DEBATES

Social rights *may have* negative consequences

DENNIS DAVIS* argues that including social clauses in a bill of rights, while superficially progressive, may in practice prove an obstacle to social transformation. Far better, at this stage, to entrench only basic civil liberties.

It is testimony to the growing consensus regarding South Africa's constitutional future that a future government in South Africa will have its powers constrained by a justiciable bill of rights. Not that long ago most people on the left equated democracy with majoritarian government. To the great credit of Professors Albie Sachs and Kader Asmal the South African debate regarding democracy has become far more nuanced and subtle and the need for a bill of rights as a vital component in a new state has finally been accepted by most.

The problem, however, is not with the acceptance of the principle of a bill of rights, but rather with its content and purpose. Traditionally a bill of rights has been seen as guaranteeing certain fundamental human rights, placing them outside of the reach of a transient legislature and ensuring that this "higher law" is able to trump legislative programmes which might well attempt to erode these higher laws.

But as a distinguished comparative lawyer, Mauro Cappelletti has noted: "to exclude social rights from a modern bill of rights is to stop history at the time of *laissez faire*; it is to forget that the modern state has greatly enlarged its reach and responsibilities into the economy and the welfare of the people." Thus the Canadian

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Charter of Rights and Freedoms, which has become a yardstick for many constitutional drafters in this country, has been criticised by Petter as "a nineteenth century document set loose in the twentieth century welfare state". Thus he argues that the negative rights discourse of the Canadian Charter, with the state being cast as a prime enemy of liberty, has precluded the document from being a reliable tool of social change. For example, all the rights contained in the bill attempt to restrict state power rather than being conceived to promote positively the rights of citizens.

For this reason the Canadians attempted to include a social charter as part of their bill of rights. One draft provided that everyone has an equal right to wellbeing, including:

- a right to a standard of living that ensures adequate food, clothing, housing, child care, support services and other requirements for full social and economic participation in their communities and in Canadian society;
- health care that is comprehensive, universal, portable, accessible, and publicly administered, including community based, non-profit delivery of services;
- public primary and secondary education, accessible post secondary and vocational education, publicly funded education for those with special needs arising from disabilities;
- access to employment opportunities and just and favourable conditions of work.

This draft Charter then provided that the Charter of Rights and Freedoms should be interpreted in a manner consistent with these rights and the fundamental right of alleviating and eliminating social and economic disadvantage. In this draft lies the great difficulty which confronts proponents of a social charter. Are these rights justiciable? In other words, can one go to court to secure an order that the state provides an applicant with adequate food, clothing, housing and child care, particularly given the limitations of a budget? And should we allow the courts to become the central planners allocating the budget in particular directions?

The ANC's Draft Bill of Rights has attempted to deal with these difficulties by means of the concept of 'the expanding floor'. For example, the ANC document provides that legislation shall ensure the creation of a progressively expanding floor of minimum rights in the social, educational and welfare spheres for all in the country. Such legislation shall take into account national priorities, the availability of resources and the capacity of the beneficiaries of such rights to contribute towards the costs involved.

If the problems of judicial intervention in the social and economic sphere prove insurmountable, it might well prove preferable to have a narrow bill of rights safeguarding traditional civil liberties and providing for accountable and open government. An attempt to circumvent the difficulties of social rights by means of a generous equality clause can well prove disastrous. For example, a number of draft documents in the South African debate have borrowed from the Canadian formulation to provide that every person is equal before and under the law and has the right to equal protection and equal benefit of the law. Superficially this seems to be a commendable attempt to fuse procedural and substantive equality; ensuring that the state does not only have the simple obligation of ensuring procedural fairness, but also the positive duty to ensure that substantive social and economic equality prevails in the society. The problem with this formulation is that it can well prevent the government from prioritising a budget.

For example, in one Canadian case the judge found that a section of the Unemployment Insurance Act was inconsistent with the equality clause because it did not accord natural parents the same child care benefits as adoptive parents. The court's remedy entitled natural parents to the same child care benefits given to adoptive parents. The Federal Government appealed against this extension of benefits on the basis that it was government's responsibility to set budgetary priorities. The Federal Court of Appeal held that the order of the trial court extending benefits appeared to be the only remedy which respects the purpose and nature of the equality

provision of the Charter. The order was therefore permissible even though the court acknowledged that the remedy granted resulted in the appropriation of funds not authorised by parliament.

In the South African context this could prove fatal. For example, government decides to provide all rural schools with child care centres on the basis that there are no such facilities in the area. All urban applicants appeal the decision arguing that they are entitled to equal benefit. Government could find itself unable to comply with the remedial order providing child care centres to all schools given the limitation of the budget and would thus have to withdraw the legislation. In short, a well-intentioned piece of constitutional drafting could produce governmental malaise and a major obstacle to social transformation in society.

There is also a danger that the rights contained in a bill will be treated as unchanging universal entitlements rather than being shaped by political struggle and social context. Take for example the right to freedom of association. On one level this would appear to be an unqualified right of universal significance. But, as the Freedom of Association Committee of the ILO has noted, any system of trade union monopoly imposed by law is at variance with the principle of freedom of association. Given this interpretation, within the collective bargaining context the right to freedom of association could endanger the closed shop – an essential condition for workers in a number of industries to bargain collectively.

The agency shop may survive a constitutional attack but if unions enter into alliances with political parties the issue of subscriptions could well be vulnerable to court decision. Workers who do not belong to the union and do not subscribe to the political affiliation of the union could challenge a compulsory deduction made pursuant to an agency shop and would probably succeed in terms of the freedom of association clause. The Canadian Supreme Court, for example, has held that the rights of non-union members required by the operation of an agency shop are infringed if their dues contribute to the political work of the union, even if it is for the advancement of workers such as lobbying for changes to labour law.

While it appears that an interim bill of rights is a necessary requirement for a constitutional settlement, hopefully it will be of a minimalist nature so that full national debate can take place regarding the content and nature of the final bill of rights. Rights are ambiguous and often can lead to unintended consequences. Of the 44 claims brought under the Canadian Charter involving sexual equality, only seven were initiated by or on behalf of women. If care is not taken a bill of rights can well hand weapons to one's enemies. ☆

continued from page 80

an equitable society; this will require policies of affirmativeaction or employment equity aimed at redressing the imbalances of the past. This is a controversial topic that goes beyond this article and there is much debate over the best ways to achieve a more balanced work-force. What is crucial is that the law should not allow people in a privileged position to use the claim of discrimination to resist any attempt to equalise society.

Policies of affirmative action will not necessarily result in a better deal for the majority of black workers. They will gain from these policies if the unions have the interest and skill to challenge the many discriminatory practices that are such a common feature in South African workplaces.

This article has concentrated on racial and gender discrimination because they are the most widespread. There are many other groups who are discriminated against in the workplace: the disabled, workers injured in accidents, those with unpopular political views, homosexuals and so on. Discrimination will only be defeated in a climate of tolerance in which any irrelevant consideration is rejected as a basis for hiring or promotion. ☆