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THE CONSTI MTOM. POSTION OF THES EAMTL STN ADE MOC RN] TC SOUTH AFRICA

How to strengthen the Tamily and at the sams tims wsakan patriarchy - no-where in the world has this besn fully achieved, and vet this is precisely the daunting task facing ug in South africa. It is nob inpeszible. Wo ars living in a period of great social ranawal in our country. Issues that have lain hidden for decades are now firmly on the agenda. The popular snergy released by Lhe

against apartheid opens up possibilities of transformation in every arga of public and personal life.

Apartheid has penetrated so violently and intrusively into the intimate lives of the majority of the people that only the complete elimination of apartheid laws and practices can permit anything approaching a normal family life to gmargsa. At the sams time, the eradication of apartheid raguires not simply the re-writing of obnoxious laws, but the repairing of millions of damaged families. The anti-apartheid struggle thus takss on a vary concrete and deeply humana responsibility, that of helping to create the conditions for the pursult of happiness in 1ts most intimate and personal of forms.

We can and have to thesorise about the lssuss, bub we can naver forget that each one of us in his or her daily behaviour anters into the matter being discussed. Nowhaers is there such an interaction between the subjective and the objective, betwesn the general and the particular, between what we say and what we do, as in the familly. Mowherae are thers more contradictions = Courageous fresdom-fighters who are tyrants at home, people who raspond actively to the needs of the massss and vet deny that those with whom they share their most intimate activitias aven have nseds [fresdom-Ffighters during the day and Tascists at night], and, converssly, people capable of great tenderness in the family at night who are torturers by day.

and nowhere is the key to advance more avi

democracy. It is precisely because familly 5

intimate and all-involving that the people themsslves must
be directly involved in the processes of 1

transformation. Happiness can never be imposed or decreed,
not by the legislatura nor by the church nor gven by those
whose lives have been committed to the pursult of freedom.
It has to be fought for and won by those who aspire to 1t.
In determining the place of the family in a naw South
African constitution, the peoples must be involved at every
stage ~ in determining prioritiss, in establishing gsneral
principles and in administering the institutions set up
for their implsmentation.

starting-off point must therefore nol be some
act, idealised model of the perfect family, but the
lives that people lead today, and the gsneral

context of democratic transformation taking place in our
county. nthe baal sof alihaird Sl nolo SES out bE rl nan
socio-cultural reality we must provide the lagal
underpinnings for the resuscitation of family life in our
country but do so in a way that consolidates rathsr than
undermines the general democratic principles for which we
have baesn fighting. We nesd democracy in our proce 5
democracy in our machanisms, and democracy inside the
family itsslf.
The family has been grisvously injured
pvarcoming apartheid means among
the family from the depths of its trauma.
time, apartheid has been particularly devastating to thes
rights of women. Dismantling aparthsid therefore requires
aspacial attention to undoing the many laws and practices
that seak to kesp women subordinated. To restors the
family in such a way as to constitutionalise mals tyrkany,
wheather benevolent or brutal, would be to eliminate ong of
the affects of apartheid while strengthening another, see.
Lt notloabne SS dnn ls ndemac rat ics Ene hal EB eatin lia ga SE
would be denving half the population ths right to decids
what kind of family law they should have, and secondly it
would result in the suppression of the on a day Lo
day basis within the family of half the family
partnership.

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FROM SLAVERY TO APARTHEID

The first point that needs to be mads about the dama

game Tne amd leiE inE Soiree at pd ca Tas havi Slee

simply as a marginal or indirect conseguaencs of the

orocass of industrialisation and urbanisation ~ as

Fi in 80 many other countriss - but as a result
alibarate policy and calculation.

In the Dutch slave-owning settlement at the Caps,

was explicit negation of the family rights of the

Slaves wers possessions of others, not possssors

rights themsslves. Thalr indigenous family Law wa
completely shattered, and they ware in general not
acimittad to baptism and ths church, and so Lane rom
the family law of their masters and mistresses. Thus thelr
UNions were not recognisad as lsgal marrilag shay eeu]
not own their own homes or bs helrs to fo Tass allied
not sven have thelr own names

Im the later colonial posiod, the attack on the family
took a different form. In traditional african society, the
household had besn ihe Foundssion of poltical and economic
Em Tair ale paople, to destroy their
independance bad detach eran Fran hal and Sha Seal aml al
authorities felt it nscessary to attack the household and
disrupt its Sel fasuiviciensy. The weapons were ldeologlioal
IAatrican cus were called savage, African beliefs
heathen], ls 7 Lond ancl Ep Canes Ls taxes WE re
imposad] and sconomic [the Lor all

rela nes re Adin nan Br a wealth].

the pass laws, the establishment
ming and farm labour, Se creation ie what
ad black locations on tha periphery of 3 urban
areas, were all designed to split African familie
compel the menfolk to work for the whites on the
single-person wages, while the womenfolk produced nsw
genarations of labourers the so-called ressarv y
mings and large parts of en and industry bscame
dependant on migrant labour; the political system of
apartheid was little more than the superstructure of
migrant labour. Family life for Africans was to bs mads
impossible in the reserves and illegal in the towns. There
was nowhars in the country for the son of man or the
daughter of woman to lay thelr heads,

The splitting of familiss thus became deliberate policy enforcad Ee Law. The Native Labour Regulation Act provided for the establishment of single-sex compounds in which no family rire was parmitted; the much-˜hated Section 10 of the Mative Urban Arsas Act was specifically designed to pravent African woman a children from Tiving wits thele husbands and fathers in the towns. Some of the more lenient magistrates in the rural areas actually allowsd African women to spend a few weeks with their husbands in the towns for what the authorising document called â\200\230hiological reasons.â\200\231

Tee En ECS ATE CONTE MT ERTIES SHOR MAT TINE
FaMILY LAW

josioasiien of African family life thus has relatively to do with family law and very much to do with the structures of apartheid law. any serious attempt Chobe respect for family life in South africa must WE with the laws and practices REE the migrant labour system. East ovmany practices have revised, wages pald on a different basis _â\200\224â\200\224 wi and rapidly phased out and replaced by ms homes, and the rural areas rehabilitated so as to i self-sufficient once more. Graster access to land commas vital.

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The crucial slement will be the involvemsnt of the people. The migrant labour system cannot simply be banned, 1b must be transformed in an active and coherent way, with trad unions and neighbourhood organisations plaving a key rola. The interssts of nelghbouring countriass would have to bs takan into account.

One direct outcome of the migrant labour system was the denial for decades that Africans living in the ftowns had a right to decsant housing. The result is anlar y today on an enormous scale. The lack of housing is doubl

Bir Air dri S-Ni, an any possibilities ia Stable and

decent family life, and it represents mass social inaeguality. The immenss insgualitiss a jf aparthsic

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Thirdly, the whole of
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When we speak of the , We are not speaking of a monolithic mass, but of a large population with the most varied sxperiences of life and the most diverse rangs of views. Reactionaries will have the right to voice their opinions along with sveryvbody slss - indeed, it is better that they subject their ideas to debate than that they resort to sabotage and deception to get their views across. Freguently on social issues of this kind, the only consensus that can be arrived at is an agrsament Lo disagrees. What bescomss vital then is that tha law and soclal practice tolerate a variety of opinions.

Those who are against birth control or against abortion, will have ths right to argue their views and work towards finding alternative approaches, but will not have the right to imposs thelr positions on others who hold different opinions. Similarly, those who favour contraception and the right to terminate unwanted or dangerous pregnancies should be free to put forward their med Lanna nie Sn ed ase ine ela a ime] al cymes Sat coniral Sand abortion Por thd ose who do not want lL ha apartheid socisty has naver done 1s to allow the people to choose for themselves how they wish to lead their lives. What post-apartheid society must do is to guarantse to pmaeople for the first time the basic rights of personal

zal f-catermination.

sas, these are questions which will be discusssd

In many ca
i a family and agreed upon by those affected. Thers

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marriage cannot agrees. For example, the wife may wish to Use contraception or to terminate a pragnancy, and the husband may opposa har, or children might wish to uss contraception against the ordasrs of their parents, who may sag contraception as an invitation to immorality. There is not much that the law can do about these situations, Â¢

in the ultimate instance to recognise that no-one should he forced either to conceive or to carry a foetus against her will, nor, by the same token, should anyone be obligsd to accept involuntary contraception or abortion.

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ortunataely be cases where, say, ths partnagrs to a

The State should bs obliged to provide facilities to parmit the fres and informed sxerciss of choice. On the ong hand there should be a range of counselling, support, and, 1f wanted, adoption services, for those who wish to

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Carry pregnancy to term. On the other, there should
ba BR Joni ad abortions for those
WE 5 DrSInInT ies. The
EE of abortion should be anded, since, apart
from moral objections, its only Cconseguance 1s Lo Cron
the hospitals with Lip suffering from the affects of
badly conducted illegal abortions.

satan nt rasan ani a Sanat her Sela SE hat
ould have. Apart from enabling psrsons to
ildren, contraceptives can play an important
hin Na the spread of sexually transmitted dissas
At the same time, the neglected gusstion of as
ragsponsible for much sadness, reguires special attentl

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astly, under this heading, there is a great need
ent on, and nob only angongat tha young. Sa
in the Tull senss connotes much more than biology less
glating how the birds and the bees do it. It deals hiikh
human relationships at their most intimate, and ral
guestions of responsibility, tenderness, trust and
raspect, as well as fundamental Lssues of how malas and
females relate to gach other.

SES

Another arga of apartheid-induced neglect is that of
health cars, pa in rela iol vo mother and ail ld.
Pre-natal, maternity and post-natal care for the mothar
and immunis ation and basic nutrition for the child ara Tha
vary foundations of a secure family life, vet their
provision for black people remains extremely scanty both
in the towns and in the a Massive infant
mortality in a country that pilonesred heart transplants
totally unacceptable. There can be no repair of family
life without eliminating the pain and tragsdy of
unnecessary infant death.

Finally, virtually no provision has made for crac
kindergartens, and schooling black children, who
again find themselves danisd 2 th oe sustaining forge
the traditional sxtended family and Ina aupport of
institutions normally EE fr with industrialised
societies. Similarly, rt ey for African Te
was stoppsd when white farmers complainasd that tb
spoiling the children and making tham lazy. Unegual access
to sducation continues all the way through, SR black

families under s2normous pressure to achieve educational opportunitiss for their children which white families simply take for granted.

Thus restoring family life in South Africa requires Tar more than simply looking at and renovating family law. At the constitutional level 1t necessitates clear principles and at the legislative level clear programmes aimed at removing all the myriad ways in which apartheid damaged family life and created tant Ite. poverty and a sense of dispossssion for the mass of the people

TRANSFORMING FAMILY Lak

There is no such thing as a typical South african family, let alone an idsal one. There arg many ee 50 african families, constituted and dissolved according to a great variety of marriage and divorce systems. The varied origin of the people who make up the population of our country is raf lected 35 the multiplicity of marriage rites. We have

marriages based on lobola or bobhall, marriages solemnised in church or temple or synagogue or before ths imam, and marriages celebrated in civil registries.

The same couple could marry three Limes - with lobola in Lhe traditional way, then at church and thirdly, ir

church is not recognised by the State Tor piivpas gglstering EI baforae a civil marriages

There are also many people living in stable unions ho have constituted ial without any process of formal solemnisation. Finally, a very large part of the population live in single-parent families, occasionally through choice, but usually through abandonment, widowhood or divorce.

at present, the law doss not give squal recognition to all the different kinds of marriage. Marriages celebrated bafore a State marriage officer or before a religious officer recognized by the State as a marrisge officer

receive the fullest recognition. They are registersd and marriage certificates are issued which identify the parties, state the date of the marriage and have strong avidantial valuz in a court of law. Tha legal conssguancss of such marriages are in general lald down by statute or by the common law as interpreted by the judges, with the parties having some say over the kind of property relationships that are established by the marriage. The law stipulates certain pre-requisites for such a marriage to be valid, the most important being free consent, minimum age and the non-existence of another marriage to which sither ths bride or the groom is a party.

Traditional marriages ars also given a measursg of recognition by tha cour â\200\230a. The rules governing these marriages are derived from what is referrad to as customary law, that is, unwritten law passed down from ganeration to generation. In fact the status Of this law today is highly confused, since the law as applied in the courts has been heavily influenced by decisions over the decades by white magils trates and Judges as well as by white text-book writers. The law is thus written and unwritten at the same time; it bslongs to the people anc vet no longer bslongs to them. Grave evidential Sukie arise as to proof of the sxistan of a marriage - had sufficient lobola been paid, what Gi was tha

understanding between the families, what was the momsnt when nuptial negotiations turned into a legally binding union?

Orhar criticisms have bean offared: far from lobola today sarving to bring the two families together, in contemporary conditions it commarcialises ard ag 2 a gives rise to endless disputes; the customs ars Â¢ ieally based and encourage a sense of sthnic apartness re

than national identification; in certain rural arsas, corrupt and unpopular chiefs manipulate family law personal advantage or else to help their ape rules themsslves are frequently out of keeping with

way African family life has svolved, for examples J relation to minimum age, polygamy, voluntarinsss, treatment of adult woman as though Lthey wersg minors, awarding of children to the fatherâ\200\231s family if lobola bean paid, sven if they would be better off with the mother.

To complicate matters, during the Verwosrd sra, ap officials concocted something called Bantu law as an icdenlogical cover for aelvding Africans from a common society. The most archaic and authoritarian aspects of traditional law were smphasised, while the democratic features were suppressed. In traditional society, as in pra-capitalist society in other continents, family law was public law, the governing class succeeding to authority according to the rules of family lingage. The Verwosrdilan aschems was to offer a spurious, tribalistic familly law as an alternative to democracy and ths vote.

i

Yet, without doubt, the traditional customs with regard Lo marriages still have great significance for the psopls, connoting respectabllity, seriousness and sensitivity to tha culture of the Son Se ml Emre net eel me things. Psople regret the debasement of tradition rather than challenge its ln

Somecial rules exist with regard to the fzaaon] zion of Hindu and Moslsm marriages in South Africa. For decades their status was a source of fisrce Ital The official position was that since these unions wers potentially polygamous [even if actually monogamous] they could not be ragardad as true marriages. Wives ware RR treated by the law as concubines, while childr wers regarded

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illegitimate. Eventually, in the facs i CONS Los fakls mobilisation by the communities dirsctly affected authorities acknowladged by mans of special legl that Hindu and Moslem marriages were indeed marrilz antitled to recognition by the law.

The same cannot sal 2 in relation to marriages celebrated in indep ant African churches, nor in ralation to A a long-lasting and stable kind astablishing foniiie racognisaed as such by the community but not having been rAd by the formalities and rif githar of a registered marriage or of a traditional ons. In the absence of properly researched statistics, ong can only guess at the number of such familiss, yet it might well be that they are as numarous as all the registered marriages and fn dn whieh the fall procedures of traditional law have besn followsd, put together. The law has tended to frown i thesa common law marriages

facto unions, as they have bsen called, in general

treating them simply as cases of co-hablitation outside of family law and virtually outside of any legal framework whatsoever.

The problem in a democratic South Africa will be how pee law and the cons bitution should regard this Spear variably of marriage systems. The registers i marria 3 non-racial out mk all that democratic. lhe traditio

marriages are popular but certainly not Linea
Millions of people are living in families that ths law doses not even regard as Tamilies. Should there bs a single legal regime of marriage, the same for everybody irrespective of background, culture or praf BNE, Or should there be a legally recognisad plurality of marriage systems? There are a great number of options, and many nuances within the options.

One radical possibility is to have a unitary syst marriage in which only ong form of marriage rite recognised and all other forms ars denouncad. This happened in theocratic countries whare religious fundamentalism has monopolissad marriage law, and certain moments in some post-ravolutionary socle Theoretically in South Africa there could Â© 2)

of marriage recognised by the State, ong which, smphasised non˜racialism, national unity and Bqua between the spouses, RR with State action to Cl religious marriages as superstitious and traditiona marriage customs as tribalistic and feudal.

A softer and less intolsrant variant of this ba to have a single South African marriage | a single concept of the Besenuial Shaan marriage, but to permit various to be constituting due solemnisation.

Thus, various State, ral 5
ba recognised as marriage cers capable of performing Or recognising marriage ceremonies. They would have Lo satisfy themselves that the pre-requisites of a proper marriage were present [for example, minimum age, monogamous relationship, fres consent] and maks some form gf regilaiica tion Sy Sthzriiee the ceremonies could be in a ois iione Gail Smeal ei pa iy esa men] asl En el a

air ny villag oa cantre or at a homestead, and

oie and community leaders could
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accompanied by prayers, or the slaughter of an ox, and in Zulu or Afrikaans or Tsonga.

What would matter here would be that, irrespective of the form of marrisgs followed, the law would attribute the same rights and responsibilitiss to the couples, wlth possibly some choles in relation to property relationships. The partiss would then in addition and bavonad what the law sald be quite fres, 1 they both so wished, to apply the particular rules of Yhalvh Calihan custom to the marriage. Thus parsons married in a Catholic church might accept that their marriage is indissoluble, gven though the law granted them the possibility of divorce. Similarly, if lobola were paid, the intricate rules governing the relationships between the two families involved might be followed in detail, if the persons concarnad so wished.

The fact is that thasss soclal and religious rulss would ym enforceable according to the convictions of the partiss, and, to some axtent, according to community pressurs, but not according to the law. The marriage law would sstablish a common set of fundamental principles applicable to all recognised marriages, principles which could be invoked by ad their mare wid nny ine ei out nel conesnia of ine ohne in sum up: the religious or traditional rules would operate outside the formal lsgal system and have sanctions of a morals 2nd social, enol Sad Sa aaa Sl ind)

Such an approach has many advantages. [ft sncourages the concept of a common society, with a common gitizenship and a common platform of legal rules applicable to all, Irraspactive of colour, language, religion, origin or gendar. Family law would be sgt in the context of fundamental constitutional rights that emphasised the basic principles of democracy, Trasdom and sguality.

At the same time it would be flexible and sensitive to the cultural and religious diversity of the country inasmuch as 1t acknowlsged that there were many ways in which meople liked to marry, and 1t would be tolerant in the sense that it psrmited informal marriages rules based on tradition or religion to exist outside of the formal, State sector. Individuals and families could continue to follow practices and beliefs that had special msaning for

, and tha law would only intervens if they could not
a amongst themsslves and at least one of the parties
The preferred to invoke his or her constitutional

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vat there are problems that have to be faced up to. Thars
are certain communities that might refuse to have their
marriages registered if the result were to impose
automatically a sebiof constitutional rights and duties on
the parties. Thay milion object Fur then that ay fr ma Sit ate
courts are not allowed to resolve disputes according to
the rilas of Cradition or of Chaloner linge SL han ths
people Will simply boycott the official cour? system and
have recourse to mechanisms of their own. This latter
point can be met to some extent by transforming the
composition of the judiciary, $0 that it bscomes more
representative of the population as a whole, and by
attuning court procesdings more to the local cultural
setting. This thems will be developed separately.

The only way to resolve these gquastions 1s to discuss them
directly with those whom they affect most intima telly. The
issues ara nob nersly symbolic or cultural, They affect
pension rights, rights of succession, questions of custody
and alan of division of nropariy. Thay alas voumh ones ne
status and at times the incoms of traditional leaders. In

some cases they deal with the very concept a community has
af dhnalt,

Thus the Moslem community has a specific cultural identity
bound up with subjection to slavery and, later, to their
status as indentured labourers. The struggle for the
maintenance of Moslem tradition, including Moslem family
law, was part of a struggle against racist domination,
which frequently took the form of aggressive and hegemonic
Christianity. The Moslem community must articulats its own
views on how best to combing the twin goals of creating a
non-racial, non-sectarian democracy based on the principles
of equal rights and duties, and preserving and developlng
the cultural and spiritual heritage of all the various
communities, including their own, that make up the
avolving South African nation.

The same point can be made about sectors of the society in
which the defence of the institutions of traditional

family law was part of a defence of the integrity of the people in the face of colonial invasion and apartheid digspossession. Thers might be argas of the country where the peoples actively involve themselves in the general democratic struggle and accept the broad pringiples of national unity, and yet at the same time wish to preserve traditional rules and practices in relation to family law. This can only ba discoversad by mans of open debate. Tha point is not so much to put general philosophical guastions to the peoples, such as: do you favour the continuation or abolition of traditional law?, but rather to discuss the concrete options available, and in particular to see what degrees of compromise or transitional arrangements are possible.

Thus in principle it should not be impossible to have a singla system of basic rights and duties attaching to all marriages Swhaiher ail aint chuisc ht anit eadd Sisal SE whiien would be recognised and applied by the courts, and at the same time permit the establishment of conciliation machinery outside of or alongside the court system, which, at the request of the parties, could give more weight to traditional or ral alaus noens.

The above ars all variants of what has been referrsd

a unitary system of family law. The new constitution could, however, reject any attempt to oresate a singls marriage law Tor South Africa, and opt for one of the many variants of legal pluralism available.

The most radical pluralist solution would bes

family law as being determined by ths personal

coupla, in terms Of which there ware ngithar comm

nor common forms of administration. Thus persons acoording to traditional law would have their cast

by traditional judges applying traditional rules; 30 religious group would have its own Judicial figurss whe would decide on family disputes involving members of congragations - canonical courts, rabbinical authorities, Moslem Judicial councils; and the State courts would only have Jurisdiction in the case of persons married according to the State marriage legislation.

radical version would be to have a single State m of Justice rasponsible for the administration of

family law, but to permit the judges to apply the principles and rules of the marriage system most relevant to the case.

This is what was done in Tanzania, wheres the further step was taken of establishing certain minimum ground rules

ba applisd in all cass Lrraspeactive of whather thea marriages had bean A ral aio Ear SY rad Yilana lS ine national minimum age was sstablished, and also the principle that a divorce only became legally affective whan made part of a court order.

accordingly, the courts would recognise Moslem marriages avan if actually polygamous, and also divoroe in terms of the Koran by talag or repudiation, but the divorce would only operate legally from the moment that the judge recognised the existence of the talag. If the marriage was accomplished by means of lobola, the court would apply Zi rules of lobola to the situation, save that minimum ages would have to be respected, and thse divorce would have Lo be decread by the court and not by any traditional lsader.

In the case of a pluralist system administered by a single Judiciary, ona of the key questions becomgs the determination of the legal norms applicable, the so-callsd choice of lawiproblamn, Thus She first aueshbion for decision by the court is whether the RE a

regarded as a civil one or a religious ons,

which, or alse a traditional ona, and, again,

group’s traditional law should apply.

Put more concretely, the basic choice is batween a sing system of rules and administration that tolerates an informal multiplicity of marriage systems outside, and saparate systems of rules, and, possibly, of administration, within the overall legal structure. Thus, ona of the major decisions which the psople have i makes wheather they want the judges to say in any particular

ase: this is a Moslem couples, therefore we apply Moslem

or this is a Xhosa marriage, therefore we apply Xhosa

or thess people wers married in the Catholic church, or are Jews, or Jehovaâ\200\231’s Witnesses, ˜ African Zionists and we must apply the appropriate es of sach religion, or they wars married before a magi 2, bherefors we apply the State family law aE

hese arse general transformations that would favour the resolution of family disputes in a more just and sensitive way. In addition, specific attention would have to bas given to the creation of a system of Family Courts such as many countries have, but with a special South African flavour. Thess courts would be part of the gensral court system, but opsrate in a manner appropriate to their particular competence. Thus, within a framework of common constitutional and legislative norms, they could have a considerable degres of flexibility in relation to the way they functionad.

In certain rural arsas, they could be composed In traditional manner of several membars. Their procsdures could be informal and largely oral in character. In this way tha vitality and flexibility of traditional methods of resolving family disputes could be maintained, while new glements are introduced, such as having women on the bench, and applying principles based on egual rights between the parties.

In urban areas there could be more emphasis on formal proceedings and legal representation, vet even here there would be scope for infusing the family law courts with the democratic aspects of African tradition. Community courts With Jurisdiction to deal with family oroblzmns,

neighboursâ\200\231 disputes, and relatively minor breaches of the peace, could snsure that an appropriate combination of legal rigour and social informality was attained. The rules would be the same as Tor any other court, but the atmospheres would be ong in which any member of the local community would fesl at homs.

In addition thers would bs a network of Family Courts composad of persons of all backgrounds to attend to the disputes of those sections of the population not served by the courts mentioned above. These courts would be not too different from the civil courts opsrating today, save that thay will be mors representative, and, in keeping with a world-wide tendency to look at family matters â\200\234in the roundâ\200\231 and less as subjects for litigation in the formal legal sense, they will be rather more flexible in their operation. Thus certain basic constitutional procedural rights will be guaranteed, but there will ba less emphasis than at praesent on strict rules of pleadings [documsntary

statements of the issues] and on technicalities of how avidenoe can be adduced. The provision of legal ald can be of special importance in family law matters, especially Lo the parties, mainly women, whosg financial position 1s

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Finally, there should be some kind of ongoing monitoring of the way Tamily law questions are being handled s0 as to that the law and the procedures svolve in a

istfactory way. As far as particular cases are concernad, the only remedy for an aggrisved party would bs to appeal to a higher court. Yel trends could bs noted and tendencies systematica lly to flout the new constitutional principles could he brought to light and counteracted.

In tha end, the affe eS of the law will depend upon many axtra-legal factors: ish degree of gensral public consciousnagss, the EEL if ann organisations, the

crutiny of the press, and tha way in which the judiciary succeeds in implanting itself in the community while maintaining its independence. Yet the terms of the law and the way the courts function will bs of major significance. It is essential that attention be paid to these gusstions now. The struggle for a new family law is part and parcel of the struggle for a new family and for a nsw nation.

Alternatively, do the people of our country want ths judges to say: whether they are Moslem, or Xhosa-spaaking, or Catholic or Jews or Jehova's Witnesses or African Zionists is their business, they have freedom of religion and the right to organise their family lifs as they wish, subject only to restrictions against domestic violencs, child abuse and so on: they can try to resolve their orooleams by resorting to traditional or religious leaders, or just accepting the decisions of the family counsils, 17 they so choose; but once they bring the mattasr before us , we Will apply the general principles of the new South african law, irrespective of their religious or ethnic background. .

We will look to the concrete problem [the judoases might continual, and if the husband is beating his He le drinking away his wages, or 1f they have ssvsre 8 a3 problems, or if there is total incompatability marsonality betwesn them, it doss not really mat ar form their marriage took, or whether they are Moslem Khosa-spaaking or whatever, we Will give TA solutions to that concrete problem.

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In brief, a wife-beater is a wife-bsater, a Moslem or

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a Tswana or 2 Catholic or a Jawiah ier Lata

If the latter approach is accepted, it is possible to lay down certain general principles which the courts would ARELY although thess too would have to be thoroughly discussed by the people before being Ange Tnar iad into the law. There has over the past three decad bean a tendency at the international level towards the ere an alan of certain family law concepts [though tha revival of the Sharia as the source of family and Gruden) law in a number of Islamic countries repressnts a counter brand].

There has been a general move in most parts of the world towards prohibiting child marriages, sncouraging monogamy, insisting on voluntariness as the foundation of marriage, defending the principle of shared parental responsibilities and rights in relation to the children, accepbing agual rights and dutiss between the spouses, and acknowledging that on the breakdown of the marriage, the family homes should be disturbed as little as possible ih that property acodired during the marriage should bs

sharad sguitably, independently of who actually paid for it. All these principles have already taken strong root in South Africa. The problem would not so much bg how to

state them as how to apply them.

MECHANISMS FOR IMPLEMENTING THE NEW FAMILY LAW

1% a policy of full legal cluralicn la adopted, than Lhers will be a multitude of Judicial officers applying a multitude of different rules. The question of how thease different kinds of judges are selected could become quite complicated, each segment having its own set of gualifications and its own mods of deciding who should exercise the Judicial power.

On the assumption, however, that some form of unitary administration of family law is going to ba adopted, ons may advance some ideas as to how the judicial structures pan be transformed so as to make them more democratic and more culturally sensiti

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In tha iret plage the wholes of the Judiciaryiwill undergo major changes so as to make it more represantative of the people as a whole. The Judges in post-apartheid society will have an important role to play in defending The ponsti tutional rights of citizens. For the ceonla ito have confidence in the judiciary, it will be essential that they see themselves and their highest qualities reflected on tha bench. The idea of one section of the population sitting in judgement over another will have to go. This means that the Judiciary will be composed of parsons of integrity and skill representing the wisdom and humanity to be found in every ssction of the community. Mot only will the judiciary cease to be a white preserve, it will loss its mals-only charactar. With ths development of a naw language policy, African litigants should be assured of the right to have proceedings conducted in the language with which they feel most comfortable. The involvement of lay assessors, and, possibly, Juries, will gnaure that the gap between litigants and adjudicators will be diminishad.

JUDGES AND GENDER

Some call it the woman guestion. Soma call it the man guesntion. From a constitutional point of view it iz boast referred to as the gender quastion. Few would deny that gender is on the agenda, but not many agree on how Lo formulate the guestion, let alone lay claim to have found the constitutional answers. The issus is painful, embarrassing and controversial, all good reasons for tackling rather than avoiding it.

it is a sad Tact that one of the fow profoundly non-racial institutions in South Africa is patriarchy. Amongst the multipla chauvinismg which abound in our country, the males version rears itself with special and sgual sgual vigour in all comminities. Indesd iris so Tirmly rooked that ly ig fraguently given a cultural halo and identified with the customs and psrsonality of the different communities. Thus, to challange patriarchy is to be ssan not as fighting against male privilege but as attempting to destroy African tradition, or subvert Afrikaner ideals or undermine civilised and decent British valuss. Manhood is expressed throughout the country [and beyond its borders] by joining the police or the army or vigilante groups and seeing how many youths you can shoot, whip, teargas, club or knife, or how many houses you can burn down or bulldoze, or how many people you can torture into helplessness.

At the same time, gender inequality takes on a specifically apartheid-related character, bearing with massive differentiation on the various sections of the population.

Any constitutional dispensation relating to gender must accordingly take account of both dimensions - the universal issues affecting women and men, and the specific forms that apartheid has given to gendsr domination in our mounts.

Thus, African women have pointed out that as a group thay have suffered from many lavers of disabilities, some of which they have shared with other groups and some of which have been specific to them. Thus they share

With thair African menfolk, the experisnce of national opprassion,

with all the women of South Africa, the burdens of inequality and the paing of being targets of sexist bahaviour,

with the workers of all races, the problems of economic subordination.

At the same time, as African women they are subjected go special disabilities and disadvantages. Spresie 0 Hao &

accordingly, although they are oppressed as Africans, they are doubly oppressed as African woman. Colonialism aod apartheid have progressively whittled away the democratic aspects of traditional African society and law and emphasised vertical power and patriarchy. The result has been to leave African womsn in a limbo, stripped of the sgoure if Junior position they had in traditional society and denied individual rights by thas state law. The spacs they occupy is that unremitting area where patrlarchies meet. For a century and mora, tradional and state law have bean interpreted in such a way as to relegate grown African women to the status of minors, subjecting tham to the guardianship of fathers, brothers, uncles and male cousins. This has borne with particular sasverlity on widows, whose legal position in relation to the family home, holdings and goods has been sxtremsly pracarious.

The whole issue of the future of African family law is essentially a cultural ons which has to bs treated with great sensitivity. Its solution will require extensive discussion, with primary involvemsnt of those most likely to be affected by any change. The constitution could anphasise respect for tradition, or it could underline the principle of equal rights. The two are not necessarily incompatible. Tradition could continue at ths social level, in terms of which families make such marriage arrangamants in terms of custom as they wish. At the sams time, the parties to ths union would, as South African citizens, enjoy their constitutional rights, ong of the most important of which would be equal treatment by the law.

Thus there would be nothing to prevent the payment of lobola or bohadi, and the parties and their heirs could, if thay chose, apply all the traditional rules that flowed from such; â\200\230arrangement. If the woman wished, as a matter of custom, to allow her husband to raprasant her in dealings with the outside world, that would be her choice and the law would not make such a situation illegal. Neverthaslsss, she would at all times be free to invoke har
Guna kui ional ed diyit aN aca] TE ala Eel ET yak
patriarchal rules were adversely affecting her rights to inheritance or a pension, or to custody of her children or maintenance for them, or her right to take up residence where she wished or enter into a contract or take up smplovment or travel, the law would come to her aid. [One assumes that the courts will be transformed so that ths paople will ses themselves reflected on the bench both in terms of cultural background and gender;it would not bs a case of one section of the community sitting in judgement

(pf another, but of new family courts drawn from thse whole

population applying the constitutional principles in a firm but culturally sensitive way.)

Secondly, although they ars oppressed as women, they ars doubly oppressed as African women. A century of migrant labour and the pass laws has had a particularly injurious effect on the lives of African women, depriving them of sexual companionship, family life and sconomic tranoulllity. One rasullt of this do that the right toulive 2 "normal Lifts in thet onntaswl of the nucl oar it aniily becomes a Teminist demand in South Africa [Just as in areas whare polygamy still exists, monogamy enters the list of womenâ\200\231s claims]. The constitution would thus have to attempt simultansously to protect the rights of unmarried women, single parents, widows and divorcees, support the institution of the family, and protact woman against the inequality created by patriarchy. This is no sasy task, but certainly not impossible. The starting-off point must always be the claims and perceptions of the parsons most affected, namely, the woman.

Thirdly, although they arse oppressed as workers, they are doubly opprassad as women workers. Hundreds of thousands work as domestic servants, without trade union rights or legislative protection. They are freguently employed in the worst-paid Jobs subject to the most inconvenient hours. Millions are involved in unpaid and back-breaking agricultural work, not to speak of the especially large amount of unpaid domestic work they put in, having the least access to domestic help, labour-saving equipment, convenisnce food and organised child cars.

Thera are many other guestions which bear most acutely on African woman but which affact the lives of all South African women [and all South african men].

A multitude of issuss exist in relation to gender and work, such as equal pay; discrimination in hiring, promotion and firing; tha allocation of jobs to men and woman; maternity and paternity leave; safety in relation to reproductive capacity; nursing rights; child care; flexible hours; anti-social hours; sexual harassment.

Similarly, thers are acute gendsr-ralated gusstlons pertaining to health and control of oneâ\200\231s body and reproductive capacity - the issues range from the organisation of health care delivery, to health education, to contraception and abortion.

another set of questions relates to violence against women both physical and mental, direct and indirect. This would include raps and domestic violence, but also sexual harassment in its manifold forms, the demsaning use of woman in advertising, and, many would argue, the degradation of women 1n pornography.

There are also sharp issuss related to gender-blasad use of language and gendsr stereotyping in public documents, gcducational material, the media and advertising.

Finally, there are never-ending problems related to the family and family break-down, to the difficulties of single parents, to welfare support ana the rights of divorcess and widows.

Four different approaches have been adopted within the anti-apartheid movement towards the above clusters of issues, @sach with profoundly different implications for any future constitution and 8107 of 24ghity.

The Tirst view, not as common now as it once was, is that to raise the gender question at this stage is divisive whan ths goal around which we all should unite is the abolition of apartheid. Women will have the vote in a free South Africa ang be able to vindicate their rights through Parliament in the ordinary way. Patriarchy 1s a vagus concept, and in any svent, it should ba fought by msansg of cultural struggle and not through the law.

Tha socond positisonis that if a 211) of Rights de tn by introduced at all it will be meaningless if it ignores the rights of the female half of the population and psrmits discrimination against them on the basis of gender. The constitution must accordingly contain an unequivocal declaration in favour of eguality between men and women, in terms of which all laws and practices which place ons sex or the other at a disadvantage shall ba unconstitutional and void.

Thirdly, there is a growing body of opinion that formal aguality is worth little if not supplemented by affirmative action to destroy the structures and behaviour patterns created by centuries of discrimination against women. Accordingly, special constitutionally-backed criteria and mechanisms are raguirsd to enable women Lo break through the lavers of disability inherited from the past. Coupled with this approach is an insistence that instead of taking a complately gender-neutral approach, which in reality sseks to assimmilatse women into a world constructed around male Interests and male ways of sesing things, the constitution should permit and redgulrse the law to look at the actual lives that women lead and thereby gnable women to define for themselves what their gxpectations and priorities are. It also reguires a strong famale presence and volce in all the processes leading up to the adoption of a new constitution, and attention to the language used in its formulation so as to 2nsure that women Teel the constitution speaks directly to and for them, and does not simply locate them in some safe appandicular space.

Finally, there are those who argue that patriarchy and saxism are older and even more pernicious than apartheid, and that failure to construct a constitutional order expressly dedicated towards their abolition will result in the transition process from apartheid to post-aparthsid being little more than the handing over of power from one gang of msn to another.

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Although each approach has considerable technical implications, the decision on which one to adopt is @ssentially political and not technical. Fundamentally, the question will be how strong the womenâ\200\231s movement 1s, and how clear and united it is in its goals, which might in fact be framed in ways quite different from thoss oresanted above.

The fundamental right underlying all other rights is the right of women to speak in their own voice, the right to determine their own priorities and strategies and the right to make their volces felt.

At the same time it must be said that the outcome of the debates in the womenâ\200\231s movemsnt is of deep interest to the whole of socisty. Without the active involvement of millions of women, not simply as mobilised detachments for change, but as lively participants determining the very meaning and quality of such change, there can be little hope of achieving what may be regarded as the thrae goals of a post-apartheid constitution, namely, the eradication of tha injustices of thse past, the crasation of a tranquil and prosperous society, and the building of a South african nation. It is not just that women constitute half the population: the social deformities and injustices created by apartheid fall with special severity on women, a0 that the rights of women and the ending of apartheid are inextricably linked.

Indead, it is no longer fruitful to debate whathsr or nob gander should be on the agenda. It is there already, having been put there by the womenâ\200\231s movement in a way that cannot be ignored. What follows is an attempt to anticipate the ranges of thas technical options available for achieving an integration of womenâ\200\231s claims into the vary substance of the constitution, and to look at soma of the dilemmas involved. Once more it is necessary to state that the issues are highly complex and controversial, and that the processes whereby they are discussed are probably more important than any particular solutions proposed.

One of the first problems is whether the constitution and Bill of Rights should have any provisions dealing with womenâ\200\231s rights or gender souality at all. This query is not as anti˜-feminist as it first appears. Thare ara sone who maintain that the presence of women should be felt in avary article of the constitution, and not in any spacial provisions. Just as it is quite unnecessary Tor the constitution to outlaw discrimination between people who have blue eves and those who have brown eves, or batwaen those born on a Monday and those born on a Tussday, 30 should the accident of having male or female sexual organs he constitutionally irrelevant. The rights of citizenship should bs as non-gender as they will be non-racial. If the constitution speaks of workersâ\200\235 rights and than goss on to speak of womenâ\200\231s rights, it implies that women and workers are sasparate categoriss, whersas woman constitute nsarly

half the paid work-force and ninety per cent of the unpaid.

The reality is that constitutional silence would do nothing to abate gender-awarsnass and everything to pesrmit axlsting discrimination and abuses to continue. What is valuable in the above approach is that it requires that avery clause of the constitution be infused with an awareness that it has besn formulated by both women and man with a view to protecting the rights of both men and woman. This means excluding the gratuitously obnoxious use of the word manâ\200\231 when parsons of both sexes are msant [a.g.â\200\235 one man, one voteâ\200\231). It also suggests that in order to underline the squality of citizenship and the inclusion of women at every stage, the word â\200\230personâ\200\231 can wheres appropriate give way to the exprassion â\200\234man and womanâ\200\231 or â\200\230woman and manâ\200\231. Thus a clause dealing with the vote could begin: â\200\234every man and woman.who has attained the age

while the preamble could repsatedly make it clear that the constitution was drafted by women and man for a citizenry composed of womsn and men.

Universalising and esgualising the presence of women and men in all situations might in fact do more to dissolve the imposition of social constructions of masculinity and femininity than any attempts to ignore the actual differences which exist between the lives of men and thoss of woman.

Equal and explicit gender-prasence throughout the constitutional text in no way impades special provisions directed at eliminating gender Lnequality. On the contrary, it provides a secure foundation for an equal rights clauses, smphasising that it is not a case of women having the right to be equal to men, but of women and men being sgual to ach other.

Being sgual doss not mean being identical. The equal rights clause must be framed in such a way as to recognises the right to be the same in some arsas, and the right to he different in others. Thus woman and men are the same in their capacities as voters or litigants or office˜holders or usars of public facilities. They are different in terms of child-bearing and whether, historically and culturally they have been the perpetrators or the targets of gender discrimination or abuse.

The constitution would thus not be violating the equal

ai cinta nnt en EE Stank Nan cating Sofitel ind of) roadie ali and sonlo-rnulb ral smal yl 8 ni he Sonn teary ETE EE a limin hy iins, acknowledging this reality that the constitution can serve its true role of guarantesing equal protection. If the drafters wished to be pedantic, they could say that any person, male or female, who gives birth to a child is entitled to certain benefits. By the same token, ong would assume that a constitutional amendment would not be needed every time a man wished to have a prostate operation racognisad for the purposes of sickness benefits.

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Similarly, sgual rights provisions should not be phrased in such a way as to prevent affirmative action procedures in relation to overcoming tha affacts of past gandar discrimination. affirmative action does nob require that ungualified women be given preference over qualified man, but it would permit special opportunities being crsated for woman in the same general qualification bracket as men. More importantly, affirmative action would permit special programmes of education, training and search in order to encourage women to cualify themselves Tor and obtain employment in argas to which they have previously hao difficult woaean

The aqual rights clauss should also not be formulated in auch a mannar ag to imply that it and it along covars btha gander question. There are strong voices in the womenâ\200\231s movement which argue that emphasis on sguality can even obscure ways in which the law should intervens to correct the injustices to which women are on a daily and massive basis subjected. Women should be free to walk in parks and gardens and along streets; they should be safe from vinlencs by husbands or lovers; they should not ba subjected to being pawsd or whistled at, or to sessing their bodies being used to sell commodities or slse degraded in sadistic pornography. For millions of women, the right to have a safa abortion could be mors important than the right to enter medical school or becoms manager of a bank. The whole problem of sexism, of stersotyping, of the thousand little gender-based assumptions that make life stifling and oppressive, that take away confidence and deny any sense of completensss and fulfilment, is barely touchad by an sgual rights clause.

These are issues of overwhelming importance to a vary large section of the population. Men have their physical strength, their economic power and the force of tradition behind them: in this context, they do not need the Brotactiontiof the conasbitult Ton, Sin Factdos nol Save nissan that these arg questions of a constitutional dimension. Surely, however, it should be possible to distill the preocoupations and demands of woman into a constitutional clause that summarised their essence in terms of a basic human right and tharegby provided the foundation of futures legislative and judicial action to provide remedies.

One recognises that guastions which are essentially cultural and psychological in character and that touch an the most intimate aspects of human relationships, cannotb be resolved simply by legal declarations, even less by super police forces. Nevertheless, the constitution 1s a special document that should spsak to the whole nation WIL Bort Ema me as mille ese rts Smeal SEE anes oli ng oppressed]... It sstablishes fundamental principlss for the whole of society and serves as a point of reference for all. It aspires, it educates and it creates institutions for implementation. Ons envisages, then, compact constitutional provisions which

proclaim equal rights and egual protection under ths law

parmit and require affirmative action to overcoms tha accumulated effects of discrimination, and

soak to outlaw or at least move away Trom all forms of abuse, oppression and insult based on gender.

Yet however vivid and complete these formulations might ba, it is difficult to see them as being anywhere nearly satisfactory in themselves. Thers are important and complicated issuss relating to the family, to health, to special problems of employment, to reproductive rights, to ohild sare, Lo aboriion, wo unpaid work, toimention only @ partial list, which do not easily subsumes thamsslves under broad constitutional provisions.

In particular, it is necessary to reiterate that important sections of the womenâ\200\231s movemsnt have expressed thelr reservations about too much emphasis on agual rights and not enough stress on the right of women to affirm themselves as women and not as neutered men. They point out that women live in their bodies, which arse different from those of men, and grow up with a set of experiences of and perspectives on the world which differ from those of men. Their problems come from having to suppress their sensibilities and vision undsr the weight of constructs which pretend to be social and neutral but which really represent a male view of the world. They point out that in South Africa as in the rest of the world, msn have not done very well with all their power, not only denying self-expression to woman, constantly killing, torturing and locking ach other up.

A distinction should thus be drawn between femininity, which is an idea that comes from men and is imposed on woman, and feminism, which is a form of self-affirmation by women themselves. According to this approach, self-determination for women as a group, and freadom for woman as individuals, requires a constitutional order which, far from suppressing or neutralising womenâ\200\231s distinctive voice, guarantees it space and opportunity to be heard. The constitution should therefore in this ares permit the at first surprising doctrine of sgual but separate.

Another facet of this approach is the smphasis which it is said needs to be placed on personal autonomy and womenâ\200\231s right to chooses. Thus the key dguestion should not be whether women as a group should be doing sverything that men do - whether it is being a doctor or a judge or a soldier or a lorry-driver - but that each individual woman should have the right to choose for herself whether she wishes to be a professional, or a trade union organiser, or a welder, or a housewife. Tha right of choice bscomss specially important in relation to health questions and the issus of control of fertility. Thus the question of abortion could be dealt with on the basis of acknowledging the constitutional right of those who oppose 1t, whathar

for religious or moral reasons, or reasons of tradition, to campaign for women not to resort to termination of

pragnancy, while guarantesing to the pregnant woman herself the constitutional right to make the final decision.

Indeed, the issuss are so multi-faceted, intricate and simul taneously concrete and elusive, that it is doubtful whether a few broad constitutional generalisations could in themselves ever provide sufficient guarantees - and one has to bear in mind that it will largely be mals parliamentarians and judges who will be responsible for their interpretation.

The answer would seem to lis in the adoption of a Charter of Womenâ\200\231s Rights, formulated essentially but not axclusively by women and expressing their claims and priorities. Such a charter would aim to be declaratory, affirmative, sducational and opsrational, that is, it would declare the rights that women and men have, it would astablish a programms of action to bs taken to rgaliss the rights in practice, it would serve as a point of reference and aducation for the whole of society, and it would gstablish appropriate mechanisms for enforcement. It would accordingly give texture to the broad constitutional principles by focussing directly on questions of immediate and pressing importancs to women, such as health, employment, reproductive capacity, violence against women angel] deans

Ong may therefore envisage a hisrarchy of constitutional and legal provisions along the following lines:

*Â¥ General principles of gender squality, non discrimination and affirmative action, to be found in the Bill of Rights section of the constitution. These broad formulations could only be altered by the relatively difficult processes of constitutional amendment.

* a Charter of Womenâ\200\231s Rights falling under the gensral Umbrella of tas BRE nT nd ova Sir ani sae aun i a separate document. The Charter would have a comprehensive set of rights and remedies formulated in relatively specific form, covering the arsas of smployment, health, sexual harassment, and so on. In the light of exparisncs gained in its implementation, and responding to the avolution of ideas and institutions, the Charter could bs amended more easily than the provisions of the Bill of Rights. At the same time it would have a special status as both a general code and as a point of reference for interpreting the Bill of Rights and for drafting relevant legislation. In other words, it would be sntrenched, but Tess riod div ivan nou dE sha gal nen ant al,

Â¥ Legislation adopted by Parliament or local authorities in keeping with the principles of the Bill of Rights and the norms and institutions of the Charter of Womenâ\200\231s Rights. Thess statutes would be eminently specific in

character, and subject to amendment by simple majority according to the ordinary processes of Parliament.

TOWARDS A CHARTER OF CHILDREN'S RIGHTS

â\200\234 In both classical law and traditional African law,

the %asic rights of the child were Testricted- substan˜
˜ tially to "the right to have.a name and the right to
3 . inheritance. In recent _Yeurs,â\200\235 the right to support,
To always Strongâ\200\235 im â\200\234African society, and the right not
" to .be abused, have been added. Clearly, in a democratic
South Africa, all these rights will be preserved and
sirengthened; indeed, the removal of apartheid is a

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˜pre-conditicn for their large-scale realisation. Yet

to restrict the rights of the child to these narrow

areas would be to turn a blind eye to -the true depriva-
tions imposed on the child in apartheid South Africa
and to ignore the full range of the children's claims.

"7A narrow concept of childrenâ\200\231s rights is approrriate
in relation to ome particular. set Â«of rights, namely
those enforceable through the courts against cruel
or neglectful-˜parents:-Since -il is not" the State that
creates the family and family relationships, great
sensitivity must be applied in this area. But the
situation is quite different when the neglect and cruelty
comes from the State, and when the parents themselves

are oppressed, whether directly by the domination of

_____the apartheid system or whether indirectly as the
dominators, their heads imprisoned by terror and hatred.

â\200\224 - Then- claims of-â\200\224the children - 0 beyond - being merely

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| claims against their parents eaforced by child protection
societies or officers of the State. The children's

claims dome to__ be claims against _the__ State. _itself,
requiring â\200\230appropriate "legal guarantees and modes of
enforcement. :

The greatest abuse to which South African children
are _subjected today in fact comes from the organised
might of the State. Any Charter of Children's Rights
in aâ\200\224democratic South Africa has to take this fact
as a starting point. The question of children's rights
thus cannot be separated from the â\200\230general struggle

to eliminate apartheid. At the same time, it is a
question thot hds its own particularities. The struggle

for children's rights contributes towards and enriches

the general struggle against apartheid. It is also __

a struggle that will continue even after apartheid

is destroyed; in fact, it is a struggle that will only .-.
achieve its full dimension once the country has been.
liberated.

At the present stage, what we can say is that the first
steps must be to restore to the children all that the
-+ ˜gpartheid - â\200\230system has -robbed them of. This means
recognising claims, both of a moral and a legal kind,
that can be enforced, either directly by the children
or else on their behalf, ageinst society as a whole
and all its institutions.

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The Right to Grow >

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Every child has mot merely -the rightâ\200\231 s to live, in

â\200\224.the zense -of the right to survive, but the right t0 â\200\224meercimrâ\200
\224ure.m

â\200\234grow, to 7levelop his or her physical and mental capaci-
ties. Apartheid society denies this right to the great ˜â\200\224â\200\224â\200\224â
\200\224â\200\224â\200\224â\200\224â\200\224â\200\224 ˜â\200\224
majority of South African children. Hunger in a country
of wealth, social diseases such as TB and Kwashiockcor
˜in a land of e&dvanced .medicine, are proof of this._

Cold actuarial statistics show that black infants have
a first â\200\230year mortality risk twenty times greater than ;
that of whites; that on average, every black citizen
hasâ\200\235 a life expectancy twenty cr more years less than

_ that of _whites. The black children of our country,
like the white, have a claim on the State and on public
and private institutions to create conditions for geaera-
lised primary health care, including mother and child
protection â\200\234Ã©nd Tor guaranteed â\200\234minimum nutrition. While ˜˜" TT TTT 7Â
°
non-governmental organisations have a valueble and
continuing role to play in these areas, the issue cannot
be left on the moral or altruistic plane alone or to
the goodwill and spare time of volunteers. The right
to altruism is an important right which should not
be submerged in the new South Africa. Butâ\200\224it should
never be seen as the main guarantor of children's rights.

i Children have itiot only moral eleims on asociety, athens ere
have.. legal "ones *as. well. Legislative programmes are rT
required whereby clear goals are established setting
out the minimum requirements of each..and_every child
in relation to food and health facilities, and thereafter
providing a statutory basis for their progressive

achievement. Once apartheid bas been removed there will be no impediment to the creation of a legally--based system of child welfare that materialises in

tangible form the right of the child to grow.

The Ri to P

Argument rages in many countries about whether the

sale of war games should be lawful or not. In South

Africa, the problem is not whether children should

be encouraged to fantasise by playing with model tanks

or rifles, but. whether real armoured cars, autcmatic

rifles and teargzs-throwers should continue to dominate

their -lives. Whea children dodge in the SirSssss it

is not to escape imagined ’cowboys or crooks’ but to : IE 0
evade real killers frequently -bent en -rmrder:=- er â\200\224â\200\224 Teme sae ee
â\200\230their-school groumds are occupied by troops, whea-their ˜˜ = Tx
courage is displayed not on the sports field but in
the torture chambers: of ˜thcâ\200\224police;â\200\224 wien persons ucting
in the name of law and_order are licensed by indemnity
provisions to kill at will, when children are slaughtered
i>: their houses by vigilante gangs acting with the
Â¢. :ivance of the authorities, then it is â\200\234clear that
7. law has been converted into an instrument of lavlÃ©sâ\200\224
Â«..:s and that the games children play becomÃ© AthÃ©rart˜- Â®
. gancs of life and death. The position should be reversed.
rr .a democratic_. South. -Africa,. the law . ik defend Â©

EIR aren: Te Rienâ\200\235

-and local authorities to â\200\234provide orcoariy supervised thai 2 en
| facilities for them to enjoy . sport and recreation. .-

- The use of violence against children, whether in. the.

"home or the school or in the streets, should be proHibi-

ted by law, and those responsible 29 such violen:e . _

. severely punished. -

The Right to Learn

- The South African statute took is filled with legislation
dealing with questions of education, but the main- objsecâ\200\224â\200\224=-="-""

tive is not to ensure that education is guaranted but

’ to guarantee that education is separate. As the late

Sir Robert Birley pointed out, in every other country

in the world, education is used to promote, at least

at the surface level, a sense of common nationhood

and equality; only in South Africa is it used to promote

disunity and inequality. The first educational right :

the children should have, therefore, is the right to- â\200\224â\200\224-â\200\224- --â
\200\224 -â\200\224â\200\224â\200\224â\200\224n-
learn together. As the U.S. Supreme Court declared : Sl
in the famous case of Prown v. Mississippi Board of

Education, segregation is per se discriminatory and harmful. .And as subsequent USA experience has shown, formal desegregation is not enough. An active programme of affimative action, binding on the state, on public | authorities and on the schools, is required to convert â\200\230abstract legal rights into actually lived social reality. State schools, private schools and church schools all have– a role to play in encouraging, through their composition, their practice, and the content of their education, the notion of an undivided South Africa

Â°

inhabited by fre: and equal citizens. Children have
the right to study in their mother tongue but also
the right to study in other languages if this gives
them greater accsss to world culture. Childrea have
the right to +trith, about themselves, their bodies,
who they are, wiere they come from, about the world
they live in, ami they also have the right to know
that truth is often complex and always filled with ˜
contradiction. Cwm: cannot legislate truth, but one
can legislate for conditions which promote the truth,
and one can enswre that information comes nor from
-a.bureau but from.experience and life itself.

The Right to Adverhure

Orie of the greatest and most elusive of all the rights
of the child is the right to adventure, the right to
explore one’s SupiroRTant and in so doing explore the
limits of one’ s Body and mind. Ir. South Africa, the
"law bars this rigit to the great majority of children;
_so that the only significant" adventure permitted to
â\200\234them is to challerge the â\200\234law itself, with all the terri-
bis consequences that follow. Ina demecrabici Souths... O70
Africa, .conditions will be created for lawful adventure. TE an aE
The country will belong to all who live in it - the

mountains, the rivers, the beaches and parks will be

â\200\230open for ,all to exglore. "Programmes will be established ˜

with a statutory Tmasis so that all children, and not

just a minority, lesrn to swim, so that all have access

to - the pleasures o. cycling, mountain-climbing _and

camping (today white kids live in a tent for fun, black

â\200\230kids because their #omÃ© has beenâ\200\231 billdozed). 2

â\200\224 re moc coa ERE TTT ITR OM soem â\200\224

The Right to Imagination and Culture

|

Children in apartheid South Africa grow up not aly:

’in physical ghettoes but with ghettoes in their minds,

cut off from each other and severed from the ideas

and culture of the world. They are permitted to know

next to nothing about their own Continent, its history

and culture, and what little they -are-told -is- distorted

and pernicious. The majority of children are informed

by "all kinds -of -direct and - indirect means. hha ER
are _diabolicsy that _ their traditional culture is debased Ba een eae
and that their demand to wander in what is called â\200\234theâ\200\235
green pastures of. the enlightened minority is sinful,
unnatural and unlawful. Instead of the great tree
of cultural sources in our country being a foundation
for richness, vitality and interchange, it is converted

â\200\230into the basis of enmity, suspicion and domination.

ee amen Ste â\200\224â\200\224teâ\204¢ =. = mo = sme ame cme p= - cmon

The law, presently an instrument of brutalisation that suffocates the imagination, needs to be completely transformed. It must not only lose its present negative character ("if you don’t behave, Fl call the Rs,

it must become a positive Juridical bulwark of creativi-
ty, suaranteeing freedom of information and access
to ideas and oatlawing the preaching and practice of
apartheid. . zi

The Right to Warrith

Every â\200\234child has the right to be cherished, to grow
up in an atmosphere of warmth and security. In present-
â\200\224day South Africa, the law, acting through bulldozers
and armoured cars, crushes any emotional security which i ig
the majority. of â\200\224oux.â\200\224shildren mi ghil: wll ˜Fr˜ JT Re nn Eas
migrant labour system, tied in with the Bantustanmset- : iE
â\200\234up and the apartheid control of housing, tears families
apart, denying to our children stable Fomes and constancy ˜ =
of parenthocd. Children see their parents humiliated

and insulted by soldiers and police, and are themselves :
directly made victims of State arrogance. Nowhere have

they safety, not in their" homes, not in their beds,

not in their schools; not in the. streets, : 3% even

in church or mosque or at the graveyard. ˜˜ EE

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˜"Theâ\204¢lav â\200\230as â\200\234suck ean never - guarantee loye â\200\231.nd_ secur
ity,
...but it’ can be a = jor instrument inâ\200\224promoting . .. . ons
which favour the achievement of these goals. It. can -.
Provide Jor a network of family support agencies, impose
duties ,0n local authorities and employers. to payâ\200\231 due
respect to family situations in relation to â\200\230ousing - .
and employment, and require the establishment of crechas.- - i
and kindergartens for the children Â« f working parents. Fete cen

The Right to Worth 2 ve

The right to worth and dignity is one of the ight
that should be most respected by the _ law and â\200\234that â\200\224Tgâ\200\224â\200
\224â\200\224â\200\224"
in fact one of those most denied in apartheid South
Africa. For many purposes, large sections of South
Africa’s children do not even rise to the level of
statistics = births are frequently not â\200\230registered,
nor, in many cases, infant deaths. There are no precise
statistics for black infant mortality, nor for life
expectancy of blacks, nor for rates of malnutrition,
this, in .2 country where the whole adult Porulation
1s fingeprinted, photographed and on rile, where highly
sophisticated systems of control of the population -
have bean established. At best, children are seen not
as the bearers of rights, each with his or her own
. personality, each destined to be a full citizen in
the land of his or her birth, but as future labourers,
bureaucrats or policemen, their lives perpetually at
the command in one way or the other of the arartheid
rulers. That millions of children should go barefoot

and in rags in a land of plenty is not regarded as scandalous. The total absence of legislation guranteeing minirum Â© rights for children flows from conceptions

starting with the Constity-
the special duty or Societ
dives
confidence- -
d active citizens
The State
identity or each and every

dignity

by apartheid Against

the fostering in their

; j fÃ©ar ang contempt. Instsag

[râ\200\224-ORenecuraging, a canes. on sister ang brotherhood, apar-

a Putsâ\200\231 child aagingt child. White children are

: : not to see their black
be exploited or

only fyture 3 oppressors

or else ia cruel collaborators
r owm Communities, Children are divided

"not only along racial lines, but on linguistic, tribal
lines,

leadership, i
to det ention

Organisations
Ly -non-raciade-â\200\224â\200\224-.. ..
organisations
espouse.
of South Africa will be respected not
children into separate Organisations, gag at Present,
but by encouraging the interchange coupled
with the 3 1 Sensitivity,
ual respect and solidarity
are acquired, the sooner +the nightmare of apartheid
will be over.

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The Right to Inicâ\200\224ent

South Africa 33 a co ountry cof immense rescurces afd
has zones of great natural be uty. Li Zetec Ve dishondd
be enjoyable for zve eryene. Vos ie Ly for the chil="
oven, life is az inferno. The insult and threatâ\200\231 that
arartheid repres saris the hunger, he lack of decent, .
clothes for the m ily,â\200\235 â\200\234the absence of secure homes,
coupled with id’s rhysical brutality, stifle
any natural enjoyment of life. The law becomes an instru-
ment of terror izztead of being a guarantee of <ran-
= quildity, -Childres are not allowed to enjoy life. They
have to be perrsiually on the run, they are turned
into wanderers zvÂ® sc vengers, they have no sense that
the country, the zhole country, belongs to them. Their
Pleasures are few, and more often than not, illicit.

â\200\234The elimination of all the araritheid laws and the > comple

EE Sou ae Dla
â\200\2242te. GismantlingT of the whole eparfiitid˜system â\200\234are the
: tasic Precoaditiaes for children to excercise their
El Chitin -exfoens The. ending of repressicn and violence

ore.

Fo epningtiien gg, ra #11 follow as a natural coas squence.,

me ee ee cae.

Butâ\200\231 â\200\230more will have to he dome than singly Io Sweweve TULSA Tee
these evils. The Inv will have to play a positive role - :

in overcoming the effects of vast discrimination and

jenablins life "tobe equally reuverding (and felt to

te such) for all <rildren. Whether it is called positive

discrimination, er arfirmative action, or corrective

anti-apci iheid mezsures, the law will have to express

itself in an =zctive ond dynamic way if this right" is

--L0 Become 2 merlitTe. cect nam - rn th TE

The Right to Chilled

ETL mE Sm ew
SE =.

Inspiring though it may ba â\200\234fo sec ThoW â\200\234the ohildren
of our country have shouldered the restonsibilities
of adults, it is also horrifying that in the process
the present generation sheuld P2y the price of being
robbed of their very childhood. The slow accumulation
of experience, +the ability to fantasise freely and
â\200\224%to--have- fun with the tody and mind, all the srontaneity
˜of ints ney and early youth, are denied when children
havd to confront + he barbarous physical Â© presence of RE
- the apartheid. state,.--to -dodge- teargas -and.. bullets SRE a

resist fantre, x

A Free a derccratic Scuth Africa wilY, for the Cirst
time since colonial domination and apartheid were

imposed, guarantee the right of children to be children,
to achicve adulthocd in their cn geod time. nh

TOWARDS AN APPRUFRIATE STRATEGY OF CULZ DRRRTHG : :

2h Lar

CHILDREN’S RICHES

For lawyers to whom the right to -â\200\230siemjcor neighbour
+ is the basis of "all legal rights, the idea of a Charter
of Children’s Rights might seem more. lita roetry than
law. The problem really lies with Tass a
â\200\224 Tot â\200\224whtirâ\200\224theâ\200\224Charter;- whatâ\200\224â\200\224they m
is =: i=risâ\200\224 to open .
their eyes to the new range of legel strategies developed â\200\224â\200\224 -â\200\224
-- - .
in recent-decades˜in-variouc-parts of theo-uerld, :

" Apartheid thrives on a tight and: tosmrinist concept

of law which demotes or even complctzly :xcludes the
human and social dimension. Such an approach Is well
suited to the use of law as an instrument for bringing
order "to the- affairs -of the-minority and- keeping the
majority in their place. It is quite inappropriate
when law is regarded as a means of guaranteeing the
Just. rights.-of the EE DE the vhole
society. â\200\224

In a democratic South Africa, major social programmes

. will be required to establish genuine equality between

all citizens. The new South African â\200\234nation will beâ\200\235

built not simply on idealism, exforwutidirs andâ\200\235 ye

but on the besis of _progressively satisfying _the_
material, â\200\224cultizral. -and spiritual. peeds of the. _whole _ :
- - pcrulation tin -a}l-spheies -of -Eife. ˜The law â\200\224hasâ\200\224-aatieyâ\200
\224â\200\224â\200\224 rr ceâ\200\224-
role to play in this process by establishing clear ˜˜ = =

appropriate institutions, suitable norms for

each phase and effective means of participation by
all interested parties. The goals, means, norms and
institutions are not merely rious projections of what
ought to be. They are given a firm statutory foundation,
and appropriate legal responsibilities and a

legal rights are created.

The courts continue to have an important role-as mecha-
nisms which supervise enforcement and ect s&s Jucscances =

of last resort ir the case of disputes. But they are not and should not be the immediate and principal agencies for the gusranteeing of rights. The vast social programme 5 that will be necessary in relzstion to. preschool and schoal-feeding, to the establishment of creches and playgrounds, to mother and child health care, to mention a few key areas, require appropriate . agencies with =ppropriate funding functioning with appropriately trained personnel, accordingly to agpropriately defined criteria, and with an appropriate relationship to the community at large. If one locks â\200\234atthe field of â\200\230health, for example, one may ask what ig the more fundsmental right - the right to primary health care, with an appropriate network of institutions and budgetary arrangements, Or the right to sue your doctor for malpractice, with a corresponding network . cf lawyers and judges?

_ In-relstion to. the operation of a Charter of Children's Rights, one way envisage the 18vw operating at six interccrnpected levels â\200\224wâ\200\224-w-w =

Firstly, all laws which discriminate against children, forcing the majority to submit to segregation and inferior conditions, must be outlawed. Race Classification,

â\200\234Group Areas, Bantu Education, each and every law whatever. its presen} name, must be annuiled to the extent that it differentiates between children on the grounds of race, coiour or ethnicity.

. Secondly,- the- instruments.-of the. law -â\200\224 the army, the police, the prisons and the judiciary â\200\224- must be transformed so that they cease to be mechanisms of abuse and humiliation of children, and become means of genuinely protecting children's rights. Clear legal and discipli- = nary requirements must be established for punishing those in State positions who are responsible for crimes

against children.

Ir the third place, the existing law relating to_the .-â\200\224-- protection of children rust be strengthened and made effective in relation to the vhole populetion. The specific rights that children have in relation to thÃ©ir parents, -nanmely, the right-to care-and the right against abuse, must not be lost sight of in the great general programmes ˜ that are nccessary. -Similary, --the--right.. to a name and minimumâ\200\231 inheritance rights should Ue guaranted, bearing in mind different cultural traditions in the country. The distinction between so-called legitimate and illegitimate children, so important in feudaltype societies, has to be elimineted es far as the general law is concernd.

The role of the wider family, particularly relevant in traditional African scciety in relation to children,

has to be given greater practical recognition, and
community involvement in protecting children's rights __
has to be encourage.

Fouthly, massive programmes of corrective action with.

a strong legislative foundation and appropriate budgetary
backing, -and with clear mechanisms for planning and
implementation inmlving the government, public and
private institutims and community bodies, have to
be established so as progressively and rapidly to improve
the conditions of Â«children's lives, guaranteeing minimum
â\200\230standards of nutrition, health care, housing, creches,
schools, sporting ad cultural facilities.

Fifthly, children's organisations dedicated to represenâ\200\224
ting the interests of children and securing their rights
â\200\234to live in peace, friendship and equality, should have

the support and proiection of the law.

ee i tm Sr

Sixthly, ccnsideration should . be given to creating
â\200\224&-post--of" -Children's. .Ombudsman to handle questions,
often of a delicate and controversial nature, related
to the rights of the child. The Children's Ombudsman
would be an indepemient figure with power to investigate
cases and make appropriate recommendations. He or she
would not be-an alternative to the institutions of
corrective anti-apartheid action, but a complement
to then, â\200\230operating in thre sphere of individual cases
or localised pockets of abuse rather than on the zeal

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Pialiy, an appropriate Eoxtual mode should be found
for proclaiming children's rights in broad and full
language. This, coold take. the form of a Declaration
of Children's Rights which would act both as â\200\230a standard-
â\200\224-setting document and as a guide to the interpretation
of the existing law. Such a Declaration or Charter
of children's Rights would enter into South African
national life and become a major point of reference
and support for those struggling to ensure that the
nev generations grow up in the secure and spontaneous
conviction that South Africa, the vhole of South Africa,

Ce â\200\224â\200\224 wrÂ» | ANA fT FD 3, {orga er

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belongs to -all who live in it, and especially to TIL
jibe childrens â\200\224=itâ\200\224râ\200\224â\200\224--â\200\224â\200\224 0

-â\200\224â\200\224 ere el

LNT ED Y QUALIFIED/

South africa has suffered so many interferences with the rights of frees spsech that the tendency to let everybody say what they want when they want how they want 1s very strong. At the same time thers 1s an awarengss that racism can lgnite explosive passions and destroy ths very fabric of a tolerant and democratic society. Furthermors, 1t is impossible to gloss over the fact that in addition to bailing unjust and exploitative, apartheld is spiritually injurious, 1t is insulting and defamatory. Tha problem, then, is how to reconcile the need for opsnnsss and ths right to speak oneâ\200\231s mind with the necessity for healing the wounds created by racism.

Clearly the constitution must oraotect the normal cilignts ta criticise the government and public officials, to take part in free public debate over issues confronting the country, to discuss international questions. Peopls should have an ungualified right to argus for or against

zncilal lant ar canilaliiien, Sars aloe iinnSninS ie anitia punishment, or to warn us that the end of the world is naar. Sind larly i Faas Bilal E arbi Soe ial t ia tvaal in establish a branch in our country, they should be free to do so ˜ there will be no lack of potential adherents.

Yat the real problem is not tolerance to the flat-sarthers or the nationalise-everyvtbthing-or-bust-srs or the frase-markaet-at-any-social-price˜ars. Nor is 1t whether or not to have frees speech corners where svery Tom, Dick or Harriet can mount his or her soapbox. The real issue 1s what to do about the organised mobilisation of racial and ethnic hatred.

Many countriss have legislation which outlaws group libel. Should the South african constitution permit and sven protect the to say such insulting and provocative things as that all whites ars rapists who should be driven into the sea? Or that blacks are baboons who should never have been given the vote? Or that the Xhosas have come Lo Natale pla felons vyendd See el EL mR es fe Shangaansg are cowards and never knew how to fight? Or that South Africans of Indian origin should be deported Lo India? Qr that Hitler knew how to treat the Jews?

In South African conditions, these are fighting words, the language of pogroms and blood. There is a strong argument fon saying tal if se hacons Biro on Sista Roomy ant ao ras upon by representatives of all the major groups in South Africa, it should include a a shared undertaking not to indulge in mutual insults and not to permit the mobilisation of rabid racist or sthnic feeling Ea palitical advantags. In this sense, democracy and non-racism bscomg Lnseparable - there 1s no democratic right to be racist.

in thaosy thes conerd polo can adapts onmaaf Evins
positions in relation to rac at Senna hi- ii SoanSnroten tv
it can leave the guestion entirely to the legislatures, or
it can lay down express gualifications to free speech,
including prohibition of defined forms of incitemsnt to
natirad and division. If it adopts tha third position, tha
further guestlion arises as how best to combat the
promotion of racial hostility - whether to rely on the
Criminal Tan Sarai oii newt saline Sore al cin any codes of

the media and political organisations,
or whether to include provisions in the electoral law
which forbid the creation of parties on racist principles
ar campaigning on thes basis of racist ar tribalist
amotlon.

Thare are other questions which bear indirsctly but
significantly on the guestion of frees speech, and which
could affect the way constitutional principles were
formulated. At present the press in South Africa is
anything but open ang anything but non-racial. The Rand
Daily Mail, the most informative and widely-respected
daily paper of the 1960Â°s and 1970Â°s was closed not on
journalistic grounds, but because 1t was selling to Loo
many blacks who had no monsgy and not snough to whites who
had the money. In market terms, nothing should be fres,
not even spsech.

English-language and afrikaans-language monopoliss control
virtually the whole of the commercial press, which means

virtually the whole of the press, and not only the press
I rend SouzEnost Rots elint inal and dl at rdbuh dan. siini Lainie
broadcasting 1s in the hands of the racist authorities.

What the commercial and state monopoliss have 1n common 1s
that they are complastely white-dominated, locked into the
apartheid structures. This affects not only the
appointment of Jour halizte, but the very determination of
what is front-page news.

Some attempts have been made by generations of courageous
and imaginative journalists, both black and white, to
mitigate the effects of this ineguality. Space hag besn
won for black voices in the commercial press, while
Journals such as the New Nation and the Weekly Mall have
transformed reporting in South africa. There arg also a
large number ofvivacious community-based alternative
media, and Righly Sintalll aunt critical Jollirnals.

Yat basically speaking there are huge obstacles to the
Free low of ntormation dal South at rics ranaling FF aom
unegual degrees of literacy, to the underprivilaging of
many languages, to official secrecy, Lo Conscious or
unconscious blases in the presentation of news. The new
oral tradition of resistance has proved far mors resilisnt
ang informative to the mass of tha population than have
the media. Yet we cannot rely on oral tradition in the nsw
democratic South Africas to keep the psople informed.

At the same time, we must remember that the objective 1s to open doors that are at praesent closed, not Lo create mora blockages to the frees circulation of ldeas and information. We would have gained little 1f we were to replace the praesent controls on the media with new ones that simply switched the propaganda and biases around, if one realm of banality took over from another. Truth has always favoured the democratic cause, and our people are tired of forever being protected 1n the name of what others think is good for them.

All these ars issues which impinge on the language and substance of the copstibtubtion. We look to our articulate

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technically experienced and battle-scarred media pgopls to lead the way 1n proposing solutions.

A BILL OF RIGHTS FOR A DEMOCRATIC SOUTH AFRICA - WORKING DRAFT FOR CONSULTATION

Article 1. GENERAL

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

2. Noindividualor group shall receivelprivilegesorbe subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birthiorictheristatus.

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

Articlen2. PERSONAL RIGHTS

The Right to Life

1. Every person has the right to life.
2. No-one shall be arbitrarily deprived of his or her life.

3. Capital punishment is abolished and no further executions shall take place.

The Right to Dignity

4. No-one shall be subjected to slavery, servitude or forced labour, provided that forced labour shall not include work normally required of someone carrying out a sentence of a court, nor military service or national service by a conscientious objector, nor services required in the case of calamity or serious emergency, nor any work which forms part of normal civil obligations.

5. The dignity of all persons shall be respected.

6. No-one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

7. Everyone shall have the right to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity.

The Right to a Fair Trial

8. There shall be no detention without trial.

9. No persons shall be arrested or detained for any purpose other Thani thaticftabringingithemitoh trial lontelcriminalichargen

10. Arrest shall take place according to procedures laid down by law, and persons taken into custody shall immediately be informed of the charges against them, shall have access to a legal representative of their choice, and shall be brought before court within 43 hours or, where that would beh an sunday ors ampublic

holiday, on the first working day thereafter.

11. Bail shall be granted to awaiting-trial persons unless a court rules that in the interests of justice they should be kept in custody.

12. No-one shall be deprived of liberty or subjected to other punishment except after a fair trial in public by an independent court.

13. Trials shall take place within a reasonable time.
14. Everyone shall be presumed innocent until proved guilty.

15. No conduct shall be punished if it was not a criminal offence at the time of its occurrence, and no penalty shall be increased retrospectively.

16. No-one shall be punished twice for the same offence.

17. Accused persons shall be informed in writing of the nature of the allegations against them, and shall be given adequate time to prepare and conduct their defence. :

18. Everything that is reasonable shall be done to ensure that accused persons understand the nature and the import of the charges against them and of the proceedings, that they are not prejudiced through illiteracy or lack of understanding, and that they receive a fair trial.

19. Accused persons shall have the right to challenge all evidence presented against them, to be defended by a legal practitioner of their choice, and if in custody, to have access to a legal practitioner at all reasonable times.

20. If a person is unable to pay for legal representation, and the interests of justice so require, the State shall provide or pay for a competent defence.

21. No persons shall be required to give evidence against themselves, nor, except in cases of domestic violence or abuse, shall persons be required to give evidence against their spouses, whether married by civil law or custom, their parents or their children.

22. No evidence obtained through torture or cruel, inhuman or degrading treatment shall be admissible in any proceedings.

23. Juveniles shall be separated from adult offenders.

The Right to Judicial Review

24. Any person adversely affected by an administrative or executive act shall have the right to have the matter reviewed by an independent court or tribunal on the grounds of abuse of authority, going beyond the powers granted by law, bad faith, or such gross unreasonableness in relation to the procedure or the decision as to amount to manifest injustice.

The Right to Home Life

25. No-one shall be deprived of or removed from his or her home on the grounds of race, colour, language, gender or creed.

26. The privacy of the home shall be respected, save that reasonable steps shall be permitted to prevent domestic violence or abuse.

27. People shall have the right to establish families, live together with partners of their choice and to marry.

28. Marriage shall be based upon the free consent of the partners, and spouses shall enjoy equal rights at and during the marriage and after its dissolution.

The Right to Privacy

29. No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be acceptable in an open and democratic society.

30. Interference with private communications, spying on persons, and the compilation and keeping of secret files about them without their consent, shall not be permissible save as authorised by law in circumstances that would be acceptable in an open and democratic society.

The Right of Movement

31 .Everyone shall have the right to move freely and reside in any part of the country, to receive a passport, travel abroad and to emigrate or return if he or she so wishes.

The Right to Conscience

32. The right to conscience shall be inviolate, and no-one shall be penalised for his or her beliefs.

Article 3. POLITICAL RIGHTS

1. South Africa shall be a multi-party democracy in which all men and women shall enjoy basic political rights on an equal basis.

2. Government at all levels shall be subject to the principles of accountability to the electorate.

3. Elections shall be conducted in accordance with an electoral law which shall make no distinction on the grounds of race, colour, language, gender or creed.

4. Elections shall be regular, free and fair and based on universal franchise and a common voters' roll.

5. All men and women entitled to vote shall be entitled to stand for and occupy any position or office in any organ of government or administration. :

6. All citizens shall have the right to form and join political parties and to campaign for social, economic and political change, either directly or through freely chosen representatives.

Article 4. FREEDOM OF SPEECH, ASSEMBLY AND INFORMATION

1. There shall be freedom of thought, speech, expression and opinion, including a free press which shall respect the right to reply.

2. All men and women shall have the right to assemble peacefully and without arms, and to submit petitions for the redress of grievances and injustices.

3. All men and women shall be entitled to all the information necessary to enable them to make effective use of their rights as citizens or consumers.

Article 5. RIGHTS OF ASSOCIATION, RELIGION, LANGUAGE AND CULTURE

Freedom of Association

1. There shall be freedom of association, including the right to form and join trade unions, religious, social andi cultural bodies, and to form and participate in non-governmental organisations.

Freedom of Religion

2. There shall be freedom of worship and tolerance of all religiong, andi nose Sitate orm of ficial religion shal lhe established.

3. The institutions of religion shall be separate from the State, but nothingiein this Constitution shall prevent them â\200\234from co-operating with the the State with a view to furthering the objectives of this Constitution, nor from bearing witness and commenting on the actions of the State.

4. Places associated with religious observance shall be respected, and no-one shall be barred from entering them on grounds of race.

Language Rights

5. The languages of South Africa are

Sindebele, Sepedi, Sesotho, Siswati, Setswana, Afrikaans, English, Tsonga [Shangaan], Venda, Xhosa, and Zulu.

6. The State shall act positively to further the development of these languages, especially in education, literature and the media, and to prevent the use of any language or languages for the purpose of domination or division.

7. When it is reasonable to do so, one or more of these languages may be designated as the language to be used for defined purposes at the national level or in any region or area where it is widely used. :

8. Subject to the availability of public and private resources, and limitations of reasonableness, primary and secondary education should wherever possible be offered in the language or languages of preference of the students or their parents.

9. The State shall promote respect for all the languages spoken intsouthiAcrica.

Creative Freedom

10. There shall be freedom of artistic activity and scientific enquiry, without censorship, subject only to such limitations as may be imposed by law in accordance with principles generally accepted in open and democratic societies.

The Right to Sporting, Recreational and Cultural Activities
11. Sporting, recreational and cultural activities shall be encouraged on a non-racial basis, drawing on the talents and

creative capacities of all South Africans, and autonomous organisations may be established to achieve these objectives.

Article 6. WORKERS' RIGHTS

1. Workers shall have the right to form and join trade unions, and to regulate such unions without interference from the State.

2. Workers shall be free to join trade unions of their choice, subject only to the rules of such unions and to the principles of non-discrimination set out in this Constitution, and no worker shall be victimised on account of membership of a union.

3. The right to organise and to bargain collectively on any social, economic or other matter affecting workers' interests, shall be guaranteed.

4. In the furtherance of these rights, trade unions shall be entitled to reasonable access to the premises of enterprises, to receive such information as may be reasonably necessary, and to deduct union subscriptions where appropriate.

5. No law shall prevent representative trade unions from

negotiating collective agreements binding on all workers covered by such agreements.

6. Workers shall have the right to strike under law in pursuance of their social and economic interests subject to reasonable limitations in respect of the interruption of services such as would endanger the life, health or personal safety of the community or any section of the population.

7. Workers shall have the right to peaceful picketing, subject only to such reasonable conditions as would be acceptable in a democratic society.

8. Trade unions shall have the right to participate in lawful political activities.

9. Trade unions shall have the right to form national federations and to affiliate to international federations.

10. Employers shall be under a duty to provide a safe, clean and dignified work environment, and to offer reasonable pay and holidays.

11. There shall be equal pay for equal work and equal access to employment.

12. The State shall make provision by way of legislation for compensation to be paid to workers injured in the course of their employment and for benefits to be paid to unemployed or retired workers.

13.0 Trade unions shall have thelr ight ol ornisnat ional federations and to affiliate to international federations

Article. GENDER RIGHTS

1. Men and women shall enjoy equal rights in all areas of public and private life, including employment, education and within the family.

2. Discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.

2 Positive action shall be undertaken to overcome the disabilities and disadvantages suffered on account of past gender discrimination.

4, The law shall provide remedies for sexual harassment, abuse and violence.

5. Educational institutions, the media, advertising and other social institutions shall be under a duty to discourage sexual and other types of stereotyping.

article 8. DISABLED PERSONS

1. There shall be no discrimination against disabled persons.

2. Legislation shall provide for the progressive opening up of employment opportunities for disabled men and women, for the removal of obstacles to the enjoyment by them of public amenities and for their integration into all areas of life.

Article 9. CHILDREN

1. All children shall have the right to a name, to health, to security, education and equality of treatment.

2. The State shall, to the maximimum of its available resources, seek to achieve progressively the full realisation of these rights.

3. No child shall suffer discrimination or enjoy privileges on the grounds of race, colour, gender, language, creed, legitimacy or the status of his or her parents.

4. In rall proceedings concerning children, the primary consideration shall be the best interests of the child.

5 Children are entitled to be protected from economic

exploitation and shall not be permitted to perform work that is likely to be hazardous or harmful to their education, health or moral well-being.

sa Tt shal IN behunilawviuliitclobligelichildrenit ohworkEoraperforn services for the employers of their parents or other family members.

ArticlleBlior SOCIAL, EDUCATIONAL, ECONOMIC AND WELFARE RIGHTS
General

1. All men and women have the right to enjoy basic social, educational, economic and welfare rights.

2. The State, shall, to the maximum of its available resources, undertake appropriate legislative and executive action in order to achieve the progressive realisation of basic social, educational, FecononichNand vel fare rights forthe whole population.

3. Such State action shall establish standards and procedures whereby all men, women and children are guaranteed by law a progressively expanding floor of enforceable minimum rights, with special attention to nutrition, shelter, health care, education and income.

20 In order toachievera common floorrofi rights for thes 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.

5. The State may collaborate with non-governmental organisations and the private sector in achieving these goals, and may impose appropriate responsibilities on all social and economic bodies with a view to their materialisation.

6. In circumstances where persons are unable through lack of means to avail themselves of facilities provided by the State, the State shall, wherever it is reasonable to do so, give appropriate assistance.

Freedom from Hunger

7. In order to guarantee the right of freedom from hunger, the State shall ensure the introduction of minimum standards of nutrition throughout the country, with special emphasis on pre-school and school feeding.

The Right to Shelter

8. In order to guarantee the right to shelter, the State shall, in collaboration with private bodies where appropriate, dismantle compounds, single-sex hostels and other forms of accommodation associated with the migrant labour system, and embark upon and encourage an extensive programme of house-building.

9. The State shall take steps to ensure that energy, access to clean water and appropriate sewage and waste disposal are available to every home.

10. No eviction from homes or from land shall take place without the order of a competent court, which shall have regard to the availability of alternative accommodation.

The Right to Education

10. In order to guarantee the right to education, the State shall, in collaboration with non-governmental and private educational institutions where appropriate, ensure that:

there shall be free and compulsory primary education for all, with a school-leaving age of sixteen,

there shall be progressive expansion of access by all children as of right to secondary education,

there shall be progressive increase in access to pre-school

institutions and institutes of vocational training and of higher learning,

there shall be increasingly extensive facilities to enable adults to overcome illiteracy and further their education.

11. Education shall be directed towards the full developme the human personality and a sense of personal dignity, and = aim at strengthening respect for human rights and fundamei freedoms, and promoting understanding, tolerance and friends. among all South Africans and between nations.

The Right to Health

12. In order to guarantee the right to protection of health, the State shall establish a comprehensive national health service linking health workers, community organisations, State institutions, private medical schemes and individual medical practitioners so as to provide hygiene education, preventive medicine and health care delivery to all.

The Right to Work

13. In order to guarantee increasing enjoyment of the right to work, the State shall, in collaboration where appropriate with private bodies and non-governmental institutions:

make technical and vocational training available to all,

remove the barriers which keep large sections of the population out of technical, professional and managerial positions,

and promote public and other works with a view to reducing unemployment.

The Right to a Minimum Income and Welfare Rights

14. In order to guarantee the achievement of a minimum income for all, the State shall introduce a scheme of family benefits and old ageâ\200\234pensions financed from general revenue.

15. In order to guarantee the enjoyment of basic social welfare rights, in particular unemployment benefits, compensation for injury, superannuation or retirement pensions, the State shall, in collaboration where appropriate with private bodies, establish a system of national insurance based upon contributions by employers, employees and other interested persons.

Article 11 THE ECONOMY, LAND AND PROPERTY

1. Legizlation on economic matters shall be guided by the principle of encouraging collaboration between the State and the

private, co-operative and family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.

2. All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colour, language, gender or creed.

3. All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not owned by any person at the time of coming into force of this Constitution, shall belong to the State

4. The State shall have the right to regulate the exploitation of natural resources, grant franchises and determine royalties, subject to payment of appropriate compensation in the event of interference with any lawfully vested interest.

5. The State may by legislation take steps to overcome the effects of past statutory discrimination in relation to enjoyment of property rights.

6. There shall be no forced removals of persons or communities from their homes or land on the basis of race, colour, language, gender or creed.

7 No persons or legal entities shall be deprived of their possessions except on grounds of public interest or public utility, including the achievement of the objectives of the Constitution.

8. Any such deprivation may be effected only by or pursuant to a law which shall provide for the nature and the extent of compensation to be paid.

9. Compensation shall be just, taking into account the need to establish an equitable balance between the public interest and the interest of those affected.

10. In the case of a dispute regarding the amount of compensation or its mode of payment, provision shall be made for recourse to a special independent tribunal, with an appeal to the courts.

11. The preceding provisions shall not be interpreted as in any way impeding the right of the State to adopt such measures as might be deemed necessary in any democratic socliotyie forthe control, use or acquisition of property in accordance with the general interest, or to preserve the environment, or to regulate oricurtaiil monopolies or to secure the payment of taxes or other contributions or penalties.

Article 12. ENVIRONMENTAL RIGHTS

1. The environment, including the land, the waters and the sky, are the common heritage of the people of South Africa and of all

humanity.

2. All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.

3. In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular :

is preventiand control poliliutienlcfthelial it andBwatersasand degradation and erosion of the soil;

ii. have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;

iii. promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;

iv. ensure that long-term damage is not done to the environment by industrial or other forms of waste;

v. maintain, create and develop natural reserves, parks and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

4. Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

5. The law shall provide for appropriate penalties and reparation in the case of any direct and serious damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.

Article 13. AFFIRMATIVE ACTION

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. Nol provision ofthe Bill ofS Rightsii shall be construednas derogating from or limiting in any way the general provisions of this Article.

Article 14. POSITIVE ACTION

1. In its activities and functioning, the State shall observe the principles of non-racialism and non-sexism, and encourage the same in all public and private bodies.

2. All benefits conferred and entitlements granted by the State shall be distributed on a non-racist and a non-sexist basis.

3. The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed.

4. With a view to achieving the above, the State may enact legislation tol prohibitithelte trculationiNor possess ioniol materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.

5. All organs of the State at the national, regional and local levels shall 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. ;

6. 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.

7. Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

gan talking steps ol correct patterns ori practices of discrimination, special attention shall be paid to rectifying the inequalities to which women in South Africa have been subjected, and to ensuring their full, equal, effective and dignified participationinsthelpolitical Msocialyiecononiciandicul tural life of-the nation.

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

Article 15. LIMITATIONS

1. Nothing in the Constitution shall be interpreted as implying for any group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set torthinin the them Congtitut ion ori at athe ir

limitation or suppression to a degree other than is authorised by the Constitution itself.

2. Nothing in this Constitution should be interpreted as impeding the right of the State to enact legislation regulating the manner in which fundamental rights and freedoms shall be exercised, or limiting such rights, provided that such regulation or limitation is such as might be deemed necessary in an open and democratic society.

3. Any restrictionsipermittedit under thesm constitution to fundamental rights and freedoms shall not be applied to or used as a cover for any purpose other than that for which they have been expressly or by necessary implication authorised.

4. Any law providing for any regulation or limitation of any fundamental right or freedom shall:
i. be of general application;

ii. not negate the essential content of the right, but simply qualify the way that itri ght sit ol bell bellexerci sed oriatiie circumstances in which derogation from the right is permitted;

iii. as far as practicable, identify the specific clauses of the . Constitution relied upon for the limitation of the right and the specific clauses of the Constitution affected by the legislation;

iv.specify as precisely as possible the exact reach of the

limitation and the circumstances in which it shall apply.

Article 16 ENFORCEMENT
General

1. The fundamental rights and freedoms contained in this Bill of Rights shall be guaranteed by the courts .

2. Provision shall be made for the establishment of a constitutional court.

3. The termsota the Bl lI NocfRRightsishallSbeRbindingaupcniathe State and organs of government at all levels, and where appropriate, on all social institutions and persons..

4. All persons who claim that rightsguaranteed them by the Bill of Rights have been infringed or threatened, shall be entitled torapply tolaRconpetent court Rforsaniorder for the declaration or enforcement of their rights, or for the restraining of any act which impedes or threatens such rights.

5. Any law or executive or administrative act which violates the terms of the Bill of Rights shall be invalid to the extent of such violation, save that the Court shall have the discretion in appropriate cases to put the relevant body or official to terms as to how and within what period to remedy the violation.

Human Rights Commission

6. Parliament shall have a special responsibility for ensuring that the basic social, educational, economic and welfare rights set out in this Bill of Rights are respected.

7. Parliament shall establish by legislation a Human Rights Commission to promote observance of the Bill of Rights.

8. Such Commission shall have the right to establish agencies for investigating patterns of violation of any of the terms of the Bill of Rights and for receiving complaints and bringing proceedings in court where appropriate.

9. The Commission shall monitor proposed legislation with a view to reporting to Parliament on its impact on the realisation of the rights set out in the Bill of Rights.

Ombudsman

10. With a view to ensuring that all functions and duties under the Constitution are carried out in a fair way with due respect for the rights and sentiments of those affected, the office of Ombudsman shall be created.

11. The Ombudsman shall be independent in the carrying out of his or her functions and may open offices in different parts of the country.

12. The Ombudsman shall receive and investigate complaints from members of the public concerning abuse of power or unfair, insensitive, capricious, harsh, discourteous or unduly delayed treatment of any person by any official of government at national, regional or local level, or any attempt by such official to extort benefits or corruptly to receive favours. â\200\231

13. In accordance with his or her findings, the Ombudsman may initiate legal proceedings, refer the matter for prosecution, negotiate a compromise, or make a report to the department or organ concerned containing recommendations with a view to remedying the improper conduct, preventing repetition, and, where appropriate, making amends, including compensation.

14. Recourse to the Human Rights Commission or to the Ombudsman shall net oust the jurisdiction of the courts to hear any matter.

(Working draft prepared by the Constitutional Committee set up by the NEC).