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HUMAN RIGHTS

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BRIEF

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Human Rights Groups Face New Challenges in South Africa

by Geoff Budlender*

For many years, South African human rights groups battled an apartheid government in a hostile political and legal environment. Now we have a democratic constitution, with a sophisticated bill of rights, as well as a new Constitutional Court, for which a demonstrated commitment to human rights is a prerequisite for appointment.

These changes create new challenges and opportunities for human rights groups. South Africans are not used to a situation in which government not only proclaims its commitment to human rights, but also takes the lead in promoting human rights. We are not used to a situation in which the most powerful court is led by human rights advocates.

Challenges and Opportunities

One of the deep ironies of our political transition is that those who were responsible for the abuse of human rights now are among those who argue most loudly for the entrenchment of human rights in the "final" Constitution currently being drafted. There seem to be two reasons for this. In part, the advocacy reflects a desire that white South Africans should not be treated in

the same manner as they previously treated black South Africans. That is a legitimate desire, although one rightly may be offended by its inherent hypocrisy.

Additionally, the support for human rights reflects a fear of democratic rule. Some people want to regain, through the constitution and the courts, that which they lost through

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political transformation. This is because a bill of rights is not an unambiguous document. In the South African context, it can be used as a means of entrenching power and privilege built up over generations of apartheid, against the legitimate wishes of a democratic majority.

Of course, a bill of rights *does* impose limits on the power of a political majority, and must do so. If the bill of rights comes to be viewed as a legal obstacle to dealing with the inequities created by apartheid, however, then the very notion of human rights and constitutionalism is threatened.

The first challenge created by the new constitutional environment is,

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European Union Anti-Racism Policy Reaches Turning Point

by Johnita P. Due*

European Union policy on racism and xenophobia is reaching a turning point as the Union's legislative bodies struggle to find legal authority to combat racism and consensus among the Member States on how to accomplish this. The 1996 Inter-Governmental Conference, where the Maastricht Treaty on European Union is scheduled to be revised, begins in March in Turin, Italy, and will be the next battleground in the fight against racism.

The 1992 Maastricht Treaty on the European Union, which amended the Treaty of Rome Establishing the European Economic Community, confirms the development of the European

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therefore, to demonstrate that a bill of rights is, in the first instance, for the benefit of the poor, the powerless and the dispossessed — and a means of

The first challenge created by the new constitutional environment is, therefore, to demonstrate that a bill of rights is a means of transformation from a society based on racism and inequality to an open and democratic society based on freedom and equality.

transformation from a society based on racism and inequality to (in the words of our interim Constitution) "an open and democratic society based on freedom and equality."

Human rights groups must provide the poor and the marginalized with access to the courts to enforce their newly-won freedoms. We cannot afford the spectacle seen in some other societies, in which those who seek to protect vested rights and interests are in the forefront of pressing "human rights" litigation in the courts. Consequently, the equality clause must become a defining instrument of constitutional litigation.

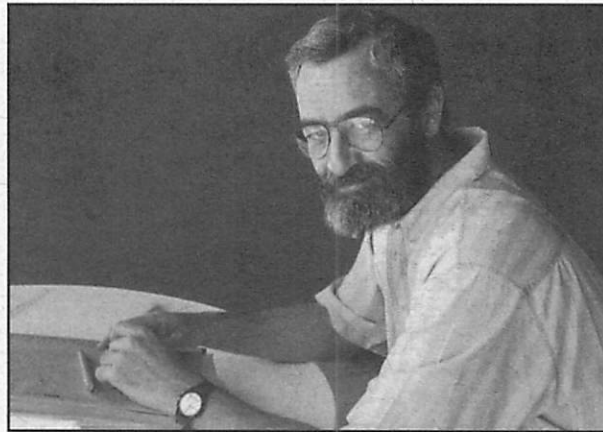
We must therefore see human rights more broadly than in the traditional role of protecting people against an oppressive government. We have to go beyond the conception of human rights as negative

We have to go beyond the conception of human rights as negative limitations on government.

limitations on government. Human rights should also impose obligations on government and other institutions of power. It now seems clear that the "final" Constitution will include social and economic rights. We will have to find ways of using these so that they are effective, not empty promises.

A second challenge is to recognize that the majority of human rights legal work takes place outside the courts. Human rights groups have to learn to work with the government in designing new laws which reflect the new human rights ethos of our society. In every area, there is a need to look again at our laws — from criminal to consumer, from health to land, from housing to water.

The government is often willing and even eager to engage in this co-operative enterprise. This willingness, however, creates new problems for human rights groups, which are used to a clear and adversarial relationship with the government. The risk of co-option is real, but the risk of losing an historic opportunity is even greater. Human rights groups must develop a new relationship with government — a relationship which is sympathetic yet critical, supportive yet independent. Within the first six months of the new govern-



Geoff Budlender

ment, the Legal Resources Centre, for example, both had given advice to the Minister of Housing and had sued him.

Playing it both ways is very difficult, but the reality is that the new government is served for the most part by an existing public service which is often unable to undertake the tasks which are now necessary. Human rights NGOs have unique skills and experience which the government currently lacks. They must make these talents available to the public.

A third challenge is to help the government do the necessary work to promote the national policy of reconstruction and development. For example, the government has ambitious programs for housing and land reform, yet it lacks the capacity to effectuate them. Human rights groups, working with the

landless and the homeless, can make these programs work. In addition, human rights organizations must recognize that the right to a decent and dignified life is also fundamental. Freedom of speech is important for everyone. It is not surprising, however, that those who are marginalised and dispossessed often find it of little comfort in

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easing the burdens of daily life. Human rights groups must dedicate themselves to these tasks.

A fourth challenge is to do the human rights work which is unpopular, perhaps particularly in the area of criminal justice. South Africa is faced with a serious crime problem. Most South Africans are probably in favor of the death penalty. Most probably believe that bail should seldom be granted. Most probably have little enthusiasm for the principle that the state should provide indigent defense in criminal cases. The truth, however, is that these are bedrock issues if the society is to be based on a respect for human dignity. It is also true that it is those who are black and poor who will bear the brunt of any attack on these rights. An expedient abandonment of these rights slides easily

into the abandonment of other rights which are "inconvenient" for the moment. Human rights groups must be willing to take on these unpopular issues.

A fifth challenge is public education on human rights. This means teaching in the schools, in the community, and on radio and television. Public education is the key to building a culture of human rights which will survive in the long term. Nothing teaches us about rights as effectively as the opportunity to enforce our own rights. Once I have been able to enforce my own rights effectively, I will better understand the need for all to have rights. Providing access to justice is therefore a critical element of public education on human rights.

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A sixth challenge is to broaden our sights. We South Africans tend to suffer from tunnel vision. In our determination to deal with apartheid, we have trained our eyes to ignore human rights issues in other parts of the globe. We owe a major debt to people all over the world, who have worked with us in fighting for human rights in South Africa. Many people have committed their time, energy, and money to South Africa. Now the time has come to start repaying that debt. The best place to start is our own region, Southern Africa. In many ways, the countries of Southern Africa have paid heavily for South Africa's sins. Some of them have been devastated by South Africa's military and its surrogates. If the struggle for human rights in South Africa should teach us anything, it is that human rights is a truly international

issue. We South Africans should start giving back, and first to the countries in our region. Human rights groups should lead the way. We must commit some of our own time, energy and resources to the struggle for human rights in the region.

Conclusion

In the final analysis, a Constitution provides only limited protection for human rights. The real protection lies in the hearts and minds of ordinary people. When they see the need to hold government and other powerful institutions to human rights standards, the Constitution and its human rights promises are secured. The central task of South African human rights groups is therefore to make human rights real for all South Africans. 🌐

**Geoff Budlender is National Director of the Legal Resources Centre (LRC), South Africa's first and largest public interest law center, founded in 1979. Since 1991, he has chaired or been a member of numerous governmental committees on issues relating to land restitution, compensation, and development. Beginning in May 1996, he will take up the post of Director-General of the South African Department of Land Affairs. Other areas of his legal practice include influx control, citizenship, consumer law, and social welfare benefits.*

Mr. Budlender is also a member of the International Advisory Board for the Center for Human Rights and Humanitarian Law at the Washington College of Law (WCL).

More information regarding the LRC may be obtained by contacting Ann Satchwill, Director of the South Africa Legal Services & Legal Education Project (SAL-SLEP), at the offices of Wilmer, Cutler & Pickering, Washington, DC.

ALUMNUS PROFILE

Alumnus Works to Improve Status of Refugees

by Stephen Jacques

Courtney O'Connor, currently a consultant in public international law for the United Nations High Commissioner for Refugees (UNHCR), has enjoyed a rich, rewarding career since receiving her J.D. from WCL in 1986. She received a fellowship with the International Human Rights Law Group while at WCL, and then after graduating, worked as a Staff Attorney for the Law Group and as a consultant to various NGOs regarding human rights and constitutional law issues. O'Connor then moved on to the UNHCR, where she encountered "the personal challenge of doing 'hands-on' human rights protection."

As the only American working as a UNHCR protection officer in El Salvador from 1988 to 1990, O'Connor assisted in repatriating Salvadoran refugees and determining the refugee status of Nicaraguan asylum seekers in a politically charged atmosphere. "The situation was very intense," she noted. "It was the cutting edge of UNHCR's protection work in the country of origin. It was very hard to go in there and be utterly neutral. If I had taken sides, however, I would have lost my legitimacy and my effectiveness."

After gaining experience in the field, O'Connor was transferred in 1990 to UNHCR headquarters in Geneva, where she served as a legal advisor in the Division of International Protection. She advised on various protection issues including refugee status determination and the particular protection problems faced by uprooted women and children. She broke up her time in headquarters by serving from 1991 to 1992 as Legal Advisor to the Director of Human Rights in the first UN peace-keeping mission ever to have a human rights component — the UN Observer Mission in El Salvador (ONUSAL). After returning to Geneva, O'Connor prepared the High Commissioner's first comprehensive policy on the protection of uprooted persons against sexual violence, which was adopted by UNHCR's Executive Committee (of States) and has served as the basis of that organization's work on this issue since 1993.

She has recently been consulting on two UNHCR projects, the first of which followed up on her earlier work by evaluating UNHCR's project for survivors of sexual violence in Kenya and making recommendations for its future

related efforts elsewhere. She is currently drafting for UNHCR a reference and case book on advanced issues in refugee status determination which, *inter alia*, updates many of the legal questions addressed in UNHCR's 1979 Handbook on Procedures and Criteria for Determining Refugee Status. The book will place refugee law into the broader context of international human rights and humanitarian law.

While the book and other work consulting in public international law and policy will consume much of the rest of the upcoming year for O'Connor, she is eager to emerge from behind the word processor and return to field work. Reflecting on her time with UNHCR in El Salvador, she said, "Every day I went to work, my identity was challenged — as a member of the UN, as a protection officer, as an American, and most importantly, as a human being." Despite working under often unnerving, precarious conditions, O'Connor looks back fondly on her time with UNHCR in the field, "It was a turning point for me. It provided me with one of the richest experiences of my life." 🌐