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A Bill of Rights for South Africa?

Introduction

There is a new openness in South Africa since Mr. F. W. de Klerk became President of South Africa in September 1989. The National Party government has released prominent political prisoners, including Nelson Mandela; it has lifted the bans on the African National Congress ("ANC"), the Pan-Africanist Congress ("PAC"), the South African Communist Party, and other radical political organizations; and the government has called for negotiations between itself and all other political groupings, particularly the ANC, to create "a totally new and just constitutional dispensation in which every inhabitant will enjoy equal rights, treatment and opportunity in every sphere of endeavour—constitutional, social and economic."¹ Despite these positive developments, South Africa remains a principal human rights violator. Its statute book is stained with a number of racist and repressive laws that violate accepted human rights norms. The new, more open political climate has fostered intensified demands to repeal these laws and to adopt legal machinery that would protect human rights. The government of South Africa is currently considering methods to protect individual freedoms in this notoriously repressive political system. To this end, a government-appointed agency has proposed a bill of rights to resolve South Africa's human rights problems.

The proposed bill of rights has generated a lively debate on the nature of human rights in South Africa and the extent of protection for those rights. This Article will examine that debate and its likely outcome. Part I examines the political and societal context in which that debate occurs, focusing on South Africa's current constitutional structure and the law of apartheid. Part II presents the historical foundations of the current human rights debate. It also presents the South African Law Commission's proposed bill of rights as well as the African National Congress's proposal for a new constitutional order. Finally, Part III analyzes the Law Commission's proposals regarding the most controversial

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1. DEBATES OF PARLIAMENT (Hansard) col. 2 (Feb. 2, 1990) (2d session, 9th Parliament).

rights to be granted, critiquing the appropriateness of those proposals for the current South African situation.

I. The Political and Social Structure of South Africa

A. South Africa's Constitutional Structure: Parliamentary Sovereignty

Since the establishment of the Union of South Africa in 1910, the central principle in its constitutional law has been the doctrine of parliamentary sovereignty, and by necessary extension, judicial subordination to the will of Parliament.

In 1910, the British Parliament enacted South Africa's first constitution, creating a union of four British colonies: the Cape of Good Hope, Natal, Transvaal, and the Orange River Colony.² Modeled after the unwritten Westminster Constitution, the first constitution contained no bill of rights and did not expressly provide for judicial review of acts of Parliament. When the Appellate Division of the Supreme Court of South Africa began questioning the constitutionality of lawmaking procedures,³ Parliament amended the 1910 constitution to expressly exclude the power of the court "to enquire into or to pronounce upon the validity of any law passed by Parliament,"⁴ leaving no doubt as to the complete supremacy of Parliament.

When South Africa became a republic in 1961, it adopted a new constitution but as in its predecessor, this constitution also prohibited judicial review of Parliamentary acts.⁵ In 1983, the present constitution was enacted.⁶ Although this constitution departs from the Westminster tradition by creating an executive President, three legislative chambers, and a special President's Council for resolving inter-chamber conflicts, it fails to provide legal protection for human rights or to recognize the power of judicial review. Again, the constitution prohibits courts from questioning the validity of acts of Parliament.⁷

The doctrine of parliamentary sovereignty cannot be justified in South Africa as it is in the United Kingdom. The United Kingdom justifies its constitutional structure on the ground that the will of the people is expressed through the acts of a fully representative Parliament.

2. For an account of the creation of this constitution, see L. THOMPSON, *THE UNIFICATION OF SOUTH AFRICA 1902-10* (1960).

3. *Harris v. Minister of the Interior*, 1952 (2) S. African L. Rep. 428 (App. Div.). For a further discussion of the confrontation between courts and Parliament, see J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 28-34 (1978).

4. South Africa Act Amendment Act, No. 9 of 1956, § 2, *STATUTES OF THE UNION OF SOUTH AFRICA* 29 (1956) [hereinafter *STAT. UN. S. AFR.*].

5. Republic of South Africa Constitution Act, No. 32 of 1961, § 59(2), *STAT. UN. S. AFR.* 346, 382 (1961).

6. Republic of South Africa Constitution Act, No. 110 of 1983, *STATUTES OF THE REPUBLIC OF SOUTH AFRICA - CONSTITUTIONAL LAW* 1301 (Butterworths) [main series hereinafter *STAT. REPUB. S. AFR.*].

7. *Id.* § 34(3).

Therefore, it would be improper for the courts to judicially review acts of Parliament that reflect the will of the people.

The South African constitutional structure cannot be justified by this argument because the Parliament represents a minority of the people. The 1910 constitution initially provided for a non-racial franchise in one of the four provinces,⁸ but it was later amended to ensure that Parliament consisted solely of white legislators, chosen by an all-white electorate.⁹ The 1961 constitution limited the franchise to whites only. The 1983 constitution creates a tricameral system that vests all power in a white House of Assembly and gives token representation to "coloreds"¹⁰ and Indians¹¹ in two separate chambers. The African people, who comprise seventy percent of the country's population, are completely excluded from this constitutional compact; they may exercise their political "rights" in ten ethnic legislatures in "independent" or self-governing homelands or *Bantustans*.¹²

Parliamentary supremacy in South Africa, therefore, is simply a pretext for white constitutional domination of a disenfranchised black majority. A white-controlled Parliament is empowered to enact any legislation it deems fit for the unrepresented black majority, without the restraints associated with a bill of rights or judicial review.

B. The Law of Apartheid

Although discrimination and political repression previously existed in South Africa, apartheid did not become established until 1948. In that year, the National Party came to power on the platform of apartheid, requiring complete segregation between white and black¹³ in every aspect of life. In its first decade of rule, the National Party enacted laws that disenfranchised the remaining colored voters,¹⁴ classified the population along racial lines,¹⁵ provided for segregation, promoted inequality in human relations,¹⁶ work,¹⁷ social life,¹⁸ education,¹⁹ and

8. The Cape Province was the only province with a non-racial franchise.

9. See J. DUGARD, *supra* note 3, at 29-31.

10. In South Africa, the term "coloreds" refers to persons of mixed descent. The "colored" chamber created by the 1983 constitution is known as the House of Representatives.

11. The Indian chamber of the tricameral system is the House of Delegates.

12. For a description of this legislative structure, see Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DEN. J. INT'L L. & POL'Y 11 (1980).

13. "Black" refers to the entire non-white population of South Africa, specifically African, colored, and Indian peoples. "Non-white" is rejected as a pejorative term. The government, however, persists in using the term "black" to refer to Africans only. Previously, the government used the term "Bantu" to describe the African people.

14. See J. DUGARD, *supra* note 3, at 29-31.

15. Population Registration Act, No. 30 of 1950, STAT. UN. S. AFR. 275 (1950). See also J. DUGARD, *supra* note 3, at 59-63.

16. The government enacted laws to prohibit inter-racial marriages and extra-marital sexual relations between persons of different races. Immorality Act, No. 23

housing,²⁰ and restricted black migration from impoverished rural areas to industrialized cities with greater employment opportunities.²¹

After establishing this legislative foundation, Parliament exercised its authority for two purposes. First, it enacted repressive security laws. To further this purpose, it abandoned *habeas corpus*, allowed indefinite detention of prisoners without trial, and suppressed political expression.²² Second, Parliament created homelands or *Bantustan* structures to appease black political aspirations. By creating these independent *Bantustans*, Parliament effectively denationalized over seven million black South Africans.²³

This legislatively-created structure premised on race discrimination and political repression constitutes the law of apartheid. This legal order has been reviled and repudiated by the modern nations of the world and has prompted the United Nations²⁴ and several individual states²⁵ to apply sanctions against South Africa.

In recent years, the National Party government has embarked upon a policy of reform. The government has repealed the laws prohibiting inter-racial marriage and sexual relations²⁶ and has abolished the notorious influx control or "pass laws" that made it a crime for blacks to visit a "white" area without a permit or "pass."²⁷ In the labor area, the government has abandoned the practice of reserving certain jobs for whites and has allowed blacks the right of collective bargaining by recognizing black trade unions.²⁸ Students of all races are now allowed to attend

of 1957, § 16, STAT. UN. S. AFR. 276 (1957); Prohibition of Mixed Marriages Act, No. 55 of 1949, STAT. UN. S. AFR. 614 (1949). See also J. DUGARD, *supra* note 3, at 68-71.

17. A number of statutes reserved certain jobs for whites only. See J. DUGARD, *supra* note 3, at 86-89.

18. Reservation of Separate Amenities Act, No. 49 of 1953, STAT. UN. S. AFR. 328 (1953). See J. DUGARD, *supra* note 3, at 63-68.

19. South African schools have traditionally been segregated. However, in 1953, the government assumed responsibility for all African education and proceeded to create an inferior form of education for Africans. See Bantu Education Act, No. 47 of 1953, STAT. UN. S. AFR. 258 (1953). See also J. DUGARD, *supra* note 3, at 83-85.

20. Group Areas Act, No. 41 of 1950, STAT. UN. S. AFR. 407 (1950) (introducing residential segregation). See also J. DUGARD, *supra* note 3, at 79-83.

21. These influx control laws were known as "pass laws." See J. DUGARD, *supra* note 3, at 75.

22. *Id.* at 110-23, 155-67.

23. See Dugard, *supra* note 12, at 27.

24. In 1977, the Security Council imposed a mandatory arms embargo against South Africa. S.C. Res. 418, 32 U.N. SCRD (Resolutions and Decisions of the Security Council) at 5 (1977). Resolutions of both the General Assembly and the Security Council have recommended a wide variety of sanctions against South Africa.

25. See, e.g., Comprehensive Anti-Apartheid Act, 22 U.S.C.A. § 5001 (West Supp. 1986).

26. Immorality and Prohibition of Mixed Marriages Amendment Act, No. 72 of 1985, STAT. REPUB. S. AFR. - CRIMINAL LAW AND PROCEDURE 631 (Butterworths).

27. Abolition of Influx Control Act, No. 68 of 1986, STAT. REPUB. S. AFR. - BLACKS 3235 (Butterworths). While in force, the pass laws resulted in the jailing of thousands of blacks who had visited "white" areas usually in search of work.

28. Labour Relations Amendment Act, No. 57 of 1981, STAT. REPUB. S. AFR. - LABOUR 603 (Butterworths).

universities.²⁹ Sports, hotels, restaurants, libraries, parks, transportation facilities, and most public amenities have been desegregated. South Africa of 1990 is therefore no longer the rigidly segregated society that it once was.

Although these reforms are important, the stain of statutory segregation remains, and race discrimination with the approval of law still characterizes South African society. Race classification laws continue to divide the South African population along racial lines.³⁰ Although it has been relaxed in practice, the Group Areas Act,³¹ which provides for residential segregation, remains in force. Separate and unequal schooling still enjoys the force of law. Blacks may own land in only thirteen percent of the country.³² Although some blacks have regained their South African nationality,³³ the majority of those denationalized in furtherance of *Bantustan* independence remain without their South African nationality. Moreover, the government continues to denationalize blacks as it territorially expands the *Bantustans*. Politically, the African population remains disenfranchised, while the colored and Indian communities enjoy only a semblance of representation in the new tricameral Parliament.

The racial reforms have been accompanied by intensified political repression. The drastic security laws that terrorized political opposition for over thirty years remain in force. Moreover, in 1985, the government declared a state of emergency³⁴ and promulgated emergency regulations that now give the security forces wide powers to detain prisoners without trial, prohibit political meetings, proscribe political organizations, and restrict the media.

Thus, during the past forty years, apartheid has undergone important changes in response to internal and external pressures. Nevertheless, despite the racial reforms of the mid-1980s, South Africa remains a racist and repressive society whose laws and practices constitute a consistent pattern of gross violation of human rights.

29. Universities Amendment Act, No. 83 of 1983, STAT. REPUB. S. AFR. - EDUCATION 41 (Butterworths).

30. Identification Act, No. 72 of 1986, STAT. REPUB. S. AFR. - CENSUS AND STATISTICS 341 (Butterworths) (current law segregating South African society).

31. Group Areas Act, No. 36 of 1966, STAT. REPUB. S. AFR. - GROUP AREAS 121 (Butterworths).

32. See Robertson, *Black Land Tenure: Disabilities and Some Rights*, in RACE AND THE LAW IN SOUTH AFRICA 119 (A. Rycroft, M. Robertson & P. Spiller eds. 1987).

33. Restoration of South African Citizenship Act, No. 73 of 1986, STAT. REPUB. S. AFR. - ALIENS AND CITIZENS 261 (Butterworths). For discussion of the limited scope of this law, see Rycroft, *Citizenship and Rights*, in RACE AND THE LAW IN SOUTH AFRICA, *supra* note 32, at 209.

34. Public Safety Act, No. 3 of 1953, STAT. REPUB. S. AFR. - CRIMINAL LAW AND PROCEDURE 191 (Butterworths). This emergency has been annually renewed since 1985.

II. The History of the Bill of Rights Debate

A. Historical Foundations of the Current Debate

South African common law is Roman-Dutch law, derived from ancient Roman law as adapted by the Netherlands during the 17th and 18th centuries.³⁵

As the guiding philosophy of Roman-Dutch law is natural law,³⁶ it might have logically produced a legal order in South Africa premised upon the rights of man and judicial review.³⁷ Traces of the natural law tradition can be found in the 1854 constitution of the Orange Free State, one of the Boer republics, which guaranteed certain individual rights and recognized the power of judicial review of legislation.³⁸ The constitution of the other Boer Republic, the South African Republic (Transvaal), did not expressly provide for judicial review, but in 1896 the Chief Justice held that the constitution created a "higher law" and set aside legislation that violated its prescriptions.³⁹

A number of factors ensured that the original South African constitution of 1910 did not include a bill of rights. First, English constitutionalism, which regarded constitutional guarantees as unnecessary, was a pervasive influence. Second, when Chief Justice Kotze exercised the testing power in the South African Republic, it precipitated a major political crisis that resulted in the dismissal of the Chief Justice and led President Kruger to label the testing power "a principle of the devil" introduced into paradise to test God's word.⁴⁰ Third, there was a distinct distrust of the United States constitutional model, which was blamed for the U.S. Civil War.⁴¹

Following World War II, South Africa refused to join the worldwide trend toward a renewed interest in human rights. For example, it refused to endorse the Universal Declaration of Human Rights of 1948.⁴² However, as the policy of apartheid began to unfold, opponents of apartheid attempted to place human rights on the political agenda. In 1955, the Congress Alliance convened and adopted a Freedom Char-

35. The Dutch introduced Roman-Dutch law to South Africa when they colonized the Cape in 1652. South Africa retained this system of law after the British occupation in 1806.

36. Hugo Grotius (1583-1645), the "father of international law," was a Dutchman who wrote extensively on Roman-Dutch law. See GROTIVS READER 5 (L. von Holk & C. Rolofsen eds. 1983). His adherence to natural law had a lasting influence on Roman-Dutch law.

37. In contrast to South Africa, the natural law tradition in the United States led to the adoption of a bill of rights protected by judicial review. See, e.g., Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 165 (1928/29).

38. See Thompson, *Constitutionalism in the South African Republics*, BUTTERWORTHS S. AFR. L. REV. 49, 52-53, 55 (1954).

39. *Brown v. Leyds N.O.*, 1897 (4) Off. Rep. 17.

40. See J. DUGARD, *supra* note 3, at 24.

41. See L. THOMPSON, *supra* note 2, at 103-04, 187.

42. South Africa, together with the Soviet bloc and Saudi Arabia, abstained from voting on the Declaration.

ter.⁴³ This document, which remains a manifesto of the liberation struggle, was "amongst the most advanced documents of its time, spelling out in clear and coherent language, economic and social rights that were only to become internationally agreed upon in the 1960's and people's rights that were only to be formulated in the 1970's and 1980's."⁴⁴

In 1960, the liberal Progressive Party promulgated a more orthodox proposal for a bill of rights aimed at the protection of principal civil and political rights.⁴⁵ However, in 1961, the National Party government outrightly dismissed attempts to have a bill of rights introduced into the 1961 republican constitution.⁴⁶

In the 1960s and 1970s, the National Party government passed repressive security laws that authorized indefinite detention without trial. Thousands were detained, many were tortured, and some fifty detainees died in the most suspicious circumstances.⁴⁷ In response to these human rights violations, many prominent political, academic, and judicial South Africans demanded constitutional protection of human rights.⁴⁸ However, when the constitutional committee of the President's Council, which was charged with the task of constitutional planning, met in 1982, it rejected proposals for a bill of rights. The committee 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."⁴⁹ Consequently, the 1983 constitution contains no guarantee for personal liberty.⁵⁰

Despite this setback, support for a South African bill of rights continued to grow. During a regional conference in Natal, the principal black and white politicians proposed the adoption of a bill of rights for that province,⁵¹ and in 1985, the South African government itself

43. The Freedom Charter, June 26, 1955 (adopted at Kliptown, Transvaal), reprinted in *THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS AND ANNOTATED BIBLIOGRAPHY* 99 (M. Hamalengwa, C. Flinterman & E. Donkwa comps. 1988). For an interesting account of The Congress of the People and The adoption of the Freedom Charter, see G. MARCUS, *THE FREEDOM CHARTER: A BLUEPRINT FOR A DEMOCRATIC SOUTH AFRICA* (Centre for Applied Studies, University of the Witwatersrand, Occasional Paper No. 9, 1985). The African National Congress played a dominant role in the Congress Alliance.

44. A. SACHS, *TOWARDS A BILL OF RIGHTS IN A DEMOCRATIC SOUTH AFRICA* 13 (Draft Discussion Paper 1988).

45. See J. DUGARD, *supra* note 3, at 34.

46. *Id.* at 34-35.

47. The most notable case was that of Steve Biko who died while in police custody in 1977.

48. In 1979, Chief Justice M. M. Corbett, who was then a senior judge of appeal, added his influential voice to the appeal for a bill of rights. See Corbett, *Human Rights: The Road Ahead*, 96 S. AFR. L. J. 192, 201 (1979).

49. President's Council Second Report, PC4/1982, ch. 9, para. 10.1.

50. See 108 HANSARD cols. 11181-494 (Aug. 15-17, 1983) (House of Assembly debate strongly rejecting an opposition proposal to include a bill of rights in the Constitution Bill).

51. See Leon, *New Hope for Natal: An Examination of the Kwa Zulu Natal Indaba's Bill of Rights*, 19 REALITY 7 (1987).

enacted a declaration of rights for Namibia.⁵²

But in 1985 the prospect of a South African bill of rights again seemed remote when the National Party government declared a state of emergency and introduced new arbitrary police powers to cope with the "unrest" that resulted from the enactment of the 1983 constitution. On April 23, 1986, with no explanation, the Minister of Justice, Mr. J. H. Coetsee, announced in Parliament that he had requested the South African Law Commission to investigate the role of the courts in protecting group and individual rights and to consider the desirability of instituting a bill of rights.⁵³ Mr. Coetsee gave no explanation for this sudden about face. Was it because the government had genuinely changed its attitude towards human rights? Or perhaps the government realized that a bill of rights might serve to protect whites, and particularly Afrikaners, against a future black government? Or it might have been an effort to forestall the U.S. Congress from adopting sanctions against South Africa by sending a belated signal that South Africa was prepared to model itself upon the U.S. Constitution in order to promote human rights.⁵⁴ Whatever the explanation, the Minister's announcement set in motion a debate over the legal protection of human rights that continues to grow today.

B. The Report of the South African Law Commission

The South African Law Commission⁵⁵ consists of seven members appointed by the State President. It is chaired by a senior judge of appeal, Mr. Justice H. J. O. van Heerden. Mr. Justice P. J. J. Olivier has been seconded from the bench to direct the work of the Commission. Other members of the Commission include experienced practicing lawyers and an academic lawyer. All of its members are white males.

The Commission, which is empowered to "make recommendations for the development, improvement, modernization or reform"⁵⁶ of the law, had previously confined its work largely to non-controversial, politically neutral areas of the common law. The Minister of Justice's directive to study the desirability of a South African bill of rights constituted a new departure for the Law Commission.

Because the National Party government has historically been hostile to individual rights, its instruction that the Commission report on a bill of rights inevitably led to suspicion and cynicism regarding both the

52. Establishment and Powers of Legislative and Executive Authority for Territory of South West Africa, R. 101, 240 GOV'T GAZETTE No. 9790 (June 17, 1985), amended by Amendment of Proclamation, R. 101 of 1985, R. 157, 255 GOV'T GAZETTE No. 10418 (Sept. 5, 1986).

53. 8 HANSARD cols. 4014-15 (April 23, 1986) (statement of Mr. Coetsee in the House of Assembly).

54. The author personally prefers this last explanation.

55. South African Law Commission Act, No. 19 of 1973, STAT. REPUB. S. AFR. - CONSTITUTIONAL LAW 901 (Butterworths) (governing the establishment and operation of the Commission).

56. *Id.* § 4, at 903.

motives for the study and its likely outcome. Many believed that the Law Commission would produce a report that exalted group rights, and by necessary implication Afrikaner group rights, over individual rights. In addition, many radical opponents of the government harbored misgivings about the legitimacy of the Law Commission itself. For these reasons, many lawyers, particularly lawyers in the black community, declined to make representations to the Law Commission.

After receiving evidence and researching the topic, the Law Commission produced a *Working Paper on Group and Human Rights* (the "*Working Paper*")⁵⁷ in March 1989. The *Working Paper* examines the philosophy of human rights, international and foreign methods of protecting human rights, current South African attitudes towards human rights, and the nature of the rights to be protected. It concludes with a draft bill of rights⁵⁸ and a discussion of various methods for implementing such an instrument.

The draft bill of rights focuses on individual rights and endorses the basic civil and political rights found in most international instruments and bills of rights. It proclaims the rights to life (but fails to outlaw capital punishment), liberty, privacy, and a fair trial; it guarantees the freedoms of speech, assembly, association, and movement; and it condemns torture and cruel, inhuman, or degrading treatment. The draft bill recognizes equality before the law and outlaws discrimination based on race or gender. Most importantly, the draft bill asserts "[t]he right of all citizens over the age of eighteen years to exercise the vote on a basis of equality in respect of all legislative institutions at regular and periodical elections and at referendums."⁵⁹ The draft bill does not include socio-economic rights such as the right to work, to holidays, to proper pay, to favorable working conditions, and to education.⁶⁰ The Commission reasoned that such rights are non-justiciable and therefore belong to a political manifesto rather than a bill of rights.

The bill does not provide for group rights on the ground that South African law is "oriented towards the individual" and "does not recognize the legal subjectivity of an amorphous group such as, for example, a racial group, an ethnic group, [or] a cultural group. . . ."⁶¹ On the other hand, cultural, religious, and linguistic rights attaching to particular groups are protected through the guarantee of individual rights. Although the bill does not directly protect group rights, it gives limited

57. SOUTH AFRICAN LAW COMMISSION, WORKING PAPER 25, Project 58: Group and Human Rights (Aug. 31, 1989) [hereinafter WORKING PAPER]. The WORKING PAPER is popularly known as the Olivier Report because the dominant figure in its compilation was Mr. Justice Olivier.

58. The Draft Bill of Rights is found in chapter 15.

59. *Id.*, art. 20, at 474.

60. Compare International Covenant on Economic, Social and Cultural Rights, Annex to G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) with Universal Declaration of Human Rights arts. 23-26, G.A. Res. 217 (III), 3(1) U.N. GAOR (183d plen. mtg.) at 71, U.N. Doc. A/810 (1948).

61. WORKING PAPER, *supra* note 57, at 383.

protection through a provision recognizing "[t]he right of every person or group to disassociate himself or itself from other individuals or groups. . . ."⁶² Where such disassociation results in racial, religious, linguistic, or cultural discrimination, however, no public funds shall be allocated to such an enterprise. The provision clearly anticipates racially exclusive private schools with no public financing.

The proposed rights in this bill may be derogated to preserve state security or other public interests, "but only in such measure and in such a manner as is acceptable in a democratic society."⁶³ The existing divisions of the Supreme Court⁶⁴ are granted the power of judicial review and may set aside any legislative or administrative act that violates any of the rights contained in the bill.⁶⁵

The Law Commission's draft bill is not intended as a final statement, but as a working paper designed to elicit comment.

C. The ANC's Constitutional Guidelines

In 1988, the ANC, which was outlawed in South Africa from 1960 until February 2, 1990, published the *Constitutional Guidelines for a Democratic South Africa*⁶⁶ (the "*Guidelines*") from its headquarters in exile, Lusaka, Zambia. Like the *Working Paper*, the *Guidelines* were issued to encourage national debate on the form that a post-apartheid society should take.

The *Guidelines* pay homage to the 1955 Freedom Charter and declare that the Charter "must be converted from a vision for the future into a constitutional reality."⁶⁷ According to the *Guidelines*:

The constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens irrespective of race, colour, sex or creed and shall provide appropriate mechanisms for their enforcement.⁶⁸

Nothing further is said about the "mechanisms for enforcement." This is probably due to the debate within the ANC itself as to whether the courts or a special commission answerable to Parliament would be best suited to monitor a bill of rights.

The *Guidelines* guarantee freedom of association, expression,

62. *Id.* art. 17, at 474.

63. *Id.* art. 30, at 479.

64. The Supreme Court of South Africa comprises nine regional divisions and an appellate division. There are some 130 Supreme Court judges in the country. See J. DUGARD, *supra* note 3, at 10-11.

65. WORKING PAPER, *supra* note 57, art. 31, at 479.

66. AFRICAN NATIONAL CONGRESS, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA, reprinted in 5 S. AFR. J. HUM. RTS. 129 (1989) [hereinafter CONSTITUTIONAL GUIDELINES]. For discussions of this document, see Nagan, *Law and Post-Apartheid South Africa*, 12 FORDHAM INT'L L. J. 399 (1989); van der Vyver, *Comments on the Constitutional Guidelines of the African National Congress*, 5 S. AFR. J. HUM. RTS. 133 (1989).

67. CONSTITUTIONAL GUIDELINES, *supra* note 66, at 129.

68. *Id.* para. h, at 131.

thought, worship, and the press.⁶⁹ These freedoms are, however, subject to the qualification that the "advocacy or practice of racism, fascism, naziism or the incitement of ethnic or regional exclusiveness or hatred shall be outlawed."⁷⁰

In contrast to the Law Commission's draft bill of rights, the *Guidelines* guarantee social and economic rights. The state would be obliged to protect the right to work, to guarantee education and social security,⁷¹ and "to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination."⁷² A Workers' Charter, protecting the right to strike and collective bargaining, is to be incorporated into the constitution.⁷³ The *Guidelines* provide for affirmative action to redress past inequalities based on both race and gender.

The *Guidelines* denounce the constitutional protection of group rights because such protection would perpetuate the *status quo*⁷⁴ while simultaneously declaring that "the state shall recognise the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development."⁷⁵

III. The Current Debate Over a Bill of Rights

The National Party government's response to the South African Law Commission's proposed bill of rights has been equivocal. While the government accepts the need to protect individual rights, there are signs that it is dissatisfied with the Law Commission's refusal to accord equal status to the protection of group rights. President de Klerk's opening address to Parliament on February 2, 1990 evidenced this equivocation:

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 justifiable 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

69. *Id.* para. l.

70. *Id.* para. k.

71. *Id.* para. l.

72. *Id.* para. j.

73. *Id.* para. v, at 132.

74. *Id.* at 130 (prefatory note).

75. *Id.* para. g, at 131.

others.⁷⁶

The ANC's attitude towards a bill of rights is likewise equivocal. While the *Guidelines* indicate support for a bill of rights, it is not clear whether the ANC is prepared to accept the principle of judicial review as a necessary component of a bill of rights. The response of other political groups has been more explicit. Predictably, the right-wing white Conservative Party has rejected the draft bill because it fails to explicitly protect group rights. The Democratic Party, which is the liberal white opposition party, has indicated its full support for a bill of rights along the lines of the draft bill.

While the various political groups have expressed themselves on the issue of a South African bill of rights, the main debate occurs among lawyers, academics,⁷⁷ church and community leaders, and the business sector. Judge Olivier continues to play a major role in this debate, as the Law Commission is presently considering comments on its *Working Paper* upon which another report and revised bill will be based. Because many disputed areas remain unresolved, it seems unlikely that this final report will be completed within the next year. In addition, because the introduction of a bill of rights is closely linked with constitutional reform, a subject that is only now receiving serious attention, there is no sense of urgency to resolve the debate. But the fact that the debate over a bill of rights has preceded the debate over constitutional options indicates that the protection of human rights will feature prominently in any new South African constitution.

The remainder of this Article will focus on the major areas of controversy within the bill of rights debate. In addition, the author will offer his own views as to the most popular and efficacious resolutions to the controversies discussed.

A. Drafting the Bill of Rights

In the *Working Paper*, the South African Law Commission identifies two types of bills of rights: those couched in broad, general terms, such as the U.S. Bill of Rights, and those written in "precise, legalistic terms, such as those drawn up by the British colonial authorities for their former colonies. . . ."⁷⁸ The Commission chose the former model because the judiciary may more easily adapt this type to unforeseen circumstances, as illustrated by the jurisprudence of the U.S. Supreme Court.⁷⁹

Although the Law Commission places the European Convention on

76. DEBATES OF PARLIAMENT (Hansard) col. 6 (Feb. 2, 1990) (2d session, 9th Parliament).

77. There is a growing body of literature on the Olivier Report. See, e.g., van der Vyver, *The South African Law Commission's Provisional Report on Group and Human Rights*, 106 S. AFRICAN L. J. 536 (1989).

78. WORKING PAPER, *supra* note 57, at 411. For examples of such "precise, legalistic" bills of rights, see BARBADOS CONST. ch. III; BOTSWANA CONST. ch. II.

79. See WORKING PAPER, *supra* note 57, at 412.

Human Rights⁸⁰ in the same category as the U.S. Bill of Rights, this analysis is not correct. The European Convention on Human Rights and other international human rights conventions formulate a more specific catalogue of rights and qualifications on those rights than the U.S. document. Moreover, while it is true that the U.S. Bill of Rights has been creatively adapted to new situations, one must recall that this judicial creativity has often resulted in major political controversy.⁸¹ A bill of rights that charts a middle course between the Scylla of liberal generalization and the Charybdis of restrictive precision would allow the judiciary to develop the law in a dynamic manner without becoming overly political.⁸² Furthermore, a post-apartheid South Africa will presumably wish to accede to a number of international human rights instruments in order to demonstrate its new commitment to human rights.⁸³ A bill of rights that models itself on these conventions will facilitate the process of accession by bringing South African domestic law into line with the international obligations imposed upon signatories to these instruments. Therefore, the European Convention on Human Rights offers a better model for South Africa than the U.S. Bill of Rights.

B. Affirmative Action

In the U.S., the Supreme Court has approved a policy of affirmative action to redress the historical injustices meted out to minority groups and women.⁸⁴ The legacy of racial injustice in South Africa not only runs deeper, but has affected the majority rather than the minority. Therefore, the need for redress through the use of affirmative action is much greater in South Africa than it is in the U.S.

Affirmative action is a controversial issue in contemporary South Africa. The civil service has retained its predominantly white character and maintains its policy of favoring Afrikaners for both employment and advancement. The business community and some universities, on the

80. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

81. See, e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Barrows v. Jackson*, 346 U.S. 249 (1953). See generally P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969* (1972).

82. This conclusion is supported by the fact that when Canada adopted its Canadian Charter of Rights and Freedoms in 1982, it followed the example of the international human rights conventions. See Canada Act 1982, ch. 11, sch. B, pt. I, 1980-81-82-83 Can. Stat. V [hereinafter Canadian Charter of Rights and Freedoms].

83. For example, a post-apartheid South Africa would probably wish to join the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 and the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

84. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

other hand, already practice affirmative action on a voluntary basis.⁸⁵ They have studied the U.S. experience with affirmative action and have modeled their own programs on this example. Thus, South African whites, at least those outside the civil service, are probably more prepared for affirmative action than the U.S. was when it first embarked upon this course.

Clearly affirmative action will have a major political role to play in a post-apartheid South Africa. It would be unacceptable to place unreasonable restraints on this process by insisting on an equality-before-the-law provision in a bill of rights. Opinions differ, however, as to what is envisaged by affirmative action. Will it merely take the form of rectification in the fields of education and employment, or will it be used to embark on a radical program of redistribution of land and wealth? While the former can be recognized in a traditional bill of rights, it will be difficult to take account of the latter in such an instrument.

The Law Commission approaches affirmative action cautiously and considers it in the context of advancing disadvantaged *minorities* in the education and employment fields. The Law Commission finds that affirmative action "is recognized in international law as being non-discriminatory, so long as it is temporary and is *not enforced against the will of the minority*."⁸⁶ It goes on to say that the legislature should be permitted "to make certain laws to grant a *minority group* which has been discriminated against certain advantages temporarily with the object of achieving equality . . ."⁸⁷ The draft bill qualifies the requirement of equality before the law with the proviso that legislation shall be permissible "on a temporary basis" for the purpose of improving the position of persons or groups who find themselves to be disadvantaged "for historical reasons."⁸⁸ But in South Africa it is not a minority that requires redress of historical injustices, as the Law Commission suggests, but rather a majority comprising seventy percent of the population. Albie Sachs, an exiled South African lawyer at the forefront of ANC constitutional planning, states:

It is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedoms and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system. If a Bill of Rights is seen as a truly creative document that requires and facilitates the

85. The experience of the School of Law of the University of the Witwatersrand indicates the extent of this voluntary affirmative action. In 1980, the students in the School of Law consisted of 84.55% whites, 3.5% Africans, 1.3% colored, and 10.7% Asians. By 1990, the student body in the School of Law consisted of 63% whites, 28% Africans, 2% coloreds, and 7% Asians.

86. WORKING PAPER, *supra* note 57, at 440 (emphasis added).

87. *Id.* (entire quotation emphasized in original).

88. *Id.* art. 2, at 471. This article echoes provisions in several other documents. See Canadian Charter of Rights and Freedoms, *supra* note 82, § 15(2); INDIA CONST. §§ 15(4), 16(4), 335; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 83, art. 1(4), at 216.

achievement of the rights so long denied to the great majority of the people, it must have an appropriate corrective strategy.⁸⁹

Sachs correctly claims that the need for corrective measures is not solely confined to education and employment as the Law Commission suggests. He argues that the necessary "corrective strategy" must be directed at every aspect of South African society, including "the restoration of land, wealth and dignity to the people. . . ."⁹⁰ Although not explicit on this subject, the ANC's *Guidelines* also contemplate a much wider form of affirmative action than that practiced in the U.S. and accepted by the Law Commission. The *Guidelines* require the state "to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination"⁹¹ and to implement land reforms "in conformity with the principle of Affirmative Action."⁹²

C. Freedom of Speech

The U.S. Bill of Rights, as interpreted by the Supreme Court, adopts a libertarian approach to free speech that tolerates even the most offensive racist utterances. For this reason, it is difficult for the U.S. to accept the International Convention on the Elimination of All Forms of Racial Discrimination,⁹³ which requires signatory states to punish "all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination. . . ."⁹⁴

It is unlikely that a post-apartheid South Africa will be able to similarly tolerate free speech. The National Party government has so greatly restricted freedom of expression⁹⁵ that this fundamental principle is virtually unknown to generations of South Africans. Furthermore, blacks have been subjected to racial abuse⁹⁶ for so long that there is an understandable desire to outlaw racial abuse and the propagation of racist ideologies. Accordingly, the ANC *Guidelines*, while reaffirming freedom of expression, provide that "the advocacy or practice of racism, fascism, naziism or the incitement of ethnic or regional exclusiveness or hatred shall be outlawed."⁹⁷

The freedom of speech clause in the Law Commission's draft bill does not address the potential problem of citizens using their right to

89. A. SACHS, *supra* note 44, at 20.

90. *Id.* at 27.

91. CONSTITUTIONAL GUIDELINES, *supra* note 66, para. j, at 131.

92. *Id.* para. u, at 132.

93. For consideration of this topic, see R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 166-70 (1979).

94. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 83, art. 4(a), at 220.

95. For a survey of these restrictions, see J. DUGARD, *supra* note 3, at 146-202.

96. South African law prohibits statements that engender feelings of hostility between the races. See *id.* at 177-78. Although these laws have been used to suppress expression of black grievances against white rule, they have seldom been invoked to punish white racist abuse of blacks.

97. CONSTITUTIONAL GUIDELINES, *supra* note 66, para. k, at 131.

free speech to advocate racist ideas. It simply recognizes "[t]he right to freedom of speech and to obtain and disseminate information."⁹⁸ While this provision may appeal to western libertarian sentiments, it fails to consider the realities of South Africa. Moreover, because South Africa's acceptance into the international community and accession to the International Convention on the Elimination of All Forms of Racial Discrimination will inevitably require overwhelming evidence of South Africa's determination to unequivocally renounce apartheid, a bill of rights that does not outlaw the public propagation of racist ideology and sentiment would only act as an obstacle in South Africa's path toward international credibility.

D. Group Rights Versus Individual Rights

The most controversial aspect of the current debate over a South African bill of rights is whether the bill should protect individual rights or group rights. The National Party government has opposed the protection of individual rights on grounds of both political ideology and religious conviction.⁹⁹ Rather, the National Party has supported group rights which may be invoked to entrench the interests of minority groups, particularly the Afrikaner group.¹⁰⁰

The Law Commission's *Working Paper* rejected the National Party's reasoning and refused to jurisprudentially rationalize the recognition and protection of Afrikaner rights. Instead, after thoroughly examining the protection of group rights under international law and foreign legal systems, the Commission concluded that the interests of members of groups — such as their rights to culture, language, and religion — should be protected as individual rights.¹⁰¹ Because South African law does not recognize racial or ethnic groups as legal *personae* entitled to standing before the courts, the Commission found that cultural, religious, and linguistic interests were individual rights, to be protected from arbitrary legislative and executive infringement through court proceedings.¹⁰² The Law Commission protects *individuals* as members of a group and not groups.¹⁰³

98. WORKING PAPER, *supra* note 57, art. 8, at 472.

99. See *supra* note 49 and accompanying text.

100. The fact that protection of group rights serves the interests of the politically powerful minority explains why the National Party government charged the Law Commission with examining the protection of both individual and group rights.

101. The Commission recognizes "[t]he right of every person, individually or together with others, freely to practise his culture and religion and use his language." WORKING PAPER, *supra* note 57, art. 21, at 474.

102. *Id.* at 388, 392-95, 408-10. The draft bill recognizes "[t]he right of every person to be safeguarded from discrimination against his culture, religion or language. . . ." *Id.* art. 22, at 475.

103. The Law Commission follows the example of the International Covenant on Civil and Political Rights which provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community

The Law Commission does, however, attempt to appease the advocates of group rights by recognizing:

The right of every person or group to disassociate himself or itself from other individuals or groups: Provided that if such disassociation constitutes discrimination on the ground of race, colour, religion, language or culture, no public or state funds shall be granted directly or indirectly to promote the interests of the person who or group which so discriminates.¹⁰⁴

This is an unfortunate provision as it will give approval to racially exclusive clubs, schools, and suburbs. It will inevitably lead to litigation as its opponents challenge its compatibility with article 2's prohibition on racial discrimination. More important, this provision will be seen as a means of maintaining white privilege, and it therefore has no place in a bill of rights that aims to advance the cause of non-racialism in South Africa.

The Law Commission correctly concludes that the political rights of minority groups should be secured by a constitutional compact rather than a bill of rights. If the white group or any other minority group wishes to secure political equality or preferential treatment in a new constitutional arrangement, it will have to do so through such devices as a minority veto on legislation or the adoption of federal units drawn in accordance with racial classification. But because the ANC rejects any suggestion of ethnicity in constitutional planning,¹⁰⁵ it seems unlikely that a new constitution for South Africa would incorporate such an arrangement.¹⁰⁶ Indeed, it was possibly the National Party government's awareness of this problem that prompted it to seek to introduce political protection for Afrikaner rights into a bill of rights. Fortunately, the Law Commission has rejected this stratagem. Indeed, it is largely the Commission's refusal to protect group political rights, together with the recognition of the franchise as a basic right, that has lent credibility to the *Working Paper*.

E. Emergency Powers

South Africa has lived under a state of emergency since 1985.¹⁰⁷ Over 40,000 persons have been detained without trial, the media has been

with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

International Covenant on Civil and Political Rights, *supra* note 83, art. 27.

104. WORKING PAPER, *supra* note 57, art. 17, at 474.

105. The ANC *Guidelines* declare that "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." CONSTITUTIONAL GUIDELINES, *supra* note 66, at 130.

106. For an examination of the various constitutional forms and models for a new South Africa that are currently the subject of debate, see Dugard, *The Quest for a Liberal Democracy in South Africa*, [1987] ACTA JURIDICA 237.

107. Public Safety Act, No. 3 of 1953, § 2 STAT. REPUB. S. AFR. - CRIMINAL LAW AND PROCEDURE at 191 (Butterworths) (empowering the State President to declare a state of emergency).

muzzled, political organizations have been proscribed, meetings have been banned, and the security forces have ruled the land.¹⁰⁸ To the north, many of South Africa's neighbors continue to live under emergency powers that have become the rule rather than the exception. Therefore, many South Africans fear that the government could devalue a bill of rights by declaring a state of emergency and suspending the provisions of the bill.

It would be naive to believe that circumstances will not arise in a post-apartheid South Africa that would warrant declaration of emergency powers and the suspension of some rights. A bill of rights must therefore anticipate such a crisis and regulate the extent to which the government may suspend the bill's provisions in an emergency.¹⁰⁹ Because of the importance of precisely limiting the government's ability to suspend rights during an emergency, the Law Commission's treatment of derogation of rights is largely unsatisfactory.¹¹⁰ First, it fails to acknowledge that certain rights, notably the freedom from torture and cruel, inhuman, or degrading treatment, may never be suspended.¹¹¹ Secondly, it confers wide discretion on the legislature to derogate rights by providing:

The rights granted in this Bill may by legislation be limited to the extent that is reasonably necessary in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others or for the prevention of disorder and crime, but only in such measure and in such a manner as is acceptable in a democratic society.¹¹²

Although the draft bill suffers from these shortcomings, the Commission introduced a radical innovation that partially restricts the government's ability to suspend the bill of rights. By extending the power of judicial review to article 30, the Commission grants the courts the power to review the executive's decision to declare a state of emergency.¹¹³ In practice, courts would probably allow the executive wide

108. See DEVELOPMENTS IN EMERGENCY LAW (N. Haysom & C. Plaskett eds. 1989).

109. See, e.g., BOTSWANA CONST. §§ 16, 17 (providing in its bill of rights for derogation of rights upon declaration of a state of emergency); INDIA CONST. § 359 (providing for derogation of rights upon state of emergency).

Likewise, international human rights conventions recognize the right of signatory states to derogate from their obligations during times of declared emergency. See International Covenant on Civil and Political Rights, *supra* note 83, art. 4, at 59; European Convention on Human Rights, *supra* note 80, art. 15, at 232-34.

110. See WORKING PAPER, *supra* note 57, art. 30, at 479.

111. Many international human rights conventions contain such limitations on a state's power to derogate rights in times of emergency. See International Covenant on Civil and Political Rights, *supra* note 83, art. 4(2), at 59; European Convention on Human Rights, *supra* note 80, art. 15(2), at 232.

112. WORKING PAPER, *supra* note 57, art. 30, at 479.

113. *Id.* art. 31. This power of judicial review extends beyond present South African law, which places the decision to declare an emergency beyond the jurisdiction of the courts. See *Stanton v. Minister of Justice*, 1960 (3) S. Afr. L. Rep. 354 (Transvaal Provincial Div.). Article 31 also extends beyond the jurisprudence of most foreign legal systems. According to the International Commission of Jurists' comparative

discretion on decisions taken in times of political crisis.¹¹⁴ Nevertheless, the power of judicial review of a declaration of emergency warns the executive that its powers during a national emergency are not unlimited and may therefore act as a restraint on the abuse of power.

F. Economic Policy and Property Rights

It is generally agreed that regulation of economic policy is a legislative rather than a judicial function.¹¹⁵ "[A] constitution is not intended to embody a particular economic theory."¹¹⁶ *A fortiori*, it is not the function of a bill of rights to lay down a particular economic policy, be it socialist or capitalist. However, in article 14 of its draft bill, the Law Commission recognizes: "The right freely and on an equal footing to engage in economic intercourse, which shall include the capacity to establish and maintain commercial undertakings, to procure property and means of production, to offer services against remuneration and to make a profit."¹¹⁷ Although the Commission intended this provision to free black entrepreneurs from the shackles of economic apartheid,¹¹⁸ it has inevitably been construed as an attempt to provide constitutional backing for an economic policy of free enterprise. This will be unacceptable to the ANC which, in its *Guidelines*, declares that the state shall ensure that the entire economy serves the interests and well-being of all sections of the population and that "[t]he economy shall be a mixed one, with a public sector, a private sector, a co-operative sector and a small-scale family sector."¹¹⁹ Moreover, article 14 will lead to endless litigation and bring the courts into the same type of confrontation with the legislature as that experienced by the U.S. Supreme Court during its period of substantive due process.¹²⁰

study on emergency powers "it is widely thought that the executive and legislature, the political branches of government, are entitled to discretion in determining the existence and gravity of a threat to the nation, i.e., the need for a state of emergency, and the necessity for recourse to specific emergency measures." INTERNATIONAL COMMISSION ON JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 435 (1983). This power is, however, in line with article 15 of the European Convention on Human Rights, which has been interpreted by the European Court of Human Rights to allow the court to pronounce on a signatory state's decision to declare an emergency. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 78 (1978), reprinted in 17 I.L.M. 680, 707 (1978).

114. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding as constitutional an executive order that excluded persons of Japanese ancestry from a West Coast military area). See generally Dugard, *The Judiciary in a State of National Crisis - With Special Reference to the South African Experience*, 44 WASH. & LEE L. REV. 477 (1987).

115. See, e.g., McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, SUP. CT. REV. 34 (1962).

116. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

117. WORKING PAPER, *supra* note 57, art. 14, at 473.

118. See *id.* at 464.

119. CONSTITUTIONAL GUIDELINES, *supra* note 66, para. a at 130.

120. See, e.g., *Murphy v. Sardell*, 269 U.S. 530 (1925); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905). See also P. MURPHY, *supra* note 81, at 128-69.

Although a bill of rights should not entrench a particular economic theory, it may be used to protect property rights.¹²¹ Consistent with the free market principles underlying the draft bill, the Law Commission included a provision that recognizes: "The right to private property provided that legislation may in the public interest authorize expropriation against payment of reasonable compensation which shall in the event of a dispute be determined by a court of law."¹²² This provision is uncontroversial regarding personal property, as the ANC *Guidelines* declare that "[p]roperty for personal use and consumption shall be constitutionally protected."¹²³

However, the dispute over protection of property held for production is much more controversial and is likely to pose greater problems. It is this property that a post-apartheid South African government might expropriate to achieve a more equitable distribution of land and wealth. But requiring reasonable compensation under a bill of rights would prove a difficult, if not insurmountable, obstacle. Despite this obstacle, any post-apartheid South African government must seriously consider rectifying a system in which "85% of the land and probably 95% of productive capacity is in the hands of the white minority."¹²⁴ Thus, a bill of rights that truly addresses the South African experience should establish a system of protecting real property rights that takes steps to rectify these inequalities, not preserve them.¹²⁵

G. Social and Economic Rights

The South African debate on whether to include social and economic rights in a bill of rights follows the traditional pattern. On the one hand, some argue that these second generation rights¹²⁶ should not be included in a bill of rights because they are non-justiciable. Taking this view, Mr. Justice J. M. Didcott, one of South Africa's foremost liberal judges, declares:

A bill of rights is not a political manifesto, a political programme. Primarily, it is a protective device. It is a shield, in other words, rather than a

121. See African Charter on Human and People's Rights, adopted on June 27, 1981, Organization of African Unity, art. 14, reprinted in 21 I.L.M. 59, 61 (1982) ("[t]he right to property shall be guaranteed"); Universal Declaration of Human Rights, *supra* note 60, art. 17(2), at 74 ("[n]o one shall be arbitrarily deprived of his property"). Compare International Covenant on Economic, Social and Cultural Rights, *supra* note 60 (silent on this right) with International Covenant on Civil and Political Rights, *supra* note 83 (same); and European Convention on Human Rights, *supra* note 80 (same).

122. WORKING PAPER, *supra* note 57, art. 15, at 473.

123. CONSTITUTIONAL GUIDELINES, *supra* note 66, para. t, at 132.

124. A. SACHS, *supra* note 44, at 18.

125. *Id.*

126. See International Covenant on Economic, Social and Cultural Rights, *supra* note 60, arts. 6-15, at 50-51 (recognizing, *inter alia*, the rights to work, to social security, to protection of the family, to an adequate standard of living, to the enjoyment of health, to education, and to take part in cultural life); Universal Declaration of Human Rights, *supra* note 60, arts. 22-27, at 75-77 (recognizing similar second generation rights).

sword, it can state, effectively and quite easily, what may not be done. It cannot stipulate, with equal ease or effectiveness, what shall be done. The reason is not only that the courts, its enforcers, lack the expertise and the infrastructure to get into the business of legislation or administration. It is also, and more tellingly, that they cannot raise the money.¹²⁷

The Law Commission endorses this approach to second generation rights.¹²⁸

On the other hand, others insist that South Africa should break with the Anglo-Saxon tradition of restricting a bill of rights to include only justiciable rights. They argue that the South African instrument should seek to advance not only second generation rights but also third generation rights, such as the rights to peace, development, and a clean environment.¹²⁹ The ANC *Guidelines* endorse this approach.¹³⁰

A potential solution to this controversy is suggested by the Indian constitution of 1949, which distinguishes between judicially enforceable civil and political rights¹³¹ and nonjusticiable second and third generation rights that are "nevertheless fundamental in the governance of the country"¹³² and are to be honoured by the state in law making. Therefore, while a South African bill of rights should focus on justiciable first generation rights, it should be accompanied by a non-justiciable declaration embodying rights such as those contained in the International Covenant on Economic, Social and Cultural Rights of 1966.¹³³ This declaration might direct the legislature in its law making function and could serve as an interpretive guide to the bill of rights.

H. Judicial Review

In South Africa, blacks are largely excluded from the judicial system.¹³⁴ Although South African law does not prohibit the appointment of black judges, none have as yet been appointed. The reason for this is twofold.

127. Didcott, *Practical Workings of a Bill of Rights*, in *A BILL OF RIGHTS FOR SOUTH AFRICA: PROCEEDINGS OF SYMPOSIUM HELD AT THE UNIVERSITY OF PRETORIA ON 1 AND 2 MAY 1986* 52, 58 (J. van der Westhuizen & H. Viljoen eds. 1988).

128. See WORKING PAPER, *supra* note 57, at 416-29. The Commission concludes that socio-economic rights should be protected in a bill of rights from legislative and executive infringement, but such a bill should not place positive obligations on the state. *Id.* at 429.

129. See, e.g., A. SACHS, *supra* note 44, at 19. *Accord* African Charter on Human and Peoples' Rights, *supra* note 121, arts. 15-24 at 61-63.

130. Article j obliges the state "to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination." CONSTITUTIONAL GUIDELINES, *supra* note 66, art. j, at 131. Article l places the state under a "duty to protect the right to work, and guarantee education and social security." *Id.* art. l.

131. INDIA CONST. § 32.

132. *Id.* § 37.

133. See International Covenant on Economic, Social and Cultural Rights, *supra* note 60.

134. The Supreme Court of South Africa consists of nine regional divisions and one appellate division. There are approximately 115 Supreme Court judges and fifteen judges of appeal. All judges on the Supreme Court are white and there is only one woman judge. For a description of the South African court structure, see J. DUGARD, *supra* note 3, at 10-13.

First, like England, South Africa has a divided bar and judges are appointed from the ranks of the senior barristers. At present there are only three black senior barristers.¹³⁵ Second, many blacks would decline to accept appointment to the bench as they are unwilling to apply the laws of apartheid.¹³⁶ This exclusion of blacks from the judicial system combined with the fact that the South African judiciary has often displayed a pro-executive approach to the interpretation of race and security laws has resulted in a growing loss of confidence in the courts.¹³⁷

These problems have provoked controversy over whether the present South African Supreme Court would be an appropriate guardian of a bill of rights. Most supporters of a bill of rights favor the Supreme Court,¹³⁸ but others argue for a special constitutional court, similar to that of West Germany,¹³⁹ or an extra-judicial commission of a quasi-political nature.¹⁴⁰ The ANC *Guidelines*'s silence on the subject of judicial review suggests not only that the ANC has no confidence in the existing judicial system but also that it does not envisage enforcement of a bill of rights by courts of law.

The Law Commission ignores these widespread misgivings about the present judiciary's impartiality on matters affecting race and security and the competence of judges inexperienced in judicial review to monitor a bill of rights. It recommends that the existing judiciary be entrusted with the task of enforcing a bill of rights on the grounds that "[t]he public has a large measure of confidence in the courts it already knows"¹⁴¹ and that there is a danger that a "constitutional court will be distrusted as a loaded or political court."¹⁴²

The Law Commission's reliance on the present South African judiciary may be well founded for there are some recent indications that the judiciary is becoming more responsive to human rights issues. In 1989, Mr. Justice M. M. Corbett was appointed as Chief Justice of South Africa. A man of liberal outlook, he has a much better human rights record than many of his predecessors. There is therefore some hope that the public will regain some confidence in the judiciary during Chief Justice Corbett's period in office. If this occurs, it will overcome the

135. See Mokgatle, *The Exclusion of Blacks from the South African Judicial System*, 3 S. AFR. J. HUM. RTS. 44, 46-47 (1987).

136. See *id.* at 48.

137. See generally J. DUGARD, *supra* note 3, at 279-388.

138. See, e.g., Didcott, *supra* note 127, at 53-54.

139. A constitutional court has a twofold attraction. First, it might consist of experts in constitutional law and human rights. Secondly, it would be easier to constitute a new court representing all sections of the community rather than to wait until black lawyers become eligible for appointment to the Supreme Court.

140. Sachs pleads for a commission that is democratic in its "composition, functioning and perspective, and that operate[s] under overall supervision of the people's representatives in Parliament." A. SACHS, *supra* note 44, at 22.

141. WORKING PAPER, *supra* note 57, at 449.

142. *Id.*

principal objection to the present judiciary as the custodian of a bill of rights.

The other objection, however, will be more difficult to surmount. Professor Cappelletti has argued that the role of constitutional review "demands a higher sense of discretion than the task of interpreting ordinary statutes"¹⁴³ and that "the bulk of Europe's judiciary seems psychologically incapable of the value-oriented quasi-political functions involved in judicial review."¹⁴⁴ This comment is a particularly apt description of the South African judiciary's approach towards constitutional litigation. Clearly, the judiciary will have to be re-educated before it assumes the role of custodian of a bill of rights.

I. Enactment of the Law: Merits of a Limited Bill of Rights in Anticipation of a New South African Constitution

Perhaps the most vigorously contested question in the debate over a South African bill of rights concerns the question of how and when to introduce the instrument. One school argues that a bill of rights should be included as a part of a constitutional compact for a post-apartheid South Africa and, therefore, should be delayed until a consensus exists on the form of the new constitutional order. This position probably has the most popular support, as there is widespread apprehension that any attempt to introduce a bill of rights before apartheid itself is completely abandoned will bring the legitimacy of the instrument into question. Dr. Frederick van Zyl Slabbert, a prominent liberal and former leader of the opposition party in the white House of Assembly, has said "it would be disastrous to introduce a Bill of Rights in the present South African constitutional set-up, or, for that matter, as long as racist laws remain on the statute books and political participation is predetermined on the basis of racial or ethnic membership."¹⁴⁵ The Law Commission endorses this view¹⁴⁶ and suggests a five stage process for implementing a bill of rights. The Commission recommends that as soon as possible Parliament should meet in joint session and adopt a non-binding policy statement in which it approves the principle of including a bill of rights in a future constitution.¹⁴⁷ Parliament should then repeal all laws clearly inconsistent with the likely provisions of a bill of rights.¹⁴⁸ Simultaneously, the government should launch a concerted educational program to inform the general public of the advantages of a bill of rights.¹⁴⁹ Next, negotiation and constitutional planning committees should draft a bill of rights as part of a new political order.¹⁵⁰ For the final phase, the

143. M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 63 (1971).

144. *Id.* at 62-63.

145. WORKING PAPER, *supra* note 57, at 281 (quoting Dr. F. van Zyl Slabbert, former leader of the opposition).

146. *See id.* at 487-91.

147. *See id.* at 488.

148. *See id.* at 488-89.

149. *See id.* at 489-90.

150. *See id.* at 490.

Law Commission recommends that the proposed constitution, including a bill of rights, be put to a single, general open referendum. Thus, the constitution would be legitimized by an unrestricted electorate that does not discriminate among voters from particular groups or races.¹⁵¹

Albie Sachs advances a more radical reason for postponing the introduction of a bill of rights until South Africa totally abandons apartheid. Sachs argues that a bill of rights can only be adopted by the former oppressed people after they have won freedom, and not by "a certain stratum in the ranks of the oppressors."¹⁵² In support of his argument he invokes the U.S. Bill of Rights, which "was adopted not before Independence, but afterwards, not by the ousted colonial authorities but by the victorious freedom fighters."¹⁵³

Although some bills of rights have not emerged as a consequence of successful armed struggle,¹⁵⁴ there is certainly considerable historical support for Sachs's view. Moreover, many of the black community's suspicions about a bill of rights arise from the fact that its main proponents are found among liberal whites. But to identify such whites as belonging to "a certain stratum within the ranks of the oppressors" is an unfair slur on the liberals who, for over forty years, have been in the vanguard of non-violent opposition to apartheid.

Opposed to this view, another school believes that many years will pass before the various political factions and racial communities in South Africa can agree on a constitution that fully recognizes the principle of universal franchise. In the interim, this school would introduce a limited bill of rights and exploit the present momentum in favour of a bill of rights.

The model for a limited bill of rights is the 1960 Canadian Bill of Rights,¹⁵⁵ which was the precursor to the 1982 Charter of Rights and Freedoms. An ordinary statute that recognized the main civil and political rights,¹⁵⁶ this Bill of Rights was not a "higher law" like the U.S. Bill of Rights. The judiciary did not have the power to overrule offensive legislation. Instead, judges construed legislation so that it did not abridge or infringe any of the protected rights unless Parliament expressly sanctioned such violations.¹⁵⁷ In practice, this power of construction allowed the courts to strike down contrary legislation enacted before the adoption of the Bill.¹⁵⁸ Although Parliament could override

151. *See id.* at 490-91.

152. A. SACHS, *supra* note 44, at 3. *See also* WORKING PAPER, *supra* note 57, at 7-11.

153. A. SACHS, *supra* note 44, at 8.

154. *See, e.g.*, Canadian Charter of Rights and Freedoms, *supra* note 82; An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, Act of Aug. 10, 1960, Can. Stat. 519 [hereinafter 1960, Canadian Bill of Rights].

155. 1960 Canadian Bill of Rights, *supra* note 154.

156. *See* Hogg, *A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS 1-23 (W. Tarnopolsky & G. Beaudoin eds. 1982).

157. 1960 Canadian Bill of Rights, *supra* note 154, art. 2.

158. *See, e.g.*, Regina v. Drybones, 9 D.L.R.3d 473, 483-85 (1969).

the Bill of Rights, the Minister of Justice was required to alert Parliament to any inconsistencies between proposed new legislation and the Bill of Rights.¹⁵⁹ Undoubtedly, this acted as a major political restraint on Parliament.

In the South African context, a limited bill of rights would work in the same manner. It would contain all the basic civil and political rights except the universal right to the franchise, which would not be granted until adoption of a full bill of rights and a new South African constitution. The limited bill of rights would be an ordinary statute, capable of Parliamentary override only after Parliament had considered a report from the Minister of Justice indicating any conflict with the bill of rights. The courts would be empowered to set aside *earlier* statutes that violate the limited bill of rights including laws comprising the law of apartheid. The single exception would be the present constitution and its discriminatory provisions relating to the franchise. The courts would also be directed to construe any ambiguous statute, whether enacted before or after the bill, consistently with the bill of rights.

The limited bill of rights would remain in force until South Africa adopts a new constitution that would include a comprehensive bill of rights, including the universal right to the franchise. The full bill of rights would become part of the higher law of the constitution and would confer the power of judicial review. A limited bill of rights operative during the transitional period is expected to serve several purposes. First, it would facilitate the removal of racist and repressive laws from the South African statute book. Second, the limited bill of rights would contribute towards the creation of a rights culture in a country that has largely ignored human rights until now. Third, the limited bill would educate a judiciary trained in a system of parliamentary supremacy to exercise judicial review over acts of Parliament.¹⁶⁰ Fourth, it would restore confidence in the courts and the legal system, and finally, the limited bill would create a political environment more conducive to negotiation and resolution.

Conclusion

Human rights are at last on the South African political agenda. Although the National Party government and the popular black political movements continue to disagree in many areas, there is now a consensus that human rights should play a central role in the political order

159. 1960 Canadian Bill of Rights, *supra* note 154, art. 3.

160. The South African judiciary faces the same problems as the Canadian judiciary faced when the Canadian Bill of Rights was introduced. South African judges have been educated in a system in which legal positivism and respect for parliamentary supremacy are the guiding principles of judicial conduct. Clearly the judiciary will have to adopt a more activist, value-oriented approach to its role if it is to succeed as a custodian of a bill of rights. For discussion of the experience of the Canadian judiciary, see Fowler, *The Canadian Bill of Rights — A Compromise Between Parliamentary and Judicial Supremacy*, 21 AM. J. COMP. L. 712, 733-38 (1973).

that is to emerge from the negotiations for a new South Africa. The South African Law Commission's *Working Paper* has at least elevated the issue of human rights to the center of the political debate.