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AFFIRMATIVE ACTION AND GOOD GOVERNMENT

A FRESH LOOK AT CONSITITUTIONAL MECHANISMS FOR RE-DISTRIBUTION IN SOUTH AFRICA

Albie Sachs

Cape Town - Cambridge

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Alistair Berkeley Memorial Lecture

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PART ONE : THE SETTING

Fly over any city, drive through any suburb, travel past the farms of South Africa, and immediately you see who owns what, who lives how, whose streets are lit at night and whose are dark. Go to any school or hospital or playground, and, with marginal differences, the story is the same.

Our children and our grandchildren are born into a world where their life chances are grossly unequal. However skilled or hardworking or upright they might be, their destinies are determined not primarily by any virtue or merit they might have, but by the accident of how their parents were classified by the state.

Colour rather than need or ability is still the greatest factor in deciding who will wear shoes or who will go barefoot, who will get water by switching on a tap and who has to walk miles each day to fetch it, who will matriculate and who will be unable to write his or her name, who will die of measles or malnutrition and who will go on to sail round the world.

Now that the battle for equal voting rights is slowly and relentlessly being won, we have to embark on the even more arduous task of guaranteeing equal access to the resources of the country.

Affirmative action is in the air. We put it there, and it is our duty to explore its implications, give it a thoroughly South African meaning, ensure that it responds to the claims of all our people and not just of a small new elite, and finally see to it that it achieves such success that it extinguishes itself.

In a distressingly ironic way, there is nothing new about affirmative action in South Africa. We have had it for decades, even for centuries, with this special difference, that it operated not in favour of the disadvantaged but for the benefit of the advantaged. By law and by practice, quite independently of individual merit or entitlement, the section of the population classified as white were given immense and at times total advantage in relation to their fellow South Africans.

Thus, the whole of apartheid law amounted to no less than a systematised and unjust form of affirmative action in favour of the whites, who were granted preferential access to land, to employment, to credit, to participation in cultural or sporting life, indeed, to every amenity and facility that society had to offer.

After their election victory in 1948, the Nationalists practised linguistic affirmative action within racist affirmative action, embarking on a conscious and declared policy of promoting Afrikaners in general and their supporters in particular in every area of South African life. Their claims that whatever the law might have said, Afrikaners were subject to various forms of exclusion and disadvantage, undoubtedly had merit, but not nearly as much as those of black South Africans today.

The Nationalists now acknowledge that their policies have failed, but they continue largely to uphold their basic principle of governmental spending: to those that have, it shall be given four or five times over.

The special favouring of the privileged minority continues to this day. While aspects of formal race segregation have been abolished, the system of 'own affairs' enables us to see clearly what is hidden in other countries, namely the iniquitous statistics of continuing advantage and disadvantage.

Thus, each white child still gets five times as much spent on his or her education as a black child. White patients continue to have four times as much spent on their health, while white farmers get vast benefits in the form of soft credits and price subsidies that are not available to black farmers. Even old aged pensions are heavily weighted in favour of whites.

It grieves one to be referring to blacks and whites, to be using the language of race. We long for the day when colour is completely irrelevant in our society, when we are all just human beings, South Africans, with a common love for this country, and possessing an equal chance of enjoying its riches, the moment when skin colour is not even noticed, let alone referred to. To achieve that, is, and must always be, our goal. Indeed, it has to be the primary aim of affirmative action.

Yet the truth is that the injustices and inequalities produced by past race discrimination do not go away simply

because the laws which enforced the discrimination are repealed. To ignore the realities of racial inequalities would be an example not of being colour-blind, but of being totally blind.

Whether in the public or the private sector, the situation is the same. Look at who sit on the boards, who direct the departments, who control the supply of money or paper or cement, who sit behind the desks and who carry the messages.

To deepen the injustice, these inequalities replicate themselves from generation to generation. Illiteracy, ill-health and poverty get handed down as a bitter bequest from parents who would love to do well by their children, but who lack the where-with-all. On the other hand, wealth, skills and confidence get locked into the communities and families that have always enjoyed them.

Inequality continues as before, only now it is regarded as natural, or, worse still, as the fault of the disadvantaged.

What a painful paradox it would be if, after decades of struggle and sacrifice, we succeeded in doing what apartheid could never do, namely, in legitimising inequality.

FEARS ABOUT AFFIRMATIVE ACTION

The best way of dealing with fears is to confront them, not to evade them. The problem in our country is that everything is divided, even our fears. This faces us with the difficulty of finding uniform principles to deal with divided fears.

Since the means of public expression are largely in white hands, we have no difficulty in discovering what white fears are. Time and time again we are warned against policies which will result in unqualified people blinded by ideology or spurred on by personal greed being placed in positions of economic command. The resulting combination of ideological misguidedness and personal ineptitude, we are told, will rapidly lead to total economic and social collapse, African style.

Blacks, on the other hand, are said not to have fears but to have expectations, usually, we are informed, of an unrealistic kind. The central problem is then projected as being how to balance white fears against black expectations.

The reality is that South African expectations are far more universal than ~~our~~ fears. Virtually all South Africans expect that government will be fair and honest, that they will be able to get on with their lives in a dignified way and live in prosperity and peace. No-one wants a breakdown of public institutions or a collapse of the economy.

Blacks fear that:

whites will destroy everything rather than live in equality ~~with them~~;

alternatively, ~~that~~ there will be formal equality ~~in that everyone will get the vote~~, but white domination will continue unabated in the social and economic spheres;

alternatively, ~~that~~ affirmative action will enable a small section of the black middle class to advance into white society, while the great majority of the people are left to carry on living in segregated squalor and misery. What we will have is not non-racial democracy, but non-racial authoritarianism, ~~which, when~~ combined with heartless free market principles, will result in continued oppression of the majority, colonial style.

What we need, says Govan Mbeki, is not affirmative action but social change.

It is in this situation of mutually re-inforcing fears that constitutionalism can come to the recue. Constitutionalism seeks out rather than runs away from incompatabilities. Its function is precisely to grasp paradox, acknowledge contradiction. Far from homogenising society and proclaiming a universality of opinions, it pre-supposes diverse and conflicting interests and posits universally accepted means of dealing with them. Good faith, past record, body alchemy between leaders and even, some would say, a favourable conjunction of the planets, might have their role to play, but none of them can act as substitutes for clearly expressed constitutional provisions.

Constitutionalism thus acknowledges the universality of South African expectatations and the separate and contradictory nature of South African fears. It then seeks to find broadly acceptable principles to deal with the tensions between the expectations and the fears.

Constitutions have to speak loudest precisely where the clash of arms is ~~the~~ greatest. We may predict that long after agreement has been reached on the three 's's -

sovereignty, suffrage and the state - there will still be emotional debate about the three 'p's - property, pensions and posts.

What we need to do at this stage is not to attempt to solve all these problems at once, but to create a constitutional mode in terms of which they can be faced up to and handled in the future.

Already we find two different approaches being adopted. The one is problem-evasive, the other problem-confronting.

The problem-evasive strategy is to strive for secret accommodation between elites to produce as plausible and vague a formula as possible. This is then sold to followers with minimum precision and maximum publicity.

It bases itself on the assumption that the public is stupid, greedy and not very interested in politics. It replaces the good principle of pragmatism with the negative one of ad hoc-ism. It confuses the vigorous scepticism about people and about power that must infuse any constitution, with a debilitating cynicism about constitutionalism itself. The constitution becomes a device for buying time rather than the basis of an ~~enduring~~ compact that endures into the future.

The danger of making constitutional arrangements through deals is that they can be unmade ~~through similar transactions~~ in the same way. The more solemn, ~~open~~ popularly-based, widely-agreed to, fully-debated the terms of the constitution, the more profound and open the process of any alteration will have to be.

The problem-confronting strategy, on the other hand, is to open up the debate as widely as possible, to search for such common ground as exists, to work out reasonable means for dealing with unresolved issues, and to agree to move forward on a step by step basis. It acknowledges that the best way to ~~move forward~~ advance is to acknowledge the existence of harsh current realities; at the same time, it rejects fatalism as a constitutional principle, and insists on the optimistic idea that putting the right institutions, values and persons in place to achieve progressive goals ~~will~~ may make a difference.

This approach pre-supposes that people on all sides are capable of great wisdom and common sense if they are directly involved in discussions about their future, receive the information necessary for intelligent decisions, trust the procedures being adopted and genuinely feel that their opinions will make a difference.

PART TWO - THE BACKGROUND

THE WORD 'BUT'

Bertrand Russell, the critical English philosopher who, amongst many things in an extraordinary life of 94 years employed Ronnie Kasrils*, once said that the most important word in the English language was ~~the word~~ 'but'.

Five years ago, when the newly-formed Constitutional Committee of the ANC was debating the question of whether to support a Bill of Rights for South Africa, the answer we gave was an emphatic 'yes', followed by an equally resonant 'but....'

We had no doubt that the Freedom Charter supported the idea of a constitution that gave firm and clear guarantees that all South Africans would in future be able to enjoy fundamental human rights and freedoms. The NEC had come out explicitly in favour of a multi-party democracy and of a justiciable Bill of Rights, that is, of an entrenched set of principles and norms that could be invoked by recourse to the courts if necessary.

Our fear was that a Bill of Rights would be projected in such a way as to highlight one aspect of the Freedom Charter while extinguishing another. We were concerned that after generations of struggle we would finally succeed in entering the political kingdom, but that all else would be denied unto us.

In other words, we would win freedom without bread, when what we wanted was freedom with bread; worse still, the freedom would be defined in terms which precluded us from getting bread. Our biggest victory would be our greatest defeat; the very constitution that signalled equality would prevent us from achieving equality, and, worse still, we would have signed away our rights ourselves. Life would be as unjust in conditions of freedom as it was under apartheid.

This is where the word 'but' came in. It was the fundamental qualification that a strong and meaningful Bill of Rights be associated with an equally firm constitutional requirement for steps to be taken to eradicate the inequalities created

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* Well-known member of the ANC who recently emerged from the underground

by apartheid. Without that, the quest for human dignity in our country had little meaning.

Perhaps in an earlier phase of our lives we would have hesitated in supporting a Bill of Rights at all. We might have condemned the idea as bourgeois, thereby, first, depriving ourselves of a major instrument of liberation, second, handing the notion over to the bourgeoisie as their private property, and, third, letting them have it in violation of their own market principles free, gratis and for nothing.

In any event, the Constitutional Committee threw its weight enthusiastically behind the idea of a Bill of Rights [well before the debacle of Eastern Europe], indicating that affirmative action should be integral to the process of extending human rights to all South Africans.

Persons who received the ANC Constitutional Guidelines some years ago will recall that the document included clauses calling for programmes of affirmative action to overcome the massive inequalities produced by apartheid. Particular mention was also made of the need to redress the disabilities imposed on women, by means of affirmative action.

We gave no definition of affirmative action. Indeed, we are unaware to this day of the term ever having been defined in legislation or international covenants. Modern conventions, however, frequently have articles which make it plain that any special treatment to favour language, cultural, religious and educational rights of formerly oppressed groups, and any moves to overcome the disadvantages imposed by past gender and race discrimination, shall not be regarded as violating human rights principles.

The phrase affirmative action came from the United States, where it had had a turbulent history. In using it, we studied American experience but gave it our own South African significance, importing neither the specific forms it took in that country nor the controversies it evoked there.

We regarded it as an advantage that the term had an open rather than a closed meaning. It has been said that the key words of any constitutional document are creatively ambiguous. A fundamental concept is established on the basis of its manifest appropriateness and necessity, and texture and refinement are then added by subsequent generations.

We needed, and still need, the substantive rightness of a broad constitutional principle that requires that active steps be taken to secure equal chances in life for all. We also wanted and continue to want a sense of procedural security. Thus we need clearly defined pointers both as to what the principle embraces and how it is to be applied.

The actual working out we will have to leave to future practice.

STRATEGIC CONSIDERATIONS

The emphasis we gave to affirmative action was based on a number of strategic constitutional considerations.

In the first place, we did not know how change was going to come about, whether through insurrection or negotiations or a combination of both. Accordingly, we wanted a concept that would require and accommodate change in all possible situations, but not be dependent on any particular mode of transformation [the one option we did not contemplate was defeat].

Secondly, after consultation with the NEC, we put forward the notion of a mixed economy as a constitutional concept. This pre-supposed an important role both for the state and the private sectors in the economy. Affirmative action is a strategy that is peculiarly well-suited to facilitate re-distribution in a mixed economy; it is ideologically open and pre-supposes active steps being taken to redress imbalances in both the public and the private spheres.

Thirdly, considerable experience, both of a positive and a negative nature, had been gained in the United States of affirmative action in practice. Difficult conceptual and practical issues had been confronted, and a number of techniques and strategies developed capable of fitting comfortably within a Bill of Rights framework. We could benefit as much from knowing about the errors and setbacks as we could from having information about the successes.

Many of the questions remain complicated, particularly that of the relationship between non-racialism [non-sexism], equal protection, and quotas. Possibly our experience in South Africa will feed back to our brothers and sisters in the USA. In addition to being able to apply hindsight to their struggles, we can look forward to certain advantages: we can count on majority support, we can anticipate clear constitutional authorisation for affirmative action and we

can rely on a deep-rooted and continuing tradition of non-racism to give it an across-the-board character.

Without doubt, we must avoid becoming too closely embroiled in American controversies, especially since they have, like many American institutions, taken on a colouring not unrelated to the election campaigns in which they featured. What is clear is that without a clear constitutional commitment to affirmative action, our courts will flounder, the judges will divide and the causes both of equality and tranquility will suffer.

Finally, and most important of all from a technical point of view, the concept of affirmative action established a firm and seamless connection between the clauses of the Freedom Charter dealing with fundamental freedoms and those referring to social rights. On the one hand, it guaranteed that being free and having the vote would better enable people to work for social advancement, on the other it ensured that the achievement of social rights would come about under the rule of law according to just principles and fair procedures.

Affirmative action should thus be seen neither as the fairy godmother of the East nor as the wicked witch of the West but as as the ~~home-born~~ midwife of equity.

It forbids the constitution, under the guise of a false libertarianism, from becoming an instrument of human abandonment, heartlessness and neglect; it prevents good constitutional concepts like equal rights and freedom of association from being turned on their heads so as to promote the privatisation of misery and what may be called the inevitabilising or fatalising of inequality.

At the same time, affirmative action excludes another and opposite kind of libertarian lawlessness, namely, constitutionalised banditry in the form of arbitrary confiscation, self-help and warlordism.

It thus becomes the even-handed alternative both to congealing present inequalities and to establishing 're-distribution' through nepotism, corruption, protection and jobs for pals.

PART THREE - PRINCIPLES OF AFFIRMATIVE ACTION IN THE BROAD SENSE

Affirmative action in the South African context has extremely broad connotations, touching, as apartheid did and

still does, on every area of life. It goes to the heart of the human rights idea in our country. It is the foundation of a sense of shared citizenship and common allegiance to South Africa.

It expresses a commitment to the taking of firm, orderly and principled steps to overcome the enormous divisions in life-chances created by apartheid.

It is the great de-stabiliser of the abnormal society created by apartheid, and the profound re-stabiliser of the new country we want to build.

In its widest sense, affirmative action covers all purposive activity designed to eliminate the effects of apartheid and to create a society where everyone has the same chance to get on in life. In terms of the ANC draft Bill of Rights, all anti-discrimination measures, as well as all anti-poverty ones, may be regarded as constituting a form of affirmative action.

The draft Bill contemplates a wide range of principles and strategies to overcome the inequalities created by apartheid.

The first is the concept of equal rights or anti-discrimination, supported in institutional terms by a Human Rights Commission and the courts.

The second is the principle of an expanding floor of minimum social, educational and welfare rights, backed up by a Social Rights Commission and the courts.

The third is the idea of regional equalisation, that is, of ensuring a flow of revenue for infra-structural development which will progressively overcome the inequalities between poor and rich regions. This achieved by ~~the way the~~ constitution regulates fiscal arrangements between the regions and the centre.

Finally, special techniques or modalities of affirmative action, involving a wide variety of agencies, may be used to deal in an urgent and accelerated way with special blockages or impediments to the achievement of equal opportunity for all.

This last is the area of affirmative action in the narrow sense. There is a close connection between affirmative action in the broad sense and affirmative action in the narrow sense, but it would be a mistake to confuse the two.

In particular, it would be an error to attempt to load affirmative action in the narrow sense with the whole burden of transformation in the country. Quotas and timetables work well if they are appropriately tailored to meet certain situations, but they can never be a substitute for good government and progressive social programmes.

Affirmative action, then, should be seen as the cherry, not the cake. The cake has to be good government based on accountability, equal rights and commitment to the advancement of all.

EQUAL PROTECTION

The words are so simple that we are inclined to view them as poetical or preambular rather than as the foundation of enforceable constitutional rights.

1. All South Africans are born free and equal in dignity and rights.

2. No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth or other status.

3. All men and women shall have equal protection under the law.

This is the fundamental anti-apartheid notion, the foundation of the new constitution. In terms of all the basic entitlements of citizenship, we are all the same, entitled to be treated in identical fashion, irrespective of race, colour, creed, gender etc. - it is for these principles that countless South Africans gave their lives.

In another kind of society where basic equality of rights exist, such a clause might be more preambular than ~~regulatory~~. In a country like ours, where every aspect of life has for decades, even centuries, been determined in a grossly unequal way, equal protection has immense potential for transformation.

The first consequence of applying equal protection will be to end the completely indefensible affirmative action currently being taken in favour of the white minority. In some countries it is difficult to prove race discrimination by the State. This is not the case in South Africa, where,

as has been pointed out, separate and unequal spending is explicitly guaranteed by the system of 'own affairs' in Government.

There is no area too poignant to escape this inequality: white schoolchildren in the countryside glide in government-subsidised buses past black pupils trudging miles to and from farm-schools each day.

The inequality of state, regional and local authority disbursements is to be found in every sphere, from health, to education, to street lighting, to the provision of parks and pools, not to speak of the furnishing of swimming lessons. How many white patients in a hospital have to share beds or sleep on the floor? While white hospitals, schools and living areas are underutilised by any standards, black areas and facilities are grossly overcrowded. Yet instead of public revenue being used to diminish these inequalities, it is employed to sustain them.

Article 14 of the draft Bill of Rights declares that in its activities and functioning, the state shall observe the principles of non-racism and non-sexism, and encourage the same in all public and private bodies. It goes on to affirm that all benefits conferred and entitlements granted by the state shall be distributed on a non-racist and non-sexist basis.

We have barely begun to appreciate the practical implications of applying the principles for which we have been fighting all our lives. Equal protection is a solid and unassailable concept. It guarantees an end to discrimination against blacks, while at the same time it protects whites against retaliatory domination or abuse. As new, non-racial authorities are elected to office at the various levels of government, we can expect them for the first time in our country's history to function according to the principle of equal protection.

Furthermore, in dealing with the private sector and with n.g.o.'s, the state will insist that the latter apply equal protection principles; there will no longer be building of schools for whites and schools for blacks, with different spending criteria, but only the construction of schools for children. Similarly, contractors that exclude blacks and women as a matter of principle or by way of established practice cannot expect work from a government committed to upholding the constitutional principle of equal protection.

Equal protection does not involve confiscation or dispossession or an attack on the living standards of anyone, but it does mean that all future spending is done on an equal basis.

Nor does equal protection require the raising of extra revenue. What it does insist on is that all moneys in the state coffers be expended on citizens equally as citizens, and not on them differentially as blacks and whites. This is not a question of new spending, but of re-directed spending - so much for the often-repeated question: but where will the money come from?

THE HUMAN RIGHTS COMMISSION

Someone applies for a job and is refused. He or she thinks it was because of race or gender. To whom can the person go for relief?

Someone is refused admission to a hotel, excluded from a sports club, prevented from buying a house, blocked in his or her career? What remedy is there if it was because of discrimination?

It is urgent that we in South Africa begin to think about and plan for a Human Rights Commission.

In Mozambique almost whatever your symptoms, the doctors diagnosed malaria, and they usually were right. Similarly, almost any setback or impediment in South Africa will be attributed to racism, and usually it will be right. Racism is so rampant in our society that unless we have manifestly active and fair means of dealing with it, people will begin to take the law into their own hands.

We need criteria as to where to draw the line: people can marry whom they like and be as bigotted as they wish in relation to whom they invite home to dinner. If they let out rooms in their house to lodgers, can they discriminate? We have to find the line between respecting the right to privacy on the one hand, and the right to accommodation and personal dignity on the other.

Civil Rights and Equal Opportunities legislation in Britain and the USA give considerable attention to the setting up of

semi-autonomous government agencies to investigate and deal with such cases.

Clearly we are going to need similar bodies in South Africa. The courts will always be there to defend the constitutional rights of everybody, including the right to equal treatment. Yet court proceedings tend to be long drawn out, expensive and conflictual.

Thus regionally based bodies ~~are~~ set up with the task of receiving and investigating complaints of race or gender discrimination. Normally, they attempt to solve the dispute by conciliation. If this fails, and there appears to be a clear case of discrimination, they can refer the matter to a Tribunal that specialises in hearing such matters.

The function of the courts in the UK is essentially to ensure that correct procedures have been followed and that the law has been correctly applied; in the United States, the Courts tend to take a more direct and active role, with the power to award damages for the violation of a person's ~~human rights~~.

We have had apartheid legislation for so long, now we will need anti-apartheid laws. ~~It is not that we believe that~~ laws solve all the problems of bad behaviour, but they are important. They set standards for what is publicly regarded as right and wrong, they make it easier for the less racist persons in letting bureaus and employment agencies and so on to stand up to their more bigoted colleagues, they tell the victim of discrimination that he or she is not helpless, and they provide for dignified and fair proceedings to deal with complaints.

In short, the choice is not limited to self-help and helplessness. Fair means are provided to achieve fair results. The elements of mediation and speedy and inexpensive resolution are given special emphasis. The culture of rights is strengthened.

The same principles apply to gender discrimination, which is even more deeply rooted and ancient. Equal protection requires effective means for ensuring that women are freed from all the burdens and disabilities imposed upon them by law and patriarchal practice.

The question then arises as to whether there should be a single agency dealing with all types of discrimination, or different bodies for race and gender. Should ~~there~~ be separate but equal equal protection?

we will have to have anti-apartheid laws for quite a time to come. This will not be

The equal rights clauses in the constitution will only have meaning if they can be put into effect. Good government and strong social organisations provide the foundation of achieving equality, but they need to be supplemented by public agencies staffed by resolute yet sensitive persons with clearly defined mandates.

The Human Rights Commission will have a huge task. It will have to be present in every area, capable of responding to every type of complaint.

Equally if not more important, a Human Rights Commission could investigate patterns of discrimination and make recommendations or orders for their elimination. One expects that the government will take steps to put its own house in order, but what about access to housing, schools, hospitals, swimming pools and to employment in the private sector?

It is in this respect, especially where there is no proof of express intent to discriminate, that the principles of affirmative action in the narrow sense, including quotas, would come into play.

THE ROLE OF SOCIAL ORGANISATIONS

One of the principal functions of a modern constitution is to see to it that the government tries to do neither too much nor too little. People need space to get on with their lives. They are entitled to privacy, choice and personal self-determination. The apartheid state intruded on every aspect of the lives of the majority.

The concept of personal freedom thus has special significance for those who have been stopped in the streets, raided in their homes, and told where they can live and with whom. There are many things that are simply not the business of the state, and it is the duty of the constitution to point out what they are.

At the same time, there are other issues that are very much the concern of the state, and the constitution must make clear what they are as well. In virtually all countries the state has primary responsibility for ensuring that basic educational and health services are available to the general public. In most countries, para-statal organisations provide water and electricity, as well as other other services such as posts and telecommunications.

The statement that the individual is free to seek education or health services or clean water or electricity wherever he or she wishes only has meaning if schools and hospitals and electricity and water supplies exist. Because of apartheid, facilities that whites take for granted simply are not there for blacks. The new state will have to shoulder the same responsibilities towards the total electorate which the old one accepted in relation to the white electorate. Equal protection means equal entitlement.

The idea of entitlement is central to the human rights notion. It represents the difference between the top-down paternalistic concept of upliftment and the bottom-up idea of advancement. Yet entitlement alone is not enough. Indeed, it can become dis-empowering if it signifies a relationship based on an active state and passive citizens.

If good, non-racial, non-sexist, democratic and open government is the main guarantee that the effects of apartheid will be overcome, then the organs of civil society are the principal guarantors that good government will exist. Over and above any mechanisms and procedures which might be established to enable people to secure their constitutional rights, there will have to be vigorous social institutions, such as trade unions, religious organisations, civics, the womens movement, student bodies, cultural circles and professional and business associations, to see to it that government tries neither to overstep nor to understep the mark.

Freedom of association and constitutionally guaranteed space for social organisations, enables people to get on with their own lives in the way they think best [Article 5 of the draft Bill of Rights]. This space is particularly important for the most exploited and oppressed in our society, who as individuals have little chance of getting maximum benefit from the new constitutional order, but who in combination will better be able to secure their rights.

It is worth repeating that all constitutions are based on mistrust, not only of our opponents but of ourselves. Governments, however honourable, are always cognisant of what they call constraints, which, when boiled down, usually means being constantly aware of the need to accommodate to power. Robust and self-confident community organisations ensure that the people are never converted into a mystical abastraction that only comes to life once in five years when hand-outs are offered before elections.

Community bodies are particularly important in relation to affirmative action. It could well be that in South Africa, as in the United States, the main beneficiaries of affirmative action in the narrow sense will be the black middle class, and, possibly, professional women of all races. These are important sections of society and have every reason to expect the constitution to support their just claims. Yet there are millions more who are also entitled to advancement and whose claims will be ignored or met in large measure according to the degree to which they are able to present coherent and impactful claims.

In other words, as far as the great majority of the people are concerned, the guarantee of affirmative action, that is of manifest reduction of inequality and improvement in their lives, will come from a combination of good government and strong community and other organisations, rather than from quotas, timetables and hiring procedures.

The organisations will see to it that no-one is too isolated or too poor or too unlettered or too fearful to lose out on their constitutional entitlements. Living according to the rule of law depends as much on the activities of non-lawyers as of lawyers.

There will also be a great need for specialised and autonomous non-governmental organisations [n.g.o.'s] to ensure that social programmes are sensitive, fine-tuned and participatory in character. Not only will bodies as diverse as the National Medical and Dental Association and Operation Hunger have a larger function than ever in helping new health and nutrition policies to evolve, there will be a great need for organisations independent of the state to help people secure their rights as against the state.

THE OMBUD

The attractiveness to South Africans of the Ombud is that it is totally unfamiliar. This gives us the chance to make it an office that deals with all the problems of abuse and maladministration that we cannot handle elsewhere in the Constitution.

The Ombudsman was an office first created in Norway and Sweden to receive complaints from the public in relation to the functioning of the state administration. In recent years many women have held the position, so now the gender-free term Ombud is used there instead.

The idea has been taken over in many countries, where it is seen as a useful means of giving the ordinary citizen redress against officials who are rude, devious, incompetent, tardy or capricious, or who in any other way abuse their office without necessarily violating the law. The Ombud investigates the complaint and can recommend action if necessary against the offending official. It is then up to the superiors of the official to decide what to do.

The office is an interesting example of yet another constitutional paradox: the state appoints an official paid out state funds to control the actions of the state.

Generally, the Ombud's decisions ~~are~~ become recommendations only, and from the point of view of 19th Century concepts of legal rights, they have no significance whatsoever since they cannot be enforced in a court of law. The fact is that there is far greater compliance with these recommendations than with many court orders [for example, maintenance payments]. New kinds of remedies give rise to new kinds of rights.

The ANC draft Bill of Rights gives an important place to the Ombud, without regarding him or her as the only agency outside of the courts for dealing with violations of human rights. On the contrary, the function of the Ombud is better fulfilled if its scope is clear and precise: to deal with the officious official. In the South African context, we could extend the role to investigating cases of the three ugly brothers, prejudice, favouritism and corruption.

The office is far too weak, however, to handle the whole question of dealing with racist structures and patterns of behaviour. It should not be put forward as an ineffectual alternative to a Human Rights Commission or to properly monitored affirmative action programmes.

AN EXPANDING FLOOR OF SOCIAL RIGHTS

The elements of race, poverty and dignity are so intertwined in our country that without a programme of active intervention to promote the enjoyment of the minimum decencies of life on an across-the-board basis, the concept of equal protection takes on a mocking quality. Africa will come back, but with an empty bowl.

It is for this reason that the draft Bill of Rights, in keeping with virtually all modern constitutions, gives great emphasis to the securing of social, educational and welfare rights. Where it differs from other constitutions is that it attempts to go beyond simply setting out these rights as something to be aimed for, and seeks to establish criteria and mechanisms for making them enforceable. Put another way, the draft Bill of Rights tries to lay a constitutional foundation for the achievement of positive or enforceable rights in the social sphere.

The basic idea is to impose a duty on Parliament to adopt legislation which, taking account of the resources of the country, grants progressively increasing rights to every citizen. It focuses on certain core or fundamental areas of human existence, establishing the notion of an expanding list of entitlements to nutrition, health, education, shelter, employment and welfare.

In a sense, this is a pro-active extension of the principle of equal protection. It goes beyond the notion of equal opportunity and demands at least equal starting-off points for everyone.

This approach is not uncontroversial. An important debate exists as to whether it is appropriate to put the concept of an expanding floor of minimum rights in a constitution at all. Many argue that social rights belong in the political rather than the constitutional domain. They contend that it does a disservice to the timeless and clearly understood principles of human freedom to submerge them in transient, poorly comprehended social rights; worse still, they say, the pursuit of collective social rights opens the way for undermining basic individual rights.

The paradox is that the more extensive the provision of social rights in any country, the easier it is to have them constitutionally recognised. The idea that everyone is entitled to certain levels of health care, to so many years of education, to electricity and clean water, has in such a country the self-evident quality that marks it down for constitutional acknowledgement.

it is the very ~~lack of access to these amenities~~ extent of the ~~right~~ lightlessness that seems somehow to ~~right~~ make it unnecessary to take a constit-stand ~~on the issue~~ against.

In a society like ours, however, persons whose biggest water worry is what kind of filter to use in their swimming pool or whether to buy bottles of Schoonspruit or Perrier, simply cannot see that access to clean water should be classified as a fundamental human right. To them it is not a question of rights but of money. To those for whom getting water is a daily chore and often an agony, on the other hand, there is simply no choice - the reservoirs, the pipes and the taps are simply not there. When they buy water in drums they pay far more.

with certain universal aspects of life in this planet

In the absence of common life experiences it is often difficult to find common standards. Yet in the search for universal concepts we can begin ~~at least with the idea~~ that ~~every family and every person has an equal right to water.~~

Water comes to us from the skies. It is not a dividend of risk capital. The dams that hold it are the product of the work and taxes of us all, as are the pipes along which it runs. Yet when this necessity of life flows into the homes of whites as a matter of course and rarely into those of blacks, who can deny that human rights are being violated? Are whites thirstier and dirtier than blacks? It is not just a question of money. The poor are willing to pay. The water is just not there for them.

Insensitivity on the issue of social rights is sometimes compounded by trivialisation. One frequently hears people arguing that it is a lovely but totally irresponsible idea to promise everyone a home when the economy simply does not allow for homes for all.

The minimum floor of rights approach in fact does not offer everyone a home, desirable though this would be. It merely promises to reduce homelessness, and guarantees certain specific housing rights, sometimes of a purely defensive character, such as the right not to have your home destroyed if alternative accommodation is not available. At the same time, it promotes the idea of progressive materialisation of the right to enjoy electricity, access to clean water, and to benefit from waste disposal, even in the most humble of homesteads.

The rights to food, clothing, shelter and education are rights in themselves, not to be weighed in a competitive scale against the rights to freedom.

Equally, freedom is a value in itself, not something to be balanced against bread.

What is required, then, is a firm constitutional commitment towards the preservation of fundamental freedoms quite independently of whether social rights are being realised.

The Bill of Rights must be formatted in such a way that both sets of fundamental rights are protected, each in an appropriate manner. There will always be overlap. The presentation and interpretation should be such that wherever possible, the different sets of rights re-inforce each other.

Where necessary, however, depending on the circumstances, one cluster of rights must give way to another. Thus, torture can never be constitutionally justified, even in times of famine to find out where food is being hoarded. By the same token, property rights can never be invoked to justify destruction of food in order to keep prices high.

If people are satisfied that there are institutions which guarantee that their basic rights are being attended to on a generalised basis, they are less likely to see each application for a job or a home or a place in a school or hospital as part of a general race war. Affirmative action in the sense race- and gender-aware programmes is thus freed of the burden of having to carry all movement towards a more just society, and enabled better to fulfill its true function, namely, to provide in a well-tailored way for accelerated advance in certain crucial areas.

In any event, whether the floor of rights idea is in the constitution or not, it should be high on the agenda of any new government. We will have to have an Education Act, a Housing Act, a Health Act, as well as legislation to help overcome hunger, unemployment and the other ills of our divided country. These statutes will create positive rights enforceable in the courts.

They will be non-racial in character, referring to pupils, patients, residents and workseekers, not to blacks and whites. Yet by focussing on the rights of those whose circumstances are the hardest, they will ensure that in practice the main beneficiaries will be those who suffered the greatest deprivations in the past, that is, blacks, and especially black women. The emphasis will, however, be on need, not on race; the white family that recently moved in with black squatters could benefit as much as their black neighbours.

A SOCIAL RIGHTS COMMISSION

If politics is the art of the possible, and science the art of the soluble; if culture is the art of the performable, then law is the art of the enforceable, and all are the art of the affordable.

One of the main criticisms of the concept of constitutionalising social rights is that they are not worth the expensive parchment they are written on, for the simple reason that they can neither be enforced nor afforded.

This observation has to be taken seriously. To fill the Bill of Rights with empty or even false promises would be to do it a major disservice. The real question is how to find appropriate remedies. Court actions are not the only mechanisms to be found in modern societies for enforcing rights. Thus, the right to clean water is daily enforced in South Africa - for the minority, at least - by means of statutes governing water supplies. These laws create a system of responsibilities involving inspectorates, reporting and penalties for endangering health. It is not necessary to sue anyone to get potable water out of your tap.

What is required in relation to social, educational and welfare rights is a concept of enforceability that takes into account both the question of affordability and the issue of appropriate forms of enforcement.

The courts have a role, sometimes direct, sometimes in the background. The ANC draft Bill of Rights proposals would in fact have immediate implications for the courts.

Thus, they could in some cases directly establish strong rights, such as that not to be evicted from shelter or have one's home destroyed if an alternative home is not available. In general, they could give rise to defensive or negative rights, that is, they could render unlawful actions which are designed to or have the effect of diminishing the exercise of the specified rights. They would also have a major impact on the interpretation of statutes and on enquiries into the validity of administrative acts or of by-laws.

Yet if the social rights clauses are to give rise to positive rights enforceable in the courts, something more is needed. Clearly, programmes get converted into structures of rights through legislation. In this way, the right, say, to free and compulsory primary education, as is found in many constitutions, is realised through an Education Act.

It is now widely accepted that the Bill of Rights should affirm a universal right to primary education. Once that principle is adopted, there is no intrinsic reason why it should not be extended to primary health care, primary nutrition provision and primary access to utilities. The same modalities of progressive creation of facilities will have to apply in each case. None is intrinsically more or less enforceable than any other.

An idea gaining increasing support is that a Social Rights Commission be established in order to monitor, report on, do research on, receive complaints on and generally supervise the implementation of social rights programmes.

Such a body would assist the courts in making determinations where social rights questions were in issue, but their function would be much wider. They would liaise with all legislative authorities, that is, at local, regional and national levels, and inform them and the public as to progress made and failures recorded in the implementation of social rights. If minimum standards are required by law, they could report on defaulters.

An adverse report by the Social Rights Commission might not be as powerful in a technical legal sense as an adverse judgment by a court of law, but it could have great significance with public opinion, and end up being enforced in practice through consequent legislative or executive action.

PART FOUR - AN EXAMPLE

POWER TO THE PEOPLE - AN ELECTRIC LIGHT IN EVERY HOME

There is no reason why there should not be a light in every home in South Africa. Whites take electricity for granted.

Yet two thirds of South Africans collect firewood, burn paraffin, use coal or candles or car batteries. Their houses fill with fumes, frequently catch fire. Darkness comes early. There is no refrigeration, no hot water, no fans.

Energy comes from the earth. We all have a right to fire, to enable us to cook, to ward off danger, to keep ouselves warm, to illuminate the darkness. The right to energy in a country like South Africa means a right to electricity, not a right to collect firewood or dung or to carry paraffin.

The right to electricity is both a right in itself and also the foundation of the exercise of other rights. When we boil water, we affirm the right to health. When we read at night,

we exercise the right to education. When we save food in a fridge, we strengthen the right to nutrition.

The problem is not one of enforceability, nor even of affordability. It is one of humanity. It is as it has always been, a question of who matters, of who counts. The resources are there, the cost can be recovered and means can be found for making the rights enforceable.

In the Yemen 94 per cent of homes have electricity. The figure in Chile is the same [and we are informed by the Minister of Energy there that they are very worried by it]. In Thailand virtually every urban dwelling and more than 70 per cent of rural homes have electricity.

In South Africa, which has the world's fifteenth largest power generation capability, the figure is about 32 per cent. We do not know the precise percentage because until now no government or other body has bothered to find out. What has mattered was that every white home has had lights.

The question of who has or does not have electricity has nothing to do with location. White farmers in the most remote areas can look forward to a cool beer in summer and a hot cup of coffee in winter, while blacks living in the cities, even right next to a power station, even workers in the electricity supply industry, have to do without.

Nor is affordability a major factor. Blacks pay one and a half times as much as do whites for each unit of energy they consume; they also suffer much more discomfort, not to speak of the hours they have to spend on acquiring and storing fuel.

Nor is it a matter of supply. The electricity is there. ESCOM is said to be the fifth largest generating authority in the western world. It has vast reserves which it cannot dispose of. Links with hydro-electric schemes in Mozambique and Zaire promise South Africa future supplies that will be cheap and produce little damage to the environment.

The key determinant of who has lights ~~and who does not~~ is accordingly not some rationally justifiable factor such as distance from a power station, capacity of the consumer to pay, or an absolute shortage of electricity. It is race. While white homes have electricity as a matter of course, only about 20 per cent of black homes have it.

The fact is that until now, the majority of South Africans were just not contemplated by the authorities that

controlled the distribution of electricity. They did not have the vote, nor the right to own homes where they pleased, nor the right to study and engage in economic activity on equal terms. Lack of power in the home was a direct consequence of lack of power in the organs of government.

The apartheid state excluded them, at best ignored them. It was not a question of excessive state intervention but of excessive state neglect. The answer is not to continue with this neglect , but to ensure that the state shoulders the same responsibility towards blacks that it has always done in relation to whites. We need to bring light to all, not to privatise darkness.

This is where a new constitution and a Bill of Rights will have immediate relevance. Democratic, non-racial government at all levels will ensure that local authorities for the first time are answerable to all the people in their area, and not just to a racial minority.

Equal protection means that all future spending, whether at national, regional or local level, has to be done on an equal basis. Street lighting has to be made equally available throughout a metroploitan area. If a white farmer has a cable running to his or her homestead, black farmworkers on the same land should have equal access to the current [subject, of course, to payment for use on the same basis].

Regional equalisation will mean that the regions which currently suffer from gross under-provision of electricity, such as Northern Transvaal or Ciskei-Transkei-Border should receive special infra-structural support. The electricity grid would have to be spread so as progressively to achieve regional equality, with the relatively well-endowed areas, such as the PWV or the Western Cape.

Affirmative action in the narrow sense would signify that special programmes might be developed to help black consumers of electricity. An example might be special tarrifs to discount costs for the poorest of the urban dwellers or to reduce connection and installation fees for those in the more remote rural areas. Basically, however, the idea would be to extend electricity to all on an equal basis as citizens and not as blacks.

This is where the expanding floor of minimum rights comes in. It is a mechanism designed to establish an enforceable programme for the progressive extension of electricity to

every home in the country. It is not something separate from equal protection, regional equalisation and affirmative action, but rather a comprehensive and coherent means of achieving ~~them~~ these all together. It is the non-racial constitutional framework for achieving the right to light.

The minimum standards idea would involve three parameters: defining target sections of the population with the most urgent entitlement [for example, health- education- or business-related]; specifying geographical areas most amenable to rapid and inexpensive electrification; and, finally, determining the levels and quality of supply and installation.

The first task would be to establish a nation-wide Electrification Commission with responsibility for surveying the present situation and creating a map showing the number and location of homes with electricity and those without. Acting in collaboration with government structures at national, regional and local levels, together with ESCOM and with civic and business organisations, the Commission would work out a programme setting out the steps that would have to be taken to extend electricity to every home.

The targetted populations would steadily increase in number, the territorial units would progressively be enlarged and the quality of electricity supply units would over time increase on a step by step basis. Eventually all homes in the country would have the same basic supply of electricity.

Appropriate legislation would have to be adopted to govern the implementation of this programme. It would establish the bodies responsible for determining and implementing the scheme, lay down the criteria they were to use, and prescribe in broad terms the way tarrifs would be worked out. The legislation would have built into it a mechanism for determining what funding would be available and how any fluctuations would affect the rate of advance.

Finally, it would lay down a system of empowerment\ accountability\ enforcement. Thus, the Electrification Commission would be subject to at least four kinds of accountability:

to Parliament and elected regional and local authorities;

to civic and community organisations, who would have rights at least to information and consultation;

to the courts, who would apply the principles of judicial review in the light of the nature and objectives of the legislation; and

to the Social Rights Commission, which would receive complaints and suggestions from the public, undertake investigations and research, assist the courts when necessary, report to Parliament and local legislatures on progress made and on blockages and possible solutions.

Critics will say that access by all to electricity might well be a worthy goal but that it can hardly be considered a right, and even less so a fundamental human right. In particular, they claim, the right to light should not be called a right at all, since it cannot be enforced. Thus, somebody who wishes to have domestic electricity cannot go to court to get an order that he or she must be furnished with electricity.

Enforceability will come from the format; the nature of the remedies will emanate from the character of the rights. There is nothing strange about this.

The right to vote is said to be a fundamental first generation right. Yet it is not a defensive right to be upheld by the courts against the state. Its exercise depends on state action. Thus, the right to vote can only be realised when there is an election. No-one can go to court and demand that the state provide him or her immediately with the right to vote. The Electoral Law lays down the periodicity of elections, how voters' rolls are to be established, where voting is to take place and what procedures must be followed when votes are cast.

Similarly, injured workers do not have to go to court to get compensation. They follow special procedures before specially appointed bodies.

Similarly, the right to primary education does not give every Tom, Dick and Harriet the right to go to court and demand an immediate place for his or her child at any particular school, and certainly not that a school be built in a particular area to suit their particular needs or convenience.

What it does require is that each and every government elected to office, independently of its specific political philosophy:

work on a programme progressively to extend educational facilities through training teachers and putting up school buildings until there is a school place for every child up to a certain standard;

adopt an Education Act governing the way people apply for entry to schools and stating how that application should be considered; and establish a system of accountability and control in relation to the process.

Citizens then enforce their childrens' educational rights through the political process and elections, by means of complaints and publicity, through invoking the support of public agencies, n.g.o's, the Ombud, and the Social Rights Commission, and, if necessary, by appeal to the courts.

Rights in relation to planning and development are exercised in terms of complex legislation involving a multiplicity of bodies, some purely political, some technical, some administrative, and some judicial.

One has to repeat: if the law were as inventive in relation to securing the rights of the poor as it is in respect of the rights of the rich, there would be no difficulty in finding appropriate ways and means to enforce basic social rights.

To the extent that the law is concerned primarily with priorities and procedures, it should be relatively simple to construct legislation that created a system of enforceable rights to electricity for all.

To begin with, the Constitution lays down a general scheme for ensuring that resources are devoted in a systematic and law-governed way to the progressive extension of basic social rights to all. It also sees to it that appropriate bodies are made responsible and accountable for the process.

Within an overall energy policy, an Electrification Act thereafter specifies the ways and means whereby electricity is steadily extended to all homes in the country. It is through the provisions of this Act that individual citizens progressively enter the category of those who can demand the furnishing of electricity to their homes as of right, going to court if necessary.

At the same time, mechanisms will exist to ensure that all citizens can insist that the question of extending electricity supplies receives constant attention. These mechanisms could consist of Parliamentary, regional and

local government committees to which the public has access, as well as the Social Rights Commission referred to above.

Finally, the courts will be in the background to ensure that proper procedures are followed and correct criteria adopted when decisions are made about where and when to extend the supply of electruicity.

As with environmental law, new forms of enforceability involving new agencies and new forms of pressure will emerge.

What matters is that everyone will feel that they are ~~regarded by~~ within the constitution ~~and the law~~. Power will come to the people ~~through~~ via the Constitution and an electricity grid.

REGIONAL EQUALISATION

The ~~third~~ second constitutional principle that supports affirmative action in the broad sense is that of regional equalisation. Article 10 of the ANC draft Bill of Rights declares that in order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extension of legislation and minimum standards from area to area.

This idea needs to be built upon in relation to the general question of funding for regional development. The gross underdevelopment of the rural zones referred to as the homelands, is an affront to all of us. The areas that have prospered on the basis of exploiting migrant labour now have to acknowledge their responsibility for ensuring the even development of the whole country. Cultural distinctness can be retained without perversely and offensively regarding isolation, poverty, lack of clothing and hunger as a cultural right.

The concept of regional equalisation will be most strongly expressed in the section of the Constitution dealing with the regions and their relations with the central government. What is clear is that priority will have to be given to building up social and economic infrastructures in areas presently under the Venda, Transkei ~~and~~ KwaZulu and other administrations if poverty and inequality are ever to be eliminated in our country.

PART FOUR - THE BENEFICIARIES OF AFFIRMATIVE ACTION

Non-racialism and good government

Equal protection, an expanding floor of rights, and regional equalisation are all profound means of attacking the problem of inequality. Overwhelmingly, it will be blacks who will benefit from these programmes, because it is blacks who are the poorest and the most disadvantaged. Yet they will be benefitting in the ordinary way as citizens and not as blacks. The non-racial principle remains intact, indeed, it is re-inforced.

We cannot emphasise too strongly that the main means of achieving affirmative action in the wide sense in South Africa is simply through applying the principles of good government.

Accordingly, before we get to the question of targets and timetables, and affirmative action in the narrow sense, we must install good government. This, more than any special programmes, is the guarantee that people will at last get their rights. The question of quotas will be dealt with later - but however they are considered, they should never become a substitute for good government. At most they should be a means of supplementing it in key areas where special measures of an intensive and accelerated kind are required.

THE THEORISATION OF AFFIRMATIVE ACTION

The difficulty arises when race and gender are specifically made relevant criteria in relation to strategies of what have variously been called benign, reverse or postive discrimination.

No theoretical problems arise with the concept of affirmative action merely being good government which for the first time regards blacks as full citizens entitled to equal rights and which develops programmes of social advancement which have the effect of benefiting more blacks than whites because they are the ones who suffer the most from social deprivation.

Yet how, it is asked, can a colour-blind and a gender-neutral constitution permit any form of preference on the basis of colour or gender?

The answers given in other countries tend to follow two lines. The first is that special intervention may be justified to level the playing field. The emphasis here is

on the creation of conditions of equal opportunity so that in future all persons may compete on a basis of equality.. The second is that affirmative action is not only permissible but obligatory to compensate victims of past discrimination for the injuries done to them.

It is suggested that we in South Africa can develop solid theories based on our own realities. The following would appear to be relevant considerations.

In the first place, it is unnecessary to require specific or case by case proof of past exclusion. The evidence is in the statutes, and the ferocity with which they were applied. Apartheid law plus separate institutions of government plus unequal budgets established discrimination as a declared principle of public life. Whole communities were affected. The results are there for the world to see.

Secondly, the exclusion of the majority is not only unjust, it threatens the stability and progress of the nation. The imbalances that helped to maintain colonialism, segregation and apartheid, become intolerable and destabilising in conditions of democracy and equal rights.

Thirdly, we are not adapting a constitution, we are creating one. If, like that of all good constitutions, its function is to deal with the great problems of equity and iniquity, then it must confront and respond to the great injustices created by apartheid. Just as the American Constitution was a post-revolutionary one, the West German [now, German] constitution a post-war and post-Hitler one, and the Indian constitution a post-independence one, so ours must be a post-apartheid constitution.

Post-apartheid means more than just chronologically after apartheid. It signifies taking into account everything that apartheid produced. By tackling the legacy of apartheid, we are doing far more than giving opportunities to individuals who have been discriminated against, and something much more profound than giving compensation for past wrongs.

We are de-colonising and de-racialising our society; we are South Africanising our country, giving it a new personality; we are re-creating our state on new foundations. We are also dealing with the fears of all and with feelings of injustice of many. We are seeking to draw on the skills, life experience and wisdom of the whole people so as to improve government and strengthen the economy.

The question is not whether there will be a restructuring of society but how the inevitable restructuring will come about. Affirmative action in our conditions becomes a crucial mechanism for ensuring

that change is meaningful,

that it benefits most those who most need it,

that it proceeds in an orderly way according to the rule of law and not the whims of well-placed, corrupt or power-hungry officials,

that it revolves around principles and values agreed upon by as many sectors of the community as possible as being the best ones to help the country move forward,

that it encourages tranquility and growth.

Principled application of affirmative action according to law is a major guarantee that majority rule operates in a fair manner for the benefit of the whole of society.

ADDRESSING WHITE FEARS

The broadness of a principle may be measured by the amount of irony it contains. It might well be that whites who were the main beneficiaries of racism in the past will be the principal ones to benefit from non-racialism in the future. What this means is that they will be protected by the constitution, as will everyone else, from the kinds of dispossession on grounds of race to which they subjected blacks in the past.

Acknowledging their right to protection from abuse or domination is not a negotiating concession or a compromise. It is in the Freedom Charter. That is the kind of society we want to live in. That is what we struggled for, an end to the world of domination and subordination. Certain issues must be put beyond the scope of vote-catching mobilisation. Now that we have moved out of the era of swart gevaar [black danger], yellow peril and red threat, we do not want to move into the age of white diabolism. The constitution, the whole philosophy of the ANC and the needs of the country to avoid civil war and to draw on the skills of everyone, all point in the same direction.

Thanks to the principles of the Freedom Charter which they did so much to resist, whites will be secure in their homes without a Group Areas Act to threaten them, be able to study

without fear of a new Extension of Universities Act to exclude them, and be free to advance their careers without a new Job Reservation law to keep them out.

~~Though~~ The main beneficiaries of affirmative action, on the other hand, will be those who suffered most under apartheid; this does not mean that affirmative action, whether in the broad or the narrow sense, should be seen as a punitive measure against those who benefited from apartheid. Put more simply, it would be wrong to conceive of affirmative action as being ~~in its~~ nature anti-white.

At the same time, the whites can not use the principle of non-racism to enable them to hold forever on to the 87% of the land which they obtained by racist methods. Nor are they entitled to monopolise for all time the commanding heights of business, and not only the commanding heights, the foothills as well, ~~which they secured in a racist context~~.

The whites by and large have the education, health care, housing and employment that they wish. They give up none of these, and if they are poor, they benefit from programmes designed to help the disadvantaged, whoever they may be. What the whites have to forego is their privileged status both as the beneficiaries of government policies and as the sole determiners of such policies. The many things they have been getting from the government, they will continue to receive, but on the same basis as everyone else. If they want extra, they will have to pay for it.

Affirmative action in this sense takes away their privileges but not their possessions. It gives them in return something they have never had, a secure position in the country, living as equals and on a dignified basis as full human beings with their fellow South Africans.

ADDRESSING BLACK FEARS

Affirmative action is a process not a result, but it is a fair process designed to achieve a just result. If it is anchored in good, non-racial, non-sexist government, and if it is envigorated by active community and social organisations, it should respond to the wishes of those who have been marginalised or excluded by past oppression. Getting our national institutions in place on a non-racial and democratic basis will be relatively easy. The real battle against apartheid will be at the level of local government and affirmative action.

Properly applied, affirmative actiont responds to the two great anxieties that blacks have expressed, namely, that getting political rights will do nothing to ease the disastrous social situation in which they are forced to live, and, secondly, that at most it will enable a tiny black elite to share in the spoils of exploitatation with the whites, leaving the majority as destitute as before.

Affirmative action establishes the goal of equal life chances for all. It puts the achievevement of equal rights firmly on the agenda, and forces the whole of society to face up to the consequences of accumulated discrimination. It establishes criteria and mechanisms for monitoring progress. It opens the way for representative institutions of government so that for the first time the population at large can feel this is our police force, our army, our civil service, these are our courts.

It gives people the skills and in-service experience to enable them to overcome the doubts and insecurities instilled by generations of imposed subordination.
It avoids the disruptions and civil conflict that forced takeover and brusque advancement would bring. In circumstances where the majority at last have political rights, it is the intransigent minority of white supremacists who seek physical confrontatation and public disorder. Peaceful transition favours the masses. We want steady, well-worked out programmes of advance that bring in everybody, not impetuous and uncoordinated assaults that at best benefit a few. Tranquility is our friend.

The strategy of principled affirmative action also helps to avoid the danger of a new bureaucratic elite emerging which, under the cloak of nationalism, regionalism or tribalism, uses its position to enrich itself and its close associates. We do not want to Bantustanise South Africa, but rather to South Africanise the Bantustans.

Affirmative action is still an open concept. It depends very much on ourselves how it functions and who it favours. Yet it contains the full possibility of establishing relatively painless lines of advance for the benefit of all. It facilitates the creation of orderly and just access to the new possibilities opening up.

Affirmative action rejects both the Big Bang theory of change and the Total Silence one. It looks at the skills which the whites have as a source of enrichment for the whole country. They belong not only to the whites but to

the whole South African nation. Conditions must be created to enable these skills to be placed at the service of all, whether in farming or policing or healing or building.

We wanted to make racist South Africa ungovernable and apartheid unworkable. Now our goal is to enable non-racial, non-sexist South Africa to govern itself and to make democracy work.

PART SIX - THE PROGRAMMES

~~AFFIRMATIVE ACTION AND QUOTAS~~

SOME REFLECTIONS ON QUOTAS

IN OTHER COUNTRIES

The USA, India and Malaysia are the three countries with the greatest experience of affirmative action. The Indian Constitution requires that special measures on a quota basis be taken to ensure representatation of low caste persons and members of what are called scheduled tribes, in and educational institutions. The indications are that these provisions have helped to break down ancient forms of exclusion and permitted members of the affected groups to lead dignified lives in general society. At the same time, they have done little to undermine communal-type thinking, which continues as before.

In Malaysia it appears that affirmative action procedures have been fairly successful in opening up both the civil service and commerce to persons from the Malay community who had previously been grossly under-represented in both areas. The price, however, has been to reinforce a spirit of communal rather than national identity. Some commentators feel that advancement could have been achieved by other means.

In the USA, affirmative action emerged after the ghetto uprisings of the 1960's when it was felt that without special intervention, black Americans would never be able to enjoy the rights said in the Constitution to be available for all. The same interventionist principles were extended to all minorities and to women.

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It is widely accepted that the main beneficiaries of affirmative action programmes in that country have been black professional men and women, and white professional women, but that the great majority of blacks and of women have not seen their status improve.

The constitutional position of affirmative action remains unclear. Some judges have insisted that a colour-blind constitution does not permit any preferential treatment on the grounds of colour. Others have argued that to achieve equal protection it is necessary to take account of the reality of racist practices that disadvantage certain groups and advantage others.

A perusal of the case law suggests that the following principles have been developed by the courts:

and qualified

Where there is proof of deliberate exclusion on the grounds of race, then race can be used as a factor in remedying the resultant disproportion. Thus if blacks constitute 20 per cent of a pool available for employment, it can be ordered that new hiring take place on the basis of one black- one white until the 20 per cent quota is reached.

If there is no proof of intentional exclusion, however, but the employer, union or public agency wishes to bring about cultural or racial diversity in the workforce, it may use race as a plus to be taken into account, provided that it is not an exclusive or controlling factor but rather part of a flexible evaluation system looking at the total picture. Thus if there are a number of suitable candidates, each with plusses and minuses, all must be considered, but there would be nothing constitutionally wrong in giving special weight to race or sex as an inclusionary factor.

One lesson we can learn is that a clear constitutional foundation for affirmative action must be found. Part of the problem in the USA was that there was a strong constitutional foundation for anti-discrimination laws in general, but not for affirmative action as such, particularly if they were colour-sensitive rather than colour-blind.

GOALS, TIMETABLES AND MONITORING IN SOUTH AFRICA

Racial quotas are so ugly ~~for us in South Africa~~ that they can only be justified on the grounds that the alternative of permitting continuing racial disadvantage is even more distasteful.

We have to confront the issue directly. As judge Harry Blackmun of the Supreme Court said, in order to deal with racism, we have to take account of the realities of race. He then went on to declare that it would be ironical indeed if racial inequality were maintained by the Equal Protection clause.

At the very least, the new South African Constitution must, as in Namibia, authorise incoming governments to take affirmative action to overcome the inequities of the past. In other words, the equal rights clause in the constitution should not be used as a means of preventing blacks from enjoying equal rights.

The same principles should apply to overcoming the exclusion of women from decision-making positions and interesting

careers. The longer an injustice has been committed, and the more widespread its impact, the more natural it is made to appear.

For these and other reasons, we feel that the Bill of Rights should go further than merely authorise the taking of affirmative action by future governments.

It should expressly require that such governments restructure themselves so that their composition conforms with the principles of the Constitution. They should also function according to the non-racial and non-sexist norms and principles set out in the Constitution, and spend their revenue in the same way. Finally, as a major contractor, they should insist on only dealing with firms that follow these principles; we hear so much about maintaining standards when they are equated with keeping present practices intact, but almost nothing when they require change towards non-racism and non-sexism.

The Constitution should accordingly impose an active constitutional duty on all incoming governments to take action to correct the injustices of the past. For this reason, the ANC draft Bill of Rights devotes two full Articles to the subject.

Article 13 reads:

1. Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.

2. No provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article.

It has been pointed out that the second clause is capable of being read in such a way as to permit affirmative action to override any and all of the fundamental freedoms set out in the Bill of Rights. In other words, it could be used to justify ignoring the prohibitions on torture, forced labour or capital punishment.

This was clearly never the intention of the Constitutional Committee, and it would seem that a tighter formulation will

be required so as to remove any possible doubt. The crucial thing is to ensure that the courts do not in future strike down affirmative action programmes simply on the grounds that they are designed to procure the advancement of and open up opportunities for those previously victimised by discrimination. In particular, the Equal Rights clause should not be used to block the achievement of equal rights.

Article 14 is entitled Positive Action. It goes further than Article 13 in that it not only permits but actually requires positive action by the state to pursue "policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa"[para 5].

The next paragraph goes on to say that such policies "shall include the implementation of programmes aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service."

Special attention also has to be paid to rectifying the inequalities to which women have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation [para 8].

Finally, legislation may be enacted requiring non-governmental organisations and private bodies to conduct themselves in accordance with the above principles.

Provisions such as these would do away with many of the problems which American judges had when dealing with affirmative action programmes. Whether or not quotas are desirable, they would not automatically be unconstitutional.

Given the history of apartheid laws and practices, it would be unnecessary to prove in each case that there had been deliberate exclusion of blacks. The danger would be that employers, universities and others would actually use past apartheid laws as an excuse for opposing affirmative action now, arguing that their hands had been tied, therefore they ~~should not be penalised~~. too were victims.

~~AFFIRMATIVE ACTION PROCEDURES AND QUOTAS IN SOUTH AFRICA:~~ SOME TENTATIVE REFLECTIONS ON QUOTAS

As long as the question of sovereignty and political rights remains unresolved, it is difficult to deal with any other

issue - cultural, economic or life style - on its merits. Every battle over every job and over every university position becomes a battle over South Africa. A genuine political settlement accordingly opens the way to honest assesment of the problems of overcoming the imbalances in every area of South African life.

All that is good from the past can be retained without fear that to do so would be to perpetuate the whole system of injustice. At the same time, eveything that needs correction can be tackled without anxiety that the whole society will collapse or that sections will be subjected to abuse.

Principles can be agreed to and institutions put in place that correspond to the needs of the situation, and are not seen simply as means for advancing the political demands of one group or the other.

Above all, an open, frank and serious national debate can be started on the question of how best to open up what had formerly been closed, and of how to do so in a manner that will benefit the most those who most deserve it, that will minimise disruption to the economy and that will promote the evolution of a true sense of national unity.

In the light of the above, and bearing in mind the general principle that good, open, accountable, government operating according to non-racial and non-sexist principles is always the foundation of achieving equality, we may tenatively suggest the following principles for the application of quotas, monitoring and timetables in South Africa:

1. Quotas should never be the main means of redressing the injustices and inequalities created by apartheid. What we need is good, democratic government answering to the needs of the people as a whole, and not just to a minority. We want a country of people, not of quotas.

2. One of the principal tasks of government will be to open up opportunities for all, giving special attention to the needs of those who have been most excluded or injured by past discrimination.

3. While the general principles of equitable adjustment must be the same in all spheres and based upon common constitutional principles, the precise methods to be used in each specific area should be adapted to its concrete reality, its traditions of organisation and its in-service or in-house culture, inasmuch as they are not racist or sexist.

4. Thus a Civil Service Commission, working with government and the trade unions, should initiate and supervise steps to open up the civil service, the Army, the police and other agencies of government. The talents and life experiences of all South Africans must be used and seen to be used. At the same time, levels of competence must be maintained and improved upon, and a sense of serving the whole of society developed.

5. Special attention will have to be paid to correcting injustices relating to the ownership and use of land. A Land Claims Tribunal should be created to see to it that victims of forced removals have their land rights restored, or else be appropriately compensated; that farmworkers who have been for generations on land receive protected rights, and that persons historically denied access to land now have access made available to them. Where existing titles are interfered with, compensation shall be ordered, taking into account an equitable balance between the public interest and the interest of the persons affected. Extension programmes, training and credit facilities must be made available to the new land owners/and users.

6. The principal task in the sphere of education will be that of integrating the disparate school systems, applying equal spending and creating the foundations of good quality education for all. This will have immediate implications for buildings, training, the provision of textbooks and pupil-teacher ratios. At the same time, there will have to be accelerated training for black and female cadres to staff the developing educational institutions and overcome the present imbalances in government, the economy and the professions.

7. In the case of health, the same process of integration and equal spending must take place, coupled with a special emphasis on primary health care and the role of teaching hospitals. The medical profession should also see to it that the impediments to black advance are removed, and take special steps to do justice to those who have been kept back in the past.

8. The government, the unions and the private sector must make special provision for overcoming the effects on employment of Bantu Education and job reservation, concentrating on programmes of accelerated vocational and professional training, both in-service and outside. Present arbitrary systems of hiring, promoting and firing must give way to new ones based on equal opportunity principles, in

terms of which special encouragement is given to persons from disadvantaged groups.

9. Business organisations, government and the unions must get together to work out ways and means of ensuring that access to managerial positions, to capital and to credit is opened up, so that when we speak of a mixed economy we mean a mixed economy, not a white one.

10. While we insist on all sections of the population being fairly and appropriately represented in the public sector, we do not favour a system based solely on quotas, particularly if it means that persons in the public service are seen as representing and serving only the group to which they belong; the incumbents are there to represent and serve the whole South African nation, not just the group from which they come.

11. Opening up the civil service, education, health and jobs should not mean appointing unqualified persons simply on the basis of colour or gender. The essence of affirmative action programmes is to give special support to enable people who have been kept out of qualifications in the past, to acquire them now. Blackness should never become a property right in itself as whiteness became, nor should whiteness continue to have the superior status it presently enjoys. Yet balance, representativity, cultural diversity and the need to draw on the widest range of skills and life experience of all are factors that could and should be taken into account.

12. Race and gender can thus be relevant elements amongst others in deciding on appointments, but only if the candidates satisfy at least basic requirements for the position. The merit principle is not abolished but applied in a more sensitive way. Special efforts should be made to search for the widest range of candidates and to give training to those who have been disadvantaged. All things being roughly equal, race and gender preferences should be permitted, even required, to overcome the effects of past discrimination. Any such preference should apply for a determinate period only, as a specific means of overcoming the structured and self-perpetuating inequalities produced by past discrimination. No-one should be excluded from consideration on grounds of race or gender, nor should quotas ever be used to establish ceilings or to bring about the exclusion of any group.

13. Encouragement should be given to voluntary schemes, and the principle of active involvement of all interested parties should be maintained at all times.

14. Mere appeals to social responsibility, however, are not enough. Legislation should be adopted defining the circumstances when quotas, timetables and monitoring should be used. They should establish the procedures to be followed, the agencies with responsibility for investigation and supervision, and the role of the courts.

15. The legislation should avoid attempts to use bureaucratic measures and arbitrary figures to enforce top-down changes. Not only are these precariously at the mercy of future statistical opportunism, they invite resistance on the part of those having to give way, and can create discomfort for those who benefit.

16. The real medium and long-term answer is to build up a system of general education and personal mobility, and to encourage strong organisations of civil society to see to it that their members enjoy their constitutional rights in every way.

17. In the short term, however, quotas and timetables could have an important role to play, if they are well-targeted, neatly tailored, participatory, limited in duration, and do not unduly or gratuitously trample on the rights of others. It is important that they be used skillfully, resolutely and with as much sensitivity as possible.

a fresh look at the Problems of Re-District

AND GOOD GOVERNMENT

AFFIRMATIVE ACTION IN SOUTH AFRICA: ~~MECHANISMS OF ENFORCEMENT~~

~~Re-Distribution, good government and affirmative action in SA.~~

PART ONE AA,

The Setting

Now that the battle for equal voting rights is slowly and relentlessly being won, we have to embark on the even more arduous task of guaranteeing equal access to the resources of the country. ~~It is in this context that~~ affirmative action is in the air. We put it there, and it is our duty to explore its implications, give it a thoroughly South African meaning, ensure that it responds to the claims of all our people and not just of a small new elite, and see to it that it becomes ~~a practised~~ reality. that it extinguishes itself.

In a distressingly ironic way, there is nothing new about affirmative action in South Africa. We have had it for decades, even for centuries, with this special difference, that it operated not in favour of the disadvantaged but for the benfit of the advantaged. By law and by practice, quite independently of individual merit or entitlement, the section of the population classified as white were given immense and at times total advantage in relation to their fellow South Africans.

Thus, the whole of apartheid law amounted to no less than a systematised and unjust form of affirmative action in favour of the whites, who were granted preferential access to land, to employment, to credit, to participation in cultural or sporting life, indeed, to every amenity and facility that society had to offer.

After their election victory in 1948, the Nationalists practised linguistic affirmative action within racist affirmative action, embarking on a conscious and declared policy of promoting Afrikaners in general and their supporters in particular in every area of South African life. Their claims that whatever the law might have said, Afrikaners were subject to various forms of exclusion and disadvantage, undoubtedly had merit, but not nearly as much as those of black South Africans today.

We are now saddled with the accumulated legacy of generations of structured advantage and disadvantage. It is not just something regrettably left over from a sad and shameful past. The special favouring of the privileged minority continues. While aspects of formal race segregation have been abolished, the system of 'own affairs' carries on as long as the Tricameral Parliament remains in existence. Through it we can see the iniquitous statistics of

continuing inequality. The basic principle of governmental spending is still largely as before: to those that have, it shall be given four or five times over.

Thus, each white child still gets five times as much spent on his or her education as a black child. White patients continue to have four times as much spent on their health, while white farmers get vast benefits in the form of soft credits and price subsidies that are not available to black farmers. Even old aged pensions are heavily weighted in favour of whites.

It grieves one to be referring to blacks and whites, to be using the language of race. We long for the day when colour is completely irrelevant in our society, when we are all just human beings, South Africans, with a common love for this country, and possessing an equal chance of enjoying its riches, when skin colour is not even noticed, let alone referred to. To achieve that, is, and must always be, our goal. Indeed, it has to be the primary aim of affirmative action.

Yet the truth is that the injustices and inequalities produced by past race discrimination do not go away simply because the laws which enforced the discrimination are repealed. To ignore the realities of racial inequalities would not be an example of being colour-blind, but a case of being totally blind.

Colour rather than need or ability is still the greatest factor in deciding who will wear shoes or who will go barefoot, who will get water by switching on a tap and who has to walk miles each day to fetch it, who will matriculate and who will be unable to write his or her name, who will die of measles or malnutrition and who will go on to sail round the world.

Our children and our grandchildren are born into a world where their life chances are grossly unequal. However skilled or hardworking or upright they might be, their destinies are determined not primarily by any virtue or merit they might have, but by the accident of which group their parents happened to belong to.

Fly over any city, drive through any suburb, travel past the farms of our country, and immediately you see who owns what, who lives how, whose streets are lit at night and whose are dark. Go to any school or hospital or playground, and, with marginal differences, the story is the same.

In the private sector the ~~story~~ picture is identical.

Look at who sit on the boards, who direct the departments, who control the supply of money or paper or cement, who sit behind the desks and who carry the messages, ~~and~~ the pattern ~~is identica~~l.

To deepen the tragedy, these inequalities replicate themselves from generation to generation. Illiteracy, ill-health and poverty get handed down as a bitter bequest from parents who would love to do well by their children, but who lack the where-with-all. On the other hand, wealth, skills and confidence get locked into the communities and families that have always enjoyed them. Inequality continues as before, only now it is regarded as natural, or, worse still, as the fault of the disadvantaged.

An ~~important part of our strategy to break out of the self-~~ FEARS reinforcing trap is affirmative action.

Everything is divided in SA, even our fears.

PART TWO THE

BACKGROUND: THE WORD 'BUT'

Bertrand Russell, the critical English philosopher who, amongst many things in an extraordinary life of 94 years employed Ronnie Kasrils*, once said that the most important term in the English language was the word 'but'.

Five years ago, when the newly-formed Constitutional Committee of the ANC was debating the question of whether to support a Bill of Rights for South Africa, the answer we gave was an emphatic 'yes', followed by an equally resonant 'but....'

We had no doubt that the Freedom Charter supported the idea of a constitution that gave firm and clear guarantees that all South Africans would in future be able to enjoy fundamental human rights and freedoms. The NEC had come out explicitly in favour of a multi-party democracy and of a justiciable Bill of Rights, that is, of an entrenched set of principles and norms that could be invoked by recourse to the courts if necessary.

Our fear was that a Bill of Rights would be projected in such a way as to highlight one aspect of the Freedom Charter while extinguishing another. We were concerned that after generations of struggle we would ~~end up in~~ enter the political kingdom, but that all else would be denied unto us. In other words, we would win freedom without bread, when what we wanted was freedom with bread; worse still, the freedom would be defined in terms which actually precluded us from getting bread.

* Well-known member of the ANC.

This is where the word 'but' came in. It was the fundamental qualification that a strong and meaningful Bill of Rights ~~the stronger, the better~~ be associated with an equally firm constitutional requirement to eradicate the inequalities created by apartheid. Without that, the quest for human dignity in our country had little meaning.

Perhaps in an earlier phase of our lives we would have hesitated in supporting a Bill of Rights at all. We might have condemned the idea as bourgeois, thereby, first, depriving ourselves of a major instrument of liberation, second, handing the notion over to the bourgeoisie as their private property, and, third, letting them have it, in violation of their own market principles, free, gratis and for nothing.

In any event, the Constitutional Committee threw its weight enthusiastically behind the idea of a Bill of Rights [well before the debacle of Eastern Europe], indicating that affirmative action should be integral to the process of extending human rights to all South Africans. Persons who received the ANC Constitutional Guidelines some years ago will recall that the document included clauses calling for programmes of affirmative action to overcome the massive inequalities produced by apartheid. Particular mention was also made of the need to redress the disabilities imposed on women, by means of affirmative action.

We gave no definition of affirmative action. Indeed, we are unaware to this day of the term ever having been defined in legislation or international covenants. Modern conventions, however, frequently have articles which make it plain that any special treatment to favour language, cultural, religious and educational rights of formerly oppressed groups, and any moves to overcome the disadvantages imposed by past gender and race discrimination, shall not be regarded as violating human rights principles.

The phrase affirmative action came from the United States, where it had had a turbulent history. In using it, we studied American experience, but gave it our own South African significance, importing neither the specific forms it took in that country, nor the controversies it evoked there.

We regarded it as an advantage that the term had an open rather than a closed meaning. It has been said that the key words of any constitutional document are creatively ambiguous. A fundamental concept is established on the basis of its manifest appropriateness and necessity, and texture

and refinement are then added by subsequent generations. We needed, and still need, both the substantive rightness of a broad constitutional principle that requires active steps to secure equal chances in life for all, and close pointers to the procedural guarantees that will be necessary to secure its enforcement.

The rest we can leave to future experience.

STRATEGIC CONSIDERATIONS

The emphasis we gave to affirmative action was based on a number of strategic constitutional considerations.

In the first place, we did not know how change was going to come about, whether through insurrection or negotiations or a combination of both. Accordingly, we wanted a concept that would require change in all possible situations, and not be dependent on any particular mode of transformation [the one option we did not contemplate was defeat].

Secondly, after consultation with the NEC, we put forward the notion of a mixed economy as a constitutional concept. This pre-supposed an important role both for the state and the private sectors in the economy. Affirmative action is a strategy peculiarly well-suited to facilitate re-distribution in a mixed economy; it is ideologically open and pre-supposes active steps being taken to redress imbalances in both the public and the private spheres.

Thirdly, considerable experience, both of a positive and a negative nature, had been gained in the United States of affirmative action in practice.

Difficult conceptual and practical issues had been confronted, and a number of techniques and strategies developed capable of fitting comfortably within a Bill of Rights framework. We could benefit as much from knowing about the errors and setbacks as we could from having information about the successes.

Many of the questions remain complicated, particularly that of the relationship between non-racialism [non-sexism], equal protection, and quotas. Possibly our experience in South Africa will feed back to our brothers and sisters in the USA. In addition to being able to apply hindsight to their struggles, we can look forward to certain advantages: we can count on majority support, we can anticipate clear constitutional authorisation for affirmative action and we

can rely on a deep-rooted and continuing tradition of non-racism to give it an across-the-board character.

Finally, and most important of all from a technical point of view, the concept of affirmative action established a firm and seamless connection between the fundamental freedoms clauses of the Freedom Charter and the social rights ones. On the one hand, it guaranteed that being free and having the vote would enable people better to work for social advancement, on the other it ensured that the achievement of social rights would come about under the rule of law according to just principles and fair procedures.

Affirmative action should thus be seen as the midwife of equity. It forbids the constitution, under the guise of a false libertarianism, from becoming an instrument of human abandonment, heartlessness and neglect; it prevents good constitutional concepts like equal rights and freedom of association from being turned on their heads so as to promote the privatisation of misery and the 'inevitabilising' or 'fatalising' of inequality.

At the same time, affirmative action excludes another and opposite kind of libertarian lawlessness, namely, constitutionalised banditry in the form of arbitrary confiscation, self-help and warlordism.

It thus becomes the even-handed alternative both to congealing present inequalities, and to opening the way to 're-distribution' through nepotism, corruption, protection and jobs for pals.

PART THREE
PRINCIPLES OF AFFIRMATIVE ACTION IN THE BROAD SENSE

Affirmative action in the South African context has extremely broad connotations, touching, as apartheid did and still does, on every area of life. It involves a commitment to take steps in a firm, orderly and principled way to overcome the enormous divisions in life-chances created by apartheid. It goes to the heart of the human rights idea in our country. It is the foundation of a sense of shared citizenship and common allegiance to South Africa.

It is the great de-stabiliser of the abnormal society created by apartheid, and the profound re-stabiliser of the new country we want to build.

In its widest sense, affirmative action covers all purposive activity designed to eliminate the effects of apartheid and create a society where everyone has the same chance to get

on in life. In terms of the ANC draft Bill of Rights, all anti-discrimination measures, as well as all anti-poverty ones, may be regarded as serving the purpose of affirmative action.

The ANC draft Bill of Rights contemplates a wide range of principles and strategies to overcome the inequalities created by apartheid.

The first is the concept of equal rights or anti-discrimination, supported by a Human Rights Commission and the courts.

The second is the principle of an expanding floor of minimum social, educational and welfare rights, backed up by a Social Rights Commission and the courts.

Third is the idea of regional equalisation, that is, of ensuring a flow of revenue for infra-structural development which will progressively overcome the inequalities between poor and rich regions.

Finally, special techniques or modalities of affirmative action, involving a wide variety of agencies, may be used to deal with special blockages or impediments to the achievement of equal opportunity for all.

in an accelerated way

This last is the area of affirmative action in the narrow sense, but before arriving there and dealing with difficult questions such as that of racial quotas, we should examine affirmative action in its broad aspect; it would be unfortunate and unnecessary to try to load all the transformations and moves towards equality that the country requires on quotas and other mechanisms associated with affirmative action in the narrower use of the term.

Equal Protection

Pride of place must go to the principle of equal protection. This is the fundamental anti-apartheid notion, the foundation of the new constitution. In terms of all the basic entitlements of citizenship, we are all the same, entitled to be treated in identical fashion, irrespective of race, colour, creed, gender etc. It is worth quoting Article One in full - it is for these principles that countless South Africans gave their lives:

1. All South Africans are born free and equal in dignity and rights.

2. No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth or other status.

3. All men and women shall have equal protection under the law.

These words are so simple that we are inclined to view them as a poetical preface to the real enforceable rights to follow. This would be quite incorrect. In another kind of society where basic equality of rights exist, even if there is some discrepancy in living standards, such a clause might be more preambular than regulatory. In a country like ours, where every aspect of life has for decades, even centuries, been determined in a grossly unequal way in terms of race and gender, equal protection has an immense transformatory potential.

The first requirement will be to end the completely indefensible affirmative action currently being taken in favour of the white minority. In some countries it is difficult to prove race discrimination by the State. This is not the case in South Africa, where separate and unequal spending is explicitly guaranteed by the system of 'own affairs' in Government.

There is no area too poignant to escape this inequality: white schoolchildren in the countryside glide in government-subsidised buses past black pupils trudging miles to and from farm-schools each day.

The inequality of state, regional and local authority disbursements is to be found everywhere, from health, to education, to street lighting, to the provision of parks and pools, not to speak of swimming lessons. How many white patients in a hospital have to share beds or sleep on the floor? While white hospitals, schools and living areas are underutilised by any standards, black areas and facilities are grossly overcrowded. Yet instead of public revenue being used to diminish these inequalities, it is employed to keep them alive.

Article 14 of the draft Bill of Rights declares that in its activities and functioning, the state shall observe the principles of non-racism and non-sexism, and encourage the same in all public and private bodies. It goes on to affirm that all benefits conferred and entitlements granted by the state shall be distributed on a non-racist and non-sexist basis.

We have barely begun to appreciate the practical implications of applying the principles for which we have been fighting all our lives. Equal protection is a solid and unassailable concept. It guarantees an end to discrimination against blacks, while at the same time protecting whites against domination or abuse. As new, non-racial authorities are elected to office at the various levels of government, we can expect them for the first time in our country's history to function according to the principle of equal protection.

This does not involve confiscation or dispossession or an attack on the living standards of anyone, but it does mean that all future spending is done on an equal basis. Nor does equal protection require the raising of extra revenue. What it does insist on is that all moneys in the state coffers be expended on citizens equally as citizens, and not on them differentially as blacks and whites, or females and males.

Expanding floor of social rights

The elements of race, poverty and dignity are so intertwined in our country that without a programme of active intervention to promote the enjoyment of the minimum decencies of life on an across-the-board basis, the concept of equal protection takes on a mocking quality. Our greatest victory would become our biggest defeat: life will be as unjust in conditions of freedom as it was under apartheid. Africa will come back, but with an empty bowl.

It is for this reason that the draft Bill of Rights, in keeping with virtually all modern constitutions, gives great emphasis to the securing of social, educational and welfare rights.

The second major constitutional concept related to affirmative action in the broad sense, therefore, is that of an expanding floor of minimum social, educational and welfare rights. The basic idea is that there should be legislation which, taking account of the resources of the country, grants progressively increasing rights to the whole population in relation to such fundamental human entitlements as those to nutrition, health, education, shelter, employment and welfare.

In a sense, this is a pro-active extension of the principle of equal protection, the guaranteeing in practice of the materialisation of equal rights.

A debate exists as to whether it is appropriate to put the concept of an expanding floor of minimum rights in a constitution.

Sometimes the argument is trivialised by saying that it is a lovely but totally irresponsible idea to promise everyone a home when the economy simply does not allow for this to be achieved.

The minimum floor of rights approach in fact does not offer everyone a home, desirable though this would be. It merely promises to reduce homelessness, and guarantees such housing rights as the right not to have your home destroyed if alternative accommodation is not available. At the same time, it promotes the idea of progressive materialisation of the right to enjoy electricity, access to clean water, waste disposal and so on, even in the most humble homestead.

In any event, whether the floor of rights idea is in the constitution or not, it should be high on the agenda of any new government. We will have to have an Education Act, a Housing Act, a Health Act, as well as legislation to help overcome hunger, unemployment and the other ills of our divided country. These statutes will create positive rights enforceable in the courts.

They will be non-racial in character, referring to pupils, patients, residents and workseekers, not to blacks and whites. Yet by focussing on the rights of those whose circumstances are the hardest, they will ensure that in practice the main beneficiaries will be those who suffered the greatest deprivations in the past, that is, blacks, and especially black women. The emphasis will, however, be on need, not on race; the white family that recently moved in with black squatters could benefit as much as their black neighbours.

Regional Equalisation

The third constitutional principle that supports affirmative action in the broad sense is that of regional equalisation. Article 10 of the ANC draft Bill of Rights declares that in order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extension of legislation and minimum standards from area to area.

This idea needs to be built upon in relation to the general question of funding for regional development. The gross

underdevelopment of the rural zones referred to as the homelands, is an affront to all of us. The areas that have prospered on the basis of exploiting migrant labour now have to acknowledge their responsibility for ensuring the even development of the whole country. Cultural distinctness can be retained without perversely regarding isolation, poverty, lack of clothing and hunger as a cultural right.

The concept of regional equalisation will be most strongly expressed in the section of the Constitution dealing with the regions and their relations with the central government. What is clear is that priority will have to be given to building up social and economic infrastructures in areas like Venda, the Transkei and KwaZulu if poverty and inequality are ever to be eliminated in our country.

Non-racialism and good government

Equal protection, an expanding floor of rights, and regional equalisation are all profound means of attacking the problem of inequality. Overwhelmingly, it will be blacks who will benefit from these programmes, because it is blacks who are the poorest and the most disadvantaged. Yet they will be benefitting in the ordinary way as citizens and not as blacks. The non-racial principle remains intact, indeed, it is re-inforced.

We cannot emphasise too strongly that the main means of achieving affirmative action in the wide sense in South Africa is simply through applying the principles of good government.

Accordingly, before we get to the question of targets and timetables and affirmative action in the narrow sense, we must install good government. This, more than any special programmes, is the guarantee that people will at last get their rights. The question of quotas will be dealt with later - but however they are considered, they should never become a substitute for good government. At most they should be a means of supplementing it in key areas where special measures of an intensive and accelerated kind are required;

Affirmative action and the whites

It might well be that whites who were the main beneficiaries of racism in the past will be the principal ones to benefit from non-racialism in the future. What this means is that they will be protected by the constitution, as will everyone else, from the kinds of dispossession on grounds of race to which they subjected blacks in the past.

Acknowledging their right to protection from abuse or domination is not a negotiating concession or a compromise. It is in the Freedom Charter. That is the kind of society we want to live in. That is what we struggled for, an end to the world of domination and subordination.

Thus whites will be secure in their homes without a Group Areas Act to threaten them, be able to study without fear of a new Extension of Universities Act to exclude them, and advance their careers without a new Job Reservation law to keep them out.

Though the main beneficiaries of affirmative action, on the other hand, will be those who suffered most under apartheid, this does not mean that affirmative action, whether in the broad or the narrow sense, should be seen as a punitive measure against those who benefited from apartheid. Put more simply, it would be wrong to conceive of affirmative action as being in its nature anti-white.

At the same time, the whites can not use the principle of non-racism to enable them to hold forever on to the 87% of the land which they obtained by racist methods. Nor are they entitled to monopolise for all time the commanding heights of business, and not only the commanding heights, the foothills as well, which they secured in a racist context.

The whites by and large have the education, health care, housing and employment that they wish. They give up none of these, and if they are poor, they benefit from programmes designed to help the disadvantaged, whoever they may be. What the whites have to forego is their privileged status both as the beneficiaries of government policies and as the sole determiners of such policies. The many things they have been getting from the government, they will continue to receive, but on the same basis as everyone else. If they want extra, they will have to pay for it.

Affirmative action in this sense takes away their privileges but not their possessions. It gives them in return something they have never had, a secure position in the country, living as equals on a dignified basis with their fellow South Africans.

PART FIVE - THE PROCEDURES

PROCEDURAL REMEDIES

The role of social organisations

If good, non-racial, non-sexist, democratic and open government is the main guarantee that the effects of

apartheid will be overcome, then the organs of civil society are the principal guarantors of good government. Over and above any mechanisms and procedures which might be established to enable people to secure their constitutional rights, there will have to be vigorous social institutions, such as trade unions, religious organisations, civics, the womens movement, student bodies, cultural circles and professional and business associations, to see to it that government tries neither to do too much nor too little. Freedom of association and constitutionally guaranteed space for such organisations, enables people to get on with their own lives in the way they think best [Article 5 of the draft Bill of Rights]. This space is particularly important for the most exploited and oppressed in our society, who as individuals have little chance of getting maximum benefit from the new constitutional order, but who in combination will better be able to secure their rights.

It is worth repeating that all constitutions are based on mistrust, not only of our opponents but of ourselves. Governments, however honourable, are always cognisant of constraints, which, when boiled down, usually means accommodating to power. Robust and self-confident community organisations ensure that the people are never converted into a mystical abastraction that only comes to life once in five years when elections are held.

They are particularly important in relation to affirmative action. It will be suggested that in South Africa, as in the United States, the main beneficiaries of affirmative action in the narrow sense will be the black middle class, and, possibly, professional women of all races. These are important sections of society and have every reason to expect the constitution to support their just claims. Yet there are millions more who are also entitled to advancement and whose claims will be ignored or met in large measure according to the degree to which they are an organised social force.

In other words, as far as the great mass of people are concerned, the guarantee of affirmative action, that is of manifest reduction of inequality and improvement in their lives, will come from a combination of good government and strong community and other organisations, rather than from quotas, timetables and hiring procedures.

In a more specific sense, too, non-governmental organisations [n.g.o.'s] will have a crucial role in ensuring that the elimination of inequality becomes a

reality in our country. Not only will bodies as diverse as NAMDA and Operation Hunger have a larger function than ever in helping new health and nutrition policies to evolve, there will be a great need for organisations independent of the state to help people present their claims to the many structures which will be set up under the constitution to enable people to pursue their rights.

The Ombud

The main danger with the Ombud is that he or she will be expected to deal with every form of abuse or maladministration that the rest of the Constitution cannot handle.

The Ombudsman was an office first created in Norway and Sweden to receive complaints from the public in relation to the functioning of the state administration. In recent years there many women have held the position, so now the gender-free term Ombud is used instead. The idea has been taken over in many countries, where it is seen as a useful means of giving the ordinary citizen redress against officials who are rude, devious, incompetent, tardy or capricious, or who in any other way abuse their office without necessarily violating the law. The Ombud investigates the complaint and can recommend action if necessary against the offending official. It is then up to the superiors of the official to decide what to do.

The ANC draft Bill of Rights gives an important place to the Ombud, without regarding him or her as the only agency, outside of the courts, for dealing with violations of human rights. On the contrary, the function of the Ombud is better fulfilled if its scope is clear and precise: to deal with the officious official. In the South African context, we could extend the role to investigating cases of the three ugly brothers, prejudice, favouritism and corruption.

The office is far too weak, however, to handle the whole question of dealing with racist structures and patterns of behaviour. It should not be put forward as an ineffectual alternative to a Human Rights Commission or to affirmative action programmes.

Human Rights Commission

It is urgent that we in South Africa begin to think about and plan for a Human Rights Commission. Someone applies for

public agencies staffed by resolute yet sensitive persons with clearly defined mandates.

The Human Rights Commission will have a huge task. It will have to be present in every area, capable of responding to every type of complaint.

Equally if not more important, a Human Rights Commission could investigate patterns of discrimination and make recommendations or orders for their elimination. One expects that the government will take steps to put its own house in order, but what about access to housing, schools, hospitals, swimming pools and to employment in the private sector? It is in this respect, especially where there is no proof of express intent to discriminate, that the principles of affirmative action in the narrow sense, including quotas, would come into play.

The role of social organisations

One of the principal functions of a modern constitution is to see to it that the government tries to do neither too much nor too little. People need space to get on with their lives. They are entitled to privacy, choice and personal self-determination. The apartheid state intruded on every aspect of the lives of the majority.

The concept of personal freedom thus has special significance for those who have been stopped in the streets, raided in their homes, and told where they can live and with whom. There are many things that are simply not the business of the state, and it is the duty of the constitution to point out what they are.

At the same time, there are other issues that are very much the business of the state, and the constitution must make clear what they are as well. In virtually all countries the state has primary responsibility for ensuring that basic educational and health services are available to the general public. In most countries, para-statal organisations provide water and electricity, as well as other other services such as posts and telecommunications.

The statement that the individual is free to seek education or health services or clean water or electricity wherever he or she wishes only has meaning if schools and hospitals and electricity and water supplies exist. Because of apartheid,

facilities that whites take for granted simply are not there for blacks. The new state will have to shoulder the same responsibilities towards the total electorate which the old one accepted in relation to the white electorate. Equal protection means equal entitlement.

The idea of entitlement is central to the human rights notion. It represents the difference between the top-down paternalistic concept of upliftment and the bottom-up idea of advancement. Yet entitlement alone is not enough. Indeed, it can become dis-empowering if it signifies an active state and passive citizens

If good, non-racial, non-sexist, democratic and open government is the main guarantee that the effects of apartheid will be overcome, then the organs of civil society are the principal guarantors of good government. Over and above any mechanisms and procedures which might be established to enable people to secure their constitutional rights, there will have to be vigorous social institutions, such as trade unions, religious organisations, civics, the womens movement, student bodies, cultural circles and professional and business associations, to see to it that government tries neither to overstep nor to understep the mark.

Freedom of association and constitutionally guaranteed space for such organisations, enables people to get on with their own lives in the way they think best [Article 5 of the draft Bill of Rights]. This space is particularly important for the most exploited and oppressed in our society, who as individuals have little chance of getting maximum benefit from the new constitutional order, but who in combination will better be able to secure their rights.

It is worth repeating that all constitutions are based on mistrust, not only of our opponents but of ourselves. Governments, however honourable, are always cognisant of constraints, which, when boiled down, usually means being aware of the need to accommodate to power. Robust and self-confident community organisations ensure that the people are never converted into a mystical abstraction that only comes to life once in five years when hand-outs are offered before elections ~~are held~~.

Such orgs.

~~They~~ are particularly important in relation to affirmative action. It could well be that in South Africa, as in the United States, the main beneficiaries of affirmative action in the narrow sense will be the black middle class, and, possibly, professional women of all races. These are

important sections of society and have every reason to expect the constitution to support their just claims. Yet there are millions more who are also entitled to advancement and whose claims will be ignored or met in large measure according to the degree to which they constitute an organised social force.

In other words, as far as the great majority of the people are concerned, the guarantee of affirmative action, that is of manifest reduction of inequality and improvement in their lives, will come from a combination of good government and strong community and other organisations, rather than from quotas, timetables and hiring procedures.

The organisations will see to it that no-one is too isolated or too poor or too unlettered or too fearful to lose out on their constitutional entitlements. ~~Living according to~~ the rule of law depends as much on the activities of non-lawyers as of lawyers.

There will also be a great need for specialised and autonomous non-governmental organisations [n.g.o.'s] to ensure that social programmes are sensitive, fine-tuned and participatory in character. Not only will bodies as diverse as NAMDA and Operation Hunger have a larger function than ever in helping new health and nutrition policies to evolve, there will be a great need for organisations independent of the state to help people secure their rights as against the state.

THE OMBUD

The attractiveness to South Africans of the Ombud is that it is totally unfamiliar. This gives us the chance to make it an office that deals with all the problems of abuse and maladministration that we cannot handle elsewhere in the Constitution.

The Ombudsman was an office first created in Norway and Sweden to receive complaints from the public in relation to the functioning of the state administration. In recent years many women have held the position, so now the gender-free term Ombud is used there instead.

The idea has been taken over in many countries, where it is seen as a useful means of giving the ordinary citizen redress against officials who are rude, devious, incompetent, tardy or capricious, or who in any other way abuse their office without necessarily violating the law. The Ombud investigates the complaint and can recommend action if necessary against the offending official. It is then up to the superiors of the official to decide what to do.

The office is an interesting example of yet another constitutional paradox: the state appoints an official ~~paid out state funds~~ and pays him or her to control the actions of the state.

Generally, the Ombud's decisions are recommendations only, and from the point of view of 19th Century concepts ~~of legal rights~~, they have no significance whatsoever since they cannot be enforced in a court of law. The fact is that there is far greater compliance with these recommendations than with many court orders [for example, maintenance payments]. New kinds of remedies give rise to new kinds of rights.

The ANC draft Bill of Rights gives an important place to the Ombud, without regarding him or her as the only agency outside of the courts for dealing with violations of human rights. On the contrary, the function of the Ombud is better fulfilled if its scope is clear and precise: to deal with the officious official. In the South African context, we could extend the role to investigating cases of the three ugly brothers, prejudice, favouritism and corruption.

The office is far too weak, however, to handle the whole question of dealing with racist structures and patterns of behaviour. It should not be put forward as an ineffectual alternative to a Human Rights Commission or to properly monitored affirmative action programmes.

AN EXPANDING FLOOR OF SOCIAL RIGHTS

The elements of race, poverty and dignity are so intertwined in our country that without a programme of active intervention to promote the enjoyment of the minimum decencies of life on an across-the-board basis, the concept

of equal protection takes on a mocking quality. Africa will come back, but with an empty bowl.

It is for this reason that the draft Bill of Rights, in keeping with virtually all modern constitutions, gives great emphasis to the securing of social, educational and welfare rights. Where it differs from other constitutions is that it attempts to go beyond simply setting out these rights as something to be aimed for, and to establish criteria and mechanisms for making them enforceable. Put another way, the draft Bill of Rights ~~seeks~~ to lay a constitutional foundation for the achievement of positive or enforceable rights in the social sphere.

The basic idea is to impose a duty on Parliament to adopt legislation which, taking account of the resources of the country, grants progressively increasing ~~rights~~ to every citizen. It focuses on certain core or fundamental areas of human existence, establishing the notion of expanding ~~entitlements~~ to nutrition, health, education, shelter, employment and welfare.

In a sense, this is a pro-active extension of the principle of equal protection. It ~~goes beyond~~ the principle of equal opportunity ~~and demands at least equal platforms~~.

This approach is not uncontroversial. An important debate exists as to whether it is appropriate to put the concept of an expanding floor of minimum rights in a constitution at all. Many argue that social rights belong in the political rather than the constitutional domain. They contend that it does a disservice to the timeless and clearly understood principles of human freedom to submerge them in transient, poorly understood social rights; worse still, they say, the pursuit of collective social rights is used as a pretext for undermining basic individual rights.

The paradox is that the more extensive the provision of social rights in any country, the easier it is to have them constitutionally recognised. The idea that everyone is entitled to certain levels of health care, to so many years of education, to electricity and clean water, has the self-evident quality that marks it down for constitutional acknowledgement.

In a society like ours, however, persons whose biggest water worry is what kind of filter to use in their swimming pool or whether to buy bottles of Schoonspruit or Perrier, simply cannot see that access to clean water should be classified as a fundamental human right. To them it is not a question

of rights but of money. To those for whom getting water is a daily chore and often an agony, on the other hand, there is simply no choice - the reservoirs, the pipes and the taps are simply not there. When they buy water in drums they pay far more.

In the absence of common life experiences it is often difficult to find common standards. Yet in the search for universal concepts we can begin with the idea that every family and every person has at the very least an equal right to water.

Water comes to us from the skies. It is not the product of risk capital. The dams that hold it are the product of the work and taxes of all, as are the pipes along which it runs. Yet when this necessity of life flows into the homes of whites as a matter of course and not into those of blacks ~~by way of exception~~, who can deny that human rights are being violated? Are whites thirstier and dirtier than blacks? It is not just a question of money. The poor are willing to pay. The water is just not there for them.

Insensitivity on the issue of social rights is sometimes compounded by trivialisation. One frequently hears people arguing that it is a lovely but totally irresponsible idea to promise everyone a home when the economy simply does not allow for this to be achieved.

The 'minimum floor of rights' approach in fact does not offer everyone a home, desirable though this would be. It merely promises to reduce homelessness, and guarantees certain specific housing rights, sometimes of a purely defensive character, as the right not to have your home destroyed if alternative accommodation is not available. At the same time, it promotes the idea of progressive materialisation of the right to enjoy electricity, access to clean water and waste disposal ~~and so on~~, even in the most humble of homesteads.

It is difficult to see why freedom vs. bread vs. should be seen as incompatible in any way.

What is required, ~~then,~~ is a firm constitutional commitment towards the preservation of fundamental freedoms quite independently of whether social rights are being realised. Freedom is a value in itself, not something to be balanced against bread.

~~Simultaneously~~, Equally, the rights to food, clothing, shelter and education are rights in themselves, not to be weighed in a competitive scale against freedom.

The Bill of Rights must be formatted in such a way that both sets of fundamental rights are protected, each in its own appropriate manner. There will always be overlap. The presentation and interpretation should be such that wherever possible, the different sets of rights re-inforce each other. Where necessary, however, depending on the circumstances, one cluster of rights must give way to another. Thus, torture can never be constitutionally justified, even in times of famine to get a food hoarder to reveal where he or she has hidden food. By the same token, property rights can never be invoked to justify destruction of food in order to keep prices high.

A major advantage of creating constitutional principles and mechanisms to guarantee that permanent attention is given to raising basic living standards is that it takes some of the pressure off affirmative action in the narrow sense. If people are satisfied that there are institutions which guarantee that their basic rights are being attended to on a generalised basis, they are less likely to see each application for a job or a home or a place in a school or hospital as part of a general race war. Affirmative action is thus freed of the burden of having to carry all movement towards a more just society, and enabled better to fulfill its true function, namely, to provide in a well-tailored way for accelerated advance in certain crucial areas.

In any event, whether the floor of rights idea is in the constitution or not, it should be high on the agenda of any new government. We will have to have an Education Act, a Housing Act, a Health Act, as well as legislation to help overcome hunger, unemployment and the other ills of our divided country. These statutes will create positive rights enforceable in the courts.

They will be non-racial in character, referring to pupils, patients, residents and workseekers, not to blacks and whites. Yet by focussing on the rights of those whose circumstances are the hardest, they will ensure that in practice the main beneficiaries will be those who suffered the greatest deprivations in the past, that is, blacks, and especially black women. The emphasis will, however, be on need, not on race; the white family that recently moved in with black squatters could benefit as much as their black neighbours.

A SOCIAL RIGHTS COMMISSION

One of the main criticisms of the concept of constitionalising social rights is that they are not worth

the expensive parchment they are written on, because they simply cannot be enforced.

This observation has to be taken seriously. To fill the Bill of Rights with false promises would be to do it a major disservice. The question of enforceability, however, can not be looked at merely in terms of the right to bring an action in court. The right to clean water is daily enforced in South Africa - for the minority, at least - by means of statutes governing water supplies, involving inspectorates, reporting and penalties for endangering health. It is not necessary to sue anyone to get potable water out of your tap.

What is required in relation to social, educational and welfare rights is a concept of enforceability that takes into account both the question of affordability and the issue of appropriate forms of enforcement.

The ANC draft Bill of Rights proposals would in fact have immediate implications for the courts, some direct some indirect.

Thus, they could in some cases establish strong positive rights, such as that not to be evicted from shelter or have one's home destroyed if an alternative home is not available. More generally, they could give rise to defensive or negative rights, that is, to render unlawful actions which are designed to or have the effect of diminishing these rights. They would also have a major impact on the interpretation of statutes and enquiries into the validity of administrative acts or of by-laws.

Yet if the social rights clauses are to give rise to positive rights enforceable in the courts, something more is needed. Clearly, programmes get converted into structures of rights through legislation. In this way, the right, say, to free and compulsory primary education, as is found in many constitutions, is realised through an Education Act.

An idea gaining increasing support is that a Social Rights Commission be established in order to monitor, report on, do research, receive complaints on and generally supervise the implementation of social rights programmes.

Such a body would assist the courts in making determinations where social rights questions were in issue, but their function would be much wider. They would liaise with all legislative authorities, that is, at local, regional and national levels, and inform them and the public as to

progress made and failures recorded in the implementation of social rights. If minimum standards are required by law, they can report on defaulters.

An adverse report by the Social Rights Commission might not be as powerful in a technical ~~legal~~ sense as an adverse judgment by a court of law, but it could have great significance with public opinion, and end up being enforced in practice through consequent legislative or executive action.

An example might better illustrate how the ... might work - the right to electricity -

POWER TO THE PEOPLE - AN ELECTRIC LIGHT IN EVERY HOME

[include breach of statutory duty]

REGIONAL EQUALISATION

The third constitutional principle that supports affirmative action in the broad sense is that of regional equalisation. Article 10 of the ANC draft Bill of Rights declares that in order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extension of legislation and minimum standards from area to area.

This idea needs to be built upon in relation to the general question of funding for regional development. The gross underdevelopment of the rural zones referred to as the homelands, is an affront to all of us. The areas that have prospered on the basis of exploiting migrant labour now have to acknowledge their responsibility for ensuring the even development of the whole country. Cultural distinctness can be retained without perversely and offensively regarding isolation, poverty, lack of clothing and hunger as a cultural right.

The concept of regional equalisation will be most strongly expressed in the section of the Constitution dealing with the regions and their relations with the central government. What is clear is that priority will have to be given to building up social and economic infrastructures in areas presently under the Venda, Transkei and KwaZulu

administrations if poverty and inequality are ever to be eliminated in our country.

PART FOUR - THE BENEFICIARIES OF AFFIRMATIVE ACTION

Non-racialism and good government

Equal protection, an expanding floor of rights, and regional equalisation are all profound means of attacking the problem of inequality. Overwhelmingly, it will be blacks who will benefit from these programmes, because it is blacks who are the poorest and the most disadvantaged. Yet they will be benefitting in the ordinary way as citizens and not as blacks. The non-racial principle remains intact, indeed, it is re-inforced.

We cannot emphasise too strongly that the main means of achieving affirmative action in the wide sense in South Africa is simply through applying the principles of good government.

Accordingly, before we get to the question of targets and timetables, and affirmative action in the narrow sense, we must install good government. This, more than any special programmes, is the guarantee that people will at last get their rights. The ~~question~~ issue of quotas will be dealt with later - but however they are considered, they should never become a substitute for good government. At most they should be a means of supplementing it in key areas where special measures of an intensive and accelerated kind are required.

THE THEORISATION OF AFFIRMATIVE ACTION

The difficulty arises when race and gender are specifically made relevant criteria in relation to strategies of what have variously been called benign, reverse or postive discrimination.

No theoretical problems arise with the concept of affirmative action merely being good government which for the first time regards blacks as full citizens entitled to equal rights and which develops programmes of social advancement which have the effect of benefiting more blacks than whites because they are the ones who suffer the most from social deprivation.

~~Yet~~ How, it is asked, can a colour-blind and a gender-neutral constitution permit any form of preference on the basis of colour or gender?

The answers given in other countries tend to follow two lines. The first is that special intervention may be justified to level the playing field. The emphasis here is on the creation of conditions of equal opportunity so that in future all persons may compete on a basis of equality. The second is that affirmative action is not only permissible but obligatory to compensate victims of past discrimination for the injuries done to them.

It is suggested that we in South Africa can develop solid theories based on our own realities. The following would appear to be relevant considerations.

In the first place, it is unnecessary to require specific or case by case proof of past exclusion. The evidence is in the statutes, and the ferocity with which they were applied. Apartheid law plus separate institutions of government plus unequal budgets established discrimination as a declared principle of public life. Whole communities were affected. The results are there for the world to see.

Secondly, the exclusion of the majority is not only unjust, it threatens the stability and progress of the nation. The imbalances that helped to maintain colonialism, segregation and apartheid, become intolerable and destabilising in conditions of democracy and equal rights.

Thirdly, we are not adapting a constitution, we are creating one. If, like that of all good constitutions, its function is to deal with the great problems of equity and iniquity, then it must confront and respond to the great injustices created by apartheid. Just as the American Constitution was a post-revolutionary one, the West German [now, German] constitution a post-war and post-Hitler one, and the Indian constitution a post-independence one, so ours must be a post-apartheid constitution.

Post-apartheid means more than just chronologically after apartheid. It signifies taking into account everything that apartheid produced. By tackling the legacy of apartheid, we are doing far more than giving opportunities to individuals who have been discriminated against, and something much more profound than giving compensation for past wrongs.

We are de-colonising and de-racialising our society; we are South Africanising our country, giving it a new personality; we are re-creating our state on new foundations. We are also dealing with the fears of all and with feelings of injustice of many. We are seeking to draw on the skills, life

experience and wisdom of the whole people so as to improve government and strengthen the economy.

The question is not whether there will be a restructuring of society but how the inevitable restructuring will come about. Affirmative action in our conditions becomes a crucial mechanism for ensuring

that change is meaningful,

that it benefits most those who most need it,

that it proceeds in an orderly way according to the rule of law and not the whims of well-placed, corrupt or power-hungry officials,

that it revolves around principles and values agreed upon by as many sectors of the community as possible as being the best ones to help the country move forward,

that it encourages tranquility and growth.

Principled application of affirmative action according to law is a major guarantee that majority rule operates in a fair manner for the benefit of the whole of society.

ADDRESSING WHITE FEARS

The broadness of a principle may be measured by the amount of irony it contains. It might well be that whites who were the main beneficiaries of racism in the past will be the principal ones to benefit from non-racialism in the future. What this means is that they will be protected by the constitution, as will everyone else, from the kinds of dispossession on grounds of race to which they subjected blacks in the past.

Acknowledging their right to protection from abuse or domination is not a negotiating concession or a compromise. It is in the Freedom Charter. That is the kind of society we want to live in. That is what we struggled for, an end to the world of domination and subordination. Certain issues must be put beyond the scope of vote-catching mobilisation. Now that we have moved out of the era of swart gevaar [black danger], yellow peril and red threat, we do not want to move into the age of white ~~diabolism~~. The constitution, the whole philosophy of the ANC and the needs of the country to avoid civil war and to draw on the skills of everyone, all point in the same direction.

Thanks to the principles of the Freedom Charter which they did so much to resist, whites will be secure in their homes without a Group Areas Act to threaten them, be able to study without fear of a new Extension of Universities Act to exclude them, and be free to advance their careers without a new Job Reservation law to keep them out.

Though the main beneficiaries of affirmative action, on the other hand, will be those who suffered most under apartheid, this does not mean that affirmative action, whether in the broad or the narrow sense, should be seen as a punitive measure against those who benefited from apartheid. Put more simply, it would be wrong to conceive of affirmative action as being in its nature anti-white.

At the same time, the whites can not use the principle of non-racism to enable them to hold forever on to the 87% of the land which they obtained by racist methods. Nor are they entitled to monopolise for all time the commanding heights of business, and not only the commanding heights, the foothills as well, which they secured in a racist context. The whites by and large have the education, health care, housing and employment that they wish. They give up none of these, and if they are poor, they benefit from programmes designed to help the disadvantaged, whoever they may be. What the whites have to forego is their privileged status both as the beneficiaries of government policies and as the sole determiners of such policies. The many things they have been getting from the government, they will continue to receive, but on the same basis as everyone else. If they want extra, they will have to pay for it.

Affirmative action in this sense takes away their privileges but not their possessions. It gives them in return something they have never had, a secure position in the country, living as equals and on a dignified basis as full human beings with their fellow South Africans.

ADDRESSING BLACK FEARS

Affirmative action is a process not a result, but it is a fair process designed to achieve a just result. If it is anchored in good, non-racial, non-sexist government, and if it is envigorated by active community and social organisations, it should respond to the wishes of those who have been marginalised or excluded by past oppression.

Getting our national institutions in place on a non-racial and democratic basis will be relatively easy. The real

battle against apartheid will be at the level of local government and affirmative action.

Properly applied, affirmative action responds to the two great anxieties that blacks have expressed, namely, that getting political rights will do nothing to ease the disastrous social situation in which they are forced to live, and, secondly, that at most it will enable a tiny black elite to share in the spoils of exploitatation with the whites, leaving the majority as destitute as before.

Affirmative action establishes the goal of equal life chances for all. It puts the achievevement of equal rights firmly on the agenda, and forces the whole of society to face up to the consequences of accumulated discrimination. It establishes criteria and mechanisms for monitoring progress. It opens the way for representative institutions of government so that for the first time the population at large can feel this is our police force, our army, our civil service, these are our courts.

It gives people the skills and in-service experience to enable them to overcome the doubts and insecurities instilled by generations of imposed subordination.

It avoids the disruptions and civil conflict that forced takeover and brusque advancement would bring. In circumstances where the majority at last have political rights, it is the intransigent minority of white supremacists who seek physical confrontatation and public disorder. Peaceful transition favours the masses. We want steady, well-worked out programmes of advance that bring in everybody, not impetuous and uncoordinated assaults that at best benefit a few. Tranquility is our friend, disturbance our enemy.

The strategy of principled affirmative action also helps to avoid the danger of a new bureaucratic elite emerging which, under the cloak of nationalism, regionalism or tribalism, uses its position to enrich itself and its close associates. We do not want to Bantustanise South Africa, but rather to South Africanise the Bantustans.

Affirmative action is still an open concept. It depends very much on ourselves how it functions and who it favours. Yet it contains the full possibility of establishing relatively painless lines of advance for the benefit of all. It facilitates the creation of orderly and just access to the new possibilities opening up.

Affirmative action rejects both the Big Bang theory of change and the Total Silence one. It looks at the skills which the whites have as a source of enrichment for the whole country. They belong not only to the whites but to the whole South African nation. Conditions must be created to enable these skills to be placed at the service of all, whether in farming or policing or healing or building.

We wanted to make racist South Africa ungovernable and apartheid unworkable. Now our goal is to enable non-racial, non-sexist South Africa to govern itself and to make our hard-won democracy work.

AFFIRMATIVE ACTION AND QUOTAS

SOME REFLECTIONS ON QUOTAS

IN OTHER COUNTRIES

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In Malaysia it appears that affirmative action procedures have been fairly successful in opening up both the civil service and commerce to persons from the Malay community who had previously been grossly under-represented in both areas. The price, however, has been to reinforce a spirit of communal rather than national identity. Some commentators feel that advancement could have been achieved by other means.

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It is widely accepted that the main beneficiaries of affirmative action programmes in that country have been black professional men and women and white professional women but that the great majority of blacks and of women have not seen their status improve.

The constitutional position of affirmative action remains unclear. Some judges have insisted that a colour-blind constitution does not permit any preferential treatment on the grounds of colour. Others have argued that to achieve equal protection it is necessary to take account of the

reality of racist practices that disadvantage certain groups and advantage others.

A perusal of the case law suggests that the following principles have been developed by the courts:

Where there is proof of deliberate exclusion on the grounds of race, then race can be used as a factor in remedying the resultant disproportion. Thus if blacks constitute 20 per cent of a pool available for employment, it can be ordered that new hiring take place on the basis of one black- one white, until the 20 per cent quota is reached.

If there is no proof of intentional exclusion, however, but the employer, union or public agency wishes to bring about cultural or racial diversity in the workforce, it may use race as a plus to be taken into account, provided that it is not an exclusive or controlling factor but rather part of a flexible evaluation system looking at the total picture. Thus if there are a number of suitable candidates, each with plusses and minuses, all must be considered, but there would be nothing constitutionally wrong in giving special weight to race or sex as an inclusionary factor.

One lesson we can learn is that a clear constitutional foundation for affirmative action must be found. Part of the problem in the USA was that there was a strong constitutional foundation for anti-discrimination laws in general, but not for affirmative action as such, particularly if they were colour-sensitive rather than colour-blind.

GOALS, TIMETABLES AND MONITORING IN SOUTH AFRICA

Racial quotas are so ugly for us in South Africa that they can only be justified on the grounds that the alternative of permitting continuing racial disadvantage is even more distasteful.

We have to confront the issue directly. As judge Harry Blackmun of the Supreme Court said, in order to deal with racism, we have to take account of the realities of race. He then went on to declare that it would be ironical indeed if racial inequality were maintained by the Equal Protection clause.

At the very least, the new South African Constitution must, as in Namibia, authorise incoming governments to take affirmative action to overcome the inequities of the past. In other words, the equal rights clause in the constitution

should not be used as a means of preventing blacks from enjoying equal rights.

The same principles apply to overcoming the exclusion of women from decision-making positions and interesting careers. The longer an injustice has been committed, and the more widespread its impact, the more natural it is made to appear.

For these and other reasons, we feel that the Bill of Rights should go further than merely authorise the taking of affirmative action by future governments.

It should expressly require that such governments restructure themselves so that their composition conforms ~~with~~ the principles of the Constitution. They should also function according to the non-racial and non-sexist norms ~~and principles~~ set out in the Constitution, and spend their revenue ~~in the same way~~. Finally, as a major contractor, they should insist on only dealing with firms that follow these principles; we hear so much about maintaining standards when they are equated with keeping present practices intact, but almost nothing when they require change towards non-racism and non-sexism.

The Constitution should accordingly impose an active constitutional duty on all incoming governments to take action to correct the injustices of the past. For this reason, the ANC draft Bill of Rights devotes two full Articles to the subject.

Article 13 reads:

1. Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.

2. No provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article.

It has been pointed out that the second clause is capable of being read in such a way as to permit affirmative action to override any and all of the fundamental freedoms set out in the Bill of Rights. In other words, it could be used to

justify ignoring the prohibitions on torture, forced labour or capital punishment.

This was clearly never the intention of the Constitutional Committee, and it would seem that a tighter formulation will be required so as to remove any possible doubt. The crucial thing is to ensure that the courts do not in future strike down affirmative action programmes simply on the grounds that they are designed to procure the advancement of and open up opportunities for those previously victimised by discrimination. In particular, the Equal Rights clause should not be used to block the achievement of equal rights.

Article 14 is entitled Positive Action. It goes further than Article 13 in that it not only permits but actually requires positive action by the state to pursue "policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa"[para 5].

The next paragraph goes on to say that such policies "shall include the implementation of programmes aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service."

Special attention also has to be paid to rectifying the inequalities to which women have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation [para 8].

Finally, legislation may be enacted requiring non-governmental organisations and private bodies to conduct themselves in accordance with the above principles.

Provisions such as these would do away with many of the problems which American judges had when dealing with affirmative action programmes. Whether or not quotas are desirable, they would not automatically be unconstitutional.

Given the history of apartheid laws and practices, it would be unnecessary to prove in each case that there had been deliberate exclusion of blacks. The danger would be that employers, universities and others would actually use past apartheid laws as an excuse for opposing affirmative action ~~now~~, arguing that their hands had been tied, ~~therefore they should not be penalised~~.

SOME REFLECTIONS ON QUOTAS IN SOUTH AFRICA

In the light of the above, and bearing in mind the general principle that good, open, accountable, government operating according to non-racial and non-sexist principles is always the foundation of achieving equality, we may tenatively suggest the following principles for the application of quotas in South Africa:

1. Quotas should never be the main means of redressing the injustices and inequalities created by apartheid. What we need is good, democratic government answering to the needs of the people as a whole, and not just to a minority. We want a country of people, not of quotas.

2. One of the principal tasks of government will be to open up opportunities for all, giving special attention to the needs of those who have been excluded by past discrimination.

3. While the general principles of equitable adjustment must be the same, the precise methods to be used should be adapted to the concrete situation of each area.

4. Thus a Civil Service Commission, working with government and the trade unions, should initiate and supervise steps to open up the civil service, the Army, the police and other agencies of government. The talents and life experiences of all South Africans must be used and seen to be used. At the same time, the level of competence must be maintained, even improved upon, and the sense of serving the whole of society developed.

5. Special attention will have to be paid to correcting injustices relating to the ownership and use of land. A Land Claims Tribunal should be created to see to it that victims of forced removals have their land rights restored, or else be appropriately compensated; that farmworkers who have been for generation on land receive protected rights, and that persons historically denied access to land now have access made available to them. Where existing titles are interfered

with, compensation shall be ordered, taking into account an equitable balance between the public interest and the interest of the person affected.

6. The principal task in the sphere of education will be that of integrating the disparate school systems and applying equal spending for all. This will have immediate implications for buildings, training, the provision of textbooks and pupil-teacher ratios. At the same time, there will have to be accelerated training for black and female cadres to staff the developing educational institutions and to overcome the present imbalances.

7. In the case of health, the same process of integration and equal spending must take place, coupled with a special emphasis on primary health care and the role of teaching hospitals. At the same time, the medical profession should see to it that the impediments to black advance are removed, and take special steps to assist those who have been kept back in the past, to take their rightful positions.

8. The government, the unions and the private sector must make special provision for overcoming the effects of Bantu Education and job reservation, concentrating on programmes of accelerated vocational and professional in-service and outside training. Present arbitrary systems of hiring, promoting and firing must give way to new ones based on equal opportunity principles, in terms of which special encouragement is given to persons from disadvantaged groups.

9. Business organisations, government and the unions must get together to work out ways and means of ensuring that access to managerial positions, to capital and to credit is opened up, so that when we speak of a mixed economy we mean a mixed at all levels.

10. Appropriate representation is not the same as proportional representation. While we insist upon all sections of the population being fairly and appropriately represented in the public sector, we do not favour a system of rigid quotas, particularly if it means that persons in the public service are seen as representing and serving only the group to which they belong; the incumbents are there to represent and serve the whole South African nation, not just the group from which they come.

11. Opening up the civil service, education, health and jobs should not mean appointing unqualified persons simply on the basis of colour or gender. The essence of affirmative action programmes is enabling people who have been kept out of

Secondly.

~~The second point is that~~ orgs.
committed to equality & advancement of
the rts. of the oppressed should
regard what has been proposed here
as a min. set of principles for a
divided country attempting to emerge
from a long history of racism.
Orgs. calling themselves progressive
should take steps in advance of
the rest of society. ~~The~~ Their
underrepresentation of women has to be
corrected by concrete steps, not ~~just~~
~~pious wishes~~ worded with good declarations. I personally
would favour the setting of precise
min. percentages as goal coupled with a requirement
that b.f. action be taken to
achieve them, that explanats. of failure
be ~~required~~ given, and that monitoring agencies
be established to supervise & report
on the whole process.

Afterword.

The subject is a difficult one. We have to feel our way forward, guided by our vision of the SA we want to see. There are many more themes to be developed than those touched upon here. In part, the whole question of dealing with discrim. against women (gender oppr.) requires much fuller treatment than I have given it. The reader feels that basically this paper has been written about racial inequality, & that gender has been tacked on, he or she will be right. There will have to be some overlap between aa to overcome race discr. & that to eliminate gender inequality, but the issues are so diff. that each cannot be fitted into the other. Human rts are indivisible, but they are always rts for someone ~~specific~~ with specific forms of oppression.

Oppression is oppression, but its form is always specific.