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Changing attitudes towards a bill of rights in South Africa

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Mr Chairman, thank you for inviting me to participate in this conference. I must confess that I did not expect that I would ever be invited to take part in a conference on a bill of rights hosted by the University of Pretoria. This is in itself evidence of a change in attitude towards a bill of rights â\200\224 which is the title of my talk today. That the University of Pretoria has taken the initiative in calling such a meeting is to its credit and a matter of congratulation.

Today I shall examine changing attitudes towards a bill of rights in South Africa in historical context not for reasons of historical curiosity, but for the purpose of stressing the urgency for the adoption of a bill of rights. Indeed I fear that if a bill of rights is not incorporated into our constitution within the next two or three years we can forget about it and resign ourselves to a struggle for power in which individual rights and the supremacy of law become luxuries which even idealists will be forced to abandon. We stand on the verge of cataclysmic change. Naively, I still believe that the law and legal institutions can guide the political decision-makers towards a just solution; and provide the framework for an environment of negotiation. But I am not so naive as to believe that time is on the side of the negotiators and peacemakers. I see a growing lack of confidence in the courts and legal institutions in the black community as they realize the extent to which law has been manipulated by the present government and as they see law and legal institutions as instruments of National party oppression.' If confidence is to be restored in the law as an instrument of justice and as a method of conflict resolution it will have to be done without delay. And, quite frankly, I do not see how it can be done without a bill of rights. It is in this spirit that I address you today.

1 HISTORICAL OVERVIEW OF THE BILL OF RIGHTS DEBATE IN SOUTH AFRICA

11 The period before 1945

Roman-Dutch law has its roots in the enlightened liberal jurisprudence of Grotius and his successors who were guided by the tenets of natural law.?

1 Lawyers, and particularly judges, have generally refrained from recognizing this trut h.
Recently, however, Mr Justice HC Nicholas, a former judge of appeal, expressed great concern that the courts were now seen as instruments of oppressive social policies by a large portion of the population â\200\224 graduation address, university of the Witwa ters-
rand, 17 April 1986 (The Citizen, 18 April 1986).

2 Sir John Wessels History of the Roman Dutch Law (1908) 291-3.

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It would have been logical for this tradition to produce a legal order in South Africa premised on the rights of man and judicial review, as happened in the United States where adherence to the natural law philosophy led to a i bill of rights protected by the judiciary.? Indeed, we find traces of this natural law tradition in the 1854 constitution of the Orange Free State, which guaranteed certain rights and recognized the competence of the courts to review . enactments of the Volksraad,* and in the famous decision of the high court of the Transvaal in Brown v Leyds NOÂ® in 1896 in which KotzÃ© CJ upheld : the judicial testing power.

But there were other more powerful forces and traditions at work in Southern Africa which ensured that the 1910 constitution of the Union of South Africa made no attempt to include a bill of rights and instead confined itself to the protection of the Cape franchise and equal language rights.5 First, there was the pervasive influence of English constitutionalism which regarded constitutional guarantees as unnecessary. Smuts and Merriman, the two men most responsible for the 1910 constitution were so devoted to the Westminster tradition that they refused to look beyond it to the needs of South Africa.â\200\235 Secondly, there was the memory of Kotze CJ's exercise of the testing power in Brown v Leyds NO which had precipitated a major polit{ ical crisis and resulted in president Kruger labelling the testing power as a â\200\230principle of the devilâ\200\235> which the devil had introduced into paradise to test
Godâ\200\231s word.Â® Thirdly, there was already a distinct distrust of the American constitutional model which was blamed for the civil war and seen to raise the expectations of blacks.Â® Fourthly, notions of equality and humanism, the necessary inspiration for a bill of rights, were sadly lacking in South Africa as a result of the infusion of Austinian positivism, crude Calvinism and naked racism into the body politic.

There was no hope for a bill of rights in 1910. Thereafter, until the second world war, there was little interest in this subject as the â\200\230Boer versus Britâ\200\231â\200\231
struggle dominated South African public life and the lack of rights of the black majority drew little attention. The international climate endorsed this mood: colonialism, in which the suppression of liberty played a central role, was widely accepted and practised, and the rise of the dictators in Europe {left no time for the consideration of racial justice in Africa.

12 The period 1945–1983

The end of World War II heralded in a new era in which race discrimination and the suppression of personal freedom could no longer be tolerated as matters of exclusive domestic concern. The charter of the United Nations, unlike

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Corwin The higher law background of American constitutional law (1955); Howard The road from Runnymede: Magna Carta and constitutionalism in America (1968).
See Sv Gibson 1898 Cape Law Journal 1; Cassim and Solomon v The State 1892 Cape Law Journal 58; Thompson â\200\230â\200\230Constitutionalism in the South African repub licsâ\200\231 1954
Butterworths SA Law Review 49.

(1897) 4 Off Rep 17.

Ss 35, 137 and 152.

Thompson The unification of South Africa 1902–1910 (1960) 95–7.

Sir John KotzÃ© Memoirs and reminiscences (1949) xli–xlii.

Thompson supra 103–5, 187. See, too, the extraordinary attack on the American constitution by Alfred Lyttelton, ex-secretary of state for the colonies, in the British parliamentary debate on the 1910 constitution: Parliamentary debates, 5th series, ix, cols 966–7 (16 August 1909).

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rights was rejected primarily because it emphasized individual rights â\200\234whereas particularly the Afrikaner with his Calvinist background is more inclined to place the emphasis on the State and the maintenance of the Stateâ\200\231â\200\231.2’ T hus

the constitution bill presented to parliament contained no guarantees for personal liberty and a roposal th bill of righ i i n-

stitution was firmly rejected by the government.2?

2 CURRENT ATTITUDES TOWARDS A BILL OF RIGHTS

A bill of rights and apartheid or separate development (however one chooses to describe our presently racially structured society) are completely incompatible with each other. Central to any bill of rights would be a provision guaranteeing the equal allocation of basic rights without any distinction based on race, gender, religion or political opinion. Furthermore, a bill of rights would of necessity outlaw torture, detention without trial and unreasonable restraints on freedom of political expression. This means that one cannot seriously contemplate the introduction of a bill of rights unless one is prepared to accept the total abolition of the apartheid legal order and the repeal of many of the provisions of the Internal Security Act.?

The unwillingness of the government to consider a bill of rights flows directly from its continued adherence to the laws of apartheid. In his opening address to parliament in 1986 the state president committed himself to the sovereignty of the law as a basis for the protection of human rights regardless of colour.2* But this rhetoric does not completely accord with reality; for there is no suggestion that the Group Areas Act, the Population Registration Act and a host of other discriminatory and repressive laws are to be repealed despite the great advance inherent in the promised abolition of the pass laws. In short, the government still has a long way to go before it can be expected to endorse a bill of rights.

There are more hopeful signs among the judiciary. The courts have adopted a benevolent approach towards race and security laws in recent times and in S v Marwane? the appellate division demonstrated its ability to utilize a bill of rights when it set aside the Terrorism Act? as incompatible with the Bophuthatswana bill of rights. Individual judges have also been willing to commit themselves in favour of a bill of rights. At least Corbett JA,â\200\235 Milne JP,2 Leon J2 and Didcott J* have given their public support to this

Second report of the constitutional committee of the president â\200\231s council PC4/1 982

ch 9 para 9 10. This report was later endorsed by the Minister of Justice in â\200\234H oekom

nic ’n verklaring van menseregte nie?â\200\235â\200\231 1984 Journal of Juridical Scien ce 5. For a criti-

cism of the report see Van der Vyver â\200\234The bill-of-rights issueâ\200\231 1985 10 Journal of

Juridical Science 1.

22 House of assembly debates vol 108 cols 11181-494 (15-17 August 1983).

23 Act 74 of 1982.

24 The Star 31 January 1986.

25 1982 3 SA 717 (A).

26 Act 83 of 1967.

27 â\200\234Human rights: the road aheadâ\200\235 1979 SALJ 192 at 196.

28 Interview reported by Kenneth Jost in The law in South Africa (reprinted from The Los Angeles Daily Journal (1986) 21.

29 â\200\234A Bill of Rights for South Africaâ\200\235 1986 SA Journal on Human Rights 60.

30 The Star 23 June 1980; Sunday Tribune 29 June 1980.

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_ within a framework which most South

cause. However, it is clear that many other judges do not share this view and from recent press interviews it seems that Rabie CJ3' and Munnik JP3? still prefer the status quo.

I know of no study of lawyersâ\200\231 attitudes towards a bill of rights, but the growing concern of the general council of the Bar and the Association of Law Societies for human rights and the establishment of Lawyers for Human Rights in 1980 point towards a concern for the need for legal safeguards for individual liberties. Academics too seem to be moving in this direction.

Among political parties, the PFP is still committed to a bill of rights, although the Labour party in the house of representatives and both the National Peoples party and Solidarity in the house of delegates support this cause. The final form â\200\224 if any â\200\224 of the â\200\230â\200\230Natal/KwaZulu optionâ\200\231 is still far off but there is a reasonable prospect that any such political dispensation will include a bill of rights as the Buthelezi commission report of 1982 envisaged such an institution.

While support is growing for a bill of rights in the centre of the political spectrum there is no doubt that â\200\230â\200\230the leftâ\200\235 â\200\224 if one may be permitted to use such a term â\200\224 is rapidly losing its enthusiasm for legal safeguards for individual rights. The attitude of the ANC towards a bill of rights is unknown.

_as since 1960 its voice has been silenced in South Africa. Arguably the endorse. } ment of constitutional safeguards for individual liberty is inherent in the freedom charter of 1955, which was in part inspired by the universal declaration of human rights of 1948, but the United Democratic Front which, like the ANC, views the freedom charter as its political foundation, has refused to be drawn into constitutional planning and thus to express.its policy towards a bill of rights. That such an institution does not rank high among the priorities of â\200\234â\200\230the leftâ\200\235â\200\235 was made clear at a recent conference held at the university of Cape Town. Dr Van Zyl Slabbert said that pleas for.a bill of rights were unrealistic until there had been nuine sharing of power, while Profes-

sor Denis Davis stated that if a bill of rights were imposed-now-it-would-be-

Africans considered to be illegal and

be seen to be a veto power for whites and thus have no legitimacy.â\200\231*

In Alan Patonâ\200\231s Cry, the Beloved Country the Reverend Msimangu said that he had one great fear in his heart, that one day when whites turned to loving they would find that blacks had turned to hating. I fear this is the

bys os race relations in this country and that it is also the fate of the bill of rights.

For years blacks have pleaded for the legal protection of human rights. Now that many whites, and possibly even the National party government, are more sympathetic towards a bill of rights, blacks, who increasingly see power round the corner, appear to be reluctant to accept an instrument perceived to be a method of protecting whites or Afrikaners who see themselves

31 Supra n 28 at 20.

32 Ibid at 21.

33 Report of the Buthelezi commission on the requirements for stability and development in KwaZulu and Natal (1982) vol 1 114. â\200\231

34 Marcus The freedom charter: a blueprint for a democratic South Africa (1985) 38.

35 The Star 14 April 1986.

as a potentially threatened minority. Those who have suffered long outside the protection of the law are now unwilling to see their oppressors brought within the protection of the law.

This development emphasizes the need for the rapid introduction of a bill of rights; that is for its introduction while whites are still in power and acting from a position of strength rather than one of weakness. The black community, which has already lost much of its confidence in our legal system, must see the introduction of a bill of rights as a change of heart towards human rights on the part of the ruling Afrikaner Ã©lite and not as an attempt

to protect an endangered species.

Realistically, if a bill of rights with judicial review is to be introduced within the next two or three years, it would be limited to guaranteeing equality before the law, and to protecting individual liberties, such as the freedoms of person, movement, speech, association and assembly. It would not attempt to deal with the franchise and the introduction of economic justice. Thus it is no immediate cure for our problems but simply a means to an end.

Ideally, I would like to see a bill of rights guaranteeing a universal franchise and securing economic and social rights enacted by a fully representative assembly of the people, as part of a new political order. But I fear this dream is still far off. This is why I plea for an interim strategy with a more modest bill of rights enacted within the prevailing order. Briefly, such a bill of rights would achieve the following objectives:

(a) By guaranteeing freedom of association (and hence the unbanning of the ANC), assembly and speech it would create the necessary political environment for negotiation.

(b) By guaranteeing equality before the law it would empower the courts to set aside all discriminatory laws. Politically it may be easier for the courts rather than the government to invalidate measures such as the Group Areas Act. Certainly the experience of the United States tends to support such a view as it is clear that Congress could not â\200\224 politically â\200\224 have desegregated
schools in 1954, as did the supreme court in Brown v Board of Education .?Â¢

(c) It would help to restore respect for our law and legal institutions at a time when they are fast falling into disrepute. Law must be seen as an objective instrument of justice and not simply as the weapon of the ruling Ã©lite. A bill of rights guaranteeing universally acclaimed fundamental rights might help to salvage the harm done by years of apartheid laws.

I repeat that there is an urgency in this matter. We meet here as lawyers concerned about our legal system and as South Africans concerned about our country. In both capacities I believe that we have an interest in a bill of rights.

36 Supra.

Menseregte-aktes:
â\200\231n vergelykende oorsig

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SUMMARY

Almost every one of the worldâ\200\231s more or less 150 independent states has a written

constitution with human rights provisions. A mere examination of constitutional texts does, however, not provide a reliable yardstick with which â\200\230â\200\230human rights practicesâ\200\235â\200\231 can be measured. Human rights provisions cannot be separated from the ideological assumptions upon which they are based and the socio-political conditions under which they are applied.

The USA provides the best example of a dynamic legal application of the human rights concept with well-developed human rights doctrines and institutions to protect such rights. The â\200\234â\200\234legalâ\200\231â\200\231 history of the American bill of rights is, however, a social, economic and political history of that country, underscoring the fact that the same condition of human rights cannot readily be achieved by a more or less technical reproduction of constitutional provisions and instruments elsewhere.

Although the written constitutions of most West-European states have contained human rights provisions since the nineteenth century, the provisions have not had the same impact as in the USA â\200\224 judicial review is a post second world war phenomenon with a somewhat narrower application. Notable features of the human rights scene in Western Europe are firstly the impact of the European convention on human rights and freedoms on the legal systems of its signatories; and secondly the explicit constitutional reference to social, economic and cultural rights and the constant endeavours to strike a balance between positive state action required by these rights and non-interference guaranteed by virtue of the classical rights to, for example, privacy, freedom of speech, assembly and association.

Despite the fact that classical Marxism had little use for human rights, all communist constitutions contain extensive human rights provisions. Citizensâ\200\231 duties and social and economic rights feature prominently while state action with regard to these rights is readily extended to the rights to individual freedom as a strengthening of the â\200\234â\200\230social dimensionsâ\200\231â\200\231 of these rights.

Almost all African independence constitutions contained bills of rights. Although judicial review (provided for in most former British colonies) was not a successful instrument to prevent human rights violations, human rights provisions have been retained in most post independence constitutions. The draft African charter on human and peoplesâ\200\231 rights prepared by the OAU, embodies a collective African approach towards human rights which is clearly distinguishable from East European collectivism. It also contains the interesting concept of â\200\230â\200\230peoplesâ\200\231 rightsâ\200\231â\200\231, albeit with a rather uncertain content.

Human rights should and will most probably feature in some or other form in a new negotiated South African constitutional dispensation. Since bills of rights have generally not lived up to expectations outside Northern America and Western Europe, recommendations in this regard should go beyond mere suggestions that â\200\230â\200\230there should be a bill of rights with judicial reviewâ\200\231â\200\231. The concept of human rights covers the relationship between the individual and the state in all its manifestations and a human rights debate cannot be limited to, for example, judicial control of state interference

with individual liberty â\200\224 the stateâ\200\231s supportive role and the individua
lâ\200\231s participa-
tion in decision making are also relevant. Human rights systems differ in content
and application and the major ideologies underlying them are heard in the present
South African political debate. Everyone should be clear on the kind of bill of rights
he proposes. This may reveal serious differences, but unless the contents of a South
African bill of rights is based upon an agreement on how the acute political and socio-
economic problems should be solved, South Africa would provide the world with
yet another decorative and ineffective bill of rights.

1 INLEIDING

In 1776 is menseregtebepalings vir die eerste keer in â\200\231n grondwet in die Noord-
Amerikaanse staat Virginia verorden. Tweehonderd jaar daarna verklaar
Louis Henkin in sy werk The rights of man today:

Today human rights is a term in common use in many languages, in the rhetoric
of national politics everywhere and of international diplomacy, in the learned jar-
gon of several professions and academic disciplines. All civilizations proclaim their
dedication to them; all the major religions proudly lay claim to fathering them;
every political leader and would-be leader makes them his platform. What the
United States (borrowing from its English mother) and France planted and dis-
seminated now decorates almost every constitution of todayâ\200\231s 150 states â\200
\224 old
or new, conservative or liberal or radical, capitalist or socialist or mixed, deve-
loped or less developed, or underdeveloped. Human rights are now also established
in international law, are the subject of numerous treaties and conventions, and
are the business of every foreign office and numerous intergovernmental bodies
and non-governmental organizations. Even philosophers, if not all persuaded, have
muted their agnosticism and moved their inquiries to less fundamental planes.
Human rights, we must conclude, have now become for everyone, everywhere,
a â\200\234â\200\230goodâ\200\231â\200\231; by some definitions, indeed, human rights a
re everything good in human
life and society.
Die wÃ©reld se nagenoeg 150 onafhanklike state het haas elkeen n geskrewe
grondwet? en van hierdie grondwette is daar weinig waarin verwysings na
die regte van die individu nie voorkom nie. Van Marseveen en Van der Tang
het in 1976 bevind dat van die 157 grondwette wat hulle ondersock het, 128
(90, 1%) die spesifiecke woorde â\200\230â\200\230burgerlike, mense-, politieke, fundam
entele,
of individuele regteâ\200\231â\200\231 of soortgelyke uitdrukkings bevat het.? Sekere g
rond-
wette bevat ander uitdrukkings byvoorbeeld â\200\230â\200\230politicke vryhedeâ\200\231
â\200\235 of â\200\234â\200\230pub-
lieke regteâ\200\231â\200\231.4 In totaal was daar slegs ses grondwette (4,2%) sonder e
nige
bepalings oor burgerlike regte en/of pligte.â\200\231 In die algemeen kom hulle tot
die gevolgtrekking:
Constitutions could be said to have a bill of rights written into them and this also
has a standard content, dealing most frequently with freedom of conscience and
religion (89.5 pc) and thereafter with the right of assembly or association (88.7 pe),

1979) xii-xiii. ;) }
go a state wat nie formele â\200\234â\200\230grondwetteâ\200\231â\200\235 het nic, bv d
ie Verenigde Koninkryk
en Israel, bestaan daar of wette wat vir alle prakticse docleindes as grondwelte beskou
kan word (bv dic sg Basic laws in Israel) of goed gedokumenteerde gewoonteregsreÃ©ls
met min of meer ’n vaste inhoud (die sg konvensies in dic Verenigde Koninkryk â\200\224
sien Marshall Constitutional conventions (1984)).

3 Written constitutions â\200\224 a computerized comparative study (1978) 100.
4 101.
S 102.

defendantsâ\200\231 rights (88.0 pc) and freedom of expression (87.3 pc). Subjects also dealt with but slightly less frequently are the right to property (83.1 pc), equality (82.4 pc) and the right to private life (80.4 pc).Â¢

Die grondwette van â\200\231n vyftiental kommunistiese state het in 1980 gesamentlik 353 artikels oor regte van die individu bevat; dit wissel vanaf drie bepalings in die grondwet van Kampuchea tot 51 in die grondwet van J oegoslawiÃ©.â\200\231 Volgens MahaluÂ® was daar in 1984/1985 uit 46 Afrikastate? slegs nege state waarvan die grondwette geen verwysings na menseregte bevat het nie.

Vergelykende statistiese gegewens van hierdie aard is interessant, maar daar word algemeen aanvaar dat die waarde daarvan redelik beperk is.’Â® Daar bestaan â\200\231n hele aantal redes vir hierdie toedrag van sake:

(@) Alhoewel die formulering van die afsonderlike regte in verskillende grondwette dikwels dieselfde is, moet dit gelees en begryp word teen die agtergrond van die filosofiese opvattings van die opstellers daarvan.’’ Bepalings in die grondwette van die negentiende en vroeg-twintigste eeu weerspieÃ©l die rasionele humanisme en liberale regstaatopvattings van die agtiende en negentiende eeue; diÃ© in byvoorbeeld die grondwet van Wes-Duitsland, die sosiale regstaatgedagtes van die twintigste eeu; terwyl bepalings in grondwette van kommunistiese stelsels nie los beoordeel kan word van die regsleer waarop

6 161. Sien ook Boli-Bennet â\200\230Human rights or state expansion? Cross-national definitions of constitutional rightsâ\200\235 in Nanda, Scarritt & Shepherd (reds) Global human
rights: public policies, comparative measures, and NGO strategies (1981) 178 wat in 1970 bevind het dat in die 141 grondwette wat hy ondersoek het, 66% substantiewe bepalings bevat het oor die reg op vrye vergadering, 79% oor vryheid van spraak, 56% oor behoorlike regsprosedures, 78% oor stemreg en 40% oor sosiale en ekonomiese regte.

Die USSR (31), AlbaniÃ© (28), Bulgarye (32), Volksrepubliek van China (16), Kuba (22), Tsjeggoslowakye (20), die Duitse Demokratiese Republiek (229), Hongarye (17), Kampuchea (3), Noord-Korea (24), MongoliÃ© (14), Pole (27), RoemeniÃ© (25), Noord-Vietnam (21), JoegoslawiÃ© (51) â\200\224 Simons (red) The constitutions of the Communist world (1980)
634. Aanhalings uit dic betrokke grondwette in hierdie referaat is uit die Engelse vertaling daarvan in Simons. RB

â\200\230Africa and human rightsâ\200\231 12 Verfassung und Recht in Ubersee 7-13.

Die Republiek van Suid-Afrika en die state wat voorheen deel gevorm het van die Republiek is nie daarby ingesluit nie.

10 Sien oa Simons xiv; Mahalu 14; Kunig â\200\230â\200\230Regional protection of human rightsâ\200\231 12 Ver-
Jassung und Recht in Ubersee 34. Safran â\200\234â\200\230Civil liberties in democracies: constitutional
norms, practices and problems of comparisonâ\200\231â\200\231 in Nanda er al 195 verklar: â\200\230â\200\234â\200\230Political systems are frequently categorized as free, partly free, and unfree, based on the extent to which civil liberties exist within them. Such categorization is sometimes derived
from a systematic examination of constitutional texts. There is a fair degree of consensus that constitutional provisions in English-speaking democracies, in the countries of Northern and Western Europe, in Japan, in Israel, and perhaps in some smaller Latin American states (eg, Costa Rica) reflect the reality of civil liberties to a signifi-

cant degree. Conversely, it is understood that in many of the countries, civil rights provisions, if they are included in constitutions, are largely decorative or at best nominal
â\200\224 ie, they serve as a guide to possible future application.â\200\235

Maritain Man and the state (1951) 79 verklaar: â\200\230On the level of rational interpreta-
tions, on the speculative or theoretical level, the question of the rights of man brings
into play the whole system of moral and metaphysical (or anti-metaphysical) certain-
tics to which each individual subscribes. As long as there is no unity of faith or unity
of philosophy in the minds of men, the interpretations and justifications will be in
mutual conflict.â\200\235

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the covenant of the League of Nations, proclaimed the internationalization
of human rights'Â® and in 1948 the general assembly adopted the universal

declaration of human rights. Progressive forces were now on the move: the

United States abandoned segre ation in 1954;!! West Germany, India and
other states adopted bills of De the European convention on human rights

extended liberties backed by new methods of international enforcement to
millions of Europeans; international covenants on human rights were
adopted; and the imperial powers set about dismantling their colonial empires.

â\200\230While the world advanced in terms of human righ
into the policy of apartheid which invoked the la
promote racial discrimination and political repression. Liberal forces in South

â\200\234Africa were obliged to concentrate their resources on the preservation of the

few rights recognized by the constitution â\200\224 the entrenched clauses. A bill

â\200\234of rights seemed an unattainable goal as_a ruthless government set_about
d : St BBL li 1 iol i "
culating the courts. 2
In the wake of the constitutional crisis, however, interest in a bill of rights
was revived by the Molteno commission of enquiry. established by the newly
formed Progressive party. This commission, comprising a group of eminent
lawyers (including ex-chief justice Centlivres), academics and public figures
found that a sovereign parliament was inappropriate to South Africa and
recommended a bill of rights, protected by judicial review in a federation. 'â\200\231

These recommendations were approved by the Progressive party with the
result that the advocacy of a bill of riechts and judicial review for the first...

time became an important part of the political debate in South Africa. This
new vision spread to the legal profession too as scholars expounded on the
advantages of the American model."

In 1961 attempts by the Progressive party and the Natal provincial coun-
cil to have a bill of rights included in the republican constitution of 1961.
failed dismally.'s The ruling National party government was not interested
in rights and liberties except for the chosen few. Thereafter South Africa
entered its bleakest period â\200\224 the Vorster era. First as Minister of Justice
and Police, and then as Prime Minister, John Vorster succeeded in trans-
forming South Africa into a police state. I know that this is a harsh term
to use but when one looks back at the Vorster years, it seems fair to describe
South Africa of the 1960s and 1970s under Vorster as a police state. In any
event, it was not a time for serious advocacy of a bill of rights as organiza-
tions and individuals were banned, dissidents detained and tortured and free-
dom of speech curtailed by a network of laws and police practice. For many
political figures survival became the main objective.

10 Articles 55 and 56.

11 Brown v Board of Education 347 US 483 (1954).

12 See further on the â\200\230â\200\230constitutional crisisâ\200\231â\200\231 Dugard
Human rights and the South Afri-
can legal order (1978), ch 2.

13 Molteno commission report on Franchise proposals and constitutional safeguards
(1960).

14 Sce eg Cowen The foundations of freedom (1961).

15 Dugard supra n 12 at 34.

In the 1970s a number of factors gave rise to a new interest in the legal protection of individual liberties. These included:

(a) The overdue realization, particularly among lawyers, that the constitutions of 1910 and 1961 had facilitated the suppression of personal freedom and furthered racial injustice.

(b) The increased support for the Progressive party (now Progressive Federal party), which is committed to a bill of rights, in the 1974 general election...

(c) The growth of the international human rights movement.

(d) The new interest in bills of rights in. Commonwealth countries, notably Canada, which had previously followed the Westminster-model-of Parfismentary supremacy.

(e) The growth in cultural and professional relations with the United States, which resulted in an increased awareness of the American constitutional system.

(f) The National party governmentâ\200\231s support for a bill of rights in Namibia, ’Â¢ despite its opposition to such an institution in South Africa itself.

(2g) .Bophuthatswanaâ\200\231s adoption of a bill of rights. when. it became.independent in 1977. ith j

(h) A new awareness of the judicial function which went some way towards exploding the hitherto carefully exploited myth that South African judges simply â\200\230â\200\234â\200\234â\200\230declaredâ\200\231â\200\231 the law. Studies showing that during the 1960s South African judges had frequently exercised a substantial judicial choice in favour of the government!â\200\235 made lawyers realize that the complete depoliticisation of the judiciary was impossible under the existing system. This helped to debunk the charge that the introduction of a bill of rights and judicial review would politicize a hitherto neutral judiciary.

13 The 1983 constitution

The 1983 constitution was preceded by lengthy political debate, which included substantial support for a bill of rights. The PFP remained committed to a bill of rights and judicial review, but it now enjoyed the open support of a number of judges â\200\224 including one judge of appeal (Corbett JA)’Â® = and Afrikaans juristsâ\200\231 â\200\224 including the head of constitutional planning in the newly created Department of Constitutional Development and Planning (Professor IM Rautenbach).20

In these circumstances one might have expected serious attention to be given to the inclusion in the new constitution of an entrenched bill of rights or at least, an unentrenched bill of rights along the lines of the Canadian bill of rights of 1960. But it was not to be. In 1982 the constitutional. committee.

_of the Presidentâ\200\231s Council published a report. i i prejudice, which showed quite clearly that the National party. had-not.changed its attitude towards. individual rights and equality before the law. A bill of

16 See Boulle â\200\234The Turnhalle testimonyâ\200\231 1978 SALJ 49.

17 See Dugard supra n 12 part 4.

18 â\200\230â\200\234â\200\234Human rights: the road aheadâ\200\235 1979 SALJ 192.

19 See Van der Vyver Die beskerming van menseregte in Suid Afrika (1975)
20 â\200\231n Nuwe grondwetlike bedeling in Suid Afrika Jacobs ed (1981) 51.