

IN SOUTH AFRICA THE INCLUSION OF SOCIAL AND ECONOMIC RIGHTS IN
A BILL OF RIGHTS IS CRUCIAL TO DEAL WITH APARTHEID INEQUALITIES

by ADVOCATE DULLAH OMAR
Director of the
Community Law Centre
University of the
Western Cape
Member of Constitutional
Committee of the African
National Congress

23 July 1991
Pietermaritzburg

1. INTRODUCTION

The draft bill of rights of the African National Congress has been criticised for its inclusion of social and economic rights on the following grounds:

- 1.1 These rights are, it is claimed, not justiciable or enforceable.
- 1.2 Their inclusion would reduce the value of first generation rights which indeed are justiciable.
- 1.3 Their inclusion would amount to making promises which cannot be fulfilled because of the cost factor.

There is no merit in this objection. Firstly a variety of mechanisms are available to enforce social and economic rights both through the courts and in other ways. Secondly as for the cost factor, the answer is three fold.

(1) It is imperative that South African society - including the public and private sectors - unite in a systematic way to implement a program to eradicate apartheid inequalities and disparities, and to ensure that every South African

will be able to enjoy a dignified and comfortable life.

2. We are not so naive as to believe that the present shocking situation can be altered with the stroke of a pen or the waving of a magic wand. However, unless the basic objective or principle is adopted as well as mechanisms created to move forward systematically towards the achievement of such objective over a period of time, the status quo will remain for the vast majority of the oppressed and exploited people in this country.
3. It is possible even within existing budgets and resources, to begin a process of redistribution with immediate effect by simply applying the principle of equality and non discrimination as between each individual in South Africa.

The ANC draft provides in article 10 as follows:

- 3.1 All men and women have the right to enjoy basic social, educational, economic and welfare rights.
- 3.2 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, economic and welfare rights for the whole population.
- 3.3 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.

3.4 In order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may be established for the phased extension of legislation and minimum standards from area to area.

3.5 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.

3.6 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.

The Article makes provision that steps should be taken to progressively eradicate hunger and to provide shelter, education, health, minimum income and social welfare for all South Africa's people. Article eleven, whilst recognising land and property rights, makes provision for redistribution in an orderly way. These provisions are no different from those which exist in a number of countries including West Germany - which has been used as a model in this regard.

Articles thirteen and fourteen provide for Affirmative and Positive action to assist those who in the past have been disadvantaged by discrimination.

Enforcement mechanisms include constitutional provisions for the adoption of policies geared towards national reconstruction and the elimination of poverty and inequalities, national legislative programs, judicial enforcement by an independent judiciary and a Constitutional Court, the introduction of a Human Rights Commission as well as the office of an ombud. The creativity which South Africans in authority have over decades used in order to sustain the status quo should be used instead to devise ways and means of ensuring that such a program is successful.

2. INTERNATIONAL HUMAN RIGHTS STANDARDS AND NORMS

Apartheid policies and successive South African governments have over the years systematically built a Chinese Wall around South Africa to prevent the free flow of progressive and democratic ideas as well as civilised international standards and values. This is particularly so with regard to international human rights standards and norms. In international law, apartheid has been condemned as a crime against humanity. In South Africa it has been conceded by government and other defenders of the apartheid system, that institutionalised apartheid was no longer viable. However, this is not enough. South Africa must be brought into line with international human rights standards and norms. In this regard I draw attention to the international Bill Of Rights consisting inter alia of

- (1) the Universal Declaration of Human Rights adopted by the United Nations in 1948
- (2) the International Covenant on Social and Economic Rights,

1966 (3) the International Covenant on Civil and Political Rights, 1966 (4) numerous international conventions.

These standards have been adopted by many nations throughout the world. It is not the ANC therefore which is out of step. It has always been the apartheid government, its apologists - and today those who oppose the inclusion of social and economic rights - who are out of step.

3. EXISTING APARTHEID REALITY

What is the existing situation in which this debate around social and economic rights is taking place?

(1) As a result of Land Laws ninety percent of the land in South Africa is owned by Whites. The remaining ten percent is not owned by Africans as is often misrepresented. This remaining ten percent also was placed under successive South African government control. It was administered in trust by the Governor General (and later the State President) who by law was decreed to be the Supreme Chief over all Africans throughout South Africa. Subsequently this ten percent was placed under the control of puppet Bantustan administrations.

(2) The productive assets of South Africa are almost wholly in the hands of Whites. Less than five percent is in the hands of Africans.

(3) Over seven million Blacks are forced to live in squatter camps and have no homes. The existing Black housing shortage is in the region of two million units. The Urban Foundation has calculated that just under five million houses will be needed to

accommodate the population growth expected by the turn of the century.

(4) The overwhelming majority of Black families in South Africa have no access to running water. In Soweto alone two thirds of homes have no running water.

(5) Countrywide more than four Black households in five have no electricity. In fact only seven of the two hundred and seventy-one Black townships outside the homelands are fully supplied with electricity.

(6) The position on the education front is chaotic not only because of Bantu Education but because of the shocking discrimination in allocation of resources. Even today White state schools get four times as much per pupil as compared to Black ones outside the Homelands, and nine times as much as in the Homeland of Kwa Zulu.

(7) In the area of health and social welfare the position is no better. Successive South African governments have spent massive amounts in a grossly inequitable way favouring Whites and it is still doing so. Today because of apartheid discrimination and exploitation, one third of all Black children under fourteen are underweight and at least half rural Black population suffers from chronic malnutrition.

(8) A fact which cannot be ignored by those who wish to eradicate the historical imbalances caused by the apartheid system, is that the South African economy is dominated by a few monopolies. Four of these, Anglo American, Rembrandt, Sanlam and S.A. Mutual control four fifths of the capitalised value of the Johannesburg Stock Exchange. Anglo American alone controls forty five

percent. (so much for free enterprise).

(9) Absolutely relevant to our discussion is the fact that the 1983 Apartheid Constitution remains in force. The divisions created by the Population Registration Act remain in place. Political power remains in the hands of an all powerful White state president. And he has made it clear that the Apartheid Constitution will remain in place and in force until a new acceptable constitution has been adopted. What is the implication of this? Taking into account the government's constitutional proposals and the Bill of Rights proposals emanating from those quarters, there is a serious danger that South Africa will move from an apartheid constitution to a constitution which entrenches existing inequalities through different mechanisms. Unless South Africa is able to win a constitution which enshrines democracy and majority rule as well as a Bill of Rights which guarantees non discrimination, protection of first generation rights and the promotion of second and third generation rights, we will end up with a situation which will effectively see the entrenchment of existing inequalities.

4. THE BILL OF RIGHTS DEBATE

Many who are so vehement in their opposition in their opposition to the inclusion of social and economic rights in a Bill of Rights do not see the Bill of Rights as an instrument to eradicate apartheid and the effects of apartheid. They do not see it as a valuable instrument to extend democracy, political,

social and economic. They see the Bill of Rights as an instrument to prevent redressing historical imbalances created by apartheid, as a means to freeze the status quo, prevent redistribution of land, property and wealth. In fact they see it as a way to entrench existing privileges. It must be remembered that all the results and effects of apartheid laws and apartheid divisions at every level still remain intact. To impose upon this apartheid reality a constitutional framework and Bill of Rights which do not positively address past wrongs as well as the imbalances and disparities caused by apartheid - is simply to maintain the status quo.

A Bill of Rights has no inherent value on its own. The examples of Ciskei and Bophutatswana, both of whom have a Bill of Rights, are cases in point. It is important to underline the fact that the value usefulness and role of a Bill of Rights depend on the constitutional framework of which it forms an integral part. All constitutions are framed to achieve certain fundamental objectives. If the objective is the establishment of a non racial, non-sexist democracy with social and economic justice, then the parliamentary structure, cabinet system, provision for distribution of power, mechanisms for the exercise and control of power, provisions relating to the judiciary and of course the Bill of Rights - will reflect this objective.

As an example of such a comprehensive package, I refer to the constitutional principles and the draft Bill of Rights of the ANC.

5. GOVERNMENT/NATIONAL PARTY PROPOSALS

It is also important to understand that government proposals have different objectives in mind. Whilst there is a recognition that statutory apartheid is finished, government's constitutional proposals seek to ensure

- (1) That there will be no majority rule
- (2) That existing rights (which means the status quo) will be preserved.
- (3) That minority domination will remain in place.
- (4) That under the guise of promoting free enterprise, the domination by existing monopolies and its increasing stranglehold over the economy and all aspect of South African life will not be interfered with.

It is in this context that pro-government theorists and academics as well as the South African Law Commission have proposed a Bill of Rights which will help to achieve such objective. If I may be forgiven the repetition, such a Bill of Rights, like the one proposed by the SA Law Commission in Working Paper twenty five, is a "Bill of Whites" instead of a Bill of Rights.

The government has not been very forthcoming in stating its intentions and objectives. There is no document which comprehensively sets out the government's constitutional proposals. One is forced to glean from various speeches and statements, the president's council's report and the South African Law Commission to gauge what the government is actually saying. However, in all its statements, it is clear that the government is aiming for the constitution which will ensure that

there is no majority rule and that minority domination continues.

Government proposals include a constitution which will entrench maximum devolution in decision making functions, decentralisation of power, constitutional checks and balances, decision making by consensus including provisions which will ensure "that there is no domination by the majority over the minority or the minority over the majority".

All this sounds wonderful - except that you must remember that we are beginning from an existing reality of minority domination over the vast majority, and massive apartheid inequalities and disparities. To impose a constitution which - without redressing any of the historical wrongs - imposes these principles, will ensure the maintenance of the status quo. What do these constitutional proposals mean in practice?

A. The totality of the principles, as I have already indicated, means no majority rule and continued minority domination. How will this be achieved? The government proposes a twoCchamber legislature where provision could be made for separate groups in the one House as well as representation of the citizenry as a whole in the other. The parliamentary structure proposed by government is designed to ensure that no majority party will be able to rule effectively unless minority parties co-operate. In other words majority rule is out. Hence the proposals:

- a) A measure can only become law if it is passed by both houses of Parliament.
- b) The second House or Chamber will not be democratically elected but will be representative of group rights and

interests.

- c) The first Chamber or House of Assembly - even though democratically elected - will not have the power to make laws - as in the case of Namibia or any other democracy for instance - because of the blocking role envisaged for the second chamber.
- d) In certain instances consensus will be a requirement before a measure can become law. So called minority groups will exercise veto powers and will be able to prevent a measure from becoming law. In other instances loaded majorities will be required.

B. Executive and Head of State

The government proposals in respect of the executive and Head of State similarly seek to make decision making without the support of minority parties impossible. Again it means no rule by an elected majority party.

The parliamentary structure and structure of government as well as distribution of powers as proposed will have the effect of creating a government which will not be able to govern effectively.

C. Devolution of Power and Decentralisation

The government proposes that these should be entrenched in a constitution. This means that a unitary state is unacceptable to government. The proposal is not designed to ensure democratic

or popular participation at various levels of government. The objective is to create a toothless parliament in a fragmented South Africa so as to

- (1) frustrate majority rule
- (2) make social and economic transformation impossible
- (3) leave the monopolies free to dominate South African life.

In our view, South Africa needs a unitary democratic state with popular participation at all levels to democratise and re-unify the country, to promote nation building and implement a program of national reconstruction as well as progressively eliminate the terrible legacy of apartheid. It is this which the National Party proposals seeks to prevent.

It is in this context that the Bill of Rights has been proposed in government and pro-government circles which excludes social and economic rights. Some proposals contain useful provisions relating to the protection of civil liberties but they include others which can have no place in a democracy. They seek to entrench existing property rights and privatised apartheid. I refer here specifically to Working Paper twenty five of the South African Law Commission which contains a proposed Bill of Rights which fits in perfectly with the government proposals. In this regard we await with interest the further report of the Commission which was apparently completed months ago but whose publication has been withheld. But in Working Paper twenty five, Judge Olivier proposes the inclusion not only of the right of Association but the right of Dissociation as well as the

deceptive right to privacy. A veiled attempt is made to protect free enterprise by the provision of the right in Article twelve to carry on "lawful business, occupation, trade or other activity" and in Article fourteen "to engage in economic intercourse" and "to make a profit".

D. All these proposals must be seen in the context of the giant monopolies who presently dominate South African life as well as the systematic policy of privatisation presently being implemented at various levels - in the economy, education, housing, health, in services etc all of which will have the effect of increasing monopoly domination.

6. CONCLUSION

In my view it is vital for us to

1. to define the objectives of a new constitutional framework
2. examine the proposed constitutional framework itself.

It is these things which will inform the nature of the Bill of Rights, its content and role. It is in the context of the Constitutional Proposals designed

(1) to transform South Africa into a united non racial non-sexist democratic country

(2) to eliminate all vestiges of apartheid

(3) to provide the basis for tackling the major social and economic problems caused by apartheid, including the problems of landlessness, homelessness, starvation, illiteracy, lack of

education and skills, malnutrition and lack of health care, inadequate social welfare and discrimination in all areas of South African life, that we propose a Bill of Rights which will entrench not only civil and political rights and the rights of due process, that is first generation rights, but also second and third generation rights namely social, economic and cultural rights as well as the right to development, the right to a clean environment, and peace. We also propose a clear program of affirmative and positive action. We believe that mechanisms for enforcement exist through the courts and through the adoption of measures proposed in our draft. In addition we would propose the immediate accession to the international Bill of Rights and international Human Rights standards and norms. These also create useful mechanisms for drawing attention to non compliance, and indirectly to enforcement.