

**Human Rights
in
the Post-Apartheid South African Constitution**

Paper # 20

**Topic: A Post-Apartheid Educational System:
Constitutional Provisions**

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CENTER FOR THE STUDY OF
**HUMAN
RIGHTS**

A POST-APARTHEID EDUCATIONAL SYSTEM :
CONSTITUTIONAL PROVISIONS

First draft

For discussion purposes only

CONFERENCE: "HUMAN RIGHTS IN A POST-APARTHEID
SOUTH AFRICAN CONSTITUTION"

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1 INTRODUCTION

Like many other facets of the South African situation, education is not only controversial, but in a crisis, even though many white South Africans may not be aware of this. The crucial importance of how one handles this crisis, now and in future, can hardly be overestimated. Franklin Sonn wrote: "When the history of this time is written, education could stand out as a factor which led our country to unity, or, God forbid, it may signify the Achilles heel through which a troubled, yet promising and beautiful country, bled itself to a sad end." (*Leadership*; Van Zijl 16)

The crisis in education is not solely the result of South African apartheid. Many African and other third world countries are struggling with illiteracy and other serious problems in this field, due to, amongst other things, poverty, a rapid population growth and the remnants of colonial exploitation. Alan Boesak once said that of course apartheid is not everything in South Africa - there are also many good and beautiful things - but that apartheid does contaminate everything. One could say that indeed apartheid is not everything. There are many other problems and evils, but racism and apartheid practices not only acutely worsen

all these, but also serve to politicise, to deepen the cleavages and to polarize any discussion of possible solutions.

Not being an educationalist or a sociologist, but a lawyer, and thus running the risk of misunderstanding the entire problem, I was asked by the organisers to produce a few pages from a legal point of view, especially with regard to possible constitutional provisions in a future South Africa. The scope of this topic ("Reconciling Linguistic, Cultural, Religious and Ethnic Diversity: Principles and Institutions - A Post-Apartheid Educational System: Constitutional Provisions) is so extremely wide and its nature so uncomfortably complicated, that it is impossible to deal with it fully or comprehensively within the present limits. I therefore do not attempt to propose final solutions (I don't regard the few ideas, which I may have, as final at all) but rather a few points for the purposes of discussion. No doubt, we have hard work and a long road ahead of us and hopefully the debate will continue and those who carry the responsibility will press forward formulating views, policies and concrete proposals.

Realising that education, and the need for it, especially in South Africa, is not only for the young and that all of us, including workers, professionals and academics, should become both teachers and students, sharing our knowledge and, in a way, using the whole country as a classroom, I nevertheless concentrate on formal education, particularly schools. I therefore do not deal with, eg, tertiary education.

I would like to accept, as a personal credo and starting point, that we share the ideal that South Africa shall be a truly non-racial democracy, with a mixed economy and that it shall be the policy of the state to promote the growth of a single national identity and loyalty (ANC Constitutional Guidelines for a Democratic South Africa (a), (g)), that racist institutions and practices shall be dismantled and the legacy of colonial conquest and white domination be removed

(ANC Guidelines, Preamble), but that the beauty and richness of our cultural and linguistic diversity should be recognised and developed (ANC Guidelines (G)). I would also like to accept, as far as the legal system is concerned, the ideals of constitutionalism, a justiciable bill of rights and an independent judiciary. I accept that democratic principles require that political questions should be settled by the popular will, but (while realising the legitimacy^{of the} aspirations of the majority of South Africans) wish to quote HLA Hart's words: "The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second." (Law, Liberty and Morality (1963) 79)

2 THE RIGHT TO EDUCATION

In view of the fact that this discussion takes place from a human rights perspective and is hosted by a world famous human rights centre, one should perhaps start with the question whether the "right to education" is indeed a recognised human right and whether it should be protected in a constitution, more particularly in a bill of rights.

In article 26(1) of the Universal Declaration of Human Rights it is stated that everyone has the right to education (Annexure A1). Article 13.1 of the International Covenant on Economic, Social and Cultural Rights describes the aims of education (Annexure A3), as does article 26(2) of the Universal Declaration.

In article 17 of the African Charter (Banjul Charter) on Human and People's Rights it is stated that every individual shall have the right to education (Appendix A4). The South African Freedom Charter, adopted by the Congress of the People at Kliptown in 1955, embodies the aspirations that

"the doors of learning and culture shall be opened" and that education shall be free, compulsory, universal and equal and goes on to stipulate the aim of education (Annexure A5).

Authors on human rights describe the right to education as a "social right", belonging to the category of rights known as "second generation rights", alongside other "economic and social rights", such as the right to work, the right to form trade unions, the right to an adequate standard of living, the right to social security, assistance and welfare and the right to health.

The idea of a right to education is traced back to the traditional concept of the natural duty of parents to look after and bring up their children. Over time the notion of parental responsibility has become increasingly associated with furthering the development and meeting the needs of the children, rather than with furthering the purposes and complying with the wishes of the parents. The emphasis has also shifted towards formal education as the most important element of upbringing. Thus the idea of a right to education is today viewed primarily as the right of all children to be educated and the duty of making such provision available, is seen as a duty of society, rather than of parents. Since some parents, out of ignorance or selfishness, would be likely not to exercise "a right" to have their children educated, compulsory state-provided school education up to some minimum age has become a feature, or at least an objective, of most present-day societies (MacFarlane 125).

However, unlike health provision, education is not a service of which the fundamental requirements can be determined objectively. Health requirements are basically the same in all societies on a more or less equal level of development or industrialisation. In contrast, education is essentially value-oriented and the nature of the orientation may influence the quality of the education.

In the bill of rights or constitutions of approximately 58 countries the right to education is recognised and mentioned. In approximately 71 it is not mentioned. The latter group includes the Federal Republic of Germany, Kenya, Norway, the Netherlands, Sweden, Sierra Leone, Thailand, the USA, Zimbabwe and Zambia. The former includes Belgium, Algeria, the People's Republic of China, Denmark, Cuba, the German Democratic Republic, Egypt, India, Italy, Greece, Japan, Poland, the USSR and Zaïre. In Southern Africa section 8(4) of the KwaZulu Natal Indaba Bill of Rights states that every person shall have "the same right to public education" (Annexure A7).

The debate on what status, if any, should be accorded to economic and social rights in a bill of rights, is well known. It is argued that only values which can be described as "freedoms" would seem to be possible candidates for inclusion. Those who argue for the elimination of social and economic rights from human rights declarations point out that amalgamating within one document social and economic rights with the traditional "first generation" civil and political rights, pushes all talk of human rights "out of the clear realm of the morally compelling into the twilight world of utopian aspiration" (Cranston 68). The objection to the inclusion of these rights as justiciable guarantees lies in the inherent defects of the remedies of administrative law. The implementation of the guarantees of the rights requires the detailed administrative apparatus of the planned economy, which lies beyond the methods of enforcing public duties (Jaconelli 6-8). The ideological and other factors and arguments behind the dispute cannot be dealt with in this paper. In contrast with the classical liberal view, Marxists, socialists, third world writers and many South Africans strongly plead for the recognition of economic and social rights. The South African Law Commission (Working Paper 25; Project 58) did not include the right to education in the proposed draft bill of rights. The Commission (429) was of the opinion that a bill of rights is not the place for enforcing positive obligations against the state. Basic

socio-economic freedoms, capacities and competences should in fact be protected in a bill of rights and then in the same way as all the other rights, that is to say, in the "negative sense". Legislation and executive acts shall not infringe them. (The South African question is dealt with below.)

Other rights and values are closely related to the right to education, or could have an influence on the way it is dealt with, such as the fundamental right to freedom of religion and expression, the right to equal treatment, freedom of association and the so-called cultural and linguistic rights.

3 THE SOUTH AFRICAN SITUATION : FACTS AND DEMANDS

The present situation amounts to a violation of the right to education, especially as far as access is concerned, and also of the principle of equality.

Several writers (including Behr 9 et seq) have described the history of apartheid education in South Africa, from the arrival of the first European settlers to the introduction of "general" and "own affairs" in 1983. Behr points out that the South African educational system owes much to the Western tradition in education, but has many facets that are of its own making. A specific educational system emerged in the latter part of the 19th century, when the white population began to grow more rapidly. The question of segregation or integration has dominated South African educational policy throughout history. Apartheid, or "separate development", especially in education, reached its pinnacle in the Verwoerd era. It is well known that Dr Verwoerd, when launching the Bantu Education Act (1953), said that there was no place for the black man in the European community above the level of certain forms of labour and that there was no point in educating blacks for positions in European society which they would never be allowed to occupy. Mazibuko (in Polley 84 et seq) provides repulsive examples of statements by white administrators, historians and others between 1820 and the

1980's, such as that "we should not give the natives any academic education ... If we do, who is going to do the manual labour in the country?" (by a National Party politician in 1945) and concludes that "the unstated educational agenda of the white ruling class in South Africa ... (is) ... the following: (1) to give black people limited knowledge and skills, so that they can serve white people; (2) to ensure that there is very little change in the social, economic and political relationships in South Africa ... (and) (3) to ensure that black people never achieve equality of any kind with white people".

Over the years, from 1863, several commissions inquired into the educational system. The most important recent one was the De Lange Commission Report of 1981. De Lange found that the differing growth rates among the population groups would result in a relative decrease in the proportion of "Asians", "Coloureds" and "Whites" and an increase in the proportion of "Blacks" and anticipated a rise in the black school population from 4,5 million in 1978 to more than 6,5 million in 1990, being more than three times that of the other groups combined. The commission paid attention to the fact that compulsory school attendance had been instituted for "Asians" and "Whites", but not for "Blacks" and "Coloureds". A tremendous loss of potential high-level manpower from the "Black" and "Coloured" population groups in particular were found. De Lange pointed out the serious demands for more and better qualified teachers, for a sound financial structure (because the norms for allocating funds to various population groups for education varied greatly), for buildings, sites and transport (which had largely been met for white education, whereas a huge backlog and a shortage in excess of 1,8 million classrooms for blacks existed) and for a well grounded educational structure. De Lange's major recommendations and proposals included the following: The government was urged to achieve equality in the financial provision per comparable educational unit, irrespective of race, colour, etc. A new structure for formal education and a new terminology was proposed. ("Free education" indicates the

contribution of the state to the financing of capital and current costs in the provision of formal and non-formal education, the funds for which accrue from the taxpayer, "compulsory education" must be distinguished from "compulsory school attendance" the duration of the former being larger than of the latter, etc.) The commission also advocated the sharing of scarce educational resources. De Lange proposed a single ministry of education, comprised of one department and headed by one minister, instead of the present fragmented system (with separate departments of education for "Blacks", "Coloureds", "Indians" and "Whites"). A "three-tier system" with "strong built-in structures for participation, consultation and negotiation at each level" was proposed. The first level would be the ministry of education, the second would relate to regional educational authorities to direct education in defined geographical areas and third level management should be vested in school governing bodies, whose function would be to interpret the needs and wishes of parents and local communities. The commission favoured **private schools** as an important innovative factor in the provision of education and proposed that private schools ought to be given state financial assistance, should enjoy a large measure of freedom of choice and should have access to the supportive services provided by the second-tier authorities.

De Lange's Main Committee devoted the final chapter of their report to the concept of equality. The right of every individual to receive equal treatment was accepted as a premise, but the need for and reality of differentiation was acknowledged. However, differentiation based purely on differences of race or colour was rejected as contrary to the social and ethical demands for justice. De Lange also reported that it would be unrealistic to expect that on a given date the educational system could be reformed to such an extent that "equal quality education" could be provided immediately in an "absolute sense".

One of De Lange's major recommendations, the creation of a single education ministry, was not accepted by the government, who also reaffirmed its standpoint that the Christian and national character of education be maintained in regard to the white population. In terms of the 1983 Constitution (Act 110 of 1983) education is partly a "general affair" and partly an "own affair". (The existing system concerning the organisation, administration and financing of education is explained by Behr, *inter alia* in chapters 3 and 9.) Enormous disparities exist. The author of *Human Rights in the Capitalist World* (1987) (63-64) alleges that 84% of the indigenous population of South Africa had only an elementary education. According to the SAIRR Race Relations Survey 1987/88 (151) the per capita expenditure for 1986/87 (including capital expenditure) was: Africans (in white designated areas) - R476,95 (the increase over 1985/86 being 23%); Coloureds - R1 021,41 (increase 15%); Indians - R1 904,20 (increase 37%); Whites - R2 508,00 (decrease 9%).

Obviously the situation concerning education has to be viewed within the context of the entire constellation of other discriminatory laws and practices, including the violation of freedom of association and freedom of religion and expression, as well as the economic and land ownership situation.

As mentioned above, serious problems also exist elsewhere in Africa. The figures provided for 33 African countries in the 1988 UNESCO Yearbook indicate a 64% illiteracy, compared to a world figure of 29% in 1980. All African states tackled the illiteracy problem with enthusiasm and vigour and progress has been made. However, the rapid population growth, together with other factors, is constantly aggravating the problem. The per capita expenditure on black education in South Africa is allegedly fairly on par with the rest of Africa. Obviously cultural differences and clashes also play a role in other educational systems in Africa. However, the glaring inequality, the brutal discrimination, the deep division, the distrust and the fears created by apartheid render the South African problem uniquely serious. Many schools and university

campuses have become sites for unrest and riots, school children fight in the vanguard of the liberation struggle and "people's education" has emerged. Engelbrecht (in Van Vuuren 491) concludes: "From a structural point of view, the provision of education in the RSA has always been strongly characterised by a stressing of differences rather than similarities. In this connection education provision has been and is a result of the political and social system in which the policy of separate development and the apartheid ideology have featured prominently." Behr (219) states: "The history and trends of education in South Africa ... points irresistibly to the fact that education has served a political purpose from its very beginning, with opposing points of view in constant conflict. This dichotomy ... still continues unresolved. South African education is still ... very much at the crossroads."

4 ACCESS AND EQUALITY; AIMS, STRATEGIES AND GUARANTEED RIGHTS

Factually and grossly oversimplified, the demands and aims concerning a future education system seem to be quite clear. The first would be access for all to educational opportunities and facilities. Education should ideally be generally available and, also, free and compulsory, at least as far as lower or elementary levels are concerned. Therefore facilities need to be extended dramatically; more teachers, books and classrooms are needed. Furthermore, the highest possible degree of equality as to access and quality must be strived for.

There is also a more philosophical or idealistic dimension to the aims one should try to achieve, namely the prime importance of content and purpose in education. Article 13.1 of ICES (Annexure A3) states that education shall be directed to the full development of the human personality and mentions a sense of dignity, respect for human rights, the promotion of understanding, tolerance and friendship among all nations

and all racial, ethnic or religious groups, as well as the maintenance of peace. These values, so desperately needed in South Africa, are also mentioned in the Freedom Charter's section on learning and culture (Annexure A5). Unity, a new national identity and a common loyalty must be cultivated, as mentioned *inter alia* in the ANC Constitutional Guidelines. Concepts such as "open education" have been mentioned alongside "nation-building" and "non-racialism" (McGurk in Polley 98).

But how, given Africa's economic situation and the destruction caused by centuries of racial discrimination, do we proceed to "open the doors of learning and culture", mentioned in the Freedom Charter?

The many approaches and strategies (ranging from "reformist-evolutionary" to "confrontational-revolutionary") which have been proposed by educationalists and other social scientists, fall outside the scope of my attempt at a modest contribution. Some observations and suggestions may be relevant, however. Dent Ocaya-Lakidi, an educationalist from Uganda, wrote:

"Judging from current official rhetoric on modernization and development, of all the problems faced by African countries today those relating to education not only occupy a central place but are also extremely urgent. Education, by which is generally meant formal education or schooling, is seen in Africa as the panacea for all pressing economic and social problems. Often, however, it has proved either ineffective or irrelevant to these problems. In some cases it has made them worse and has sometimes created new problems where none existed before. Consequently there is today in Africa a general dissatisfaction and disenchantment with education." (Prospects vol X no 1 1980 13-25)

Also the De Lange Commission held the view that formal schooling *per se* is not a panacea for economic development and social progress. Investment in education can only show dividends if it ensures that the human potential of a country is applied productively in its development (Behr 39). Furthermore, the advancement of and access to education is

obviously closely dependent on the strength of the economy, the redistribution of wealth and the creation of wealth.

A few strategies that have been proposed quite generally regarding education in Africa, deserve to be kept in mind: the involvement of and contributions by local communities normally prove to be a positive factor as far as developing and especially maintaining educational facilities are concerned; private schools could play an important part in the creation and extension of opportunities and facilities; mother tongue tuition has proved to be very valuable, especially at primary school level.

What does this have to do with the legal system and the constitution? Naturally the requirements and implications are much wider than making laws and handing down judgments.

Obviously all apartheid laws must be removed from the statute book immediately, as a first step. The statute book must be "purged", in the language of the South African Law Commission.

Fundamental human rights, values and freedoms, such as equality, freedom of association and freedom of belief, religion and expression must be guaranteed in a constitutionally entrenched bill of rights.

Should the right to education be written into the constitution? Must we go even further and state that education shall be free and compulsory?

In article 26 of the Universal Declaration the right to education is mentioned and it is stated that at least elementary education shall be free, that elementary education shall be compulsory, that technical and professional education shall be made generally available and that higher education shall be equally accessible to all on the basis of merit (Annexure A1). The African Charter mentions the right

to education (A4) and the Freedom Charter free, compulsory and universal education (A5).

Article 45 of the Constitution of the Soviet Union (A12) mentions the right to education, which is ensured by free provision of all forms of education and continues to describe some detail.

Article 25 of the constitution of the German Democratic Republic is even more "outspoken" and more detailed in its approach (A11).

In article 4 of the South African FCI Charter (A8) it is stated that everyone has the right to equal educational opportunities (concentrating on the equal use of what may be available, rather than on everyone's right to education).

The differences of opinion on the question whether second generation or economic and social rights, such as the right to education, should be protected in bills of rights were briefly mentioned above and cannot be fully analysed and evaluated in this paper. With regard to South Africa considerable attention is paid in the Law Commission's Working Paper to the question whether socio-economic rights should be protected (pp 416-429). The Commission decided not to include the right to education. The notion that the object of a bill of rights is to protect the individual against the infringement of his basic rights and freedoms, that it is a shield, rather than a sword (in Judge John Didcott's words) and that it is to be enforced by a court of law, is accepted.

In our situation the question is crucially important. There is no way that enough schools can be built and enough teachers trained to provide free access and equal facilities to all, for a considerable time to come. Attempts should be made to utilise the available facilities as equally and fairly as possible, but the demographic and logistic difficulties are obvious. It could be argued that guaranteeing everyone's right to education and even free and

compulsory education, knowing that enforcement of such provisions is impossible, would amount to mere lip-service and could even be disastrously dangerous for the credibility and legitimacy of a new constitution and bill of rights.

On the other hand, the demand for the recognition of economic and social rights in South Africa is so strong and the promotion of these rights will have to form such an important part of any future political and economic policy, that omitting it from a constitutional instrument in which basic rights are listed, would be even more unacceptable. A bill of rights merely recognising first generation classical civil and political rights could easily be viewed as a device for the protection of existing privileges and an obstacle to real socio-economic change, without any legitimacy. Criticism of the Law Commission Report to this effect has already emerged.

I would therefore suggest that these rights should be included, perhaps (more or less in agreement with John Dugard 1987 *Acta Juridica* 237 257-8) by attaching a non-justiciable Declaration of Economic and Social Rights, as a statement of belief and intent and as a guide to the interpretation of the bill of rights and the constitution. After centuries of denying the majority of the people proper education, the right to education has to be unequivocally recognised. The aim or ideal of free and compulsory education could then also be included. As Albie Sachs pointed out, the fundamental constitutional problem is not to set one generation of rights against another, but to harmonise all three (*Towards a Bill of Rights* 7).

The need for affirmative or corrective action in a post-apartheid South Africa - also in the field of education - seems to be obvious. The ANC Constitutional Guidelines are very clear on this point and the Law Commission expressly acknowledged it as well (437-440). It is not necessary to go into the meaning or moral justification of this concept, or to dwell on details concerning the implementation thereof in

various fields. One is not necessarily talking only about the American model and a new terminology is not unthinkable.

The question is whether, how and in what detail it should be dealt with in the constitution or the bill of rights.

The Law Commission decided to include an affirmative action clause in the draft bill of rights. It does not force the legislature to act, but permits it to make laws to grant groups, which have been discriminated against, certain temporary advantages. In article 2 equality before the law is guaranteed and discrimination is ruled out, "provided that such legislation or executive or administrative acts as may reasonably be necessary for the improvement, on a temporary basis, of a position in which, for historical reasons, persons or groups find themselves to be disadvantaged, shall be permissible". (Also see article 15 of the Canadian Charter of Rights and Freedoms - Annexure A14.)

An affirmative action clause does seem to be necessary. It has repeatedly been pointed out by several writers that a bill of rights could easily be seen as an instrument designed to serve as an obstacle to social and economic change and to entrench privileges. Therefore an equality or non-discrimination clause (to which South Africans are not accustomed anyway) could be used to block affirmative or corrective action, especially by those with the necessary economic power to enable them to fully utilise all apparently available legal avenues for the purposes of protecting their own interests. Or it could be perceived to be used for that purpose, by the deprived majority of the people.

It would seem that there is no need for such a clause to go further than merely permitting affirmative action. Normally, one would expect, affirmative action programmes are supposed to benefit disadvantaged minorities, who do not have any direct political power, but who do have moral or political influence on the legislature or administration. In South Africa, however, the disadvantaged group, who have been

discriminated against, is the majority whose political representatives will hopefully be in power in a post-apartheid society. The administration will therefore be naturally inclined or pressed to implement such programmes. The motivation will be there and the bill of rights could control this process, like other state actions, within the context of constitutionalism and human rights protection. For the purposes of this discussion the inclusion of an affirmative action clause, more or less along the lines of the Law Commission's proposal, is therefore suggested.

Should a future government find it necessary to embark on "forced integration" programmes, such as "bussing" (the merits or practical workability of which is not discussed here), in order to further equality in education, a similar provision connected to the freedom of association clause could perhaps be considered. However, it is suggested that active and positive encouragement may be preferable to the legal enforcement of any such measures.

Another question, which may be relevant as far as a broad educational policy is concerned, is whether, or to what extent, the **contents, purpose or aims** of education should be expressly stated, eg in the constitution. The above mentioned ideals of article 26(2) of the Universal Declaration (Annexure A1), article 13.1 of ICES (A3) and the Freedom Charter (A5) (i.e. respect for human rights, understanding, tolerance, friendship, peace, etc) come to mind. These values should be acceptable to all and expressly stating them can serve a positive educational purpose. It will not amount to discrimination, such as legislating a "Christian national education policy". ^(See Arts 17+28 of the GDR Constitution - A12) In other words, officially recognising these ideals could do no harm. This does not necessarily have to happen in the **constitution**, though.

5 CULTURAL, LINGUISTIC, RELIGIOUS, ETHNIC DIVERSITY;
PRIVATISING GROUPS?

5.1 The direction

It is a fact that cultural, linguistic, ethnic and religious diversity does and will always exist in South Africa. In a way this phenomenon poses a natural threat to national unity. The cultural diversity could also be a tremendous asset which could enrich all the people of this country and stimulate development. The inherent evil and harmfulness of apartheid and other forms of racism is also a fact, however. Therefore (referring back to 1 above) I wish to reemphasize the state's duty in a post-apartheid South Africa to eradicate apartheid and to promote a single national identity and loyalty, but to recognise, protect and develop the positive aspects of cultural and linguistic plur^alism.

There is neither the time nor the space to deal with all the possible different meanings or connotations of the concept of **group rights** here. I reject the validity (from a human rights or bill of rights angle, at least) of "political group rights", with reference to, eg, the composition of the legislature, a veto right for a race group or ethnic group, etc. I also reject any system of forced race classification, for obvious reasons. But I do accept the validity of claims for the recognition and protection of cultural, linguistic and religious interests and other possible "group values", as long as the basic rights to equality and freedom of association, are respected. Logically at least, the protection of the above mentioned interests can be achieved by way of protecting individual rights, such as freedom of religion, association, etc. The purpose or the effect of the recognition of cultural and other differences, and even of the existence of groups, should be to promote the equal enjoyment of human rights and not to maintain or extend special privileges, therefore to discriminate.

For several philosophical, anthropological and other reasons, **ethnicity** should not be the deciding factor. Recognising cultural diversity must not amount to entrenching mere racism. Furthermore, the recognition and development of cultural diversity should be subject to the ideal of national unity and loyalty. Partisan minorities must not be encouraged.

The richness of cultural diversity should therefore be recognised, protected and developed, also in education. This is recognised in the Freedom Charter, the ANC Constitutional Guidelines and the writings of prominent thinkers like Albie Sachs (eg in 1985 *Journal of SA Studies* 49 59). Apart from its possible legal effectiveness, the constitutional protection of such group interests could have a positive emotional and psychological effect, in making minorities feel safe and fostering a feeling of belonging. (It can be accepted, however, that there may very well be other complimentary or better political devices or processes available to cater for minority claims than the legal "protection" of "rights".) In view of specialised information available, I also suspect that the promotion of respect for cultural and group values is simply beneficial for the education of children.

In dealing with these matters, the right or freedom of parents to choose the kind of education that shall be given to their children (as recognised, eg in article 26(3) of the Universal Declaration - see Annexure A1) should be kept in mind. This freedom of choice would normally involve religious and other related moral matters. Does this mean that a white supremacist parent has the right to choose a racist education for his or her children?

This brings to the fore the question whether the state should dismantle apartheid, but allow groups or structures that are factually racially exclusive or

segregated to continue existing, or whether active interference to break down even mere factual segregation is called for. Section 8(4) of the KwaZulu Natal Indaba Bill of Rights (Annexure A7) guarantees "the same right" for every person to education "without discrimination", but the Indaba's information department states that "bussing school children from one neighbourhood to another" is definitely not proposed (see Indaba Information Sheet - Proposals on Education). The ANC Constitutional Guidelines are clear on the principle that the advocacy or practice of racism etc "shall be outlawed", but do not offer concrete proposals concerning how this should be done. The constitution and bill of rights should allow space for social programmes designed by the state, while, at the same time, protecting basic human rights, as mentioned above in connection with affirmative action. Using the bill of rights to interfere with private matters obviously raises complicated questions, *inter alia* regarding the concept of *Drittwirkung*. Perhaps any desired state intervention to this end should preferably rely on active encouragement and persuasion, rather than coercion. Numerous ways and means may be available.

5.2 Public schools

In view of the ideals and aims stated in 1 and 5.1, I would like to see public schools to serve some kind of "salad bowl", if not "melting pot" purpose. (Van Zijl, on the Indaba, mentions three models to describe how educational systems could cope with different cultures, namely (1) cultural pluralism or the own affairs scenario, (2) the assimilationist model or melting pot scenario and (3) the multicultural approach, or salad bowl approach, allowing cultures to enrich each other.) Seeing that "separate" is not "equal", this would also be educationally justified. If the right to equality is respected, public money could certainly not be used to

promote racially exclusive or segregated schools. Ethnicity should not even be mentioned.

Public schools exclusively or specifically for cultural, religious or language groups do not seem to be acceptable either. Not only could such a state of affairs serve to perpetuate apartheid in disguise with state funding and official blessing, but it will be practically extremely difficult to allocate funds and other supporting facilities on an absolutely equal basis.

However, this does not mean that appreciation and respect for cultural and linguistic differences as well as religious tolerance should not be actively cultivated in the curricula of public schools and that cultural traditions should be denied or broken down.

Regional realities, interests and needs will necessarily play an important role in this regard. The challenge would be to reconcile centralised state policy and control over education with regional needs and traditions. This is not the time to indulge in the centralisation versus decentralisation or the unitary state (with delegation of administrative powers) versus federation or consociational democracy debate, which is obviously important. Education will of necessity in South Africa and many other countries be a matter that has to be dealt with on different levels, central, regional and local. What can be accepted though, is that the "general" and "own affairs" distinction must be rejected. Education as an "own affair" continues and will continue to be viewed by many of its proponents and opponents strictly in terms of segregated education and a polarised approach.

The KwaZulu Natal Indaba Bill of Rights (in section 8(4) - see Annexure A7) guarantees "the same right to education ... without discrimination", but provides for

the possibility to distinguish between persons on grounds of language or sex in providing facilities: The Indaba proposals envisage that schools will be open to all children living in the neighbourhood, but that the system will be "flexible", with room for schools serving "the particular language, religious, cultural and philosophical needs" of all communities. Race will cease to be a criterion for admission, but schools "will be able to retain their distinctive character". A Provincial Education Council (the central authority) is envisaged. Elected School Committees will serve particular geographic areas, decide the ethos of their schools and play a major role in the selection of staff and in deciding curricula. Regional Co-ordination Committees and District Offices and Committees are further provided for. (See eg the above mentioned Information Sheet and Van Zijl's paper.)

What seems wrong here, is not the recognition of language or culture, or regional needs and customs, but the emphasis on the neighbourhoods and preservation of the "ethos" and "philosophical convictions" of existing schools, which are the products of apartheid education.

Mother tongue instruction, on the other hand, especially for younger children (let's say on elementary or primary school level) seems to be educationally quite sound and indeed conducive to the advancement of education on the African continent. On more senior levels the official language or languages of the country or the region are obviously more important (see Alexander Language Policy and National Unity in South Africa/Azania 1989).

It is interesting to note that the constitution of the Soviet Union provides for ensuring the right to education by, inter alia, "the opportunity to attend a school where teaching is in the native language" (article 45, see A13). The situation in Canada also

merits attention. (See article 23 of the Canadian Charter of Rights and Freedoms - Annexure A14).

5.4 Private schools

The advantages of private sector involvement and private schools, within the context of the illiteracy crisis and other problems concerning education on the African continent, have repeatedly been pointed out. Whereas the provision of formal education is the responsibility of the state, the private sector has a shared responsibility for the provision of non-formal education and could be an important innovative factor in the provision of formal education, by providing for educational needs not provided for or perceived not to be provided for by state schools.

Private schools run by religious denominations (notably Anglican, Catholic, Jewish, Methodist and Presbyterian) have been a feature of the educational system of South Africa for a long time. Many of these schools have a tradition of non-racialism and opposition to apartheid. Presently (in terms of the Private Schools Act 104 of 1986) private schools must be registered with the relevant department. Conducting a private school without its being registered is a criminal offence. The minister may make regulations as to the admission of pupils, the appointment of teachers, etc, and may delegate to an official the right to inspect the operation of such schools and decide on whether the pupils may write the department's examinations. Financial grants may be made to registered private schools.

Articles 19(5) and 20 of the Zimbabwean Constitution guarantee the right not to be prevented from sending a child to a school only because the school is not established or maintained by the state (A10). In the West German Bill of Rights (see Annexure A11) the right to establish private schools is guaranteed, provided,

inter alia, that such schools are not inferior to state or municipal schools. Also in Bophuthatswana "private educational institutions" may be allowed, but only if the educational aims and standards are not inferior to state institutions (see A9)! The KwaZulu Natal Indaba envisages the retention of private schools, but this is not expressly stated in section 8(4). (See Annexure A7.)

If it is accepted that private schools could play an important role in the provision and development of education and that the establishment and maintenance thereof should thus be supported and encouraged, incentives to motivate people and organisations to do so are necessary. One such incentive could obviously be a degree of autonomy or a large measure of freedom of choice and association, but still within the bounds of the broad national education policy.

Thus religious and some other cultural values and interests could be "privatised". This must not be allowed to include apartheid and racism. Racial exclusiveness violates freedom of association and choice, amongst other things. A person can choose or change his or her religion or language, but not race.

How far should freedom to retain a particular identity in a private school be allowed to go? One could consider, as examples, (a) Jewish schools, (b) Catholic or Anglican schools, (c) NG Kerk (Dutch Reformed Church) schools, (d) APK (Afrikaanse Protestantse Kerk) schools and (e) schools for Afrikaans, German, Portuguese or Zulu speakers.

In view of the fact that the APK is a church exclusively for whites, who recently broke away from the NGK because of the latter's changed racial policy, such a school would be nothing but an apartheid institution. Therefore (d) would be out.

The first three categories comprise religious groups, with greater or lesser degrees of overlapping with racial or linguistic factors, but racial exclusiveness is not necessarily involved. In allowing these, it could be advisable to distinguish between the nature or character of the education and formal admission requirements. A Catholic school, eg, could therefore provide education which is Catholic in nature, without requiring pupils or parents to be formal members of the Catholic church, but merely to accept certain principles concerning education. This would imply an even smaller degree of potential exclusiveness or discrimination. (Religious interests should not be oversimplified, however.)

More or less the same could apply to category (e), provided that the country's official language policy is respected.

The possibility of discrimination on grounds of the financial means of parents (and consequently the perpetuation of class differences and even apartheid) could now still remain. It is interesting to note that article 7 of the West German Bill of Rights (see A11) guarantees the right to establish private schools, subject to the state's approval, which will be given if segregation of pupils according to the means of the parents is not promoted thereby. How this provision is applied in practice, has not been investigated by me. If the notion of private schools necessarily implies a certain degree of discrimination against the poor, this should, firstly, be weighed against the possible advantages for the ideals of access to education and the creation and extension of facilities (eg places vacated in state schools by pupils who attend private schools will be filled by others) and, secondly, be addressed by the state economically and politically, instead of merely banning the possibility.

The state has several possible avenues to encourage or coerce private schools to follow its policies, or to discourage or outlaw counterproductive practices, ranging from merely withholding financial support, or access to certain supportive services, to closing them down and criminal punishment. Refusing registration, admission to examinations or recognition of qualifications would amount to effectively outlawing such schools.

6 PROPOSALS

Many choices have to be made when drafting a constitution. Some of these comprise serious and complicated philosophical and ideological questions, which cannot be dealt with here.

One of the first questions would be whether attempts at detailed, accurate and comprehensive provisions should be made, or whether vague and general principles ought to be stated.

For the purposes of this discussion I accept that if one wishes to introduce constitutionalism and to use the constitution and the bill of rights to induce and regulate change and reconstruction as speedily as possible, constitutional provisions should be as accurate as possible, without, on the other hand, limiting the initiative and the power of imagination of the courts.

In conclusion a few (at this stage extremely rash and unadvised) proposals are offered for the purposes of discussion. Obviously the rest of the constitution and the bill of rights will be highly relevant. (Several examples are attached as Annexure A anyway.)

Re: the right to education (See 2 and 4 above) (An equality clause elsewhere is accepted)

- (1) Everyone has the right to education. Elementary and fundamental education shall be free and compulsory. Technical and professional education shall be open to all on the basis of merit.
- (2) The aim of education shall be to develop the human personality and to strengthen respect for human rights. It shall promote tolerance, understanding and friendship among all people, groups and nations, as well as liberty and peace.

Provision could be made for mother tongue instruction:

- (3) Everyone has the right to receive primary school instruction in his or her first language learnt and still understood, provided such language is an official language of the country or of the particular region. The state may (subject to the equality clause) provide facilities for primary school instruction in any language spoken in the country or in a particular region of the country.

Re: affirmative action

See 4 above, with reference to article 2 of the South African Law Commission's draft Bill of Rights.

Re: state supervision; private schools; cultural diversity

(Clauses concerning freedom of association, choice, expression, religion, etc, elsewhere are accepted.)

As to state supervision and private schools, adaptation of the provisions of the Bill of Rights of the Federal Republic of Germany (see Annexure A11) could be considered:

- (1) The entire educational system shall be under the supervision of the state.
- (2) The right to establish and maintain private schools is guaranteed. Private schools shall require the approval of the state. Such approval shall be given if private schools are not inferior to state schools in their educational aims, facilities, or the training of their teaching staff and if racism or discrimination on grounds of race or colour (or the financial means of parents?) is not practised or promoted thereby.
(The last part may not be necessary in view of other provisions concerning equality, national unity, etc.)

As to "group rights" related to cultural and linguistic diversity, section 8(1) of the KwaZulu Natal Indaba Bill of Rights (A7) or article 9 of the Bill of Fundamental Rights and Objectives of Namibia (A6) could be considered or adapted.

Otherwise the standard protection against discrimination on the ground of race, colour, language, sex, religion, etc (Law Commission article 2) as well as freedom of association (Law Commission article 16) and of choice (Law Commission article 10) could suffice. (See the Law Commission's conclusions on group rights on p 409-410 of the Working Paper.)

ANNEXURE A

**CONSTITUTIONAL PROVISIONS AND INTERNATIONAL
HUMAN RIGHTS DOCUMENTS**

1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 26

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

2 UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

3 INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

Article 13.1

... education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedom ... education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

4 AFRICAN CHARTER (BANJUL CHARTER) ON HUMAN AND PEOPLE'S RIGHTS

Article 17

- (1) Every individual shall have the right to education
- (2) Every individual may freely take part in the cultural life of his community
- (3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.

5 THE FREEDOM CHARTER

All national groups shall have equal rights

There shall be equal status in the bodies of state, in the courts and in the schools for all national groups and races;

All people shall have equal right to use their own languages, and to develop their own folk culture and customs;

All national groups shall be protected by law against insults to their race and national pride;

The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime;

All apartheid laws and practices shall be set aside.

The doors of learning and of culture shall be opened

The government shall discover, develop and encourage national talent for the enhancement of our cultural life;

All the cultural treasures of mankind shall be open to all, by free exchange of books, ideas and contact with other lands;

The aim of education shall be to teach the youth to love their people and their culture, to honour human brotherhood, liberty and peace;

Education shall be free, compulsory, universal and equal for all children;

Higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit;

Adult illiteracy shall be ended by a mass state education plan;

Teachers shall have all the rights of other citizens;

The colour bar in cultural life, in sport and in education shall be abolished.

6 SWA/NAMIBIA BILL OF FUNDAMENTAL RIGHTS AND OBJECTIVES

Preamble

.....

Diversity:

Whereas lasting peace, stability and progress depend on the recognition of and respect for the rights of all in the prevailing cultural, linguistic and religious diversity of our society;

Unity:

Whereas it is the desire of the people to achieve unity in that diversity with common loyalties to a single state;

.....

article 9

The Right to Enjoy, Practise, Profess, Maintain and Promote Culture, Language, Tradition and Religion

All ethnic, linguistic and religious groups and all persons belonging to such groups, shall have the right to enjoy, practise, profess, maintain and promote their cultures, languages, traditions and religions, in so far as these do not infringe upon the rights of others or the national interest.

7 KWAZULU NATAL INDABA BILL OF RIGHTS

Section 8

- (1) A person belonging to an ethnic, religious or linguistic group shall not be denied the right to enjoy his own culture, to profess and practise his own religion or to use his own language.
- (2) Everyone shall have the right freely to participate in the cultural life of the Province, to enjoy the arts, to share in scientific advancement and its benefits, and to the free and full development of his personality.
- (3)
- (4) Every person shall have the same right to public education in an institution that will cater for his interests, aptitudes and abilities and the Province shall make provision for this right without discrimination: Provided that, notwithstanding the provisions of section 1(2), it may, in providing facilities, distinguish between persons on ground of language or sex.

8 SA FEDERATED CHAMBER OF INDUSTRIES

SA BUSINESS CHARTER OF SOCIAL, ECONOMIC AND POLITICAL RIGHTS

PART I: Social and cultural rights and principles

- 4 Everyone has the right to equal educational opportunities, and in the exercise of any functions which the state or private institutions assume in relation to education and to teaching, the state shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.
- 5
 - (1) All ethnic, religious, linguistic and other cultural groups have equal rights.
 - (2) Everyone has the right freely to participate in the cultural life of the nation, to enjoy the arts, and to share in scientific advancement and its benefits.
 - (3) Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.

9 **BOPHUTHATSWANA DECLARATION OF FUNDAMENTAL RIGHTS**

13(3)

The system of education shall be controlled by the State, but private educational institutions may, on application, in the discretion of the Government and subject to such conditions as the Government may deem fit, be allowed where such institutions in their educational aims and standards are not inferior to state institutions.

10 **CONSTITUTION OF ZIMBABWE**

CHAPTER III : THE DECLARATION OF RIGHTS

Protection of freedom of conscience

Article 19

- (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say, freedom of thought and of religion, freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or in private, to manifest and propagate his religion or belief through worship, teaching, practice and observance.
- (2) Except with his own consent or, if he is a minor, the consent of his parent or guardian, no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.
- (3) No religious community shall be prevented from making provision for the giving by persons lawfully in Zimbabwe of religious instruction to persons of that community in the course of any education provided by that community, whether or not that community is in receipt of any subsidy, grant or other form of financial assistance from the State.
- (4) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision -
 - (a) in the interests of defence, public safety, public order, public morality or public health;
 - (b) for the purposes of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief

without the unsolicited intervention of persons professing any other religion or belief; or

- (c) with respect to standards or qualifications to be required in relation to places of education, including any instruction, not being religious instruction, given at such places;
 - (d) for regulating such schools in the interests of persons receiving instruction therein.
- (5) No person shall be prevented from sending to any school a child of whom that person is parent or guardian by reason only that the school is not a school established or maintained by the State.

Protection of freedom of expression

Article 20

- (e) No religious denomination and no person or group of persons shall be prevented from establishing and maintaining schools, whether or not that denomination, person or group is in receipt of any subsidy, grant or other form of financial assistance from the State.

11 FEDERAL REPUBLIC OF GERMANY BILL OF RIGHTS

Article 7 (Education)

- (1) The entire educational system shall be under the supervision of the state.
- (2) The persons entitled to bring up a child shall have the right to decide whether it shall receive religious instruction.
- (3) Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except in secular (bekenntnisfrei) schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.
- (4) The right to establish private schools is guaranteed. Private schools, as a substitute for state or municipal schools, shall require the approval of the state and shall be subject to the laws of the Laender. Such approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities and the professional training of their

teaching staff, and if segregation of pupils according to the means of the parents is not promoted thereby. Approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured.

- (5) A private elementary school shall be permitted only if the education authority finds that it serves a special pedagogic interest, or if, on the application of persons entitled to bring up children, it is to be established as a inter-denominational or denominational or ideological school and a state or municipal elementary school of this type does not exist in the commune (Gemeinde).
- (6) Preparatory schools (Vorschulen) shall remain abolished.

12 GERMAN DEMOCRATIC REPUBLIC CONSTITUTION

PART I

Article 17

- (1) The German Democratic Republic supports science, research and education with the aim of protecting and enriching society and the life of its citizens. This is served by the unification of the scientific-technical revolution with the advantages of socialism.
- (2) The German Democratic Republic assures all citizens a high education - corresponding to the constantly increasing societal requirements - through the unified socialist educational system. It enables citizens to shape socialist society and to participate creatively in the development of socialist democracy.
- (3) Any misuse of science directed against peace, the understanding of peoples, against life and the dignity of man is forbidden.

PART II

Article 25

- (1) Every citizen of the German Democratic Republic has an equal right to education. Educational facilities are open to all. The integrated socialist educational system guarantees every citizen a continuous socialist upbringing, education, and further education.

- (2) The German Democratic Republic insures the march forward of the people to a socialist community of universally educated and harmoniously developed human beings who are imbued with the spirit of socialist patriotism and internationalism and possess a high general and specialised education.

13 THE CONSTITUTION OF THE USSR

II, chapter 7

Article 45

Citizens of the USSR have the right to education. This right is ensured by free provision of all forms of education, and broad development of vocational, specialized secondary, and higher education, in which instruction is oriented towards practical activity and production; by the development of extramural, correspondence and evening courses; by the provision of state scholarships and grants and privileges for students; by the free issue of school textbooks; by the opportunity to attend a school where teaching is in the native language; and by the provision of facilities for self-education.

14 CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Equality Rights

Equality before and under law and equal protection and benefit of law

- 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Minority Language Educational Rights

Language of instruction

23(1) Citizens of Canada

- (a) whose first language learned and still

understood is that of the English or French linguistic minority population of the province in which they reside, or

- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province (90).

Continuity of language instruction

- (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

- (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
 - (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
 - (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ANNEXURE B

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ATTENTION ALL 1989-90 FINANCIAL AID APPLICANTS !!

Please note the following information :

- * The deadline for applications for all continuing students is
April 15, 1989
(This includes all forms and materials, except scholarship recommendations from your professors.)
- * Starting with the Autumn 1989 term, all students must pay tuition and fees at registration or have proof of Financial Aid.
- * College Work-Study for the 1989-90 academic year starts on **July 3, 1989**. There will be no Work-Study earnings between May 12th and July 3rd.
- * Please make an appointment for Financial Aid Counseling after you receive the processed copy of your FAF.
- * If you have not yet received your Financial Aid materials in the mail or are unsure of your eligibility, please come by the Financial Aid Office at 303 Lewisohn or call (212) 854-3781.