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TOWARDS A BILL OF RIGHTS IN A DEMOCRATIC SOUTH AFRICA*

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INTRODUCTION

All revolutions are impossible until they happen; then they become inevitable. South Africa is trembling between the impossible and the inevitable, and it is in this tensely unstable situation that the question of human rights in a post-apartheid society clamours analysis.

Like slavery and colonialism, apartheid is regarded as irremediably bad. It is no longer necessary to spend much time investigating schemes to modernize, reform, liberalize, democratize or even privatize apartheid. It is accepted throughout the world that you cannot have good apartheid or degrees of acceptable apartheid. The only questions which should be on the agenda are how to end apartheid rapidly, with as little destruction to the country's infrastructures as possible, and how to ensure that the new society which replaces it lives up to the ideals of the South African people as a whole and the standards of the international community in general. Thus, at the constitutional level, the issue is no longer whether to have democracy and equal rights, but how best to achieve these principles and how to ensure that within the overall democratic scheme, the cultural diversity of the country is accommodated and the individual rights of all citizens are respected.

* This paper was presented at an in-house seminar organized in March 1986 by the Legal and Constitutional Department of the ANC to discuss the ANC's proposed Constitutional Guidelines. I deliberately refrained from dealing with the role and structure of the Courts since I felt that this deserved extensive treatment on its own. I have since developed the ideas first presented in this paper and in particular have underlined the important role which I envisage a non-racial judiciary in South Africa playing in guaranteeing the democratic rights and fundamental liberties to be enshrined in a new constitution. Judicial protection of hard-won constitutional rights becomes more rather than less important. See Albie Sachs 'A Bill of Rights for South Africa: Areas of Agreement and Disagreement' (1989) 2 *Columbia Human Rights Law Review* 13.

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It is in this connection that argument about a Bill of Rights in post-apartheid South Africa is beginning to rage. At first sight it might appear that, given the existence of internationally accepted documents on human rights, the adoption of a Bill of Rights in South Africa should be a relatively simple process. Some have even proposed the acceptance of a Bill of Rights as a confidence building measure that could precede the adoption of a new Constitution, the first assumption being that it is possible to separate a Constitution and a Bill of Rights, and the second that, granted a general commitment to end apartheid, the question of formulating a Bill of Rights would be unproblematic. In reality, the issue of a Bill of Rights is proving highly controversial not simply because of its relationship to a Constitution, but even in its own terms.

Basically two positions have emerged. Reduced to their essentials, they are, on the one hand, that a Bill of Rights is necessary to protect the interests of the white minority against a future black majority government, and on the other, that a Bill of Rights can be a major instrument in guaranteeing to the black majority and the whole population the effective realization of the rights which they have been denied for so long.

The former and more narrow position is the one that until now has been the most forcefully articulated. In some cases it has required courage on the part of the proponents to be associated with even this narrow approach, and one must pay tribute to those who have begun to take serious steps along this road. In other cases, unfortunately, a Bill of Rights is projected cynically as a cloak for covering the most violent abuses against the people. One thinks of the Ciskei, for example, where the existence of a Bill of Rights as part of the so-called Independence Constitution has done little to protect the people from a ferocious reign of terror; or one recalls that amongst the signatories to a recently adopted Bill of Rights document in Natal are persons allegedly responsible for sending murder squads to butcher students, lawyers, trade unionists and community workers. In between these two extremes are a great number of lawyers and social scientists acting for a variety of professional and personal motives. What all these people have in common is that the documents they produce, though purporting to be in universal language, in reality have a very narrow focus and are in fact highly self-serving.

The wider approach to a Bill of Rights has until now received little direct expression, though indirectly it is projected whenever documents such as a Workers' Charter or an Education Charter are formulated. The main purpose of this article is to spell out loudly and clearly in the language of legal discourse this alternative view of Human Rights. Instead of seeing a Bill of Rights as a means of protecting group privileges under the guise of protecting group rights, it regards a Bill of Rights as an instrument for enlarging the freedom of the oppressed majority, thereby creating a South Africa in which equal rights becomes a reality and in which the whole population irrespective of colour or origin, can live in peace and with dignity.

Some Misconceptions

A Bill of Rights is necessary because if you grant the legitimate rights of the black majority you must also give reasonable protection to the rights of the white minority.

A Bill of Rights is a reactionary device designed to preserve the interests of the whites and to prevent any effective re-distribution of wealth and power in South Africa.

(Summary of two widely held views on a Bill of Rights)

The most curious feature about the demand for a Bill of Rights in South Africa is that it comes not from the ranks of the oppressed but from a certain stratum in the ranks of the oppressors. This has the effect of turning the debate on a Bill of Rights inside out. Instead of a Bill of Rights being associated with democratic advance, it is seen as a brake on such; instead of being welcomed by the mass of the population as an instrument of liberation, it is viewed by the majority with almost total suspicion. Indeed, South Africa must be the only country in the world in which sections of the oppressed people have actually constituted an anti-Bill of Rights Committee.

At first sight, nothing appears simpler than to adopt a Bill of Rights based upon a universally accepted document such as the UN Declaration of Human Rights. The fact is that the apartheid divide lies as heavily on the Bill of Rights debate as it does on any other important topic in South Africa. Disagreement relates not only to the specific clauses to be included or excluded, but to the whole thrust of a possible Bill, to the manner in which it should be created, and to the means whereby it should be enforced.

This section will deal with certain misconceptions, which, in the writer's view, block effective discussion of the subject. The next section will then set out proposals relating to the manner in which a Bill of Rights should be created and to what its basic character should be.

Suspicions About the Bill of Rights

It is a sad tribute to the way the law has impinged on the life of the majority of South Africans that a Bill of Rights is seen essentially as a means of using juridical techniques to restrict rather than enlarge the area of human freedom. Suspicion is founded on a variety of interconnected factors:

- The push for a Bill of Rights comes not from the heart of the freedom struggle, but from people on the fringes, many of whom have criticized apartheid, but few of whom have been actively involved in the struggle against it;

- The objective of the Bill of rights is seen as being primarily to protect the existing and unjustly acquired rights of the racist minority rather than to advance the legitimate claims of the oppressed majority;
- The attack on 'majoritarianism', which underlies many arguments in favour of a Bill of Rights, is manifestly racist, since South Africa has been governed without a Bill of Rights and in accordance with the principles of majority rule (for the minority!) since the Union of South Africa was created in 1910, and the need for checks and balances suddenly becomes allegedly self-evident when blacks are about to get the vote;
- The key role given to what are called experienced lawyers in controlling the implementation of the proposed Bill of Rights would mean inevitably an interpretation in favour of the existing and unjustly acquired rights and against any meaningful re-allocation of rights;
- While protection of the individual is necessary, the complete failure of the proposed Bill of Rights to address the question of grossly disadvantaged communities renders it largely irrelevant to the human rights needs of the country.

Such suspicions might seem shockingly unjust to the proponents of a Bill of Rights, many of whom have a genuine hatred of apartheid and a deeply sincere desire to see as rapid and peaceful a transformation of the country as possible. Yet the proponents of a Bill of Rights have rushed ahead with their drafts without paying due attention to questions to which their lawyerly background should have made them more sensitive. Before drafting a Bill of Rights for a post-apartheid South Africa, it is necessary to ask certain preliminary questions, the answers to which will decisively affect the final result. More specifically, it is necessary to ask simply:

What Bill of Rights?
By whom, for whom and how?

Misconceptions About the Contents of a Bill of Rights — The Question of the Three Generations of Rights

Most proponents of a Bill of Rights for South Africa operate within a thematically limited and historically out-of-date perspective. Very few get beyond what has been called the First Generation of Human Rights, namely, civil and political rights and rights of due process, as were declared during the great anti-feudal and anti-colonial revolutions of the eighteenth century. The Second Generation of Rights, namely those of a social, economic and cultural nature enunciated in the UN Charter of Human Rights of the 1960s gets scant mention, while the Third Generation of Rights, the rights to development, peace, social identity and a clean environment, which have been clearly identified as human and people's rights only in the past decade, get virtually no attention at all. At a time when every possible intellectual input is needed, it is

perverse indeed to restrict the scope of the debate to First Generation Rights only, just as it would be grossly anachronistic to start post-apartheid South Africa with a Bill of Rights document as archaic (even if not as vicious) as the system it is designed to replace.

The great majority of South Africans have in reality never enjoyed either First, Second or Third Generation rights. Their franchise rights have been restricted or non-existent, so the extention of the franchise is fundamental to the achievement of democracy and the overcoming of national oppression. But for the vote to have meaning, for the rule of law to have content, the vote must be the instrument for the achievement of Second and Third Generation rights. It would be a hollow victory if the people had the right every five or so years to emerge from their forced-removal hovels and second rate Group Area homesteads to go to the urns, only thereafter to return to their inferior houses, inferior education and inferior jobs. And it would be a strange panoply of rights that not only ignored but excuded the rights to peace and development, the rights to enjoy the beauty of and benefit from the natural resources of the country, and above all the right to be a people, to be South Africans in the full sense of the word, to constitute a nation, to overcome the divisions and inferiorization imposed by racism, tribalism and regionalism, and to participate as a people in the life of the community of nations.

There are some persons who would wish to restrict the extension of rights to the First Generation only, granting formal political power, but depriving it of practical content; the people can have the vote, but not homes and jobs. There are others who would see the extension of Second Generation socio-economic rights as an alternative to First Generation political rights — the people can have homes and jobs but not the vote. Very few look at the Third Generation at all, the rights so important to a people denied peace, security, dignity and identity for centuries.

The fundamental constitutional problem, however, is not to set one generation of rights against another, but to harmonize all three. The possessors of the rights are the same physical human beings, the citizens of a democratic South Africa. They do not exercise one set of rights in the morning, another in the afternoon and a third at night. The web of rights is unbroken in fabric, simultaneous in operation and all-extensive in character.

In the world at large, the Generations of Rights, or, rather, of Rights formulations, succeeded each other at different times, but their sphere and object was essentially the same and their line of development has been continuous. It would be absurd for us in South Africa to have to recapitulate and live through each stage separately before advancing to the next. We do not need to reinvent each formulation. Rather, we draw on the achievements of the struggles of other peoples and benefit from the intellectual creation of the world community in order to find formulae and solutions for our own problems. Thus, when the majority in South Africa look to the complete elimination of apartheid in all its shapes and forms, what they are longing for is the rights as formulated in all three

Generations. The people of South Africa want to be free, to live decent lives, to be a community with their own personality and culture and to live in peace and with dignity with each other and the world; no more, no less.

A Bill of Rights — by Whom and for Whom?

A look at the historical contexts in which other Bills of Rights have been adopted shows the back-to-front nature of the proposed Bill of Rights for South Africa. The Magna Carta, the Bill of Rights adopted in England, in the 17th century, the US Bill of Rights, the French Declaration of the Rights of Man, were all formulated and adopted by the former victims of arbitrariness and oppression as a means of controlling or excluding the power of the former oppressors and guaranteeing the aggrieved classes against future revival of arbitrary behaviour. It was not Hitler or former supporters who drafted the UN Declaration of Human Rights or the subsequent Charter.

If we take a close look at the great prototype Bill of Rights, namely, that contained in the early Amendments to the US Constitution, we see that it was adopted not before Independence, but afterwards, not by the ousted colonial authorities but by the victorious freedom fighters. We observe too that the objective of the Amendments was not to preserve the rights of the defeated loyalists, but rather to root out once and for all the kinds of oppressive behaviour indulged in by supporters of the Crown. Thus, each of the Amendments was designed to deal with a specific form of denial of rights: no freedom of speech or assembly, the imposition of an official Church, the use of torture and cruel punishments, the forcing of confessions and so on. The Bill was not an abstractly conceived set of rights designed by lawyers in terms of general pre-conceived notions, but a concrete set of responses to specifically felt forms of domination. The former colonized people, victims of despotism, anxious to guarantee that there be no revival of the suffering to which they had been subjected and to consolidate their new-found freedom, remembered exactly where the shoe had pinched, and designed their Bill of rights accordingly.

Applied to South Africa, this would mean essentially that the Bill of Rights would be adopted largely at the behest of the former oppressed, after freedom had been won, and as a means of ensuring that their oppression was not restored in old or new forms. The Bill of Rights would confront and outlaw all the specific forms of oppression associated with apartheid: the whole system of racial domination, the pass laws, the forced removals, the Group Areas legislation, the violence of the troops in the townships and of the security police in the cells. And since the equivalent of Independence in South African conditions is the restoration of the land, of dignity and rights within the existing boundaries of the country, a Bill of Rights would have to address itself directly to the question of equal access to resources. In other words, a genuine document in the classic Bill of Rights tradition would have as its principal

objective the total elimination of apartheid and the guaranteeing of rights to those presently oppressed.

In the proposal being made we find almost exactly the opposite being expressed. The principal objective is precisely to give guarantees to the present oppressors, to protect them against the claims of the oppressed; to do so in advance of and as an alternative to rather than as a guarantee of democracy, to act as a bulwark against rather than as a prescription in favour of change. Such a Bill of Rights would be deprived of its true function. Instead of being an instrument designed to protect the future rights of the whole population, it becomes a means of defending the present privileges of the minority, surpassing the legitimate bounds of legal irony by perpetuating injustice in the name of constitutionality. It is only necessary to refer to a concrete case to see the significance of this.

If one looks at the question of the land, one sees the contradiction immediately. In the past three decades more than three million South Africans have been forcibly removed from their homes and farms, on the simple legal basis that they were black. Apartheid law then conferred legal title on owners whose main legal merit was that of having a white skin. Whom would the proposed Bill of Rights protect: the victims of the unjust conduct, which has been condemned by all mankind as a crime against humanity, or the beneficiaries? Although oppression and poverty are not necessarily completely synonymous, they do tend to go hand in hand. Where would the people, condemned as squatters after living on land for generations, their homes bulldozed into the ground, get the finance to compensate the new owners with their legal 'titles', when the only collateral the dispossessed would have has no known market value, namely, centuries of suffering and dispossession?

Looking at the surface area of South Africa as a whole, one finds that at present the dominant minority of less than twenty per cent of the population have reserved to them by law nearly ninety per cent of the land. It would be a strange Bill of Rights that said in effect that the remaining eighty per cent of the population had to forego their right to own and farm land because to exercise such a right would be to violate the acquired apartheid rights of the twenty per cent. Looked at from the perspective of human rights, who has the stronger claim to land: the original owners and workers of the land, expelled by guns, torches and bulldozers from the soil, turned into migrant workers, perpetually on the move with no plot they can call their own, or the present owners, frequently absentee, whose rights are based on titles conferred in terms of the so-called Native Land Act and the Group Areas Act?

This not to say that there are no white farmers with a deep attachment to and love of the land, who in the future would have no role to play in the growing of the food the country needs. Nor is it to argue that the past humiliation of the oppressed can only be assuaged by the future humiliation of the oppressors. One of the main functions of a new

Constitution would be to guarantee conditions in which all citizens, independently of race, colour or creed, could make their contribution to society and live in dignity and peace. But it is to insist that there be no de facto constitutional freezing of the present unjust and racially enforced distribution of land. There might be good arguments for careful study of transitional arrangements, for giving the present owners alternatives to sabotage and fighting to the death, for taking care to maintain high levels of food production while new generations of agricultural scientists are being trained, and for creating the conditions in which a common patriotism involving all South Africans is allowed to evolve. But these are practical questions that belong to the arena of political debate. They are not inalienable human rights principles that can be written in to a Bill of Rights.

The question in relation to the great tracts of land owned by the whites, while millions of black would-be farmers have no rights to land whatsoever, is how to create legal interests that eliminate what has been the foundation of the whole system of cheap, migrant labour, of pass laws, compounds and locations, of the denial of citizenship rights, and how to do so in a way that encourages a reduction rather than an intensification of racial antagonism and a minimization of damage to the country's food supply.

From a human rights point of view, the starting point of constitutional affirmation in a post-apartheid democratic South Africa is that the country belongs to all who live in it, and not just to a small racial minority. If the development of human rights is the criterion, there must be a constitutional requirement that the land be re-distributed in a fair and just way, and not a requirement that says there can be no re-distribution except on conditions that are clearly unattainable by the black majority.

Misconceptions about Structure and Implementation — The Question of Affirmative Action

Since most proponents of a Bill of Rights in South Africa see it as an instrument designed to block rather than promote any significant social change, they completely omit from their projections any reference to affirmative action. This deprives the Bill of Rights of its true potential as a major instrument of ensuring a rapid, orderly and irreversible elimination of the great inequalities and injustices left behind by apartheid.

Without a constitutionally structured programme of deep and extensive affirmative or corrective action, a Bill of Rights in South Africa is meaningless. Affirmative action by its nature involves the disturbance of inherited rights. It is re-distributory rather than conservative in character. It is not a brake on change but rather a regulator of change, designed on the one hand to guarantee that change takes place, and on the other that it proceeds in an orderly way according to established criteria, enabling

all the interested parties to make an appropriate contribution, or at least to know where they stand. Affirmative action presupposes the concertation of diverse forces in an agreed direction, with the State playing an ultimately decisive though not necessarily exclusive role in the process. A Bill of Rights cannot, accordingly, be seen in the eighteenth century way simply as a fetter on the State in relation to the citizen (though it should never lose its character as a guarantee against abuse of citizen's rights by the State). On the contrary, through giving constitutional backing to affirmative action, it gives to the State, as well as to other bodies, a duty to use national institutions and resources to promote the rights of the citizens.

In the historical conditions of South Africa, affirmative action is not merely the corrector of certain perceived structural injustices. It becomes the major instrument in the transitional period after a democratic government has been installed, for converting a racist, oppressive society into a democratic and just one. It is the instrument in terms of which nationally agreed and constitutionally established goals are realized in a fundamental way, attributing appropriate responsibilities to all social forces — the public sector, the private sector and the individual citizen.

Misconceptions Amongst the Mass of the People About a Bill of Rights

The way in which a Bill of Rights has been projected in South Africa as a means of preserving vested interests and of blocking corrective action to bring about genuine equality, has given the whole concept a bad name amongst the mass of people. This is most unfortunate. A Bill of Rights as such is neither a reactionary nor a progressive instrument; everything depends on the context.

The fact is that there is a true and progressive concept of a Bill of Rights that merits the support rather than the suspicion of all genuine anti-apartheid fighters, one that situates such a document in its classic context as a true consolidator of the gains of the people in struggle. Those of us engaged in the anti-apartheid fight also have our decisions to make. Either we leave the question of a Bill of Rights to others and then criticize the results, or we enter the fray directly and say: these are our positions, this is where we stand, this is what a Bill of Rights should really be like. More concretely, we can transfer the debate from the remote arenas of the Think Tanks and locate it where it belongs: in the midst of the life and strivings of the people. Justice and human rights do matter to us. This is what we are fighting for, and there should be no cynicism in our hearts on the matter, nor laziness in our minds.

In South Africa we already do have a document that embodies the key elements of a Bill of Rights, a document born out of struggle, one that responds directly to South African conditions, expresses the aspirations of the oppressed people and meets with internationally accepted criteria

of a human rights programme — the Freedom Charter adopted at the Congress of the People in 1955.

From human rights point of view, the Freedom Charter was amongst the most advanced documents of its time, spelling out in clear and coherent language, social and economic rights that were only to become internationally agreed upon in the 1960s, and people's rights that were only to be formulated in the 1970s and 1980s. The Freedom Charter is accordingly a contribution towards world human rights literature of which we South Africans can be proud. Similarly, we can look forward in the future not simply to borrowing from the world treasury of human rights documents, but to making our own specific contribution. Just as apartheid attacks human rights at all levels, political, social, economic, the very concept of the person, so the fight against apartheid brings together the themes of human rights at all levels, and makes its contribution to the enrichment of human rights concepts the world over.

Some Pre-Conditions

A Bill of Rights can either be an enduring product of history shaped by lawyers, or a transitory product of lawyers imposed upon history. If in South Africa it is to be the former and not the latter, four basic pre-conditions will have to be met.

1. An appropriate process must be created whereby a Bill of Rights may be adopted.

Bills of Rights can be either copied, defined, negotiated or constructed.

The easiest and least rewarding procedure, is simply to *copy* a Bill of Rights from a model regarded as working well in another country. Apart from the fact that this saves on drafting fees, there is little that can be said in its favour. An effective Bill of Rights in any country must relate to the culture, traditions and institutions of that country, and, above all, correspond to the specific and felt demands of the people at the historic moment when the Bill is considered necessary. This is not to deny an educative and exemplary role for a Bill of Rights, nor to refuse it a capacity to take on new meanings in the course of time. But it is to insist that an effective Bill comes from inside the historical process, not outside, and that it reflects a set of values gained in the course of struggle and rooted in the consciousness of the people, not one imported from other contexts.

Defining a Bill of Rights has the advantage of being directed towards the specific problems of a specific situation. This is what the burgeoning Think Tank movement on Southern Africa aims to do: select experts who define their way into the problem and define their way out again. The flaw in this approach is that it presupposes that the basic issue is an intellectual one: if only the correct formula can be found, everyone will come to their

senses, apartheid will disappear and all will end well. The reality is that the basic problems are ones of power and consciousness, not of formulation. It is not chauvinistic to assert that there is no lack of brains in South Africa; unfortunately even the defenders of apartheid have an intelligentsia of considerable brain power, today armed with all the intellectual apparatus of what is called contemporary political science. The truth is that until the social reality and especially the power structure have changed the intellectual reality will remain imprisoned in the categories of apartheid. The context will be that of rearrangement rather than substitution; yet try as the Thinktankers might, there is no way in which apartheid can be adapted or modified to make it consistent with any meaningful Bill of Rights. Similarly, there is no way in which a Bill of Rights that obeys international standards could be adapted to be consistent with apartheid, however rearranged. Any constitutional scheme designed to entrench the rights of the white minority, whether property rights or rights to racially exclusive education or residential areas, violates the principles of equal dignity and equal opportunity which lie at the heart of any Bill of Rights. Yet most of the Think Tanks seem to have set themselves just such an agenda, namely, to propose a constitutional scheme which, under the guise of a Bill of Rights, would guarantee that however many blacks there might be in Parliament, whatever the flag or anthem or even the name of the country might be, none of the privileges presently enjoyed by the whites would be touched in any way.

Negotiating a Bill of Rights, the third method, has two great virtues, namely, it operates from inside the process, and, by definition, its outcome will correspond to the power realities of the moment, giving it a fair chance of becoming operational. But it has certain serious drawbacks. As in the case of a copied or defined Bill of Rights, the people who are to be the holders of the rights, are regarded as mere spectators in the process. Furthermore, the negotiations inevitably result in a document so full of compromises and short-life arrangements that it hardly constitutes a true Bill of Rights at all. The fact is that one cannot negotiate goals, one has to establish them; what one can negotiate is the means whereby agreed goals can be achieved. If there is no agreement on goals, save at the level of banalities — such as that everyone shall be happy and none shall feel oppressed — then there is no basis for negotiating a Bill of Rights. In the case of South Africa, it is only when the fundamental goal of a non-racial, democratic and united South Africa is accepted, that a suitable foundation could exist for negotiating the terms of a Bill of Rights. What could be negotiated then would be the precise configurations, both substantive and institutional, as well as the exact steps to get there in as speedy and orderly way as possible.

Even granted agreement on goals, however, the major weakness in a negotiated process remains the passivity of the people at large in relation

to their fundamental rights. We live in an age in which every form of communication with and involvement of the people is possible. Even in the difficult circumstances of apartheid South Africa in the 1950s, the meetings that preceeded the Congress of the People at which the Freedom Charter was adopted, involved hundreds of thousands and possibly millions of people. All the participants felt thereafter that in some way or another the document was theirs, made by them for them and all the people of South Africa, something for which they were willing to fight, and, as Nelson Mandela said, something for which, if needs be, they were willing to die.

In my view this is what Bills of Rights are or should really be about, and this is what makes the fourth procedure for adopting a Bill of Rights for South Africa imperative — namely, *constructing* such a Bill. A constructed Bill of Rights will of course, copy from other models; it should eventually be a coherent and well defined document drawing on the advice and experience of all the thinkers — whether in Tanks or outside — of the world; and it will involve important elements of negotiation. But in addition it will have the characteristics of:

- being built up over a period of time rather than drafted at one moment;
- being constructed in sections and layers rather than as a single, unique document;
- being the product of active involvement of the widest strata of the population and not just of a few experts.

These three characteristics are inter-related. The time-frame gives the people, as a whole, and all interest groups, a chance to be involved. A Bill of Rights is built up, stage by stage, starting with agreement on general principles, and moving to specific institutional arrangements. In the meanwhile, all the major social forces that accept the basic goals are specially though not exclusively involved in the evolution of sections that have particular relevance for them. Thus, we already have in South Africa an Education Charter in draft, emerging in the course of struggle against racist education; one could contemplate a Worker's Charter in which trade unions would have a special role; perhaps a Charter of Religious Freedom and the role of the churches, mosques, synagogues and temples, in promoting the goals of the new society. The embryos of important sections of a future Bill of Rights are already emerging in the work of the National Education Crisis Campaign, the programmes of COSATU and SACTU, the Trade Union bodies, the declarations of activist religious leaders, programmes of the women's organizations, and so on. At a future stage, when a democratic government has been formed or is imminent, the process of consultation and involvement could be extended and formalized. The Freedom Charter itself is, of course, the fundamental document already in existence, and on its foundation, a Bill

of Rights could be gradually constructed, drawing upon all the inputs of all the different sectors.

In the same way as a constructed Bill of Rights presupposes a building up of the substantive part of the Bill, so it takes account of the need to evolve, step by step, the institutions which are to be invoked to make the Bill operative especially those relating to corrective action (this theme will be dealt with later).

Clearly it would be presumptuous to attempt to lay down or even predict the exact course whereby future constitutional documents will be adopted. But the perspective that needs at least to be considered is that of constitution-making as a process rather than an event. Once this is done, the possibilities become greatly enlarged of involving the people directly in the shaping and formulation of the rights of which they are to be holders. Rights in the true sense of the word are never conferred — they are seized, shaped, expressed and lived by their bearers. In this way, the Social Contract ceases to be a pure legal fiction and takes on substantive meaning.

2. In terms of its content the Bill of Rights must be associated with the extension rather than the restriction of democracy in South Africa.

To project a Bill of Rights as being essentially a mechanism to frustrate majority rule is to doom it from the start. The fundamental argument of this article is that a Bill of Rights should precisely be used to enlarge rather than to freeze the area of human rights, and to eliminate rather than perpetuate racial distinctions and the fruits of such distinctions.

What needs to be done is to turn the Bill of Rights concept from one of a negative, blocking instrument, which would have the effect of perpetuating the divisions and inequalities of apartheid society, into one of a positive, creative mechanism that would encourage orderly, progressive and rapid change in the direction of real equality.

At the level of content, this would take into account the specific features of the South African situation. Thus, while providing for general civil and political rights, including a multiparty system based on freedom of speech, association and organization, in a word, political pluralism — there would be no freedom to call for the maintenance or restoration of apartheid. If the majority of countries in the world have in one way or another outlawed the preaching or practice of apartheid, it would be rather ironical for South Africa, where the policy has caused so much misery and death, to be one of the few exceptions. At another level, any entrenchment of property rights has to take account of the fact that a reality has been constructed in terms of which 85 per cent of the land and probably 95 per cent of productive capacity is in the hands of the white minority. What is required is a constitutional duty to rectify these percentages, not one to preserve them.

In relation to Second Generation socio-economic rights, attention needs to be given to breaking out of the confines of the Anglo-Saxon legal tradition whereby basically rights are restricted to what is justiciable, that is, to interests that can be protected by recourse to a court of law. While the role of the courts should always be important, it should be complemented by a richer concept in terms of which the Bill of Rights not only operates to defend individual rights, but seeks to guarantee the extension of rights to the community as a whole. To take one example, what would be more important: the right to sue your doctor or the right to health? The former, litigation-oriented right might have significant justification in other countries: in South Africa what is urgently needed is the imposition of a duty on the State and the private sector to ensure that conditions are created for improving the people's health.

Consideration thus needs to be given to a Bill of Rights as a legal programme and not simply as a set of justiciable interests. A constitutional document that is programmatic in character presupposes that certain major social goals are set out in the document, and public and private entities are placed under a legal duty to work towards their realization. The Second Generation of rights lend themselves more to treatment of this kind than to the justiciable First Generation kind.

Third Generation rights, such as the right to peace, development and a clean environment, also necessarily have a strong programmatic character. This might be upsetting to lawyers used to Anglo-American legal conventions who argue that such concepts are political and not legal and as such have no place within a Bill of Rights. Any serious look at the needs of a post-apartheid society, however, shows that sweeping changes will be needed to ensure that the majority of the people have genuine and not merely token access to the rights, privileges and benefits of society. The problem is not to oppose the law to this process, but to ensure that the process is anchored in the law. The objective in a society undergoing major transformation can never be to separate law and politics, but to find the right relation between them. In some countries this has been done by giving institutional and juridical form to already existing revolutionary transformations, in others by means of sweeping social welfare legislation. In either event the need for a statutory based programme of change based on extensive public intervention has been recognized and acted upon.

3. The Bill of Rights must be Centred around Affirmative or Corrective Action

The third fundamental feature of a meaningful Bill of Rights for South Africa is that it must be structured around a programme of affirmative action. It is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedoms and improving the quality of their lives, but whole communities, especially those whose rights have been

systematically and relentlessly denied by the apartheid system. If a Bill of Rights is seen as a truly creative document that requires and facilitates the achievement of the rights so long denied to the great majority of the people, it must have an appropriate corrective strategy. To adapt Anatole France, if the law in its majesty were to give equal protection to a family of ten occupying a two-roomed shanty and a family of two living in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa. Whatever attitude is taken to unused or under-used accommodation, the failure to impose a legal duty on the State and the private sector to reduce inequality in living conditions would be to deprive the Bill of true meaning in this important area. The argument here is not whether or not the ten-roomed mansion should be confiscated, but whether or not there should be an obligation on the State and the construction industry to take measures to reduce the massive imbalance.

The advantages of corrective action is that clear and irreversible goals with an undeniable social and moral purpose are stated, but considerable flexibility is permitted in terms of how the goals are to be realized. This helps avoid the dangers of backsliding on the one hand, and producing grandiose but highly voluntaristic and unrealizable plans on the other. If the private sector is to play a positive role in reducing inequality in a democratic South Africa, it is difficult to see how any strategy other than that of massive affirmative action could be appropriate.

The example of housing has been given. But just as there is no area of South African life that apartheid has left untouched, so it will be necessary to extend affirmative action to every aspect of South African society — health, education, work, leisure, to mention but a few. And the transformations will have to affect not just the social and economic life but the very institutions of government. Even with the best will in the world, structures themselves built on inequality and injustice cannot be expected to be the guardians of equality and justice for others. In the presence of one of the worst wills in the word, the need to apply affirmative action to the Civil Service and the organs of state power becomes even more urgent.

4. The Mechanism For Applying the Bill of Rights must be Broadly Based and not Restricted to a Small Class of Judges Defending the Interests of a Small Part of the population

The assumption in most current writing on a Bill of Rights is that its final watchdog should be a body of highly trained and elderly judges, applying traditional legal wisdom in what is considered a neutral and objective manner. If the goal is selfishly to guarantee a minimum disturbance of existing property and social 'rights' (one has to put the word in inverted commas — the power to ensure that your child goes to a whites only school cannot be dignified by the word [right]) the goals to fulfil

the role than those who not only belong to and share the values of the very group to be protected, but whose whole professional mode has been shaped in the context of the interests, values and styles of that group? If, on the other hand, the dog is to watch the interests of the former oppressed, it would have to have a totally different pedigree and training. The question of whether the word 'and' in a particular context only means 'and' or can also mean 'or', which has exercised the minds of traditional lawyers for generations, would have little interest for defenders of the rights of the oppressed, who would look overwhelmingly to social rather than semantic factors in making their decisions.

This raises the important and delicate question of the relationship of a Bill of Rights to the legislative power of Parliament. It has already been argued that the objective of a Bill of Rights should be to re-inforce rather than restrict democracy. In South African conditions, it is unthinkable that the power to control the process of affirmative action should be left to those who are basically hostile to it. In later years when the foundations of a stable new nation will have been laid and when its institutions will have gained habitual acceptance, it might be possible to conceive of a new-phase Bill of Rights interpreted and applied by a 'mountain-top' judiciary. At present, the great need will be to give people confidence in Parliament and representative institutions, to make them feel that their vote really counts and that Parliamentary democracy serves their interests.

The kind of body that might provide a bridge between popular sovereignty on the one hand, and the application of highly qualified professional and technical criteria on the other, would be one similar to the Public Service Commission. A carefully chosen Public Service Comission with a wide brief, high technical competence and general answerability to Parliament, could well be the body to supervise affirmative action in the Public Service itself. Similarly, a Social and Economic Rights Commission could supervise the application of affirmative action to areas of social and economic life. Finally an Army and Security Commission could ensure that the army, police force and prison service were rapidly transformed so as to make these bodies democratic in composition and functioning (perhaps the hardest and most necessary of all the tasks facing those who wish to end apartheid in South Africa).

To sum up: the oppressed and all true democracts in South Africa have a great interest in promoting a Bill of Rights for the country, and in welcoming it as a progressive phenomenon. But such a Bill of Rights has to be created over a period of time with the active involvement of the people; it has to be located in the heart of the democratic process and not be seen as a foreign object imposed upon it; it has to be structured around a strategy of affirmative action; and its implementation has to be entrusted to institutions that are democratic in their composition,

functioning and perspective, and that operate under overall supervision of the people's representatives in Parliament.

Such a Bill of Rights, born out of the struggle for freedom, would live for decades, perhaps centuries, and enrich the international human rights' patrimony rather than impoverish it.

The Question of Majorities and Minorities

Apartheid has the capacity of turning the banal into the marvellous. The principle of equal rights, which in other countries is regarded as so ordinary as not to merit any explanation or require any defence, is projected as something quite wondrous in South Africa, indeed so astonishing as to be constitutionally illusory and practically unattainable. Yet, essentially this is what the anti-apartheid struggle is directed towards, the achievement of full equality between all south Africans independently of race, colour, ethnic origin, sex or creed; the measure of the success of any new constitutional order will thus be the degree to which it enshrines and helps materialize the principle of full, genuine and ineradicable equal rights.

Equal rights means rights for each and every individual South African. As far as the basic of citizenship are concerned there will be no distinction whatsoever between persons on the grounds of race or ethnicity. Just as race classification and group areas will disappear from legislation, so they will vanish from citizenship and the electoral system. There will be a common voters roll made up of all adult South Africans to elect a Parliament representative of and speaking in the name of the whole nation. The Constitution in this sense will be completely colour blind and totally race free. There will be no special privileges for racial or ethnic groups, no vetoes, no areas of special competence or 'own affairs'. Race will only enter the Constitution as a negative principle, that is, to the extent that the Constitution is not only non-racial but anti-racist. The anti-racist character will be guaranteed by provisions expressly referring to race, which:

- outlaw racial discrimination;
- prevent the dissemination of racist ideas and the organization of racist parties; and
- ensure that measures are taken to overcome the effects of past racial discrimination.

The question may be asked as to what guarantee would exist in such a constitutional order, especially one based on majority rule, against persecution of minorities by the majority. It may be argued that, while recognizing the evils of apartheid, it would be unjust to inflict on future generations of whites the very kinds of discrimination which their fathers have been and are inflicting on blacks. At the pragmatic level it may be

contended that if one wishes to persuade whites to relinquish power now, they must be given reasonable guarantees against persecution in the future. In fact the general scheme already outlined presupposes guarantees against the persecution both of individuals and of groups, but accomplishes this without introducing racist concepts dressed up as group vetoes, own affairs or separate voter's rolls.

Three sets of constitutional devices may be distinguished, each different in character and operating at a different level, but all having the common objective of preventing arbitrary or unjust treatment or harassment on the basis of race, appearance or ethnic origin. These devices supplement the general rights of citizenship and complement each other and will have to be located in the context of affirmative or corrective action.

In the first place there will be a Bill of Rights which entrenches basic individual rights for all citizens. Any individual discriminated against on the grounds of belonging to any minority (or majority) group, will have appropriate legal recourse. This is the *guarantee of equal individual rights*.

Secondly there will be a general non-discrimination provision which will outlaw any discrimination against any group on the grounds of race, colour or ethnicity. Any member of a group discriminated against, would have a legal remedy even if he or she was not directly affected by the discrimination. This is the *guarantee of non-discrimination*.

Thirdly the cultural diversity of the country will get a degree of constitutional recognition that will permit groups to develop certain aspects of what they might call their own way of life with a view to enriching the texture of society as a whole. This is the *guarantee of equal rights for all national groups*.

Here it is necessary to separate out from a group's way of life, what are presently objectionable features requiring abolition, what are really universally or widely accepted modes of behaviour not restricted to that group, and what are truly characteristics that justify protection and even promotion. The right to behave as a member of a master race, to insult blacks and to use violence gratuitously, for example, might be regarded as a marked feature of the way of life of a certain group today but would clearly be denounced in any democratic constitution.

Similarly, there are many social habits which in reality belong to or are open to all people, such as matters of dress, cuisine and etiquette. One does not need a constitutional right to eat curry or have a braaivleis (barbecue) or wear trousers. What will be guaranteed will be the inviolability of the home, freedom to pursue family life and general freedom of the personality. Non of these freedoms attach to any particular racial or ethnic group. Next, there are certain activities which historically and culturally have been associated with certain groups, usually based on linguistic association. Thus, there are many communities historically created with a distinctive socio-cultural personality which possesses considerable subjective significance for its members. Shorn of their association with oppression and domination, these socio-cultural features will continue and even have a measure of constitutional protection and support. What will not be permitted is the basing of political rights on socio-cultural formations, nor attempts to restore apartheid by political mobilization based on setting group against group.

Thus, from a general juridical and citizenship point of view the whites as whites will disappear from South Africa, as will the blacks. As far as the law is concerned (outside the special area of corrective action already dealt with), there will no longer be whites or blacks, only South Africans. But within the framework of an equal and undivided citizenship, there will be full recognition of linguistic diversity (that is there will be one South African citizenship with a single suffrage but many South African languages). There will be extensive recognition of the right to constitute religious organizations, many of which may have their holy literature in a particular language. Thus, Afrikaans speakers who feel comfortable worshipping in the Dutch Reformed Church will be able to continue their prayers and hymns in the way to which they are accustomed, as well as to choose their spiritual leaders and to develop their doctrine according to the internal teachings of the Church. In this sense there will be unfettered freedom of religious-cultural association (one can think of many other groups — Jews, Cape Moslems, Hindus, Greek Orthodox, as well as the many African independent sects that might have a similar basis).

What would not be permitted would be to deny membership on grounds of race etc, nor would these socio-religious organizations be allowed to function as a cover for political mobilization on a divisive or racist or ethnic basis. One hopes, in fact, that the religious organizations will play an active role in helping to build a united South Africa and in overcoming the inequalities and divisions left behind by apartheid, for without their involvement, the task will be difficult indeed.

Another sector where the Constitution could manifest a special tolerance could be in relation to certain areas of traditional law and custom. This is a question where extensive discussion with the people is required, so that all that is rich and meaningful to the people can be retained and progressively developed, while that which is divisive, exploitative and out of keeping with the times — especially that which has been distorted by colonialism and apartheid — can be eliminated.

Finally, it should be mentioned that there will be other constitutionally protected group rights which by their nature will necessarily cut across linguistic and ethnic divides. Thus the workers of South Africa, who today are playing a key role in the fight to destroy apartheid and build a new South Africa, will receive extensive constitutional recognition in the form both of individual and of collective rights. Similarly, South African women, also active in combat, and the victims of special social and legal

disabilities, should have the right not only to be free from discrimination but to call upon special resources so as to overcome the legacy of past discrimination. Other groups that could merit special constitutional recognition could be children, the aged, handicapped persons and victims of apartheid persecution. In none of these cases would the question of race or ethnicity enter. Group rights will exist, but they will be the rights of workers, women and so on, not of racial groups.

Transitional Arrangements

The only value of predictions into the future is that they enable their makers later to determine how wide off the mark they originally were. The eventual defeat of the forces of apartheid can be predicted with certainty, but the precise time that this will take and the nature of the intermediate or transitional phases, is still quite open.

Thus, if apartheid is destroyed by insurrection and a revolutionary seizure of power, the correlation of forces will be such that the classes of society represented by the victorious revolutionaries can impose their terms on society as a whole. A Constitution is necessary to institutionalize the new power and not to bring it into being. It will include a Bill of Rights, but the procedures of corrective action to ensure the restoration of land, wealth and dignity to the people, would inevitably be far less cumbersome and protracted than those contemplated in this paper.

On the other hand, the increasing precariousness of the base of the apartheid regime inside South Africa and its growing isolation internationally, could lead it to go along with attempts to bring about a managed solution on the lines of the Lancaster House agreement arrived at in relation to Zimbabwe. That is, there could be an attempt to negotiate a Constitution and a Bill of Rights along lines that have been criticized, because they keep racist principles alive and guarantee privileges, not rights, for the whites, but which nevertheless permit some kind of majority rule.

The position of the anti-apartheid forces has long been that the making of a Constitution for a democratic South Africa belongs to the people as a whole, acting through a democratically elected Constituent or National Assembly. What should be negotiated is not a Constitution, but the transitional arrangements leading up to the making of a Constitution. By their nature such arrangements, which might or might not include political and legal guarantees of a firm though transitory kind, will fall short of the democratic ideal. For their reduced life-span, they could well include certain features which still bear lingering imprints of apartheid society, and violated the general principles of a democratic Bill of Rights.

The crucial thing is the destruction of white supremacy as a system and the guaranteeing to the oppressed majority of their just rights. Once this is accomplished, the conditions will be created for embarking on the

process of encouraging the people of South Africa as a whole progressively to identify with and voluntarily regard as their own the principles contained in the Freedom Charter. The experience of the democratic movement in this respect is instructive: it has not pushed the Freedom Charter down the throats of the people, but, rather, patiently and successfully worked for a real understanding and appreciation of its principles.

Any transitional arrangements must be clearly distinguished from attempts to create a so-called internal settlement, like the Turnhalle Agreement in Namibia. In the first place, these internal settlements are arrived at by means of an alliance between the apartheid rulers and a black collaborator class. Since the majority of the people are excluded from the agreements, nothing is settled, the war continues, and the only difference is that blacks play a bigger role in the oppression of their fellow blacks. Furthermore, internal settlements are meant to be permanent, whereas transitional arrangements are intended to be self-eliminating. What it comes down to is that internal settlements are a means of postponing democracy, while transitional arrangements are a means of hastening it.

The negotiations for a transitional arrangement could in fact pave the way for a relatively peaceful dismantling of the structures of apartheid and the establishment of a democratic South African state. The goal of a race-free democratic society would not be negotiable, but the means of getting there, and in particular, the timetable and method of transferring power from a racial minority to the people as a whole, would be.

In this context, it becomes more important than ever that opponents of apartheid the world over keep their eyes fixed on the goal of genuine democracy in South Africa. To suspend sanctions because apartheid managed to don attractive new clothes would be to betray generations of South Africans who have struggled to liberate their country from racial oppression and exploitation. It would be to negate the principles of equality and democracy which the world community claims to live by. It would also be to postpone the peace which our country so sorely needs, and delay the reconstruction necessary to ensure that South Africa truly becomes a country that belongs to all who live in it and a proud member of the community nations.

A Look in the Future: The Afrikaner Businessman and the African Peasant

For the purpose of making a clear projection into the future, it is proposed to imagine how the adoption of a democratic Bill of Rights would affect two prototypical persons, an Afrikaner businessman and an African peasant (both male) and then to see what significance the Bill of Rights would have on the relationship between the two.

Simply to say that in a post-apartheid South Africa the Afrikaner businessman and the African peasant will enjoy equal rights is not enough. At present, their relationship is one of profound inequality, and the question arises as to how the Constitution would promote real and not simply formal equality between them. Furthermore, it is necessary to reflect on the cultural-linguistic dimension, which while disappearing as a basis for the exercise of political rights, nevertheless continues to be relevant in relation to cultural and national rights.

Looking first at the position of the *Afrikaner businessman* in relation to the new constitutional order we see that:

As a citizen, he will enjoy all the civil and political rights which he presently exercises in his privileged capacity as a member of the dominant racial minority, but will do so on the new basis of being an equal citizen in a non-racial democratic South Africa exercising normal constitutional rights. Thus, he will have the right to elect and be elected, to join the political party of his choice, to criticize or defend the government; he will also have the right not to be deprived of his liberty except in terms of the law and after a fair trial. He will enjoy freedom of speech and information, but will lose the right to propagate division and hatred on grounds of race. With regard to personal rights, he will continue to have security in his home, the right to live a family life if he so chooses, to enjoy his hobbies and pastimes, to move freely around the country, to have his holidays and to visit other countries. As a businesman he will continue to have the right to exercise his professional and entrepreneurial skills and to be appropriately remunerated therefor. His rights to personal property (a home, a motor car, a bank deposit, etc.) will be protected while his rights in relation to productive property will be subjected to the principles of public interest and affirmative action.

As an Afrikaner he will have a guaranteed right to use and develop his language, and to belong to the Dutch Reformed Church (non-segregated) or to any other religious body of his choice. If he wishes as part of his private life to mix with and marry only Afrikaners, that will be his choice; similarly, there will be no interference with habits and customs of daily life, most of which will in fact be practised by many non-Afrikaners. What he will have to learn to live with, however, is that in relation to anything outside the immediate private or family sphere, there will be constitutional norms of non-discrimination. Thus, there will certainly continue to be schools and universities in which Afrikaans is the medium of instruction and in which special attention is given to the study, development and enrichment of the Afrikaans language and literature. But these schools would not be able to restrict their entry on the basis of race.

Similarly Afrikaners might wish to occupy certain neighbourhoods as a matter of social practice. What they would not be able to do would be to create racially exclusive areas to which non-Afrikaners or non-whites

are not admitted. The new Constitution thus would not only automatically declare null and repeal such divisive legislation as the Group Areas Act, but would also prohibit the use of restictive covenants or the formation of racially exclusive condominiums as a means of continuing apartheid, this time in a privatized form.

Looking next at the position of the *African peasant*, we find that for the first time he will be able to enjoy full and normal rights of citizenship, and specially those of suffrage, in the land of his birth. He will no longer be subject to arbitrary arrest, removal or banishment. All the apartheid laws which presently dominate his life will be annulled. A a person, he will for the first time be free to move and reside anywhere in the country. His home will be inviolate and his dignity as a person and his right to a stable family life will receive full constitutional protection. As a farmer he will have a claim on the State for access to land and technical, educational and financial support. His house will be safe from the bulldozers, his plot of land and livestock guaranteed against confiscation. He will have a claim on the State to assist him to build, buy or rent a decent home and to enable him to acquire an interest in land for farming that will be legally protected.

As an African he will for the first time enjoy equal rights with all his fellow South Africans and be free from any discrimination or deprivation. His language will be recognized as one of the national languages of the country and his culture and the history of his forebears will be respected. Place names, national monuments and national holidays will record the struggle of his and previous generations for liberty and national freedom. As a victim of past discrimination and domination, he will have a claim on the State for invoking the procedures of affirmative or corrective action.

The above analyses have proceeded on the basis that the personalities are male. If they are female, an extra constitutional right will enter, namely the Equal Rights clause, which will bar any discrimination on the grounds, inter alia, of gender. In addition, women will have a claim for affirmative action in respect of removing disabilities or disadvantages associated with past discrimination, and will also have constitutionally recognized benefits in relation to maternity and mother and child care. Hopefully, too, there will be provisions designed to help the combat against sexist abuse and harassment.

Carry the constitutional projection one step forward, and positing that the African peasant is a tenant farmer on land owned by the Afrikaner businessman, what bearing would the future Constitution, and specially the Bill of Rights, have on their relationship?

In broad terms, the Constitution will require that the immense injustice whereby 87 per cent of the land belong to a 15 per cent minority, be corrected as rapidly as possible.

Exactly how this will be achieved, and how this will affect the specific relationship between the businessman and the farmer, will be conditioned by two factors, one historical and the other institutional.

The historical factor relates principally to the behaviour of the businessman. If he and his class prefer to fight to the death, if they threaten to destroy and massacre the workers as a protest againt the installation of a democratic government, then they should not be surprized if appropriate countermeasures, including confiscation of land and goods, are taken. If on the other hand, they accept a new patriotism, adhere to the new Constitution and continue to use their productive skills for the growing of food and for the benefit of the country as a whole, the process of land re-distribution will necessarily have a less drastic character.

Affirmative action presupposes orderly, significant and irreversible progress to eliminate the inequalities produced by centuries of colonialism and apartheid. As has been stated, constitutionally determined criteria are used to establish clear goals, and then the parties most directly interested negotiate the means whereby these goals can effectively be achieved. If disputes arise on the modalities of change, appropriate conflict resolution machinery exists.

In the case of land, it is of course not the soil itself that is re-distributed, but title to or interest in it. Here the possible legal forms are infinite, ranging from State confiscation on the one hand, to outright State purchase, to joint ventures with the State (or local public authorities), to co-operatives, to non-racial private or public companies or corporations, to partnerships, to parcelling out the land to individual farmers. Regional particularities and the existence or otherwise of abandoned or unused land will be relevant, as will, to a considerable extent, the economic importance to the country of maintaining high levels of food production. Similarly, the time needed for new owners or shareholders or partners or co-operative members to acquire appropriate technical and management skills, will enter the picture. Legally enforceable phased arrangements could be worked out and the particular wishes and family situations of the interested persons could be taken into account.

What is certain is that the present deformed and unjust relationship between the Afrikaner businessman and the African farm tenant, structured on legally protected arrogance and domination, will have to go.

The new Bill of Rights, democratic in its mode of adoption and democratic in its content, will provide the legal framework whereby the injustices of the past can be redressed and each and every person, whatever his or her background, will be able to act as a free person and to enjoy the benefits of freedom in the land of her or his birth.

ALBIE SACHS ON HUMAN RIGHTS IN SOUTH AFRICA

D H M Brooks*

I wish that I could welcome Albie Sachs' view on human rights as heartily as I welcome his recently announced views on art and literature. Some of the things he says, though, do give rise to liberal concerns. His overall approach is that

> '[i]nstead of seeing a Bill of Rights as a means of protecting group privileges under the guise of protecting group rights, it regards a Bill of Rights as an instrument for enlarging the freedom of the oppressed majority'.[1]

He begins with the curious fact that the majority of people view the idea of a Bill of Rights with suspicion even to the extent that the oppressed have set up an anti Bill of Rights committee. He lists the grounds for this suspicion and it is good that this is a section on misconceptions, as these suspicions are an invalid basis for rejecting any Bill of Rights out of hand. I will explain why I fear that Sachs himself is not immune to some of the errors lurking here.

The first ground of suspicion, that the Bill of Rights is urged by people who have not been at the heart of the freedom struggle, is an example of what logicians term the fallacy of genesis. Doubt is cast on a statement or proposal on the grounds of its origin. In fact an unreliable witness may make a true statement. The boy who cried 'wolf', when disregarded by his tribe and eaten by the wolf, was not raising a false alarm even though he had done so earlier. Secondly, it is felt that the objective of a Bill of Rights is to protect unjustly acquired rights rather than to advance the majority. Again, that something is put forward with an ignoble motive does not imply that it is bad in itself; the genetic fallacy again. More significantly, there can be bills of rights and bills of rights. One bill of rights might lay down a system of group rights which would be merely a disguise for apartheid; another might guarantee only rights which it is said accrue to us through our rational human nature. Such rights as the right to freedom of religion and freedom from torture can hardly protect something unjustly acquired unless our minds and bodies could be unjustly acquired by ourselves. Thirdly 'the attack on "majoritarianism", which underlies

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1 A Sachs 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1.

many arguments in favour of a Bill of Rights, is manifestly racist, since South Africa has been governed without a Bill of Rights and in accordance with the principles of majority rule (for the minority!) since the Union of South Africa was created in 1910, and the need for checks and balances suddenly becomes allegedly self-evident when blacks are about to get the vote'.[2] This presents a variety of muddles. First an attack on majoritarianism need not be racist. J S Mill saw the dangers of majoritarianism in a racially homogenous society. Those same objections can be raised quite honourably to majoritarianism in post-apartheid society. Secondly, that some racists now see an advantage in a bill of rights and were happy to rule a majority without one is an irony and one which reflects badly on them rather than a bill of rights. Hypocrisy is not the only tribute vice pays to virtue. The tyrant who has disregarded appeals to morality throughout his career suddenly sees the benefits of morality when he is treated unjustly. Thirdly, the very horrors of South African history over the last 70 years are a potent object lesson in the dangers of an unfettered sovereign parliament whether elected by a majority or a minority. The evils of Nationalist rule are one of the best reasons for a Bill of Rights. Fourthly, there is the suspicion that a Bill of Rights administered by experienced lawyers will be interpreted 'in favour of the existing and unjustly acquired rights and against any meaningful reallocation of rights'.[3] Now it must be accepted that even judges can err and it is possible that, in South Africa, older whites, however much they strive for objectivity, will tend to be biased. This though is not to endorse the facile and insidious cliché of latter-day thought that objectivity or even an approximation to it is in principle unobtainable. I also have to point out again that it is only things like property rights that can be either unjustly acquired or reallocated. The final suspicion is that 'the proposed Bill of Rights' (which and by whom?) fails to 'address the question of grossly disadvantaged communities' rendering it 'largely irrelevant to the human rights needs of the country'.[4] Now either grossly disadvantaged groups in South Africa are miraculously immune from detention without trial, censorship and state torture or there is a gross failure to understand what is offered by a Bill of Rights. The underlying concern can again be seen to be economic. It may be granted that many lists of human rights do not put bread into people's mouths nor prescribe that bread should be put there. This does not mean that a Bill of Rights is irrelevant.

These objections to a Bill of Rights are, as Sachs realises, misconceived suspicions rather than cogent arguments for its unsuitability. It is highly disturbing but understandable that people should distrust those they regard as the enemies. Laocoon turned out to be correct in his suspicions

2 Sachs at 4.

3 Ibid.

4 Ibid.

when he said 'Timeo Danaos et dona ferentes'; the Greek gift of a wooden horse did lead to the downfall of Troy.[5] It is also true that a Bill of Rights could be yet another cosmetic disguise for the perpetuation of apartheid. Still we should not throw out the baby with the bath water. The failings of one possible Bill of Rights should not discredit them all. Sachs goes on to do us the service of saying what he believes is needed from a Bill of Rights.

First he addresses the question of the content of a bill of rights and argues that a future Bill of Rights should harmonize what have been called the three generations of rights. The first two generations are more commonly known as negative and positive rights. Negative rights are rights against the whole world requiring forbearance from others rather than positive action. One cannot say that negative human rights are unproblematic; dictatorial and totalitarian states have refused to accept them and where such rights have been upheld by the state it has usually been the result of a hard won struggle. However it is fairly clear what is demanded and from whom. Everyone is to refrain from interfering with another's wish to say what he wants, associate with whom he pleases, worship as he feels appropriate, etc.

Negative rights, it is often argued, accrue to people simply by virtue of their being human. To be a rational person and a moral agent confers upon each of us a dignity which should be respected by others. We are autonomous adults capable of choosing for ourselves responsibly and should not be hindered in carrying out our plans except, in Mill's phrase, 'to prevent harm to others'.[6]

Positive rights, by contrast, are sometimes thought only to accrue by contract. A positive right demands more than forbearance from others; it requires positive action. Everyone has the negative duty of forbearing to hinder me in my enjoyment of my motor car (except perhaps for a traffic officer who may prevent me from driving recklessly or drunkenly and thus endangering the lives of others); only the mechanic with whom I have specifically contracted has a positive duty to repair the vehicle so that I may enjoy it fully. Positive human rights or welfare rights or second generation rights claim that I have not only the right to unhindered exercise of my autonomy but also the right to demand what will enable me to fully exercise that autonomy. Positive rights impose on others the positive duty to provide the right holder with adequate food, education and health care. If ownership of a motor car gave such positive rights in addition to negative property rights then I could expect my car to be kept in petrol, maintained and repaired. To accept that there are positive human rights is to hold that we should not only be left undisturbed and at peace but that the world also owes each and every one of us a living.

5 'I fear the Greeks even when bringing gifts' Vergil *Aeneid* Book II.

6 J S Mill 'Essay on Liberty' in *Utilitarianism* (1910) 73.

The first question that arises is whether morally we ought to respect the autonomy of others, their negative rights. I think that it is clear that we do and many infringements of negative rights are criminal acts. If I imprison, torture or gag my neighbour I will be justly liable for punishment. It also seems that my neighbour has a right to demand that I refrain from treating him or her thus and to call on others to help to prevent me doing so.

I think that we also have a duty to help others, if we can, by more than forbearance. If I have more than enough food, surely some of it should go to help the starving man at my gate rather than be allowed to go off or be used to entertain my well-fed friends. Does this though confer a right upon the man at the gate? While for every right there is a corresponding duty, is there for every duty a corresponding right? Suppose that I have a duty to give up say 10 per cent of what I own to the poor; does this confer a right on anyone? It cannot confer a right on all starving people since 10 per cent of what I own divided by the number of the severely malnourished would not amount to more than the merest fraction of the world's smallest curency unit apiece. If I have a duty to give to charity do I not have a corresponding right to decide on the recipient?

So while one may agree that we or society should endeavour to see that all are provided with the bare necessities of existence, food and shelter and with what is necessary to develop oneself to one's fullest potential such as education and health care, it is not clear that this duty confers corresponding rights. Such rights could be legislated by, for example, a system of negative income tax and the issuing of health and education vouchers. Under such a system people whose income fell below some level would be, say, guaranteed the right to claim the amount their income falls short of that level against the state together with vouchers entitling them to so much education and health care.

Legislation of this sort would convert a moral duty without corresponding rights into clear and, most importantly, justiciable rights for individual citizens. The mere inclusion of positive welfare rights in a Bill of Rights need not have this outcome. Benn and Peters point out that

> '[i]t should be noted, in any case, that the Universal Declaration is not positive law . . . ; it is a statement of objectives felt to be *generally* desirable. It is quite properly open to economically backward people to argue, for example, that while recognizing the desirability of working towards the ideal of a universal, free system of elementary education required by Article 26, the rate of progress must be governed by the relative claims of other ideals upon their resources. Formal declarations of rights are mainly directed not to the regulation of relations between private citizens, but to the duties of governments and legislators.'[7]

A pious hope or statement of a government's ultimate aims does not provide the same benefit to the individual as a specific right for a specific

7 S Benn & R Peters *Social Principles and the Democratic State* (1959) 102.

thing to be upheld in a court of law. If positive welfare rights are not to be given a concrete, justiciable form which an individual can act upon it seems more correct and more honest to declare social welfare a charge on or a duty of the state rather than a right of the individual. Such a duty imposed on the state might best be discharged by arrangements other than those instituted by Eastern European countries which are now seeming to reject old-style Marxist socialism.

As for Sachs' third generation rights, it is not very clear what they are. He talks of 'the rights to development, peace, social identity and a clean environment which have been clearly identified as human and people's rights only in the past decade'[8] but this is all that can be cleary ascribed to third generation rights. (He may also intend to include 'the rights to enjoy the beauty of and benefit from the natural resources of the country, and above all the right to be a people, to be South Africans in the full sense of the word'.[9]) No attempt is made to say who can claim these rights or who has the corresponding duties. These matters are clearly desiderata but it is not clear how they would be incorporated in a Bill of Rights nor what the benefit of doing so would be. I will not discuss them any further.

Sachs speaks slightingly of a bill of merely negative rights. To advocate such a bill is 'to operate within a thematically limited and historically out-of-date perspective'[10] and 'it would be grossly anachronistic to start post-apartheid South Africa with a Bill of Rights document as archaic (even if not as vicious) as the system it is designed to replace'.[11] Now to be old or long-standing is not in itself a criticism. What is a criticism is to be either no longer relevant or superseded. Argument is only given that people have advocated bills of rights for a long time and in particular in the 'anti-feudal and anti-colonial revolutions of the Eighteenth Century'. This does not show that a bill of purely negative rights is out of date or archaic. Laws prohibiting murder are old and of long-standing; this is no criticism of them. Clearly even today in South Africa and elsewhere people need the protection of a bill of negative rights. Sachs argues for the supplementation of such a bill with second and third generation rights, not for its replacement. Accordingly there is no argument for a bill of negative rights being either irrelevant or superseded hence the criticism of being out of date or archaic is unfounded.

The argument for the supplementation of a bill of negative rights goes as follows:

> 'for the vote to have meaning, for the rule of law to have content, the vote must be the instrument for the achievement of second and third generation rights. It would be a hollow victory if the people had the right every five years or so to emerge from their forced

8 Sachs at 4.
9 Sachs at 5.
10 Sachs at 4.
11 Sachs at 5.

removal hovels and second rate group area homesteads to go to the urns, (sic) only thereafter to return to their inferior houses, inferior education and inferior jobs. And it would be a strange panoply of rights that not only ignored but excluded the rights to peace and development . . .'[12]

Now, first of all, if the mere promulgation of a Bill of first, second and third generation rights would eliminate poverty and remove all the scars of apartheid, no-one could rightly stand in its way. However more needs to be done. Nor does the adoption of a purely negative Bill of Rights stand in the way of the elimination of poverty and eradication of apartheid unless these goods can be obtained only through curbs on freedom of speech, detention without trial, torture, etc. If this is the suggestion it needs to be looked at very carefully lest a Stalinist policy adopted in the name of the people massively breaches civil liberties without even succeeding in eliminating poverty. Such seems to have been the result of the policy of collectivization in Tanzania.

The phrase 'not only ignored, but excluded' is tendentiously misleading. A bill of purely negative rights would leave out and exclude *clauses* like 'Everyone has the right to medical care' and 'The people have a right to a clean environment'. This does not mean either that the bill positively prohibits people from access to medical care and rules out attempts to clean up the environment nor that the pioneers of the bill were indifferent to those goods. The verbal clauses are excluded not the real goods they refer to. The reason for leaving the second and third generation rights clauses out are, first of all, that a bill of rights *is* an appropriate instrument for curbing executive excess and for protecting the individual from the will of the people however much or little acts done in the name of people reflect their real wishes. It is not clear that a bill of rights is the appropriate instrument for the goods aimed at by proponents of later generation rights. That a bill of negative rights only is passed does not by any means mean that the victims of apartheid have to remain in Group Areas hovels. Such a bill of rights merely rules out certain ways in which some might try to alleviate poverty, etc. That Mr Sachs is prepared to include negative rights in his extended Bill shows that this would not be a problem for him. Except perhaps for one clause often included in Bills of negative Rights. Article 17 of the Universal Declaration of Human Rights reads:

'(1) Everyone has the right to own property alone, as well as in association with others.
(2) No-one shall be arbitrarily deprived of his property.'[13]

Sachs says

'Apartheid law . . . conferred legal title on owners whose main legal merit was that of having a white skin . . . Where would the people, condemned as squatters after living on

12 Sachs at 5.

13 I Brownlie (ed) *Basic Documents in International Law* (1967) 135.

land for generations . . . get the finance to compensate the new owners with their legal "titles" . . . ? One of the main functions of a new constitution would be . . . to insist that there be no de facto constitutional freezing of the present unjust and racially enforced distribution of land.'[14]

These words, admittedly reproduced here without various caveats, could lead people to credit the spectre of forced nationalization of land without compensation. This is not what Sachs is advocating but a failure to guarantee property rights in a Bill of Rights might leave the door open for this to happen. The question of property rights in South Africa is very difficult. On a positivist basis whites in South Africa have legal rights to their property. However are they morally entitled to it? Theories supporting the institution of private property imagine an original fair appropriation of unowned goods or territory which have come down to their present owners through a series of just transactions. No such scenario holds in South Africa. Land originally seized from others by conquest has been handed on according to racially discriminating laws keeping the majority of the land out of the hands of the majority of the people. I have argued elsewhere that those unjustly enriched by apartheid have at the least a duty to compensate the dispossessed.[15] I will not go into the matter here save to note both that it is worthy of serious and extended attention and that there could be justifiable alarm at the prospect of wholesale uncompensated expropriation in spite of the manifest and gross injustice of the past.

Sachs devotes a fair amount of attention to how a Bill of Rights should come into existence. To a large extent this is irrelevant. What is important is what a Bill of Rights will uphold and that it is upheld. Whether a Bill of Rights is negotiated, copied, adopted by popular acclaim, etc, does not matter, provided that it is a good one. This concern with results rather than procedures for arriving at them may strike some, perhaps lawyers in particular, as being cavalier. Procedures are vitally important in many areas. For practical purposes if we have a good set of procedures we can remain satisfied that what they produce is, by and large, right and not concern ourselves with the details of every case. The courts in most western countries provide an example of this. The courts are not infallible; miscarriages of justice do occur; but by and large if someone is found guilty then he is guilty and this is something we can rely upon. Similarly we cannot ourselves verify every law of physics but the procedures and ways of working of the society of physicists tend to produce an account of physical reality which is reliable. The outcome of a good procedure is more likely to be correct; the outcome of a bad procedure is more likely to be wrong. However, it is important to remember that there are horses for courses. Physicists are notoriously

14 Sachs at 7–8.

15 D Brooks 'On Living in an Unjust Society' (1989) 6 *Journal of Applied Philosophy* 31–42.

bad at detecting Uri Geller type frauds; they need the assistance of skilled conjurers. The Appellate Division would not presume to judge the merits of quantum theory.

Sachs wants a Bill of Rights to have the

'characteristics of:

- being built up over a period of time rather than drafted at one moment;
- being constructed in sections and layers rather than as a single unique document;
- being the product of active involvement of the widest strata of the population and not just of a few experts'.[16]

Though democracy has many advantages, this does not mean that a democratic vote is the best procedure for arriving at any outcome. The vote of a democratic assembly would be no substitute for the society of physicists in discovering the laws of nature nor for the courts in ascertaining guilt and liability. With a Bill of Rights there is the additional danger that the people or their leaders might feel that there is no justification for any courts standing in the way of the people's will. Evidence of this type of thought existing can be found in Sachs' essay. However insofar as a Bill of Rights is only of value if it is enforced and upheld (and there is currently suspicion of Bills of Rights) some process of popular endorsement of a Bill of Rights might be pragmatically valuable. Not because this is liable to lead to a better Bill of Rights but because it might lead to a Bill of Rights which is both popularly respected and upheld.

There are three further aspects of Sachs' proposals which give grounds for concern. These are his desire that a Bill of Rights 'be structured around a programme of affirmative action';[17] the suggestion that a Bill of Rights be upheld not by the courts but by a commission of 'defenders of the rights of the oppressed, who would look overwhelmingly to social rather than semantic factors in making their decisions';[18] and the demand that the constitution be 'not only non-racial but anti-racist'.[19] Those suggestions need not have bad consequences and could be commendable. I will examine them in turn.

South Africa has a history of gross injustice and oppression. Many of its people are deprived and impoverished in consequence. I have, as I have said, argued that whites at the least have a duty to compensate and have argued against critics of affirmative action.[20] Why then do I demur at the suggestion of constitutionally endorsed affirmative action? Crudely put a constitutionally entrenched permanent programme of affirmative

16 Sachs at 12.

17 Sachs at 14.

18 Sachs at 16.

19 Sachs at 17.

20 D Brooks 'Why Discrimination is Especially Wrong' (1983) 18 *Journal of Value Enquiry* 305–11.

action or reverse discrimination could amount to reverse apartheid. Is the constitution to uphold a policy whereby blacks are preferred to whites for jobs, educational opportunities, etc, into the indefinite future? This is far-fetched and would preserve racial discrimination which Sachs has set his face firmly against.[21] However what is more likely and what Sachs seems to endorse is a policy of Africanization. He says '[a] carefully chosen Public Service Commission with a wide brief, high technical competence and general answerability to Parliament, could well be the body to supervise affirmative action in the Public Service itself . . . Finally, an Army and Security Commission could ensure that the army, police force and prison service were rapidly transformed so as to make these bodies democratic in composition and functioning.'[22] Now it is widely accepted that the Public Service in South Africa has for many years been a means whereby the wealth of the country has been channelled in the direction of the Afrikaner. At the same time the police force, in particular, is believed to be riddled with racist supporters of the Conservative Party. Surely this is something a post-apartheid government should rectify at once. It should, but not at once, nor by a policy of Africanization. (What would it need to make an organization 'democratic in composition'? Vacant positions filled by democratic ballot?) A policy of Africanization overt or disguised could be a perpetuation of racial discrimination. Wrong in itself as discriminatory, it could have disastrous consequences in provoking a white backlash and more insidiously by displacing from their jobs the more competent and experienced and replacing them by those less able to fill them efficiently. A policy of affirmative action has been carried out in the USA without being explicitly specified in the constitution[23] and in some areas in South African life. Such a policy may be better for not being explicit. It is clearly a priority to make massive resources available to educate and uplift the oppressed in South Africa. However the policy of uplifting the Afrikaner through proliferating bureaucracy has already had unfortunate consequences. To perpetuate this system and put people's jobs in jeopardy in the process is not the way to build up a prosperous and harmonious society.

I have already conceded that judges may be fallible and could be biased unconsciously towards the status quo. This does not seem good reason for replacing them with a people's commission paying more heed to social factors than to semantics. Sachs sneers at strict legalism by saying that lawyers discuss whether 'and' in a certain content can also mean 'or', as if this disqualifies judges. A difference such as this can have significant-

21 Indeed, Sachs may not envisage a permanent programme of affirmative action. He speaks (at 9) of affirmative action becoming 'the major instrument in the transitional period'. The temporary nature of an affirmative action programme must be expressly specified.

22 Sachs at 16.

23 Though it may have been given impetus by some judgments interpreting the constitution.

consequences. If to be guilty of murder I must have killed a person and have intended to do so, the semantic factor becomes a matter of life or death. If 'and' meant 'or' here I could be hanged for culpable homicide or for raising a gun with murderous intent and then thinking better of it. If social factors were to decide the matter there would be no security in the law's consistency. What is more it is the very attention to semantics which keeps judges as objective as they are. Without this constraint the members of a Human Rights commission could be more biased than anyone would dream of suggesting South African judges are.

Finally there are the strictures against racism. Sachs says that there will be 'provisions expressly referring to race, which:

- outlaw racial discrimination;
- prevent the dissemination of racist ideas and the organization of racist parties; and
- ensure that measures are taken to overcome the effects of past racial discrimination'.[24]

This certainly opens the door for censorship. How widely is 'racism' to be interpreted. Would Jensen's controversial but scholarly views on race and IQ be allowed to circulate? Could any party that was a clear successor to the avowedly racist National Party (let alone the Conservative Party) be allowed to exist? Could Afrikaners be represented by a party they would feel theirs? What is worse, these clauses open up the possibility of a witch-hunt where people are hounded for views which are not in the least bit racist. Consider the McCarthyite witch-hunt in the United States, where far from there being clauses in the Constitution outlawing communism, freedom of speech was upheld. Broad interpretations of racism are already extant in South Africa. Racism needs to be extirpated in South Africa but the means of doing so must be looked at very carefully.

It is difficult to know exactly what to make of Sachs' document. On the one hand a believer in human rights can only applaud his defence of the inclusion of a bill of negative rights and his statement that the Bill 'should never lose its character as a guarantee against abuse of citizens' rights by the State'.[25] On the other hand statements he makes elsewhere leave the door open for human rights abuses. We do well to remember that while the 'Stalin constitution of 1936 formally guaranteed certain basic freedoms . . . it is now admitted by everyone except the Chinese and Albanian Stalinists that the Stalin constitution . . . [was] a hollow mockery of Soviet conditions, that the repressions and purges that accompanied Stalin's rule went far beyond anything that could be justified by the exigencies of revolutionary transformation or the need to

24 Sachs at 17.

25 Sachs at 9.

preserve and maintain socialism in the face of foreign and internal hostility'.[26] I am not for a moment saying that Sachs advocates this but a tradition of letting second generation rights override first generation rights, the upholding of human rights by a commission swayed by social factors rather han semantics, the idea that the Bill of Human Rights should only come into existence gradually and as an expression of the will of the people and a broad interpretation of racism could open the flood gates.

Albie Sachs' views on human rights were applauded and deeply impressed delegates at a recent conference in Paris. It could be that a true liberal deeply concerned about civil liberties, given a climate of distrust of human rights and the circumstances in which Sachs finds himself, could not win acceptance for the preservation of basic human rights other than by producing a document of this nature. Let us hope so and yet not let the applause for what is commendable deafen us to signals of alarm.

26 Alice Erh-Soon Tay 'Marxism, socialism and human rights' in E Kamenka (ed) *Human Rights* (1978).