

From: A Bill of Rights for S.A.
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3 Changing attitudes towards a bill of rights in South Africa

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Mr Chairman, thank you for inviting me to participate in this conference. I must confess that I did not expect that I would ever be invited to take part in a conference on a bill of rights hosted by the University of Pretoria. This is in itself evidence of a change in attitude towards a bill of rights – which is the title of my talk today. That the University of Pretoria has taken the initiative in calling such a meeting is to its credit and a matter of congratulation.

Today I shall examine changing attitudes towards a bill of rights in South Africa in historical context not for reasons of historical curiosity, but for the purpose of stressing the urgency for the adoption of a bill of rights. Indeed I fear that if a bill of rights is not incorporated into our constitution within the next two or three years we can forget about it and resign ourselves to a struggle for power in which individual rights and the supremacy of law become luxuries which even idealists will be forced to abandon. We stand on the verge of cataclysmic change. Naively, I still believe that the law and legal institutions can guide the political decision-makers towards a just solution; and provide the framework for an environment of negotiation. But I am not so naive as to believe that time is on the side of the negotiators and peacemakers. I see a growing lack of confidence in the courts and legal institutions in the black community as they realize the extent to which law has been manipulated by the present government and as they see law and legal institutions as instruments of National party oppression.¹ If confidence is to be restored in the law as an instrument of justice and as a method of conflict resolution it will have to be done without delay. And, quite frankly, I do not see how it can be done without a bill of rights. It is in this spirit that I address you today.

1 HISTORICAL OVERVIEW OF THE BILL OF RIGHTS DEBATE IN SOUTH AFRICA

1.1 The period before 1945

Roman-Dutch law has its roots in the enlightened liberal jurisprudence of Grotius and his successors who were guided by the tenets of natural law.²

¹ Lawyers, and particularly judges, have generally refrained from recognizing this truth. Recently, however, Mr Justice HC Nicholas, a former judge of appeal, expressed great concern that the courts were now seen as instruments of oppressive social policies by a large portion of the population – graduation address, university of the Witwatersrand, 17 April 1986 (*The Citizen*, 18 April 1986).
² Sir John Wessels *History of the Roman Dutch Law* (1908) 291-3.

It would have been logical for this tradition to produce a legal order in South Africa premised on the rights of man and judicial review, as happened in the United States where adherence to the natural law philosophy led to a bill of rights protected by the judiciary.³ Indeed, we find traces of this natural law tradition in the 1854 constitution of the Orange Free State, which guaranteed certain rights and recognized the competence of the courts to review enactments of the Volksraad,⁴ and in the famous decision of the high court of the Transvaal in *Brown v Leyds NO*⁵ in 1896 in which Kotzé CJ upheld the judicial testing power.

But there were other more powerful forces and traditions at work in Southern Africa which ensured that the 1910 constitution of the Union of South Africa made no attempt to include a bill of rights and instead confined itself to the protection of the Cape franchise and equal language rights.⁶ First, there was the pervasive influence of English constitutionalism which regarded constitutional guarantees as unnecessary. Smuts and Merriman, the two men most responsible for the 1910 constitution were so devoted to the Westminster tradition that they refused to look beyond it to the needs of South Africa.⁷ Secondly, there was the memory of Kotzé CJ's exercise of the testing power in *Brown v Leyds NO* which had precipitated a major political crisis and resulted in president Kruger labelling the testing power as a "principle of the devil" which the devil had introduced into paradise to test God's word.⁸ Thirdly, there was already a distinct distrust of the American constitutional model which was blamed for the civil war and seen to raise the expectations of blacks.⁹ Fourthly, notions of equality and humanism, the necessary inspiration for a bill of rights, were sadly lacking in South Africa as a result of the infusion of Austinian positivism, crude Calvinism and naked racism into the body politic.

There was no hope for a bill of rights in 1910. Thereafter, until the second world war, there was little interest in this subject as the "Boer versus Brit" struggle dominated South African public life and the lack of rights of the black majority drew little attention. The international climate endorsed this mood: colonialism, in which the suppression of liberty played a central role, was widely accepted and practised, and the rise of the dictators in Europe left no time for the consideration of racial justice in Africa.

1.2 The period 1945 – 1983

The end of World War II heralded in a new era in which race discrimination and the suppression of personal freedom could no longer be tolerated as matters of exclusive domestic concern. The charter of the United Nations, unlike

³ Corwin *The higher law background of American constitutional law* (1955); Howard *The road from Runnymede: Magna Carta and constitutionalism in America* (1968).
⁴ See *S v Gibson* 1898 *Cape Law Journal* 1; *Cassim and Solomon v The State* 1892 *Cape Law Journal* 58; Thompson "Constitutionalism in the South African republics" 1954 *Butterworths SA Law Review* 49.
⁵ (1897) 4 *Off Rep* 17.
⁶ Ss 35, 137 and 152.
⁷ Thompson *The unification of South Africa 1902-1910* (1960) 95-7.
⁸ Sir John Kotzé *Memoirs and reminiscences* (1949) xli-xlii.
⁹ Thompson *supra* 103-5, 187. See, too, the extraordinary attack on the American constitution by Alfred Lyttelton, ex-secretary of state for the colonies, in the British parliamentary debate on the 1910 constitution: *Parliamentary debates*, 5th series, ix, cols 966-7 (16 August 1909).

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Establishment
View:
- Progressive Party
- leaves out ANC history
- interesting

rights was rejected primarily because it emphasized individual rights "whereas particularly the Afrikaner with his Calvinist background is more inclined to place the emphasis on the State and the maintenance of the State".²¹ Thus the constitution bill presented to parliament contained no guarantees for personal liberty and a PFP proposal that a bill of rights be included in the constitution was firmly rejected by the government.²²

2 CURRENT ATTITUDES TOWARDS A BILL OF RIGHTS

A bill of rights and apartheid or separate development (however one chooses to describe our presently racially structured society) are completely incompatible with each other. Central to any bill of rights would be a provision guaranteeing the equal allocation of basic rights without any distinction based on race, gender, religion or political opinion. Furthermore, a bill of rights would of necessity outlaw torture, detention without trial and unreasonable restraints on freedom of political expression. This means that one cannot seriously contemplate the introduction of a bill of rights unless one is prepared to accept the total abolition of the apartheid legal order and the repeal of many of the provisions of the Internal Security Act.²³

The unwillingness of the government to consider a bill of rights flows directly from its continued adherence to the laws of apartheid. In his opening address to parliament in 1986 the state president committed himself to the sovereignty of the law as a basis for the protection of human rights regardless of colour.²⁴ But this rhetoric does not completely accord with reality; for there is no suggestion that the Group Areas Act, the Population Registration Act and a host of other discriminatory and repressive laws are to be repealed despite the great advance inherent in the promised abolition of the pass laws. In short, the government still has a long way to go before it can be expected to endorse a bill of rights.

There are more hopeful signs among the judiciary. The courts have adopted a benevolent approach towards race and security laws in recent times and in *S v Marwane*²⁵ the appellate division demonstrated its ability to utilize a bill of rights when it set aside the Terrorism Act²⁶ as incompatible with the Bophuthatswana bill of rights. Individual judges have also been willing to commit themselves in favour of a bill of rights. At least Corbett JA,²⁷ Milne JP,²⁸ Leon J²⁹ and Didcott J³⁰ have given their public support to this

21 *Second report of the constitutional committee of the president's council* PC4/1982 ch 9 para 9 10. This report was later endorsed by the Minister of Justice in "Hoekom nie 'n verklaring van menseregte nie?" 1984 *Journal of Juridical Science* 5. For a criticism of the report see Van der Vyver "The bill-of-rights issue" 1985 10 *Journal of Juridical Science* 1.

22 *House of assembly debates* vol 108 cols 11181-494 (15-17 August 1983).

23 Act 74 of 1982.

24 *The Star* 31 January 1986.

25 1982 3 SA 717 (A).

26 Act 83 of 1967.

27 "Human rights: the road ahead" 1979 *SALJ* 192 at 196.

28 Interview reported by Kenneth Jost in *The law in South Africa* (reprinted from *The Los Angeles Daily Journal* (1986) 21.

29 "A Bill of Rights for South Africa" 1986 *SA Journal on Human Rights* 60.

30 *The Star* 23 June 1980; *Sunday Tribune* 29 June 1980.

cause. However, it is clear that many other judges do not share this view and from recent press interviews it seems that Rabie CJ³¹ and Munnik JP³² still prefer the *status quo*.

I know of no study of lawyers' attitudes towards a bill of rights, but the growing concern of the general council of the Bar and the Association of Law Societies for human rights and the establishment of Lawyers for Human Rights in 1980 point towards a concern for the need for legal safeguards for individual liberties. Academics too seem to be moving in this direction.

Among political parties, the PFP is still committed to a bill of rights, although the Labour party in the house of representatives and both the National Peoples party and Solidarity in the house of delegates support this cause. The final form – if any – of the "Natal/KwaZulu option" is still far off but there is a reasonable prospect that any such political dispensation will include a bill of rights as the Buthelezi commission report of 1982 envisaged such an institution.³³

While support is growing for a bill of rights in the centre of the political spectrum there is no doubt that "the left" – if one may be permitted to use such a term – is rapidly losing its enthusiasm for legal safeguards for individual rights. The attitude of the ANC towards a bill of rights is unknown as since 1960 its voice has been silenced in South Africa. Arguably the endorsement of constitutional safeguards for individual liberty is inherent in the freedom charter of 1955, which was in part inspired by the universal declaration of human rights of 1948,³⁴ but the United Democratic Front which, like the ANC, views the freedom charter as its political foundation, has refused to be drawn into constitutional planning and thus to express its policy towards a bill of rights. That such an institution does not rank high among the priorities of "the left" was made clear at a recent conference held at the university of Cape Town. Dr Van Zyl Slabbert said that pleas for a bill of rights were unrealistic until there had been a genuine sharing of power, while Professor Denis Davis stated that if a bill of rights were imposed now it would be within a framework which most South Africans considered to be illegal and be seen to be a veto power for whites and thus have no legitimacy.³⁵

In Alan Paton's *Cry, the Beloved Country* the Reverend Msimangu said that he had one great fear in his heart, that one day when whites turned to loving they would find that blacks had turned to hating. I fear this is the fate of race relations in this country and that it is also the fate of the bill of rights.

For years blacks have pleaded for the legal protection of human rights. Now that many whites, and possibly even the National party government, are more sympathetic towards a bill of rights, blacks, who increasingly see power round the corner, appear to be reluctant to accept an instrument perceived to be a method of protecting whites or Afrikaners who see themselves

31 *Supra* n 28 at 20.

32 *Ibid* at 21.

33 *Report of the Buthelezi commission on the requirements for stability and development in KwaZulu and Natal* (1982) vol 1 114.

34 Marcus *The freedom charter: a blueprint for a democratic South Africa* (1985) 38.

35 *The Star* 14 April 1986.

as a potentially threatened minority. Those who have suffered long *outside* the protection of the law are now unwilling to see their oppressors brought *within* the protection of the law.

This development emphasizes the need for the rapid introduction of a bill of rights; that is for its introduction while whites are still in power and acting from a position of strength rather than one of weakness. The black community, which has already lost much of its confidence in our legal system, must see the introduction of a bill of rights as a change of heart towards human rights on the part of the ruling Afrikaner élite and not as an attempt to protect an endangered species.

Realistically, if a bill of rights with judicial review is to be introduced within the next two or three years, it would be limited to guaranteeing equality before the law, and to protecting individual liberties, such as the freedoms of person, movement, speech, association and assembly. It would not attempt to deal with the franchise and the introduction of economic justice. Thus it is no immediate cure for our problems but simply a means to an end.

Ideally, I would like to see 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. But I fear this dream is still far off. This is why I plea for an interim strategy with a more modest bill of rights enacted within the prevailing order. Briefly, such a bill of rights would achieve the following objectives:

(a) By guaranteeing freedom of association (and hence the unbanning of the ANC), assembly and speech it would create the necessary political environment for negotiation.

(b) By guaranteeing equality before the law it would empower the courts to set aside all discriminatory laws. Politically it may be easier for the courts rather than the government to invalidate measures such as the Group Areas Act. Certainly the experience of the United States tends to support such a view as it is clear that Congress could not – politically – have desegregated schools in 1954, as did the supreme court in *Brown v Board of Education*.³⁶

(c) It would help to restore respect for our law and legal institutions at a time when they are fast falling into disrepute. Law must be seen as an objective instrument of justice and not simply as the weapon of the ruling élite. A bill of rights guaranteeing universally acclaimed fundamental rights might help to salvage the harm done by years of apartheid laws.

I repeat that there is an urgency in this matter. We meet here as lawyers concerned about our legal system and as South Africans concerned about our country. In both capacities I believe that we have an interest in a bill of rights.

³⁶ *Supra*.

4 Menseregte-aktes: 'n vergelykende oorsig

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SUMMARY

Almost every one of the world's more or less 150 independent states has a written constitution with human rights provisions. A mere examination of constitutional texts does, however, not provide a reliable yardstick with which "human rights practices" can be measured. Human rights provisions cannot be separated from the ideological assumptions upon which they are based and the socio-political conditions under which they are applied.

The USA provides the best example of a dynamic legal application of the human rights concept with well-developed human rights doctrines and institutions to protect such rights. The "legal" history of the American bill of rights is, however, a social, economic and political history of that country, underscoring the fact that the same condition of human rights cannot readily be achieved by a more or less technical reproduction of constitutional provisions and instruments elsewhere.

Although the written constitutions of most West-European states have contained human rights provisions since the nineteenth century, the provisions have not had the same impact as in the USA – judicial review is a post second world war phenomenon with a somewhat narrower application. Notable features of the human rights scene in Western Europe are firstly the impact of the European convention on human rights and freedoms on the legal systems of its signatories; and secondly the explicit constitutional reference to social, economic and cultural rights and the constant endeavours to strike a balance between positive state action required by these rights and non-interference guaranteed by virtue of the classical rights to, for example, privacy, freedom of speech, assembly and association.

Despite the fact that classical Marxism had little use for human rights, all communist constitutions contain extensive human rights provisions. Citizens' duties and social and economic rights feature prominently while state action with regard to these rights is readily extended to the rights to individual freedom as a strengthening of the "social dimensions" of these rights.

Almost all African independence constitutions contained bills of rights. Although judicial review (provided for in most former British colonies) was not a successful instrument to prevent human rights violations, human rights provisions have been retained in most post independence constitutions. The draft African charter on human and peoples' rights prepared by the OAU, embodies a collective African approach towards human rights which is clearly distinguishable from East European collectivism. It also contains the interesting concept of "peoples' rights", albeit with a rather uncertain content.

Human rights should and will most probably feature in some or other form in a new negotiated South African constitutional dispensation. Since bills of rights have generally not lived up to expectations outside Northern America and Western Europe, recommendations in this regard should go beyond mere suggestions that "there should be a bill of rights with judicial review". The concept of human rights covers the relationship between the individual and the state in all its manifestations and a human rights debate cannot be limited to, for example, judicial control of state interference

with individual liberty – the state's supportive role and the individual's participation in decision making are also relevant. Human rights systems differ in content and application and the major ideologies underlying them are heard in the present South African political debate. Everyone should be clear on the kind of bill of rights he proposes. This may reveal serious differences, but unless the contents of a South African bill of rights is based upon an agreement on how the acute political and socio-economic problems should be solved, South Africa would provide the world with yet another decorative and ineffective bill of rights.

1 INLEIDING

In 1776 is menseregtebepalings vir die eerste keer in 'n grondwet in die Noord-Amerikaanse staat Virginia verorden. Tweehonderd jaar daarna verklaar Louis Henkin in sy werk *The rights of man today*:¹

Today *human rights* is a term in common use in many languages, in the rhetoric of national politics everywhere and of international diplomacy, in the learned jargon of several professions and academic disciplines. All civilizations proclaim their dedication to them; all the major religions proudly lay claim to fathering them; every political leader and would-be leader makes them his platform. What the United States (borrowing from its English mother) and France planted and disseminated now decorates almost every constitution of today's 150 states – old or new, conservative or liberal or radical, capitalist or socialist or mixed, developed or less developed, or underdeveloped. Human rights are now also established in international law, are the subject of numerous treaties and conventions, and are the business of every foreign office and numerous intergovernmental bodies and non-governmental organizations. Even philosophers, if not all persuaded, have muted their agnosticism and moved their inquiries to less fundamental planes. Human rights, we must conclude, have now become for everyone, everywhere, a "good"; by some definitions, indeed, human rights are everything good in human life and society.

Die wêreld se nagenoeg 150 onafhanklike state het haas elkeen 'n geskrewe grondwet² en van hierdie grondwette is daar weinig waarin verwysings na die regte van die individu nie voorkom nie. Van Marseveen en Van der Tang het in 1976 bevind dat van die 157 grondwette wat hulle ondersoek het, 128 (90,1%) die spesifieke woorde "burgerlike, mense-, politieke, fundamentele, of individuele regte" of soortgelyke uitdrukkings bevat het.³ Sekere grondwette bevat ander uitdrukkings byvoorbeeld "politieke vryhede" of "publieke regte".⁴ In totaal was daar slegs ses grondwette (4,2%) sonder enige bepalinge oor burgerlike regte en/of pligte.⁵ In die algemeen kom hulle tot die gevolgtrekking:

Constitutions could be said to have a bill of rights written into them and this also has a standard content, dealing most frequently with freedom of conscience and religion (89.5 pc) and thereafter with the right of assembly or association (88.7 pc),

1 (1979) xii-xiii.

2 In die enkele state wat nie formele "grondwette" het nie, bv die Verenigde Koninkryk en Israel, bestaan daar of wette wat vir alle praktiese doeleindes as grondwette beskou kan word (bv die sg Basic laws in Israel) of goed gedokumenteerde gewoonteregsgreëls met min of meer 'n vaste inhoud (die sg konvensies in die Verenigde Koninkryk – sien Marshall *Constitutional conventions* (1984)).

3 *Written constitutions – a computerized comparative study* (1978) 100.

4 101.

5 102.

defendants' rights (88.0 pc) and freedom of expression (87.3 pc). Subjects also dealt with but slightly less frequently are the right to property (83.1 pc), equality (82.4 pc) and the right to private life (80.4 pc).⁶

Die grondwette van 'n vyftiental kommunistiese state het in 1980 gesamentlik 353 artikels oor regte van die individu bevat; dit wissel vanaf drie bepalinge in die grondwet van Kampuchea tot 51 in die grondwet van Joegoslavië.⁷ Volgens Mahalu⁸ was daar in 1984/1985 uit 46 Afrikastate⁹ slegs nege state waarvan die grondwette geen verwysings na menseregte bevat het nie.

Vergelykende statistiese gegewens van hierdie aard is interessant, maar daar word algemeen aanvaar dat die waarde daarvan redelik beperk is.¹⁰ Daar bestaan 'n hele aantal redes vir hierdie toedrag van sake:

(a) Alhoewel die formulering van die afsonderlike regte in verskillende grondwette dikwels dieselfde is, moet dit gelees en begryp word teen die agtergrond van die filosofiese opvattinge van die opstellers daarvan.¹¹ Bepalinge in die grondwette van die negentiende en vroeg-twintigste eeu weerspieël die rasoniele humanisme en liberale regstaatoopvattinge van die agtiende en negentiende eeu; dié in byvoorbeeld die grondwet van Wes-Duitsland, die sosiale regstaatedagtes van die twintigste eeu; terwyl bepalinge in grondwette van kommunistiese stelsels nie los beoordeel kan word van die regsleer waarop

6 161. Sien ook Boli-Bennet "Human rights or state expansion? Cross-national definitions of constitutional rights" in Nanda, Scarritt & Shepherd (reds) *Global human rights: public policies, comparative measures, and NGO strategies* (1981) 178 wat in 1970 bevind het dat in die 141 grondwette wat hy ondersoek het, 66% substantiewe bepalinge bevat het oor die reg op vrye vergadering, 79% oor vryheid van spraak, 56% oor behoorlike regsprosedures, 78% oor stemreg en 40% oor sosiale en ekonomiese regte.

7 Die USSR (31), Albanië (28), Bulgarye (32), Volksrepubliek van China (16), Kuba (22), Tsjeggieslowakye (20), die Duitse Demokratiese Republiek (229), Hongarye (17), Kampuchea (3), Noord-Korea (24), Mongolië (14), Pole (27), Roemenië (25), Noord-Vietnam (21), Joegoslavië (51) – Simons (red) *The constitutions of the Communist world* (1980) 634. Aanhalings uit die betrokke grondwette in hierdie referaat is uit die Engelse vertaling daarvan in Simons.

8 "Africa and human rights" 12 *Verfassung und Recht in Übersee* 7-13.

9 Die Republiek van Suid-Afrika en die state wat voorheen deel gevorm het van die Republiek is nie daarby ingesluit nie.

10 Sien oa Simons xiv; Mahalu 14; Kunig "Regional protection of human rights" 12 *Verfassung und Recht in Übersee* 34. Safran "Civil liberties in democracies: constitutional norms, practices and problems of comparison" in Nanda *et al* 195 verklaar: "Political systems are frequently categorized as free, partly free, and unfree, based on the extent to which civil liberties exist within them. Such categorization is sometimes derived from a systematic examination of constitutional texts. There is a fair degree of consensus that constitutional provisions in English-speaking democracies, in the countries of Northern and Western Europe, in Japan, in Israel, and perhaps in some smaller Latin American states (eg, Costa Rica) reflect the reality of civil liberties to a significant degree. Conversely, it is understood that in many of the countries, civil rights provisions, if they are included in constitutions, are largely decorative or at best nominal – ie, they serve as a guide to possible future application."

11 Maritain *Man and the state* (1951) 79 verklaar: "On the level of rational interpretations, on the speculative or theoretical level, the question of the rights of man brings into play the whole system of moral and metaphysical (or anti-metaphysical) certainties to which each individual subscribes. As long as there is no unity of faith or unity of philosophy in the minds of men, the interpretations and justifications will be in mutual conflict."

A Bill of rights for S.A. editors

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the covenant of the League of Nations, proclaimed the internationalization of human rights¹⁰ and in 1948 the general assembly adopted the universal declaration of human rights. Progressive forces were now on the move: the United States abandoned segregation in 1954;¹¹ West Germany, India and other states adopted bills of rights; the European convention on human rights extended liberties backed by new methods of international enforcement to millions of Europeans; international covenants on human rights were adopted; and the imperial powers set about dismantling their colonial empires.

While the world advanced in terms of human rights, South Africa retreated into the policy of apartheid which invoked the law and legal institutions to promote racial discrimination and political repression. Liberal forces in South Africa were obliged to concentrate their resources on the preservation of the few rights recognized by the constitution – the entrenched clauses. A bill of rights seemed an unattainable goal as a ruthless government set about destroying constitutional safeguards, repealing common-law rights and emasculating the courts.¹²

In the wake of the constitutional crisis, however, interest in a bill of rights was revived by the Molteno commission of enquiry established by the newly formed Progressive party. This commission, comprising a group of eminent lawyers (including ex-chief justice Centlivres), academics and public figures found that a sovereign parliament was inappropriate to South Africa and recommended a bill of rights, protected by judicial review in a federation.¹³ These recommendations were approved by the Progressive party with the result that the advocacy of a bill of rights and judicial review for the first time became an important part of the political debate in South Africa. This new vision spread to the legal profession too as scholars expounded on the advantages of the American model.¹⁴

In 1961 attempts by the Progressive party and the Natal provincial council to have a bill of rights included in the republican constitution of 1961 failed dismally.¹⁵ The ruling National party government was not interested in rights and liberties except for the chosen few. Thereafter South Africa entered its bleakest period – the Vorster era. First as Minister of Justice and Police, and then as Prime Minister, John Vorster succeeded in transforming South Africa into a police state. I know that this is a harsh term to use but when one looks back at the Vorster years, it seems fair to describe South Africa of the 1960s and 1970s under Vorster as a police state. In any event, it was not a time for serious advocacy of a bill of rights as organizations and individuals were banned, dissidents detained and tortured and freedom of speech curtailed by a network of laws and police practice. For many political figures survival became the main objective.

10 Articles 55 and 56.

11 *Brown v Board of Education* 347 US 483 (1954).

12 See further on the "constitutional crisis" Dugard *Human rights and the South African legal order* (1978), ch 2.

13 Molteno commission report on *Franchise proposals and constitutional safeguards* (1960).

14 See eg Cowen *The foundations of freedom* (1961).

15 Dugard *supra* n 12 at 34.

In the 1970s a number of factors gave rise to a new interest in the legal protection of individual liberties. These included:

(a) The overdue realization, particularly among lawyers, that the constitutions of 1910 and 1961 had facilitated the suppression of personal freedom and furthered racial injustice.

(b) The increased support for the Progressive party (now Progressive Federal party), which is committed to a bill of rights, in the 1974 general election.

(c) The growth of the international human rights movement.

(d) The new interest in bills of rights in Commonwealth countries, notably Canada, which had previously followed the Westminster model of parliamentary supremacy.

(e) The growth in cultural and professional relations with the United States, which resulted in an increased awareness of the American constitutional system.

(f) The National party government's support for a bill of rights in Namibia,¹⁶ despite its opposition to such an institution in South Africa itself.

(g) Bophuthatswana's adoption of a bill of rights when it became independent in 1977.

(h) A new awareness of the judicial function which went some way towards exploding the hitherto carefully exploited myth that South African judges simply "declared" the law. Studies showing that during the 1960s South African judges had frequently exercised a substantial judicial choice in favour of the government¹⁷ made lawyers realize that the complete depoliticisation of the judiciary was impossible under the existing system. This helped to debunk the charge that the introduction of a bill of rights and judicial review would politicize a hitherto neutral judiciary.

1 3 The 1983 constitution

The 1983 constitution was preceded by lengthy political debate, which included substantial support for a bill of rights. The PFP remained committed to a bill of rights and judicial review, but it now enjoyed the open support of a number of judges – including one judge of appeal (Corbett JA)¹⁸ – and Afrikaans jurists¹⁹ – including the head of constitutional planning in the newly created Department of Constitutional Development and Planning (Professor IM Rautenbach).²⁰

In these circumstances one might have expected serious attention to be given to the inclusion in the new constitution of an entrenched bill of rights or, at least, an unentrenched bill of rights along the lines of the Canadian bill of rights of 1960. But it was not to be. In 1982 the constitutional committee of the President's Council published a report characterized by ignorance and prejudice, which showed quite clearly that the National party had not changed its attitude towards individual rights and equality before the law. A bill of

16 See Boule "The Turnhalle testimony" 1978 *SALJ* 49.

17 See Dugard *supra* n 12 part 4.

18 "Human rights: the road ahead" 1979 *SALJ* 192.

19 See Van der Vyver *Die beskerming van menseregte in Suid Afrika* (1975).

20 'n *Nuwe grondwetlike bedeling in Suid Afrika* Jacobs ed (1981) 51.