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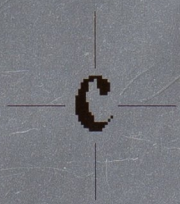
The political debate over a bill of rights for South Africa

Henk Botha



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1 Introduction

South Africa stands on the brink of a new constitutional order. The Convention for a Democratic South Africa (CODESA) has already made significant progress, and official white rule is expected to end soon with the establishment of an interim government. There also seems to be increasing convergence on fundamental issues between the various participants to constitutional negotiations. A new political realism seems to have emerged since State President de Klerk's historic speech on 2 February 1990.

The South African legal and political order has, for quite some years now, experienced a severe crisis of legitimacy.[1] It is significant that the adoption of both the present Constitution (Act 110 of 1983) and its predecessor (the Republican Constitution of 1961) were turning-points in the struggle for liberation of the disenfranchised and disempowered; they became symbols of polarization rather than national unity; they authorized (or, at least, contained nothing to prevent) practices which are completely at odds with internationally accepted norms. This resulted in widespread violence, unrest and lawlessness, a lack of confidence in the ordinary courts and the erection of alternative structures.

It is imperative that a new constitution enjoy popular legitimacy. An enforceable Bill of Rights could go a long way to restoring respect for law and order in South Africa. But a Bill of Rights, in order to have a lasting impact, has to be embedded in the value system of a political community; it presupposes a common commitment to certain fundamental values and the existence of a *culture of human rights*. Does such a common commitment exist in South Africa? It is significant that most of the major political parties and organizations have already committed themselves to a 'united, democratic, non-racial and non-sexist' South Africa; a multiparty democracy and regular elections on the basis of universal adult suffrage on a common voters' roll; and an entrenched and justiciable Bill of Rights.[2] A closer examination of the constitutional debate, however, reveals considerable ideological differences lurking just beneath the surface of growing consensus. It is not clear, for example, that the terms 'democracy' and 'human rights' carry the same meaning for the different participants in the debate.[3] In this paper, I shall examine the main areas of disagreement regarding a Bill of Rights. I shall try to give an indication of the different ideological premisses underlying such disagreement. I shall evaluate the various proposals in light of the special needs, interests and beliefs of different sections of the South African population. The challenge facing South Africans is to construct a Bill of Rights which will become central to the political discourse of progressive *and* moderate forces; of those who have been the victims of apartheid, *and* those who fear that they may become the victims of new forms of oppression. Such a document will

have to be many-sided and draw on different political cultures; at the same time, it must enable the courts to establish an integrated approach to the protection of human rights, based on sound legal principles.

2 The political debate over a new constitution: areas of agreement and disagreement

2.1 Historical background

The South African Bill of Rights debate is of a fairly recent origin. South Africa has not been a signatory to any of the international human rights charters. Attempts to have a Bill of Rights introduced into the 1961 Republican Constitution were outrightly dismissed by the ruling National Party (NP)[4], and this scenario was repeated with the adoption of the 1983 Constitution.[5] In a nut-shell, the *conservative* element in South African politics has been extremely cynical about the idea of a Bill of Rights and the judicial review of parliamentary legislation, rejecting it both on religious grounds (a Bill of Rights being the product of the humanist philosophy)[6] and political grounds (a Bill of Rights being inconsistent with the Westminster system of parliamentary sovereignty, and thus undemocratic). And, of course, being irreconcilable with the apartheid system, the adoption of a Bill of Rights would simply amount to 'political suicide' on the part of the white minority. As political opposition to apartheid grew in intensity, the government increasingly resorted to draconic security legislation[7], justifying severe inroads into individual liberty in terms of the 'total onslaught' against 'civilized norms' in South Africa.

South African *liberals* have repeatedly called for the introduction of a Western-styled Bill of Rights. Such a document would consist mainly of civil and political rights. In the 1970s and 1980s, the voices of prominent judges[8] and Afrikaner academics[9] were added to the call for a Bill of Rights. And in 1986 the Minister of Justice, Mr H.J. Coetsee, announced that he had requested the South African Law Commission[10] 'to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights as well as the role the courts play in connection with the above'. The government's sudden interest in a bill of rights, and especially its emphasis on *group rights*, met with considerable suspicion. It was feared that the idea of a bill of rights would be discredited by an attempt to use such a document to entrench white rule and privilege.

In 1989, the report of the South African Law Commission was published.[11] It contained, *inter alia*, the Commission's proposed Bill of Rights. To the surprise of many a liberal sceptic, the Working Paper turned out to be an honest attempt towards a truly liberal human rights document.[12] It recognizes, *inter alia*, that a Bill of Rights is incompatible with a social, legal and political system founded on racial discrimination. It emphasizes that a bill of rights must have 'unimpeachable

legitimacy'; in order to be 'accepted and trusted by a considerable majority of the population as a whole', it should not be 'merely cosmetic in character'; it should not 'protect the position of one group, for example the Whites'. All population groups must work together in preparing such a bill; thereafter, it should be legitimized through a referendum in which all the inhabitants of the country over a certain age have an equal vote. It is essential that Black people be given the vote.[13] Language, religious and cultural rights could best be protected as individual rights; so there is no need to offer groups special protection in a bill of rights. The Commission is of the opinion that socio-economic rights, insofar as these constitute obligations on the state, should not be protected in a bill of rights.

In his opening address to Parliament on 2 February 1990, State President de Klerk announced that the government had accepted the principle of individual rights in a Bill of Rights, as proposed by the Law Commission. Inevitably, this would also involve acceptance of the proposal that a new constitution be drawn up. Accordingly, he also announced that he had requested the Law Commission to investigate:

a 'The identification of the basic matters and institutions to be provided for in a future constitution for the Republic of South Africa with a view to the balanced protection of human rights.

b The identification of the main types or models of democratic constitutions that should be considered for a future South Africa.

c An analysis of the different ways of protecting the individual rights of all citizens, as well as the rights of collective units, associations, minorities and peoples in each such type of model.

d A discussion of the possible methods by which a future constitution can be safeguarded and guaranteed in a legitimate way.'[14]

As the idea of a bill of rights gained support among the white establishment, suspicions about a Bill of Rights arose in the ranks of the oppressed.[15] This left the *liberation movements* with two options: they could either insist that their first priority was the transfer of political and economic power, and that decisions on a bill of rights should only be taken after a democratic government had been put into place[16]; or they could join the call for a Bill of Rights as part of a constitutional settlement, showing that a Bill of Rights is not the sole intellectual property of the present establishment, but that, instead, the true aim and function of such a document, which is distorted in the establishment's version, could only be attained through an alternative understanding, which is rooted in the people's struggle for freedom and equality. The African National Congress (ANC) has clearly chosen the second option.

In January 1987, the ANC issued a statement in support of a justiciable Bill of Rights. This was followed in March 1988 by the adoption of the *Constitutional Guidelines for a Democratic South Africa*[17], which set out the general principles

upon which the constitution of a post-apartheid South Africa ought to be based. These principles were intended to be provisional directives and the basis for further debate. The document defined 'how the Bill of Rights would fit into the total constitutional picture, and more particularly, how it would relate to programmes of affirmative action'.[18] The Guidelines were based upon the Freedom Charter, which is called 'by far the most widely accepted programme for a post-apartheid country'; the Freedom Charter must now 'be converted from a vision of the future into a constitutional reality'.

It has often been debated whether the Freedom Charter constitutes a suitable basis for a South African Bill of Rights.[19] The Charter was adopted in 1955 at the Congress of the People in Kliptown, near Johannesburg. It was a response to grievances of the suppressed majority in South Africa, and is said to embody the hopes and aspirations of the South African people. In the preamble it is stated, *inter alia*, that 'South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people.' Supporters of the Freedom Charter claim that it is a truly South African document, enacted by the people, which lives in the hearts and minds of South Africans; it 'embodies the key elements of a Bill of Rights. It is a document that was born out of the struggle, responds directly to South African conditions, expresses the admirations of the oppressed people, and meets with internationally accepted criteria of a human rights programme.'[20] However, sceptics argue that the Charter is not acceptable to all South Africans, that it is more in the character of a political manifesto than a legal document, and that its provisions are vague, highly programmatic and unjusticiable.[21] Moreover, the document adheres to outdated economic policies, and openly advocates nationalization.[22]

In 1990, the so-called Draft Bill of Rights was released by the ANC Constitutional Committee.[23] The Draft Bill - which was also intended to be a working document for further discussion - draws on *and* goes beyond the Freedom Charter and Constitutional Guidelines. It seeks to give protection to first, second and third generation rights, and also contains special sections on worker's rights, gender rights, and the rights of disabled persons and children. Once again, the commitment to affirmative action is central to the document. In 1991, yet two other documents were issued by the ANC Constitutional Committee: 'Constitutional principles for a democratic South Africa' and 'The structure of a constitution for a democratic South Africa.'[24] In the same year, the National Party issued its constitutional proposals[25], which are based upon the principle of power-sharing. Later that year, the Law Commission's second report on human rights was published.[26] In this report the Commission reconsidered, inter alia, the question of second and third generation rights and group rights, and also considered the feasibility of providing special protection for women and children. And soon thereafter, the Commission's report on constitutional models was published.[27]

2.2 Ideological differences

2.2.1 Continuity and discontinuity

A Bill of Rights can either be *reactive*, or it may seek to preserve a certain *continuity* with the past. A reactive Bill of Rights owes its origin 'to a particular crisis in the history of the state, and ... entail(s) guarantees for the future against the laws and practices perceived to have been responsible for the crisis'.[28] The American Constitution is such a document: it reflects a response to the repressive conduct of British colonial rule. The fundamental rights enunciated in the German *Grundgesetz* were 'to a large extent dictated by the atrocities of the Third Reich and hold out the promise that history will not repeat itself in post-Nazi Germany'. The Namibian Constitution also reveals a strong anti-colonialist, anti-racist focus. On the other hand, the Bill of Rights in the Constitution of the Netherlands was not inspired by any particular social, cultural or political revolution but entails norms that have already become established in ... (its) legal tradition.

The South African liberation movements (or former liberation movements?) would like to see a complete breach with the status quo: as apartheid in all its forms should be eradicated, there may be no continuity between the 'terrible past' and a new democratic order.[29] A new constitution should be drafted by a constituent assembly, which will be democratically elected by the whole of the population. And in the meantime, the country should be governed by an interim government.

The government, on the other hand, has stressed the necessity of a certain degree of continuity between the old and the new. They have warned against the creation of a constitutional vacuum: a new constitution should be adopted in accordance with the provisions of the existing constitution. So, they initially rejected the ideas of an interim government and a constituent assembly: a constitution should rather be negotiated at an all-party conference, and should thereafter be promulgated by the existing tricameral Parliament.

At this stage, it is necessary to comment briefly on the nature of the process of change in South Africa. The current political process is not simply a matter of handing over the power to a majority government. 'There has not been a revolution in South Africa. This is going to be a *negotiated* settlement - that is, negotiated between the incumbent government and those aspiring towards sharing the power of the state for the first time. This explains the present government's emphasis on the fact that the negotiations are about power-sharing, not the unqualified transfer of power.'[30]

Recently, there has been greater convergence of opinion on a constituent assembly and an interim government. The government has accepted these principles; an interim constitution, which will be adopted in accordance with the present constitution, could solve the problem of a constitutional vacuum, and a

first phase interim government may soon be in place. However, the underlying tension between the principles of continuity and discontinuity still remains. Generally speaking, whites need to be reassured that 'civilized standards' will be maintained, and existing property arrangements respected under a new dispensation. Black people, on the other hand, demand a significant improvement in their material conditions: constitutional change should not be confined to the apparatuses of state, but should also extend to a fundamental restructuring of economic and social relations. The constitution should symbolize the eradication of apartheid in all its forms; it should represent a complete breach with past injustice.[31]

2.2.2 Drafting a constitution

A comparison between the constitutional documents of the ANC and the Law Commission reveals fundamental differences in their approaches to the problem of drafting a Bill of Rights. The Law Commission seeks to formulate provisions in terms of *sound legal principles*; a Bill of Rights is after all a legal document which must be interpreted and enforced by the courts. The Commission often criticizes provisions in the ANC charters for their lack of clarity, for a failure to lay down general principles, or for failing to distinguish between different categories of rights. The ANC has responded to such criticism by stressing that a Bill of Rights should be 'intelligible to all who can read it or hear it read'.[32] The ANC criticizes the approach of the 'think-tank movement', which selects 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 ... 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.'[33]

2.2.3 Freedom and equality

The principles of freedom and equality are central to any Bill of Rights. Freedom and equality are closely related; the one presupposes the other. But they are also in constant tension.[34]

In liberal thought, much stress is laid upon the principle of *freedom*. Freedom is interpreted negatively: it means freedom to live your own life with minimum interference from others. It presupposes the sanctity of the individual sphere. Individuals should be free to associate, to enter into a variety of relations with other individuals: to marry, to take part in economic enterprise, to acquire and

dispose of property, to belong to church organizations and social clubs; in short, to determine their own fate. Therefore, liberal theory insists upon a *separation between state and civil society*; there should be minimal state interference in that sphere where individuals are freely associating and interacting. Freedom, however, may never be the exclusive privilege of a ruling class: all people must be allowed to be free. This is where the principle of *equality* comes in: all individuals' interests must have equal protection. All people must be equal before the law; no-one should be discriminated against on unreasonable grounds (such as race, sex, religion or language).

But if all individuals' interests must have equal protection, the question inevitably arises 'whether in fact individual interests can be protected equally by the political mechanisms of liberal democracy, i.e. whether the latter creates an equal distribution of power'.[35] Or are massive inequalities rather perpetuated by the liberal emphasis on negative freedom and mere formal equality? Doesn't the principle of private autonomy (or freedom) itself require that the state has to intervene in other societal orders (the social, the economic, the cultural) in order to counter the distorting by-effects of the market economy? *Social democrats* have come to accept that a free civil society is not sufficient; in addition, civil society must be *democratized*. This has often resulted in the *politicization* of civil society (in the sense of increased state interference). But to what extent is individual freedom compatible with a politicized 'private sphere'?

In South Africa, liberty is frail indeed. South Africans have almost grown accustomed to human rights violations on a regular basis; this makes the danger all the more real of severe inroads into personal liberty by a future regime. Experience in Eastern Europe and Africa (including South Africa!) has shown that human rights violations are often justified in terms of economic and social programmes. Thus, the fear of many South Africans that a 'democratized' civil society will also mark the end of individual freedom. And that economic growth will be hampered to such an extent by programmes of massive redistribution, nationalization and affirmative action, that no-one will really be better off in the 'new', 'utopian' South Africa.

But no-one can ignore the gross material inequality in South Africa. 87 percent of the land is owned by a white minority of 13 percent of the population. The same 13 percent receive 65 percent of all income in South Africa. The history of South Africa has been characterized by the systematic and extensive deprivation of the basic rights and freedoms of the majority of the population (and this dates back much further than 1948, when apartheid was officially adopted). This included severe legal restrictions on the freedom of black people to compete in the trade and labour markets, inferior education, migrant labour, forced removals, and the racialization of property law. Today 'white' civil society is well organized and prosperous, while the civil society is still largely underdeveloped in the black realm.[36] The result is a situation where the mere removal of racial

restrictions may not be enough; a *fundamental restructuring of economic and social forces* is called for. This is not only in the interest of the deprived majority; it is also in the interest of long-term stability, and thus in the interest of those elites whose expertise and entrepreneurship are so vital to a healthy South African economy. Solutions will have to be found which recognize that the situation in South Africa is no zero-sum game; which recognize the need for economic growth *and* greater social justice, for freedom *and* equality.

2.2.4 Nation-building and cultural diversity

It is widely recognized that a more inclusive South African nationalism needs to be established; that the rivalry and factions of the past have to make way for cooperation and a common loyalty. However, experience in multi-ethnic societies has shown that the denial of cultural diversity (policies directed towards assimilation) often has precisely the opposite effect: a revival of ethnic factionalism which threatens political and social stability. Moreover, a 'permanent minority situation' may cause such minorities to regard democratic institutions as largely irrelevant and so they may resort to unconstitutional avenues. Most of the more prominent South African political parties accept the need to recognize and protect South Africa's cultural diversity. They differ, however, on the appropriate measures. The question of group and minority rights has become one of the major themes of the South African human rights debate. Many South Africans, however, believe that these concepts are synonymous with continued white privilege. The challenge is to find a constitutional model which avoids both a tyranny of the majority *and* a tyranny of a minority.

2.3 Areas of agreement

There is wide acceptance of the following principles:

- South Africa needs a Bill of Rights;
- such a document must be the product of negotiations, and must give expression to the needs, aspirations and values of all South Africans;
- it must be justiciable;
- it must protect the 'classic' civil liberties, procedural rights and political rights (including the right of all South Africans over a certain age to vote);
- it must outlaw discrimination on grounds of race, sex, origin, language, religion and any other unreasonable grounds.

2.4 Areas of disagreement

The following topics are still controversial:

- economic policy, property rights and affirmative action;
- second and third generation rights, especially economic and social rights;
- group and minority rights;
- the application of the Bill of Rights to private relations (including the question of 'private discrimination');
- the death penalty;
- which institutions should be responsible for the enforcement of the Bill of Rights.

3 Economic policy, affirmative action and private property

3.1 General

There is broad acceptance in South Africa of the following three principles:

- The South African economy needs to be *opened up*. The economic advancement of Blacks, in particular, has been severely hampered by racial and other restrictive practices.
- But it is clear that the mere formal abolition of restrictions and discriminatory measures will not be enough to secure real equality and to improve the lot of the economically and socially deprived; some form of *redistributive action* is needed to make up for past dispossession and discrimination.
- Such redistributive action must not be arbitrary: it must 'be governed by law, be subject to the principles of public interest, and be controlled by manifestly just procedures, that is, that both the criteria and the procedures be just'.[37]

There is no agreement, however, on what form of redistribution will be adequate. And what should the constitution provide in this regard? Should it be silent, and thus leave it to a future legislature to decide upon the proper form, scope and limits of such action? Should it contain a vague and general authorization of redistributive measures? Or should it lay down specific criteria in this regard?

3.2 Economic policy

It is accepted that a constitution is not intended to lay down a particular economic policy.[38] In South Africa, participants in the constitutional debate often accuse each other of attempting to entrench in a Bill of Rights policies that should best be left to the decisions of a future government. The ANC's insistence that a Bill of Rights be structured around a programme of affirmative action, and that it must impose a positive duty on the state to provide social services, is seen as an attempt to use the Bill of Rights debate to advocate a socialist economic policy. At the same time, proposals for the protection of free economic enterprise and private property are often seen as attempts to entrench a free market system, and to block any attempts to redress the inequalities caused by apartheid.[39] The following clause proposed by the South African Law Commission is said to be an attempt to entrench the economic policy of free enterprise[40]:

> 'Everyone has the right freely and on an equal footing to engage in economic enterprise, which right includes the capacity to establish, manage and maintain

commercial undertakings, to acquire property and procure means of production and to offer or accept employment against remuneration.'

The ANC's economic vision for South Africa is set out in broad terms in the Constitutional Guidelines. The state is assigned a central role in the economy: it 'shall ensure that the entire economy serves the interests and well-being of all sections of the population' (clause n); and 'shall have the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity' (cl. o). A mixed economy is foreseen, with a public sector, a private sector, a co-operative sector and a small-scale family sector (cl. q). The private sector 'shall be obliged to co-operate with the state in realising the objectives of the Freedom Charter in promoting social well-being' (cl. p). There shall be a duty on the state to support co-operative forms of economic enterprise, village industries and small-scale family activities (cl. r), and to 'promote the acquisition of managerial, technical and scientific skills among all sections of the population, especially the Blacks' (cl. s).

Article 11 of the ANC Draft Bill is titled 'The economy, land and property.' Subarticle 1 provides,

> 'Legislation on economic matters shall be guided by the principle of encouraging collaboration between the State and the private, co-operative and family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.'

3.3 Affirmative action

It is clear that the mere opening-up of opportunities (abolition of 'formal' discrimination) will not be enough to improve the fate of the economically and socially deprived. Positive action is required to redress past discrimination. Affirmative action (or positive discrimination) remains controversial, however.

The Law Commission has made a comparative study of affirmative action in the United States, India, Malaysia and Australia. Although it expresses reservations about the effectiveness of affirmative action[41], it does recognize the need for it. It may, however, never amount to reversed discrimination or retribution. Affirmative action programmes should be aimed towards equal opportunities for all; in order to achieve this, it may be necessary to spend more funds *per capita* on black education, black housing, etc. Provision for affirmative action is made in article 3 of the proposed Bill. Paragraph (a) of this article guarantees *equality before the law*, and prohibits discrimination by the state on grounds of 'race,

colour, sex, religion, ethnic origin, social class, birth, political or other views or disabilities or other national characteristics'. Paragraph (b) provides as follows: 'To this end the highest legislative body may by legislation of general force and effect introduce such programmes of affirmative action and vote such funds therefor as may reasonably be necessary to ensure that through *education and training, financing programmes and employment* all citizens have equal opportunities of developing and realizing their natural talents and potential to the full' (emphasis added).

According to Sachs, a South African Bill of Rights must be centred around affirmative action.[42] In the eyes of the ANC, programmes of affirmative action should not be confined to the fields of education, financing and employment, but should extend to *every aspect of South African society*, including the public service, the security sector, health, education, housing, land, and the public and private sectors of the economy.[43] Article 13 of the Draft Bill provides as follows:

1 'Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.

2 No provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article.'

The wording of this article creates the impression that an absolute power is to be conferred on the state and private bodies to adopt affirmative action programmes; other provisions in the Bill of Rights seem to be subordinate to such power. Such a formulation is dangerous: a court of law should be in a position to test affirmative action measures to the constitution, just like any other legislation or administrative action could be tested; this inevitably implies the weighing of conflicting interests. The Law Commission has been extremely critical of any attempt to 'misuse' the concept of affirmative action to justify the nationalization of land, or a redistribution of minerals, land and other assets.[44]

In addition to the authorization of affirmative action in article 13, article 14 also imposes a *positive duty* on the state to 'pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa' (a. 14.5). Such policies should include programmes 'aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service' (a. 14.6).

3.4 Property rights

Article 22 of the Law Commission's proposed Bill reads as follows[45]:
a 'Everyone has the right individually or jointly with others to be or to become the owner of private property or to have a real right in private property or to acquire such right or to be or to become entitled to any other right.
b Legislation may authorize the expropriation of any property or other right in the public interest and against *payment of just compensation, which in the event of a dispute shall be determined by a court of law.*'

There is an obligation on the part of the state to give compensation for the expropriation of property; *such obligation may not be limited.* The Commission rejects the approach of the ANC, which pays lip-service to the concept of property rights, but in article 11 of its Draft Bill authorizes nationalization in the guise of expropriation, without laying down objective criteria for the payment of compensation.[46]

4 The constitutional protection of economic and social rights

4.1 General

It has become the norm to distinguish between three different generations or categories of human rights. The first generation rights (or 'blue' rights) are the civil and political rights which have been established in the eighteenth century as a reaction against feudal and colonial absolutism. These rights are 'concerned with giving individuals freedom of action and choice, and freedom to participate in the political life of their community and society'. Second generation rights (or 'red' rights) are social, economic and cultural rights. They were said to result from the socialist revolutions. These include welfare rights, workers' rights, the right to food, education, etc. They impose positive obligations on a government to provide for certain needs. Third generation rights (or 'green' rights) include the right to a clean environment, the right to development and the rights of minorities. In South Africa, there is no agreement whether a Bill of Rights should only include first generation rights, or whether second and third generation rights should also be included.[47]

4.2 Arguments pro and contra the inclusion of economic and social rights in a Bill of Rights

4.2.1 Arguments contra

The main thrust of the arguments against the inclusion of economic and social rights in a Bill of Rights, is the liberal concern that this may render individual (classical-liberal) rights ineffective; that the preoccupation with economic and social goals contradicts the true aim and essence of a Bill of Rights, which is to protect the individual from executive and legislative excess. The following arguments are advanced to support this proposition:

a The first argument concerns the proper nature and meaning of a Bill of Rights, and the relation between, on the one hand, classical-liberal, individual or negative rights, and, on the other, socio-economic or positive rights. It is argued that a Bill of Rights is properly a shield, not a sword; that it is not intended to lay down a particular economic policy; that the very rationale behind a Bill of Rights is to protect individual rights and liberties from executive excess and from 'the will of the people however much or little acts done in the name of people reflect their real wishes'.[48] Thus, the inalienable rights and liberties of the individual are regarded as 'trumps' that can be played against collective goals and interests; if the latter are allowed to take precedence, it will inevitably result in the erosion

of individual rights and liberties.[49] Of course, the liberal position does not preclude social programmes aimed at, for example, the elimination of poverty; it does not even - unless it assumes the form of a very crude *laissez-faire* approach - deny the importance of redistributive measures in order to redress past injustices. However, it does function to *restrain* such measures; it does preclude the realisation of collective goals insofar as 'these goods can be obtained only through curbs on freedom of speech, detention without trial, torture, etcetera'.[50] It is pointed out that it is precisely this instrumentalist attitude towards law (the willingness to sacrifice individual liberty in favour of collective goals and interests) that characterizes totalitarian regimes; that a preoccupation with collective interests may result in 'a Stalinist policy adopted in the name of the people (which) massively breaches civil liberties without even succeeding in eliminating poverty. Such seems to have been the result of the policy of collectivization in Tanzania.'[51]

In short: it is argued that human freedom could only be realized by means of the *negative protection of individual rights*. The inclusion of (positive) economic and social rights is incompatible with this ideal: economic and social 'rights' embody collective interests or political goals; such interests/goals should properly be seen as limitations of civil and political rights. If civil and political rights were to be 'socialized' as a result of they being associated with and qualified by economic and social rights, liberty would lose.

b Economic and social rights are said to be *unrealizable* for two reasons. In the first place, it makes little or no sense to proclaim clauses such as 'everyone has the right to medical care' or 'everyone has the right to a job', as such 'rights' refer to scarce commodities; to make such promises is not only dishonest but also dangerous, as expectations are raised that, in light of economic realities, cannot possibly be met. This is the argument of *non-deliverability*.[52]

Secondly, it is argued that, because of their independence, the courts are the proper institutions to deal with the protection of human rights. The translation of human rights (which is somewhat of a vague concept) into legal entitlements is dependent upon the courts' power to invalidate legislation and administrative acts that violate these rights. This amounts to the negative protection of human rights. But economic and social rights require positive protection, which is something fundamentally different. The courts do not possess the means to force Parliament, for example, to adopt social security legislation. And besides, it is not proper for the courts to interfere in policy issues. This is the argument of *non-justiciability*.

4.2.2 Arguments pro

As has been the case in many other African countries, the idea of a Bill of Rights is viewed with suspicion by many South Africans.[53] It has often been argued that civil and political rights are largely irrelevant to African problems, that what is needed above all is an improvement in the material conditions of people's lives,

and that the entrenchment of civil and political rights is an obstacle to greater social justice: it is in fact an entrenchment of the inequalities caused by colonialist, racist and capitalist exploitation of the African people.[54] But I shall not deal here with the view that civil and political rights should enjoy no constitutional protection, or that economic and social programmes should take priority over such rights. Rather, I shall consider the view that economic and social rights should be protected *alongside* civil and political rights. The following arguments are advanced to support the latter proposition:

a First, the view that economic and social rights are incompatible with civil and political rights is challenged. For example, prof. Kader Asmal (who is a member of the ANC's Constitutional Committee) supports the 'human rights as trumps' approach; apparently, he sees no difficulty in reconciling such an approach with his insistence that economic and social rights be included in a Bill of Rights.[55] And, according to prof. Albie Sachs[56],

> 'Whatever approach is adopted, the commitment to the classic first generation rights must be total and unequivocal. The inclusion of social and economic rights should be seen as additional to, and in no way diminishing of, unconditionable respect for fundamental civil and political rights. The Bill of Rights should be unambiguous on this point. It could adapt a format that maintains the integrity of the classic rights, spelling out the mechanism for their enforcement in such a way that even the champions of the most classic formulations of human rights would be satisfied. What should be impermissible is the kind of argument recently attributed to the leader of one of the world's great nations, who explained that while his people are concerned with overcoming hunger and getting decent homes, they cannot be distracted by so-called "human rights". The rights are not so-called, and failure to respect them leads to much blood in the streets, as experience in his country shows. *The right to eat should never be seen as antagonistic to the right to be free.*'

It is also pointed out that both categories of rights are rooted in the concern for human dignity.[57] So, instead of concentrating on the differences, one should try to establish an integrated approach to human rights.

b '(T)he absolute distinction between sword and shield, between economic and political rights, has been blurred in international human rights jurisprudence and in the rulings of the world's most illustrious supreme courts including those of the USA, Canada and India. The US courts have shown how the enforcement of traditional civil rights may require the sword (for example the right to free legal aid) and the Indian Supreme Court has demonstrated that policy directives can be given effect so as to direct the state to protect basic survival needs without entering the terrain of pure politics.'[58]

c In order to be legitimate, a Bill of Rights should reflect indigenous values. The emphasis on individual rights and formal (procedural) justice, which is so

characteristic of Western Bills of Rights, is foreign to African beliefs and traditions.[59] In traditional African societies, political life centres around the group, not the individual. Although human rights are not known in such societies, human dignity is protected by collective means. The group as a whole is responsible for the physical well-being of its members. The protection of human dignity is not confined to the political sphere; the economic and social well-being of the members of the group is of particular importance. Something of this ethic has been preserved in African human rights thinking. The African Charter on Human Rights and People's Rights, which included first, second and third generation rights, was an attempt to represent an African conception of human rights. A South African Bill of Rights should draw upon African legal philosophy and experience.[60]

4.2.3 Summary

The case against the constitutional protection of economic and social rights relies upon moral, economical and legal-political grounds. The moral argument rests on the following assumptions:

1 There is a clear distinction between individual entitlements and collective interests.

2 This distinction is morally significant, as *freedom* requires that individual entitlements may not be sacrificed in favour of collective interests.

3 First generation rights are (at least for the most part) individual entitlements, whereas second and third generation rights usually embody collective interests or political goals.

The economical/legal-political arguments rest on the following assumptions:

1 There is a clear distinction between negative rights and positive rights.

2 *a* This distinction is economically significant, as the insistence upon the protection of positive rights (in the form of a constitutional guarantee of the actual enjoyment of such rights) ignores:
- the economic reality of a scarcity of resources, and/or
- the proven superiority of a free market model, as opposed to models of state intervention to fight such scarcity.

b This distinction is legally/ politically significant, as it goes beyond the proper scope and limits of the judicial function (and the courts are, after all, the proper guardians of a Bill of Rights) to interfere in matters of state policy.

3 Civil and political rights are negative rights, whereas economic and social rights are positive rights.

The moral argument is usually challenged by showing that, in order to be meaningful (and to extend to all layers of society, not just a privileged few), the protection of civil and political rights needs to be backed up by economic and

social rights. The liberal wrongly assumes that the state is the only threat to human freedom; his obsession with negative freedom and merely formal equality (coupled with his sharp distinction between the public and private spheres) is a denial of the fact that other societal orders (the economic, the social, the cultural) are themselves sources of repression that have to be checked.

Common to both the economic and legal-political arguments, are a sharp distinction between negative and positive rights, and a reduction of the distinction between civil-political rights and socio-economic rights in terms of the negative-positive dichotomy. In order to be able to establish an integrated approach to human rights, one needs to play down these dichotomies, and to show that they are not particularly helpful to a proper understanding of human rights. One also needs to address the problem of the enforcement of economic and social rights.

In the final analysis, the entire debate could be reduced to one central question: whether the inclusion of social and economic rights in a Bill of Rights would enhance (or, even, constitute a precondition for) the effective protection of the so-called first generation rights, or whether it would detract from (or even diminish) the protection of the latter.

4.3 Economic and social rights in South African charters

4.3.1 The South African Law Commission

In Working Paper 25, the Law Commission distinguished between those economic and social rights that can be protected negatively, and those which demand positive protection:

> 'The Commission is of the opinion that the basic socio-economic freedoms, capacities and competences should in fact be protected in a bill of rights and then in the same way as all the other rights, that is to say, in the negative sense that legislation and executive acts shall not infringe them. A bill of rights is not the place for enforcing positive obligations against the state.'

Consistent with this approach, the right to engage in economic intercourse is protected, as well as property rights.[61] The former provision has been criticized for attempting to entrench the economic policy of free enterprise; and the latter as it may be an obstacle to a redistribution of land.

In the Interim Report, the Commission reconsidered the issue of economic and social rights.

It recognizes that in the Third World, and especially in Africa, '(t)he primary needs of citizens ... are those of food, housing, work, training, medical services, etc. There is not much point in telling the poor, the jobless or the illiterate that they have freedom of speech if they are dying of hunger or exposure or a treatable

disease.'[62] The Commission's response to the arguments that the recognition of economic and social rights is socialist, demands great economic sacrifices from the 'haves' and calls for a completely new view of the role of the state, is that 'if we are in earnest about human rights and justice these sacrifices are precisely what is called for and that the stereotyped view of the state is outdated'.[63] It calls the argument that economic and social rights are not enforceable and therefore not rights 'formalistic': 'If there is a need for a *right* to be recognized, the law should find a procedure for its realisation, even if this means reforming the existing procedure.'[64] 'In this lies a wonderful challenge, an opportunity, for everyone in South Africa', and the Commission 'has tried to respond to this challenge in this report and in the bill'.[65] The Commission should be commended on this undogmatic approach.

However, it still 'avoids any attempt to make economic and social rights justiciable and enforceable in a positive way, since this will prove to be juridically futile and may plunge the country into a serious constitutional crisis. Apart from that, such attempts in the Constitution may make it very difficult for any future government to govern and to meet expectations if it lacks the necessary means. Furthermore, such attempts can undermine the credibility of the bill as a whole.'[66]

The Commission does recognize, however, that 'there are quite a number of second generation rights which indeed can and must, like the first generation rights, be protected in a "negative" way - so that they cannot be infringed by the state'.[67] These include employees' rights (a. 28 of the Draft Bill), employers' rights (a. 29) and social security rights (a. 27). *Employees' rights* include the right to 'work under safe, acceptable and hygienic conditions; to work reasonable hours; to have sufficient opportunity for rest, recreation and leave; to receive equal pay for equal work; to be protected in his or her physical and mental well-being; to be insured against unemployment and (against) accidents while on duty; to take part in collective bargaining and strikes and to withhold labour; and not to be subject to unfair labour practices'.[68]

The following *employers' rights* are recognized: 'to present labour opportunities and to employ persons in accordance with their needs and having regard to the workers' suitability, qualifications and level of training and competence; to require of the employee adequate production of acceptable quality; to lock out labour; to terminate the services of the employee in a lawful manner; freedom of choice to associate or form groups with others; to apply the principle of no work no pay in accordance with the law; to manage one's business; to make use of alternative labour; to negotiate and bargain collectively or individually; and to be protected from unfair labour practices, including intimidation and victimization'.[69]

Social security rights include: 'to be allowed to provide against the costs of illness, pregnancy, unemployment, unfitness for work, etc.; to provide for the maintenance of a reasonable standard of living, for education and training; and

to claim the available state assistance with regard to support and medical needs that may arise from physical or mental illness or disability where the individual himself or herself cannot meet these ends'.[70]

4.3.2 The African National Congress

In the introductory note to the ANC's Draft Bill of Rights, the organization's position on economic and social rights (and the relation of such rights to civil and political rights) is set out as follows[71]:

> 'In the first place, in keeping with the approach of most contemporary human rights documents, we do not feel that it is necessary to make a constitutional choice between having freedom or having bread. *We want freedom, and we want bread.* The document thus opts firmly and unequivocally for the fundamental rights and freedoms associated with a democratic society. Indeed, abhorrence of any form of arbitrary or oppressive behaviour is underlined in a whole series of articles which not only affirm classic civil, political and legal rights, but which assert the claims made in modern society for freedom of information, freedom from censorship, and freedom from surveillance and secret political files ....
>
> At the same time, the document gives considerable attention to social, economic and educational rights. There are some lawyers who argue that these rights should not appear in a Bill of Rights at all, since they are not enforceable through recourse to the courts. We do not agree. These rights are contained in nearly all contemporary human rights documents. In Europe, they appear in the Charter of Social Rights. In the Irish, Indian and Namibian Constitutions, they appear as Directives of State Policy. Our approach has been to identify certain needs as being *so basic as to constitute the foundation of human rights claims*, namely, the rights to *nutrition, education, health, shelter, employment and a minimum income*. In South Africa, it is not just a question of dealing with poverty such as you might find in any country, but with *responding to the social indignities and inequalities created as a direct result of State policies under apartheid*. The strategy proposed for achieving the realization of these rights is to acknowledge them as *basic human rights*, and require the State to devote maximum available resources to their progressive materialization.'

Article 10 of the Draft Bill is titled 'Social, educational, economic and welfare rights.' The article contains the following headings: 'General'; 'Freedom from hunger'; 'The right to shelter'; 'The right to education'; 'The right to health'; 'The right to work' and 'The right to a minimum income and welfare rights.' The article imposes positive obligations on the State to undertake,

> 'to the maximum of its available resources, ... appropriate legislative and executive

action in order to achieve the progressive realization of basic social, educational, economic and welfare rights for the whole population' (a. 10.2).

What is striking about these provisions, is their highly *programmatical* nature. For instance, '(i)n order to guarantee the right to shelter, the State shall ensure the introduction of minimum standards of nutrition throughout the country ...' (a. 10.7); '(t)he State shall take steps to ensure that energy, access to clean water and appropriate sewage and waste disposal are available to every home' (a. 10.9); 'the State shall establish a comprehensive national health service linking health workers, community organizations, State institutions, private medical schemes and individual medical practitioners so as to provide hygiene education, preventative medicine and health care delivery to all' (a. 10.12); 'the State shall introduce a scheme of family benefits and old age pensions financed from general revenue' (a. 10.14); 'the State shall, in collaboration where appropriate with private bodies, establish a system of national insurance based upon contributions by employers, employees and other interested persons' (a. 10.15). Of course, these provisions have been criticized for their lack of judicial enforceability.[72]

Another striking aspect is the *reactive* nature of these provisions.[73] The document directly addresses the legacies of apartheid; some clauses may indeed sound strange to the outsider who is not familiar with the laws and social practices of the apartheid system. For instance, '(i)n order to guarantee the right to shelter, the State shall, in collaboration with private bodies where appropriate, dismantle compounds, single-sex hostels and other forms of accommodation associated with the migrant labour system, and embark upon and encourage an extensive programme of house-building' (a. 10.8). Such provisions could be criticized for the failure to use general, more 'universal' formulations. On the other hand, one might argue that such provisions are truly indigenous (rooted in past South African experience), and may therefore add to the legitimacy of a South African Bill of Rights.[74]

Article 6 contains the rights of *workers*. The right of workers to form and join trade unions (a. 6.1), not to be victimized on account of membership of a union (a. 6.2), to organize and bargain collectively on any social, economic or other matter affecting workers' interests (a. 6.3), to peaceful picketing (a. 6.7) and to equal pay for equal work and equal access to employment (a. 6.11) are recognized. Trade unions shall be entitled to 'reasonable access to the premises of enterprises, to receive such information as may be reasonably necessary, and to deduct union subscriptions where necessary' (a. 6.4), to negotiate collective agreements (a. 6.5), to participate in lawful political activities (a. 6.8) and to form national federations and to affiliate to international federations (a. 6.9). A duty is imposed on employers to provide a safe, clean and dignified work environment, and to offer reasonable pay and holidays (a. 6.10). There is a duty on the state to 'make provision by way of legislation for compensation to be paid to workers

injured in the course of their employment and for benefits to be paid to unemployed or retired workers' (a. 6.12).

4.4 An integrated approach to human rights

4.4.1 A way out of the impasse?

The economic and social rights debate reveals considerable ideological differences among the various South African political parties and interest groups. Has the debate reached an impasse? And is there a way out of it? On the one hand, there are positive signs. The Law Commission's recognition of 'negative' socio-economic rights; its justification of its view that these rights should not be protected positively in terms of practical rather than ideological considerations; and the ANC's insistence that the inclusion of economic and social rights should be 'in no way diminishing of, unconditional respect for fundamental civil and political rights' already indicate a greater degree of convergence. However, the debate has become stuck on the 'rights-goals' and 'negative-positive' dichotomies. Furthermore, the debate increasingly reminds one of the question, 'Which came first, the chicken or the egg?' On the one hand, it is argued that a firm foundation of economic and social rights provides the only meaningful context for the protection of civil and political rights. On the other hand, it is argued that civil and political rights constitute the basic requirements for democratic rule (freedom of expression, association, etc.) and that it should be left to the mechanisms of democracy to ensure social justice.

The latter approach is supported by the Law Commission. There is much to say for such an approach. Indeed, one could argue that the majority of South Africans belong to the category of the 'less privileged', and that they could use their hard-won democratic rights (not only the right to vote, freedom of association and other civil and political rights, but also 'negative' economic and social rights, such as the right to join a trade union) to undo the injustices of the past, while government excesses could be checked and a 'tyranny of the majority' be prevented by the constitutional entrenchment of 'classical' rights and liberties, and other checks and balances. However, this argument falsely assumes the 'solidarity' of the underprivileged classes; it loses sight of the 'displacement strategies' often employed by governments, which result from 'a kind of "class compromise" among the powerful'; as the acquiescence and support of these 'strategic groups' (for example, big business and the trade unions) are crucial to economical and political stability, the effects of economic problems are passed on, or 'displaced' to vulnerable groups (for example, 'the young, the elderly, the sick, non-unionized, ..., and those in vulnerable areas, for example areas with "declining industries no longer central to the economy"'.[75]

In order to move beyond the impasse, two things need to be recognized:

i the two sets of rights are 'interactive, not sequential'[76];

ii the negative-positive distinction is not absolute.

4.4.2 The basic rights approach

The view of the ANC that there are certain rights (that is, economic and social rights) which are so basic as to constitute the foundation of human rights claims requires closer consideration. I shall argue that a basic rights approach may contribute considerably to our understanding of human rights. This theme, however, is not elaborated sufficiently by the ANC; in fact, many of the ANC's proposals are not warranted by such an approach. A basic rights approach may contribute to a more integrated human rights theory, as it stresses the inter-connectedness of different sets of human rights, and plays down the negative-positive dichotomy.

Basic rights, according to Shue[77], 'are everyone's minimum reasonable demands upon the rest of humanity'. They are

> 'a shield for the defenceless against at least some of the more devastating and more common of life's threats, which include, as we shall see, loss of security and loss of subsistence. Basic rights are a restraint upon economic and political forces that would otherwise be too strong to be resisted. They are social guarantees against actual and threatened deprivations of at least some basic needs. Basic rights are an attempt to give to the powerless a veto over some of the forces that would otherwise harm them the most.'[78]

Shue distinguishes two basic rights: the right to *physical security*, and the right to *subsistence*. The right to security is the right not to be subjected to murder, torture, mayhem, rape, or assault.

The right to subsistence is the right to unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care. These rights are so basic, that it is impossible for a person to exercise or enjoy any other right in the absence of physical security or subsistence.

Ramose, Maphala and Makhabane[79] have called for the constitutional recognition in South Africa of the right to subsistence as a legally enforceable right. I shall now consider the basic right to subsistence in the light of the objections against the constitutional protection of economic and social rights.[80]

a First, the moral objection that liberty will always lose if economic and social goals are allowed to take precedence over civil and political rights. Three observations must be made in this regard:

i A basic rights approach does not mean that civil and political rights are 'luxuries', the protection of which could be postponed until after the achievement

of greater social and economic justice.[81] Securing the right to subsistence is not a utopian ideal which provides justification for the encroachment of human rights; it is not an ideology in terms of which a particular human need or philosophical principle becomes so important that other human needs become largely irrelevant. Basic rights are 'the morality of the depths', not the morality of the heights. 'They specify the line beneath which no one is to be allowed to sink.'[82] Thus, they are rooted in the concern for human dignity, which underlies the concept of human rights.

ii Not all economic and social rights are basic rights, neither are basic rights limited to the category of economic and social rights. The right to physical security (which is regarded a first generation right) is just as basic as the right to subsistence. Thus, a basic rights approach does not warrant the hegemony of economic and social rights (as a category) over the category of civil and political rights (or vice versa).

iii The right to subsistence is not merely a lofty ideal: it is a *moral right*; indeed, it is so basic that it is inherent to all other rights[83]; other rights could not be enjoyed in the absence of subsistence. If any other rights are to be enjoyed, security and subsistence must be socially guaranteed. 'People who cannot provide for their own security and subsistence and who lack social guarantees for both are very weak, and possibly helpless, against any individual or institution in a position to deprive them of anything else they value by means of threatening their security or subsistence.'[84]

b Secondly, there is the economic argument that the inclusion of economic and social rights in a Bill of Rights ignores the reality of a scarcity of resources, and is a clear choice for socialism as an economic system. If we are serious about human rights protection, we would surely be prepared to pay the costs (economically) in order to secure (or try to secure) a dignified existence for all. And to argue that socialism is the only system which is compatible with social institutions which are to guarantee the right to subsistence, is to recognize the moral superiority of socialism - an honour it probably does not deserve.[85]

c I shall deal with the problem of justiciability (legal-political arguments) under 4.4.4 below.

4.4.3 The negative-positive dichotomy

Civil and political rights are said to be negative, whereas economic and social rights are positive. For instance, the right to freedom entails a *duty* on others *not to do* anything which is inconsistent with that freedom; thus it is a negative right. The right to food, on the other hand, entails a *duty* on the part of the government (or society) *to provide* food to the hungry; so it is a positive right. It is important to recognize the relativity of this distinction. Civil and political rights may also imply positive duties, whereas economic and social rights may also imply negative duties. The right to vote and the right to a fair trial are examples of civil and

political rights which also imply positive duties. It would be absurd to reason that the *right to vote* is adequately protected if the government merely refrains from preventing anyone to vote, but fails to establish (or maintain) the machinery needed for free and regular elections. The right to vote imposes a positive duty on the state: it has to hold regular elections; it has to maintain social institutions which have to see to it that law and order is upheld, and that freedom of expression and freedom to associate and organize along party-political lines are respected. This may cost vast amounts of money. But the right to vote is such a cornerstone of democracy, that no liberal democrat would suggest that this right may be sacrificed, or should not be included in a justiciable Bill of Rights, as it may impose too heavy a financial burden on the state.[86] Likewise, the *right to a fair trial* may require that an accused in a criminal case have legal representation. This may imply a positive duty on the part of the state to provide free representation in cases where the accused cannot afford to pay a lawyer.

Thus, it is misleading to speak of negative and positive rights, as if each right is either negative or positive. It would be more useful to explore the *various duties or obligations* corresponding with each right. According to Shue, three types of duties correlate with every basic right[87]:

- duties to avoid deprivation;
- duties to protect from deprivation;
- duties to aid the deprived.

Duties to *avoid* deprivation require merely that one respect someone else's basic rights; that one 'refrain from making an unnecessary gain for oneself by a means that is destructive for others'. This is the negative duty not to interfere with another's security or subsistence. Duties to *protect* from deprivation would be unnecessary, if everyone could be counted upon voluntarily to fulfil their duties to avoid deprivation. But since this is almost never the case, it is necessary that 'some individuals or institution have the duty of enforcing the duty to avoid'. This is normally the duty of the government of the threatened person's nation. Duties to *aid* require that resources be transferred to those who cannot provide for their own survival. The source of their deprivation (their inability to provide for their own survival) could either be the result of failures to fulfil duties to avoid deprivation and duties to protect from deprivation (people are to blame: some people have eliminated the last available means of subsistence for other people, and the government has failed to protect the victims), or it could be the result of natural forces (like an earthquake or a hurricane).

4.4.4 Enforcing economic and social rights

I shall now consider the problem of the justiciability (or non-justiciability) of economic and social rights (or at least those economic and social rights that

cannot be protected negatively). Four viewpoints could be distinguished in this regard:

a As such rights are non-justiciable, they should not be protected in the constitution.

b As such rights are non-justiciable, they should not be included in a Bill of Rights. However, in view of the strong insistence by, among others, the ANC, that such 'rights' be protected, they could be included in a separate chapter as principles of state policy, like in the constitutions of India, Namibia and Ireland. Although such a declaration will not be justiciable, it 'might direct the legislature in its law making function and could serve as an interpretive guide to the bill of rights'.[88]

c We should break 'out of the confines of the Anglo-Saxon legal tradition whereby rights are basically restricted to what is justiciable', and should explore extra-judicial means of enforcing economic and social rights.[89]

d The courts should find ways of protecting economic and social rights. A Bill of Rights should contain principles of social justice, and the courts should have the power to test legislation in the light of such principles.[90]

Thus, the protection of socio-economic rights or principles could either be entrusted to the courts, or to extra-judicial or political institutions (or a combination of both). *Political* enforcement means that it is the duty of the government (usually the legislature) to provide institutional guarantees for the protection of such rights. But what if the government fails to take adequate steps? In the first place, the electorate could use the economic power which accompanies the right to vote to pressurize the government of the day to meet the requirements put by economic rights. In addition, a constitutional economic committee could be introduced to see to it that the state budget gives due recognition to economic rights.[91] Free discussion of economic issues and freedom of information (and the 'penalty of publication') may also exert pressure on the government to provide adequate social guarantees for the protection of economic and social rights. But such political 'guarantees' will probably not be adequate to ensure an improvement in the material conditions of vulnerable and marginalized minorities.

The *courts* should play an active role in the protection of economic and social rights. Of course, this may require a new understanding of the role and functions of the judiciary. Will the South African jurisprudence be able to accommodate such a new understanding? Will the South African judiciary - which has often been accused of a strict positivistic approach - be able to adapt to this new role? To a certain extent, this will depend upon the nature and composition of the court(s) entrusted with the interpretation and application of a Bill of Rights. But once the similarities between different generations of human rights are recognized, it should become clear that economic and social rights may be protected in much the same way as civil and political rights. Moreover, it is not just economic

and social rights that may require the courts to adapt to a new role. The very introduction of a justiciable Bill of Rights will require a major paradigmatic shift: the law will reign supreme as the basic norm of South African law, and acts of Parliament will be subjected to scrutiny by the judiciary on the basis of the constitution and the Bill of Rights. The South African Law Commission has, for example, proposed that it should be left to the South African constitutional court to decide whether, and under what circumstances, the death penalty may be imposed. In order to make such a decision, it may be necessary to weigh considerations of state security, as well as social and psychological aspects, and to consider large volumes of empirical evidence.[92] If such extensive powers could be given to a court to decide on a matter so fundamental as the right to life, there should be no reason why the same court should not be able to make decisions on fundamental economic rights.

The following ways could be suggested to give legal effect to economic and social rights:

a Economic and social rights may be protected negatively: legislation (or administrative acts) may be struck down by the courts on the ground of incompatibility with socio-economic rights. This will be the case where the government has failed to fulfil its duty to *respect* the socio-economic rights of its subjects. This should not only apply to the 'negative' socio-economic rights recognized by the Law Commission, but also to those cases where government policies are the cause of economic deprivations which encroach upon the basic rights of subjects.

b Where (basic) economic and social rights have not been respected by third parties, the courts could prohibit such persons o go ahead with the economic activities that are the causes of deprivation, and thus extend the scope of socio-economic rights to the private sphere.

c Economic and social rights may be used as directives in the interpretation of statutes. Thus, 'gaps' in economic and social legislation may be filled.

d The courts could use economic and social rights, in combination with the right to equality, to make orders 'that certain legally organized benefits or services be granted to persons who were originally excluded from these by the unconstitutionally discriminatory law'.[93]

The constitutional protection of economic and social rights will not make economic and social injustice simply disappear. However, (especially if combined with a relaxation of the rules of standing), it could provide human rights activists with an important instrument in their struggle for greater equality.

5 Group rights versus individual rights

5.1 General

It has often been asserted that in a multi-ethnic society such as South Africa, the rights of groups rather than individuals need to be protected. The Conservative Party and other right-wing organizations reject the idea of a Bill of Rights, and have called instead for the recognition of the right of a *people* to self-determination. When the Minister of Justice announced in 1986 that he had requested the South African Law Commission to investigate the protection of group and individual rights, it was clear that the government was more interested in group than individual rights. Instead, the Law Commission concluded that so-called group rights could best be protected as individual rights. According to Dugard[94], there are signs that the government was dissatisfied with this approach. In his historic opening address to Parliament on 2 February 1990, President de Klerk explained the government's position as follows[95]:

> 'The Government accepts the principle of the recognition and protection of the fundamental individual rights which form the constitutional basis of most Western democracies. We acknowledge, too, that the most practical way of protecting those rights is vested in a declaration of rights justiciable by an independent judiciary.
>
> However, it is clear that a system for the protection of the *rights of individuals, minorities and national entities* has to form a well-rounded and balanced whole. South Africa has its own national composition, and our constitutional dispensation has to take this into account. The formal recognition of individual rights *does not mean that the problems of a heterogeneous population will simply disappear*. Any new constitution which disregards this reality will be inappropriate and even harmful.
>
> Naturally, the protection of collective, minority and national rights may not bring about an imbalance in respect of individual rights. It is neither the Government's policy nor its intention that any group - in whichever way it may be defined - shall be favoured over or in relation to any of the others.'

The Government's proposals for the protection of group rights have been outrightly rejected by the ANC. At the same time, however, the Freedom Charter contains a clause that 'All national groups shall have equal rights.'[96] Moreover, the African Charter is renowned for its emphasis on collective rights. African writers often reject the idea of 'group or minority rights', but regard the protection

of 'collective rights' as perfectly legitimate. The different usages of these terms are confusing. I shall briefly consider the different contexts in which they are used.

5.2 Equality, cultural identity, and the political protection of groups

5.2.1 In the first place, the term 'group right' may be used to designate the right not to be discriminated against on the ground of a particular group affiliation. This is the right to *equality*, or what Albie Sachs calls the 'right to be the same'[97]:

> 'The constitution must expressly and unequivocally guarantee the fundamental equality of all citizens, and establish mechanisms to make this guarantee a reality. The law must ensure that *in all spheres of public life* - education, health, work, entertainment and access to facilities - no one is discriminated against because of colour, language, gender or belief.
>
> In South Africa today, physiognomy is destiny; your skin colour determines what your rights and duties are and how and where they shall be exercised. From a legal point of view, therefore, the struggle against apartheid is precisely *a struggle against separateness and a struggle to be the same*.'

This right is sometimes called a group right, as group organizations may 'have a particular legitimacy or standing to assert rights on behalf of their members, which gives them certain advantages over individuals seeking redress for rights violations. They are the best bodies to seek affirmative action programs, initiate test-case litigation, handle educational programs, engage with the media, lobby governments, and choose spokespeople for the group.'[98] The group right, however, is simply the sum of the rights of the individual members of the group. The right to be the same is essentially an *individual right*: it is the right to be judged on individual criteria, and not for sharing some characteristics with other members of a group.

5.2.2 The right to be the same does not apply to all areas of life. If it did, there would have been no room for cultural diversity. According to Sachs[99],

> 'Sameness, however should not be equated with *identity*. It is worth repeating that sameness relates to one area of life, identity to another. Sameness refers to one's status as citizen, voter, litigant, scholar, patient, or employee. In this capacity, one's appearance, origin, and gender are totally irrelevant. Identity relates to personality, culture, tastes, beliefs, and ways of seeing and doing things. Here we struggle for the *right to be different*.

> The objective of non-racial democracy is not to create a society of identikit individuals, all looking the same, dressing in the same way, eating the same food, speaking the same language, voting in the same way, and doing the same dance steps to the same band (the so-called civilized person of earlier British assimilationist policy, who happened to be male, English-speaking, with a neat crease in his trousers, and a penchant for tomato sauce).
>
> Equality, or the sameness of political rights, does not mean homogeneity or cultural blandness. As feminists and others have pointed out, to be equal in a hegemonic culture means to take on the culture of your oppressors. Non-racial democracy presupposes just the opposite. Political equality becomes the foundation for cultural diversity. Once the problem of basic political rights is solved, cultural questions can be treated on their merits. Liberated from the blockages and perversions imposed by their association with domination and subordination, the different cultural streams in South Africa can flow cleanly and energetically together, watering the land for the benefit of all.
>
> The very concept of equality presupposes equal rights between those who are different. The aim is not to eliminate the different personal and cultural characteristics, not to get people to deny or to be ashamed of (nor to over-glorify) who they are, but to ensure that these differences are no longer used for purposes of exploitation, oppression, insult, or abuse.'

The right to be different could be protected as an *individual right*: it is the right of every individual to speak the language, practise the religion, wear the type of clothes and eat the type of food he prefers. The right to *freedom of association* is vital in this regard.

5.2.3 There is, however, a school of thought which insists that the right to cultural identity is the *right of a group* to (establish and) maintain a *collective identity*; it is the right to group survival. The individual right to belong to a particular group is meaningless unless the group's survival is protected. Douglas Sanders argues that both liberal and socialist states tend to favour assimilation: state policies assume the 'gradual reduction of cultural and linguistic differences as economic exchange increases, linking all peoples together. Natural differences will disappear as a result of natural historical processes.'[100] So, something else is needed, in addition to the recognition of the individual's right to associate freely. '(T)he leaders of cultural minorities often *look to the state for support*. They seek either *protection or autonomy* as the means to ensure that their collectivities can survive and develop.'[101] And this brings us to a third meaning (or usage) of the term 'group right': that of special political/constitutional measures to ensure the survival and development of a group. In South Africa, a whole range of proposals seeking to

grant special powers and/or varying degrees of autonomy to groups, have been put forward. All these proposals seem to be directed towards the same two ends: to prevent a tyranny of the majority (and a 'permanent minority situation') and to protect group identity. Time after time, however, such proposals have been criticized, or even outrightly rejected, by those who saw in it an attempt to preserve apartheid under a different guise. Moreover, there is the problem of *defining* the groups that need to be protected. In light of South Africa's past, any attempt to constitutionally define groups along racial or ethnic lines, will meet with very strong resistance.[102]

5.2.4 In its Interim Report, the Law Commission distinguished three divergent points of view regarding the problem of national unity and cultural diversity in South Africa[103]:

> *a* 'There are those who *reject* the idea of a national *unitary state* in which individual rights and minority rights are protected. They first want to see the right to self-determination of their people (e.g. the Afrikaner people) recognised; they want a territory of their own to be granted to them; only then will the question of the rights of individuals and minorities in that territory or state arise. This, for example, is the stand taken by the Conservative Party of South Africa, the official opposition in the white House of Assembly.
>
> *b* There are those who see this country as a national *unitary state* in which both individual rights and community rights will be protected. Among those who belong to this school of thought it is generally assumed that individual rights will be protected in a bill of rights, although there is as yet no finality as to which individual rights will be so protected. As regards the question of which community rights will be protected and in what way this will be done, there is no agreement either. The ruling National Party envisages an extensive system: group values, such as language, religion and culture, can be protected as individual rights in the bill of rights; political participation and the communities' say can be protected by constitutional systems of power sharing and checks and balances. The African National Congress, on the other hand, is averse from power sharing if it means that a minority group will be given disproportionate weight in the political process through, for example, a veto on legislation, but recognizes the protection of language, religion and culture in a bill of rights.
>
> *c* Lastly, there are those, for example the Pan Africanist Congress, who envisage a unitary state in which no rights will be entrenched; at most, a new government will, after a redistribution of wealth, be in a position to decide arbitrarily whether a bill of human rights is wanted. Falling in the same category (as far as human rights are concerned) are also parties and movements to the right of the white political spectrum which wish to retain the *status quo* of white domination and are opposing a bill of rights tooth and nail.'

5.3 Lingual, cultural and religious rights

5.3.1 The South African Law Commission

In Working Paper 25, the Commission considered it necessary to distinguish between group rights and other group values. Culture, religion and language constitute *group values* (or group interests), but should not be protected as *group rights*, since in South African law a group is not a legal persona which can enforce rights. It is considered adequate to protect such group values or interests as *individual rights*. Determining the content of the cultural, religious and linguistic values to be protected in a Bill of Rights, as well as the weighing of conflicting group and individual interests should be left to the courts, and not the legislature.

In the Interim Report, the Commission added that *instruction* through the medium of the mother tongue at school level should be protected as a fundamental right. At the same time, it should not be made compulsory for the pupil: a choice of media of instruction should be recognized. While full mother tongue education is not always practicable or economically possible, the state should not be in a position to decide arbitrarily whether it will be able to supply this need; it must be justiciable by the courts in accordance with the Bill.[104]

In the Report on Constitutional Models, the Commission also considered the various options regarding the language policy of a new South African state.[105] It considered the advantages and disadvantages of the different options regarding the official language or languages, but did not state its own preference. It recognized the principle of *freedom of language*: no language should be prohibited and there should be no discrimination on the ground of the use of a language. *Multi-lingualism* could also be guaranteed:

> 'serious attention should be given to making multi-lingualism a constitutional principle. By this is meant that the state should be bound not only to use the official language in the state-assisted media, for example television and radio, but, where there are several official languages, also to apply the principle of equal treatment and, *in addition*, to guarantee all other regional languages or mother tongues equal time and privileges - for example on a pro rata basis calculated according to the linguistic population numbers.'[106]

5.3.2 The African National Congress

Article 5 of the ANC Draft Bill guarantees the freedom of association, religion, culture and language. In the section on language rights, it is stated that the languages of South Africa are Sindebele, Sepedi, Sesotho, Siswatsi, Setswana, Afrikaans, English, Tsonga (Shangaan), Venda, Xhosa, and Zulu (a. 5.5). It imposes a duty on the state 'positively to further the development of these languages, especially in education, literature and the media, and to prevent the use of any language or languages for the purpose of domination or division' (a.

5.6), and to 'promote respect for all the languages spoken in South Africa' (a. 5.9). It recognizes that school education should 'wherever possible be offered in the language or languages of preference of the students or their parents' (a. 5.8). Recently, the ANC announced its language policy.[107] The proposed policy would strip English and Afrikaans of their status as South Africa's only official languages. None of the eleven South African languages would be regarded as official. The state would then be empowered to designate any of these languages 'to be used for defined purposes at the national level or in any region or area where it is widely used' (a. 5.7). Civil servants would also be required to be competent in the indigenous language spoken in their specific region.

5.4 Political group or minority rights

5.4.1 The South African Law Commission

The Commission considers the protection of minorities in South Africa essential, 'since to ignore the rights of minority groups should be to invite endless conflict'.[108] It is not appropriate, however, to include political group rights in a Bill of Rights, as this is not a legal issue, but a political one. Political minority rights should be protected in those sections of the constitution where the composition of the legislative and executive authority is dealt with.

In the Interim Report, the Commission considered the claim that the right of a people (for example the Afrikaner people) to *self-determination* should be recognized.[109] It examined, inter alia, the rights to partition and secession in the context of international law. It concluded that, at present, no South African group has a justified claim to *secession* under international law. The Afrikaners, for instance, do not have the right simply to secede (that is, withdraw unilaterally) and proclaim their own state. The other option is *partition*, which implies a negotiated settlement. An own state for Afrikaners could be negotiated, but it is unlikely that consensus will be reached in this regard. A possible compromise might be to grant special minority protection to certain groups, in order to counter their fear of domination by the majority.

The Commission also considered the possible *protection of groups in a unitary state*.[110] It examined minority protection in international treaties, and concluded that:

> 'the international treaties and measures adopted in many countries to protect minorities point to international acceptance of the legitimacy of such measures, provided, of course, that they are just and reasonable. We, too, do not regard such protection as anti-democratic or undemocratic. We also believe that such protection need not stand in the way of nation-building; on the contrary, if it is done in a fair and just manner, it can play a very positive role, particularly in the initial phase of nation-build-

ing, in persuading all ethnic groups to take part in the process of nation-building in a peaceful manner.'[111]

It emphasized that such minority protection may not amount to a perpetuation of white domination under another name.

In the Report on Constitutional Models, the Commission examined various models of group federation, consociation or power-sharing. It examined the techniques employed in the constitutions of various countries, and made a comparative study of the successes and failures of such constitutions.[112] From this, it drew three conclusions.[113] In the first place, 'power-sharing and accommodation *will fail unless all parties have the serious will and sustained commitment to make them work*'. Not even the most clever techniques and mechanisms could make them work if such will is absent. There is only one viable solution to South Africa's problems:

> 'Accept the fact of ethnic diversity but foster national loyalty. All citizens - and therefore also the majority - have to be convinced of the wisdom of this solution because this will at the same time engender and strengthen the will to accommodate and to share power.'

A second conclusion is that 'the constitution must *avoid rigidifying ethnic groupings* as such and making them the building blocks of the form of government'. Ethnic groups should be permitted to form political parties by free association, and political parties should be permitted to form alliances and coalitions. Thirdly, the Commission found that certain techniques have proved to be successful, whereas others usually fail. The following techniques are considered to be successful: the system of proportional representation; power-sharing in the cabinet; techniques to encourage cross-cutting loyalties, for instance the requirement that a party has to put up candidates from more than one group, joint committees and advisory councils; the formation of coalitions and alliances; and the free mandate system. On the other hand, *separate voters' rolls* based on race, ethnicity, language or faith, as well as *minority vetoes* are unsuccessful techniques, as they tend to freeze ethnic divisions. The Commission thus rejects the idea of separate racial or ethnic group representation in the legislature. It does consider the requirement of a *special majority* in respect of certain fundamental matters as a viable option.

Apart from models of group federation, consociation and power-sharing, the Commission also examined other forms of state, such as a unitary state with or without regionalism, a geographic federation and confederation. Another option would be a combination of these basic forms. According to the Commission, 'it is possible to apply power-sharing techniques in every legislative and executive body', regardless of what combinations are used.

5.4.2 The African National Congress

The ANC has repeatedly rejected the constitutional protection of political group rights. While it recognizes the need both to protect cultural diversity (in the form of lingual, cultural and religious rights in a Bill of Rights) and political pluralism (based upon freedom of expression, a multi-party system and basic democratic principles), it has argued that these two principles should not be conflated: political rights should not be based on cultural formation, as this is incompatible with the ideal of a non-racial democracy and would promote fragmentation and hostility between various ethnic groups.[114] Furthermore, political group rights (such as minority vetoes) may be misused by privileged minority groups to block any attempts to address vast economic and social inequalities:

> 'constitutional protection for group rights would perpetuate the status quo and would mean that the mass of the people would continue to be constitutionally trapped in poverty and remain as outsiders in the land of their birth'.[115]

The ANC recognizes the need, however, to allay white fears about their future. They seem willing to accept *temporary or interim measures* for the protection of the white minority; such measures should be seen as a means to the end of a truly non-racial democracy.[116] Mr Nelson Mandela recently suggested - on the lines of the Zimbabwean model - the idea of a guaranteed minimum number of seats for whites in parliament. In Zimbabwe, 20 percent of all parliamentary seats had been guaranteed to the white people (constituting only 3 percent of the population) for a period of ten years. The reaction of South African whites to this 'concession' by the ANC was not very positive, to put it mildly. The Zimbabwean model has been called 'probably the worst by which to address this sensitive issue'.[117] It seems that the realisation is growing among many white South Africans that their best possible protection lies in participation in politics along non-racial lines; that race or ethnicity should not be written into the constitution; and that the protection of minorities should be left to 'colour-blind' checks and balances.

5.4.3 The National Party

In recent times, the National Party has moved away from the idea of a racial federation or power-sharing along ethnic lines: it has committed itself to universal franchise and a common voters' roll. It has opened its membership to people of all races. Recent polls have shown that the National Party, together with its 'natural allies' (such as the Democratic Party and Inkatha Freedom Party) could win a considerable percentage of votes if elections on the basis of universal suffrage were to be held.[118]

It is significant that the National Party's constitutional proposals[119] contain no reference to racial or ethnic groups. It does, however, provide for an extensive system of power-sharing or government by consensus, extending to all levels and

branches of government: the legislature *and* executive; the central government *and* regional and local authorities. Central to the proposals are two principles: the *devolution of power* and the *sharing of state power between a number of political parties*. The proposed second house of parliament, which is required to give its approval to Bills passed by the first house (which is to be elected proportionally), is to be elected on the basis of regional representation. In each region any party polling a minimum percentage of the regional vote will be allocated the same number of seats. This clearly favours minority parties. At the executive level, the office of head of state or of government is to be vested in a collective body known as the presidency, which will consist of the leaders of the three largest parties in the first house (or of the largest five if the largest three do not command 50 percent of the vote). Decisions will be taken by consensus, and the chairmanship of the presidency will rotate among the members on an annual basis. A multi-party cabinet will be elected by the presidency. This will mean that the leader of the third largest party (or even the fifth largest party) will have an effective veto power over executive decisions.

It seems that the National Party proposals simply go too far: such a degree of consensus is required, that effective government may become impossible. Moreover, legitimate attempts to address economic and social inequalities could be so frustrated by a minority, that the constitution's legitimacy may be eroded. The National Party lost sight of one of the basic requirements for successful power-sharing (a requirement which has been emphasized by the Law Commission)[120]: that all parties must have the serious will to make it work. It probably over-estimates the potential of constitutional devices: constitutional mechanisms to prevent abuses of power will only prove lasting and effective insofar as the constitution enjoys popular legitimacy; cleverly formulated provisions are no substitute for the latter. Nevertheless, there are positive aspects to the proposals, one of them being that race and ethnicity are not written into the institutions of state. The principle that a single political party should not be allowed to dominate at all levels of government, also seems justified.

5.5 Freedom not to associate

In Working Paper 25, the Law Commission expressed the opinion that the right to free association also implies the right to 'disassociate' from those with whom one does not wish to associate. It recognized, however, that the right to free disassociation 'should not be used to justify discrimination on the grounds of race, colour, religion or language *where public funds are directly or indirectly involved*'.[121] For instance, according to this provision a school may decide to preserve its Afrikaner-identity, and thus not to allow children whose first language is not Afrikaans (or it could even discriminate against non-white children

whose first language is Afrikaans), but it may receive no public funds if it is thus discriminating.

This has been one of the most controversial aspects of the Commission's findings. It has been criticized on two grounds. First, it is said to permit 'privatized discrimination'; apartheid would be outlawed in the public sphere, but allowed to continue in the private sphere; it would no longer be administered by the state, but by private associations. This is regarded as incompatible with the cause of non-racialism in South Africa. A clause which guarantees the freedom to disassociate, in conjunction with a clause upholding freedom of contract, would enable racially exclusive private associations, which could draw upon the vast economic power of their members, acquired during the days of 'official white privilege', to 'reproduce all the present patterns of a racially divided society, even if under a different legal guise'.[122] Secondly, it is not justified to penalize organizations (by withholding public funds) for excluding persons on cultural, lingual and religious grounds. If the need to protect cultural, lingual and religious values is recognized, there is no reason why state funds may not be made available to help protect such values.[123]

In the Interim Report, the term 'freedom of disassociation' is no longer used: it is stated that individuals or groups may not be *debarred or restrained* from associating with other individuals or groups, nor may they be *compelled* to associate with other individuals or groups. The withholding of public funds is confined to cases of discrimination on grounds of *race or colour*.[124]

5.6 The protection of specified groups

5.6.1 The Law Commission

In Working Paper 25, the Commission considered the possibility of granting special protection to certain 'natural groups', such as women, children, the disabled and homosexuals. The Commission found that special protection was unnecessary; the non-discrimination clause in the Bill of Rights should simply be extended to these persons as well. Additional protection against third persons (e.g. employers) could be granted in a civil rights charter or civil rights legislation, as in the United States, but not in a Bill of Rights.[125]

In the Interim Report, however, the Commission did find it necessary to protect the needs of women, children, employees and employers. Women's rights are protected by a general prohibition on discrimination on the ground of sex (a. 3(a)); by the right to claim that a marriage entered into as monogamous shall be maintained as such (a. 19 dealing with family rights) and by the right that women may not be compelled to perform military service (a. 3(c)). Children's rights are protected in article 20. A duty is imposed upon the state to support indigent

children, to provide free medical care for such children, and to provide free state education up to the end of the primary school phase.

5.6.2 The African National Congress

In accordance with their view that a Bill of Rights should be 'constructed in layers', the ANC Draft Bill contains quite a number of provisions protecting specific groups: article 6 guarantees workers' rights, article 7 gender rights, article 8 the rights of disabled persons, and article 9 the rights of children. Equal rights for men and women in all areas of public and private life is guaranteed (a. 7.1); and discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation is outlawed (a. 7.2). Provision is made for positive action 'to overcome the disabilities and disadvantages suffered on account of past gender discrimination' (a. 7.3). A duty is imposed on educational institutions, the media, advertising and other social institutions to discourage sexual and other types of stereotyping (a. 7.5).[126]

5.7 Conclusion

Although the issues of political group rights and private discrimination are still controversial, there has recently been much greater convergence on the question of group versus individual rights. A future constitution will probably give the following protection to groups:

a The Bill of Rights will contain an anti-discrimination clause, which is to protect the right to be the same.

b Cultural, religious and linguistic values will be protected as individual rights in a Bill of Rights.

c The right to free association will be protected. Disassociation on grounds of race or ethnicity will probably not be permitted.

d Specified groups, such as women, children and employees, and possibly employers and disabled persons, will be granted special protection in the Bill of Rights.

e Political group rights will not be protected in the Bill of Rights. The composition of the legislature and, possibly, the executive, will probably display some features of power-sharing. It is unlikely that races or ethnic groups will have direct representation in parliament. Special majorities in respect of certain fundamental matters may be required. Other techniques that may be employed to protect minorities include proportional representation[127], regionalism, and an upper house of parliament which differs in composition from the lower house.

6 Conclusion

Much is expected of a new South African Constitution and especially a Bill of Rights - perhaps too much. The National Party proposals simply go too far in an attempt to counter majoritarianism - a constitution can never guarantee such extreme forms of power-sharing. Equally, a Bill of Rights which is intended primarily to frustrate the majority, will not have a lasting impact. The ANC, on the other hand, is too confident that they will form the first government under a new constitution - and their constitutional proposals are based on that assumption. Too much emphasis is laid on the importance of an *effective* government with wide powers, and too little on the *limitations* of government.

A Bill of Rights should never be regarded as a set of lofty ideals or political promises which has little to do with the harsh everyday reality. A contradiction between constitutional theory and constitutional reality is dangerous, as it may result in cynicism and a lack of legitimacy. In this regard, one should stear clear of two opposite dangers in the formulation of a Bill of Rights. On the one hand, a Bill of Rights which is too widely formulated, may come to be regarded as a mere 'wish list' that promises the unattainable. A too narrow approach, on the other hand, could result in a situation where the Bill of Rights is regarded as a 'bourgeois' document, which has little to offer to those who need protection the most.

A South African Bill of Rights should be many-sided: it should be aimed towards the eradication of apartheid in all its forms; at the same time, it should prevent new forms of domination. It should not only protect the 'classic' freedom rights, but should also contain second and third generation rights. The interconnectedness of (and the similarities between) the various categories of rights must be explored, in order to establish an integrated approach to human rights. Negative freedom and greater social justice (or equality) should not be seen as mutually exclusive, but as interactive principles. A Bill of Rights should not be antidemocratic. It should not entrench the privileged position of the white minority. But at the same time, it should give protection to minorities; it should allow for cultural and other forms of diversity.

Over the past few years, much has been said and published on a South African Bill of Rights. In many respects, prejudice and rigidity have made way for an open debate and greater consensus. However, deep-seated ideological differences continue to exist. The establishment of a real and common commitment to the principles of equality, freedom and non-domination is vital for the success of a South African Bill of Rights.

Notes

1 Greenberg *Legitimating the illegitimate* (1987) 1 proclaimed: 'Perhaps more than any other state or legal order, South Africa stands illegitimate and repressive before its own people.' See also Human Sciences Research Council Investigation into Intergroup Relations *Constitution and Politics* (1985); Van der Vyver 'State sponsored terror violence' 1988 *SA Journal on Human Rights* 55.

2 CODESA Declaration of Intent, reprinted in *United Nations Centre Against Apartheid Notes and Documents* 1/92 at 3-4. 17 of the 19 political parties participating in CODESA signed this document. It was not signed by the Bophutatswana Government and the Inkatha Freedom Party. The white Conservative Party, as well as the Pan Africanist Congress and AZAPO did not participate at 'CODESA 1'.

3 Asmal 'The discourse on human rights: are we speaking the same language?' (unpublished paper, ANC Conference on a Bill of Rights, 1991).

4 See Dugard *Human rights and the South African legal order* (1978) 34-36.

5 The Minister of Justice set out a number of reasons why the introduction of a Bill of Rights was not justified, see Coetsee 'Hoekom nie 'n verklaring van menseregte nie' 1984 *Tydskrif vir Regswetenskap* 5. The constitutional committee of the President's Council reasoned that 'a bill of rights emphasized individual rights and the "Afrikaner with his Calvinist background is more inclined to place the emphasis on the state and the maintenance of the state"', Dugard 'A bill of rights for South Africa?' (1990) 23 *Cornell International Law Journal* 441 at 447.

6 When Chief Justice Kotze exercised the constitutional testing power in the South African Republic in 1897 to invalidate legislation, President Kruger labelled the testing power 'a principle of the devil' introduced into paradise to test God's word. The Chief Justice was dismissed, see Dugard *Human rights* 21-24.

7 The term 'police state' is probably not exaggerated, see Dugard *Human rights* 30.

8 In 1979, Chief Justice Corbett, who was then a senior judge of appeal, voiced his support for a Bill of Rights, see Corbett 'Human rights: the road ahead' 1979 *SA Law Journal* 192.

9 One of the first South African university lawyers to do extensive research in the field of human rights was prof. Johan van der Vyver, who defended the idea of human rights from a reformed (Calvinist) perspective, cf. Van der Vyver *Die beskerming van menseregte in Suid-Afrika* (1975); 'The Bill of Rights issue' 1985 *Tydskrif vir Regswetenskap* 1.

10 The South African Law Commission was established by an Act of Parliament, and is empowered to 'make recommendations for the development, improvement, modernization or reform' of the law. It consists of seven members, drawn from the judiciary, the legal profession, law schools, the magistrate's courts and the Department of Justice. All members are appointed by the State President. It is chaired by a senior judge of appeal, Mr H.J.O. van Heerden. Mr Justice P.J.J. Olivier has been seconded from the bench to direct the work of the Commission. At the time of the preparation of Working Paper 25 (the first report on group and human rights) all members were white males. Since then, one black member has been appointed.

11 SA Law Commission Working Paper 25, Project 58: *Group and human rights*.

12 According to Van der Vyver 'The Law Commission's Provisional Report on group and human rights' 1989 *SA Journal on Human Rights* vi, '(i)f that was the government's intention (to perpetuate apartheid under the auspices of human rights ideology), its hopes have been dashed. Mr Justice Pierre Olivier, who conducted the research on behalf of the Law Commission, has produced an impressive scholarly report which reflects an honest attempt to come to grips with the real demands of human rights protection and to tackle the challenges of implementing a genuine Bill of Rights dispensation in our divided society.' See also Wiechers ''n Monument in die Suid-Afrikaanse regsontwikkeling: die werkstuk van die Suid-Afrikaanse Regskommissie oor groeps- en minderheidsregte' 1989 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 311.

13 Working Paper 482-483.

14 *Debates of Parliament* (2 February 1990) col 6.

15 According to Sachs *Protecting human rights in a new South Africa* (1990) 6, '(t)he 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.'

16 This seems to be the position taken by the Pan Africanist Congress, see 5.2.4 (c) below.

17 See Van der Vyver 'Comments on the Constitutional Guidelines of the African National Congress' 1989 *SA Journal on Human Rights* 133; Corder and Davis 'The Constitutional Guidelines of the African National Congress: a preliminary assessment' 1989 *SA Law Journal*.

18 Sachs *Protecting human rights* 37.

19 On the *Freedom Charter*, see Marcus *The Freedom Charter: a blueprint for a democratic South Africa* (1985); Suttner and Cronin *Thirty years of the Freedom Charter* (1986); Van der Westhuizen '"The people shall govern": enkele opmerkings oor die "Freedom Charter" as moontlike menseregte- handves' 1986 *De Jure* 372; A.J.G.M. Sanders 'The South African Freedom Charter' Hund (ed.) *Law and justice in South Africa* (1988) 222.

20 Sachs *Protecting human rights* 13. He adds, '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.'

21 Notably, provisions such as 'The land shall be shared among those who work it!', 'There shall be work and security!', 'The doors of learning and culture shall be opened!', and 'There shall be houses, security and comfort!'

22 Under the heading 'The people shall share in the country's wealth!' it is proclaimed, *inter alia*, that '(t)he national wealth of our country, the heritage of all South Africans, shall be restored to the people; (t)he mineral wealth beneath the soil, the banks and

monopoly industry shall be restored to the ownership of the people as a whole; (a)ll other industries and trade shall be controlled to assist the well-being of the people'.

23 ANC Constitutional Committee *A Bill of Rights for a new South Africa*. See Haysom 'Democracy, constitutionalism and the ANC's Bill of Rights for a new South Africa' 1991 *SA Journal on Human Rights* 102.

24 These two documents were published as the *Discussion document: constitutional principles and structures for a democratic South Africa*, see Olivier 'ANC constitutional proposals and state reaction' *SA International* (October 1991) 55.

25 *Constitutional rule in a participatory democracy The National Party's framework for a democratic South Africa*. See Chaskalson 'South African National Party's constitutional proposals' *United Nations Centre Against Apartheid Notes and Documents* no 20/1991. For a more sympathetic appraisal, see Schlemmer 'The National Party constitutional proposals - stable democracy or minority imperialism?' *SA International* (Oct 1991) 65, see also Couwenberg 'Onderhandelingen over een nieuw Zuid-Afrika' *Zuid-Afrika* (January 1992) 10.

26 SA Law Commission *Interim report on group and human rights*.

27 SA Law Commission *Report on constitutional models*.

28 Van der Vyver 'Constitutional options for post-apartheid South Africa'.

29 See Asmal 'Democracy and human rights: developing a South African human rights culture' (unpublished paper, Conference on Democracy in Post-Apartheid South Africa, University of Transkei, 1990) 1-3.

30 Erasmus 'Towards a new constitution: what are the issues?' 1991 *De Rebus*. According to Adam 'the old state has not been defeated in South Africa by the revolutionary forces .... The more self-sufficient minority regime in South Africa ... can prolong a violent stalemate almost indefinitely ... although it remains vulnerable to sanctions and economic isolation' - Adam 'Implications of Eastern Europe for South Africa - comparing transitions to democracy' Nurnberger (ed.) *A democratic vision for South Africa* (1991) 510 at 511.

31 Van der Vyver 'Comments on the Constitutional Guidelines of the African National Congress' 1989 *SA Journal on Human Rights* 133 at 138 thus proclaims: 'In view of the circumstances in South Africa that prompt the need for a new constitution, it is essential that political entrepreneurs should opt for a reactive response to the challenges of constitutional planning. Constitution-making ought to commence with an in-depth diagnosis of the causes of friction in the South African community. Which aspects of the South African social, economic, juridical and political institutions and practices are resented by the majority or a cross-section of the South African population? What is it that stimulates insurrection and violence in the country? Why has South Africa become a pariah in the international community? A constitution destined to introduce a truly new South Africa must address the basic sources of strife from which the need for a new dispensation derives.'

32 Sachs 'From the violable to the inviolable: a soft-nosed reply to hard-nosed criticism' 1991 *SA Journal on Human Rights* 98. 'A comparison of the sophisticated but almost unintelligible text proposed by the Law Commission shows the difference. We feel that in order to develop a rights culture which permeates the whole community, the language in which the rights are expressed should be immediately understandable' (99), see also Marcus and Davis 'Judicial review under an ANC government' 1991 *SA Journal on Human Rights* 93.

33 Sachs *Protecting human rights* 15-16.
34 See Couwenberg *Constitutionele ontwikkelingsmodellen* (1984) 28-30.
35 Held *Models of democracy* (1987) 71.
36 See Adam 515-516.
37 Sachs *Protecting human rights* 167.
38 Cf. the dictum in *Lochner v New York*, 198 US 45, 75 (1905), that 'a constitution is not intended to embody a particular economic theory'.
39 Sachs *Protecting human rights* 165 talks about 'the new ideologues' who try to load the constitution with free market principles: 'Once upon a time it used to be the dispossessed who were heavily ideological and the possessors who were flexible and pragmatic, at least so they claimed. Nowadays it is the property-owners who wish to submit society to pre-determined schemes, certain of their correctness as a matter of principle, and oblivious to evidence one way or the other. People who traditionally favoured the establishment of a precisely-defined economic framework in the constitution, now argue for an open constitution which leaves the issue of economic policy to the wishes of future electorates and the good sense of future governments. Persons who formerly opposed any reference to economic matters in the constitution, now wish to load the constitution with economic clauses. This group demands elaborate clauses in the constitution to protect private property, promote privatization, and entrench free market principles. In other words, after years of criticizing socialist countries for putting ideologically motivated programmes into their constitutions, and thereby removing the issues from public debate, they are now themselves planning to do just that, though from the opposite point of view.'
40 A.21 of the Bill proposed in the Interim Report. The wording of the article is almost identical to that of a.14 of the Bill proposed in Working Paper 25, for a criticism of the latter, see Dugard 459 and Du Plessis 'Glosses to the Working Paper of the South African Law Commission on Group and Human Rights with particular reference to the issue of group rights' 1989 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 442. According to Du Plessis, aa.14 and 15 (protecting the right to free economic intercourse and private property respectively) 'reveal a commitment to a rigid form of capitalism', and 'constitute an unjustifiable obstacle to a future government's freedom to choose and implement methods of socio-economic reform'.
41 On affirmative action in the United States, Thomas Sowell is quoted as follows: 'In fact, however, studies have found little or no effect from affirmative action in advancing ethnic minorities, in either incomes or occupations. ... The ineffective record of "affirmative action" policies is in sharp contrast with the record of "equal opportunity" laws in the years immediately preceding', Interim Report 7.92.
42 Sachs *Protecting human rights* 19-20.
43 Sachs *Protecting human rights* 171.
44 Interim Report 7.96.
45 Interim Report - emphasis added.
46 A.11 recognizes the right to property, including the right to acquire, own, or dispose of property (a.11.2). It authorizes the state to 'regulate the exploitation of natural resources, grant franchises and determine royalties, subject to payment of appropriate compensation in the event of interference with any lawfully vested interest' (a.11.4). It further provides:

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

47 Sachs *Protecting human rights* 144-145.

48 Brooks 'Albie Sachs on human rights in South Africa' 1990 *SA Journal on Human Rights* 25 at 30.

49 R *Taking right seriously* (1978). This conception of liberty has attracted much criticism from progressive scholars, Cassels J. 'Judicial activism and public interest litigation in India: attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 495-6, writes, for example, that '(a) purely formal understanding of liberty, wherein governmental action is portrayed as the primary enemy of human freedom, leads to the view that the only function of judicial review is to police those very forms of collective action which are necessary to redress inequality. Strategic considerations, including the composition and ideology of the judiciary, the costs of litigation, and the unequal distribution of legal resources militate against litigative strategies aimed at social change. The legalization of politics threatens to divert, manage, and contain the demands of social activists for a more humane social order.'

50 Brooks 30.

51 Brooks 30.

52 Carpenter 'The Namibian Constitution - ex Africa *a liquid novi* after all?' 1989/90 *SA Yearbook of International Law* 57 writes: 'Freedom from want and poverty is a praiseworthy ideal: as a constitutionally guaranteed right, it would place an intolerable strain on resources which are already limited.'

53 See 2.1 above.

54 See Howard 'The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from Sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* 466 for an extensive criticism of such theses; instead, the author argues that civil and political rights:

(a) 'are needed in order to implement reasonable development policies and to ensure equitable distribution of wealth, as well as economic growth'; (b) 'are needed in order to guarantee social and cultural rights'; and (c) 'are needed in and of themselves; that is, that even at the lowest levels of economic development, some people need and want individual freedom' (469).

55 Asmal 'Democracy and human rights'.

56 Sachs (1989) 21 *Columbia Human Rights Law Review* 13 at 24-25 (emphasis added). It is, however, not clear that everyone in the ANC shares this view. Adam 522 quotes Harry Gwala, a prominent figure in the ANC and South African Communist Party leadership, saying: 'The saying that the term "dictatorship of the proletariat" has been abused and therefore we must shy away from it sends shivers down our spine.'

57 Basson 'Economic rights: a focal point in the debate on human rights and labour relations in South Africa' 1989 *SA Public Law* 120.

58 Haysom 'Democracy, constitutionalism and the ANC's Bill of Rights for a new South Africa' 1991 *SA Journal on Human Rights* 103 at 107. See also ANC Constitutional Committee *A Bill of Rights in a new South Africa* (1990) viii.

59 According to A.J.G.M. Sanders 'The bill of rights issue: "Look at the rest of Africa!"' 1990 *SA Public Law* 185 at 190-191 this was the main reason for the failure of the African independence constitutions: 'Within a very short time and without prior study of the consequences, a completely new structure of government was introduced. In

the constitution-making process the people hardly played a role. The independence constitutions were neither formulated nor enacted by them. What took place was nothing short of a revolution, but one imported from abroad and inadequately supported by local beliefs and traditions. A legal heart transplant had been performed without the necessary precautions having been taken against organic rejection. Under the new constitutional model, executive and legislative powers had overnight become restricted by a bill of rights which the judiciary was expected to uphold, if need be in the face of the executive, the legislature, and existing laws. The bills of rights were of European design. They did not contain communitarian provisions; their main aim was to protect minority groups and private property.' According to Boshoff 'Geregtigheid en sosio-ekonomiese regte in Suid-Afrika' 1991 *Tydskrif vir Suid-Afrikaanse Reg* 446 at 460 the recognition of economic and social rights is indispensable to the legitimacy of a future Bill of Rights.

60 See Rautenbach 'Menseregte-aktes: 'n vergelykende oorsig' Van der Westhuizen and Viljoen (eds.) *A Bill of Rights for South Africa* (1988) 35 at 48-51; Beukes and Fourie 'Economic and social human rights: an exploratory survey' 1988 *Tydskrif vir Regswetenskap* 14; Boshoff 'Menseregte: 'n Afrika-perspektief' 1990 *Tydskrif vir Suid-Afrikaanse Reg* 697. The danger of too much emphasis on indigenous values, however, is that the violation of internationally accepted human rights norms may be justified in the name of cultural relativism.

61 Article 14 and 15 respectively, see 3.2 and 3.4 above.

62 Summary 13.

63 14.

64 14.

65 16.

66 19.

67 19.

68 19.

69 19-20.

70 19.

71 viii-ix (emphasis added).

72 SA Law Commission *Interim Report* 525-526?

73 Sachs 'Towards a Bill of Rights in a democratic South Africa' 1990 *SA Journal on Human Rights* 1 at 6-7 explains such reactive approach as follows: '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, the forced removals, the Group Areas legislation, the violence of the troops in the townships and of the security police in the cells. And 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.'

74 See 2.2.1 above.

75 Held *Political theory and the modern state* (1989) 149-150. Already, there is concern that a future dispensation might reflect a 'power pact' between NP and ANC elites. Despite the ANC's assertions that they represent the 'masses', they 'have made few

attempts to represent and integrate the denigrated and illiterate migrants and squatters' - Adam 523. It may be easy for a future government to ignore the needs and interests of such groups (those who have no voice).

76 Howard 469.

77 Shue *Basic rights Subsistence, affluence, and US foreign policy* (1980) 19.

78 Shue 18.

79 Ramose, Maphala and Makhabane 'In search of a workable and lasting constitutional change in South Africa' 1991 *Quest* (vol. v no.2) 5.

80 See 4.2.1 and 4.2.3 above.

81 See n 10 above.

82 Shue 18.

83 Shue 26-27.

84 Shue 29-30.

85 Shue 24 writes: 'It makes no difference whether the legally enforced system of property where a given person lives is private, state, communal, or one of the many more typical mixtures and variants. Under all systems of property people are prohibited from simply taking even what they need for survival. Whatever the property institutions and the economic system are, the question about rights to subsistence remains: if persons are forbidden by law from taking what they need to survive and they are unable within existing economic institutions and policies to provide for their own survival (and the survival of dependents for whose welfare they are responsible), are they entitled, as a last resort, to receive the essentials for survival from the remainder of humanity whose lives are not threatened?'

86 A.26 of the Bill proposed by the Law Commission (Interim Report) recognises the right of every citizen over the age of 18 years 'to exercise the vote on a basis of equality in accordance with the Constitution in respect of legislative and other institutions and other public offices *at regular and periodical elections* and at referendums' (emphasis added).

87 Shue 52, see also Alston 'International law and the right to food' Eide *et al. Food as a human right* (1984) 170; Van Hoof 'The legal nature of economic, social and cultural rights: a rebuttal of some traditional views' Netherlands Institute of Human Rights *The right to food: from soft to hard law* (1984) 25-27. Van Hoof distinguishes four layers of state obligation: an obligation to *respect*; an obligation to *protect*; an obligation to *ensure*; and an obligation to *promote*. The obligation to respect forbids the state itself to encroach upon recognized rights and freedoms. This obligation is purely negative; it is the obligation of non-interference. The obligation to protect goes further; it requires the state 'to take steps - through legislation or otherwise - which prevent or prohibit others (third persons) from violating recognized rights or freedoms'. The obligations to ensure and to promote are the so-called programmatic obligations. The obligation to ensure requires the government to 'actively create conditions aimed at the achievement of a certain result in the form of a (more) effective realization of recognized rights and freedoms'. The obligation to promote concerns 'more or less vaguely formulated goals, which can only be achieved progressively or in the long term'.

88 Dugard 'Bill of Rights' 461.

89 Sachs *Protecting human rights* 18. In connection with the right to health, for example, he calls for the creation of mechanisms such as 'sanitation control, safety measures,

inspection, a system of primary health care, and school-feeding, all with appropriate legal underpinning'.

90 Boshoff 'Geregtigheid' 460.

91 Basson 123.

92 Interim Report 7.34 -7.41.

93 Pieters 'Social fundamental rights in national constitutions' 1986 *SA Public Law* 68 at 74-75.

94 Dugard 451.

95 *Debates of Parliament* (2 February 1990) col 6 (emphasis added).

96 A.J.G.M. Sanders 'The Freedom Charter and ethnicity - towards a communitarian South African society' (1989) 33 *Journal of African Law* 105.

97 161 (emphasis added).

98 Sanders D. 'Collective rights' (1991) 13 *Human Rights Quarterly* 368 at 369.

99 161-162 (emphasis added).

100 371.

101 Sanders 370 (emphasis added).

102 The now repealed Population Registration Act with its racial classification system was one of the pillars of apartheid. Dugard 59 quotes Mr Arthur Suzman QC of the Johannesburg Bar on such classifications: '(a)ny attempt at race classification and therefore of race definition can at best be only an approximation, for no scientific system of race classification has as yet been devised by man. In the final analysis the legislature is attempting to define the indefinable.' There is also the moral dimension: individuals may experience any attempt to 'fix' their status in terms of one of official criteria as humiliating, and a denial of their freedom of association. To prevent this, there have been proposals for the classification of South Africans in different ethnic, cultural or language groups, with an additional 'South African' group. Any voter may choose to belong to the latter category, rather than one of the 'background groups'. Such an arrangement was adopted by the KwaZulu Natal Indaba: the second chamber of the proposed provincial legislature would consist, in equal numbers, of representatives of five groups: the African, Afrikaans, Asian, and English background groups, and the South African group.

103 Summary 26-27.

104 See the new a. 21(f), and the summary 36-37, see also the summary of the Report on Constitutional Models 42-43.

105 Chapter 11, see also the summary 37-50.

106 Summary of the Report on Constitutional Models 50.

107 'ANC announces its language policy' *The Star International Airmail Weekly* (19 February 1992) 3.

108 Working Paper 25 at 409; see also 387-388.

109 Summary 27-29.

110 See summary 30-37.

111 Summary 33.

112 Summary 67-82.

113 Summary 82-87.

114 Sachs 163.

115 Constitutional Guidelines.

116 'Temporary confidence-building measures based on acknowledgement of the current

divide would not be inconsistent with the goals of democracy; on the contrary, provided their short-lived character was clearly understood, and the goal of non-racial democracy always kept firmly in mind, they could be seen as positive in the South African context. A caretaker administration based *de facto*, to some extent, on group or so-called consociational forms of representation could be considered as one of many possible means for creating conditions for the introduction of full, non-racial democracy', Sachs 156.

117 'Minorities become central issue' *Focus on South Africa* (March 1992) 5.

118 According to prof. Laurence Schlemmer of the Human Sciences Research Council, the National Party and Democratic Party could win 32 percent, and the Inkatha Freedom Party 12 percent of the vote if snap elections were held - 'HSRC foresees "big-party cartel"' *The Star International Airmail Weekly* (6 May 1992) 11. These figures are probably exaggerated.

119 See note 25 above.

120 The National Party publicized its proposals after the Commission had already completed and approved its Report on Constitutional Models, but before the publication of the latter. Therefore, the NP proposals were not discussed and evaluated by the Commission.

121 Aa.16 and 17, see also 398.

122 Sachs 158; also see Dugard 457.

123 Wiechers 318-319.

124 The new a.17.

125 398-400.

126 See also Sachs 53-63.

127 In the CODESA Declaration of Intent, it was already agreed that '(i)n general the basic electoral system shall be that of proportional representation'.

About the author

Henk Botha (1966) took a degree of law at the University of Pretoria. He specializes in state and administrative law and wrote 'The political debate over a bill of rights for South Africa' during his visit as a guest researcher at the Netherlands Institute of International Relations 'Clingendael' during Spring of 1992.

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