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Harmonizing Competing Ethnonationalisms?: A Bill of Rights for a New South Africa

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INTRODUCTION

The story of present-day South Africa is one of competing ethnonationalisms. Whites are divided into the English-speaking and long-ruling Afrikaans-speaking groups.¹ Once exceedingly antagonistic toward one another because of historic animosities, the groups have now largely cast aside their differences in favor of a more united front against a perceived common black enemy.² Blacks, as the oppressed prefer to call themselves, for decades have been divided by whites into Asians, Coloureds (mixed race), and Africans (subdivided into ten different groups).³ Yet, the yoke of white domination has, contrary to government desires and with certain ominous exceptions, united rather than divided blacks in their struggle against apartheid. Thus, the major cleavage in the battle for a new South Africa is between whites and blacks. To be white is to enjoy political and economic power and privilege, while to be black is to be denied such advantages. The arena in which the battle is being fought is increasingly the legal one. This has been made possible in part through the extraordinary developments that have occurred in South Africa in the last year.

The 1990s began in South Africa with some dramatic changes. In early February, State President F.W. De Klerk made a speech which many took as an indication that he was serious

about transforming South Africa.⁴ The measures announced included the unbanning of the African National Congress (ANC), the Pan-Africanist Congress (PAC), the South African Communist Party and other groups;⁵ the lifting of restrictions on thirty-three other organizations including the powerful Congress of South African Trade Unions; the release of most political prisoners; the lifting of restrictions on 374 freed detainees; the limiting of detention without trial to six months, with provision for legal representation and medical treatment; and a moratorium on hangings. De Klerk also indicated that he would free ANC leader Nelson Mandela, perhaps the world's most famous political prisoner, after twenty-seven years in jail.⁶

Mandela's release a few days later was accompanied by jubilation from many of his compatriots as millions watched worldwide. Mandela proceeded to tour numerous foreign countries where he was greeted by adoring crowds. At home, the ANC held meetings with the government on "talks about talks" and set up offices throughout the country. Organizing by other unbanned groups also went into high gear. In June, De Klerk announced the lifting of the four year-old state of emergency for all of South Africa except Natal where fighting between those loyal to Chief Mangosuthu Buthelezi's rural, Zulu Inkatha movement and supporters of the broad-based anti-apartheid coalition known as the Mass Democratic Movement (MDM) continued to claim many African lives.⁷ Although the violence continued, De Klerk later lifted that state of emergency as well.

Many came to believe the promise of De Klerk's February speech that "[h]enceforth, everybody's political points of view will be tested against their realism, their workability and their fairness. . . . The time for negotiation has arrived."⁸ Graffiti in some African townships even proclaimed, "Viva Comrade De Klerk!" Yet, euphoria quickly evaporated as people recognized that despite the unprecedented occurrences, the main pillars of apartheid the Natives Land Act, the Group Areas Act, and the Population Registration Act - remained intact.⁹ At the same time, the government was steadfast in its refusal to release prisoners sentenced for offenses such as murder, terrorism, and arson on behalf of political organizations. To make matters worse, by December, South Africa teetered perilously on the brink of collapsing in internecine convulsions as Africans, allegedly with police complicity, brutalized and murdered each other in areas throughout the country in conflicts fueled by urban-rural, class, and ethnic tensions.¹⁰

Even as De Klerk ordered an investigation into the situation in response to ANC allegations of government involvement,

it was clear that any new order somehow would have to provide sufficient human rights guarantees so that, at its birth, a new South Africa would not be baptized in blood. For both the white supporters of the government and the overwhelmingly black membership of the ANC and other anti-apartheid groups, this realization has led to an insistence that the constitution of a new South Africa contain a bill of rights to be interpreted by an independent judiciary. That is where the agreement ends. Closer examination reveals two radically different conceptions of such a document which reflect the clash between competing black and white ethnonationalisms. Indeed, it is the South African legal heritage that has grown out of white desire to suppress black nationalism, including the failure of the white minority to create respect for the rule of law among blacks, that will, inevitably, play a decisive role in the fate of any bill of rights. Ultimately, the entire legal culture will have to be transformed before any constitution can be successful.

This article proposes that some progress can be made toward such a transformation if South Africa adopts a constitution with an Africanist bill of rights. Part I explores the bill of rights debate currently raging in South Africa. Part II offers suggestions for an Africanist bill of rights.

I. The Bill of Rights Debate

When the British colonies of the Cape of Good Hope and Natal joined with the two former Afrikaner republics of the Orange Free State and the Transvaal in 1910 to form the Union of South Africa, the country adopted a system of parliamentary supremacy.¹¹ This meant that with the exception of three entrenched constitutional clauses which had to be amended by a special procedure, all legislation passed by a simple parliamentary majority became the supreme law of the land. Unlike the United States, where the judges are free to declare legislation unconstitutional, in South Africa there was nothing but custom to check parliamentary excesses. In the new polity such custom was lacking with regard to blacks. Accordingly, many discriminatory and repressive laws were passed by Parliament after Union.¹² The number of such laws grew prodigiously after 1948 when the National Party came to power with its slogan "apartheid."¹³

Custom has, however, been sufficient to restrain parliamentary actions in Britain from which South Africa took its model.¹⁴ The distinguishing factors there were: 1) the progressive extension of the franchise to incorporate all elements of society, in contrast to the South African case where the franchise became less inclusive in the years after Union, and 2) a tradition of respect

for the notion of the rule of law.

Although the concept of the rule of law has generated countless pages of writing, four generalizations are opposite.¹⁵ First, there must be representative government or to use Abraham Lincoln's phrase, the government must be "of, by, and for the people."¹⁶ Second, there must be acceptance of the notion of equality before the law. Third, there must be procedural and substantive limits on government action against the individual. Thus, there is the belief that fundamental freedoms are not to be abrogated arbitrarily by the state. Fourth, review by an independent judiciary must be a central mechanism for constitutional enforcement. Central to the viability of the concept of the rule of law is the assumption that the legislature will adhere to such principles in all its decision-making.

In the South African case, the legislature has never adhered to the rule of law with regard to blacks. Only by abrogating black rights has the white-minority regime been able to ensure its survival. Particularly in the post-1948 years, the government has continually enlarged its arsenal of security legislation and since 1983, concentrated ever greater powers in the hands of the executive.¹⁷ According to South African jurist J.D. van der Vyver

[i]nstead of applying its supremacy in accordance with the historical purpose of a sovereign parliament, to keep a tight rein on the powers of government, the South African legislature on the contrary utilized its dominant authority to confer on the executive extensive, and in many instances excessive or even arbitrary, competencies—thereby converting the de iure institution of parliamentary sovereignty into a de facto state of executive supremacy. . .¹⁸

Underlying this executive-minded behavior has been an obsession with legalism (legal formalism) among the Nationalists - there is a law for everything - and the view that such laws, no matter how draconian, are just simply because they are laws.

Assisting to reinforce this obsession with legalism has been the all-white and nearly all-male South African judiciary which has been loath to challenge the executive. Supporters of the judges have argued that the judges merely have been acting in accordance with their proper role in a system of parliamentary supremacy, i.e. to declare the law and not to make it.¹⁹ The judges' task is only to see that the manner of promulgation was procedurally correct and that executive action was taken "in terms of" the

legislation.

In practice, however, this positivistic justification has been an excuse for the generally conservative judges, many of whom are National Party supporters, to lend approval to the underlying moral assumptions of the legislation they are called upon to construe. South African jurist M.G. Cowling has argued that "within the framework of legislative supremacy, the positivistic approach to judicial decision-making provides an extremely convenient cloak behind which judges can hide their 'inarticulate major premisses' by attributing inequitable results to the legislation."²⁰ According to Cowling, these premisses are the "underlying motives, perceptions, [and] political outlook[s]" that mould a judge's interpretation of the law as it is envisioned by the legislature. In the South African case, it is not implausible to suggest that, for many judges, such premisses include beliefs in white domination and continued hegemony, the need to preserve state security, and fear of communism.²¹

The unhappy result of the judiciary's captivity to such premises has been that, instead of protecting human rights, the courts - especially the A.D. - have routinely upheld the draconian will of the executive. In many cases involving security legislation, most recently in Omar,²² Fani,²³ and Bill,²⁴ the courts have deferred to the executive's authority in matters concerning state security. Such cases have revealed that the judiciary, in its refusal to protect even the most basic civil liberties, is largely a rubber stamp for executive decisions. Indeed, some South African scholars have even suggested that more liberal judges resign in an effort to underscore the proposition that, under present conditions, it is inappropriate to speak of an independent judiciary.²⁵

Views such as these have led to calls for a redefinition of the role of the South African judiciary so that it could become an effective guardian of human rights. To effect such a change in orientation there have been demands for the introduction of a bill of rights which would give the judiciary standards for protecting human rights by "restricting the competence of persons in authority to curtail those rights and freedoms by means of legislative or administrative interference."²⁶ Consequently, some scholars have argued that a South African bill of rights would free judges from the constraints of legislative supremacy, providing a "recourse to a positive human rights standard that operates independently of the legislative will and to which the latter [would] be subordinated."²⁷ Without a bill of rights there would be a penumbra surrounding the institutional jurisdiction for the protection of civil liberties. Thus, the, the argument goes, the entrenchment of a bill of rights would not only protect individual rights and freedoms but

also serve to promote the institutional integrity of the judiciary.²⁸

Even as progressive scholars have sought a bill of rights, conservative members of the politico-legal establishment also have turned their attention in that direction.²⁹ However, their interest springs not from their desire to nurture the rule of law in a non-racial democratic state but from their perception that the days of white minority rule are numbered and that a bill of rights is the best way of safeguarding property and minority rights. With such disparate views, it is not surprising that disagreements over what form such a document should take are profound.

A bill of rights can incorporate three types of rights.³⁰ First, procedural rights guarantee that the individual is subject to a judicial process that ensures equal treatment under the law, impartiality, and fairness. Second, substantive rights protect fundamental freedoms such as freedom of expression, movement, assembly, association, and franchise and may include group rights. Procedural and substantive rights appear almost universally in bills of rights. Third, economic rights guarantee the individual's basic material needs such as employment and housing and frequently include freedom from hunger, and access to free medical care and education, sometimes even tertiary education. This last category of rights can be described as the right to expect. Not historically part of western constitutions, economic rights increasingly are being incorporated into the constitutions of many social democracies and third world states.³¹ Economic rights differ from procedural and substantive rights because, as South African historian T.R.H. Davenport has written, they reflect their proponents' assumptions that diverge "from the strictly individualist view of society to which the more basic civil liberties seem logically to belong, by laying down socio-economic standards which must be realized if the individual is to be able to exercise his basic freedoms with profit to himself and the community."³²

The South African debate surrounding a bill of rights centers on the concepts of economic and minority rights. Many aligned with the MDM believe that any proposed bill of rights must ensure, or at least must not obstruct, the economic redistribution which must follow the abolition of the apartheid state. If there is no state-directed economic redress, the argument goes, the members of the white community will simply substitute their current racially-defined supremacy with an economically-defined one reflecting their already superior economic status, a status acquired at the expense of blacks.³³ Moreover, the guarantee of certain minimal economic standards will be the only way of infusing meaning into blacks' newly-secured political rights. As

black advocate Ernest Moseneke contends, "the right to development. . . is probably more crucial than the right to vote; not as a favour which somebody hands out, but a right that you can claim and enforce. . . anything less than that is going to in effect perpetuate the present system."³⁴

For many blacks, capitalism as practiced in South Africa and civil liberties as propounded by the government and interpreted by the judiciary are wedded in a conspiracy of oppression aimed at preserving and perpetuating inequality in economic relations. In this context, the concern of the ANC is not so much with individual property rights as it is with the enormous concentration of monopoly capital in a few huge white-controlled corporations and holding companies. Drawing from the 1955 Freedom Charter,³⁵ ANC draft constitutional guidelines proposed in 1989 emphasized the need to vest the state "with the right to determine the general context in which economic life takes place and define and limit the rights and obligations attaching to the ownership and use of productive capacity."³⁶

The document distinguished between individual property owners and the collective wealth of the corporations. Accordingly, it envisioned that "[p]roperty for personal use and consumption shall be constitutionally entrenched"³⁷ while privately-owned companies and transnational corporations "shall be obliged to co-operate with the state in realising the objectives of the Freedom Charter in promoting social well-being."³⁸

The inclusion of provisions such as this in a new bill of rights will, no doubt, fail to calm white fears of expropriation and, at the same time, anger blacks whose societies have been destroyed by the government's policy of forced removals. Failure to deal with the land question will not win the government blacks' confidence. Yet, if Namibia, which is confronted with a similar problem, is any indication, the new government may not be able to develop a policy acceptable to both sides for some time after independence and maybe even never.

The government has not offered any solutions capable of satisfying whites and blacks and has favored maintaining the status quo with regard to the protection of existing property rights. This preference manifested itself in the South African Law Commission's 1989 Working Paper on Group and Human Rights.³⁹ The Commission, established in 1973 by an Act of Parliament, consists of members of the judiciary, legal profession (including academic lawyers), the magistrates' bench, and officials of the Department of Justice. Its mandate was "to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-

up and the possible extension of the existing protection of individual rights as well as the role the courts play or should play. . .⁴⁰

The Commission stressed that economic rights should be protected only "in the negative sense that legislation and executive acts shall not infringe them. A bill of rights is not the place for enforcing positive obligations against the state."⁴¹

A number of white legal scholars have justified this resistance to any constitutional guarantees of economic redistribution in arguments that revolve around judicial competence to deal with such matters. Legal scholar Cowling and Natal judge John Didcott contend that the judiciary is ill-equipped to deal with issues of economic policy.⁴² Therefore, a bill of rights should be free of economic standards to which the central government would be bound and the judiciary obliged to review. As to property rights, they insist that the judges be neither spoilers of economic redistribution nor rubber stamps for arbitrary expropriation. They are determined that there be a "neutral" bill of rights to act as a "shield" and not a "sword."⁴³ This neutrality is crucial, they maintain, because South African judges are neither qualified nor in possession of the resources and enforcement capabilities necessary to adjudicate issues arising out of economic restructuring.⁴⁴ Such questions of economic restructuring are "political" problems and not germane to jurisprudential deliberation.

Unfortunately, these observers fail to explain why the judges would be ill-equipped to pass on such matters. An explanation can be found in the Law Commission report's distinction between positive and negative rights.⁴⁵ Substantive rights seek to prevent the state from infringing upon individual liberties while economic rights seek to compel the state to fulfill an obligation. Thus, it is for the judges to determine that the state has acted arbitrarily and not that it has not complied with minimal economic guarantees. This argument, however, is unpersuasive. If the judges can ascertain whether the state has abrogated fundamental freedoms such as freedom of the press or speech, they can just as easily determine whether the government has failed to strive for the minimum standards enshrined in the constitution. To suggest that these are political problems not appropriate for adjudication is to engage in perpetuating the positivist myth upon which the South African judiciary has relied for decades.

South African legal scholar John Dugard has taken the middle ground. He contends that property rights are not the *sine qua non* of a bill of rights.⁴⁶ Rather, rights of expropriation with delayed or reduced compensation can furnish the means of obtaining economic redress. While many Africans may feel that compensation is unnecessary because the whites stole the land from

them, the new government will still have to recognize international economic realities. If there is no adequate compensation, international corporations and banks will undoubtedly consider the country a poor risk and the massive investment that South Africa will require if it is to improve the standard of living of its people will never materialize.⁴⁷ Even with the acceptance of Dugard's suggestion about compensation, there is no reason why property rights also cannot be incorporated in a bill of rights.

As for the question of minority rights, the South African government has insisted that these be protected in any bill of rights. The Law Commission's report drew a distinction between political group rights and other group values such as culture, religion, and language.⁴⁸ It determined that the latter should be protected as individual rights in the bill of rights and that the former be protected in the rest of the constitution. The ANC's Constitutional Guidelines also recognize culture, religion, and language as individual rights.⁴⁹ The idea of group political guarantees, however, is at odds with the document which provides for "a system of universal suffrage based on the principles of one person, one vote."⁵⁰ In October 1990, the government appeared to back away from its insistence on group political rights. The Deputy Constitutional Minister Rolf Meyer stated that the government had abandoned the notion of demanding recognition of "group rights" based on race or color "in any form whatever."⁵¹ Despite his rejection of the group rights approach, however, Meyer then indicated that the government was looking at various constitutional mechanisms established elsewhere to protect the white minority, "first of all a bill of rights."⁵²

It seems that no constitution will ever receive black acceptance unless it creates the perception that it is bias free. The protection of minority interests will perpetuate existing inequalities and diminish or destroy the new government's credibility. If a new government is truly committed to the rule of law, there will be no need for minority rights if individual rights are protected. Whites are not easily persuaded by such statements. After all, they well know that their representatives have long used the law as an instrument of oppression. What would prevent a black-dominated government from behaving in a similar fashion? Moreover, life under apartheid has made it impossible for many whites to conceive of a unitary, non-racial state. Their world view is one of ever competing black and white nationalisms. For them, as historian T.R.H. Davenport has noted, "[t]he frontiers of nationalism tend to stop short with the frontiers of the in-group to which the rights of out-groups are really irrelevant since they are presumed to be antagonistic. The nationalist, moreover, tends not to

think in universals, for the very concept of universality makes nonsense of nationalist group particularism."⁵³ Accordingly, the challenge for drafters of a bill of rights is to create a document acceptable to both sides. One possible way of doing so is by creating a document that is Africanist and internationalist at the same time. Such a document would appeal to international standards of human rights, particularly those which enjoy broad acceptance in the rest of Africa.

II. An Africanist Bill of Rights

International human rights norms are contained in many documents. In the African context, the most relevant is the African Charter on Human and Peoples' Rights, popularly known as the Banjul Charter.⁵⁴ Adopted as a regional treaty by the Organisation of African Unity (OAU) in 1981, it entered into force, contrary to most expectations, only five years later in October 1986. Thus far it has been ratified or acceded to by thirty-five African states or some two-thirds of the OAU members.⁵⁵ This makes it the largest regional human rights system in existence.⁵⁶ While most of the states party to the Charter have failed to concretize the lofty ideals it contains, the document is significant because it reflects the African affirmation of international human rights standards.⁵⁷ It also furnishes African solutions to the issues of economic and group rights.

For South Africa, use of many of the Charter's tenets in a bill of rights would enable it to create a truly Africanist jurisprudence and, at the same time, express solidarity with the rest of the international community on key human rights issues. Adherence to such principles could make South Africa a model for the respect of human rights not only in Africa but also in the world, a lofty goal but one worth striving for.

The Banjul Charter enumerates various individual rights, many of which are recognized in African constitutions. Among them are the rights to: non-discrimination;⁵⁸ equality and equal protection under the law;⁵⁹ life;⁶⁰ the respect of human dignity;⁶¹ liberty;⁶² have one's cause heard, i.e the right to certain minimum standards during legal proceedings;⁶³ freedom of conscience and religion;⁶⁴ freedom of expression and dissemination of opinion;⁶⁵ freedom of association;⁶⁶ freedom of assembly;⁶⁷ freedom of movement;⁶⁸ participation in government and access to public services and public property;⁶⁹ and property.⁷⁰ In this respect the Charter has much in common with other older universal instruments such as the United Nations Charter⁷¹ and regional instruments such as the European⁷² and American⁷³ conventions. While endeavoring to reflect an African conception of human rights, the

drafters recognized that it would be imprudent to deviate too much from norms already established in other international human rights instruments. In so doing, they accepted the concept that human rights are universal and "transcend the boundaries of nation, race, and belief."⁷⁴

At the same time, the Charter is unique among international and human rights treaties in its enumeration of civil and political rights as well as economic, social, and cultural rights. The inclusion indicates that the two categories of rights are of fundamental importance and intertwined. It also refutes the argument by some South African jurists that both kinds of rights are not justiciable.⁷⁵ Nowhere in the Charter is there the suggestion that civil and political rights are inferior to or may be suspended by the government in order to promote economic, social, and cultural rights, or vice versa.

The economic, social, and cultural rights guaranteed to individuals include the rights to: work and equal pay for equal work;⁷⁶ health;⁷⁷ and education.⁷⁸ With regard to the practical application of such rights, in most African countries - and a majority-ruled South Africa would no exception - it is difficult to imagine how they can be guaranteed when the economy is not sufficiently developed (e.g. the right to work) or the necessary infrastructure is absent (e.g. the rights to health and education). Nevertheless, even though it may take many years before state action can begin to ensure anything like the full implementation of these rights, their inclusion mandates that existing public facilities be made available to all on a non-discriminatory basis⁷⁹ and provides minimum standards by which state actions can be judged. For example, the Charter requires non-discrimination in the allocation of government economic resources. Thus, a court could declare unconstitutional any misallocation of resources where the government deprived some members of the community of services essential to development for reasons unrelated to economic feasibility or general principles of proportionality. The role of the judiciary in enforcing such economic rights has been demonstrated in recent years by the judges of the Indian Supreme Court who, guided by specific directives contained in India's Constitution, have freely developed the common law.⁸⁰

The Charter also includes a right to property ownership which appears in the First Protocol to the European Convention but is absent from both United Nations Covenants on Human Rights.⁸¹ This right is in line, too, with Dugard's middle path on expropriation with just compensation.⁸² The Charter indicates that the right to property may be encroached upon only for public purposes or "in the general interest of the community and in

accordance with the provisions of appropriate laws.⁸³ At the same time, the state has an obligation to "promote respect, equitable exchange, and the principles of international law."⁸⁴ This implies that nationalization of property owned by foreigners such as multinational corporations and business assets is lawful only if the government complies with the appropriate international legal standards, including the payment of just compensation. Hence, in cases of expropriation or nationalization, courts are free to ascertain whether the state has overstepped its bounds in taking property. Thus, a bill of rights based on the Banjul Charter would address the economic concerns of both sides in South Africa. On the issue of group rights, the Charter also provides guidance.

A unique aspect of the Banjul Charter is its inclusion of rights attributable to "peoples." These rights, which appear even in the title, distinguish it from the European and American conventions. The drafters of the Charter believed that it was central to the "African" conception of human rights. It was meant to be reflective of the importance of the community in African culture, particularly because collective agricultural and other efforts have often been essential to ensure survival. It was within the group that individuals had identity in African customary law and expulsion from the group was one of the most serious punishments that could be inflicted on the individual.⁸⁵

In fact, "peoples" rights in Charter are the rights of the individual.⁸⁶ No new rights have been created and accordingly no new rights arise for adjudication. However, given the legacy of apartheid with its deliberate attempt to classify everyone as a member of a racially- or ethnically-defined group, a reference to "peoples" rights in a South African bill of rights might appear to furnish a means of perpetuating divisions. To guard against the rise of vocal lobbies clamoring for special treatment based on a misinterpretation of the phrase, it would be best to incorporate only individual rights with no special provisions protecting group rights. As long as individual freedoms are guaranteed, people will be free to band together as they please. Certainly, this has been the case elsewhere in the decolonized world, most notably in Zimbabwe and Namibia, where little has changed in the exclusivist world of social relations.

There is one aspect of group rights where the Charter has much to offer a South Africa in which the horrors of apartheid, especially the migrant labor system, have destroyed the family. The Charter provides that the family "shall be the natural unit and basis of society."⁸⁷ It gives the state the duties to: safeguard the physical, health, and moral welfare of the family;⁸⁸ assist the family, which is the custodian of moral and traditional values

recognized by the community;⁸⁹ eliminate discrimination against women;⁹⁰ and protect internationally-recognized women's and children's rights.⁹¹ This family-oriented approach, framed in terms of positive obligations, differs from that taken in the European⁹² and American⁹³ conventions, which merely provide for the absence of interference in family life. The Charter reflects the drafters' belief in the family including the extended family - as central to African values.⁹⁴ Such views would find wide acceptance among black South Africans who have witnessed the crumbling of family life under white domination. It also would satisfy whites, particularly Afrikaners who often stress their commitment to family life. Family guarantees in a South African bill of rights would serve as guiding principles for judges called upon to assess the government's compliance in the enactment of social legislation and the formulation of social policies.

The obligations the Charter places upon the state are not one-sided. The Charter has an unparalleled approach which places requirements on the individual as well. In the South African case, these duties would demand the commitment of all to reconciliation. It is not enough for individuals merely to expect protection from the state. Rather, they should participate actively in the creation of a more just social order.

The African Charter stands alone among regional human rights instruments in its stipulation that "every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community."⁹⁵ This differs from the European Convention, which is silent on the matter, and the American Convention, which recognizes obligations to the family, community, and humanity but does not enumerate the duties.⁹⁶ In contrast, the African Charter imposes a duty on the individual to consider his fellow human beings without discrimination.⁹⁷ It then lists specific duties such as respect for the family, the maintenance of parents in case of need, and the preservation of the family's harmonious development.⁹⁸ Broader social obligations include the duty to place one's intellectual and physical abilities at the service of the community, to work to the best of one's ability and competence, and to preserve positive cultural values in one's relations with other members of the society in a spirit of tolerance. Additional duties include the preservation of national unity and the territorial integrity of the country and the contribution to national defense in accordance with the law. If incorporated into a South African bill of rights, many of these, although in the nature of moral obligations, at least would serve to set a tone of morality in a country where their denial has caused immeasurable suffering. Other

duties, such as the one to maintain parents, could properly be regarded as legal obligations enforceable in courts of law. These would present a challenge of interpretation to judges. Indeed, the issue of judicial interpretation will be one of the most vexing in a new South Africa.⁹⁹ Ultimately, of course, it is with the people that the greatest challenges for any new order will lie. However, an Africanist bill of rights can at least aid them to overcome ethnonationalistic animosities and create a more humane society.

CONCLUSION

In recent years, the South African government has come under ever increasing threats to its domination from without and within. Internal black protests and political organizing have reached unprecedented levels. Pressure from anti-apartheid groups around the world has persuaded many members of the international community to bring pressure on the government through economic sanctions and diplomatic moves. With the advent of an independent Namibia, South Africa has become the only country in Africa still ruled by a white minority government. Already, the eyes of the international community are focussed on South Africa as the next target for change. Recognizing and in many cases fearing the inevitability of black majority rule, the white politico-legal establishment which rules South Africa has recently placed much emphasis on introducing a bill of rights for the country. As discussion of this issue has raged in white political circles, the ANC has also turned its attention to the same issue while it grapples with the question of a post-apartheid legal order. Both sides are in particular disagreement over the issues of economic and minority rights.

One way to harmonize these differences would be for drafters to adopt a South African bill of rights that draws upon the Banjul Charter. Reliance on the Charter would result in the creation of a document that is both Africanist and internationalist in orientation by appealing to international standards of human rights, particularly those which are widely recognized in the rest of Africa. While such a document alone will not free the new country from abuses by the judiciary and the executive, it will at least furnish ammunition for those South Africans - black and white - who are bent on harmonizing competing ethnonationalisms so that a truly non-racial order may emerge.

FOOTNOTES

¹Whites form fifteen percent of a population of thirty-eight million. L. THOMPSON, *A HISTORY OF SOUTH AFRICA* 240 (1990). Afrikaner nationalism is described in H. ADAM & H. GILIOME, *ETHNIC POWER MOBILIZED: CAN SOUTH AFRICA CHANGE?* (1979).

²For an examination of this shift, see generally L. THOMPSON, *THE POLITICAL MYTHOLOGY OF APARTHEID* (1985).

³Blacks comprise eighty-five percent of the South African population. L. THOMPSON, *supra* note 1, at 240.

⁴New York Times, February 2, 1990.

⁵The history of these groups is described in T. LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* (1983).

⁶On Mandela, see F. MEER, *HIGHER THAN HOPE* (1990).

⁷New York Times, June 15, 1990.

⁸New York Times, *supra* note 4.

⁹This legislation is described in L. THOMPSON & A. PRIOR, *SOUTH AFRICAN POLITICS* (1982); L. THOMPSON, *A HISTORY OF SOUTH AFRICA* (1990).

¹⁰New York Times, October 30, 1990.

¹¹The process of unification is described fully in L. THOMPSON, *THE UNIFICATION OF SOUTH AFRICA 1902-1910* (1960).

¹²See generally Berat, Conscientious Objection in South Africa: Governmental Paranoia and the Law of Conscription, 22 *VAND. J. TRANSN'L L.* 128, 131-35 (1989).

¹³See generally *id.*; L. THOMPSON, *supra* note 9, at 190-95.

¹⁴On parliamentary supremacy in Britain, see J. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955).

¹⁵South African writings on this concept include Beinart, The Rule of Law, *ACTA JURIDICA* 101 (1962); Budlender, Law and Lawlessness in South Africa, *S.A. J. HUM. RTS.* 140 (1988); Molteno, The Rules Behind the Rule of Law, *ACTA JURIDICA* 136-37 (1965-66).

¹⁶Lincoln, Gettysburg Address.

¹⁷See generally Berat, *supra* note 12, at 158-76; Berat, Doctors, Detainees and Torture: Medical Ethics v. the Law in South Africa, 25 *STAN. J. INT'L.* 499, 528-31 (1989).

¹⁸Van Der Vyver, Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights, 99 *S.A. L.J.* 560, 575 (1982).

¹⁹Basson, Judicial Activism in a State of Emergency: an Examination of Recent Decisions of the South African Courts, 3 *S.A. J. HUM. RTS.* 42-43 (1987).

²⁰Dugard, The Judicial Process, Positivism, and Civil Liberty, 88

S.A. L.J. 181-200 (1971); Cowling, Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premise, 3 S.A. J. HUM. RTS. 180,189 (1987).

²¹Cowling, supra note 20, at 189.

²²Omar v. Minister of Law and Order, 1987 (3) SA 859 (A). In the Appellate Division case, Omar included the appeals in Fani and Bill.

²³Fani v. Minister of Law and Order (ECD Case No. 1840/1985, unreported).

²⁴Bill v. State President, 1987 (1) SA 265 (W).

²⁵See generally Wacks, Judges and Injustice, 101 S.A. L.J. 266 (1984); Dugard, Should Judges Resign? - A reply to Professor Wacks, 101 S.A. L.J. 286 (1984).

²⁶Weeramantry, The Constitutional Reconstruction of South Africa: Some Essential Safeguards, 3 LESOTHO L.J. 1, 16 (1987); Van Der Vyver, supra note 18, at 582-83.

²⁷Cowling, supra note 20, at 196.

²⁸Weeramantry, supra note 26, at 15.

²⁹See, e.g., S.A. L. COMM., PROJECT 58: GROUP AND HUMAN RIGHTS (1989) [hereinafter cited as S.A. L. COMM. REP.].

³⁰Davis, Human Rights - A Re-Examination, 97 S.A. L.J. 95 (1980).

³¹See, e.g., Republic of Ireland, Constitution; Republic of India, Constitution.

³²Davenport, Civil Rights in South Africa, 1910-1960, ACTA JURIDICA 12 (1960).

³³Davis, Legality and Struggle: Towards a View of a Bill of Rights for South Africa, in A BILL OF RIGHTS FOR SOUTH AFRICA 179 (J. Van der Westhuizen & H. Viljoen eds.1988).

³⁴E. Moseneke, quoted in Panel Discussion, in A BILL OF RIGHTS FOR SOUTH AFRICA, supra note 33, at 149.

³⁵On June 26, 1955, three thousand delegates of all racial groups met at Kliptown, near Johannesburg, and adopted a Freedom Charter which, among other things, stipulated that "South Africa belongs to all who live in it, black and white. . ." The text of the Charter is reprinted in T. KARIS & G. CARTER, 3 FROM PROTEST TO CHALLENGE 205 (1977)

³⁶AFRICAN NATIONAL CONGRESS, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1989), cl. (O) [hereinafter cited as ANC CONST. GUIDELINES].

³⁷Id. at cl. (T).

³⁸Id. at cl. (P).

³⁹See generally S.A. 1, COMM REP. supra note 29.

⁴⁰Id. at Introduction, 4.

⁴¹Id. at 9.1.

⁴²Didcott, Practical Workings of a Bill of Rights, in A BILL OF RIGHTS FOR SOUTH AFRICA, supra note 33, at 60; Cowling, supra note 20, at 179.

⁴³Didcott, supra note 42, at 58-60.

⁴⁴Cowling, supra note 20, at 179.

⁴⁵S.A. L. COMM. REP., supra note 29, at 9.1.

⁴⁶Dugard, The Quest for a Liberal Democracy in South Africa, ACTA JURIDICA 252-53 (1987).

⁴⁷See generally Berat, Namibia: The Road to Independence and the Problem of Succession of States, in GOVERNMENTS-IN-EXILE (Y. Shain ed. 1991) (forthcoming), reprinted in XVIII J. POL. SCI. 33 (1990) (discussing this problem in the Namibian context).

⁴⁸S.A. L. COMM. REP., supra note 29, at § 8.

⁴⁹ANC CONST. GUIDELINES, supra note 36, cl. g), h), 1)

⁵⁰Id. at cl. e).

⁵¹Washington Post, October 5, 1990, at A29.

⁵²Id.

⁵³Davenport, supra note 32, at 25-26.

⁵⁴African Charter on Human and Peoples' Rights, Organisation of African Unity, General Secretariat, Division of Press and Information, June 1982 [hereinafter cited as Banjul Charter].

⁵⁵OAU member states party to the Charter are: Algeria, Benin, Botswana, Burkina Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia, and Zimbabwe.

⁵⁶Twenty-one states are party to The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, 213 U.N.T.S. 221, popularly known as the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter cited as European Convention]. Nineteen states are party to the American Convention on Human Rights of 1969, (1970) 9 I.L.M. 99 [hereinafter cited as American Convention].

⁵⁷See OAU Doc. CAB/LEG/67/3/rev. 1 (1979), Dakar Draft, at 1.

⁵⁸Banjul Charter, supra note 54, at art. 2.

⁵⁹Id. at art. 3.

⁶⁰Id. at art. 4.

⁶¹Id. at art. 5.

⁶²Id. at art. 6.

⁶³Id. at art. 7.

⁶⁴Id. at art. 8.

⁶⁵Id. at art. 9.

⁶⁶Id. at art. 10.

⁶⁷Id. at art. 11.

⁶⁸Id. at art. 12.

⁶⁹Id. at art. 13.

⁷⁰Id. at art. 14.

⁷¹U.N. Charter. The U.N. Charter was signed on June 26, 1945 and entered into force on October 24, 1945. To date the Charter has been amended on three occasions: arts. 23, 27, and 61 by G.A. Res. 1991 A and B, 18 U.N. GAOR Supp. (No. 15) at 21, U.N. Doc. A/5515 (1963). art. 109, G.A. Res. 2101, 20 U.N. GAOR Supp. (No. 14) at 90, U.N. Doc. A/6014 (1965); and art. 61, G.A. Res. 2847, 26 U.N. GAOR Supp. (No. 29) at 69, U.N. Doc. A/8429 (1971).

⁷²European Convention, supra note 56.

⁷³American Convention, supra note 56.

⁷⁴See South West Africa Case, Second Phase, (1966) ICJ Rep. 6, 296 (dissenting opinion of Judge Tanaka).

⁷⁵See generally Addo, The Justiciability of Economic, Social and Cultural Rights, 14 COMMONWEALTH L. BULL. 1425-32 (1988).

⁷⁶Banjul Charter, supra note 54, at art. 15.

⁷⁷Id. at art. 16.

⁷⁸Id. at art. 17.

⁷⁹Id. at arts. 2, 19.

⁸⁰See generally Bhagwati, Fundamental Rights in Their Economic, Social, and Cultural Context, in COMMONWEALTH SECRETARIAT, REPORT OF THE JUDICIAL COLLOQUIUM IN BANGALORE, February 24-26, 1988 (1988).

⁸¹Banjul Charter, supra note 54, at art. 14.

⁸²Dugard, supra note 47, at 252-53.

⁸³Banjul Charter, supra note 54, at art. 14.

⁸⁴Banjul Charter, supra note 54, at art. 21, cl. 3.

⁸⁵INT'L, COMM. JURISTS, SEMINAR ON HUMAN RIGHTS IN A ONE-PARTY STATE 65 (1978).

⁸⁶On the concept of peoples' rights, see generally Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights, June 1981, CAB/LEG Draft Rapt. Rpt (II) Rev. 4 . at. 4 - Mumba, Prospects for Regional Protection for Human Rights in Africa, HOLDSWORTH L. REV. 101, 106 (1982); Kiwanuka, The Meaning of "People" in the African Charter on Human and Peoples' Rights. 32 AM. J. INT'L. 8 (1988).

⁸⁷Banjul Charter, supra note 54, at art. 18.

⁸⁸Id. at art. 18(1).

⁸⁹Id. at art. 18(2).

⁹⁰Id. at art. 18(3).

⁹¹Id. at art. 18(4).

⁹²European Convention, supra note 57, at art. 8.

⁹³American Convention, supra note 57, at art. 5.

⁹⁴See generally Nwabueze, Family Law in Nigeria, in LE DROIT DE LA FAMILLE EN AFRIQUE NOIRE ET A MADAGASCAR 117 (M'baye ed. 1968); Marasinghe, Traditional Conceptions of Human Rights in Africa, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 32 (Welch and Meltzer eds. 1984).

⁹⁵Banjul Charter, supra note 54, at art. 27(1).

⁹⁶American Convention, supra note 57, at art. 32.

⁹⁷Banjul Charter, supra note 54, at art. 28.

⁹⁸Id. at art. 29.

⁹⁹The role of the judiciary is beyond the scope of this article. It is examined in Berat, A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary, LOY. L.A. INT'L & COMP. L. REV. (Winter 1991) (forthcoming).