

## TOWARDS A BILL OF RIGHTS IN A DEMOCRATIC SOUTH AFRICA

by Albie Sachs

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This summary -  
 typed in Mozambique  
 - corresponds to  
 my memory of  
 what I focused on  
 at the In-House  
 Seminar.

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A Bill of Rights, properly conceived, is not something marginal to our struggle, the plaything of lawyers and political scientists. It in fact has central importance for us, for three basic reasons:

Firstly, it is fundamental to the concept of a united, non-racial South Africa governed by the people as a whole. It forms an integral part of our rejection of the essentially racist argument that our country has to be divided, that there have to be separate chambers of Parliament, or 'own affairs' or group vetoes, so as to prevent minorities being oppressed by the majority, ~~in the future~~. As in any democratic state based on representative government and majority rule, in <sup>a</sup> free South Africa there will be a Bill of Rights to guarantee the fundamental rights of all South Africans, independently of race, colour, sex or creed. A Bill of Rights, guaranteeing rights and freedoms to the individual, is therefore part of our answer to those who wish to fragment our country and keep apartheid alive under the guise of group rights.

Secondly, as the standard-bearers of freedom, justice and democracy in our country, we more than anyone else have the right to proclaim the words Human Rights on our banner~~x~~. The racists are conducting an expensive and ruthless campaign to project to persons at home and abroad~~x~~ that ~~the~~ ANC is a body of totalitarian fanatics bent on crushing all opposition, now and in the future. We need to refute this propaganda. The fact that reactionaries have in the past frequently abused the term 'defence of human rights' is no reason for us today to show the slightest equivocation on the subject: the people of our country and the people of the world need to know that we in the ANC believe in and fight for human rights.

This brings us to the third, and most important reason for making our position clear on a Bill of rights: we do in fact believe in a Bill of Rights, and we regard it as a major instrument for guaranteeing

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South Africa has the distinction of being the only country in the world in which sections of the oppressed set up an anti-Bill of Rights committee. This was a totally understandable response at a particular moment to attempts by sections of the ruling racial minority to project a Bill of Rights as a means of ensuring that, under the guise of an apparently neutral constitutional provision, the vast riches of our country remained forever in their hands.

It has now become necessary for our movement to project our own vision of a Bill of Rights, a totally different one, which will act as an instrument for enlarging the rights of the presently oppressed majority rather than as a means of defending the privileges of the oppressor minority.

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Secondly, as the standard-bearers of freedom, justice and democracy in our country, we more than anyone else have the right to proclaim the words Human Rights on our banner. The racists are conducting an expensive and ruthless campaign to project to persons at home and abroad that ANC is a body of totalitarian fanatics bent on crushing all opposition, now and in the future. We need to refute this propaganda. The fact that reactionaries have in the past frequently abused the term 'defence of human rights' is no reason for us today to show the slightest equivocation on the subject: the people of our country and the people of the world need to know that we in the ANC believe in and fight for human rights.

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and bringing about)

the implementation of the Freedom Charter progressive, orderly, rapid and irreversible change in our country. We believe in constitutional guarantees both for negative and positive reasons. The negative reasons are to be found in the tragic aspects of some of the great revolutionary transformations of our times, ranging from false confessions to mass murder of the Pol Pot kind. Legality, or the rule of law, can have many different philosophical foundations, but nowhere in the world is it self-operative, always it has to be fought for, whether in post-revolutionary or liberal democratic or anti-fascist societies. ANC members, who have been victims of oppression and every form of barbarism and torture, know better than anyone the importance of being able to live in freedom and tranquillity. We who have lived in a police state are not fighting to create another police state, using different language or justifications. We want a society in which people can sleep freely at night, without fear of police raids or bulldozers, in which they can walk freely in the streets without worrying about armoured cars and tear gas, in which they can go about their business, using their talents and skills without constantly being reminded that they are of this or that colour or ethnic background. In this context, a Bill of Rights, properly understood, can make a major contribution not only to outlawing oppression and discrimination, but to eliminating the effects of three centuries of apartheid inequality.

To grasp the full potential of a progressive Bill of Rights,

bear in mind what

In this connection it is necessary to say something about what have been called the three generations of Human Rights. The first generation are the classic rights to citizenship, the vote and due process of law, associated with the American and French Revolutions of the Eighteenth Century. The Second refers to social, economic and cultural rights, which were put on the agenda by the Russian revolution early this Century and consolidated in the UN Charter of Social and Economic Rights of the 1960's. The Third Generation are the so-called People's Rights, which have come to the fore in recent years. These include the rights to peace, to self-determination, to control over resources, to development and to a clean environment. In our view, all three Generations are fundamental: we do not want the vote without economic rights; we do not want better homes and jobs without the vote; and above all, we cannot see the human rights problems of our country solved unless national oppression of the African people as a whole, and racial discrimination against all blacks, are eliminated, the barriers to the creation of a South African nation are lifted, and the effects of the past racially-based injustice are removed. In other words, when whole communities have been deprived of their basic rights, action to correct past wrongs is necessary on a community level and not just in relation to individuals.

Against the background of trying to ensure the realisation of all three Generations of Rights, it becomes clear that an effective Bill of Rights in South Africa presupposes the fulfilment of various conditions.

the process whereby at least four

The first condition relates to how the Bill of Rights is brought into being. Like all constitutional documents, a Bill of Rights may either be copied, defined, negotiated or constructed. Simply to copy a

Bill of Rights, whether from a Western country or a socialist one, would be disastrous, since it would not take account of the concrete, cultural, social, economic and political features of our society. Similarly, attempts by aloof Think Tanks to define their way into the problem and define their way out again are doomed, because, however useful research might be, it can only have value to the extent that the people of South Africa regard the scheme as their own. A negotiated Bill of Rights has the advantage of corresponding to the realities of power at any moment, but it is flawed by virtue of its failure to involve the people as a whole in the process of formulation. Rights in their true sense cannot be conferred, even less imposed, they can only be won. Rights that have been won in struggle are real and enduring for their holders; the law merely gives literary and institutional form to rights that already exist in the hearts and minds of the people. Accordingly, we conceive of a Bill of Rights as a document constructed in layers, over a period of time, and with massive popular involvement. Coinciding with the principles of the Freedom Charter, a Bill of rights is built up over time on the basis of documents emerging from struggle and debate, such as the Education Charter, the Worker's Charter, the Charter of Women's rights and, possibly, a Charter of Rights of Religious Communities and Individuals. Mobilisation for and popular participation in drafting a Bill of Rights accordingly starts now, as millions of South Africans are drawn into the process of finding appropriate formulations in areas of most fundamental and direct concern to themselves. Just as the Freedom Charter has stood the test of time because it emerged from a vast popular involvement, so a Bill of Rights that emerges from popular struggle will endure in a democratic South Africa. **L** If the course of our historical process is such that, in conformity with the balance of forces at any particular moment, various transitional arrangements have to be made, (including legal guarantees of a firm but temporary nature) then such arrangements should be called ~~for~~ **by** their proper name and not dressed up as parts of a Bill of Rights. Furthermore, such transitional arrangements should be clearly distinguished from so-called Internal Settlements; transitional arrangements are intended to bring democracy nearer, whereas Internal Settlements are designed to prevent the achievement of democracy at any time. **all.**

The second pre-condition for a true Bill of Rights is that in terms of its substance the Bill deals with the real human rights problems of the South African people. This means it must address all three Generations of rights - the basic political and legal rights, the fundamental socio-economic and cultural rights, and the basic rights of oppressed communities and of the people as a whole. **E**ach Generation of rights has its own appropriate mechanisms of enforcement. Thus the right not to be detained without trial and the right to have a lawyer are protected directly by the courts, while the right to housing has the courts playing a ~~background~~ **only** background role. Similarly, the right to health cannot be reduced simply to the right to sue one's doctor - it presupposes legally enforceable duties on the central government, local authorities and public and private enterprises to take steps guaranteeing sanitation, industrial safety and the furnishing of medical services.

A third fundamental pre-condition for an effective Bill of rights is that it be firmly structured around the principles of affirmative action. In its essence, affirmative action presupposes progressive, orderly, rapid and irreversible measures, involving both the public and the private sectors, to correct the injustices left behind by ~~the~~ past oppression and discrimination. Its mechanisms are such that clear goals and timetables are set but flexibility is introduced into the ~~measures~~ <sup>mechanisms</sup> ~~for~~ achieving them. All interested parties participate in the formulation of the programme of change, and all affected parties have some measure of discretion in terms of how concretely to fulfill their obligations. Given strong public awareness and mobilisation, coupled with clear government leadership, affirmative action can be a major instrument for overcoming <sup>in</sup> the massive inequalities created by apartheid, and for doing so <sup>in</sup> a way that avoids backsliding on the one hand and grandiose but highly voluntaristic and unrealisable plans on the other.

Finally, the enforcement machinery for a Bill of Rights must be consistent with the kind of rights to be protected. While the courts should always play a key role in ensuring compliance with the law and the Constitution, their role should not be seen as essentially a negative or blocking one. <sup>On</sup> the contrary, it should be their function to ensure that affirmative action is carried out, not that it is frustrated. Granted the vast amount of social transformation necessary to progressively eliminate the huge gaps between black and white created by apartheid, it is evident that special affirmative action machinery would have to be created, capable of acting at the national, regional and local levels. Such affirmative action tribunals or commissions would have to function with simplified procedures guaranteeing easy and inexpensive access to the public and public organisations. Their composition should be such that they obey the principles of representativity, on the one hand, and expertise on the other, and special attention will have to be given to their answerability <sup>both</sup> to Parliament ~~on the one hand~~ and to <sup>the</sup> courts, ~~on the other~~. Affirmative Action Commissions could accordingly be a vital force in ensuring that in areas such as the Civil Service, the Security Forces, the Economy, Land and Social Rights, the effects of apartheid <sup>be</sup> removed and ~~that the~~ changes take place with the active participation of all concerned, according to clearly defined criteria, ~~backed up by the force of law~~.

and in a manner carrying the full force of the law.