THE INCLUSION OF SOCIAL AND ECONOMIC RIGHTS IN A BILL OF RIGHTS FOR A FUTURE, DEMOCRATIC SOUTH AFRICA

INTRODUCTION

This essay examines the nature of social and economic rights and whether a Bill of Rights is the appropriate means of achieving the goals that supporters of the values underpinning these rights would like to see realised.

Further, it examines the criticisms of **non-justiciability**, (because of (a) the alleged unsuitability of these rights by their very nature for justiciability and (b) the alleged institutional incompetence of the judiciary to enforce them) and that concerning the **undemocratic nature of the judicial review** of these rights, and concludes that a) the distinction between 1st and 2nd generation human rights is overexaggerated; b) these rights should indeed be included in a Bill of Rights; (c) they are indeed justiciable; and (d) a restructured judiciary is indeed the appropriate institution to enforce them.

As a preface to the main body of this essay it is perhaps appropriate to make the point that it is of the most crucial importance to the peace and prosperity of a future, democratic South Africa that social and economic rights be included in a Bill of Rights. Beukes and Fourie [1] make the following statement:
"... classical freedom rights alone certainly may not be sufficient.... We live in times where the issues relating to economic and social rights must be squarely faced. This implies that both the discussion of human rights in general and of the role a human rights charter could play in social change in South Africa in particular, are in dire need of augmentation to include the economic demension explicitly. In this sense the human rights issue shares a characteristic of many intractable societal problems, i.e. a distinct tendency to be multi-disciplinary in nature."

Scott and Macklem [2] make the point that: "... a South African constitution that recognizes the interdependence of human rights would both draw sustenance from and take a leading role in the international human rights movement." The false note is sounded

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(1) Elwil P. Beukes & Frederick C.V.N. Fourie: Economic & Social human rights: An exploratory survey

(2) Craig M. Scott and Patrick Macklem <u>The Case for the Inclusion of Justiciable Social Economic Rights in a Future South African Constitution</u> (Prepared for the Constitutional Committee of the ANC July 23 1990) p. 13

by Leyshon [3] who holds the view that the Bill of Rights is designed merely to guarantee white priviledge and protect the whites against a majority black goverment. In a particularly hard-hitting passage [4] he says: "Is it reasonable to expect the "Have nots" of South African society to respect the court rulings which protect the interests of the "Haves" in the name of a justiciable Bill of Rights? ...Anyone who believes that the current extra-paliamentary movements are deeply and sincerely attached to the principles of a judicially enforceable Bill of Rights should ponder upon the character of political activity in the republic at the moment. Rival Black political movements demonstrate an extraodinary amount of in tolerance towards one another, and people are dying as a consequence... The real tragedy is, that if Black people do not understand the horrifying political significance of Communist Party flags and emblems - they are not going to understand or appreciate abstract theories of First Generation human rights."

While I am of the opinion that Leyshon moves on very thin ice when he attempts to speculate on the psyche of the voteless mass, his article nevertheless has the advantage that it brings into clear focus the dangers which face us if constitution-framers do not include social and economic rights in a Bill of Rights in such a way that the underprivileged masses are appeased thereby. It is the object of this paper to argue for such inclusion and to urge Constitution-framers to be pioneers in the sense that Scott & Macklem would have them be [5].

THE JUSTICIABILITY OF SOCIAL AND ECONOMIC RIGHTS

Social and economic rights are held to be non-justiciable for a variety of reasons. For convenience's sake I have grouped these reasons into reasons relating to the **nature** of these rights and reasons relating to the **institutional incompetence** of the Judiciary to enforce them. I shall treat of each of these in turn.

THE NATURE OF THESE RIGHTS

Briefly put the traditional description of these rights holds that these are "rights owed to the individual by the community, which has a duty to make life fairer and more human for man in society."[6] It is perhaps apposite to mention some traditional (mis?) conceptions flowing from this 'definition'.

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(3) Doubts about a Bill of Rights D.J. LEYSHON COMMENT 4 Summer 1990, Rhodes University.
(4) Supra p. 13 - 14
(5) Supra
(6) Economic and social Rights: Their inclusion in the European Convention on Human Rights. Problems of Formulation and Interpretation: Alexandre Berenstein.

* Social and economic rights are contrasted with the classical political and civil rights (Also evidenced by the splitting of the U.N Declaration of Human Rights into the two covenants; the one Civil and Political - the other social Economic)
* Social and economic rights are held to be positive rights (they place a duty on the state to act positively) whereas civil and political rights are regarded as negative rights (they protect the individual liberty of the citizen against undue State inteference)
* Social and economic rights are not justiciable
* They are vague and enforced only with great difficulty [7].

These perceptions of the nature of social and economic rights have led to the viewpoints that:

(a) Social and economic upgrading should be the task of the political process, and the courts should have no power of review over that process.
(b) Social and economic rights, should they be included in a constitution, should be included in that part of the constitution reserved for non-justiciable rights (or put differently, unenforceable duties of state).

The following section examines some of these (mis)conceptions.

Social and economic rights vs Political and Civil Rights

Berenstein compares social and economic rights with civil and political rights and concludes that:

"We ... cannot make any clear distinction between economic and social rights and civil and political rights according to the nature of their legal effects. Those rights differ from one another by the nature of what they protect, and while, generally speaking, the realisation of civil rights only requires the State not to interfere, whereas the realisation of economic and social rights requires the State to take positive action, this distinction between the two is becoming somewhat blurred and cannot be taken to mark a dividing line between them." [8]

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(7) Examples of Social and Economic Rights in the European Social Charter are: 1) Everyone should have the opportunity to earn his living in an occupation freely entered upon; 2) All workers have the right to just conditions of work; 3) All workers have the right to safe and healty working conditions; 4) All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.
(8) Supra point 15

That Berenstein is right is for me a point beyond dispute. However, I do not intend to review here his argument leading to that conclusion (more pressing issues beckon). However, this heading serves as a convenient launching pad from which to discuss those (mis)conceptions which result from a comparison of social and economic rights with civil and political rights.

Positive vs Negative rights

Here I can do no better that to restate the position of Scott & Macklem [9] that "any distinction between positive and negative rights in a constitutional context .... is a serious oversimplification." They cite various civil and political rights, the enforcement of which place an obvious burden on the State to act positively. To cite some examples:

(a) **Enforcing the right to procedural fairness,** the courts have held states to be under an obligation to provide free legal aid [10]

(b) **Enforcing the right to life,** international tribunals have held states to a standard of diligence to "prevent, investigate and prosecute crimes against persons on a state's territory."

(c) **Enforcing the right to equality** the courts, in upholding a group of persons' (negative) right to equality, by necessary consequence must order the State to provide those benefits which it has denied that group.

(d) Positive obligations on authorities for prison conditions

The obvious conclusion is that, these civil and political rights not being rendered non-justiciable as a result of the positive obligations they impose on the state, there is also no reason why social and economic rights should be rendered non-justiciable for the same reason.

Social and Economic Rights: Imprecise rights?

This argument is most simply answered by Scott & Macklem as follows:

" The specific shape and contour of a right are the result of years of repeated application of practical reasoning to facts at hand. The lack of precision associated with many social rights should not be held up as justification for their nonentrenchment."

They suggest a multi-layered obligations structure that would render social and economic rights justiciable in spite of allegations of vagueness or imprecision. I come back to this when I discuss mechanisms for the enforcement of these rights.

It should be clear from the above that nothing in the the nature of these rights justifies the allegation of non-justiciability.

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(9) Supra, p. 24

(10) Didcott. J. in

THE COMPETENCE OF THE JUDICIARY TO ENFORCE THESE RIGHTS

Here I intend to focus not on that aspect of judicial competence which relates to the **nature** of social and economic rights (in other words on the argument that holds that the Judiciary is an incompetent institution precisely because the nature of those rights render it so; this has already (albeit indirectly) been dealt with above), but rather on that argument which holds that the Judiciary, **precisely because of its very nature** is an incompetent institution for the enforcement of these rights.

Proponents of the Judicial incompetence view tend largely to support the view that social and economic upgrading should be the task of a Sovereign Parliament dedicated to a substantial transformation of society. It is therfore appropriate at this juncture to deal with the suitability of Parliament for this task. (This was referred to earlier as one of the viewpoints spawned by the (mis)conceptions since discussed.)

Leyshon [11] believes that South African constitutional writers [12] respond to this view by suggesting that "South Africa has perverted the doctrine of sovereignty - which has its origins in British constitutional theory - because South Africa's Parliament has never conformed to the norms of a universal adult franchise and legislative self-restraint based on the philosophy of the Rule of Law." [13]
He, in turn, believes that "it is writers of the calibre of Van Der Vyver and Hund who are engaging in phoney arguments... Thus it is not so much that South africa has perverted the doctrine of parliamentary sovereignty as that it has failed to modernize its application in the context of current political theory. Secondly, and more importantly, if the parliamentary franchise is to be granted to all South African citizens over the age of 18 years, then Van der Vyver and Hund's objections immediately fall away. ... Van der Vyver and Hund cannot object that British society has perverted the doctrine of parliamentary sovereignty by denying the vote to some of its citizens. Why, therefore, is parliamentary sovereignty a discredited doctrine in the context of a non-racial South Africa in which every adult citizen will enjoy the same, equal vote?" [14]
Leyshon's statement demands the following response:

* Van der Vyver and Hund might well be making the point that, by denying the vote to all South African citizens, the South African parliament has perverted the doctrine of parliamentary sovereignty. However, this is not sufficient basis upon which to (dis)credit those writers with the view that parliamentary sovereignty, **in its unperverted state,** is a sufficient guarantee of fundamental freedoms, much less a guarantee of social and economic change.

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11. COMMENT, supra
12. Johan van der Vyver and John Hund A Bill of Rights for South Africa (1989) 34 The American Journal of Jurisprudence 23
13. Supra p.6
14. Ibid

* Sure, South Africa has perverted the doctrine of parliamentary sovereignty, but the perversion of that doctrine is not the basis for arguments in favour of a Bill of Rights and the entrenchment of social and economic rights therein. Rather it is the inherent incapacity of parliament (perverted or otherwise) to be the custodian of even the fundamental political and civil rights that supports the argument for a Bill of Rights for South Africa. The reasons for this incapacity are briefly set out below, but are more fully dealt with in another essay.[15]
* If, by referring to the modernisation of the application of the doctrine, Leyshon intends to suggest that the French model be followed, I am in respectful disagreement with him, for reasons which I will develop later.

The comment of Donald Woods, self-exiled South African journalist is particularly relevant here:

> "The obscene laws which constitute apartheid are not crazed edicts issued by a dictator, or the whims of a megalomaniac monster, or the one-man decisions of a fanatical ideologue. They are the result of polite caucus discussions by hundreds of delegates in sober suits, after full debates in party congresses. They are passed after three solemn readings in a parliament which opens every day's proceedings with a prayer to Jesus Christ. There is a special horror in that fact.[16]

The point being, of course, that perversity is no necessary prerequisite for incompetence.

The point simply is that the legislature has many more incentives than the Judiciary to ignore constitutional constraints on its power; it is after all **legislative** excess/duty that is at issue here. Even the most avid supporter of parliamentary sovereignty should feel somewhat disturbed at the prospect of entrusting to parliament the task of policing itsself. (Of course the stock response is that at least parliament consists - ideally - of the elected representatives of the people; but that is an issue which I will address later, when dealing with the non-democratic nature of judicial review.) In the words of Alexander Hamilton, in his classic statement concerning the three branches of government:

> "...the judiciary, from the nature of its funtions, will always be the least dangerous to the rights of the constitution; because it will be least in a capacity to ignore or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary, has no

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15. My essay : <u>The Bill of Rights: A Violation of Democratic Principles?</u> handed to Prof. Steytler (1991)
16. Woods, <u>The Indictment</u> N.Y. Rev. of Books May 4 1978, at 23. See D.WOODS, ASKING FOR TROUBLE (1981)

> influence over either the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[17]

Parliament is thus an inappropriate institution for overseeing human rights because, as Perry puts it:

> "Executive and especially legislative officials tend to deal with fundamental political-moral problems, at least highly controversial ones, by reflexive reference to the established moral conventions of the greater part of their particular constituencies. They function that way principally because for many of them few, if any values rank as high as incumbency. "Leaders in both houses (of Congress) have a habit of counselling members to "vote their constituencies". [18] He quotes Robert Dahl as saying;
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> "Congressional leaders rely mainly on persuasion, party loyalty, expectations of reciprocal treatment, and, occasionally, special inducements such as patronage or public works. But none of these is likely to be adequate if a member is persuaded that a vote to support his party will cost him votes among his constituents. Fortunately, for him, the mores of Congress, accepted by the leaders themselves, are perfectly clear on this point: His own election comes first." [19]

I will atempt to show later [20] that recourse to merely the **moral conventions** of a greater part of the parliamentarian's particular constituency is inappropriate in a society that looks to an evolutionary human rights culture. However, the crucial point here is merely that concern with re-election is one of the prime factors that makes members of parliament unsuitable for the task of upholding (and developing) human rights.

Secondly, parliament is under no obligation to accompany what a minority might perceive to be a law violating their human rights (be it social and economic or political), with any sort of reasoned explanation, whereas the courts would be obliged to do so. In the words of Herbert Wechsler: [21]

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17. Hamilton, Federalist #78, THE FEDERALIST PAPERS 464, 465 (Mentor ed. 1961)
18. Michael J. Perry, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 1982 Yale University p. 100
19. R.Dahl, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 131 (1967)
20. When I deal with the criticism relating to the allegedly undemocratic nature of judicial review. Infra
21. Wechsler, TOWARD NEUTRAL PRINCIPLES OF CONSTITUTIONAL LAW, 73 Harv. Law Rev. 1, 3-5 (1959)

> "The main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite trancending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application, but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?"

This statement by Wechsler provides for a convenient transition from a discussion of the unsuitability of parliament for the task of overseeing human rights to one which deals with the emminent suitability of the judiciary for that purpose. Briefly, the judiciary is the most suitable institution for the following reasons. [22] (Here I feel constrained to once again relate this suitability to the enforcement of particularly social and economic rights.)

* It is an intuitive response of many to believe that a right is in fact something less than a right if the courts have no role in its protection. Thus if the courts are to be denied a role in the enforcing of social and economic rights, the danger is very real that these rights will cease to be regarded as fundamental societal values or commitments.
* In entrusting the courts with the task of overseeing social and economic rights, these rights are brought within the constitutional discourse which shapes the legal relations among individuals, groups and the state.
* A court provides a forum for relating debates over fundamental values to individual concrete cases. It is unrealistic to expect the drafters of legislation to be aware of the intensely personal way in which this legislation impacts upon the individual. The legislative function requires mechanisms to keep it in touch with how its policies actually affect people. The courts can function as one such mechanism.
* Scott and Macklem make the last point in a way which I can do no better than repeat: "Perhaps the most insiduous quality of poverty is the tendency of advantaged members of society to become immune to it. Court cases in conjunction with media publicity generated by a free press keep the plight of marginalised members of the community on the political agenda. Rights litigation is important for its demonstrative effect on society at large and for its potential to encourage other bodies ... to take the values underpinning social rights seriously." [23]

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22. See also the statement by Alexander Hamilton above.
23. p.19 supra

* The arguments that the court is an incompetent institution due to the fact that a) it cannot order a government to fulfill a positive obligation and b) these rights are too vague and imprecise to make for easy enforcement by the courts have already been dealt with above, but attention needs to be redrawn to Alexander Hamilton's statement above [24] and the suggestion contained therein that the judiciary, by its very nature, is emminently suitable for this task.

I have attempted above to dispose of the argument that social and political rights are non-justiciable due to their nature and the institutional incompetence of the judiciary to enforce them. The following remarks should conclude this section of the essay.

The separate studies of Berenstein [25] and Pieters [26] reveal incontrovertible evidence of the fact that social and economic rights are as important as civil and political rights and are interdependant of them. Civil liberties are illusory without addressing the question of poverty. Put more metaphorically, social and economic rights breathe life into liberty.

But the inclusion of social and economic rights fulfills another, and perhaps more important function. By including these rights in a Bill of Rights, and entrusting the judiciary with their enforcement, a dialectic relationship is established between the judiciary and parliament. As Perry [27] puts it, "If the court rejects a given policy choice, the political process must respond, whether by embracing the court's decision, by tolerating it, or, if the decision is not accepted, ... by moderating or even by undoing it." [28]

Bickel observes...

> "Virtually all important decisions of the Supreme Court are the beginnings of conversations betwen the court and the people and their representatives." [29]

... and Martha Minow of Harvard Law School extends the metaphor when she observes that...

"Rights can be understood as a kind of communal discourse that reconfirms the difficult commitment to live together even while engaging in conflicts and struggles... The discourse of rights may be all the more important as a medium for speaking across conflicting affiliations, about the separations and connections among individuals, groups and the state." [30]

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24. Above fn.17
25. Supra
26. Danny Pieters, Social fundamental rights in national constitutions S.A. Public Law Vol 2 No 1 July 1987
27. Supra p. 112
28. While Perry is here referring to non-interpretive judicial review, or then Judicial policymaking, the essence of his statement is as true for interpretive review.
29. A. Bickel, The Supreme Court and the Idea of Progress (1970) p.91.
30. Scott and Macklem p. 17.

Thus the inclusion of social and economic rights in a Bill of Rights and the acknowledgement of the justiciability of these rights fulfills an important conciliatory role in South Africa at a time when conciliation is at a premium. Scott and Macklem are correct when they say that it would be unwise to expect that values left unconstitutionalised can hold their own in wider political discourse; they will be marginalised, categorised as second-class arguments and those most dependant on them for basic survival will in turn be marginalised and will become or remain second-class citizens. It should thus be clear that the argument that rejects the inclusion of social and economic rights in a Bill of Rights because of their alleged non-justiciability, is invalid. The alternative of including these rights as directives to government policy, or of including them in a non-justiciable part of the constitution, is best described by the Indian Supreme court as "throwing a rope of sand" to the poor, powerless and least powerful in society.

THE UNDEMOCRATIC NATURE OF JUDICIAL REVIEW

This is quite easily the subject of another essay, indeed it is [31]; thus I will be brief in dealing with this and the connected argument that all rights of the individual should be subject to the dictates of the general will - as determined by parliament.

The argument that suggests that is inherently undemocratic for the judiciary to exercise the power of review over state legislation is succintly stated as follows:

"In the first place, it is often argued that when a court declares the enactment of a legislative body tobe unconstitutional and void, it thereby defeats the will of the people as expressed through their representatives in the legislature. It is claimed to be undemocratic that the final word in goverment should rest with judges who are neither elected by nor answerable to the people. If Parliament makes a mistake, it is said, the people may always turn them out and put another parliament in their place; but the judges are not accountable to the people." [31]

I have already discussed the institutional incompetence of paliarment for the enforcement of human rights, and those comments hold true in this context as well. However, what needs to be pointed out is that few constitutional law writers in the South African context make the important distinction between interpretive and non-interpretive judicial review. The former refers to judicial review of legislation where judges have recourse to the value judgements evident from the constitution against which to adjudicate legistative enactments. This is

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[31] D.V. Cowen, The Foundation of Freedom (1961) 139

generally considered to be valid review as it is considered legitimate for the courts to have recourse to historical factors to determine what constitution-framers' response would be to particular legal-moral questions which they did not explicitly provide for.

More problematic is the question of non-interpretive judicial review, or judicial policymaking where the court goes beyond the constitution and employs its own value-judgements in order to arrive at a new human-rights policy. It is this that is the subject of intense debate.

Without delving into the finer points of the many and varied arguments for and against judicial policy-making, it will suffice for my purposes here, to restate Perry's extremely convincing argument for judicial policymaking in its barest essentials.

Perry's point is that judicial policymaking has a functional justification in that it ensures an evolving human rights morality. (More about this when I deal with the issue of the supremity of the will of the people as expressed in Parliament.) There is an objective sense of right which is located outside the law. It is to this sense of right, indeed the judges own morality, that the court has recourse when it determines an issue such as the one which confronted the U.S. Supreme Court in Roe & Wade.
One might well ask, "But doesn't this give the court extensive powers? And is there not some truth in the complaint of U.S senator Norris who in 1930 said, "We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of 9 men and they are more powerful than all the others put together." [32]

Perry's response is that the legislature still has the power to limit the court's jurisdiction. But, one might well ask where the power lies? Is it with the legislature or with the courts? The answer is that it lies with neither, and Perry's thesis brings into stark - nay, beautiful- relief the true nature of democracy. Simply (and unflatteringly) put, it goes thus: The courts check parliament's excesses and evolves a human rights culture with reference to its own value system. Parliament, in turn, limits the court's jurisdiction and the courts in turn, check parliament's jurisdiction-limiting enactment by interpretive review against the will of the people as expressed in a Bill of Rights. Thus the power, such as it may be, lies in the dynamic tension between the institutions of democracy. [33]

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32. Congressional Record part 4 vol. 72 3566
33. That parliament has in the United States, scarcely exercised its jurisdiction-limiting power should not, according to Perry, be seen as a reason for denying the functional role of judicial review. In fact, maintains Perry, parliament oftentimes prefers to leave the adjudication of thorny issues where a politico-moral value judgment is required, to the judiciary.

The argument that there is no objective right greater than the will of the people as expressed through their elected representatives (the French model) is really a question of choice. Perry argues that it is a view held by moral skeptics who do not believe in any objective sense of moral right which is located outside of the law. This, he argues, results in a stagnating rather than an evolving morality and thus in a stagnating human rights culture. I agree, and Lourens du Plessis seems to agree too when he suggests that the very basis upon which the concept of human rights rests is an objective sense of right which is beyond both man and the law. [34]

Thus the choice is between a stagnant human rights culture on the one hand, where legislative invasions/laxity with regard to human rights issues can be cured only by a general election ousting that parliament (a time-consuming and ineffective process); and an evolving human rights culture where the court is actively involved in breaking new ground in keeping with what it perceives to be the evolving morality of the nation.

I believe the latter to be the preferable option for a democratic South Africa determined to employ human rights as a "kind of communal discourse". Thus it is my belief that judicial review (interpretive or non-interpretive) serves a democratic function and that the argument which holds it to be undemocratic must fail, and with it, the argument that social and economic rights should be excluded from a Bill of Rights for this reason.

I believe strongly that these rights <u>can</u> be enforced with the aid of: a) a multi-layered obligations structure generated for the protection of human rights such as that developed by the United Nations over the past decade,[35] b) a nationwide system for the identification of local needs, and c) a creative affirmative action program.

However, it should be obvious that I have already over-indulged my interest in this area of the current constitutional debate. Thus, as those topics can be dealt with in a later essay(?), I will end with the observation that I hope that the arguments advanced above will go some way towards informing the debate on the inclusion of social and economic rights in a Bill of Rights.

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34. L.M. du Plessis, <u>Filosofiese perspektief op 'n menseregtehanves vir Suid-Afrika</u> Note that Du Plessis proposes a God-given law. This should not exclude non-Christians, as Perry suggests an objective right which is located at a point of convergence among a variety of moral systems.
35. Scott and Macklem p. 30 - 32 <u>supra</u>