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# PROPOSED SOUTH AFRICAN BILL OF RIGHTS: A PRESCRIPTION FOR EQUALITY OR NEO- APARTHEID?

M.C. Jozana\*

## INTRODUCTION

South Africa has reached the threshold of a new era. Apartheid,<sup>1</sup> South Africa's sophisticated political and economic social system based on racial discrimination shows signs of withering away. President F.W. de Klerk's pledge to eradicate racial discrimination and to dismantle apartheid represents a significant departure from the ideology of the controlling white minority.<sup>2</sup> He articulates in spirited aphorisms what the majority of white South Africans do not want to hear or admit. Yet in spite of the thorny path lying ahead, the realization of a negotiated settlement and the dismantling of the apartheid system in South Africa is discernible. A post-apartheid era requires a post-apartheid constitution, and any such constitution is incomplete without a bill of rights.<sup>3</sup>

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1. See generally L. THOMPSON, *A HISTORY OF SOUTH AFRICA* (1990) (tracing the processes that shaped modern South Africa from pre-colonial history through the present). The term "apartheid" was coined in the 1930s by Afrikaner intellectuals to describe the requirement that urban African migrant workers should not be accompanied by their families. *Id.* at 186. The term "apartheid" has since come to represent the institutionalization, through laws and executive action, of the separation of South Africa into four racial groups: Colored, Indian, African, and White. *Id.* at 190-91. The system provides for absolute control over the nation by the Whites. *Id.* The rise of the system of institutionalized apartheid dates back to the early 1940s. *Id.* at 187-220. See also R. OMOND, *THE APARTHEID HANDBOOK: A GUIDE TO SOUTH AFRICA'S EVERYDAY RACIAL POLICIES* (1985) (reviewing the apartheid system of racial discrimination in South Africa); Van Zyl Slabbert, *From Domination to Democracy*, 9 LEADERSHIP 66 (1990) (examining the dominant economic power and privileges of the white South African minority) [hereinafter Van Zyl Slabbert].

2. See Jozana, *The Detroit News*, Jan. 14, 1990, at 15A.

3. *Imperfect Blueprint*, *The Daily Telegraph*, Sept. 5, 1991 at 16. See generally *Law Reform in Action: Formulating a Bill of Rights for South Africa*, 30 CODICILLUS 4-83 (1989) [hereinafter *Law Reform*] (offering a collection of essays on a South African bill of rights); *Human Rights in Post-Apartheid South African Constitution*, 21 COLUM. HUM. RTS. L. REV. (1989) (presenting papers from human rights lawyers, experts, and academicians) [hereinafter COLUM. HUM. RTS. L. REV.]. See also *The Record of Constitutions in Africa: Some Lessons For A Post-Apartheid South Africa* 7

The idea of sharing political power with blacks has left many white South African supremacists unmoved or hardened, while leaving white liberals bewildered.<sup>4</sup> The Conservative Party which is presently the main opposition party in the all-white parliament,<sup>5</sup> has persistently accused President de Klerk of acquiescing to a "black power communist dictatorship."<sup>6</sup> A deeply divided white political leadership compounds de Klerk's difficult position.<sup>7</sup> In addition, de Klerk's willingness to start negotiations with the African National Congress (ANC)<sup>8</sup> has left him open to the caprice and malevolence of the white South African extremists.<sup>9</sup> Some of these extremists have vowed to do anything to circumvent the negotiation process for a democratic post-apartheid constitution.<sup>10</sup>

In contrast, many blacks welcome de Klerk's proposals to dismantle the apartheid system.<sup>11</sup> A vast majority of the black population, though not the entire community, has accepted the idea of involving black rep-

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ARIZ. J. INT'L & COMP. L. 224-44 (1990) (discussing the creation of a constitution and the future of South Africa).

4. Sparks, *White Liberals Divided by S. African Shifts; Democrats Weigh Alliance With ANC, Links With Ruling Party or Go-It-Alone Stand*, Wash. Post, Sept. 11, 1990, at A14. See *Law Reform*, *supra* note 3, at 9 (noting the precarious position of white liberals in South African society).

Many blacks believe that even within the so called white progressive and liberal community, "there are many people" (sic) who, although not openly admitting it, feel protected by the present political dispensation, and so would be adverse to any change that tended to guarantee the rights of blacks or even remotely threatened to rock the boat. This belief is based, among others, on the shift to the right in national elections whenever some presence is being brought to bear on South Africa, either internally or externally.

*Id.*

5. *South Africa's Right Wing Threat*, U.S. NEWS & WORLD REPORT, July 16, 1990, at 52.

6. Maclean, *South Africa Spells Out Minority Rights Plan Ahead of ANC Talks*, Reuter Library Report, May 13, 1990.

7. See de Klerk, *Return of the Nats*, 9 LEADERSHIP 51-54 (1990) (providing an interesting account of the political divisions within the white South African community).

8. See H.W. VAN DER MERWE, PROSPECTS FOR NEGOTIATION IN SOUTH AFRICA 157-74 (1987) (examining the prospects for negotiation in South Africa among the various political groups). According to the author, there are three basic reasons why the South African government has not made much progress in negotiating, even though there is an underlying willingness among the various groups: (1) the conflicting ideologies and divergent considerations within the white government; (2) the continuation of political violence by the government and opposition groups; (3) the fear of communism and the communist connections of the African National Congress. *Id.* See also A. LEMON, APARTHEID IN TRANSITION 351-55 (1987) (detailing the history of the African National Congress).

9. Wren, *Rumblings on the Right*, N.Y. Times, Oct. 7, 1990, at 32.

10. Clough, *South Africa: A Land Losing Hope*, San Francisco Chron., Oct. 10, 1990, at D1.

11. Mbeki, *Disarming Talk*, 9 LEADERSHIP 24 (1990).

representatives in the negotiation process.<sup>12</sup> Some blacks strongly feel that de Klerk is a crafty and calculating politician who is faking liberalism to disguise his true motives, and that his anti-apartheid speeches and purported willingness to negotiate with the ANC are cynical, hypocritical, and a meaningless public relations exercise.<sup>13</sup> Others argue that de Klerk desperately needs the support of accredited black leaders like Nelson Mandela and Chief Mangosuthu Gatsha Buthelezi for the salvation of his reform program.<sup>14</sup> Despite the fears and skepticisms, most black South Africans are united in the belief that de Klerk deserves the chance to honor his negotiation promise.<sup>15</sup>

There are still genuine fears as to whether the South African political climate is ready for proper negotiations to take place without hindrance. Nelson Mandela has succeeded in convincing the majority of South Africans to support the ANC in the negotiation process;<sup>16</sup> but de Klerk has lost some support for reform among the white minority.<sup>17</sup> Despite the rise in activities of extremist white vigilante groups that harass blacks and white opponents of apartheid,<sup>18</sup> the progress toward dismantling the system of apartheid is irreversible. Mandela and de Klerk's eagerness to negotiate stems from an authoritative mandate received from their respective popular organizations, although there has been no serious debate or indication of any possible agreement concerning the structure and form of a post-apartheid constitution. There is, however, a general consensus regarding the need for the inclusion of a

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12. Ottaway, *South Africans Begin to See Each Other in New Light, Talks Between Government, ANC Left Former Enemies with Revised Perceptions*, Washington Post, May 8, 1990, at A34.

13. *Id.*

14. See generally G. MARE & G. HAMILTON, *AN APPETITE FOR POWER: BUTHELEZI'S INKATHA AND SOUTH AFRICA* (1987) (examining Chief Buthelezi's role in South African politics)[hereinafter MARE & HAMILTON]; A. LEMON, *APARTHEID IN TRANSITION* 351-55 (1987) (discussing Chief Buthelezi's rise to power). Zulu king formed Inkatha yeNkululeko yeSisme, the "National Cultural Liberation Movement," in 1928. *Id.* at 330. Chief Buthelezi revived and reshaped the movement into a politically-oriented mobilization organization with over one million blacks of Zulu origin. *Id.* See also O. TAMBO, *OLIVER TAMBO SPEAKS: PREPARING FOR POWER* (1988) (discussing the ANC's role in the appointment of Chief Buthelezi as Chief Minister of Kwa-Zulu and the recreation of Inkatha).

15. But see MARE & HAMILTON, *supra* note 14, at 135-79 (focusing on the relationship between Inkatha and the ANC).

16. See Van Zyl Slabbert, *supra* note 1, at 70-74 (discussing the ANC's position on proposed reforms in South Africa).

17. See Interview with Koos van der Merwe, *reprinted in Window on the Right*, 9 LEADERSHIP 79 (1990) (interviewing Mr. van der Merwe who assesses the rise of white South African nationalism and predicts increasing white resistance to reform).

18. See *The Wind Rises in Welkom*, TIME, May 28, 1990, at 37 (examining the actions of South African white extremists).

bill of rights in any constitution.<sup>19</sup> It is absolutely impossible to guarantee protection of all human rights, however, without distinguishing between rights which are fundamental and those which are incidental or concurrent.<sup>20</sup>

Both de Klerk's National Party (NP)<sup>21</sup> and the ANC have prepared and published some weighty documents which spell out how each organization proposes to protect human rights under a new democratic institution.<sup>22</sup> This article analyzes these documents and examines, strictly from a human rights lawyer's perspective, whether the proposed Bill of Rights will lead to equality or neo-apartheid.

This article discusses the extent to which human rights will be promoted and protected under the envisaged South African Constitution and Bill of Rights. In addition, it endeavors to establish what norms of human rights are considered necessary to preserve and protect in a bill of rights, and the criterion used to make that determination. Finally, the article addresses the prospect of settlement negotiations to give the black majority full equality without suppressing the individual freedoms and fundamental rights of some ethnic groups, including the white minority.

There are immense problems facing all parties to the negotiations.<sup>23</sup> Mandela's fortitude coupled with his sense of forgiveness and pragmatism have won him a great deal of support and admiration all over the world. Nevertheless, harsh opposition from conservative and extremist groups, who demand a referendum among the white population on the issue of negotiating with the black majority, may affect de Klerk's mandate.<sup>24</sup>

President de Klerk must, however, forge ahead with his mandate to negotiate with the ANC and other accredited leaders. Other countries

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19. See Breytenbach, *Dreams of Hope*, 9 LEADERSHIP 86 (1990) (arguing that the real problems lay beyond the dismantling of the apartheid system, and stating that the South Africans must outline a procedural framework to deal with these problems).

20. See *infra* notes 177-87 and accompanying text (discussing the inclusion of fundamental rights and other concurrent rights in the proposed South African Bill of Rights).

21. See ADAM & MOODLEY, *supra* note 5, at 58-76 (providing a general description of the National Party and the other white political parties).

22. See 21 COLUM. HUM. RTS. L. REV., *supra* note 3, at 241-48 (reproducing the "South African Law Commission Bill of Rights" issued by the South African government's Commission consisting of judges, attorneys, government officials, and academicians). See also *id.* at 235-39, 249-51 (reproducing the ANC's "Freedom Charter" and the ANC's Constitutional Guidelines for a Democratic South Africa).

23. See *supra* notes 5-18, and accompanying text (presenting the main political and ideological groups participating in the reform negotiations in South Africa).

24. See Waldner, *Talk of War*, 9 LEADERSHIP 78 (1990) (observing the hostility of white extremists toward changes in the apartheid system).

have experienced the same or similar problems concerning the issue of equality. South Africa can learn from the experiences of other states in resolving these problems under international and municipal law.

## I. EQUALITY AND CHANGE

Throughout the history of social and political development, colossal empires and powerful regimes have collapsed under the mighty tides of freedom and the crescendo of clamors for justice, liberty, and equality.<sup>25</sup> Social transformation is an irreversible process, and those who still want to embrace and preserve the system of apartheid ignore the laws of social dynamics. To avoid a blood bath which has characterized most struggles for freedom and independence, all South Africans should seize this opportunity and support the negotiation process for a constitutional settlement.

Racism is a special form of oppression, in the sense that it primarily considers the victim as inherently inferior and the oppressor as a righteous saint called upon to fulfill a "divine" role of disempowerment and denigration.<sup>26</sup> Where blacks are the victims of oppression, whites benefit regardless of class, status, or gender. Indeed, the white working class in South Africa vehemently supports apartheid.<sup>27</sup>

The injustices and inhumane social conditions under which people live generate the demand for equality. The concept of equality harks back to the classic Stoic notions of democracy,<sup>28</sup> the English liberal tradition of Hobbes and Locke,<sup>29</sup> and the French social philosophy taught by Voltaire and Rousseau.<sup>30</sup> Gerhard Liebholz, an early scholar defined equality and the law's involvement in promoting and protecting equal rights in a democracy:

Modern democracy is characterized by the generalization of the idea of equality. This process seems to represent some sort of historic necessity, but it also shows the inherent tendency of the equality notions to radicalize itself. And the basis of

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25. Examples are the ancient Roman Empire, the colonial British Empire, the Nazi regime of Adolph Hitler, and other fascist and racist regimes which also collapsed. All of these authorities used law to entrench their powers and to silence and subjugate their opponents. More recently, dictatorial regimes collapsed in the disintegration of communism in Eastern Europe.

26. See THOMPSON, *supra* note 1, at 187-220 (discussing the beliefs that led to the creation of the apartheid system in South Africa).

27. Battersby, *Botha's Party Loses Ground in Segregated Local Voting*, N.Y. Times, Oct. 28, 1988, at A6.

28. Koupmans, *Comparative Analysis and Evaluation*, in CONSTITUTIONAL PROTECTION OF EQUALITY 215 (T. Koupmans ed. 1975).

29. *Id.*

30. *Id.*

this evolution consists of the abstract and general orientation of the concept itself.<sup>31</sup>

Equality constitutes a demand for equal opportunities in law, government, education, employment, housing, and social welfare. In the South African context, the law's role to promote change depends upon one's perception of the law as an isolated system or flexible social instrument. If one views the law as a flexible social instrument that constantly changes and develops, then the theory of social transformation is a prognosis for a new social order in which the law has an important role facilitating legal changes.

The creation of human rights protections has played a key role in this new social order. Human rights protection continues to be of central significance in the development of nations and promotion of equality among people. The notion of human rights depicts a political consciousness and social commitment toward the protection of individual rights.

In South Africa, the demand for political freedom and respect for basic human rights is implicit in the debate regarding the Bill of Rights. Post-apartheid South Africa cannot afford to suddenly guarantee all human rights to South Africans without causing some discontentment. The ANC may function as a source of liberation for the black South African majority, but it would be naive to think that once the government institutes a constitution, black South Africans will suddenly have decent jobs, better pay, adequate housing, access to a good education, and social security. Governments should guarantee and protect human rights based upon the indispensability and necessity of such rights. A right is indispensable when its quality is innate. Recognition of this quality should dictate the priority of human rights which governments should protect.

The unequivocal proclamation of some rights as inalienable and imprescriptible goes back to the ancient teachings of Aquinas.<sup>32</sup> Inalienable rights have their origin in natural law, and are often referred to as natural rights.<sup>33</sup> Natural law holds that positive law cannot take away any right given to man by nature or divine power without good reasonable course.<sup>34</sup> The Declaration of the Rights of Man enacted by the

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31. *Id.*

32. See Kamenka, *The Anatomy of an Idea*, in HUMAN RIGHTS 2 (1978) (presenting the background of scholarly discourse on the conception of rights).

33. K. Minogue, *The History of the Idea of Human Rights*, HUM. RTS. READER 3-16 (1990).

34. See Locke, *Second Treatise of Government*, reprinted in J. LOCKE TWO TREATISES OF GOVERNMENT (Dent ed. 1975); DE MONTESQUIEU, THE SPIRIT OF THE LAW,

French in 1789 was an establishment of a Bill of Rights after the collapse of a repressive feudal system, which promoted equality and respect for fundamental freedoms and individual liberties.<sup>35</sup>

Critics of natural law are likely to be law and order proponents who adhere to the supremacy of positive law.<sup>36</sup> Karl Marx warned about the danger of putting emphasis on the individual aspect of natural rights to the extent that no consideration was given to the class or collective outlook of these rights in relation to the dynamics of class conflicts and social transformation.<sup>37</sup> What really matters is not whether these are individual or collective rights, but the fact that they are all inalienable rights. The ideology of natural law and natural rights transcends the limits of moral philosophy to embrace political and social issues like the right of self determination, the right to vote, the right to unionize, and the right to strike. In sum, the South African Bill of Rights will have to give priority to those rights which are considered to be fundamental by virtue of their social necessity.

## II. THE PROTECTION OF HUMAN RIGHTS UNDER INTERNATIONAL AND MUNICIPAL LAW

### A. INTERNATIONAL RECOGNITION OF HUMAN RIGHTS

The notion of equality and international commitment to the promotion and protection of human rights existed before the creation of the United Nations<sup>38</sup> and the subsequent pronouncement of the Universal

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reprinted in 38 GREAT BOOKS OF THE WESTERN WORLD 1-320 (T. Nugent trans. 1977); J. ROUSSEAU, THE SOCIAL CONTRACT, reprinted in THE ESSENTIAL ROUSSEAU 1-124 (L. Blair trans. 1974); J.S. MILL, ESSAY ON LIBERTY (1859); I. KANT, ON THE RELATIONSHIP OF THEORY TO PRACTICE IN POLITICAL RIGHT (1792). Rights which are generally proclaimed as natural rights are *inter alia*, the right to life, the right to property, the right to liberty, freedom of speech, and freedom of association. The right to life is the most important one due to the fact that the enjoyment of all the other rights is actually dependent on being alive. Accordingly, no person or government should take lives or connive in the taking of lives or allow others to take lives without good reason. Derogation from this rule may be considered in cases pertaining to capital punishment or in exceptional instances involving abortion.

35. See J. ROUSSEAU, THE SOCIAL CONTRACT (reprinted in THE ESSENTIAL ROUSSEAU 1-124 (L. Bair trans. 1974)) (teaching that human society is the basis of morality and that moral rights stem from society's demand not to injure one's neighbor).

36. See Williams, *At the Gates of Freedom*, Wash. Post, Apr. 8, 1990, at 16 (identifying South African racism as unique).

37. Vassilyev, *Equality and Social Progress: Legal Aspects* in 3 EQUALITY AND FREEDOM 953-57 (G. Dorsey ed. 1977).

38. See generally F. ADCOCK & J. MOSLEY, DIPLOMACY IN ANCIENT GREECE (1975) (noting that the role of customary international law relating to the protection of human rights in ancient Egypt and Greece existed long before the United Nations).



Declaration of Human Rights by the United Nations General Assembly in 1948.<sup>39</sup> The first positive evidence of international law involvement in the protection of human rights was in the area of customary international law.<sup>40</sup> The first situations concerned the establishment of treaties to resolve international disputes.<sup>41</sup> During the 17th century the works of eminent scholars such as Hugo Grotius advanced the doctrine of humanitarian intervention.<sup>42</sup> Grotius viewed humanitarian intervention as the lawful use of force against a state which mistreats its own nationals.<sup>43</sup> Some powerful states, however, have used the doctrine as a pretext to invade weaker nations, establishing political influence and hegemony.<sup>44</sup> In spite of this abuse, the doctrine remains an appropriate method for the protection of human rights.

In the beginning, the defense and preservation of human rights was hindered by the belief that only states could be subjects of international law. Individuals were regarded as objects of international law, therefore they had no standing in an international court or tribunal (dualist theory).<sup>45</sup> This seriously affected the right of an individual to enforce his or her right in international law.<sup>46</sup> In addition, under the principle of non-interference in the national affairs of another independent state, humanitarian intervention may violate the sovereign integrity of another independent state.<sup>47</sup>

The concept of human rights resembles a universal and comprehensive concourse of distinct and palpable rights.<sup>48</sup> These may be individ-

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39. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (noting that the Universal Declaration of Human Rights was a reflection of natural rights at a later stage of social and political development).

40. See J. BRIERLY, *THE LAW OF NATIONS* 16-40 (6th ed. 1963) (identifying natural law and custom as sources of international human rights law)[hereinafter BRIERLY].

41. A. BLAUSTEIN, R. CLARK & J. SIEGLER, *HUMAN RIGHTS SOURCEBOOK* 1-219 (1987) [hereinafter, BLAUSTEIN] (detailing United Nations documents addressing human rights); C. MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* (1934) (suggesting that while nation-states defined by territory are a modern phenomenon, states of nationalities have existed since the creation of societies).

42. See L. OPPENHEIM, *INTERNATIONAL LAW* 312 & n.3 (Lauterpacht 8th ed. 1955); E. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 56-7 (1921); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 117-18 (1950) (stating that Grotius and other commentators supported humanitarian intervention in cases where states denied fundamental human rights to its nationals).

43. H. LAUTERPACHT, *supra* note 42, at 117-18.

44. J. MOORE, *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (1974).

45. L. HENKIN, *INTERNATIONAL LAW: CASES AND MATERIALS* 137-227 (2d ed. 1987).

46. *Id.* at 140-41.

47. *Id.* at 106-07.

48. See Driscoll, *The Development of Human Rights in International Law*, HUM. RTS. READER 41 (1990).

ual rights or collective rights. Individual rights are rights which belong to persons on an individual basis; and collective rights are rights which persons acquire as a group, minority, or nation.<sup>49</sup> The right of self-determination entitles a nation or people (people's right) to political independence and to freely choose its own government; and collective rights entail the right of a group or minority to enjoy the same freedoms and liberties without suffering discrimination at the hands of the majority.<sup>50</sup>

International protection of human rights and development of international human rights law only began to seriously attract the attention of the international community after the Nazi government in Germany committed the genocide of Jews and other minorities during World War II.<sup>51</sup> Determined never to see this tragic episode happen again, the superpowers and their allies agreed to establish an international institution for the purposes of promoting international peace and security. As a result, the United Nations was founded on June 26, 1945.<sup>52</sup> Although initially it concentrated on human rights in Europe, the new independent nations of Asia, Africa, and Latin America brought to the United Nations General Assembly's attention the peculiar problems of decolonization and neo-colonialism.<sup>53</sup>

The United Nations Charter contains provisions for the protection of human rights. Articles 1, 13, and 55 of the Charter specifically include references to the promotion of human rights and fundamental freedoms

49. Cranston, *Are There Any Human Rights?*, 112 DAEDALUS 10 (1983).

50. See BRIERLY, *supra* note 40, at 23 (noting the significance of human rights law and its affinity with national law).

... the law of nature stands for the existence of purpose in law, reminding us that law is not a meaningless set of arbitrary principles to be mechanically applied by the courts, but that it exists for certain ends, though those ends may have to be differently formulated in different times and places.

*Id.*

51. L. HENKIN, *supra* note 45, at 981-82. The League of Nations, the predecessor of the United Nations, formed in 1919 as part of the World War I Peace Settlement, was the first international organization to be entrusted with the duty of promoting the rights of European minorities. *Id.* However, the League of Nations lacked the power and credibility which was required for its success, faded away and was replaced by the United Nations. *Id.* The United Nations Charter fully guarantees the protection of the rights of minorities, this also involves their right to self determination. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. Doc. A/4684 (1960), reprinted in 1960 U.N.Y.B. 49 (reaffirming the General Assembly's faith in the fundamental human rights proclaimed in the United Nations Charter).

52. Starke, *Human Rights and International Law*, HUMAN RIGHTS 113 (Kamenka ed. 1978).

53. See *id.* at 122-23 (enumerating the scope of United Nations human rights resolutions during the 1950s and 1960s).

for all without distinction as to race, sex, language, or religion.<sup>54</sup> Article 2 promotes respect for the principle of equal rights and self-determination in respect of all peoples.<sup>55</sup> Article 55 further guarantees a high standard of living, and economic and social development.<sup>56</sup>

The United Nations has the ability to apply economic sanctions or even military force against a delinquent member-state,<sup>57</sup> and such a decision binds all member-states.<sup>58</sup> Sanctions accelerated the downfall of Ian Smith's regime in Rhodesia,<sup>59</sup> and are now playing a very significant role in expediting the eradication of apartheid in South Africa.<sup>60</sup> The question remains whether an independent South Africa can afford to promote and guarantee all the human rights contained in the Charter, including guarantees of economic and social progress.

Other United Nations resolutions, however, may assist in forcing compliance of human rights in countries like South Africa. The United Nations created the "International Bill of Rights"<sup>61</sup> not to proclaim itself as an agency that formulated or enforced international law, but to represent the wishes of the international community for the accomplishment of peace, international cooperation, and respect for human rights and dignity.

The United Nations' Universal Declaration of Human Rights in 1948 and the two 1966 covenants, which jointly form the "International Bill of Rights", represented an international proclamation of general human rights. Thirty-five member-states ratified the covenants, which came into force in 1976.<sup>62</sup> The member-states provided procedures with noticeable differences for each of the two covenants. The International Covenant on Civil and Political Rights, supplemented by

54. U.N. CHARTER, arts. 1, 13, 55.

55. U.N. CHARTER, art. 2.

56. U.N. CHARTER, art. 55.

57. U.N. CHARTER, arts. 39-43. The Security Council, entrusted with the maintenance of international peace and security, may invoke measures to maintain or restore international peace and security if it is convinced that there is a breach of the peace or act of aggression. U.N. CHARTER, art. 39. These measures include complete or partial interruption of economic relations and severance of diplomatic relations. U.N. CHARTER, arts. 41-43.

58. See H. Kelsen, *THE LAW OF THE UNITED NATIONS* 706-65 (1964) (surveying the use of sanctions by the United Nations against its member-states).

59. Moffet, *The Security Council and the Use of Force*, 3 J. INT'L AFFAIRS 80-130 (1989).

60. *Id.* at 92.

61. Universal Declaration of Human Rights, G.A. Res. 217A, (III), U.N. Doc. A/810 (1948); the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter International Covenant on Economic, Social and Cultural Rights].

62. See *supra* note 61 (citing the International Bill of Rights).

the Optional Protocol,<sup>63</sup> has a special body (Human Rights Commission) which considers complaints of human rights violations, and must report to the Economic and Social Council of the United Nations. In contrast, the International Covenant on Economic, Social, and Cultural Rights has no commission required to promote its enforcement. Instead, state parties are expected to submit progress reports to the Economic and Social Council.<sup>64</sup>

Legislators may resort to the International Bill of Rights to create a future South African Bill of Rights. Community relations legislation aimed at eliminating discrimination may also benefit from the covenants. The main weakness, however, of these human rights covenants (and that of international law as a whole) is the inability of enforcement. The International Court of Justice (ICJ), the organ of the United Nations responsible for adjudication of international disputes, is only authorized under article 59 of the United Nations Charter to make decisions binding on the parties involved in the dispute.<sup>65</sup> International treaties, however, become enforceable once ratified by member-states.<sup>66</sup> The status of resolutions and declarations is completely different. Article 13 of the United Nations Charter grants to member-states the power to approve resolutions and any recommendations contained therein.<sup>67</sup> Declarations are statements of intent which, though not legally binding, are universally accepted as general principles of law.<sup>68</sup>

The proposed South African Bill of Rights represents the views of the ANC and the government on the issues of constitutionalism and human rights within the framework of a negotiated settlement and a post-apartheid democracy. Professor Thomashausen reminds us that:

Declarations, charters or other legal instruments purporting to legally protect and enforce human or fundamental and political rights have one difficulty in common: That of defining (i) the scope or the reach of any particular human or fundamental right, and (ii) the permissible limitations of or encroachment upon such a right in the individual case or under specific circumstance.<sup>69</sup>

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63. Optional Protocol to the International Covenant on Civil and Political Rights, G. A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966).

64. See The International Covenant on Economic, Social and Cultural Rights, *supra* note 61 (regarding United Nations effects to eliminate racial discrimination). See also G.A. Res. 3151 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 33, U.N. Doc. A/9030 (1973) (regarding United Nations condemnation of apartheid).

65. U.N. CHARTER, art. 59.

66. HENKIN, *supra* note 45, at 4.

67. U.N. CHARTER, art. 12.

68. Article 38 1.c of the new Charter; BLAUSTEIN, *supra* note 41, at 3-7.

69. Thomashausen, *Savings Clauses and the Meaning of the Phrase "Acceptable in a Democratic Society" - A Comparative Study*, 30 CODICILLUS 56 (1989).

To achieve peace in the area of human rights, states apply other methods which can be equally important for a post-apartheid South Africa. Regional institutions such as The Council of Europe, the Organization of American States (OAS), and the Organization of African Unity (OAU) have implemented these methods with success. The most successful regional instrument is the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) signed by the member-states of the Council of Europe in November, 1950.<sup>70</sup> The European Convention assigned the task of investigating human rights violations in the European region to the European Commission of Human Rights.<sup>71</sup> The European Convention also established a European Court of Human Rights with compulsory jurisdiction over all human rights issues and complaints involving European governments.<sup>72</sup> An individual complainant must first exhaust all available domestic remedies before he or she can file a complaint with the Commission.<sup>73</sup>

The OAU does not provide for an African Court of Human Rights. Instead, it has a Human Rights Commission without any enforcement power.<sup>74</sup> The Human Rights Commission's refusal to grant membership to states ruled by white minority governments reveals its concern with racism. Still, it turns a blind eye on the admission of oppressive ethnic minority governments and states which have horrendous records of human rights violations. In contrast to the OAU and OAS, the Council of Europe restricts membership to states which have a good record of respect and honor for human rights and democracy.<sup>75</sup> It was this restriction which delayed the admission of Greece, and caused the Council to bar the admission of Spain and Portugal until both countries had established democratic governments.<sup>76</sup>

The Council of Europe is principally concerned with civil liberties, and social and cultural rights. In contrast, the OAU emphasizes political rights, and is the first regional authority to stress the importance of peoples' rights and the need to promote the right of self-determination.<sup>77</sup>

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70. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950) [hereinafter European Convention].

71. *Id.* at art. 19(1).

72. *Id.*

73. *Id.* at art. 26.

74. *Id.* at arts. 30-31.

75. *Id.* at art. 3.

76. T. BUERGENTHAL & H. MAIER, BASIC INTERNATIONAL LAW 49 (1985).

77. See The African Charter on Human and Peoples Rights, art. 19, O.A.U. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 59 (1982). See also Omuzurike, *Interna-*

1. *South Africa's Post-Apartheid Role in the Promotion of Federalism and the OAU*

A democratic South Africa will have a significant role to play in the advancement of equality in Africa through the OAU. Problems of ethnicity and secession continue to bedevil the OAU and frustrate its efforts toward the realization of African unity. This dilemma is compounded by the fact that federalism in Africa has not had enough time to gain ground and neutralize ethnic hostilities and other related conflicts. Accordingly, it is completely unfair to write off the federal constitutional model in Africa just on the basis of the existing ethnic conflicts.

Africa, like any other continent, is dynamic and not static. Most of the political tensions facing the African continent at present stem from the ugly legacy of the colonial divide-and-rule policy. Africa's political progress is to some extent hampered by the eurocentric sense of judgment. Africans should choose their own destiny according to their own heritage and concrete historical experiences.

The legacy of colonialism, for instance, has imposed serious ethnic frictions in Nigeria. Some minorities and ethnic groups in Nigeria conveniently use regional autonomy platforms as rallying cries for separatism and secession. The creation of new states and building of new schools, technical colleges, and universities for each state, has in spite of all the set backs, helped in the promotion of national unity and advancement of educational and employment opportunities in Nigeria.<sup>78</sup>

Thus, the spirit of federalism in Nigeria and Africa as a whole is still very much alive. A federal constitution is the best alternative left for the promotion of national unity and equal opportunity. Yet, the proliferation of secessionist trends within federal unions today, bears abundant evidence of a sad gravitation away from federalism. There can be no national unity without patriotism, and the answer to disparity lies not in vindictiveness or abdication, but in national tolerance and cooperation.

Likewise, it is injudicious for some South African academicians<sup>79</sup> to cultivate the notion that an independent South Africa should be instrumental towards the establishment of an independent "regional" human

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*tional Law and Colonialism in Africa*, ZAMBIA L.J. (1971-72) (discussing self-determination and colonialism).

78. Raudal, *Bouyed by Oil, Rags-to-Riches Nigeria Fends Off Disaster*, Wash. Post, Feb 27, 1977, at A13.

79. See *infra* notes 80-81 and accompanying text (citing the opinions of Professors Naidu and Ndaki).

rights organization in Southern Africa, notwithstanding that the OAU still remains the only recognized and accredited regional authority in the world and the African continent. Nobody would disagree if such an idea canvasses the creation of a Southern African Economic Union based on the same or similar views and objectives as the European Economic Community (EEC) and Economic Community of West African States (ECOWAS). Professor Ndaki writes:

One of the positive consequences of a bill of rights is that South Africa could then be the catalyst for the initiation of a Southern African convention on human rights and fundamental freedoms similar to the European conventions. This would then ensure the protection of human rights of all people in this part of Africa. Such a Southern African regional convention would affiliate with the African Charter on Human and Peoples Rights.<sup>80</sup>

Regionalism in international law is defined in terms of continental areas, thus the European Convention involves European states, the OAS involves American states, and the OAU involves African states. South Africa is part of the African continent, and it will therefore be imprudent to create a sub-regional human rights organization while still claiming membership to the OAU. Further, Ndaki's treatment of South African homeland authorities as "regional states" within the context of regional protection of human rights, creates the false impression that the homeland governments are recognized in international law.<sup>81</sup>

## 2. *Individual v. Group Rights*

From historical and modern perspectives, the struggle for equality in South Africa is a struggle about human rights and self-determination. In essence, equality is a rejection of domination by one group, and a demand that the government should be a true picture of fair representation and a symbol of national unity, composed of all the racial and minority segments of society. South Africa's struggle is therefore not just a crusade against apartheid or racial discrimination, but a struggle for self-determination and national unity.

The intriguing question is how a post-apartheid South Africa deals with national unity and the issue of individual and group rights. The extirpation of apartheid is chiefly designed to redress the historically indigent and disadvantaged black majority. The concept of equality

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80. See Ndaki, *Human Rights - The Regional Dimension*, 30 CODICILLUS 29 (1989) (citing Naidu, *The Right to Freedom of Thought and Religion and to Freedom of Expression and Opinion* 1987, in OBITER 73).

81. *Id.* at 24-25.

and protection of human rights should therefore be reflected in a legal system which provides immediate redress and justice to the historically disadvantaged groups, while also creating a new democratic order which is characterized by respect for individual freedoms and group rights.

The question frequently asked is whether the black majority will be prepared to guarantee all freedoms to a white minority in an independent South Africa. The ANC has stated that it is prepared to respect minority rights,<sup>82</sup> but it remains to be seen whether that will be possible under the present ANC's Freedom Charter and Constitutional Guidelines.<sup>83</sup> It may be strange that black South Africans are preoccupied with the protection of the rights of a white minority in a post-apartheid South Africa, while white South Africans have never been really interested in the rights of blacks as an indigenous majority.

When former white colonies like Zimbabwe were about to become independent, similar fears about the rights of the white minority settlers were raised.<sup>84</sup> It is not surprising at all, that in the whole history of human and race relations, there has never been any complaint or cause to believe that a white minority was oppressed or discriminated against by a black majority. On the contrary, white-dominated regimes have historically subjugated and oppressed black indigenous peoples through colonialism and enslavement.

A post-apartheid South Africa will have to accord to the white minority some protection as individuals and as a group; not on the basis of color, but as South Africans. The same applies to all the various ethnic groups or minorities wishing to retain their religious or cultural heritage, including the rights of women and children. As indicated earlier, modern federalism offers the best chance of success for South African democracy.

Federalism should not be viewed as separatism or license to create political divergence where each level of government has autonomous power which may well be misused. Modern federalism is about interaction between various groups; coordination between central government and regional bodies; and sharing of national resources for the benefit of the national state and for the advancement of every individual and group at all levels of government. Its goals are socio-legal rather than predominantly political.

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82. See Interview with Thabo Mbeki, 9 LEADERSHIP 24 (1990) (presenting the views of Thabo Mbeki, director of international relations for the ANC).

83. See 21 COLUM. HUM. RTS. L. REV., *supra* note 3, at 235 (discussing the "Freedom Charter" and visions of a democratic post-apartheid South Africa).

84. *Zimbabwe, Progress*, THE ECONOMIST, Sept. 29, 1977, at 65.



South Africa's great national achievement would be the creation of a common South African citizenship for a multiracial, multicultural, multilingual, and multireligious nation. The emphasis on individual rights at the expense of group rights or conversely the stress on group rights which may encourage separatism, may frustrate the realization of that goal. South Africa should resist becoming a "melting pot" like the United States, and reject the assimilation of other cultures into a dominant state culture as in the Soviet Union. In addition, it should repudiate the promotion of other nationalisms within one nationalism as in Canada. The idea is to accept and protect rights not because they are individual or group rights, but because they are fundamental rights. South Africa should base its approach to national identity and rights issues upon the slogan of "one nation with different peoples;" different not in a national sense, but in racial or cultural terms. Before examining the provisions of the envisaged Bill of Rights in South Africa, however, it will help to look at how some other countries have tackled the enigmas generated by centuries of discrimination and inequality.

#### B. PROTECTION OF HUMAN RIGHTS UNDER OTHER STATE'S CONSTITUTIONS

Many new member-states of the United Nations, regardless of ideological differences and constitutional models, are now emulating the common European tradition of proclaiming the protection of fundamental freedoms and individual rights. It is momentous to remember, however, that notable constitutional documents like the English Magna Carta,<sup>85</sup> Petition of Rights,<sup>86</sup> Habeas Corpus,<sup>87</sup> and the Bill of Rights,<sup>88</sup> did nothing to deter the British from oppressing and dehumanizing people of color during the epoch of colonialism. Similarly, the American Declaration of Independence, which proclaimed "all men to be equal" and to possess "inalienable rights to life, liberty, and pursuit of happi-

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85. See Magna Carta, arts. 16-17 (1215) (describing basic human rights); HUM. RTS. READER 105.

86. *Id.* The Petition of Rights was a classical British document which expressed the feelings of the British about justice and the struggle against absolutism and autocracy.

87. Habeas Corpus Act (1679). Habeas Corpus is a traditional English law writ issued by a judge requiring an imprisoned person to be brought to court in person so that the reason for his detention or imprisonment can be determined. Habeas Corpus Act (1679).

88. HUM. RTS. READER 104-05. The English Bill of Rights was passed in 1689 during the reign of Prince Orange to guarantee freedom of worship and liberties after the abdication of the late King James II. The English Bill of Rights (1689); HUM. RTS. READER 104-105.

ness" did not protect the blacks who were legally kept in bondage until the Civil War.<sup>89</sup>

Regarding constitutional safeguards, many countries ranging from the popular western democracies to the acclaimed socialist republics ostentatiously express constitutional commitment to the promotion and protection of human rights. Most of these provisions represent a universal awareness of what constitutes fundamental freedoms, and judicial review or legislative action may enforce some of these protections. A presumption that political rights and group rights deserve more attention than economic and social rights characterizes the nations' constitutional protection of human rights. The "new rights" such as matters pertaining to environmental issues are just beginning to attract the attention of the international community. The following examples of constitutional human rights protections should be considered when attempting to deal with discrimination and inequality in post-apartheid South Africa.

### 1. *India*

India is perhaps the most admired populous democracy as it created and sustained a democratic constitution, and a Bill of Rights devoted to the protection of human rights. Nevertheless, India consists of several ethnic groups divided by cultural, linguistic, religious, and distinctive class and caste barriers. The Indian Constitution guarantees equality of all citizens, along with respect for the preservation of language, culture, and choice of education. Article 46 of the constitution requires the Indian state to:

Promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.<sup>90</sup>

Rights under article 46, however, are not enforceable in any court of law or tribunal even though the Indian Supreme Court can legally en-

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89. See F. FANON, *THE WRETCHED OF THE EARTH*; F. FANON, *DYING COLONIALISM* (perceiving the subject of European colonialism and racism as something not entirely divorced from "white supremacist" ideology). See also I. WALLERSTEIN, *AFRICA: THE POLITICS OF INDEPENDENCE* (concerning the same proposition). It must be pointed out that the Civil War was not a war about the freedom of the slaves. It was an economic war between the North and South which necessarily involved the freeing of the slaves to work in the new industries of the North. It was not until the passage of the Civil Rights Act of 1964 that blacks started to enjoy some significant rights and privileges. J. GESCHWENDER, *CLASS, RACE AND WORKER INSURGENCY* 13 (1977).

90. INDIA CONST. art. 46.

force the Bill of Rights.<sup>91</sup> In *State of Madras v. Champakan*,<sup>92</sup> the Indian Supreme Court held that where a nonjusticiable directive principle of the constitution is in conflict with a justiciable fundamental right, the fundamental right takes preference over the constitutional directive.<sup>93</sup> This dichotomy, coupled with the existing acrimony of the Indian upper and middle classes against the government's affirmative action program, has caused some serious conflicts among the various groups.<sup>94</sup>

In addition to the constitutional protection of the rights of the indigent Indian masses, the government enacted the Protection of Civil Rights Act in 1955, which sought "to prescribe punishment for preaching and practice of 'untouchability', for the enforcement of any disability arising therefrom and for matters connected therewith."<sup>95</sup> Thus, any discrimination on the ground of "untouchability" would constitute an offense punishable by imprisonment for a term of not less than one month and not more than six months.<sup>96</sup> This clearly shows the Indian government's determination to eradicate discrimination in the Indian society.

## 2. Nigeria

Nigeria, with a population of 150 million and over 250 different ethnic groups,<sup>97</sup> has a federal constitution which although based on the American federal tradition, is similar to the Indian Constitution. Chapter IV of the constitution provides an elaborate list of fundamental rights and group rights.<sup>98</sup> This feature of the constitution has prompted some American human rights academics to claim that the Nigerian Constitution provides the best method of protecting human rights in the international community.<sup>99</sup>

Article 42 of the constitution allows any person alleging violation of a guaranteed constitutional right to apply to the High Court for re-

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91. INDIA CONST. at arts. 32, 37.

92. *State of Madras v. Champakan*, 1951 S.C.R. 525.

93. 6 MOD. LEGAL SYS. CYCLOPEDIA 390.43 (1990).

94. See *Fin. Times*, May 21, 1991, at 4 (discussing how this long bitterness was recently inflamed by former Prime Minister V.P. Singh's decision to reserve 27 percent of government posts for the "backward classes" which represents about one fifth of a total of 840 million people).

95. The Protection of Civil Rights Act, preamble (A.I.R. 1955).

96. *Id.* at § 4.

97. 6 MOD. LEGAL SYS. CYCLOPEDIA 390.10 (1990).

98. *Id.* at 390.24, 390.35, 390.52.

99. BLAUSTEIN, *supra* note 41, at 783.

lief.<sup>100</sup> The weakness of the Nigerian Constitution is that it puts individual rights above group rights. The assumption that an individual represents a group can be misleading when a group wants to enforce its right collectively as a group independently of the individuals which make it.

The Nigerian Constitution presents well-defined principles, including the separation of powers. Apart from the doctrine of judicial review provided by the Nigerian Constitution,<sup>101</sup> the federal supremacy clause also serves to control the actions of local governments and the abuse of human rights. In *Adesanya v. President of The Federal Republic of Nigeria*,<sup>102</sup> the Chief Justice of Nigeria, Fatayi Williams, clearly stated that any law inconsistent with the Nigerian federal constitution is invalid.<sup>103</sup> The same view was stressed in *Okogi v. Attorney General of Lagos*,<sup>104</sup> where the plaintiff challenged the constitutionality of a Lagos State circular letter which purported to ban private education in the Lagos State.<sup>105</sup> The prohibition on private education arose from the argument that Lagos State provides equal education opportunities in public schools built by the state in accordance with the federal "directive" contained in section 18 of the federal constitution.<sup>106</sup> The Nigerian Court of Appeals held that such a directive reflects state policy and has to comply with fundamental rights.<sup>107</sup> In the event of transgression upon the fundamental freedoms guaranteed by the federal constitution, the right of a private citizen would prevail over that of the public at large.<sup>108</sup> *Okogi* strengthened the belief that equal education opportunities in public schools do not necessarily guarantee the quality of education available in private schools.<sup>109</sup> This provides a good example for those who would advocate a compulsory public school system of education for a post-apartheid South Africa. Nigeria does not have legislation which prohibits discrimination, and the emphasis on individualism seems to be a negation of the African communal way of life and an open invitation for corruption and political adventurism.

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100. 6 MOD. LEGAL SYS. CYCLOPEDIA 390.37 (1990).

101. *Id.* at 390.37.

102. *Adesanya v. President of The Federal Republic of Nigeria*, 1981 2 N.C.L.R. 358.

103. *Id.* at 357.

104. *Okogi v. Attorney Gen. of Lagos*, 1981 2 N.C.L.R. 337, 352-53.

105. *Id.* at 352.

106. 6 MOD. LEGAL SYS. CYCLOPEDIA 390.41-43 (1990).

107. *Id.*

108. *Id.*

109. *Id.*

### 3. *Malaysia*

Malaysia is another developing country which has a strong federal constitution designed along the lines of group rights. Although the Chinese are the dominant merchant class, the Malay Constitution provides special educational and economic opportunities for the Malay minority.<sup>110</sup> A prohibition on any challenge of its indispensability shows the importance of this affirmative action clause.<sup>111</sup> This places the Chinese in a difficult position to contest what looks like a permanent endorsement of affirmative action.

### 4. *Fiji*

Fiji is another example of the proposition that there can be no equality within inequality. When Fiji was due to become independent, there were justifiable fears that the introduction of one man, one vote could lead to the domination of the native population by the Indian majority and other ethnic minorities like the Chinese and whites who control the Fijian economy.<sup>112</sup> In the negotiations about the constitutional future of Fiji, representatives of the various ethnic groups resolved to adopt a "group rights" type of constitution under which each group was guaranteed a delegate in the house of representatives.<sup>113</sup> Section 16 of the 1990 Constitution prohibits discrimination on the grounds of color, race, or national origin, but the constitution is silent on the issue of positive discrimination in favor of the historically disadvantaged Fijian natives.<sup>114</sup> The Fijian experience certainly is not good for South Africa, and even Judge Rooney, who seemingly thought it could be useful for South Africans, ultimately, concluded that:

Democracy to be viable requires popular consensus on the acceptability of the system itself. It is easier to achieve such a consensus in a society which is not deeply riven by ethnic, religious, linguistic, or racial divisions. Experiments attempting to confine such differences within one democracy have seldom succeeded. The one great and enduring exception is the biggest democracy in the world, India, which despite difficulties in certain areas has survived as a free society against all expectations.<sup>115</sup>

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110. FED. CONST. pt. XII, art. 153 § 2 (Malaysia).

111. BLAUSTEIN, *supra* note 41, at 769-70. See T. SUFFIAN, H. LEE & F. TRINIDADE, *THE CONSTITUTION OF MALAYSIA* (1979) (discussing the protections provided for the Malays in the Malaysian Constitution).

112. Rooney, *Group Protection - The Fijian Experience*, 30 CODICILLUS 15, 16 (1989)[hereinafter Rooney].

113. *Id.*

114. FIJI CONST. § 16.

115. Rooney, *supra* note 112, at 22-3.

## 5. *Canada*

In Canada, the federation is primarily a union of the economically powerful Anglophones who are the majority, and the Francophones who are specially favored as a minority group.<sup>116</sup> This preferential treatment is guaranteed by the new Canadian Constitution (1982) which treats the French-speaking province of Quebec as a special entity within the federation.<sup>117</sup> The Indian aboriginal minority has not received similar treatment from the Canadian government or the constitution.<sup>118</sup> Section 15 of the 1982 constitution does, however, guarantee equality to all Canadians including the Indians, and further approves of any:

programme or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national, or ethnic origin, color, religion, sex, age or mental or physical disability.<sup>119</sup>

The affirmative action is generally designed for all minorities or groups and does not single out the Indians or black Canadians as a special group, although the constitution favors the Francophones as a particularly deserving group.<sup>120</sup> The French-speaking Canadians do not wish at all to become assimilated to the Canadian cultural and political mainstream.<sup>121</sup> They prefer to remain distinctively French even though they are a minority in Canada.<sup>122</sup> It would be unfortunate if a future South African Constitution were to treat white South Africans as a "special group" and thus accord them a special constitutional status. This would result in the indirect promotion of white supremacy by a constitution which is supposed to be the antithesis of racism and group domination.

## 6. *Belgium*

The current Canadian ethnic tensions bear a semblance to the Belgian situation involving the Flemish- and French-speaking Belgians.<sup>123</sup>

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116. T. KOOPMANS, CONSTITUTIONAL PROTECTION OF EQUALITY 65-6 (1975)[hereinafter KOOPMANS].

117. CAN. CONST. pt. 1, § 23 (1982). Quebec is exempted from the section's requirement that children of the language minority be taught in their primary language. *Id.*

118. *Id.* Indians receive an exemption from the section's requirements. *Id.*

119. CAN. CONST. pt. 1, § 15 (1982).

120. CAN. CONST. pt. 2, § 35 (1982).

121. KOOPMANS, *supra* note 116, at 65.

122. *Id.* at 243.

123. *Id.*

The Belgian Constitution of 1971 was designed to promote group rights on the basis of equality and recognition of cultural and linguistic diversities.<sup>124</sup> Equality in Belgium operates on the assumption that all the social groups are on the same social level; hence the constitution does not make a provision for positive discrimination in favor of any of the groups.<sup>125</sup> The old Belgium Constitution was meant to create a unitary identity, but campaigns by the Flemish-speaking section of the community forced the government to amend the constitution in such a way that Belgium could pursue a policy of cultural pluralism and "group rights" identity.<sup>126</sup>

This clearly indicates that a unitary system in South Africa may create some similar problems, but it does not mean to say that the "group rights" notion is the best solution for a post-apartheid system. The countries discussed so far do not have serious racial problems, and the promotion of group rights was intended to achieve justice and equality among the various social groups. In South Africa, however, group rights are at present a euphemism for racial segregation and white domination.

## 7. Germany

Countries which have a history of racial discrimination like Germany, Britain, and the United States, have by and large gone beyond constitutional provisions to control the menace of racism and to prevent racial discrimination.<sup>127</sup> Germany's constitution guarantees equality for all German citizens, and gives the Federal Constitutional Court unlimited powers to review all matters relating to the interpretation of rights.<sup>128</sup> Although the constitution does not provide for preferential treatment of any German minority, each individual citizen has direct access to the Federal Constitutional Court to enforce his or her constitutional rights.<sup>129</sup> The constitution does not consider racism as deserving of special legal protection separately from the general equality provisions contained in article 3. The German government's approach to

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124. BELG. CONST. art. 59.

125. BELG. CONST. art. 59.

126. BLAUSTEIN, *supra* note 41, at 766-69.

127. See R. WINTER, *AFFIRMATIVE ACTION: THE ANSWER TO DISCRIMINATION?* 1-40 (1975); Marshall, *Enforcing Equality: Two Statutory Attempts* in 3 *EQUALITY AND FREEDOM* 933-39 (F. Dorsey ed. 1977) (discussing how to make the Civil Rights and Race Relations Acts more effective in implementation and enforcement).

128. GRUNDGESETZ [GG] art. 93(4)(a) (W. Ger.) (stating that all constitutionality complaints shall be heard by the Federal Constitutional Court).

129. *Id.*

the need for a distinct statutory protection for the historically oppressed and disadvantaged groups denotes that constitutional provisions alone are not satisfactory means for the protection of fundamental freedoms and individual rights.

### 8. *Great Britain*

The British, believed to be the earliest Europeans to introduce and institutionalize racism in Africa, Asia, and the Caribbean, are also ironically the first Europeans to create a statute which deals distinctively with protection against racial discrimination.<sup>130</sup> The typical experience of many blacks in Britain is manifested in the following statement:

When I left Jamaica for England I did respect the Englishmen; and I did expect these people to treat me with respect as how we treat them in Jamaica. But I found that we West Indian Negroes are looked upon as inferior human beings by the English natives. I found that even when my children go out to play with the English children in the street, the English parents pull back their children to come inside.<sup>131</sup>

The British Parliament passed the Race Relations Act of 1976 (1976 Act).<sup>132</sup> The 1976 Act marked the first time that both overt and covert racial discrimination were deemed illegal. According to section 1 of the 1976 Act, a person discriminates against another if:

- (a) On racial grounds he treats that other person less favorably than he treats or would treat other persons; or
- (b) he applies to that other person a requirement or condition which he applies or would apply equally to persons not of the same racial groups as that other but -
  - (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
  - (ii) which is to the detriment of that other person because he cannot comply with it.<sup>133</sup>

Section 3 of the 1976 Act defines a "racial group" as a group of persons who are identified by reference to race, color, nationality, or ethnic or national origin; and "racial grounds" as any reason which is found in the above statute.<sup>134</sup> Generally, the 1976 Act covered discrimi-

130. See Race Relations Act 1976, ch. 74 [hereinafter jointly cited as Race Relations Acts] (deriving from the 1965 and 1968 Race Relations Acts).

131. W. DANIEL, RACIAL DISCRIMINATION IN ENGLAND 31 (1968) (noting that blacks in Britain, including West Indians, Africans, Indians, and Pakistanis make up over a million of the country's 55 million citizens).

132. Race Relations Act 1976, ch. 76.

133. Race Relations Act 1976 pt. I, § 1.

134. Race Relations Act 1976 at pt. I, § 3.



nation in employment, housing, education, and situations when a person is treated less favorably than others because of what he or she is alleged to have done or said.<sup>135</sup>

The 1976 Act allows positive discrimination in employment,<sup>136</sup> and incitement to racial hatred is a criminal offence under the Public Order Act of 1986.<sup>137</sup> The 1976 Act empowered the Commission for Racial Equality:

- (a) to work toward the elimination of discrimination,
- (b) to promote equality of opportunity, and good relations between persons of different racial groups generally, and
- (c) to keep under review the working of the Act and, when they are so required by the Secretary of State or otherwise think it necessary, to draw up and submit to the Secretary of State proposals for amending it.<sup>138</sup>

Unlike whites in the United States, whites in Britain have not drastically resisted positive discrimination. The main criticism made against the 1976 Act relates to its feeble process of enforcement. The Commission for Racial Equality is entrusted with the duty of investigating all complaints about racial discrimination,<sup>139</sup> and if convinced about the substance and authenticity of the complaint, the Commission may try to effect a conciliation before the case goes to a tribunal for settlement.<sup>140</sup> The complainant has no direct access to a court or to the European Court of Human Rights.<sup>141</sup>

## 9. *The United States*

Finally, in the United States, racial discrimination is still a controversial issue particularly in the areas of education, housing, and employment.<sup>142</sup> The pre-Civil War Constitution was quiet on the question of slavery as a private right within state law and legal jurisdiction.<sup>143</sup>

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135. Race Relations Act 1976 pt. I, § 2.

136. Race Relations Act 1976 pt. VI, § 38.

137. Public Order Act 1986, ch. 64, pt. III.

138. Race Relations Act 1976, ch. 76, at pt. VII, § 43.

139. Race Relations Act 1976, ch 76, at pt. VII, § 48.

140. See Marshall, *Enforcing Equality: Two Statutory Attempts*, in 3 *EQUALITY AND FREEDOM* 933 (1977) (discussing the enforcement of the Race Relations Acts, and the powers of the Commission for Racial Equality).

141. *Id.*

142. See generally D. BELL, *RACE, RACISM AND AMERICAN LAW* 363-661 (1986) (providing a history of American civil rights cases and laws in the areas of housing, education, and employment)[hereinafter Bell].

143. *Id.* at 2-30. See e.g. O. HANDLIN, *RACE AND NATIONALITY ON AMERICAN LIFE* (1957); J. BOGGS, *RACISM AND THE CLASS STRUGGLE* (1970); R. WINTER, *AFFIRMATIVE ACTION: THE ANSWER TO DISCRIMINATION?* (1975) (providing varied descriptions of the protracted struggle for racial equality in the United States).

An analogy can be made between the apartheid policy in South Africa and the prevalent attitude in southern American states prior to the enactment of the Civil Rights Act of 1964 (Civil Rights Act).<sup>144</sup> Like the American Civil War, the Anglo-Boer War (1899) between the English and the Afrikaners in South Africa was also to some extent fought over domination and control of the indigenous black population.

After a series of bitter campaigns by black Americans for equality and an end to racial discrimination, Congress finally responded by enacting the Civil Rights Act.<sup>145</sup> The Civil Rights Act intended to strengthen and enforce the civil rights provisions contained in the thirteenth, fourteenth, and fifteenth amendments of the Constitution.<sup>146</sup> This illustrates the frailty of non-self executing enforcement clauses contained in the Bill of Rights which depend upon appropriate legislation for enforcement.

Prior to the Civil Rights Act, the three constitutional amendments, which some academicians claim were self-executing,<sup>147</sup> caused a great deal of anxiety on the part of those seeking protection from the courts. The thirteenth amendment abolished slavery,<sup>148</sup> while the fourteenth and fifteenth amendments guaranteed to blacks equality and the right to vote respectively.<sup>149</sup> In *Plessy v. Ferguson*,<sup>150</sup> the doctrine of "separate but equal," which called for separate facilities for blacks and whites was endorsed by the Supreme Court,<sup>151</sup> even though this meant a perpetration of separate development on an equal level as it is in most parts of South Africa today. A sense of justice later prevailed when the Supreme Court overruled *Plessy* in *Brown v. Board of Education*.<sup>152</sup> *Brown* concerned the admission of a black student in a predominantly white college. The Court held that a state law which required racially segregated public schools violated the equal protection clause of the federal constitution, because "separate educational facilities are inherently unequal."<sup>153</sup> In *Shelley v. Kraemer*,<sup>154</sup> the Court extended the

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144. 42 U.S.C. § 2000a *et seq.* (1988).

145. 42 U.S.C. § 2000a *et seq.* (1988).

146. Civil Rights Act of 1964, preamble, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000a *et seq.* (1988)).

147. See KOOPMANS, *supra* note 116, at 14 (stating that the Civil War amendments were self-executing and were subject to judicial enforcement). Although self-executing, each amendment grants Congress the power to implement and enforce appropriate legislation. *Id.*

148. U.S. CONST. amend. XIII, § 1.

149. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1.

150. 163 U.S. 533 (1896).

151. *Id.*

152. 347 U.S. 483 (1954).

153. *Id.* at 495.

right of ownership of real property to blacks, where the property in question was subject to a restrictive covenant making it available only to whites.<sup>155</sup>

These gains were not realized without fights and the loss of life of civil rights leaders and activists, who looked upon the court for assistance. This situation is well articulated by Professor Nathan Glazer when he argues that "we should not underestimate the significance of the individual aspect of these rights. Each case goes into the individual's account of discrimination, the damage to the individual."<sup>156</sup> Glazer concludes that in 1964 it was expected "that these rights would become effective because individuals would claim them, and because they would now be treated as individuals, without distinctions of color or national origin."<sup>157</sup>

By the 1970s Congress had introduced the quota system, which was an admission that positive action could achieve true advancement of group rights in a better manner. Congress designed the system to compel employers, college authorities, government agencies, and other similar institutions, known to have the tendency to discriminate against blacks and other minorities, to reserve certain positions for minorities as groups rather than individuals.<sup>158</sup> Many colleges and employers in the United States have responded positively to this federal requirement. Thus, some predominately white American universities reserve a certain number of places in their various departments for minorities. This, however, has generated a lot of resentment and anger as some whites claim that minorities are promoted at the expense of white progress. The attitudes of some whites toward affirmative action is expressed by Professor Bell as follows:

Conceding that blacks have been harmed by slavery, or segregation, or discrimination, which groups of whites should pay the price or suffer the disadvantage that may be incurred in implementing a policy nominally directed at rectifying that harm?<sup>159</sup>

In the test case *Regents of the Univ. of Cal. v. Bakke*,<sup>160</sup> a white applicant who had been twice refused admission to study medicine at

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154. 334 U.S. 1 (1948).

155. *See id.* (explaining that restrictive covenants were used by white property owners to exclude blacks, Jews, and other minorities from purchasing real estates in the predominantly white neighborhoods).

156. N. GLAZER, *ETHNIC DILEMMAS* 1964-1982 260 (1983).

157. *Id.*

158. *Id.* at 261.

159. D. BELL, *supra* note 142, at 145.

160. 438 U.S. 265 (1978).

the University of California Medical School challenged the system of affirmative action.<sup>161</sup> The medical school denied admission to the student not because of his inability, but because of the quota system which required the university to consider a minority student first.<sup>162</sup> The medical school had reserved sixteen percent of its places for minority students.<sup>163</sup> The student contended that the special admission program, which gave preference to minorities like blacks, Asians, Latin-Americans, and others,<sup>164</sup> violated his rights under the fourteenth amendment and under Title VI of the Civil Rights Act, pertaining to nondiscrimination in federally assisted programs.<sup>165</sup>

The Supreme Court, which ruled in Bakke's favor, rationalized its decision by pointing out that the university authorities had, among other things, failed to produce evidence which would persuade the Court that the quota system did not harm white students who did not contribute to, or directly benefit from, discriminatory practices.<sup>166</sup> The black community saw the decision as a legitimization of the reverse discrimination claim and an attempt to undermine affirmative action. Since *Bakke*, it is fair to say that the Supreme Court, especially during President Reagan's administration, has been unwilling to promote affirmative action and to protect victims of discriminatory practices.<sup>167</sup> In spite of all these problems, Congress and the courts have played an integral role in the improvement of race relations in the United States, and the black community has benefitted from affirmative action.<sup>168</sup>

The United States, as a nation, is meant to be a federation of individual states (not ethnic groups) in which each and every American citizen is supposed to have the opportunity to achieve his or her individual objectives. This "melting pot" theory depicts a unity of individual and patriotic American achievers, rather than a symbol of group spirit and national self-determination. In fact, the whole idea behind this methodology is to de-emphasize the existence of group or ethnic conflicts. The emphasis on individual success is intended to psychologically suppress ethnic or racial tensions on the part of the disadvantaged and

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161. *Id.*

162. *Id.* at 276.

163. *Id.* at 279.

164. *Id.* at 274.

165. *Id.* at 278.

166. *Id.* at 319-20.

167. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988) (showing recent Supreme Court decisions addressing affirmative action and racial discrimination in employment).

168. *Detroit Free Press*, Jan. 31, 1990, at 7A.

impoverished minorities, and to instill the concept that everyone can achieve success as an individual in American society.

The black South African majority is, however, more concerned about human rights in a broader political and economic sense than the black American minority. Black South Africans are in a struggle for independence as well as civil rights. They refuse to assimilate into foreign cultures and would rather co-exist than be seen as part of the whole. Moreover, the blacks in America lack the cultural identity and linguistic bond which are so vital for the sustenance and maintenance of a political struggle. As one writer puts it:

It is not unlikely that the Quebecois have no intention of professing their loyalty to Canada, because the option in favor of separation is a more realistic perspective for them than the American Negroes . . . . They don't share only a common language and a disfavored social position but also. . . a way of life which distinguishes them from their English speaking compatriots. In short they have been able to maintain a culture of their own. The American blacks on the contrary have no cultural identity to the same extent: They were largely sharing normative opinions and attitudes of the white population.<sup>169</sup>

### III. PROPOSALS FOR A SOUTH AFRICAN BILL OF RIGHTS

Faced with the conflict between group rights and individual rights, basic rights and essential rights, and federalism and unitary government, the enormity of the task confronting parties working to craft a new South African Bill of Rights becomes apparent. Both the government's Law Commission and the ANC have developed draft proposals for a new South African Bill of Rights. The highlights, strengths and weaknesses of each are contained below, in addition to recommendations for this all-important document.

#### A. THE GOVERNMENT'S LAW COMMISSION'S PROPOSAL

The present South African apartheid policy, whether it chooses to appear in the costume of "Separate Development," to change to a "Tri-cameral" three piece suit or to a casual "Own Affairs" uniform,<sup>170</sup> is still a legalized and institutionalized oppressive system based on the

169. KOOPMANS, *supra* note 116, at 243-66.

170. See Promotion of Black Self Government Act of 1959, as amended (allowing for group separate development). See also W. HOSTEN, A. EDWARDS, C. NATHAN & F. BOSMAN, *INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY* 664 (1977) (providing an in-depth analysis of the Black Self Government Act of 1959). The Act resulted in the creation of the "Bantu Homelands" of Transkei, Ciskei, KwaZulu, Venda, Bophuthatswana, Qwaqwa, KwaNdebele, Lebowa, Gazankulu, and Kwa-Ngwane. *Id.* Subsequently, four of these homelands—Transkei, Ciskei, Bophuthatswana, and Venda—were granted independence by South Africa. *Id.* However, no

racial domination of the white minority upon the black majority. In these circumstances, the group concept means or implies group divisions, not for the purpose of promoting justice and equality, but for protecting and maintaining white privileges at the expense of black advancement. The government's willingness to negotiate a new constitutional dispensation with the ANC and other recognized organizations, and to establish a Bill of Rights, however, indicates the government's realization that the Homeland Policy and the Tricameral system have failed to prove that the group rights policy of separate development or representation can work in South Africa.

The working paper of the South African Law Commission on group and human rights and its draft Bill of Rights published in April 1989<sup>171</sup> have to be studied and analyzed in the context of what group rights really mean in international and constitutional law. Mr. M. A. Pathudi is right in pointing out that:

[r]eference to the so-called group rights concept on the bill will certainly carry with it obscure and somewhat far-reaching implications which boldly speaking are seen as propagating and fostering the philosophy of separate development in its true but disguised form, the very mischief which the bill allegedly desired and seeks to cure.<sup>172</sup>

If black South Africans view the document solely from an emotional and subjective posture, they may miss an opportunity to utilize it for their own benefit and for the promotion of peace and democracy in a united nonracial South Africa. Most importantly, blacks should tolerate and respect the views of white opposition — for that is what negotiation for peace is really about.

The South African Law Commission should be commended for undertaking such a difficult task, especially with the current wave of white right-wing terrorism in the country. The Commission's document is an interesting comprehensible report which certainly warrants an honest appraisal. The bill reflects the government's intention to eliminate institutionalized racism. The bill, however, does not make it clear what the government considers as 'fundamental rights' and how it proposes to achieve equality and a nonracial democracy in South Africa.

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171. See *The South African Law Commission Bill of Rights*, 21 COLUM. HUM. RTS. L. REV. 241 & n.1 (1989) [hereinafter *South African Bill of Rights*] (noting that the commission which was made up of Afrikaner legal academics, members of the judiciary, and political scientists). The commission is a product of the South Africa Law Commission Act 19 of 1973. *Id.*

172. Address by M.G. Pathudi, reprinted in 30 CODICILLUS 78 (1989).

Part A of this cumbersome document contains an excessive list of what appears to be a random selection of 'fundamental rights'.<sup>173</sup> The introduction to part A assures that these are "fundamental rights to which every person in the Republic of South Africa shall be entitled. . . ."<sup>174</sup> This implies that all South Africans regardless of race, color, sex or creed are entitled to those rights. The confusion in the selection of the list of fundamental human rights, stems from the fact that the Commission seriously ignored that human rights are not the same; that each one of them serves a specific function for a particular reason. Fundamental rights are different from other rights such as civil liberties and some economic rights.<sup>175</sup> The fact that the Commission does not explain the rationale or methodology which was used to achieve the list further compounds the problem. This document looks more like a declaration of human rights than an enumeration of fundamental rights.

In the area of natural rights or fundamental freedoms, the list contains, *inter alia*, the right to life,<sup>176</sup> the right to property,<sup>177</sup> the right to freedom of association,<sup>178</sup> and the right to equality and due process of law.<sup>179</sup> Regarding political and civil rights, the list includes the right to education,<sup>180</sup> the right to vote,<sup>181</sup> and the right to freedom of movement and residence.<sup>182</sup> These are generally considered individual rights. The Commission did not pay much attention to economic and social rights, although article 18 guarantees the right to form trade unions.<sup>183</sup>

The most striking thing about the Commission is its apparent sensitivity to group rights. The Commission uses the notion of human rights, which conforms to the international standard, even though some may disagree about the need to protect these group rights. There is, however, an overemphasis on the protection of cultural heritage and languages in articles 21 and 22 which is unnecessary duplication. Leaving that aside, every sensible South African agrees that a constitutional document should preserve the right of each and every group to worship

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173. *South African Bill of Rights*, *supra* note 171, at pt. A, arts. 1-29.

174. *South African Bill of Rights*, *supra* note 171, at pt. A, preamble.

175. See generally D. OWEN, *HUMAN RIGHTS* (1978) (discussing the categorization of human rights).

176. *South African Bill of Rights*, *supra* note 171, at art. 1.

177. *South African Bill of Rights*, *supra* note 171, at art. 14.

178. *South African Bill of Rights*, *supra* note 171, at art. 16.

179. *South African Bill of Rights*, *supra* note 171, at art. 2.

180. *South African Bill of Rights*, *supra* note 171, at art. 9.

181. *South African Bill of Rights*, *supra* note 171, at art. 20.

182. *South African Bill of Rights*, *supra* note 171 at art. 12.

183. *South African Bill of Rights*, *supra* note 171 at art. 18.

and to retain its own culture and language. But the inclusion of article 17 has made many people apprehensive. It guarantees:

The right of every person or group to disassociate himself or itself from other individuals or groups: Provided that if such disassociation constitutes discrimination on the ground of race, color, religion, language or culture, no public or state funds shall be granted directly or indirectly to promote the interests of the person who or group which so discriminates.<sup>184</sup>

This right is already provided for under article 16 relating to freedom of association because the right to associate also entails the right to disassociate. Common sense dictates that individuals will always feel more comfortable when they are with their own people or social group, and no law is necessary to enforce or change that. The law, however, should equally protect those who refuse to be enslaved by tradition or chauvinism from within their own group. Article 17 is also dangerous in the sense that it may encourage racial separatism or even secession from a future South African federation as currently is the danger in Canada. The Commission is naive if it assumes that a government's refusal to provide some public or state funds is an effective way of discouraging the formation of extremist organizations from either the right or left sides of the political spectrum. Most organizations of that nature are self-supportive and self-efficient. Mr. Mathole Motshekga makes a good point when he concludes that:

Article 22 may even encourage the formation of cultural groups (similar to Inkatha) which could take advantage of Articles 17 and 18 to form political parties along racial lines. In short, recognition of the right of groups to exist in any form and their right to have voting and veto powers could be misused to preserve apartheid and prevent South Africa from becoming a truly nonracial and democratic society.<sup>185</sup>

Many blacks have feared the inclusion of a white minority "veto power" in the document. There does not appear, however, to be such a provision of this nature in the Commission's draft. On the other hand, the lack of a clear presentation of the government's thesis creates improbabilities and implausibilities which are enough to make the ANC and other groups suspect government interference with the due process of law. In addition, the failure to clearly explain whether the group rights provisions under articles 17, 18 and 22 also apply to the homeland authorities add to that suspicion. Furthermore, article 22 states that the South African Supreme Court, which will be entrusted with

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184. *South African Bill of Rights*, *supra* note 171 at art. 17.

185. Motshekga, *The African Charter on Human and Peoples' Rights—Its Importance to Human Rights Thinking in South Africa*, 30 *CODICILLUS* 31, 48 (1989).



the power to enforce all human rights related complaints, should always "have regard to the interests of other individuals or groups of individuals" in adjudicating claims of discrimination.<sup>186</sup> These issues have caused observers to view the government proposals in a highly sensitive and critical light. This might explain why Mothshekga complained about "group veto power"<sup>187</sup> and Thabo Mbeki declared that the ANC "can't accept a system which seems to give the right to vote to every person and then establishes institutions which make that capacity ineffectual."<sup>188</sup>

In the strict legal sense, one cannot talk about a claim of minority veto power when there is neither direct nor circumstantial evidence of it in the document. This document is not a constitutional proposal; it is an envisaged Bill of Rights which can become an integral part of a future constitution or stand on its own feet. The government will very likely introduce a "minority veto power" clause during the actual constitutional discussions. If that occurs, the opposition will have a valid reason to reject any constitutional leverage that may be used as a disguise to preserve white privileges and domination. The fact that there are good reasons to question the true commitment of the government to equality does not make its declaration of intent redundant or invalid. Further, treating a Bill of Rights as if it were a political manifesto or constitutional proposition is bound to create some confusion or at least a crescendo of innuendos. The document clearly points out that:

[t]he so called constitutional question in South Africa was not part of the commission's mandate, however this question cannot be solved without a solution to the problems concerning individual rights, and the cultural, religious, and linguistic values.<sup>189</sup>

The Commission should also receive credit for the introduction of positive discrimination<sup>190</sup> in recognition of the long history of political and economic exploitation of black people. That exploitation has reduced them to a position of political powerlessness and economic vulnerability. Their plight makes blacks economically dependent even when they are politically independent. The most significant pronouncement in this draft Bill of Rights is the guarantee of the right to vote for every South African over the age of eighteen years old, which implies

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186. See *South African Bill of Rights*, *supra* note 171, at art. 22 (stating the right against discrimination).

187. Mothshekga, *supra* note 185, at 48.

188. Tudor, *South Africa's ANC Wants Two-house Parliament Free of Race*, Reuters Library Report, Sept. 7, 1991.

189. *South African Bill of Rights*, *supra* note 171, at para. 13.70.

190. *South African Bill of Rights*, *supra* note 171, at art. 2.

the acceptance of majority rule on the principle of one man one vote, based on the doctrine of universal suffrage.<sup>191</sup> Regarding the right of enforcement, the draft Bill of Rights entitles each individual or group to directly approach the South African Supreme Court concerning a complaint or request for judicial review.<sup>192</sup>

One weakness in the document is that although it guarantees positive discrimination on a "temporary basis,"<sup>193</sup> it does not offer any guidelines on the definition or scope of "temporary basis." Another weakness present in the document is the lack of a systematic and clear approach to identify fundamental rights. For instance, the list includes such obscure rights like the right to a good name and reputation,<sup>194</sup> the right to spiritual and physical integrity,<sup>195</sup> the right to freely carry out scientific research and to practice art,<sup>196</sup> and the right to freely, and on equal footing, engage in economic intercourse, which shall include the capacity to establish and maintain commercial undertakings, to produce property and means of production, to offer services against remuneration, and to make a profit.<sup>197</sup>

The inclusion of private law rights and commercial law rights in the list is unfortunate and misleading. Professor J. E. Devenish remarks that:

[t]he report and the draft bill of rights do have certain patent limitations which have their origin in their authorship and legitimacy. They are essentially the product of the research of white judges and academics involved in the operation of the existing status quo. . . the most serious deficit is that they virtually ignore the great problem of poverty and the startling discrepancy between an affluent ruling white oligarchy and a poor and oppressed black majority.<sup>198</sup>

Perhaps it might have been this desire to maintain the status quo and the determination not to deal with economic and social rights which inadvertently forced the Commission to claim as fundamental rights, some rights which are rooted in private law.

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191. *South African Bill of Rights*, *supra* note 171, at art. 20.

192. *South African Bill of Rights*, *supra* note 171, at art. 31.

193. *South African Bill of Rights*, *supra* note 171, at art. 2.

194. *South African Bill of Rights*, *supra* note 171, at art. 3.

195. *South African Bill of Rights*, *supra* note 171, at art. 4.

196. *South African Bill of Rights*, *supra* note 171, at art. 9.

197. *South African Bill of Rights*, *supra* note 171, at art. 14.

198. Devenish, *Democratic Power Sharing, the Ultimate Guarantee of Human Rights* 30 CODICILLUS 76 (1989).

## B. THE ANC'S FREEDOM CHARTER AND THE CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC AND NON-RACIAL SOUTH AFRICA

Concerning the ANC's position on the issue of protection of fundamental rights and promotion of equality in South Africa, the Freedom Charter (Charter)<sup>199</sup> and Constitutional Guidelines for a Democratic South Africa (Guidelines)<sup>200</sup> represent a new light in the dark tunnel of South African politics and economic reforms. The Guidelines, which represent a short summary of the Charter and the views of the ANC on the constitutional structure of a post-apartheid democracy, are intended to promote an honest debate. Therefore, the Guidelines do not constitute any final ANC policy or thesis pertaining to the actual constitutional arrangement and Bill of Rights. The ANC accepts these Guidelines as corrigible and that the final constitutional outcome should be a synthesis which reflects both sides of the coin.

The Charter basically states the ANC's manifesto, which needs to be updated or amended to reflect the current social and economic realities. These realities concern the obstacles encountered in the enforcement of the International Covenant on Economic, Social, and Cultural Rights<sup>201</sup> on both international and national levels. A future ANC government can put itself in a very embarrassing situation by making guarantees which cannot be fulfilled. The ANC, like the Commission, does not define or give any indication about what it actually means by fundamental human rights. In its endorsement of affirmative action, which is certainly a good idea, it has equally failed to state whether positive discrimination will be on a temporary or permanent basis. This is a serious omission when considering the experiences of India, Britain, and the United States on the issue of a perpetual affirmative action program. The Guidelines further make provisions for a mixed economy, a land reform program, a charter of workers' rights, and equal rights for women.<sup>202</sup>

The Guidelines therefore, provide protection for both individual and group rights in the universal sense. The Guidelines, however, mainly emphasize group rights in the economic and social sphere, which in view of the obvious social dichotomy between the haves and have nots is something desirable. Dr. Zola Skweyiya illustrates this idea in his

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199. See Note, *Freedom Charter*, 21 COLUM. HUM. RTS. L. REV. 249 n.1 (1989) [hereinafter Note, *Freedom Charter*] (noting that the Congress of the People at Kliptown adopted the Freedom Charter in 1955).

200. Note, *Constitutional Guidelines*, 21 COLUM. HUM. RTS. L. REV. 235 (1989).

201. International Covenant on Economic, Social and Cultural Rights, *supra* note 61, at 49-52.

202. Note, *supra* note 200, at 237-38.

discussion of land reform in South Africa. He states that "[t]he main objective of this proposal is to redress the economic and social inequalities of the agricultural population and to ameliorate the miserable conditions of the black rural masses."<sup>203</sup> Dr. Skweyiya concludes that:

a well conceived post-apartheid land reform policy should guard against the destruction of the commercial agricultural sector, considering its major role as the national food supplier and as a significant contributor to the country's national foreign currency reserves.<sup>204</sup>

Dr. Albie Sachs vindicates the ANC's failure regarding identification of fundamental rights by saying that:

Whatever approach is adopted, the commitment to the classic first generation rights (natural rights) must be total and unequivocal. The inclusion of social and economic rights should be seen as additional to, and in no way diminishing of, unconditional respect for fundamental civil and political rights. The Bill of Rights should be unambiguous on this point.<sup>205</sup>

To help understand the situation, Dr. Sach could make some indication about those social and economic rights which he thinks are worth considering as "additional" to the notion of fundamental freedoms. It is precisely the tendency of overlooking or ignoring this crucial matter which causes some problems for a developing society. On the sensitive issue of national identity, the Guidelines provide that:

It shall be state policy to promote the growth of a single national identity and loyalty binding on all South Africans. At the same time, the state shall recognize the linguistic and cultural diversity of the people and provide facilities for free linguistic and cultural development.<sup>206</sup>

This commitment proves that although the ANC's constitutional ideal model is one which is based on a unitary system of government, it does appreciate the necessity of providing protection for group rights. What is not a conviction, however, is whether group rights can be properly and effectively protected and promoted within the narrow confines of a unitary state. Moreover, the Guidelines do not fully explain how the Bill of Rights will be enforced except just to state that an "appropriate mechanism for their enforcement" will be provided.<sup>207</sup> Sachs merely argues that "citizens should have the right of recourse to an independent judiciary respected by the population at large and heeded

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203. Skweyiya, *Towards a Solution to the Land Question in Post Apartheid South Africa: Problems and Models* 21 COLUM. HUM. RTS. L. REV. 211, 220-21 (1989).

204. *Id.*

205. Sachs, *A Bill of Rights for South Africa: Areas of Agreement, and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 13, 24 (1989) [hereinafter Sachs].

206. See Note, *supra* note 200, at 237 (noting the policy on national identity).

207. See *id.* (discussing the Bill of Rights).

by whatever government is in power at the time."<sup>208</sup> Neither the ANC nor the commissioner mentions the idea of introducing a jury system in South Africa or the establishment of a special constitutional court and/or the enactment of a special statute(s) to deal directly with cases of discrimination.

Pennell M. Maduna agrees that one of the recourses available to an individual is judicial review,<sup>209</sup> but he is unhappy about the inherent conservatism of the judiciary, especially in members of the bench. In support of his apprehension, he quotes from Professor John Dugard who argues that "South African judges are drawn from one small section of the population - the white group - and whether they support the government or not, most have one basic premise in common - loyalty to the status quo."<sup>210</sup>

The Guidelines are a set of challenging and thought-provoking pronouncements, but they might ask for too much. This is true regarding the ANC's hypersensitivity concerning economic and social rights, as it is completely unrealistic to guarantee peace and friendship, and other non-fundamental social and economic rights like food, lower prices, lower rents, and new suburbs.<sup>211</sup> It would be enough if the ANC would just commit itself to a social security system covering employment, housing, health, and education. The ANC's vision of a new South Africa is one of universal principles of equal justice and opportunity for all South Africans. The new society would be a social democracy in which each and every person or persons would have an opportunity to pursue an economic goal in a mixed economic system within the framework of industrial democracy and free collective bargaining. Every South African is entitled to criticize and to make a constructive contribution to the advancement of democracy and equality. "The ANC guidelines were not intended to resolve all of South Africa's problems. . . . The ANC guidelines are not exhaustive. They are silent on many topics."<sup>212</sup>

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208. Sachs, *supra* note 205, at 19.

209. Maduna, *Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73, 76 (1989).

210. *Id.* at 82.

211. See Note, *Freedom Charter*, *supra* note 199, at 250-51 (discussing the right to work and the right to security).

212. Masemola, *Rights and a Future South African Constitution: The Controversial and the Non-Controversial*, 21 COLUM. HUM. RTS. L. REV. at 45, 47 (1989).

## CONCLUSION

A straw vote in South Africa today would prove that the overwhelming majority of all South Africans support a negotiated settlement. While violence in the townships has threatened the solidarity of the ANC,<sup>213</sup> it deserves the support of the South African people for pioneering this negotiation process. The same praise goes to the National Party and to those courageous members of the South African business community and clerics who actually initiated the negotiations by creating an atmosphere in which both the ANC and the government could sit together, as equals, to discuss the constitutional future of South Africa.

It is apparent that both parties agree on some of the major issues like majority rule, eradication of all apartheid legislation, protection of group rights, and the promotion of equal rights and opportunities through affirmative action, especially in the sphere of employment. In addition, both parties realize and appreciate the importance of the promotion of good industrial relations. To this end, the parties guarantee the existence of free trade unions and collective bargaining. In the area of education, a general consensus pertaining to the dismantling of the "separate but equal" policy also prevails.

On the whole, a future constitutional assembly needs to overhaul and update both the Commission's document and the ANC's Guidelines, especially on the subject of identifying fundamental human rights. A South African Bill of Rights should *inter alia* provide that:

- (a) all the inherent fundamental rights including those social and economic rights which are considered necessary on the grounds of social need and expedience be protected;
- (b) all group rights should be protected save when they are sought for the purposes of creating racial divisions and perpetration of the enjoyment of white privileges and domination;
- (c) a jury system should be introduced in South Africa to assure fair trial and administration of justice;
- (d) an independent constitutional court and special legislation(s), in addition to the Bill of Rights, should be introduced to deal specifically with issues of discrimination;
- (e) such envisaged legislation should, in addition to providing a civil remedy for violation, also provide a criminal sanction for incitement of racial hatred or discrimination on the grounds of race;

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213. See Wren, *Mandela in Conciliatory Mood, Agrees to Meet with Zulu Leader*, N.Y. Times, Sept. 22, 1990, at A1 (discussing the opening of dialogue between Mandela and Buthelezi to discuss the violence in black townships which has taken hundreds of lives).

(f) a post-apartheid constitution should make provision for the creation of a "Common House" based on hereditary title or appointment for the purposes of consultation in respect of all matters pertaining to group rights, and that any legislation which directly affects the interests of any particular group, should necessarily go through the same process of consultation; provided that there should be equal representation in the "Common House" and that no group in any of the other houses should be granted any special privilege or right of veto.

In conclusion, it is fair to state that the government's paper on the proposed Bill of Rights does not seem to be a prescription for neo-apartheid. On the other hand, it is too early to say that the government proposal guarantees full equality. President de Klerk in his recent visit to the United States reiterated that:

South Africa has embarked on a great journey. It is a journey towards full democracy at home and abroad, full participation in the family of nations. It is a journey that I sincerely believe will bring the fruits of both justice and economic well-being to every South African family.<sup>214</sup>

The ANC's Freedom Charter and Guidelines bring to all South Africans a new dawn, even though some of the ANC's economic demands are unrealistic. We should draw a lesson from the disastrous collapse of the socialist planned economies in Eastern Europe and the abandonment of socialism by its potent instructors and devoted advocates. All parties should stop vacillating so, in the name of peace and democracy, South Africa can move ahead to create a new nation that will be a home for all its citizens regardless of race, color, ethnic origin, gender or creed.

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214. See Wren, *Pretoria Offers Model for Future* N.Y. Times, Oct. 25, 1990, at A5 (noting that the South African government unveiled a synopsis of what it purports to be its constitutional model for a future democratic South Africa). The report will still have to be formally discussed and approved by Mr. de Klerk before it is ready to be introduced at the negotiation table. *Id.* Initially it proposed a two chamber Parliament, a Bill of Rights and a National Dispute Resolution System. *Id.*