# FUNDAMENTAL RIGHTS AND THE IMPLEMENTATION OF A BILL OF RIGHTS IN SOUTH AFRICA[1]

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## ABSTRACT

In the title of this article reference is made to fundamental rights and not human rights because it is my contention that human rights should be seen as only one category of fundamental rights. In the first section an overview is given of the human and group rights discussion in South Africa and in the second section different strategies regarding the introduction of a bill of rights in South Africa are considered. Against the background of these discussions in the third section, attention is given to the different categories of fundamental rights which could be meaningfully protected in the constitutions of developing states. In the fourth section the importance of the creation of a fundamental rights legal culture in South Africa is reviewed against the backdrop of the constitutional histories of England and France.

## 1. THE HUMAN AND GROUP RIGHTS DISCUSSION IN SOUTH AFRICA

The current debate on human rights in South Africa in academic and legal circles seems[2] to focus on the question, not whether, but how and when human rights are to become part of the legal system of this country. Closely linked to this discussion is the group rights dilemma that already surfaced at the First

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[2] According to the South African Law Commission (1989) the arguments against human rights and the implementation of a bill of rights come from a small group of South Africans viz. rightwing organisations (e.g. the

International Conference on Human Rights in South Africa.[3] But it is precisely this possible linkage between human rights and group rights that makes the introduction of a bill of rights attractive to whites (to the centre and right of the political spectrum) and unacceptable to blacks. During the symposium A Bill of Rights for South Africa[4] different views regarding the attitudes of blacks were raised. According to Dugard (1988) there is a negative attitude towards human rights among blacks.[5] Whilst Corder (Van der Westhuizen and Viljoen 1988: 133) is of the opinion that a bill of rights imposed by the ruling group would not be tolerated, Didcott (1988) emphasizes that the chances of a political

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Afrikaner Volkswag), political parties (e.g. the Herstigte Nasionale Party) and individuals.

[3] Held from 22 to the 26 January 1979 at the University of Cape Town. The proceedings were subsequently published in Forsyth and Schiller (1979). NJ Rhoodie (Forsyth and Schiller 1979: 47-48) emphasizes that human rights in democratic, plural societies must necessarily comprise, not only the individual-orientated but also the group-orientated dimension. According to him it is essential to take account of the rights of groups in South Africa. He does not, however, propose that individual rights should be ignored in favour of group rights but he only suggests that ethnic factors (not racial categories) should be taken into account in promoting human rights.

[4] It took place at the University of Pretoria on 1 and 2 May 1986 and the papers and discussions were published in Van der Westhuizen and Viljoen (1988).

[5] "For years blacks have pleaded for the legal protection of human rights. Now that many whites, and possibly even the National Party government, are more sympathetic towards a bill of rights, blacks, who increasingly see power round the corner, appear to be reluctant to accept an instrument perceived to be a method of protecting whites or Afrikaners who see themselves as a potentially threatened minority. Those who have suffered long outside the protection of the law are now unwilling to see their oppressors brought within the protection of the law" (33-34).

settlement might well be enhanced were a bill of rights to be accepted by all parties involved. According to Moseneke (Van der Westhuizen and Viljoen 1988: 149) a bill of rights that only guarantees civil and political rights would not be acceptable to blacks and therefore it should address itself to social and economic rights, as well. He also mentions the right to development that should be a right that could be claimed and enforced and emphasizes that although most speakers at the symposium have said that such rights should not be incorporated into a bill of rights anything less is going to perpetuate the present system. Both Didcott (1988) and Dugard (1987) argue that socio-economic rights should not be part of a bill of rights because they are not easily justiciable. After considering the provisions of the Freedom Charter in this regard, Didcott clearly states that he cannot imagine anybody quarrelling with the pursuit of these ideals, but he suggests that this belongs, not in a bill of rights but in a political programme. Dugard, however, thinks that in order to affirm the commitment of the new order to these ideals, it would be wise to attach a non-justiciable Declaration of Social and Economic Rights to the bill of rights (along the lines of the International Covenant on Economic, Social and Cultural Rights of 1966) that could provide guidelines for the interpretation of the bill of rights and the constitution.

South Africans who accept the necessity of the introduction of a bill of rights thus clearly differ as to the rights that should be incorporated. The question of group rights is even more controversial. Those in favour of ethnic group rights[6] argue that it is, on account of the ethnic composition of the South African population, a necessary precondition for peace and stability. The opponents[7] of ethnic group rights argue that there is no such thing as ethnic group rights, mainly since an ethnic group is not a legal subject or legal person and therefore cannot have rights. Moreover, the present South African constitution, with its distinction between general and own affairs, is based on the distinction between racial groups and is rightfully seen as a further attempt

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[6] Cf. Booysen (1980), Jacobs (1981, 1987), Cloete (1981) and Rhoodie (1984).

[7] Cf. Coetzee (1983), Du Plessis (1984, 1985, 1987, 1988a, 1988b), Van Niekerk (1988) and the South African Law Commission (1989).

to institutionalise racial discrimination. Any attempt to differentiate between people on an ethnic group basis is therefore regarded with suspicion, especially by those who are adversely affected by the present system.

Two of the most important recent contributions to this debate are the doctoral thesis of Blaauw (1988) and the thorough working paper on Group and Human Rights (released on the 11th March 1989) by the South African Law Commission (1989).

Although Blaauw (1988) is in favour of group rights, she belongs to a totally different category when compared to some of the other proponents of group rights, because she takes great care to develop a theory that could by no chance be mistaken for a variety of neo-apartheid. On account of the fact that the recognition of group rights with a political connotation is intertwined with the notion of legitimacy she is of the opinion that it could be counterproductive in the constitutional climate of the present legitimacy, crisis because until now it has been rejected, especially by the extra-parliamentary opposition. She proposes a neutral, non-political approach, aiming at the extension of fundamental rights, including civil rights to groups. Since civil rights only accrue to individuals (due to the democratic basis of a constitutional order) and not automatically to juristic persons, groups cannot be original bearers of civil rights. Civil rights could (as is done in constitutional practice elsewhere) be explicitly extended by a bill of rights to groups or private-law juristic persons in order that they qualify as bearers of rights vis a vis the state. In this way the German bill of rights extended civil rights in terms of section 19(3) to private law juristic persons. From this she concludes that theoretically, there is no reason why civil rights could not in a similar manner be extended to groups. It is a prerequisite for Blaauw that the existence of these groups as bearers of fundamental rights must also be acceptable to all the citizens of South Africa, irrespective of their personal association to or disassociation from groups. Although Blaauw's contribution is not without merit, she does not take the structural differences between public law and private law fundamental rights into account and she proposes, moreover, that civil rights should be extended

to groups which do not qualify as juristic persons.[8] It is precisely in this respect that the South African Law Commission clearly differs from her point of view.

According to the South African Law Commission (1989), who joins the ranks of the opponents of group rights, the protection of human rights of individuals may be instrumental in protecting the interests of groups. In its proposed Bill of Rights the commission concentrates on the human rights of natural (and juristic) persons; thereby signalling the end of, especially, all racial discrimination in an envisaged post-apartheid society that should be brought about in an evolutionary fashion via five proposed phases and with universal franchise as a conditio sine qua non. The commission regards this as the only way to attain unimpeachable legitimacy for a Bill of Rights in South Africa. For its rejection of ethnic group rights the South African Law Commission relies to a large extent on Du Plessis's (1988a, 1988b) views. It would therefore be fruitful to have a closer look at his ideas. In spite of his rejection of ethnic group rights, he does differentiate between individual and institutional group rights and maintains that there is no conflict between the latter two. Group rights as the rights of social institutions are, according to him, susceptible to legal personality and to receive legal recognition. Ethnic (or "race") rights are not group rights for purposes of such recognition. Du Plessis (1988b) explains the difference between ethnic group rights and institutional group rights by pointing out that an ethnic group is a collectivity and therefore in essence juridically undefinable and cannot be protected by (private and public) law. Ethnic or cultural rights (viz. language rights) can only be protected as rights of the individual. This could only be attained by optimally endorsing the right of association of individuals. Institutional group rights can exist only in the case of institutional communities[9] created through such free association.

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[8] Only social entities which are legal subjects can have rights. This is not the case with language and cultural groups, and therefore it would be legally fictitious to extend rights to these groups.

[9] Examples of institutional communities are states, churches, universities, business enterprises, marriages, families etc..

He therefore comes to the conclusion that the law "can at most recognise and protect the cultural rights of individuals, permit maximum freedom of association, and protect the rights of institutional communities" (Du Plessis 1988b: 233). This point of view can only be subscribed to.

The only important distinction made by the South African Law Commission (1989) regarding categories of individual human rights, is that between procedural, substantive and socio-economic rights. Without further distinctions within these categories the commission gives lists of procedural and substantive rights, that should be protected as a minimum. As far as the socio-economic rights are concerned, the commission is of the opinion that the basic socio-economic freedoms, capacities and competences should, like all other rights, be protected in a bill of rights in a negative way in other words, in the sense that legislation and executive acts shall not. Although the commission considers opposing arguments concerning these rights, it gives no theoretical grounds for its view but only states that a bill of rights is not the place for enforcing positive obligations against the state.

Van der Vyver (1975) also distinguishes between procedural and substantive human rights without giving any theoretical foundation for this distinction. Du Plessis (1988a) questions the theoretical viability of this distinction and gives his own classification. He limits[10] himself, however, to the so-called substantive rights. Du Plessis (1987, 1988a, 1988b) argues that there are three basic human rights (viz. the right to freedom, the right to just and equal treatment and the right to free association and participation in social processes) that form the basis of all specific human rights, capable of being protected in a bill of rights. Although the result of this attempt is three impressive lists of specific human rights, Du Plessis does not succeed in highlighting the structural differences between these different categories. In the third section some of the fundamental rights and legal principles embodied in modern constitutional states will be considered in order to get an insight into the

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[10] Although he refrains from discussing the technical aspects of the legal process he does stress the importance of free access to the legal process and equal treatment and protection by the legal system.

different categories of rights which could be meaningfully enshrined in the constitution of a developing state like South Africa.

## 2. THE IMPLEMENTATION OF A BILL OF RIGHTS IN SOUTH AFRICA

As is the case with the categories of rights to be embodied in a bill of rights South Africans differ about the strategies that are to be followed in the successful introduction of a bill of rights. The proposed strategies for the introduction of a bill of rights could be narrowed down to three,[11] viz. (i) the immediate introduction of a full-fledged bill of rights, (ii) the immediate introduction of a limited bill of rights and (iii) the strategy of negotiating a bill of rights for a future post-apartheid dispensation.

Van Wyk (1988) propagates the immediate introduction of a full-fledged bill of rights, thereby expressing not only the sentiments of the extra-parliamentary opposition (e.g. the UDF) but also the "interest groups in exile" (e.g. the ANC). He refrains from saying whether it should be immediately enforceable or only a declaration of intent. The present government is, according to him, transitional and could play a positive role by introducing a bill of rights, thereby proving its sincerity and honesty.

Corder (Van der Westhuizen and Viljoen (1988: 133), Davis (1988), Devenish (1988), Didcott (1988), Venter (1986) and Vorster (Van der Westhuizen and Viljoen 1988: 152) propose that a limited bill of rights be introduced immediately. Davis (1988) denies that a limited bill of rights would have no effect on democracy because if it safeguarded procedural rights it could be used to provide protected spaces to enhance the struggle towards a true democracy. It might furthermore convince embittered disenfranchised South Africans of the importance of rights and civil liberties that can, in spite of the present repressive legal system, work to their advantage. He thereby stresses the important educational role it could fulfil. Van Zyl Slabbert (Van der Westhuizen and Viljoen 1988: 138) deems the idea of a limited bill of rights to be a very

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[11] Cf. Davis (Van der Westhuizen and Viljoen 1988: 130-131) and the South African Law Commission (1989).

dangerous one because it is going to highlight the absence of other fundamental rights that do not exist in South Africa. If it is introduced before the stage of negotiation is reached it could be seen as an instrument to entrench the position of the ruling minority.

Cilliers (1987), Sanders (1986), Dlamini (1988), Du Plessis (1988b), Rautenbach (1988), Van Zyl Slabbert (Van der Westhuizen and Viljoen 1988: 138), and the South African Law Commission (1989) stress the importance of a process of negotiation as a precondition for the legitimacy of a bill of rights among all South Africans. A constitutional blueprint that does not have the approval of the black people can, according to Dlamini (1988), as recent history has illustrated, no longer be taken seriously in South Africa or abroad. A successful bill of rights will therefore have to be a negotiated one.

Du Plessis's (1988b) proposals are of special importance not only because they take the present polarization into account but also provide for a bill of rights with autochtonous and therefore true African elements without ignoring the positive elements in our English and Roman Dutch law background. He proposes a threefold strategy: (i) An awareness and information programme eliminating the ignorance about the true nature and operation of a bill of rights should get initiated; (ii) consensus on the content of a bill of rights reached through political negotiation on a national level (including the groups "in exile") would represent basic agreement on fundamental values for a post-apartheid South Africa; (iii) the idea of African socialism (as well as traditional African thinking) and the Freedom Charter should, for the sake of legitimacy and legality of a bill of rights in a future South African society, be taken seriously (especially by whites) without totally discarding the Western legal and political culture.

In its variety of a negotiated bill of rights the South African Law Commission (1989) proposes five stages: (i) The acceptance in principle by parliament that a bill of rights be adopted in future; (ii) the way for the adoption of a bill of rights should be cleared by the repeal or amendment of legislation conflicting with it; (iii) a thorough educational process to inform the population about the role and value of a constitution of which a bill of rights forms part; (iv) reaching consensus on a future constitution and finalising the bill of rights;

and (v) a single open referendum without any racial or group restriction or discrimination should be held to legitimise the bill of rights.

My preference for the strategy of negotiation (as proposed by Du Plessis and the South African Law Commission) is based on the argument that then only would the idea of guaranteeing fundamental rights in a bill of rights not be compromised and the depolarized atmosphere created by education and negotiation could be the beginning of the development of a fundamental rights legal culture in South Africa. This argument will be explained in the last section, after attention has been given not only to the different categories of fundamental rights but also to the importance of a fundamental rights legal culture for the implementation of a bill of rights in South Africa.

## 3. DIFFERENT CATEGORIES OF FUNDAMENTAL RIGHTS PROTECTED IN THE CONSTITUTIONS OF MODERN STATES

In order to get insight into the different categories of rights enshrined in modern constitutions we shall now consider some of the fundamental rights and legal principles embodied in modern constitutional states.

The current situation in South Africa could serve as a starting point. Van der Vyver (1988) appraises South Africa in terms of the power-restrictive mechanisms and conditions for due legal process as they have developed in the history of Western public institutions. He mentions several constitutional structures designed to restrict the power of the state, which he calls power-restrictive strategies. These include the principle of constitutional representation in a democratic system; separation of powers; decentralisation; a bill of rights; the institution of an ombudsman; and restrictions on the sphere of competence of the state to allow scope for non-state spheres of life and the rule of law. With regard to the judicial system in Western public institutions, he sees so-called procedural human rights as a set of juridical norms or criteria for the due process of law designed to ensure that the courts function independently and impartially; the possibility of innocent persons being convicted is ruled out through respect for procedural rules and means of proof; every individual is refutably supposed innocent; nobody is tried more than once for the same crime; an accused person cannot be obliged to testify against himself; no decisions prejudicial to a person are taken unless he is given an

opportunity to defend himself; everybody who falls foul of the law is accorded legal representation; laws are not enforceable retrospectively if this is prejudicial to the rights and freedoms of subjects; cruel and inhuman punishments are not imposed; and arbitrary detention or detention without trial is not permitted. Van der Vyver regards these juridical criteria as the basic rules according to which properly organised states maintain law and order and the authority of the state is secured, the aim being to guard against abuses of power and to safeguard justice. In his assessment of the measures to restrict power and secure authority in South Africa he concludes that there are no power-restrictive measures incorporated into the constitutional system; and in the process of safeguarding the authority of the state the requirements for the due process of law are thrown overboard completely. In his appraisal of South Africa as a material constitutional state Van Wyk (1979, 1980) maintains that, although the country has certain significant claims to being a formal constitutional state, it can claim only qualified status as a material constitutional state. Its attributes as a formal constitutional state include the following: separation of powers; basic personal rights; legality; an independent judiciary; and the **nulla poene sine lege** principle. He sees a material constitutional state as one whose authority, on the basis of formal constitutional state principles, is intrinsically tied up with certain higher juridical values (**Grundsätze**), the application of which will result in a materially just juridical situation. Basson and Viljoen (1988) likewise find that, although South Africa largely qualifies as a formal constitutional state, it cannot be regarded as a material one.

The distinction made by Hommes (1976, 1983, 1986) between formal and material constitutional states shows certain interesting parallels with Van Wyk's conception, in that it involves a distinction between the constitutive and regulative principles of modern constitutional states. Hommes's constitutive principles largely correspond with van Wyk's characteristics of formal constitutional states, but he claims that a material constitutional state may be said to exist only if the application of these constitutive principles is guided by regulative principles. The latter show a marked similarity to the **Grundsatze** or higher juridical values mentioned by Van Wyk. Significant is the fact that Hommes's distinction between constitutive and regulative principles applies not only to the various spheres of public law (constitutional law, administrative law and the law of criminal procedure), but also to civil private law and the

non-civil private law[12] of non-state societal spheres. He thus arrives at a systematization of most of the principles identified by Van Wyk and Van der Vyver, on the basis of the material juridical spheres, in which the cardinal principles of modern constitutional states are manifested. Following and amplifying on these illuminating ideas, we shall now try to present a systematization of the different rights and principles that characterize modern constitutional states. Of cardinal importance in this respect is the question as to which of these rights and principles could be meaningfully enshrined in bills of rights and constitutions of modern constitutional states. This question will be addressed after the above-mentioned systematization has been given.

The internal public law of a state includes constitutional law, administrative law, criminal law and the law of criminal procedure. Each of these spheres of public law has constitutive and regulative legal principles which may be used as criteria for determining whether we are dealing with a material or a formal constitutional state. But these criteria are not confined to the distinctive sphere of public law. Because the state positivises the principles in civil private law, these principles may also serve as criteria in this respect. In addition, the limitation of state authority in respect of the non-civil private law of non-state societal spheres - another indicator of a material constitutional state - implies the existence and functioning of such non-state spheres of private law.

### 3.1 Constitutive and regulative principles of public law

The four spheres of public law (constitutional law, administrative law, criminal law and the law of criminal procedure), although not divisible, are nonetheless distinguishable.

#### 3.1.1 Constitutive and regulative principles of constitutional law

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[12] South African legal theory does not distinguish between civil and non-civil private law. In section 3.3 attention is given to the importance of this distinction.

**Constitutional law** may be defined as the constitutional or organisational law of the state which regulates the following: areas of competence; tasks; structure and interrelationship of central and subordinate legislative and political bodies (for example the presidency, parliament, executive committees of provinces, town councils, etc); the position and organisation of the administration (independent of the legislative power) and the judiciary, with their respective spheres of competence; the relation between the legislature, the executive and the judiciary; the political rights of citizens (for example active and passive franchise); and the constitutional fundamental rights guaranteeing the fundamental freedom of individuals and non-state institutions against the power of the state.

Modern constitutional states are based on or grounded in constitutive constitutional law principles such as those of constitutional representation (democracy), the separation and balance of powers (trias politica), regional and functional decentralisation, constitutional fundamental rights, and the independence of the judiciary. These constitutive principles peculiar to constitutional law should always be applied in accordance with the notion of the res publica, in the sense of a public structure embodying the principles of justice. This regulative principle presupposes that the state will be organised according to the constitutive principles of constitutional law. In the modern constitutional state this happens only if, in structuring the state, the wielders of political power are guided by the regulative principle of the res publica

When the constitutive principles of constitutional law are incorporated into a modern state without regard to the regulative principle of the res publica, one can at most speak of a formal constitutional state. The constitution and system of constitutional law of such a state might provide for the separation of powers, rule of law, decentralisation, political representation, independence of the judiciary, even constitutional fundamental rights. But these measures remain formal organisational technicalities with no real regard for authentic political representation, balance of constitutional powers (separation of powers and decentralisation), material limitation of the powers of the state (constitutional fundamental rights) and the like.

Proper regard for the constitutive and regulative principles of constitutional law makes a modern state a material constitutional state. These principles may

assume various forms in the political conventions and institutions of modern constitutional states. These, although necessary for the existence and survival of the state as such, are not sufficient to qualify it as a material constitutional state. In determining whether it is federal or unitary, a republic or a constitutional monarchy; whether it has a written constitution or not, single-member constituencies or proportional representation, a two-party or a multi-party system etc. the fundamental criterion is whether its political conventions and institutions apply the constitutive principles of constitutional law in accordance with the distinctive regulative principle of the res publica.

Since constitutional fundamental rights are constitutive principles of constitutional law, a constitutional state can properly be said to exist only when these rights are recognised in a material sense in positive constitutional law. They represent the material juridical bounds of state power over the juridical spheres of freedom of the human personality and of non-state societal spheres. These include freedom of religion and of speech, habeas corpus (freedom from arbitrary arrest), freedom of religious organisation, association and education (primary, secondary and tertiary). The constitutional fundamental rights to which everyone in the national territory is entitled, irrespective of nationality, do not include active and passive franchise, which is reserved for citizens only.

### 3.1.2 Constitutive and regulative principles of administrative law

Administrative law governs the organisation and execution of the specific administrative or managerial task of the state. It concerns not only the internal organisation of administrative or managerial organs and the regulation of administrative adjudication, but also the legal rules governing the police, the defence force, taxation, foreign policy, education and the like. The administrative law principle of the general interest of the state (salus publica suprema lex esto) should be the supreme regulative principle of public administration. The nature of this regulative principle is determined mainly by the normative character of modern public administration, which requires that, in administering public law interests at the various levels, the general welfare of all individuals and societal spheres should be promoted as equitably as possible. The general interest of the state, as a regulative principle of administrative law, should not be interpreted in the (Machiavellian) sense of the absolute state to constitute a raison d'état. This principle requires

recognition of non-state societal spheres and any violation of these spheres is always counter to the general interest of the state. The regulative principle of the general interest of the state may mean that certain private legal interests of subjects (individuals or non-state societal spheres) may have to be sacrificed to the public interest. When such damage is of a permanent, special or abnormal nature and reduces the value of a subject's property or infringes his legal interests (in a manner that can be valued in monetary terms), he should receive compensation from the treasury. The constitutive principle at issue is that of a government's accountability to its subjects for its lawful actions. This constitutive principle of administrative law demands that the general public interest would be juridically harmonised with private legal interests. Observance of this principle means, firstly, that the public interest is served and, secondly, that private interests are protected by the payment of compensation.

The constitutive administrative law principle of weighing public interest against private contractual interests requires that a contract between an administrative organ and a subject may not obstruct the implementation of a legislative or administrative measure deemed necessary for the common good. When public legal interest is served in an excessive manner at the expense of private legal interests without due compensation, this is clearly counter to the constitutive principle of the weighing of public legal interests against private contractual interests.

The constitutive administrative law principles of proper management which are applied in modern constitutional states are in effect simply public law criteria of care qualified in terms of administrative law by the structure of government administration. Examples of such principles are that the administration should prepare its decisions carefully with due regard to all relevant factors and circumstances, and that administrative decisions should be substantiated on carefully considered factual grounds.

### 3.1.3 Constitutive and regulative principles of criminal law

Criminal law regulates the imposition of punishment under public law (by an independent judge) for unlawful violation of public law interests protected by criminal law, such as state security, public order and good morals, safety of

persons and property, personal freedom, life, physical integrity, honour and reputation, and freedom of movement.

Modern constitutional states recognise the constitutive principle of criminal law that no punishment may be inflicted without prior penal enactment (**nulla poena sine previa lege poenali**). In contrast to undifferentiated legal systems, those of modern constitutional states observe the following three constitutive criminal law principles: punishability of complicity; punishability of provocation; and punishability of criminal attempt. Another typical constitutive principle of criminal law is that of **ne bis in idem**, which means that one can be prosecuted only once for the same offence. The above constitutive principles of criminal law are observed through the application of the regulative principle of criminal law which requires that in imposing punishment cognizance should be taken of the severity of the act committed, the person of the suspect and the circumstances under which the act was committed.

### 3.1.4 Constitutive and regulative principles of law of criminal procedure

The law of criminal procedure governs the following: detection of suspects (suspected doers) of crime; preliminary investigation and trial; the manner in which sentence is determined; appeal against and review of convictions; implementation of punishments; etc.

In the law of criminal procedure in modern constitutional states the following constitutive principles are observed: due process of law, namely that criminal procedure must be in accordance with the provisions of the act; public prosecution, which implies that criminal prosecution can take place even in the absence of a plaintiff; the suspect is deemed innocent until proven guilty and sentenced; the suspect may not be compelled to incriminate himself. The regulative principle of the law of criminal procedure to be observed by criminal judges is that they may only impose punishment when the charge against the accused has been proved, is punishable and they are convinced that the accused committed the deed in a culpable manner. The prosecuting party (public prosecutor) is governed by the regulative principle of **nolle prosequi**, which demands that the public legal interest served by the prosecution of a criminal act be weighed against and harmonised with the public legal interest,

which may be better served by not prosecuting in instances where prosecution incurs greater damage to public interest than non-prosecution would do.

### 3.2 Constitutive and regulative principles of civil private law

The civil rights recognised in this legal sphere are rights of fundamental equality as distinct from constitutional fundamental rights. Any human being who enters the national territory is entitled to these civil freedoms. The constitutive principle of civil private law is civil equality and freedom, which are inalienable human rights.

The principle of freedom in civil private law is manifested in freedom in the choice of a marriage partner outside certain degrees of kinship; the right of free disposition and enjoyment in the exercise of subjective rights (that is, catering for objective legal interests); freedom to attend to subjective legal interests (rights of personality); freedom to enter into contracts and make a will; and freedom to institute a civil action. The principle of equality in civil private law is manifested in the equality of all persons before the law and in the administration of justice. The regulative principle governing all civil private law is that of **iustitia commutativa** in the sense of the most equitable harmonisation of the private interests of legal subjects in the application and execution of civil private law.

### 3.3 The non-civil private law of non-state societal spheres

The fact that the norms of civil private law are positivised by the law-making organs of the state, and that civil private law is mistakenly identified with the private law of non-state societal spheres, could create the impression that the official law-giver is the sole source of positive law in the national territory. This is a denigration of the authentic law-generating competence of non-state societal spheres; in other words, their distinctive juridical character. The internal legal system of non-state societal spheres likewise comprises constitutive and regulative legal principles which are positivised in accordance with the particular nature of that sphere. Because they are not part of the public or civil private law spheres these principles are not positivized and the legal orders called into being by them not maintained by the official law-giver. It would therefore be meaningless to have them enshrined in constitutions and

bills of rights. The existence and functioning of such internal legal spheres are however essential to restrict the power of the state over the constitutional fundamental rights of the private law of non-state societal spheres.

The structural differences between fundamental rights and principles in the civil private law and the public law spheres are important on account of the difference in functioning of these different rights. The sphere of civil private law and its inter-individual co-ordinational legal relations is the basis for civil (private law) liberty which displays a positive character. This entails that the legal subject must give it some content when he participates in these relations by entering into legal contracts, making a will, instituting a civil action, disposing of his property etc. The constitutional fundamental rights of academic freedom, religious freedom, freedom of association etc. embody the material limits of the legal competence of the state and display in comparison with civil liberty a negative character because they make evident what the state may not do vis à vis individuals and non-state societal relationships if it does not want to transgress the limits of its competence. It is precisely in this respect that the other public law rights also differ from the constitutional fundamental rights because they do not guarantee the absence of interference with the functioning of the non-civil private law spheres of universities, churches etc. They are, however, essential for the establishment of the administrative, criminal and criminal procedural branches of public law in modern constitutional states. The right to vote and to be elected is a special constitutional legal competence and does not delimit the state's competence externally but is an element of the inner organization of the constitutional state.

After having reviewed some of the rights and principles that characterize the public and civil private law spheres of modern constitutional states the question as to which of these rights and principles could be meaningfully enshrined in bills of rights and constitutions of a developing state like South Africa could be addressed.

## 4. THE IMPORTANCE OF A FUNDAMENTAL RIGHTS LEGAL CULTURE FOR THE IMPLEMENTATION OF A BILL OF RIGHTS IN SOUTH AFRICA

The constitutive principles of public and civil private law are constitutive because they are **conditiones sine qua non**, i.e. necessary conditions, for the

existence of a modern constitutional state. It is therefore difficult to imagine the public law and civil private law spheres of a modern constitutional state without these principles and rights in one form or another. These principles are, however, not conditiones per quam, i.e. sufficient conditions for the existence of a material constitutional state. The latter only comes into being when the constitutive principles of public and civil private law are positivized in accordance with the distinctive regulative principles belonging to these legal spheres. Although the constitutive principles could be guaranteed in bills of rights and constitutions, this is not the case with the regulative principles because the latter are actually ideas/principles of justice[13] which could only as part of the legal culture in a country play the above-mentioned regulative role. When a legal culture embodying these principles does not exist, an attempt to enshrine them in a constitution would be of no avail. These ideas of justice could only have the desired regulative effect if the wielders of political and legal power are committed to them. This could only be the case when the majority of the citizens of that particular state also have faith in these ideals and therefore choose political leaders at the polls in order to have a government (and eventually a judiciary appointed by this government) that would adhere to these regulative principles. The citizens would, however, only make such a choice if they had a political and legal culture embodying these ideals. They can in other words only make political choices, i.e. use their democratic rights, in order to bring a material constitutional state into existence on the basis of a fundamental rights political and legal culture. The English and French constitutional histories could show how important the development of such a legal and political culture is for the coming into being of a material constitutional state. The naive idea that democracy or universal franchise is not only a necessary but also a sufficient condition for the development of a material constitutional state is thereby refuted. In view of the constitutive and regulative principles in the spheres of public and civil private law which characterise modern material constitutional states, it is important to consider the place and role of democracy - in the sense of the principle of constitutional representation - in the institutionalisation of the constitutive principles in accordance with the regulative principles of public and civil private law.

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[13] Van Wyk (1979, 1980) calls them higher juridical values or Grundsätze.

Sartori wrestles with the dilemma of the unattainability of the democratic ideal. He concludes that "in a democracy the tension between fact and value reaches the highest point, since no other ideal is farther from the reality in which it has to operate" (Sartori, 1962:4). He tries to solve the problem by distinguishing between the **is** and the **ought to be** of democracy by means of a descriptive and a prescriptive definition. The interaction between ideals and realities is important. Without ideals no democracy can ever be attained and without a factual basis the ideals are self-negatory. The democratic ideal operates differently in different situations, for instance in counteracting a non-democratic system or when functioning in a democratic form. In its purest form the democratic principle demands "all power to the people", which in practice assumes two meanings. In a non-democratic system it acts as a limitation of power; in a democracy it demands unlimited power. Hence a political system can survive as a democracy only if, with the progressive achievement of democracy, the principle of "all power to the people" is gradually modified to "all power to no one". If the principle of "all power to the people" is upheld perfectionistically and unyieldingly, Sartori (1962:67) foresees that "it will end by undermining constitutional guarantees and the techniques of representative government". Thus Sartori demonstrates that democracy cannot be an end in itself and affirmatively quotes John Stuart Mill, who argues that people should have political rights "'not in order that they may govern, but in order that they may not be misgoverned'" (Sartori, 1962:406).

Aron (1968:82) asks an important question concerning the place and role of democracy: "Were constitutional-pluralistic regimes constitutional before they were popular?" This question implies not merely the interrelationship between a multiplicity of parties, electoral legitimacy and the constitutionality of the exercise of power, but the development of such a historical phenomenon, namely that originally authoritarian systems manifest a gradual development towards constitutional forms. For several centuries the political struggle centred on the creation of constitutional rules to curb the arbitrary powers of monarchical governments. He points out that power may be wielded constitutionally without a multi-party system or democratisation. Thus Britain was ruled constitutionally at a time when the franchise was confined to a small minority and no parties existed to participate in election campaigns among the masses. His comparison of the political development of England and France leads to an illuminating conclusion:

> Democratization, in the form of the extension of the right to vote and of the creation of parties followed in England upon the constitutional evolution of the exercise of power. The fundamental difference between political evolution in Britian and in France lies in the different relation between these two phenomena. The constitutional use of power in Britain came before democratization; in France it was delayed by revolutionary attempts at democratization (Aron, 1968:60).

In his view, therefore, the French revolution attempted to introduce a constitution similar to that already existing in Britain. The revolutionary tempest that followed swept all constitutions with it and was followed by a series of governments - republican, revolutionary, imperial - which exercised power arbitrarily and dictatorially. He further points out that during the nineteenth century the constitution was respected in Britain, and at times in France as well, even though electoral laws were characterised by restrictions and visible power was in the hands of a small minority.

Mekkes (1940) points out that the development of a proper parliamentary democratic system (in the modern sense of the indivdual political freedoms of Britsh citizens) only took place in the period following the "Glorious Revolution" of 1689, when the constitutional monarchy was established, resulting in the guarantee not merely of individual criminal and civil private law liberties under the rule of law, but also of the constitutional rights of parliament. Rights of political participation for ordinary citizens were not established until after 1689 with the introduction of the freedom of the press, freedom of petition, right of association and assembly and the franchise (which was restricted to the aristocracy until 1832 and to males until the twenties of this century).

Thus Aron and Mekkes, in their analyses of British political history, demonstrate that democracy (on the basis of universal franchise) was not a necessary or sufficient condition for the institutionalisation of the other constitutive principles in accordance with the regulative principles of public and civil private law, but that it was more a case of institutionalising the constitutive principles under the guidance of the regulative principles adhered to by the wielders of political and legal power. In the case of England this happened under governments that were not popularly elected in the sense of one man one vote. The meaning of this for the present situation in South Africa

is not that universal franchise should be postponed indefinitely while the main wielders of political and legal power (who at this stage happen to be white) commit themselves to the above-mentioned regulative principles and reform the present system in accordance with them with the hope that a fundamental rights political and legal culture would spontaneously develop out of this.

In the second section it was stated that the strategy of negotiation (as proposed by Du Plessis and the South African Law Commission) is to be preferred. When the main strategies for the implementation of a bill of rights are considered, the question of legitimacy (especially among those who are presently disenfranchised) is of the utmost importance. Those who propose the immediate introduction of a full-fledged bill of rights underscore this in an uncompromising way. The immediate introduction of a full-fledged justiciable bill of rights would mean that universal franchise must be introduced immediately with the effect that the present polarization, hatred and fear will be reflected at the polls. The proponents of the other two strategies realise that a bill of rights cannot be introduced in a politically and ideologically polarized society in which the idea of fundamental rights and the implementation of a bill of rights are clouded with suspicion and fear. Moreover the sort of legal and political culture that should support the functioning of a bill of rights is totally lacking in some quarters and in its infancy in others. In the light of the track record of the present government (with reference to the accommodation of black aspirations and especially the entrenchment of racism in the present constitution in the name of reform) the immediate introduction by the present government of a limited bill of rights (marred or not by the legal fiction of ethnic group rights) could be the midas touch for any future bill of rights. The strategy of negotiation is to be preferred because the idea of a bill of rights would not be compromised and the depolarized atmosphere created by education and negotiation could be the cradle and kindergarten of a bill of rights legal culture in South Africa, comprising the abovementioned regulative principles of public and civil private law.

## BIBLIOGRAPHY

BLAAUW, L.C. 1988. The constitutional tenability of group rights. LLD Thesis. UNISA.

BOOYSEN, H. 1980. Volkereg: 'n Inleiding. Cape Town : Juta.

CILLIERS, A.C. 1987. A Bill of Rights for South Africa. Abiter. :92-99.

CLOETE, G.C. 1981. Etnisiteit en groepsverteenwoordiging in die staatkunde - 'n vergelykende studie. D.Phil Thesis. University of Stellenbosch.

COETZEE, C.J. 1983. Groepe en kategorieë in Suid-Afrika. Woord en Daad, 23(252):6-7, Augustus.

DAVIS, D.M. 1988. Legality and struggle: towards a view of bill of rights for South Africa. (In Van der Westhuizen, J. & Viljeon, H.P., (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.169-180.)

DEVENISH, G.E. 1988. Cardinal constitutional and statutory obstracles which obstruct the introduction of a justiciable bill of rights in South Africa. (In Van der Westhuizen, J. & Viljoen, H.P., (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.96-11.)

DIDCOTT, J.M. 1988. Pratical Workings of a Bill of Rights. (In Van der Westhuizen, J. & Viljoen, H.P., (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.52-62.)

DLAMINI, C.R.M. 1988. Obstacles in the way of a Bill of Rights. De Rebus, 248:553-556, August.

DUGARD, J. 1987. The Quest for a Liberal Democracy in South Africa: Acta Juridica, :237-258.

DUGARD, J. 1988. Changing attitudes towards a Bill of Rights in South Africa. (In Van der Westhuizen, J. & Viljoen, H.P., (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.28-34.)

DU PLESSIS, L.M. 1987. 'n Regsteoreties-Regspolitiese Peiling van die Menseregte handvesdebat in Suid-Afrika. Journal for Juridical Science, 12(2):124-144.

DU PLESSIS, L.M. 1988a. Filosofiese perspektief op 'n menseregtehandves vir Suid-Afrika. (In Van der Westhuizen, J. & Viljoen, H.P., (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.8-27.)

DU PLESSIS, L.M. 1988b. The position of human rights in South Africa. (In Van Vuuren, D.J., Wiehahn, N.E. & Wiechers, M., (eds.). South Africa: The challenge of Reform. Pine Town : Owen Burgess. p.225-241.)

FORSYTH, C.F. & SCHILLING, J.E., (eds.) 1979. Human Rights: The Cape Town Conference. Cape Town : Juta.

HOMMES, H.J.v.E. 1976. Die samengestelde begrippen der rechtswetenschap. Een juridische metodologie. Zwolle : W.E.J. Tjeenk Willink.

HOMMES, H.J.v.E. 1983. De elementaire grondbegrippen der rechtswetenschap. Een juridische methodologie. Deventer : Kluwer.

HOMMES, H.J.v.E. 1986. De wijsgerige grondslagen van de rechtssociologie. Deventer : Kluwer - Zwolle : W.E.J. Tjeenk Willink.

JACOBS, S.C. 1981. 'n Juridiese analise van die konstitusionele voorstelle vir 'n nuwe grondwetlike bedeling in Suid-Afrika. (In Jacobs, S.C, (ed.). 'n Nuwe Grondwetlike bedeling vir Suid-Afrika. Durban : Butterworth. p.88-108.)

JACOBS, S.C. 1987. Grundrechte und Verfassungsreform in Südafrika. (In Ress, G. (HRSG). Verfassungsreform in Südafrika und Verfassungsgebung für Namibia/Südwestafrika. Heidelberg : C.F. Müller. p.107-128.)

MEKKES, J.P.A. 1940. Ontwikkeling der Humanistische Rechtsstaatstheorieën. Utrecht-Rotterdam : Libertas.

RAUTENBACH, I.M. 1988. Menseregte-aktes: 'n vergelykende oorsig. (In Van der Westhuizen, J. & Viljoen, H.P. (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.35-51.)

RHOODIE, E. 1984. Discrimination in the constitutions of the World. Columbus Georgia : Brentwood.

SANDERS, A.J.G.M. 1986. The Bill of Rights Issue: Good Government First. **Journal for Juridical Science**, 11(2):212-214.

SARTORI, G. 1962. Democratic Theory. Detroit : Wayne State University Press.

SOUTH AFRICAN LAW COMMISSION. 1988. Group and Human Rights. Working paper 25. Project 58.

VAN DER VYVER, J.D. 1975. Die beskerming van menseregte in Suid-Afrika. Cape Town : Juta.

VAN DER VYVER, J.D. 1988. State Sponsored Terror Violence. **South African Journal on Human Rights**, 4(1):55-74.

VAN DER WESTHUIZEN, J. & VILJOEN, H.P., (eds.) 1988. A Bill of Rights for South Africa. Durban : Butterworth.

VAN NIEKERK, P.J. 1988. The viability of pluralistic models for political stability and justice in South Africa: a juridico pluralist alternative. (In Van Vuuren, D.J., Rhoodie and Wiechers. 1988. p.35-64.)

VAN VUUREN, D.J., WIEHAHN, N.E. & WIECHERS, M., (eds.) 1988. South Africa: The Challenge of Reform. Pine Town : Owen Burgess.

VAN WYK, D.H. 1979. Persoonlike status in die Suid-Afrikaanse: Publiekereg. LLD Thesis. UNISA.

VAN WYK, D.H. 1980. Privaatreg, Publiekereg en Subjektiewe Regte. **De Jure**, 13(1):1-11.

VAN WYK, D.H. 1988. Menseregte en politieke idioom. (In Van der Westhuizen, J. & Viljoen, H.P., (eds.) A Bill of Rights for South Africa. Durban : Butterworth. p.87-95.)

VENTER, F. 1986. Menseregte, groepsregte en 'n proses na groter geregtigheid. **Suid-Afrikaanse Publiekereg**, 1(2):202-229.