compared to that of a father. In addition he noted that in some circumstances, for example with respect to a child born as a result of a rape, to require the father's consent for adoption would lead to anomalous consequences. The Court found however that the Act went too far in its blanket exclusion of the father's consent under any circumstances regardless of the age of the child or the relationship between the father and the child. The Court therefore found the provisions breached the equality clause, but suspended the declaration of invalidity for a period of time for Parliament to amend the defect in the law.

In this judgement again one notices that there is an attempt on the part of the Court to be sensitive to the special situation and needs of single parents, while at the same time ensuring that traditional stereotypes linked to gender-specific parenting roles are not further ingrained.

In 2000 the Constitutional Court confronted a challenge to the constitutionality of a provision in the Prevention of Family Violence Act which, it was argued, reversed the onus of proof in domestic violence matters and thus violated the right of an accused person to be presumed innocent.²⁷ Justice Sachs, writing for the majority in a unanimous decision, embarked on a thoughtful analysis of the need to deal comprehensively and effectively with the problem of domestic violence. He described the 'hidden, repetitive character' of domestic violence, its ubiquity in cutting across class, race, culture and geographic boundaries, and the deleterious consequences of its persistence for society. He characterised domestic violence as a matter of gender equality, noting that because of the gender-specific nature of domestic violence, it mirrored patriarchal domination in a particularly abhorrent manner. In proceeding to analyse the conflicting rights at stake, the Court found that the presumption of innocence had not been disturbed because there were other mechanisms in place to ensure an 'accessible, speedy, simple and effective' process.

This judgement follows the *Hugo* and *Fraser* decisions in contextualising the contemporary reality of South African women. There is widespread recognition that private violence against women is a cause for great concern. Some would argue that such violence constitutes a continual violation of women's human rights. The Court places its imprimatur on the need to eradicate such violence without constraining the constitutional rights of the perpetrators.

As an aside, I should point out that the Court's decision is incontrovertible: there is a general, societal consensus that private violence, indeed any violence, against women is odious, and the state ought to deal with this problem aggressively. There is still a large gap, however, between widespread cultural attitudes about women, fuelled by a particular brand of South African masculinity that gives rise to such violence, and the laudable statements of the Court. Closing this gap will require a recognition that the structural and attitudinal impediments to the 'right to be free from private violence' as articulated in the Bill of Rights can only be eradicated by a combination of governmental assaults, which include education, access to resources, and continued vigilance regarding the extent and persistence of violence. The Constitutional Court, at least, is doing its part but it needs to be bolstered by other institutional arrangements that include both legal and extra-legal measures.

I now focus on two decisions involving the enforcement of socio-economic rights. In both of these cases the Court has shown that these rights can bring meaningful relief to the poorest in the country. First, in 2000 the Constitutional Court had to consider the right to housing as incorporated in Section 26.²⁸ The case concerned an application for temporary shelter brought by a group of people, including a number of children, who were without shelter following their brutal eviction from private land on which they were squatting. The conditions under which the community lived were deplorable. They had access to one tap and no sanitation facilities. This case is widely regarded as an international test case on the enforceability of social and economic rights.²⁹ The Court affirmed that the government had a duty in terms of Section 26 of the Constitution (the right to adequate housing) to adopt reasonable policy, legislative, and budgetary measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions. The judgment also dealt in detail with the implications of the children's socio-economic rights enshrined in Section 28.

Second, in the Treatment Action case the appeal to the Constitutional Court was directed at reversing orders made in a high court against the government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge.³⁰ The court found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that the government had acted unreasonably in (a) refusing to make an anti-retroviral drug called nevirapine available in the public health sector where the attending doctor considered the drug medically indicated, and (b) not setting out a timeframe for a national program to prevent mother-to-child transmission of HIV.

In another landmark judgement in 2001,³¹ and one which has profound ramifications for development of the common law, the Constitutional Court considered a claim by a woman who had been attacked and seriously injured by a man who was at the time awaiting trial for rape. In spite of a previous conviction for indecent assault and a history of violent behaviour towards women, he had been released unconditionally on his own recognisance in the rape matter—despite repeated requests by the victim and other members of the community to apprehend the assailant. The victim sued the police and prosecution for their negligent failure to take proactive steps to protect her as a potential further victim. A unanimous court stated that the Constitution embodies an objective, normative value system which must shape the common law. The Constitution obliged the state to respect, protect, promote and fulfil the rights in the Bill of Rights, including the right of women to have their safety and security protected. The Constitutional Court found in her favour that the state officials had a legal duty to take steps to prevent further violent actions by the perpetrator, and referred the matter back to the trial court for determination of further issues in the tort claim. At the later trial the Cape High Court found for the plaintiff and ruled that the state was indeed liable.

Observations or lessons for Australia

I have not been party to discussions in Australia, and in particular the ACT, about the enactment of a Bill of Rights, so these observations are rather general. In comparing South Africa's project of constitutionalism, and particularly the Bill of Rights, with that mentioned above, I am cognisant of the vast differences between South Africa and Australia. A significant difference is the respective point of departure. For South Africa, the embracing of a bill of rights is predicated on the undisputed idea that South Africa is an unjust society into which inequality is systematically structured. This premise shapes the universe of constitutional adjudication. In most democratic societies, and particularly constitutional democracies, the assumption is that the underpinnings are basically fair and that any derogation from the status quo has to be justified. The contrary applies in South Africa. The legacy of structural inequality has rendered defence of the status quo difficult, and the Bill of Rights mandates a justification for doing so (by incorporating a presumption of unfair discrimination on the listed grounds).

Most constitutions, such as the American model, are negative in their orientation. They protect against government intrusion. The South African constitution does this too, but it is also positive through the listing of socio-economic rights, thereby imposing positive duties on the South African government. The South African Bill of Rights therefore proscribes government intrusion on one level, but also obliges the government to provide an array of socio-economic rights.

Consequently, the role of the Constitutional Court is to check unjustifiable intrusions on people's rights, as well as to ensure that the rights promised in the Constitution are actually achieved. A significant point about the interpretation of social and economic rights in South Africa is that to a large extent the script is being written at the outset by the Constitutional Court judges themselves, with very

little to draw from in terms of comparative jurisprudence. Although the United Nations Economic and Social Council has attempted to grapple with the enforcement of socio-economic rights globally, it has done so not as a court of law but, instead, has relied on compliance by member states.³²

Although the vast inequalities that so pervade South African society are not present in Australia, it is now universally accepted that social and economic rights are indispensable to a democracy. After almost half a century of the primacy of civil and political rights in international human rights discourse, there is a growing consensus about the interdependence of rights and an increasing recognition that social and economic rights are essential to enjoy the panoply of civil and political rights deemed a precondition for democracy. I would argue that when the conditions in certain remote Aboriginal communities are compared with other Australian communities, vast inequalities are apparent, and this raises some important questions about the nature of citizenship for the individuals in some of those communities.³³

Another feature of the South African Constitution is the mandate to consider international and foreign jurisprudence. Unlike the American courts which tend to be self-contained and self-referential, my perusal of Australian jurisprudence suggests that the courts are willing to consider international and foreign jurisprudence. Since the global human rights endeavour crosses national boundaries an 'open' jurisprudence allows for greater access and creativity and, I would argue, a richer human rights jurisprudence.

A further observation for Australia concerns the issue of a culture of rights. As outlined above, South Africa has the most comprehensive and generous constitution in the world, one that is continuously cited as a global model. But South Africa is one of the most unequal societies in the world, with immense poverty and deprivation. In addition, South Africa is a disturbingly violent society, particularly with respect to women. It is also ironic that with such a heavy concentration of HIV-positive people, the stigma attached to AIDS is hard to jettison, despite the constitutional imperative of non-discrimination. Part of the problem lies in the observation that despite official narratives of inclusivity and consultation, the negotiations leading to the Constitution were largely the ambit of the elites (with lawyers at the helm). There was a considerable amount of public education on television, radio and the print media as to the nature and scope of the Constitution at the time when both the interim and final Constitutions were being drafted. This campaign however was short-lived and has not sustained the momentum that would ensure the gradual adoption and internalising of a human rights culture across South African society.

This raises a recurrent question. In order to attain the goals of equality, dignity, and other principles in a bill of rights, does a society first need to attempt to generate a culture of rights and then promulgate a bill of rights, or does a bill of rights lead to a culture of rights? It is indisputable that South Africa has a great Bill of Rights. But there is ample evidence to suggest that the culture of rights has not taken root and is still alien to South African society, and that in fact the 'rights culture' is elusive at the most basic of societal levels.

For Australia the question that arises is one that is concerned with the dominant culture's respect for indigenous and non-Western cultures. During the transitional period in South Africa when seemingly competing principles were vigorously contested—particularly when it came to the question of women's rights and equality—and when the conflict between 'tradition' and 'modernity' was most pronounced, the guiding principle was equality. Women activists within South Africa had already managed to organise and successfully influence the process. They

armed themselves with evidence of the importance of formalising protection for women. They were also sensitive to complex arguments over human rights and moral relativism that ensue when an attempt is made to incorporate gender equality into a system of constitutional law that retains respect for traditional law.

These questions are certainly not novel. For example, in the international women's human rights community the debate between those who advocate a universal secular approach to rights increasingly confront a constituency espousing religious, nationalist, or cultural interpretation of rights. These divergences of rights interpretation challenge those in the human rights community to confront continuously what appears to be the most taxing human rights problem, namely the accommodation of 'culture' to rights.

Also crucial for Australia is the question of how a bill of rights may influence the common law. So far the South African experience has demonstrated that cross-pollination between bills of rights and common law is essential and, more importantly, how important it is that common law reflect the rights incorporated in the constitution. I have heard Australians comment that a system of parliamentary democracy such as theirs contains sufficient checks and balances to curb government intrusion, which may lead to violations of rights. It is true that Australia has a fine democracy and that it has largely served the majority of Australians. But if reflecting on the history of colonisation and the dispossession of Aboriginal communities, it is noteworthy that the will of the majority can also turn into the tyranny of the majority. There is a distinction between democratic government and fundamental rights and frequently this distinction is most evident when it comes to issues that affect minorities.

Finally, there is also the thorny issue of separation of powers and the shape and content of a democracy. This question is particularly acute when it comes to socio-economic rights and who is ultimately in the best position to balance competing priorities—an elected parliament or unelected judges? In South Africa this question is one that is constantly confronted. The reality is that the Bill of Rights does not mandate the government to grant the right on demand, rather the Bill of Rights states that the existence of such rights places a duty on the government to show that it has allocated its resources reasonably.

The South African experience provides valuable insights about both the law's possibilities and its limitations, especially in the face of entrenched cultural and other societal attitudes and practices that do not always comport with notions of equality. The South African model furnishes a lens through which to consider strategies of rights enforcement and to explore methods of reducing the arcane and often cumbersome nature of rights enforcement through structures such as the Human Rights Commission, Gender Commission, and Public Protector. South African equality jurisprudence has generated some useful lessons for contextualising equality in hybrid situations (for example, of African and Western, Muslim and Christian). Moreover, this jurisprudence is important in demonstrating the interdependence of rights. Finally, it has demonstrated the importance of feminist and other critical perspectives in the law, and the ability of these perspectives to influence other dimensions of the human rights project.

Limitations on the Bill of Rights in South Africa

Before concluding I will comment on the limitations of South Africa's Bill of Rights despite the possibilities created by the Constitutional Court's interpretation of the document, and the enabling legislation aimed at giving effect to the rights listed. I underscore these limitations to illustrate some pitfalls that may be considered in Australia. With respect to the pursuit of equality, much of the energy of political

and human rights activists in South Africa was directed at legal change and ensuring that rights were incorporated in the Constitution. Women activists were particularly resourceful: they campaigned throughout the country in rural and urban areas to ensure that women's demands were heard and tabulated, with impressive results. However, although there were tremendous successes at the formal legal level, the same had not occurred substantively. In other words, the South African Constitution still represents an arcane construct, far removed from the lives of the majority of South Africans. What is of perennial concern to civil rights, human rights and public interest lawyers is, namely, the task of transforming legal rights into substantive rights so that they have an impact on people's lives in a fundamental way. This is a difficult issue involving questions of access, resources, professional responsibilities and a host of other considerations.

The second point is related to the question of enforcement and is starkly illustrated by the two most important cases brought under the socio-economic provisions of the Constitution that I mentioned earlier. The first involved the issue of the right to housing; the second the right to health. When I visited South Africa in October 2002, I was informed that with respect to the housing case, the community members are still where they were with only slight improvement to their condition. Similarly, in relation to the Treatment Action Case, the government appears from all accounts to have stalled the developments of the programme and anti-retroviral drugs are still not available to HIV-positive mothers in public hospitals across the country. So the lesson is that rights implementation and enforcement require a vigilant citizenry and effective institutions of civil society.

The third problem is one not necessarily confined to South Africa and is worth reflecting upon now in the light of the ACT's discussions about a bill of rights. It is trite that questions of rights do not always confront a reasonably affluent and therefore complacent society. In other words, when basic needs appear to be well cared for, the question of rights appears abstract or irrelevant. Whether the citizenry overwhelmingly support a bill of rights or not, the application and enforcement of the rights become sorely tested in extreme situations. That is where the actual document (a bill of rights) and the culture of rights are symbiotic. To illustrate the point, I would like to refer to an example from South Africa. Despite the entrenchment of non-discrimination in the Bill of Rights and laudable attempts by community activists, HIV and AIDS sufferers face enormous stigma and widespread discrimination. This is one area in which the principles in the Bill of Rights are being tested, and in which the lack of a culture of rights has led, and continues to lead, to enormous suffering. I would venture to say that the post-September 11 and post-Bali situations will test the norms of non-discrimination and fairness in *this* country, and I have no doubt that a bill of rights will at least provide some succour to affected individuals and communities.

Conclusion

I do not wish to be cavalier about the significance of the codification of rights, especially when in South Africa the constitutionalisation of human rights has been a precondition for the establishment of a fledgling democracy. But the formal edifice of law often obscures the underlying structural dimensions which law cannot fix. There are enormous challenges facing Australian society, ranging from the increased risk of terrorism, to the displacement of people as they find their ways to Australian shores as refugees, and challenges to the environment. Further complications are raised by the increasingly privatised nature of the Australian economy and the imperatives of a market driven agenda—these factors may to a lesser or greater extent undermine the possibilities of a bill of rights. Overall, once there is agreement about a bill of rights, the challenge in incorporating rights in a formal legal document is marrying symbolism with substance.

Endnotes

- ¹ Constitution of the Republic of South Africa 1996 (hereinafter Constitution) Section 8(1).
- ² *Ibid.* Section 165 (2).
- ³ *Ibid.* Chapter 1, Section 1(a) and (b). The Preamble to the Constitution states:
We, the people of South Africa,
Recognize the injustices of our past;
Honour those who have suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
- ⁴ 'In what is certainly one of the most abrupt shifts in international reputation, South Africa moved from one of the most morally suspect nations in modern history to the poster child of the international human rights movement ...'; Ronald C. Slye, 'International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law' *Chicago Journal of International Law*, 59(2) 2001.
- ⁵ Constitution *supra* note 1. Section 9 (1).
- ⁶ *Ibid.* Section 9 (2).
- ⁷ *Ibid.* Section 9 (3).
- ⁸ *Ibid.* See also Section 9 (4).
- ⁹ See *Craig v Boren*, (1976) 429 US 190, 197 (noting that gender classifications 'must be substantially related to [the] achievement of those [governmental] objectives'); *Korematsu v United States*, (1944) 323 US 214, 216 (stating that the 'most rigid scrutiny' should be applied to racial classifications).
- ¹⁰ For a comprehensive discussion on women's rights and the South African Constitution, see Penelope E. Andrews, 'The Stepchild of National Liberation: Women and Rights in the New South Africa' in Penelope Andrews and Stephen Ellmann (eds), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Ohio University Press, 2001), p. 326
- ¹¹ Constitution *supra* note 1, Section 9 (5).
- ¹² *Ibid.* Section 10.
- ¹³ See *S v Makwanyane and Another* (1995) 3 SA 391 (CC).
- ¹⁴ President Nelson Mandela made the following remarks in his Inaugural Address to a Joint Sitting of Parliament on May 23, 1994: 'My Government's commitment to create a people-centered society of liberty binds us to the pursuit of goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear. These freedoms are fundamental to the guarantee of human dignity.'
- ¹⁵ Constitution *supra* note 1, Section 12 (1).
- ¹⁶ *Ibid.* Section 12 (2) and 12 (2) (a).
- ¹⁷ In fact, in 1996 the South African Parliament enacted *The Choice of Termination of Pregnancy Act 92* of 1996, which allows a woman access to an abortion upon request during the first 12 weeks of her pregnancy. The Act survived a constitutional challenge in 1997.
- ¹⁸ Constitution *supra* note 1. Section 16 (2) (c).
- ¹⁹ *Ibid.* Sections 24 to 29.
- ²⁰ *Ibid.*

- ²¹ Amartya Sen, *Development as Freedom* (Oxford University Press, 2001).
- ²² Section 38 provides as follows:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
a anyone acting in their own interest;
b anyone acting on behalf of another person who cannot act in their own name;
c anyone acting as a member of, or in the interest of, a group or class of persons;
d anyone acting in the public interest; and
e an association acting in the interest of its members.
(Constitution *supra* note 1. Section 38.)
- ²³ *President of the Republic of South Africa Et Another v Hugo*, (1997) 6 BCLR 708 (CC).
- ²⁴ *Incorporated Law Society v Wookey*, (1912) AD 523.
- ²⁵ Justice Kriegler's dissent is worth noting because it appears to comport with current American equal opportunity jurisprudence. He insisted that where some rebuttal is provided for the presumption of unfairness, such rebuttal must be scrutinised thoroughly and must not be 'discharged with relative ease'. He took issue with the rationale that women were the primary caregivers of young children, stating this generalisation to be 'a root cause of women's inequality in our society. It is both a result and a cause of prejudice: a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and feature of the patriarchy which the Constitution so vehemently condemns'. Justice Kriegler concluded that a small number of women would benefit from this pardon, but the rebuttal and the rationale for the rebuttal used by the majority would operate as a 'detriment to all South African women who must continue to labor under the social view that their place is in the home'. He concluded that the benefit to a few hundred women cannot justify the continued stereotyping of women as the primary caregivers.
- ²⁶ *Fraser v Children's Court, Pretoria North* (1997) 2 BCLR 153 (CC).
- ²⁷ *S v Baloyi* (2000) 1 BCLR 86 (CC).
- ²⁸ Section 26 provides as follows: Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
- ²⁹ *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169.
- ³⁰ *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC).
- ³¹ *Carmichele v Minister of Safety and Security and Another* (2001) 4 SA 938 (CC).
- ³² Although the Indian Supreme Court has on occasion imposed duties on the government to enforce socio-economic rights listed in the Indian Constitution, most constitutions do not provide for the justiciability of socio-economic rights.
- ³³ For an interesting discussion on these matters, see John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines Et Australian Citizenship* (Cambridge University Press, 1997).