CRITIQUE

A Feminist Critique of

"The Charter For Social Justice – A Contribution to the South African Bill of Rights Debate"

by H Corder et al 1992

Dept Public Law UCT

BRIDGITTE MABANDLA

COMMUNITY LAW CENTRE

ACKNOWLEDGEMENTS

This critique would not have been possible without the sponsorship of UNICEF which enabled me to undertake the research. Special thanks goes to the International Women's Human Rights (IWHR) Law Clinic at the City University of New York; Professors Rhoda Capelon, Celina Romany and the student assistants of the IWHR.

The team at IWHR made invaluable contributions especially in the area of American Jurisprudence and International Women's Human Rights Law. Professor Celina Romany helped especially in the editing of the paper. Then, also thanks to the students who spent a lot of time and energy finding appropriate research material.

I further wish to thank Mbali Mncadi who acted as a sounding board and lent her support in writing this paper.

A Feminist Critique of the Proposed Charter for Social Justice[1]

by

Brigitte Mabandla

INTRODUCTION

This paper is a feminist response to the Charter for Social justice (hereinafter "ACSJ"). It provides a critique of the extrapolation of a constitutional model based upon a classical liberal bill of rights which draws boundaries between civil, political and social and economic rights. It also addresses the textual exclusion of women who are significantly affected by a conceptualization of civil and political rights which does not address the social and economic spheres of life and the "private" spheres where women are principal actors.

The paradigm from which this critique departs is the critical legal demarginalising feminist perspective. This stems from a praxis of gender-based dispossession which is beginning to be articulated and developed in conjunction with a global feminist analysis. It is one informed by the political and social urgency of acknowledging the gender dimension in the constitutionalisation of the South African reconstruction process. It will also attempt to incorporate, through the lens of feminist views those critiques waged against the so-called "negative" bill of rights.

This critique (of the proposed Charter for Social Justice) is also informed by the current feminist critique of international human rights law which addresses the exclusion of women from such a framework.

This paper will incorporate the experience and demands of South African women. These are in essence, the constitutionalisation of women's rights in recognition of their full citizenship.

Whilst the ACSJ authors state that their proposal is premised on the Canadian model, they base part of their supporting argument on USA jurisprudence. One such argument relates to the distinction between civil/political rights on the one hand and social/economic rights on the other hand. It is therefore necessary to more closely examine USA jurisprudence.

---

1. A Charter for Social Justice - A contribution to the South African Bill of Rights debate. Dept of Public Law, UCT, Dept of Public Law, UWC, Legal Resources Centre, Cape Town (1992).

This paper will offer a set of guideposts in the critique of the proposed Charter for Social Justice. At times questions will be formulated to raise issues from a feminist perspective in the hope that the constitutional process does not replicate the international and multi-national experience which relegate women to the margins.

THE CONSTITUTIONAL DEBATE IN SOUTH AFRICA

For the past three years there has been an intense and ongoing debate on a post-apartheid constitution. The debate focuses on two issues: one is the *structure* of a post-apartheid state (i.e., whether it should be a unitary federal or confederal state); the other relates to the *substance* of a post-apartheid bill of rights.

With regards to the substance of a bill of rights there is a debate which reflects two over-arching conceptual models with regard to a bill of rights. One that views the constitution -as embodying civil and political rights entrenched as fundamental rights. This is commonly labelled as a "negative" constitution. On the other hand there is the "positive" constitution perspective which views civil, political, social, and economic rights as an indivisible unit.[2] Whilst the debate on the substance of a bill of rights is one relevant to this paper, it is important to mention that in the current debate, structure and substance intersect. This is because both are discussed in the context of the post-apartheid dispensation of power.

The proponents of a negative constitution recommend the United States federal model. One of the key considerations in such endorsement is instrumental. They regard a bill of rights as an instrument for checking excessive use of power. Advocates of this model are inspired by fear of a majority government, as it is generally assumed that a government elected by a black majority will be the outcome of the upcoming democratic elections.

---

2 The South African Journal on Human Rights, Fourth Quarter 1992, contains three articles by prominent Human Rights lawyers on the discourse of constitutional rights. Professor Haysom at 454 argues for entrenched socioeconomic rights in the bill of rights. "... A constitutional democracy requires both political/civil and socio-economic rights as a condition for its existence. It cannot be seen to institutionalise and guarantee only political / civil rights and ignore the real survival needs of the people ... it must promise both bread and freedom." Prof Davis at 486 says "... A difference must be drawn between these rights and those of a social and economic nature, and this again is best achieved by means of directive of principles of state policy. He bases his arguments on the hierarchical distinction of rights wherein civil/political rights are seen as fundamental rights are cast as objects of state policy in the constitution. Prof Etienne Mureinik, in his paper, "Beyond a Charter of Luxuries: Economic Rights in the Constitution", argues that social and economic rights are justiciable, and that courts will have the opportunity of reviewing governmental action and inaction. At 474 he says "... Finally the Courts would give relief in negative form, striking down what could not be justified." Both Haysom and Mureinik seem to recognise the indivisibility of rights.

The intense debate on the substance of a bill of rights is a reflection of the divide in our society. The Constitution making process is in itself an arena of struggle for power. Most conservative white parties and prominent conservative opinion-makers regard distributive justice as "theft" from whites by the "hordes"/"masses" of blacks. The relinquishment of economic and social privileges brings about both tangible and psychic minority reactions. There is an almost pathological collective fear of black majority rule which is visible at the negotiations table and mirrored in the mainstream media. In its most extreme incarnation it manifests itself in racist, stereotypical cliches such as "South Africa will be like the rest of black Africa when majority rule takes over."[3]

The ACSJ authors do not fall into the above category. They are academics and lawyers in pursuit of a viable option for South Africa. In the introduction of ACSJ the authors assert their progressive political inclinations as social democrats who believe in the regulation of the market and the provision of social welfare by the incumbent state[4]. They are also mindful of the oppressive discrimination against black women in South Africa, and in their explanatory notes assert their intention to avoid disadvantaging women.

---

[3] The bill of rights is seen as one of the many mechanisms to weaken central government. Accordingly federalism is seen as a complementary framework to check excessive executive power. The 1992 constitutional government's proposals for a troika presidency and federalism were clearly inspired by fear of relinquishing privilege. Some of the sentiments against majority rule have been echoed in mainstream media. Ken Owen, a prominent libertarian and editor of a widely read Sunday paper, leads the liberal press in its attacks on ANC policy and its proposed bill of rights; Sunday Times, January 31, 1993, at 20; in a lead article entitled "A new order takes shape, an old Quest resumes", says "... the clever lawyers of the ANC use the idiom of democracy with greater familiarity, but they lay more subtle traps. Confident that the ANC will command an electoral majority. True to their Leninist roots, they seek freedom for government, not freedom from government"

See also; Sunday Times February 14, 1993, at 20. An article entitled "A ramshackle edifice built on quicksand", states that "Faith in our judges, our courts, our judicial system, and tragically in our common law, has since eroded to the point where nobody, not even slavish admirers of Roman Dutch Law, like me, trust it to defend us against the State ... the trouble is that the task of drafting a bill of rights has fallen on the one hand, to ANC lawyers deeply imbued with socialist ideas...".

Tony Leon, spokesperson of a libertarian party called the Democratic Party, has similar views to Owen; Sunday Times February 14, at 21; "Finding wrong with Rights"; argues against the ANC proposal, "... where liberals regard the bill of rights as a shield to protect individuals in a zone of rights which are God-given, not government-bestowed, the Left views the bill of rights as a battering ram to enforce a range of issues incapable of adjudication. Where the liberals regard the judiciary as the guardian of individual liberty, the ANC sees it as a cypher".

The extent of white fear is aptly described by Flip Buys, organiser of the whites-only union in the steel industry, who, in an interview with the New Nation, March 19 - 25, 1993 at 8, motivates as follows for a confederation. "... we do not see any future for our people under an ANC government because an ANC government will govern for the benefit of its own people, and it will only be a change from white minority to black majority. It will be a democratisation dictated by the masses, which we refer to as massification."

[4] ACSJ at 28. "the choice of this value system which is described as a "social democracy", clearly indicates our belief in a substantial role for the State in its regulation of the market, the provision of social welfare services (such as health, housing and education), and its guardianship of the institutions and mechanisms of political democracy."

Thus in their critique of the ANC draft bill of rights and the Law Commission's report, they seek to provide a viable constitutional option for South Africa. However, the substance and content of the Charter is in stark contrast to their stated objectives.

The major problem with the ACSJ is that it is acontextual., with theoretical underpinnings that are libertarian in nature. The first point that must be made is that the constitution of South Africa must be contextualised.

It should reflect the history of its people and establish specific principles to redress the inequalities created by decades of apartheid rule. It should therefore explicitly embrace reconstruction in the post-apartheid society. Thus, it cannot adopt wholesale constitutional models that deny an affirmative role of the state in the reorganization of the South African society.

A contextual Constitution explicitly embraces the values inherent in a racial and economic reconstructive process. It sets the historical foundations of such reconstruction and within that framework articulates and guarantees the rights of all its citizens. Unlike a classical liberal framework the contextual constitution explicitly acknowledges that it is not value-free.

A key ingredient of that history is the history of our women, in particular black women who are most oppressed. In articulating constitutional rights that translate the powerful voices of women, a feminist analysis has to acknowledge the intersection of race, class and gender. If we fail to include broadly conceived, textually explicit guarantees of civil, political, economic and social rights, we are bound to deny women the protections which are most meaningful.

WOMEN IN SOUTH AFRICA

The greatest weakness of the ACSJ proposal is that it completely undermines the fact that black women in South Africa regard socioeconomic rights as part of their fundamental rights.[5] The needs identified by women derive from their experience. Poverty in South Africa is feminised.

---

[5] Mabandla B. " Protecting the Rights of Women in the Constitution". Women and Power. World University Service (Women's Development Programme). 1992. Page 60 states that:
"Education and health are very pertinent to women and that is where the rights of women are located within the broader social and economic rights"

Women are the major victims of forced removals and today dominate settlements of the homeless (squatters) and poor rural family units as heads of single parent households. The majority do not even have functional literacy and therefore cannot make informed choices in matters relating to the most important aspects of their lives. Black women occupy the lowest ranks in employment because they are unskilled.[6] Notwithstanding their gallant opposition to apartheid, leading struggles in many communities;[7] the majority do not have the requisite skills to effectively participate in institutions of governance of a post apartheid South Africa. The basic point is that *South African women cannot enjoy their Civil and Political Rights unless their Social and Economic needs are regarded as fundamental rights.*

Recognition of the indivisibility of rights responds to the intersection of race class and gender in the human rights discourse. The marginalisation of social and economic rights condemns black South African women to perpetual slavery. As conceptualized in this proposal women's rights are defined in terms of a paradigm which silences the experiences of women marginalised by the interaction of race, class and gender.[8]

Furthermore, the ACSJ authors describe government's task as that "of selecting the means least burdensome to human rights".[9] South African black women would join me in asking: *whose rights are human rights?*

WILL ASSERTING "NEGATIVE" RIGHTS TO THE EXCLUSION OF POSITIVE RIGHTS BEST SERVE SOUTH AFRICA?

The characterisation of rights as "negative", implies non-intervention by the state (freedom from). In its classic articulation, negative rights include freedom of speech, assembly and other traditional civil and political rights. "Positive" rights, on the other hand, include the right to education, shelter and other economic and social rights which contemplate state intervention to guarantee their realisation.

---

6 Barrett J. Dawber A. Klugman B. Obery I. Shindler J. Yawitch J. Vukani Makhosikazi - South African Women Speak. Sigma Press. 1985. Pg 20:"Because they are unskilled....African women are paid low wages."

7 Walker Cherryl. Women and Resistance in South Africa. David Philip Publishers. 1991.

8 Mtinso T. " Race Class and Gender". Women and Power. Op cit. Pg 31 - 34. In this article Ms Mtintso explains that women in South Africa have different experiences arising from their race and class positions. She argues for the recognition of the intersection of race class and gender in defining women's oppression.

9. Corder et al . ACSJ page 16.

Critiques of the American Bill of Rights characterise it as either a negative or conservative constitution, because it does not promote social intervention by the state. They often advocate for one that promotes state action. However, characterising rights as positive or negative means little given that both negative and positive constitutional provisions may impose affirmative duties.[10] Traditionally, human needs have been defined as economic and social rights while human rights have been viewed as falling within the civil and political realm.[11] Indeed, the human rights discourse developed since the drafting of the International Bill of Rights has bootstrapped the characterization of rights into one or the other category. In hierachalizing "rights" as such, the individual is frequently left with no rights at all.[12]

Divergent attitudes towards the State and its relationship with society have contributed to the creation of the artificial divide between, and definition of, negative and positive rights.[13]Constitutionally enshrined social/economic rights, for example., are foreign to Americans, whose belief in the concreteness of rights has been described as:

> "that a right-holder should be able to call upon the courts to 'smite' anyone interfering with that right."[14]

The traditional concept of fundamental rights pivots on the obligation of the state not to infringe on certain basic freedoms, recreating a permanent tension between the state and a large section of its citizens.[15] Examples of these are the poor and women.

To instill a bill of rights with the required legitimacy in South Africa, lessons from other juridictions have to be noted. However, the South African constitution must be fashioned in a manner that responds to the needs of its nationals.[16]

---

10 Gerhardt, The Ripple Effects of the Slaughter-house: A critique of a Negative Rights View of the Constitution, 43 Vanderbilt Law Review 409, 425 (1990).
Further, Gerhardt notes that the 14th Amendment, "may be read as imposing an affirmative duty on the part of the states to avoid complicity with violations of fundamental rights or to provide fair procedures prior to its involvement in the deprivation of someone's "life, liberty, or property."" Id.

11 Oliviero. Human Needs and Human Rights: Which Are More Fundamental, 40 Emory Law Journal 911, 915. (1991).

12 As Oliviero further states, "Constitutionalism is thus misused by the state to organise power in its favour and ensure its dominance over individuals who have restricted access to political instruments of power. The crisis that often results is that states lose their legitimacy as civil and political rights are increasingly curtailed and dissent is no longer tolerated." Id. at 916.

13 Glendon, Twentieth Century Constitutions, 59 The University of Chicago Law Review, 519, 525 (1992).
14 Glendon at 533.
15 Oliviero at 920.
16 Oliviero at 935.

Thus relegating economic and social rights to a nonbinding sphere as does the ACSJ reflects a failure to recognize that:

> The conception of negative rights as freedom from coercive violence has questionable value in shaping constitutional restraints on a government that more often exerts its power by withholding benefits than by threatening bodily harm. ...The greatest force of a modern government lies in its power to regulate access to scarce resources.[17]

While certainly within the South African context, freedom from (coercive) violence is critical, it should not necessarily trump economic and social rights. The stark absence of economic and social rights in the American constitution has become the exception and not the rule in twentieth century constitutions.[18] After World War II, European constitution-makers supplemented negative liberties with certain affirmative social and economic rights or obligations, a pattern that is increasingly visible among developing countries as well.

Although the United States constitution has been defined as a "negative" constitution in the sense that it protects the individual from the state rather than imposing affirmative duties on the state, there remains affirmative characteristics which refute the position that it be strictly construed as a "negative" document. Even those constitutional duties which are most clearly phrased in the negative may be enforceable only through affirmative governmental intervention.[19] The government may be required to take affirmative steps by allocating resources to ensure public access to constitutionally mandated forums and information.

---

17 Bandes, The Negative Constitution: A Critique, 88 Michigan Law Review 2271, 1783 (1990).

18 Glendon at 524. She compares to Germany, France, Italy, Japan, Spain and the Nordic countries but later dismisses them as pragrammatic and not constitutionally mandated. Id. at 528. Contends that "there does not appear to be any strict correlation between the strength of constitutional welfare language and the generosity of welfare states, as measured by the proportion of national expenditure devoted to health, housing, social security, and social assistance." Id. at 531.

19 See notes and accompanying text, infra.

As formulated in the American context, negative rights find their basis in the social contract theory advanced by Hobbes and Locke who believed "that the legitimacy of the state depends on our being able to say that people would give up the liberties they enjoy in the state of nature in exchange for the staters guarantees of intemal and extemal security."[20] If the state fails to protect the individual, then the State has violated the Constitution.[21] Locke's social contract supplied the theoretical foundation for other economic rights --public education and health care. Public entitlement has become part of the state apparatus from its inception.[22]

The fact that the USA Constitution and Bill of Rights were adopted over two hundred years ago, at a time when "the welfare state as.we know it was not even a twinkle in the eyes of the Founding Fathers" should have some significance to proponents of a "negative" Constitution.[23] The overwhelming majority of the world's constitutions have been adopted within the past thirty years. Not only must rights contextualise evolving norms to give them substance, but social and economic rights should be central components of constitutionalism. In this sense, human needs are indistinguishable from human rights.[24]

Origins of the refusal to recognize positive constitutional rights in the Constitution is derived from the text and the intent of the American Framers.[25] However, their intent and the conditions which prevailed at the time the Constitution was drafted must also be considered.

---

[20] Bandes at 2282.

[21] Posner. The Constitution as an Economic Document. 56 The George Washington Law Review. 1987.4, 24. At 24 Posner notes, "Does the libertarian approach therefore open vast possibilties for a most aggressive constitutionalism--one that does not just tell the state to leave people alone but tells it to allocate more resourcesto particular public uses? I fear so."

[22] Stark. Economic Rights in The US. and International Human Rights Law: Toward an "Entirely New Strategy, 44 Hastings LAw Journal 79, 92-93 (1992).

[23] Glendon at 520. Cites as distinguishing factors between American constitutionalism and others, that there exists no enumerated affirmative welfare rights or obligations and the unwillingness of the United States to ratify any of the major intemational rights instruments that all other liberal democracies have acceded; and that pensions, health care, etc. is left to privatise industry and not the public sector. Id. at 521.

[24] See generally, Oliviero, Human Rights and Human Needs, supra.

[25] Bandes at 2310.

Since the time of the founding of the American Constitution, there has been a shift in the conceptualisation of the constitution as a result of social pressure and active scholarly intervention. Accordingly the outcome of this is that it now hardly resembles the polity with which the founders of the constitution were familiar.[26] Even the enforcement of negative rights may require the imposition of affirmative obligations on government. A strong argument exists that equal protection and due process clauses were meant to impose on the government an affirmative duty to protect the citizen against private action. Based on a series of choices about the role of government, state action rarely occurs in the practice.[27]

Despite the establishment in the U.S. of social welfare programmes like Medicaid and limited Social Security, the needs served have never been defined as fundamental rights and are thus unprotected by the constitution outside of procedural due process. The states' constitutional jurisprudence of individual rights have been tailored to local norms and needs and have provided a prototype for evolving economic rights.[28]

In *DeShaney v Winnebago County Department of Social Sciences (109 S.Ct 998)*, the U.S. Supreme Court found no state responsibility for the death of a child who was known to the state to be in danger. In reference to *DeShaney,* one commentator noted:

> "A less restrictive reading of the 14th amendment by the Court would have imposed an affirmative duty on the states to develop common law, construct statutes, or tailor services that protect fundamental rights against encroachment from the states themselves or from private action. If a fundamental interest is at stake in a particular case, then the government's responsibility tums on the nature of that interest."[29]

In *DeShaney,* the "critical inquiry should've been not whether state action existed but whether there is a fundamental right that the 14th amendment requires, through judicial interpretation or congressional enactment, the indifferent or incompetent state to protect against private violence." The *DeShaney* court's assertion that the state had no duty to protect a minor victim makes no sense in the light of the Court's concession that a minor may have had a fundamental right. This is because once that concession is made, the state's duty flows from those rights.[30]

---

[26] Bandes at 2311.
[27] Bandes at 2313.
[28] Stark at 96.
[29] Gerhardt at 429
[30] Gerhardt at 432

Consideration should be given to Blackstone's definition of life. He defined it as "the right of personal security [that] consists in a person's legal and uninterrupted enjoyment of... life, ... limbs, ... body, ... health, and ... reputation."[31]

The Courts routinely assume, as it was the case in *DeShaney*, that the standard of comparison for government action is whether they render the plaintiff worse off. Based on a misapprehension of the nature of government, and certainly of modern government with the arrival of the New Deal, government regulation and services, rather than lack of government action, has been the norm. In fact, the baseline of government inaction has not described the status quo in at least half a century.[32]

The United States Supreme Court has often imposed an artificial penalty/subsidy distinction whereby the government may not penalize constitutionally protected activity, however, it is under no obligation to subsidize it.[33]

This point is further illustrated in abortion funding cases such as *Maher v Roe 432 US at p474* and *Harris v McRae 448 US 297 /1980* where the Court assumed the absence of a constitutional right to medical services and that the government can withhold all such services if it so chooses. In rendering its decision the court assumed no responsibility on the women's pre-existing condition of indigency.[34]

Shapiro v. Thompson and *Memorial Hospital v. Maricopa* seemed to advance the recognition of welfare rights. There, the court was "unwilling to permit legislative classifications that adversely affected the poor's ability to exercise certain unwritten rights."

These cases could be read to say that "once the government created welfare programs, it lost at least some of its ability to exercise discretion over the administration of benefits."[35]

---

[31] Note, Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered, 103 Harvard Law Review 1363, 1367 (1990). The "lochner era" refers to a period in American constitutional jurisprudence which was marked by, an extremely limited view of state intervention.

[32] Bandes at 2292.

[33] Bandes at 2297

[34] Nicholson, Marlene. Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine. 10 Hastings Const. L.Q. 615 who states that: "denial of funding that enables a person to exercise a constitutional right is not a penalty, but denial of other benefits because he or she chooses to exercise such a right would be considered a penalty."

[35] Brown, Parmet & Baumann, The Failure of Gender Equality: An Essay in Constitutional Dissonance,36 Buffalo Law Review 573, 622 (1987).

Other sections in the U.S. constitution lend ample support to the contention that the state can, should (and sometimes does) impose on itself affirmative obligations. A good example of this is the 5th section of the Fourteenth Amendment, which empowers Congress to pass legislation to effectuate it. Gerhardt observes that:

> Proponents of a negative rights view of the Constitution have difficulty reconciling it with their view in light of ample evidence that the framers of the Civil War Amendments meant them to serve as a basis for a positive, comprehensive federal program - a program defininf fundamental civil rights protected by federal machinery against both state and private encroachment.[36]

Another example of this the 6th Amendment right to speedy public trial, compulsory process, assistance of counsel and the opportunity to be informed of the nature of the accusation. Coupled with the Equal Protection Clause, the government has been required to sometimes take affirmative steps to ensure that certain groups are treated equally.

Sight must not be lost of the fact that the purpose of making comparison with the American experience in this article, is to inform the South African discourse. Craig Scott and Patrick Macklem eloquently capture the inherent difficulties and dangers - in limiting constitutional protection to civil and political rights in South Africa. Commenting on this problem they state that:

> If South Africa were to constitutionalise civil and political rights but decide to treat social rights as non-justiciable... it would create another kind of danger, namely that values underpinning social rights would be devalued as a result of selective constitutionalisation. A constitutional discourse could emerge that implicitly views the values protected by social rights to be illegitimate aspirations of modern governance.[37]

---

36. Gerhardt op cit 443.

37 Scott & Macklem, Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution, 141 University of Pennsylvania Law Review 1, 27 (1992). For a very complete discussion on conservative and progressive views of constituionalism and constitutional guarantees in a democratic state, see West, Progressive and Conservative Constitutionalism, 88 Michigan Law Review 641 (1990).

A CHARTER FOR SOCIAL JUSTICE: A Reply

Judicial Review

The ACSJ authors state that they have departed from the ANC bill of rights in three important ways:

> "Three structural elements of our proposed bill of rights seek to ensure a model of constitutional review similar to the one we are proposing is adopted. These three elements are the style and the language in which the constitution is phrased, the recognition of independent Directives Of State Policy and the general circumscription clause contained in Article 1."[38]

They have substituted the ANC's detailed rights-enumeration with a "shorter list" of broad entitlements. They have included a "general circumscription" clause. The authors contend that their proposed Bill of Rights will be "more accessible" and will "best achieve the protection of human rights without entrenching social inequality".[39] The circumscription clause reads:

> "This Bill of Rights guarantees the rights and freedoms set out in it subject only to such limits as can be demonstrably, justified in a free and open social democracy."[40]

ACSJ's authors contend that their directives of State policy will sufficiently safeguard economic and social rights. The proposal is in large measure justified on cost and institutional competence grounds. Its rationale is sketchy at best. There is very little elaboration of why judges lack the competence to make decisions having to do with social and economic rights.
Firstly, they argue that the attainment of social and economic guarantees is extremely expensive. Secondly, that it is constitutionally inappropriate for judges to determine how budgets should be allocated, to decide a range of complex policy issues that judges are unsuited for and thus reluctant to make, and to order positive forms of relief rather than merely strike down legislation.

In addition, the authors of ACSJ define judicial review as giving "the judiciary the power both to strike down legislation and to overturn executive action."[41]
A critical examination of these assertions is necessary.

---

38 Corder et al: A Charter for Social Justice at 16.

39 Corder et al Charter for Justice at 17." .....broad entitlements expressed in simple language are more accessible to citizens: they can be easily understood and can become part of everyday usage."
40. Corder et al Charter for Social Justice at 13.
41. Ibid.

Application of the Bill of Rights: Vertical and or Horizontal?

The ACSJ's proposal is conceptualised as applying vertically only. The ACSJ's definition of judicial review fails to incorporate constitutional claims amongst individuals. The latter excludes from the sphere of state responsibility violations which occur in the so-called "private" sphere such as violence against women, and goes uncorrected by virtue of state inaction. Domestic violence against women, perpetrated by private individuals, should be a valid cause of action in a constitutional court. A constitutional duty must be imposed on the state to ensure the security and intergrity of battered women.

The authors are correct when they state that a constitution provides a foundational framework for the organization of government and thus for the relations of the state vis a vis its citizens. However, that organization need not follow a monolithic model and can include layers of interaction that incorporate both ***vertical*** citizen/state relations and ***horizontal*** relations among individuals (this is particularly so when dealing with the constitutionalisation of the reconstruction after years of entrenched racism perpetrated by private and governmental entities or individuals). A private/public racism that gets compounded when it is directed against black women must be recognized and constitutionally addressed.

The authors seem to recognize the South African reality when in Article 27 they state:

> We believe that this approach would be totally unacceptable in South Africa,. It seems obvious to us that were courts able to hide behind the private nature of actions and to uphold racist practices for instance the legitimacy of a new constitutional order could be seriously threatened.[42]

In spite of this recognition, in their procedural guidelines for constitutional review there is only reference to the individual and the state.[43]

The Interpretive Framework

Contrary to the assertion by the ACSJ authors that their proposed interpretive framework would best protect constitutional rights, serious problems may in fact occur as a result of the framework proposed. The proposed circumscription clause may lead to interpretive difficulties. The authors concede that the clause is modelled along the circumscription clause in the Canadian Charter of Rights viz "free and democratic society".

---

[42] Corder, et al; Charter for Social Justice at 60.

[43] Corder et al Charter for Social Justice at 13.

They state that they have added the word "open" to ensure democratic accountability.[44] In addition they propose interpretive directives derived from the *R v Oakes* case, *(1986) 26 DLR, (4th 200)* which are premised on the principle of proportionality.[45]

The procedure they propose is that an aggrieved person must establish a prima facie case showing that his/her individual right has been violated. In response the state must assert that the underlying policy or legislation is one specified in the Directives of State Policy and proceed to satisfy the court that acceptable means to balance the policy with fundamental rights has been accomplished. If the government policy is not one specified in the Directives of State Policy the court will consider the circumscription clause in Article 1 which states that the policy underlying the act or omission which caused the infringement is "demonstrably justifiable in a free and open social democracy" and further inquire whether there has been an acceptable method used in its implementation.

The practical implications of the interpretive standards proposed by the ACSJ authors reinforce a rigid bill of rights because the burden weighs heavily on the state to provide justification for its actions. This interpretive framework is proposed in the context of a hierachical treatment of rights, which is the entrenchment of civil and political rights as fundamental rights in the constitution and the treatment of social and economic rights as Objects of State Policy. Even in such circumstances the recommended procedure would make it almost impossible for the harmonization of Directives of State Policy in the Charter, because the theoretical underpinning is stricto senso that of separation of powers. This brings us to the next question, which is whether there are any precedents for the harmonious interaction between the implementation of the Directives of State Policy and the advancement of entrenched civil and political rights.

The Indian experience is instructive in this regard. Its constitution was formulated in 1947 and a distinction was drawn between civil and political rights (which were considered as sacrosanct and fundamental) and social and economic rights presented as the Directives of State Policy (considered as aspirational rights). [46]

---

[44] Corder et al. Charter for Social Justice at 29.

[45] Corder et al at 16. " The proportionality principle is the core of review, the approach allows for a wide range of activities or interests to fall within the spheres of rights and freedoms guaranteed in the language of a bill of rights."

[46] See Scott at 72.

Accordingly, rights were treated in a hierarchical manner. From the time that the Indian constitution came into force, up until a decade ago, civil and political rights took precedence over Directives of State policy.[47] Changes were brought about by academic critique of the constitution, public interest litigation, and deliberate judicial activism.[48] The latter occurred in the 1980s when activist judges sought to harmonise the interaction between the Bill of Rights and Directives of State Policy.

It took more than forty years for the entrenched rights and non-justiciable rights to be harmonised. The proposed Charter could face a similar future. The hierachical treatment of rights as proposed in the Charter of Social Justice is one of the features of the interpretive framework. The ACSJ authors seem to be aware of the attendant problem in this. In order to bring about a harmonious interaction between the entrenched rights and the Directives of State Policy they propose the general circumscription clause as well as the application of the principle of proportionality as derived from *R v Oakes*.

A closer examination of these proposals indicates that difficulties may arise. The general circumscription clause is problematic because of the word " open". This clause, theoretically provides the lens through which all state action might be constitutionally judged..

The clause purports to guarantee the rights and freedoms set out in the Bill of Rights in terms of "a free and open social democracy". However, the concept of "free and open social democracy" remains the controlling benchmark that dictates the outer limit as to what substantive rights can ultimately be guaranteed. Although deceptively expansive in defining the ultimate scope of the Bill's substantive rights, the circumscription clause may infact conflict with the stated objectives. To illustrate this point the language of the clause could be narrowly construed to forbid the enactment of any anti-pornography or hate speech legislation designed to deter racial or sexual harassment, group libel or gross incitement to ethnic, racial or religious violence, etc.

The precedent in the *R v Oakes* case has been critically reviewed by feminists in Canada This case laid the foundation for the interpretation of the Canadian Charter in particular Section 11 D, which deals with the presumption of innocence for an accused. In practise this has required an increased burden of proof by the prosecution, where otherwise convictions would be ensured, for example in racially motivated assaults on blacks as well as in crimes against women and children.

---

[47] De Villiers B: "Directives of State Policy and Fundamental Rights: The Indian Experience". South African Law Journal on Human Rights. 1992(8) at 40. He further states that "Through the years the courts have adopted various attitudes to the relationship between fundamental rights and directive principles. Initially fundamental rights were 'sacrosanct' and sovereign to directive principles....harmony and nexus, and for the past decade they have tended to uphold legislation which even though it may limit fundamental rights, furthers the ideals of the directive principles."

[48] De Villiers. Ibid. at 39 to 48 discusses the impact of judicial activism in the endeavour to harmonise the directive principles and entrenched constitutional rights.

The case of *Seaboyer* [49] provides a worst case scenario for the application of these standards. The Canadian Advisory Council on the Status of Women has this to say about the application of these interpretive standards as was the case in *Seaboyer*:

"... The rights protected by s. 11 which is the right to be tried within a reasonable time and the right to a fair and public hearing before an independent and impartial tribunal - have provided the basis for claims that clash with some feminist objectives. For example, the Seaboyer case decided in 1991, the Supreme Court of Canada held that the right to a fair trial under 2, ì 1 (d) was violated by the Criminal Code rules which prohibited evidence about the previous sexual conduct of the complainant. These rules, though not perfect, were the outcome of a long and hard battle by women's organisations to achieve such protection."[50]

The ACSJ proposes the exclusion of the legislative history of the bill of rights from a future interpretive framework. It is unclear why the ACSJ makes this proposal. The reasons advanced are not convincing. They state that:

> We think that in the South African context, this may cause more problems than it resolves, because the South African bill of rights will be the result of negotiation and political compromise. The political compromises of the 1990s should not bind courts in the twenty - first century although of course the language will.[51]

If accepted this proposal could have the unfortunate effect of obliterating the specific contributions of the formerly disenfranchised / dispossessed people. An example of this would be submissions of women's groups to the constitution - making body (eg Women's Charter).

Justiciability /Institutional Competence

The rationale for the hierachical treatment of rights is based on the assumption that social and economic rights are not justiciable because they are indeterminate. The ACSJ authors fail to recognise that the reason for the indeterminacy of social rights is precisely that they have been declared presumptively non-justiciable. In the U.S. context, the Equal Protection Clause of the 14th Amendment (a constitutional codification of political and civil equality) was indeterminate at its outset.

---

49. R v Seaboyer. 1991. 2SCR at 577.
50. Smith Lynn and Watchel Eleanor. A Feminist Guide to the Canadian Constitution. p.37.
51. ACSJ. Corder et al p.15

It was only through years of judicial development that the current understanding of equal protection jurisprudence emerged.[52] The argument that social and economic rights are indeterminant is challenged by critics of a negative constitution..[53]

Similar arguments have been advanced in the United States constitutional debate regarding the constitutional legitimacy of affirmative action vis a vis the Bill of Rights. Susan Bandes, in her critique of negative constitutions, notes that the popular "floodgates" argument is often coupled with its institutional competency counterpart. The floodgates argument is premised upon the assumption that the judiciary is not a legitimate body to try cases which require positive action and that any precedent in this regard would unleash a flood of similar cases.

In her critique of the judicial competence argument Bandes states:

> This argument assumes that by avoiding recognition of affirmative duties the court is kept out of the political realm. On the contrary, the decision not to consider whether a duty has been breached is a decision to defer to, and ratify, the political choices government makes. Whether that ratification is correct is unavoidably a judicial question.[54]

The doctrinal and theoretical justifications for the separation of powers doctrine undergirds the judicial competence argument.[55] The ACSJ authors seem to be expressing a fear that the embodiment of economic and social rights in a Bill of Rights necessarily implies that a Constitutional Court will tie the hands of the legislature, essentially dividing up the nation's economic pie on a piecemeal basis based on who arrives at the courthouse first. On the basis of this assumption, they start from a position that the courts are ill-equipped for this task.[56]

---

[52] Scott, supra note at 72.See notes and accompanying text. See also supra @ pgs 6 and 7 for a more detailed discussion of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

[53] Scott supra note at 73.

[54] Bandes opcit at 2329.

[55] See, generally, Kurland, "The Rise and Fall of the "Doctrine" of Separation of Powers", 85 Mich.L.Rev. 592, 593 (1986).

[56] See, Corder, et al.at 20-22. See also, Scott, at 43.

The separation of powers doctine implicitly embodied in the United States Constitution has been elevated to an interpretive tenet in American jurisprudence.[57] ,A strict view of separation of powers doctrine would theoretically imply that only the legislature spends public money. Nevertheless, American caselaw is replete with examples of court - imposed "spending", particularly in the context of civil rights.[58] These "positive" rights or obligations of the state are found in the areas of procedural due process, life, liberty, security, rights of prisoners, rights of the accused and equality rights.[59] Positive obligations are also routinely found when international instrruments are interpreted. The outcome is not necessarily disconsonant with the maintenance of a free and democratic society.

Even though we can point to all of these court-imposed state obligations which arise from a right rooted in the civil and political arena, it would be a gross mistake to assume that civil and political guarantees are enough, particularly for women. The interpretive developments made by US. courts in fashioning positive obligations have not extended to rights rooted in the privacy doctrine, which impact on women. The most obvious example is the US. Supreme Court's refusal to force the government to extend Medicaid funding for abortions to poor women.[60] The absence of explicit, positive, economic/social rights to reproductive health care allowed the Court to retreat behind the negative rights wall.

In discussing the separation of powers doctrine, we must be careful to remember that the way the theory is described and viewed traditionally should not relieve drafters of the task of normative redefinition to suit the particular society in which it is employed.

---

[57] Kurkland. ibid.

[58] One key example involves giving effect to the mandate of Brown v. Board of Educ., which declared racially based school segregation unconstitutional. Court-mandated "busing" schemes, however when one evaluates their success they required state and local governments to appropriate funds to carry them out. Stripped bare, these cases point not to a court's competence to spend public money. Rather, they point to a court's competence to decide what is necessary to remedy an unconstitutional condition. Also, it is important to point out that the practical recognition that court's spend public money does not speak to the substantive quality of the U.S. Constitution in the effort to advance economic and social rights.

[59] For an excellent overview of caselaw in these areas, see Scott, supra note at 48-71. Also, see text and accompanying notes, infra.

[60] Although abortion rights in the first two trimesters of pregnancy are protected by the Court in Roe v. Wade (1973), in Harris v. MacRae (cite 1980), the Court-refused to make that right meaningful to poor women. 'Tbe Court held, in essence, that as long as the govemment did not directly interfere with a woman's right to choose, its obligation was met.

Clearly, the separation of powers doctrine can be re-cast as a command to mutual and ongoing refinement of the roles of the "separate" branches of government.[61] It is then possible to view the doctrine as a guidepost for all branches of government to work together to solve a nation's problems. A cooperative framework might be ideal.[62] By boxing themselves into a mode of thinking about judicial competence, the ACSJ already disallows any review of legislative action in the field of social rights.

The argument therefore that these rights are not justiciable becuase of their indeterminancy, is not sufficient to address the very problem that the ACSJ raises even when social rights are treated as objects of state policy. Hence, under this kind of reasoning, a constitutional court could not apply the Directives under any circumstances. The whole purpose of the Directives is therefore frustrated from the outset. What the authors fail to recognize is that they imply that social rights are mushy. It is therefore this mushiness that makes them inappropriate for judges to rule upon.

Specificity and Substantive Self-limitation

The ACSJ departs fundamentally from the ANC's conceptualisation of textual specificity in the bill of rights. The authors state: "We think that the entitlements contained in the Bill of Rights should be expressed as general standards, as broadly as possible".[63] The ACSJ fails to recognise that this is not only a matter of "style" but also that of *substance*.

The ACSJ authors, as mentioned previously, rely heavily on the "extremely brief" US. Constitution to support their contention that South Africa, in its effort to promote civil, political, economic and social rights, should draft a Bill of Rights which closely mirrors the US. instrument. This kind of approach could be problematic for South Africa. The ACSJ raises two rules of interpretation against specificity. These are the *expressio unius exclusio alterius* and the *iusdem generis* rules.

With regard to the former judges would read an explicit list of prohibited forms of discrimination on the basis of "race, sex and religion" as excluding, for example, age and disability. With regards to the latter judges would only consider similar categories of an open ended list. The ACSJ attempts to overcome these problems through broad drafting.

---

[61] Minow, Making All The Difference: Inclusion, Exclusion, and American Law at 361 (1990).

[62] Scott, supra, note -at 43.

[63] Corder et al. p 17. An inference that can be drawn from reading the authorities cited by the ACSJ authors that the theoretical underpinnings which inform this perspective are libertarian. The ACSJ authors cite John Stuart Mill whom Currin V. Shields (Mill on Liberty. 1956. Liberal Arts Press. New York) characterizes as being anti-democratic rule. He was therefore seized in his later years with preventing "the tyranny by a majority of the common people". On page 18 the ACSJ also refers to Alexis de Tocqueville in their motivation for "an extremely brief" bill of rights. However they fail to recognise that Alexis de Tocqueville wrote this glowing praise of the American Constitution during the 19th century at a time when African-Americans, women and the non-propertied class were excluded from its most substantive protections.

There are at least two questions which must be answered:
1) Has broad drafting led to the broad construction that the ACSJ authors seek?
2) Can there be specificity without the problems indicated by the interpretive rules?
Specificity in drafting is not substantively self-limiting as the ACSJ authors contend. The dangers of specificity outlined by the authors can be overcome through a range of interpretive directives and structural changes in the judicial branch.

The express reference to men and/or women, where appropriate, in the ANC draft bill of rights, is a deliberate and appropriate formulation to appeal to the cognitive senses of the reader, it is a way of making women visible. Thus to expressly refer to candidacy of, for example, a president, in language that denotes either of the sexes, reminds the citizenry that the president can be a man or a woman.[64] The importance of specificity is that it infuses constitutional rights with a woman's perspective which is to build into traditional human rights women's demands and needs.

Under certain circumstances interpretive devices have contributed to the unintended circumscription of rights. In the same manner, constitutional interpretation itself can be prescribed. This reality is also recognised by the ACSJ authors. Accordingly, the Bill of Rights may provide interpretive guidelines. It may therefore enumerate a specific list of prohibited bases for discrimination and include a directive that the protection is not limited to enumerated categories. In addition the said directive could state that the court shall liberally construe the protection to include other categories.

An important point to consider in this regard relates to interpretive choices of judges. There is as much danger of narrow interpretation for a non-discrimination clause where the prohibitted categories are specifically listed as there is in the case where broad language is used. In the context of South Africa, a broadly constructed constitution is more likely to be narrowly construed. As is observed by Scott and Macklem:

> One might have good reason to be wary entrusting the interpretation of a new socially progressive constitution to a South African judiciary that historically has practiced and tolerated racism in its courtrooms.[65]

---

[64] ANC Draft Bill of Rights Article 3.5.

[65] Scott & Macklem, " Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution", 141 U. Penn. L.Rev. 1, 4-5 (1992). The authors seem to be operating on the assumption that South Africa will end up with a progressive judiciary who will read broad language broadly. This is by no means certain. Broad language in constitutional law can lead coures to divine the "intent of the framers" in an effort to get to the meaning of the language. See, e.g., Bork, "The Impossibility of Finding Welfare Rights In the Constitution, 1979 Wash. U.L.Q. 695. Judge Bork, an outspoken "originalist", believes that many judicial opinions which liberally construed the Ninth Amendment to the U.S. Constitution to include many reproductive freedom rights in the United States were wrongly decided. Under a Judge Bork, reproductive freedom rights as we understand them in the United States would be virtually non-existent. See also, van der Vyver, supra, note- at 812: : "The track record of many South African judges ... compels one to doubt the wisdom of entrusting a court of law with the responsibility of unfolding and applying the prevailing trends in public morality. Judicial activism almost invariably tends to support the status quo, which would be a bad omen in any plural and divided society."

A related problem arising out of the position of the ACSJ with regards to specificity, is the ommission in their proposal of the principle of non-discrimination. This principle is normatively established as a *ius cogens*[66] and forms part of the equality clause in most contemporary constitutions. An equality clause must therefore prohibit discrimination inter alia on the basis of sex.

The important point to note is that judicial discretion can easily translate into extraordinary law-making power, far beyond any exercise of power granted explicitly by the legislature.[67] The problems that may arise out of judicial discretion may not even be cured by activist jurists where the text is couched in broadly written language.[68]

The remedy may lie in textual specificity as well as the establishment of appropriate enforcement mechanisms. The ANC proposal for a separate constitutional court, an ombudsman and a human rights commission addresses the need for structural change to the judicial system. It is however unclear whether the ACSJ authors have considered structural changes to the judiciary. One can only assume from their explanatory notes that they consider the existing structures as appropriate. They note:

> The key institutions for enforcing the provisions of a bill of rights is the judiciary. The intention in enacting a bill of rights as the supreme law of the land is to give the judiciary the power to strike down legislation and to overturn executive actions.[69]

Textual Specificity and Accessibility

The ACSJ's authors motivate for broad textuality as they argue that this renders the Bill of Rights accessible to the ordinary people. This approach is conceptually faulty.Their view of accessibility ignores the value of textual substance and the process of creating a new constitution as valuable touchstones for evaluation. Brief, broadly written constitutions are, in their view, the most "accessible" to the people.

The assumption made by the authors is that broad language is easier to read and understand. A simplistic question that may be posed is whether "accessibility" relates to the amount of time it takes to read?

---

66 Jus cogens, in short, is a non-derogable peremptory norm in intemational jurisprudence.

67 van der Vyver, supra, note at 812.

68 Newman, "Introduction: The United States Bill of Rights, Intemational Bill of Human Rights, and Other "Bills"" 40 Emory L.J. 731, 741-42 (1991), states: [I]t took the united States Supreme Court a very, very long time indeed to transform the [United States] Constitution into a meaningful instrument for the protection of civil liberties." Furthjer, quoting, Burgenthal he says, "Comparative Study of Certain Due Process Requirements of the European Human Rights Convention", 16 Buffalo LRev. 18, 24 (1966).

69 Corder et al ACSJ p 13.

If it is to be assumed that the ACSJ draft is textually accessible, the whole debate seems to stray from the larger question: How can a South African Constitution make full participation in the life of the nation more accessible? If accessibility is to have any substantive meaning to ordinary people, it must mean access to a system of social justice. This implies a system which contemplates a remedy for the needs of the poor and disempowered people, in particular, women.

Accessibility also may mean the potential for a document to serve other valuable purposes. Beyond the ability of a document to provide a vehicle for judicial review of a particular controversy, a constitution can provide legitimacy for rights-assertion in many different contexts. It can become a source of political coalescence, a rallying point. If a constitution becomes a mirror into which women and other traditionally oppressed groups can see themselves, it arguably becomes a tool for socio-political change that goes far beyond a constitution's role as the primary touchstone for a court's rights analysis.

Lack of textual substance increases interpretive choices, that can lead to a variety of inconsistencies as the US experience demonstrates. Textual substance, on the other hand, is a basis for accessibility -- especially in a situation like the South African constitutional process where the main actors are common people. The Women's Coalition, for example, was formed with the sole objective of infusing the constitutional process with women's views. The campaign for a women's charter is intended to characterize constitutional rights as inclusive of women's rights.

Textual specificity is, according to South African women the path to visibility.[70] It is also the representation of their voices viz their literal breaking with silence. The recharacterisation of traditional human rights such as the right to life, liberty , security, family , culture, privacy, expansively defined for encompassing women's needs/claims is the most effective way of making rights accessible to women. Any South African woman who has suffered the compounded effects of racism and sexism can easily relate to a constitution that directly talks to her experience, a constitution that truly makes her a citizen.

There is a sharp contradiction in the assertion of accessibility by the ACSJ with the textual form adopted in their drafting. They adopt the traditional rights formulation ironically in those areas which impact mainly on women. The following are examples:

Article 18:

"Everyone has the right to the protection of his or her privacy."[71]

Article 19:

1. "Everyone shall have the right to live with partners of their choice. "
2. "Everyone shall have the right to found a family."

---

70 Driver D:. "the ANC Constitutional Guidelines in Process - A Feminist Reading"; In "Putting Women on The Agenda" at 83 Bazilli (Ravan Press 1991)

71. Corder et al at 6

3. "Marriage shall be based on the free consent of the partners and spouses shall enjoy equal rights at and during marriage, and in respect of its dissolution."[72]

In contrast, the ANC draft in its article on home life goes further than the ACSJ by prohibiting violence in the family. It therefore lifts the veil of secrecy in the family, that paradigmatic private domain. Articles 18 and 19, separately or jointly read, do not prohibit violence in the family. In their explanatory note the authors recognize the rationale behind the ANC's prohibition of violence but justify their proposal as follows:

> In spite of these difficulties, we propose a general unqualified right to privacy. We do this because we feel that the ANC list of three areas in which privacy should be protected is too limited and potentially excludes areas in which we believe that a right to privacy might be important. For instance a court may interpret a right to home life to exclude the protection of intimate practices outside the home which in no way intrude-on any other individual's rights. Similarly, the right to privacy may explain why we should respect people's fully voluntary requests for euthanasia whereas the ANC's wording provides no scope for this. In addition the abortion debate has proceeded on the basis that women have a right to privacy in making decisions about reproduction whereas this is not covered by the notion of home life.[73]

It may be easier for judges to expand the broad formulation on the right to privacy to include euthanasia, which has little to do with power relations or to recognize abortion provided such recognition does not require provision of health care services for safe abortion. It is unlikely that such a formulation would inspire judges to circumscribe the right to privacy in the event of domestic violence. What is most probable is that an entrenched right to privacy as broadly formulated as that of the ACSJ would take precedence over any rights claimed by battered women and children.

It is interesting to see how ACSJ's authors are in fact silent on how domestic violence should be handled constitutionally. That silence, coupled with their rationale indicate that the prevalence and systemic nature of violence against women, lacks the importance that a constitutional provision merits. The only place where the prohibition of violence is considered is in the Directives of State Policy, Article 8, which in neutral language directs the state to promulgate legislation "against violence harassment and abuse and the impairment of the dignity of any person."[74]

---

72. Corder et al at 7
73. Corder et al at 47
74 Corder et al ibid.

The assumptions made by the ACSJ in their conventional formulation as stated above ignores that there are powerful lobbies seeking to undermine the advancement of women. There is currently a tendency towards religious and customary fundamentalism which is advocating for conservative religious and customary values. It is common knowledge that these values relate to family and personal law, wherein women are most disadvantaged. Thus violence against women cannot be subsumed under "violence against any person", as suggested by the ACSJ in their Directives of State Policy (article8).

A FEMINIST CRITIQUE OF 'THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK - THE PUBLIC/PRIVATE DISTINCTION[75]

The current feminist critique waged against the human rights framework is very relevant for the South African constitutional process, since it is a critique which exposes the connection between the liberal / negative framework of international civil and political rights and the marginalisation of women.

A critique of human rights based on the need to make international discourse more responsive to the most basic rights of women around the globe provides a feminist foundation for the South African constitutional effort to grant full equality to women, as indicated in the introduction to this paper.

The human rights framework recognizes individual civil and political rights only in the context of public life, and neglects to protect against the violation of those same rights within the private sphere of family relationships, where women face the greatest threats to life, dignity, and bodily integrity. Although the system is dependent upon patriarchal values and the public/private distinction, it holds a potential reserve for guaranteeing freedom and dignity for women through a powerful reconceptualisation of the basic civil and political human rights framework.

As Celina Romany points out:
"....women are *aliens* within their states, *aliens* within an exclusive club of international states which constitute the global society. A society that by virtue of its exclusionary construct *alien-ate* women throughout the globe."[76]

---

[75] This section is based on an excerpt from Celina Romany.Women as Aliens: A Critique of the Public / Private Distinction in International Human Rights Law, 1993 Harvard Human Rights Journal. Further, it must be made clear that intemational instruments are entirely different from a national constitution. With that caveat in mind, see, e.g., United Nations Intemadonal Covenant on Economic, Social and Cultural Rights, adopted, Dec. 16 1966, 993 U.N.T.S.3 (entered into force Jan. 3, 1976).

[76] Celina Romany. ibid. Page 87

The proposed Charter encodes such a public / private distinction that departs from current human rights developments which blur that distinction and which incorporate the more encompassing vision articulated in feminist scholarship. As Romany states, the need to recognize real gender equality is past due:

> The categories of equality embedded in the human rights framework are primarily elaborated on "similar abstract and formalistic conceptualizations of gender relations, ideal scenarios for sanitized versions which don't deal with oppressive conditions in the real world. The dispensation of fairness in the human rights world is modeled after the abstract construction of women imposed by the forefathers" who held a monopoly in revolutionary struggles and who, with few exceptions, saw the world through the lens of privileged patriarchy, a privileged angle hard to relinquish...To the extent that the state is viewed as genderless, as separate from the individual, as not implicated in the construction of gender subordination, state responsibility for the systemic perpetuation of such subordination in the realm of civil society (where most women exist concretely) will not be acknowledged. Therein lies the urgency to confront the gender, stratification embedded in the liberal state.
>
> Consider the endemic problem of violence against women. Although inflicted by private individuals, its systematic nature and the systematic omissions on the part of the state to adequately regulate it reveal "complicity". A complicity "which rests upon the verifiable existence of a parallel state with its own system of justice, a state which systematically deprives women of their human rights to life, liberty and security. A parallel state designed, promoted and maintained by official state acts. A parallel state that hegemonises male supremacy.[77]

Violence against women is a political act. The message is domination: "stay in your place or be afraid." [78]

A United Nations Report on Violence Against Women has clearly documented its global occurrence and through the exploration of the intersection of its social, cultural and economic components indicts states for their complicity in perpetuating violence and invisibility. The report exposes how the concept of privacy is manipulated to the perpetrator's advantage and how the latter's acts are "tacitly adopted by public authorities such as doctors, social workers, the police, the legal profession and the judiciary - who join in a conspiracy of silence and in some ways almost approve of the man's behaviour"[79]

---

77 Id at 100 and 111.

78 Charlotte Bunch. Women's Rights as Human Rights: Toward a Revis. of Human Rights. 12 Hum. Rts Quarterly 486 (1990) at 491.

79 United Nations Report on Violence Against Women in the Family (1989) at 105. See also D. Russell ed. (1984)."Crimes Against Women : The Proceedings of the International Women Tribunal."

Lori Heise expresses this observation best when she states that violence against women is not random violence, the risk factor is being female.[80]

In articulating the state's responsibility as well as its affirmative duties, we must examine the diverse ways through which state involvement in gender based violence can be conceptualized. The state's failure to arrest, prosecute and imprison perpetrators of violence against women as other violent criminals can be interpreted as the state's acquiescence in or ratification of the private actors conduct.[81]

THE POLITICAL / CIVIL & ECONOMIC / SOCIAL RIGHTS DISTINCTION[82]

A feminist critique of human rights discourse also grapples with the current dichotomisation of political/ civil and economic/social rights, a dichotomisation which must be avoided in South Africa. The critique of such dichotomisation must be inserted in the South African debate, which raises questions about the characterization of social and economic rights as goals, policies or programmatic aspirations, rather than as entitlements. In so doing, a feminist critique is underscoring the role social structures play in the construction of subordination, best examplified by violence against women.

Those who underscore the programmatc-aspirational quality of social and economic rights rely on legal and non-legal arguments. On the non-legal front we find the limited availability of resources championed as a pragmatic consideration that precludes conceivina, economic and social rights as entitlements to be respected and ensured. This reality is translated in the legal front through the absence of a "respect and ensure" clause in the Covenant on Economic and Social Rights which declares in Article 2 that a state party "undertakes to take steps - - - to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."

---

[80] Lori Heise, Intemational Dimensions of Violence Against Women, 12 Response 13 (1989).

[81] NAACP v Clairborne , 458 U.S. 886 (1982) where U.S. Supreme Court stated that one who has knowledge of unlawful or tortuous activity of another and ratifies such action is liable for unlawful conduct. See also Orpiano v Johnson 632 F 2d 1096, 1101 (4Lh Cir 1980)' Haynesworth v Muler, 820 F. 2d 1245, 1261 (D.C. 1987) cases in which police supervisor held to have acquiesced in or given 'tacit approval" to brutal acts of individual police officers by failing to stop or punish repeated or systemic acts).

[82] This section is excerpted from Celina Romany's article, supra, note at 122 - 124

These arguments have to be confronted with the increasing gross imbalance between the developed and undeveloped world. Exploding populations, resource depletion, disequilibrium in world trade and flows of capital and, more important, the transfer of capital from the undeveloped to the developed countries constitute a reality that can only gradually be transformed through a human rights discourse.[83] The impoverishment experienced by disadvantaged countries which since 1983 have been forced to displace capital to developed countries, (in excess of 43 billion dollars in 1988) is daunting.

This global deterioration, however, cannot elude a human rights discourse which aims to guarantee basic citizenship rights, and which can begin to exert pressure on attitudes and values that reveal our common needs and the bonds of mutual interest in combatting social and economic underdevelopment. As Oscar Schachter notes:

> I believe rights become relevant when we face more squarely the underlying question of human attitudes and values. For it seems more certain than ever that the problems . . . of economic development and basic economic rights cannot be solved without a profound transformation in attitudes throughout the world, in both the North and South. That transformation must yield a sense of common interest and solidarity in combating poverty and misery in the disadvantaged countries. The assertion of universal human rights --and especially of basic economic and social rights -- emphasizes the common needs of human beings. It does so not only on an abstract level but also in specific and concrete ways. By taking those rights seriously, governments and their peoples reinforce the bonds of mutual interest. It may then be seen more clearly that we are all in the same boat and must act to overcome the tragic imbalance that now exists.[84]

For women, the reality of social and economic underdevelopment transcends the North/South axis. Male supremacy institutes a system of subordination which becomes the organizing principle in the economic and social distribution of resources, and which compounds the subordinated position of women throughout the globe. Through the working of such supremacy women lie at the bottom of the economic and social ladder, a ladder legitimated by the concrete ways in which cultural and social attitudes characterize gender differences. As the Human Development Report (adopted by the United Nations Development Program) shows:

In most societies, women fare less well than men. As children they have less access to education and sometimes to food and health care. As adults they receive less education and training, work longer hours for lower incomes and have a few property rights or none.[85]

---

[83] Oscar Schachter. International Law In Theory and Practice (1991). Pgs 354-355.

[84] Id. pg 355

[85] Cited in Roxanna Carrillo Violence Against Women: An Obstacle to Development, unpublished manuscript on file at UNIFEM.

Such reality is buttressed by the socially constructed dependency of women on men, in their unpaid labour, in their education and socialization attaching their self-esteem and value on marriage, family, and men in general; by the commodification of her sexuality.

In order to minimally comply with women's civil and political rights, the dichotomisation which exists in the current human rights discourse needs to be transcended. Thus, in ensuring women's citizenship rights, the state has an affirmative duty to ensure the eradication of those social and economic conditions that maintain and perpetuate subordination.[86] An affirmative duty that, at this historical juncture, may appropriately viewed as an entitlement to reparations.

Rights discourse becomes particularly relevant in this dichotomization between economic/social and political / civil rights. Entitlements not only become a matter of priority within the human rights framework but also serve to galvanize movements, raise consciousness and create spaces which enables a stronger civil society to become the state's partner in a struggle against subordination, to be waged in governmental and non- governmental arenas. A discourse of entitlements gives visibility and respect, and opens up the legal argument towards the legitimation of alternative social arrangements.

Violence against women stands at the extreme of a continuum of subordination which deeply affects womens' capabilities of development as citizens even when they manage to survive its lethal consequences. A citizen is deprived of the opportunity to contribute to the overall social and economic development of her society.

South African women are part of this global dialogue/critique and indeed demonstrate through the ravages of the apartheid system, the need to embrace a discourse that defines civil and political citizenship in a way that incorporates economic and social restructure.

---

[86] Such an affmative duty benefits the state formal a cost /benefit analysis perspective, in terms of the resources depleted in addressing the problem of domestic violence. Beyond those costs lie however, "the human suffering, which are vast. The most significant long term effect and ultimate cost of wife battery ... is the perpetuation of the societal structure, confirmed by marital violence, that keeps women inferior and subordinate to men politically, economically and socially. UN Centre for Social Development and Humanitarian Affairs (1989) at 24.

CONCLUSION

This critique of the ACSJ cautions against the dangers of an acontextual constitutional proposal. There can be no neutral formula for a post-apartheid constitution.

The challenge we face is to define a bill of rights which enables the reconstruction of South Africa into a non-sexist and non-racial state as well as promote the redistribution of wealth and fairness in our society. The ACSJ authors are mindful of this necessity yet they propose a bill of rights that may have the effect of undermining the very objectives they seek to advance. The choices before us are simple: do we have a bill of rights entrenching civil/political rights conceptualised in the conventional form as a negative constitution or do we choose a positive constitution? The latter can either prescribe state action such as the ANC proposal does, or it can be permissive. The Namibian constitution is permissive and differs fundamentally from the ACSJ.

The preamble of the Namibian constitution unambiguously directs that the effects of apartheid rule should be redressed. Whilst the founders of this constitution treat rights in a hierarchical manner viz relegating social rights to the status of directive principles, education (which is a social right) is singled out for entrenchment. The inclusion of education in the bill of rights alters the nature of the bill of rights.

The Namibian constitution therefore differs fundamentally from the Indian constitution. The directive for redress embodied in the preamble provides the basis for a harmonious treatment of rights. This, coupled with the inclusion of education contributes to making this constitution permissive. Whilst it is still early to make assumptions about the effectiveness of the Namibian constitution in this regard; indications are that an opportunity has been created for a balanced treatment of entrenched social / economic rights.

Accordingly, Namibia's reconstruction programme is in place in no less than five years of its independence. There is no serious challenge resulting from the constitution to the process of reconstruction, notwithstanding programmatic difficulties. On the other hand, prior to 1971 the Indian Constitution in Article 37 expressly stated that directive principles of state policy are unenforceable by a court and cannot override the provisions found in part three thereof (fundamental rights). As a result, meaningful social welfare programmes were delayed for a long period viz., from independence to the seventies. One other fundamental difference between the ACSJ proposal and the Namibian constitution relates to gender specificity. Whilst the ACSJ uses gender neutral language the Namibian constitution is specific. In this context therefore, the Namibian constitution requires affirmative action to redress societal gender inequalities.

Finally, it is important to recognise that South Africa's socio-political history is informed by racism and sexism and that an effective legal framework is necessary to provide the foundation for substantive social transformation. The current feminist critique of international human rights provides a contemporary perspective which we have to embrace and adapti to our social reality. We have to make it responsive to our reconstructive goals.