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THE FUTURE PROSPECTS FOR THE PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA*

It must by now be obvious to every intelligence, I presume, hat the winds of change which have been sweeping across the continent of Africa over the last two decades, are presently also raging south of the Limpopo. Ever since Mr Harold Macmillan, the then prime minister of the United Kingdom, in his historic address of 3 February 1960 to the South African parliament, directed our attention to the political significance of the prevailing tide of national consciousness of the African peoples, the white man in Africa has felt the increasing chill of the side-effects of those winds so accurately predicted by him. Not only have we seen our western allies turning their backs on the White regime of South Africa, but on the domestic scene we have also experienced the murmurs of the African breeze and the unrest and even violence which signified an impatient urge on the part of the less privileged sections of the South African population for a better deal in what is their fatherland too.

At a time like this it is, I believe, most appropriate to reflect on the future of our country and, perhaps, to recall once again the prophetic enquiry of Dr D.F. Malan at the opening of the Voortrekker Monument on 16 December 1949: South Africa, *quo vadis!* In doing so we must realise that South Africa has been forced into a situation where we will have to find our solutions and work out our destiny in almost complete seclusion.

Even though circumstances compel us to seek the answer to our problems on our own, we cannot isolate South Africa from the international community of states; and in whatever direction we may plan our future, we simply will have to give account of

* Address delivered at the Conference of the South African Council of Churches, Hammanskraal, July 1977.

our political institutions in terms of internationally acceptable standards. The attention of the entire world has been focussed upon the future development of our political structure; and however much the South African government may wish and endeavour to confine the impact of our political make-up to the enclave of our proper regional household, its effect upon even strictly internal race relations can no longer be said to be essentially domestic.

Since the Second World War (1939-45) the idea of fundamental human rights has evolved as the criterion for the evaluation of the political systems of our time; and whatever political structure we may elect for South Africa will be judged by the international community of states with reference to the compatibility of that structure with the contemporary notion of human-rights ideals.

In this sense all reflections and deliberations on the political destiny of South Africa must begin with an enquiry into the future prospects for the protection of human rights in our subcontinent.

The international standard of human rights protection

What, then, are the standards by which South African political institutions are to be judged?

As far as the United Nations Organization is concerned, the criterion to be applied finds expression in the UN Charter and in various international declarations and conventions for the promotion and enforcement of certain basic human rights and fundamental freedoms. In international law it is generally accepted that any meaningful protection of human rights presupposes
(a) realization of the right to self-determination of peoples, which includes the full and free participation of all adult citizens of a particular political community in the legislative and governmental instrumentalities of that community; and
(b) adherence to the principle of equality, which requires the equal treatment of every individual within a particular political

community by and before the law, and which only permits a classification of persons and differentiations between groups of persons for purposes of the law in cases where a definite reasonable foundation for such classification and differentiations can be demonstrated.

The recognition of the right to self-determination of peoples as a prerequisite for the meaningful protection of human rights originated from article 1(2) of the UN Charter, which proclaims the development of friendly relations among nations, "based on respect for the principle of equal rights and self-determination of peoples", to be a purpose of the organization – other provisions of the Charter referring to this right being articles 55 and 76. A long sequence of United Nations resolutions has endorsed the special importance attached by the international community to the principle of political independence. In its resolution 421D(V) 1950 the General Assembly of the United Nations decided that the right of peoples and nations to self-determination was a fundamental human right; and in resolution 637 (VII) 1952 the General Assembly went even further and actually acknowledged the right of peoples and nations to self-determination as a precondition for the full enjoyment of all human rights. The right to self-determination also finds expression in the *Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960,* and in article 1 of the *International Covenant on Economic, Social and Cultural Rights,* 1966, and of the *International Covenant on Civil and Political Rights,* 1966.

The principle of equality is equally fundamental to international law as expounded by the United Nations. In article 1(3) of the UN Charter the purposes of the organization are said to include the achievement of international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; in article 13(1)(b) of the Charter mention is made of the task of the General Assembly to "initiate studies and make recommendations for the purpose of... assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; in article 55(c)

of the Charter the United Nations is directed to "promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion", and by virtue of article 56 of the Charter all members of the United Nations have pledged themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in article 55; etc. In terms of article 2.2 of the *International Covenant on Economic, Social and Cultural Rights,* 1966, and article 2.1 of the *International Covenant on Civil and Political Rights,* 1966, every State party to the respective covenants undertakes to ensure to all individuals within its territory and subject to its jurisdiction the rights enunciated in the covenants without any discrimination based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", etc.

The particular rights and freedoms that ought to be safeguarded against state interference may, according to contemporary notions, differ from time to time and from place to place in view of what Gustav Radbruch (1878-1949) called *die Natur der Sache*[1]; that is, the natural, social and juridical circumstances under which the particular human rights are destined to operate[2]. The international community has nevertheless insisted on the documentation of the rights and freedoms which are thought to be fundamental.

The fact is that when the United Nations was brought into being in 1945 its founders considered the possibility of including a Bill of Rights in its Charter. The idea was abandoned for the time being because it was believed that diversities of opinion regarding the proper contents of an international Bill of Rights with binding force would prolong the inauguration of the world body. A commission was nevertheless immediately set up with in-

1) *Vorschule der Rechtsphilosophie* 2e Aufl (Göttingen 1959) 20-3.

2) *Idem* 21.

structions to draft a human rights charter, and in 1948 the commission came up with the *Universal Declaration of Human Rights.* Although the directions contained in the Declaration have no binding effect on the members of the United Nations, they do give an indication of the human rights standards insisted upon by world opinion.

The United Nations subsequently continued with its efforts to create an international Bill of Rights which would lend binding force to the principles enunciated in the Universal Declaration of Human Rights. In fact it took the United Nations eighteen more years to produce such a human rights charter and ten further years to obtain the prescribed number of signatories in order to put that charter into operation. The final outcome of it all was the *International Covenant on Economics, Social and Cultural Rights,* 1966, and the *International Covenant on Civil and Political Rights,* 1966, which came into force on 4 January 1976 and 23 March 1976 (respectively).

The rights and freedoms listed in the *Covenant on Economic, Social and Cultural Rights* include the right to work, the right to form and join trade unions, the right to social security, the right to an adequate standard of living, the right to enjoy the highest attainable standard of physical and mental health, the right to education, the right to participate in cultural activities and to enjoy the benefits of scientific progress, etc. The *Covenant on Civil and Political Rights* proclaims the right to life, the right to liberty and security of the person, freedom of movement and the right to choose one's residence, the right to privacy, freedom of thought, conscience and religion, the right to assemble peacefully, freedom of association, the right to vote and to participate in public affairs, etc., and it also provides for guarantees against cruel, inhuman and degrading treatment and punishment, against slavery and involuntary servitude, against civil imprisonment, against arbitrary expulsion from a foreign country, etc.

Whereas, in international law, human rights have accordingly come to be sub-divided into economic, social and cultural rights on the one hand and civil and political rights on the other hand, a long standing tradition in the United States has been to dis-

tinguish between substantive and procedural human rights, the former including basic human rights such as the freedom of speech and of the press, the freedom of religion and the right to petition the government for the redress of grievances, while the latter refer to basic principles of criminal and civil procedure, such as the guarantee of a fair trial by an independent tribunal, the right to legal representation, the right to state one's case before being convicted, the proscription of double jeopardy in criminal prosecutions and guarantees against cruel and inhuman punishments.

In the present context mention may also be made of the commendable classification of human rights in the legal philosophy of Jacques Maritain (1882-1973). He distinguished three categories of human rights:[3] i.e. *the rights of man as such,* which ininclude the right to personal freedom, the right to seek eternal life, the right to marry the person of one's own choice and to raise a family, etc.; *the rights of man as a citizen,* which include the right to participate in political processes, to found and be active in political associations, freedom of speech, etc.; *and the rights of man as a social personality and in particular as a worker,* which include the right freely to choose one's occupation, the right to found and to participate in the activities of professional and labour organizations, the right to equitable remuneration for one's services, etc..

The doctrine of human rights has many pitfalls and every theory based upon its basic assumptions is perhaps open to destructive criticism. Yet the basic idea it endeavours to convey is a commendable one and does deserve to be implemented in the polititcal and legal systems of the entire world. In view of a Christian interpretation of the theories of human rights the foundational principle can perhaps be reduced to a sacred concern for the intrinsic value of human life and an unconditional insistence upon the appraisal of every human being acco·ding to his/her in-

3) Cf. *Les Droits de l'Homme et la Loi Naturelle* (Paris 1945) 110-13.

dividual merit.

I wish to emphasise in passing that recourse to violence and bloodshed as a means for achieving or preserving protection of human rights clearly contradicts the very core of human-rights ideals as set out above. The truth is, however, that the founders of the United Nations have actually sanctioned armed intervention as a last resort for purposes of suppressing a threat to the peace, a breach of the peace or an act of aggression;[4] and the General Assembly of the United Nations has also recognised the use of armed force as a legitimate means for the liberation of peoples subjected to colonial or alien domination or to racist regimes[5]. The so-called freedom fighters of Africa may in fact also derive encouragement for their belligerent attempts to gain political control of Rhodesia, South West Africa/Namibia and South Africa from certain United Nations instruments, such as the *Convention on the Suppression and Punishment of the Crime of Apartheid,* 1973[6], and from the many United Nations resolutions condemning the White regimes in Southern Africa, the latest of which proclaimed the South African government to be "illegitimate" and stated that the "racist regime" in South Africa had left "no alternative to the oppressed people of South Africa but to resort to armed struggle to achieve their legitimate rights"[7].

I do not entertain the slightest doubt that the use of armed force as a means for achieving political purposes runs contrary to the basic values championed by Christian exponents of human-rights ideals; and in so far as the United Nations has attempted to justify belligerency in the relevant instances, its actions have, from a human rights point of view, been counter-productive. The

4) Cf. art. 42 of the UN Charter.

5) Cf. GA Res. 3103 (XXVIII) 1973.

6) Cf. GA Res. 3068 (XXVIII) 1973. This convention came into force in November 1976.

7) GA Res. 31/6 I (XXXI) 1976.

instances in which political leaders, who have taken refuge in violence for political purposes, have been inspired by a genuine concern for human rights and fundamental freedoms are at the most few and far between. Too often have the so-called freedom fighters directed their aggression against innocent people and too often have they resorted to brutal cruelty. Warfare in whatever form ought always to remain restricted to attacks upon the military powers and strategic materials and installations of the enemy; and under no pretences whatsoever can anything short of that be classified otherwise than as criminal terrorism and downright murder.

Nor can the end justify the means. The moral value of ends invariably seems to be debatable, whereas the means that are relied upon to sanctify the ends are always unquestionably base. Endeavours to justify the use of admittedly rejectable means for the sake of highly debatable ends therefore labour under an almost insurmountable handicap. The celebrated American Supreme Court Judge, Louis D. Brandeis (1856-1941), expressed these same sentiments in the following terms: "One can never be sure of ends, political, social, economic. *There* there must always be doubt and difference of opinion. There is not the same margin of doubts as to *means*. Here fundamentals do not change; centuries of thought have established standards. Lying and sneaking are always *bad*, no matter what the ends"[8].

In view of these remarks I wish to add my own protestations to those of the many responsible South Africans of all races against material assistance and moral encouragement being given to violence committed by the so-called freedom movements in Africa by, inter alia, the United Nations and certain religious institutions, including the World Council of Churches. Even assuming (without admitting) that liberation warfare can be reconciled with human rights principles and that the circumstances in Southern Africa are of a kind that would justify such belligerency, it still remains obvious that the recipients of the material

8) Quoted in A. Mason's *Brandeis: A Free Man's Life* 569.

and moral support in question are indulging in activities which include, by definition, acts of terrorism.

The human rights situation in South Africa

When one evaluates the political and legal system of South Africa in view of the basic prerequisites for, and norms inherent in, the meaningful protection of human rights, it becomes quite obvious that our institutions do not entirely make the grade. It is in fact a matter of common knowledge that drastic reform will be needed to bring our political and legal system into conformity with the appropriate international standards. A few examples of *de facto* human rights infringements will suffice to illustrate the point.

Political self-determination of peoples and the full and free participation of all the adult citizens of a given political community in the political processes of that community has been identified as an important precondition for any meaningful protection of human rights. This idea is based upon the notion that the persons to be subjected to any particular legal provision must themselves, directly or indirectly, participate in the law-making and law-executing machinery; they must have a say in the matter irrespective of whether the provisions in question serve to grant or to restrict their freedom. Contrary to these assumptions, political competencies with regard to the major legislative and executive organs of South Africa are the prerogative of White citizens of the country[9].

The second important prerequisite for meaningful human rights protection concerns the principle of justice. The very notion of human rights presupposes that the rights and freedoms in-

9) Franchise rights in respect of parliamentary and provincial elections have been restricted to the White electorate by virtue of sec. 3(1), read with the definition of "election" in sec. 1, of the Electoral Consolidation Act 46 of 1946. In terms of the Republic of South Africa Constitution Act 32 of 1961 membership of the Senate (sec. 34(d)), the House of Assembly (sec. 46(c)) and Provincial Councils (sec. 68(2)) is equally the prerogative of Whites.

sisted upon by the international community should be enjoyed on a basis of equality by all the subjects of a given political community. Classifications of persons for juridical purposes are therefore immediately suspect and ought only to be permitted in cases where such classifications are based upon a reasonable foundation[10]. South African law contradicts this principle in the many instances of legally sanctioned discrimination based on sex, political opinion, religious conviction, race and other similar factors.

Such instances of discrimination authorised by South African law include the following: In terms of sec. 14(7) of the Public Service Act 54 of 1957 a female civil servant, not being a member of the South African Defence Force, the South African Police Force, the Prison Service or the Bureau of State Security, loses her job when she marries, unless the Minister or Administrator of the governmental department or province concerned, upon the recommendation of the Public Service Commission, directs otherwise – the civil service entertains no such bias against married males in its employ. By virtue of sec. 2(1) of the Internal Security Act 44 of 1950 the Communist Party of South Africa has been proclaimed an unlawful organization and it is therefore, in terms of sec. 3(1)(a) of the Act, an offence for any person (inter alia) to become, to continue to be, or to perform any act as, an office-bearer, officer or member of the Communist Party, or to contribute or solicit anything which can in any way be used for the benefit of the Communist Party, or to take part in or to continue any activity of the Communist Party, etc. – no such impediments have been proclaimed in the case of any other of the existing political parties; White children attending public schools in South Africa are, by virtue of sec. 2 of the National Education Policy Act 39 of 1967, compelled to undergo Christian National

10) The differentiation sanctioned by South African law in connection with the age of puberty for purposes of the competency to marry may be quoted as an example of a permissible classification, since it is based on the physiological fact that, in normal cases, the processes of sexual maturity commence, in the case of girls, at the age of 12 years and, in the case of boys, at the age of 14 years; and since sexual maturity is relevant to marriage, the fact that the competency to marry is based on the age of puberty cannot be said to be unjust.

education – parents who wish to base the education of their children upon a non-Christian religion must resort to (unsubsidized) private schools; in terms of sec. 3 of the Reservation of Separate Amenities Act 49 of 1953 separate facilities for different racial groups in or upon any public premises or public vehicle need not be equal – facilities in or upon public premises or public vehicles may in fact be provided for the members of one racial group without similar facilities having to be provided for any other racial group at all; etc.

As far as the protection of particular human rights is concerned[11], South African law is again far from perfect, though, on the other hand, it would be wrong to assume that South African law does not render protection to basic human rights and fundamental freedoms at all. We can, on the contrary, justifiably take pride in the measure of protection afforded by South African law to substantive human rights such as family, educational and trade union rights, and be proud of the prevailing extent in South Africa of basic freedoms such as the freedom of speech and of the press and the freedom of conscience and of religion; and as far as procedural human rights are concerned, the most basic principles included in that concept can, generally speaking, also be said to be part and parcel of the South African system of evidence and procedure.

The shortcomings of the South African system of human-rights protections are not so much to be found in the nature of the rights and freedoms being protected (or not being protected) or in the extent of such protection, but can be reduced to two fundamentally rejectable characteristics of our legal set-up: firstly, the fact that human rights protection has been sanctioned and is being administered on a racial discriminatory basis; and secondly, the fact that the *de facto* protection of human rights has re-

11) An analysis of some of the laws of South Africa in terms of the doctrine of human rights is to be found in J.D. van der Vyver, *Die Beskerming van Menseregte in Suid-Afrika* (Juta & Co., Cape Town/Wynberg/Johannesburg/Durban 1975) and *Seven Lectures on Human Rights* (Juta & Co., Cape Town/Wynberg/Johannesburg 1976).

mained dependent upon the highly unpredictable whims and fancies of the government of the day. What is needed in South Africa is, in the first place, a colour-blind adherence to the basic principles and values favoured by the human rights ideal; and, in the second place, the entrenchment of those principles and values in a constitutional instrument with inherent safeguards which will secure the continued protection of the concerned rights and freedoms by restricting their amendment or repeal to special circumstances and extraordinary procedures. We are, in a word, in want of a Bill of Rights which will afford entrenched protection to basic human rights and fundamental freedoms on the basis of equality and justice.

South Africa, *quo vadis!*

The urgent need for change in South Africa has become axiomatic and seems to be generally recognized by every responsible political leader in this country. One may in fact rightly speak of an awakening awareness amongst an increasing number of South African academics and politicians – and in a cross-section of the population as a whole – regarding the true value and necessity of a more consistent, elaborate and visible system of human rights protection. Yet this mood for change is in itself in need of dynamic stimulation. For it finds itself confronted by various resistant factors which may in the end hamper the *de facto* implementation of actual reform. I shall mention only a few of the most obvious obstructions in the way of the necessary political and legal innovations:

(a) Firstly the economic prosperity of the country. The present government came into power in 1948 and has since then led this country to probably the biggest economic boom in the history of our ancestry. Until fairly recently White South Africans – the people upon whose support the government is dependent for bringing about reform – have reaped the fruits of that boom.

History has proved that all nations are reluctant to initiate

radical change while, in the area of economics, the going is good. Reform breeds upon hardship rather than prosperity. There is no reason to believe that the sentiments in this regard entertained by the White electorate of South Africa constitute an exception to the rule; and although the economic boom has obviously come to an end, the people whose votes really count at the polls have not yet felt the sting of the present recession to an extent where insistence upon adaptations of our social structure to the needs of the day becomes a dominant factor in the democratic processes.

(b) The second important factor which has created resistance to change in South Africa may perhaps be referred to as the expediency of the propaganda machinery of the National Party. Party spokesmen have over a period of more than twenty years brainwashed a majority of the voters into believing that the policies advocated by the Party, and in particular the idea of apartheid and separate development, provide an adequate answer to South Africa's problems and that the total implementation of those policies would constitute the ultimate utopia in human relations.

Since more or less the last turn of the decade the truth has dawned upon many Party office-bearers that apartheid and separate development may just not be a practicable means for achieving racial harmony and for securing the peaceful coexistence of all the racial groups of South Africa in our subcontinent. That, after all, is what it is all about. Talks of change and reform therefore became the order of the day, even within the ranks of the Party leadership. But then it turned out that a substantial percentage of Party supporters were simply not ready to accept that they had actually been misled in the past. Now the Party finds that its efforts to initiate reform along alternative lines meet with internal opposition; and while the time for achieving a peaceful solution to South Africa's problems is running out, energies must be spent on combating the successes of the Party's own propaganda efforts of the past in order to change the attitudes and recapture the minds of the obstructionists among the Party's own members.

It stands to reason that one must not expect too much in the line of meaningful reform as long as the government is faced with internal opposition of the nature described above. To go against or too far beyond the wishes of its own supporters could mean political suicide; and that is too much to expect of any political party.

(c) A third obstacle in the way of meaningful change is, in my opinion, attributable to a fairly general misconception in South Africa as to the true impulse behind the need for reform. Too many persons on both sides of the colour bar entertain the negative notion that change and reform represent concessions of the White man to the growing tide of Black national consciousness. This approach must in itself create reluctance on the part of the people who are believed to have been forced into a situation of retreat; and those people happen to be the ones who monopolise the political recourses for the accomplishment of changes and reforms along constitutional and peaceful lines.

The truth is that remoulding of the South African political and legal structure is called for as a matter of Christian necessity. We ought to have it on our conscience to find a formula for human relations which shall reflect the respect for the dignity and worth of his fellow-man required of man on the basis of the eternal command which directs man to love his neighbour. Only such a social system can, internationally speaking, bear the light of day and, at the same time, find satisfaction in the eyes of God.

The Whites of South Africa must accordingly be persuaded that by initiating change they are not in fact backing away from principles which they may happen to cherish, but that, on the contrary, social reform is being demanded by the very religious, ethical, cultural, economic and other values which they seek to uphold.

(d) Finally, one may in the present context refer to what can conveniently be called the Soweto backlash.

Whatever sympathies one may have with the participants in the Soweto riots, and similar disturbances, however much one may concede the validity of the grievances that gave rise to the

unrest, the fact remains that, in so far as the prospects for peaceful change in South Africa are concerned, violence of that nature was, to say the least, counter-productive. It is a matter of trite history that the tedious process of gradual reform which had been noticeable in the area of, for instance, sport, public facilities and labour relations came to an almost complete stop when the riots erupted; and although efforts on the part of the government to normalise race relations in South Africa seem once again to have gained momentum, the pace of those efforts has obviously slowed down considerably. The Whites in Africa – and the Afrikaners probably more so than any others – have consistently proved that they become exceptionally stubborn when threatened with violent means of compulsion.

What then does the future hold out for South Africa?

In attempting to give an answer to this question, I shall restrict myself to what I believe to be the realities of tomorrow: not what in my opinion ought to be our aims, but what I expect will in fact be accomplished in the immediate future as far as human rights protection is concerned. It must be emphasised that prophecies of this nature are bound to be inaccurate, for as time goes on it seems to accelerate beyond the limits of human comprehension and tends to belie even our most evident expectations. One can but evaluate the present tendencies, regard the continuity of historical patterns and, in the end, take a long shot in the dark.

In view of the above analysis of the human rights idea, I shall deal with the probabilities of the immediate future under three headings: (a) the doctrine of national self-determination and political participation; (b) the principle of equality; and (c) the extension of human rights protection – and I shall assume that the National Party will in the foreseeable future retain political control of South Africa.

1. National self-determination and political participation

South Africa's present political predicament can perhaps best

be understood against the background of the conflicting national aspirations of the various peoples who inhabit our sub-continent. It is, in a word, a problem of racial, ethnic and cultural pluralism.

An overwhelming majority of White South Africans have in the past sought to deal with the strife and conflicts, which always seem to be an integral risk in pluralistic societies, on the basis of geographical partition. As far as the Afrikaners are concerned, insistence on separation of the races was, in a way, an inevitable consequence of their political evolution. The history of South Africa in fact reflects the continued struggle of the Afrikaner to found a settlement on the continent of Africa where he would be free from foreign domination; and having achieved political control of South Africa in 1924 and again in 1948, the National Party, as the citadel of Afrikaner national aspirations, proved itself prepared to secure the newly acquired right to self-determination of the Afrikaner people at almost any cost. In the present context it must once again be stressed that the right to self-determination constitutes a noble cause in the eyes of the United Nations and the international community of states.

South Africa being a plural society with complicated racial, ethnic and cultural entanglements, the White regime was, however, unable to monopolise political power without resorting to political domination of the other races of South Africa. This presented a serious problem, because imperialism was never part of the Afrikaner's national make-up. The Tomlinson Commission was therefore appointed to find a formula whereby the Whites in South Africa could exercise their right of political self-determination while at the same time permitting the other ethnic entities within the country to do the same. The Tomlinson Commission drafted in its report of 1955 the blueprint for the separate development of the peoples of South Africa and at the same time spelt out the immense financial and other sacrifices that would be required of the White man if the policy were to succeed.

I need not dwell upon the subsequent history of the policy of separate development, save perhaps in mentioning that the National Party government never really gave it a chance to work.

Not having wanted to burden the White electorate to any perceptible extent, the government right from the outset rejected some of the most fundamental demands of the Tomlinson Commission and indulged in a luke-warm implementation of the policy of separate development, thereby frustrating the very purpose of that policy, that is, to secure the right to self-determination of all the peoples of South Africa on a territorial basis. As it stands today, the territorial entities envisaged by the government for the Black peoples of South Africa are, for the most part, not sufficiently viable to make political sense, and the policy simply makes no provision whatsoever for the Indian, coloured and urbanised Black communities. We have, therefore, now come to the point where an alternative or supplementary plan of action must be sought to safeguard the peaceful co-existence of the peoples of South Africa in a system of full participation of all of those peoples in the various political processes of the state.

Any prognosis of the future development of South African political institutions must allow for certain elementary premises. The most evident ones are, perhaps, the following:

(a) Although the right to self-determination of peoples ought always to maintain a supreme rating on the scale of political values, its realization is not immune to moral scrutiny and should under no circumstances be achieved or preserved in a manner which would perpetuate injustices. Irrespective of the ethical issues that may be involved, history has provided ample proof that a nation simply cannot in the long run retain its political independence at the expense of its own people or of any other nation.

(b) All arrangements for the future political structure of South Africa must take the plural composition of its population into account. Ethnic or cultural plurality is a world-wide reality with definite political significance.

A recent survey[12] disclosed in this regard the following il-

12) Abdul Said & Luiz R. Simmons, *Ethnicity in an International Context* (Transaction Books, New Brunswick, NJ, 1976).

luminating statistics: In the 132 states of the world included in the survey –

(i) 12 (9,1 percent), of which only one was an African state (i.e. Somalia), were found to house a single ethnic group;

(ii) 25 (18,9 percent) had a dominant ethnic group of 90 percent or more of the population;

(iii) 25 (18,9 percent) had a dominant ethnic group of between 75 and 89 percent of the population;

(iv) in 31 (23,5 percent) the largest ethnic group consisted of between 50 percent and 74 percent of the population;

(v) in 39 (29,5 percent) the largest ethnic group accounted for less than 50 percent of the population.

It was furthermore estimated that in 53 states the population was composed of five or more significant ethnic groups; and of these South Africa was found to be the most complex.

The pattern of constitutional crises in Africa is, in my opinion, to a great extent attributable to sectional strife or cultural chauvinism in plural societies and should in that sense be seen as a clear indication of the political relevance of ethnicity.

The imperialists of bygone days, such as England and France, can justly pride themselves on having started their former colonies in Africa on the route of independence equipped with truly democratic and libertarian systems of government. But very little of the dual-party system, free elections, freedom of the press, the right to speak one's mind and other foundational values of a free society has remained in force in the third-world countries. The overthrowing of governments has almost become a regular ingredient of the African way of living, and the many instances in recent years of *coups d'états* inspired by tribal expedience run well into double figures[13]. The major cause of the political

13) Successful *coups d'états* have taken place in the following African countries: Algeria – on 19 June 1965; Benin (formerly Dahomey) – altogether six, the last one in 1972; Brazzaville-Congo – various ones, the last one in 1969; Burundi – on 11 July 1966; Gabon – in 1964; Ghana – on 13 January 1972; Libya – in 1969; Nigeria – in 1976; Seychelles – in 1977; Somalia – in October 1969; Sudan – in November 1958 and in 1964; Togo – three within four years, the last one in 1967; Uganda – in 1971; Zaire – in 1960.

confusion in Africa is, in my opinion, the failure of the former colonial powers to recognise the fact of, or the political force engendered by, ethnicity.

According to current interpretations of human rights ideals, ethnicity ought not to be a determining factor as far as political competencies are concerned; or to put it more bluntly, differentiations for political purposes based upon race, cultural affiliations or ethnic origin are generally regarded as essentially base. The truth is, however, that ethnicity is a fact in Africa with very definite political connotations. To ignore that fact would be unrealistic and may result in the kind of confusion exemplified by the African political experience; to give ethnicity its due in our future political dispensation may, on the other hand, tend to perpetuate the sectional strife of ethnistic egotism. In my opinion we ought to risk the latter for the sake of a realistic approach.

(c) A third axiomatic proposition which needs emphasis is that majority rule on the basis of one man one vote in a single state comprising an ethnic diversity is definitely out.

Insofar as the policy of the present government is directed towards creating more or less homogenous national states and insofar as it provides for certain of the peoples of South Africa, who wish to do so, to achieve full political control of their own affairs, its implementation on a reasonable and just basis ought to be encouraged by all who value the right of peoples to political self-determination – which, as you may recall, includes the United Nations and the international community of states. But in whatever way one looks at it, the fact remains that a substantial portion of the present-day South Africa will in the end remain multi-national. Even assuming that all of the Black homelands will eventually be consolidated into viable entities and will request and be granted independence, one must still cope with ethnic plurality in the remainder of South Africa being occupied by the White population together with Coloureds, Indians and urbanised Blacks. For the purposes of this, shall we say, "grey" portion of South Africa, majority rule on the basis of one man

one vote simply is not practical politics.

Nor does the system of majority rule, in my opinion, coincide with the basic assumptions of the doctrine of human rights. Political control of a minority by the majority has all the potential of leading to more ghastly consequences than would be the case where a minority dominates the majority, for in the latter instance the greater numbers of the subjected group tend to restrain the exercise of arbitrary powers. Furthermore, the political history of Africa – not forgetting our own constitutional scandal of the 1950's which culminated in the Senate Act 53 of 1955 – has provided ample proof that constitutional guarantees of the rights and freedoms of subjects belonging to subordinate ethnic entities are, to say the least, dubious.

What is required, therefore, is an alternative system of full participation; that is a system in which every ethnic entity shall maintain an effective say in all legislative, governmental and judicial processes. Such a system may require the composition of the cabinet, as head of the executive branch of government, on an ethnic basis so that every ethnic group within the state will at all times necessarily be represented in the policy-making organ of the state. Representation of all ethnic groups in the legislative assembly can perhaps be effected by free elections based on a separate voters' roll, and the *de facto* control of any particular legislation by an ethnic group being affected by that legislation, can be secured by means of a right of veto. The courts, as the final custodian of human rights protection, ought at all times to be staffed in strict observance of individual merit, provided, however, that opportunities shall remain open for members of all ethnic groups to acquire the training and experience required for their appointment as judicial officers of every rank.

(d) Finally, I wish to emphasise the evident need for *all* ethnic groups involved to participate in the final draft of our common political future; for politics has become exceptionally hostile towards all expressions of paternalism.

It is equally beyond dispute that South Africa does possess the brainpower to mould the above principles into a workable system

of inter-group cooperation. The success of such endeavours will, however, in the end depend upon the ability of the political leaders to combine the wisdom of our constitutional intelligentsia with mutual trust, goodwill, integrity and determination. This will undoubtedly be difficult to achieve, but is by no means impossible. The sceptics in our midst may be reminded of the lesson in trans-ethnic co-operation so dramatically demonstrated by the Turnhalle experiment.

Turning next to the probable constitutional developments of the immediate future I must at once caution those seeking comfort in my lecture not to expect too much. There are vague indications that the government is contemplating a new deal for the Coloured and Indian sections of the South African nation, but it has become quite clear that the members of the cabinet committee entrusted with the task of finding an alternative for the Westminster system of government differ greatly as to the proper means for accommodating the political aspirations of the Coloureds and Indians within the framework of the so-called "White" political order. It is therefore to be expected that their recommendations will not amount to much more than the limited extension of the powers of the Cabinet Council as a forum for selective dialogue. South Africans will, after all, soon be going to the polls and one can hardly expect the government to confuse the National Party constituents on the eve of the election with the intricacies of a highly controversial issue. The not so immediate future nevertheless holds out promises of more spectacular reform on the lines of the basic principles mentioned above.

2. Equality and justice

The elimination of racial discrimination constitutes almost as big a challenge as the extension of political rights to all the peoples of South Africa and is perhaps dependent on the actualization of an acceptable system of political power-sharing. The urgent necessity of restoring justice in South Africa stands to

reason and is generally accepted by a large cross-section of South Africans of all racial groups. The South African government has in fact committed itself internationally to "move away from racial discrimination", and the only remaining controversy in this regard seems to have become focussed on problems relating to the method, sequence and speed of this imperative reform. It must however again be emphasised that petty politicizing has had a crippling effect on the *de facto* normalization of race relations. Furthermore, certain instances of racial discrimination, such as the existing laws relating to group areas and influx control, are essential accessories of the formative stages of separate development, and their abolition will in all probability be postponed until the political entrepreneurs will have created sufficient safeguards for the free exercise of political rights by all ethnic groups. On the other hand, the government can do away with at least ninety percent of legally sanctioned discrimination without in any way jeopardising the implementation of its policy of separate development.

All that remains to be said in the present regard is to call upon the government, as a matter of great urgency, to do so without further delay. One must not be unmindful of, or ungrateful for, the changes that have been introduced by the government over the last few years; nor ought one to ignore or oversimplify the practical problems that must be overcome in the process of eradicating discriminatory practices which have been cultivated by established traditions. I am, however, convinced that such problems are not insurmountable and that the principle of non-discrimination already has sufficient backing within the ranks of National Party supporters for the government really to get on with the job. The current signs of reluctance on the part of some National Party spokesmen to increase the tempo of reform may, therefore, cast doubt upon the credibility of the many assurances given by the government that it would move away from racial discrimination.

3. Human rights protection

As pointed out earlier, deficiencies from a human rights point of view of the South African legal system are not so much to be found in the nature or extent of the rights and freedoms being protected or not, but stem from two basic characteristics of the South African laws in question: firstly, the racially based discriminatory application of human rights protection; and secondly, the lack of appropriate constitutional safeguards.

South Africa can, objectively speaking, go a long way to satisfy the international appetite for human rights protection, but as long as racial discrimination prevails in this country, the existing laws which afford protection to basic human rights and fundamental freedoms will be run down by South Africa's critics as being "cosmetic". This will be so by virtue of the generally accepted premise that the sociological principle of non-discrimination, together with the political principle of full participation, is an essential prerequisite for any meaningful protection of human rights. In actual fact very little needs to be done right now in the area of human rights protection as such. Priority must be afforded to the solution of the political problem and to the elimination of racial discrimination.

The South African system of human rights protection can nevertheless be improved by the introduction of a Bill of Rights which would barricade the protected rights and freedoms against discretionary and arbitrary governmental encroachments. Partisans of this idea have in the past experienced strenuous opposition on the part of several government spokesmen, presumably on account of the mistaken belief that constitutional entrenchment would result in the promulgation of absolute rights and competencies. This misconception has probably been inspired by the tendency in the United States to transform the constitutionally protected human rights into infinite claims and titles. The truth is, however, that constitutional safeguards need not change the nature or ambit of the rights and freedoms concerned. I believe, in fact, that the American notion of preferred

freedoms is opposed to the postulate of justice which requires an equilibrium of *all* conflicting claims to be maintained in conformity with the Roman-Dutch maxim: *sic utere tuo ut alienum non laedas* (use what is yours so as not to injure others). The entrenchment of certain rights and freedoms in a Bill of Rights should not, therefore, entitle the subordinates of the state to claim excessive or extensive privileges arising from those rights and freedoms, at the cost of any other right, freedom or interest, whether included in the Bill of Rights or not. The only significance of a Bill of Rights would be that the government is constantly reminded that the rights and freedoms it contains have been regarded as of special importance for the preservation of a free society, that those rights and freedoms can be curtailed by state authority in the specified circumstances and to the specified extent only, and that restrictions upon those rights and freedoms ought always to remain the exception and not the rule.

Though a Bill of Rights for South Africa is, to the best of my knowledge, not anticipated by the present government at all, explication of the nature, function and implications of such a constitutional deed may just bring the idea home to the right authorities.

Concluding remarks

The prospects for the future may to some seem grim, but while the scope for dialogue remains, there will be hope. The first and major obstacle to overcome, is perhaps the communication gap between the government and the people, between the different races, and between sectional groups within each ethnic entity.

May this conference contribute towards the bridging of that gap!

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Note

Readers are requested to direct comment, if any, on this viewpoint to us for eventual discussion in a following English issue.

Editor.