The Pretoria bill of rights symposium

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In one of a series of articles on the law in South Africa the *Los Angeles Daily Journal* reported a few months ago that discussions of a bill of rights had increased significantly in political, legal and judicial circles and that proposals for a bill of rights were no longer confined to overt opposition groups.[1] The author cited as evidence the FCI charter, a recent speech by the judge-president of Natal and the intention of the "conservative Afrikaans-speaking University of Pretoria law school" to hold a conference on this topic later this year.

During the symposium on a bill of rights for South Africa, presented by the law faculty of the University of Pretoria, under the auspices of the Society of University Teachers of Law, which took place on 1 and 2 May, it became quite clear that a bill of rights was still a controversial topic albeit for somewhat different reasons than before, that attitudes towards human rights had indeed changed and that liberal and democratic Western values were not the exclusive intellectual property of specific cultural groups and political parties. Furthermore, at least a part of the black population viewed such values and ideals with some suspicion and cynicism, calling instead for an entirely new social and economic order.

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As is generally known the present South African constitution is without an entrenched bill of rights, being based on the sovereignty of parliament. The judiciary does not have the power to proscribe legislative violations of human rights. The government has for many years been unenthusiastic about the concept of individual human rights and has completely rejected the idea of a bill of rights. Just prior to the Pretoria symposium, however, the Minister of Justice announced that he had instructed the South African Law Commission to investigate the issue, with particular attention to group rights and the Minister of Constitutional Development and Planning was reported to have said that such a bill could form part of negotiations on powersharing and that it could be a means of protecting minority interests.[2]

The symposium can justifiably be described as of considerable historical, political and legal significance. More than two hundred prominent lawyers from various parts of the country, representing all the branches of the legal profession and a very wide spectrum of political opinions, gathered to discuss a bill of rights as a possible means to protect human rights in a troubled and divided country. A noteworthy number of judges attended, as did members of the law commission and the President's council, together with representatives of black lawyers' organizations and law students.[3]

To summarize and analyze a full and hectic two-day programme on a controversial and multi-faceted topic, is a perilous task. Despite the author's attempt at objectivity, misconception or subjective interpretation is bound to be evident in the following account. Publication of the full proceedings will present a more complete and accurate picture.[4]

Opening address

In his opening address, former judge of appeal G P C Kotzé identified respects in which human rights are denied in this country. He pointed out that the political order had always been based on racial discrimination and that, despite commendable attempts to break with the past, a solution of the country's problems is not yet in sight. The current constitution does not measure up to the standards of democracy and political freedom, inter alia because of the existence of three racially separated chambers. In the field of security legislation vast powers of detention still remain vested in the minister and are sometimes applied in a very harsh and wrongful manner. Serious consideration should be given to further constitutional change, which should also embrace a bill of rights, enforced by a more powerful appellate division of the supreme court.

Philosophical perspective and changing attitudes

Lourens du Plessis provided a philosophical, theoretical and religious foundation for the concept of human rights, exposing the fallacy and racist nature of many objections that had been raised in the past.[5] He distinguished three main categories of rights (liberty, equality and life) which should be protected in a bill of rights. Du Plessis also referred to the view of some of those to the radical left, who argue that liberation should first take place, whereafter a bill of rights would no longer be necessary, because "comrades" would all protect one another sufficiently. He described this view as naïve in that it denies the well-known fact that the individual will always need protection against the State. An effective bill of rights would also reduce the liberation struggle to a mere civil rights campaign. During a panel discussion, Durban advocate and (until recently) UDF executive member, Zac Yacoob, argued that the struggle was indeed one for liberation and not merely for civil rights.

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Changing attitudes towards human rights were dealt with in a paper by John Dugard,[6] who emphasized the urgency of the situation. He called for the introduction, within two or three years and from a position of strength, of a "modest" bill of rights, as an interim strategy. He stated that the ideal should be a bill of rights guaranteeing a universal franchise and securing economic and

social rights enacted by a fully representative assembly of the people, as part of a new political order.
Ignus Rautenbach presented a comparative analysis of a number of legal systems and concluded that very few modern constitutions do not contain a bill of rights in some form. A fact which did not require discussion was that a new South African constitutional dispensation should and would entail the entrenchment of human rights. However, expectations that a bill of rights would solve or avoid conflict within the State had not been fulfilled in

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many countries.[7] He quoted President Leopold Senghor, stating, in 1979, that Africans should neither copy American and European concepts, nor strive for originality merely for the sake of originality, but rather show imagination and efficiency, bearing in mind the values of civilization and the real needs of Africa.

Practical workings

Mr Justice John Didcott referred to the constitution of the United States in particular.[8] He pleaded for an accurate and legally enforced bill of rights, instead of a mere declaration of intent. He maintained that the ordinary high courts of the country, rather than a specialized constitutional court deciding only "political" matters called for by others, should enforce such a bill. He dealt with several of the provisions of the Freedom Charter, pointing out that not all its lofty ideals and socio-economic programmes could be effectively enforced by the courts of a country. Like several other speakers, he postulated a new constitutional dispensation and a new democratic South Africa.
Dion Basson examined the role of the judiciary in the application and enforcement of a bill of rights,[9] arguing that judges frequently had to choose between certain alternatives, thereby actually creating law. Such choice was necessarily based on certain value considerations and recently published authoritative studies indicated that the judiciary generally delivered executive-minded decisions in conflicts between individuals and the governing authority. He recommended a number of solutions in order to secure an activist judiciary, willing to protect human rights and which would retain or restore confidence in the legal system. These included the appointment of judges from different backgrounds and on the basis of merit and the rejection of the positivist theory of law according to which judges merely apply the commands of parliament in a mechanical manner, in favour of a legal theory which requires the application of the true legal values inherent in the legal system when exercising judicial choices.
"Cardinal constitutional and statutory obstacles to the introduction of a justifiable bill of rights" was the topic of the paper delivered by George Devenish, while Dawid van Wyk measured the government's official pronouncements on human rights and freedom against the norms contained in a typical bill of rights, with reference to a random selection of speeches by the State President and senior cabinet ministers.[10] He found that the government was conversant with, and prepared to express itself in, typical human rights terminology, but that no actual system or structure to protect human rights accompanied this rhetoric. Van Wyk submitted that the government had nothing to lose and everything to gain by formally associating itself with a bill of rights, thereby putting its money where its mouth is.

No easy path

Presenting the last formal paper at the symposium,[11] Mr Justice L W H Ackermann expressed his belief that a bill of rights, in the context of a rigid constitution with a review-empowered supreme court, was the only means of protecting the human rights of all in a diverse society and the only path out of the present dilemma. The legal, economic and social implications of a genuine commitment to such a course should be realized, however, because mere constitution modelling or an armchair bill could be extremely dangerous at this juncture. After dealing with examples from the American experience, he emphasized that segregated systems of education were not compatible with a bill of rights, founded on universally accepted human rights norms. He also pointed out that neither the constitution nor statute guarantees the right to legal representation of the accused in a criminal trial. He pleaded for an unreserved commitment to adequate legal aid and to the drastic and innovative transformation of our locus standi doctrine to enable impoverished, disabled or socially and economically deprived persons or classes of persons to approach the courts for judicial redress. He made it clear that there is no cheap, easy or painless path to a bill of rights which will ensure justice for all.

Main streams of thought

During both panel and open discussions several interesting and important points were raised. Very few, if any, of the traditional ideological and religious objections to the basic concepts of equality and individual rights were heard.[12] Participants evidently realized that it is already very late for a discussion of this nature. They were reminded of the early warnings that a bill of rights and anti-discrimination laws would become popular only if the white population came to see itself as a political minority, but that the majority, raised on the apartheid legal order, might by then find such a system inexpedient[13] and that it might be too late to negotiate a bill of rights once power structures are changing.[14]
Several black speakers expressed severe doubts about the introduction of a bill of rights. A serious lack of confidence in the courts and the legal system of the country, after years of enforcement of apartheid laws and harsh security legislation, was evident. The constitutional protection of human rights is no longer simply accepted as an aid in the struggle against discrimination. In fact, it is seen by some as a transparent device to secure white political power, a veto or a means to preserve minority rights and exclusive white privileges. The legitimacy of the present constitutional dispensation was challenged and subsequently too the value of reform based upon it.[15] A bill of rights introduced in such a situation, would tend to lend credibility to the system and could even present an obstacle to real change towards a fully democratic society. The prevailing political and socio-economic order necessitates the violation of human rights and any effort to introduce a bill of rights before radical political, social and economic change had taken place, would be considered premature.[16] What the man in the street needs is improved human relations, rather than a sophisticated bill of rights drafted by lawyers, was also argued.[17] A different view was expressed by Prof Charles Dlamini of Zululand, who regarded a bill of rights as necessary for the protection of individuals of all races and groups.

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Several white speakers too repeatedly exposed major flaws in the present constitution. They pointed out that a credible bill of rights is incompatible with existing discriminatory laws and draconian aspects of security legislation, such as detention without trial. Such measures would therefore have to be repealed, be declared unconstitutional in terms of the bill, or simply fall into disuse. Marinus Wiechers, in particular, viewed a bill of rights as a yardstick against which State policies and practices could be

measured, emphasizing that the protection of human rights is a necessity for any State.

Three options

Three main options emerged concerning the question of how and when a bill of rights should be introduced. The most "radical" of these entails that a bill of rights should result from the freedom struggle or process of political change, that it should be negotiated by all, as part of the process of political bargaining and that it should reflect the real needs of society. A bill introduced unilaterally, before this stage has actually been reached, would run the risk of being viewed as a tool to entrench the power of the ruling class. It might not work and thus discredit the entire concept. One of the arguments against this option, was that there is not enough time available to postpone the issue indefinitely, until all relevant parties are willing and in a position to engage in serious negotiations, or until events have otherwise run their full course.

The immediate and unilateral introduction of a completely liberal bill of rights was put forward as another possibility. Such a bill would effectively destroy the present apartheid-based political dispensation and would thus amount to such a major departure from present government policy, that it could indeed be regarded as revolutionary.[18] Although imposed unilaterally, the bill and the courts applying it could then "prove themselves" and so gain acceptance and confidence as the tool with which apartheid was destroyed. Socio-economic conditions and the likely unwillingness of the government to "go all the way" were, however, also pointed out.

As a third option, the introduction of a modest or limited bill of rights as soon as possible as a starting point and an interim strategy, was called for.[19] The courts would be able to do away with objectionable laws and a climate and legal framework for negotiation could be created. From such negotiation involving all relevant parties, including the government and the ANC, a legitimate full bill of rights, enjoying the confidence of the majority, would emerge. One point of criticism against this option was that it could be dangerous, as it would highlight the absence of those fundamental rights still denied. If freedom of speech and association were allowed, these would be used to demand full rights. If such a bill failed to live up to expectations, serious harm could be done.[20]

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Group rights: socialism

Concerning the nature and contents of a bill, the Freedom Charter adopted by the ANC in the 1950's and by the UDF, the FCI charter, the American constitution and the German model were referred to. The conflict between capitalism and socialism and the possible redistribution of wealth emerged as important points of contention particularly concerning the question of whether or not private ownership should be protected as a basic right.

The apparent tension between individual and group rights received considerable attention. The granting of legally enforceable rights to racial or ethnic groups defined by statute was said to be neither morally sound nor theoretically viable. Members of groups could be effectively protected by guaranteeing their individual rights, including the right to associate freely. Voluntary associations, religious and cultural organizations could possibly be protected, so it was argued. The fact that the Freedom Charter mentions group and cultural interests was also referred to in this regard. Individual rights were clearly regarded as the basic or primary requisite.

Some concluding remarks

From the above and other opinions expressed, a few (possibly rather subjective) concluding remarks are offered in brief:

The general idea of a bill of rights received considerable support. Strong differences on crucial issues were evident. However, a noteworthy measure of consensus, reconciliation, or appreciation of differing points of view seemed to have resulted from the frank and open discussions. Some preconceptions, misconceptions and suspicions concerning the concept itself and the motives or aspirations of those supporting it, may have been partly broken down and agreement may, in fact, be possible after all.[21] A bill of rights could guarantee the necessary protection of basic individual rights and therefore of human dignity. It could well be a means to achieve a just society. For lawyers, it might even by our last hope. The matter is extremely urgent, but it is delicate and complicated and ought not to be over-simplified. Responsibility and care are required and mere imitation should be avoided. Although the bill of rights idea cannot be separated from the political debate, it should not be viewed as a possible cure-all or instant solution to all the country's political, social and economic problems. It might represent one small part of a solution, but it is no magic formula for constitutional perfection. Should it be hijacked for such a purpose by politicians, or by others with political ambitions, it is bound to become just one more of the many now discredited and ill-fated political slogans that have come and gone in this country. The possible risks attached to the introduction of a bill of rights should be judged not only against its obvious potential advantages, but also against the unhappy status quo and the alternatives. Naturally no constitution is worth the paper it is written on in the face of total anarchy or a ruthless dictatorship and responsible government is necessary. However, a democratic tradition is not easy to break down. Obviously an independent, strong and courageous judiciary is absolutely essential.

Obedience to the law of the land should be the result of respect for the just and moral nature of such law and not merely of brute force. A bill of rights could restore faith in the legal order. If it embodies generally accepted basic values, it could be a strong unifying factor in a deeply divided society. The improvement of the external image of the legal system could be a secondary advantage, but cosmetic change must not be an aim.

It is extremely important that a bill of rights is accepted and trusted by the population at large. Strong emotions and serious misgivings about it can therefore not be ignored. Realism must also prevail. The now-privileged will have to sacrifice those privileges which are based on institutionalized inequality and injustice.[22] A bill aimed at the protection of the political power of a minority, will not work. Those eagerly awaiting liberation, on the other hand, should realize that the individual, whether belonging to a majority or minority group, is always in need of protection against the awesome power of the State. Blacks must try to look past the, what they understandably consider, suspect, motives of whites and whites should no longer hesitate to have a good look at the Freedom Charter. It could serve as a basis for negotiation.

The questions concerning private ownership and the desired redistribution of wealth cannot be avoided. A bill of rights protecting the status quo and preventing any redistribution is unlikely to find general acceptance, since it will be regarded as an instrument of power in the hands of those currently in power.[23] Naturally such a bill must guarantee equality before the law. Whether that will suffice, is uncertain since equal opportunities cannot be achieved easily after a long history of inequality and restriction incompatible with real free enterprise. Some form of redistribution is thus bound to be called for. There is certainly more than one possibility available. Perhaps a bill of rights should avoid trying

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to regulate this issue in great detail, leaving it to be resolved around the negotiation table in the light of economic and social realities. It should rather concentrate on basic universal values, which are likely to be supported by all reasonable people and are thus likely to unite, rather than divide.

Finally, a remark made by Mr Justice Johann Kriegler in his closing speech deserves emphasis: the law has an essential conciliatory role to play in individual and group conflicts. The suggestion that the bill of rights debate is misplaced amongst lawyers, that such issues are to be decided by politicians and that the law should be totally divorced from the political sphere, is a fallacy. Lawyers do have a very definite responsibility and should strive relentlessly toward peace, reason and justice, instead of just waiting for Armageddon.

Footnotes

[1] Kenneth Jost "Demand increases for a bill of rights in South Africa" 1986-01-24.

[2] *Rapport* 1986-04-27 and 1986-05-28.

[3] Papers were presented by Proff L M du Plessis (Potchefstroom), J Dugard (Wits), I Rautenbach (RAU), D Basson (Pretoria), D van Wyk (Unisa) and G Devenish (UNIBO) and by Judges J M Didcott of the Natal bench and L W H Ackermann of the Transvaal bench. During panel discussions Dr H Corder (Stellenbosch), Prof D M Davis (UCT), Prof S C Jacobs (Potchefstroom), Mr W C Malan MP, Mr M S Motshekga and Prof M Wiechers (Unisa), Prof L Schlemmer (Natal), Mr Z Yacoob (Durban bar), Proff J van der Westhuizen and M P Vorster (Pretoria), Mr A Chaskalson SC (Legal Resources Centre), Mr G M Pitje (Black Lawyers' Association) and Mr E D Moseneke (Pretoria bar) shared the stage. The president of the Association of Law Societies, Mr R B Cleaver, was actively involved as a chairman, as were Mr Justice P J J Olivier and Mr Justice J C Kriegler.

[4] The organizers of the symposium intend to publish the full proceedings in a volume. Only a very brief report is presented in this journal, as requested by the editor. Justice cannot possibly be done to the excellent papers and eloquent presentations of all the distinguished speakers.

[5] "Filosofiese perspektief."

[6] "Changing attitudes towards a bill of rights."

[7] "'n Regsvergelykende oorsig." Other speakers, such as M P Vorster, also referred to the unimpressive track record of African States with bills of rights.

[8] "Practical workings of a bill of rights."

[9] "Die regbank en 'n menseregtehandves." See also H Corder *Judges at work* (1984) and C F Forsyth *In danger for their talents* (1985).

[10] "Politieke idioom en menseregtehandves."

[11] "Aspekte van menseregte in die internasionale gemeenskap."

[12] Prof S C Jacobs pleaded that the human rights debate should be separate from politics. Prof D C du Toit questioned this as being a positivistic attitude. Several speakers acknowledged or even stressed the close connection between the protection of human rights and the political and constitutional dispensation.

[13] J Dugard *Human rights and the South African legal order* (1978) 402.

[14] See the remarks of P H Amoah and S Kentridge at the 1979 conference in *Human rights: the Cape Town conference* (edited by C F Forsyth and J E Schiller) (1979) 294.

[15] This argument was pursued, inter alia, by M S Motshekga of the Democratic Lawyers Congress and the Unisa law faculty and by speakers of the recently formed Democratic Lawyers Anti Bill of Rights Committee.

[16] E D Moseneke of the Pretoria bar, amongst others, presented this view.

[17] G M Pitje strongly emphasized this point, even mentioning the possibility of black retaliation, but also stressing the importance of the invitation to blacks to speak on an Afrikaans campus.

[18] This was pointed out by Dennis Davis. See also his article in *Finance Week* 15-21 May 1986, 397.

[19] See the reference to Dugard's paper above.

[20] Dr F van Zyl Slabbert put forward this argument from the floor. Zac Yacoob replied that a bill of this kind could well have some advantage to those striving for their rights and could not be seen as dangerous.

[21] See also Davis in *Finance Week* 15-21 May 1986, 397.

[22] This was also clearly stated by Du Plessis in his paper.

[23] This point was ably argued by Davis. □