

Tug of war over  
new document?

## Bill of Rights faces no

Is there a clash between the new Bill of Rights and the popular will? SHAUNA WESTCOTT found the experts divided.

**B**ARELY four months in existence, South Africa's first Bill of Rights may be under pressure. Calls for the reinstatement of the death penalty, widespread use of corporal punishment, fundamentalist antagonism to constitutional protection for gay people are among the signals that seem to indicate a tension between the rights document and the popular will.

Not so, says constitutional lawyer Albie Sachs. "The Bill of Rights draws on universally accepted principles that the majority have been fighting for at least since the Freedom Charter was adopted in 1955."

University of Cape Town (UCT) senior law lecturer Alfred Cockrell disagrees. "The Bill of Rights is meant to be a counter-majoritarian document," he says. "The majority may believe, for example, that all homosexuals should be put up against a wall and shot. The whole point of the Bill of Rights is that it says to the majority 'you can't do that'. It is based on a notion of democracy that runs deeper than mere majoritarianism."

UCT law professor Kate O'Regan takes a position between these two views. She sees an irony in the fact that the Bill of Rights was drawn up by a technical committee but points to the need for expert as well as popular input to such a document. She believes that part of the purpose of a bill of rights is educative, but she also warns against misrepresenting the popular will.

"We should be cautious about accepting that the public will is some sort of base beast without values. In fact, there is a strong sense in South Africa that we want a decent society, one that respects individual rights as well as standing for social and economic justice.

"There isn't, in fact, a real tension between the Bill of Rights and the will of the people. I think the very necessary process of dialogue and debate around the Bill of Rights will highlight a widespread commitment to fundamental human rights values."

Sachs would say "viva!" to that. "The so-called ignorant masses have shown a great yearning for freedom and dignity," he notes. "The spirit of reconciliation and negotiation is deep in popular tradition. We hear a lot about *ubuntu* as though it were some kind of magic word but it is a lived reality for millions of people.

"If we can deal with the squalor of people's lives and ensure dignified employment and enjoyable entertainment for everybody, I think the pressure to use the rope, the cane and the gun to solve social problems might be less."

O'Regan is sceptical that calls for reintroduction of "the rope" reflect a majority view. "We are a deeply religious society," she says, noting also that "the whole Judeo-Christian push over the last 2 000 years has been against retribution" – the older notion of "an eye for an eye".

Both O'Regan and Sachs emphasise that the Bill of Rights is an interim document. With Cockrell, they stress the need for popular participation in debates around the bill before a final version is written. All have been struck by the extent of public awareness of the rights instrument and the role played by the media in building it.

Interesting differences of opinion emerged on why a safeguard for



# base beast'

gay people found its way into the Bill of Rights while women's right to control over their own bodies has not.

Sachs feels the majority may well support gay rights. "The ANC draft bill of rights expressly included such a provision. The draft was discussed at many conferences and became accepted ANC policy. I think that on certain culturally controversial questions the majority would not balk at accepting a pro-human-rights position from the leadership of an organisation which in broad terms they support."

Cockrell's view is that the gay rights provision does not reflect a majority view but rather the way the interim Bill of Rights was drawn up. The impact of "a strong gay rights lobby" and the fact that party political negotiators at Kempton Park did not see a stand on gay rights as a potential vote loser explain the provision's adoption.

Abortion, on the other hand, was simply too contentious and too risky. A pro-choice stand might have won some votes but it would certainly have lost votes too.

O'Regan notes that gay rights "were hidden in a very long list" facing negotiators and also that it is "very difficult for people in South Africa today to argue against equality". Sachs points out that "there is a greater willingness to accept formal equality than there is to accept substantive equality, which requires recognising past and present subordination and taking steps to overcome it."

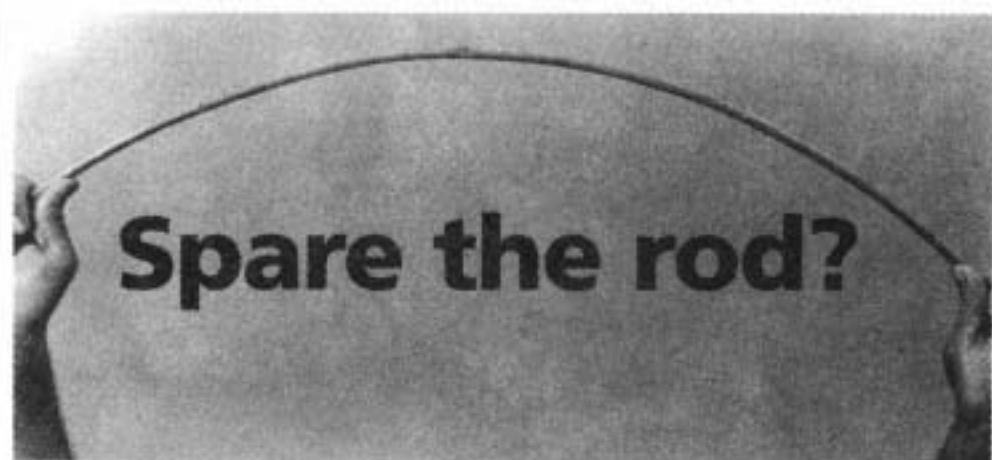
"The issue of abortion," says Sachs, "has to be dealt with in as calm and balanced a way as possible. In other countries it has proved to be extremely divisive. It would not have been appropriate for negotiators to have taken a final position on a question where honestly held opinions conflict sharply."

O'Regan observes that "the formulation of the abortion issue in terms of the right to life of a foetus is not an illuminating way to approach the debate". She feels, unlike Sachs, that it is a pity the issue is not dealt with directly in the Bill of Rights but notes that, when it comes before the courts, the constitutional commitment to such values as the dignity of the person could counter the right to life provision.

Sachs would not be drawn on whether the Bill of Rights outlaws corporal punishment but O'Regan feels that "it certainly does outlaw the use of corporal punishment in the justice system". Cockrell agrees. "Prima facie it is outlawed," he says.

Both feel that it is likely that corporal punishment will also be barred in state schools but think this will probably be a slow process. Cockrell expresses uncertainty over the position in private schools and also over whether parents' traditional right to punish children might be affected.

O'Regan is convinced, however, that if parents are to be discouraged from hitting their children, it will be by means of family law rather than through the Bill of Rights. Both she and Cockrell note that the law is not often effective in the sphere of private relations. "The family is an area where the Bill of Rights is not going to extend its tentacles very efficiently," is how Cockrell puts it. ■



By Sobantu Xayiya

UNCERTAINTY reigns on the Cape Flats about how the Bill of Rights may affect traditional means of disciplining children. Some schools continue to impose corporal punishment; others want to do away with it but lack guidance on alternatives.

Nokwanda Makubalo, a teacher at Topcor Primary School in Crossroads, says teachers were themselves taught at schools where corporal punishment was seen as a normal part of the system, and that this makes it extremely difficult for them to accept the validity of the argument against it.

Makubalo holds teacher training colleges responsible to a large extent. "Human rights were never part of their curriculum. As a result, when faced with a dynamic situation and its challenges, we don't respond uniformly."

For Moses Maboe and Godfrey Njimba, both heads of department at Imbasa Primary School in Nyanga, the difficulty lies in the transition from primary to secondary school level. Corporal punishment is not imposed at Imbasa because, they feel, respect for teachers is automatic in very young children.

"However, we've noted that the behaviour of children starts to change when they graduate to high school level," they say.

Nelson Mandela High School principal Zalisile Mkhontwana believes that there are "circumstances beyond one's control which require us to employ corporal punishment" in certain cases. The policy at his school is not to exceed three lashes and to provide counselling to pupils punished in this way.

Students at Nelson Mandela High support the decision to limit corporal punishment to three lashes, although, according to the deputy chairperson of the Students' Representative Council, Amos Gaji, teachers now hit students far too hard. Students also feel angry that a disciplinary committee on which students were represented has been replaced by a committee consisting only of teachers.

A less troubled view of the issue is taken by Khayelitsha mother of two Jackolyne Velani. "I send my children to school to be educated, not to be involved in endless arguments with teachers," she says. "I was forced to leave school at a very early stage to work and assist my parents. I want to make sure my children do not suffer the same fate I did. Our children are lucky to have the opportunity to learn."

Mother of six Nomathemba Zwelibanzi, who sells meat from a stall at KTC squatter camp, agrees. She says she is not aware of a bill of rights and contends that there is nothing wrong with corporal punishment. "Everybody went through it," she says. ■