

Preface

Readers will have no difficulty in discerning the influence of decades of involvement with the ANC, starting with participation in the Defiance of Unjust Laws Campaign in the early 1950s and culminating in membership today of the ANC's Constitutional Committee. Those who know about these things will also immediately understand that what follows is not an official presentation of ANC views, nor even an unofficial one, but a small personal contribution to the great national debate which the ANC has done so much to encourage.

I would like to dedicate this book to Oliver Tambo. One day the story will be told of the contribution he has made and is still making to the creation of a new South Africa and the influence he has had on all of us. If ever there was a democrat, a patriot and a lover of freedom, it is he.

*Albie Sachs
London and Cape Town
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Community Law Centre
University of Western Cape
Private Bag X17
Bellville
7535

Apr./SA.
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1 Towards a Bill of Rights for a democratic South Africa

All revolutions are impossible until they happen; then they become inevitable. South Africa has for long been trembling between the impossible and the inevitable, and it is in this singularly unstable situation that the question of human rights and the basics of government in post-apartheid society demands attention.

No longer is it necessary to spend much time analysing schemes to modernize, reform, liberalize, privatize, or even democratize apartheid. Like slavery and colonialism, apartheid is regarded as irremediably bad. There cannot be good apartheid, or degrees of acceptable apartheid. The only questions are how to end the system as rapidly as possible and how to ensure that the new society which replaces it lives up to the ideals of the South African people and the world community. More specifically, at the constitutional level, the issue is no longer whether to have democracy and equal rights, but how fully to achieve these principles and how to ensure that within the overall democratic scheme, the cultural diversity of the country is accommodated and the individual rights of citizens respected.

Five constitutional schemes

Proposals for new constitutional dispensations have been made in the past decade on almost a monthly basis. South African air has been thick with a specially invented or adapted vocabulary: confederation, consociation, tricameral, three-tier, group rights, own affairs. Behind the multiplicity of reports and proposals, however, it has been possible to discern a number of major positions. For the sake of convenience, and bearing in mind that the categories shade into each

other, five basic constitutional schemes may be distinguished. They can be summarized as follows:

- open apartheid;
- reformed apartheid;
- multiracial apartheid;
- hidden or democratic apartheid; and
- anti-apartheid (non-racial democracy).

The terminology is, of course, not that of the authors of the proposals since most of them insist that their schemes would end rather than perpetuate apartheid. But what the first four proposals have in common is that they have all been based on a desire to preserve constitutionally privileged position for the white minority. Furthermore, all four proposals have made the distribution of power and wealth depend on the criterion of race, the first three directly, the fourth indirectly.

Open apartheid

The basic constitutional tenets of open apartheid are well known. They presuppose separate sovereignties for whites and blacks with no constitutional mixing at any level. In the original formulation whites were to have exclusive control over so-called white South Africa, that is, eighty-seven per cent of the surface area of the country including all the developed zones. Blacks were to become independent in their so-called tribal homelands. Even blacks living in the so-called white areas were to exercise their rights through the *bantustans* to which they were attached by descent and language. Ethnicity was given a territorial base and was made the exclusive constitutional principle. Relations between black and white became relations of international law, not of constitutional law.

Today the supporters of open apartheid are just a tiny bit more modest. They demand a separate white or Afrikaner state, but cannot agree on where it should be.

Reformed apartheid

Reformed apartheid sought to make race the dominant but not the exclusive principle of the constitution. It based political rights on race but recognized that some sort of political interrelationship involving all ethnic groups was necessary. The term most frequently used was confederation. Essentially it presupposed links between the white

dominated central Parliament and the bantustans. To complete the picture, South Africans of mixed or Indian descent (almost completely ignored in the open apartheid scheme) were to be junior partners in the tricameral Parliament, and so-called urban blacks were to have a series of councils, starting at the community level and moving upwards, to represent their interests. Apartheid would remain intact in that all organs of legislative power would continue to be established on separate ethnic bases, each one having exclusive control over what was defined as 'own affairs'. The element of reform was to be contained in a provision that 'common affairs' would be dealt with at a high level on the basis of meetings between representatives of the different groups in some form of confederal council. Since everybody would have the vote at some level or other, it would be claimed that the principle of universal suffrage was being recognized. At the same time, overtly discriminatory laws would be gradually reduced.

A fundamental feature of this scheme was that through dividing the black population, through regulating numbers at crucial levels, through the definition of own affairs and common or general affairs, through the control of funds, and control of the state apparatus including the army and police force, the white minority and specifically the National Party would maintain control over the country. This would be a form of limited power-sharing under the clear hegemony of the leading party in the white chamber of the tricameral Parliament.

It was the manifest failure of this scheme that produced the crisis leading to recognition of the central role of the ANC and of the need for serious negotiations.

Multiracial apartheid

In essence multiracial apartheid, which is still on the agenda but for which support is fading, is based on the politics of inter-ethnic alliance rather than inter-ethnic consultation. The bantustans or tribal homelands retain some importance but are not projected as the sole structures through which Africans can exercise political rights. Rather, they are gradually integrated as component parts of regional political structures, retaining some autonomy, but sharing certain powers on a regional basis with the people living in the so-called multiracial areas.

The foundation of this approach lies in the report of a Commission Chief Gatsha Buthelezi set up some years back to inquire into the future of the province of Natal. More recently, the report evolved into the so-called KwaZulu-Natal Indaba proposals. The region is projected as the embryo unit of a future federal state. Regions may

have differences in their political structures and advance at different rates. The federal government is gradually structured on the basis of interaction between the leaders of the regions. The way is left open for a black Head of State, who by virtue of his/her own election to office will declare that apartheid is dead and buried. What are referred to as legitimate white fears are constitutionally catered for by means of a combination of territorial divisions, own affairs concepts, racial quotas in government, group vetoes for minorities, privatized racism through voluntary association, and entrenched group and individual rights. Behind all these devices are two fundamental principles: there shall be no majority rule and there shall be no rapid moves to end the inequalities produced by apartheid.

Recently, Pretoria has begun more and more to adopt these positions, though now it uses the language of minority rights rather than group rights.

Hidden or democratic apartheid

Hidden or democratic apartheid starts off on the democratic assumption, but is reluctant to accept universal suffrage in a unitary state. It accepts the hypothesis that the African National Congress (ANC) would probably be the ruling party in the new society (ours being the only revolution to be accompanied by opinion polls). Where the apartheid aspect would live on buried in the heart of the new democratic constitution would be in entrenched clauses which would be insisted upon as the condition for the acceptance of the principle of one person, one vote. Such clauses would impose a double brake on the dismantling of apartheid; they would gravely restrict the competence of Parliament, especially in economic matters, and they would institutionalize conservative and white-dominated machinery to guarantee that such competence is narrowly interpreted. Thus, they would abolish *de jure* apartheid but constitutionally freeze the existing *de facto* apartheid whereby eighty-seven per cent of the land and ninety-five per cent of the country's productive capacity belong to whites.

Non-racial democracy

Non-racial democracy presupposes a united South Africa governed by the principles of universal suffrage, majority rule, and equal individual rights. The Freedom Charter, adopted by the Congress of the People in 1955, sets out a clear programme born out of South African reality which for many of us would serve as the fundamental

document around which a new constitution could be developed. Others might arrive at similar positions by different routes. But within the basic framework of the rights and freedoms set out in the Freedom Charter, and with a view to making its principles the property of all the South African people, there would be many issues which could be discussed: the internal structure of the government, whether to have a Presidential or Prime Ministerial form of leadership, what the official languages should be, the role of an upper house, the electoral system, the territorial divisions of the country, and where the capital should be situated. Perhaps more important, negotiations could play a key role in providing for the orderly transfer of power from a racial minority to all the people. Once the principle is accepted that apartheid is to be completely dismantled, and once it is agreed that the only effective and lasting way to dismantle it is to establish a non-racial, non-sexist, democratic society in a united country, the issue of how to proceed most rapidly to the materialization of this solution comes to be placed squarely on the agenda.

The ANC has in recent years opted for a Bill of Rights enforceable through the courts and has accepted that there will be a mixed economy in which the state will play an important role. On the other hand, supporters of the 'hidden/democratic apartheid' option, mentioned above, are moving closer to the idea that there has to be some economic redistribution. Thus the gap between these two options is narrowing. Former supporters of the multiracial apartheid option are also beginning to accept that non-racial democracy offers a far more secure future for whites, as for all South Africans, than would any attempt to entrench group rights. The possibilities of a democratically based consensus are far stronger than a few years ago; and as the revolution becomes increasingly 'more inevitable' and increasingly 'less impossible', so do the chances of a peaceful constitutional resolution improve.

A Bill of Rights for a post-apartheid South Africa: some misconceptions

Two widely held but opposing views on a Bill of Rights argue in summary that either

- a Bill of Rights is necessary because if you grant the legitimate rights of the black majority you must also give reasonable protection to the rights of the white minority, or

- a Bill of Rights is a reactionary device designed to preserve the interests of whites and to prevent any effective redistribution of wealth and power in South Africa.

The most curious feature about the demand for a Bill of Rights in South Africa is that initially it came not from the ranks of the oppressed but from a certain stratum in the ranks of the oppressors. This had the effect of turning the debate on a Bill of Rights inside out. Instead of being welcomed by the mass of the population as an instrument of liberation, it was viewed by the majority with almost total suspicion as a brake on advance. Indeed, South Africa must be the only country in the world in which sections of the oppressed actually constituted an anti-Bill of Rights Committee.

At first sight, nothing would appear simpler than to adopt a Bill of Rights based upon a universally accepted document such as the United Nations Universal Declaration of Human Rights. The fact that the apartheid divide lies as heavily on the Bill of Rights debate as it does on any other important topic in South Africa. Disagreement relates not only to the specific clauses to be included or excluded, but to the whole thrust of a possible Bill, to the manner in which it should be created, and to the means whereby it should be enforced.

Suspensions about a Bill of Rights

It is a sad tribute to the way the law has impinged on the life of the majority of South Africans that a Bill of Rights has been seen essentially as a means of using juridical techniques to restrict rather than to enlarge the area of human freedom. Suspicion has been founded on a variety of interconnected factors:

- The push for a Bill of Rights came not from the heart of the freedom struggle, but from people on the fringes, many of whom have criticized apartheid, but few of whom have been actively involved in the struggle against it.
- The objective of the Bill of Rights was seen as being primarily to protect the existing and unjustly acquired rights of the racial minority rather than to advance the legitimate claims of the oppressed majority.
- The attack on majoritarianism, which underlay many arguments in favour of a Bill of Rights, was manifestly racist, since South Africa has been governed without a Bill of Rights and in accordance with the principles of majority rule (for the minority!) since the Union of South Africa was created in 1910. It is only now

the majority promises to be black, that constitutional doubts and the need for checks and balances suddenly become allegedly self-evident.

- The key role given to what are called experienced lawyers in controlling the implementation of the proposed Bill of Rights would have meant inevitably an interpretation in favour of the existing and unjustly acquired rights and against any meaningful re-allocation of rights.
- While protection of the individual was accepted as necessary, the failure of the proposed Bill of Rights to address the question of grossly disadvantaged communities rendered it largely irrelevant to the human rights needs of the country.

Such suspicions might have seemed shockingly unjust to proponents of a Bill of Rights, many of whom had both a genuine hatred of apartheid and a deeply sincere desire to see as rapid and peaceful a transformation of the country as possible. Yet the proponents of a Bill of Rights have rushed ahead with their drafts without paying due attention to questions to which their lawyerly background should have made them more sensitive.

Before drafting a Bill of Rights for a post-apartheid South Africa, it is necessary to ask certain preliminary questions, the answers to which will decisively affect the final result. More specifically, it is necessary to ask simply:

What Bill of Rights?

By whom and for whom?

How?

Misconceptions about the content of a Bill of Rights — the question of the three generations of rights

Most proponents of a Bill of Rights for South Africa operate within a thematically limited and historically out of date perspective. Very few get beyond what has been called the first generation of rights, namely, civil and political rights and rights of due process, as were declared during the great anti-feudal and anti-colonial revolutions of the eighteenth century. The second generation of rights, namely those of a social, economic, and cultural nature enunciated in the United Nations Charter of Human Rights of the 1960s, get scant mention. The third generation of rights, the rights to development, peace, social identity, and a clean environment, which have been clearly identified

as human and people's rights only in the past decade, get virtually no attention at all. At a time when every possible intellectual input is needed, it is perverse indeed to restrict the scope of the debate to first generation rights only, just as it would be grossly anachronistic to start post-apartheid South Africa with a Bill of Rights document as archaic (even if not as vicious) as the system it is designed to eliminate.

The great majority of South Africans have in reality never enjoyed either first, second, or third generation rights. Their franchise rights have been restricted or non-existent, so the achievement of first generation rights is fundamental to the establishment of democracy and the overcoming of national oppression. But for the vote to have meaning, for the Rule of Law to have content, the vote must be the instrument for the achievement of second and third generation rights. It would be a sad victory if the people had the right every five or so years to emerge from their forced-removal hovels and second-rate Group Area homesteads to go to the polls, only thereafter to return to their inferior houses, inferior education, and inferior jobs. Indeed it would be a strange panoply of rights that not only ignored but excluded the right to peace and development, the right to enjoy the beauty of and benefit from the natural resources of the country, and above all, the right to be a people, to be South African in the full sense of the word, to constitute a nation, to overcome the divisions and inferiorization imposed by racism, tribalism, and regionalism, and to participate as a people in the life of the community of nations.

There are some persons who would wish to restrict the extension of rights to the first generation only, granting formal political power but depriving it of practical content; the people can have the vote, but not homes and jobs. There are others who would see the extension of second generation socio-economic rights as an alternative to first generation political rights; the people can have homes and jobs, but not the vote. Very few look at the third generation at all, the rights so important to a people denied peace, security, dignity, and an identity for centuries.

The fundamental constitutional problem, however, is not to set one generation of rights against another, but to harmonize all three. The possessors of the rights are the same physical human beings, namely, the citizens of a democratic South Africa. They do not exercise one set of rights in the morning, another in the afternoon, and a third at night. The web of rights is unbroken in fabric, simultaneous in operation, and all-extensive in character. In the world at large, the generations of rights, or rather, of rights formulations, succeeded each other at different times, but their sphere and object was essentially

the same and their line of development has been continuous. It would be absurd for us in South Africa to have to recapitulate and live through each stage separately before advancing to the next. We do not need to re-invent each formulation. Rather, we draw from the intellectual creation of the world community to find formulae and solutions to our own problems. Thus, when the majority in South Africa look to the complete elimination of apartheid in all its shapes and forms, what they are longing for is the progressive, rapid, and simultaneous achievement of all the rights as formulated in all three generations. The people of South Africa want to be free, to live decent lives, to be a community with their own personality and culture, and to live in peace and with dignity with each other and the world, no more, no less.

In a phrase, they wish to exercise simultaneously what Kader Asmal, member of the ANC Constitutional Committee, has felicitously called blue rights, red rights, and green rights. Each has its own sphere, its own modalities of enforcement; each has a fundamental and irreducible character, but all need to be taken together in framing a new constitution.

A Bill of Rights: by whom and for whom?

A look at the historical contexts in which other Bills of Rights have been adopted shows the back-to-front nature of the proposed Bill of Rights for South Africa. The Magna Carta, the charter of rights adopted in the seventeenth century, the United States Bill of Rights, and the French Declaration of the Rights of Man were all formulated and adopted by the former victims of arbitrariness and oppression as a means of controlling or excluding the power of the former oppressors and guaranteeing the aggrieved classes freedom from future revivals of arbitrary behaviour. It was not Hitler or his former supporters who drafted the United Nations Declaration of Human Rights or the subsequent charter, but rather the survivors of the Hitlerite pillage and massacre, supported by a shocked world.

If we take a close look at the great prototype Bill of Rights, namely that contained in the early amendments to the United States Constitution, we see that it was adopted not by the ousted colonial authorities but by the victorious freedom-fighters. We observe too that the objective of the amendments was not to preserve the rights of the defeated loyalists, but rather to root out once and for all the kinds of oppressive behaviour indulged in by supporters of the Crown. Thus, each of the amendments was designed to deal with a specific form of denial of rights: no freedom of speech of assembly, the imposition of

an official church, the use of torture and cruel punishments, the forcing of confessions, and so on. The Bill was not an abstractly conceived set of rights designed by lawyers in terms of general, pre-conceived notions, but a concrete set of responses to specifically felt forms of domination. The former colonized people, victims of despotism, anxious to guarantee that there be no revival of the suffering to which they had been subjected, and to consolidate their new-found freedom, remembered exactly where the shoe had pinched, and designed their Bill of Rights to respond accordingly.

Applied to South Africa, this would mean essentially that the Bill of Rights would be adopted after freedom had been won, and as a means of ensuring that oppression was not restored in old or new forms. The Bill of Rights would confront and outlaw all the specific forms of oppression associated with apartheid: the whole system of racial domination, the pass laws, legally enforced removals, the Group Areas legislation, and the violence of the troops in the townships and of the security police in the cells. Since the equivalent of independence in South African conditions is the restoration of the land, of dignity, and rights within the existing boundaries of the country, a Bill of Rights would have to address itself directly to the question of equal access to resources. In other words, a genuine document in the classic Bill of Rights tradition would have as its principal objective the total elimination of apartheid and the guaranteeing of rights to those presently oppressed. In attending to these issues it would speak out in general language guaranteeing rights to the whole population.

In the proposals being made we find almost exactly the opposite expressed. The principle objective is precisely to give guarantees to the present oppressors, to protect them against the re-vindications of the oppressed; to do so in advance of and as a bulwark against rather than as a prescription in favour of change. Such a Bill of Rights would be deprived of its true function. Instead of being an instrument designed to protect the future rights of the whole population, it becomes a means of defending the present privileges of the minority, surpassing the legitimate bounds of legal irony by making a Bill of Rights the document that perpetuates injustice. It is only necessary to refer to a concrete example to see the significance of this issue.

If one looks at the question of the land, one sees the contradiction immediately. In the past three decades, more than three million South Africans have been forcibly removed from their homes and farms, simply because they were black. Apartheid law then conferred legal title on owners whose main merit was that of having a white skin. Whom would the proposed Bill of Rights protect: the victims of this

unjust conduct, which has been condemned as a crime against humanity by all humankind, or the beneficiaries? Although oppression and poverty are not necessarily completely synonymous, they do tend to go hand in hand. Where would the people, condemned as squatters after having living on land for generations, their homes bulldozed into the ground, get the finance to compensate the new owners who have legal 'titles', when the only collateral the uprooted would have has no known market value, namely, centuries of suffering and dispossession?

Looking at the surface area of South Africa as a whole, one finds that at present the dominant minority of less than twenty per cent of the population has reserved to them by law nearly ninety per cent of the land. It would be a strange Bill of Rights that said in effect that the remaining eighty per cent of the population had to forego their right to own and farm land because to exercise such a right would be to violate the acquired apartheid rights of the twenty per cent. Looked at from the perspective of human rights, who has the greater claim to land — the original owners and workers of the land, expelled by guns, torches, and bulldozers from the soil, turned into migrant workers, perpetually on the move with no plot they can call their own; or the present owners, frequently absentee, whose rights are based on titles conferred in terms of the so-called Native Lands Act and the Group Areas Act?

This is not to say that there are no white farmers with a deep attachment to and love of the land, who in future would have no role to play in the growing of the food the country needs. Nor is it to argue that the past humiliation of the oppressed can only be assuaged by the future humiliation of the oppressors. One of the main functions of a new constitution would be to guarantee conditions in which all citizens, independently of race, colour, or creed could make their contribution to society and live in dignity and peace. But it is to insist that there be no *de facto* constitutional freezing of the present unjust and racially enforced distribution of land. There might be good arguments for the careful study of transition arrangements, for giving the present owners alternatives to sabotage and fighting to the death, for taking care to maintain high levels of food production while new generations of agricultural scientists are being trained, and for creating the conditions in which a common patriotism involving all South Africans is allowed to evolve. But these are essentially pragmatic factors that belong to the political arena. They are not inalienable human rights principles that belong to a Bill of Rights.

From a human rights point of view, the starting point of constitutional affirmation in a post-apartheid democratic South Africa is that the country belongs to all who live in it, not just to a small racial minority. If the development of human rights is the criterion, there must be a constitutional requirement that the land be redistributed in a fair and just way, not a requirement that says there can be no redistribution except on conditions that are clearly unattainable by the black majority.

Misconceptions about structure and implementation — the question of affirmative action

Since most proponents of a Bill of Rights in South Africa see it as a instrument designed to block rather than promote any significant social change, they completely omit from their projections any reference to affirmative action. This deprives the Bill of Rights of its true potential as a major instrument of ensuring a rapid, orderly, and irreversible elimination of the great inequalities and injustices left behind by apartheid.

Without a constitutionally structured programme of deep and intensive affirmative action, a Bill of Rights in South Africa is meaningless. Affirmative action by its nature involves the disturbance of inherited rights. It is redistributory rather than conservative in character. It is not a brake on change but rather a regulator of change designed on the one hand to guarantee that change takes place, on the other hand that it proceeds in an orderly way according to established criteria. Affirmative action enables all the interested parties to make an appropriate contribution, or at least to know where they stand. It presupposes the concertation of diverse forces in an agreed direction, with the State playing an ultimately decisive, though not necessarily exclusive role in the process. A Bill of Rights can accordingly be seen in the eighteenth century way simply as a guarantee on the state in relation to the citizen (though it should never lose its character as a guarantee against abuse of citizens' rights by the state). On the contrary, through giving constitutional backing to affirmative action, it gives to the state, as well as other forces, a duty to use national institutions and resources to promote the rights of citizens.

In the historical conditions of South Africa, affirmative action is merely the corrector of certain perceived structural injustices. It comes as the major instrument in the transitional period: once a democratic government has been installed, for converting a

oppressive society into a democratic and just one. It is the instrument in terms of which agreed national and constitutionally established goals are realized in a fundamental way, attributing appropriate responsibilities to all social forces — the public sector, the private sector, and the individual citizen.

Misconceptions amongst the mass of the people about a Bill of Rights

The way in which a Bill of Rights has been projected in South Africa as a means of preserving vested interests and of blocking affirmative action to bring about genuine equality has given the whole concept a bad name amongst the mass of people. This is most unfortunate. A Bill of Rights as such is neither a reactionary nor a progressive document. Everything depends on the context.

The fact is that there is a true and progressive concept of a Bill of Rights that merits the support rather than the suspicion of all genuine anti-apartheid fighters. This progressive concept situates such a document in its classic context as a true consolidator of the gains of people in struggle. Those of us engaged in the anti-apartheid fight also have our decisions to make. Either we leave the question of a Bill of Rights to others and then criticize the results, or we enter the fray directly and say 'these are our positions, this is where we stand, this is what a Bill of Rights should really be like'. More concretely, we can transfer the debate from the remote arenas of the think tanks and locate it where it belongs — in the midst of the life and strivings of the people. Justice and human rights do matter to us. This is what we are fighting for and there should be no cynicism in our hearts on the matter.

In South Africa we already in fact have a document that embodies the key elements of a Bill of Rights. It is a document that was born out of struggle, responds directly to South African conditions, expresses the aspirations of the oppressed people, and meets with internationally accepted criteria of a human rights programme — namely, the Freedom Charter adopted at the Congress of the People in 1955.

From a human rights point of view, the Freedom Charter was amongst the most advanced documents of its time. In clear and coherent language, it defends fundamental legal, political, and civil rights, it spells out social and economic rights that were only to become internationally agreed upon in the 1960s, and refers to people's rights that were only to be formulated in the 1970s and 1980s. The Freedom Charter is accordingly a contribution towards world human rights literature of which we South Africans can be proud.

A Bill of Rights for a post-apartheid South Africa: some pre-conditions

A Bill of Rights can either be an enduring product of history shaped by lawyers, or a transitory product of lawyers imposed upon history. If in South Africa it is to be the former and not the latter there will have to be, it is suggested, four basic pre-conditions:

- An appropriate process whereby a Bill of Rights may be adopted.
- In its content, the Bill of Rights must be associated with the extension rather than the restriction of democracy.
- The Bill of Rights must be centred around affirmative action.
- The mechanisms for applying the Bill of Rights must be broadly based, and not restricted to a small class of judges defending the interests of a small part of the population.

An appropriate process whereby a Bill of Rights may be adopted

Bills of Rights can be either copied, defined, negotiated, or constructed.

Copying a Bill of Rights

The easiest and least rewarding procedure is simply to copy a Bill of Rights from a model regarded as working well in another country. Apart from the fact that this saves on legal drafting fees, there is little that can be said in its favour. An effective Bill of Rights in any country must relate to the culture, traditions, and institutions of that country, at the historic moment when the Bill of Rights is considered necessary. This is not to deny an educative and exemplary role for a Bill of Rights, nor to refuse it a capacity to take on new meanings in the course of time. But it is to insist that an effective Bill comes from inside the historical process, not outside, and that it reflects a set of values gained in the course of struggle and rooted in the consciousness of the people, not one imported from other contexts.

Defining a Bill of Rights

Defining a Bill of Rights has the advantage of being directed towards the specific problems of a specific situation. This is what the burgeoning think tank movement on southern Africa aims to do: select experts who define their way into the problem and define their way out again. The flaw of this approach is that it presupposes that the basic issue is

an intellectual one: if only the correct formula can be found, everyone will come to their senses, apartheid will disappear, and all will end well. The fact is that the basic problems are ones of power and consciousness, not of formulation. It is not chauvinistic to assert that there is no lack of brains in South Africa. Even the defenders of apartheid, unfortunately, have an intelligentsia of considerable brain-power, today armed with all the intellectual apparatus of what is called contemporary political science. The fact is that until the social reality and especially the power structure has changed, the intellectual reality will remain imprisoned. The context will be that of rearrangement rather than substitution. Yet, try as the think-tankers might, there is no way in which apartheid can be adapted or modified to make it consistent with any meaningful Bill of Rights. Similarly, there is no way in which a Bill of Rights that obeys international standards could be adapted to be consistent with apartheid, however rearranged. Any constitutional scheme designed to entrench the rights of the white minority, whether property rights or rights to racially exclusive education or residential areas, violates the principles of equal dignity and equal opportunity which lies at the heart of any Bill of Rights. Unfortunately, most of the think tanks seem to have set themselves just such an agenda, namely, to propose a constitutional scheme which, under the guise of a Bill of Rights, would guarantee that however many blacks would be in Parliament, none of the privileges presently enjoyed by the whites would be touched.

Negotiating a Bill of Rights

Negotiating a Bill of Rights, the third method, has two great virtues. It operates from inside the process and, by definition, its outcome will correspond to the power realities of the moment, giving it a fair chance of becoming operational. But it has certain serious drawbacks. As in the case of a copied or defined Bill of Rights, the people who are to be the holders of the rights are regarded as mere spectators in the process. Furthermore, the negotiations inevitably result in a document so full of compromises and short-life arrangements that it hardly constitutes a true Bill of Rights. The fact is that one cannot negotiate goals. One has to establish them. What one can negotiate is the means whereby agreed goals can be achieved. If there is no agreement on goals, save at the level of banalities (such as that everyone shall be happy and none shall feel oppressed), then there is no basis for negotiating a Bill of Rights. In the case of South Africa, it is only when the fundamental goal of a non-racial, democratic, and united South Africa is accepted, that a suitable foundation could exist

for negotiating the terms of a Bill of Rights. What could be negotiated then would be the precise configurations, both substantive and institutional, as well as the exact steps to be taken to get there in as speedy and orderly way as possible.

Even granted agreement on goals, however, the major weakness remaining is the passivity of the people at large in relation to their fundamental rights. We live in an age in which every form of communication with and involvement of the people is possible. Even in the difficult circumstances of apartheid South Africa in the 1950s, the meetings that preceded the Congress of the People at which the Freedom Charter was adopted involved hundreds of thousands and possibly millions of people. All the participants felt thereafter that some way or another the document was theirs, made by them, for them, and for all the people of South Africa, something for which people were willing to fight, and, as Nelson Mandela said, something for which if needs be, they were willing to die.

Negotiations have an important role to play in removing obstacles to popular participation in the processes leading up to the final drafting of a Bill of Rights but they are no substitute for democratic input.

Constructing a Bill of Rights

In my view, this is what Bills of Rights are, or should really be about. This is also what makes the fourth procedure for adopting a Bill of Rights for South Africa imperative — namely, constructing such a Bill. A constructed Bill of Rights will, of course, copy from other models. It should eventually be a coherent and well-defined document drawing on the advice and experience of all the thinkers — whether think tanks or outside — or the world. It will also involve important elements of negotiation. But in addition it will have the character of:

- being built up over a period of time rather than drafted at a moment;
- being constructed in sections and layers rather than as a single unique document; and
- being the product of active involvement of the widest strata of the population at all important times.

These three characteristics are interrelated. The time-frame given to the people as a whole and all special interest groups a chance to be involved. A Bill of Rights is built up, stage by stage, starting with agreement on general principles, and moving to specific institutional

arrangements. In the meanwhile, all the major social forces that accept the basic goals are specially, though not exclusively, involved in the evolution of sections that have particular relevance for them. Thus, we already have in South Africa an education charter in draft, emerging in the course of struggle against racist education. One could contemplate a workers' charter in which trade unions would have a special role. Another example is a charter on religious freedom and the role of the churches, mosques, synagogues, and temples in promoting the goals of the new society. The embryos of important sections of a future Bill of Rights are thus already emerging in the work of the National Education Crisis Campaign, the workers' charters, the declarations of activist religious leaders, programmes of the women's organizations, and so on. At a future stage, when a democratic government has been formed or is imminent, the process of consultation and involvement could be extended and formalized. The Freedom Charter itself is, of course, an important document already in existence. On its foundation, a Bill of Rights could be gradually constructed, drawing upon all the inputs of all the different sectors.

In the same way as a constructed Bill of Rights presupposes a building up of the substantive part of the Bill, so it takes account of the need to involve, step by step, the institutions which are to be invoked to make the Bill operative.

Clearly it would be presumptuous to attempt to lay down or even predict the exact course whereby future constitutional documents will be adopted. But the perspective that needs at least to be considered is that of constitution-making as a process rather than an event. Once this is done, the possibilities become greatly enlarged of involving the people directly in the shaping and formulation of the rights of which they are to be holders. Rights in the true sense of the word are never conferred — they are seized, shaped, expressed, and lived by their bearers. In this way, the social contract ceases to be an abstraction and becomes a reality. The sovereignty of the people takes on a real and not purely notional meaning. Negotiating the terms is the final touch, not the foundation of the new constitution.

In terms of its content, the Bill of Rights must be associated with the extension rather than the restriction of democracy in South Africa

To project a Bill of Rights as being essentially a mechanism to frustrate majority rule is to doom it from the start. Of course, in entrenching certain fundamental freedoms and liberties, it establishes a rigid

framework of rights within which majority rule will operate. These basic rights can be defended in the courts even against the will of the majority, yet they do not operate to deprive the majority of the right to deal with substantive questions facing the nation. The fundamental argument of this paper is that a Bill of Rights should precisely be used to enlarge rather than freeze the area of human rights, and to eliminate rather than perpetuate racial distinctions and the fruits of discrimination.

What needs to be done is to turn the Bill of Rights concept from that of a negative, blocking instrument, which would have the effect of perpetuating the divisions and inequalities of apartheid society, into that of a positive, creative mechanism, which would encourage orderly, progressive, and rapid change.

At the level of content, this would take into account specific features of the South African situation. There are a large number of areas that are relatively non-controversial and on which agreement could rapidly be reached. These include general civil, political, and legal rights. Yet property rights are highly contentious in the context of the impact of apartheid.

In relation to second generation socio-economic rights, attention needs to be given to breaking out of the confines of the Anglo-Saxon legal tradition whereby rights are basically restricted to what is justiciable, that is, to interests that can be protected by direct recourse to a court of law. While the role of the courts should always be important, it should be complemented by a richer concept in terms of which the Bill of Rights not only operates to defend individual rights, but seeks to guarantee the extension of rights to the community as a whole. To take one example, what would be more important: the right to sue your doctor or the right to health? Appropriate enforcement mechanisms should be created, such as sanitation control, safety measures, inspection, a system of primary health care, and school-feeding, all with appropriate legal underpinning.

Consideration thus needs to be given to a Bill of Rights as a programme and not simply as a set of directly justiciable interests. A constitutional document that is partly programmatic in character presupposes that certain major social goals are set out in the document. Public and private entities are placed under a legal duty to work toward their realization. The second generation of rights lend themselves more to treatment of this kind than to the justiciable first generation kind.

Third generation rights, such as the right to peace, development, and a clean environment also necessarily have a strong programmatic

character which might be upsetting to lawyers habituated to Anglo-American legal conventions. The argument that such concepts are political rather than legal makes increasingly less sense in relation to the changes required in a post-apartheid society. The law has to recognize its political functions and politics have to be structured by law. The object is not to separate the two, but to find the right relation between them. International conventions and domestic legislation all have their role to play in defending these rights.

The Bill of Rights must be centred around affirmative action

The third fundamental feature of a meaningful Bill of Rights for South Africa is that it be structured around a programme of affirmative action. It is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedom and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system. If a Bill of Rights is seen as a truly creative document that requires and facilitates the achievement of the rights so long denied to the great majority of people, it must have an appropriate affirmative strategy. To adapt Anatole France, if the law in its majesty were to give equal protection to a family of ten living in a two-roomed shanty and a family of two in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa. Whatever attitude is taken to unused or under-used accommodation, the failure to impose a legal duty on the state and the private sector to reduce inequality in living conditions would be to deprive the Bill of true meaning in at least one important area.

The advantage of affirmative action is that clear and irreversible goals with an undeniable social and moral purpose are stated. However, considerable flexibility is permitted in terms of how the goals are to be realized. This helps avoid the dangers of backsliding on the one hand, and producing grandiose but highly voluntaristic and unrealizable plans on the other. If the private sector is to play a positive role in reducing inequality in a democratic South Africa, it is difficult to see how any strategy other than that of massive affirmative action could function.

The example of housing has been given. But just as there is no area of South African life that apartheid has left untouched, so it will be necessary to extend affirmative action to every aspect of South African society — health, education, work, leisure, to mention but a few. The

transformations will have to affect not just the social and economic life of the population, but the very institutions of government. Even with the best will in the world, structures themselves built on inequality and injustice cannot be expected to be the guardians of justice and equality for others. In the presence of one of the worst wills in the world, the need to apply affirmative action to the civil service and the organs of state power becomes even more urgent.

The mechanisms for applying the Bill of Rights must be broadly based, and not restricted to a small class of judges defending the interests of a small part of the population

If the objective is to guarantee the minimum disturbance of existing property and social 'rights' (one has to put the word in inverted commas — the power to ensure that your child goes to a whites-only school cannot be dignified by the word 'rights'), then who better fulfil the role than those who not only belong to and share the values of the very group to be protected, but whose whole professional mode has been shaped in the context of the interests and values of that group? If, on the other hand, the dog is to watch the interests of the formerly oppressed, it would have to have a totally different pedigree and training. The question of whether the word 'and' in a particular context only means 'and' or can also mean 'or', which has exercised the minds of lawyers for generations, would have little interest for defenders of the rights of the oppressed, who would be overwhelmingly to social rather than semantic factors in making their decisions.

This raises the important and delicate question of the relationship of a Bill of Rights to the legislative power of Parliament. It has already been argued that the objective of a Bill of Rights should be to reinforce rather than restrict democracy. In South African conditions, it is unthinkable that the power to direct the process of affirmative action should be left to those who are basically hostile to it. In later years when the foundations of a stable new nation have been laid and when its institutions have gained habitual acceptance, it may be possible to conceive of a new-phase Bill of Rights interpreted and applied by 'mountain-top' judiciary. At present, the great need is to give people confidence in Parliament and representative institutions, to make them feel that their vote really counts and that Parliamentary democracy serves their interests.

The kind of body that might provide a bridge between popular sovereignty on the one hand, and the application of highly qualified professional and technical criteria on the other, would be one similar to the Public Service Commission. A carefully chosen Public Service Commission with a wide brief, highly technical competence, and general answerability to Parliament, could well be the body to supervise affirmative action in the public service itself. Similarly, a Social and Economic Rights Commission could supervise the application of affirmative action to areas of social and economic life, while a Land Commission could deal with the question of access to land. Finally, an Army and Security Commission could ensure that the army, police force, and prison service were rapidly transformed so as to make them democratic in composition and functioning, perhaps the hardest and most necessary of all the tasks facing those who wish to end apartheid in South Africa. At the same time, the courts would have a fundamental role, far more important than their role today. Representative of the people as a whole, they would be the bastions of first generation rights, which would be fully justiciable, and the guarantors by means of judicial review that second and third generation rights were realized in a constitutional way.

Summary

To sum up: the oppressed and all true democrats in South Africa have a great interest in promoting a Bill of Rights for the country and seeing it as a welcome and progressive phenomenon. But such a Bill of Rights has to be created over a period of time with the active involvement of the people. It has to be located in the heart of the democratic process and not be seen as a foreign object imposed upon it. It also must be structured around a strategy of affirmative action. Finally, its implementation has to be entrusted to institutions that are democratic in their composition, functioning, and perspective, and that operate in a manifestly fair way under the supervision of the people's representatives in Parliament and subject to review, in terms of the constitution, by the courts.

Such a Bill of Rights, born out of the struggle for freedom, would live for decades, perhaps centuries, and enrich the international patrimony of human rights.

The question of majorities and minorities

Apartheid has the capacity of turning the banal into the marvellous. The principle of equal rights, which in most other countries is

regarded as so ordinary as not to merit any explanation or require a defence, is projected as something quite wondrous in South Africa indeed so astonishing as to be constitutionally illusory and practically unattainable.

The anti-apartheid struggle is directed precisely towards the achievement of full equality between all South Africans, independent of race, colour, ethnic origin, gender, or creed. The measure of the success of any new constitutional order will thus be the degree to which it enshrines the principle of full, genuine, and ineradicable equal rights.

Equal rights mean equal rights for each and every individual South African. As far as the basics of citizenship are concerned there will be no distinction whatsoever between persons on the grounds of race or ethnicity. Just as race classification and group areas will disappear from legislation, so will they vanish from citizenship and the electoral system. There will be a common voters' roll, made up of and speaking in the name of the whole nation. In this sense, the constitution will be completely colour-blind and totally race-free. There will be no special privileges for racial or ethnic groups, no vetoes, no areas of special competence, or 'own affairs.' Race will only enter the constitution as a negative principle, that is, to the extent that the constitution is not only non-racial but anti-racist. The anti-racist character will be guaranteed by provisions, expressly referring to race, which:

- outlaw racial discrimination,
- prevent the dissemination of racist hostility, and
- ensure that measures are taken to overcome the effects of past racial discrimination.

The question is raised as to what guarantees would exist in such a constitutional order, especially one based on majority rule, against persecution of minorities by the majority. It may be said that, even recognizing the evils of apartheid, it would be unjust to inflict on future generations of whites the very kinds of discrimination that their fathers and mothers have been and are inflicting on blacks. At the more pragmatic level it may be contended that if one wishes to persuade whites to relinquish power now, they must be given reasonable guarantees against persecution in the future.

Like so many questions in South Africa, the issue of minority rights is presented in a back-to-front way. International human rights law pays considerable attention to the issue of minority rights. In fact, protection of minority rights preceded and opened the way for international protection of individual rights. Yet always the context

was the protection of minorities against discrimination and persecution. The object was never to accord to minorities the right to discriminate against and oppress others, as happens in South Africa today. Nor has the protection of minorities ever encompassed the maintenance of special privileges for a minority who constitute a social and economic élite. The whole object of minority rights law has been to counteract discrimination and inequality, not to perpetuate it.

More recently, protection of minority rights has moved beyond the principle of non-discrimination and equal rights, and added the principle of non-assimilation, that is, of maintaining the right to cultural, linguistic, or religious identity in the face of pressure to adopt the ways of the majority. In other words, the law has both affirmed the right of minorities to be the same as the majority in terms of basic civil, legal, and political rights, and different in respect of language, cultural, and religious rights. In fact, international law increasingly accepts the right to use affirmative action or positive discrimination procedures to promote the language, culture, religious, and even economic rights of minorities that have been subjected to past discrimination.

The complication in South Africa is that minority rights law is being invoked as a basis for preserving the interests of a dominant and not a dominated minority. It is paradoxical that in South Africa it is the majority and not the minority that would be the natural subject and automatic beneficiary of minority rights law. It is the majority that has been discriminated against and kept out of public life, and it is the majority whose languages and culture have been despised or else presented in a distorted way. If affirmative action has any scope, it is to overcome the effects of discrimination against the majority, not the minority.

What all sections of the population in South Africa have a right to expect — and this would include the group self-classified as whites — is that any future constitutional set-up protects them against discrimination and abuse, and recognizes their right to preserve and develop their cultural, linguistic, and spiritual heritage. If this were all that the white minority were after, then a new constitution would have been drafted long ago. Just as certain fundamental rights and freedoms can be guaranteed for the individual citizen as part of the context in which majority rule operates, so certain rights for minorities can be guaranteed as constituting the overall legal framework within which majority rule takes place. It would place certain parameters on the scope of majority rule, without undermining the principle of

Parliament functioning according to the principles of majority rule. In fact, the Freedom Charter contemplated exactly such a relationship between majority rule and respect for cultural and other rights when it declared that the people shall govern, and that all national groups shall have equal rights.

Unfortunately, what really has been in issue is the perpetuation of constitutional privileges under the guise of establishing legitimate defences against domination of group over group. Hence the recourse to such bizarre constitutional devices as separate voter rolls, own affairs, and group vetoes, all of which have a profoundly racist character, and the use of such offensive phrases as the need for protection against being swamped.

In fact there are quite simple ways in which the principle of non-domination can be maintained without recourse to racist concepts and structures. Three levels of constitutional devices can be contemplated, each preventing arbitrary or unjust treatment or harassment of any kind on the basis of race, appearance, origin, religion, language. These devices supplement the general rights of citizens and complement each other, and in their conjunction acknowledge the cultural richness and diversity of the country. They could also be associated with a non-racial electoral system that guarantees political pluralism and provides protections against political oppression.

In the first place there should be a Bill of Rights which entrenches basic individual rights for citizens. Any individual discriminated against on the grounds of belonging to any minority (or majority), that is, on the grounds of race, colour, ethnicity, language, or gender would have appropriate legal recourse. This is the *guarantee of equal individual rights*.

Secondly, there should be a general non-discrimination provision which will outlaw any discrimination against any group as a group on the grounds of race, colour, ethnicity, language, or religion. Any member of a group discriminated against would have legal remedy even if he or she is not directly affected by the discrimination. This is the *guarantee against discrimination*.

Thirdly, the cultural diversity of the country would get a strong degree of constitutional recognition so as to permit groups to develop certain aspects of what they might call their own way of life with a view to enriching society as a whole. This is the *guarantee of equal rights for all national groups*. Here it is necessary to separate out from a group's 'way of life' what are presently objectionable features that require abolition, what are really universally or widely accepted

modes of behaviour not restricted to that group, and what are intimate characteristics that justify protection and even promotion.

The right to behave as a member of a master race, to insult blacks, and to use violence gratuitously, for example, are boasted about by some as a marked feature of the way of life of a certain group today. Clearly these would be denounced in any new democratic constitution.

Similarly, there are many social habits which in reality belong to, or are open to all people, such as matters of dress, cuisine, and etiquette. One does not need a constitutional right to eat curry or have a braaivleis (barbecue) or wear trousers. What will be guaranteed will be the inviolability of the home, freedom to pursue family life, and general freedom of personality. None of these freedoms attach to a particular racial or ethnic group.

Next, there are certain activities that historically and culturally have become associated with certain groups, usually based on linguistic association. Thus there are historically created communities with a distinctive socio-cultural personality possessing considerable subjective significance for its members, and contributing towards the general overall texture of South African life. Shorn of their association with oppressive domination, these socio-cultural features will continue and even have a measure of constitutional protection and support. What will not be permitted is basing political rights on socio-cultural formations, nor attempts to restore apartheid by political mobilization based on setting group against group. Thus, from a general juridical and citizenship point of view, the whites as whites will disappear from South Africa, as will the blacks. There will only be South Africans. But within the framework of an equal and undivided citizenship, there will be full recognition of linguistic diversity. That is, there will be one South African citizenship with a single suffrage, but many South African languages.

There will be extensive recognition of the right to constitute religious organizations, many of which may have their holy literature in a particular language. Afrikaans-speakers who feel comfortable worshipping in the Dutch Reformed Church will be able to continue their prayers and hymns in the way to which they are accustomed, as well as to choose their spiritual leaders, and to develop their doctrine according to the internal teachings of the Church. In this sense there will be unfettered freedom of religious-cultural association (one can think of many other groups — Jews, Muslims, Hindus, Greek Orthodox, as well as the many African independent sects that might have a similar basis). What would not be permitted would be to deny