A Bill of Rights for South Africa: Areas of Agreement and Disagreement

by Albie Sachs*

Introduction

Evolving a Bill of Rights Culture

Very few South Africans know what a Bill of Rights is. It is something outside our experience, something that belongs to exotic legal and political cultures like that of the United States of America. The battle for human rights in our country has essentially been a struggle for the vote and not for a Bill of Rights.

When the Union of South Africa was created in 1910, Parliament was given unlimited sovereignty, subject only to certain vestigial links to the British Empire which were gradually erased. The Union of South Africa Act[1] united what had formerly been four British colonies into a single state and laid down the structure of government and the modes whereby the legislature would be elected, the executive established, and the judiciary nominated. Following the British parliamentary tradition, nothing was said in the Act about the rights of citizens. It was a laconic constitution, proudly technical and devoid of programmatic or human rights provisions.

Two provisions of the Act were entrenched; the first protected the right of a certain number of blacks in the Cape to remain on the voters' roll, and the second provided equality between English and Dutch (later Afrikaans) as official languages. This entrenchment, however, took the form of requiring a special parliamentary majority for change, and not of a Bill of Rights. Attempts by the Nationalist party in the 1950s to by-pass this special majority led to the nullification by

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1. 1909, 9 Edw. 7, ch. 9, pt. II, para. 4.

the Appellate Division of the Supreme Court of a series of acts of Parliament, but the cases turned on the required majority in Parliament and not on questions of fundamental human rights. When the two-thirds majority was eventually achieved by means of enlarging the Senate and packing it with Nationalist Party supporters, the subsequent legislation was declared to be valid.[2]

The absence of a Bill of Rights tradition has not, however, meant the non-existence of a human rights heritage, nor the absence of a tradition of judicial review. Even if we do not include primary resistance as part of the human rights tradition (when people defended their land and independence with spear in hand), South Africa has had anti-slavery agitation and the struggle for a free press as far back as the 1820s, the emerging movement for African rights of the 1880s, the campaigns over the treatment of Boer women and children in concentration camps at the turn of the century, the feminist movement shortly after that, the struggle for recognition of the Afrikaans language, trade union struggles, passive resistance campaigns in half the decades of this century, the Freedom Charter adopted in 1955,[3] and the contemporary anti-apartheid movement. There are many personalities of whom the current generation of human rights activists can be proud—Pringle, Rubasana, Ghandi, Abdurahman, Schreiner, Seme, Plaatjies, Junod, Krause, Gumede, Luthuli, Fischer, Gqabi, First.

Similarly, South African courts have created for themselves a certain amount of space within which to exercise judicial review. They have not been able to refer to any constitutional base for this power; instead they have relied upon common law principles and English judicial precedent to give themselves the right to scrutinise the validity of certain executive acts and of legislation, that is, of provincial and municipal regulations.

Judges have from time to time upheld claims that proclamations, regulations, and by-laws issued by bodies or personalities acting under powers granted them by Parliament have been void because of vagueness or unreasonableness. They have also invalidated certain executive acts,

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2. Only one judge has attempted to declare the legislation unconstitutional, and his actions have been regarded by legal scholars as a curious aberration rather than the beginning of a Bill of Rights tradition. *See* Ackermann, *Constitutional Protection of Human Rights: Judicial Review*, *infra* at 59, 61-64.

3. The Freedom Charter, *reprinted in* SELECTED WRITINGS ON THE FREEDOM CHARTER 1955-85, A SECHABA COMMEMORATIVE PUBLICATION 1 (1985). The Charter is also reprinted in the appendix to this issue, *infra* appendix C.

such as forced removals or banning orders, because the persons adversely affected had not been given a hearing. At times they have softened the impact of apartheid legislation by applying "statutory presumptions." If legislation was clear and unambiguous, the judges gave full effect to it, even if it violated fundamental human rights. Yet if there were gaps or uncertainties in the statute, the courts leant in favour of the interpretation least onerous to those whose rights were adversely affected, declaring that since Parliament was itself a product of liberty, it had to be presumed that Parliament intended a pro-liberty construction of its legislation.

The word "presumed" must be underlined. Judges attributed to Parliament a will in favour of liberty and fair dealing that was truly fictitious. They declared that unless the Union of South Africa Act took away rights by clear language or necessary implication, such rights should be presumed to exist, including the right to be heard before being made to suffer a penalty or disadvantage, the right to be clearly informed as to what behaviour constituted a crime or not, and the right to have access to one's lawyer.

The reality has always been, however, that at its next session, Parliament has been able to refute expressly the generous assumptions imputed to it by the courts, preferring to regard any presumed pro-liberty intentions as irritating loopholes to be plugged. Parliamentary draftsmen are then called upon to be more astute in the future in eliminating any possible inference of legislative respect for individual rights.

There is thus no tradition in South Africa of judicial review in the full sense of the term. The courts have had no power to test legislation, including acts of Parliament, according to whether it violated certain fundamental constitutional rights of the citizen. We do not even speak about basic constitutional rights; in fact, we have never had a constitution in the sense of a fundamental and not easily changed law which provided the framework for the adoption of other laws. With the exception of the two entrenched clauses, the acts of Parliament referred to as constitutions have been no more than ordinary statutes subject to amendment in the same way as any other statutes. In legal terms, they have had no more weight than an Act which provided for fixing the price of ice-cream. We South Africans do not have to imagine John Rawls' veil of ignorance in relation to a Bill of Rights. Our ignorance is real.

To the extent that "Bills of Rights" have appeared on the legal scene, they have done so in the most negative context possible, namely,

as provisions or declarations in the documents referred to as the Bantustan Constitutions. These documents impose a spurious independence on the so-called ethnic homelands in terms of the apartheid policy. They are regarded as little more than decorative proclamations, certainly not as serious means of preserving fundamental liberties. While torture, assassination, and violence against anti-apartheid activists unfortunately are endemic to the whole country, the Bantustans have manifested an almost unequalled degree of arbitrariness and authoritarian rule. It is almost as if an inverse relationship exists between the adoption of a Bill of Rights and respect for human rights—the more grandiose the language of the Bill, the more likely it is that rights will be abused. An occasional judgement by an occasionally conscientious judge has done little more than emphasise how tangential the courts have been.

On the principle of good coming out of bad, however, we can benefit from the experience of the bantustan Bills of Rights by learning negative lessons. First, in order to be meaningful, a Bill of Rights must be associated with democracy, and not be a verbal patina covering an authoritarian regime. Second, the people affected by the Bill must be involved in the process of its formulation, so that they see it as their own, as something they have struggled for and will defend, even if in a particular case its immediate application is inconvenient to many of them. Third, the content of the Bill of Rights must correspond to the deepest aspirations of the people and must be manifestly just. Finally, the people as a whole must have confidence in those whose task it is to guard over the Bill of Rights.

I. Close Encounters of an Intellectual Kind

Happily, we are not totally confined to ignorance and negative lessons. Two recent events have completely transformed the nature of the discussion on a Bill of Rights for South Africa. The first was a statement by the African National Congress (ANC) early in 1986 that it supported a justiciable Bill of Rights which protects the fundamental rights and liberties of all individuals in the country. This was followed by the publication of the organisation's Constitutional Guidelines, which spelt out how the Bill of Rights would fit into the total constitutional picture, and, more particularly, how it would relate to programmes of affirmative action.[4] More recently, the Law Commission, appointed by

4. African National Congress, Constitutional Guidelines for a Democratic South Africa (1988) [hereinafter Constitutional Guidelines]. The Constitutional Guidelines are reprinted in the appendix to this issue, *infra* appendix A.

the authorities in Pretoria to enquire into the viability of a Bill of Rights for South Africa and to see how group rights could be incorporated into such a document, issued its report.[5] Inter many debatable alia, it declared firmly that a Bill of Rights would be meaningless if the basic right to vote had not been secured and that a Bill of Rights should not be designed to protect the rights of racial or ethnic groups but of individual citizens.

These two independent processes of enquiry, undertaken against completely different experiences of life, referring to quite separate sources, and using totally distinct modes of discourse, found themselves coming to similar conclusions or, rather, recommending similar points of departure. It is amusing to think that at exactly the same time the outlawed ANC was seeking public responses in South Africa to its Guidelines, the Commission was using official channels to elicit comments on its report, the ANC document having by far the wider circulation. Indeed, so many bodies have taken up, analysed, and criticised the Guidelines that they have ceased to be simply an ANC document; instead they have become a working text for the entire anti-apartheid movement. Such close intellectual encounters are so rare in our divided country that when they do occur the possibilities they offer should be fully explored. The fact is that a wide democratic and anti-apartheid consensus is beginning to emerge in South Africa, representing the coming together of forces and personalities that previously had little to do with each other.

This growing consensus provides a solid basis for discussion by lawyers concerned with the question of human rights in our country. Frequently, lawyers find themselves out of touch with reality because their proposals are idealised projections into the future; the danger now is the opposite, that reality will leave us behind. What we articulate are not just private musings of legal dreamers, but the wishes and longings of millions of our compatriots, a clear majority in our land, drawn from every nook and cranny of the country and representing all its diverse social formations.

The struggle for human rights takes place everywhere and at all times. It reaches directly into all structures of our society, so that any

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5. SOUTH AFRICAN LAW COMMISSION, WORKING PAPER 25, PROJECT 58, GROUP AND HUMAN RIGHTS 235 (1989) [hereinafter SOUTH AFRICAN LAW COMMISSION]. Pertinent sections of the SALC Report are reprinted in the appendix to this issue, *infra* appendix B.

individual, even one involved in institutions which until now have been used for purposes of oppression, has an opportunity to make her or his contribution.

Clearly it is necessary to consolidate the broad anti-apartheid consensus and reinforce the sense of shared goals. We should determine precisely what the areas of common thinking are and then embark upon a constructive dialogue concerning areas still open to debate. In some cases we will convince each other, in others we will be able to compromise because the issues are relatively tangential, and in still others there will undoubtedly be various questions on which we simply will have different opinions. What we need to do is to find out how we can handle these disagreements: should we leave them to the democratic process, should we subsume them in a general compact which gives everyone most of what they want without giving anyone exactly what they desire, should we try to agree on transitional arrangements whose objectionable features are attenuated by the fact that they are declaredly short-lived, or should we simply leave the matter over to be solved by future generations? There are many possibilities.

What matters is that we are learning how to agree and how to disagree. There is an important relationship between the two processes—it is precisely because we agree that apartheid is an abomination and a disaster that we are able to come together and discuss our disagreements on how best to achieve its abolition. It is the existence of consensus on the one hand that permits dissensus on the other. Indeed, the right to debate questions freely and openly, a right consistently denied to the majority since the early days of conquest, is one of the most fundamental rights we are fighting for. We cannot wait until day-one of post-apartheid society to begin debating our differences and finding ways and means of handling divergent points of view; we need to acquire the habit now. Perhaps more important than the fact that people from our brutally divided society can agree is that we can differ. In that sense, we are the proof of our aspirations.

II. Areas of Agreement

In broad terms, the widely diverse anti-apartheid forces, in which the ANC plays a central but far from hegemonic role, are all agreed on the need to end apartheid in South Africa and to establish a non-racial democratic society; such a society should recognise the equal worth and dignity of each and every citizen and provide appropriate protection for his or her fundamental rights. More specifically, in

addition to requiring periodic elections based upon the principle of universal and equal suffrage on a common voters roll, a future constitution should contain provisions which establish fundamental rights and freedoms. Such basic liberties have to be acknowledged and respected by the legislature and the executive, however sizeable the majority might be at any moment in favour of ignoring them. Furthermore, these constitutional provisions should not be merely aspirational; they should be capable of speedy invocation through clearly identified and secure mechanisms. Citizens should have the right of recourse to an independent judiciary respected by the population at large and heeded by whatever government is in power at the time. In a phrase, there should be a parliamentary democracy subject to a Bill of Rights.

We are aware that in Britain a major debate is taking place over the desirability of adopting a Bill of Rights. Although we follow this discussion with interest, we note that in our country the theme of protection of individual rights has a special dimension which makes even those who would otherwise opt for unqualified majority rule favour the adoption of a Bill of Rights.

The fact is that strong and clear protection of individual rights on a non-racial basis makes the protection of group rights on a racial basis not only objectionable but unnecessary. A Bill of Rights coupled with guarantees of an orderly transition to full democracy in fact provides far more security than racially based constitutional schemes which ensure that the racial principle remains the dominant feature of public life and that voters are forever mobilised on racial grounds. Once white South Africans can accept the simple fact that they are just people like everyone else, and not the masters and mistresses of anyone, they will in fact enjoy far more security under a Bill of Rights than they would living in the precarious constitutional laager of group rights.

We do not need to look abroad for help in raising our human rights consciousness. Indeed, the frequent and massive violations of human rights in our country, taken together with a vigorous internal movement of contestation and considerable international attention, have produced on our part unusual sensitivity to and a passionate interest in the safeguarding of human rights. For those of us who have suffered arbitrary detention, torture, and solitary confinement, who have seen our homes crushed by bulldozers, who have been moved from pillar to post at the whim of officials, who have been victims of assassination attempts and state-condoned thuggery, who have lived for years as rightless people under states of emergency, in prison, in exile, outlaws

because we fought for liberty, the theme of human rights is central to our existence.

There appears to be general agreement amongst the broadest range of anti-apartheid forces as to the basic democratic context in which a Bill of Rights should be elaborated. It is not difficult to follow through with a number of substantive constitutional provisions materialising this basic accord. We do not at this stage have to dwell on the formulations in great detail. The uncontroversial is always less interesting than the controversial. Moreover, because we start with a clean slate and with a strong concern for human rights, there is nothing to stop us from taking a look at human rights documents that exist in other countries and on other continents. We all participate in an international human rights culture and share in the patrimony of human rights instruments. Confident as those of us struggling for democracy are in the strength and resilience of our South African-born human rights convictions, we can only benefit from the great store of human rights wisdom accumulated in many other countries over many centuries. This is particularly true when deciding how best to organise institutions so as to guarantee respect for fundamental rights. Indeed, while insisting on the specificity of our experience and our solutions, we firmly deny any idea of South African exceptionalism.

The universalisation of the human rights concept is one of the great achievements of our era. We want this universal idea to link up directly with our strivings and become a living force in our land. We want simple justice, simple democracy, simple freedom, no more and no less. Thus we have no difficulty in agreeing on the following universally recognised fundamental principles:

(1) The equal dignity and worth of all South Africans, irrespective of race, colour, sex, origin, or creed;

(2) The inviolability of the person, the home, and correspondence;

(3) Freedom of movement, residence, and travel;

(4) The right to vote, stand for election, and engage in political campaigns;

(5) Freedom of expression and the right to information;

(6) Freedom of conscience and the right to practise one's religious faith;

(7) The outlawing of torture and of cruel, inhuman, or degrading treatment;

(8) The prohibition of servitude, slavery, or forced labour;

(9) The requirement of due process of law in relation to any deprivation of liberty or imposition of penalties.

In relation to all the aforementioned issues, we could argue over format and style, over whether to use a "broad painter's brush" or a "fine jeweller's tool." For example, the rights, freedoms, and prohibitions may be set out in very general terms, as in the Bill of Rights of the United States of America, or they can be enumerated in detail, with extensive qualifications, as more modern Rights documents tend to do. If the qualifications, or "clawback clauses" as they are sometimes called, are spelt out with precision, there is bound to be some argument as to their exact wording.

Yet these are not issues that should give rise to fundamental disagreement. We live in an era when there are internationally held views on what constitutes the minimum guarantees of a fair trial, when there already exist many precise formulations spelling out when requirements of public health or occurrences of natural or other disasters permit deviations from the basic protections accorded to the citizens. We may look with profit to the formulations adopted in the major international human rights conventions and charters, especially those of the United Nations, of Europe, the Americas, and Africa. By their nature, human rights documents know no copyright; indeed, there is a certain resonance, a certain sense of security, to be gained from utilising tried and tested formulations.

Within this general cluster of provisions there might be specific points of controversy that some would feel should be settled in the constitution, while others would prefer to leave open for future legislative resolution. The question of capital punishment, for example, has come very much to the fore in South Africa, and there is a growing abolitionist movement with which many of us in the ANC strongly sympathise. Yet others would argue that this is not the type of question which, in South African conditions, should be posed at the constitutional level, but rather, one that should be left to public debate and legislative decision.

III. Areas of Greater Controversy

In addition to serving goals common to any Bill of Rights anywhere in the world, a South African Bill of Rights should address the specific problems raised by the fact that we will be moving from an apartheid to a post-apartheid society. Different sections of the population will look to a Bill of Rights for different things. Many will hope that it protects them against the kind of abuse to which apartheid has subjected them over the decades and that it will guarantee to them that steps

will be taken to reduce or eliminate the enormous inequalities and indignities under which they are living. Others will see in it a bulwark against destructive revenge and a guarantee against the collapse of the economy and the social order. The greatest difficulty will be how to integrate the basic longings and fundamental expectations of all South Africans, however diverse, in a single document. Moreover, the document realising this integration must be operative and command respect because of its manifest fairness. Concretely, the ideal Bill of Rights should, in addition to its classic functions: help remedy and eliminate the injustices, indignities, and inequalities produced by apartheid; create a climate of tranquillity conducive to a good quality of life and to economic advance; and promote the building of a nation.

In order to accommodate these different and not easily reconcilable aims, a number of strategic decisions have to be made. They are not the sort of decisions that can be made confidently in advance. Rather, it will be necessary to explore the issues and work through the implications of different positions, both at the substantive and the procedural levels. The key element at all stages will be popular involvement and popular discussion. Then it will be possible to come back to the initial strategic options and make appropriate determinations.

For purposes of convenience, one may distinguish five major problem areas of a thematic or substantive kind. First, there is the problem of first and second generation rights. Should the Bill of Rights include only the classic first generation of individual, legal, and political rights, or should it also refer to the more recently recognised second generation of social, cultural, and economic rights? More specifically, should property rights be seen in the context of individual or social rights?

Second, there is the problem of the right to be the same versus the right to be different. More specifically, should cultural rights be protected? Where does the public domain end and the private sphere begin? Should there be a right of privacy?

Third, there is the problem of creating a non-racial society while recognising the need to eliminate existing race-based inequalities. Is non-discrimination enough, or should there be affirmative action to overcome the legacy of inequality?

Fourth, there is the problem of the tolerance of intolerance. Should the right of free speech include the right to promote racial hatred and division?

Finally, there is the problem of the scope of a Bill of Rights. Should the Bill of Rights be completely general in its language, or

should it make special provision for sections of society with special claims? More specifically, should it include provisions dealing with the rights of workers and the rights of women?

In addition, there are at least three problem areas relating to the operationality of a Bill of Rights. They are merely mentioned here for the sake of completeness, but will not be analysed, since they merit full and separate treatment. First, what criteria and procedures should govern suspension or derogation of rights in times of emergency? Second, how should the Bill of Rights be entrenched and how can it be amended? And third, what should the machinery be for its implementation?

A. The Question of Social and Economic Rights

Here we encounter differences of tradition and differences of substance. The ANC tradition, as evidenced by the Freedom Charter adopted in 1955,[6] is to regard civil, political, social and economic rights as closely inter-related and mutually supportive. At the in-house seminar to discuss the Constitutional Guidelines, members insisted on express references to education and land reform—they understood that the Guidelines represented a constitutional framework and not a political programme, but declared that any talk of human rights was meaningless without dealing with education and land rights in South Africa. On the other hand, most academic lawyers and nearly all the judges belong to a tradition in which the term "rights" can only properly be applied to the classic set of civil and political rights: the right not to be detained without trial, freedom of expression, and so on. They feel uneasy about the inclusion of social and economic rights on two grounds: first, such rights by their nature are not justiciable, that is, not capable of being defended by the courts, and second, their inclusion inevitably leads to a dilution of the truly fundamental rights. They point to societies in which the achievement of rights for the collective has been done at the expense of rights for the individual, with disastrous results, they declare, both for the individual and the community.

At first sight, it appears difficult to reconcile these two perspectives. International experience is far from conclusive. The tendency in recent decades has been to enlarge the scope of human rights concepts. In

6. The Freedom Charter, *supra* note 3.

the 1960s the United Nations sponsored a Convention on Social and Economic Rights,[7] and more recently the African Charter of Peoples' and Human Rights included many so-called second and third generation rights of a social, economic, and community character.[8] Similarly, when Portugal in the 1970s and Brazil in the 1980s respectively displaced military dictatorships, the new democratic constitutions that they adopted made extensive reference to social and economic rights.[9] Yet critics point out that a distinction has to be made between human rights documents that are meant to be enforced and those that are essentially aspirational or standard-setting in character. Each has its place, but the two should not be confused. Similarly, many countries in the world with constitutions that had their origins in the institutionalisation of revolutionary transformations, and that placed heavy emphasis on the class nature of political power and the importance of setting out programmes of socio-economic advance, have in the last few years considered it necessary to give fundamental importance to guaranteeing individual rights and free speech. In that sense there has been a certain tendency towards constitutional convergence: the liberal states have moved towards accepting at least a minimum platform of welfare rights, while the socialist ones have gone in the direction of more judicial guarantees of individual rights.

Whatever approach is adopted, the commitment to the classic first generation rights must be total and unequivocal. The inclusion of social and economic rights should be seen as additional to, and in no way diminishing of, unconditional respect for fundamental civil and political rights. The Bill of Rights should be unambiguous on this point. It could adopt a format that maintains the integrity of the classic rights, spelling out the mechanism for their enforcement in such a way that even the champions of the most classic formulations of human rights would be satisfied. What should be impermissible is the kind of argument recently attributed to the leader of one of the world's great nations, who explained that while his people are concerned with overcoming hunger and getting decent homes, they cannot be distracted by so-called "human rights." The rights are not so-called, and failure

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7. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

8. African [Banjul] Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58.

9. CONST. OF THE REPUBLIC OF PORTUGAL; C.F. (Brazil).

to respect them leads to much blood in the streets, as experience in his country shows. The right to eat should never be seen as antagonistic to the right to be free.

The institution for dealing with social and economic questions must be Parliament. The role of the constitution is consequently to ensure that Parliament is chosen in a free and democratic manner. The courts should not have the burden imposed upon them of considering the desirability of legislation dealing with social and economic questions, unless such legislation raises issues with a constitutional dimension.

The constitution may be completely silent on the question of social and economic rights, and confine itself simply to structuring the government, providing for periodic elections, and setting out the classic guarantees of individual civil rights. At first sight, this would appear to be the most conservative position, but in reality it might be the most radical. In effect, it would leave Parliament free to adopt any measures it saw fit in the socio-economic arena. The majority in Parliament would almost certainly have a mandate for moving as rapidly as possible towards the elimination of the massive inequalities created by apartheid.

Another approach might provide a constitutional context in which social and economic law-making is to take place. It may directly or indirectly prohibit certain actions, such as nationalisation on the one hand, or privatisation on the other. It may forbid the creation of economic monopolies. It may declare that private property is sacrosanct, or, alternatively, that the land, or the sub-soil, or the off-shore ocean depths, belong to the State. It might even go further and provide for a clear programme of goals and a framework of socio-economic development along socialist or capitalist lines.

The approach adopted may, on the other hand, be merely permissive of certain legislation, for example by making it clear that land reform, or affirmative action, or minimum wage legislation, or collective bargaining would not be regarded as unconstitutional, notwithstanding any other provisions in the constitution.

The constitution could limit itself to providing certain principles or presumptions that are to be used by the executive and the courts in interpreting and carrying out legislation. For example, it could require that all legislation be interpreted in a way which furthered the achievement of equality.

The constitution may turn its back on all of the above options, and adopt a human rights rather than a socio-economic approach to the question. This would exclude any direct constitutional pronounce-

ment on socio-economic questions as such, but would focus instead on broad human rights principles of general application. The principles could either be expressed in open terms, leaving it to the legislators and judges to find appropriate forms of compliance, or actual mechanisms and procedures could be built in from the beginning.

In this way, a central position could be given in the constitution to the principle of equal protection under the law. Such a constitutional principle could serve both as a shield against discrimination based on race, colour, origin, gender or creed, and as an active instrument for guaranteeing the achievement of real equal opportunity. An equal protection principle could protect persons against individual acts of discrimination, and at the same time, require equitable adjustment or equal opportunity or remedial action to deal with areas where patterns of discrimination have impeded the life chances of whole sections of the community.

Thus, where schooling or health care or housing was grossly unequal because of the accumulated effects of years of apartheid, the problem would be seen not simply as a social, economic, or political one, as in any part of the world, but as a constitutional one related to South Africa's special history of racial domination. The constitution first would contemplate certain procedures for identifying a phenomenon as manifesting apartheid-related inequality. Then it would stipulate procedures for guaranteeing that the rights and interests of all affected parties would receive due consideration. This process would focus on the goals of genuinely enjoyed equal rights and opportunity for all. Appropriate institutions under democratic control, staffed by persons possessing the necessary technical expertise, and enjoying widespread public confidence would hold the necessary enquiries and make the appropriate determinations, while the courts would exercise a watchdog role by ensuring that the correct constitutional procedures were followed.

B. The Question of Cultural Rights

What we are struggling for in South Africa is the right to be the same. Simultaneously, we are fighting for the right to be different. At first sight it appears that these two principles are mutually exclusive, yet in reality they can be reconciled. In a multi-cultural, multi-faith country such as ours, a correct approach to harmonising the right to be the same with the right to be different is fundamental to any constitutional scheme.

The struggle for the right to be the same manifests itself as a struggle for equal citizenship, as a battle not to be treated differently

because one is black or brown or white or Christian or Moslem or Jewish or Hindu or male or female or Xhosa-speaking or Tswana-speaking or Afrikaans-speaking or English-speaking. We are all South Africans, human beings living in and owing loyalty to the same country. The country belongs equally to all of us; we all belong equally to the country. There is no differentiation whatsoever of citizenship or nationality between us. Nobody is worth more than anybody else because of his or her appearance or origin or gender or beliefs. This is the principle of equal rights for every individual. Expressed negatively, it is the principle of non-discrimination. An individual may not be treated advantageously or disadvantageously because he or she belongs to a certain racial, linguistic or religious group, or is of a certain gender, nor may whole groups be treated advantageously or disadvantageously for the same reason. The constitution would take a clear, affirmative stand for equality, and provide mechanisms for guaranteeing that in all the essential spheres of public life—education, health, work, entertainment, and the enjoyment of public facilities—no one is discriminated against because of colour, language, or gender. In South Africa today, physiognomy is destiny. One's whole life is determined by racial classification. At the legal level, therefore, the struggle against apartheid is essentially a struggle against separateness, a fight to be the same, to enjoy equal rights.

Sameness, however, is one thing, uniformity or identity is another. The sameness relates to one's condition as citizen, voter, litigant, scholar, patient, or employee. It does not refer to one's personality, culture, or modes of behaviour. In this respect, we struggle for the right to be different. The objective is not to create a homogenous society of identikit individuals, all looking the same, dressing the same, eating the same food, speaking the same language, singing the same songs, and even voting in the same way (the so-called civilised persons of British assimilationist policy, who happened to be male, English-speaking, with a neat crease in their trousers, and a penchant for tomato sauce). The very concept of equal rights presupposes equality between people who are different. The aim is not to eliminate the different personal and cultural characteristics, but to ensure that they are not used for purposes of exploitation, oppression, abuse, or insult.

Language is one area of major difference. In a country with as many languages as South Africa, and in which there have been so many struggles over the enforced use, first of English, then of Afrikaans, we ignore the language question at our peril. Equal rights means that no-one should be at a disadvantage because he or she speaks any one

of South Africa's many languages. Afrikaans writers and linguists have raised many questions about the future of Afrikaans in a non-racial democratic South Africa; they are entitled to a clear answer from the constitution. Afrikaans should be protected not by the barrel of a gun, but by the fact that it is spoken by millions of South Africans, for whom it is the vehicle of their most intimate thoughts and feelings. Yet the problem is not simply to guarantee the free exercise and development of Afrikaans, but to ensure that Zulu and Xhosa and Sipedi and Tsonga and all others are recognised as South African languages, with the full status and dignity that such recognition implies.

Exactly how this is to be done requires serious study, with considerable input from all those most directly interested. A mere constitutional declaration might not be enough—there is the question of language use in Parliament, in the courts, by the civil service, in the police force and army, and at the level of local government. There are also the matters of language teaching and the medium of instruction at schools and universities, of place names and street signs, of broadcasting and books and films.

Special attention might have to be given to languages spoken by smaller communities, or used for religious purposes, such as Gujerati, Hebrew, Greek, Arabic, and Portuguese. Clearly, in setting out language rights, a Bill of Rights need not attend to all these details, but it should frame the broad operative principles. It should also indicate mechanisms to ensure that the issue receives appropriate and continuing attention, with the courts always in the background to guarantee that the constitution is followed.

A politically more difficult question is whether cultural associations with an ethnic base should receive constitutional protection. In the case of groups such as the Cape Moslems, the Jews, members of the Greek Orthodox community, and Hindu believers, the answer would clearly appear to be in the affirmative, since rights of conscience are clearly involved. But what of organisations that restrict their membership to Zulu-speakers or Afrikaans-speakers? If these become covers for ethnic divisiveness and racist mobilisation, should they receive constitutional protection, should they be constitutionally prohibited, or should the issue be left to the good sense of Parliament? What criteria should be adopted for distinguishing between legitimate cultural promotion, which might enjoy express constitutional protection, and abuse of cultural affiliation to encourage racial and ethnic hatred? Conversely, how can one avoid the abuse of the promotion of national unity if the slogan is merely a cover for suppressing the legitimate cultural aspirations of different groups?

Should an organisation like the Broederbond, whose membership is restricted to Afrikaans-speakers, and whose objective has been to achieve Afrikaner hegemony, receive constitutional protection? What if the Broederbond decides to encourage Afrikaans-speakers to abandon their drive for domination and to seek the survival and development of Afrikaans culture through promoting the principles of non-racist democracy? One may say that in principle the constitution should lean in favour of diversity and an open society, of recognition that the emerging South African nation will be made up of many different groupings with a multiplicity of languages and historical experiences. Yet the problem does not end there. Multilingualism, cultural diversity and political pluralism are all desirable constitutional goals. What one wants to avoid is the confusion of the last with the first two—that is, to prevent the merger of political and cultural pluralisms so as to lead to fragmentation of the voting public into warring racial and ethnic blocs.

Another area in which the right to be the same comes into potential conflict with the right to be different is in determining, from a constitutional point of view, where the public domain ends and the private domain begins. In terms of fundamental rights, the issue may be expressed as that of deciding where the principle of equal protection and the principle of personal privacy intersect.

We cannot imagine a constitution which prescribes or permits the prescription of whom people should marry or not marry, or whom they should have as their friends or dinner guests or companions. At the same time, if South Africa is to have a post-apartheid society, there cannot continue to be a constitutionally protected right to bar people from hotels, restaurants, or sports facilities on the grounds of their race. In the ordinary course of things, the legislature could adopt civil rights legislation which would determine the appropriate cut-off point, distinguishing between the freedom from insult and exclusion, on the one hand, and the rights of privacy on the other. Many countries in the world have adopted sensitive anti-discrimination legislation which could be consulted with profit.

The issue of public versus private rights has major constitutional significance in South Africa. Constitutional experts close to sections of the business community have argued strongly in favour of a provision in a Bill of Rights which would protect the sanctity of contract and freedom of voluntary association. What appears to be an innocuous provision concerned with free commercial activity in fact takes on a vast practical and controversial social dimension. It amounts to constitutional protection for privatised apartheid. If adopted, it would mean that persons who identified themselves by race could enter into agreements with each

other to provide racially restricted housing zones, schools, and social amenities. Apartheid would thus continue, but by virtue of voluntary association rather than apartheid law. The law would in fact be powerless to deal with these restrictive covenants since they would be protected by the Bill of Rights. The state law would no longer enforce apartheid, but it would intervene to prevent apartheid from being dismantled.

The question of the right to be different and the related right of privacy has many other dimensions which are not peculiarly South African, some of which will be referred to later. One aspect which has been raised by gay activists in the anti-apartheid movement is whether there should be a constitutional prohibition against discrimination based on sexual preference. Gay rights groups have raised the question directly with the ANC, whose Director of Publicity has made it clear that sexual behaviour between consenting adults should be regarded as a private matter and not be subject to any penalisation. The whole question touches on a variety of cultural sensibilities, and it clearly needs to be handled with dignity and sensitivity, without pandering to backwardness and homophobia, and bearing in mind the special contribution which the South African gay community has to make towards finding the right answer.

The right of women to proceed with or terminate a pregnancy is another important privacy issue not special to South Africa. The question of abortion is seen by many as one of a woman's right to choose, while others argue that there is an unborn child whose rights must be protected. Since there is such a clear division of sincerely held opinion, this is an area where a pluralist approach might be better than forcing a constitutional victory for one side or the other. While it would be regarded as unconscionable to force a woman to give birth to an unwanted child, there need be no objection to strengthening facilities for promoting safe childbirth and for giving support to the mother and child, or, alternatively, for promoting adoption.

The concept of individual rights and the right of privacy are still so underdeveloped in South Africa that it is not easy to see the question of abortion recommending itself for direct solution at the Bill of Rights level, but sooner or later, in the context of the general provision of health services for mother and child, and in the context of the rights of women, it will have to be attended to.

C. Affirmative Action and Nation-Building

There are three possible constitutional positions on affirmative action: it can be prohibited, it can be permitted, or it can be required. The

ANC supports the adoption of affirmative action as a mandatory constitutional principle. Other groups have been silent on the problem but have adopted provisions in favour of protecting vested interests that would make affirmative action extremely difficult. The term used is not important. Sometimes it is called positive discrimination, sometimes corrective or remedial action. In essence, affirmative action is a strategy which sets out a series of special efforts or interventions to overcome or reduce inequalities which have accumulated as a result of past discrimination.

In the United States, affirmative action emerged as a major component of civil rights legislation adopted in the 1960s. Conceived of as a means of materialising the principles of the equal protection clause introduced into the Constitution after the victory of the North in the Civil War, affirmative action programmes have been particularly important in the area of employment, where they have sought, with some measure of success, to require employers to open up jobs and promotions to minorities and to women. Their impact in the area of education appears to have been more uneven, but undoubtedly they have made their mark on the composition of the student body in higher education, on the secretarial staff, and even on the teaching staff.

Affirmative action is highly controversial in the United States, and the majority of the Supreme Court today seems to be cutting back on the scope of the doctrine as determined by the majority of the Court in the 1970s. Clearly we South African lawyers have to study American experience in this area very closely, both in its theoretical and its practical dimensions. The objective will not be to attempt to replicate in South Africa what was done in the United States, but to examine the strategies adopted and the difficulties encountered, and then, independently, to design our own strategies.

One major problem which the two countries share is the apparent contradiction between promoting non-racism, which presupposes blindness to the factor of race, and equality, which requires a hard look at the actual discrepancies resulting from past and present racist practices. A truly non-racial society cannot be simply declared into existence and will not come automatically into being with the promulgation of a non-racist constitution. If people's life chances continue to be determined by race, if people know that their educational opportunities, their health care, their housing, their jobs, and their ability to control their lives are different from and inferior to that provided to others because of their race, the society is still racist. If a non-racial, multi-lingual, multi-faith South African nation is to be built, we must simultaneously free

our heads of racial stereotyping and classification and confront with open eyes the impact that racist practices and law have had on our society. Put another way, we must insist on a common citizenship and patriotism as South Africans, but we cannot ignore the immense inequalities created by apartheid, inequalities enforced by racist statutes under which whites own eighty-seven percent of the land and blacks thirteen percent.

There is, however, a difference between the American and South African situations that alters the whole context in which affirmative action would take place. In South Africa it is not a question of advancing minority rights, but of materialising the rights of the majority. The paternalistic aspects of affirmative action are reduced—the majority would have a strong position in Parliament and could vindicate its rights by means of simple legislative action directed towards eliminating the massive apartheid-induced inequalities. Why, then, should those who are fighting for the rights of the oppressed majority support affirmative action as a constitutional principle? There are two reasons.

In the first place, it will be necessary to anticipate attempts to use the Bill of Rights as a mechanism for blocking any challenges to the existing material and social privileges enjoyed by the racial elite in South Africa. The concept of respecting vested rights is deeply entrenched in current judicial ideology. Coupled with a restricted view of non-racism, which looks purely at the legal dimension and not at the socio-cultural reality, the vast privileges vested by apartheid in the form of legal titles could continue from generation to generation. Society would remain divided, there would be constant war between the courts and the legislature, and the constitution would be seen as the instrument of the minority and not as the protector of the rights of the people as a whole.

The second reason is perhaps even more fundamental. The constitution could be envisaged neither as the embodiment of victory of one side over the other, nor as the unprincipled outcome of horsetrading but as a solemn compact, a document based on trust and realism, which establishes in advance certain fundamental principles and procedures to enable all South Africans to live together in peace and with dignity. It would seek to gain the confidence of the broadest sectors of the population by laying down procedures that guarantee both that equitable change will take place and that such transformation is governed by law and by clearly established and manifestly fair procedures.

By means of constitutional provisions relating to affirmative action, Parliament would at least be authorised, if not actually committed, to

undertake programmes of legislative intervention intended to promote equal opportunity. Furthermore, the constitution could oblige Parliament to adopt certain standards or criteria when adopting legislation such as the consideration of the existence of manifest inequality based on racist laws and practices and the need to involve all interested parties in finding a solution. The role of the courts, then, would not be to analyse the merits or demerits of the legislation as such, or the concrete actions undertaken in terms of the legislation, but to ensure that the appropriate principles and procedures have been followed.

One such principle, mentioned above, could be that all affected parties have the right to participate in discussions leading up to the final decision. Another could be that, given a clear goal such as equalising access to health services within a certain number of years, the least onerous and disruptive option be adopted.

An additional point to be made is that there already is extensive affirmative action in South Africa, but it is affirmative action in favour of the whites. As much as five times more is spent by the state on the education of each white child compared to each black child, although the discrepancy is being reduced; white farmers are subsidised billions of rands in loans which are not called in; and figures show that the inhabitants of Soweto are in fact subsidising services for the inhabitants of the luxurious white suburbs of Johannesburg. How swiftly these imbalances should be removed will be a matter of good political judgement. What presumably would not be in issue is the legal competence of Parliament to do so.

D. The Question of Property Rights

As has been mentioned, eighty-seven percent of the surface area of South Africa is by law reserved for white ownership and occupation. Any simple deed of transfer has by law to contain an affirmation that the seller and the purchaser belong to the racial group permitted to own land in the area in question. In the past three decades, no less than three million people, ninety-eight percent of whom were black, have been forcibly evicted from their homes through apartheid property laws. Forced removals from so-called black spots in so-called white areas continue to this day.

The question of property rights in South Africa accordingly goes well beyond the issue of market economy versus planned economy. Indeed, although there are advocates of every social philosophy in South Africa, ranging from proponents of highly centralised socialism to de-

fenders of a totally unfettered market, there is a broad consensus that at least for the foreseeable future South Africa will have a mixed economy. While there will forever be contention over the exact mix at any time, there is wide agreement on the fact that the private sector has an active economic role to play and that the government will strongly influence the parameters within which economic activity takes place.

The constitutional problem thus does not relate to the question of capitalism versus socialism. The Bill of Rights will guarantee fundamental rights and liberties for the people, independent of whether a particular government opts for more privatisation, more central planning, more cooperatives, or more social welfare. The different political groupings will compete for the support of the electorate in the ordinary democratic way, by seeking their vote.

What is at issue is the competence of Parliament to deal with the totally skewed property relationships produced in South Africa by centuries of colonial dispossession and apartheid law. A Bill of Rights could adopt the position of the European Convention on Human Rights and say nothing on the question of whether or not existing property rights can be interfered with in the public interest.[10] Alternatively, it could accept the principle that no such rights can be taken away except in the public interest and then only if prompt and adequate compensation is paid. Another possibility is to accept a general principle of compensation, but to qualify it by the principles of affirmative action, in which the market price is only one of many elements to be taken into account in determining the level of compensation, the others including social and historical considerations and factors relating to productive use. Affirmative action could also allow for flexibility in the modalities of payment and a wide variety of transitional arrangements and forms of mixed interests of a usufructuary, cooperative, or partnership kind in the same piece of land. Finally, the Bill of Rights could authorise outright taking without compensation, or, alternatively, adopt a radical position and declare that in the name of restoring the land to the dispossessed, all land shall belong to the State, which can then grant leases and concessions to public or private entities.

10. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

This would seem to be an area requiring much attention, literally close to the ground, and where, it seems, simplistic global solutions should be avoided at all costs. The central planning/free market dichotomy, with all its respective constitutional and ideological implications, by no means exhausts the subject. Looking at the question of the economy as a whole, and not just at the land question, one can indulge in a number of interesting legal speculations.

One such speculative approach would be to apply a simple anti-trust measure, that is, a law against monopolisation of the economy, such as can be found in the United States. Bearing in mind that something like eighty percent of shares quoted on the Johannesburg Stock Exchange belong to companies in four major conglomerates, a move towards breaking up cartels could have more dramatic implications than a drive towards nationalisation.

Similarly, apartheid laws and practices deform not only the market but the whole area of entrepreneurial activity, effectively excluding blacks as significant actors in the spheres of finance, production, and services. Presumably even extreme pro-marketeers would support affirmative action if it resulted in breaking one of the most solid of white monopolies and most blatant unfair restrictions on trade activities. What one wants to promote is a genuine opening-up of economic activity; what one wants to avoid at all costs is a constitutional arrangement that permits the kind of physical thuggery and corrupt economic appropriation indulged in by many of the Bantustan leaders, who go on to declare themselves ardent supporters of free enterprise. Legally governed affirmative action, subject to public scrutiny and judicial review, is the exact opposite of opportunist and corrupt action. It has the additional advantage of encouraging the flowering of a great variety of forms of economic activity, from joint ventures, to purely private operations, to cooperative undertakings, to support for village-type industries.

Bearing in mind the importance of being flexible and not foreclosing future possibilities, one may offer at least three preliminary areas of widespread agreement: first, that there be no interference with property rights except by due process of law; second, that interference will only be justified if in the public interest; and third, that personal property (that is, means of consumption as opposed to means of production) will be protected against any form of seizure other than that normally authorised by the law, such as in the case of insolvency, execution of a civil debt, or payment of a fine. Affirmative action procedures, if

adopted, would not be able to touch a person's home or dog or television set or motor car, all of which would be constitutionally protected.

E. Free Speech: Unlimited or Qualified?

South Africa has suffered so many interferences with the rights of free speech that the tendency to let everybody say what they want, when they want, and how they want is very strong. At the same time there is an awareness that racism can ignite explosive passions and destroy the very fabric that contains and is supported by the constitution; furthermore, apartheid is not only unfair and exploitative, it is spiritually injurious, it is insulting, defamatory. The problem is how to reconcile these two competing considerations, the right to absolute free speech and the need to save the country from the promotion of racial hatred and division.

Clearly the constitution must protect the normal rights to criticise the government and public officials, to take part in free public debate over national and international issues confronting the country. People should have an unqualified right to argue for or against socialism or capitalism, or abortion or capital punishment, or to warn us that the end of the world is near. Similarly, if the Flat Earth Society wishes to establish a branch in our country, they should be free to do so—there will be no lack of potential adherents. Yet the real problem is not tolerance of the flat-earthers or the presence of cosy free speech corners where anybody can say anything to amuse tourists and prove that the country is free; the problem is how to respond to the organised mobilisation of racial and ethnic hatred and divisiveness.

Should the constitution permit and even protect the right to say such insulting and provocative things as that whites are rapists and devils who should be stripped of their rights and driven into the sea? Or that blacks are baboons who should never have been given the vote? Or that the Xhosas are exploiters who have come to Natal to suck the blood of the Zulus? Or that the Shangaans are cowards and never knew how to fight? Or that Hitler was right? Or that South Africans of Indian origin should be deported to India?

There is a strong argument for saying that if the constitution is a compact, agreed upon by representatives of all the major groups in South Africa, it should include a shared undertaking not to indulge in mutual insults and not to permit the mobilisation of racist or ethnic feelings for political advantage. In this sense, democracy and non-racism become inseparable—there is no democratic right to be racist.

Here once again the constitution can in theory adopt one of three positions: it can protect the right to make racist propaganda, it can leave the question entirely to the legislature, or it can expressly outlaw incitement to racial hatred and division. If it adopts the third position, further questions arise as how best to combat the promotion of racial hostility—whether to rely on the criminal law or voluntary codes of conduct affecting the media and political organisations, or whether to include provisions in the electoral law which forbid the creation of parties on racist principles or campaigning on the basis of racist or tribalist emotion.

It is interesting to compare the idea of the constitution as an anti-racist compact, with Lijphart's concepts of consociationism.[11] Both are based on the notion of an agreement to demobilise rather than mobilise constituencies organised on racial or ethnic lines. Yet whereas consociationism seeks to institutionalise ethnicity and make its recognition central to governmental functioning, non-racial democracy de-institutionalises ethnicity and emphasises the role of the Bill of Rights in guaranteeing the security that people want. Whatever merits consociationism might have in other societies, in a country like South Africa where the inequalities are enormous, consociationism inevitably comes to be seen as a means of safeguarding the privileges of the dominant minority; as such, it will never obtain the consent and willing participation of the oppressed majority.

There are other questions which indirectly but significantly bear on the subject of free speech and which could be relevant to the way principles should be formulated. At the moment the press is anything but open, and anything but non-racial. The *Rand Daily Mail*, the most informative and widely respected newspaper of the 1960s and 1970s, was closed not on journalistic but on market principles, proving that free speech is really rather expensive. English-language and Afrikaans-language monopolies control virtually the whole of the commercial press, which means virtually the whole of the press. The apartheid authorities monoplise broadcasting. What the commercial and state monopolies have in common is that they are completely white-dominated, locked into the apartheid structures. Some attempts have been made by generations of courageous and imaginative journalists, both black and white, to mitigate the effects of this inequality. Space has been found for black voices in the commercial press. On journals such as the *New Nation*

11. A. Lijphart, Power-Sharing in South Africa (1985).

and the *Weekly Mail*, these voices have transformed reporting on South Africa. There are also some extremely intelligent radical analyses appearing in a number of journals and bulletins, and a great variety of community-based alternative media have emerged. Nevertheless, the "silenced majority" have had to rely on word of mouth to communicate their views and ideas.

Much as we may appreciate the oral tradition on the one hand, and much as we may wish to avoid the creation of a banal and propagandistic press on the other, we cannot ignore the fact that a great deal needs to be done to make the press more open and less reflective of the structures of racist South Africa. There is an articulate, technically experienced and battle-scarred generation of media-workers in South Africa, and one looks forward to their active engagement in the process of resolving these questions.

F. The Question of Workers' Rights

One of the features which differentiates the constitutional proposals for South Africa is whether they contain guarantees of workers' rights. The ANC Constitutional Guidelines expressly guarantee the right of workers to form trade unions which shall be independent and explicitly recognise the right to strike.[12] This is a good example of the notion that rights can never be conferred or donated: they are seized or created by those who wish to exercise them, and then recognised by the State. Thus, neither are we born free, nor do we obtain our freedom from the State. We achieve our freedom through struggle and then adopt laws to protect that freedom.

The trade union movement has struggled hard for its existence. In a country riddled with authoritarianism, it has in many ways become a model of participatory or shop-floor democracy. The constitution cannot create a healthy and vigorous trade union movement, but it can guarantee room for such a movement to flourish. What gives special importance to the unions in South Africa is that, along with the churches, they are major institutions for promoting non-racism and national unity. It is no accident that the union movement has become the biggest single agency for the discussion of constitutional questions in South Africa. The debate starts with the text of the ANC Constitutional Guidelines, but it is open-ended, with the objective of arriving

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12. CONSTITUTIONAL GUIDELINES, *supra* note 4, para. t.

at positions which represent a broad anti-apartheid consensus. Naturally, the unions are paying special attention to ensuring their own future, so that they can avoid becoming either sweetheart unions or puppet bodies, but their interest extends to all questions of equal citizenship.

Thus the constitutional vision which is emerging rejects both the idea of unions having a precarious existence in the face of combined state-employer opposition, and the concept of unions being institutionalised and made into mere transmission belts of state policy. There is no reason why the broad constitutional safeguards governing union activity should not be supplemented by a more detailed Charter of Workers' Rights. Such a document could take the form of an entrenched legislative code which consolidates the gains made by workers in years of hard struggle to organise and protect rights including collective bargaining procedures, working conditions, unfair dismissals, health, compensation for injury, unemployment insurance, holidays, and other matters of import to workers.

The strength of a Bill of Rights depends partly on the institutional mechanisms for its implementation, but no less on the meaning it has for the public affected by it. To the extent that over a million organised trade unionists, and through them their families, feel involved in helping to create basic legal provisions for the country, they can be relied upon in the future to be defenders of the fundamental law which they have helped to formulate and which guarantees them their rights.

The above sentiments clearly express pro-union positions. We recognise, of course, that there are many who would say that unions should not have constitutionally privileged positions, but should instead be regarded as voluntary organisations just like any other. Some might oppose the right to strike as a constitutional right; others might argue that in the context of nation-building, workers cannot claim autonomous positions for themselves and their organisations. Some unionists might argue that the achievement of socialism should be written into the constitution as one of its goals; certain business people might reason that, paradoxically, effective affirmative action and the existence of a strong trade union movement are the surest guarantees of the continuity of a vigorous private sector in the economy, since they would remove manifest racial inequalities and promote the welfare of the whole population without necessarily challenging the market system.

Hopefully, members of the business community will start taking the question of human rights seriously and begin to think about the contribution they can make towards consolidating non-racial democracy,

removing the massive inequalities from which they have benefited so much in the past, and helping to build the new South African nation. The country would be spared much travail if those who hold economic power today would direct their energies towards promoting rather than resisting orderly, law-governed change.

G. Women's Rights

Women's rights is another area where the position of the ANC comes out quite differently from that of other groups in that the rights of all persons are explicitly considered. The Guidelines refer in general terms to guaranteeing the fundamental human rights of all citizens irrespective of race, colour, sex, or creed.[13] Though not all the other proposals are quite so explicit, for the most part they go along with such a formulation; indeed, in this day and age it seems inconceivable that any constitution, certainly one of an industrialised country like South Africa, could fail to include a general declaration of equal rights for men and women.

The Guidelines specifically state that women shall have equal rights in all spheres of public and private life and that the state shall take affirmative action to eliminate inequalities and discrimination between the sexes.[14] This was not a controversial question in the ANC. On the contrary, there was a feeling that the Guidelines, in the treatment of equal rights and affirmative action, did not sufficiently serve to remove the de facto discrimination built into our society. What more needed to be stated? The answer is the necessity to combat sexism. The preamble to the Guidelines was amended to include as a goal of the Constitution the promotion of the habits of non-racial and non-sexist thinking.[15]

The issue was thus placed robustly on the agenda. It was put there by African women who pointed out that they suffered from many layers of disabilities, some of which they shared with others and some of which were specific to them. With their African menfolk they shared the experience of national oppression; with all the women of South Africa they shared the burdens of inequality and sexist behaviour; with the workers of all races they shared in subjection to economic exploitation. Thus, though they were oppressed as Africans, they were doubly

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13. *Id.* preamble.
14. *Id.* para. u.
15. *Id.* preamble.

oppressed as African women. The democratic aspects of traditional African society and law had been progressively whittled away under apartheid, and the aspects of centralised power and patriarchy emphasised. The result was that African women were frequently treated as minors, subject to the guardianship of their fathers, brothers, uncles, husbands, or sons. Widows were in a particularly precarious position, often being denied any secure part of the family goods or holdings. Application of the principles in the Guidelines would mean that such differential and inferior treatment, founded on traditional rules and practices, would clearly lack the force of law.

These cultural questions should not be treated in an insensitive manner. The whole issue of the future of African family law is one that will require extensive discussion, with primary involvement of those most likely to be affected by any change. Nevertheless, any African woman who feels that her rights to inheritance, to a pension, to maintenance for herself and her children, to take up residence where she wishes, to sign a contract, or to enter employment, are being adversely affected by patriarchal rules, would have the right to seek redress through the constitution. Similarly, there would be nothing to prevent people from contracting and dissolving their marriages according to the practices of tradition, if such were their wish. The state would not interfere to ban marriage or divorce arrangements that might seem discriminatory against women, but it would provide legal remedies through the courts for those women who wished to challenge any unequal disposition (assuming that the courts also will have been transformed, and that the African community will be well represented on the Bench).

African women have been doubly oppressed, as Africans and as women. Decades of the application of the pass laws and of the migrant labour system have had a particularly injurious effect on the lives of African women, depriving them of sexual companionship, family life, and economic tranquillity. The Guidelines address this point by affirming that the family, parenthood, and children's rights shall be protected.[16] Whereas non-African women often find themselves fighting for the right to live outside the confines of the family, one of the central demands of African women is that they be allowed to lead normal family lives.

In addition to discrimination as African women, these women have also been oppressed as African workers. Hundreds of thousands worked

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16. *Id.* para. v.

as domestic servants, usually under the control of white women. Other jobs involving unsocial hours and low pay, with poor chances of union organisation, were reserved for women. Presumably, this is the type of question which the Workers' Charter would attend to.

Many have argued that in general, apartheid has borne particularly harshly on African women. They have even less access than their menfolk to education or health care, and less chance to travel or obtain reasonable employment. Affirmative action programmes in general would accordingly have special importance in enabling African women to overcome the multiple disabilities under which they labour.

There are many other themes which would appear in a Charter of Women's Rights, should such a document be drafted. The Bill of Rights could set out the basic principles, and the Charter could be adopted as a legislative code with special status, responding to the many concrete questions needing solution. Thus, in addition to dealing with the concerns already mentioned, the code could cover equal pay, maternity rights and responsibilities (as well as paternity rights and responsibilities), welfare rights, child care arrangements, reproductive rights and the control of fertility, problems of sexual harassment and of domestic violence, and the specific modalities that affirmative action should utilise to overcome male privilege.

Here once again, the active involvement of the women's movement would be the greatest single guarantee that appropriate formulations would be established. To the extent that the Bill of Rights helps guarantee the rights of South African women, it will gain millions of new adherents. There is one important and difficult conceptual problem that will require considerable thought, however. This is the problem of whether the law should be gender neutral, interpreting equal rights as meaning that no distinctions at all can be drawn between men and women, or whether the law should look to the actual situations in which women live, and try expressly to assist them in making their lives better.

At the center of this problem is the argument that apparently gender-neutral rules were always made by men in ways that corresponded to their needs and their vision of the world. If women simply strive for equality or the right to do everything that men do, they are fighting to assimilate themselves into a world dominated by male interests and pre-occupations. It would be far better, the argument continues, to look to the realities of women's lives, to acknowledge that they live inside their bodies, bodies which are different from the bodies of men, and develop ways of seeing the world that are different (at

least until they reach the age that apparently neutral but actually male-constructed rules are imposed upon them).

Adopting a gender-reality approach rather than a gender-neutral one has extensive implications for the law. It means that remedies related to rape, sexual harassment, and domestic violence are based on the reality that, in the vast majority of cases, women are the victims. This could have implications for the types of intervention that are the most efficacious and just. Similarly, it could require a new look at the question of pornography, in which obscenity lies not in the violation of puritanical sexual mores, but in the defamation of women through cruel and degrading representation of their bodies.

Another crucial issue is that of maternity leave. It is difficult to imagine that there are industrialised societies which refuse to grant women full rights of maternity leave on the grounds that this would be inequality for men (they do not stop men from getting sickness leave to have prostate operations), but apparently some such countries still exist.

Sooner or later these kinds of questions will have to be dealt with by the legislature and the courts in South Africa, and it is necessary to be sensitive to them when framing a Bill of Rights, even if no clear answer is given at this stage. It might well be that the solution lies in harmonising the right to be the same with the right to be different—women will be entitled to enjoy all the basic civil rights without discrimination or impediment of any kind, but will not be required to neuter themselves and lose their distinctive experience and voice in the process.

Finally, it has to be acknowledged that there are those who feel that the question of women's rights should not be raised at the constitutional level at all and that the state has no right to interfere with traditional family relationships or employment practices. In a sense, patriarchy in South Africa is non-racial, or, rather, has its adherents in all sections of society. This in itself would not be enough to justify its protection by the law. Indeed, it is an indication of the impact of the women's movement that whereas some years ago the onus would have been on those who sought to justify moves toward equality and emancipation to make out their case, today the burden lies on those who would oppose it.

Conclusion

Any future constitution in South Africa will, in the context of the move from apartheid to a non-racial democracy, have to deal with the

problem of reconciling and harmonising the principles of liberty, equality, and solidarity. The task of finding the appropriate formulations will not be easy. There is a broad and growing consensus on the importance of creating an open, united, non-racial, and democratic society in which the fundamental rights and liberties of all will be respected, but there are still major differences of viewpoint on the questions of equal opportunity, affirmative action, and the redistribution of wealth, on the right to be the same and the right to be different, on workers' rights and on gender relations. What is significant is that these controversial questions are being debated openly and freely now in a way which augurs well for the growth of democracy and tolerance in a post-apartheid South Africa.