FREE MARKET FOUNDATION
SUPPLEMENTARY ARGUMENT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 23/96

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

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

HEREWITH SUPPLEMENT TO OUR OBJECTION

TAKE FURTHER NOTICE that the FREE MARKET FOUNDATION OF SOUTHERN AFRICIA appoints its national head office on the second floor of Export House at 71 Maud Street, SANDTON, at which it will accept notice aiid service of all documents in these proceedings.

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TO: The REGISTRAR
Constitutional Court of South AFrica

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BILL OF RIGHTS: VERTICAL AND HORIZONTAL RIGHTS

This memorandum argues that rights conferred by the Bill of Rights in the Constitution should be vertical only, that is to say, rights of private persons against the state. The Constitution is not the appropriate place to regulate the rights of private persons among themselves (horizontal rights), and to attempt to do so in this way would have a number of highly undesirable ettects.

The memorandum is in two parts. The first part sets out the arguments of principle and the second part sets out concrete illustrations of the points which are made.

PART I

1. Of the numerous constitutions in the world which contain bills of fights (there must be at least fifty), know of not a single one in which horizontal rights are expressly conferred. There have been one or two cases where courts have very tentatively attempted to make horizontal applications but these are novel, tentative controversial. The significance of this fact is threefold:

a) If some fifty countries have decided not to do something there is probably a good reason for this decision.
b) The real effect of conferring horizontal rights in a constitution has not been tested anywhere. The danger, therefore, of undesirable, unintended consequences is extremely high, and there is no guidance from international experience as to how to handles these consequences.
c) A very important point: since those who propose horizontal fights are proposing an untried and unprecedented innovation, the onus surely is on them to show that this innovation is practical and desirable rather than on those who oppose it to show that it is undesirable.

2. The conferring of horizontal rights in a constitution is not in accordance with the nature and purpose constitution. The constitution is the agreement in terms of which the state is constituted. It confers power on the state and sets the limits of that power. These limits have to be entrenched because there is a particular temptation to those who at any time control the power of the state to extend that power, especially with purpose of perpetuating their constrol. The rights of individuals among themselves are defined bythe common ans statute law. There is no similar reason why this law should be entrenched.

3. The relationshp of individuals among themselves and the relationship of individuals to the state are so different that it is highly inappropriate to attempt to deal with them by the same measures. This is for two reasons:

a) The state has no rights; it has only functions, so there is no conflict between the rights of individuals over against the state and the rights of the state. The rights of individuals, however, are in conflict with each other and any increase in the rights of individuals must also, and at the same time, be a reduction in their rights since every individual has to accommodate the increased fights of other individuals. The constant need to adjust the

resulting conflicts is a very good reason why ordinary law among individuals should not be entrenched.

b) The need for a bill of rights over against the state derives from the fact that historically in South Africa and, indeed, in most states in the world, the state had absolute unlimited power. There was nothing in South African law as it existed prior to the present intenim Cotistitution to prevent the repetition of the crimes of Stalin, Hitler or Pol Pot. If the South African Parliament had passed a law that all Jews should be put to death, that would have been the law. Even under the existing Constitution (and under most constitutions) the state has absolute and unlimited power over all persons resident under its jurisdiction except to the extent that this power is limited by the Constitution.

The relationship of private persons among themselves could not be more different. The whole system of common law and much statute law regulates their mutual relations and there are in fact almost no situations where one person has power over another where that power has not been conferred voluntarily by agreement, either by contract or by voluntarily entering into a place where the other person is in control (eg a restaurant where there is a no smoking rule). This means that any attempt to "enlarge" the rights of rights of people over against each other will necessarily diminish the right of freedom of contract. For example, does the right of freedom of speech (interpreted horizontally) make it impossible to sign a confidentiality agreement?

It is by now perfectly well established that to deprive people of the right to contract is not to increase their rights but to impose disabilities on them. Disabilities of this kind which were in the past imposed on women in the common law (and which have since been abolished) were correctly seen not as an increase but as a derogation of their rights.

The one exception to the principle that nobody has power over another which has not been conferred by voluntary agreement is the power or parents over children. This, however, is already elaborately (and, I would suggest, amply) circumscribed by existing law. The existence of child abuse is not a result of inadequate law, but of the extreme difficulty of policing the existing laws in this area.

4. Not surprisingly in view of what has been said above, many rights which are traditional in a bill of rights, having been formulated to be vertical only, will, if applied horizontally, give rise to gross absurdities or irresoluble conflicts. It is not argued that the courts will in fact make decisions which are absurd. The courts will no doubt find a reasonable way of interpreting the horizontal bill or fights.

This, however, gives rise to the next major objection. The courts will be forced to interpret the bill of rights in ways which will appear to the man in the street to amount to sophistry, or to the court merely inventing the law. Thus highly controversial issues of social policy (eg abortion) YAII be seen to have been determined not by the elected representatives of the people but by an unelected and irremovable constitutional court. This is extremely undesirable. The prestige of the courts and the justification of their non-elected and

irremovable status is based on the perception that the courts are engaged in bona fide interpreting and applying a law wffich has a separate existence and a legitimate origin. As soon as this ceased to be so the courts become a target for attack while one of the fundamental functions of democracy, to ameliorate social conflict by giving the losers in any policy debate the prospect of reversing the decision through the polls, is lost.

5. The fact that the Bill of Rights applied horizontally will not be able to be applied literally has a further extremely undesirable consequence. This is perhaps the worst of all. It will not be possible for anybody to foresee with any confidence what decisions the courts will come to. The whole structure of common and statute law on which daily life - both commercial and personal - is based will be thrown into doubt and until the courts have rules on any particular matter, there will in effect be no law. The resulting uncertainty is likely to inhibit all kinds of transactions, causing serious economic damage. It will increase litigation, which is costly, and, perhaps most seriously, it will give rise to a huge number of decisions which will be unjust. The object of a system private law is that private actors, knowing what the law is, should be able to arrange their transactions in way that their honest expectations will be fulfilled. In the absence of law this cannot be done and disputes will constantly arise between people, both of whom acted in complete good faith, so that no fair resolution is possible.

   It is true that certainty in the law in the sense that the outcome of any case where the facts are known can be foreseen with certainty, is not attainable in the real world, but this does not mean that the legal system should not strive to approximate to such certainty in every way that is practically possible.

PART II

The points raised here are purely by way of illustration. The arguments raised in relation to a few rights (or others very similar to them) can easily be developed in regard to practically every clause in the Bill of Rights. To avoid undue length I am confining myself to a small lnumber.

I shall address first some of the inost uncontroversial of the first generation rights.

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otherwise they would keep secret, and, therefore, to make possible form of co-operation which othewise would not take place. To prevent confidentiality agreements will not make more information available, but less.

As regards the other issues, it will no doubt be argued that the Court, will arrive at a reasonable answer. Maybe you will be allowed to have a "no talking" rule in the library; you will be allowed to prevent a politicil rally from being held in the circulation area of a shopping mall (thereby seriously interfering with its proper use); but you will not be allowed to prevent somebody ftom handing out pamphlets in a shopping mall. But perhaps you will be allowed to prevent pamphlets being handed

out in a restaurant and you will almost certainly be allowed to prevent them being handed out in a school classroom.

All this might or might not be reasonable but, until a great deal of case law has been developed, society will be plagued with a tremendous number of try-ons leading to conflict and possibly violence, and the rights of ordinary people to go about their lives without invasion will be seriously diminished.

Another area of grave uncertainty would be whether a shop could be compelled to carry particular literature. There have in the past been many booksellers with a distinct and quite unconcealed political bias. This would seem to me to be reasonable; people know where to go if they are looking for a particular kind of literature. If there is a demand for other kinds of literature, other people will certainly supply it.

The value of this arrangement, which is only possible in the absence of categorical rights in this matter (other than the categorical right of the shopkeeper to decide what he will carry) is well illustrated by the recent controversy in South Afiica about printed pornography. This is an area in which there is the most violent disagreement and, indeed, disagreement which cotild lead to violence. Without any government intervention the matter has been adjusted in what would seem to be a satisfactory manner. Some shops do not carry pomography, and advertise that they do not. This meets a distinct demand. Other shops do carry pornography, and advertise the fact so that the material is available to those who want it. Pomography is available in the streets, but it is displayed in plain covers so that those who do not want it are not offended.

This would appear to have gone a long way to defuse what was otherwise a potentially explosive conflict. One could visualise that laws forcing shops to carry pornography could lead to violence, boycotts or even the bombing of shops.

It is very important to realise that in discussing these matters one is not trading-off the rights of the general public against the rights of property owners. It is the property owner who has every incentive to meet the wishes of the general public. If the handing out of political pamphlets in shopping malls is popular so that it will attract people into the mall, both the owner and the tenant shopkeepers will want it to happen. If it is unpopular there will be an incentive to forbid it. Those who wish to prevent such forbidding are seeking to give individuals (possibly a very sniall number) the fight to invade the privacy of a large number of individuals.

Finally there is the question whether the "freedom of the press and other media" applies horizontally and means that any person can require any publication or broadcasting network to carry his material. Obviously this is not possible. The amount of material which could be imposed on the media might (and probably would) hugely exceed what could be published, so this cannot be taken literally. How far is it to be taken? Is it to end that not the editor of a newspaper but the Constitutional Court is to decide what appears in any particular newspaper? This, again is not feasible.

The last point to be made here: supposing all these examples of what these rights might mean are considered too far-fetched and unreasonable? Then what do they mean? Is it open to the courts to decide that where the Constitution explicitly says that the right exists and that right is horizontal; that it nevertheless has no meaning whatever? I fear that a court would feel bound to give the right some content, even if the judges themselves did not think that this was desirable.

If these problems arise with first generation rights, what are we to say about second generation rights?

(iv) Housing and Land

"Everyone has the fight to have access to adequate housing". What does this mean horizontally? Presumably we can be confident that it does not mean that anybody who does not have a house can take away the house of somebody who does have one. Does it mean that everyone who does not have a house can sue everyone in sight for the cost of giving him one? I cannot suggest any reasonable or plausible horizontal application of this right, so the worry raised at the end of the last section applies here very strongly.

Why Horizontal Rights are Wrong

A critique on theoretical and pragmatic grounds of the proposed horizontal application of the new Constitution's vertical rights.

1. HORIZONTAL RIGHTS IN THEORY

1.1 **The essential nature of a Constitution**. The idea of horizontal application of the Bill of Rights confuses and obfuscates the essential nature and purpose of a Constitution. A Constitution does what the word implies: it constitutes. It constitutes the state and its government. In doing so, it prescribes and proscribes their powers and obligations, and the institutions and procedures of governance.

In none of these does it nor ought it to pretend to be comprehensive. There must, for instance, be a parliament, senate, provincial legislature, supreme court, etc - only that which the govemmenl is absolutely obliged to have. There may be control boards, a national airline, a distiict court or a municipal bus service. These are not obligatory.

Similarly, the Constitution protects - or should protect - truly fundamental rights. These are concemed with what the government may absolutely not do. Beyond these, there are other rights it is also expected to respect such as the right to information, or the rights to hire school halls for political meetings, but it is not obliged to do so.

Furthermore, it is expected to act assertively in many respects, such as environmental protection, education, basic welfare et al, but cannot be obliged to do so - the arguments for

'second generation' rights notvathstanding - because, unlike 'first generation' rights, such action is necessarily resource and policy dependant.

As far as horizontality is concerned, this is essentially why there is a govemment at all: to regulate relationships between subjects. How it will do so is what it has to go to the polls to establish by way of electoral mandate. But what it may not do even with a mandate is that which experience has taught has to be rendered non-votable on account of how absolutely fundamental it is. Only these tnily flindamental fights, and no more, must be provided for. There should be nothing else in the Constitution. To dilute and pollute it vath all sorts of ideas that are currently trendy is short-sigheil and regressive. It reverses rather than advances the evolution of constitutionalism.

1.3 **The unique and awesome nature of the State**. The reason why a Bill of Rights is necessary is because of the completely distinctive and unique nature of a govemrnent. To bring horizontality into the Constitution reflects a profound misunderstanding of this point. The government of the day is there to regulate relationships amongst subjects - which is why they are called "subjects".

The Bill of Rights and the Constitution is there - and necessary - to curtail the manifestly awesome power and danger of the sole entity in society with the right and ability to initiate and threaten coercion. Only the state can imprison and fine people. Only it can make laws. It alone has the threaten coercion. Only the state can impdson and fine people. Only it can make laws. It alone has the ability to tax, forbid employment of one by another, prescribe and proscribe forms of entrepreneur ship, dictate the terms of private contracts, dictate the place, content and method of schooling by compulsion, and so on *ad infinitum*.

The distinction between the government and all other entities cannot be over-emphasised. Virtually everything a goveniment does would be a serious crime if done by any other entity. Government is not only legalised force, it is legalised crime. Were private people to do much of what governments do they would be deemed not only criminal but insane. A private citizen walking into a shop and requiring customers to leave and the shop to be closed at the point of gun would be certifiable, but the same act be a Shop Hours Inspector would be regarded as both normal and acting "in the public interest".

To consider horizontality and verticality in the same context is to trivialise the Constitution and the rights of citizens.

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The onus for proving (beyond reasonable doubt - the standard of proof required for Constitutionalising something) that there will be no counter-productive, unintended, or unforeseen consequences rests squarely on the shoulders of those who advocate horizontality especially since it is a novel idea that does not exist explicitly in any other Constitution.

It is true that the courts in a few countries have started interpreting their constitutions horizontally. Such cases are new, they are rare, and controversial. On all these counts Constitutionalised horizontality is clearly unwarranted.

Not only should we not be called on to illustrate the impropriety of horizontality, but its protagonists have done nothing to show that there are unlikely to be counter-productive effects. They have legitidsed their case neither theoretically nor empirically.

We cannot possibly anticipate what will go wrong in the real world in this document. The dangers mentioned here might never materialise. What is more probable is that things we have not anticipated will go horribly wrong. For this reason alone the govermnent should legislate rather the constitutionals horizontality (if is serious about the idea).

1.8 **Dilution of vertical rights**. A crucial point is that the courts are bound to find horizontality enforceable only when it is feasible. This would have the effect of verticality being diluted and undermined to the same extent.

If there is to be horizontality in the Constitution at all, it should, as with second generation rights, be separated clearly from verticality (in a preamble, appendix or dedicated Chapter).

1.9 **Horizontality is ideologically biased**. Since horizontality is ideologically biased, the Constitution permanently be under a sword of Damocles. A new party, or the same party new ideas/leadership, at a later staae will have to amend the Constitution to implement its policies. Horizontality therefore degrades the Constitution to merely another piece of legislation, to be amended at the behest of current leaders and their constituents. (Conversely, an enduring Constitution - a Constitution for the long term - prescribes the rules according to which parties from the left to the right that share only a commitment to democracy, can get to power and govern according to their programme.

A Constitution with only horizontality is not one that all democrats of all persuasions can agree on. It is not elevated above party politics, transient ideology, and shifting policy trends. A good Constitution is one that can survive any predictable and legitimate change of government or a change of mind by the incumbent government in the light of experience.

1.10 **Transient versus enduring values**. A popular commentator - it might have been Alistair Cook wrote of the Arnerican Constitution that "It speaks to us across two centuries." If one reads it, or; of the few other great Constitutions that have stood the test of time, one can scarcely tell what the political issues and fashions of the time were. The Founding Fathers managed somehow to rise above and transcend the issues of the day, to be informed by a vision of the future, and to draft a document that ******could survive indefinitely and under which virtually any party from e,@eme dirigiste to laissez could implement its policy. A democratic Cotistitution should embody Sir Karl Popper's definitions

democracy: a system that provides for the peaceful change of government - by ballot instead of b I

The limitation clatise? It has been argued that the horizontality of dglits would not have absurd effects because it would be subject to the liniltatioii clause - so that hodzoiitality would not apply unless it would be "reasonable" or "necessary" in "open aiid democratic" society based on "freedo and equality".

However, the limitation as presently worded is a latitude allowed the state alone. It allows th cyovemiiient to violate basic n'ghts by way of laws of "general application" etc. It does not limit th(,@ lion'zontal application of rl(,hts. Horlzontality would be as utidiltited as the verticality ought to be.

This would be ati intolerably perverse state of affilrs. Citizens would find the protections foi, wlilch they have fotight tiirned aoalnst theni. The Bill of RI,,Iits would llave beer] ttimed on its beald-

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People who disclose income from unlicensed businesses ought to be able to establish whether the Receiver has informed the licensing authorities or the police, thereby breaching the promise of confidentiality on the part of a government agency with unique and awesome powers.
This is an entirely different state of affairs from that which exists horizontally. Private individuals/businesseslassociations have no power to extract information from anyone. Information they have has to be gathered lawfully. They may share it with others only to the extent permitted by law. The state is free to regulate these matters. There is absolutely zero need for a Constitutional @ provision on this.

2.4 Unforeseen consequences. The strongest case against horizontality is the unforeseen consequences it n-dght have. Surely nobody is in a position to say that this is a matter of such fundamental truth that they or their political competitors might not change their minds in the light of experience. Since no other country (to my knowledge) has such a provision, it cannot legitimately be called "fundamentaf'It is a newfangled idea and even those enthusiastic for it must realise that they themselves could change their minds - and they must want a Constitution that pe@ts them to do so - in the light of practical experience with a new, contentious and clearly dangerous idea.
It may turn out, for instance, that access to information held by credit bureaux, banks etc could disrupt tried and tested credit information techniques to the extent that credit becomes less rather th m more available as they had hoped for. It is simply not possible for anyone to predict the consequen(,es of such a measure. This point alone establishes conclusively the case against horizontality in tile Constitution and for it ordinary legislation.
Perhaps the most telling anomalies and unintended consequences of horizontal access to information would be to consider what its effects might be for trade unions and employers. As the present draft stands it would entitle Anglo-Amen'can to the confidential records of NUM - who attended meetings at which negotiating positions were adopted: was the vote by secret ballot; how many of its members are paid up; what do its full time staffeam; is it solvent etc? Conversely, NUI\L would have access to Anglo's confidential information.
Consider any number of other possibilities: A sues B who works for C. A now has the right of access to C's records on B. With a view to challenging A's integrity as a witness B now has the rii2ht to information about A from any source that is relevant. This presumably includes A's priest in the confessional, his psychologist, lawyer, banker, auditor, spouse, mistress, partners et al.

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2.5 Human dignity (clause 9). Horizontal application of the dignity clause, on the face of it, would m that most of Ken Owen's editorials would be unconstitutional since they reveal disrespect for the dignity of countless victims of his rrdghty pen. Common place media denunciations of people, and attempts to impair their respect and dignity, would become unlawful. No more footage of Eugene Terreblanche falling off his horse, or PW wagainq his finger. No more satires. No more Evita Bezuidenhout, and no more Winnic or Buthelezi bashing. Nothing more fights for Noseweek to distort the truth, and probably ail end to the Weekly Mall and Radio 702.
The horizontality of the dignity clause is in direct contradiction of the freedom of expression clause, just as the privacy clause (1 ')) contradicts the access to information clause (if applied horizontally.) These clauses make sense and can be applied consistently only vertically. Horizontality brings virtually every clause in the BOR into direct conflict with another,

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2.6 Medical treatment, food, @vater, social security (26). Everyone is entitled to health care "of the highest attainable standard" tinder the Draft Constitution. And no one may be refused "emergency' medical treatment.
With horizontality, not just the state, but everyone @vill be bound by such Santa Clause clauses. Anyone will be free to go to any physician and demand, as a Constitutional fight, treatment of the highest attainable standard, at all times and places, whether or not the physician is on holiday, on t@ e beach, or visiting witli fiieiids.

2.10 Freedom of movement. Does the "fight of freedom of movement anywhere in the Republic" inc ude the right to move freely over pdvate land? In private buildings? Down private roads? Into pdvat(:
homes?
Horizontality could presumably be defended feebly by arguing that private people have the same fight as state to exclude people from private places. The state may exclude people fonn eg securit ' establishments or government buildings out of hours. But this is no escape. To suggest that afi pedple should have the same fights of entry to private places which they do not own, as they have to
f- government facilities, which they do, is logically and morally indefensible.

2.11 Privacy. Does the tight for people "not to have their person or home searched" mean that Pick 'n or de Beers can no longer search staff for stolen goods when they leave work? Does it mean that potential private employers, including the ANC, cannot ask questions other than those which the st would be pennitted to ask during job interviews? Again, a clear distinction has to be

drawn betwe private people using their own money and property and the state using tax payer's money, and pull property.
What seems to be a pervasive flaw that informs the notion of hodzontality is the failure, as have observed, to distinguish between the nature of the state and all other entities. There is no legitimate case for subjecting private people to the same constraints that the state is necessarily subjected to.

1.19 Access to courts. Hodzontality would oblige you to satisfy my fight to have any dispute "resolved in an independent and impartial forum". Including a private disciplinary committee, or a church or welfare agency? What does this mean horizontally? Can we now demand of private citizens, N(-j:)

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welfare agency? What does this mean horizontally? Can we now demand of private citizens, N(-j)'s and companies that they provide mediation and arbitration services, indeed that they provide ALL the services the state has to provide: schools (28), courts (') 7), etc?
TI-tis discussion - and all the countervailinq arguments that astute readers would recognise raises the key point that the mere fact that, since it is so hard to think of and work through all the practical implications of so manv of the fights being applied horizontally, the idea is entirely inappropriate. We truly believe that it not have advanced this far had it been thought through systematically. Had the idea been thought through properly, the proposal would, at most, have b(@en for it to be applied only to specified n'chts where it might make some sense. Hofizontality is a good idea on the face of it, and it sounds like the sort of thing South @cans can include to make ours the most 'advanced' constitution in the world. However, on reflection, everyone should agree that it (lid not pass the necessary test and criteria for inclusion in the county's most important document.

1.20. Administrative justice. The horizontal right to written reasons for administrative decisions wou

Administrative justice. The horizontal right to written reasons for administrative decisions wou d presumably include the right to @tten reasons from an employer for not giving a salary/wage incease or for tuming down a special leave request; from a shop for not being VAIling to order a book requested by a customer or for closin,, on Saturday aftemoons; from a restaurateur for not servini Y a roll before meals; from a trade tlnloii accepting a pay offer; from SAA for having four instead of f.ve (or three) flight attendants on SA304; from the ANC for supporting the EFP's horizontal rights proposal, or for appointing its telephonist in preference to number two on its short list; from a wculdbe seller for declining an offer to buy; from ... well, from everyone for who takes decisions outsid,- the government sector.

It might be argued that it applies only to administrative decisions effecting someone directi:@, such as their rezoning or business licence application. Apply this horizontally and it either means nothing since only the state has such powers (even if delegated), in which case leave it out, or it applies wliere it should not, such as the Aii-lo-Amedcan Chairman's Fund's decision not to donate RI m to the Socielyfor lhe Restoialioii of llie H(71).@biiig.@ or the Foiiticialioti.for ll?e Rehcibililalioll of Coffee Ati(lict,v.

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Bill of rights: Limitation clause

The key to a successfbl future in this country is a constitution that protects the fights of every citizen and
provides the framework for good government in the new South Afiica.

The purpose of a constitution

The primary purpose of a constitution is to protect citizens from the state. This is necessary because

governments are legally entitled to use force (the army, the police and prisons) to compel obedience. The state has the power to do things to citizens that citizens may not do to one another. For example, in many countries the state can conscript citizens into the army and force them to fight acid fisk their lives for their country. But if a powerful citizen attempted to force others to give up their normal Iii@es and jobs and to protect him at the risk of losing their lives he could be charged with all sorts of crimes including slavery.

Because governments enjoy these special powers all democratic constitutions are based to some degree on trust. The people elect a.nd empower{xe "Power: abuse of 'I representatives trusting that they will not abuse I heir position. '

However, trust alone is clearly insufficient to prevent power from being abused, so in constitutional democracies various checks and balances aim to contain the exercise of state power vathin certain well-defired linlits.

Constitutions are created to protect us, not fronl the best of governments, but from the worst. Ma'ny South Afiicans would argue that they have fought for three hundred years to establish a state that they can, Lt last, tr-ust. They feel that there is no reason to fear olir present government.

But what about the government that our grandchildren vote into power? Constitutions are not design@@d to protect us for only a few years; they are there for the long tenn. The people in this country deserve a constitution that VA'11 protect them even if their worst political enernies come to power.

Only if the members of the extreme fight wine, feel secure under a government made up of the extrem,- le wing, and only if members of the extreme left @ng feel that their fights are secure under a government mad up of the extreme fight wing, can we say that we have a sturdy constitution.

Constitutions protect citizens through various mechanisms. Many of these checking and balancing mechanisms have been included in the draft constitution. TWs submission makes proposals to strengthen the se provisions and to include additional mechanisms that have been overlooked.

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Protecting human rights

Bills or declarations of rights{xc "Bill of rights:and common law"} are an important mechanism to protect individuals from government abuse.

In a traditional bill of fights, such as that of the USA or the French Declaration of the @ghts of Nlan, comrnon law freedoms are listed which can be enjoyed by all people simultaneously. These are genuine liberties or freedoms (or "first-generation" rights).

The common law does not envisage a certain type of society and draw up a body of laws intended to bdn it about, as aovemments often do. Rather it assumes, and aims to protect from violation, inherent common-law or fundamental freedoms which can be enjoyed by all people simultaneously.

{xe "Common law:and individual n'ghts") For exaniple, it is possible for any individual, regardless of race, -ender or other distinguishing fictors, to enter contracts; to cam inconie., to buy movable and immovable property front a willing seller and do whatever he wishes with it; to move freely through the public domain; to speak or write on any matter as long as he does not commit libel or slander., to be tried in an impartial court if accused of a ,Yrong-doing; and to vote for the political representative of his choice -- ivithout impinging on the fight of any other person to the sanic freedoms.

Sotiie Soutli Afiicans argue that these nghts are not sufficient for this country because tlley don't pro,@de people W'tli the wlierewitlial to exercise tliei-n, nor do they reverse the dainage dotie by apartheid. The peop le \vho need inost protection from the state are those wlio niost lacked it in the past. the poorest acid weakest niexiibers of olir society. ThLis it is argued that beyond protecting the basic n'glits of all citizens the constitution

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It is only when socioeconomic goals are included in a bill of rights that the question of horizontality becomes relevant. Horizontality applied to the socioeconomic aspects of our draft bill would mean, for example, that businesses would no longer be free to employ whomever they regarded as the best person for the job. If challenged, they would have to be able to prove in a court of law that in choosing one candidate they were not disciirdnating against any other candidate.

The introduction of horizontality combined vath second generation rights would place many common aw fights in jeopardy and put various aspects of the law in contradiction vath others.

Section Thirty-one, Access to Information, is applied horizontally in the draft bill of fights 3 1(1)(b) an(states that: "Evdry one has the fight of access to any information that is held by another natural or juristic per ;on and that is required for the exercise or protection of any fights". This conflicts directly with the right to privacy which includes the "fight of any person not to have the privacy of their communications violated".

Specific clauses in the bill of rights

Section Two - Equality

In the draft constitution 8.(I) says that everyone is equal before the law. Logically this prohibits statutory affirmative action which requires that the government classify people by race and gender and treat them differently depending on their classification. However, 8. (2) Option I says that "measures that are designed o ... advance groups or categories of persons disadvantaged by [unfair] discrimination may be used"; and 8.(2) Option 2 states that "this section shall not preclude measures likely to achieve the adequate protection and advancement of persons or categories of persons disadvantaged by unfair discrimination..... and Option 2 (4: states that "Discn'mlnation ... is unfair unless it is established that the discrimination is fair."

At least eighty percent of South Afiicans have been disadvantaged by unfair discrimination. Statutory measures designed to discridnate in favour of the vast majority of the population defined by race and gende. make nonsense of section 8.(1).

We subnu't that 8.(2) Options I and 2 should be omitted and the intention that the state promote equal ty of condition should be included in a general statement of "National Goals" which should be included in the preamble or Transitional Affairs appendix to the constitution.

Section twenty-one - Economic Activity

Option 2 (2) contradicts Option 2 (1) and as such should be ordtted. In place of the three Options offered h(we propose a statement to the effect that:
The state shall make no law that inhibits the right of the people to improve their quality of life, materia welfare and personal development.

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Section twenty-three -- Environment
Section 23(a) states that every person 17ay the right to an environment which is not detfimental to his or her health or well-being. This cannot be regarded as a natural or fundamental right since vathout any human intervention, famines, floods, earthquakes, fires and plagues occur in nature and threaten the health and well. being of people. Nor is it a right that can be conferred by the state which does not have the power to preven natural disasters.
The inclusion of rights that are not enforceable nor achievable by the state undermines those rights wl ch are enforceable. The clause should therefore be omitted from the chapter on rights and included in "Nationa Goals" along ,vith 23 (b) to the effect that the state shall aim to promote a healthy environment for the peop e.

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Section t",enty-seveti -- Children

27.(b)(c)(d) and (c) (parental care; seclin'ty, nutrition, health and social services. not to be subject to neglect or
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abuse; not to be subject to exploitative labour practices) cannot be guaranteed by the state, they should ther(@fore
be deleted from the bill of rights and included under "National Goals".

Section thirtv-f-ive -- Limitation

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This section states that entrenched rights "may be linilted by or ptirstiant to la@v" only to the extent that the
Iiiiiltation is reasonable and J'tistifiable/iiecessai-y in ail open and democratic society based on freedom and

The bill of rights

Summary

The clauses in Chapter 3 on Fundamental Rights in the interim constitution nearly afi commence "Every person shall have the right to" equality, life, and so forth.
This implies that the rights in the chapter have been conferred by the constitution and by the politiciais who negotiated it.
This is dsleading and incorrect. The fights mentioned in the constitution, and other individual rights and freedoms, have always been enjoyed in terms of common law.
The problem is not that people do not have these fundamental freedoms, but that legislation and governments restrict and destroy these freedoms.
The wording of the clauses should all therefore be changed accordingly, so as to read, for example: 'The
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right to freedom of (conscience, religion, thought and belief etc.) shall not be abridged", and "No person shai
deprived of the right to life", and so on.

Equality: In the interim constitution 8.(I) and 3.(2) prohibit the state from making distinctions between peo)le on any basis including race, gender and belief Logically this prohibits statutory affirmative action. We submi: that 8.('))(a) should be omitted, therefore, and its intention that the state promote equality should be include(in a general statement of "National Goals" which should be included as a preamble, preface or postscript to the constitution.
Linlitation: This section states that entrenched fights "may be limited by law" provided such limitat on is reasonable and 'ustifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right in question.
No matter how well-intentioned this may be, it means that government at all levels has the power to violate fundamental rights, and this power is vaguely defined and open to differing interpretations.

Legislatl'Ve violations of all the listed rights, from the fight to life to the fight to vote, will be measured against this liniitetion clause.
If there must be a limit on the extent to which any particular dght is protected, the precise limit should b vmtten into the section that entrenches that right.

No special privileges for state or governments: The bill of fights should include a clause which prevents legislatures from conferring on the State special privileges which are denied to private citizens.
In particular, the State should be forbidden from conducting any enterprise or business activity whili,, prohibiting others from also carrying on the same activity.
Secondly, the State should be forbidden from exempting itself from the effects of laws imposed on

persons.

Enstiriiig accountability: The most effective way to ensure that democratically elected representatives ren accountable to the people is by allowina the people to veto political decisions or propose their own laws thr direct democracy. We therefore propose that the follokvlng rights be included in the bill of rights:

1) Tite I(ijvmaking initiatii,e and referetithitit
2) The iefoing inititititiie and referetr(liitpi
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5) The recall initiatii,e acid r@fereti(luttt

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Secdon Two - Eqiiality

In the interim constitution 8.(I) and 8.(2) prohibit the state from mak:lng distinctions between people on any basis including race, gender and belief Logically this prohibits statutory affirmative action which requires that the government classify people by race and gender and treat them differently depending on their classification. However, 8.(3)(a) states that "this section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discddnation.....

At least elighty percent of South Africans have been disadvantaged by unfair discrimination. Statutorr measures designed to discriminate in favour of the vast majority of the population defined by race and gendei. make nonsense of sections 8.(I) and 8.(2).

We submit that 8.(3)(a) should be ornitted and its intention that the state promote equality should be included in a general statement of "National Goals" which should be included as a preamble, preface or postscript to the constitution.

Section twenty-six - Ecotiomic Activity

26.(2) contradicts 26. (1 i and as such should be omitted. In its place we propose a statement to the effect tha:: The state shall make no law that i@bits the right of the people to improve their quality of life, material welfare and personal development.

-Sectiott twei@-tiiiie - Eiiviroiimeiit

This section states that every person shall 17cne she fight to an environment which is not detrimental to his oi health or well-being. This cannot be regarded as a natural or fundamental right since W'thout any human intervention, famines, floods, earthquakes, fires and plagues occur in nature and threaten the health and wellbeing of people. Nor is it a n'ght that can be conferred by the state which does not have the power to prevent natural disasters.

The inclusion of rights that are not enforceable nor achievable by the state undermines those fights M, are enforceable in practice. The clause should therefore be omitted from the chapter on rights and included iii "National Goals" in a statement to the effect that the state shall aim to promote a healthy enviromnent for tli people.

Seclion thirty - Cltildren

')0.(b)(c)(d) and (e) (parental care; security, nutrition, health and social services; not to be subject to neglect abuse; not to be subject to exploitative labour practices) are not natural rights nor can they be guaranteed by state, they should therefore be deleted from the bill of rights and included under "National Goals".

Sectiott tliirty-tliree - Liinitadoii

This section states that entrenched rights "may be limited by law" pro@@ded such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and does not negate the essenti i content of the right in question.

No matter how well-intentioned this may be, it means that government at all levels has the power to violate fundamental n'ghts, and this power is vaguely defined and open to ditten'ng interpretations. Legislati@ c violations of all the listed fights, from the n'ght to life to the fight to vote, VA'11 be measured against this lidt,.t clause.

For example, the constitution says every person shall have the right to life. But current legislation countenances capital punishment, which is, arguably, an invasion of one's fight to life. Does Clause 33 mean t the death sentence is an "unreasonable" and "unjustifiable limitation" that negates the essential content of th(@ nght to Life? Or W'11 Clause 33 be interpreted to mean that capital punishment is a "reasonable" aiid "justifiab limitation" that does not negate the essential content of the fight to life, since it is found in "open and democr societies"? The answer to this question is not certain, and the application of the]ii-nltation clause allows for opposin(y interpretations and for tinpredictability about which interpretation will prevail, which is undesirabi

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5) The recall iiiitiaidve acid referepiditlti
The fight of the people, initiated by a petition signed by a certain number or percentage of voters, to propose that a particular politician or other elected or appointed office-bearer, be dismissed, which must be put to a referendum.

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institutional constraints on the spontaneous and proven propensity of markets to redistribute property. These include the laws goveming credit, conveyancing, land survey, subdivision of land, township development, zoning, equities, companies, licensing, transfer and stamp duties, and the like.
Redistribution is, by defhtion, promoted when people are free to exercise the fight of alienation in whole or part. The notorious land acts, and countless other curtailments of property fights, were introduced @

whole or part. The notorious land acts, and countless other curtailments of property fights, were introduced')y earlier regimes precisely because they recognised this. They observed that, in the real world, property tended to be redistributed on a scale wholly unacceptable to them. They and their followers often expressed the fear th; it, unless black's property rights were curtailed, black South Africans "would take everything over" C'hulle sal able

be redistributed on a scale wholly unacceptable to them. They and their followers often expressed the fear th; it, unless black's property rights were curtailed, black South Africans "would take everything over" C'hulle sal able

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The historical record provides ample evidence that this expectation was justified. Dudng the brief periods that black South Afiicans were free to acquire property, and property markets were relatively deregulated, they succeeded in many areas of enterprise -- including in the acquisition of rural and urban land through direct ownership and tenancy.
Should the state decide to intervene directly to subvert the natural redistribution process, however, this could be adequately achieved, without diluting constitutional protection of property rights. The state can anc should, for instance, use the vast property holdings and other assets amassed in its hands (for past ideological reasons) for redistribute purposes.

Should it decide to redistribute priiate property, the property rights principle -- security of tenure -- obliges it, to compensate fully those from whom property is redistributed.
It would be an unconscionable irony to right past wtongs by way of the same illegitimate means that the dispossessed were violated in the first place.
Whatever is decided regarding exislitig property fights, no coherent case has been nia(lefor not constitutionalising tite untlilutedprotection of those, especially tlze (lispo.,Ysesse(l, svho acquire property legitii?lately in the neivYA. Everyone in good faith should at least agree that the those whose property figh s were so ruthlessly violated in the past, should never be at n'sk again in the future. It could truly be said that those who sacrificed so much in the struggle W'11 have been betrayed if they fall to gain the protection of the fights against the violation of which they fought for in the first place.
And it should be remembered that apartheid -- like most crimes a@nst humanity -- would have been impossible- had there been an ettective property rights clause since 19 1 0.

1.2 R@itution

The concepts of restitiitioti and (coercive) redistribiilioti are frequently confused and even used synonymously. They are poles apart. The principle of restitution is simply an aspect of property fights. The right to restitution or compensation is the right to property.
There is no need to negate the very essence of the property d-hts clause, as all the present proposals envisage, in order for the government to acquire property for redistribution.'This should be done just as democratic governments and the private sector do the world over - through purchasing property that comes on the market.
Powers of exprol.?riatioti are acceptable only where there is t7o reasonable allen7ative, such as a locllitybound harbour, freeway or security installation.
THs conception of property fights is not history-specific. It should apply for all time: anyone whos(@ properly lights are violated in the future should, likewise, have the constitutionally protected fight to restitution or compensation. That would be the etyect of a good clause.
Note that there is nothing special about this view. It is an inherent ingredient of most common law systems. Anyone, including the state, that violates anyone else's property (or other) fights, should always b(! liable for restitution or compensation (damages).
Except where existing property holders have acquired their property by identifiable unjust means (ie other tilan by botiaftde purchase, inheritance, donation, or xvliatever), they shoijld in no way be penalised b@, the sealed need to restore or compensate. This would tum innocent people arbitrarily, randomly and unjustly irto victims and result in a never-ending cycle ofjtist claims. At

sonie future time, when the passions and resultant distortions of our present transition have receded, progressive and fair-i-niiided people will find the case for compensating the new round of victims -- on identical grounds -- irresistible.

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Furthermore, there is no case to be made for delayed or reduced compensation of a present bonafic owner whose property is repossessed. Compensation should be full and immediate. If the state lacks resour(lvvith which to compensate a restitution claimant, it is a matter between them, to be resolved as justly and expeditiously as possible, perhaps, for instance, by the transfer to the aggrieved person of comparable state-f property elsewhere, or of other state assets (held at whatever level of govermnent).
Needless to say, to justify protection, property fights must have been acquired legitimately. Ad hoc legislation, under consideration by the Department of Land Affairs, may be necessary to deal with malafide dispossessions W, for instance, some former homeland regimes, at token prices. (The legitimate protection

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dispossessions W, for instance, some forrner homeland regimes, at token prices. (The legitimat(f
existing property rights is not to be confused vath land disposals that ought to be set aside, or v ,re

additional money should be paid in. In cases such as those alluded to above, where land may h@ of by a homeland govermnent to a favoured beneficiary at well below its recognised market val transactions concerned should be investigated to see if there was real corruption. Mechanisms f

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dubious land disposals, whether historically or in fbture, are adequately provided for in ordinar3 id the conunon law.

Such problems @ll always arise, since the State Land Disposal Act permits it to dispos4 su terms as it deems fit". This issue is not to be confused math the question of legitimate land acqt rights. Disposals in the nonnal course and acquisitions in bad faith are not the same thing and should prefer,,bly not to be dealt vath in the same context.

Acquisitions by the state itself might be found to have been nialefide, for example, where a farmer r Jay have been paid much more than "consolidation" land may have been worth, or where powers of expropriati(in were used to victimise people (mostly blacks). Such acquisitions may also justify separate section.)

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1.4 Le,"al Certainty

Good law and good government deniand that every effort be made to ensure that all legislation, especially a bill of fights and a constitution, are maximally itt7anibiptoits and etiditiiiig.

The needless vagueness and uncertainty, and the manifestly temporary nature of the existing qualifications to the proposed property rights clause/s is, for citizens and investors, akin to a team preparing for and going onto a sports field vathout knowing in advance whether the game is to be subject to the referee changing the r-u'les at will.

In the govemment's laudable efforts to generate investor confidence, a crucial element would have I o be security of property. Bankers report that mortgage markets have already been destabilised due to uncertainties surrounding tenure and restitution rights.

There is no reason why property rights protection -- a simple matter in principle -- should be subject to such ambiguous, subjective and confusing qualifications. All that needs to be done is to protect people front the confiscation of their proper-ty by the state.

Not ordy would the addition of the proposed dilutions generate needless uncertainty, but the courts are obliged, in South Afiican law, to read meaning into the clause-specific limitations that go beyond general limitation clauses.
The question to ask is: What is it that the state might want to do that it cannot do under the (ther limitation clauses? The answer must surely be something unacceptable in an open and democratic society something that negates the essential content of the fights concemed.

2.0 Draft Consfitufion
Options I and 2 of Clause 24 of the draft constitution do tiot protect property rights whereas Option 3 wit[
amendments proposed ivill protect property lights.

2.1 Clause 24, option 3, subclatise 3 reads as follows:-

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24 (Option 3) Sub-clause 5 reads as follows:
Every person and community (lispossesseil of land after 19 June 1913 as a result of a tliscrindna I(nv or practice has the right to claim restitution of the land or equitable redress subject to and in accordance ivith this section and a lmv ofgeneral application.
It seems probable that restitution in terms of this sub clause YAII be at the expense of the state (wher(, present holder has bona fide possession). @owever, this could be interpreted to imply that restitution must t the expense of an existing bona fide occupier. To remove the matter from doubt, this sub-clause should be amended as follows:
... equitable redress at the expense of the state ...

Conclusion
The effect of removing the existing property rights protection (which is in the Intedm Constitution) or of gi% i the state vade powers to violate property rights, could have a disproportionate impact on ordinary people as well as on local and foreign investors.
Had there been no property rights clause in the Interim Constitution, as in Britain, the failure to introduce one would not amount to much. But if there is one, as in Germany, and it is purposefully removed the implications are obvious: the state wants to seize property ofat;y kind. Why else would it remove protection, especially in the face of severe opposition?
Conversely, strengthening the existing clause, apart from being the right thing to do, would send a much-needed and very positive message to potential foreign and local investors.