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Towards the Reconstruction of South Africa *

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I The Relationship Between Self-Determination, National Liberation, De mocracy and Civil Rights

Legal truth, like all truth, arises out of the clash of opposites. At the heart o f all debate on the legal characterisation of the apartheid state lies the oppos ition between two seemingly irreconcilable truths, namely that South Africa is an indep endent state, and that the eradication of apartheid represents the culmination of the struggle to free Africa from colonial domination. Put in terms of the internal situatio n in South Africa, a struggle essentially anti-colonial in origin and character is taking place in a country that has long ceased to be a colony. It is to this seemin gly contradictory situation that international lawyers must address themselve s.

The central argument of this paper is that the debate as to whether a strug gle of this nature should be characterised legally and politically as a national liberat ion struggle or a struggle for democracy or a struggle for civil rights is a false one; th at once the central issue of self-determination and the achievement of sovereignty by the South African people is grasped, the themes of national liberation, democracy an d civil rights fall into py'ace. Much confusion has arisen over the question of Sou th Africa's status because of failure to appreciate that the basic question is not one of recognition but of de-recognition. There can be no question that for many decades So uth Africa

was recognised as an independent state. State practice and legal theory seemed in accord in this respect. All the criteria of recognition as an independent state appeared to be present. South Africa had a defined territory, a permanent population and a government exercising internal control, and was not legally subject to the external control of any other state. (See the Montevideo Convention, 1933, Art. 1.) Even those who might have argued that in addition to effective control the element of legitimacy should have been added, would have been satisfied that sovereignty had properly passed according to due constitutional and legislative process from Britain.

How, then, is it possible to challenge South Africa's claim to be an independent state? The answer to this question must be found in the changed nature of the international legal order and the increased emphasis given to the principle of self-determination of peoples as the foundation of sovereignty. The domination of

*This is a slightly abridged version of a paper presented in outline to the Conference on Law and Politics in Southern Africa in London, April 1984, and presented in full to the United Nations Centre against Apartheid Seminar on the Legal Aspects of Apartheid held in Lagos in August 1984. For general background to this analysis see J. Dugard, Human Rights and the South African Legal Order (Princeton, 1978); A. Sachs, Justice in South Africa (Berkeley, 1973).

people by people, race by race, once consecrated in the international legal order in the form of colonial and racist rule, not only lost its legitimacy, but came to be regarded as legally obnoxious. The anti-colonial revolution changed both the rules and the nature of those who made the rules. Thus what was once normal became abnormal; what was once abnormal became the norm. It was not so much that the principle of self-determination became accepted as that its applicability became universalised and the rights formerly conceded only to the peoples and nations of Europe and Latin America came to be extended to the peoples and nations of Asia and Africa as well. As a result, the once accepted legitimacy of racist authority in South Africa came to be questioned.

At the level of international state practice, what had previously been a majority phenomenon, namely, recognition of South Africa as a state and of the Pretoria authorities as representatives of that state, became a minority phenomenon. Some states which had formerly had diplomatic relations with Pretoria, ceased to have such relations (India, the USSR, Czechoslovakia). At the same time, of the hundred new states which took their place in the international community, only one went on to enter into diplomatic relations with Pretoria. Similarly, international organi-sations which had formerly accepted representatives of the apartheid state as being representatives of South Africa, one by one withdrew the credentials of these representatives. The result is that today there is not a single United Nations body - whether the General Assembly or the most specialised organ - in which the Pretoria authorities are represented.

On the contrary, the United Nations has sponsored the Convention on the Suppression of Apartheid which stigmatises the philosophy and practices of the apartheid state as a crime against humanity; the General Assembly has frequently called upon states to isolate apartheid South Africa economically, culturally,

militarily and diplomatically; the Security Council has imposed a mandatory embargo on the sale of arms to South Africa; the U.N. has established the Committee against Apartheid to ensure that the peoples of the world are kept constantly aware of the affront which apartheid represents to the human personality. Similarly, the overwhelming majority of international non-governmental organisations have also expelled the representatives of Pretoria, as have virtually all international sporting bodies.

The process of expulsion from international organisations, de-recognition by certain older states, and non-recognition by newer states, has created a situation in which time has undermined rather than legitimised the apartheid state. It is true that many of the older states, especially those with strong commercial interests involved, still treat South Africa as a normal if criticisable state, and still maintain diplomatic relations with it. But the day has long passed when these states, as the so-called civilised nations of the world, determined for themselves who should and who should not be considered members of the family of nations.1

In a slightly different but essentially related context, Brownlie has pointed to the importance of seeing legal rules and their application in the context of law as history. Referring to the question of rights over territory, he reminds us that the nineteenth

1 M. Akehurst, A Modem Introduction to International Law (London, 1977), 62.

century witnessed contradictory developments.

In Europe and Latin America the principle of nationalities appeared which, as the principle of self-determination, has become increasingly important. At the same time the European powers made use of the concept of res nullius, which was legal in form but often political in application, since it involved the occupation of areas in Asia and Africa which were often the seat of organised communities. Thus the principle of self-determination requires harmonization with the pre-existing law.2

By analogy, the pre-existing law, namely, the recognition of South Africa as an independent state, has to be harmonised with the increasing importance attached to the principle of self-determination; to the extent that it can be shown that the South African state is constructed - formally, legally, officially - on principles which deny self-determination to the majority, excluding them from sovereignty and denying them nationality, to that extent the once-accepted legitimacy of the South African state is impugned, and its recognition as a member of the community of nations put in issue.

International state practice in relation to Southern African questions casts an interesting light on the classic international law controversy between the adherents of the constitutive and the declaratory theories of recognition. The constitutive theory, which argued that international legal personality came essentially from recognition by the international legal community, was based historically on the situation in the nineteenth century when a relatively small group of nations, mainly in Europe and the Americas, dominated international law, constituting a sort of 'club' to which other nations could only belong if 'elected' as 'members'.3 The declaratory theory, on the other hand, which contended that recognition merely acknowledged the fact of the existence of a state with international legal personality, and was not the basis of constituting such personality, was strongly supported by

new revolutionary states as more progressive and as favourable to peaceful co-existence. The question now arises, however, as to whether certain elements of the constitutive theory need not be revived in a new form, in the sense that in certain objectively defined circumstances the organised world community can refuse to admit to normal international intercourse an entity even though it might possess the elements of territory, population and government.

Whereas previously the members of the 'club' that decided to confer or not confer international legal status on other states constituted a self-elected elite applying the so-called norms of Western civilisation, today the international community has become global in character, and its norms have been universalised and made more democratic by virtue of such instruments as the United Nations Charter. The legitimacy of any new entity claiming admission to the family of nations therefore depends fundamentally on whether by its very character and constitution such entity contravenes any of the generally recognised principles of international law, and particularly the principle of self-determination.4

2 I. Brownlie, Principles of Public International Law (Oxford, 1979), 131.

3 Akehurst, International Law, 62.

4 D. Feldman, 'Recognition of States and Governments in Present Day International Law', in G. Tunkin (ed.), Contemporary International Law (Moscow, 1969), 206-9.

Perhaps more emphasis needs to be given than has been shown in some scholarly writing to the difference between recognition of a new state and recognition of a new government.5 Whereas the principle of effectiveness is decisive in the case of recognising or not recognising a new government, it is the principle of self-determination that should as a matter of logic be fundamental in the case of recognition or otherwise of a state. The same would apply to the process of de-recognition: the vast colonial empires, once recognised as falling within the sovereignty of the metropoles, were progressively de-recognised by international law, at times with the consent of the colonising powers, at times against their wishes (Algeria as independent of France; Guinea-Bissau as independent of Portugal. The question of effective control ceased to be the determining element and was only indirectly relevant in that in both these cases it was popular insurrection and armed struggle that manifested to the world a claim to self-determination). The greater the international acceptance of the principle of the rights of colonised peoples and nations to self-determination, the more tenuous became the legitimacy of the remaining colonial empires.

This is not to argue that the U.N. has become a supra-national organ with authority to determine whether the conditions of statehood exist or not6 but to say that the acceptance by the international legal community of the principle of self-determination as the foundation of statehood has created a situation in which the once unassailable position of South Africa as an independent state has been undermined.

To sum up: South Africa has certain of the essential characteristics of an independent state, but lacks the fundamental one, namely, the co-existence, internally, of statehood and sovereignty. The mere existence of a territory, population and a government exercising a degree of effective control is not enough. A state which reserves its sovereignty to a small racially constituted minority, which negates the legal personality of the great majority of the people on the ground that the

y are of
indigenous origin, which deprives them constitutionally of elementary righ ts of
citizenship, which leaves them without nationality and subjects them to m assive racial
discrimination, cannot claim to be an 'independent state' in the full meani ng of the
term. The state is independent in the sense that it is not subject to the leg al control of
any other state, but the people are not independent inasmuch as they lac k sovereignty.
The clearest proof of the exclusion of the majority of the people from nati onal
sovereignty comes from the apartheid regime itself, through its Bantustan policy,
which is expressly designed to exclude the mass of people from the nation al polity
under the guise of granting them separate independence in separate tribal states.

We may take an example from recent history: the Smith regime was never able to
obtain international recognition for the Republic of Rhodesia, not so muc h because its
Declaration of Independence was unilateral and illegal, but because the supposedly
independent state violated the principles of self-determination and de-col onisation.
The same may be said of the Bantustans today. It is extremely doubtful i f any of them

5 C. D. de A. Mello, Curso de Direito International Publico, Biblioteca Jur idica Freitas (Rio de
Janeiro, 1975), 231; Feldman, 'Recognition', 211.

6 N. Mugerwa, 'Subjects of International Law', inM. Sorenson (ed.), Manua l of Public International
Law (London, 1968), 268.

satisfy even the minimum criteria of the Montevideo Convention, in that their lands are too scattered to form a 'territory', their so-called nationals are too separated from the lands to constitute a 'population' and their administration and security forces far too integrated with those of Pretoria to be said to exercise effective authority. Furthermore, the overall vassalage to Pretoria is so evident that even the formal element of independence from external authority is manifestly absent. But even if one or other of the more compact and economically viable Bantustans were able to make out a case for satisfying the above requirements, the international community would deny them recognition as independent states, since their very existence, based on ethnicity and division, is designed to negate the claims to true self-determination of the majority of the South African people.

Self-determination, by its intrinsic nature, can never be endowed, even less imposed. It arises out of a determination by a nation or a people to organise themselves into an independent state. The Bantustans were conceived of in Pretoria as a means of frustrating rather than of accepting the national demands of the majority. Thus no new state can come into being if it violates the principles of self-determination. And the argument is that in the contemporary world, no old state can expect to maintain its position in the family of nations if its very constitution denies sovereignty to the great mass of the people. The consequent denial of human rights internally and the constant rogue behaviour externally both aggravate the indictment, but are not the essence of it. South Africa is not just one more of the many states in which the people have no effective say in government; nor is it merely one of the many states in which racism is practised. South Africa is an explicitly racist state, in which racist domination is as expressly built into the legal order as colonial domination was built into the now dismantled Empires.

It is important to remember that the system of racial domination consecrated in the

Union of South Africa Act which came into force in 1910, was never asse nted to by
the majority population. The African National Congress, founded in 1912, is
virtually as old as the state which it was formed to contest. The National Convention
which drafted the Union of South Africa Act consisted of white persons on ly. The
precursors of the African National Congress sent delegations to Britain to protest
against the system of racial supremacy being introduced. The ANC prote sted against
the Land Act of 1913 which purported to legitimise conquest by means of reserving
nine-tenths of the country's land for exclusive white ownership. At the inte rnational
level, the ANC sent a delegation to the Versailles Peace Conference in 1 919 to
advance African claims. In more recent times, it has spearheaded the inte rnational
campaign to isolate the apartheid state. Throughout its history, the ANC has
dedicated itself to the building of unity amongst those excluded from the c onsti-
tution, fighting against all forms of tribal or racial division. Its Programme of Action
of 1949 constituted a direct challenge to the system of racial domination in South
Africa, and a clear assertion of African claims. The Defiance of Unjust L aws
Campaign of 1953 was a further challenge to the legitimacy of the racist s tate and its
organs of power. The Freedom Charter, adopted by the Congress of the People in
1955, represented a confrontation at the programmatic level with the princ iples of
the racist state. Finally, the formation of Umkhonto we Sizwe, Spear of th e Nation,

armed wing of the ANC, in 1961, after legal campaigning for the creation of a non-racial democratic country had been effectively outlawed, represented the most emphatic and advanced form of self-determination by the rightless majority. The struggles under the leadership of Nelson Mandela on Robben Island, the underground activities, the workers' strikes in Durban, the uprising of the youth of Soweto and elsewhere, the community actions, bus boycotts, strikes and armed attacks against apartheid installations and security personnel since then, have legal significance as concrete acts of self-determination, which, taken together, constitute both a challenge to the existing state structure and the forging in practice of the elements of a new one. A new popular sovereignty proclaims itself through the praxis of the mass national liberation struggle for democratic rights, so that the international legal community, while increasingly denying recognition to the old, increasingly grants recognition to the new.

If South Africa is an independent state, it is one in which the majority of the people have never enjoyed independence. Until such time as the independence granted by Britain in 1910 to the white minority comes to cover the whole population and the whole territory, it cannot be treated as an independent state in the proper sense of the word. Its independence is inchoate, and will only be complete when sovereign power is exercised not by a racial minority but by the people as a whole.

II Should the Anti-Apartheid Struggle be Regarded as one for National Liberation,

Democracy or Civil Rights?

International law, like nature, abhors a vacuum. The negation of the rights of the majority of the people of South Africa on the grounds of their national origin is the fundamental characteristic of apartheid from which all the other detailed features of the system flow. At the centre of apartheid lies the destruction of African independence and the usurpation of African land. In legislative terms, the bed-roc

k is the
block of statutes which restrict the land, rights, labour, movement and re sidence of
the African people. The exclusion of the African people from political righ ts and the
evolution of the Bantustan programme are directly related to the objective of
maintaining the majority population of indigenous descent as a subordina te and
controlled source of cheap labour. The aspects of race discrimination in t he social
sphere - so rightly condemned by the world - are essentially secondary or

superstructural to the system of national oppression of the African peopl e. There are
laws such as those prohibiting inter-racial marriage or inter-racial sex, or those
reserving cinemas and beaches to one race only, which have had importa nt ideolo-
gical and symbolical functions in maintaining the myth of white supremacy ; there
are others such as those providing for race classification which have bee n important
in instrumental terms, in maintaining control of the population. But the f undamental
laws of apartheid are those which penalise hundreds of thousands of Afr icans each
year for being in areas prohibited to them, or for taking on employment no t
authorised to them or for residing where they are not allowed to live. It is these laws,
coupled with the exclusion of the African people from the constitution, wh ich
constitute the foundation of apartheid and which make the statute book o f South
Africa itself the strongest proof that the central feature of apartheid is the denial of
the national rights of the African people.

Thus the struggle against apartheid presents itself as the culmination of the process of freeing Africa from foreign domination and liquidating the last relics of overt colonial conquest on the continent. It is true that the form of 'de-colonisation' must differ in that the colonisers settled permanently in the territory they colonised and established a state that was independent of the states from which they had come. An important legal consequence of this is that independence cannot mean secession and the creation of a separate state, but rather implies the elimination of the internal structures of domination which make the majority rightless in the land of their birth. In that sense, the form that self-determination will take is the destruction of the barriers which exclude the majority of the people from national sovereignty. The right to the franchise on a basis of complete equality (one person one vote on a common voters roll throughout the country) becomes the concrete political expression of the achievement of 'independence'. This coincides with the fundamental notion in any democratic society that the people shall govern, that government is based not simply on the consent of the people, but on their will.

Thus national liberation in South Africa will be achieved through the creation of a democratic state that is non-racist in its constitution and anti-racist in its activities. It follows that it would be wrong to attempt to define the struggle against apartheid as being either for national liberation or for democracy. It is for both. National liberation is the content, democracy the form. A democratic state will replace a racist supremacy state not simply because it is good in itself, but because it is the only means of redressing the great historic injustices brought about in the past by invasion, conquest and domination, and institutionalised today by the network of apartheid laws. Genuine popular sovereignty, which is at the heart of democracy, therefore presupposes far more than mere incorporation, step by step, into the existing political order. It presupposes restoration of usurped land and wealth, an

end to national humiliation in all its forms, and an affirmation of the cultu re and
personality of the rightless majority.

The fundamental tasks of the democratic state will be to achieve those go als.
Precisely how they should best be achieved is a matter which belongs to the new
sovereignty. Thus to take the question of how the land should be restored to the
people, one can envisage many different means reflecting many different phil-
osophies - the land could be parcelled out to peasants, or agro-business es could be
created with a non-racial shareholding, or cooperatives instituted, state f arms
established, or joint ventures with state participation set up, or there coul d be an
infinite mixture of all these forms, or even others invented to meet the oc casion.
These are issues which the people of South Africa should be free to settle for
themselves in a democratic way.

It is in this context that the question of civil rights in South Africa must be viewed.
If it would be wrong to see the struggle for democracy as an alternative to the
struggle for national liberation, it would be even less correct to attempt t o oppose the
struggle for self-determination with that of the struggle for civil rights. Peo ple in the
Portuguese colonies fighting for their independence were understandably unim-
pressed by the argument that they should abandon their armed struggle f or indepen-
dence because their human rights would be guaranteed by the transforma tions then

said to be in progress in the Portuguese metropole. They insisted that the question of sovereignty and the rights of the people had to precede the question of individual human rights; that the objective of their struggle could never be to liberalise or democratise colonialism, but only to end it. Similarly today in South Africa the enjoyment by all of civil rights can only be a reality when the country is governed by the people as a whole and not by a racial minority. The fundamental question is not who can ride in railway carriages or sit on park benches or play in sports teams, important though these matters are, but to whom does the country belong, who is it who decides who can ride in railway carriages or sit on park benches or play in sports teams?

To stress that apartheid is as deeply structured and as totally condemnable as slavery and colonialism is not to say that criticism at the humanitarian level of its detailed aspects is out of place, or that the struggle for civil rights in South Africa is not important. The objective of a document such as the Freedom Charter was precisely to create the conditions in which the people of South Africa could enjoy full civil rights.
In the meanwhile, battles to defend and enlarge such limited rights as exist, and campaigns to reveal and denounce the more gross examples of violations of fundamental rights, contribute towards exposing the fact that the appropriation of sovereign powers by the racial minority inevitably requires forcible suppression of the rights of the excluded majority. Thus the tortures, forced removals and shootings into crowds are not mere accidental episodes produced by abnormally reactionary or cruel individuals, but necessary features of a society based on institutionalised racism and a denial of the rights of the majority.

The struggle for civil rights, therefore, takes on meaning not as something autonomous in itself but as part and parcel of the struggle for a non-racial society. The lawyers, doctors and others who participate in the struggle at this level make a limited but useful contribution to the general struggle, challenging the legitimacy

of the
regime in terms of its functioning rather than of its legal basis. Even the pa lliative
function often referred to with some disdain is not something to be dismis sed out of
hand. We do not ban aspirin simply because it cannot cure cancer or heart disease. It is
only when strategies based on legal defence are offered as alternatives t o other and
more fundamental forms of struggle against apartheid that they become o bjectionable.

The anti-apartheid cause is not well served by attempts to create either/o r formulae
for characterising the nature of the struggle. What exists in reality is a si ngle popular
struggle taking on a variety of forms and being engaged in by a wide rang e of
democratic and patriotic forces with the goal of destroying the apartheid state and
replacing it with a democratic state that is non-racial in character and anti-racist in
programme. In the process of destroying apartheid and re-constructing So uth Africa,
self-determination is the essence, national liberation the substance, dem ocracy the
form and human rights the goal.

Ill Is Power-sharing and a Bill of Rights the Answer?

Because of the internal base of colonial domination in South Africa, the st ruggle for
self-determination materialises itself at the political level in a struggle ar ound the
constitutional order. On the one hand it is a struggle against the Bantusta ns, on the

other it is a struggle to achieve a democratic constitution guaranteeing equal rights for all in the whole country. In recent times, a whole range of constitutional formulae have been invented, in a variety of countries, with a view to convincing the excluded majority that everything will change and persuading the dominant minority that everything will remain the same. The most frequently quoted and most ambiguous phrase in this context is 'power-sharing'. The suggestion is made that the only way to solve the problem of apartheid is to arrange a system of power-sharing between black and white. In constitutional terms this is projected as being structured around the existing institutions, presented as 'facts', brought together in some kind of framework which will be geographically co-extensive with the whole territory of South Africa and which will embrace all the different population groups. Thus, the Tri-Cameral Parliament, the Bantustans, the so-called Homelands Governments, and councils still to be created to represent the so-called urban blacks, will come together in a loose arrangement, variously called Federation, Confederation and Consociation, which will share power amongst themselves, ensuring participation by all and domination by none.

Since the precepts of democracy are well known, and in the case of South Africa have already been given programmatic shape by the Freedom Charter, the energies of the constitutional experts are directed solely towards designing schemes to dilute it, the objective being to find plausible if not very elegant arrangements for satisfying what are called the legitimate fears of the white minority. Power-sharing therefore boils down to a scheme in terms of which the whites are offered three guarantees against too much change: blacks will be constitutionally divided along racial, ethnic and regional lines; group minority rights, meaning the rights of the whites, will be protected by constitutional vetoes; and a judicially protected Bill of Rights will ensure that individual rights, including the right not to have property confiscated,

will be protected.

In analysing concepts such as power-sharing and a Bill of Rights, the fundamental question must always be whether such a scheme would perpetuate apartheid or bring it to an end. The first doubt that arises is why the term 'power-sharing' is necessary at all when the very adequate term 'democracy' is available. Secondly, implicit in the term 'power-sharing' is the concept of two sides, the whites on the one hand and the blacks on the other. In any negotiations or constitutional arrangements, power would be distributed and balanced in terms of the criteria of race. This concept of sides does not correspond to reality. The reality is that the two sides, if one is to talk like this, consist of the anti-apartheid and the pro-apartheid forces. Naturally, the anti-apartheid forces are primarily black, since they are the principal sufferers under the system. But the historical process in South Africa has matured to the extent that unity of the African people has created the basis for the unity of all the dominated communities, and unity of all the rightless has created the basis for the unity of all democratic fores, irrespective of race. On the other hand, the Bantustan policy coupled with the Tri-Cameral Parliament has created a determinate section of personalities, drawn from the dominated majority, who increasingly identify themselves with the apartheid policy of ethnicity, and whose incomes, status and world views make them natural allies of the apartheid rulers.

Thirdly, the implication of an equal division of power between groups quite unequal in size suggests that inequality person-for-person will still continue on the basis of race. A fifty-fifty distribution between twenty and eighty means that each white will have four times what each black has. Though this might represent an advance on the present position where the ratio would be nearer to ten to one counting all income and social benefits together, it still presupposes a continuation of privilege on the basis of race. Of course it would be unfair to suggest that the advocates of power-sharing, who include many sincere opponents of apartheid who see the formula as a practical means of securing relatively rapid change without causing the country extensive loss of life or destruction of property, conceive of power being shared in a crude quantitative way. But the term itself, coupled with proposed protection of minority rights, coupled with the projected fragmentation of blacks into more than a dozen different ethnic and regional groups, gives rise to the suspicion that for many of its proponents the fundamental objective is to cede only so much as can be given without substantially altering the existing power structure.
A constitutionally polychrome Parliament could have a majority of blacks, perhaps even a black Prime Minister or President, but Parliament would not be supreme, it would not have sovereign power. Racial supremacy will be transformed into racial privilege, and apartheid will change into multi-racialism in which the whites still dominate.

Finally, the curious way in which the Bill of Rights is projected gives rise to the suspicion that its effect, if not its intention, is to give further constitutional protection to racial privilege. In other countries, notably the United States of America, the Bill of Rights was created by the formerly oppressed as a means of guaranteeing future generations against the very specific forms of tyranny and abuse to which they had been subjected. Thus the Amendments to the American Constitution were designed to outlaw the cruel punishments practised by the col

onial
authorities, the interference with assembly and the press, the forced self-

incrimination and so on. One would imagine that a Bill of Rights in South Africa
would be conceived of as an instrument to protect future generations from the kinds
of oppression contained in the pass laws, the Urban Areas legislation and the
migrant labour system. Instead one finds that the Bill of Rights is being proposed as
a means of guaranteeing the rights of the oppressors, more especially their property
rights. There might or might not be good practical reasons for moving swiftly or
slowly in the re-distribution of wealth, but to use the term Bill of Rights to protect as
a matter of constitutional principle the rights of a few to live in splendour and luxury
because their parents were white while millions are trapped in hunger and misery
because their parents were black, is an abuse of language and a violation of
constitutional theory.

This is not to say that there would be no scope for a Bill of Rights in a democratic
South African State. On the contrary, it could be a valuable instrument in promoting
national reconstruction, in particular of harmonising the social programmes neces-
sary for the restoration of the land, wealth, dignity and general social rights of the
dispossessed, with the legitimate personal needs and anxieties of all the individuals
who make up the South African people.

In the first place, such a Bill of Rights should declare all apartheid law and practices to be unlawful and punishable, so that citizens may freely claim their place in society irrespective of race or ethnic origin.

Secondly, it should commit the new state to a programme of social, cultural and economic reconstruction so that access to the benefits of society should be made equally available to all citizens.

Thirdly, it should, in the context of respect for the principles of democracy and equality, affirm the general political rights of citizens, and guarantee processes designed to ensure that power is truly exercised by the people and not by some group usurping the name of the people.

Next, it should set out clearly what are the rights of the person which all are entitled to enjoy: the right to respect, to walk freely in the street and feel secure in one's home; the right and duty to work, to contribute one's skills and energies towards the re-building of the country and to be appropriately rewarded; the right to respect for one's family, or to live outside of a family; the right to equal treatment in all spheres of life, independently of sex, religion or social background.

Finally, one can envisage an important set of clauses dealing with group rights, such as the right to use one's language, the right to cultural expression and the right to worship. Stripped of its association with race and political dominance, cultural diversity becomes an enriching force, which merits constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole.

What would be quite inappropriate for a Bill of Rights would be a property clause which had the effect of ensuring that 87 % of land and 95 % of the productive capacity of the country continued to remain in the hands of the white minority. It is one thing to have a guaranteed right to personal property, such as to one's clothes or bed or

domestic pets, one's car or current account at the bank. It is quite another to say that one should have a constitutional right to own a gold mine or a farm of a hundred thousand hectares. Whether major productive enterprises should be in pri vate or public hands is an issue hotly debated throughout the world. Different so cieties have adopted different policies on the question, and the debate continues as v igorously as ever. But in terms of national policy, these are questions of an essentially political character that democratic principle requires be settled by the popular will. That is precisely what the vote is for; that is what sovereignty is all about.

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Transforming the Foundations of Family Law in the Course of the Mozambican Revolution

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Traditional law, the system of rules formerly applied by the traditional courts - whether of the chiefs or religious leaders - still influences to a greater or lesser extent the behaviour of large sections of Mozambican people, but is not used as a formal source of law in the state courts of independent Mozambique. A study of the operation of more than six hundred local courts, dozens of district courts, ten provincial courts and the appeal court shows that the emerging legal system, based on the principles of what is called Popular Justice, draws extensively on certain aspects of traditional law without incorporating its rules into its normative system.

The courts do not recognise different systems of family law for different groups. Race, place of birth, ethnic origin, religion, social occupation, style of life, degree of 'civilisation' or 'assimilation', to use the tests that have been or are still applied elsewhere in the continent, are irrelevant in determining the rights and duties of parties. There are no chiefs' courts or religious courts, only a single State court system operating in terms of the uniform principles of Popular Justice. There is no system of internal conflict of laws to decide which personal law is applicable in a particular situation, because there is only one system of law for all, what is regarded as a Mozambican law for Mozambican citizens, rather than a law of tribes, religious groups, races or social classes.

The Constitution of the People's Republic of Mozambique, adopted by acclamation by the Central Committee of FRELIMO a few weeks before Independence on 25th June 1975, declares unequivocally that:

Citizens . . . enjoy the same rights and are subject to the same duties independently of their colour, race, sex, ethnic origin, place of birth, religion, education, social p

osition or
occupation.

It adds that all acts designed to prejudice social harmony or create divisio n or
situations of privilege on the basis of colour, race, sex, ethnic origin etc., are
punishable by law. (Art. 26). Whereas other independence constitutions wi th similar
equal rights clauses add a proviso excepting traditional family law and l and use, the