A BILL OF RIGHTS FOR SOUTH AFRICA

'N MENSEREGTEHANDVES VIR SUID-AFRIKA

J V VAN DER WESTHUIZEN
H P VILJOEN

BUTTERWORTHS

A bill of rights for South Africa
'n Menseregtehandves vir Suid-Afrika

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'n Menseregtehandves vir Suid-Afrika

Proceedings of symposium held at the University of Pretoria on 1 and 2 May 1986
Verrigtinge van 'n simposium gehou by die Universiteit van Pretoria op 1 en 2 Mei 1986

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Preface

The symposium, *A Bill of Rights for South Africa*, which took place at the University of Pretoria on 1 and 2 May 1986, was organized by the Faculty of Law of the University of Pretoria, under the auspices of the Society of University Teachers of Law. The idea to hold the conference originated amongst members of the Law Faculty and the organizing committee consisted of academic staff from all departments in the faculty.

The organizers endeavoured to make the programme as representative as possible of the current trends in opinion amongst the legal fraternity in South Africa. The main speakers, panellists and chairpersons on the programme came from nine universities and four organisations of lawyers, and included a retired Apellate Division judge, other judges, members of the Bar and Side Bar, and a member of Parliament. Participants at the symposium numbered approximately two hundred, and included members of the bench, legal practitioners, legal academics and experts in related fields, politicians, foreign diplomats and other overseas observers, students, members of the business community and officials of the South African government.

Before this symposium took place, spokesmen of the South African government had begun to speak, for the first time, of the possibility of a bill of rights for South Africa, although it was not clear whether their ideas corresponded with generally accepted notions of such a bill. It became known during the symposium that the Minister of Justice had instructed the South African Law Commission to investigate the issue, with special attention to the protection of group rights. Several members and researchers of the Law Commission, including the Honourable Justice Pierre Olivier, attended the symposium. The Law Commission's report is expected shortly.

A wide range of political and other opinions expressed frankly in papers and during discussions drew considerable attention and gave rise to lively debate. Prominent delegates regarded the symposium as one of the most important ever held in South Africa. At least some of the significance attached to the event was related to the fact that it was hosted by an Afrikaans university in a city known for its conservatism.

We have to apologise for the late appearance of this book. Editing the papers and discussions proved to be far more difficult and time consuming than expected. Panel and open discussions were tape recorded and in some cases, the quality of these recordings was not high. The discussions were often lively, and speakers participated with varying degrees of eloquence, especially when speaking off the cuff. Thus it was not always easy to reconstruct sentences and paragraphs in such a way as to reflect accurately the thought the speaker wished to convey. Although we have had to summarise, to report indirectly, and even to omit some of what was said, we have tried to stick as closely as possible to the actual words used by speakers. Questions and arguments from the floor during question time after the main papers were not recorded fully and are therefore not included.

We hope and believe that the contents of this volume will contribute to the legal and constitutional debate, as well as to furthering the protection of human rights in South Africa.

A direct consequence of the symposium was the establishment at the University of Pretoria of a Centre for Human Rights Studies with Johann van der Westhuizen as its first director. The purpose of the Centre is the promotion of the idea of human rights, both in an academic and popular way.

JV van der Westhuizen
HP Viljoen

Members of the organising committee:

Professors	Johann van der Westhuizen (chairman) Henning Viljoen Dion Basson Trynie Davel Piet Delport Niek Grové Dirk Kotzé Ferdinand van Oosten Derek van der Merwe Dawid van Wyk	representing the Society of University Teachers of Law
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Mesdames	Grieta de Bruyn Rentia Booyens	Secretaries

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GPC Kotzé
Oud-Appèlregter

Die opvatting van 'n groot deel van die blanke bevolking van ons land met betrekking tot menseregte is, soos prof Jonker van die fakulteit Teologie van die Universiteit van Stellenbosch daarop wys, een van uitgesproke afkeur.[1] Na my mening is die basiese rede hiervoor dat die owerheid sigself in 'n dilemma bevind, naamlik omdat die bestanddele van ons bevolking nie gelyksoortig is nie, die land se politieke bestel oor die jare op diskriminasie berus. Die dilemma bestaan daarin dat ons voor 'n keuse staan: moet ons vasklou aan die verlede of soek na 'n werklik, vir die volksmassa, regverdige nuwe bestel? Diegene wat vreesloos oor die onderwerp debat wil voer, vind hulleself noodgedwonge op politieke terrein en loop gevaar om deur die politici (wat graag die alleenreg opeis om hierdie terrein te betree) of selfs deur die staatsowerheid veroordeel te word. U besluit om hierdie onderwerp as tema van hierdie simposium uit te sonder, is dus 'n moedige besluit wat hoë aanprysing verdien. Ek beskou dit derhalwe as 'n besondere eer dat u die waagmoed gehad het om my uit te nooi om die openingsrede te lewer en spreek my opregte dank teenoor u daarvoor uit.

Ofskoon ek onlangs my vorige amp neergelê het en nou met groter vrymoedigheid kontensieuse sake mag aanraak, is dit nogtans niks minder as reg dat ek, as voormalige bekleder van die amp, nie my sin vir verantwoordelikheid kwytraak nie. Dit is dus my voorneme om so objektief as moontlik die aandag te vestig op sommige aspekte waar fundamentele menseregte wel misken word in die hoop dat u, toegerus met u besondere kundigheid, oplossings vir die heersende probleme sal soek en vind.

Dit is waar dat dit tot 'n mate mode geword het in die wêreldpolitiek om Suid-Afrika genadeloos met die vinger na te wys oor die miskenning van menseregte en dit is belangrik om nie hierdie mode blindelings te volg nie. Neem byvoorbeeld die kwessie van godsdiensvryheid: weliswaar mag mens nie orals op Sondag na hartelus visvang of georganiseerde sport beoefen nie, maar tog bestaan daar in hierdie land, in teenstelling met vele ander lande, 'n volslae tradisie van godsdiensvryheid waar die skeiding tussen kerk en staat nie betwyfel kan word nie, en waar iedere individu na begeerte kan aanbid of weier om dit te doen. Ook dui die onlangse herroeping van die Wet op Verbod van Gemengde Huwelike, sekere artikels van die Ontugwet en die onlangs aangekondigde afskaffing van die paswette, op die soeke na 'n nuwe benadering tot die hele probleem. Dit sal vryheid van beweging in Suid-Afrika 'n veel groter werklikheid maak as wat dit tot nou toe was.

Ek gaan onmiddellik oor tot 'n kort bespreking van sommige van die terreine waar, na my mening, daadwerklik en spoedig opgetree behoort te word om die ernstige en ontstellende onrus wat tans in die land heers, af te wend.

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1 Du Toit (red) *Opstelle oor menseregte* (1984) 47.

Die erkenning van menseregte is een van die waarmerke van 'n ware demokrasie. In wese beteken demokrasie politieke vryheid, dit wil sê die reg om deel te hê aan die keuse van jou land se regeerders en om 'n sinvolle stem uit te bring. In die woorde van Abraham Lincoln op 19 November 1863 te Gettysburg beteken dit: "government of the people, by the people, for the people". Grondliggend tot daardie toespraak was die gedagte dat "all men are created equal".

Hierdie gedagte is vandag universeel wat die Westerse buitewêreld betref. Dit het 'n byna onkeerbare stroom geword wat op Suid-Afrika afspoel. En dit bring my by die eerste groot struikelblok wat ons land vandag in die gesig staar. As ons eerlik wil wees, moet ons toegee dat politieke vryheid vir "all the people" nie bestaan nie. Omdat die bevolking nie homogeen is nie, ons politieke stelsel op rassediskriminasie gegrond is en dit moeilik is om beskerming vir minderhede te verorden, is die probleem 'n ontsaglike een. Dit beteken egter nie dat daar nie dringend na 'n oplossing gesoek behoort te word nie. Die politieke monopolie van mag in Suid-Afrika setel onteenseglik in 'n enkel bevolkingsgroep. Onder die huidige grondwet word Suid-Afrika regeer deur 'n parlement wat uit rasse-aparte kamers bestaan, swart burgers uitsluit en 'n ingeboude oorheersing vir die heersende blanke politieke party verseker. As dit so is, en ek glo dat dit nie betwyfel kan word nie, dan behoort u en ek, iedere lid van die regbank, die advokateberoep en die prokureursorde die stem van ons land se gewete te word, en by verantwoordelike geleenthede soos hierdie een, na die antwoord te soek en aan die owerheid deurdagte voorstelle te doen oor hoe die weerhouding van die stemreg van 'n groot gedeelte van ons bevolking sinryk afgeskaf kan word. U sal my nie verkwalik nie as ek u daaraan herinner dat, indien die voorstel van 'n gekwalifiseerde stemreg geopper word, dit nie uit die oog verloor mag word nie dat 'n groot deel van die bevolking aan 'n toestand van opvoedkundige agterstand ly – wat op sigself 'n miskenning van 'n wesentlike mensereg is.

Vryheid van spraak en van die pers is ook 'n belangrike komponent van 'n ware demokrasie. In die tyd tot my beskikking is daar nie bra geleentheid om aandag te gee aan botsings tussen die staat en buitelandse pers- en televisie verteenwoordigers nie. Vryheid van spraak, sover dit burgers van die land betref, verdien kort behandeling. Hierdie vryheid word in Suid-Afrika op die politieke terrein streng beperk deur onder andere die Wet op Binnelandse Veiligheid 74 van 1982. Besonderhede hiervan is aan u goed bekend. In skrille teenstelling hiermee is die vryhede wat in die VSA, byvoorbeeld aan seepkisredenaars verleen word ten opsigte van die sogenaamde "market place theory of free speech". In *Terminiello v City of Chicago*[2] het *associate justice* Douglas die volgende ekstremistiese uitlating gemaak ter ondersteuning van 'n bevinding dat 'n uiters opruiende rassistiese toespraak deur die grondwetlike waarborg van vrye spraak beskerm word:

> (The) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . ., is nevertheless

2 337 US 1 4-5.

> protected against censorship or punishment, unless shown to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance or unrest. . . .

Gedeeltes van hierdie uitlating bevat wyshede en moontlik sal u die geleentheid vind om oorweging te skenk aan die vraag of 'n middeweg tussen hierdie twee uiterstes nie ernstige oorweging deur die owerheid verdien nie.

Ons veiligheidswetgewing en die wyse waarop dit toegepas word, het hierdie land reeds onberekenbare skade berokken. Gedurende 1977 het Biko, terwyl hy kragtens arbitrêre magte ingevolge die veiligheidswetgewing aangehou is, gesterf. 'n Hele aantal soortgelyk sterfgevalle het, soos Dugard in 'n artikel aangeteken het,[3] vòòr dit plaasgevind. Biko se dood het menige Suid-Afrikaner nie "koud gelaat" nie en het saam met sekere ander optrede deur die uitvoerende gesag, daartoe aanleiding gegee dat die veiligheidsraad van die VVO op 4 November 1977 resolusie 418 uitgevaardig het, waarkragtens 'n verpligte wapenverbod teen die land ingestel is en waarskynlik ingestel sal bly, totdat Rusland moontlik genoeë sal neem met 'n toekomstige regeringsvorm en besluit om nie sy vetoreg uit te oefen nie. U sal u herinner dat ondersoek hierna deur 'n kommissie, onder voorsitterskap van die huidige hoofregter, ingestel is wat aanleiding gegee het tot die aanname deur die parlement van die Wet op Binnelandse Veiligheid 74 van 1982, wat die land se veiligheidswetgewing gekonsolideer en ietwat gelenig het. Maar, soos die hoofregter op 30 Maart van hierdie jaar in die eenparige gesamentlike uitspraak van die appèlhof in drie sake[4] verklaar het, verleen artikel 28 van hierdie wet steeds ontsaglike mag ("vast powers"), aan die Minister van Wet en Orde vir aanhouding van persone in 'n gevangenis, ten einde die pleging van sekere misdrywe of die ingevaarstelling van die veiligheid van die staat of van wet en orde te voorkom. Artikel 29 verleen eweneens ontsaglike mag vir die aanhouding van persone vir ondervraging. Gemelde drie sake demonstreer op treffende wyse hoe onwenslik dit is dat die wetgewer selfs aan 'n hooggeplaaste funksionaris, in plaas van aan die hooggeregshof, mag verleen om die regte van die individu aan bande te lê. In hierdie en talle ander sake het die Minister van Wet en Orde die aanhouding van persone in gevangenisse veroorsaak op 'n wyse wat nie aan die voorskrifte van die wet voldoen het nie. Die appèlhof kon hier regshulp verleen kragtens sy uiters beperkte hersieningsmag omdat die minister nie, soos vereis deur die wet, die redes vir sy drastiese optrede aan die betrokke persone bekend gemaak het nie. In gevalle waar foutiewe optrede deur 'n minister of ander funksionaris wat nie regterlike ondervinding het nie, nie ooglopend duidelik is nie soos hier, kan 'n groot onreg teenoor die onderdaan gepleeg word. Ek glo dat bykans elke lid van die regbank dit betreur dat daar so 'n sterk neiging in ons land bestaan om aan ministers (lede van die uitvoerende gesag), rade, die polisie en amptenare in plaas van aan die regterlike gesag wye magte en bykans onbeteuelde diskresie te verleen om menseregte aan te tas. Deur op hierdie wyse toe te tree tot die terrein wat tradisioneel dié van die howe is, ontstaan die gevaar dat die legitimiteit van die howe onder verdenking

3 "A triumph for executive power – an examination of the Rabie report and the Internal Security Act 74 of 1982" 1982 SALJ 589.

4 *Nkondo and seven others v Minister of Law and Order*; *Gumede and five others v Minister of Law and Order* en *Minister of Law and Order v Gumede and six others* 1986 (2) SA 756 (A).

kom. Hierdie tendens het ernstige afmetings aangeneem: tot so 'n mate dat administratiewe funksionarisse, liggame en hulle magte feitlik 'n vierde vertakking van die landsregering geword het. Hierdie uitsluiting van die geregtelike proses wek kommer. Administratiewe liggame is nie suiwer regsprekend nie. Sodanige liggame inisieer optrede, versamel getuienis, besluit oor beleid, voer die saak en gee die beslissing. So geskied reg baiekeer nie. Die regterlike funksie is 'n beperkte funksie. Die regter beslis slegs en doen niks meer nie.

Die doel van wat ek tot nou toe gesê het, is nie om afbrekende kritiek te lewer nie, maar om 'n beskeie voorstel te doen om tekortkominge reg te stel. Na my mening lê die antwoord op die probleem in die toekenning van mag aan ons hoogste hof om die miskenning van menseregte te toets aan 'n grondwetlike handves, wat die reg behels om in gevalle van botsing met die grondwet, wetgewing en administratiewe of uitvoerende optrede ter syde te stel. In hierdie verband sluit ek graag aan by die voorstelle wat my voormalige kollega, appèlregter Corbett, tot die 1979 konferensie insake menseregte gerig het.

Ten grondslag van 'n ordelike demokratiese regeringsisteem lê die prinsipe van die *trias politica*: die skeiding van die staatsfunksies in wetgewende, uitvoerende en regterlike mag.[5] Die huidige grondwet dra in 'n mate die soewereiniteit van die parlement oor aan die staatspresident wat nou, anders as voorheen, wye uitvoerende magte besit. Voorts vervul die staatspresident 'n leidende rol in die wetgewende proses ofskoon hy nie konstitutief 'n lid van die parlement is nie. Dit, so wil dit voorkom, bring tot 'n mate 'n versteuring mee van die fyn balans wat voorheen tussen wetgewende, uitvoerende en regterlike mag bestaan het.

Soos in die verlede bly die bevoegdheid van die hooggeregshof om 'n wet ongeldig te verklaar uiters beperk. Artikel 34(3) van die huidige grondwet bepaal uitdruklik dat geen geregshof bevoeg is om ondersoek in te stel na of uitspraak te doen oor die geldigheid van 'n wet van die parlement nie. Hierop is daar 'n groepie uitsonderings, soortgelyk aan dié wat sedert 1910 in ons land se vorige grondwette gegeld het, wat van weinig praktiese belang is. Die eerste is dat enige afdeling van die hooggeregshof bevoeg is om ondersoek in te stel na, en uitspraak te doen oor die vraag of die bepalings van die grondwet nagekom is in verband met 'n wet wat te kenne gee dat dit die bepaling van die staatspresident en die parlement of van die staatspresident en een van die drie huise is. Dit beteken slegs dat die hooggeregshof by magte is om die prosedure deur die wetgewer gevolg te ondersoek, maar nie die meriete daarvan nie. Tweedens is 'n afdeling van die hooggeregshof bevoeg om ondersoek in te stel na, en uitspraak te doen oor die vraag of die staatspresident met die speaker van die parlement en die voorsitters van die onderskeie huise geraadpleeg het, alvorens by besluit het dat 'n saak ressorteer onder eie sake van 'n bevolkingsgroep. In die derde plek bepaal artikel 89(1) van die grondwet dat Afrikaans en Engels die amptelike tale van die land is en op gelyke voet behandel word, en artikel 99(2) verbied die herroeping of wysiging van artikel 89(1), tensy sodanige herroeping of wysiging deur minstens twee derdes van die totale getal lede in elke huis goedgekeur is.

5 Vgl *Hess v Staat* 1895 OR 139 142.

Vermoedelik is die hooggeregshof by magte om 'n herroeping of wysiging wat nie hieraan voldoen nie, nietig te verklaar. Hieruit blyk dit dus dat 'n sisteem van geregtelike hersiening van wette van die parlement feitlik nie bestaan nie. In die VSA is die posisie heel anders. Reeds gedurende 1930 het senator Norris gekla:

> We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of 9 men; and they are more powerful than all the others put together.[6]

Die geldigheid van hierdie klag is nie nou ter sprake nie, maar die senator se uitlating dui daarop, soos wel bekend is, dat die *supreme court* van die VSA beslis 'n kragtige konstitusionele rol speel. Ek doen nie aan die hand dat Suid-Afrika se hoogste hof so 'n sterk instelling word nie maar wel dat, ten grondslag van die *trias politica* prinsipe, die idee lê dat die regterlike mag, as een van die drie pilare van die staatsbestel, 'n gewigtige en nie bloot 'n denkbeeldige een behoort te wees nie.

In 1803 het die *supreme court* van die VSA in *Marbury v Madison*[7] beslis dat die hof bevoeg is om deur middel van regterlike hersiening ("judicial review"), regte en vryhede te beskerm teen uitvoerende en administratiewe optrede en ongeoorloofde wetgewing. Die *ratio* van die beslissing was logies en oortuigend. Kortliks gestel was hoofregter Marshall se benadering dat die grondwet die opperste landswet is wat die wetgewer, die uitvoerende gesag en die regbank bind; dat 'n wet van die wetgewer wat met die grondwet bots van nul en gener waarde is; dat dit onteenseglik die funksie van die regbank is om die reg neer te lê; dat tensy die grondwet as absurditeit beskou word, die regbank daartoe gebonde is om die oppergesag van die grondwet in stand te hou. Met die aanvaarding van hierdie beginsel het die *supreme court* (en in besonder die Warren-hof tussen 1953 en 1969) die kragtigste staatswaarborger van menseregte in die geskiedenis van die VSA geword. Waar ek reeds afgetree het, pleit ek nie uit eie belang wanneer ek aan die hand doen dat 'n handves van menseregte by die grondwet ingelyf word en dat 'n onbeperkte mag in ons land se hoogste hof gevestig word om wetgewing, administratiewe en uitvoerende optrede te hersien en aan die grondwet te toets nie. Ek kan my nie voorstel, gesien die integriteit wat die regbank kenmerk, dat dit tot wanorde in die regering van die land aanleiding sal gee nie. Dit het sekerlik nie in die VSA gebeur nie. Die *supreme court* het gedurende die tydperke 1789-1864 (wat die regime van die Marshall-hof insluit) en 1937-1959 (wat die eerste ses jaar van die Warren-hof insluit), dit wil sê 'n gesamentlike tydperk van bykans 'n eeu, gemiddeld slegs een keer in twaalf jaar federale wetgewing ongeldig verklaar.[8] Professor Robert Dahl lewer die volgende veelseggende kommentaar oor *Marbury v Madison* en die instelling van regtelike hersiening:

> Marshall's opinion has the majestic finality of Euclid. It has been quoted and paraphrased thousands of times in defence of judicial review, by judges, lawyers, historians, political scientists and others. From 1803 to 1966, the Supreme Court used the power of judicial review on more than eighty occasions to strike down

6 *Congressional record* deel 4 van vol 72 3566.
7 1 Cranch 137.
8 Glendon Schubert *Constitutional politics* (1964) 174.

> federal legislation. It has used the power many more times – no one has ever calculated how many – to hold state laws unconstitutional. The Court's actions have invariably been met with protest. Yet more often than not, critics protest a particular decision but not the general principle of judicial review. And the bitterest critics of the Court in one decade are often the Court's boldest defenders in the next.
>
> Thus the principle of judicial review is firmly anchored simultaneously in tradition and in a highly compelling rational-legal appeal to the supremacy of the Constitution.[9]

I have been reminded, ladies and gentlemen, that some of you are from abroad and may have experienced some difficulty in following my remarks in Afrikaans. Mindful of that, I propose, with your kind concurrence, to detain you a very brief while longer for the purpose of providing a résumé of the main thrust of my remarks.

Human rights, the theme of this symposium, is a concept which many South Africans shrink from discussing. Accordingly, although I am no longer hindered by the duty which attached to my previous office to avoid the expression of contentious views, I am still obliged to take care not to harm the dignity of that office by irresponsible or unworthy utterances. At the same time bearing in mind that human rights are an abiding concern of the Western world and that South Africa is frequently singled out for harsh attack, I propose to be objective albeit perfectly frank in identifying some of the respects in which, I believe, such rights are being denied in this country. I would however, preface my remarks by mentioning that in some fields, like freedom of religion, it has little to be ashamed of.

South Africa's position is a perplexing one by reason mainly of the fact that to the present day the political order has been based on discrimination between races. Notwithstanding commendable attempts to break with the past by the adoption of a new constitution (which some citizens claim to be flawed), the repeal of the Prohibition of Mixed Marriages Act and the repeal of degrading provisions of the Immorality Act, a solution to our problems is not yet in sight.

The current constitution does not, in my view, measure up to Abraham Lincoln's high ideal of "government of the people, by the people, for the people". Our parliament consists of three racially separate chambers, it excludes Blacks and reins of government are effectively in the hands of a white political party which rules by virtue of a built-in position of dominance. The result is that political freedom in the full sense does not exist. This is the first obstacle which requires to be surmounted without delay. Our population is not a homogeneous one and the protection of minority rights cannot be overlooked. Yet who can deny that it is of the essence of a society which upholds human rights that the vesting of a monopoly of power in a single racial group cannot persist? It is my sincere hope that you, the delegates to this symposium, will apply your expertise to finding a solution to this overwhelming problem.

In regard to freedom of speech I have drawn attention to the constraints imposed on political freedom of expression by the Internal Security Act 74

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9 *Pluralist democracy in the United States* (1967) 149.

of 1982, and have compared it with the wide protection extended by associate justice Douglas (in the passage which I have quoted) to the right to indulge in free speech of even the most vituperative character. I expressed the hope that this approach might usefully be applied in part in achieving an alleviation of South Africa's very strict stance.

The tragic consequences of our security legislation as, for example, exemplified in the Stephen Biko type of occurrence, the subsequent appointment of the Rabie commission and the adoption of less harsh security legislation I also referred to and pointed out that vast powers of detention still remain vested in the Minister of Law and Order. The harsh and wrongful manner in which this legislation is sometimes applied to the detriment of the freedom of the subject, emerges from the recent unanimous judgment of the appellate division of the supreme court and demonstrates the need for a reinforcement of the judicial power vis-à-vis the legislative and executive powers. These are shortcomings of the South African system which have moved me to suggest, as my former colleague Mr Justice Corbett did some seven years ago, that very serious consideration be given to yet a further constitutional change in South Africa which *inter alia* should embrace a bill of rights enforced by a more powerful appellate division of the supreme court of South Africa.

The rise of administrative agencies is cause for concern to lawyers. Such rise has virtually become a fourth branch of government. Ministers of state and administrative officials and bodies frequently combine the initiation of proceedings, collect evidence, decide on evidence and pronounce judgment. Lawyers know that judges adjudicate and that they do so dispassionately.

Mr Chairman, my best wishes go out to you for a highly successful two days. May your deliberations bear rich fruit and make its contribution to the emergence of a happier South Africa!

2 Filosofiese perspektief op 'n menseregtehandves vir Suid-Afrika

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SUMMARY

A case is argued in favour of a bill of rights for SA by firstly drawing attention to the very basis upon which the concept of human rights rests. It is argued that one's view of this basis for human rights is determined by pre-theoretical convictions and that in terms of a Christian view of the matter, human rights can be seen as active manifestations of the status of man, created in the image of God and called upon to rule over and care for God's creation.

Three categories of "founding rights" are then distinguished and it is argued that all other more specific rights, susceptible to protection in a bill of rights, are based upon these. The categories so distinguished are:

- ☐ the right to freedom;
- ☐ the right to equality; and
- ☐ the right to free association and participation in societal processes.

It is contended that group rights as the rights of social institutions susceptible to legal personality, are to receive recognition, but that ethnic rights are not group rights for purposes of such recognition.

The relationship between the recognition and protection of human rights on the one hand and the legal order is then briefly dwelt upon. In conclusion an attempt is made to answer the question whether a bill of rights is a possibility for South Africa. The attitude of the South African courts and the political situation is briefly analysed, and it is concluded that the ideal of a bill of rights is worthwhile working for even though certain factors in the present situation are discouraging.

It should, however, be clearly understood that a bill of rights will only be meaningful in a country where all citizens enjoy full political rights and where a majority government is in power. Furthermore a bill of rights should deliberately be designed to benefit the less privileged members of our society and to improve their present backward position.

1 TEN GELEIDE

Op 'n simposium oor 'n omstrede kwessie kan die spreker wat die filosofiese perspektief moet bied, maklik voor die versoeking swig om in abstrakte breingimnastiek en/of spitsvondige semantiek te probeer ontvlug. Ek probeer hierdie versoeking weerstaan.

Wat ek as suiwer teoretiese fundering vir die begrip en idee van menseregte aanbied, gaan bloot 'n inleidende onderafdeling tot my lesing wees. In die lig van die teoretiese inleiding toon ek daarna aan watter drie hoofkategorieë menseregte (met hulle onderafdelings) myns insiens in 'n handves beskerming behoort te geniet en hoedat die beskerming van hierdie regte langs die

normatiewe weg van die voormelde handves op die korrelasie menseregte-regsorde inspeel. Ten slotte sal ek, mede om ook 'n bal van praktieser besinning oor 'n brandende eietydse staatkundig-konstitusionele aktualiteit by die bek van die dinkskrum te probeer inkry, 'n eie mening lug oor die vraag of die daarstelling van 'n menseregtehandves binne die afsienbare toekoms in Suid-Afrika moontlik sal wees.

Ek verwoord deurentyd primêr my eie insigte oor tersaaklike onderwerpe so kernagtig moontlik, sonder om u telkens te vermoei met die filosofies- en polities-historiese aanloop tot elke kwessie wat in die proses aan die orde kom.[1]

Menseregte appelleer op die hart van menswees. Daarom, ofskoon akademiese diskussies oor menseregtekwessies saaklik, beredeneerd en objektief kan wees, is hulle nooit neutraal nie. Elk van die deelnemers aan so 'n diskussie se opvatting oor mensregte word deur bepaalde grondliggende, voorteoretiese oortuigings oor die plek en rol van die mens in die wêreld, menswaardigheid, menseverhoudinge, mensverwesenliking ensovoorts deursuur. Vandaar 'n wye verskeidenheid menseregteopvattings.[2]

My eie opvatting oor die aard en oorsprong van en wesensgrond vir menseregte is 'n Christelike en meer bepaald Calvinistiese of, soos ek verkies om dit te noem, 'n Christelik-reformatoriese opvatting. Ek noem my uitgangspunt by die naam, omdat die feit dat daar in die Calvinistiese teologieswysgerige en regsfilosofiese tradisie volop duidelike aanknopingspunte vir die ontwikkeling van 'n menseregteteorie te vind is,[3] dikwels deur die onderdeurdagte en selfs onkundige opvatting dat "die Afrikaner, *met sy Calvinistiese agtergrond*, meer geneig is om die staatsorde en die handhawing daarvan" eerder as "individuele regte" te beklemtoon,[4] versluier word. Daar

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1 Ek sal egter wel in voetnotas na literatuur verwys waarin bepaalde sodanige onderwerpe breër aangesny en beredeneer word, en/of, waar ek dit ter wille van groter helderheid dienstig ag, self bepaalde kernaangeleenthede kortliks toelig.

2 Velema *Discussie over de mensenrechten* (1980) onderskei bv 'n klassiek-liberale opvatting, 'n Marxisties-Leninistiese opvatting en 'n dêrde wêreldse opvatting en trek kontoere vir 'n eie Christelike opvatting. Uit 'n studie van die eerste agt hoofstukke van Van der Vyver se *Die juridiese sin van die leerstuk van mensregte* (LLD-proefskrif 1973 UP) blyk eweneens duidelik dat die verskillende mensregteopvattings van filosowe deur hulle (dws die filosowe se) onderskeie voorteoretiese uitgangspunte en oortuigings gerig word. Omdat al hierdie opvattings op een en dieselfde werklikheidsverskynsel afgestem is, vertoon hulle vanselfsprekend bepaalde raakpunte en oorvleuel hulle dikwels. Hulle onderskeie aanhangers kan die een die ander egter nie op suiwer teoretiese gronde of met tipies rasionele argumente van die fundamentele (of "uitgangspuntmatige") houdbaarheid van mekaar se opvattings oortuig nie.

3 Kyk oor die algemeen Van der Vyver "The bill-of-rights issue" 1985 *TRW* 1 veral 4-5 tesame met die vollediger uiteensetting in sy *Juridiese sin* 420-35 asook sy *Die beskerming van mensregte in Suid-Afrika* (1975) 13-16. 'n Verdienstelike oorsig wat die ontwikkeling van mensregtedenke binne die Christelik-reformatoriese tradisie ook goed in perspektief stel, is dié van Olivier *Mensregte: oorsig en uitsig* (HL Swanepoellesing PU vir CHO 1984). Stoker *Die aard en rol van die reg – 'n wysgerige besinning* (RAU Publikasiereeks A36 1970 38 ev) aanvaar die bestaan van menseregte ten spyte van ander Calviniste se huiwering wat onder andere uit 'n reaksie teen die humanistiese beskouings van "natural rights" spruit. Stoker ontwikkel tewens 'n baie interessante menseregtebeskouing wat my eie beskouing in bepaalde belangrike opsigte sterk beïnvloed het.

4 My kursivering in die aanhaling. Vgl *Tweede verslag van die grondwetkomitee van die presidentsraad oor die aanpassing van staatkundige strukture in Suid-Afrika* (PR

word tewens dikwels gepoog om hierdie diep gewortelde wanopvatting oor die 'Afrikaner se Calvinisme' te ontrimpel deur dit met die gesigsroom van 'die etnies-plurale samestelling van die Suid-Afrikaanse bevolking en die noodsaaklikheid om die individu-in-groepsverband te sien'' te beplak.[5] Dat agterdog jeens die idee en praktyk van menseregte gekoppel aan 'n oorbeklemtoning van 'n romantiese, universalistiese geheel – en veral die volk of etniese groep – leidende temas in Afrikanerdenke is, betwis ek nie, maar die vorm van ''Calvinisme'' in die naam waarvan apartheid gepleeg en facisme geheilig word, is hoogstens Afrikaner stamcalvinisme – 'n verdraaide namaaksel van die ware Jakob.[6] In Calvinistiese (kerklike sowel as akademiese) geledere word tans nie alleen die idee van menseregte aanvaar nie, maar ook die noodsaak vir die daadkragtige erkenning en beskerming daarvan toenemend bepleit.[7]

4/1982 72) asook Coetsee ''Hoekom nie 'n verklaring van menseregte nie?'' 1984 *TRW* 5 6. Rondom oa die houdbaarheid van die mensregte-idee in Calvinistiese geledere is ook 'n interessante debat tussen Robinson ''Menseregte, militêre diensplig en geloofsbeswaardes'' *Woord en Daad* 23(256) Des 1983 12-13 en Venter ''Menseregteperspektief in perspektief'' *Woord en Daad* 24(262) Jun 1984 13-14 aan die een kant en Van der Vyver ''Menseregte in perspektief'' *Woord en Daad* 24(259) Maart 1984 12-13 en later ook 1985 *TRW* aan die ander kant gevoer.

5 *Tweede verslag van die grondwetkomitee* 72; Coetsee 6.

6 Hierdie stelling is in 'n besondere mate van Afrikanercalvinisme in vergelyking met ''Calvynse Calvinisme'' waar – kyk in hierdie verband bv my uiteensetting in 'n artikel getitel ''Calvin and Calvinism on the state and the law: a few perspectives for South Africa today'' (in *IRS Our reformational tradition – a rich heritage and lasting vocation* PU for CHE reeks F3 no 21 1984 510 528-531). Ek ontken nie dat daar in die wesenlik negentiende eeuse Calvinisme van iemand soos Kuyper heelwat van die kultuuroptimisme van sy tydsgewrig en van sy Europese omgewing en onmiskenbare trekke van die romantiek te vind is nie (vgl bv Douma *Algemene genade* 1966 veral 48 ev) maar hierdie trekke in Kuyper se denke is nie kenmerkend reformatories nie en bots selfs met ander fasette van Kuyper se eie teologie en filosofie.

7 Natuurlik dra Calvinistiese menseregteopvattings 'n eie stempel en beklemtoon dit aspekte van menseregte wat in ander opvattings nie so 'n prominente rol speel nie en selfs geïgnoreer word. Dit is egter nie ongewoon nie. Sodra 'n mens die bestaan van 'n op voorteoretiese uitgangspunte gebaseerde opvattingsverskeidenheid oor menseregte erken, erken jy ook dat die verskillende opvattings in vergelyking met mekaar prinsipiële sowel as klemverskille sal vertoon.

Afgesien van duidelike blyke van erkenning van die idee en praktyk van menseregte wat in Calvinisties wysgerige en regsfilosofiese geledere bestaan en waarna voorheen verwys is, het die menseregtedebat onlangs ook 'n sterk teologiese en veral teologies-etiese dimensie bygekry. Die algemene trant van die debat is een van aanvaarding eerder as verwerping van die idee en praktyk van menseregte en menseregtebeskerming. In sekere kringe (soos bv in die geledere van die teologies oorwegend konserwatiewe Gereformeerde Ekumeniese Sinode (GES)) is hierdie aanvaarding ooglopend sterk – vgl bv RES *Testimony on human rights* 1983 asook 'n vroeëre uitgawe van die *RES Theological forum* 3(1) Desember 1979. In lg publikasie is veral die artikel van Gordon Spykman, ''Toward a Biblical view of 'human rights' '' op 1-14 van besondere belang. 'n Konserwatiewer en miskien versigtiger instemmende verwoording van die voorgaande geesdrif is in Velema se hierbo aangehaalde *Discussie* te vind.

In die geledere van die Suid-Afrikaanse lidkerke van die GES (wat onder andere die teologies sowel as polities konserwatiewe Nederduits-Gereformeerde en Gereformeerde Kerke insluit) word die GES se oorwegend positiewe houding teenoor menseregte nie op teologiese of ander prinsipiële gronde weerspreek nie. By sekere Afrikaanse teoloë en kerklidmate binne die Calvinistiese kerktradisie is daar 'n entoesiastiese aanvaarding van die idee en praktyk van menseregte merkbaar: Du Toit (red) se *Menseregte* 1984 gee hiervan treffend blyke. Selfs by konserwatiewer en ''versigtiger'' gereformeerde teoloë, soos Helberg ''Die Ou Testament oor menseregte'' in die *Skriflig* 18(72) Des 1984 4-12, is egter ook 'n positiewe houding te bemerk.

2 DIE FILOSOFIESE GROND VIR MENSEREGTE

Om iets van die kern van die konsensus oor die inhoud van die begrip "menseregte" onder Christelik-reformatoriese denkers onder woorde te probeer bring, omskryf ek menseregte kortweg en in algemene terme as die *mens se basiese ampsaansprake wat hom in die vervulling van sy deur God opgelegde taak of roeping rugsteun of borg*.[8] Die erkenning van menseregte word wesenlik deur eerbied vir die menslike lewe self sowel as vir die mens se geleenthede om die skepping te benut en daarvoor te sorg, genoodsaak. As kroon van die skepping en beeld van God het die mens 'n primêre verantwoordelikheid voor God en 'n fundamentele reg teenoor ander mense om die lewensmoontlikhede wat hom gebied word te ontplooi en te benut.[9] Ofskoon menseregte fundamenteel is in dié sin dat hulle met die mens-wees van die mens gegee is,[10] is hulle geen aansprake teenoor God nie: hulle is juis aansprake teenoor die medemens op sterkte van 'n verantwoordelikheid voor God.[11]

Wat ek tot dusver oor die aard van menseregte gesê het, bring hulle met die uniekheid van die mens as skepsel en, in die besonder, as God se gevolmagtigde bewerker en bewaker van sy skepping in verband. As sodanig word die bestaan van menseregte as 'n skeppingsfeit gekonstateer. Hierdie skeppingsfeit het onteensegtelik konkrete sosiale en uiteindelik ook heilsimplikasies. Wat tot dusver oor die skeppingsmatige fundering van menseregte gesê is, is teologies-filosofies uit Bybelse gegewens afgelei. Die Bybel self praat

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8 Du Plessis "Die reg van die gelowige – menseregte en menseverantwoordelikhede" 1984 *Almanak van die Gereformeerde Kerk in Suid-Afrika* 210-214 210.

9 Ek steun in my uiteensetting oor die wesensfundering van menseregte en die konsensus wat daar onder veral reformatoriese Christene hieroor bestaan, sterk op 'n konsep *Getuienis oor menseregte* aan die opstel waarvan ekself, prof Lategan van Stellenbosch asook drr De Villiers van Wellington en Kinghorn van Stellenbosch meegewerk het. Hierdie dokument sal so wyd moontlik onder Christene in Suid-Afrika versprei word ten einde vas te stel presies hoe groot die vermoedelike konsensus oor menseregte in hulle geledere is. Die projek word deur die RGN, as uitvloeisel van die religieuse aspek van sy ondersoek na tussengroepverhoudinge, geborg. (Dit het tewens juis uit hierdie TGV-ondersoek geblyk dat daar 'n aansienlike mate van konsensus onder 'n groot verskeidenheid Christene en Christelike kerke oor bepaalde uitgangspunte ivm menseregte bestaan – vgl RGN *Die Suid-Afrikaanse samelewing: werklikhede en toekomsmoontlikhede* 1985 75-6. Ek verwys in my lesing (en veral in hierdie en die volgende paragraaf daarvan) taamlik vryelik na hierdie dokument – wat ek as *Konsepgetuienis*, gevolg deur 'n verwysing na die toepaslike artikel daarvan aanhaal – eensdeels omdat terugvoering en kommentaar vir verdere skaafwerk aan die konsep met die oog op die finalisering daarvan van veel waarde sal wees en andersdeels omdat kernstellings oor menseregte soos deur Christene verstaan, kort en kragtig geformuleer daarin voorkom. Verwysings na die *Konsepgetuienis* verkort en vergemaklik dus my eie uiteensetting. Tans verwys ek hoofsaaklik na art 2 en in die besonder art 2.1 van die konsep.

10 Stoker 38.

11 Vgl in hierdie verband ook Velema 34-5 se kontensie dat juis op grond van wat God X in verband met sy optrede teenoor Y beveel, aan Y regte verleen word. Dit is natuurlik nie heeltemal dieselfde as wat hierbo, waar ek die feit dat X op grond van sy verantwoordelikheid voor God regte teenoor Y en andere het beklemtoon, gesê word nie. Velema se stelling dui egter op die gevoeligheid vir die korrelasie reg-plig of regverantwoordelikheid wat sterk in die Christelike denke oor menseregte figureer. 'n Ander manier om dit te stel is om te sê dat X se reg Y se plig en *vice versa* is. Ek wil egter ook beklemtoon dat X se verantwoordelikheid – juis omdat hy "toerusting" benodig om dit na te kom – eweneens sy reghebbendheid fundeer.

egter nie in sulke teoretiese terme oor die skeppingstatus van die mens nie,[12] en dit is veral baie konkreet en prakties oor die daadwerklike reghebbendheid van mense in verhoudingsituasies. In die Ou Testament is daar verskeie kere sprake van menslike reghebbendheid in gevalle waar veronregtes hulle op 'n regter – meesal Jahwe, die God van die Verbond self – beroep met dié versugting: "Verskaf (tog) aan my reg – ook en veral teenoor diegene wat my bedreig of veronreg."[13] Die regter wat reg verskaf, word veelal ook as redder of verlosser van die veronregte of hulpbehoewende beskou, en hierdie beeld word in sommige gevalle profeties op die heilswerk van die Messias betrek.[14]

Die voorgaande lys voorbeelde put Bybelse verwysings na die verreikende sosiale implikasies van menslike reghebbendheid hoegenaamd nie uit nie. Hulle is tewens maar net regstreekse konkretiserings van 'n gedagtegang oor die regte van die mens wat op heelwat ander plekke in 'n verskeidenheid onregstreekser skakerings voorkom.

Ten einde die werking en verwerkliking van menseregte binne die regsorde beter te begryp, moet ek die voorgaande algemene stellings oor die algemeen skeppingsmatige maar veral die meer spesifiek sosiale wesensgrond(e) vir menseregte, filosofies enigermate verfyn. Ek doen dit deur menseregte na hulle eie aard met die wesensaard van die reg in verband te bring.[15]

Die woord ampsgeborgenheid is myns insiens wesenstiperend van die reg.[16] "Amp" dui op die kreatuurlike staanplek of status van die gevolmagtigde mens as skepsel met 'n taak of roeping. Hierdie unieke skepsel is "beskermingsbehoeftig" in die ruimste sin van die woord: hy moet ter wille – en in die uitvoering – van sy taak, te midde van 'n wisselwerking van veral sosiale magte, gesaghebbend gerugsteun of geborg word. Die reg vervul hierdie "ampsborgende" funksie op 'n heel basiese "voorwaardevlak". Soos

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12 Met hierdie stelling wil ek vanselfsprekend nie probeer te kenne gee dat teologiese en/of filosofiese teoretisering in die gepaste(r) konteks van regswetenskapsbeoefening noodwendig futiel is nie.

13 Kyk oor die algemeen Du Plessis 1984 *Almanak* 211. Vir spesifieke voorbeelde kyk Gen 16:5; Ex 5:21; Rig 11:27B; I Sam 24:13 en 16; Ps 7:9, 26:1. 35:24, 43:1 en Klaag 3:59.

14 Vgl bv Jes 11:4; Jer 21:11-12, 23:5 en 33:15.

15 Ek steun in hierdie verband sterk op my artikel "Reg, geregtigheid en menseregte" 1980 *Obiter* 51 veral 70-80. Ander uiteensettings van my opvatting oor die wesensaard van die reg en die verband tussen die regsorde en menslike status is te vind in my *Die juridiese relevansie van Christelike geregtigheid* (LLD-proefskrif 1978 PU vir CHO) 799-803; "Menseregte en konfliksituasies" 1979 *Koers* 339 344; "Enkele opmerkings oor wet en orde en konflik" 1984 *Koers* 319 329-332; "Thoughts on law, order and state security" 1985 *TSAR* 233 236.

16 Ek gebruik 'n enkele woord vir hierdie wesentipering aangesien 'n definisie as 'n omskrywing van a in terme van (sy verhouding tot) b en c en d en e ens nie die eie-aard van die reg behoorlik kan vasvang nie. 'n Mens se "sienende greep" op die reg as menslike belewings- en ervaringswyse van die werklikheid berus op intuïtiewe waarneming en bygevolg insig. Die wetenskaplik-metodologiese geldigheid van intuïtief insien berus op die feit dat die intuïsie as kulminasiepunt van alle menslike ervarings en belewings ook 'n teoretiese dimensie het. Stoker *Oorsprong en rigting I* (1967) 239 ev beskryf hierdie metode van intuïtiewe wesenskou as die diafanerotiese metode. In 'n veralgemenende sin kan die diafanerotiese metode as die "sintuiglike waarneming" van nie-sintuiglik waarneembare gegewens in die geestes- en sosiale wetenskappe beskryf word.

John Rawls[17] dit heel kernagtig so raak stel: ". . . [L]aw defines the basic structures within which the pursuit of all other activities take place." Ampsgeborgenheid impliseer 'n onverbreeklike korrelasie tussen die status van die mens (as reghebbende), die gesaghebbende normbepaalde en -gereguleerde beskerming wat hy geniet en die orde waarbinne die wisselwerking tussen status en normatiewe beskerming plaasvind..

Die gegewenheid van menseregte appelleer op die feit dat die mens 'n statushebbende wese in gemeenskap met andere is. Menseregte kan daarom ook, in 'n filosofies verfynder sin as aan die begin van hierdie paragraaf, as manifestasies of verskyningsvorms van die mens-in-amp se status-in-aksie in vehouding tot ander mense (maar) binne die konteks van 'n normatiewe orde van beskerming omskryf word.[18]

3 WATTER BASIESE MENSEREGTE BEHOORT IN 'N HANDVES BESKERM TE WORD?[19]

Ek wil kortliks enkele menseregte wat ek meen eksplisiet in 'n menseregtehandves opgeneem en beskerm behoort te word identifiseer en sistematies tabuleer. Vooraf egter drie kantaantekeninge:

(a) Oor presies welke ampsaansprake van die mens (of dan verskyningsvorms van sy status-in-aksie) as beskermingswaardige menseregte kwalifiseer en oor hoe geïdentifiseerde regte sistematies getabuleer kan word, kan en sal daar altyd verskille van mening bestaan. Die regte wat ek identifiseer en die sisteem wat ek aan die hand doen is myns insiens in pas met die uitgangspunte waarop ek my tot dusver beroep het.

(b) Die indelingsisteem wat ek aan die hand doen, is in ieder geval nie 'n voorbeeld van 'n praktiese handvessisteem nie maar van 'n teoretiesfilosofiese sisteem. Ofskoon ek dus van mening is dat al die regte wat ek opnoem in 'n handves beskerm kan en behoort te word, kan 'n handves nie sonder meer en regstreeks op die sisteem wat ek hier gebruik baseer word nie.

(c) Die regte wat ek tabuleer is hoofsaaklik wat soms ook substantiewe menseregte soos te onderskei van prosessuele menseregte genoem word.[20] Op die vraag of hierdie onderskeid in alle opsigte wetenskaplik houdbaar is, wil ek tans nie ingaan nie. Ek konstateer bloot die feit dat die regte waarna ek

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17 *A Theory of Justice* (1972) 236.

18 Vgl ook Du Plessis 1980 *Obiter* 79.

19 Vir gegewens in hierdie paragraaf het ek besonder sterk op die *Konsepgetuienis* art 3, 4 en 5 gesteun.

20 Van der Vyver, veral in sy *Beskerming*, maak ruim van hierdie onderskeid gebruik sonder om dit ooit werklik te verduidelik. Op 41 konstateer hy gewoon dat daar so 'n onderskeid bestaan en noem dan voorbeelde van agtereenvolgens substantiewe en prosessuele menseregte. Substantiewe menseregte sluit, volgens hom, die vryheid van spraak en van die pers, die kompetensie om te vergader en te betoog en die kompetensie om wapens te dra in, terwyl prosessuele menseregte die verbod op arbitrêre gevangesetting en lewens-, vryheids- of eiendomsontneming sonder behoorlike regsproses en die reël dat die bewyslas in strafsake op die staat rus, insluit. Wat Van der Vyver oor hierdie onderskeid te sê het en die voorbeelde wat hy noem, berus op inligting wat hy uit menseregtehandveste bekom het en is dus waardevol in dié sin dat dit 'n mens 'n aanduiding gee van hoe hierdie aangeleenthede in die praktyk geformuleer word. Of die onderskeid wetenskaplik egter altyd houdbaar is, is argumenteerbaar.

verwys in terme van hierdie onderskeid hoofsaaklik as substantief aangemerk sou kon word. Ek laat my dus nie uit oor die meer tegniese aspekte van die regsproses gesien teen die agtergrond van menseregtebeskerming oor die algemeen en die noodsaak vir 'n menseregtehandves nie. Dis nie dat ek dink dat probleme op hierdie vlak onbelangrik is nie – inteendeel. Ek dink egter dat ek, gegewe die grense van my onderwerp, met die konstatering van 'n reg op vrye toegang tot die regsproses en op gelyke behandeling voor en beskerming deur die reg kan volstaan. Daarbenewens noem ek ook sekere regte waarop nie sonder behoorlike regsproses inbreuk gemaak kan word nie.

Uit die grond(e) vir menseregte in paragraaf 2 hierbo aangestip, volg myns insiens drie basiese regte (*qua* ampsaansprake *qua* manifestasies van die mens-in-amp se status-in-aksie) te wete 'n reg op vryheid, 'n reg op gelykheid en 'n reg op lewe. Alle ander, meer besondere menseregte berus op hierdie basiese regte, soos ek tewens vervolgens aantoon.

3 1 Die reg op vryheid

Die mens beheers die skepping as gevolmagtigde. Volmag behels eensdeels "die vermoë om te kan" of kompetensie (dit wil sê gesag)[21] en veronderstel (en verg) andersdeels noodwendigerwys 'n (gesags-)uitoefeningsruimte (dit wil sê vryheid).[22] Die basiese mensereg op vryheid berus op die wisselwerking of korrelasie tussen die mens se gesag (dit wil sê ook sy besondere vermoëns, aanleg en talente) om skeppingsmoontlikhede te ontgin aan die een kant en, aan die ander kant, die ruimte waarbinne hy sy gesag laat geld. Hierdie reg word nie op grond van geloof, ras, kleur, geslag of herkoms nie maar alleen deur die noodsaaklike erkenning en eerbiediging van die soortgelyke reg van andere beperk.[23] Konkreter en meer besondere verskyningsvorms van hierdie basiese reg op vryheid is die volgende:[24]

3 1 1 die reg op vryheid van geloof en van gewete;

3 1 2 die reg om verantwoordelikheid te aanvaar en beslissings te neem;

3 1 3 die reg van elke mens om sy volle potensiaal ooreenkomstig sy besondere aanleg en met die verantwoordelike gebruik van beskikbare hulpbronne en -middele te ontgin;

3 1 4 die reg op vrye toegang tot die regsproses en op menswaardige behandeling deur regstoepassers en regsprekers;

3 1 5 die reg op vryheid van beweging wat insluit die reg om nie sonder behoorlike regsproses van die gemelde vryheid ontneem te word nie;

3 1 6 die reg om vryelik aan politieke prosesse deel te neem;

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21 Gesag is dus volgens my beskouing nie, soos wat dit tradisioneel verstaan word, slegs die kompetensie van diegene in "hoëre" ampte nie. Dit is iets waaroor elke mens *qua* gevolmagtigde in 'n eie besondere (skeppingsmatige) amp beskik. Owerheidsgesag, dws die gesag van diegene in "hoëre" ampte of dan "gesagsposisies" soos wat dit tradisioneel genoem word, is bloot een verskyningsvorm van menslike gesag. Vir 'n vollediger uiteensetting van my gesagsbeskouing kyk "Prinsipiële en praktiese besinning" (in *Magsdeling – 'n Trojaanse perd?* IRS-studiestuk nr 179 1982 16-8).

22 Kyk Du Plessis *Juridiese relevansie* 750-1 vir 'n vollediger uiteensetting.

23 *Konsepgetuienis* art 3 1.

24 Kyk art 3 1 1 tot 3 1 13.

3 1 7 die reg op vryheid van spraak – waarby vryheid van die pers en van ander media inbegryp is – en in die besonder vryheid van kritiek;

3 1 8 die reg op vryheid van keuse van werk- en woonplek;

3 1 9 die reg op vrye deelname aan die ekonomiese lewe en in die besonder die reg om lewensonderhoud te verdien en nie gedwing te word om onder mensonwaardige omstandighede te werk nie asook die reg om na vrye keuse en ooreenkomstig eie finansiële vermoë eienaar van roerende en onroerende goed te word;

3 1 10 die reg om nie inbreuk op 'n mens se vermoënsregte sonder behoorlike regsproses te duld nie;

3 1 11 die reg op 'n behoorlike opvoeding en opleiding tot vrye verantwoordelikheid en op onderwys in die taal en aan die inrigting(s) van eie keuse;

3 1 12 die reg om vryelik 'n eie kultuur uit te leef en uit te bou en die taal van eie keuse vryelik te skryf en te praat, en

3 1 13 die reg om vryelik en na eie keuse met andere te assosieer.

3 2 Die reg op gelykheid

Die Christelike grondoortuiging dat alle mense na die beeld van God geskape is, dien as grondslag vir die aanvaarding van 'n primêre gelykheid tussen mense wat inhou dat alle mense in beginsel aanspraak op gelyke behandeling en gelyke toegang tot gelyke geleenthede het.[25] Hierdie primêre (en prinsipiële) gelykheid tussen mense word hoegenaamd nie deur verskille in geloof, ras, kleur, geslag of herkoms aangetas nie.[26] Die basiese mensereg op gelykheid sluit die volgende besondere regte in:[27]

3 2 1 die reg op gelyke behandeling voor en beskerming deur die reg en "die reg" sluit wetgewing in;

3 2 2 die reg op 'n billike verhoor voor 'n onafhanklike regbank in die besonder wanneer oordele gevel moet word wat 'n mens se regte en verpligtinge raak;

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25 Daar is diegene wat verkies om nie van die primêre of prinsipiële gelykheid van mense te praat nie, maar eerder te sê dat hulle gelykwaardig is – vgl bv Velema 35-7. Die kernbeswaar teen die gebruik van die term gelykheid is dat dit sou impliseer dat daar geen verskille tussen mense bestaan nie – dws dat almal "dieselfde is" – en dat verskille in bv aanleg en talente dan geïgnoreer word. Hierdie probleem val mi egter weg indien 'n mens in gedagte hou dat die begrip "gelykheid" toegepas op mense altyd geometriese gelykheid is, dws 'n gelykheid wat in die konteks van elke gegewe konkrete situasie tersaaklike verskille tussen mense verdiskonteer en verhoudingsmatig tussen hulle differensieer. Die gelykheid van "dieselfde wees" is aritmetiese gelykheid en kan nie op mense nie maar alleen op meetbare dinge van toepassing gemaak word. Geometriese gelykheid is juis elasties genoeg om die nie-meetbaarheid van die menslike persoonlikheid te akkommodeer. Daarom is dit 'n "in beginsel"-gelykheid: dit kan by geleentheid die afwesigheid van verskille hipotetiseer ten einde riglyne vir die konkrete (gelyke) behandeling van mense neer te lê. Die argument lui dan bv só: "Ek het aan A behandeling x en aan B behandeling y uitgemeet. Sou y x gewees het indien B A was? Maw: behandel ek A's en B's met dieselfde vermoëns onder dieselfde omstandighede dieselfde? Daarbenewens moet 'n mens onthou dat omdat regsnorme na hulle eie-aard generaliserend werk, veral vir regsdoeleindes verskille tussen mense nie oorbeklemtoon moet word nie: sommige verskille is in sommige situasies feitlik nie ter sake nie.

26 Art 4 1.

27 Kyk art 4 1 1 tot 4 1 8.

3 2 3 die reg op gelyke deelname aan en toegang tot die politieke proses en politieke ampte;

3 2 4 die reg op gelyke toegang tot kanale vir ordelike protes en verset;

3 2 5 die reg op gelyke toegang tot die hulpbronne van die land en op so 'n billike aandeel in die opbrengs van die land soos wat vir 'n menswaardige lewe nodig is;

3 2 6 die reg op gelyke toegang tot werkgeleenthede en op mededinging om en die bekleding van posisies;

3 2 7 die reg op gelyke besoldiging vir dieselfde werk en (in die geval van werknemers) op billike vergoeding vir billike prestasie of (in die geval van werkgewers) op billike prestasie vir billike vergoeding, en

3 2 8 die reg op gelyke geleenthede tot onderwys en opleiding en die gelyke verdeling van kragte en middele in die onderwys.

3 3 Die reg op assosiasie en deelname aan gemeenskapsprosesse

Die mens is in 'n ruim mate vir sy algemene welstand en voortbestaan op andere (medemense) aangewys en is daarom per definisie 'n gemeenskapswese wat sy regte in gemeenskap met ander realiseer. Daarom het elke mens eensdeels die reg om deur vrye assosiasie by the daarstel en instandhouding van samelewingsverhoudings en -instellings betrokke te wees en andersdeels die reg om aan samelewingsprosesse wat hom raak, deel te neem.[28] Hierdie basiese reg vind in die volgende meer besondere regte konkreter gestalte:[29]

3 3 1 die reg op deelname aan sosiale prosesse en inspraak in besluitneming in elke samelewingsinstelling waarvan 'n mens lid is;

3 3 2 die reg op die noulettende beskerming van 'n mens se regte in 'n gemeenskap waar jy om die een of ander rede in 'n ongunstige posisie (byvoorbeeld lid van 'n sosiaal swakker groep of 'n minderheidsgroep) is;

3 3 3 die reg om vryelik met geloofsgenote te assosieer en in gemeenskap met hulle geloofs- en gewetensoortuigings uit te leef;

3 3 4 die reg op huweliks- en gesinsvorming en op die erkenning van die integriteit van die huweliks- en gesinslewe;

3 3 5 die reg om aan politieke partyvorming deel te neem en aldus om die verkryging van politieke seggenskap mee te ding;

3 3 6 die reg op daadwerklike deelname aan die vorming en organisasie van ekonomiese belangegroepe, insonderheid in arbeidsverband, en die reg om kollektief te beding;

3 3 7 die reg om na vrye keuse in skool- en breëre opvoedkundige verband met ander te assosieer en om 'n vrye keuse van toegang tot opvoedkundige inrigtings te hê, en

3 3 8 die reg om vryelik met taal- en kultuurgenote te kan assosieer maar ook om ter wille van interkulturele kontak taal- en kultuurgrense vryelik te kan oorsteek.

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28 Art 5 1.
29 Kyk art 5 1 1 tot 5 1 9.

Ek is 'n voorstaander van die erkenning van groepsregte. Die is myns insiens tewens onafwendbaar dat menslike samelewingsinstellings (of -kringe of -verbande) regte, menseregte, sal hê.[30] Onder "groepe" (dit wil sê menslike samelewingsinstellings) met menseregte tel al daardie instellings wat ek (institusionele) gemeenskappe noem. 'n Gemeenskap in die voormelde betekenis van die woord is 'n sosiale instelling in die gesagsgesteunde, sosio-institusionele orde waarvan sy lede ter bereiking van 'n besondere gemeenskaplike doel *qua* strukturele bestemming van die instelling ingevoeg is. So 'n gemeenskap vertoon 'n definitiewe innerlike organisasiestruktuur en kan regtens as 'n "entiteit", byvoorbeeld 'n regspersoon, erken word. Die reëls in terme waarvan basiese menseverhoudinge binne die gemeenskap gekonstitueer en omlyn word, is regsreëls. Voorbeelde van gemeenskappe wat ek hier in gedagte het, is die staat, die kerk, die universiteit, die handelsmaatskappy maar ook die huwelik, die gesin, ens.[31]

Van die gemeenskap is te onderskei die maatskap met 'n veel "nie-ampteliker" of "losser" sosiale struktuur waarin 'n definitiewe organisasiestruktuur geheel en al ontbreek en tipiese institusionele gesagsverhoudings 'n baie ondergeskikte plek inneem. 'n Maatskap se strukturele integriteit word nie deur juridiese gesagsmiddele en -norme nie maar veeleer deur etiese oorredingsmiddele verseker, dit wil sê deur die mate waarin lede onderling vrywillig verantwoordelikheid teenoor mekaar aanvaar. Voorbeelde van sulke maatskappe is vriendskappe of vriendekringe, liefdesverhoudings en (belangrik vir my betoog) etniese groepe of volkere.[32] Omdat die etniese groep of volk 'n maatskap en daarom wesenlik juridies ondefinieerbaar is,[33] bestaan daar ook nie so iets soos regtens beskermingswaardige etniese groepsregte of -belange nie.[34] Sodanige regte en belange sal dus ook nie as regte van groepe in 'n menseregtehandves beskerm kan word nie. "Etniese regte" soos byvoorbeeld taalregte wat met tipies etniese kenmerke verband hou, kan tewens juridies gesproke alleen as regte van die individu beskerm en/of verskans word. Die individu se "sosiaal-etniese" behoefte om met taal- en kultuurgenote om te gaan, word weer deur die veroorlowing en beskerming van sy reg om vrywillig en vryelik met andere te assosieer, optimaal gerugsteun. Institusionele gemeenskappe wat dan in terme van hierdie laasgenoemde reg gevorm word, byvoorbeeld kultuurorganisasies, skole, verenigings ensovoorts, geniet "normale" institusionele beskerming, nie uit kragte van die etniese affiliasie(s) van die lede daarvan nie, maar op grond van die sosio-institusionele struktuur van die besondere gemeenskap self.[35]

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30 Kyk in hierdie verband ook Stoker "'n Kursoriese besinning oor menseregte" 1965 *Bulletin van die Suid-Afrikaanse Vereniging vir die Bevordering van Christelike Wetenskap* 133-4 en *Aard en rol* 30-40; vgl ook Van der Vyver 1985 *TRW* 5-7.

31 Vir 'n gedetailleerder uiteensetting kyk Du Plessis *The Law as a regulator and/or manager of conflict, particularly in ethnically plural societies* RGN (1984) 10-2, 60-3 en 74-7 en "Law, race and ethnicity in a plural society" 1985 *TRW* 89-93.

32 Du Plessis *Regulator and/or manager* 10-2.

33 Vgl ook Coetzee "Groepe en kategorieë in Suid-Afrika" *Woord en daad* 23(252) Aug 1983 6.

34 Du Plessis *Regulator and/or manager* 75-7 en 1985 *TRW* 90-92; RGN *Suid-Afrikaanse samelewing* 66-7 en 135-6.

35 Let egter daarop dat die staat as regsgemeenskap nie 'n tipiese etniese gemeenskap is nie en dat vir sover daar 'n etniese verskeidenheid binne die geografiese jurisdiksie van 'n besondere staat bestaan, die staatstaak van juridiese integrasie en die gelyke uitmeet van publieke geregtigheid aan al sy burgers en aan institusionele gemeenskappe binne sy gesagsfeer onverswak bly geld.

Die futiliteit van pogings om "etniese regte" regtens te probeer beskerm, blyk uit die bestaan en tans in 'n gelukkig al hoe groter wordende mate geskiedenis van rasgebaseerde apartheidswette in Suid-Afrika wat ten spyte van 'n (veral sedert die sestigerjare) verklaarde owerheidsbeleid van etniese eerder as rassedifferensiasie òf in die lewe geroep òf aan die lewe gehou is. Op grond van velkleur en fisiese voorkoms en/of afkoms en/of (soms) sosiale affiliasies is en word mense regtens verskillend behandel – daar is en word tussen hulle gedifferensieer en in etlike gevalle teen diegene behorende tot "donkerder" raskategorieë gediskrimineer. Dit spreek vanself dat 'n mens se blote ras niks wesenlik met jou reghebbendheid as mens te make het nie en daarom in beginsel nooit in enige mate hoegenaamd enige invloed op jou regte as staatsburger hoef te hê nie – tensy 'n wetgewer natuurlik hierdie prinsipiële nie-tersaaklikheid tot 'n differensiasiegrond verhef. Gebeur dit, is sodanige differensiasie *per se* – afgesien van die vraag of daar gediskrimineer word of nie – onregverdig en onredelik omdat dit 'n prinsipiële (en skeppingsmatige) nie-realiteit vir die bepaling van menseregte, deur differensiërende wetgewende maatreëls tot wel so 'n realiteit probeer verhef. Vanweë die veralgemenende aard van regsnorme wreek so 'n regtens onrealistiese (rasse-)differensiasie hom in die juridiese institusionalisering van louter rassevooroordeel: die uitgangspunte waarop die differensiërende regsnorme berus, gee immers voor om algemeen (dit wil sê in 'n veralgemenende sin) vir alle lede van sê raskategorie A *vis-à-vis* alle lede van sê raskategorie B geldig te wees. Hierdie vooroordeel wortel op sy beurt gewoonlik weer in 'n nog dieperliggender, histories geworde en vertroetelde sosiaal-psigologiese "geloof" dat kategorieë A en B as sodanig en daarom ook hulle lede wesenlik onversoenbaar is, hoofsaaklik omdat die lede van een van die twee kategorieë, vanweë gewaande tipiese raskenmerke oor die algemeen gesproke "beter" (beskaafder, ontwikkelder, edeler, intelligenter, hardwerkender, welriekender, ekonomies produktiewer, sedeliker – en so sou 'n mens kon voortgaan) weergawes van die mensespesie as die lede van die ander kategorie is.[36] Ek stel my onomwonde op die standpunt dat enige wetlike verwysing na ras as 'n juridiese differensieasiegrond per definisie onregverdige rassisme is, en daarom nie alleen nie in 'n mensregtehandves durf voorkom nie, maar ook deur die praktiese werking van die bepalings van die handves uit alle ander staatlike wetgewing geweer moet word. Ek stem ook saam met diegene wat beweer dat daar wetlik geen wesenlike geregtigheid in Suid-Afrika kan geskied voordat die "grondwet" vir rasgebaseerde apartheid, die Bevolkingsregistrasiewet,[37] nie onvoorwaardelik herroep word nie. Die beoogde nuwe wetgewing oor hierdie aangeleentheid, waarvan die inhoud tydens die skrywe hiervan bekend geword het, is steeds wesenlik mankoliek presies vir sover dit nie die rasdifferensiërende angel van die bestaande wet trek nie. Voeg hierby die verantwoordelike minister se suggestie in 'n televisie-onderhoud dat wetlike groepkategoriseringe vir die regering steeds net so belangrik soos individuele identifikasie is, en die bestaande probleem word beklemtoon eerder as vermy.[38]

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36 Vgl Du Plessis *Regulator and/or manager* 80-2 en 1985 *TRW* 92-3; RGN *Suid-Afrikaanse samelewing* 66-7.

37 30 van 1950.

38 Vgl ook *Beeld* 24 April 1986 6. Die minister het ook gesê dat nadruk op "eie identiteit" (wat hier niks anders as rasse-identiteit kan wees nie) die grondslag van die Suid-Afrikaanse politieke stelsel is.

Die samelewingsteorie waarmee ek werk en waarvan bepaalde aspekte tot dusver aan die lig gekom het, het een verdere implikasie vir menseregte wat ter afsluiting van hierdie paragraaf vermeld moet word: fundamenteel (dit wil sê prinsipieel-skeppingsmatig) beskou, bestaan daar nie 'n botsing tussen individuele en kollektiewe belange en daarom individuele en groepsinstitusionele menseregte nie.[39] Menseregte is dus nie per definisie regte wat die enkeling teenoor die groep – en veral die enkeling staatsburger (in sy minuskule weerloosheid) teenoor die (al-)magtige Staat (met 'n hoofletter) – het nie. Menseregte is die regte van enkelinge onderling teenoor mekaar en teenoor samelewingsinstellings, en van samelewingsinstellings onderling teenoor mekaar en teenoor enkelinge. Dit is dus nie byvoorbeeld slegs die enkeling burger wat regte teenoor die staat[40] (en in die besonder die staatsowerheid) het nie; die staat het ook regte teenoor die burger.

Die Christelike beskouing oor menseregte maak egter ook daarvoor voorsiening dat die prinsipieel werklike moontlikheid van harmonie tussen individuele regte onderling en tussen individuele en kollektiewe regte, grondig deur 'n ander werklikheid, dié van die sonde en die kwaad, versteur word.[41] Daarom, in plaas daarvan dat enkelinge en samelewingsinstellings hulle menseregte tot heil van mekaar benut, bedreig hulle mekaar dikwels in die verwerkliking (en uitoefening en uitlewing) daarvan. Hierdie disharmonie het onder andere tot gevolg dat die staatsowerheid by geleentheid dwangmatig moet ingryp om versteurde verhoudings te herstel. Terselfdertyd egter, omdat die staatsowerheid uit mense bestaan, is die verhouding owerheid-burger ook deur die sonde aangetas, sodat die owerheid (en diegene wat owerheidsampte beklee) deurlopend voor die versoeking van magsvergrype staan: mag/gesag wat veronderstel is om ten behoewe van die burger en bygevolg die voorkoming en/of herstel van versteurde verhoudings aangewend te word, word in òf die eiebelang van die gesagsdraer self òf die seksionele belang van die (bevoorregte) groep waartoe hy behoort, misbruik. Omdat die staatsowerheid *de facto* so magtig is, kan – benewens die feit dat sy magsvergrype dikwels diepgrypende implikasies vir die burger inhou – hy in die reël moeilik tot verantwoording geroep of in sy vergrype gestuit word. *Bills of rights* of menseregtehandveste het histories ontwikkel as normatief-konstitusionele "skilde" teen owerheidsvergrype. In beginsel kom die aanvaarding van 'n verskanste en afdwingbare menseregtehandves daarop neer dat die staatsowerheid homself dissiplineer: hy roep 'n doeltreffende konstitusionele middel in die lewe, waardeur hy met behulp van onafhanklike "kruis-" of dubbele kontrole paal en perk aan sy eie (en in praktyk dus sy verskillende funksionarisse se) potensiële veral wetgewende en uitvoerende magsvergrype stel.[42] Ofskoon 'n menseregtehandves nie die enigste en selfs miskien nie eens die effektiefste (konstitusionele) beskermingsmiddel teen owerheidsvergrype is

39 Van der Vyver 1985 *TRW* 5-7; *Tweede verslag van die grondwetkomitee* 72.
40 Ekself skryf, uit beginseloorwegings, "staat" nie met 'n hoofletter nie.
41 *Konsepgetuienis* art 6.
42 Ek praat hier van "kruis-" of dubbele kontrole omdat dit kontrole van een staatlike gesagsinstansie oor 'n ander is. Die regbank vervul gewoonlik die funksie van onafhanklike kontroleur, en regterlike gesag is een besondere vorm van staatlike owerheidsgesag.

nie,[43] is die besondere betekenis van die aanvaarding daarvan juis in die owerheid se daadwerklike erkenning van die noodsaak aan kontrole oor sy eie gesagsuitoefening geleë. Een van die kernkenmerke van outoritêre of absolutistiese staatsowerhede is juis dat hulle nie bereid is om hulle langs die voorgaande ordelike weg in die wyse waarop hulle hul gesag uitoefen, te laat knot nie. Dikwels word pleidooie vir die daarstel van menseregtehandveste boonop ook nog deur die segsmanne van en apologete vir sulke owerhede met dié uiters belaglike – en in Suid-Afrika ongelukkig kwistig gebruikte – argument dat in baie ander (outoritêre) state, die aanvaarding van 'n handves geen snars verskil aan die *de facto* beskerming van menseregte maak nie, van die tafel gevee.[44]

4 DIE KORRELASIE MENSEREGTE – REGSORDE

Wat ek in die laaste gedeelte van die vorige paragraaf in verband met die beskerming van menseregte langs die normatiewe weg van 'n handves gesê het, impliseer die bestaan van 'n ander verskynsel in intermenslike verkeer waarmee met die oog op die ordelike akkommodasie en die optimale beskerming van menseregte deeglik rekening gehou moet word, naamlik konflik. Menseregte word te midde van 'n veelheid reële en potensiële konfliksituasies beskerm. "Konflik" verwys hier na die verskillende verskyningsvorms van sosio-politieke botsing of stryd tussen die draers van menseregte (enkelinge en samelewingsinstellings).[45]

Konflik hoef nie noodwendig sinoniem met chaos te wees nie. In menseverhoudinge en in verband met menseregte impliseer dit tewens wisselwerking. Daarom kan doeltreffend geakkommodeerde en oordeelkundig gekanaliseerde konflik sosiale verhoudings in etlike deurslaggewende opsigte verstewig[46] en 'n betekenisvolle sosiale integreringsfunksie vervul.[47] 'n Perspektief op "positiewe konflik" help 'n mens voorts om die menseregbeskermende funksie van die reg oor die algemeen sowel as die vereistes waaraan 'n menseregakkommoderende regsorde moet voldoen, beter te verstaan.[48]

Menseregte is nie ewige, onveranderlike, vaste gegewes nie, maar het 'n onbetwisbare wordings- en verwesenlikingsgeskiedenis. Die fundamentele grond(e) vir menseregte (soos in paragraaf 2 hierbo uiteengesit) bly met verloop van tyd in beginsel relatief vas, wisselinge in die menslike verstaan daarvan ten spyt. Siende egter dat menseregte self manifesteringe van die mens as historiese wese se status-in-aksie is, verskil hulle na inhoud en veral kultuurhistoriese "verpakking" van tyd tot tyd en van plek tot plek. Sekere van

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43 Vgl ook Van der Vyver 1985 *TRW* 16-17.

44 Coetsee 1984 *TRW* 10-11; kyk ook Van der Vyver 1985 *TRW* 14 se kommentaar hierop.

45 Die gemelde botsing of stryd spruit uit die werklike of vermeende aanwesigheid van een of meer van die volgende faktore voort: onversoenbare aansprake op en/of belange by 'n relatief beperkte leefruimte en relatief skaars lewensmiddele; onderling uitsluitende aansprake op mag en status; die najaag van uiteenlopende oogmerke of die aanwending van uiteenlopende middele ter bereiking van dieselfde oogmerke, en uiteenlopende benaderings tot of persepsies van selfverwerkliking, selfbehoud en selfgelding of, oor die algemeen, die lei van 'n sinvolle lewe. Kyk Du Plessis *Regulator and/or manager* 7-8.

46 Coser "Conflict: social aspects" (in Sills (red) *International encyclopedia of the social sciences III* (1968)) 232.

47 North "Conflict: political aspects" (in Sills (red) *International encyclopedia III* 226).

48 Du Plessis "Menseregte en konfliksituasies" 1979 *Koers* 339 veral 345-352.

die menseregte wat ek byvoorbeeld in paragraaf 3 hierbo in my sisteem opgeneem het, sou vir mense uit ander tydperke in die geskiedenis of tydgenote wat onder ander omstandighede as u en ek leef, dalk nie van soveel belang gewees het nie. Ons besondere omstandighede hier in Suid-Afrika noop tewens die beklemtoning van bepaalde menseregte wat in ander lande van minder belang sal wees.[49]

Die regsorde waarbinne menseregte geakkommodeer en beskerm moet word, is self ook dinamies in tweërlei sin: ten eerste word dit deur 'n wisselwerking van magte en in die besonder die korrelasie tussen beskermende norme aan die een kant en die status(-se) van subjekte aan die ander kant daargestel. In die tweede plek is dit self kultuur-histories bepaald – is dit, net soos menseregte self, van tyd tot tyd en van plek tot plek wisselend. Met die kultuurhistoriese lig tot my beskikking, meen ek dat 'n regsorde wat konflik optimaal reguleer en oordeelkundig kanaliseer sekere tipiese kenmerke vertoon. In hierdie kenmerke is ook bepaalde regs- en veral regspolitieke waardes beliggaam en hulle vervul die funksie van strategiepeilers by die opstel van 'n menseregtehandves.[50] Ek noem die voormelde kenmerke vervolgens kortliks – ek kan hulle ruimteonthalwe ongelukkig nie uitvoerig bespreek nie.[51]

4 1 Die uniekheid van al die verskillende fasette van menswees word erken en eerbiedig. Daar word dus nie gepoog om met behulp van die reg die samelewing tot in die fynste besonderhede te reguleer deur byvoorbeeld te probeer voorskryf wat "goeie" kuns, aanvaarbare wetenskap, die "regte" godsdiens, die beste sakebeginsels of die mees gepaste morele kode is nie. Die "basisiteit" of voorwaardekarakter van die reg word dus as't ware "toegelaat" om die geldingsterrein van regsnorme prinsipieel en fundamenteel te beperk.

4 2 Daar word gesaghebbend vir die akkommodasie van 'n verskeidenheid struktureel eiesoortige menslike samelewingsinstellings voorsiening gemaak deurdat die gesag en vryheid van elke instelling om self sy eie sake te reël en sy eie belange in die verwerkliking van sy eie unieke bestaansdoel te behartig, erken, eerbiedig en beskerm word. Dit beteken dat die *de facto* magtige staat wie se funksie dit is om 'n regsorde in stand te hou, nie die

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49 Of bv die regte op vrye deelname aan en gelyke toegang tot die politieke proses, die reg om vryelik aan politieke partyvorming deel te neem en die reg op kollektiewe bedinging in arbeidsverband vir 'n Middeleeuer van soveel belang sou wees soos vir die tipies twintigste eeuse Westerling, is te betwyfel. Iemand wat in 'n stamverband leef sal weer verbaas wees om te verneem dat hy 'n reg op vrye beweging en op keuse van woon- en werkplek het en dat hy vryelik met mense en groepe van sy keuse kan assosieer. En les bes is dit tipies Suid-Afrikaans om taal- en kultuurregte prominent te beklemtoon.

50 Die tersaaklike kenmerke self sowel as die waardes wat hulle beliggaam, is eweneens tydgebonde. My siening daaroor is sterk deur die regstradisie waarin ek geskool is bepaal. Wanneer 'n menseregtehandves vir Suid-Afrika opgestel moet word, hoef hierdie kenmerke nie noodwendig die enigste deurslaggewende rigtingpeilers te wees nie. As gevolg van die historiese feitelikheid van sterk Westerse elemente in ons samelewing, meen ek egter ook dat hulle nie somaar so geheel en al oorboord gegooi kan word nie.

51 Vir 'n volledige bespreking kyk Du Plessis *Regulator and/or manager* 82-93. Hierdie kenmerke word ook in RGN *Suid-Afrikaanse samelewing* 137-8 gebruik as "fundamentele waardes" waaraan 'n regstelsel getoets kan word.

"eie sake" van nie-staatlike instansies behoort te probeer monopoliseer of inpalm nie. Ook behoort die staat nie hierdie samelewingsinstellings se sake vir en namens hulle te bestuur of vir hulle voor te skryf hoe om dit te bestuur nie.

Die staat se taak is wesenlik om die juridiese kompetensiesfere sowel as die regte en verpligtinge van samelewingsinstellings teenoor mekaar en teenoor individuele regsonderdane amptelik af te grens, en om geskille wat daar ten aansien van hierdie afgrensing ontstaan, gesaghebbend te besleg.

4 3 Die regsorde laat ruimte vir die individualiserende toepassing van regsnorme in elke unieke, konkrete situasie. Dit is met ander woorde billik. Wetstoepassers (dit wil sê regsprekers en amptenare van die uitvoerende gesag) beskik bygevolg oor die diskresie om dit wat die reg (nie net na die letter nie maar ook na gees en strekking) vereis, behoorlik met die eise van die konkrete situasie te korreleer.

4 4 Blote formalismes word vermy. Dit beteken gewoon dat die uiterlike vorm van regsnorme en ander regsfigure nie oor hulle inhoud die botoon voer nie.

4 5 'n Regverdige regsorde diskrimineer nie. Hieroor het ek voorheen, in 'n ander verband, reeds genoeg gesê. (Kyk paragraaf 3 hierbo.)

4 6 Regsnorme geld met sekerheid en kan in beginsel deur almal geken word op wie hulle van toepassing is. Die reg op regsverteenwoordiging, synde 'n reg van toegang tot kundige advies, vloei uit hierdie behoefte aan regsekerheid voort.

4 7 Burger sowel as owerheid (en insonderheid owerheidspersone en -instansies) eerbiedig die verskillende prosedures en regsmiddele waarvoor die reg(-sorde) voorsiening maak – dit is, samevattend, die "weg van die reg" – en regskanale is dermate "oop" en die regsweg dermate toeganklik dat hulle inderdaad eerbied afdwing. Regskanale word voorsien en die regsweg word in stand gehou mede omdat die reg as "geleier" en reguleerder van konflik in die samelewing funksioneer.[52]

Die voormelde *legaliteit* van 'n regsorde en sy instellings hang nou saam met hulle *legitimiteit*, dit is "hulle *de facto* reg" om op sterkte van die erkenning en aanvaarding wat hulle geniet, gesaghebbend te geld. In praktyk bestaan die legitimiteit van instellings gewoonlik uit die korrelasie tussen die

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52 Hierby moet die volgende in gedagte gehou word: "Legality draws on the subjects' as well as the authorities' reverence for the course of the law. Should political authorities themselves, therefore, not champion the cause of legality impeccably, the a-legal resistance of subjects will be explicable partly in terms of the a-legal exercise of power by the authorities, and from this follows a vicious circle: the authorities are threatened in their position of authority by the a-legal resistance of their subjects, more and more a-legal means are employed to suppress acts . . . of resistance, and these once again give rise to more and more resistance. Once sufficient (conflictual) pressure has thus mounted, a legal order can be destroyed" – Du Plessis *Regulator and/or manager* 90.

mate waarin die instellings hulle werklike funksies behoorlik vervul aan die een kant en die mate waarin subjekte bereid is om hulle te aanvaar en eerbiedig aan die ander kant. Die ideaal is dat hierdie twee korrelate in 'n min of meer "spontane harmonie" moet wees.

4 8 Daar word vir die onpartydige beregting van geskille deur onafhanklike gesagsinstellings voorsiening gemaak.

5 SLOTPERSPEKTIEF: 'N MENSEREGTEHANDVES VIR SUID-AFRIKA?

Ek is bevrees dat daar geen louter of selfs oorwegend filosofiese antwoord bestaan op die vraag of Suid-Afrika binne die afsienbare toekoms 'n menseregtehandves kan of gaan hê nie. Enkele belangrike regswetenskaplike publikasies oor die afgelope byna dekade en 'n half het in 'n groot mate daartoe bygedra dat wie ook al bereid was om na die noodkrete uit verskillende oorde te luister, gaandeweg al hoe pynliker bewus geword het van die mate waarin menseregteskendings op grond van ras in die Suid-Afrikaanse regsorde verskans is.[53] Ons regstelsel is, in die mate wat dit op 'n rassegrondslag differensieer (en dit is steeds aansienlik) 'n skoolvoorbeeld van hoedat 'n stelsel wat daarop gerig is om menseregte te beskerm, nie moet lyk nie. Juriste wat in 'n mindere of meerdere mate oor die beskerming van menseregte begaan is, het hulle nog altyd oorwegend ten gunste van die aanvaarding van 'n verskanste en gesaghebbende menseregtehandves vir Suid-Afrika uitgespreek. Die meeste werklike kenners van tersaaklike probleme was deurentyd egter versigtig (en hoogstens matig) optimisties oor die impak wat die daarstel van 'n handves op die herstel van 'n regverdige regsorde in Suid-Afrika sal kan hê.

Ek wil my as pleitbesorger vir 'n handves in Suid-Afrika by die versigtige optimiste aansluit, wel wetende dat so 'n handves bloot een van die boustene in 'n regverdige bestel sal kan wees. As idealis glo ek dat 'n handves as opvoedingsinstrument by die minder dikvellige lede van die bevoorregte minderheidsgroep in ons land dalk 'n groter gevoeligheid kan kweek vir die regte van diegene wat al jarelank aan die ontvangkant van die stelsel staan. As 'n realis weet ek dat dit die dikvelliger lede van hierdie groep, wat die skending van die menseregte van hulle minderbevoorregte medeburgers as 'n godgegewe prerogatief en selfs plig beskou (het), in 'n mate tot stilstand kan ruk.

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53 Uit die vroeë sewentigerjare dateer Mathews se baanbrekerswerk, *Law, order and liberty in South Africa* (1971) en die miskien iewat minder streng akademiese (dog nie minder invloedryke nie) verslag van die regskommissie van die *Study project on Christianity in apartheid society* (Spro-cas) onder redaksie van Peter Randall en onder die titel *Law, justice and society* (1972). Uit die vroeë en middel sewentigerjare dateer Van der Vyver se *Juridiese sin*; *Beskerming* en *Seven lectures on human rights* (1976). Van groot betekenis uit die later sewentigerjare is Dugard se *Human rights and the South African legal order* (1978). Vanaf 22-26 Januarie 1979 is die First international conference on human rights in South Africa in Kaapstad gehou, die verrigtinge waarvan as Forsyth en Schiller (reds) *Human rights: the Cape Town conference* (1978) gepubliseer is, en uit hierdie konferensie het die stigting van Regslui vir menseregte voortgevloei, 'n juristeliggaam wat hom vir die beskerming van menseregte beywer en tans ook 'n eie tydskrif, die *South African journal on human rights*, uitgee.

Om te sê dat 'n mens die daarstel van 'n menseregtehandves vir Suid-Afrika steun is een saak; die vraag of die aanvaarding van 'n handves te midde van die groeiende spanning en konflik en haat in ons samelewing nog moontlik is, is weer iets heeltemal anders. Ek wil ten slotte vanuit 'n drietal perspektiewe aan hierdie moontlikheidsvraag aandag skenk: ek vra ten eerste of ons howe vir 'n handves gereed is; ten tweede vra ek of die daarstel van 'n handves polities haalbaar is, en ten slotte maak ek enkele opmerkings oor die strategie wat ek dink deur die voorstanders van 'n handves gevolg behoort te word.

Die gedagtes wat ek ter tafel lê, berus in 'n groot mate op my persoonlike waarnemings oor die afgelope aantal jare maar ook in die jongste tyd. Ek wil egter sonder huiwering vir u sê: ek sal glad nie omgee indien u my daarvan kan oortuig dat veral sommige van my waarnemings verkeerd is nie. Dit mag tewens selfs gerusstellend wees.

5 1 Kan en/of wil ons howe (en kom ons bepaal ons vir die huidige maar net by die hooggeregshof met sy verskillende afdelings) 'n menseregtehandves (behoorlik) hanteer? Dit is vir my moeilik om hierdie vraag kategories te beantwoord. Party regters het hulle al in die openbaar ten gunste van die aanvaarding van 'n menseregtehandves uitgespreek (en sommiges het hulle oproep by verskeie geleenthede herhaal) en ek is daarvan oortuig dat daar heelwat van hulle geleerde ampsbroers is wat hierdie gedagte in stilte steun. Die meerderheidsuitspraak in *S v Marwane*[54] het voorts by my die met eerbied tereg beskeie vertroue gewek dat ons howe sal weet hoe om 'n menseregteakte gesaghebbend en vreesloos te implementeer. Ek het egter steeds bepaalde reserwes wat nie op dit wat tans onvoorspelbaar is aan (moontlike) regterlike reaksie betrekking het nie, maar juis op dit wat ek verseker weet, naamlik dat ons howe 'n baie (selfs gevaarlik) verouderde (selfs primitiewe) wetsuitlegteorie aanhang, en dat die soort konstruktiewe en kreatiewe benadering wat tot die uitleg van 'n handves gevolg behoort te word, in terme van ons howe se basiese benadering feitlik onmoontlik is.

In 'n neutedop saamgevat kom die huidige benadering daarop neer dat die hof aan die gewone betekenis van die woorde van 'n wetsbepaling (dit wil sê hulle "plain meaning") gevolg moet gee, tensy dit tot die een of ander absurditeit sal lei of tensy die betekenis van die woorde onduidelik of die woorde self dubbelsinnig is. Dikwels word hieraan toegevoeg dat die bedoeling van die wetgewer (altyd) in die duidelike en ondubbelsinnige woorde van 'n wet te ontdek is en dat die uitleg van 'n wet (eweneens altyd) in gevolggewing aan die gemelde bedoeling in finale vervulling gaan. In feite kom dit daarop neer dat letterknegtig (of ten minste dan woordknegtig) geïnterpreteer moet word, behalwe in gevalle waar 'n wet swak geskryf is en 'n soektog na die bedoeling van die wetgewer op tou gesit moet word – dan mag die hof konstruktief interpreteer! Vir die feit dat die betekenis van 'n wet nie alleen in die kinkels van sy eie komplekse struktuur nie maar ook in sy geskiedenis, in sy verhouding tot ander regsnorme en in sy deel wees van en aangewesenheid op 'n heel komplekse regsorde met 'n eie waardesisteem skuilhou, bestaan daar bloedweinig begrip. Dat interpretasie as 'n dinamiese,

54 1982 3 SA 717 (A); kyk ook *Smith v Attorney-General, Bophuthatswana* 1984 1 SA 182 (B).

historiese gegewe wesenlik kreatief is, is vir vele van ons wetsuitleggers ondenkbaar.

Selfs in die meerderheidsuitspraak in die *Marwane*-saak is nog volop blyke van steun vir die tradisionele uitlegbenadering van ons howe te bespeur.[55] Een van die positiefste fasette van die meerderheidsuitspraak is tewens juis dat die uitgesproke steun vir ons howe se tradisionele uitlegbenadering wat daarin voorkom, gegewe die uiteindelike resultaat waartoe die meerderheid geraak, gelukkig net lippediens is. Die konsekwenter navolging van 'n meer letterknegtige benadering soos wat dit in die minderheidsuitspraak voorkom – en tot sy logiese konsekwensies gevoer word – is meer in pas met die aanvaarde regterlike benadering tot wetsuitleg in Suid-Afrika. In hierdie sin is die minderheidsuitspraak die korrekte.

Ek is bevrees dat 'n mens 'n verkeerde uitlegteorie nie met behulp van byvoorbeeld wetgewing kan regdokter nie. Akademici sal maar net eenvoudig moet inklim en alternatiewe uitlegteorieë onder diegene wat saak maak se neuse moet vryf. Die daarstel van 'n verskanste menseregtehandves en die verlening van 'n toetsingskompetensie aan die hooggeregshof sal myns insiens ook tot 'n ondermyning van die tradisionele "grammofoonfunksie" van ons howe bydra, en gevolglik 'n al hoe groter vrymoedigheid by ons regsprekers wek om konstruktief en kreatief te interpreteer.

5 2 Is die ideaal van 'n menseregtehandves polities haalbaar? Hierdie vraag is nog moeiliker om te beantwoord. 'n Mens het stadigaan begin gewoond raak aan die regs-reaksionêre politieke besware wat veral die huidige politieke maghebbers teen die daarstel van 'n menseregtehandves inbring.[56] Namate die regering van die dag egter tekens begin toon het dat hy voor die politieke druk tot magsdeling swig, het die hoop weer begin opvlam dat in 'n klimaat van "wegdoen met die eksklusiewe politieke mag van slegs een groep" daar dalk ook groter belangstelling in 'n handves mag begin posvat. Die voorrede tot die 1983-Grondwet is myns insiens tewens 'n baie beskeie eksperiment met so 'n ietsie van die soort materiaal wat 'n mens in 'n handves sou kon opneem.

Intussen het die handveskwessie egter 'n erg kompliserende dimensie bygekry, deurdat daar nou ook van links-radikale kant ernstige besware teen die daarstel van 'n handves geopper word. Daar is oor hierdie standpunt nog nie veel gepubliseer nie, maar as ek die besware reg verstaan, kom dit daarop neer dat die aanvaarding van 'n handves die onderdruktes die geleentheid tot 'n outentieke bevrydingstryd (wat, na dit my wil voorkom, in kru-naïewe Marxistiese terme verstaan word) sal ontneem. Die "bevryders" wil met ander woorde hulle bevrydingstryd ("liberation struggle") nie in 'n blote burgerregtestryd ("civil rights struggle") laat ontaard nie. Bowendien word aangevoer dat in 'n nuwe, sosialistiese Suid-Afrika daar geen behoefte aan 'n *bill of rights* vir die beskerming van die regte van sy burgers sal wees nie, want die een kameraad sal die ander beskerm! Dat hierdie uiters naïewe geloof wreed tot 'n einde geruk sal word deur die feit dat slegs sommige van die kamerade uiteindelik politieke mag sal hê, word tans kennelik nie voorsien nie.

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55 Kyk bv 749 veral D-F.

56 Vgl bv die *Tweede verslag van die grondwetkomitee* 71-8 en Coetsee 1984 *TRW* wat hierdie besware saamvat en probeer verduidelik.

Myns insiens bly dit die taak van die nugter juris om te midde van hierdie uiterste standpunte wat so kenmerkend van die snel toenemende polarisasie in ons land is, beredeneerd die beskerming en bevordering van die regte van alle mense in ons samelewing op die grondslag van optimale geregtigheid te bepleit. En as heethoof utopiste (of hulle nou revolusionêr of reaksionêr is) dan die fondamente van wat 'n ordelike samelewing moes wees stukkend sal skop, sal daar altyd geleentheid vir koelkop juriste wees om, wanneer die ergste storm en (vernietigings-)drang uitgewoed is, met herstelwerk aan die ruïnes te begin . . . en desnoods ook die sement van 'n menseregtehandves daarvoor te gebruik. In hierdie lig dan my slotopmerkings oor strategie.

5 3 Watter strategie moet gevolg word ? 'n Afdoende antwoord op hierdie vraag kan uiteraard nie binne die bestek van enkele beknopte slotopmerkings gegee word nie. Ter wille van die gesprek wil ek egter tog enkele van my gedagtes met u deel. Vooraf moet ek dit duidelik stel dat wat ek ook al oor die moontlike aanvaarding van 'n menseregtehandves vir Suid-Afrika te sê het, in drie opsigte grondig gekwalifiseer is: eerstens wil ek herbeklemtoon dat ek nie 'n handves beskou as die towerstaf waarmee ons land in 'n japtrap sosio-polities reggedokter kan word nie: dit is nie dié alleroplossing van ons probleme nie, maar hoogstens deel van die oplossing.

In die tweede plek pleit ek nie vir 'n handves in my hoedanigheid as 'n bevoorregte witman wat glo dat die dag van afrekening naderkom en dat die grusame effek van die afrekeningsproses daarom met allerlei konstitusionele foefies versag moet probeer word nie. Indien so 'n bedenklike motief by witmense swartmense in Suid-Afrika tot teenstand teen die gedagte van 'n handves noop, dan het ek begrip vir daardie teenstand en wil ek my daarmee vereenselwig. Ons moet egter ook oppas dat ons nie die kind van 'n verdienstelike konstitusionele geregtigheidsmiddel saam met die badwater van verkeerde motiewe uitgooi nie. Ek pleit vir die daarstel van 'n handves wat vir almal groter geregtigheid kan verseker, en indien ons uiteindelik 'n handves sou kry waarby die tans minderbevoorregtes in ons samelewing nie meer as die tans bevoorregtes baat nie, sal ons maar net eenvoudig moet teruggaan na die tekenbord toe, want 'n handves moet daarop gemik wees om die huidige onreg in ons samelewing te help opruim en huidig veronregtes in 'n posisie te help stel waar hulle agterstande kan inhaal. Laat ek dit ronduit in terme van eensydige en oorvereenvoudigde tipiese Suid-Afrikaanse kategoriseringe so stel: 'n menseregtehandves wat nie van die witman meer opofferinge as van die swartman sal verg nie, sal nie die moeite werd wees nie.

In die derde plek bepleit ek 'n menseregtehandves vir 'n genormaliseerde Suid-Afrika en nie as lapwerk op die skeure van 'n abnormale, rasaristokratiese samelewing nie. In die besonder het ek 'n Suid-Afrika in gedagte waarin almal, afgesien van ras of kleur, volle politieke regte en medeseggenskap geniet. Ek dink dus ook in terme van 'n Suid-Afrika met 'n meerderheidsregering wat ek, omdat ek 'n broertjie dood het aan alle vorme van rassisme, nie 'n swart meerderheidsregering wil noem nie. Ek aanvaar egter dat omdat die bevolkingsmeerderheid in Suid-Afrika swart is, die meerderheid mense in die regering ook swart sal wees.

Die strategie wat ek voorstel staan op twee bene.

5 3 1 In die eerste plek stel ek voor dat ons doen presies wat ons by en met hierdie simposium doen: ons moet 'n bewusmakings- en inligtingsprogram op dreef kry. Privaatinisiatief moet hierin deurslaggewend wees, en ons moet van soveel moontlik kanale gebruik maak om die saak vir 'n handves, tydig en (indien nodig ook) ontydig te stel. Ek dink tewens dat baie van die teenstand teen die handvesgedagte op onkunde oor die werklike aard en werking van *bills of rights* berus. Ek sal daarom ook wil sien dat die werk van hierdie simposium op die een of ander wyse voortgesit sal word.

5 3 2 Op 'n breër nasionale vlak meen ek dat die handveskwessie baie hoog op die agenda vir politieke onderhandeling oor die toekoms van ons land moet staan. By hierdie onderhandelinge moet alle politieke belangegroepe in Suid-Afrika betrek word, ook dié wat tans (soos dit soms genoem word) "in ballingskap" verkeer. Indien tydens die onderhandelinge op die inhoud van so 'n handves ooreengekom word, sal dit myns insiens alreeds as aansienlike vordering aangemerk kan word, aangesien sodanige konsensus ook as 'n basisafspraak oor fundamentele waardes vir die inrigting van 'n nuwe staatsbestel beskou sal kan word. Om presies hierdie rede meen ek dat veral juriste aanvanklik nie onnodig sterk op 'n klinies-tegniese presiesheid van formuleringe moet aandring nie – dít sê ek natuurlik in die veronderstelling en in die hoop dat ons howe toenemend bereid sal wees om wette (en veral konstitusionele wetgewing) konstruktiewer en kreatiewer as tans te interpreteer.

U mag vir my sê dat ek naïef is om in die huidige politieke klimaat in ons land sommer so sito-sito oor sulke ingrypende politieke onderhandelinge te praat. Ek dink egter dat veral juriste hardnekkig moet bly vasklou aan die geloof dat onderhandeling altyd moontlik is en dat dit in ieder geval altyd die moeite werd is om 'n geskil daadkragtig vreedsaam eerder as kragdagig stydlustig te probeer oplos. Immers: ons opleiding en agtergrond bekwaam ons om reg en geregtigheid op die markpleine van ons woelige samelewing te verkondig – nie om lyke op straat te tel nie.

3 Changing attitudes towards a bill of rights in South Africa

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Mr Chairman, thank you for inviting me to participate in this conference. I must confess that I did not expect that I would ever be invited to take part in a conference on a bill of rights hosted by the University of Pretoria. This is in itself evidence of a change in attitude towards a bill of rights – which is the title of my talk today. That the University of Pretoria has taken the initiative in calling such a meeting is to its credit and a matter of congratulation.

Today I shall examine changing attitudes towards a bill of rights in South Africa in historical context not for reasons of historical curiosity, but for the purpose of stressing the urgency for the adoption of a bill of rights. Indeed I fear that if a bill of rights is not incorporated into our constitution within the next two or three years we can forget about it and resign ourselves to a struggle for power in which individual rights and the supremacy of law become luxuries which even idealists will be forced to abandon. We stand on the verge of cataclysmic change. Naively, I still believe that the law and legal institutions can guide the political decision-makers towards a just solution; and provide the framework for an environment of negotiation. But I am not so naive as to believe that time is on the side of the negotiators and peacemakers. I see a growing lack of confidence in the courts and legal institutions in the black community as they realize the extent to which law has been manipulated by the present government and as they see law and legal institutions as instruments of National party oppression.[1] If confidence is to be restored in the law as an instrument of justice and as a method of conflict resolution it will have to be done without delay. And, quite frankly, I do not see how it can be done without a bill of rights. It is in this spirit that I address you today.

1 HISTORICAL OVERVIEW OF THE BILL OF RIGHTS DEBATE IN SOUTH AFRICA

1 1 The period before 1945

Roman-Dutch law has its roots in the enlightened liberal jurisprudence of Grotius and his successors who were guided by the tenets of natural law.[2]

1 Lawyers, and particularly judges, have generally refrained from recognizing this truth. Recently, however, Mr Justice HC Nicholas, a former judge of appeal, expressed great concern that the courts were now seen as instruments of oppressive social policies by a large portion of the population – graduation address, university of the Witwatersrand, 17 April 1986 (*The Citizen*, 18 April 1986).

2 Sir John Wessels *History of the Roman Dutch Law* (1908) 291-3.

It would have been logical for this tradition to produce a legal order in South Africa premised on the rights of man and judicial review, as happened in the United States where adherence to the natural law philosophy led to a bill of rights protected by the judiciary.[3] Indeed, we find traces of this natural law tradition in the 1854 constitution of the Orange Free State, which guaranteed certain rights and recognized the competence of the courts to review enactments of the Volksraad,[4] and in the famous decision of the high court of the Transvaal in *Brown v Leyds NO*[5] in 1896 in which Kotzé CJ upheld the judicial testing power.

But there were other more powerful forces and traditions at work in Southern Africa which ensured that the 1910 constitution of the Union of South Africa made no attempt to include a bill of rights and instead confined itself to the protection of the Cape franchise and equal language rights.[6] First, there was the pervasive influence of English constitutionalism which regarded constitutional guarantees as unnecessary. Smuts and Merriman, the two men most responsible for the 1910 constitution were so devoted to the Westminster tradition that they refused to look beyond it to the needs of South Africa.[7] Secondly, there was the memory of Kotze CJ's exercise of the testing power in *Brown v Leyds NO* which had precipitated a major political crisis and resulted in president Kruger labelling the testing power as a "principle of the devil" which the devil had introduced into paradise to test God's word.[8] Thirdly, there was already a distinct distrust of the American constitutional model which was blamed for the civil war and seen to raise the expectations of blacks.[9] Fourthly, notions of equality and humanism, the necessary inspiration for a bill of rights, were sadly lacking in South Africa as a result of the infusion of Austinian positivism, crude Calvinism and naked racism into the body politic.

There was no hope for a bill of rights in 1910. Thereafter, until the second world war, there was little interest in this subject as the "Boer versus Brit" struggle dominated South African public life and the lack of rights of the black majority drew little attention. The international climate endorsed this mood: colonialism, in which the suppression of liberty played a central role, was widely accepted and practised, and the rise of the dictators in Europe left no time for the consideration of racial justice in Africa.

1 2 The period 1945 – 1983

The end of World War II heralded in a new era in which race discrimination and the suppression of personal freedom could no longer be tolerated as matters of exclusive domestic concern. The charter of the United Nations, unlike

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3 Corwin *The higher law background of American constitutional law* (1955); Howard *The road from Runnymede: Magna Carta and constitutionalism in America* (1968).

4 See *S v Gibson* 1898 *Cape Law Journal* 1; *Cassim and Solomon v The State* 1892 *Cape Law Journal* 58; Thompson "Constitutionalism in the South African republics" 1954 *Butterworths SA Law Review* 49.

5 (1897) 4 Off Rep 17.

6 Ss 35, 137 and 152.

7 Thompson *The unification of South Africa 1902-1910* (1960) 95-7.

8 Sir John Kotzé *Memoirs and reminiscences* (1949) xli-xlii.

9 Thompson *supra* 103-5, 187. See, too, the extraordinary attack on the American constitution by Alfred Lyttelton, ex-secretary of state for the colonies, in the British parliamentary debate on the 1910 constitution: *Parliamentary debates*, 5th series, ix, cols 966-7 (16 August 1909).

the covenant of the League of Nations, proclaimed the internationalization of human rights[10] and in 1948 the general assembly adopted the universal declaration of human rights. Progressive forces were now on the move: the United States abandoned segregation in 1954;[11] West Germany, India and other states adopted bills of rights; the European convention on human rights extended liberties backed by new methods of international enforcement to millions of Europeans; international covenants on human rights were adopted; and the imperial powers set about dismantling their colonial empires.

While the world advanced in terms of human rights, South Africa retreated into the policy of apartheid which invoked the law and legal institutions to promote racial discrimination and political repression. Liberal forces in South Africa were obliged to concentrate their resources on the preservation of the few rights recognized by the constitution – the entrenched clauses. A bill of rights seemed an unattainable goal as a ruthless government set about destroying constitutional safeguards, repealing common-law rights and emasculating the courts.[12]

In the wake of the constitutional crisis, however, interest in a bill of rights was revived by the Molteno commission of enquiry established by the newly formed Progressive party. This commission, comprising a group of eminent lawyers (including ex-chief justice Centlivres), academics and public figures found that a sovereign parliament was inappropriate to South Africa and recommended a bill of rights, protected by judicial review in a federation.[13] These recommendations were approved by the Progressive party with the result that the advocacy of a bill of rights and judicial review for the first time became an important part of the political debate in South Africa. This new vision spread to the legal profession too as scholars expounded on the advantages of the American model.[14]

In 1961 attempts by the Progressive party and the Natal provincial council to have a bill of rights included in the republican constitution of 1961 failed dismally.[15] The ruling National party government was not interested in rights and liberties except for the chosen few. Thereafter South Africa entered its bleakest period – the Vorster era. First as Minister of Justice and Police, and then as Prime Minister, John Vorster succeeded in transforming South Africa into a police state. I know that this is a harsh term to use but when one looks back at the Vorster years, it seems fair to describe South Africa of the 1960s and 1970s under Vorster as a police state. In any event, it was not a time for serious advocacy of a bill of rights as organizations and individuals were banned, dissidents detained and tortured and freedom of speech curtailed by a network of laws and police practice. For many political figures survival became the main objective.

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10 Articles 55 and 56.
11 *Brown v Board of Education* 347 US 483 (1954).
12 See further on the "constitutional crisis" Dugard *Human rights and the South African legal order* (1978), ch 2.
13 Molteno commission report on *Franchise proposals and constitutional safeguards* (1960).
14 See eg Cowen *The foundations of freedom* (1961).
15 Dugard *supra* n 12 at 34.

In the 1970s a number of factors gave rise to a new interest in the legal protection of individual liberties. These included:

(a) The overdue realization, particularly among lawyers, that the constitutions of 1910 and 1961 had facilitated the suppression of personal freedom and furthered racial injustice.

(b) The increased support for the Progressive party (now Progressive Federal party), which is committed to a bill of rights, in the 1974 general election.

(c) The growth of the international human rights movement.

(d) The new interest in bills of rights in Commonwealth countries, notably Canada, which had previously followed the Westminster model of parliamentary supremacy.

(e) The growth in cultural and professional relations with the United States, which resulted in an increased awareness of the American constitutional system.

(f) The National party government's support for a bill of rights in Namibia,[16] despite its opposition to such an institution in South Africa itself.

(g) Bophuthatswana's adoption of a bill of rights when it became independent in 1977.

(h) A new awareness of the judicial function which went some way towards exploding the hitherto carefully exploited myth that South African judges simply "declared" the law. Studies showing that during the 1960s South African judges had frequently exercised a substantial judicial choice in favour of the government[17] made lawyers realize that the complete depoliticisation of the judiciary was impossible under the existing system. This helped to debunk the charge that the introduction of a bill of rights and judicial review would politicize a hitherto neutral judiciary.

1 3 The 1983 constitution

The 1983 constitution was preceded by lengthy political debate, which included substantial support for a bill of rights. The PFP remained committed to a bill of rights and judicial review, but it now enjoyed the open support of a number of judges – including one judge of appeal (Corbett JA)[18] – and Afrikaans jurists[19] – including the head of constitutional planning in the newly created Department of Constitutional Development and Planning (Professor IM Rautenbach).[20]

In these circumstances one might have expected serious attention to be given to the inclusion in the new constitution of an entrenched bill of rights or, at least, an unentrenched bill of rights along the lines of the Canadian bill of rights of 1960. But it was not to be. In 1982 the constitutional committee of the President's Council published a report characterized by ignorance and prejudice, which showed quite clearly that the National party had not changed its attitude towards individual rights and equality before the law. A bill of

16 See Boulle "The Turnhalle testimony" 1978 *SALJ* 49.
17 See Dugard *supra* n 12 part 4.
18 "Human rights: the road ahead" 1979 *SALJ* 192.
19 See Van der Vyver *Die beskerming van menseregte in Suid Afrika* (1975).
20 *'n Nuwe grondwetlike bedeling in Suid Afrika* Jacobs ed (1981) 51.

rights was rejected primarily because it emphasized individual rights "whereas particularly the Afrikaner with his Calvinist background is more inclined to place the emphasis on the State and the maintenance of the State".[21] Thus the constitution bill presented to parliament contained no guarantees for personal liberty and a PFP proposal that a bill of rights be included in the constitution was firmly rejected by the government.[22]

2 CURRENT ATTITUDES TOWARDS A BILL OF RIGHTS

A bill of rights and apartheid or separate development (however one chooses to describe our presently racially structured society) are completely incompatible with each other. Central to any bill of rights would be a provision guaranteeing the equal allocation of basic rights without any distinction based on race, gender, religion or political opinion. Furthermore, a bill of rights would of necessity outlaw torture, detention without trial and unreasonable restraints on freedom of political expression. This means that one cannot seriously contemplate the introduction of a bill of rights unless one is prepared to accept the total abolition of the apartheid legal order and the repeal of many of the provisions of the Internal Security Act.[23]

The unwillingness of the government to consider a bill of rights flows directly from its continued adherence to the laws of apartheid. In his opening address to parliament in 1986 the state president committed himself to the sovereignty of the law as a basis for the protection of human rights regardless of colour.[24] But this rhetoric does not completely accord with reality; for there is no suggestion that the Group Areas Act, the Population Registration Act and a host of other discriminatory and repressive laws are to be repealed despite the great advance inherent in the promised abolition of the pass laws. In short, the government still has a long way to go before it can be expected to endorse a bill of rights.

There are more hopeful signs among the judiciary. The courts have adopted a benevolent approach towards race and security laws in recent times and in *S v Marwane*[25] the appellate division demonstrated its ability to utilize a bill of rights when it set aside the Terrorism Act[26] as incompatible with the Bophuthatswana bill of rights. Individual judges have also been willing to commit themselves in favour of a bill of rights. At least Corbett JA,[27] Milne JP,[28] Leon J[29] and Didcott J[30] have given their public support to this

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21 *Second report of the constitutional committee of the president's council* PC4/1982 ch 9 para 9 10. This report was later endorsed by the Minister of Justice in "Hoekom nie 'n verklaring van menseregte nie?" 1984 *Journal of Juridical Science* 5. For a criticism of the report see Van der Vyver "The bill-of-rights issue" 1985 10 *Journal of Juridical Science* 1.

22 *House of assembly debates* vol 108 cols 11181-494 (15-17 August 1983).

23 Act 74 of 1982.

24 *The Star* 31 January 1986.

25 1982 3 SA 717 (A).

26 Act 83 of 1967.

27 "Human rights: the road ahead" 1979 *SALJ* 192 at 196.

28 Interview reported by Kenneth Jost in *The law in South Africa* (reprinted from *The Los Angeles Daily Journal* (1986) 21.

29 "A Bill of Rights for South Africa" 1986 *SA Journal on Human Rights* 60.

30 *The Star* 23 June 1980; *Sunday Tribune* 29 June 1980.

cause. However, it is clear that many other judges do not share this view and from recent press interviews it seems that Rabie CJ[31] and Munnik JP[32] still prefer the *status quo*.

I know of no study of lawyers' attitudes towards a bill of rights, but the growing concern of the general council of the Bar and the Association of Law Societies for human rights and the establishment of Lawyers for Human Rights in 1980 point towards a concern for the need for legal safeguards for individual liberties. Academics too seem to be moving in this direction.

Among political parties, the PFP is still committed to a bill of rights, although the Labour party in the house of representatives and both the National Peoples party and Solidarity in the house of delegates support this cause. The final form – if any – of the "Natal/KwaZulu option" is still far off but there is a reasonable prospect that any such political dispensation will include a bill of rights as the Buthelezi commission report of 1982 envisaged such an institution.[33]

While support is growing for a bill of rights in the centre of the political spectrum there is no doubt that "the left" – if one may be permitted to use such a term – is rapidly losing its enthusiasm for legal safeguards for individual rights. The attitude of the ANC towards a bill of rights is unknown as since 1960 its voice has been silenced in South Africa. Arguably the endorsement of constitutional safeguards for individual liberty is inherent in the freedom charter of 1955, which was in part inspired by the universal declaration of human rights of 1948,[34] but the United Democratic Front which, like the ANC, views the freedom charter as its political foundation, has refused to be drawn into constitutional planning and thus to express its policy towards a bill of rights. That such an institution does not rank high among the priorities of "the left" was made clear at a recent conference held at the university of Cape Town. Dr Van Zyl Slabbert said that pleas for a bill of rights were unrealistic until there had been a genuine sharing of power, while Professor Denis Davis stated that if a bill of rights were imposed now it would be within a framework which most South Africans considered to be illegal and be seen to be a veto power for whites and thus have no legitimacy.[35]

In Alan Paton's *Cry, the Beloved Country* the Reverend Msimangu said that he had one great fear in his heart, that one day when whites turned to loving they would find that blacks had turned to hating. I fear this is the fate of race relations in this country and that it is also the fate of the bill of rights.

For years blacks have pleaded for the legal protection of human rights. Now that many whites, and possibly even the National party government, are more sympathetic towards a bill of rights, blacks, who increasingly see power round the corner, appear to be reluctant to accept an instrument perceived to be a method of protecting whites or Afrikaners who see themselves

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31 *Supra* n 28 at 20.
32 *Ibid* at 21.
33 *Report of the Buthelezi commission on the requirements for stability and development in KwaZulu and Natal* (1982) vol 1 114.
34 Marcus *The freedom charter: a blueprint for a democratic South Africa* (1985) 38.
35 *The Star* 14 April 1986.

as a potentially threatened minority. Those who have suffered long *outside* the protection of the law are now unwilling to see their oppressors brought *within* the protection of the law.

This development emphasizes the need for the rapid introduction of a bill of rights; that is for its introduction while whites are still in power and acting from a position of strength rather than one of weakness. The black community, which has already lost much of its confidence in our legal system, must see the introduction of a bill of rights as a change of heart towards human rights on the part of the ruling Afrikaner élite and not as an attempt to protect an endangered species.

Realistically, if a bill of rights with judicial review is to be introduced within the next two or three years, it would be limited to guaranteeing equality before the law, and to protecting individual liberties, such as the freedoms of person, movement, speech, association and assembly. It would not attempt to deal with the franchise and the introduction of economic justice. Thus it is no immediate cure for our problems but simply a means to an end.

Ideally, I would like to see a bill of rights guaranteeing a universal franchise and securing economic and social rights enacted by a fully representative assembly of the people, as part of a new political order. But I fear this dream is still far off. This is why I plea for an interim strategy with a more modest bill of rights enacted within the prevailing order. Briefly, such a bill of rights would achieve the following objectives:

(a) By guaranteeing freedom of association (and hence the unbanning of the ANC), assembly and speech it would create the necessary political environment for negotiation.

(b) By guaranteeing equality before the law it would empower the courts to set aside all discriminatory laws. Politically it may be easier for the courts rather than the government to invalidate measures such as the Group Areas Act. Certainly the experience of the United States tends to support such a view as it is clear that Congress could not – politically – have desegregated schools in 1954, as did the supreme court in *Brown v Board of Education*.[36]

(c) It would help to restore respect for our law and legal institutions at a time when they are fast falling into disrepute. Law must be seen as an objective instrument of justice and not simply as the weapon of the ruling élite. A bill of rights guaranteeing universally acclaimed fundamental rights might help to salvage the harm done by years of apartheid laws.

I repeat that there is an urgency in this matter. We meet here as lawyers concerned about our legal system and as South Africans concerned about our country. In both capacities I believe that we have an interest in a bill of rights.

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36 *Supra.*

4 Menseregte-aktes: 'n vergelykende oorsig

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SUMMARY

Almost every one of the world's more or less 150 independent states has a written constitution with human rights provisions. A mere examination of constitutional texts does, however, not provide a reliable yardstick with which "human rights practices" can be measured. Human rights provisions cannot be separated from the ideological assumptions upon which they are based and the socio-political conditions under which they are applied.

The USA provides the best example of a dynamic legal application of the human rights concept with well-developed human rights doctrines and institutions to protect such rights. The "legal" history of the American bill of rights is, however, a social, economic and political history of that country, underscoring the fact that the same condition of human rights cannot readily be achieved by a more or less technical reproduction of constitutional provisions and instruments elsewhere.

Although the written constitutions of most West-European states have contained human rights provisions since the nineteenth century, the provisions have not had the same impact as in the USA – judicial review is a post second world war phenomenon with a somewhat narrower application. Notable features of the human rights scene in Western Europe are firstly the impact of the European convention on human rights and freedoms on the legal systems of its signatories; and secondly the explicit constitutional reference to social, economic and cultural rights and the constant endeavours to strike a balance between positive state action required by these rights and non-interference guaranteed by virtue of the classical rights to, for example, privacy, freedom of speech, assembly and association.

Despite the fact that classical Marxism had little use for human rights, all communist constitutions contain extensive human rights provisions. Citizens' duties and social and economic rights feature prominently while state action with regard to these rights is readily extended to the rights to individual freedom as a strengthening of the "social dimensions" of these rights.

Almost all African independence constitutions contained bills of rights. Although judicial review (provided for in most former British colonies) was not a successful instrument to prevent human rights violations, human rights provisions have been retained in most post independence constitutions. The draft African charter on human and peoples' rights prepared by the OAU, embodies a collective African approach towards human rights which is clearly distinguishable from East European collectivism. It also contains the interesting concept of "peoples' rights", albeit with a rather uncertain content.

Human rights should and will most probably feature in some or other form in a new negotiated South African constitutional dispensation. Since bills of rights have generally not lived up to expectations outside Northern America and Western Europe, recommendations in this regard should go beyond mere suggestions that "there should be a bill of rights with judicial review". The concept of human rights covers the relationship between the individual and the state in all its manifestations and a human rights debate cannot be limited to, for example, judicial control of state interference

with individual liberty – the state's supportive role and the individual's participation in decision making are also relevant. Human rights systems differ in content and application and the major ideologies underlying them are heard in the present South African political debate. Everyone should be clear on the kind of bill of rights he proposes. This may reveal serious differences, but unless the contents of a South African bill of rights is based upon an agreement on how the acute political and socio-economic problems should be solved, South Africa would provide the world with yet another decorative and ineffective bill of rights.

1 INLEIDING

In 1776 is menseregtebepalings vir die eerste keer in 'n grondwet in die Noord-Amerikaanse staat Virginia verorden. Tweehonderd jaar daarna verklaar Louis Henkin in sy werk *The rights of man today:*[1]

> Today *human rights* is a term in common use in many languages, in the rhetoric of national politics everywhere and of international diplomacy, in the learned jargon of several professions and academic disciplines. All civilizations proclaim their dedication to them; all the major religions proudly lay claim to fathering them; every political leader and would-be leader makes them his platform. What the United States (borrowing from its English mother) and France planted and disseminated now decorates almost every constitution of today's 150 states – old or new, conservative or liberal or radical, capitalist or socialist or mixed, developed or less developed, or underdeveloped. Human rights are now also established in international law, are the subject of numerous treaties and conventions, and are the business of every foreign office and numerous intergovernmental bodies and non-governmental organizations. Even philosophers, if not all persuaded, have muted their agnosticism and moved their inquiries to less fundamental planes. Human rights, we must conclude, have now become for everyone, everywhere, a "good"; by some definitions, indeed, human rights are everything good in human life and society.

Die wêreld se nagenoeg 150 onafhanklike state het haas elkeen 'n geskrewe grondwet[2] en van hierdie grondwette is daar weinig waarin verwysings na die regte van die individu nie voorkom nie. Van Marseveen en Van der Tang het in 1976 bevind dat van die 157 grondwette wat hulle ondersoek het, 128 (90,1%) die spesifieke woorde "burgerlike, mense-, politieke, fundamentele, of individuele regte" of soortgelyke uitdrukkings bevat het.[3] Sekere grondwette bevat ander uitdrukkings byvoorbeeld "politieke vryhede" of "publieke regte".[4] In totaal was daar slegs ses grondwette (4,2%) sonder enige bepalings oor burgerlike regte en/of pligte.[5] In die algemeen kom hulle tot die gevolgtrekking:

> Constitutions could be said to have a bill of rights written into them and this also has a standard content, dealing most frequently with freedom of conscience and religion (89.5 pc) and thereafter with the right of assembly or association (88.7 pc),

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1 (1979) xii-xiii.

2 In die enkele state wat nie formele "grondwette" het nie, bv die Verenigde Koninkryk en Israel, bestaan daar òf wette wat vir alle praktiese doeleindes as grondwette beskou kan word (bv die sg Basic laws in Israel) òf goed gedokumenteerde gewoonteregsreëls met min of meer 'n vaste inhoud (die sg konvensies in die Verenigde Koninkryk – sien Marshall *Constitutional conventions* (1984)).

3 *Written constitutions – a computerized comparative study* (1978) 100.

4 101.

5 102.

defendants' rights (88.0 pc) and freedom of expression (87.3 pc). Subjects also dealt with but slightly less frequently are the right to property (83.1 pc), equality (82.4 pc) and the right to private life (80.4 pc).[6]

Die grondwette van 'n vyftiental kommunistiese state het in 1980 gesamentlik 353 artikels oor regte van die individu bevat; dit wissel vanaf drie bepalings in die grondwet van Kampuchea tot 51 in die grondwet van Joegoslawië.[7] Volgens Mahalu[8] was daar in 1984/1985 uit 46 Afrikastate[9] slegs nege state waarvan die grondwette geen verwysings na menseregte bevat het nie.

Vergelykende statistiese gegewens van hierdie aard is interessant, maar daar word algemeen aanvaar dat die waarde daarvan redelik beperk is.[10] Daar bestaan 'n hele aantal redes vir hierdie toedrag van sake:

(a) Alhoewel die formulering van die afsonderlike regte in verskillende grondwette dikwels dieselfde is, moet dit gelees en begryp word teen die agtergrond van die filosofiese opvattings van die opstellers daarvan.[11] Bepalings in die grondwette van die negentiende en vroeg-twintigste eeu weerspieël die rasionele humanisme en liberale regstaatopvattings van die agtiende en negentiende eeue; dié in byvoorbeeld die grondwet van Wes-Duitsland, die sosiale regstaatgedagtes van die twintigste eeu; terwyl bepalings in grondwette van kommunistiese stelsels nie los beoordeel kan word van die regsleer waarop

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6 161. Sien ook Boli-Bennet "Human rights or state expansion? Cross-national definitions of constitutional rights" in Nanda, Scarritt & Shepherd (reds) *Global human rights: public policies, comparative measures, and NGO strategies* (1981) 178 wat in 1970 bevind het dat in die 141 grondwette wat hy ondersoek het, 66% substantiewe bepalings bevat het oor die reg op vrye vergadering, 79% oor vryheid van spraak, 56% oor behoorlike regsprosedures, 78% oor stemreg en 40% oor sosiale en ekonomiese regte.

7 Die USSR (31), Albanië (28), Bulgarye (32), Volksrepubliek van China (16), Kuba (22), Tsjeggoslowakye (20), die Duitse Demokratiese Republiek (229), Hongarye (17), Kampuchea (3), Noord-Korea (24), Mongolië (14), Pole (27), Roemenië (25), Noord-Vietnam (21), Joegoslawië (51) – Simons (red) *The constitutions of the Communist world* (1980) 634. Aanhalings uit die betrokke grondwette in hierdie referaat is uit die Engelse vertaling daarvan in Simons.

8 "Africa and human rights" 12 *Verfassung und Recht in Übersee* 7-13.

9 Die Republiek van Suid-Afrika en die state wat voorheen deel gevorm het van die Republiek is nie daarby ingesluit nie.

10 Sien oa Simons xiv; Mahalu 14; Kunig "Regional protection of human rights" 12 *Verfassung und Recht in Übersee* 34. Safran "Civil liberties in democracies: constitutional norms, practices and problems of comparison" in Nanda *et al* 195 verklaar: "Political systems are frequently categorized as free, partly free, and unfree, based on the extent to which civil liberties exist within them. Such categorization is sometimes derived from a systematic examination of constitutional texts. There is a fair degree of consensus that constitutional provisions in English-speaking democracies, in the countries of Northern and Western Europe, in Japan, in Israel, and perhaps in some smaller Latin American states (eg, Costa Rica) reflect the reality of civil liberties to a significant degree. Conversely, it is understood that in many of the countries, civil rights provisions, if they are included in constitutions, are largely decorative or at best nominal – ie, they serve as a guide to possible future application."

11 Maritain *Man and the state* (1951) 79 verklaar: "On the level of rational interpretations, on the speculative or theoretical level, the question of the rights of man brings into play the whole system of moral and metaphysical (or anti-metaphysical) certainties to which each individual subscribes. As long as there is no unity of faith or unity of philosophy in the minds of men, the interpretations and justifications will be in mutual conflict."

dit gebaseer is nie.[12] Soms blyk die ideologiese grondslae wel uit die formulerings self. Artikel 50 van die 1977-grondwet van die USSR lui byvoorbeeld:

> In accordance with the interest of the people and in order *to strengthen and develop the socialist system,* citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meeting, street processions and demonstrations . . .[13]

Daarenteen word in artikel 18 van die Wes-Duitse grondwet bepaal dat wanneer onder andere die vryheid van meningsuiting, in besonder die persvryheid, die onderrigvryheid en vergaderingsvryheid in 'n stryd teen die *liberale demokratiese orde (freiheitliche demokratische Grundordnung)* misbruik word, hierdie regte verbeurd verklaar mag word.[14]

(b) Menseregtebepalings is nie slegs die produk van filosofiese uitgangspunte nie, maar ook van die besondere politieke en maatskaplike omstandighede waaronder dit gepositiveer is. Uit hierdie hoek verklaar Ritter byvoorbeeld dat die positivering van die regte in Noord-Amerika teen die einde van die agtiende eeu by uitstek beskou moet word as die konkrete resultaat van praktiese politieke strategie.[15] In 'n sleutelbydrae tot die menseregtedebat in Suid-Afrika het Schlemmer aangetoon dat daar 'n hele aantal noodsaaklike maatskaplike omstandighede is waaronder menseregte in die positiewe reg van die Westerse wêreld ontstaan en gehandhaaf word.[16] Geen "positiefregtelike" oorsig van grondwetlike menseregtebepalings kan heeltemal volledig wees indien dit nie beskou word teen die agtergrond van die staatkundige en sosio-ekonomiese omstandighede van die gemeenskappe waarin dit geld nie.

(c) Op die formele toepassingsvlak verskil die metodes waardeur die menseregtebepalings afgedwing kan word. Verskillende wetgewende, administratiewe of regsprekende liggame kan op 'n verskeidenheid van maniere betrek

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12 Sien in die alg *Human rights – comments and interpretations – a symposium edited by UNESCO* (1949) waarin bydraes opgeneem is soos dié van Lo "Human rights in the Chinese tradition" 186 ev; Kabir "Human rights: the Islamic tradition and the problems of the world today" 191 ev en Puntambekar "The Hindu concept of human rights" 195 ev.

13 My kursivering. Sien Henkin *Rights* 68.

14 'n Beslissing oor die verbeuring en die omvang daarvan berus by die *Bundesverfassungsgericht*. Sien in die alg hieroor Gallwass *Der Missbrauch von Grundrechten* (1967); Schmitt Glaeser *Missbrauch und Verwirkung von Grundrechten im politischen Meinungskampf* (1968). Die bepaling het tot dusver nog geen noemenswaardige rol in die praktyk gespeel nie.

15 "Ursprung und Wesen der Menschenrechte" (1958) in XI *Wege der Forschung* (1964) 215-7. Oestreich *Geschichte der Menscenrechte und Grundfreiheiten im Umriss* (1978) 58 verklaar: "Sie sind in ihrer letzten Fassung ein Ergebnis der Revolutionsgeschichte, in taktisch-propagandistischer Absicht als Mittel des Kamfes formuliert . . ."

16 "The social foundations of human rights: the problem of developing and rural societies" in Forsyth & Schiller (reds) *Human rights: the Cape Town conference* (1979) 33-45. Op 34 verklaar hy: "Human rights are part of what may be called 'democratic responsiveness' in a society; the type of interplay of forces and structures out of which an open franchise and the protection of civil liberties can emerge. There is a range of necessary conditions for the emergence of democratic responsiveness, suggested by the social history of Western society, no single one of which is a sufficient condition by itself." Benewens die begrip menseregte, vind hierdie "democratic responsiveness" ook begripsmatig neerslag in *rule of law*-leerstukke, die regstaatgedagte, die leerstuk van skeiding van magte, die legaliteitsbeginsel, die beginsel van wetmatigheid van die administrasie en teorieë oor publieke subjektiewe regte. Daarom behoort teen puntenerige begripsafbakening gewaak te word wanneer hierdie teorieë gelyktydig in 'n gesprek oor die publiekreg van 'n bepaalde staat ter sprake kom.

word.[17] Die volkeregtelike verpligtinge van state speel ook in hierdie verband 'n toenemende rol. Die formele bepalings self gee geen aanduiding hoe suksesvol of onsuksesvol die verskillende metodes is nie. Daarbenewens vereis sekere bepalings (veral ten opsigte van die sogenaamde sosiale, ekonomiese en kulturele regte)[18] dat die regte daarin gewaarborg deur verdere wetgewende stappe gerealiseer moet word – dit bly dikwels agterweë.[19] Selfs wanneer formele voorsiening vir judisiële kontrole gemaak word, het dit nie altyd dieselfde diepgang as byvoorbeeld in die Verenigde State van Amerika nie en sekere bedenklike tendense in die bestaande statutêre of gemenereg bly eenvoudig voortbestaan.[20]

Terwyl die menseregtebepalings in grondwette as sodanig nie 'n betroubare barometer vir die feitelike stand van sake is nie, bestaan daar ook nie eenstemmigheid oor ander maatstawwe wat gebruik kan word nie.[21] Die werk wat in hierdie verband deur *Amnesty International*, *Freedom House* en die Amerikaanse *state department* (in veral die *Country reports on human rights practices* van 1978) gedoen is, is in 'n meerdere of mindere mate almal omstrede. Alhoewel hierdie 'n terrein is waarop "politieke subjektiwiteit" onvermydelik kan botvier, is die ontwikkeling van min of meer "betroubare" meetinstrumente 'n prikkelende en dinamiese ontwikkeling in die staatkunde wat nie geïgnoreer kan word nie.[22] McCamant verklaar:[23]

> The concept of human rights emphasizes evaluation – the moral worth of actions. Moral condemnation – and outrage – needs to be cultivated in this increasingly jaded world, but if we go no further than moral condemnation, we will be consigned to impotence. Even where sanctions back up condemnations, this approach greatly limits policy alternatives. It is possible that it even will be counterproductive, making the situation condemned worse rather than better, as was the case in this country with the prohibition of alcoholic beverages and marijuana. For suitable policies that do more than applaud the good guys and denounce the bad guys, it is necessary to develop a theory about how and why the bad guys are bad and the good guys, good. We need a causal theory about violations of human rights.

Hy stel sekere sogenaamde "societal-level" maatstawwe voor[24] wat in 'n mate aansluiting vind by die gedagtes van Schlemmer.[25]

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17 Vir 'n nuttige oorsig van die verskillende metodes sien Jaconelli *Enacting a bill of rights* (1980) hfst 2-4.

18 Sien hieronder.

19 Safran 196-200.

20 Safran 200-3. Op 198 verklaar Safran tov Wes-Europa: "Neither the existence of constitutional courts, functioning in the context of very explicit constitutional rights provisions (as in Germany, Austria, and Italy), nor a long tradition of individual liberties (as in France), nor even a deep 'internalization' of civil rights expectations (as in Britain) is a sufficient guarantee against the nonenforcement of erosion of civil rights."

21 Sien in die alg hieroor Nanda *et al* deel 2.

22 Scarrit "Definitions, dimensions, data and designs" in Nanda *et al* 119 verklaar: "Policy-makers in various countries claim to be interested in improving the human rights of their own peoples and those of other nations. Scholars might help them (and at the same time provide useful criticism of their efforts) by developing a scheme for accurately measuring changes in content, implementation patterns, and extensiveness of the application of human rights."

23 "A critique of present measures of 'human rights development' and an alternative" in Nanda *et al* 124.

24 NI "1. Equality of economic and social conditions 2. Provision of minimum economic and social conditions 3. Respect for cultural diversity 4. Group-self-determination 5. Political participation 6. Political freedom and repression."

25 Hierbo n 16.

'n Verdienstelike vergelykende oorsig van grondwetlike menseregtebepalings behoort rekening te hou met die voorgaande faktore. Dit behels ten opsigte van elke stelsel wat ondersoek word 'n veel indringender studie as wat vervolgens oorsigtelik aangebied word van die bepalings in enkele stelsels wat in Suid-Afrikaanse verband van besondere belang is, naamlik dié van die Verenigde State van Amerika, Wes-Europese state, kommunistiese state en Afrikastate.

2 DIE VERENIGDE STATE VAN AMERIKA

Die federale grondwet van die Verenigde State van Amerika van 1787 het geen afsonderlike *bill of rights* bevat nie.[26] Die sogenaamde *bill of rights* is met die ratifikasie van die eerste tien wysigings in 1791 tot die grondwet gevoeg. Hierdie bepalings en die sogenaamde *civil war amendments*,[27] vorm die grondslag van 'n gesofistikeerde stelsel met goed ontwikkelde instellings en prosedures ter beskerming van die individu.

Wanneer die menseregtebepalings van die Amerikaanse grondwet vergelyk word met dié in moderne grondwette, is die bondigheid en selfs onvolledigheid daarvan opvallend.[28] Nêrens in die grondwet word uitdruklik verklaar dat die regsprekende gesag finale kontrole oor die nakoming van die bepalings uitoefen nie en in die meeste gevalle word geen voorsiening gemaak vir die beperking van die regte deur die wetgewende en uitvoerende gesag nie. Oor die howe se bevoegdheid om wetgewende en uitvoerende handelinge wat met die grondwet bots, nietig te verklaar, het daar sedert 1803 met die uitspraak van die *supreme court* in *Marbury v Madison,*[29] nog nooit enige twyfel bestaan nie.[30] Daarbenewens het die howe met verloop van tyd sekere maatstawwe ontwikkel vir die wetgewende en administratiewe beperking van individuele regte. Hierdie proses het *ad hoc* met betrekking tot die afsonderlike bepalings plaasgevind en dit is moeilik om algemene leerstukke ten opsigte van die beperking van die regte uit die hofbeslissings te konstrueer.

Dit is belangrik om daarop te let dat die *bill of rights* en judisiële kontrole nie die enigste middels is waardeur individuele regte beskerm word nie. Dit

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26 Dit bevat nietemin 'n aantal bepalings waardeur direkte beskerming aan die individu verleen word bv in a 1(9)(2), 1(10)(2), 3(2)(3) en 6(3).

27 Die dertiende, veertiende en vyftiende wysigings.

28 Die interpretasie van vae bepalings in die *bill of rights* (bv "unreasonable searches and seizures" in die vierde wysiging; "impartial jury" in die sesde wysiging; "cruel and unusual punishment" in die agste wysiging; "privileges and immunities, life, liberty and property" en "due process of law" in die veertiende wysiging) vorm een van die belangrikste bronne van die dinamiese ontwikkeling van die Amerikaanse publiekreg. Cardozo *The nature of the judicial process* (1921) 17.

29 5 US (1 Cranch) 137 (1803).

30 Oor die grondslag van judisiële kontrole bestaan by die meeste skrywers min of meer eenstemmigheid: die grondwet bevat beperkinge op die uitoefening van owerheidsgesag wat as regsreëls alle owerheidsorgane bind en wat gesaghebbend deur die regsprekende gesag geïnterpreteer en toegepas word. Sien bv Eidelberg *The philosophy of the American constitution* (1968) 203; Field "Judicial review as an instrument of government" (1935) in Association of American law schools I *Selected essays on constitutional law* (1938) 733-734; Corwin "Judicial review in action" (1926) in *Selected essays* (1938) 449; Haines *The American doctrine of judicial supremacy* (1932) 23; Rostow "The judicial power of the United States" (1952) in *Selected essays* (1963) 3.

vorm slegs twee elemente van 'n staatkundige stelsel wat as geheel 'n besondere resultaat tot gevolg het. Ander belangrike elemente van hierdie stelsel is:

- ☐ 'n geskrewe grondwet wat slegs deur 'n besonder moeilike grondwetwysigingsprosedure afgeskaf, vervang, tydelik opgehef of gewysig kan word;
- ☐ die grondwet is die positiefregtelike bron van owerheidsgesag en die grondslag van die legitimiteit daarvan;
- ☐ waarborge teen te sterk regering deur skeiding van magte, kruiskontrole *(checks and balances)* en federalisme; en
- ☐ verteenwoordigende regering as 'n basiese reg.[31]

Die grondwet is nog nooit vervang of ter syde gestel nie[32] en die wysigings wat deur die jare aangebring is, het geen afbreuk gedoen aan die menseregtebepalings of die beperkings wat op die regering uit hoofde van die skeiding van magte geplaas is nie. Die regte is aanvanklik eng en hoofsaaklik in politieke sin vertolk. Daar was geen vryheid van slawerny, algehele gelykheid en universele stemreg nie. Alhoewel hierdie regte ingeklee is as die regte van die "mens", het dit eerder gegaan oor die beskerming van die regte van die gevestigde burgery teen die bestaande vorms van onderdrukking deur outoritêre regerings. Die state was nie gebonde aan die bepalings van die eerste nege wysigings nie en tot met die burgeroorlog het die *supreme court* slegs een wet van die kongres in 1857 ongeldig verklaar.[33] Na die oorlog is die dertiende, veertiende en vyftiende wysigings aangeneem om gelyke regte vir diegene wat voorheen slawe was, te waarborg. Deur hierdie wysigings is die state onderworpe gestel aan federale menseregtebepalings, federale judisiële kontrole en federale wetgewende regulering. Gedurende die eerste vyftig tot sestig jaar na die aanname van die veertiende wysiging het die *supreme court* die *bill of rights* relatief eng geïnterpreteer. Op grond van 'n beperkende uitleg van die begrip *state action* in die veertiende wysiging is byvoorbeeld verskillende wette van die kongres ter syde gestel[34] en is verskillende federale pogings om die welsyn van die individu te bevorder uit hoofde van die menseregtebepalings aan bande gelê.[35]

Hierteenoor het daar sedert die sogenaamde "new deal" in die dertigerjare en die Tweede Wêreldoorlog 'n dramatiese uitbreiding in die vertolking en toepassing van die menseregtebepalings plaasgevind.[36] Dit was omvattend want haas elke aspek van die staatshuishouding, die privaatsektor en die individuele lewe is daardeur geraak. So byvoorbeeld is die regte gewaarborg

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31 Henkin *Rights* 36 ev.

32 Die grondwet bevat trouens (soos die Suid-Afrikaanse grondwet) geen bepaling waardeur die grondwet (sonder grondwetwysiging) ter syde gestel kan word nie.

33 *Dred Scott v Sanford* 60 US (19 How) 393 (1857).

34 Bv in die *Civil Rights Cases* 109 US 3 (1883); die *Slaughter-House Cases* (1873) 83 US (16 Wall) 36; *Grovey v Townsend* (1935) 295 US 45.

35 Die regulering van lone, werksure, en arbeidsbetrekkinge is beskou as ongeoorloofde staatsoptrede, die ontneming van "eiendom" en 'n aantasting van kontrakteervryheid – *Lochner v New York* (1905) 198 US 45; *Adair v US* (1908) 208 US 161; *Coppage v Kansas* (1915) 236 US 1; *Adkins v Children's Hospital* (1923) 261 US 525. Hierdie beslissings is almal later ter syde gestel.

36 Vir 'n oorsigtelike samevatting van hierdie ontwikkeling sien Henkin *Rights* 43-51.

in die eerste nege wysigings[37] wat aanvanklik slegs die federale owerhede gebind het, deur selektiewe inkorporasie deur middel van die *due process of law*-bepaling van die veertiende wysiging ook op state van toepassing gemaak; deur 'n omgekeerde inkorporasieproses is ook van die federale liggame dieselfde *equal protection of the laws* vereis as wat aanvanklik slegs van die state ingevolge die veertiende wysiging vereis is.[38]

'n Selfs meer dramatiese ontwikkeling was egter die dinamiese wyse waarop die vertolking en toepassing van die bestaande bepalings uitgebrei is. Terwyl die formulerings van die agtiende en negentiende eeue onveranderd gebly het, het al die bekende regte ten opsigte van die vryheid van spraak, die pers, vergadering, assosiasie, godsdiensbeoefening, en veral die prosedurele regte van verdagtes en beskuldigdes, 'n nuwe inhoud en betekenis verkry.[39] *Equal protection of the laws* is met 'n kliniese konsekwentheid, nie slegs ten opsigte van alle bevolkingsgroepe nie, maar ook ten opsigte van vrouens, armlastiges, vreemdelinge, gevangenes, onwettige kinders, militêre personeel, geestesversteurdes en kinders toegepas. Selfs "nuwe" regte is uit die bestaande bepalings geskep, byvoorbeeld die reg op bewegingsvryheid en 'n reg op privaatheid. Henkin[40] verklaar:

> On the horizon may be rights undreamed of – a right to be born and a right to die; rights for the dead and the unborn; rights to security, peace, a healthy environment, the animal, even the vegetable and mineral.

Dit is belangrik dat die indruk nie hierdeur geskep word dat dit in die Verenigde State slegs gaan om 'n ekstreme vorm van liberale individualisme nie. Afgesien daarvan dat staatswetgewers en die kongres[41] ingrypende wetgewing aanvaar het om alle staatsinstellings en individue te verbied om rassediskriminasie toe te pas,[42] en *state action* in die veertiende wysiging vertolk word om ook die judisiële sanksionering van 'n "private" kontrak met 'n diskriminerende inhoud te dek,[43] is daar sedert die ekonomiese depressie van die dertigerjare talle wette aangeneem waardeur in effek erkenning verleen word aan sosiale en ekonomiese regte van die individu en is daar sedertdien (weliswaar stadiger as in Wes-Europa) beweeg in die rigting van die welsynstaat.

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37 Bv tov die vryheid van godsdiensbeoefening, spraak, die pers en vergadering, aspekte van die reg op privaatheid en sekere prosesregtelike waarborge.

38 Die inkorporasie is "selektief" omdat die standpunt gehuldig word dat slegs bepalings wat "minimum standards which are of the very essence of a scheme of ordered liberty" bevat, ingesluit word – *Adamson v California* (1947) 332 US 46 91. Die belangrikste bepalings is egter reeds ingesluit.

39 Vir 'n oorsig sien Henkin *Rights* 43-9.

40 *Rights* 47.

41 Lg veral kragtens die sg "commerce power" in a 1(8)(3) van die grondwet.

42 Bv die *Civil Rights Act* van 1964, 78 Stat 241, 42 USC a 2000a (1970) en die *Voting Rights Act* van 1965, 79 Stat 437, 42 USC a 1973 (1970).

43 Lg resultaat (wat ook weerspieël word in die Wes-Duitse *Drittwirkung*-leerstukke) word soms deur Suid-Afrikaanse skrywers beskou as 'n ongewenste vermenging van privaat- en publiekreg (sien bv Venter *Die Publiekregtelike Verhouding* (1985) 176-7). Met so 'n standpunt word uit die oog verloor dat dieselfde "vermenging" deur die aanwending van die *boni mores*-begrip in die Suid-Afrikaanse kontraktereg kan plaasvind – sien 1971 *THRHR* 45-53.

Samevattend kan twee opmerkings oor die Amerikaanse grondwetlike bepalings gemaak word:

(a) Ten spyte van die feit dat die Verenigde State na die tweede wêreldoorlog 'n sleutelrol gespeel het om die gedagte van menseregte in grondwette en internasionale verdrae konkrete beslag te gee, is die formulering van die Amerikaanse *bill of rights* as 'n onvolledige en selfs verouderde teks nie wyd nagevolg nie. As 'n aanknopingspunt vir die manier waarop regte geformuleer behoort te word, is die waarde daarvan beperk.[44] Meer moderne menseregteaktes soos dié vervat in die grondwet van die Federale Republiek van Duitsland[45] en volkeregtelike handveste soos die Europese konvensie oor menseregte en fundamentele vryhede en die verenigde volke organisasie se *international covenant on civil and political rights* en *international covenant on economic, social and cultural rights*, bied in die verband beter voorbeelde.

(b) In die Verenigde State van Amerika word die beste voorbeeld van die dinamiese aanwending van die menseregtebegrip in die positiewe reg van enige staat gevind. Daartoe het die feit dat menseregtebepalings in 1791 tot die grondwet gevoeg is en dat judisiële kontrole oor die nakoming deur alle owerheidsorgane aanvaar is, geen geringe bydrae gelewer nie. Terselfdertyd moet hierdie feit veral vanuit 'n juridiese hoek, in perspektief gesien word. Soos aangedui, is die *bill of rights* en judisiële kontrole nie die enigste elemente in die staatsbestel waardeur die regte gehandhaaf word nie.[46] Daarbenewens het die *supreme court* dikwels die bepalings "belemmerend" geïnterpreteer in die lig van wat vandag in Amerikaanse konteks algemeen beskou sal word as 'n volle ontplooiing van die regte.[47] Die geskiedenis van die Amerikaanse menseregtehandves is 'n maatskaplike, ekonomiese en politieke geskiedenis van 'n bepaalde staat. Hierdie feit dien enersyds as waarskuwing dat dieselfde instrumente nie sonder meer in 'n ander sosio-politieke milieu sal slaag nie. Andersins bied 'n studie van die Amerikaanse menseregtebepalings vir die Suid-Afrikaanse juris buitengewone vergesigte oor die politieke en sosio-ekonomiese implikasies van sulke bepalings.

3 WES-EUROPA[48]

Die Franse verklaring van die regte van die mens en die burger van 1789 is woordeliks oorgeneem in die Franse grondwet van 1791.[49] Hierdie verklaring het die slagspreuk geword van die Europese derde stand in hulle stryd

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44 Sien Henkin "International instruments for the protection of human rights" in Forsyth & Schiller 233.

45 Waarop bv etlike van die menseregtebepalings in die grondwet van Bophuthatswana gebaseer is – sien Thomashausen "Human rights in Southern Africa: the case of Bophuthatswana" 1984 *SALJ* 467 en *Smith v Attorney-General, Bophuthatswana* 1984 1 SA 196 (B) op 202.

46 Sien teks teenoor n 31 hierbo.

47 Sien teks teenoor n 35 hierbo.

48 Oor die geskiedenis van menseregte in Wes-Europa sien in die algemeen Hartung *Die Entwicklung der Menschen- und Bürgerrechte van 1776 bis zur Gegenwart* (1972); Oestreich *Geschichte der Menschenrechte und Grundfreiheiten im Umriss* (1978); Kipp "Die Menschenrechte in Geschichte und Philosophie" in *Die Menschenrechte in Christlicher Sicht* (1953) 19.

49 Na die afskaffing van die monargie is 'n meer uitgebreide menseregteverklaring in die 1793-grondwet ingesluit, terwyl dit weer aansienlik verkort is in die grondwet van 1795 (na die skrikbewind van Robespierre); die staatsgreep van Napoleon is bekragtig in

teen die feodale wantoestande en die absolute monargie. Die gedagte van die opname van menseregtebepalings in grondwette het ook algemene inslag gevind. Gedurende die negentiende eeu is byna geen grondwet in Wes-Europa gepromulgeer waarin menseregte nie op die een of ander wyse vermeld is nie.[50] Ten spyte daarvan is die positivering van die gedagte van natuurlike en aangebore regte nie so konsekwent as in die Verenigde State van Amerika deurgevoer nie en het veral die gedagte van judisiële kontrole oor die beperking van die regte voor die Tweede Wêreldoorlog nie algemene inslag gevind nie. Verskillende redes bestaan hiervoor. In teëstelling met die Verenigde State van Amerika waar 'n immigrantegemeenskap op 'n nuwe vasteland 'n nuwe staatkundige bestel as't ware op min of meer 'n skoon bladsy kon skryf, was die vervanging in Europa van 'n ou orde met 'n nuwe waarin voorsiening gemaak is vir die erkenning van individuele regte, 'n moeisame proses wat in verskillende state onder uiteenlopende omstandighede en met verskillende grade van sukses volvoer is. Die aanhang wat die regspositivisme gedurende die negentiende eeu geniet het, het 'n ingrypende invloed uitgeoefen op die betekenis wat aan die begrip menseregte in die Europese grondwette geheg is – die natuurregtelike grondslae van die regte is al minder en minder beklemtoon en teen die tweede helfte van die eeu omtrent nie meer vermeld nie.[51] Die resultaat hiervan was dat toe die gedagte van soewereine staatsgesag in dieselfde tydperk taamlik algemeen gepropageer is, individuele regte in die praktyk en in die werke van skrywers soos Von Gerber, Laband, Zorn en Jellinek in soveel woorde bestempel is as blote vergunnings van die staat of reflekse van die positiewe reg.[52]

Anders as in die Verenigde State van Amerika was daar alreeds in die Franse grondwet van 1793 uitdruklik regte geformuleer uit hoofde waarvan die individu aanspraak kon maak op die aktiewe bystand deur owerheidsorgane.[53] Afgesien van sporadiese vermelding van sekere sosiale en ekonomiese regte,[54] was dit egter veral gedurende die huidige eeu dat die gelykheidsbeginsel van die Franse slagspreuk *liberté, egalité, fraternité* ook vertolk is as sou dit die staat verplig om burgerlike gelykheid deur staatsoptrede te bewerkstellig – die staat moet 'n positiewe bydrae lewer tot die sosiale, ekonomiese en kulturele ontplooiing van die individu. Hierdie verpligtinge van die staat is as

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die grondwet van 1799 waarin slegs enkele regte in die laaste gedeelte genoem word; die beginsels van die verklaring word herbevestig in die aanhef tot die grondwette van 1946 en 1958 – Kipp 32; Hartung 17-18.

50 Bv in die grondwette van Frankryk (1814, 1815, 1830, 1848), Nederland (1814, 1815, 1848), Noorweë (1848, 1849, 1867), Griekeland (1864), Roemenië (1866), Serbië (1888), die Duitse Ryk (1849), verskillende Duitse state soos Beiere (1818), Baden (1818), Württemberg (1819), Hesse (1830), Sakse (1830), Hannover (1833), Pruise (1850) en selfs buite Wes-Europa in Turkye (1876) en Rusland (1906).

51 Oestreich 100 ev; Laun *Die Menschenrechte* (1948) 11.

52 Oestreich 102. Die publiekregsisteme wat hieruit gespruit het, kom ook reeds in Suid-Afrika onder die soeklig – sien Van Wyk *Persoonlike status in die Suid-Afrikaanse publiekreg* (proefskrif UNISA) 1979 en Venter 12-63.

53 A 21 van die grondwet het onder andere bepaal dat die gemeenskap onderneem om behoeftige burgers te ondersteun deur die direkte verskaffing van lewensmiddele of deur werkverskaffing.

54 Bv in die Franse grondwet van 1848 tov werkverskaffing, beroepsopleiding en maatskaplike bystand – Hartung 22-3.

sosiale, ekonomiese en kulturele regte van die individu gewaarborg.[55] Alhoewel aanvaar word dat die implementering van sosiale, ekonomiese en kulturele regte in 'n meerdere of mindere mate 'n negatiewe en beperkende uitwerking kan hê op die gelding van die sogenaamde liberale vryheidsregte wat 'n individuele vryheidsfeer vir die individu skep en waarmee die staat in beginsel nie mag inmeng nie,[56] moet beklemtoon word dat dit hier gaan om 'n tipiese Wes-Europese verskynsel.[57]

In Wes-Europa word deurentyd ernstig gepoog om 'n balans te vind en te handhaaf tussen staatsoptrede en nie-inmenging wat onderskeidelik deur die sosiale, ekonomiese en kulturele regte aan die een kant en deur die liberale vryheidsregte aan die ander kant, vereis word. So byvoorbeeld word die begrip *sosiaal* soos dit in artikels 20(1) en 28(1) van die grondwet van die Federale Republiek van Duitsland aangewend word, deurgaans vertolk as sou sosiaalstaatlike staatsoptrede begrens word deur die regstaatgedagte in sowel formele as materiële sin.[58]

Na die Tweede Wêreldoorlog het natuurregtelike opvattings 'n heropbloei beleef[59] en is menseregtebepalings dienoorkomstig op groot skaal in nuwe grondwette ingesluit. Die mees uitstaande voorbeeld hiervan is die grondwet van die Federale Republiek van Duitsland waarin al die elemente van die Amerikaanse stelsel van menseregtebeskerming in 'n moderne en aangepaste vorm vervat is. Die beskerming van menseregte in die verskillende Wes-Europese state moet ook in samehang beskou word met die invloed van die Europese konvensie oor menseregte en fundamentele vryhede. Die moontlikheid wat daardeur geskep is om regte van die individu binne state deur tussenstaatlike instrumente van buite te beskerm, het daartoe aanleiding gegee dat in alle state 'n lewendige debat ontstaan het oor die interne stand van sake rakende die handhawing van menseregte.[60] In die Verenigde Koninkryk was dit een van die vernaamste oorsake vir 'n indringende debat oor die moontlike verordening van 'n menseregte-akte.[61]

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55 Bv in die grondwette van Duitsland (1919, 1949), Frankryk (1946, 1958), Italië (1947), Spanje (1931, 1947) en Turkye (1961). Sien Huber "Soziale Verfassungsrechte?" (1948) in CXVIII *Wege der Forschung* (1968) 1-15 en Cassin "Man and the modern state" in *An introduction to the study of human rights* (1970) 31-51.

56 Huber 9. Boli-Bennet 187 verklaar: "In the light of extensive civil rights violations in most of the periphery and semiperiphery of the world system in the postwar period, one crucial question to ask is the following: is the steadfast protection of civil rights consistent with state mobilizational efforts to establish comprehensive programs that ensure social and economic rights?"

57 Henkin *Rights* 56 verklaar: "[S]ocialism is not necessarily inconsistent with substantial individual freedom, for, in principle, a socialist society might favour large freedom (in matters other than economic organization and activity), and, indeed, the better distribution of economic justice may make such freedoms more meaningful for all."

58 Sien bv Hesse *Grundzüge des Verfassungsrechts der Bundersrepublik Deutschland* (1977) 86 ev; Stern I *Staatsrecht* (1977) 716-28; Badura "Das Prinzip der sozialen Grundrechte und seine Verwirklichung im Recht der Bundesrepublick Deutschland" 1975 *Der Staat* 17 ev; Huh "Rechtsstaatliche Grenzen der Sozialstaatlichkeit" in Berberich, Holl & Maass *Neue Entwicklungen im öffentlichen Recht* (1979) 281 ev.

59 Van der Vyver *Die beskerming van menseregte in Suid Afrika* (1975) 9 en Riezler "Der totgesagte Positivismus" (1951) in XVI *Wege der Forschung* (1966) 239-56.

60 Sien bv Safran 204 en in Berberich *et al* die bydraes van Oppermann "Europaïsche Integration und das deutsche Grundgesetz" 85 en Panebianco "Europaïsche Integration und das italienische Verfassungsordnung" 103.

61 Sien bv Scarman *English law: the new dimension* (1974); Hailsham *The dilemma of democracy* (1978); Zander *A bill of rights* (1975).

Alhoewel die wyse waarop individuele regte in hierdie state beskerm en gehandhaaf word onderling en in vergelyking met die Verenigde State verskil,[62] en alhoewel al die Wes-Europese state in 'n meerdere of mindere mate sekere probleme ondervind,[63] kan aanvaar word dat die feitelike stand van sake in die meeste van die state nie wesenlik verskil van dié in die Verenigde Koninkryk waarin die beskerming van individuele regte nog nie deur middel van judisiële kontrole oor grondwetlike bepalings geskied het nie.

4 KOMMUNISTIESE STATE

In navolging van die Franse menseregteverklaring is daar in Rusland na die rewolusie van 1918 'n verklaring van die regte van die werkende en geëksploiteerde volk in die grondwet opgeneem.

Marx het geen menseregteleer ontwikkel nie en het die menseregteopvattings van sy tyd verwerp as "the will of the bourgeois class made into law for all".[64] Hierdie benadering word tans nog aangetref in kommunistiese skrywers se weergawes van die ontstaan en ontwikkeling van die menseregteidee in die Weste.[65] Volgens hulle was die positivering van menseregte in die grondwette van die laat-agtiende en negentiende eeue enersyds gerig teen feodalisme en monargale absolutisme, maar het dit terselfdertyd ook die grondslae van die nuwe kapitalistiese staat gevorm waarvan die reg op privaateiendom en kontrakteervryheid die hoekstene was.[66] Ingevolge die klassieke leer van Marx en Engels sal daar geen bestaansreg vir die staat en die reg in die klaslose heilstaat wees nie en saam daarmee sal ook die begrip menseregte afsterwe.[67] Vooraf gedurende die diktatuur van die proletariaat moes die begrippe reg en ook menseregte, soos inhoudelik deur die werkers bepaal, aangewend word om die oogmerke met die rewolusie te verwesenlik.[68]

Verwysings na die regte van die individu kom in die grondwette van alle kommunistiese state voor.[69] (In die 1977-grondwet van die USSR kom dit voor ten spyte van die feit dat in die aanhef van die grondwet verklaar word dat die diktatuur van die proletariaat beëindig is.)[70] In die algemeen beskou, is die bepalings selfs meer omvangryk as in Westerse grondwette want die sosiale, ekonomiese en kulturele regte word deurgaans uitvoeriger beskryf en alle handveste bevat ook bepalings oor die *pligte* van burgers – iets wat in Westerse handveste nie voorkom nie.

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62 Henkin *Rights* 51-3.
63 Safran 200 ev; Henkin *Rights* 55.
64 Soos aangehaal deur Peselj "Recent codification of human rights in socialist constitutions" 1965 *Howard Law Journal* 342 n 2.
65 Sien bv Klenner *Studien über Grundrechte* (1964) en in Halász (red) *Socialist concept of human rights* (1966) die bydraes van Szabó "Fundamental questions concerning the theory and history of citizens' rights" 27-52, Péteri "Citizens' rights and the natural law theory" 83-119 en Kulcsár "Social factors in the evolution of civic rights" 121-63.
66 Szabó 30 en 37; Klenner 19-20.
67 Szabó 54: "(T)he actual implementation of these rights and duties leads – in keeping with the whithering away of state and law – also to their disappearance."
68 Szabó 54; Peselj 344-5.
69 Sien n 7 hierbo.
70 Die aanhef lui oa: "Having fulfilled the tasks of the dictatorship of the proletariat, the Soviet state has become an all-people's state."

Die formulering van die tipiese vryheidsregte waarmee die staat nie mag inmeng nie, verskil nie wesenlik van dié in Westerse bepalings nie. Enkele voorbeelde kan genoem word. Artikel 56 van die 1977-grondwet van die USSR lui:

> The privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications is protected by law.

Artikel 46 van die 1978-grondwet van die Volksrepubliek van China lui:

> Citizens enjoy freedom to believe in religion and freedom not to believe in religion, and to propagate atheism.

Artikel 29 van die 1968-grondwet van die Duitse Demokratiese Republiek lui:

> Consistent with the principles and goals of this constitution, citizens of the German Democratic Republic have the right of association in order to pursue their interests through common action in political parties, social organizations, associations, and collectives.

Die belange van die werkers en die grondslae van die sosialistiese orde, is twee beperkingsgronde waardeur die meeste van hierdie regte gekwalifiseer word.[71] Ten spyte van bepalings wat voorsiening maak vir judisiële kontrole oor die handhawing en afdwinging van individuele regte,[72] kon nie in die beskikbare literatuur positiewe aanduidings gevind word oor die effektiwiteit daarvan nie.

Die sosiale, kulturele en ekonomiese regte word in kommunistiese grondwette volgens Szabó[73] uitvoeriger omskryf omdat dit die produktiwiteit van die individu verhoog om sodoende sy materiële welsyn te bevorder.[74] Die Westerse pogings om 'n balans te vind tussen staatsingryping ingevolge hierdie regte en die beperking van staatsoptrede ingevolge die sogenaamde vryheidsregte, word nie in kommunistiese stelsels aangetref nie. Wanneer dit van kommunistiese kant gestel word dat die handhawing van hierdie regte onontbeerlik is vir die handhawing van die politieke en vryheidsregte,[75] word die positiewe staatsoptrede wat vereis word in geval van die sosiale regte geredelik uitgebrei na die gelding van die liberale vryheidsregte. Szabó verklaar byvoorbeeld[76]:

> (T)he socialist state has the further obligation to secure that citizens make *real* use of these opportunities as rights. Thus eg as far as the freedom of the press is concerned, it would not suffice to introduce mere legal protection for its safeguarding

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71 Peselj 347. As voorbeeld kan a 39 van die 1976-grondwet van Albanië genoem word: "The rights and duties of citizens are established on the basis of the reconciliation of the interests of the individual and those of the socialist society, with priority given to the general interest. The rights of citizens . . . cannot be exercised in opposition to the socialist order."

72 A 92 van die 1968-grondwet van Tsjeggoslowakye bepaal bv: "The Constitutional Court of the Czechoslovak Socialist Republic decides on the protection of the rights and freedoms guaranteed by the Constitution where they have been infringed upon by a decision or another intervention of a federal organ unless the law grants others judicial protection." A 388 van die grondwet van Joegoslawië (1974) bevat 'n soortgelyke bepaling. A 58 van die grondwet van die USSR lui oa: "Complaints may be brought to a court, in the manner established by law, against actions which violate the law or exceed the authority of officials and which infringe the rights of citizens."

73 75.

74 Sien ook Lörincz "Economic, social and cultural rights" in Halász 203, 209-10.

75 Lörincz 208.

76 66.

and to define the scope within which the press is free for the working people; the state also has the duty almost to 'create' press, to contribute through various measures to its unfolding in all fields of reporting, the political and technical spheres of press, etc.

Grondwetlike menseregtebepalings in kommunistiese state het 'n wesenlik ander betekenis en inhoud as dié in die Verenigde State en Wes-Europa.

5 AFRIKA

Die feit dat byna al die onafhanklikheidsgrondwette wat sedert die vyftigerjare in Afrika aangeneem is menseregtebepalings bevat het, kan aan verskillende faktore toegeskryf word. Die meeste nasionaliste wat hulle beywer het vir onafhanklikheid, het konsekwent hulle koloniale onderhorigheid belewe en vertolk as 'n aantasting van hulle menseregte. Die stryd vir politieke onafhanklikheid was gevoer op die grondslag van menseregte. 'n Tweede rede is dat hierdie state hulle onafhanklikheid gekry het toe die gedagte van menseregte reeds deur die verenigde volke organisasie in die universele verklaring van menseregte en die Europese koloniale moondhede in die Europese konvensie oor menseregte en fundamentele vryhede as't ware geïnternasionaliseer is; na-oorlogse grondwette bevat in die reël almal menseregtebepalings.[77] Derdens was die koloniale moondhede direk betrokke by die opstel van die nuwe grondwette en volgens Mbaya was die onafhanklikheidsgrondwette 'n middel om hulle eie regsopvattings en-tradisies ook na onafhanklikheid in die nuwe state voort te sit.[78] Die stelling word in 'n groot mate gesteun deur die benaderings wat in verskillende state met die formulering van die regte gevolg is.

Nadat Ghana in 1957 sonder 'n menseregtehandves onafhanklik geword het, is uitvoerige menseregtebepalings in 1960 in die onafhanklikheidsgrondwet van Nigerië geïnkorporeer. Aangesien die Verenigde Koninkryk self geen *bill of rights* het nie, was die bepalings hoofsaaklik gebaseer op die Europese konvensie oor menseregte en fundamentele vryhede en is daar voorsiening gemaak vir judisiële kontrole oor die beperking van die regte deur die wetgewende en uitvoerende organe. Met die uitsondering van Tanganjika, is hierdie patroon in al die ander voormalige kolonies nagevolg.[79] In 10 state word hierdie patroon nog "formeel" in die grondwette gehandhaaf[80] terwyl in drie daarvan die menseregtebepalings met die aanvaarding van nuwe grondwette

77 Mahalu 5.

78 "Jüngste Entwicklungen in den Afrikanischen Rechtsordnungen" in Berberich *et al* 300: "Die alten britischen Kolonien besassen auch geschreibene Verfassungen, die ganz anders waren als jene ihrer alten Kolonialmetropole. In diesem Fall hat die Ausarbeitung einer Verfassung zum Ziel, für den Gebrauch durch die Afrikaner schriftlich die Regeln des konstitutionellen englishen Systems festzulegen, dieses Modell zu konstruieren oder klarzustellen." Op 302 wys Mbaya daarop dat in Afrika suid van die Sahara alle amptelike grondwettekste in die taal van die koloniale moondhede geskryf was: "Solche Texte können auf keine Art und Weise ein Ausdruck der nationalen Kultur sein."

79 Read "The protection of human rights in municipal law" in Forsyth & Schiller 156.

80 Botswana, Gambië, Kenia, Mauritius, Nigerië, Sierra Leone, die Seychelle, Uganda, Zambië en Zimbabwe.

weggelaat is.[81] In voormalige Franse kolonies is in die aanhef tot die grondwet dikwels verwys na die Franse verklaring van die regte van die mens en die burger van 1789.[82] Die Britse en Franse invloed is opmerklik afwesig in grondwette van voormalige Portugese kolonies[83] en van Arabiese state waarin die Islam dominant is.[84]

Uit 'n praktiese oogpunt beskou, was die eksperiment nie suksesvol nie. Read[85] gee die volgende verklaring daarvoor:

> Circumstances attending the birth of African states did not appear propitious for the protection of human rights, which arose by reaction against, rather than imitation of, former colonial rule. The new states emerged often hurriedly from authoritarian colonialism with dominant nationalist movements but essentially weak political systems, with vulnerable opposition parties and institutions like the judiciary, the press and the professions too weak to exert effective pressures on government, with poor and poorly-educated populations and struggling economies – rocky soil for the nurture of human rights.[86]

Alhoewel dit nie korrek is om te beweer dat daar in voormalige Britse kolonies niks tereg gekom het van judisiële kontrole oor die handhawing van individuele regte nie,[87] was dit uiters beperk en in meeste gevalle sonder dat die uitvoerende en wetgewende gesag op enige noemenswaardige wyse aan bande gelê is.[88]

Ten spyte van hierdie toedrag van sake is dit nietemin opvallend dat die vervanging van talle onafhanklikheidsgrondwette met nuwe grondwette (waarvan weer eens talle onder militêre bewindhebbers vir korter of langer tye opgeskort word), die menseregtebepalings op enkele uitsonderings na[89] formeel behou word.[90] Hierdie verskynsel kan vanuit 'n siniese oogpunt bestempel word as bewys van die feit dat dit kortsigtig is van enige staat om nie sy internasionale aanvaarbaarheid te probeer verhoog nie deur die insluiting van menseregtebepalings in sy grondwet – afgesien van sy regeringsvorm en afgesien van sy erns met die saak. Dit mag egter ook wees dat Afrika nie die ideaal van menseregte laat vaar het nie en dat talle Afrikastate onder uiters moeilike omstandighede steeds poog om *vir Afrika* praktiese betekenis aan die ideaal te gee.

Afrika het 'n groot verskeidenheid state met uiteenlopende staatsinstellings en politieke ideologieë. Uit die "nuwe" grondwette en staatspraktyke kan nog geen duidelike eenvormige politieke ideologie ook ten opsigte van menseregte afgelei word nie.[91] In hierdie verband is die gesamentlike poging om binne die raamwerk van die organisasie vir Afrika-eenheid 'n *African charter on human and people's rights* daar te stel van besondere belang. Aan

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81 Malawi, Lesotho en Swaziland.
82 Bv in die grondwette van Benin, Chad, die Republiek van Sentraal-Afrika, Djibouti, Gaboen, Guinieë, die Ivoorkus, Ruanda, Senegal en Zaïre.
83 Bv in Angola, Mosambiek en Guinië-Bissau.
84 Bv Algerië, Egipte, Libië, Marokko, die Sudan, Somalië en Tunisië.
85 156.
86 Sien ook Mbaya 305.
87 Soos in die algemeen blyk uit die bydrae van Read.
88 Read 164-73.
89 Sien n 81 hierbo.
90 Read 161.
91 Mbaya 301.

die hand van Benedek se ontleding van die konsep-handves,[92] kan enkele fasette uitgelig word wat daarop dui dat menseregte-ontwikkelings in Afrika meer genuanseerd benader behoort te word.

(a) Opvattings oor menseregte in Afrika word gekenmerk deur 'n gemeenskapsoriëntasie eerder as 'n beklemtoning van die individu soos in Westerse stelsels. Alhoewel daar in sommige state ongetwyfeld sprake kan wees van beïnvloeding deur kommunistiese idees,[93] word aanvaar dat 'n benadering weerspieël word wat duidelik onderskei kan word van die kollektivisme van Oos-Europa. Die kommunistiese benadering tot die regte van die individu is materialisties[94] en staatgeoriënteerd – daar word gekonsentreer op die staat as die enigste kollektiewe eenheid waaraan die individu trou verskuldig is. Met inagneming van snelle "modernisering", is regsopvattings in Afrika in 'n ander sin gemeenskaps-georiënteerd:

> In African traditional societies the human being could not survive apart from his people, the community, who in turn was dependent on the participation of all its constituent parts. Therefore the relationship between the individual and the group was not one of subordination but of complementarity, participation and dialogue.[95]

(b) Oor die presiese betekenis van die woord "people" in die uitdrukking "peoples' rights" bestaan onsekerheid. Die formulering van sekere van hierdie regte (byvoorbeeld die regte op selfbeskikking, op die vrye beskikking oor natuurlike rykdom en hulpbronne, op ontwikkeling, en op nasionale en internasionale vrede) dui daarop dat dit regte omskryf van die hele bevolking wat deur die staatsorgane teenoor buitestaanders beskerm moet word. Volgens Benedek[96] is daar egter ook aanduidings dat "peoples" verskillende subeenhede van die bevolking soos plaaslike gemeenskappe en ander intermediêre groepe kan insluit.[97] Ter wille van die behoud van nasionale eenheid is die gedagte van regte van subeenhede van die staatsbevolking egter nie 'n gewilde gedagte nie.[98] Hierdie houding doen nie afbreuk aan die feit dat talle Afrikastate ernstige minderheidsprobleme het waarvoor daar soos in die res van die wêreld, nog geen klinkklare demokratiese oplossings gevind is nie.

6 SLOT

Uit die voorgaande vergelykende oorsig kan sekere afleidings gemaak word oor die funksie van 'n menseregtehandves in die staatkundige toekoms van Suid-Afrika. Alhoewel menseregtebepalings in die grondwette van die wêreld groot verskeidenheid vertoon en met verskillende grade van effektiwiteit toegepas word, is daar weinig state sonder sulke bepalings. In 'n nuwe onderhandelde grondwetlike bedeling vir Suid-Afrika behoort en sal daar

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92 "Peoples' rights and individuals' duties as special features of the African charter on human rights and peoples' rights" 12 *Verfassung und Recht in Übersee* 59-94.
93 Kunig 47; Benedek 63.
94 Sien teks teenoor n 74 hierbo.
95 Benedek 63 en sien ook Mbaya 299 en die besprekingsbydraes van Amoah en Vilikazi in Forsyth & Schiller 48-9.
96 70-1.
97 A 19 van die konsep-handves lui byvoorbeeld: "All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."
98 Die reg op selfbeskikking word dienooreenkomstig so vertolk dat dit nie toekom aan minderhede binne 'n staat nie – Benedek 68.

na alle waarskynlikheid ook sulke bepalings wees. 'n Verdere debat daaroor is moontlik slegs van akademiese belang.

Buite Noord-Amerika en Wes-Europa is die hoë verwagtinge dat 'n menseregtehandves (met of sonder judisiële kontrole) dié katalisator sou wees om konflik binne state op te los of te vermy, grotendeels nie verwesenlik nie. Ten einde enigsins 'n mate van sukses en effektiwiteit met die implementering van sulke bepalings te verseker, is dit dus nie voldoende om te volstaan met 'n enkele aanbeveling dat "'n menseregtehandves en judisiële kontrole" ingestel word nie. Dit is 'n ingewikkelder onderneming. Menseregtebepalings raak alle aspekte van die verhouding tussen die individu en owerheidsorgane. Dit behels aspekte van die individuele lewe waarmee die staat nie mag inmeng nie (die sogenaamde liberale vryheidsregte), aspekte waarin die staat 'n bydrae behoort te lewer tot die individuele welsyn (sosiale, ekonomiese en kulturele regte) en die deelname van die individu aan besluitneming van owerheidsweë oor sy wel en weë (politieke regte). Al drie hierdie kategorieë van regte is in Suid-Afrika in die brandpunt – om enigeen daarvan in die huidige debat uit te sluit, is sinneloos.

Uit die oorsig is dit duidelik dat daar oor die inhoud van die gewaarborgde regte 'n fundamentele benaderingsverskil tussen byvoorbeeld Westerse demokratiese en kommunistiese state bestaan. Verskillende benaderings is duidelik aanwesig in die Suid-Afrikaanse politieke debat. Wanneer 'n menseregtehandves aanbeveel word, behoort hieroor ook standpunt ingeneem te word. Daar bestaan 'n wesenlike gevaar dat in hierdie verband voor onversoenbare standpunte te staan gekom sal word. Die gevaar kan verminder word indien in gedagte gehou word dat alhoewel veel geleer kan word uit die ervaring van ander state, die inhoud van 'n Suid-Afrikaanse handves bepaal sal word deur die verstandhouding wat *hier* bereik sal word oor die wyse waarop die politieke en sosio-ekonomiese probleme *hier* opgelos behoort te word. In hierdie verband is die ervaring met menseregtehandveste in Afrika van besondere belang: nie in 'n negatiewe sin en as verskoning om die handhawing van menseregte ook in hierdie deel van Afrika as 'n hopelose saak af te skryf nie, maar omdat Suid-Afrika se staatkundige, ekonomiese en maatskaplike probleme dié van Afrika is en ons nou eers ten volle voor die uitdaging te staan kom om daarvoor oplossings te vind – ook in terme van "menseregte".

In sy openingsrede van die vergadering van deskundiges wat die konsephandves oor menseregte in Afrika opgestel het, het president Leopold Senghor op 8 Desember 1979 in Dakar verklaar[99]:

> You have therefore to be careful so that your charter may not be a charter of the rights of "the African Man". Mankind is one and indivisible and the basic needs of man are similar everywhere. There is neither frontier, nor race when the freedoms and rights attached to the human being are to be protected. That does not mean that we have to give up thinking by ourselves and for ourselves. Europe and America built up their system of rights and freedoms by referring to a common civilization: to their respective peoples and to specific aspirations. As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.

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99 Die volledige teks van die openingsrede is gepubliseer in 12 *Verfassung und Recht in Übersee* 121-4.

5 Practical workings of a bill of rights

Mr Justice JM Didcott

So that you may not be influenced unduly by what I shall say this morning, I must begin by warning those of you who do not know it already that I am no scholar. Nor in particular am I an expert on constitutional law. I can claim some acquaintance with the United States bill of rights and its workings, gained unsystematically over the years. But I am not well versed, I confess, in the details or functioning of other and newer bills of rights. The judicial work I have had to do since I was invited to participate in this conference has left me with insufficient time, what is more, for the research which the occasion deserved, the research which I wish I could have found the opportunity to devote to it. Perhaps, however, you will not mind. A number of distinguished scholars addressed you yesterday and more are due to do so today. What is expected of me, as I understand it, is not to imitate them unsuccessfully, but simply to kick this day's ball into play by suggesting some lines of thought which strike me as worthwhile.

According to the programme for the conference, yesterday was devoted largely to the idea of a bill of rights while today is to be spent more on the shape which a bill of rights might take in South Africa and how one would be likely to work. Being an enthusiast for the cause, I am happy to find myself speaking at a stage which postulates the acceptance in principle of a bill of rights. Since one cannot talk about the sort of bill of rights one would like to have without some discussion of the idea itself, however, the treatment of the two topics is bound to overlap. Unfortunately I could not attend the conference yesterday, with the result that I do not know to what extent my remarks will amount to repetition. I hope they will not in any large measure and that, if as it happens they do, you will bear with me.

The first point I want to make about the kind of bill of rights one envisages for South Africa is that it must, I believe, be linked with the power of judicial review, as the Americans call it, with the power of the courts to strike down as invalid all statutes and subordinate legislation and all executive and administrative acts which are incompatible with the bill's provisions. Judicial review, to my mind, is fundamental. It comes with the territory. Without it the requirements of your bill of rights are unenforceable and the bill itself is nothing but a list of highfalluting sentiments. The report of the president's council which dealt with a bill of rights held one to be unnecessary here because the common law of South Africa by and large recognised the very freedoms, or the more important of them at any rate, which a bill of rights would guarantee. That is certainly the effect of our common law. Yet the finding ignored altogether the snag, obvious to the most unsophisticated lawyer, that parliament can ride roughshod over the common law and has done so time and again throughout our history, not least in the area of personal liberty. When one has in mind an effective bill of rights one can conceive

therefore only of a bill of rights entrenching basic liberties which is the supreme law of the land on the issues it governs, taking precedence over all statutes. Parliamentary sovereignty, in other words, has to yield. Parliament's powers must be subordinated to the dictates of the bill of rights. Once that is achieved parliament itself cannot be the judge of whether its enactments conform to the bill of rights or whether it has exceeded its powers by producing legislation repugnant to such. That stands to reason. Some other arm of the constitution has to decide the question whenever it arises. And the constitutional arm best equipped to do so is surely the judicial one.

An objection to this extension of judicial power has been lodged in the United States many times over the years. Why should judges appointed and not elected, the question is asked, have the power to frustrate the will of the democratically elected legislature they have, and we look forward to having, by striking down its enactments? The answer is not that the judges are wiser than anyone else. They are not. But they have, I suggest, three important and distinctive attributes. First of all, they have no constituency to which to pander. They are not subject to the pressures which politicians experience. They do not lose their jobs as the result of unpopular decisions. Secondly, they are professionally trained to decide issues; they are professionally accustomed to deciding issues, on grounds of principle and for reasons which, being open to public scrutiny and vulnerable to public criticism, have to be articulated convincingly. Thirdly, their whole experience is one of weighing and endeavouring to balance interests which clash. That is what the law is all about. Decisions on questions arising from a bill of rights are essentially balancing acts. The rights and liberties of the individual must be weighed against the good of the community as a whole, or what is thought by the legislature or the executive to be such. Judges are no strangers to tasks of that sort.

I have not overlooked, I should mention, the criticisms levelled sometimes at the track record of the South African judiciary when the liberties of the subject have been at stake. This is not the occasion to debate the point. Two remarks seem, however, to be pertinent. The first is this. Not even the sternest critic of our judiciary would maintain, I feel sure, that any other organ of the constitution, any alternative instrument for the enforcement of a bill of rights which was on the cards, had a better record on that particular track. My second observation concerns the complaint lodged most frequently against our judiciary. I have in mind what is said to be its infatuation with the literal sense of the words appearing in statutes. Well, if the charge is a fair one, think what an advantage the infatuation may turn out to be once the statute governing the case is a bill of rights. That great defender of American liberties, Justice Hugo Black, achieved the results which won him his reputation by strictly literal interpretations of the United States bill of rights. Freedom of speech, he insisted, meant freedom of speech and nothing less. No exceptions or qualifications were noted in his book.

It is suggested sometimes that litigation under a bill of rights should be entrusted to a specially created constitutional court dealing with such matters alone. I do not like the idea in the least, I must say, for this country at all events. Issues concerning a bill of rights often have a strong political flavour. Often they are politically controversial. Often they have political consequences. Appointments on political grounds to a special constitutional

court would surely prove to be likelier in those circumstances than politically inspired appointments to the ordinary courts of the land, where the need for judges with experience of and expertise in the daily round of litigation, much of it highly sophisticated, serves as a filter a good deal of the time. Nor would it be the end of the problem to devise a system which met satisfactorily the danger of political appointments. One would be left with the unhealthy situation in which, because the constitutional court did nothing but work noticeably political, the public suspected its decisions, imputing political reasons to and looking for political motives behind such. It would tend to be distrusted, one fears in short, much more than the ordinary courts. For litigation involving a bill of rights to be kept within the mainstream of the judicial process would, I feel sure, be much better.

Turning now to the characteristics of the bill of rights I would like to see here, I must disclose a bias. Perhaps because it is the bill of rights I know best, indeed the only bill of rights of which I have any real knowledge, I feel strongly partial to the United States bill of rights. Even those without my bias must admit, however, that it has proved itself to be remarkably resilient and effective. Its earliest provisions have been on the statute book for almost two hundred years. The rest that matter have lain there for well over a century. During that period the United States has grown from nothing much into a super power, expanding its territory enormously, increasing its population greatly, transforming its society radically, and assimilating in vast numbers immigrants of different races, cultures, languages and religions. For much of the time the country has been torn by internal conflicts and clashes of interest. It has undergone a bloody civil war and a ferocious industrial revolution. That it has survived and progressed as a unified state despite such conditions for instability and disintegration looks rather like a modern miracle. The United States constitution and its bill of rights must surely take much of the credit. The history of the United States is relatively so short that one tends to forget the age of its constitution, the oldest written one in the world today. A constitution like that, a constitution which has weathered such storms, has a lot to teach those making constitutions elsewhere.

The most important single reason for the durability and effectiveness of the United States bill of rights may well be found in its wide and general terms, in its avoidance of the specific, in its lack of definitions, explanations and adumbrations. Let us take a look at some of its provisions. And let us consider the sort of questions they pose, the sort of questions of greater or lesser importance that have actually arisen, which they do not answer, in so many words at all events.

Congress is forbidden by the first amendment to enact any law "respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press". Is religion established when public funds or facilities are made available to schools owned and run by the church, when public land is used for the celebration of religious festivals or the display of religious symbols? Is the free exercise of religion prohibited when the use of public land for such purposes is denied on the other hand or, to change the subject, when religious pacifists are drafted for military service? And what is really meant by freedom of speech? What is speech? It is surely not confined to the spoken word, but encompasses the written

one as well. But does it cover in addition any message, a message conveyed for instance pictorially or by gesture? And what account must be taken of content and character, as distinct from form? Is libel protected? Is obscenity? Are racial insults? Are threats and incitements to violence? How great, in any event, is the freedom secured? And what kind or measure of interference has the effect of abridging such? Unless you are a Justice Black, you will find in the wording of the first amendment no easy answer to quite a number of these questions.

The fourth amendment proclaims that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated". And "no person", the fifth amendment insists "shall be compelled in any criminal case to be a witness against himself". Now when is a search or seizure unreasonable? And what amounts in the first place to a search or seizure? Is electronic surveillance, bugging, a search? Is it a seizure to take from somebody against his will a sample of blood which is needed to test intoxication? Does the result of the test, if positive, make him a witness against himself the moment it is proved? Does he become such on the production in court of a confession which he has made under interrogation or of a fingerprint which has been obtained from him? Then what follows from an infringement of the fourth or fifth amendment? Is the result a total embargo on the evidence collected illegally, and not only on that but also on its tainted fruit, on all information elicited independently yet sought consequently?

The sixth amendment entitles every person accused of a crime "to have the assistance of counsel for his defence". What happens should he find himself unable to pay for the services of one? Must the assistance be provided at public expense? Must it be made available, what is more, not just at his trial but earlier too, during any interrogation which precedes such for instance, indeed as soon after his arrest as it can be provided? "Cruel and unusual punishments" are banned by the eighth amendment. Is corporal punishment cruel and unusual? Is capital punishment?

No single state is allowed, so the fourteenth amendment stipulates, to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deny to any person within its jurisdiction the equal protection of the laws". How wide are those privileges and immunities? And how far does the guarantee of equal protection go? Is the fourteenth amendment violated whenever a state enjoins or tolerates racial discrimination in public schools, in public transport, in public accommodation, or when it does so for that matter with reference to private amenities which are subject to regulation or licensing, when it does so in relation to the ownership or occupation of land which is privately held? Is affirmative action hit, although it discriminates in order to alleviate the effects of past discrimination? Is differentiation between the sexes covered and, if so, in what field does it find itself beyond the pale? Are imbalances of various kinds outlawed in such areas as welfare benefits and public assistance programmes, employment practices and government contracts, the apportionment of legislative districts and the consequent value of votes?

Last for the time being, but by no means least, one has the "due process" clauses of the fifth and fourteenth amendments, the one general in its scope,

the other dealing explicitly with the powers of the individual states and limiting those. "No person shall be . . . deprived of life, liberty or property", the fifth amendment decrees, "without due process of law". Sounding at first so simple and straightforward, these statements have turned out to be highly plastic, to be versatile instruments for the development of American constitutional law along lines both imaginative and dynamic, as well sometimes as controversial. "Procedural due process", the courts have held, is not all that counts and has to be observed. So does "substantive due process", focusing not so much on means as on ends, invoking fundamental values, or what are perceived to be such, which the bill of rights does not separately protect and may not even identify, but which are thought worthy all the same of protection. Nobody may be deprived of life, liberty or property, according to this doctrine, once it is incompatible with such values for that to happen to him. The doctrine served initially to protect economic and proprietary interests. It no longer operates so narrowly, but reaches now into many corners. Its implications can be seen in the judgments invalidating, for instance, legislative bans on the sale of contraceptives and on the performance of abortions during the early stages of pregnancy. These were viewed as unconstitutional infringements of personal freedom.

Consider next, if you will, what would have happened had everything been spelt out by those who framed the United States bill of rights. That it would never have produced the effect which has been given to it over the years seems pretty certain. Circumstances for which it caters nowadays, in the first place, did not exist at the time, could not be foreseen, and would not therefore have been covered. Some concepts, in the second, were then understood rather differently. To illustrate this is easy. It is accepted almost universally in the United States today that governmental support for racial segregation amounts to a clear violation of the fourteenth amendment's equal protection clause, even when such separate facilities as are available happen to be on a par materially. Yet was that always obvious? Was it taken for granted in 1868, when the fourteenth amendment was ratified? The answer is surely that it was not. Twenty-eight years later, after all, the supreme court concluded without much difficulty in *Plessy v Ferguson* that racial segregation was in order constitutionally, as long as the separate facilities on offer were more or less equal. Nor can one readily imagine that discrimination against women was offensive to a large number of the Americans who were alive in 1868, that many who were around to see the sixth and eighth amendments coming into operation in 1791 would have branded the death penalty a cruel punishment, let alone an unusual one, or thought trials unfair in which accused persons lacked legal representation because they could afford none. The point I am endeavouring to make is just this. An American bill of rights which was precise and specific in its formulation would have closed the door, one can safely guess, to the judicial decisions ensuing as time went by on these and many other points. Frequent amendments would have been required to keep it abreast of changing circumstances and attitudes, to ensure that it met the demands these made on it and satisfied the expectations they aroused. The process would have been laborious. It is in the United States, as it ought to be everywhere. Bills of rights should always be difficult to amend. They should never be vulnerable to passing moods or transient passions. Yet a process of amendment which is laborious tends to supply the occasion, to

set the stage, for political strife both intense and prolonged, once the amendment is controversial at all events or it suits some powerful interest to make it such. Think of the battles waged in the American courts over the economic and social reforms of the New Deal, over school desegregation, over abortion, over issues of law and order. Think how much more clamorous and rancorous the fights would have been, how much more protracted and debilitating, how much more divisive and damaging, had they taken place instead in all the organs, federal and state, which have a say in the constitution's amendment. The solution to the problem lay in a bill of rights that did not date, that did not call for constant revision.

The authors of the United States bill of rights grasped this. They avoided the perils of rules which were detailed and therefore rigid. They proclaimed rather the broad and basic principles to which they dedicated their society, the ideals to which they meant their society to aspire, leaving it to future generations to work the implications out, to construe and implement the principles according to the needs and temper of the times. The function has been performed, since *Marbury v Madison* at any rate, largely by the supreme court of the United States. And, on the whole, it has been performed with remarkable success. Sometimes, to be sure, the supreme court has lagged behind or shot ahead of public opinion, but never outrageously or, in the historical sense, for very long. It could not have got away with doing so. Professor Archibald Cox has written in *The role of the supreme court in American government* (at 103-4):

> Although the courts control neither the purse nor the sword, their decrees often run against the executive, set aside the will of the Congress, and dictate to a state. Compliance results from the belief that in such cases the courts are legitimately performing the function assigned to them.

Once the belief goes the result is a rebellion by the public against the courts, expressed in demands for the curtailment of their powers by legislation or, if necessary, by constitutional amendment. Many such demands have been heard throughout the history of the United States supreme court. Yet none has been heeded because the supreme court has never stepped out of line so far or done it with such persistency as to alienate public opinion strongly enough. Things came close to that when, in his anxiety to overcome the resistance of the conservative element on the supreme court to the legislation of the New Deal, president Roosevelt threatened measures which would have empowered him to pack its bench. But the supreme court saved itself by giving way. Justice Roberts changed sides, transforming a conservative majority of five to four into a conservative minortiy of four to five and prompting the quip that a switch in time had saved nine.

A bill of rights of the kind which the United States enjoys has, of course, made constitutional litigation there a growth industry. Some of you will no doubt think that a bad thing. I do not. Litigation over questions arising from private law is seldom, I agree, a cause for rejoicing. The best that can be said for most of it is that, once more sensible means of resolving disputes have failed, nothing else is left. Trial by battle is less sensible still. By and large, I believe however, the same does not go for litigation concerning public law, or the areas of it at all events which bills of rights touch. A society which reassesses constantly the balance to be struck between the good of the

community and the liberties of the individual, a society which reacts to changing circumstances and new challenges by exploring afresh the outer reaches of public interest and personal freedom, strikes me as a most healthy and virile one. And a society which does this through the courts, which uses the courts as its instrument for doing so, seems to me highly civilised. For there, removed from the heat of the political kitchen, the scene is set for the case to be argued rationally, investigated intelligently, and decided responsibly.

Yes, we can learn a lesson or two from the experience of the United States, I hope you will agree, when we come to consider the nuts and bolts of a bill of rights for South Africa. Too many might well make the product as inefficient here as they would surely have made it there. Then one has the problem not so much of a bill of rights dealing too specifically and in too much detail with matters appropriately covered as of a bill of rights dealing with matters inappropriate in the first place for coverage by one.

A bill of rights is not a political manifesto, a political programme. Primarily, it is a protective device. It is a shield, in other words, rather than a sword. It can state, effectively and quite easily, what may not be done. It cannot stipulate, with equal ease or effectiveness, what shall be done. The reason is not only that the courts, its enforcers, lack the expertise and the infrastructure to get into the business of legislation or administration. It is also, and more tellingly, that they cannot raise the money. They cannot levy the taxes needed to finance those accomplishments they may like to see, and the idea of their ordering the legislature to do so presents certain difficulties.

I do not overlook the reality that in some situations, in situations where only two alternative courses are on the cards, a prohibition against the one may be tantamount to a commandment on those concerned to follow the other because it leaves them with no choice but to do so and thus compels them indirectly to do it. *Brown v Board of Education* had that effect. The ban against racial segregation in public schools meant that the authorities practising such had either to open their schools to pupils of all races or to close their schools to everyone, to close their schools altogether. And that, though not unthinkable in all circles since it was actually contemplated in some, never amounted to a real option. *Gideon v Wainwright* furnishes a second example. Once the trials which the decision governed were vitiated for want of legal representation, the authorities were forced in those cases to remedy the defect at public expense. It was the price they had to pay for valid trials, all they could do short of holding none and therefore prosecuting nobody. None of this affects my point, however, which has to do with issues less clearcut. An authority which is told not to provide a housing or welfare scheme with particular flaws, for instance, may find it politically feasible to provide no housing or welfare scheme at all. And, if the cost of providing an unflawed one is significantly higher, any demand that the authority go ahead and incur it may be met by a pointblank refusal to raise or vote the cash. What happens then?

Nor do I ignore, I should add, some modern thinking in the United States which has a bearing on the present topic, indeed on the very type of problem I have just posed. The idea is growing there of a constitutional and therefore legally enforceable right to freedom from poverty and its consequences, a constitutional and legally enforceable right to "livelihood", as Professor Charles Black of the Yale Law School called it in the Samuel Rubin lecture

he delivered earlier this year at the Columbia Law School, a marvellous lecture by the way, an incandescent one, the text of which I was fortunate enough to receive through the mail the other day. The subject is complex, and the legal reasoning on which it calls is highly sophisticated. To keep a close watch on developments in the United States, to see whether the idea gains ground and becomes eventually accepted doctrine, will surely prove worthwhile to South African lawyers. The relevance of such a doctrine to our society, should we ever obtain a bill of rights, needs no stressing.

Having mentioned all this, however, I still think it important to underline the problem of overreach in a South African bill of rights, a problem which the local acceptance of a similar doctrine would not necessarily or entirely solve, indeed a problem of which account would have to be taken when the doctrine itself was evaluated and its scope considered.

Perhaps I can best illustrate what troubles me by inviting you to look at the Freedom Charter. I do so for the following reason. I have heard it suggested that there is no occasion for us to examine models of a bill of rights or to concern ourselves with the terms of any. All that is required here is to give the Freedom Charter the force of law. The Freedom Charter contains much, of course, which could find a home in your typical bill of rights. But it has a good deal extra to say. Take for instance, these excerpts:

> Rent and prices shall be lowered, food plentiful, and no one shall go hungry. A preventive health scheme shall be run by the state. Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children. Slums shall be demolished and new suburbs built where all shall have transport, roads, lighting, playing fields, creches and social centres. The aged, the orphans, the disabled and the sick shall be cared for by the state. Rest, leisure and recreation shall be the right of all.

Our society would be much improved, without a doubt, were these goals to be attained, and one cannot imagine anybody quarrelling for a moment with their pursuit. But the place where the commitment to them belongs is a political programme, I venture to suggest, not a bill of rights. I say this because I have great difficulty in seeing how the commitment could be enforced and its enforcement supervised by legal processes, as distinct from those political. I have the same difficulty with the proposal of Mr Albie Sachs, mentioned by Professor Denis Davis in the paper he has presented to this conference of which he kindly sent me an advance copy, that a bill of rights for South Africa should "commit the new state to a programme of social, cultural and economic reconstruction". To expect from a bill of rights goods which it cannot deliver, will not merely be futile but will subject it to strains damaging perhaps to its capacity to perform the work it can do well.

If such are the limitations of a bill of rights, the question may be asked, what value will one have for the average rural peasant, the average urban worker, and therefore the bulk of the population? It is all very well for freedom of speech and of assembly to be guaranteed, for arbitrary arrests and detentions to be outlawed, for the right to vote and participate in the political life of the country to be secured. But these are the preoccupations of those with the time and inclination to write or read books, to make or listen to speeches, to concern themselves with public affairs, to stick their necks out. What matters more to most of the men and women living in Soweto, in

Guguletu, in Kwa Mashu, is a full stomach, employment, housing, health care and an education for their children. What use to them is a bill of rights which may not ensure that needs so basic are met?

The answer, I believe, is this. Even if a bill of rights cannot in itself guarantee successfully achievements like these, what it can do is highly relevant to such and of real benefit as a result to the rural peasant or the urban worker. For, by guaranteeing freedom of speech, of the press, of assembly and of association, it can see to it that those political parties or movements which have as their policies the satisfaction of his demands are at liberty to organise themselves, to solicit his support, to represent him effectively, and to promote his interests. It can, in short, guarantee the democracy in which his best chance surely lies.

What a bill of rights cannot afford to do here, I put to you, is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably. The pressure to tackle the problem is likely to prove irresistible. No government which ignores it has much chance of retaining popular support. Should a bill of rights obstruct the government of the day when that direction is taken, should it make the urgent task of social and economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights as a whole and the survival of constitutional government itself. I am not pleading for a bill of rights which takes sides on matters of economic policy, be they capitalist or socialist sides. I am pleading for a bill of rights which is neutral altogether on the issue, which leaves it to the political process to choose the economic policy that should be pursued, merely ensuring that all are free to preach and propagate their own beliefs.

Not only would a bill of rights which entrenched economic and social privilege be unlikely to work in the long run; in all probability one which endeavoured to do that would never get off the drawing board. I say this because such an effort could hardly be expected to capture the imagination of black leadership or to gain its confidence and backing. And I cannot see the case for a bill of rights having much prospect of success without that confidence and backing.

I am far from sure of black support existing at present, on any large scale at all events, for even a bill of rights without that blemish. On previous occasions when I have taken part in discussions on the subject I have encountered amongst some blacks a noticeable lack of enthusiasm for the concept. I find this disturbing, but not in the least surprising.

Hitherto, in the first place, the idea of a bill of rights has been sponsored, promoted and encouraged largely by whites. Our history provides enough examples of whites making constitutions which are then imposed on blacks for the cause of a bill of rights to be discredited were this to happen again. We dare not let it.

Then, in the second place, many blacks are cynical about the sudden enchantment of whites, or some of them, with the notion of a bill of rights. Blacks tend to sneer at the anxiety of whites for a bill of rights protecting them against a black majority when there was scarcely any mention in the

past of the need for one to protect blacks against a white minority. But the reply is surely that, although those who look like requiring protection may come predominantly from one group at certain times and from another at different times, the function of a bill of rights is to protect neither blacks nor whites, but everybody. And, while I fully understand the cynicism of which I have spoken, it does not seem to me to be a powerful answer to the case for a bill of rights, if one is indeed appropriate to a heterogenous society like ours, to complain about its presentation rather late in the day. Nor should we overlook the reality that the chances of a political settlement through negotiation might well be enhanced were a bill of rights to be accepted on all sides as part of the deal.

One comes, in the third place, across the argument that all talk about a bill of rights is premature, that until South Africa is transformed into a true democracy any bill of rights which is adopted will perforce be so attenuated as to be worthless. To hope as matters stand for more than a bill of rights strictly limited in range is, I agree, quite fanciful. The standard model would result, after all, in the immediate invalidation of any number of important statutes which parliament has not yet shown much willingness to repeal. Indeed, it is difficult to envisage the co-existence of a bill of rights worth its salt with valid legislation of any kind produced by a parliament which continues to represent not the whole population but only a minority. Whether a limited bill of rights might be useful as an interim measure would depend, I suppose, on its terms. As for the principle of the thing, I should perhaps remind you of the contention which Professor Davis had advanced in his paper, most cogently it seems to me, that in the short term some valuable purpose may well be served. After referring to the incompatibility of a bill of rights with the present structure of parliament and the nature of its statutes, he says:

> Such observations do not mean that a . . . limited Bill of Rights will have no effect upon democracy . . . (I)f such a Bill safeguarded procedural rights, the Bill could be used to provide protected spaces to further the struggle for a truly democratic society. The advantage of the introduction of even a limited Bill of Rights in the context of present South Africa is that it might convince people, especially the embittered disinfranchised who perceive our legal system to be extremely repressive, that rights and civil liberties are important and can work their advantage. If this is the result of a Bill of Rights, it could help to preserve a tradition of democracy which will be carried forward into a future South Africa. At present there is a tendency amongst opposition groups to dismiss all rights as cynical manipulations by a crumbling white hegemony. If such a view dominates in a future South Africa, we would have only succeeded in replacing one repressive regime with another . . . (F)or a democracy to emerge in South Africa in which the arbitrary excesses of central state power are curbed, and in which participation in the political process is extended to all capable of participating in it, a tradition which emphasises the importance of rights and democracy must be built and strengthened even before political power is gained.

That the introduction of a bill of rights may nevertheless be dismissed by some of us as premature does not mean, in any event, that the same should go for all debate over or planning for one. Even if actual introduction is delayed until a bill of rights forms part of a constitution which in all respects is democratic, it is surely wise for lawyers, postulating and foreseeing such a constitution, to give thought to the kind of bill of rights they want in it

so that, when the time arrives, they may be equipped to offer well considered and constructive proposals. A bill of rights will not, after all, spring into existence on its own.

Would a bill of rights make South Africa a haven at last for liberty and justice? Who can tell? Those who have the determination and the strength to seize power by force will not be deterred by such from doing so. They can tear up constitutions and do so not infrequently. But, as long as constitutional government survives, I have no doubt that it will be not only tougher but also a good deal healthier if it is buttressed by the bill of rights we are gathered here to discuss.

6 Die regbank en 'n menseregtehandves

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SUMMARY

Judges do not merely interpret and apply the acts of parliament in a purely mechanical fashion. They frequently have to *choose* between two or more alternatives when they interpret statutes or when they apply the common law principles or control subordinate legislation and administrative action. In exercising this choice whenever the law is unclear, judges create the law on that point. Furthermore, it is clear that the alternative which they eventually decide upon will be determined (albeit unconsciously) by the *value* considerations on which they necessarily have to base their choice.

When exercising this choice the judiciary is faced with a dilemma: there are two distinctly different value systems to choose from.

On the one hand, the value system which underlies the (common law) legal system requires that the individual should be treated justly and that his rights and freedoms should be protected according to the traditional Western heritage.

On the other hand, the value system of the *status quo* as it is manifested in the legislative program is considered to be grossly unjust when judged according to the legal values which underlie the first value system.

It is clear that the eventual outcome of a judgement will largely depend on the question: which one of these two value systems applied when the judge exercised his choice:

(a) Acting according to the legal values which underlie the liberal Western heritage a judge will exercise his choice in the favour of the individual and render a judgement which protects human rights.

(b) Acting according to the values of the *status quo*, embodied in the apartheid acts which require unequal treatment on the basis of racial separation or embodied in the security legislation providing for arbitrary and uncontrolled executive powers, the judge will give an "executive-minded" decision and maintain the *status quo* thereby infringing upon human rights.

Authoritative studies of appeal court decisions in this regard (covering the period from 1910 until today) show that the judiciary generally delivered executive-minded decisions whenever they had to decide a legal conflict between an individual and the government authority even though they had the choice to rather protect individual rights and freedoms.

The following solutions can be recommended in order to secure an activist judiciary willing to protect human rights:

(a) A rejection of the positivist theory of law according to which judges merely apply the acts (commands) of parliament in a mechanical manner, in favour of a legal theory which requires the application of the true legal values inherent in the legal system when exercising judicial choices.

(b) Lawyers should demand the repeal of unjust laws and judges should apply these laws only when they have no choice in this regard, protesting loudly and expressing their criticism.

(c) Judges should be appointed from different backgrounds and not only from the one dominant group and appointments should be made on the basis of merit where politics play no part.

(d) The most *practical* solution is the responsibility of lawyers and academics alike to point out the choices to judges whenever the opportunity arises. This will ensure that judges are aware of the fact that they must choose as well as of the fact that they must take into account the values on which they base their decisions.

This practical solution is illustrated by discussing the newest cases dealing with the most reprehensible provisions of the security legislation, that is, detention without trial and the refusal by the Attorney-General that the court may grant bail. In all of these reported cases (1985 3 to 1986 1 and an unreported appeal court case in March) the court exercised its choice in favour of the legal values which underlie the legal system and was thus able to protect human rights. One hopes that this will become a new and welcome trend.

Dire consequences will be the result if the courts return to their former position and give executive-minded rulings. These decisions are responsible for the fact that a large number of South Africans view the courts not as objective but as maintaining the unjust legislative programme of the *status quo*. It is imperative that the courts must be reinstated as the independent guardians of individual liberty. This will only be possible if the judiciary gives activistic judgements to protect human rights in the face of unjust acts of parliament. Furthermore, a constitutionally entrenched bill of rights will create new opportunities for the courts to invalidate unjust apartheid and security legislation.

A legal system is a country's most valuable institution and it is imperative that *all* the people should retain their confidence therein. Unless it retains the confidence of the people the legal system loses its legitimacy and the result of the distrust will almost certainly be anarchy and revolution. The solution lies with the powers that be to repeal the unjust legislation in order to create a just society but in the event of this not taking place, the judiciary still has a solemn duty to remain activistic, striving to retain the confidence of the people in the legal system. In this regard all lawyers, be they academics, practicians or judges, carry a heavy responsibility.

Enige bespreking oor die regbank en 'n menseregtehandves impliseer noodwendig dat die regbank as 'n onpartydige en onafhanklike arbiter optree in geskille waarby die onderdaan en die staat betrokke is. Slegs in die geval waar die regbank vreesloos die grondwetlike waarborge vir menseregte afdwing en nie huiwer om die onderdaansregte te beskerm wanneer daarop inbreuk gemaak word nie, kan die invoer van 'n menseregtehandves in die Suid-Afrikaanse grondwetlike bestel 'n betekenisvolle rol vervul om 'n meer regverdige samelewing te skep.

'n Mens sou dus kon bespiegel of die Suid-Afrikaanse regbank in die toekoms hierdie grondwetlike rol met onderskeiding sou kon vervul. Of 'n mens sou meer prakties kon wees en eerder na die baanrekord van die Suid-Afrikaanse regbank kyk ten einde vas te stel of die regbank nou reeds – binne die huidige staatsregtelike raamwerk – individuele regte beskerm indien daar onregmatiglike inbreuk op gemaak word deur die staatsgesag.

Laasgenoemde benadering gaan hier gevolg word. As uitgangspunt word die prestasiegeskiedenis van die regbank geneem. Indien die regbank nou reeds as die vesting van individuele vryheid gesien kan word en die aansien en legitimiteit van die Suid-Afrikaanse regstelsel as gevolg hiervan bo verdenking staan, sou dit as die enigste ware basis kon dien vir die invoer van 'n menseregtehandves in 'n toekomstige grondwetlike bedeling. Gevolglik word

fundamentele staatsregtelike beginsels soos die skeiding van magte, die afwesigheid van arbitrêre gesagsuitoefening, en die legitimiteit van die regstelsel self by hierdie bespreking betrek.

'n Faktor wat die grondwetlike rol van die regbank as die beskermer van individuele vryheid in regskonflikte tussen die onderdaan en die staat vertroebel, is die standpunt (wat selfs deur sommige regters gehuldig word) dat die regterlike funksie bloot meganies is. Hierdie standpunt kom daarop neer dat die regters slegs die wette van die parlement interpreteer en toepas en gevolglik uitgelewer is aan 'n soewereine wetgewer en self geen keuse het in hierdie verband nie. Hierdie stelling is eenvoudig onwaar. Daar is naamlik vele gebiede waar die reg onduidelik is omdat die parlement nie elke feitekompleks waarop die statuut moontlik van toepassing kan wees, vooraf kan voorsien nie.[1]

Die regter moet by die interpretasie van die statuut 'n bepaalde betekenis daaraan heg of hy moet 'n keuse maak tussen 'n aantal moontlike interpretasies daarvan. Met ander woorde, deur statute op hierdie wyse te interpreteer volg die regter nie 'n vooraf-neergelegde reël nie nóg ontdek hy eenvoudig die bedoeling van die wetgewer maar in sy keuse van die een of die ander interpretasie skep hy reg op hierdie punt. Nie alleen in die geval van statutêre interpretasie nie maar ook in die geval van die hersiening van administratiewe optrede en ondergeskikte wetgewing sowel as by die toepassing van die gemenereg het die regter dikwels 'n keuse. Dugard maak in ooreenstemming hiermee die volgende opmerking[2]:

> . . . choice is a necessary concomitant of a fertile legal system with contradicting and competing rules of statutory construction, presumptions, principles and precedents.

Ander skrywers sluit by hierdie siening aan[3] en verklaar dat die regterlike funksie nie bloot neerkom op die meganiese toepassing van 'n wet nie (soos

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1 Sien hieroor Dugard "The judicial process, positivism and civil liberty" 1971 *SALJ* 181. Hierna word verwys as Dugard "Judicial process".

2 "Some realism about the judicial process and positivism – a reply" 1981 *SALJ* 372 ev. Hierna word verwys as Dugard "Some realism". Cameron "Legal chauvinism, executive-mindedness and justice – L C Steyn's impact on South African law" 1982 *SALJ* 38 ev veral op 59-60 wys insgelyks daarop dat HR Steyn van mening was dat dit die plig van die regter was om slegs die "bedoeling van die wetgewer" vas te stel. Hy wys daarop dat die proses van wetsuitleg nie 'n futiele soeke is of behoort te wees om 'n nie-bestaande parlementêre "bedoeling" te vind nie. Dit is veel eerder 'n skeppende proses: "whereby embodiment is given to a set of words and sentences in the context of the underlying principles of the legal system." Hierdie woorde en sinne gee opsigself rigting aan die proses en plaas 'n beperking op die reeks van opsies wat vir 'n regter bestaan wanneer hy hulle moet interpreteer. Binne daardie beperkings word daar egter 'n beroep op 'n regter gedoen om 'n betekenis aan te bring in ooreenstemming met die normatiewe verantwoordelikhede wat sy regterlike pligte hom oplê en hy gee dan 'n betekenis aan die woorde: "whose application to a range of situations can never be pre-ordained. Unreflective references to 'the intention of the legislature' cloud these facts."

3 Sien skrywers soos Corder *Judges at work – the role and attitudes of the South African appellate judiciary 1910-1950* (1984); Mathews "The South African judiciary and the security system" 1985 *SA Journal on Human Rights* 199; en veral Forsyth *In danger for their talents – a study of the appellate division of the supreme court of South Africa from 1950-80* (1985) viii ev. Hierna word verwys as Forsyth *In danger for their talents*.

dit blyk uit die soeke na 'n nie-bestaande bedoeling van die wetgewer) maar dat 'n soektog deur die regsbronne nie altyd 'n korrekte antwoord oplewer nie en in sulke gevalle van onduidelikheid is die taak van die regter dan noodwendig skeppend wanneer hy moet kies uit 'n aantal aanneemlike interpretasies.

Hierdie aandrang op 'n blote meganiese interpretasie kan toegeskryf word aan 'n vorm van positivisme wat hierdie redenasies onderlê. Forsyth[4] verklaar egter dat die moderne, gesofistikeerde positivisme nie te blameer is vir die meganiese optrede van regters nie. Moderne positivisme is naamlik geen regsteorie nie. Dit is gevolglik nie voorskriftelik van aard nie maar dit is bloot beskrywend – 'n sogenaamde "epistomology".[5] Die doel daarvan is om kennis van die reg te verkry deur die toepassing van die rede op waarneembare verskynsels eerder as deur verwysing na morele waardes. Dugard[6] toon egter aan dat hierdie siening van die positivisme as 'n blote beskrywende epistomologie, nie die algemene opvatting oor positivisme in Suid-Afrika (veral onder die regspraktisyns) is nie. Hierdie positivisme is inderdaad 'n regsteorie en wel die positivistiese regsteorie van Austin wat verklaar dat die reg 'n bevel is en dat reg en moraal altyd streng geskei moet word.[7] Die reg word in ooreenstemming hiermee beskou as 'n bevel van die soewereine wetgewer (die parlement) welke bevel die howe verplig is om toe te pas. Hiermee saam word die reg en regswaardes altyd streng geskei wat weer daartoe aanleiding gee dat waardeoordele geen rol speel by die uitoefening van die regterlike funksie nie. Die noodwendige gevolg van hierdie formalistiese, positivistiese regsteorie is dan dat 'n blote meganiese funksie aan die regbank toegesê word waarvolgens die regter eenvoudig die wil van die soewereine wetgewer moet toepas sonder om enigsins oorweging te skenk aan waardeoordele. Daar kan gevolglik met Dugard saamgestem word dat hierdie vorm van positivisme wat in Suid-Afrika aanhang geniet waarskynlik daarvoor verantwoordelik gehou kan word dat die regterlike funksie as 'n blote meganiese interpretasie van die wetgewer se wil afgemaak word.

Hierdie positivistiese aandrang op 'n meganiese toepassing van wette is geheel en al strydig met die werklikheid. Nieteenstaande sekere regters hulle daarop beroep dat waardeoordele geen rol speel in hulle uitsprake nie, het hulle dikwels 'n keuse (soos reeds ter inleiding aangedui is) en oefen hulle hierdie keuse inderdaad ingevolge sekere waardes uit. Dugard[8] noem die waardes waarvolgens die Suid-Afrikaanse regters optree hulle "inarticulate major premises" en hierdie politieke en morele waardes van die regters kom dan uiteindelik neer op 'n lojaliteit teenoor die *status quo*. Ander skrywers[9]

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4 Forsyth & Schiller "The judicial process, positivism and civil liberty II" 1981 *SALJ* 218 ev. Hierna word verwys as Forsyth "Judicial process II".

5 230: "Positivism will reveal rather than obscure the deficiencies of the judiciary."

6 Dugard "Some realism" 387 stel die vraag of die energie wat Forsyth aanwend om Dugard te kritiseer nie beter aangewend kan word nie "to a study of the judicial process as it *is* in South Africa; to a search for a jurisprudential explanation of the forensic malaise that inflicts our judiciary; and, above all, to suggestions for a remedy?"

7 374 ev.

8 375: "Consequently my consistent complaint has been that an unsophisticated, out-of-date, popular, crude or vulgar positivism is to blame for the present state of the judicial process in South Africa."

9 Mathews 208. Sien ook die standpunt van Erasmus (n 12) in hierdie verband.

stem saam met hierdie standpunt dat 'n "crude and distorted" vorm van positivisme verantwoordelik is daarvoor dat 'n uitspraak wat essensieel 'n politiese of morele uitspraak is voorgehou word as een wat bloot meganies afgelei is.[10]

Om hierdie standpunte saam te vat kan verklaar word dat 'n vorm van positivisme toepassing vind in Suid-Afrika wat daarop neerkom dat die regbank die bevel van 'n soewereine wetgewer bloot toepas sonder dat waardeoordele 'n rol hierin speel. Hierdie regsteorie verskaf 'n gerieflike regverdiging vir die stelling dat die regterlike funksie bloot 'n meganiese funksie van interpretasie en toepassing van statute is. In werklikheid bestaan daar egter dikwels keuses vir regters by die interpretasie van wette asook by die ontwikkeling van die gemenereg en by die uitoefening van kontrole oor ondergeskikte wetgewing en administratiewe handelinge en by die uitoefening van hierdie keuses is die regterlike funksie dan noodwendig skeppend. Verder word hierdie keuses dan uitgeoefen (al is dit onbewustelik) ingevolge sekere waardes wat bepaal welke een van die keuses uiteindelik verkies word.

Dit bring ons dan by die eg-Suid-Afrikaanse dilemma: die waardesisteem van die *status quo* verskil hemelsbreed van die waardesisteem wat die regstelsel onderlê. Die regswaardes wat die regstelsel onderlê is essensieel gebaseer op die waarde geregtigheid soos dit onderlê word deur die individuele vryheid en sy oorsprong het in die Westerse tradisie.[11] Hierdie regswaardes vereis die regverdige behandeling van die individu ooreenkomstig die vryheidsbewussyn van die Westerse tradisie en het ten doel die welsyn en die vrye ontwikkeling van die individu. Hierteenoor word die waardes van die *status quo* vervat in wetgewing wat (ingevolge die regswaardes wat die regstelsel onderlê) as onregverdig beskou word. Hierdie wetgewing is in besonder die apartheidswetgewing wat individue skei op grond van ras en ongelyke behandeling tot gevolg het. Die veiligheidswetgewing is die ander sondebok deurdat groot inbreuk gemaak word op individuele vryheid deur arbitrêre en ongekontroleerde staatsgesag.

Die dilemma vir die Suid-Afrikaanse regbank is dus hieruit meteens duidelik: word die regterlike keuse toegepas volgens die regswaardes wat onderliggend is aan die regstelsel (die Suid-Afrikaanse vryheidsgesinde gemenereg) of word die keuse uitgeoefen ingevolge die waardes van die *status quo* soos

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10 Dugard "Some realism" 372 ev; Mathews op 207: "By positivism I mean the assumption that law consists of an autonomous body of legal rules and that by a source-based master test a judge in most, if not all, legal disputes is able to discover the rule appropriate to the facts of the case before him. It follows that the judicial function is essentially *not* one of doing justice between the parties . . . but in determining without reference to political or general morality what the result of the rule revealed by the master test yields in a particular dispute." Op 208 ev wys hy in ooreenstemming met die benadering van Dugard daarop dat daar 'n groot gebied van "unsettled law" is waarvolgens die regters gevolglik keuses moet uitoefen tussen "goeie" en "slegte" reg.

11 Dugard "Some realism" 382-3; ". . . the primary political and legal value of Western society – the well-being and free development of the individual must be fostered through the medium of certain guiding legal principles or values that have their roots in the Western tradition: freedom from arbitrary arrest and detention without trial; freedom from cruel and unusual punishment; the right to legal representation when the individual's liberty is at stake; the right to be heard in one's own defense before one's liberty is curtailed; equality before the law; freedom of speech and literary expression; freedom of the press; freedom of assembly; and freedom of movement."

vervat in die onregverdige wetgewing van die parlement? Die vraag is dus aan die eenkant of 'n vryheidsgesinde regbank menseregte beskerm en, aan die anderkant, of 'n *status quo* gesinde regbank die belange van die regeringsgesag (veral die uitvoerende gesag wat wye inbreukmakende bevoegdhede het) behartig. Ten einde hierdie vraag te kan beantwoord moet daar gelet word op verskeie navorsingsprojekte wat in hierdie verband onderneem is juis om 'n antwoord te verskaf op die vraag: Is die regbank vryheidsgesind en leun hy dus oor na die kant van die individu of is die regbank *status quo*-gesind en leun hy dus oor na die kant van die uitvoerende gesag (anders gestel is hy "executive-minded") – in hierdie gevalle waar die individu en die staatsgesag in konflik staan?

Erasmus[12] lewer 'n besondere bydrae. Hy gaan uit van die standpunt dat niemand, ook nie regters nie, ooit volkome objektief kan wees in hulle oordele nie. Ook regters is tyd-, kultuur-, en self-gebonde en het 'n sekere ideologiese diensbaarheid. Daar is gevolglik 'n onbewuste neiging om die waardes te aanvaar van die dominante groep waaruit hulle aangestel word – waardes wat Erasmus die ideologie van apartheid noem. Hy illustreer hierdie stelling op 'n oortuigende wyse deur na die ideologie van "separate but equal" te verwys. Uitsprake voor die aanvaarding van die Wet op Aparte Geriewe 49 van 1953 het wel ondergeskikte wetgewing nietig verklaar wat voorsien het in aparte maar ongelyke geriewe.[13] Die howe het dus gesteun op die "separate but equal"-leerstuk – ironies genoeg in dieselfde tydperk toe hierdie leerstuk in die Verenigde State van Amerika verwerp is deurdat die hof beslis het dat "separate" reeds inherent "unequal" is.[14] Na die aanname van bogenoemde wet deur die parlement het daar egter selfs in hierdie houding 'n betreurenswaardige agteruitgang ingetree. In die appèlhofbeslissing van *R v Pitje*[15] is daar weliswaar ook op die verwerplike "separate but equal"-leerstuk gesteun toe daar beslis is dat dit geregverdig is om te vereis dat 'n swart prokureur op 'n ander plek in die hof optree as sy blanke kollegas. Daar is egter selfs verder gegaan en die hof het sy steun toegesê aan die leerstuk van "separate but unequal", soos wat dit uit die bogenoemde stuk apartheidswetgewing blyk.[16] Die hof het gevolglik hier die ideologie van rasseskeiding op 'n ongelyke basis onderskryf en die appèlhof het hom dus laat meesleur deur die ideologie van rasseskeiding wat selfs ongelyke behandeling tot gevolg mag hê: "As daar na aanleiding van hierdie saak gesê kan word dat die destydse hoofregter en die betrokke appèlregter 'executive-minded' en handhawers van die *status quo* was, dan word daar nie gesê dat

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12 Erasmus-lesing gelewer te Stellenbosch Februarie 1986 *Regpleging in die gedrang* 24-5.

13 6 ev. Hy verwys in hierdie verband na die sake van *R v Abdurahman* 1950 3 SA 136 (A) en *R v Lusu* 1953 3 SA 484 (A).

14 9 ev. Hy verwys na die bekende saak van *Brown v Board of Education of Topeka* 347 US 483 (1954) wat die *separate but equal*-leerstuk wat voorheen nagevolg is, verwerp het as synde strydig met die "equal treatment"-klousule van die VSA grondwet.

15 1960 4 SA 709 (A).

16 Erasmus 26 ev. Die hof gaan in hierdie uitspraak egter verder en voer aan dat, alhoewel die aanwysing van aparte tafels nie gedoen is kragtens die Wet op Aparte Geriewe 49 van 1953 nie, die feit dat dit ingevolge hierdie wet gedoen sou kon word, nie sonder betekenis is nie. Op 710 van die verslag is gesê: "It shows that the distinction drawn by the provision of separate tables in the magistrate's court, is of a nature sanctioned by the legislature, and it makes it more difficult to attack the validity of the magistrate's order on the ground of unreasonableness."

hulle oneerlik, onbekwaam of bewustelik bevooroordeeld was nie. 'n Mens sou wel aan hulle 'n bepaalde gebrek aan insig kon toedig."[17]

Erasmus gaan gevolglik van die standpunt uit dat regters nooit volkome "objektief" kan wees nie en dat hulle dus neig om die bewaarders van die *status quo* te wees[18] en daarom nie genoeg doen om binne die raamwerk van hul staatsregtelike posisie die individu te beskerm teen apartheid soos in wetgewing vervat nie maar eerder meegesleur word deur hierdie ideologie.

Cameron[19] volg 'n ietwat ander benadering maar kom tot dieselfde gevolgtrekking nadat hy die beslissings van hoofregter L C Steyn ontleed het. Deur 'n analise van hierdie uitsprake toon hy aan dat die uitvoerende gesag se optrede gesanksioneer is ook in daardie gevalle waar menseregte eerder beskerm kon en moes gewees het. Deur middel van statistiek toon hy ook aan dat daar 'n kenmerkende neiging ten gunste van die uitvoerende gesag in hierdie uitsprake te bespeur was.[20] Hy wys daarop dat Steyn se stelling dat regterlike interpretasie bloot 'n meganiese proses is,[21] weerspieël word in sy uitsprake en dat die gevolglike stilswye en apatie (ten einde buite die "politieke" arena te kan bly) net so duidelik spreek soos positiewe optrede. Dit het dan verreikende gevolge gehad vir die behoud van sekere waardes deurdat individuele vryheid telkens ondergeskik gemaak is aan die belang van die uitvoerende gesag. Die hof was gevolglik "executive-minded" deurdat hy simpatiek was teenoor die rassistiese wetgewende program en min gedoen het om menseregte te beskerm in 'n tydperk toe hierdie regte toenemend beperk is deur die magte van die uitvoerende gesag.[22]

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17 26. Rabie "Regbank en akademie" 1983 *De Jure* 21 op 24-5 toon sensitiwiteit vir die stelling dat regters nie objektief is nie, dit wil sê, die stelling wat implisiet of eksplisiet aantygings van vooroordeel of gebrek aan objektiwiteit bevat.

18 27. Corder 244 ev wys in ooreenstemming met hierdie benadering daarop dat die wyse waarop regters regstandaarde beoordeel het "was substantially fashioned by their own past experiences and their perception of contemporary social circumstances and needs, all of which are viewed through the spectacles coloured by their ideological frames of reference."

19 Aw 36 ev.

20 52 ev.

21 60. Steyn se aandrang dat 'n regter se rol bloot meganies is: "can no doubt, on a benign view, be explained by the general and understandable reluctance on the part of conscientious and scrupulous judges to acknowledge their own role in the ascertainment and implementation of inequitable laws. Attributing all to the legislator obscures the fact that judges have opportunities – and responsibilities – in relation to harsh or inequitable laws whose terms are disputed before them. On a less benign view, insistence on the supremacy of legislative intent allows a judge in covert sympathy with a legislative programme to give full effect to his predispositions without having to accept public responsibility for doing so."

22 61. Regters wat hulle beroep het op 'n rol buite die "politieke" arena het egter deur hul stilswye en apatie nie bloot stilgebly nie: ". . . it delivered a series of decisions which rebuffed not unrealistic or unfounded hopes that police powers would legitimately be contained." Hierdie houding van die regbank het verreikende implikasies gehad vir die behoud van sekere waardes in die land en, uiteindelik, in praktiese terme vir die lewens en welsyn van daardie persone wat onderwerp is aan die aanhoudingswette: "It does not, however, suggest that, in a hard case, zeal in countenancing what is apprehended to be 'the policy of the Act' or 'the intention of the legislator' should not lightly be allowed to prevail over judicial vigilance in the protection of individual liberty." Steyn moes eerder besef het: "executive power too amply accorded will be abused."

Corder[23] en Forsyth[24] sluit by hierdie benadering aan deurdat hulle van die standpunt uitgaan dat die regter 'n keuse het wanneer hy wetgewing interpreteer in gevalle waar een uitleg nie verpligtend is nie. Die wyse waarop hierdie keuse uitgeoefen word, sal dus reflekteer op regterlike houding en beleid veral omrede aangetoon kan word dat enige een van twee beslissings regtens houdbaar was. Die vraag wat met ander woorde beantwoord moet word, is of die regters hulle met die uitvoerende gesag geassosieer het selfs al was hulle nie regtens daartoe verplig nie. Albei hierdie skrywers (soos ook Cameron en Erasmus hierbo) kom tot die gevolgtrekking dat daar geen sprake is van bewustelike partydigheid nie.[25] Nieteenstaande hierdie feit, is dit duidelik dat die regbank, hoewel dit formeel onafhanklik was, 'n integrale deel gevorm het van die struktuur wat ongeregtigheid geskep het en dat min gedoen is om hulle hiervan te onttrek.[26] Hoewel daar dikwels oortuigende regsgronde bestaan het wat 'n minder harde en onregverdige resultaat sou regverdig (of selfs sou verplig) was die regters geneig om eerder hulle keuse uit te oefen ten gunste van "harsh and unjust" interpretasies. Hierin het die regbank gevolglik 'n rol vervul ten gunste van die *status quo* en 'n houding ten gunste van die uitvoerende gesag geopenbaar.[27] Hierdie houding het die appèlhof geopenbaar voor die tydperk van hoofregter Steyn en veral in die tydperk daarna:[28] Corder ondersoek naamlik die appèlhofuitsprake vanaf 1910 tot 1950 en Forsyth bespreek die appèlhofuitsprake vanaf 1950 tot 1980.

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23 Aw 236 ev.

24 Aw vii-viii ev. Hy wys op die eed (ingevolge a 10(2)(*a*) van die Wet op die Hooggeregshof 59 van 1959) waarvolgens regters 'n eed aflê: "to administer justice in accordance with the law and customs of the Republic of South Africa." Dit volg wel hieruit dat regters gebonde is om gevolg te gee aan onregverdige sowel as aan regverdige wette. Dit beteken egter nie dat regters morele blaam kan vryspring indien hulle onregverdige wette toepas nie. Hy ondersoek egter nie gevalle van morele blaamwaardigheid nie maar wel daardie gevalle: "in which the application of reason to the sources of law does not reveal a clear picture of the law and the judges chose from one of a number of alternative interpretations in applying the law." Uit hierdie nadere ondersoek van regterlike keuse poog hy dan om regterlike tendense en beleid onderliggend aan die beslissings uit te wys. Hy ondersoek dus die wyse waarop die regters gereageer het op die keuses en opsies wat bestaan het by "administering politically charged laws in a highly ideological policy".

25 Hierdie standpunt van Cameron kan gevind word op 52 ev. Vgl ook Corder 238 en Forsyth *In Danger for their Talents* 225.

26 Corder 240. Alhoewel daar simpatie was in beslissings vir individuele ongeregtighede: ". . . the court was very seldom prepared to extend such relief to an individual when the consequences of such action would connote like treatment for a much larger number of people in the position of the appellant." Hy vervolg op 241: "If criticism is to be made, it must be that the AD failed to display a positive commitment to justice on those occasions when the legislative will was advancing injustice in the social formation. In this way, the judges unwittingly aided the development of the socio-legal system which ignores many of the basic principles of justice in South Africa today." Van der Merwe in 1986 *THRHR* 241 op 244, kom tot dieselfde gevolgtrekking: "Corder has, on the whole, convinced even the most sceptical reader that the appellate judiciary, when faced with a 'political issue' were often motivated (whether consciously or otherwise) by extraneous factors in their interpretation of the law to fit the facts of the case before them."

27 Forsyth *In Danger for their Talents* 226, 236.

28 Forsyth *In Danger for their Talents* 236 ev stem saam met Cameron (n 20 en 21) veral op 74 dat dit veral sedert die tydperk van oud-hoofregter Steyn was dat die howe "executive-minded" begin word het en sê op 226: "This willingness to place proper restraint upon the authorities has been abandoned by the court. During the late 1950s

Mathews[29] wys ook op die totale gebrek aan regterlike aktivisme veral sedert 1950 toe 'n totale aanslag op vryheid en legaliteit begin het. Hy wys dan ook in hierdie verband op die feit dat die regbank skuldig was aan "judicial dereliction" omrede daar telkemale 'n teenoorgestelde beslissing moontlik was en omrede die howe ten spyte van statutêre beperkinge tog 'n mate van jurisdiksie behou het by wyse waarvan hulle individuele vryheid sou kon beskerm.

Dit blyk dus dat daar op grond van gesaghebbende navorsing in hierdie verband eenstemmigheid bestaan oor die feit dat die regters die keuses toegepas het ten gunste van die *status quo* en dat hierdie "executive-minded"-houding daartoe aanleiding gegee het dat die vryheidsgesinde regswaardes negeer is en dat die individuele regte en vryhede nie beskerm is nie. Hierdie was die geval beide wat betref die ongelyke uitwerking van die apartheidswetgewing sowel as die uitwerking van die veiligheidswetgewing wat vir arbitrêre en ongekontroleerde uitvoerende bevoegdhede voorsiening gemaak het. Daar is gevolglik volle werking verleen aan die waardesisteem soos vervat in die onregverdige wetgewing en die volle konsekwensies van hierdie wetgewing het die individu getref, nieteenstaande die feit dat dit telkens moontlik was vir die howe om eerder 'n keuse te maak ten gunste van die beskerming van menseregte. Hieruit is dit dus duidelik waarom die bevelteorie van positivisme so gewild is – dit dien as gerieflike dekmantel vir die toepassing van die waardes van die *status quo* deurdat verklaar word dat die wette (die draers van hierdie waardes) bloot meganies toegepas word en dat waardeoordele (wat die toepassing van die vryheidsgesinde regswaardes in berekening bring) geen rol het om te speel nie. Daar is verskeie redes vir hierdie houding van die regbank wat gesien kan word as die oorsake agterliggend aan die aanvaarding van hierdie positivistiese regsteorie.

(a) Die Westminster staatsregtelike model

Hierdie regeringstelsel wat Suid-Afrika in 1910 van Brittanje geërf het, is gebaseer op die grondbeginsel van parlementêre soewereiniteit.[30] Ingevolge

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and 1960s in case after case the court sought to avoid all conflict with the executive authorities." Alhoewel toegegee word dat die regeringsbeleid met sy ideologie van apartheid en toenemend drakoniese wetgewing op rasseverhouding- en veiligheidswetgewinggebiede nog meer bygedra het tot die feit dat die howe handhawers van die *status quo* eerder as beskermers van menseregte was, was die prentjie voor 1950 egter geensins so rooskleurig nie – soos die ondersoek van Corder na appèlhofsake vanaf 1910 tot 1950 ook duidelik uitwys: sien n 26. Hierdie standpunt is ook duidelik uit 'n koerantberig: Jost in 'n artikel wat herdruk is uit die *Los Angeles Daily* van 10/2/1986 skryf: "The legal positivist philosophy – viewing the judge's role to enforce the law as it is – antedates the apartheid regime, but has served it well by cutting off any judicial enquiry into the justice of the web of racial separation and police state laws." Hy vervolg deur daarop te wys dat slegs 'n minderheid van regters ontvanklik sal wees vir argumente soos in die onderhawige relaas wat daarop gerig is om die keuse wat regters het by uitsprake aan hulle uit te wys.

29 Mathews 202-5 bespreek sake wat gefaal het om individuele vryheid te beskerm, die negering van die vereistes van *due process* bewerkstellig het en derdens gefaal het om arbitrêre amptelike optrede van regeringskant aan bande te lê en vra (voor *Hurley* se beslissing – sien n 55) dat die howe nie moet toelaat dat uitsluitingsklousules hulle jurisdiksie totaal uitsluit nie. Sien ook in hierdie verband Dugard "Some realism" 383-6.

30 Corder 244 ev wys daarop dat die konstitusionele model in Suid-Afrika aan die regsprekende gesag die swakste posisie van die drie regeringsvertakkinge toeken. Hierdie is veral te wyte aan die posisie van die oppermagtige parlement.

hierdie beginsel beskik die howe nie oor 'n toetsingsreg ten opsigte van parlementêre wetgewing nie en word die swakste posisie van die drie regeringsvertakkinge aan die regsprekende gesag toegeken. Dit is duidelik dat die bevelteorie van positivisme waarvolgens die howe verplig is om die bevel van die parlement (soos dit uitdrukking vind in wetgewing) toe te pas, goed inpas by hierdie soort van regeringstelsel. Anders as sy Britse eweknie, het die Suid-Afrikaanse regbank egter reeds met die sogenaamde *Harris*-beslissings 'n prosessuele toetsingsreg opgeëis wat vandag deur die grondwet erken word en tot gevolg het dat die howe alle wette kan toets en nietig verklaar indien daar nie voldoen is aan die grondwetlike wetgewende prosedure-vereistes nie.[31] Hiermee is die beginsel van absolute parlementêre soewereiniteit dus reeds afgewater. Huidiglik moet egter toegegee word dat die Westminstertradisie van parlementêre soewereiniteit nog hoogty vier en beslis een van die oorsake is waarom die howe onder die dekmantel van 'n positivistiese regsteorie aandring op 'n blote meganiese interpretasie van wetgewing ingevolge waarvan gebuig word voor die wil van die wetgewer selfs in gevalle waar keuses ten gunste van die individu moontlik is.

(b) Die negatiewe invloed van die Engelse regbank

Daar is so pas gewys op die baanrekord van die Engelse regbank waarvolgens eenvoudig gevolg gegee word aan die wetgewer se wil. Mathews[32] wys in ooreenstemming hiermee daarop dat die logiese en analitiese beslissings van die Engelse regbank tog ook die negatiewe gevolg gehad het dat daar 'n onwilligheid was om hom te begewe op die terrein van belange- of beleidsanalise in geval van regskonflikte.[33] Hierdie tendens het oorgewaai na die Suid-Afrikaanse regters wat insgelyks ongeneë is om in te gaan op die werklike beleidsimplikasies van byvoorbeeld die veiligheidsetgewing.[34] Ook die Engelse tradisie met sy oormatige ontsag of eerbied vir die uitvoerende gesag en sy fanatiese vermyding van "politics" het hierheen oorgewaai[35]:

> It remains a mystery why the court is above politics when it makes an executive-minded ruling and politically embroiled when it rules in favour of individual liberty against the executive.

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31 Kyk vir 'n volledige bespreking van parlementêre soewereiniteit en die toetsingsbevoegdheid van die Suid-Afrikaanse howe: Basson en Viljoen *Studentehandboek vir die Suid-Afrikaanse Staatsreg* (1986) 276-320. Kyk verder 321-33 vir 'n bespreking van die prosessuele toetsingsbevoegdheid van die howe ingevolge die Grondwet van 1983.

32 205 ev. Die Engelse regters word bewonder vir hulle uitsprake wat dui op "legal craftsmanship and it depends upon the command of the rational techniques of deductive logic, precedent evaluation and analogical reasoning."

33 206 ev. Agter teenstrydige eise van "legal right and entitlement" lê konflikte van beginsel, beleid en belang.

34 *Ibid.* Indien die regters dieper sou ingaan op Suid-Afrikaanse veiligheidswetgewing, sou hulle besef dat dit nie slegs wet en orde bevorder nie maar ander meer twyfelagtige belange en beleid bevorder, in besonder die politieke kontrole oor diegene sonder die stemreg en die onderdrukking van teenstand teen die amptelike beleidsrigtings. Indien hulle tot hierdie besef sou kom, sou regters baie meer onwillig wees om menseregte op te offer vir 'n program wat sulke twyfelagtige belange dien.

35 *Ibid.* In hierdie verband verwys hy na Lord Parker se opmerking in die *Zamora*-saak ((1916) 2 AC 77 (PC) op 107) wat steun verleen aan standpunte in Suid-Afrika wat daarop neerkom dat die uitvoerende gesag die alleenbevoegdheid moet hê om te bepaal welke getuienis weerhou moet word van die howe in sake van nasionale veiligheid op grond daarvan dat dit gepriviligeerde inligting bevat. Hierdie houding gee aanleiding tot beskuldigings dat kritici wat beslissings begeer wat meer gunstig is vir die behoud van basiese menseregte, die regters in die politiek wil insleep en dat die standpunt aangehang word dat die regterlike funksie essensieel 'n neutrale meganiese taak is.

Daar bestaan dus min twyfel dat die Engelse invloed veel daartoe bygedra het dat die regsteorie van positivisme vandag in Suid-Afrika so 'n groot aanhang geniet.[36]

(c) Die invloed van regsopleiding

Ook hierin word die Engelse voorbeeld nagevolg en word positivistiese regsteorieë (veral die verwerplike bevelteorie) verkondig. Hierdie kom neer op growwe akademiese versuim om eerder 'n studie te maak van regswaardes soos vervat in die leerstuk van die *Rule of Law* en die *Rechtstaats-beginsel*.[37] Hierdie vorm van positivisme is voorgehou as die enigste ware of geldige regsteorie en as gevolg hiervan het dit ook die regsteorie geword waarmee die regspraktisyns en regters (wat hierdie regsopleiding ontvang het) hulle mee vereenselwig het.

(d) Die agtergrond en persoonlikheid van regters

Corder[38] kom ook tot die gevolgtrekking dat die opleiding van regters wel as rede aangevoer kan word vir die gebrek aan aktivistiese uitsprake en voeg nog die volgende oorsake hieraan toe: opvoeding en rasse- en klasseagtergrond. Die regters druk hierdie invloede dan uit in terme van 'n positivistiese aanvaarding van die konsep van parlementêre soewereiniteit. 'n Ander oorsaak wat hy identifiseer, is die bewus-wees van die politieke realiteite wat dan aanleiding gee tot beslissings ten gunste van die *status quo*.[39] Forsyth omskryf hierdie sieninge[40] en verklaar dat die kenmerkend konserwatiewe agtergrond van regters sowel as die verandering in die politieke klimaat in die land (dit wil sê die siening dat velerlei bedreigings bestaan) albei 'n effek gehad het op regterlike tendense ("trends"). Hierdie oorsake kan egter bloot uitsprake beïnvloed en nie bepaal nie en om hierdie rede is

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36 Dugard *Human rights and the South African legal order* (1977) (hierna verwys na as *Human rights*) 393-7 wys daarop dat die Engelse positivisme verantwoordelik was vir die regspositivisme in Suid-Afrika. Positivisme het Suid-Afrika nie gedien as 'n gids tot die denke oor die reg nie: ". . . it has discouraged lawyers from playing a more active role in the protection of those principles which make up the country's legal heritage."

37 Mathews 208. Hy verwys na die betreurenswaardige beslissing van die House of Lords in die saak van *McEldoweney v Forde* (1969) 3 WLR 179 wat op 'n "executive-mindedness' dui en wat die futiliteit aandui van 'n proses om individuele regte deur die howe te handhaaf. Indien Suid-Afrika van 'n soortgelyke lot gered moet word, is 'n nuwe regsfilosofiese tradisie dringend nodig. Kyk ook in hierdie verband Basson en Viljoen 360-376. Hierdie studente-handboek onderskryf 'n sogenaamde "regsfilosofiese" benaderingswyse tot die staatsreg wat regswaardes betrek en volg die *Rechtstaats*-benadering.

38 237-8: "In the final analysis, the overall picture which emerges is one of a group of men who saw their dominant role as the protectors of a stability in the social formation of which they formed an integral part. This conception of their tasks was, doubtless, influenced by their racial and class backgrounds, education and training. The judges expressed it in terms of a positivistic acceptance of legislative sovereignty despite a patently racist political structure, and of a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest social inequalities."

39 48, 240.

40 Forsyth *In Danger for their Talents* 227-8.

die verband tussen die oorsake en die "executive-minded" uitsprake onduidelik en onseker, alhoewel toegegee moet word dat dit wel uitsprake beïnvloed.[41]

Welke oplossings kan aanbeveel word ten einde hierdie gebrek aan aktivisme van die Suid-Afrikaanse regbank aan te suiwer?

(a) 'n Nuwe regsteorie

Aangesien al die bogenoemde oorsake terugherlei kan word na 'n aanvaarding van die bevelteorie van positivisme, moet 'n nuwe regsteorie die plek daarvan inneem. Dit is noodsaaklik dat die opvatting dat hierdie vorm van positivisme die enigste ware en korrekte regsteorie is, sonder versuim die nek ingeslaan word.

Dugard[42] bepleit dienooreenkomstig 'n nuwe benadering tot die reg wat die siening van die Amerikaanse realiste en die relativistiese natuur-regsteorie verenig. Die doel van die realiste was weliswaar om die reg te ondersoek soos wat dit "is", maar hierdie ondersoek is juis gedoen om die hervorming van die reg soos wat dit "behoort te wees" te regverdig. Die reg moet hervorm word ingevolge die ware regswaardes wat die vryheidsgesinde Westerse regstradisie onderlê en gevolglik moet die regters eerder hul keuses uitoefen ingevolge hierdie regswaardes en nie ingevolge die waardes van die *status quo* nie.

'n Moderne, gesofistikeerde positivis soos Forsyth[43] verskil natuurlik van hierdie opvatting en verklaar dat hierdie benadering van Dugard (wat ooreenstem met die benadering van Dworkin)[44] onrealisties ambisieus is omrede die blote verbetering in die regsfilosofiese kennis van die regters nie die probleem sal oplos nie.[45] Alhoewel daar toegegee kan word dat die blote verandering

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41 228. Forsyth kritiseer die standpunt van Wacks op 230. Wacks verklaar dat regters geen keuse het nie omrede hulle die enkele korrekte antwoord op elke vraag vind in die gemeenskapsmoraliteit – wat in Suid-Afrika die blanke moraliteit is en gevolglik tot "illiberal" antwoorde aanleiding gee wat die waardes van apartheid onderskryf: die korrekte antwoord is dus altyd "verkeerd". Regters moet dus eerder bedank omdat hulle geen keuse het nie. Forsyth (232) wys egter daarop dat regters juis daarop aandring dat hulle bloot meganies optree en dus nie moraliteit toepas nie: sy ondersoek het dan ook bevind dat die appèlhof vry is van rassevooroordeel. Hy stem dus eerder saam met die standpunt van Dugard dat dit nie veel sal beteken as regters bedank nie.

42 Dugard *Human Rights* 366-88.

43 Forsyth *In Danger for their Talents* 130 ev.

44 Forsyth *Judicial Process II* 227 ev: Hy verklaar dat Dugard bloot 'n besondere teorie van die reg (*vulgar Austinianism*) aanval en nie die positivisme self nie. Hierin stem sy standpunt ooreen met dié van Dworkin *Taking rights seriously* (1977) veral op 14-80. Regters het geen diskresie by die beslissing van "hard cases" nie maar moet verskeie beginsels in ag neem wat hulle beslissings sal bepaal. Forsyth vra hoe gaan jy die bindende beginsels identifiseer deur die reg soos wat dit "is", terwyl Dworkin daarop wys dat daar streng onderskei moet word tussen die reg soos wat dit behoort te wees en die reg soos wat dit is en daar is geen "master rule" ingevolge waarvan vasgestel kan word welke beginsels bindend is nie. Hy sluit dus by Dugard aan wat ook verklaar dat in die geval van hierdie "hard cases" (Dugard noem dit die gebiede van die reg waar daar 'n keuse tussen verskillende interpretasies bestaan) die beginsels van die natuurreg (relativisme) gevind moet word. Dugard identifiseer dan hierdie regswaardes of regsbeginsels (n 11).

45 323. Hy is self nie gekant teen die toepassing van waardes nie! 223-225 van "Judicial Process II": 'n Positivis mag morele oortuigings hê en daarvolgens handel maar positivisme as epistomologie bied slegs 'n pad na kennis en nie verligting van morele

in die regsfilosofiese benadering tot die reg[46] nie opsigself dalk genoegsaam sou wees om aktivistiese uitsprake ten gunste van menseregte te verseker nie en dat ander oplossings (soos hieronder bespreek) ook toegepas moet word, kan dit nie ontken word nie dat die verwerping van hierdie vorm van positivisme veel daartoe sal bydra om die legitimiteit van "executive-minded" uitsprake te bevraagteken. Dit word dus in oorweging gegee dat 'n nuwe regsfilosofiese benadering dringend noodsaaklik is en dat daar in hierdie verband gekyk moet word na die Amerikaanse tradisie soos weerspieël in werke van skrywers soos Dworkin, Pound, Llwellyn en Fuller[47] asook dat daar lig opgesteek word by die Europese tradisie van die *Rechtstaatsidee*.[48]

(b) Die aanstellingswyse van regters

Omrede die agtergrond van die regters uitsprake beïnvloed en regters in Suid-Afrika uit ongeveer dieselfde agtergrond afkomstig is, is dit nodig dat daar indringend gekyk word na die wyse waarop regters aangestel word. Ten einde die neiging om die waardes van die een dominante groep waaruit die regters aangestel word, toe te pas, aan bande te lê, is dit noodsaaklik dat regters ook uit die ander groepe as die blanke groep aangestel word.[49] Ten einde objektiwiteit nog verder te bevorder moet daar ook gewaak word teen bloot politieke aanstellings en moet alle aanstellings slegs op meriete geskied en moet alle regters dan ook alle soorte van sake (ook dié waar die individu en die staatsgesag in konflik staan) verhoor.[50]

(c) Herroeping van onregverdige wetgewing

Indien daardie statute wat onregverdig is vanweë die ongelyke behandeling van individue op die basis van rasseskeiding (apartheidswetgewing) sowel as daardie statute wat op 'n arbitrêre en ongekontroleerde wyse inbreuk maak op individuele vryheid (veiligheidswetgewing) van die wetboek geskrap word,[51]

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dilemmas nie. Hy sal die morele dilemmas so goed moontlik die hoof bied en kan selfs besluit om 'n onregverdige wet nie te gehoorsaam nie, maar hy sal nie ontken dat dit regskrag het nie. Myns insiens kritiseer hy die benadering van Dugard maar kan nie 'n ander oplossing bied as die verandering van die reg by die keuses wat 'n regter moet uitoefen nie. Hy verklaar dat die positivisme van Dugard bloot 'n simptoom is en nie die oorsaak van regters se "pro-executive" houding nie. Verderaan verklaar hy egter self dat die meganiese siening van die regterlike funksie te wyte is aan die onwilligheid om tot dispute met betrekking tot moraliteit en politiek toe te tree (*supra*).

46 Vir 'n pleidooi in hierdie verband kyk Basson en Viljoen 360-76 wat 'n regsfilosofiese benaderingswyse tot die reg bepleit en in hierdie verband oa volledig na Dugard verwys.

47 Mathews 209. Hierdie is dieselfde standpunt as dié van Dugard (n 42) wat 'n nuwe regsfilosofiese benadering bepleit ten aansien van die rol van die howe in Suid-Afrika en wat in hierdie verband die regsteorie van die Amerikaanse realiste (Pound) verenig met 'n relativistiese natuurregsteorie wat regswaardes bevorder.

48 Vir 'n volledige bespreking van die regstaatsidee kyk Basson en Viljoen 365 en 374-5.

49 Erasmus 28 ev; Corder 244 ev. Corder 244 ev wys in ooreenstemming hiermee daarop dat die aanstellingwyse van regters daartoe aanleiding gee dat dieselfde soort van mense in die parlement (wat aanstellings beheer – die betrokke minister) en op die regbank sit: "assuring the forging of a close allegiance of character between the members of the Bench and Parliament."

50 Kentridge "Telling the truth about law" 1982 *SALJ* op 652.

51 Erasmus 12-3; beide die wetgewing wat voorsiening maak vir 'n rigiede skeiding van die rasse (veral instromingsbeheer en burgerskapsreëlings) en wat 'n groot deel van die bevolking uitskakel uit die politieke prosesse en diskriminasie institusionaliseer op die basis van die *separate but unequal*-leerstuk sowel as veiligheidswetgewing van 'n

sal die dilemma van die regbank opgelos word omrede die regswaardes wat die wette beliggaam dan in ooreenstemming gebring sal word met die regswaardes wat die vryheidsgesinde regstelsel onderlê. Gesofistikeerde positiviste[52] sien die oplossing vir die dilemma hierin geleë, eerder as in die toepassing van 'n nuwe regswaarde-georiënteerde benadering tot die reg. Soos dit ook met aanstellings van regters die geval is, is hierdie oplossing egter afhanklik van die instemming van die regering van die dag en lê dit nie op die gebied van die regbank om statute te wysig nie.

(d) Die opvoedkundige taak van die howe

Alhoewel die howe nie wetgewing kan wysig nie, is dit wel die taak van die regbank as die bewaarder van beskaafde regswaardes[53] om hom uit te spreek teen bestaande onregverdige wetgewing wanneer die geleentheid hom voordoen. Dit beteken dat die regters selfs in daardie gevalle waar hulle verplig is om die onregverdige wet toe te pas, nog steeds die verantwoordelikheid het om dit alleen onder protes te doen. Die howe het gelukkig al by geleentheid nie geskroom om gewetgeefde vorme van ongeregtigheid te kritiseer nie.[54]

(e) Die uitwys van keuses aan die regters

Hierdie oplossing plaas die verantwoordelikheid volledig op die skouers van die regspraktisyn en die akademikus. Hierdie is naamlik 'n praktiese oplossing wat daarop neerkom dat die keuses telkens duidelik aan regters uitgewys word by konflikte tussen die individu en die regeringsgesag. Hierdie bewusmaking van die keuses sal aanleiding gee tot aktivistiese uitsprake aangesien dit die bewuswording by regters tot gevolg het dat daar inderdaad keuses bestaan en dat daardie keuses ingevolge 'n bepaalde waardesisteem uitgeoefen moet word. Wanneer regters dan bewustelik verplig word om 'n keuse uit te oefen tussen die waardesisteem van die *status quo* en die vryheidsgesinde waardesisteem wat die regstelsel onderlê, sal dit noodwendig beteken dat regters op 'n "objektiewe" wyse hierdie waardesisteme teen mekaar sal moet

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toenemend drakoniese aard het aanleiding gegee tot: "'n drastiese proses wat in fundamentele opsigte afwyk van die basiese waardes vervat in ons klassieke straf- en strafprosesreg." Die oplossing vir die dilemma is geleë in die herroeping van hierdie wetgewing. (28).

52 Forsyth *In danger for their talents* vii ev verklaar dat indien 'n positivis uitvind dat 'n wet onregverdig is sal hy nie die regskrag daarvan ontken nie maar aanneem dat die remedie daarvoor geleë is in die verandering van daardie wet. (n 45).

53 Mathews 202.

54 Sien in hierdie verband die sake waarna Erasmus 6 ev verwys. Sien ook die uitspraak van regter Didcott in die saak van *In re Dube* 1979 3 SA 820 (N) op 821: "When the commissioner has finished with you, the papers in your case go on review to a Judge of the Supreme Court. He is expected, if everything is in order, to certify that what happened to you appears to him to have been 'in accordance with justice'. The trouble is that it was not. It may have been in accordance with the legislation and, because what appears in the legislation is the law, in accordance with that too. But it can hardly be said to have been 'in accordance with justice'. Parliament has the power to pass the statutes it likes, and there is nothing the Courts can do about that. The result is law. But that is not always the same as justice. The only way Parliament can ever make legislation just is by making just legislation." Sien ook *S v Ramgobin* 1985 4 SA 130 (N) waar wetgewing wat die tradisionele rol van die hof om borg te verleen gekritiseer word en gewys word op die voordele van 'n menseregtehandves. Sien in hierdie verband veral n 78-82.

opweeg voordat hulle die keuse uitoefen. Die verantwoordelikheid om keuses aan regters uit te wys, word nou hier opgeneem deur in die praktyk die keuses uit te wys wat daar vir regters bestaan.

As voorbeeld word die mees gewraakte bepalings van die veiligheidswetgewing geneem, te wete, daardie bepalings wat voorsiening maak vir aanhouding sonder verhoor (die sogenaamde artikel 29 aanhouding vir ondervraging en die sogenaamde voorkomende aanhouding van artikel 28) asook daardie bepalings wat die toestaan van borg deur die geregshowe verhoed (dit wil sê, artikel 30). Al hierdie artikels is natuurlik bepalings van die Wet op Binnelandse Veiligheid 74 van 1982. Die hofbeslissings in die nuutste vonnisbundels – 1985 3 tot en met 1986 1 – word bespreek ten einde op 'n heel praktiese wyse en met verwysing na feitegevalle waaroor inderdaad beslis is en ten aansien waarvan inderdaad keuses gemaak is, aan te dui op welke wyse die korrekte keuse in die guns van individuele regte en vryhede gemaak kan word, nieteenstaande die streng bepalings van die Suid-Afrikaanse veiligheidswetgewing.

Artikel 29 bepaal dat 'n polisieoffisier wat rede het om te glo dat 'n persoon hom aan sekere voorgeskrewe optrede skuldig maak, hom kan arresteer en dat hy dan vir 'n onbepaalde tyd vir ondervraging aangehou kan word. Artikel 29(6) is 'n sogenaamde uitsluitingsklousule of "ouster clause" wat bepaal dat geen geregshof hom mag uitspreek oor enigiets wat ingevolge artikel 29 gedoen word nie. In die saak van *Hurley v Minister of Law and Order*[55] is aansoek gedoen by die hof vir 'n bevel vir die vrylating van 'n artikel 29 aangehoudene. Alhoewel die hof nie 'n streng interpretasie ten gunste van die individu volg nie,[56] lê regter Leon nietemin die woorde "rede het om te glo" so uit dat dit nie bloot "dink dat hy rede het om te glo" beteken nie maar die regter vereis dat daar 'n feitelike basis, oftewel 'n objektiewe jurisdiksionele feit, moet bestaan alvorens die polisieoffisier die wetgewende magte van artikel 29 sal kan uitoefen.[57] Die uitsluitingsklousule kan nie verhoed dat die hof ingryp in 'n geval waar die jurisdiksionele feit afwesig is nie omrede wetsmagtiging vir die uitvoerende gesagsuitoefenaar (polisieoffisier) in sodanige geval afwesig is en hy gevolglik *ultra vires* die wetsmagtiging optree.[58]

In die onderhawige geval is daar 'n *prima facie* saak uitgemaak ten gunste van die feit dat die aangehoudene 'n pasifis was wat hom nie aan die vereiste voorgeskrewe optrede skuldig gemaak het nie. Die polisie het nie feite aangebied op grond waarvan afgelei kon word dat hulle rede het om te glo dat

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55 1985 4 SA 709 (D & K).

56 Op 716A volg hy die benadering van *Rossouw v Sachs* 1964 4 SA 551 (A) en ondersoek die relevante wetgewing in die lig van die omstandighede asook die algemene beleid en doel daarvan, "adopting neither a strict construction in favour of the individual nor a strained construction in favour of the executive." Die benadering van die regter in die *Ramgobin*-saak wat wel bereid is om 'n streng uitleg ten gunste van die individuele vryheid te volg, behoort eerder nagevolg te word (588I-589B).

57 *Ibid.*

58 Op 722: Die jurisdiksionele feit wat dus vereis word is van die objektiewe soort soos beskryf in die bekende *dictum* van Regter Corbett in die saak van *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 31 (K): "I am satisfied, on a consideration of the authorities, that the ouster clause does not preclude this court from investigating whether the necessary jurisdictional facts objectively existed."

die aangehoudene wel skuldig was aan hierdie optrede nie.[59] Aangesien die objektiewe jurisdiksionele feit gevolglik ontbreek, beslis die hof dat die optrede nie ingevolge die voorskrifte van artikel 29 plaasgevind het nie en dus onwettig was en die aanhoudingsbevel word nietig verklaar en daar word gelas dat die aangehoudene vrygelaat word.

Hierdie beslissing is in ooreenstemming met die Suidwes-Afrika/Namibië beslissing in die saak van *Katofa v Administrator-General for South West Africa*[60] waar beslis is oor die aanhouding van 'n persoon ingevolge die veiligheidswetgewing van hierdie gebied. Daar word naamlik ook vereis dat die administrateur-generaal "tevrede moet wees" dat die persoon hom aan sekere optrede skuldig gemaak het voordat die bevel vir sy aanhouding gegee kan word. Die hof beslis dat daar objektief redelike gronde (jurisdiksionele voorvereistes) moet bestaan voordat hierdie statutêre bevoegdheid uitgeoefen mag word.[61] Die hof beslis dus dat die blote *ipse dixit* van die orgaan nie genoegsaam is vir die hof om vas te stel of regsgronde vir die aanhouding bestaan nie.[62] Omrede die orgaan verplig was om hierdie redes of gronde vir die aanhouding aan die hof te openbaar en dit nie gedoen het nie, word die aansoek vir die *interdictum de homine libero exhibendo* toegestaan.[63] Van verdere belang is ook die feit dat die hof in 'n individu-georiënteerde uitspraak beslis dat die aangehoudene die reg op regsverteenwoordiging het.[64]

Dit is duidelik dat die keuse in hierdie gevalle uitgeoefen is ten gunste van die individu.[65] Die blote subjektiewe oordeel van die uitvoerende gesagsorgaan wat inbreuk maak op individuele vryheid ingevolge 'n wetsmagtiging is nie genoegsaam om te bewys dat hy die nodige jurisdiksie (objektief gesproke) het om so te handel nie. Die jurisdiksionele feit in hierdie gevalle bestaan gevolglik uit 'n feit wat, objektief gesproke, moes bestaan voordat die statutêre mag (om die individu aan te hou) uitgeoefen kan word in welke geval die objektiewe bestaan van die feit beregbaar is in 'n geregshof. Selfs 'n uitsluitingsklousule kan hierdie bevoegdheid van die hof nie verhoed nie.

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59 Op sy beste was die antwoord van die polisie 'n onbevredigende antwoord en op sy slegste geen antwoord nie.

60 1985 4 SA 211 (SWA).

61 Op 221.

62 Op 211I-222D-E. Die hof moet uit die redes wat gegee word kan aflei of gronde vir aanhouding bestaan en hierdie redes *moet* aan die hof verstrek word. Berker R stem met Levy R saam en verklaar op 223-225 dat daar eers gekyk moet word na die jurisdiksionele voorvereistes voordat die optrede ingevolge die wetsbepaling kan geskied, dit wil sê, dat daar objektiewe gronde moet wees om te glo dat die persoon wel aan die vereiste optrede skuldig was.

63 Op 221A-B beslis die hof dat by 'n aansoek om die *interdictum de homine libero exhibendo* die persoon bloot moet aantoon dat hy van sy vryheid ontneem is. Die onus rus dan op die gesag wat hom daarvan ontneem het om hierdie optrede te regverdig.

64 Op 216J. Gevolglik beslis Levy R dat hy regsverteenwoordiging mag hê en dat daar niks in die relevante wetsbepalings is wat hierdie reg op enige van hierdie wyses ontneem nie. Berker R (255C-H) sluit hierby aan en verklaar dat die reg op regsverteenwoordiging en die reg om nie ondervra te word nie, fundamentele regte is wat slegs by wyse van spesifieke wetgewing ontneem kan word.

65 Boulle "Detainees and the courts: new beginnings" *SA Journal on Human Rights* 251 laat hom as volg uit oor die *Hurley*-beslissing: "For the first time, a detention order issued in terms of s 29 of the Internal Security Act 74 of 1982 has been invalidated and a detainee's release secured. The decision deals with issues of a deep and universal constitutionality – limited government, separation of powers, justiciability of executive action, and the liberty of the individual."

Artikel 28(1) maak voorsiening vir voorkomende aanhouding indien daar deur die minister op respektiewelik drie gronde besluit word om 'n persoon aldus aan te hou. Hierdie kennisgewing van die minister moet ingevolge artikel 28(3)(b) vergesel gaan van 'n geskrewe verklaring waarin, onder andere, die redes vir die aanhouding uiteengesit word. Artikel 28(9) bepaal dan dat die aangehoudene vertoë aan die minister mag rig binne 14 dae nadat hy hierdie kennisgewing tesame met die redes vir sy aanhouding ontvang het. In die appèlhof-uitspraak van *Nkondo and Others; Gumede and Others v Minister of Law and Order; Minister of Law and Order v Gumede*[66] word die vraag bespreek wat "redes" sal daarstel.

Die hoofregter wys daarop dat artikel 28(1) ingrypende magte verleen en dat die minister nie arbitrêr moet optree nie.[67] Aangesien artikel 28(9) beoog dat die aangehoudene 'n regverdige geleentheid moet verkry om te handel met die redes wat die minister gee,[68] is die blote mededeling van die minister op welke (een van die drie) statutêre gronde hy optree nie genoegsaam om "redes" daar te stel soos deur die wet beoog nie.[69] Ook die kennisgewing as geheel beskou bevat nie "redes" nie aangesien "redes" beteken dat die minister die aangehoudenes moet inlig waarom hy hul aanhouding beveel het op grond van wat hulle gesê of gedoen het – juis omrede die doel van hierdie aanhouding voorkomend van aard is.[70] Die hoofregter verwerp gevolglik die interpretasie van die regters in die hof *a quo* dat, aangesien daar drie verskillende gronde is waarop die minister kan handel, sy blote aanduiding van op welke (een van die drie) statutêre gronde hy handel, "redes" daarstel soos deur die wet beoog.[71]

Die appèlhof het hier 'n keuse gemaak ten gunste van die individu wat van sy vryheid ontneem word deurdat vereis word dat die aangehoudene nie net vae verduidelikings moet ontvang nie, of bloot ingelig moet word op welke statutêre grond die uitvoerende gesagsdraer hom van sy vryheid beroof nie, maar dat hy inderdaad ingelig moet word van die gronde waarop (waarom) die uitvoerende gesagdraer die aanhouding beveel het. Dit word gedoen sodat die aangehoudene die reg om sy saak te kan stel (ingevolge die statuut wat die reëls van natuurlike geregtigheid beliggaam) na behore kan uitoefen. Omrede die minister in die onderhawige geval nie redes verskaf het nie, maar bloot aangedui het dat hy hulle op 'n statutêre grond (moontlik die tweede van die drie) aanhou, het hy nie redes verskaf soos die artikel vereis nie en die kennisgewings word ongeldig verklaar.[72]

Artikel 29 het weer ter sprake gekom in die saak van *Mkize v Minister of Law and Order*[73] toe die hof versoek het dat 'n landdros die aangehoudene besoek ten einde vas te stel of hy aangerand is asook dat 'n distriksgeneesheer die aangehoudene besoek ten einde hom medies te ondersoek sodat

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66 (Tot op datum) ongerapporteerde appèlhofbeslissing deur Rabie HR met Trengove, Hoexter, Botha en Van Heerden ARR wat saamstem. Beslis op 20 Maart 1986.

67 Op 12. Hierdie bepaling maak naamlik daarvoor voorsiening dat die minister die aanhouding van 'n persoon kan beveel sonder dat hy die geleentheid verkry om aangehoor te word.

68 19-20.

69 Op 29.

70 33.

71 29.

72 34 van die verslag.

73 1985 4 SA 147 (N). 'n Volbank beslissing deur Wilson R met Friedman en Shearer RR wat saamstem. Die saak is nagevolg in *Mda v Minister of Justice, Police and Prisons* 1986 3 SA 500 (CkSC).

hieroor verslag gedoen kan word aan die hof. Artikel 29(7) maak voorsiening vir die besoeke van 'n landdros en distriksgeneesheer aan 'n aangehoudene indien hierdie persone "are acting by virtue of their office". Die hof beslis dat hulle "are acting by virtue of their office" selfs indien die hof versoek dat hulle die aangehoudene besoek.[74]

Die volgende vraag wat die hof moet beantwoord is of die verslag wat hy met betrekking tot die moontlike aanranding of die mediese toestand ontvang nie dalk "amptelike inligting" is wat slegs aan bepaalde ampsdraers en nie die hof bekend gemaak kan word nie. Die hof lê hierdie begrip eng uit en verklaar dat "amptelike inligting" slegs slaan op inligting wat betrekking het op die redes of die doel van aanhouding.[75] Inligting met betrekking tot die gesondheid en behandeling van die aangehoudene is duidelik van 'n ander aard as hierdie "amptelike inligting" en die hof beveel dus dat die landdros en die distriksgeneesheer die aangehoudene moet besoek en verslag doen aan die hof oor die gesondheid en behandeling van die artikel 29 aangehoudene.

Die hof het gevolglik die keuse ten gunste van die individu gedoen – hy kon net sowel die woord "amptelike inligting" wyd uitgelê het en verklaar het dat, aangesien hierdie inligting aan 'n amptenaar van die staat verstrek word, dit uit hoofde van hierdie feit "amptelike inligting" is.[76] Die eng benadering wat die hof verkies, bevoordeel egter die individu deurdat inligting wat betrekking het op die omstandighede van sy aanhouding of op sy gesondheidstoestand nie as "amptelike inligting" beskou word nie en gevolglik wel aan die hof bekend gemaak kan word.

Dit is nie slegs in sake van aanhouding sonder verhoor wat die howe bereid was om die onderdaan tegemoet te kom nie. Ook wat betref die omstandighede waarvolgens die verlening van borg deur die howe verhoed word, het die howe aktivisties opgetree.

Artikel 30(1) beperk individuele vryheid en stel beperkings op die howe deurdat dit die verlening van borg verhoed. In die saak van *S v Ramgobin*[77]

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74 Op 150E-I verklaar die hof dat dit die klaarblyklike doel van a 29(7) is om die landdros in staat te stel om ondersoek in te stel na die omstandighede van aanhouding asook om die distriksgeneesheer in staat te stel om ondersoek in te stel na sy fisiese en geestelike welstand. Die hof is dus nie beïndruk met die argument dat hierdie persone elkeen nie meer "acting by virtue of his office" optree indien die hof versoek dat hulle die aangehoudene moet besoek nie.

75 Op 151J-152B: "official information" word uitgelê om te beteken: inligting wat beperk is tot aangeleenthede rakende, direk of indirek, die redes of die doel van aanhouding. Inligting van hierdie aard is duidelik van 'n amptelike aard en 'n mens kan verstaan waarom die openbaarmaking teenstrydig sal wees met die doel van die wet. Inligting aangaande die gesondheid en behandeling van die aangehoudene is duidelik van 'n ander aard: "In the absence of very special circumstances such information could not, in any way, adversely affect the reason for, or purposes of, the detention."

76 Op 152C-H. Die hof stem nie saam met die argument van Trengove R in *Cooper* se saak nie (naamlik dat die inligting amptelik is bloot omdat dit ontvang word deur 'n amptenaar van die staat nie) en stem eerder saam met Didcott R wat hierdie enger uitleg aan die woorde verleen in *Nxasana* se saak.

77 1985 4 SA 130 (N).

het regter Milne kritiek uitgespreek teen hierdie bepaling.[78] Ook in die saak van *S v Ramgobin*[79] (die volbank beslissing wat hier bespreek gaan word) het regter Friedman hom sterk hierteen uitgespreek.[80] Omrede die beginsel van parlementêre soewereiniteit geld ingevolge die Suid-Afrikaanse staatsreg, ag die hof hom gebonde aan hierdie wetgewing alhoewel hy sonder skroom daarop wys dat die invloed van 'n menseregtehandves hierdie ernstige beperking van individuele vryheid kon vermy het.[81]

Omdat hierdie bepaling so 'n groot inbreuk maak op individuele regte, gee die hof 'n streng uitleg aan die woorde van die wetsbepaling[82] en beperk die hof die uitwerking daarvan soveel as wat die woorde toelaat. Voordat die prokureur-generaal sy statutêre magte kan uitoefen (en verhoed dat die hof borg toestaan) moet daar naamlik eers 'n "objektiewe jurisdiksionele feit" bestaan.[83] Hy mag naamlik slegs ingevolge artikel 30 borg verhoed indien die beskuldigde gearresteer is "upon a charge" dat hy 'n sekere misdryf gepleeg het.[84] Die regter lê hierdie woorde dan streng uit en beslis dat 'n beskuldigde alleenlik "upon a charge" gearresteer is indien daar besluit is deur die betrokke gesag om hom aan te kla en dit beteken dus dat daar gronde vir die besluit om hom aan te kla, moet bestaan.[85] Die regter wys ook daarop dat die besluit om aan te kla op hersiening geneem kan word sodat byvoorbeeld vasgestel kan word of daar gronde bestaan wat redelikerwys die vereiste oortreding daarstel waarvan die beskuldigde aangekla word.[86]

Hierdie beslissing vereis gevolglik dat 'n objektiewe jurisdiksionele feit moet bestaan voordat die gesagsorgaan die bevoegdheid ingevolge die wetsartikel kan uitoefen wat inbreuk maak op die individuele vryheid van die individu. Die hof kan dienooreenkomstig ingaan op die feit of hierdie objektiewe jurisdiksionele feit bestaan – wat in die onderhawige geval gronde moet wees vir die besluit om die beskuldigde aan te kla. Indien hierdie objektiewe gronde ontbreek, kan die hof die bevel van die prokureur-generaal verontagsaam omrede dit onwettig is aangesien dit nie kragtens die wetsmagtiging (artikel 30) uitgeoefen is nie.

Artikel 30 het ook ter sprake gekom in die saak van *S v Baleka*.[87] Regter Stegmann verklaar dat artikel 30 nie spesifiek voorsiening maak vir die toepassing van die *audi alteram partem*-reël na die uitreiking van die kennisgewing wat borg verhoed nie.[88] Die toepassing van die *audi alteram partem*-leerstuk is egter 'n "jurisdiksionele feit" wat moet bestaan alvorens ingevolge

78 Op 131A-J.
79 1985 3 SA 587 (N), 'n volbank beslissing deur Friedman R met Booysen en Galgut RR wat saamstem.
80 Op 588B-589G.
81 Op 588I-589B.
82 *Ibid.*
83 Soos in die *Hurley*-saak (n 58) verklaar die regter dat 'n "objective jurisdictional fact" moet bestaan voordat die prokureur-generaal hierdie magte onder a 30 kan uitoefen. Hy verwys insgelyks na regter Corbett se uitspraak in die saak van *South African Defence and Aid Fund*.
84 Op 591D. A 30 bepaal dat hy so mag handel "if each of the appellants have been 'arrested upon a charge of having committed an offence referred to in Schedule 3' ".
85 Op 592H-589A.
86 Op 594A-E.
87 1986 1 SA 361 (T), 'n volbank beslissing deur Eloff, Stegmann en Preiss RR.
88 Op 383-4.

artikel 30 opgetree kan word.[89] Die beskuldigde behoort dus binne die veertien dae (tussen die aankondiging in die hof en die finale besluit van die prokureur-generaal) die bevoegdheid te hê om vertoë tot die prokureur-generaal te rig en sodanige optrede sal nie die veiligheid van die staat in die gedrang bring nie.[90] Selfs al kan daar slegs in 'n minimum mate voldoen word aan hierdie leerstuk, is sy vereistes buigbaar ("flexible") en moet dit toegepas word in soverre dit redelikerwys moontlik is.[91] Aangesien dit egter nie eens tot 'n minimum mate in die onderhawige geval toepas is nie, ontbreek die voorvereiste of die jurisdiksionele feit wat moet bestaan voordat opgetree kan word ingevolge artikel 30 en is die bevel wat borg verhinder, nietig.

Regter Preiss stem nie saam met hierdie argumente nie, maar vind tog 'n ander manier om die beskuldigde tegemoet te kom. Hy verklaar naamlik dat die woord "issue" in die artikel streng uitgelê moet word omdat hierdie artikel inbreuk maak op individuele regte.[92] Om hierdie rede kom hy op die feite tot die gevolgtrekking dat die bevel nie op die korrekte tydstip ge-"issue" is nie en ook hy verklaar die bevel nietig wat beteken dat dit die meerderheidsbeslissing en gevolglik die beslissing van die hof is.[93]

Die feit dat albei regters hier 'n keuse moes uitoefen ten gunste van individuele vryheid blyk baie duidelik indien hulle respektiewe uitsprake vergelyk word met die uitspraak van regter Eloff wat volle regskrag verleen aan die bevel van die prokureur-generaal wat borg verhoed (die minderheidsuitspraak). Regter Eloff lê die klem op "preventative justice" en ander oorwegings van staatsveiligheid soos dat die prokureur-generaal beter in staat is om te besluit oor die vrylating van 'n beskuldigde op borg in gevalle waar oortredings teen staatsveiligheid ter sprake is vanweë sy besondere kennis van die handhawing van wet en orde.[94] Hy kom dus tot die gevolgtrekking

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89 Op 382-91 van die verslag bespreek Stegmann R vier faktore wat moontlik kan bepaal of die *audi alteram partem*-reël toepassing moet vind al dan nie voordat hy tot hierdie gevolgtrekking kom.

90 Op 391D-F word gesê dat dit nie die staatsveiligheid of die handhawing van wet en orde in die gevaar sal stel nie: "On the contrary, the safety of the State does not require such rights to be overridden, the Legislature has not expressly overridden them, and there is no sufficient reason for concluding that it has done so by implication."

91 Op 388A-G en 390H-I. Al sou volledige voldoening aan die maksimum vereistes van die *audi alteram partem*-reël nie moontlik of redelik wees nie, moet daaraan voldoen word in die mate wat dit redelik aan voldoen kan word. Die prokureur-generaal moet die betoog van die beskuldigde oorweeg – dit is die minimum mate waarin hy aan hierdie stelreël moet voldoen: "What can be said with some certainty is that there is a minimum extent of compliance with the *audi alteram partem* which in the very nature of things must always be possible; which cannot frustrate, or in any way diminish, the effectiveness of the measure as a means of 'preventative justice'."

92 Op 291I-292D. In hierdie verband volg hy die *Ramgobin*-saak en verwys uitdruklik ook daarna – sien n 82.

93 Sien respektiewelik 390 en 396 van die verslag vir hierdie bevele.

94 *Contra* – sien die uitspraak oor "preventative justice" van Stegmann R in N 91. Op 404D-G sê Eloff R egter: "The significance is that the Legislature usually expects prompt and unfettered action by those who are to administer 'preventative justice'." Tweedens beskou hy die prokureur-generaal as 'n persoon wat in staat is om te kan beoordeel of 'n beskuldigde op borg vrygelaat moet word vanweë sy besondere kennis van staatsveiligheid en die handhawing van wet en orde. Derdens sê hy dat dit wel nadelig kan wees vir die staatsbelang indien verwag sou word dat die prokureur-generaal sy bronne bekend moet maak. Op 405D-H: ". . . the Legislature indicated that it sets a high

dat die parlement nie in hierdie gevalle die toepassing van die *audi alteram partem*-leerstuk sou beoog het nie en beskou die argument dat daar 'n minimum mate van voldoening aan hierdie reël van natuurlike geregtigheid moet wees as "onrealisties".[95] Daar hoef dus nie aan die beskuldigde die geleentheid gebied te word om sy saak te stel nie en gevolglik het die prokureur-generaal korrek opgetree ingevolge die bepalings van artikel 30 om die toestaan van borg deur die hof te verhoed.

In die tweede plek verskil regter Eloff ook van regter Preiss wat betref die argument dat die woord "issue" streng uitgelê moet word indien die wetsbepaling inbreuk maak op individuele vryheid.[96] Regter Eloff volg 'n meer meganiese benadering wat ontken dat waardeoordele soos die waarde van individuele vryheid 'n prominente rol speel wanneer die woorde van 'n wetsbepaling uitgelê word en kom tot die gevolgtrekking dat die bevel korrek uitgereik is en daarom volkome geldig is.

Die meerderheid van die hof beslis dus ten gunste van die individu, alhoewel dit maar naelskraap is en die regters wat die meerderheid uitmaak om heeltemal verskillende redes tot hierdie slotsom kom.[97]

Die keuses wat uitgeoefen is in hierdie saak illustreer duidelik op welke wyse die waardes wat 'n regter as uitgangspunt neem uiteindelik sy beslissing beïnvloed. Die regter wat uitgaan van die standpunt dat die individuele regte behoue bly behalwe as die teendeel duidelik uit die wetgewing blyk, beslis dat die beskuldigde die reg verkry om sy saak te stel (selfs al is dit slegs in 'n minimum mate) en kom dan tot die gevolgtrekking dat die bevel wat verhoed dat die hof aan hom borg verleen ongeldig is omrede daar nie aan die jurisdiksionele voorvereiste van die *audi alteram partem*-reël voldoen is nie. Hierteenoor beslis die regter wat as uitgangspunt oorwegings van staatsveiligheid ("preventative justice") neem dat die bevel wat die borg verhoed,

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premium on the maintenance of State security and the preservation of law and order, so much so that the rights and liberties of individuals have to be curtailed". Hy kom dus tot die gevolgtrekking op grond van bogenoemde drie oorwegings: op 405H: "In my judgement there are weighty considerations which show sufficient cogency that Parliament did not contemplate that the maxim should be observed."

95 Op 407I-408B. Sien daarteenoor n 88. In hierdie verband is ek geneig om met hierdie benadering van Stegmann R saam te stem.

96 Op 403I-404A. Eloff R sê dat daar nie 'n keuse bestaan tussen 'n enger en 'n wyer betekenis van die woord "issue" en op grond daarvan te besluit wat in belang van die individu sal wees nie. "(W)e should merely, as I have endeavoured to do, take account of the fact that some form of communication, emitting a publication is necessary to constitute an 'issue', and when on the facts it took place." Mi verdedig die regter hier 'n meganiese proses van wetsuitleg wat nie aan waardes (soos individuele vryheid) 'n groot genoeg rol by die keuse van 'n spesifieke interpretasie toeken nie.

97 Volledigheidshalwe moet gemeld word dat Stegmann R op 'n tegniese punt beslis het dat die hof nie jurisdiksie het om die aansoek om borg aan te hoor nie (op 381F) en alleen voortgegaan het om die bevel nietig te verklaar omrede die meerderheid van die hof van mening was dat die hof wel die nodige jurisdiksie het om dit aan te hoor. Let ook daarop dat Stegmann R saamgestem het met Eloff R se uitleg van die woord "issue" (op 381H) en dat Preiss R (wat die bevel nietig verklaar het juis omrede dit nie korrek ge-"issue" was nie) weer op sy beurt saamgestem het met Eloff R dat die *audi alteram partem*-reël nie nagekom hoef te word nie (op 392A). Die meerderheidsbeslissing was wel dat die bevel nietig verklaar word maar dit was om verskillende redes (waaroor hulle van mekaar verskil het) op grond waarvan Stegmann en Preiss RR tot hierdie slotsom gekom het.

geldig is omrede dit onrealisties is om te aanvaar dat die reg om jou saak te stel in 'n minimum mate aan voldoen behoort te word. Laasgenoemde regter is dienooreenkomstig ook ongeneë om die feit dat hierdie bepaling groot inbreuk op individuele regte maak in ag te neem by die uitleg van die woord "issue" en beslis gevolglik dat die bevel korrek "uitgereik" is. Hierteenoor lê 'n ander regter die klem op die feit dat hierdie 'n inbreukmakende bepaling is en lê die woord dienooreenkomstig streng uit ten einde tot die gevolgtrekking te kom dat die bevel nie wettiglik uitgereik is nie.

Hierdie uitspraak dien gevolglik as 'n uitstekende illustrasie om te bewys hoe regters die keuses waarmee hulle gekonfronteer word, uitoefen: hétsy ten gunste van die individu hétsy ten gunste van die uitvoerende gesag. In eersgenoemde geval word gesteun op vryheidsgesinde regswaardes en word menseregte beskerm terwyl in die laasgenoemde geval gesteun word op die waardes van die *status quo* wat 'n meganiese benadering tot gevolg het en wat volle werking verleen aan die wet se inbreukmakende werking.

Opsommend kan gewys word op die effek wat bogenoemde uitsprake sal hê op die toepassing van die betrokke bepalings van die veiligheidswetgewing. Uitvoerende gesagsorgane sal nie meer individue kan aanhou vir ondervraging of ter voorkoming nie, tensy hulle in die hof gronde kan aantoon op grond waarvan hulle, respektiewelik, 'n persoon verdink van die voorgeskrewe misdrywe of 'n persoon aanhou ter voorkoming van sekere misdrywe. Selfs 'n klousule wat poog om die howe se jurisdiksie in hierdie gevalle totaal uit te sluit kan verontagsaam word indien hierdie objektiewe jurisdiksionele feite afwesig is. 'n Hof sal verder ook kan gelas dat 'n landdros of distriksgeneesheer die aangehoudene mag besoek ten einde verslag te kan doen oor die omstandighede van aanhouding en die gesondheidstoestand van die aangehoudene. Wat betref die bevel van die prokureur-generaal wat verhoed dat die hof borg kan toestaan aan 'n beskuldigde, moet die bestaan van objektiewe jurisdiksionele feite insgelyks eers bewys word – die beskuldigde moet naamlik die reg verkry om sy saak te stel en verder moet daar ook gronde bestaan vir die besluit om hom aan te kla. Dit is duidelik dat die uitsprake in die 1985 3 tot 1986 1 vonnisbundels (en die een ongerapporteerde appèlhofbeslissing in Maart 1986) sonder uitsondering die beskerming van menseregte teweeg gebring het – selfs in die aangesig van wetsbepalings wat voorsiening maak vir ongekontroleerde en arbitrêre uitoefening van regeringsgesag. Dit dien as bewys van die feit dat dit beslis moontlik is vir regters om binne die huidige staatsregtelike raamwerk vryheidsgesinde keuses te maak en hierdeur die werking van die onregverdige wetgewing te temper. 'n Mens kan maar net hoop dat hierdie tendens sal voortduur.

Indien die regbank egter eerder "executive-minded" beslissings sou gee en blote handhawers van die *status quo* word (soos duidelik blyk uit die bogenoemde bespreking van die baanrekord van die appèlhof) sal dit verreikende gevolge vir die regstelsel as geheel inhou. Die regbank sal naamlik toenemend deur die ander groepe in Suid-Afrika as "nie-objektief" of "bevooroordeeld" waargeneem word en die regters (die howe) gaan as gevolg hiervan beslis legitimiteit inboet.[98] Daar bestaan geen twyfel nie dat die betrokkenheid van die howe by die toepassing van rasse- en veiligheidswetgewing

98 Erasmus 27.

beslis die aansien van die regspleging sowel as die legitimiteit daarvan aftakel.[99]

Die regstelsel is 'n land se heel waardevolste instelling[100] en gevolglik kan sodanige legitimiteitskrisis nie geduld word nie.[101] Verskeie instellings het reeds in die onlangse verlede daarop gewys dat daar inderdaad 'n legitimiteitskrisis in die Suid-Afrikaanse regspleging bestaan.[102] Die RGN verslag oor tussengroepsverhoudinge het bevind dat hierdie krisis alleen te bowe gekom kan word deur stelselmatige opleiding, regshulp, voorligting en hervorming en die kommissie van ondersoek na die struktuur en funksionering van die howe

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99 *Ibid* 29 ev. Hy wys veral op rassewetgewing asook veiligheidswetgewing en verklaar: "Vanuit die oogpunt van die regspleging is die herroeping van hierdie wette veel meer as net 'simboolaftakelings'. Hierdie wette, met hul diskriminerende oogmerke en uitwerking, 'is die produk van 'n wetgewer wat die strewe na die ideaal van geregtigheid bewustelik nie nagekom het nie. Die gevolglike onreg en ongeregtigheid is en bly 'n historiese skandvlek op ons regsisteem'. (per Van der Walt *NP van Wyk Louw: Enkele konsekwensies vir die Regdenke* N P van Wyk Louw gedenklesing Johannesburg 1985 15). Die betrokkenheid van die howe by die toepassing van hierdie wette, asook die wette wat gemaak is om geweld te besweer wat prof Keet dertig jaar gelede voorspel het, knaag soos 'n kanker aan die status van ons regspleging, en dit bring mee dat die howe op groot skaal aan legitimiteit inboet." Op 4 ev wys hy ook op ons regserfenis soos uitgespel in die saak van *In re Willem v Kok and Nathaniel Balie* 1879 Buch 45: "(t)he Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue" en op 66: ". . . its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country." Vgl ook die onafhanklike houding van Kotzé HR teenoor die destydse regering van die ZAR, (sien hieroor Kotzé in *Die Ekonoom* 1986 "As regters en regerings bots" 18) asook die prysenswaardige optrede van die appèlhof tydens die *Harris*-beslissings wat die howe se prosessuele toetsingsreg van parlementêre wetgewing (in stryd met die meer positivistiese posisie van absolute parlementêre soewereiniteit van die Engelse howe: Basson en Viljoen 280-94) bevestig het. Erasmus 4 wys ook daarop dat "broad equitable spirit" en "libertanian principles" egter deur vele eerder voorgehou word as "unjust and repressive".

100 Kentridge 649 wys daarop dat 'n regstelsel 'n land se waardevolste sosiale instelling is.

101 Sien ook in hierdie verband regter Kriegler se toespraak voor Regslui vir Menseregte, Pretoria-tak, November 1985 3: "Dit kan nie wegredeneer word nie dat daar verlies aan vertroue in die sogenaamde witman se regsisteem onder talle van ons medelandsburgers is. I know that it is popular (to proclaim) that whatever else can be said about South Africa, its legal system and its system of courts and justice is above criticism. I believe that it is time for us to think very seriously about the essential truth of that boast. But even if it were objectively true, which I am prepared to accept for the purposes of this discussion, that is beside the point. The point in issue now is whether, in the perception of the majority of the population, it is indeed an effective and satisfactory system for the enforcement of rights. Very little has been written authoritatively on the topic, therefore I cannot say with any claim to veracity or accuracy what the black man's perception of the Courts is. But I suspect, because of quite some years of contact with both the law and with blacks, that there is a diminishing confidence." Corder 244 ev wys ook op die ideologiese rol wat die reg en die regsproses gespeel het in die geordende regering van die samelewing. Dit is voldoende om te sê dat die hofstelsel gesien kan word as die wyse waardeur die wetgewende en uitvoerende gesag hulle beleid afdwing, asook waardeur weerspannige elemente stoom kan aflaat op 'n gekontroleerde en beheerbare wyse. Forsyth *In danger for their talents* 266 wys ook daarop dat dit die regters is wat "harsh and unjust" interpretasies gekies het en om hierdie rede dra hulle 'n deel van die verantwoordelikheid vir die skade aan: "the legal system and to the policy as a whole by these developments."

102 Erasmus 22 ev.

(die Hoexter-kommissie) het daarop gewys dat die oplegging van gevangenisstraf vir geringe, tegniese oortredings van die instromingsbeheermaatreëls minagting kweek vir die regswese in die algemeen. Dit blyk duidelik hieruit dat daar 'n dringende behoefte bestaan vir die herstel van die hooggeregshof as die bastion van individuele vryheid,[103] veral omrede dit vasstaan dat wantroue in die regstelsel een van die sterkste uitnodigings tot rewolusie is.

Regterlike aktivisme ingevolge waarvan die regbank onafhanklik en onpartydig individuele regte en vryhede beskerm by die uitoefening van sy keuses, sal veel daartoe kan bydra dat die geskende vertroue herstel word en dat die legitimiteit van die regstelsel bo verdenking gestel word.[104] Aangesien regters in die huidige staatsregtelike opset slegs in daardie gevalle waar hulle keuses het, geregtigheid kan laat seëvier, is die invoer van 'n menseregtehandves die enigste wyse waarop die regbank 'n groter rol sal kan speel deur eenvoudig onregverdige wette as ongrondwetlik nietig te verklaar.[105]

Dit word gevolglik in oorweging gegee dat die legitimiteit van die Suid-Afrikaanse regstelsel in geheel eers volkome herstel sal word wanneer alle wetgewing waardeur die stelsel van ongeregtigheid in die lewe geroep is, in die niet verdwyn. Alleen wanneer hierdie toedrag van sake gerealiseer het, sal die howe met onderskeiding hulle tradisionele funksie van arbiter tussen die belange van die individu en die staatsbelang met onderskeiding kan vervul wanneer daar regskonflikte ontstaan.

Ten einde die Suid-Afrikaanse grondwetlike dilemma op te los, sou 'n mens gevolglik die herroeping van alle onregverdige wette kon vereis en in hierdie verband dan ook kan vra vir die invoer van 'n grondwetlike menseregtehandves ingevolge waarvan hierdie wette onbestaanbaar sal wees. Indien hierdie noodroep op dowe ore val en die legitimiteitskrisis van die Suid-Afrikaanse regstelsel voortduur, kan regsgeleerdes, hetsy akademici, praktisyns of regters, daartoe meewerk dat die regbank, ten spyte van die geweldige beperkinge waaronder hy hedendaags gebuk gaan, aktivisties optree en dat elke geleentheid wat hom voordoen om 'n vryheidsgesinde uitspraak te gee, met oop hande aangegryp word.

Daar kan nie toegelaat word dat die Suid-Afrikaanse regstelsel se aansien erodeer word nie, aangesien regsgeleerdes in so 'n geval medeverantwoordelik is vir die rewolusie en toestande van anargie wat noodwendig moet volg wanneer 'n land se bevolking alle vertroue in sy regstelsel verloor en daar gevolglik geen ordelike basis meer bestaan waarvolgens 'n samelewing homself kan rig nie.

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103 *Ibid* 28 ev.

104 Boulle 256-7. Sien ook Jost 10/2/1986 op 22 ev: "Change is coming to South Africa – perhaps through evolutionary reforms, perhaps through violence. Lawyers and judges will not control those events, but they can play an important role in trying to establish true justice in a country where the law has been used assidiously to create injustice. If they do, they will earn the respect they have so earnestly sought from the rest of the world." *Contra* Corder 244 ev.

105 Dugard *Human rights* 400-2 wys daarop dat indien die regswaardes van ons regserfenis die keuses van regters soos wat die reg "behoort te wees" sal beïnvloed, sal dit 'n oplewing na die bestaan van 'n menseregtehandves ontketen en dit sal die vertroue in die Suid-Afrikaanse regstelsel herstel terwyl daar nog tyd is. 'n Menseregtehandves is die minimum-vereiste hiervoor en die gedagte sal toeneem in gewildheid wanneer blankes hulself wil beskerm as 'n politieke minderheidsgroep: "By then, the new majority, reared on the apartheid legal order, may find such a system inexpedient."

7 Menseregtehandves en politieke idioom

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Ons het sover tydens hierdie simposium van verskillende kante af heelwat indrukke gekry oor maniere waarop 'n menseregtehandves in Suid-Afrika ingevoer sou kon word. Ons het ook agtergekom, en veral professor Dugard het dit gister met groot oortuiging aangetoon, dat politieke partye in Suid-Afrika dit nie heeltemal eens is wanneer dit oor menseregte gaan nie. Een politieke party, by name die PFP, is tradisioneel sterk ten gunste daarvan. Dit is bekend dat hulle tydens die bespreking van die 1983-Grondwet probeer het om 'n verklaring van menseregte ingevoer te kry. 'n Ander politieke party, wat toevallig die regerende party is, is tot dusver nog nie op rekord dat hulle hulle positief uitgelaat het oor 'n verklaring van menseregte nie. Inteendeel, hulle het sover veral by monde van die minister van Justisie, baie moeite gedoen om aan te toon waarom hulle dink dat dit nie gewens is om 'n verklaring van menseregte in Suid-Afrika te hê nie.

Van die argumente wat die Minister van Justisie gebruik, is dat dit moeilik sal wees om presies te formuleer watter regte in so 'n handves opgeneem moet word, dat dit miskien te vaag sal wees en dat 'n mens nie werklik vat daaraan sal kry nie. Ek noem die redes spesifiek omdat dit hopelik in die loop van die referaat duidelik sal word dat die minister se vrese in 'n sekere mate weerspreek of besweer word, af en toe deur sy eie uitlatings, maar meer dikwels deur die van die Staatspresident van die Republiek van Suid-Afrika.

Wat ek gedoen het, was om betreklik willekeurig na 'n aantal toesprake en uitlatings van die regerende party te gaan kyk, en by name die van senior segsmanne; en hierdie uitlatings te toets aan die norme wat in 'n tipiese verklaring van menseregte te vinde is. Ek het my beperk tot toesprake en uitlatings wat ná die 1983-hervormings gemaak is, en in die besonder na die parlementsopening van 1985.

Dit gaan hoofsaaklik oor uitlatings van die Staatspresident en ander senior lede van die kabinet. Die handves wat gebruik is om hierdie uitlatings aan te toets, is die dokument wat bekend geword het as die FCI-handves. Ek het dit nie om dowe neute gedoen nie. Ek het dit eerstens gedoen omdat dit die jongste is van 'n hele reeks sulke dokumente wat oor die jare in Suid-Afrika bekend geraak het. Ek het dit ook gedoen omdat daar by hierdie simposium sekere verwysings na byvoorbeeld die *Freedom Charter* gemaak is, en die indruk by my ontstaan het dat die *Freedom Charter* nogal 'n bepaalde geloofwaardigheid in hierdie simposium het – en omdat die FCI-handves in merkwaardige opsigte met die *Freedom Charter* ooreenstem. Hierdie ooreenkoms kan vlugtig aangetoon word.

Op bladsy een van die *Freedom Charter* word die uitdrukking aangetref "will of all the people", terwyl artikel 19 van die FCI-handves lui:

> The will of the people is the basis of the authority of the government.

'n Ent verder aan in die *Freedom Charter* word die volgende aangetref:

> All people shall be entitled to take part in the administration of the country.

Artikel 19(3) van die handves bepaal:

> Everyone has the right of equal access to the public service.

'n Volgende bepaling van die *Freedom Charter* lui:

> The rights of the peoples shall be the same, regardless of race, colour or sex.

Artikel 11 van die FCI-handves sê:

> Everyone is equal before the law and entitled to equal protection without discrimination on the basis of race, colour, sex . . .

ensomeer. Aan die einde van die eerste bladsy en aan die begin van die tweede bladsy van die *Freedom Charter* is daar drie of vier bepalings oor "national groups" wat beskerm moet word teen "insults to their race and national pride". Artikel 17(2) van die handves bepaal:

> Any advocacy of racial, national or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Op bladsy 2 van die *Freedom Charter* is daar 'n opskrif

> People shall share in the country's wealth.

Artikel 9 van die FCI-handves voorsien:

> The people may themselves or through the institutions of democratic government freely dispose of their natural wealth and resources.

So sou 'n mens kon aangaan.

Die voorgaande verklaar waarom die FCI-handves gekies is as basis van vergelyking. Dit lyk naamlik of daar wel iets "tuisgemaak" aan die handves is.

Voordat daar iets meer oor die FCI-handves gesê word, moet 'n beswaar wat moontlik sou geopper kon word, ondervang word. Ek het in hierdie oefening eenvoudig na die woorde van die Staatspresident en ander ministers gekyk. Dit is reeds by hierdie simposium dikwels gesê dat daar nie buite die verband of "konteks", en buite die "ideologie" en die filosofie om na die woorde van mense gekyk moet word nie. Waarom ek egter nie verskoning daarvoor aanbied dat ek eenvoudig net na die taal van die betrokke ampsbekleërs gaan kyk het nie, is juis omdat konteks en ideologie baie maklik as 'n verweer of 'n skuifmeul gebruik kan word waarom mense nie na mekaar hoef te luister en nie met mekaar hoef te praat nie. Daar kan gesê word dat die Suid-Afrikaanse regering nie 'n liberaal-demokratiese tradisie het nie, en daarom kan sy uitlatings nie met 'n liberaal-demokratiese handves van menseregte vergelyk word nie. Of daar kan gesê word dat die Suid-Afrikaanse regering histories nie 'n legitieme basis het nie, en dat hulle nie saam in die "liberation struggle" of so-iets is nie, en daarom kan daar nie na die uitlatings van die Suid-Afrikaanse regering geluister word nie want die konteks is verkeerd. Juis om hierdie soort probleem te ondervang, haal ek nie noodwendig in konteks aan nie. Ek laat u luister na die woorde van die handves en na die woorde van die ministers.

As 'n mens na die FCI-handves kyk, blyk dit dat hy uit ses afdelings bestaan. Die eerste is 'n voorrede, dan is daar vier gedeeltes oor onderskeidelik maatskaplike en kulturele regte en beginsels, oor ekonomiese regte en beginsels, oor burgerlike en politieke regte en beginsels, en dan ten slotte ook 'n afdeling oor persoonlike en openbare verantwoordelikheid en heel aan die einde 'n stel ondernemings.

Die stel ondernemings word uitgelaat, want dit is die besigheidsmense wat daardie ondernemings gee. Ek laat ook die vierde gedeelte oor persoonlike en openbare verantwoordelikhede uit. As u vinnig na daardie artikels kyk, sal u sien artikel 23 bepaal net in meer algemene terme: geen diskriminasie op grond van geslag en al die ander gebruiklike gronde nie. Artikel 24 is nogal 'n uitvoerige artikel wat in 'n sekere mate professor Jacobs se opmerking aanraak dat daar ook oor die *begrensing* van fundamentele regte gepraat moet word. Artikel 25 verleen enersyds aan die staat die bevoegdheid om te help verhinder dat nasionale groepe se regte aangetas word, terwyl sub-artikel (2) andersyds die gebruiklike bepalings bevat oor 'n noodtoestand – dit wil sê die vereistes daarvan, soos proporsionaliteit ensovoorts.

Die voorrede sou ook uitgelaat kon word. 'n Mens sou kon argumenteer dat die voorrede die gesamentlike ondernemings van die groot besigheidsmense is, van "private enterprise", van die 5% wat 95% van die natuurlike bronne van Suid-Afrika beheer. Dit was egter vir my interessant, en verbasend, dat dit juis mense is wat veronderstel is om na hulle eie belange om te sien, en nie 'n regering of die "staat" wat in die openbare belang regeer nie, wat op hierdie bepalings ooreengekom het.

Die voorrede word dus nie uitgelaat nie. Ek sou graag wou aantoon hoe die uitsprake van die politici ooreenstem met selfs die voorrede van hierdie handves. In die voorrede is daar 'n bepaling wat soos volg lui:

> . . . mindful of our important role in promoting human rights and the dignity of man . . .

Die Staatspresident is op rekord dat hy gesê het:[1]

> The recognition of the human dignity, life, liberty and property of all, the furtherance of the contentment and spiritual and material wealth of all, and the equality of all under the law, as expressed in the preamble to the Constitution unequivocally testifies to this.

(Die aanhaling slaan op die regering se voorneme om individuele belange te bevorder.) Verderaan in die voorrede van die FCI-handves vind 'n mens die volgende:

> . . . recognizing the need for South Africa to take up its rightful place in the international community, as a land of justice, equal rights and opportunities and to fulfil its duties in the community of free and peace seeking nations . . .

Die Suid-Afrikaanse Minister van Buitelandse Sake sê:[2]

> Ons is onwrikbaar deel van die vasteland van Afrika en ons is deel van die wêreld.

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1 Persverklaring getiteld "Reaction of the government on the HSRC Report on intergroup relations" 12 Sept 1985 op 4.

2 *Debatte van die Volksraad* 31 Jan 1985 kol 287.

Die Staatspresident sê:[3]

> We accept unequivocally that the Republic of South Africa is part of the international community. We have no wish to isolate ourselves in the world, particularly not from Africa of which we form an integral part.

Die Staatspresident sê ook:[4]

> Op staatkundige gebied wil ek beklemtoon dat dit die regering se erns is in sy soeke na vreedsame en demokratiese oplossings wat aan die eise van billikheid en geregtigheid voldoen.

Sover dit die voorrede van die FCI-handves betref.

Kyk 'n mens na die artikels van die handves, is daar te veel om binne die kort tydsbestek te behandel. Ek neem lukraak 'n paar voorbeelde.

Ons kan by artikel 1 begin. Daar staan dit kort en kragtig:

> All human beings are born free and equal in dignity and rights.

(Dit is goed om voortdurend in gedagte te hou dat baie van die dinge wat hier aangehaal word, ook in die *Freedom Charter* staan, of as dit in chronologiese volgorde geneem word, is baie van die dinge wat in die *Freedom Charter* staan, ook hier te vinde.) Die Staatspresident het by geleentheid gesê:[5]

> We believe that human dignity, life, liberty and property of all must be protected regardless of colour, race, creed or religion.

Word na artikel 4 toe gespring, word 'n omstrede bepaling aangetref, een van die sogenaamde sosiale regte:

> Everyone has the right to equal education opportunities and in the exercise of any function which the parents or private institutions assume in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Die Staatspresident:[6]

> The Government has accepted the principle of providing and has repeatedly confirmed its intention to provide equal education opportunities including equal standards of education for all.

Volgens die Minister van Onderwys en Kultuur:[7]

> . . . sal by die bepaling van die leerinhoud . . . hierdie departement deeglik rekening hou met die siening van die ouers, die opvoeders en die gemeenskap wat ook die private sektor insluit.

Beweeg ons na artikel 5(3) vind ons die volgende:

> Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess their own religion or to use their own language.

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3 *Debates of the House of Delegates* 31 Jan 1986 kol 5.
4 *Debatte van die Volksraad* 31 Jan 1985 kol 12.
5 *Debates of the House of Representatives* 31 Jan 1986 kol 11.
6 Persverklaring getiteld "Reaction of the government on the HSRC Report on intergroup relations" 12 Sept 1985 op 7.
7 *Debatte van die Volksraad* 29 Jan 1985 kol 180.

Die Minister van Onderwys en Kultuur:[8]

> In ons land met sy verskeidenheid kulture is dit noodsaaklik dat elke kultuur beskerm en vertroetel moet word.

Maar luister dan:[9]

> Dit is ook noodsaaklik dat kennis van en waardering vir die kultuur van ander groepe en nasies ontwikkel word om beter begrip en beter menslike verhoudinge te bevorder. Om aan 'n kultuurbedrywigheid deel te neem, is dus 'n voorreg wat 'n gemeenskap het.

Ons kan na artikel 6(1) toe gaan:

> Everyone has the right to own property alone as well as in association with others.

Die Staatspresident sê, en ofskoon dit nou reeds histories is, is dit tog interessant:[10]

> In die eerste plek wil ek sê dat dit niks nuuts is vir 'n blanke regering om die standpunt in te neem dat 'n nie-blanke gemeenskap eiendomsreg in blanke Suid-Afrika kry nie. Paul Kruger het dit reeds gedoen.

Verder sê die Staatspresident ook by geleentheid:[11]

> The ways in which the fundamental rights of individuals and groups such as life and property can be protected are therefore an essential element of the Government's agenda for constitutional reform.

Artikel 8(2) van die handves lees soos volg:

> Everyone has the right to work and to free choice of employment.

Dit moet toegegee word dat hierdie bepaling met gekleurde ore, maar nie in die "rasse-sin" van die woord nie, beluister moet word.

Die Staatspresident sê:[12]

> As far as job reservation is concerned, all forms of statutory job reservation have been abolished in accordance with the Government's declared policy, while the principle of abolishing job reservation in the mining industry was accepted in 1981 already. In the public service too is found that trained persons of all population groups are increasingly being appointed to positions previously held exclusively by whites.

'n Mens sou natuurlik kon argumenteer dat daar nog nie van 'n "reg" sprake is nie, maar dit lyk darem al asof daar 'n voet in die deur is, om dit spreekwoordelik te stel.

'n Mens kan na artikel 9 kyk. Dit is 'n interessante artikel:

> The people may themselves, for their own ends or through institutions of democratic government freely dispose of their natural wealth and resources without any prejudice to any obligations arising from international economic co-operation based on the principles of mutual benefit and international law. In no case may a person be deprived of his own means of subsistence.

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8 *Ibid* kol 183.
9 *Ibid.*
10 *Debatte van die Volksraad* 31 Jan 1985 kol 329.
11 Toespraak van die Staatspresident tydens die Kaapse Kongres van die Nasionale Party op 30 Sept 1985 soos gerapporteer in *Business Day* van 1 Okt 1986.
12 Persverklaring getiteld "Reaction of the government on the HSRC Report on intergroup relations" 12 Sept 1985 op 7.

Die Minister van Staatkundige Ontwikkeling en Beplanning sê die volgende (en die reeks aanhalings wat volg moet in verband met mekaar gesien word):[13]

> Daar is 'n dringende behoefte daaraan om grondwetlike strukture te ontwerp en in te stel wat die demokratiese basis van ons land asook die basis van deelname aan die proses van politieke besluitmening in Suid-Afrika verbreed.

Die Staatspresident:[14]

> As regards backlogs in satisfying the elementary needs of certain communities everything possible should be done to counter the perception among some groups that they are being excluded from economic benefits. The reduction of inequalities and the elimination of absolute poverty by supplying basic human needs are therefore priorities. And in these respects progress has already been made. As regards greater participation in the economy to more equal opportunities and greater occupational mobility, the Government is in agreement with the report (dit was 'n verslag van die RGN) that access to key economic resources should not be determined by prescribed group membership. The Government has already adopted the view that it is necessary to abolish the measures that limit the possibility of greater numbers of entrepreneurs and professional persons of all groups availing themselves of opportunities in the market system.

Artikel 11 is die baie bekende gelykheidsbepaling:

> Everyone is equal before the law without any discrimination on the basis of race, colour, language, sex, religion . . .

ensovoorts. So onlangs as 31 Januarie 1986, sê die Staatspresident:[15]

> We believe that human dignity, life, liberty and property of all must be protected regardless of colour, race, creed or religion.

Verder:[16]

> On the personal and individual level respect for and the protection of human dignity, life, liberty and property of all.

En verder:[17]

> I have further repeatedly stated, the Government rejects discrimination – I have already repeatedly stated that if apartheid means racial discrimination and encroachment upon human dignity, then the South African Government shares in the rejection of that concept. For this reason we are involved in the pursuance of equal rights for individuals and security for groups.

Hy sê ook, baie insiggewend:[18]

> Besides the constitutional aspect, it is evident that further socio-economic reform based on the principle that discrimination on the basis of race, ethnic character and origin are rejected, is also put on the agenda by the Government.

En dan, dit is in 'n koerantberig, het die Minister van Buitelandse Sake die spreekwoordelike en waarskynlik anglisistiese kersie op die koek gesit toe hy gesê het:[19]

> Laws to enforce racial discrimination should never have been made.

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13 *Debatte van die Volksraad* 1 Feb 1985 kol 405.
14 Persverklaring getiteld "reaction of the government on the HSRC Report on intergroup relations" 12 Sept 1985 op 6.
15 *Debates of House of Assembly* 31 Jan 1986 kol 11.
16 *Ibid* kol 12.
17 Toespraak van die Staatspresident tydens die Kaapse Kongres van die Nasionale Party op 30 Sept 1985 soos gerapporteer in *Business Day* van 1 Okt 1986.
18 *Ibid.*
19 Toespraak gehou te Johannesburg op 14 Okt 1985 soos gerapporteer in die *Pretoria News* van 15 Okt 1985.

Ons kan na artikel 12(1) gaan:

> Everyone has the right to life, (ofskoon professor Lourens du Plessis dit skynbaar ontken) liberty and security of person.

Hieroor sê die Staatspresident:[20]

> Recognition of the human dignity, life, liberty and property of all.

Weer sê hy:[21]

> The way in which the fundamental rights of individuals such as life and property can be protected is an essential element of the Governments's agenda for reform.

Artikel 16 lees:

> Everyone has the right of freedom of movement, and residence within the borders of the State.

Ongelukkig word dit nou gekoppel aan die sogenaamde begrip van ordelike verstedeliking waar die Staatspresident sê stappe ter bevordering van ordelike verstedeliking en die uitskakeling van negatiewe en diskriminerende aspekte verbonde aan instromingsbeheer, is onder dringende oorweging.

Artikel 17:

> Everyone has the right to freedom of opinion and expression.

Die Staatspresident:[22]

> We recognise the right to protest.

Dit is nogal 'n ingrypende erkenning.

> Everyone – artikel 18 – has the right of freedom of association, and the freedom of peaceful assembly.

Die Staatspresident:[23]

> The Government is prepared to accept in the interest of inter-group relations the free association of individuals and groups.

Artikel 19(2):

> Every citizen has the right to take part in public affairs directly or through freely chosen representatives.

Die Minister van Samewerking en Ontwikkeling (soos hy toe was):[24]

> Die aanvaarding dat alle groepe en individue aanspraak moet hê in politieke besluitneming wat hulle lewens en belange raak.

Staatspresident:[25]

> All South Africans must be placed in a position where they can participate in government through their elected representatives.

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20 Persverklaring getitled "Reaction of the government on the HSRC Report on inter-group relations" 12 Sept 1985 op 4.
21 Toespraak van die Staatspresident tydens die Kaapse Kongres van die Nasionale Party op 30 Sept 1985 soos gerapporteer in *Business Day* van 1 Okt 1986.
22 *Ibid.*
23 Persverklaring getiteld "Reaction of the government on the HSRC Report on inter-group relations" 12 Sept 1985 op 4.
24 *Debatte van die Volksraad* 28 Jan 1985 kol 49.
25 *Debates of the House of Delegates* 31 Jan 1986 kol 11-12.

Artikel 19(4):

> Due regard being given to the protection of the rights of minorities, the will of the people shall be the basis of authority of government.

Staatspresident:[26]

> I finally confirm that my party and I are committed to the principle of a united South Africa, one citizenship and, (belangrik) universal suffrage.

Artikel 20:

> The institutions of democratic government and in particular the separation of state powers, the independence of the judiciary, the supremacy of the legal system, the freedom of the press, and the free formation of political parties shall be the foundation of South African statehood.

Staatspresident:[27]

> The government is committed to democracy as the only acceptable way in which substance can be given to every South African's political aspirations.

Verder:[28]

> We believe in the sovereignty of the law as the basis for the protection of the fundamental rights of the individual as well as groups. We believe in the sanctity and indivisibility of law and the just application thereof. Solutions must be democratic – . . . the Political Interference Act was repealed.

In die laaste instansie sal ek u vinnig na artikel 22 toe neem:

> South Africa as a sovereign state, shall respect the rights and independence of all nations and shall strive to maintain world peace and the settlement of all international disputes by negotiation, not war.

Die Staatspresident:[29]

> Suid-Afrika is nie 'n eiland nie en sal sy regmatige plek inneem in die Statery en in besonder in die vasteland waarvan hy deel is met behoud van die mooi tradisies en kultuurbesit van al ons verskillende groepe.
>
> The national party also opposes any selfish motives in relations among nations. We remain committed to peace. The Government is willing to hold discussions with each South African who is interested in peaceful solutions.[30]

Samevatting

Nadat ek hierdie oefening gedoen het, het ek gaan tel. In byna 70% van die gevalle (op die basis van die aantal artikels en sub-artikels van die FCI-handves) is die tipe uitlatings van die Staatspresident of sy senior ministers sodanig dat hulle aan die handves herinner. Dit lei tot die gevolgtrekking, hopelik logies, dat die regering heeltemal vertroud is met die uitdrukkings wat in menseregtehandveste gebruik word, en met menseregtehandvesterminologie. Die regering gebruik ook inderdaad self hierdie uitdrukkings. My

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26 Toespraak van die Staatspresident tydens die Kaapse Kongres van die Nasionale Party op 30 Sept 1985 soos gerapporteer in *Business Day* van 1 Okt 1986.

27 Persverklaring getitled "Reaction of the government on the HSRC Report on intergroup relations" 12 Sept 1985 op 11.

28 *Debates of the House of Delegates* kol 11.

29 *Debatte van die Volksraad* 21 Jan 1985 kol 5.

30 Toespraak van die Staatspresident tydens die Kaapse Kongres van die Nasionale Party op 30 Sept 1985 soos gerapporteer in *Business Day* van 1 Okt 1986.

probleem met die regering se gebruik van hierdie uitdrukkings is egter dat dit op die oog af en klaarblyklik geheel en al struktuurloos gedoen word. Dit kan doelbewus struktuurloos wees omdat die regering dit nie in 'n vorm wil giet nie; dit kan uit onkunde wees, wat 'n mens nie graag aan hulle wil toeskryf nie; of dit kan eenvoudig wees dat dit idiosinkraties is om dit te doen op die manier waarop hulle dit doen. Gelukkig lyk dit, te oordeel aan die jongste parlementêre openingstoespraak van die Staatspresident, dat hierdie uitdrukkings in 'n sekere vorm agter mekaar gegiet begin word. Maar van werklike behoorlike struktuur is daar nog geen sprake nie. Dit lei my tot die volgende bewering: op grond van die 70% ooreenstemming tussen wat die regering sê en wat in menseregtehandveste staan (vir die doeleindes van hierdie bespreking word aanvaar dat die FCI-handves 'n verteenwoordigende handves is) kan hierdie uitlatings in 'n behoorlike menseregtehandvesstruktuur gegiet word. Dit lei tot die volgende bewering: die regering het na my mening op hierdie stadium niks te verloor deur hierdie gedagtes en uitlatings van hom in die vorm van 'n menseregtehandves te begin giet nie. Hy kan net alles wen. En as dit na propaganda vir die regering klink, sê ek graag dit is die allerlaaste wat beoog word. Ek plaas die regering in 'n sekere mate voor die uitdaging deur te sê (en dan gebruik ek graag 'n uitdrukking wat hulle nogal graag gebruik) dat hy sy huis 'n slag in orde moet kry sover dit 'n menseregtehandves betref: of, om 'n Engelse woordspeling te gebruik: "Maybe the government should put its bill of rights where its mouth is."

Ek sluit af met drie kort punte. Eerstens: ek dink as die regering 'n verklaring van regte aanneem, kan hy die meeste Suid-Afrikaners nog steeds oortuig van sy opregtheid om 'n vry Suid-Afrikaanse gemeenskap wat op gelykheid en die "rule of law" gebaseer is, te skep. Tweedens: in die een of ander vorm is die regering vandag 'n oorgangsregering in die sin dat hy gesag begin oordra. 'n Oorgangsregering het egter 'n baie positiewe rol om te vervul. Dit is my oorwoë mening dat die regering op hierdie stadium 'n verklaring van menseregte moet aanneem; en ek laat my nie daaroor uit of dit afdwingbaar moet wees en of dit net 'n verklaring van voorneme moet wees nie. Bloot deur die aanname daarvan, deur sy standpunte en uitlatings in die struktuur van 'n formele menseregteverklaring te giet, kan miskien selfs ook die *Freedom Charter* se ondersteuners 'n mate van bevrediging kry; boweal kan dit geweldig baie bydra tot die positiewe oorgangsrol wat die regering te speel het. Die laaste punt: die regering "praat" soos 'n "bill of rights", en miskien juis omdat hy die regering is, moet hy dit 'n slag ook "doen".

8 Cardinal constitutional and statutory obstacles which obstruct the introduction of a justiciable bill of rights in South Africa

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1 INTRODUCTION

The rationale behind this paper is to consider and evaluate certain of the more significant legislative enactments which would obstruct the introduction of an entrenched and enforceable bill of rights together with certain cognate constitutional and political issues. An academic paper of this nature cannot provide an exhaustive account and analysis of the plethora of statutory provisions that infringe civil and political rights in our country and that result in gross economic inequality between blacks and whites.

South Africa has undergone and continues to experience a controversial process of change and endemnic crisis.[1] Racialistic laws like the Prohibition of Mixed Marriages Act,[2] section 16 of the Immorality Act[3] and the Prohibition of Political Interference Act[4] have as a consequence of this traumatic process of change been repealed. In addition, the new tri-party coalition government has, as a prelude to the invocation of its clearly enunciated policy of power sharing with Blacks, (whatever this may mean), ostensibly dismantled the administratively labyrinthine system of influx control[5] and has subjected the Reservation of Separate Amenities Act[6] to investigation. The extent to which influx control* and the Reservation of Separate Amenities Act will indeed be abolished is uncertain. As they have existed and operated they have constituted insurmountable obstacles to the quality of treatment and freedom of movement which are inherent in and indispensible to the content and jurisprudence of a western styled and operative bill of rights. Because of their prospective possible complete demise, these two statutory manifestations of the apartheid system will not be scrutinised with the view to the introduction of a bill of rights.

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1 See *SA Digest* 4 October 1985, 899 "Major restructuring of government policy".
2 No 55 of 1949, repealed by Act 72 of 1985.
3 No 23 of 1957, amended by Act 68 of 1967 and 57 of 1969 and repealed by Act 72 of 1985.
4 No 51 of 1968, repealed by s 1 and 2 of the Constitutional Affairs Amendment Act 104 of 1985.
5 The government has committed itself to a review of influx control and a positive urbanisation policy – see *SA Digest* 6 September 1985, 803.
6 At present this matter is being investigated by the president's council.
* After this paper had been delivered, the system of influx control was abolished by the Abolition of Influx Control Act 68 of 1986 (eds).

A comprehensive and justiciable bill of rights could provide a cogent mechanism to protect individual liberties in a new South African constitutional and political dispensation which could be essentially democratic, non-racial and would, therefore, adhere to the spirit and practice of the Rule of Law. However, such a bill of rights could at most be part of an entirely new constitutional order which would, inter alia, it is submitted, have to include a non-racial territorially based negotiated federation[7] (which by its very nature and operation involves continuous negotiation and compromise) and a demonstratively effective programme of social democracy or democratic socialism,[8] operating in a liberal democratic framework, for the systematical upliftment of impoverished black communities, all of which would have to be the end product of an authentic process of negotiation between the legitimate leaders of the recognised cultural and language groups that inhabit South Africa. Furthermore, the dialectic involved in this paper is premised on an enforceable bill of rights that protects essentially political and civil rights and not one that includes a host of socio-economic rights like the right to employment, housing and a decent standard of living. It is submitted that socio-economic upliftment, which is considered to be imperative for a just society must flow from a policy of effective social democracy[9] rather than from the invocation of the provisions of a bill of rights. A further relevant consideration is that an operative bill of rights is incompatible with a centrally planned marxist economy and a one party state.[10] It is therefore submitted that significant adjustments would have to be made to the economic system thereby producing a mixed economy, but without destroying the metaphorical goose that lays the golden egg, and thereby preserving the operation of the Rule of Law in society. Those who wish to effect a radical change in the nature of the South African economy, regard a bill of rights and the Rule of Law as a serious constitutional obstruction.[11] The systematic implementation of socio-economic human rights would require "all the detailed administrative apparatus of the planned economy, which lies beyond the control of declaration, mandamus, and other methods of enforcing public duties."[12] Furthermore, according to Cranston[13] the effect of amalgamating within one document a multitude of heterogeneous rights, is "to push all talk of human rights out of the realm of the morally compelling into the twilight world of utopian aspiration."

2 RACE CLASSIFICATION

The notorious system of race classification based on the Population Registration Act[14] is seminal to the political philosophy and constitutional practice of race differentiation and pseudo-decolonisation. Without legally

7 See the *Buthelezi commission report* (1982) vol II 107.
8 See Schonfield *In defence of a mixed economy* (1984) and also MacCormick *Legal right and social democracy* (1984) 1.
9 *Ibid.*
10 Davis "The Rule of Law and the radical debate" (1981) *Acta Juridica* 65 and Hayek *The constitution of liberty* (1972) 232.
11 See the Davis-Forsyth debate in the 1980 *SALJ* 94, 103, 616 and 623.
12 Jaconelli *Enacting a bill of rights* (1980) 8.
13 Cranston *What are human rights?* (1973) 68.
14 No 30 of 1950.

endorsed race classification the complex structure and design of *apartheid* as it has evolved with all its manifold ramifications would collapse like a pack of cards.

The act provides for an exhaustive compilation by the Director General of the Interior, of a register of the complete South African population, which must indicate the classification of each person "as a white person, coloured person or a Black person as the case may be, and every coloured person and every Black person whose name is included, shall be classified by the Director-General according to the ethnic or other group to which he belongs." Furthermore, in South Africa a person's political, civil, economic and social rights are determined by racial status as a result of a legion of discriminatory statutes. Therefore, voluntary political and economic association is legally impermissible.[15] Indeed one of the most imminent issues in the current political and constitutional debate relates to the desirability of legislatively enforced group association, as opposed to uninhibited voluntary association.[16] Whites in general, and National party supporters in particular, are at present adamant that the survival of their cultural identity, political privilege and hegemony, necessitates rigidly enforced race classification and consequently they have a pathological fear that its abolition would result in their catastrophic political and economic demise and an irreconcilable and violent conflict between opposing black ethnic groups in South Africa. When the Prohibition of Political Interference Act[17] was repealed in 1985, Mr Heunis stressed that "the abolition of the act did not mean that the government had abandoned its declared policy that all groups must take part in decision-making processes as groups."[18]

The apprehension that the whites have, that after decades of *apartheid* rule, South Africa could be engulfed in internecine conflict is not irrational. Furthermore, the effective protection of minorities in a culturally heterogeneous and deeply cleavaged society is one of the most intractable and problematic issues confronting democratic theory and practice.[19] A justiciable bill of rights, which protects individual liberties is at most an inchoate answer to this problem, and is certainly not a panacea. A more catholic approach to the problem lies in comprehensive scientific research, in authentic and intensive negotiations between credible leaders in South Africa and in political education. Thus "in any country whatsoever its constitution, the existence or absence of legislation in the nature of a bill of rights could in practice play only a relatively minor part in the protection of human rights. What was important above all, was the country's political climate and traditions."[20] On the other hand, the efficacy of a justiciable bill of rights should

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15 Dugard *Human rights and the South African legal order* (1978) 59.

16 See article in *Rapport* 2 March 1986, "Groepe: statutêre beskerming van vrye assosiasie" by Dr S van der Merwe MP. A report by the Human Sciences Research Council dealing with intergroup relations published in July 1985 stated "that freedom of association with individuals and groups, as well as the right to non-association, should be guaranteed" *SA Digest* 5 July 1985, 587. The juridical work committee pointed out that "race can never be a legally relevant ground for justified differentiation".

17 See note 4.

18 See *SA Digest* 31 May 1985, 467.

19 Lijphart *Democracy in plural societies – a comparative exploration* (1977) 236.

20 Zander *A bill of rights?* (1975) 29.

not be underestimated. The American experience in this regard is an exemplary illustration.[21] However, judicial review is at the best of times haphazard in its operation, depending on the willingness and ability of the litigant to incur the trouble and risk of impugning legislation in a court and the likelihood of evoking a positive judicial response.[22]

The practical effects of implementing race classification in borderline cases has resulted in incalculable human suffering and has besmirched South Africa's image abroad. "Families are torn apart when husbands and wives, parents and children, brothers and sisters are differently classified with all the consequences to their personal, economic and political lives."[23] The infinitely tragic consequences of statutory race classification has created a legacy of acrimony and bitterness, which has contributed to the present racial polarisation which militates against the prospect of successful negotiation.

One of the principal motivations for the enactment of this legislation was to endeavour to eliminate or at least drastically reduce attempts to cross the colour bar. However, since inordinate difficulty was experienced in devising suitable definitions of the terms "white", "coloured" and "black", these have been frequently amended. The extant definitions are premised on a triology of criteria; appearance, social acceptance and descent. The Director-General of the Interior effects his categorisation on the basis of sensus returns, registration of births, and other documents. An aggrieved person does have the right to lodge an objection against his official classification with an administrative tribunal designated as the race classification appeal board.

Racial classification has led to profound resentment especially among persons of colour. It was unilaterally devised by a chauvenistically inclined government to secure racial purity and monopolize the privileges accorded to them by other cognate *apartheid* laws which institutionalised racial discrimination to the advantage of whites and to the detriment of persons of colour. Furthermore, race classification has a psychologically humiliating effect, both on disadvantaged individuals and on groups to which individuals are allocated. The practice and theory of legal and political equality which is intrinsic to an authentic bill of rights is incompatible with race classification of any description. A bill of rights protects individuals rather than groups. The protection of minorities could be augmented by a skillfully devised and negotiated federal and a presidential system of government involving the separation of powers,[24] akin to that found in the American constitution. The report of the political and constitutional sub-committee of the Buthelezi commission expressed the view that "a federation on a non-ethnic basis is more likely to secure the necessary stability and avoid the danger of mobilisation

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21 *Ibid* 46.

22 Jaconelli *op cit* 13, 27. As to whether judicial review is in essence undemocratic see Rostow "The democratic character of judicial review" 1952 *Harvard Law Review* 193 ff.

23 Dugard *op cit* 62.

24 Richter "Separation of powers" 1968 *International Encyclopaedia of Social Sciences* vol 10 472. In regard to separation of powers in general see Vile *Constitutionalism and the separation of powers* (1969). See also Gwyn *The meaning of separation of powers* (1965) and Hough *Die verdeling van staatsgesag in Suid-Afrika* (doctoral thesis UP 1977).

of races against one another"[25] and that "under a geographic federal principle, if there is adequate decentralisation of powers, a great deal of natural protection of cultural diversity can be obtained provided the sub-regions correspond to a degree with concentrations or communities of people with particular cultural interests."[26] On the other hand a strong president is required to effect socio-economic reforms.[27]

Race classification may, however, have to be phased out as a federal system of government is phased in. What is of paramount importance, is that the process of change must be a demonstratively negotiated one involving credible leaders of all groups. A bill of rights can therefore only to a lesser extent provide protection for minorities, but since "the traditional liberal democratic view, if true to itself, should not countenance oppressive conduct by the majority against the minority",[28] a comprehensive constitutional and socio-economic dispensation is required.

The theory and practice of consociationalism[29] has evolved to provide protection for minorities employing the mechanism of voluntary political association. The four characteristic features of consociationalism[30] namely grand coalition government, minority veto, segmental authority and proportionality are intended to ensure government by inter-group consensus and thereby prevent the "tyranny of the majority".[31] Genuine democratic consociationalism is compatible with a justifiable bill of rights. Whether such a consociational system is viable in a deeply cleavaged society such as South Africa, is a moot point.[32] However, a comprehensive and profound study[33] of the prospects of peaceful change found that "the relations between the black leaders and their supporters are such that the majority group is open to a policy of accommodation and consociation. But whether this situation will persist is debatable."[34]

3 THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 110 OF 1983

The 1983 tri-cameral constitution, which is based on the seminal distinction between own and general affairs[35] and which incorporates a political colour bar in that Africans are excluded from participation, by its very nature would constitute a fundamental obstacle to an operative and effective bill of rights which in its turn would entrench legal, civil and political equality. Thus although the 1983 constitution was adroitly marketed as one extending

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25 *Buthelezi commission report* (1982) vol II 107.
26 *Ibid* 107.
27 Dahl *Dilemmas of pluralist democracy* (1982) 105.
28 Zander 50.
29 See Boulle *South Africa and the consociational option* (1983) and Lijphart *op cit.*
30 Boulle *op cit* 47-51 and Lijphart *op cit* 25-52.
31 Anthony Lester Fabian Tract No 390 as quoted by Zander *op cit* 50.
32 Lijphart *op cit* 236.
33 Hanf, Weiland & Vierdag *South Africa – the prospects of peaceful change* (1981).
34 Ibid 397.
35 See Devenish *Constitutional change and reform in South Africa* (doctoral thesis UNISA 1986) 282.

democracy to formerly excluded groups, individuals can only participate as members of statutorily defined groups in terms of the Population Registration Act.[36]

The constitutional ambivalence inherent in the 1983 constitution is evident from the irreconcilable conflict between the profoundly religious and eloquent phraseology of the preamble,[37] which is tantamount to an unenforceable[38] declaration of rights, and the body of the Act, which belies the noble sentiments of the preamble by excluding Africans completely from participation by allocating the franchise on a differential basis to whites, coloureds and Indians and by elevating the state president to an executive status above the law in the crucial demarcation between own and general affairs.[39] Furthermore, the 1983 constitution is no ordinary act. The entrenchment[40] of a significant number of politically and constitutionally decisive provisions gives it virtually the status of a *grundnorm*,[41] which is mutually exclusive of an entrenched bill of rights. The 1983 constitution has therefore created the most formidable legislative obstruction to the introduction of a bill of rights. A contextual examination and analysis of the entrenched provisions in the light of the complete constitution and its political ethos, indicates that it is the hegemonic position of the dominant white party that is guaranteed together with the cognate concepts of our own and general affairs, which are a contemporary and euphemistic manifestation *par excellance* of institutionalised racial discrimination.[42]

A bill of rights can only function effectively within an authentically democratic ethos and system of government. The principles of representative and responsible government are the very essence of democracy. The 1983 constitution makes penetrating inroads into these constitutional principles.[43] The executive state president, unlike a Westminster prime minister, is not directly responsible to any house of parliament, although all ministers of state are responsible to their respective houses. The constitution also makes provision for the undemocratic feature of nominated and indirectly elected members of the three houses.[44] In addition, a restructured and influential

36 Act 30 of 1950.

37 "In humble submission to Almighty God, who controls the destinies of people and nations, . . . We declare that we are convinced of the necessity of standing united and pursuing the following goals: To uphold Christian values and civilised norms, with recognition and protection of freedom of faith and worship . . . To respect and to protect the human dignity, life, liberty and property of all in our midst, . . ."

38 The preamble to a statute can only be invoked should there be ambiguity in the body of the act itself – see Steyn *Die uitleg van wette* (1981) 145-7. See also *Law Union & Rock Insurance v Carmichael's Executor* 1917 AD 597: "A preamble has been described by an old English Judge as a 'key to open the mind of the makers of the Act and the mischiefs they intended to redress'. But the key cannot be used if the meaning of the enacting clause is clear and plain. In cases, however where the wording is ambiguous, and in cases where the court is satisfied that the legislature must have intended to limit in some ways the wide language used, then it is proper to have recourse to the preamble."

39 See the opinion of the South African bar council as repeated in *Hansard* col 12499 29 August 1983.

40 See Boulle *op cit* 202-3.

41 See Walker *The Oxford companion to the law* (1980) 542: "In Kelsen's philosophy of law, the basic, fundamental postulate, which justifies all principles and rules of the legal system and from which all inferior rules of the system may be deduced." See Kelsen *General theory of law and state* (1945) and *The pure theory of law* (1960).

42 Boulle *op cit* 202-3.

43 See Devenish *op cit* at 283.

44 Ss 41(b), 41(c), 42(c), 42(b) and 43(c).

president's council, acting as a constitutional *deus ex machina*, which *de facto* forms part of the legislative structure of government as the deadlock resolving body, is constituted by indirectly elected and nominated members.

The principle motivation behind a bill of rights is to protect individual liberty by placing effective checks on the exercise of executive power.[45] However, regrettably, the 1983 constitution effects a transfer of power from the legislature to the executive. Parliament under the new dispensation emerges as an emasculated institution, and the executive and its extensions, that is the state president and the president's council, emerge correspondingly stronger. As a result, the constitution does not provide sufficient mechanisms for the curbing of executive power.[46]

However, a positive attribute of the new constitution is that it assumes, as a general rule, the viability of inter-group negotiation between the participating parties as a mode of government and deadlock resolving by the president's council as an exceptional last resort.[47] But only a continuous stream of meaningful reforms both of a political and socio-economic nature flowing from negotiation and consensus in the cabinet will be able to prevent deadlocks in both the cabinet and the legislature and thereby enhance the prospect of relatively peaceful change. The implementation of the new constitution amounts to a very significant symbolic change since, for the first time in our constitutional history, persons of colour sit in parliament as elected representatives,[48] but in virtually all other respects it is fatally flawed and beyond constitutional redemption.

It is therefore virtually impossible that the new constitutional dispensation could result in an enduring constitution for South Africa, which will have to be forged by the *de facto* participation of the legitimate leaders of all South Africa's culturally diverse people. It is indeed submitted that a justiciable bill of rights would be indispensable for the existence and protection of civil and political rights that are found in western democratic government, and which require to be both created and preserved for all of South Africa's diverse people in a post *apartheid* era that is politically inevitable.

4 SECURITY LEGISLATION

The South African government has, in the last decade, embarked on a politically and psychologically significant rhetoric of reform in the wake of the tragic internal unrest flowing from the Soweto riots of 1976.[49] However, in regard to the battery of security laws which have been placed inexorably over the years on our statute books, there has been no fundamental reform.[50] South

45 Jaconelli *op cit* 3.
46 See Boulle "The RSA constitution: continuity and change" in *South Africa – a plural society in transition* Van Vuuren (ed) (1985) 9.
47 Booysen & Van Wyk *Die '83 grondwet* (1984) 129-131.
48 *Ibid* 46.
49 *Survey of race relations in South Africa* (1979) 3.
50 See Dugard "A triumph for executive power – an examination of the Rabie report and the Internal Security Act 74 of 1982" 1982 *SALJ* 589.

Africa's draconian security legislation has proved manifestly unsuccessful in diminishing the chronic civil commotion in the Republic in recent months.[51]

The eclipse of the rule of law in South Africa has had devastating international implications for South Africa since it was certain disgraceful consequences of the application of the security laws (for example the Biko affair) that motivated and mobilised the security council of the United Nations to order mandatory sanctions for the first time ever against a founder and formerly respectable member, thereby directing member states to impose an arms embargo on South Africa.[52] In the light of this sequence of events, it must be seriously asked whether these pernicuous security laws have not indeed become highly counter-productive and have undermined confidence in the administration of justice and our legal system.[53] The South African government was induced to appoint a judicial commission of inquiry as a result of the increasing disquiet voiced in legal and other circles relating to application of the security laws and epitomised by the courageous call of Mr DP de Villiers SC for a penetrating and comprehensive examination of those laws that did not comply with South Africa's great Roman-Dutch legal tradition or with elementary justice.[54] The resulting report[55] and the consequential Internal Security Act of 1982 were disappointingly to provide "a triumph for executive power".[56]

An examination of the Internal Security Act of 1982 and cognate legislation indicates that they are the very antithesis of the content and operation of a bill of rights, which presupposes judicial supremacy. The South African security laws are a manifestation of a grotesque executive aggrandisement succinctly expressed by Lord Parker in the *Zamora* case:[57]

> Those who are responsible for national security must be the sole judges of what national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

However, both the esteemed writ of *habeas corpus* and its Roman-Dutch equivalent were on the contrary premised on the belief that it was essential to allow an independent and fearless judiciary to exert some form of control over the exercise of executive powers.[58]

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51 There has been chronic unrest in South Africa since September 1984. The application of the security laws has proved patently ineffective in curbing civil commotion. It was only after this paper had been delivered that a state of emergency was declared on 12 June 1986 to contain the unrest (eds).

52 Resolutions 417 and 418 of 31 October and 4 November 1977 – see 1977 *Annual survey of South African law* 56-7.

53 See "Report on the Rabie Report" March 1982 *Centre for Applied Legal Studies* 95, 97.

54 "Regsoppergesag en openbare veiligheid in die hedendaagse Suid-Afrika" 1979 *TSAR* 83.

55 *The report of the commission of inquiry into security legislation* RP 90/1981 (the Rabie commission).

56 Dugard *op cit.*

57 (1916) 2 AC 77 at 107.

58 See the Report of the *Rabie Commission* op cit 42.

The rights protected by a bill of rights are not absolute,[59] but where a bill of rights operates, judicial review ensures that a reasonable balance is maintained between the liberty of the subject and the security of the state. This is indeed impossible where security laws give the executive untrammelled powers. It is furthermore submitted that even in times of emergency, the courts should retain a supervisory role in regard to the executive infraction of civil liberties, although it may indeed be essential in such circumstances to curtail this role.[60] Thus if the executive has the sole prerogative to invoke a state of emergency and suspend the operation of fundamental rights, the possibility of abuse of an emergency situation becomes possible. The European convention makes provision for emergencies in article 15, which permits a member of state to take such measures derogating from the obligations under the convention "in time of war or other public emergency threatening the life of the nation". However, such action must be limited to that required by the demands of the situation and compatible with international law. Furthermore, the convention permits no derogation, even in the event of an emergency, from guarantees of the right to life (save through lawful acts of war), guarantees against torture or inhuman or degrading treatment of punishment, the guarantee that no one shall be held in slavery or servitude and the guarantee against retrospective legislation in the criminal law. Whether in fact, a state of war or other public emergency exists or not, would require an objective test.[61]

An examination of the application of South Africa's demonic security laws leads to an irrebutable inference that they are virtually indiscriminately vented against persons involved in extra-parliamentary, but in most cases perfectly legal, political activities. So for instance, the Minister of Law and Order revealed in parliament,[62] that of the 166 people detained under the Internal Security Act in 1984, 60 were charged in court but not one was convicted and that of the 1 924 persons detained in 1985, 114 were charged and only eight convicted.[63] This is a crude and morally indefensible mode of essaying to maintain law and order in a civilized community.

It is submitted that persons involved in extra-parliamentary political activities have an important, and indeed essential, role to play in regard to constitutional reform in South Africa. Arbitrary and executive punitive action against them is not in accordance with the spirit of authentic reform and its materialisation and enhances the potential for violent change. A justiciable bill of rights would exclude arbitrary punitive action on the part of the executive. Recent supreme court judgments[64] however, indicate that the

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59 A bill of rights does not permit licence but it should ensure that a balance is maintained between the maintenance of law and order and the protection of civil liberties.

60 See article 15 of the European convention and also Robinson "The protection of human rights in the Republic of Ireland" in *Do we need a bill of rights* Campbell ed (1980) 57.

61 See *Hurley v Minister of Law and Order* 1985 4 SA 709 (D&C).

62 See editorial in *The Argus* 21 March 1986.

63 Ibid. See "Report on the Rabie Report" at 17 "There are many instances of detainees held for no apparent reason for lengthy periods and then being released without charges being laid."

64 See Ranchod "Now judges step in to uphold our rights under law" *Sunday Times* 20 October 1985, *Hurley v Minister of Law and Order* 1985 4 SA 709 (D&C) and *Elsie Nair v Minister of Law and Order* 1985 (unreported). See also "Amazing judgment sets detainees free" *Weekly Mail* 21 March 1986.

judiciary is moving in the direction of greater judicial assertiveness, despite the fact that its testing right does not include the invalidation of legislation.[65]

In a remarkable ruling[66] Rabie CJ and four judges of appeal found unanimously that the Minister of Law and Order had served *ultra vires* detention orders on 14 extra-parliamentary activists. In his judgment, the chief justice stated that the detention orders merely informed the people concerned on what statutory grounds their detention had been authorised, but failed to give the detainee all the minister's reasons for doing so, as required under section 28. He further stated that the legislature intended that the detainee should have a fair opportunity to reply to the minister's reasons for detaining him and to persuade him that the issue of the order was unjustified. South Africa's chronic constitutional and socio-economic problems cannot be solved or even ameliorated by the extant and diabolical system of security laws. Indeed the present situation of endemic unrest has been in many instances exacerbated by the untramelled use of brutal and indiscriminate force unleashed by the regulations and the atmosphere engendered by the recent state of emergency. The application of the security law has placed behind prison bars important community leaders who could have been involved in restraining frustrated and lawless persons from committing indiscriminate acts of violence in the African townships.

5 PSEUDO-DECOLONISATION AND RESIDENTIAL SEGREGATION

Unilateral territorial partition in South Africa has its origin in the Lands Act of 1913[67] and in the political segregation effected by the Representation of Natives Act of 1936.[68] It was on the twin foundations of territorial and political segregation that the National party was to evolve and develop its policy of unilateral partition resulting in the four independent states of Transkei, Bophuthatswana, Venda and Ciskei and the denationalisation of their citizens.[69] Grand *apartheid has resulted in a manifestly inequitable distribution of land between blacks and whites and consequent flagrant economic inequality. In the urban areas the Group Areas Act*[70] racially demarcates residential and other land thereby protecting white privilege to the detriment of persons of colour.

A bill of rights which proscribes racial discrimination would therefore require the repeal of the Lands Act and the Group Areas Act. These statutes form the foundation of the National party's policies, and in spite of its innovative rhetoric of "power sharing with blacks", these two laws still appear at this juncture to be non-negotiables.[71]

However, black citizens of the TBVC countries are prospectively to have their South African citizenship restored to them apparently whether they live

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65 *Rikhoto v East Rand Administration Board* 1983 4 SA 278 (W); *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 4 SA 448 (A).

66 See "Amazing judgment sets detainees free" *Weekly Mail* 21 March 1986.

67 Act 27 of 1913.

68 Act 12 of 1936.

69 See Dugard "The denationalisation of black South Africans in pursuance of apartheid" Aug 1984 *Lawyers for human rights bulletin* no 4, 11.

70 Act 36 of 1966.

71 See Rhoodie "White perceptions of socio-political change in South Africa" in *South Africa – a plural society in transition* 310-8.

within or outside the borders of the independent states.[72] This is an unprecedented volte-face, the exact constitutional and political implications of which are not clear at this stage. This could, however, be the beginning of a process of political reintegration into a federally structured, but politically unified South Africa. A viable and politically legitimate federation would have to be a product of an authentic process of negotiation. A geographical federation coupled with an operative bill of rights could provide a measure of autonomy for states, which in turn could provide a measure of protection for minority groups without discrimination against other groups.[73] This is at present a matter of speculation and the extant principle and practice of territorial and residential segregation is incompatible with both the spirit and content of a western styled bill of rights.

6 STATUTORY RESTRICTIONS RELATING TO THE PRESS

Press freedom and freedom of information are indispensable for a genuine system of democratic government, involving meaningful participation by the citizenry of a country. Press freedom is therefore, an essential right that must be protected by a comprehensive and effective bill of rights. Furthermore, press freedom is a prerequisite for a continual and evolutionary process of reform. Press freedom and the cognate freedom of information are severely inhibited by a formidable and hostile array of more than 100 laws.[74] Indeed an exhaustive analysis of all the statutes impinging on press freedom fills an entire book entitled *The newspaperman's guide to the law* by Kelsey Stuart, which in a span of 12 years, has seen four editions.

South Africa retains a meaningful measure of press freedom "and even today we can still lay claim to having the most free and most professional press in Africa."[75] Also the South African press is free in the sense that there is no prior censorship of news reporting. However, when compared to the position in other western countries, it becomes manifest that dangerous inroads have indeed been made into the substance of press freedom. This is demonstrably evident when the American position is evaluated. The first amendment to the United States constitution "declares with ringing, majestic simplicity: 'Congress shall make no law . . . abridging freedom of speech and the Press'."[76] The American supreme court has upheld this fundamental freedom in times of peace, war and great national dissension and crisis.[77]

A careful examination of the labyrinthian multitude of laws inhibiting indicates that they are "actually unnecessary"[78] and are merely "another manifestation of the horrendous degree to which we are over-governed."[79]

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72 See *SA Digest* 20 September 1985, 851.
73 The *Buthelezi commission report* vol II 107.
74 See review of Stuart's *The newspaperman's guide to the law* (1986) *Sunday Times* 9 March 1986.
75 *Ibid.*
76 *Ibid.*
77 *New York Times Co v United States* 403 US 713 (1971). See Van der Vyver *Seven lectures on human rights* (1976) 62.
78 Myburgh's review of Stuart's book *op cit.*
79 *Ibid.*

Of far more profound significance however, is the consideration that withholding of information due to the inhibition of press freedom is politically dangerous in the times of crisis and civil commotion in which we live. The South African electorate and public can only make informed and rational judgments relating to the future destiny of the country if it is honestly and comprehensively informed concerning important but sensitive issues relating to: internal security,[80] the conduct of the defence force[81] and the behaviour of the police,[82] and office bearers of the Department of Prisons.[83] Regrettably press freedom is severely curtailed in all these theatres of activity to the detriment of informed and therefore responsive public opinion.

Very often the consequences of these press freedom inhibiting provisions are anomalously counter productive in that information inevitably leaks out, very often distorted or flawed together with pernicuous rumours, for which the only effective antidote is a complete disclosure of the truth. Even in the great democracies of the world, secrecy is essential in regard to certain military and cognate matters, but it can spread like an insidious and malignant blight and may be surreptitiously employed for dubious and questionable purposes.[84]

Press freedom does indeed create problems. In the words of Alexis de Tocqueville:[85] "there is no medium between servitude and extreme licence; in order to enjoy the inestimable benefits which the liberty of the Press ensures, it is necessary to submit to the inevitable evils which it engenders." Unfortunately therefore, press freedom is by its inherent nature open to abuse. However, if a country believes in democratic principles and the process of constitutional reform, means must be sought to discipline the press other than by legislative encroachment on press freedom. A system of self-imposed restraint although unsatisfactory, is a preferable alternative to state-imposed censorship. When the then prime minister announced the government's decision to relinquish the contentious provisions of the Advocate-General Bill, he sounded a note of warning:

> The government expects and invites the media to hold discussions with the government during the parliamentary recess with a view to taking effective steps to ensure that the truth of reports is established before they are published. I must, however, point out that there is increasing concern on the part of the government and the public at the role of certain irresponsible media. The government commits itself to taking steps in this regard if these actions do not stop.[86]

It is clear from this statement that the press in South Africa continues to operate under the threat of further drastic inroads into press freedom and even censorship. This in itself places the press in a position of siege and has an inhibiting influence on press reporting. Self-censorship is thus the most

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80 Act 74 of 1982.
81 S 118 of Act 44 of 1957.
82 Act 7 of 1958 and in particular s 27B(1).
83 S 44(f) of Act 8 of 1959. See Burns "Freedom of the press in South Africa" in *South Africa – a plural society in transition* ed Van Vuuren (1985) 233.
84 See the *Report of the Erasmus commission* 13, 451: "Secrecy gave rise to covert acts and malpractices, in other words, secrecy became a Judas cloak for all those who wished to act dishonestly and steal."
85 *Democracy in America* (1946) 120.
86 *Hansard* (1979) col 8742.

limiting characteristic of the operation of the press in South Africa which is facilitated by "wide legislative provisions which do not define prohibited criminal conduct clearly."[87] The entrenchment of press freedom in a justiciable bill of rights would remove the sword of Damocles from the operation of the press in South Africa.

The press in South Africa finds itself in a difficult position. It must act with the greatest responsibility in regard to the complex and sensitive domestic and international issues facing the country, but this same responsibility demands that it serve the country by being true to the highest principles of journalism and report courageously on all matters which the public has a right to know, without fear or favour. Should the press fail as a result of intimidation in this important function, the battle for press freedom will be lost despite the absence of formal censorship.

There are areas of government where, through legislative enactment, complete freedom of information has ceased to exist, for example, defence, prisons, police, strategic products and petroleum. In the absence of the controlling influence of the press in these spheres of activity, the possibility of abuse of power and corruption has been increased. Furthermore, press freedom is essential for a process of constitutional reform to which South African leaders have rhetorically committed themselves.[88] Finally, press freedom is of great importance for the administration of justice.

> In any society a free press is, in my view, indispensible to the proper administration of justice. Judges cannot arrive at correct judgments unless they are made aware through the media of what is happening in society, what people are freely saying and thinking.[89]

7 CENSORSHIP

Censorship by virtue of the Publications Act[90] makes a serious inroad into the concept and practice of freedom of expression. It is employed to proscribe the importation and publication of literature that is either politically or morally undesirable.

The relevant section[91] has been employed to ban radical political and ideological writing, especially those of Marxist inclination and those of the banned organisations. This has led to impoverishment in the research and teaching of several cognate disciplines like political science, sociology and economics, but more importantly it has shielded the South African public and informed opinion from the intense anger and frustration manifest in the statements of the political leaders in exile and their followers, thereby making the whites singularly ill-prepared for the fundamental constitutional and political changes that are inevitable in the longer term.[92] The erstwhile banning of the *freedom charter* resulted in an inordinate disservice to all South Africans. Regardless of whether or not a person is an apologist of this document

87 Burns *op cit* 248.
88 *Ibid* 249.
89 Corbet J "Human rights – the road ahead" 1979 *SALJ* 192 at 202.
90 Act 42 of 1974.
91 47(2).
92 See Burns *op cit* 244.

it is undoubtedly a crucially important charter that merits very serious consideration and examination. The most controversial aspect of the document relates to the "demand for nationalisation of key monopolies and the transfer of land to those who work it."[93] A revolutionary change would most certainly give rise to a kind of large-scale nationalisation without compensation and everything it entails, whereas a programme of systematic socio-economic upliftment within a framework of social democracy could be a product of genuine political negotiation. Nationalisation without compensation is contrary to the rule of law and a bill of rights protecting property rights. Democratic socialism within a liberal democratic framework however, makes use of nationalisation coupled with compensation.[94] The British labour party made use of such a strategy in the creation and development of the welfare state in the United Kingdom in the post Second World War years.

8 CONCLUSION

It is clearly evident that there are formidable, and possibly at the present juncture, virtually insurmountable constitutional and statutory obstacles to the introduction of an authentic and operative bill of rights. Furthermore, South Africa's common-law heritage, both Roman-Dutch and English law, has proved patently ineffective in the protection of human rights.[95] The argument that the *status quo* adequately protects civil rights does not hold water.[96]

The National party's reformative rhetoric involving "power sharing with blacks" can at most be an embryonic starting point. Its innovative reformative sentiments must be put into practice thereby involving the highly unpalatable curtailment of white privilege and prejudice.

South Africa requires a new constitutional dispensation which should be the product of an authentic process of negotiation and a bill of rights would play an indispensible role as part of a just and non-racial legal order. Statesmanship of a superlative calibre is required to mobilize a reform and negotiation initiative in the present climate of endemic unrest and crisis. Unfortunately a state of constitutional deadlock has been reached in South Africa. The crucial importance of the Natal Indaba[97] lies in the prospect of breaking this deadlock by a combination of scientific research and intensive negotiation. This indaba will make use of the recommendations of the Buthelezi Commission which recommended a multi-racial legislative assembly for Natal elected by proportional representation, run by an executive drawn from all population groups. Furthermore, the report recommended "a bill of individual rights and of cultural (language, religion, education) group rights".[98]

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93 Suttner "The freedom charter – the people's charter in the nineteen-eighties" *South Africa International* (1985) 241.
94 Ebenstein *Today's isms* 245-9 and 275-284.
95 See *Simonlanga v Masunga* 1976 2 SA 732 (W) at 740.
96 See Coetzee "Hoekom nie 'n verklaring van menseregte nie" 1984 *Tydskrif vir regswetenskap* 5.
97 See "Kwa Natal: – the footsie-footsie option" by Glazer *Weekly Mail* 4-10th April 1986.
98 *Ibid* vol 1, 114.

If the ANC and the PAC were to be unbanned and persuaded with other black groups to meet with the South African government, a serious endeavour could indeed be made to negotiate a constitutional and political future for all South Africans by removing institutionalised racial discrimination, protecting civil and political rights of all South Africans by a bill of rights and concomitant judicial review, and systematically rehabilitating impoverished communities. The immediate unbanning of the proscribed organisations could provide the embryo for an expanding bill of rights as Dugard explained in his paper. As the process of negotiation and reform proceeded, this limited bill of rights could be expanded culminating in a comprehensive one at a later stage. This strategy could reinvigorate credibility in the administration of law and the judicial process. Furthermore, a limited but expanding bill of rights is not incompatible with the prospect of a comprehensive liberal bill of rights to be devised at a later stage.

The alternative to authentic reform is cataclysmic change, the consequences of which would be endlessly tragic and devastating for all. South Africa does not require a miracle but rather statesmanship of exceptional moral and political courage to mobilize the potential for relatively peaceful change that still exists in all our communities. A justiciable bill of rights and the values it encapsulates are still relevant in the time of unprecedented crisis in which we live.

The statutory obstacles to the introduction of an enforceable bill of rights are, however, the symptoms of an intrinsic desire and malaise on the part of whites in general and Afrikaners in particular to exercise political hegemony in South Africa and a profound fear of their political demise and consequent catastrophic change. The *realpolitik* of the situation must, however, be faced, that whites, like certain other groups, that is Indians and coloureds, are a minority and that some form of essentially black rule is inevitable in the long term. There is a rising tide of liberal thinking and rhetoric in Afrikaner institutions, like the National party, the Afrikaans universities, the press and belatedly even the church. This conference at this venue is a clear manifestation of this liberal movement. However, in the present climate of chronic turmoil and crisis in the black townships, informed and articulate African spokesmen are not favourably disposed to a liberal democracy. The sentiment "too little too late" is repeated *ad nauseam* by them. They are far more favourably disposed to a completely new economic and political order free from the inherent limitations and checks and balances found in a liberal democracy and a justiciable bill of rights. Open hostility to the philosophy and practice of liberal democracy is a serious obstacle to a bill of rights. However, it must in mitigation be borne in mind that "negotiations between implacably opposed enemies normally start with both sides stating extreme positions. From those public stances then begin the long process of compromises, bargaining, give and take assuming that both sides start with a real will to negotiate, and that is how mutually acceptable deals are arrived at."[99] A justiciable bill of rights, within a negotiated federally

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99 *The Star* 8 February 1985.

structured constitutional dispensation involving a division of power and consociational characteristics, which flowed from a process of authentic negotiation, is an attainable political objective despite the present chronic crisis and endemic unrest. South Africa requires audacious political leadership to cut through the gordian knot that has entangled our land in a spiral of ever increasing violence and to systematically negotiate for the removal of constitutional, statutory and political obstructions to an enforceable bill of rights within a new and just constitutional paradigm.

9 Aspects of international human rights

Mr Justice LWH Ackermann

Toe ek gevra is om 'n voordrag by hierdie simposium te lewer het ek die uitnodiging onmiddellik, maar met huiwering aanvaar. Met huiwering, omdat ek nie 'n akademikus is nie en 30 jaar gelede laas 'n student in die staats- en volkereg was. Onmiddellik omdat dit my oortuiging as mens en juris is dat 'n menseregtehandves, verskans in 'n konstitusie waar die klem op konstitusionalisme ("constitutionalism") val en beskerm en afgedwing deur die toetsingsreg van die hooggeregshof, die enigste pad, hoe smal en klipperig ookal, uit die huidige Suid-Afrikaanse dilemma bied. Hoewel gespesialiseerde vakkundige kennis natuurlik onontbeerlik is by enige skeppende konstitusionele gesprek, is die onderliggende waardes wat ter sprake is, sowel as die implikasies van 'n mensregtehandves, so universeel dat verskillende insette van belang mag wees.

I would be surprised if much that I have to say to you as the last formal speaker at this seminar has not already been canvassed and debated by you. Yet certain truths bear repetition.

However deeply-held one's belief may be, and mine is, that a bill of rights, in the context of a rigid constitution with a review-empowered supreme court, is the only way of protecting the human rights of all in a diverse society such as ours, no-one should be under any illusion as to the full implications, juridical, economic and social of a genuine commitment to such a course.

Nothing could be more dangerous at this juncture than mere arm-chair bill or constitution modelling. Unless the constitutional lawyers, indeed all lawyers, and following them the public at large, genuinely grapple with and accept the full implications of what human rights and their real, genuine implementation involve, any talk about a bill of rights is illusory. Worse than that, it may undermine the confidence in a bill of rights on the part of those South Africans whose fundamental human rights have for so long been infringed and who might perceive such talk as little more than a semantic game to entrench inequality. The full implications may be uncomfortable for and even frightening to many whites. The time is overdue, however, to look the facts squarely in the face. Grappling honestly with the truth now is better than having to face, unprepared, serious disillusionment later.

What is the relevance to all this of human rights in the international community, or of international human rights law generally? It is a little known fact to many outside observers that South Africa is a common-law country whose legal roots go back to the *Corpus Juris* of Justinian and can draw not only on the great learning of the 17th, 18th and 19th century continental jurists before codification, but also on the English law. The importance of this is that customary international law forms part of South African common law without any act of legislative incorporation but, as it is part of our

common law, it must give way to legislation in the case of conflict.[1] This has significance for the application of international human rights norms even under our present constitution. In an instructive analysis, which all practising lawyers interested in human rights would do well to study, Professor John Dugard lists five main areas in which it is open for our courts to apply international human rights norms.[2] This, however, is not my main concern today.

A genuine bill-of-rights-centered constitution of the nature I have indicated must, as I see it, of necessity involve the dismantling of legislative enactments which discriminate on the basis of colour or sex alone or which discriminate solely on the basis of other irrelevant criteria. Such dismantling would remove the major bar to the implementation, as part of our common law, of international human rights norms. It is the implication of this which, I suggest, it would do us well to carefully consider.

In part VII paragraph 701 of the draft revision of the American restatement adopted in May 1982 at the annual meeting of the Council of the American Law Institute, the international law of human rights is circumscribed in the following terms:

> A state is obliged to respect the human rights of persons subject to its jurisdiction –
> (a) that it has undertaken by international agreement to respect;
> (b) that states generally are bound to respect as a matter of customary international law; or
> (c) that are recognised by general principles of law common to the major legal systems of the world.

In paragraph 702 the customary international law of human rights is broadly described as follows:

> A state violates international law if, as a matter of state policy, it practices, encourages or condones –
> (a) genocide;
> (b) slavery or slave trade;
> (c) the murder or causing the disappearance of individuals;
> (d) torture or other cruel, inhuman or degrading treatment or punishment;
> (e) prolonged arbitrary detention;
> (f) systematic racial discrimination, or
> (g) consistent patterns of gross violations of internationally recognised human rights.

Two examples from American jurisprudence illustrate how customary international human rights law can be applied by the courts.

In *Filartiga v Pena-Irala*[3] the plaintiffs, citizens of the Republic of Paraguay, who had applied for permanent political asylum in the United States, brought action against the defendant, also a citizen of Paraguay, who was in the United States on a visitor's visa, for wrongfully causing the death of their son allegedly by the use of torture. The United States Alien Tort Statute provided that a federal district court only had original jurisdiction

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1 *South Atlantic Islands Development Corporation v Buchan* 1971 1 SA 234 (C) at 238C-F; *Nduli v Minister of Justice* 1978 1 SA 893 (A) at 905H-906H.

2 "International human rights norms in domestic courts: Can South Africa learn from Britain and the United States?" in *Fiat Justitia, essays in memory of Oliver Deneys Schreiner.*

3 630 Federal Reporter, 2d Series 876.

in a civil action by an alien for a tort "committed in violation of the law of nations or a treaty of the United States". The United States district court dismissed the action but on appeal the second circuit of the United States court of appeals held that deliberate torture perpetrated under the colour of official authority violates universally accepted norms of international law of human rights regardless of the nationality of the parties, and, thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien tort statute provides federal jurisdiction. In the course of his judgment, Kaufman J said the following:

> Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in *Dreyfus v Von Finck, supra*, 534 F. 2nd at 31, to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state", is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.

An even more interesting case is that of *Fernandez v Wilkinson*.[4] The petitioner was a Cuban who, together with approximately 130 000 Cuban nationals was transported by boat to the USA and arrived at Key West on June 2, 1980, seeking admission to the country. The petitioner was held by the court to be an "excludable alien", *inter alia* because he had been convicted in Cuba of a crime involving moral turpitude. A deportation order was issued but, because the Cuban authorities were unwilling to co-operate, the deportation order could not expeditiously be carried out and the US authorities could not even speculate as to a date of departure. In the meanwhile the petitioner was being held in the US Penitentiary at Leavenworth. The court also accepted that it was bound by supreme court authority to the effect that an "excludable alien" such as the petitioner did not fall within the protection afforded by the fifth or eighth amendments of the United States constitution. Nevertheless Rogers, district judge, held the following:

> International law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case . . . Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law. Petitioner's continued, indeterminate detention on restrictive status in a maximum security prison, without having been convicted of a crime in this country or a determination having been made that he is a risk to security or likely to abscond, is unlawful, and as such amounts to an abuse of discretion on the part of the Attorney General and his delegates.

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4 *Ibid* 884-5.

As to the universality of human rights Professor Louis Henkin of Columbia University rightly remarks:

> Despite impressions to the contrary, I stress, the idea of human rights, as well as their general content, are universally accepted and are not the subject of controversy. Philosophers and students of politics may still murmur disbelief and sceptics may insist that human rights are only paper rights, but, even if hypocritically – the homage that vice pays to virtue – no government today denies that there are human rights, nor is there essentially disagreement as to which they are. Without an agreed philosophical base, and despite continuing – and on occasion violent – general ideological disagreement, the acceptance of human rights is reflected in national and international constitutions and institutions.[5]

Human rights began as limitations on government. Those are the well-known rights of the American bill of rights and the French declaration of the rights of man and of the citizen. To these were added political and civil rights by, for example, the various amendments to the American constitution. An important post-World War II development has taken place which has emphasised individual economic and social rights and has given rise to constitutions which include not only USA-style bills of rights but also the right to live, the right to eat, the right to work and the right to be educated. It would be wise, I believe, if deliberations on a South African bill of rights took serious cognisance of such developments.

In looking realistically at the implications for South Africa of a justiciable bill of rights two examples from the American experience may prove instructive. The judgment in *Brown v Board of Education of Topeka*[6] which held that, in the field of public education, separate educational facilities for different races constituted a violation of the equal protection of the laws guaranteed by the fourteenth amendment is probably, to South Africans, the most well-known decision of the United States supreme court. In 1896 the same court had propounded, in *Plessy v Ferguson*[7] the "separate but equal" doctrine in relation to public transportation. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In 1899 the doctrine was for the first time applied by the supreme court to the field of public education.[8] The American courts needed another 55 years to reverse this doctrine. In the interim, several decisions were given holding that violation of the fourteenth amendment had occurred, but in all inequality of education was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications.

In *Brown v Board of Education of Topeka* the question was posed in its starkest form, namely:

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive children of the minority group of equal education opportunities?

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5 *The internationalization of human rights,* Proceedings of the general education seminar, Columbia University Vol 6, No 1 at 6.
6 347 US 483 (1954).
7 163 US 537.
8 *Cumming v Richmond County Board of Education* 175 NS 528.

In the course of delivering the court's judgment Mr Chief Justice Warren said the following:

> To separate (children in grade and high schools) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> "Segregation of white and coloured children in public schools has a detrimental effect upon the coloured children. The impact is *greater* when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."
>
> Whatever may have been the extent of psychological knowledge at the time of *Plessy v Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v Ferguson* contrary to this finding is rejected.
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

I venture to think that the legal and ethical challenges posed by this judgment and the norms implicit therein will have to be thought through before drafting a bill of rights for SA. The challenge is obvious. Are separate, segregated systems of education compatible with a bill of rights founded on universally accepted human rights norms? I believe not. A principal argument sometimes heard to justify such segregation is that one group, (the white group), contributes far more *per capita* by way of taxation than the other group, (the black group), to public education. This contention is fallacious. I am not aware that this argument finds acceptance anywhere else in the world today. More significantly it is not applied within the white group itself. Admission to white government schools in the suburb where this conference is being held, schools which are regarded as "elite" by any standard, is not regulated by a means test. Provided the parent lives in the appropriate zone it is immaterial whether such parent pays R50,00 or R50 000,00 income tax per annum. He or she is entitled to have his or her child enrolled at these schools and the particular child receives precisely the same educational subsidy.

The second example I should like to touch on is that of legal aid as a human right. The approach to access to justice has undergone a radical change in the past few decades. The formal approach which prevailed in the era of *laissez faire* was essentially negative. It protected the individual's right to prosecute or defend a claim or defend a criminal prosecution and his right to legal representation if he had the means. The state's roll was passive and it did virtually nothing to ensure that, as a matter of fact, the litigant had proper legal representation. It was content to protect the litigant's right to employ counsel from being infringed.

It seems to me virtually axiomatic that the acceptance of fundamental human rights, whatever the scope of their acceptance, imply as a necessary corrollary the fundamental right to enforce such rights. It is therefore not surprising that, with the growth of the human rights concept, the right to proper legal representation became to be increasingly regarded as something that needed positive affirmation. The reason is obvious. A right is meaningless and illusory if it cannot be enforced or protected.

Although free or subsidised legal representation is not explicitly referred to in the universal declaration of human rights article 11(1) seems to imply this where it provides that:

> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.

It is however expressly referred to in the international covenant on civil and political rights where clause 14(3)(d) provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (d) . . . to defend himself through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, *in any case where the interests of justice so require*, and without payment by him in any such case if he does not have sufficient means to pay for it.

Materially similar provisions are contained in article 6.3(c) of the European convention for the protection of human rights and fundamental freedoms.

The development in the United States of America on this front is illuminating. In 1963, in *Gideon v Wainwright,*[9] the supreme court held that all persons accused of a felony were entitled to counsel, to be furnished by the state if the defendant could not afford a fee. That right was subsequently extended to various pre-trial steps and also to appeals. In *Argersinger v Hamlin*[10] in 1972 this right was extended to trials of lesser criminal offences. The court held that:

> Absent a knowing and intelligent waiver, no person may be imprisoned for any offence whether classified as petty, misdemeanour, or felony, unless he was represented by counsel at his trial.

The consequences of these decisions were far-reaching. The court in *Argersinger's* case noted that in 1965 there were between four and five million misdemeanour, and three hundred and forty thousand felony trials. In 1973 it was estimated that there were as many as eight million criminal trials annually.[11] In consequence of *Gideon v Wainwright* the Criminal Justice Act of 1964 required each federal district court to develop plans for furnishing legal aid to indigent defendants. Whereas in 1964 some 4,25 million dollars was available for criminal legal aid from private sources, in the first year of the Legal services program more than 27,5 million dollars was allocated and by

9 372 US 335 (1963).
10 407 US 25 (1972).
11 Bamberger "Poverty Law Programs" in *Legal Aid in South Africa*, University of Natal, June 1974 at 76.

1969 the federal commitment had risen to 45 million dollars. Far from inhibiting private contributions to legal aid the massive federal and state programs in fact acted as a catalyst for increased private concern and commitment.[12]

It is all too easy to shrug off the development in the United States as a liberal luxury which only a super-rich country can afford. The developments which have taken place in India, a country with great disparities in wealth, much proverty and many of our own socio economic problems, counter such an easy dismissal.[13] The "due process" clause of the American constitution was not reproduced in the Indian constitution by the framers thereof. Article 21 merely provided that no one shall be deprived of his life or personal liberty except according to procedure established by law and did not use the expression "except by due process of law". For a period of 27 years after the adoption of the Indian constitution, the Indian supreme court did not consider legal aid in a criminal trial to be a fundamental right of an indigent accused. In a series of imaginative judgments thereafter, however, the supreme court proceeded to give positive content to the provisions of article 21 and now legal aid is a constitutional right of an accused in India and a trial held in violation of this constitutional right would be vitiated. In response, the government of India set up a National legal aid committee under the chairmanship of the chief jsutice, Mr Justice Bhagwati for the purpose of organising a legal aid program throughout the country and supervising and monitoring it.

The Committee did not seek to transplant the British or American model into India and, while setting up litigation-oriented legal aid programmes in different parts of the country, even greater emphasis has been placed on the preventative aspects of the legal services programme. Various innovative strategies have been adopted. Steps have been taken to promote legal literacy and awareness amongst the weaker sections of the community. Legal aid camps have been organised to carry legal services to the people. Paralegals have been trained who act as Ombudsmen to protect the interest of the poor and provide first aid in law to the vulnerable sections of the community. Legal aid clinics have been set up in universities and law colleges. Public interest litigation is being increasingly utilised in consequence of a judgment of the supreme court of India which has, in the words of Mr Chief Justice Bhagwati,

> . . . smashed the narrow fetters within which the doctrine of *locus standi* was confined and revolutionised the entire concept of *locus standi* to an extent unknown in many parts of the world.

In this judgment it was held that where legal injury is caused to a person or class of persons who by reason of their poverty, disability or socially or economically disadvantaged position cannot approach the courts for judicial redress, any member of the public acting *bona fide* can bring an action before the court seeking judicial redress for them. *Ex India semper aliquid novi*!

What is the present position in the Republic of South Africa? As far as

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12 Bamberger *supra*.

13 The information following is gleaned from an address by the chief justice of India, Mr Justice Bhagwati, to the International Bar Association.

legal aid is concerned we are still locked in the negative *laissez faire* mould. Section 73(2) of the Criminal Procedure Act[14] merely provides that:

> An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

There is no constitutional or statutory guarantee of any legal representation for any indigent litigant in any criminal trial.

In November 1959 Schreiner JA in delivering a judgment of the appellate division stated the following:

> It is disquieting to think that under our system of procedure, of which we are in general justly proud, it is possible for an accused person to be convicted by a Judge sitting alone and be sentenced to death after a trial in which by reason of his poverty he has had to conduct his own defence.[15]

In 1978 the position was re-affirmed that there is no rule of law which requires the appointment of counsel for a needy accused and that failure to appoint an advocate therefore does not, in itself, result in either the trial and conviction or the imposition of the death sentence being irregular.[16]

I am not overlooking the fact that, as a matter of practice, *pro deo* counsel are, with the very rarest of exceptions, appointed in all cases where the death penalty is a competent verdict nor am I overlooking the fact that the Legal Aid Board provides funds for criminal defences nor the sterling work done by the university legal aid clinics, the Legal Resources Centre and other private agencies. The point I am making is a simple one. The indigent accused has no constitutional guarantee of legal representation at all.

In any event, despite the efforts of the other bodies I have mentioned, about 180 000 accused were sentenced to terms of imprisonment in 1980 without any legal representation.[17]

As far as *locus standi* is concerned, since the *actiones populares* became obsolete in Holland more than two centuries ago our doctrine of *locus standi* is still, with limited exceptions which include *habeas corpus* applications, confined in "narrow fetters".[18]

It seems to me that all talk about a bill of rights is idle talk and will remain idle talk, even if all the substantial practical obstacles to its implementation are overcome, unless there is an unreserved commitment to adequate legal aid and to the drastic and innovative transformation of our *locus standi* doctrine to enable persons or classes of persons who are impoverished, disabled or socially or economically disadvantaged to approach the courts for judicial redress. This is but one of many illustrations indicating the vast economic and social changes and readjustments which will have to take place before a bill of rights can become a meaningful reality.

Just as in the case of forgiveness and reconciliation, there is no cheap, easy or painless path to a bill of rights which will ensure equal justice for all individual human beings in this country.

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14 Act 51 of 1977.
15 *R v Mati* 1960 1 SA 304 (A) at 307A.
16 *S v Chaane* 1978 2 SA 891 (A).
17 McQuoid-Mason *An outline of legal aid in South Africa*, 100.
18 *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (A).

10 Paneelbespreking / Panel discussion — 1 Mei 1986 / 1 May 1986

Voorsitter / Chairman	**Prof HP Viljoen**	Universiteit van Pretoria
Paneel / Panel	**Adv Z Yacoob**	Durban Bar
	Prof J van der Westhuizen	Universiteit van Pretoria
	Prof L Schlemmer	Centre for Applied Social Sciences, University of Natal
	Adv MS Motshekga	UNISA; Democratic Lawyers' Congress
	Mnr WC Malan	Parlementslid vir Randburg
	Prof SC Jacobs	Potchefstroomse Universiteit vir CHO
	Prof DM Davis	University of Cape Town
	Dr H Corder	Universiteit van Stellenbosch

Adv Z Yacoob

I appreciate the opportunity to be present here and welcome the chance to participate in this conference which will no doubt have an important effect on life in South Africa in the future. I think one of the major problems is the starting point that one adopts or any position for which one might contend. In a sense, once the starting point is properly determined, the rest follows logically. And that is why I would like to distinguish, to begin with, between three starting points in relation to the bill of rights: The first starting point is that apartheid is good and that everything that follows from it is good. If this is so, there is no need for a bill of rights and there is no problem about security legislation, because such legislation exists to support apartheid. The second starting point is that apartheid is not so good and not so bad. The consequence of that starting point is that one does, in fact, say that the apartheid system can actually be improved and that certain things can be done in order to create a better impression. The bad part of the whole system must actually be excised from the good, which then could be used to build up something new, which will, in essence, also be good. The third starting point is that the whole system of racial discrimination is bad and that there is no justification for it whatsoever and that the struggle of the people for liberation – and I do indeed mean liberation – is totally justified.

Once one has that starting point then, of course, certain consequences necessarily follow. I want to make it very plain that I make no apologies for the fact that my starting point is unreservedly the third. Having made that point then, what are the necessary consequences that follow from this

starting point? The first is that there are differences between the USA and South Africa. Certainly ours is not a civil rights struggle. If a previous speaker intended to suggest that it was, I dispute it on the basis that the majority of people in this country are denied fundamental rights of every kind – not only human rights – at all levels. In the USA the minority of people are struggling for more civil rights. This distinction between the two countries must not be ignored. The struggle for liberation is indeed a legitimate struggle of the majority of people in this country.

The next point I want to make, is that the law in this country and the whole question of the bill of rights, cannot be seen in isolation. In every country a particular system exists and in order to maintain that system, certain steps have to be taken. Depending on the circumstances and the nature of the system, the maintenance of that system may involve to some extent a diminution of human rights. For example, if there is a democratic system operating in a particular country and there is a law which says that murders must not be committed in that particular country, people who go around inciting others to commit murder, must be dealt with, regardless of the consequences in relation to human rights. The fundamental question again is whether the system which is being supported by laws of the country and by constitutional, structural and various other arrangements, is justified. The starting point in this country is that the position is not that the law goes too far but that basic human rights are being withheld. As the system as a whole is based on an erosion of human rights, maintenance of that system necessarily means that human rights are being disregarded. It is in this context then, that we must look at what a bill of rights can do. The question has been confused. Are we talking of a bill of rights in an undemocratic South Africa, or a bill of rights in a democratic South Africa? A bill of rights in an undemocratic South Africa is impossible, because it does not fit into the present context. It is not one of the things which will effectively protect the *status quo* and therefore it will contradict the existing state of affairs. It can do nothing to improve the situation, while fundamental rights, such as the right to vote, cannot be addressed in any meaningful way. The danger is that the majority of the people will begin to feel pleased on account of the fact that there are judicial testing rights available, which they may or may not be able to afford, in view of the amount of money they earn.

We are talking about a bill of rights in a democratic society, something quite different, namely the sort of South Africa we want in the future. We are discussing whether we want to protect certain rights in that future democratic society. The answer to that question is clearly yes. Surely it is necessary to protect these rights and the way these rights are generally protected, is by a constitution, to which a bill of rights may or may not be attached. I think the rights of the minority in a country must be protected in some way and I think this can only be done in a democratic South Africa. We must consider very carefully precisely what our starting point is to be.

Prof J van der Westhuizen

In the light of the papers which have been presented, the viewpoints stated during discussions and opinions expressed elsewhere recently in the bill of rights debate, the following statements are submitted for discussion:

The desirability of a bill of rights and its successful application depend to a great extent on how credible and acceptable such a bill would be, on

the degree of trust and enthusiasm with which it would be regarded by the community, in other words, on its legitimacy. In certain deeply divided communities a bill of rights does enjoy the faith of the greater part of the population and it even serves as the basis of legal interpretation.

An important cause of the present unsatisfactory social, economic and political situation, is the inequality and gross injustice which as a result of the apartheid ideology, have by means of legislation been institutionalized in the South African legal system. (Both the Roman-Dutch law and English law recognize and protect equality and freedom as basic values.) Disobedience of the law is therefore a natural consequence necessitating coercion which, in turn, leads to further resistance.

Ideological, philosophical and religious disapproval of the concept of individual human rights, which still exists among many whites to the 'right' of the political spectrum, is based on ignorance, misconception or racism. In certain circles, the fear that a bill of rights will lead to the end of order, rests on the misconception that the situation *is* one of order. It further denies the fact that much of the present order is artificial in many respects and ignores the element of peace or harmony in law as it orders society.

Sceptics often suggest that a bill of rights will not be worth the paper on which it is written. No constitution *per se* is worth any more than the paper on which it is written. Good government is always necessary, as is a strong democratic conviction among the population. A strong and independent judiciary is also essential for the effective application of a bill of rights.

The office of advocate-general, or even an ombudsman, which has been mentioned in this regard, cannot fulfil the function of a bill of rights and a court exercising judicial review. The reasons for this are *inter alia* that his task, as is usually perceived, does not include declaring legislation invalid and that he does not function like a court and will, therefore, not enjoy the same trust among the public. His independence, from the legislature in particular, will be under suspicion. Furthermore, the linking of his activities to a specific person cannot be reconciled with such enormous power.

Whether a workable bill of rights is possible in the current dispensation or whether it is a question of 'too little, too late', or perhaps 'too much, too soon', is a very relevant question. Many blacks doubt the motives of whites who support a bill of rights which they see primarily as a means to protect white rights, a veto, or a transparent device to secure white political power. Their suspicion is understandable and probably partly justified. However, the source of the bill or the ulterior motives of some supporters thereof should not be allowed to overshadow its inherent potential value.

No credible bill of rights could co-exist with any form of apartheid. Any effort to use a bill of rights to improve certain aspects of apartheid, while merely entrenching others, will irreparably harm the cause of rights in this country. In the long run, a bill of rights can only go hand in hand with a non-racial democracy. Whites will, therefore, have to accept the full consequences of the recognition of freedom and equality with honesty and sacrifice. Discriminatory laws and draconic aspects of security legislation must be abolished, while privileges based on institutionalized inequality, cannot be retained. This would be both immoral and impractical.

Key aspects of the present constitutional dispensation, such as the accent on race or group, cannot co-exist with a credible bill of rights. Above all it should not embody an attempt to validate the present dispensation or primarily to improve its external image.

Whites must also be prepared to look at the *Freedom Charter* and recognize its positive aspects. Due to existing perceptions, it does enjoy legitimacy and the support of many people.

Ideally, a bill of rights must not be forced down from above. It must be negotiated or emerge democratically, or, at least, it must be perceived to have emerged in such a way. A unilaterally introduced bill of rights will have to be very effective in order to prove itself. It must be seen to be working. Such an honest and credible bill of basic substantive and procedural human rights, combined with judicial review by the courts, could make a real contribution to the protection of human rights, the restoration of confidence in law and social stability. The declaration of discriminatory legislation as invalid by the courts in terms of a bill of rights with retrospective working could restore faith in the courts to a great number of the population. This line of reasoning brings to the fore the question whether a bill of rights can be used as an instrument or a tool to remove apartheid and to achieve democracy.

Finally, a few loose observations are offered:

A bill of rights is no instant solution or magic wand and needs to be accompanied by serious negotiations and fundamental change. Discussing it and working towards it is, however, a starting point and a step forward for the jurist.

Regarding property and wealth – and the desired redistribution thereof – the bill of rights should neither rigidly favour the *status quo*, which is considered unjust, nor prescribe in too much detail. Economic and political realities are likely to determine the outcome of things.

A bill of rights could guarantee the necessary protection of rights for the individual, irrespective of race, or whether he or she belongs to a majority or minority group. Members of majority groups also need protection. In spite of the present deep divisions and many other problems, an attempt to work towards an acceptable bill of rights is, in the light of the alternatives, worth the effort and risk. Idealistic views in this regard are no more naïve than the belief that the *status quo* can remain or that the future for the 'majority' will, as a matter of course, be Utopian.

Prof L Schlemmer

Ek is natuurlik nie 'n regsgeleerde nie, so ek gaan nie in besonderhede op 'n menseregtehandves ingaan nie, want die ingewikkeldhede daarvan is vir my baie vreemd. Ek wil net baie kortliks gesels oor 'n bepaalde probleem wat op ons wag sodra ons in die toekoms met onderhandelinge begin. Ek hoop nie die onderhandelinge gaan te lank uitgestel word nie. Ek praat hier oor die onderskeid tussen 'individuele regte', wat natuurlik vasgelê kan word in 'n handves, en dit wat 'groepregte' genoem word. Ek verkies die benaming 'kollektiewe regte'. Hierdie is 'n probleem wat reeds in 'n ander deel van die land opgeduik het waarby ek betrokke is, naamlik KwaZulu-Natal. Ek dink trouens dit is die werklike turksvy in ons hele toekomstige

grondwetlike ewolusie. Daar is 'n basiese onderskeid te maak tussen die implikasies van individuele regte en dié van kollektiewe regte. Ek aanvaar dat indien individuele regte in 'n handves of in 'n grondwet baie deeglik beskerm word, hierdie regte – veral die reg van vrye assosiasie – die individu sal beskerm teen diskriminasie. Ek aanvaar dat hierdie soort beskerming in 'n aansienlike mate die motivering vir kollektiewe regte kan aanspreek, met ander woorde die vrese wat groepe mag hê in 'n groot mate kan besweer. So ek aanvaar onmiddellik dat daar 'n wisselwerking en 'n interafhanklikheid tussen die twee opvattings is, sowel teoreties, as in die praktyk in die een of ander grondwetlike bestel. Soos dit egter uit die belange van deelnemers en toekomstige deelnemers in 'n toekomstige onderhandelingsproses blyk, voldoen individuele regte aan een belangrike vereiste nie, naamlik deelname, in Engels 'participation'. Nou wil ek onmiddellik 'n baie duidelike onderskeid tref tussen die neiging of behoefte om te domineer en te beheer aan die een kant en die behoefte om deel te neem, te 'partisipeer'. Dit is 'n fundamentele onderskeid en ongelukkig is baie van die groepe en belange wat hulle aan die kant van kollektiewe regte skaar, eintlik besig met 'n poging om te sorg dat dominasie of beheer oor die situasie beskerm kan word. Ek kan myself persoonlik nie daarmee vereenselwig nie en dink dat daardie benadering tot 'groepregte' in feite die wese van die inhoud van 'kollektiewe regte' ondermyn. Die behoefte om deel te neem en te onderhandel in 'n bestel is basies anders as die behoefte om te beheer of te domineer. Met hierdie onderskeid wil ek 'n bietjie verder gaan.

To the extent that a bill of individual rights does not necessarily allow participation, or co-determination if you like, it may be very problematic in our constitutional future. It needs to be looked at critically in that regard. By way of analogy, if you have in an industrial relations system, various provisions not only at the level of the national constitution, but also in various other kinds of enactments specifically relating to industrial rights and if you have provided adequate protection of workers' interests as individuals, (and these have been institutionalized sufficiently early in the emergence of an industrial system) there will be a fairly weak urge to organize collectively. Indeed, many post-industrial societies experience the fact that as the levels of affluence and the human rights situation improve, the urge or the incentive to belong to trade unions, declines, as it is declining in America. But that is looking at it purely from the negative side. The moment the right to free association becomes translated into a desire to participate or be represented on, let us say an industrial council, or, as in the German or Yugoslav case, to participate or be represented on the board of a company, then we are talking about a different order of rights, which is a form of collective rights. Trade unions, as they become institutionalized and involved in industrial council systems and in co-determination as in Europe, are beneficiaries of a type of collective rights. So, in a sense, individual rights can 'protect', whereas collective rights can 'enable'. This distinction is terribly important. I think that it can be justifiably argued that there is in any social system among the participants an urge to be actively part of the institutions and procedures which determine their future. In a majoritarian situation the majority automatically becomes institutionalized and it enjoys collective rights of almost exclusive participation, with other parties in some systems having no more than a check, in other words, the negative side protecting the people who

are excluded. The question that will face us in the future is whether or not a system can be devised which will answer the needs of minorities. I don't want to call these 'groups' because they are not necessarily groups, or 'ethnic groups'. This is not about ethnicity at all. The issue is far broader than that, namely whether or not a system can be devised in which minority interests can enjoy the right of participation and co-determination, without control and without seeking to dominate and which does not interfere with the workings or functioning of a democratic process. Now this seems to me the difficult question which faces the future negotiation process in our country.

Adv MS Motshekga

Although I am a lecturer at UNISA, the point of view I will convey is not that of UNISA, but of the Democratic Lawyers' Congress. While listening to all this I wondered whether a bill of rights could work within the present constitutional framework. I believe that two approaches could be adopted when looking at this question. The first is the reformist approach which, I believe, is not going to work. The second one is the fundamentalist view. If one wishes to know what the fundamentalist approach or view is, one has to go back to the origin of the South African states where one finds that this state, which was rooted in British imperialism and racialism, created an upper class of all Europeans and a lower class of all Blacks. According to the fundamentalists when the Union of South Africa was set up in 1909, a settler colonial state which excluded the black majority was created by the British. Attempts by the ANC to protest even at a peaceful level failed. Racialism was thus entrenched. In 1919 the League of Nations adopted a principle which justified settler colonialism on the basis of trusteeship and which promised the excluded majority that as soon as they became civilized, they would be allowed to participate in the political process. The National Party abandoned this principle when it came to power.

The question of sovereign legitimacy should be central in the debate on human rights. If one looks back at the Imperial Conferences of 1923 to 1930 and the statute of Westminster one realizes that the British then believed that there were so-called 'backward' or 'inferior' races. These races could be exterminated or ruled by force and their land could be taken away – this was then the British approach in colonizing South Africa. In terms of the statute of Westminster the British granted independence to the dominions but they overlooked the black majority. It can therefore be argued that the independence which was given to South African was incomplete and illegitimate. In terms of this analysis when one considers the formation of a republic in 1961, the question would be then whether the Republic of South Africa Act is a valid act. I would argue that it is not, in that it derives its authority from the authority of a settler and colonial state. The Republic of South Africa Act does not have sovereign, political and legal legitimacy in respect of the whole country. The reform process, now under way, is therefore based on an illegitimate situation.

In the light of the debate in the country about what can be done to avoid further polarization between the races, my suggestion would be that the government adopt the Lusaka Manifesto of 1960, which accepts this government as a *de facto* government. The government must see itself as being

transitional . . . and in this capacity call a national convention which would then work out the mechanics of a new society.

In such a convention, the *Freedom Charter* would be an excellent guarantee for the rights of Whites because it states that South Africa belongs to all who live in it, in other words no one is going to be discriminated against because he arrived only yesterday. I think, if there is any reasonable compromising on the part of the native population of this country, that compromise is enshrined in the *Freedom Charter*.

In conclusion, I would say that reform calls for sacrifice. Today, when time is punctuated by loss of human lives at an alarming and increasing rate all peace-loving people who respect human life must impress upon the minds of Botha's government that the legitimacy of this government is not only in conflict with principles of justice recognized by civilized nations, it is not legitimate in respect of the majority of the population.

I have no doubt that we still have enough goodwill to ensure a safe future for all. We do not need tedious ways to prolong the conflict and the loss of lives.

Mnr WC Malan

Dit is 'n voorreg om by my ou *alma mater* uit te kom, veral wanneer ek vir Kobus van Rooyen en Ignus Rautenbach hier raakloop. Ons drie was saam in regter Olivier se klas toe hy nog meneer Olivier was. Hy het ons almal ewe mooi geleer, die ander twee het beter onthou. Toe ek in die politiek ingegaan het, het ek alles van die *Rule of Law* vergeet. En nou het ek nie 'n professor geword nie. Dit is 'n voorreg om hier te wees. Ek wil vir u sê – voordat ek begin gesels – dat die geselsie van advokaat Motshekga seker by die meeste van u so 'n bietjie koue rillings veroorsaak het, in terme van 'n nuwe evaluering van 'n benadering tot legitimiteit. Dit is egter 'n heel geldige oogpunt. Dit was vir my by herhaling 'n koue ervaring om daarna te luister. Ek wil in my vertrekpunt aansluit by professor Lourens du Plessis se referaat. Ek self huldig die uitgangspunt dat menseregte vanuit 'n Christelike hoek, of Christelik-reformatoriese hoek, gefundeer word op die basis dat ons sekere bestaansmoontlikhede vanuit die skepping gegee is deur God en dat ons nie net die reg nie, maar ook die verantwoordelikheid het om dit waar te maak. Ek sou met hom in gesprek tree oor sy afgeleide regte, wat hy genoem het, maar ek dink nie dit is vir doeleindes hiervan belangrik nie.

Die gedagte wat eintlik ter sake is, is my standpunt oor 'n menseregteakte vir Suid-Afrika, vandag. Ek sou dadelik wou sê dat ek dit sou wou hê. Daar is egter 'n paar dilemmas op die pad. Die eerste is die feit dat die regering hom vir 'n lang tydperk uitgespreek het teen 'n handves van menseregte, terwyl hy menseregte as sulks baie sterk beklemtoon het. Ek verwys na die retoriek. Ek wil nie die toepassing van beleid of wetgewing probeer beoordeel nie. Dis ook nie met 'n bietjie tevredenheid nie, dat ek kan sê dat vanuit ons kiesafdeling daar in die Transvaalse Kongres in September 1985 'n beskrywingpunt gekom het, waarin ons gevra het dat die regering moet opdrag gee aan die Regskommissie om ondersoek in te stel na die herstel van individuele regte in Suid-Afrika. Op daardie stadium is dit verwerp, maar verlede week het die Minister van Justisie meneer Coetzee, aangekondig dat

die regering wel die Regskommissie opdrag gegee het om ondersoek in te stel na die moontlikheid en wenslikheid van 'n menseregtehandves vir Suid-Afrika, ook met aandag aan die begrip 'groepregte'. Die dilemma met die instel daarvan lê vir my enersyds op die vlak van die wil en andersyds die vermoë om dit in te stel en in stand te hou en dit hang saam met die definisie van groepregte. Die wil om die akte vir Suid-Afrika daar te stel, dink ek, is afhanklik van die interpretasie van die begrip teen die agtergrond van bestaande diskriminerende wetgewing met bevolkingsregistrasie en rasseklassifikasie as basis. Uiteraard sou die konsep van 'n handves van menseregte onbestaanbaar wees gelyktydig met die huidige bestel. Die vraag is dan – dit is ook al hier beredeneer – of mens dit kan instel, selfs 'n beperkte mate, soos professor Dugard voorgestel het, en andersyds ook of 'n handves van menseregte nie die hervormingsproses en die onslae raak van diskriminerende praktyke juis moontlik kan maak nie. Ek dink dit is 'n bietjie baie gevra van 'n owerheid vanuit 'n sekere kulturele agtergrond, wat altyd self die aksie geneem het en wat in die verlede ook al die parlement as 'n soort *Privy Council* gebruik het, bo die appèlhof, wat menseregtelik georiënteerd was. Die een probleem lê dus op die terrein van diskriminerende wetgewing, maar die tweede – vir my moeiliker en miskien vir u nie so moeilik nie – lê op die terrein van veiligheidswetgewing. Ek bevind my nog in die raamwerk van denke waar ek meen dat die uitvoerende gesag die verantwoordelikheid het om staatsveiligheid te handhaaf en daarmee ook die veiligheid van sy inwoners, sonder om aan seksionele belange aandag te gee, maar uit hoofde van die algemene belang. Om dit te kan doen, dink, verstaan en glo ek miskien nog dat hy besondere magte nodig het, wat kan inbreuk maak op die regte van individue. Die vraag in watter mate die howe arbiter kan speel, moet seker op 'n basis van graad beoordeel word. In welke mate inbreukmaking deur wetgewing dan met 'n akte van menseregte bestaanbaar is, is 'n vraag wat op u as regsgeleerdes se terrein geleë is.

Ek wil twee slotgedagtes opper. Die eerste is dat 'n stelsel gegrond op 'n menseregte-akte bots met 'n wetgewende stelselhervormende benadering. 'n Mens moet òf die *bona fides* van die owerheid aanvaar, òf nie aanvaar nie, as die owerheid sê dat hy op 'n sekere plek wil uitkom. Die feit dat die kwessie na die Suid-Afrikaanse Regskommissie verwys is, skep vir my baie groot hoop. Ek dink dit is 'n liggaam met 'n objektiewe beeld wat ook objektief ondersoek instel in terme van wat hy in die algemene belang teen die agtergrond van ons regstelsel beskou. Die insette wat u spesifiek daar kan maak en dan ook die vermoë van die kommissie self om die regering deurlopend op die hoogte te hou in die uitvoering van sy taak, kan ons dalk by 'n verandering van die klimaat en by antwoorde bring. Die tweede is dat die definisie van groepregte baie intensief ontleed sal moet word. Tans hang groepregte direk saam met die gedagte van ras of kleur, wat 'n moeilike begrip is om te verwerk, maar die meeste (nasionaliste – in elk geval – en 'n hele klomp aan hulle regterkant) verstaan groepregte in daardie verband. Die beskerming van individuele regte kan uiteraard 'n hele aantal groepregte beskerm. Ek weet nie of daar ander groepregte is wat nie vanuit 'n individuele regsbenadering beskerm kan word, op voorwaarde dat daar ook verteenwoordigende deelname in die besluitnemingsproses sou moes wees nie. Ek is dankbaar vir die geleentheid om by u te kon wees en hoop dat u van u kant af vorentoe sal bydra om ons te help om wat ons almal as visie vir onsself gestel het, te bereik.

Prof SC Jacobs

Perhaps equality is only a theoretical concept. I am batting in the B-team and I only have eight minutes to make my runs.

Teen hierdie agtergrond is dit vanselfsprekend dat hier net enkele kursoriese opmerkings gemaak kan word. Aan die hand van 'n paar stellings, wil ek graag bespreking uitlok. In die eerste instansie, kortliks gestel, is dit jammer dat 'n menseregtedebat in Suid-Afrika niks meer geword het as 'n politieke debat nie. Dit is dikwels maar net die raamwerk van 'n eie ideologies-politieke standpunt, of voorveronderstelde politieke denkmodelle, of selfs 'n eie godsdienstige uitgangspunt. Die standpunt dat menseregte slegs maar meerderheidsregering op die basis van een mens een stem beteken, is hiervan 'n voorbeeld. Dit is vanselfsprekend dat binne die raamwerk van hierdie politieke kleur wat aan die menseregtedebat gegee word, daar min ruimte vir 'n behoorlike juridiese analise is. Dit is kortliks my standpunt dat wanneer ons uitgaan van die aanvaarding van 'n menseregtehandves vir Suid-Afrika, soos ek ook daarvan uitgaan, ons drie hoofkomponente het waaraan aandag gegee moet word. Dit is die inhoud van daardie akte, sy werking in die praktyk (dit wil sê sy trefwydte), die beperkings wat op elke reg geplaas word en die kontrole. Dit sou ons nie baat as ons die menseregtedebat bemoeilik, met uitsprake soos onlangs by die Universiteit van Kaapstad se konferensie gemaak is, dat in die nuwe Suid-Afrika of Azanië dit eintlik maar 'n geval sal wees dat ons nie menseregte nodig sal hê nie, omdat, soos my kollega Du Plessis ook daarna verwys het, 'one comrade will only protect the other'. Dit kan nie ontken word nie en dit is 'n faset wat in Suid-Afrika behoorlik nagevors moet word, dat so 'n benadering niks anders is nie as wat in die Duitse literatuur 'sozialistische Gesetzlichkeit' genoem word, wat juis die kern vorm van die kommunistiese staatsregsleer.

Aan die ander kant van die pennie, naamlik die benadering in die VSA, wil ek kortliks aanstip dat die inhoud daarvan neerkom op 'n oordrewe, byna oewerlose, byna grenslose, vorm van menseregte. Die begrensingsproblematiek, wat eintlik in die hart van enige menseregtekonsep gevind moet word, kry in die Amerikaanse benadering selde enige aandag. 'n Tweede probleem wat uit die Amerikaanse menseregtebenadering voortspruit, is dat die Amerikaanse konsep ook behels dat menseregte nie slegs toepassing in die publiekregtelike verhouding tussen staat en burger vind nie.

Die grondpilare vir enige menseregtekonsep is vryheid en gelykheid. As ons nou die menseregtebenadering binne die privaatregtelike verhouding van individu tot individu wil indwing, kry ons die volgende resultaat:

> As die staat deur wetgewing my verplig om almal op 'n sekere manier te behandel of voorskryf dat ek ander nie op 'n bepaalde manier mag behandel nie, ontneem die staat my die vryheid om bepaalde voorkeure te mag hê en maak dit so 'n inbreuk op my eie vryheid.

Teenoorgestelde benadering bring uit die aard van die saak weer die gelykheid ter sprake. Die enigste werkbare oplossing vir die spanningsverhouding tussen vryheid en gelykheid is om te sê menseregte vind slegs toepassing in die publiekregtelike verhouding tussen staat en burger. Menseregte is afweerregte teen inbreukmaking op my vryhede. Ek kan ongelukkig nie lank ingaan op die baie interessante probleem van groepregte nie. Ek weet dat my kollega, professor Corder, is waarskynlik 'n teenstander hiervan, maar ek wil kort en kragtig vir u sê dat die erkenning van groepregte niks anders maar ook

niks meer is nie, as die erkenning van die reg van selfbeskikking van volke, wat 'n internasionaal erkende volkeregtelike norm is, wat ingeskryf is in die handves van die Verenigde Volke en wêreldwyd aanvaar word. My kollega professor Du Plessis sê ek moet vir hom een voorbeeld noem en dan sal hy dalk sy standpunt verander waar groepregte binne staatsverband 'n rol speel en ter sprake kom. Ek kan maar kortliks verwys na die situasie in België met betrekking tot die twee taalgroepe en dan veral wat hulle gedoen het met betrekking tot die universiteit van Leuven om dit praktiese gestalte te gee. Ek sou ook 'n paar oomblikke kon stilstaan by die ewe belangrike vraag, naamlik of daar aanknopingspunte in die regsleer en praktyk te vind is vir die benadering van 'n verskillende maar gelyke behandeling. Ek kan ongelukkig hierop ook nie breedvoerig ingaan nie, maar ons moet ook nie so maklik aanvaar soos wat in Suid-Afrika vir ons gesê word dat daar nie onderskeidings mag plaasvind tussen bevolkingsgroepe, met die enigste maatstaf dat daardie onderskeidings nie benadelend moet werk nie. Ek wil u slegs verwys na die baie interessante beslissing van die Maleisiese Minerale Hof, waar die hoofregter die volgende sê:

> "the principle underlying article 8 is the equality clause in the constitution of Malaysia. The principle underlying article 8 is that a law must operate alike on all persons under suchlike circumstances; not simply that it must operate alike on all persons in any circumstance, nor that the state is no longer to have the power of distinguishing and classifying persons."

Ek sou ook kon wys op 'n ander uitspraak van dieselfde hof, waar nog 'n baie sterker benadering met betrekking tot hierdie aangeleentheid gestel word.

Ek kan ongelukkig ook nie ingaan op die baie interessante uitspraak van die Amerikaanse 'Circuit Court' nie en kan maar net vir ons geleerde regters daarop wys. In hierdie uitspraak sê die hof – en ek haal hom kortliks aan:

> Some of the rights relied upon by appellants as stating principles of international law recognising individual rights are clearly not expected to be judicially enforced throughout the world . . . Since enforcement of these principles would revolusionize most societies.

Menseregte het ook nie bloot die funksie om meerderheidsregering op die basis van een mens een stem te verwesenlik nie, want sou menseregte slegs hierdie kwalifikasie gehad het, sou die werking daarvan onmiddellik beëindig moet word, waar meerderheidsregering reeds verwesenlik is. Menseregte is ook nie iets wat in die lug rondsweef en wat na willekeur uit sy voorpositiefregtelike vorm soos 'n bottel medisyne geneem kan word om 'n bepaalde *ad hoc*-situasie reg te dokter nie. Dan, waarskynlik die heel laaste maar ook die heel belangrikste gedagte, volgens my standpunt, ons het in Suid-Afrika al baie oor menseregte gesê, maar myns insiens nog niks gepraat, behoorlik gepraat, oor die begrensing, oor die afgrensing, oor die omlyning van menseregte nie, want hierin, as ons 'n menseregte-akte erken, lê die belangrikste taak van 'n hof. Daar is bloedweinig regte wat in artikel 1 tot en met 19 van die Duitse grondwet vervat is wat nie elk 'n beperking in hom ingebou het nie. In die Duitse reg, (ken ek drie beperkings: Elke grondreg het grense; in die tweede instansie, aan die hand van ander norme word perke gestel en in die derde instansie perke deur middel van algemene wetgewing. Uit hierdie oogpunt beskou, moet ek sê is staatsveiligheid nie 'n probleem in die Duitse reg nie, want aan die howe word die funksie verleen om die regte van die staat en die regte van die individu behoorlik te balanseer. Ek sluit af, dames en here: Graag, baie graag, 'n akte van menseregte, maar nie 'n akte van menseregte waaragter weggekruip word om daardeur my reg van voortbestaan in Suid-Afrika te ondermyn nie.

Prof DM Davis

(Professor Davis submitted a paper entitled *Legality and struggle: towards a view of a bill of rights for South Africa* during the panel discussion – see appendix 1.)

I have prepared a paper which is in front of you and I am going to make some comments in relation to that paper. Perhaps I should start off by saying that the proposition of understanding a bill of rights in South Africa cannot be examined either in idealistic terms or in a historical fashion. For example, this morning, Professor Dugard spoke about why there was a concern with a bill of rights in South Africa at present, and he mentioned a whole series of reasons, such as renewed support for the PFP, increased pressure from the national human rights movements, greater cultural connections with the USA, interest rates, interest in a bill of rights in other countries, comparative regimes like those of Bophuthatswana, Namibia, etcetera. I was intrigued to listen to this, because there was not one reference to the massive amount of extra-parliamentary pressure, which has been exerted in this country since 1973 and the Durban strike and no mention was made of the intensified international pressure with respect to disinvestment, or to the fact that South Africa at present suffers from a major crisis of legitimacy.

South Africa is today – and I think we must be blunt about it – in a situation where large areas are becoming civil war zones and where some black local authorities can only function with army and police support. It has been suggested that black community councils have become negatively portrayed as urban equipments of the homeland rulers. In this context it seems to me not surprising that a bill of rights and new constitutional orders are once more on the agenda. They are on the agenda precisely because of the legitimacy crisis. The point is that bills of rights in South Africa and arguments in relation thereto have to be predicated upon an understanding that the South African state is in an enormous crisis. It cannot move without the aid of the police and the army in vast areas of this country. That is a reality. Within the context of that reality, it is not surprising that matters of legality and bills of rights have come to the fore.

In contrast to the situation in Sharpeville in 1961, where the state was able to repress the African National Congress, the Pan Africanist Congress and other organizations with some measure of ease, the 1985 state of emergency has not proved a success for the repressive arms of the state. By contrast, the oppositional organizations are stronger today than they were before the state of emergency. It is true that a vast variety of weapons could be unleashed and oppression be used to quell and to crush the resistance, but I dare say that if this were to happen it would drag South Africa into a wasteland and it would hardly, if ever, be possible to perpetuate any form of civilized standards and economic growth in South Africa. Thus more than any other factor of the structure of the struggle within South Africa today, bills of rights and legality are back on the agenda.

The question about a bill of rights can be evaluated in three categories:

(a) a limited bill of rights of the kind that has been mentioned this morning,

(b) a completely liberal bill of rights and

(c) a bill of rights for a future democratic dispensation in South Africa, within the framework of a convention and the participation of all political groups.

If a full liberal bill of rights was, in fact, implemented in South Africa today, I have absolutely no doubt that it would be revolutionary, in that it would be completely incompatible with the constitution based upon the Population Registration Act and bolstered by a system of security legislation. The whole structure of the South African constitutional arrangement of today would have to collapse. Now I am not as naïve as to believe that that premise falls within government thinking, which has been obsessed with ethnicity of a statutorily defined nature. I note that my colleague, Professor Jacobs, (and obviously there are others as well) is even more committed to ethnicity of a statutorily defined and imposed nature. The kind of bill of rights that would be implemented in South Africa – if at all – would be a limited bill of rights. I believe that it would be a bill of rights within the context of consociational structures, thereby acting as a veto for whites, although official discourse will claim it to be concerned with the protection of group rights. The recent amendments to the Public Safety Act which extend the powers of the Minister of Law and Order to declare a limited state of emergency, are significant.

In short, the kind of argument that I believe is presently operative within South Africa, is one which is antithetical to a liberal bill of rights. By contrast, the fact that the *Freedom Charter* is on the political agenda of the United Democratic Front, indicates that, unlike the government, the opposition is concerned to deal with individual rights and the promotion of social justice. I must take issue with what was said this morning with regard to the fact that the *Freedom Charter* received a very belated mention right at the end of discussions. The *Freedom Charter* and the debates in relation thereto are vitally important, if indeed, the South Africa of the future is going to resolve the tensions of individual rights and the promotion of social justice. I am not one of those people who believe that bills of rights can only be discussed after power has been transferred. I believe that it is absolutely imperative that if a democratic tradition is to survive in this country, it begins to operate now and that it is extended, deepened and enriched. That means, to a large degree, that one should hope that the debates around the *Freedom Charter* and documents such as this continue.

What I am trying to say, ladies and gentlemen, is that the kind of legality which will operate in the South Africa of the future might be very different to the kind of legality we are talking about at the moment. Informal justice is not only found in communist countries. Informal justice is a very important component, not only of a third world society, but also of a first world society. Within that framework, I am suggesting that the kind of discussions that will have to take place, will be for a South Africa of the future with a bill of rights which has legitimacy. One must bear in mind that a recent Human Sciences Research Council study suggested that 69% of those black South Africans between the ages of eighteen and forty-four in the PWV area earning R300 or more and with a matric, were likely to support the ANC. Within that context it is quite clear that the kind of bill of rights that will work will have to be concerned with the redistribution of wealth and cannot be perceived as being a white veto.

Finally, if, during an interim phase, a bill of rights is indeed to be implemented by this government under the kind of pressure which I have been talking about, that too should not be completely dismissed, for in the final analysis it will open up space for organizations to actually develop politically. That, in itself, might well preserve a tradition.

Dr H Corder

Enige debat oor 'n menseregtehandves in Suid-Afrikaanse konteks moet met veral twee werklikhede rekening hou, naamlik die huidige sosio-ekonomiese-grondwetlike stand van sake en die strukturele geskiedenis en huidige toestand van die regstelsel.

Met betrekking tot die eerste aangeleentheid aanvaar ek die volgende stellings as beskrywend van die werklikheid en as grondslae vir sinvolle bespreking: Algemene sosiale verhouding word gekenmerk deur onkunde, agterdog, vrees en haat. Dat dié sektore van 'n bevolking wie se toekoms so innig van mekaar afhang so min van mekaar weet en begryp, is 'n betreurenswaardige feit. Die ekonomiese stelsel is vinnig besig om in duie te stort en die gepaardgaande werkloosheid gee aanleiding tot 'n wydverspreide gevoel van magteloosheid en wanhoop. Die konstitusionele bedeling is bankrot – 'n groot meerderheid van die Suid-Afrikaanse bevolking ondersteun dit nie, die regerende groep reageer hoofsaaklik teen buite-parlementêre druk en die wettigheid (om nie eers te praat van die legitimiteit nie) van die regering word wyd en syd bevraagteken.

Teen hierdie agtergrond moet die *menseregtehandves*-idee ontleed word. In sy moderne gedaante, soos algemeen begryp, is 'n menseregtehandves amper sinoniem met die geskrewe produkte van die Franse en Amerikaanse Rewolusies. Dit is te verwagte dat die oorwinning van die bourgeoisie oor die feodale magte sou gelei het tot 'n oordrewe beklemtoning van die begrip van privaateiendom. Onder die Suid-Afrikaners wat as wit geklassifiseer word, was die moontlike totstandkoming van 'n menseregtehandves nooit 'n gewilde gedagte nie. Dit is gewoonlik gesien as 'n uitheemse gevaar wat hulle bevoorregte posisie sal ondergrawe. Dit blyk egter dat die nuttigheid van so 'n waarborg van sekere regte besig is om skielik steun te verwerf, maar in die vorm van die beskerming van "groepregte" (apartheid). Geen wonder dus dat dit met grootskaalse en diepgegronde agterdog bejeen word deur daardie mense wat dekades lank gely het onder die las van blanke bevoorregting en vooroordeel en wat duidelik tans die politieke inisiatief neem. Onder hierdie omstandighede is dit vanselfsprekend dat 'n manifes wat deur die Parlement uitsluitlik opgestel word en wat enigsins na "groep", "nasie" of "volk" verwys, van nul en gener waarde sal wees.

Dit beteken nie dat daar niks aan die probleem van die skending van menseregte gedoen moet word nie. Albei bronne van ons regstelsel (die Romeins-Hollandse en Engelse reg) het die erkenning van basiese regte hoog op prys gestel. Hierdie besorgdheid is sistematies en al hoe vinniger gedurende die twintigste eeu amptelik deur die owerhede verpletter, maar dit bly nog in die bewussyn van groot gedeeltes van die landsbevolking voortbestaan, (vergelyk byvoorbeeld die *Freedom Charter* van 1955.) Hierdie gesindheid moet aangemoedig word deur die erkenning deur die wetgewende, uitvoerende,

en regsprekende gesag van fundamentele prosessuele regte, sodat 'n bewustheid van die waarde van menseregte vir almal weer deel kan word van die murg en been van ons regspolitieke stelsel. Daar word ook voorgestel dat een enkele substantiewe reg onmiddellik gewaarborg word, naamlik die reg van vrye assosiasie, sodat alle apartheidswetgewing afgeskaf kan word. So 'n proses moet voorts natuurlik onvermydelik met ingrypende politieke veranderinge gepaardgaan, anders sal dit 'n niksseggende oefening wees.

'n Duidelike gevolg van so 'n proses is dat die gewone howe (wat myns insiens die aangewese liggaam is om sulke regte toe te pas) hulle benadering teenoor die regsprekende taak aansienlik sal moet heroriënteer. Of hulle daartoe in staat is, in die lig van hulle houding teenoor soortgelyke probleme deur die jare, is 'n ope vraag. Die gevaar van meer openlike politieke aanstellings tot die regbank moet ook hier in gedagte gehou word.

Daar word ter opsomming voorgestel dat 'n proses van diepgaande verandering en die skepping van 'n eenheidstaat waarin universele stemreg bestaan, vergesel moet word van 'n doelbewuste program om prosesregtelike geregtigheid te verseker en om substantiewe menseregte geleidelik in ons politieke bewussyn in te lyf. 'n Menseregtehandves deur die heersende groep op die bevolking afgedwing, sal nie geduld word nie.

11 Oop bespreking / Open discussion — 1 Mei 1986 / 1 May 1986

Voorsitter / Chairman **Mr Roger Cleaver** — President of the Association of Law Societies

Chairman

I haven't heard a voice against a bill of rights. It seems to me that we have had views from both sides of the scale: We have had the purely theoretical view expressed by Professor Du Plessis – I hope he doesn't mind me calling it purely theoretical – the practical implications of such a bill by Advocate Yacoob and then the middle road suggested by Professor Dugard and also referred to by other speakers. It seems too, that that may well be a worthwhile topic to stand still at – to consider those three possibilities.

Prof DC du Toit

Professor Schlemmer het verwys na groepregte. In 'n sekere sin voel ek 'n bietjie skuldig. Ek het in 1980 in getuienis 'n dokument voor die Presidentsraad gelê, waarin die eerste keer hierdie kwessie van groepregte gepropageer is. Ek het dit daarna soos 'n warm patat gelos, om twee redes: in die eerste plek, is die hele begrip van groepregte teoreties onoplosbaar – dit word effens anders genuanseerd gestel deur Professor Schlemmer en in 'n sekere sin probeer hy dit oplos, maar Lourens du Plessis het die teoretiese onhoudbaarheid daarvan in 'n sekere sin aangeroer. Ek dink nie dis geldig nie. Aan die een kant dink ek dis teoreties onhoudbaar, in die tweede plek is die probleem (en dit is veral waarom ek dit gelos het) dat dit beskou word as 'n heilmiddel of geneesmiddel vir alle moontlike kwale, wat dan vertolk of geïnterpreteer word in die sin van groepsbevoorregting. Dit is blykbaar waarom die huidige regering so veel aandag op die oomblik probeer gee aan groepregte en dit propageer. Ek dink dit is die twee redes waarom 'n mens versigtig moet omgaan met groepregte.

Op die oomblik word groepregte in sommige kringe gesien as iets wat 'n reg gaan gee op aparte skole, aparte woonbuurtes, ensovoorts. Met ander woorde, 'n voortsetting van apartheid in 'n ander vorm, in die vorm van groepregte, terwyl dit glad nie is waaroor groepregte aanvanklik gegaan het nie, of waaroor dit behoort of kan gaan nie. Dit is die klassieke vorm van die sogenaamde reg op die heem, of wat jy dit ookal wil noem, op grondgebied, waarin groepregte soms vertolk is as sou dit die reg behels van die groep om nie verdryf te word uit die gebied wat hy okkupeer nie. Dit sou dus juis, byvoorbeeld gewerk het teen verskuiwings van mense of hele groepe mense uit areas wat hulle bewoon, dit wil sê, presies die teenoorgestelde van wat ons gehad het in hierdie land en miskien nog het. Die reg van 'n individu om nie verdryf te word nie kan slegs met verwysing na die groep vasgestel word.

Prof L Schlemmer

Ek dink dat indien die hele saak van groepregte benader word vanuit die hoek van 'n afgebakende groep, wat op 'n basis van etnisiteit of rasse-identiteit regspersoonlikheid kry, dan is dit onhoudbaar. Ek dink dit is teoreties onhoudbaar, maar dit is ook moreel onhoudbaar in ons hele opset. Die feit is, indien 'n mens kyk na baie van die Europese demokrasië, dan het 'n mens met die neiging daar tot koalisieregering, wel 'n staatsvorm waar groepregte 'n rol speel – ek praat nou nie van etniese groepe nie, ek praat van belangegroepe, streke, klasse en godsdiensgroepe. In 'n ewolusionêre proses het 'n bestel daar ontwikkel waar daar 'n uitbalansering of afbalansering van die belange van verskillende groepe is en dit kry 'n gestalte in 'n koalisieregeringsvorm. Ek wil nie eers naby aan die idee van bevolkingsklassifikasie kom nie. As 'n mens egter vanuit die hoek kom van 'n bestel waar die regeringsvorm en veral die vorm van die uitvoerende bestel 'n afbalansering van verskillende belange in die gemeenskap is, soos hierdie belange in politieke partye gestalte kry, dan kry 'n mens 'n ander idee van 'n moontlikheid in verband met groep- of kollektiewe regte wat baie meer houdbaar is.

Mr W Lane

I picked up something that sounds rather like an eternal verity and if it is correct, I would like to have it in my collection of eternal verities: Collective rights can enable, individual rights can protect. I understood Professor Schlemmer as saying that individual rights are something just for protection. If that is correct, I would say that Professor Schlemmer is wrong, because surely the greatest individual right is freedom of speech and freedom of assembly. And if you have the right of freedom of speech, everything else follows. The present distressing situation in this country surely is due to the desire on the part of successive governments to suppress freedom of speech. Before the ANC was banned, it was a peaceful organization. I heard on the radio this morning that the government would talk to the ANC if it gave up violence. But the ANC did not practise violence at the time it was banned. Surely freedom of speech is something on which everything depends, that is an individual right and that is probably the most enabling right of all. All the other rights which Professor Du Plessis expounded, are rights which we could achieve for ourselves if we had freedom of speech and freedom of assembly. Most removals of groups of blacks are achieved by stopping the people from meeting. They may not meet without permission. Therefore the authorities are able to say that they know what these people want and therefore they all want to move. If those people were allowed to meet and express their views, they would be protected from being unlawfully removed. Could we ask Professor Schlemmer just whether he takes such a negative view of individual rights as I understood he was taking.

Prof L Schlemmer

What I was doing, in fact, was making a rather stylized distinction just to make a point. Quite obviously I regard human rights and individual rights as absolutely fundamental. In a situation where the constellation of forces and structures in a society is favourable – and by favourable I mean one

in which there is a natural balance of interests and forces so that you cannot have any one particular set usurping the interests and freedoms of others as we have had in the past under the apartheid regime – individual rights can go a very long way to meet the kind of fears which would make people wish to acquire collective rights. So, it is entirely possible that in post-industrial societies, where there is a high level of affluency, the notion of collective rights becomes rather academic. Even trade union rights are becoming less relevant in some societies, because individual rights are so effective and powerful. The problem is that in our country we have a constitutional hump to get over. Our society has got a dynamic balance in potential to have a completely normal open democracy with no particular provisions for collective rights. The hump is constituted by a minority which at the moment is usurping the freedoms of the majority, but also the possibility of a compact majority from the other side, which will usurp freedoms in the same way and therefore there is fear on both sides. If we can get over this hump, we shall have a normal society. Collective rights may play a role in getting over the hump.

Prof PL Volpe

All day we have talked of a bill of rights being conceived and born in South Africa. Some of the speakers have questioned the paternity of such a bill – possibly the paternity might not even be above suspicion – other speakers have expressed fears that such a bill might well end in a miscarriage. Have we given thought to an African convention on human rights, in other words, a convention similar to the European Convention on Human Rights, which is created not by a white minority in South Africa, but by states, black and white, in Southern Africa, signed by states in Southern Africa? This type of convention might be far more acceptable than one born and bred within South Africa.

Adv Z Yacoob

What we are suggesting, is a convention in this country, consisting of representatives of all the people within the country. And once this is sorted out it can be decided whether it is desirable to become involved in a convention with other countries as well. Until there is a convention between those not represented and those represented within the country itself, it seems like skipping a very important step and perhaps deceiving oneself talking about a convention in which other countries are involved as well.

Adv MS Motshekga

We have one white South Africa and several black mini South Africas. The constitution of this country is not valid and therefore the other mini states or so-called 'national states' within South African cannot be valid either. A change in the constitutional order of the country necessarily means a dismantling of all bantustans. I think that anything that is desired in the line of group interests is embodied in the *Freedom Charter.*

Mnr WC Malan

Ek sou dit baie graag wou sien, maar ek weet net nie of dit polities haalbaar is nie. Ek weet nie of die ander state graag met ons sou wou assosieer nie.

Prof DM Davis

Human rights cannot be seen in an abstract sense – they have shifted and changed over years. There can be little doubt that a liberal *laissez-faire* kind of rights would be incompatible with a right towards some form of redistribution or nationalization. Of course, the issue with regard to the *Freedom Charter* is to whether it in fact constitutes any more than a social democracy. If you look at the *Freedom Charter* it could well be compatible with any social democratic dispensation. One would hardly have regarded Attlee in 1945 as a raving Marxist, but I am sure that if he had subscribed to the *Freedom Charter*, nationalization of certain key industries in England would have been perfectly compatible with the type of approach which is adopted in the *Freedom Charter*. The second and more important point is the question of the protection of property rights and the issue of redistribution of wealth in this country. It seems to me that no bill of rights which would prevent some form of redistribution of wealth or some form of ability on the part of the state in the future to close the gap between the haves and have-nots could work. Any bill of rights which entrenches a property clause in it will be seen as a veto power to protect the vested interests of the minority. It will lack legitimacy. One of the great problems in the South Africa of the future will be for the state to produce the goods, in other words to be able to comply with and meet the legitimate aspirations of the majority, which would obviously have risen to considerable heights at the point of a transition. Any bill of rights which would be seen to block the possible redistribution, the possible eradication of massive inequality and poverty in this country, would be an illegitimate instrument. That is why I think that one should not run away from the *Freedom Charter* and those particular clauses. We have to debate those issues squarely and honestly, if we are serious about a future dispensation for this country. I certainly think that we should not swallow the kind of nonsensical and historically inaccurate argument that the *Freedom Charter* as a document is nothing more than some kind of communist manifesto. It was not held to be such in the treason trial in 1956 to 1961. It is also very much in line with the *Universal Declaration of Human Rights*. Tragically, even that kind of document is revolutionary in the sense that it is so antithetical to the group's norm at present.

Chairman

I wonder whether it is not a suitable time to deal with the real issue: On the one hand we had this very clear exposition from Professor Du Plessis in which he added a number of compartments as the ideal situation and that was repeated by Professor Davis, when he said we have the three alternatives: the fully liberal one, the limited one and the one where we would agree on a bill of rights when consultations took place with everyone else in this country.

Dr F van Zyl Slabbert

I would like to refer to the talks of Professor Dugard, Professor Rautenbach and Professor Davis. In other words, that in different stages in the political process, if I follow the debate today, a bill of rights apparently fulfills different functions. The argument has been put foward this morning that the government could introduce a limited bill of rights. Professor Dugard gives a certain degree of causal importance to that bill of rights. It could generate a certain climate. That is a totally different function in the political process to the one that Dennis Davis is talking about, which is almost a culmination of a political process which has run its course and reflects the conditions in society. The third possibility is to introduce a completely liberal bill of rights, without actually having reached the stage of transfer of power or of negotiating a new constitutional dispensation. In other words, the present government, through some kind of Damascus insight, decides that it is going to introduce a fully liberal bill of rights which is going to become operative after it has got rid of certain laws and practices which contradict a bill of rights. I think that the idea of a limited bill of rights is a very dangerous one. The limited bill of rights is simply going to highlight the absence of other fundamental rights that do not exist in our society. If you then allow freedom of association, that freedom is going to be used by people to demand the very rights that have been denied in the rest of society. If, on the other hand, you unilaterally impose a completely liberal bill of rights, but you do not negotiate the political situation, you also have contradictions. It would seem to me that I tend to agree with the point that Dennis Davis has made, that the bill of rights in the political process has to form part of a process of bargaining or the process of negotiation. If you introduce it before you actually reach that stage, it is going to be seen as an instrument to entrench the position of the ruling minority.

Prof J Dugard

This of course is the central issue in the debate. I have suggested that a bill of rights could be introduced now in order to create the climate, the legal framework, for negotiation. I believe that the government has difficulty in withdrawing many of the legal restrictions of freedom of speech, association and assembly and also difficulty in withdrawing some of the restrictions or discriminatory provisions that remain in our law, such as the Group Areas Act. A bill of rights might give to the courts the power to set aside some of these laws and thereby create the political framework for the discussions. I think Van Zyl Slabbert and I both agree that those negotiations are crucial. One has got to bring the ANC and the present government to the negotiating table. Then a bill of rights will emerge – a full bill of rights with the legitimacy of the kind that Dennis Davis has advocated. The only question that remains in my mind is whether we wait indefinitely for the government to take the decision to unban the ANC and to withdraw the Group Areas Act. It may take longer than we can afford to wait. It may be easier for the government to introduce a bill of rights and to allow the courts to create the correct legal framework. I see it as an interim strategy. I don't pretend to have the absolute answer.

Adv Z Yacoob

I actually do not understand why it is dangerous to place people who are deprived of their rights in a position to demand them. From whose point of view is it dangerous and what are we actually trying to achieve? I think that a bill of rights might well have some advantage to the majority of people in this country, who are striving for their legitimate rights.

Mr A Cager

I have some problems with this whole idea of a bill of rights. I do not see how we can have a bill of rights at all. It seems to me that the tension that exists between the judiciary and the executive is incompatible with the type of role which the judiciary will have to play in upholding the rights under such a bill of rights. I am also extremely doubtful as to whether the judiciary wants to play this role, being so used to play the role they play at the moment. I do not know whether they want to assume a new role and try and solve problems by applying a bill of rights. Because the way I see this, the problem in South Africa is primarily a political and not a legal one. We can fix the law up in no time. It is the politicians who have to get their act together, not the lawyers. One has to realize that the power of the courts and the success and enforceability of a bill of rights depend not on the legal order, but rather on the political and economic order. I was wondering whether someone is prepared to comment on the inferior position of our Supreme Court, compared to the American or German ones.

Dr H Corder

It is true that the kind of role which would be required of courts and the judiciary in the interpretation of a bill of rights and in the necessary testing of acts of parliament against the provisions of a bill of rights would constitute a departure from the normal course of events or the normal course of judicial history in this country. It worked before 1900 in the Orange Free State. It did not work in the Zuid-Afrikaansche Republiek before 1900. That might have had something to do with the political forces and conditions in each of those societies. It does seem to me that, without trying to make too much out of too small a number of decisions, there has recently been an awareness or a coming to terms with the crisis situation which exists in this country by a not insignificant minority of judges. I think that those decisions indicate that the judiciary actually are able and willing to strike out in a new direction and to depart from the accepted way of doing things. My difficulty would be that 99% of the administration of the laws of this country occurs at magistrates' courts level and while it might be possible that the Supreme Court is able to shift and that it would gradually through the doctrine of precedent sift down, we need a radical re-orientation at the level of the inferior courts as well. That is something which I think ought to be borne in mind, because the initial testing of even a by-law against the bill of rights will come before magistrates' courts as well.

Prof J vd Westhuizen

Net een baie kort opmerking in verband met die debat oor howe se gewilligheid en vermoë om 'n menseregtehandves toe te pas: Is daar nie miskien iets verkeerd met die wyse waarop ons die optrede van die howe beoordeel nie? Ons beskou die verlede waar die howe sonder 'n menseregtehandves en binne die konsep van parlementêre soewereiniteit geopereer het. Daaruit lei ons af hoe hulle met 'n handves sal optree en ons maak die gevolgtrekking dat hulle nie in staat of bereid sal wees om dit behoorlik toe te pas nie. Dit lyk vir my soos om aan 'n persoon wat nog nooit 'n motor bestuur het of 'n rybewys gehad het nie, een te weier omdat sy rekord daarvan getuig dat hy nie kan bestuur nie. Wat is die oorsaak en wat die gevolg? Die howe se optrede in die verlede is sekerlik ten dele die gevolg van die sisteem wat gegeld het. Natuurlik was daar soms verskillende moontlikhede en regters het ook verskillend opgetree. Om egter slegs na die howe se optrede binne die huidige bedeling te kyk ten einde te bepaal hoe 'n toekomstige bedeling sal funksioneer, is nie korrek nie. Met 'n menseregtehandves wil ons dit juis nie slegs vir die howe moontlik maak om anders op te tree nie, maar wel verpligtend.

Adv MS Motshekga

Mr Chairman, I do not hesitate to adopt the phrase suggested by you that a bill of rights called for now, could be seen as a reactionary measure. Professor Dugard made it clear when he spoke of the urgency of the bill, saying that it is better to introduce it as soon as possible, so that one can use it as a negotiating platform. I tend to differ, because the problem you find is that you have a new (1983) constitution, which under 'own affairs' entrenches what I prefer to call 'new apartheid'. The ANC, an essential party to negotiations, as Professor Dugard indicated, rejects apartheid, or so I gather from scanty newspaper information, whether it is a new or a modified form of apartheid. So, the suggested desired bill, which could serve as a platform for negotiation, will not work, because it is still within the framework of apartheid. I believe that one could start without preconditions. I regard Botha's reforms as very prescriptive.

When one analyzes Supreme Court judgments since 1934 one must come to the conclusion that the courts have consistently favoured the executive. Judges have adopted a positivistic approach, like the judges of Nazi Germany and the Nationalist government has exploited this. Security legislation is only necessary to suppress opposition to apartheid. If apartheid is completely abolished, security legislation will not be necessary.

Prof G Devenish

Many black people are no longer interested in a liberal democracy, but merely in a new economic order.

Prof D Basson

'n Mens kan nie ontken dat die howe vandag in 'n legitimiteitskrisis verkeer nie. Die tussengroepverhoudinge-ondersoek van die RGN het dit aangedui.

Selfs die Hoexter-kommissie se ondersoek het gesê dat die howe se toepassing van die instromingsbeheermaatreëls minagting gekweek het vir die regswese in die algemeen. Onder die swart mense wat dan onder hierdie wetgewing gebuk gegaan het, is daar minagting nie net slegs vir die wette waaronder hulle gebuk moes gaan nie, maar ook vir die regswese in die algemeen. Dit is 'n gevaarlike verskynsel. Vir my is 'n regstelsel 'n land se mees waardevolle instelling. As daardie instelling begin om geërodeer te word, dan is die gevolg van die wantroue daarin anargie en revolusie. Ek wil graag aansluit by die standpunt wat gestel is dat die regbank meer aktivisties moet wees. Ek kan nie saamstem met professor Van der Westhuizen se standpunt dat 'n mens nie gaan kyk wat in die verlede gebeur het nie, maar eenvoudig aanvaar dat die howe nou skielik anders gaan optree, net omdat daar 'n menseregtehandves bestaan. Hulle sal waarskynlik anders optree, aangesien dit nou binne die staatsregtelike opset moontlik is om die menseregtehandves af te dwing, maar dit gaan nie beteken dat die howe noodwendig dan die vertroue van die gemeenskap het nie. Dit is waaroor dit vir my gaan. Die regstelsel in die algemeen moet die vertroue hê van die gemeenskap wat hy moet orden. Om hierdie vertroue te handhaaf, sal die howe nou reeds meer aktivisties moet optree. Hierin het ons as akademici en as praktisyns 'n plig, wat hierdie sake voor die howe moet beredeneer waar die individu teenoor die staatsgesag in konflik kom.

Prof SC Jacobs

Ek het die standpunt in my referaat gehandhaaf dat solank ons in Suid-Afrika die wenslikheid van die opname van 'n menseregte-akte knoop aan ander politieke doeleindes wat ons daarmee wil verwesenlik, sal ons die menseregtedebat in diskrediet bring. Dit is 'n realiteit, wat geen bespreking buite rekening kan laat nie. Die tweede standpunt, wat hieruit voortvloei, is dat ons nie vandag praat oor die legitimiteitskrisis van die huidige regering of die feit dat hy onwettig is nie. Dit mag vir u interessant wees dat ek self dink dat van eergister af die huidige regering onwettig is, omdat dit die eerste keer is dat daar meer as vyf jaar verloop het waarin geen algemene verkiesing gehou is nie. Dit is egter nie vandag ter sprake nie. Wat vandag ter sprake is, is die vraag rondom die instelling van 'n menseregte-akte en wat daarmee saamhang. Rondom die kontrolebevoegdheid van die howe wil ek sê dat parlementêre soewereiniteit nie die kontrolebevoegdheid van die howe in die weg staan nie. Dit is reeds in 1898 in die epogmakende en baie belangrike, maar ietwat verwaarloosde beslissing van *S v Gibson* gegee deur regter en later generaal Hertzog. Ons het gehoor dat dit maar twaalf of agtien keer was wat die Amerikaanse hooggeregshof die afgelope aantal dekades wetgewing ongeldig verklaar het. As ons kyk na die funksie van die Duitse *Verfassungsgerricht* in hierdie verband, dan sien ons hy neem sy kontrolebevoegdheid met die grootste mate van terughoudendheid op. Nou ontstaan die vraag selfs al sou ons vandag die howe daardie mate van kontrolebevoegdheid gee wat die VSA het, of wat 'n staat soos Duitsland het, sou dit dan almal hier tevrede stel? Die antwoord is negatief, omdat ons deur middel van menseregte in judisiële kontrole eintlik die mannetjie daaragter nooit kan bykom nie. Daardie mannetjie wat die land regeer, wil ons eintlik daarmee byt. Die realiteit daarbuite is nie net 'n 'struggle' aan die een kant nie,

maar kan ook 'n 'struggle' aan die ander kant word. Dit is ons taak as juriste om te sorg dat die een 'struggle' nie die ander 'struggle' verder in 'n derde 'struggle' laat ontwikkel nie. As die *Freedom Charter* praat van 'n redistribusie van welvaart, dan is die gedagte dat dit met geweld bereik sal word, as dit nie grondwetlik bereik kan word nie. Daar moet in gedagte gehou word dat as dit in die *Freedom Charter* staan, dan is dit sonder twyfel inherent 'n Marxistiese beginsel. Nou mag 'n mens sê: 'Ek hou van hierdie Marxistiese beginsel', maar dit doen nie afbreuk daaraan dat dit 'n Marxistiese beginsel is nie. Ek wil u vandag daaraan herinner dat selfs 'n moderne samelewing soos die Federale Bondsrepubliek van Duitsland in sy handves vir menseregte die beginsel van resosialisering het en dat dit niks anders as die herverdeling van welvaart is nie. Daardie artikel is dood op die wetboek van die Federale Republiek. Dit is dood omdat dit inherent die vryheidsmaatstaf aantas. As ek 'n persoon verplig om sy rykdom te verdeel en met ander te deel, tas ek daarmee een van die hoekpilare van enige menseregsisteem aan, naamlik vryheid.

Mr WC Malan

Daar is een stelling wat Professor Jacobs gemaak het waarop ek moet reageer. Dit is dat solank as wat die menseregtedebat rondom politieke doelwitte konsentreer sal ons nêrens kom nie. Ek wil juis die teendeel stel. Solank as wat die mensregtedebat maar 'n idee is sodat die idee daar is en jy 'n mooi beeld na buite het gaan dit niks beteken nie. As die feit dat 'n reg wat 'n mens toekom, hom nie inderdaad in staat stel om iets wesenliks daarvan te maak om sy bestaansmoontlikhede te verwerklik ten opsigte van al die uitgangspunte wat daar gestel is dan beteken dit absoluut niks. In hierdie verband wil ek aansluit by veral die gesprek oor die *Freedom Charter* en ekonomiese regte. Ek dink dit is relatief maklik om ontslae te raak van die beperkinge op politieke regte in terme van deelname en in terme van diskriminerende wetgewing. Die dilemma lê egter op die vlak van die ekonomiese regte, of ons nou arm mense in hierdie land gehad het of nie. En dan tel ek myself as 'n ryk mens. Ek is nie bereid om net in die beperkte kring die magskonsentrasie in terme van ekonomiese vermoë wat daar in die hande van 'n paar individue of maatskappye lê, te regverdig nie. En op geen manier kan ek dit regverdig vir die totale gemeenskap nie. Daar wil ek saamstem met Professor Davis toe hy gesê het dat as die akte van menseregte nie toelaat dat daar 'n drastiese herverdeling kom nie, beteken dit niks vir die toekoms nie. Op welke wyse herverdeling moet geskied, wil ek my nie uitlaat nie. Maar ek wil verder gaan. Ons moet kyk of ons nie ook in die skep van hierdie akte van menseregte sekere regte kan inbou nie, wat beperkend werk teenoor die ander. As ons nie op 'n manier kan keer dat magskonsentrasie voortgaan nie en dat mense gebrek ly vanweë optrede wat nie vasgevat kan word met 'n idee soos 'n wet teen onregverdige mededinging nie, gaan ons nie ver genoeg nie. Vir die toekoms van hierdie land sal ons werklik moet konsentreer op ekonomiese regte.

Mr J Malatji

When we talk about wealth that should be shared it is something that frightens white people. We are not talking of taking the wealth away from people who

have worked hard for it and giving it to people who don't work. We mean that the wealth of the land be shared amongst those who work it. Oppenheimer is in control of a number of mines but never goes down into the mines. There are many people who work there for eight to ten hours each day and who will only earn R400 or R200 or even R100 a month. So when we talk of the redistribution of wealth, we mean that people who have laboured hard should also benefit. When one views it from this angle one sees that it does not mean denying people what they have worked for but, in fact, making them work harder because they have been given the incentive. The second point is the role of the judiciary. Comrade Motshekga made a point on attitudes of the courts from 'toeka tot nou'. Clause 5 subsection 3 of the *Freedom Charter* reads that the courts shall be representative of the people. I think that we have reached the stage in South Africa where black people have the qualifications to be appointed as judges. If we have a non-racial bench, people will tend to have greater confidence in the bench.

Mej A van den Heever

Ek wil eerstens 'n stelling maak en dan 'n vraag vra, na aanleiding van wat advokaat Motshekga en dr Slabbert gesê het, naamlik dat mens eers van 'n menseregtehandves kan begin praat wanneer dit deel vorm van die onderhandelingsproses.

Gisteraand het biskop Desmond Tutu in die Kaap by 'n vergadering van die ECC die stelling gemaak dat die swart mense nie meer belang stel in die afskaffing van diskriminerende maatreëls nie. Op hierdie stadium al wat vir hulle saak maak is die oordrag van politieke mag. Ek wil die stelling maak dat ons nie werklik kan begin gesels oor 'n menseregtehandves of die implementering daarvan nie, voor ons nie eers begin gesels oor die oordrag van politieke mag nie. As ons noodwendig die twee koppel, lyk dit vir my dat die doel van 'n menseregtehandves heeltemal tweede gaan kom. In gesprekke met jeugdiges van ander politieke organisasies en veral met die swart jeug, was dit baie duidelik aan ons gestel dat hulle nie in 'n menseregtehandves belangstel nie. Die *Freedom Charter* is vir hulle voldoende, want die 'people' het die *Freedom Charter* opgestel en die doel van die *Freedom Charter* is dat 'the people shall govern'. Op hierdie stadium lyk dit vir my dat ons tussen twee pole sit – een groep mense wat glo in die *Freedom Charter* en 'n ander groep, wat glo in 'n menseregtehandves. Vir baie van ons lyk dit na presies dieselfde ding en of daar net 'n aanpassing tussen die twee moet kom. Hoe gaan ons hierdie twee groepe versoen?

Adv MS Motshekga

Just to help you get a platform for reconciling the two: The true position, you will agree, is that both the ANC and the UDF have room for all races in their politics, but that white politics are exclusive. Whites, who are in the minority, now, before considering the *Freedom Charter*, already want to design another charter. In other words, they are not interested in a common venture. So I think it is easy and possible to reconcile, but the difficulty is presented by the white society. The UDF and ANC say 'Let's work out a common future', but the whites want a common future worked out by

themselves and imposed on some other people, either as reforms, or some similar thing. On the question of the black youth not being interested in the 'afskaffing van diskriminerende wette': U moet dit verstaan, want hierdie afskaffing vind so 'n bietjie-bietjie plaas, maar die getalle mense wat as gevolg van hierdie ongeregtige wette sterf, styg elke dag. Ek dink dit is in die belang van die beskerming van lewe, dat ons hierdie proses van bietjie-bietjie afskaffing laat vaar en iets drasties doen.

Prof DC du Toit

Ek wou eintlik met Professor Jacobs praat oor sy suiwer, puristiese, juridiese siening van die menseregte en wil weet of dit werklik realisties is. Is dit nie maar 'n geweldig positivistiese standpunt nie? Kan 'n mens werklik met menseregte opereer, sonder dat jy dit op die staatsbegrip van toepassing maak en sonder dat jy die staatstruktuur in ag neem? Is dit werklik nie maar weer 'n kreet hierdie om politiek uit menseregte te hou nie? Hoe op aarde gaan ons dit doen? Politiek is 'n lewensgrootte realiteit. Ons kan nie nou meer in ons ou ivoortorinkie sit en menseregte preek nie. Professor Jacobs sê ook dat legitimiteit nie nou ter sprake moet kom nie en dat ons vandag te veel oor legitimiteit praat. Dit kan ons ook nie aanvaar nie. Hier is een groot tekortkoming by hierdie hele bespreking en dit is dat ons nie onderskei wanneer ons oor menseregte praat nie en wanneer ons praat van die verandering van die grondwet van ons land nie. As ons besig is om die grondwet te verander, moet ons vasstel langs watter proses ons 'n nuwe konstitusie in hierdie land te berde gaan bring. Dan kom die hele legitimiteitsvraag tog ter sprake. Daarvan moet ons die vraag of dit wenslik is of nie om 'n menseregtehandves in hierdie land te hê, onderskei. Dit moet heeltemal onderskei word van die prosedurevraag, hoewel daar natuurlik 'n verband tussen die twee bestaan. Ek kan net een groepreg raaksien. Dit is die reg dat daar nie teenoor jou gediskrimineer word op grond van jou ras, kleur en godsdiens nie. Hierdie reg van die individu, met verwysing na die groep waaraan jy behoort, is 'n groepreg by uitstek. Dit hang intiem saam met die legitimiteitsvraagstuk.

Prof SC Jacobs

Uit die aard van die saak is dit nie moontlik om te argumenteer dat 'n menseregte-akte los staan van die politieke realiteit nie. Dit is juis wat ek sê. Maar die realiteit word dikwels eensydig raakgesien. Dit is eweseer 'n realiteit van groepregte – en die literatuur ondersteun my ook in hierdie verband, ook internasionale literatuur – dat ons praat van die reg van selfbeskikking wanneer ons van groepregte praat. Daar is niks mee verkeerd om te praat van 'n reg van selfbeskikking, soos uitgekristaliseer in 'n groepreg met betrekking tot eie skoolonderrig nie. Ek sê nie dat ons die politiek buitekant die deur moet laat en net positivisties te werk gaan nie, maar as ons politiek praat, dan praat ons politiek en as ons met die reg omgaan, hoop ek kan ons 'n mate van objektiwiteit bewaar.

Adv Z Yacoob

Talking about human rights in any country, is actually an attempt to achieve peace within the country. The question of peace is linked to the question

of human rights. While there is ongoing violence in a particular country, human rights are very difficult to preserve in a very circular kind of position. There are problems in this country arising out of the absence of human rights on the part of the majority of people. As a result of this, there is escalating violence and trouble. The authorities thus justify security legislation on the basis that it is necessary to avoid the problems that are being experienced in the country. This is the kind of circle in which we continuously find ourselves. For peace we need a thorough process of consultation. I think that a process of sensitive consultation must begin very soon to arrange a convention in which all views can be expressed. From this a form of society within which peace and human rights can actually exist must be negotiated. The question of human rights is a long term one. It cannot be sorted out on any kind of short term basis. The real answer and the only way to bring people together, is to ensure that the majority of people are consulted in some form or another. It is the only long term way to secure peace and through peace to secure human rights in this country.

12 Paneelbespreking / Panel Discussion — 2 Mei 1986 / 2 May 1986

Voorsitter / Chairman	**Prof JC van der Walt**	Randse Afrikaanse Universiteit
Paneel / Panel	**Adv A Chaskalson**	SC; Legal Resources Centre
	Adv ED Moseneke	Pretoria Bar
	Mr GM Pitje	Black Lawyers' Association
	Prof MP Vorster	Universiteit van Pretoria; Department van Buitelandse Sake
	Prof M Wiechers	UNISA

Adv A Chaskalson

I suppose one of the advantages of being at the end of the proceedings is that although you may not be able to say anything new you are probably left free to express a few personal preferences. Let me begin by saying immediately that I favour a constitutional system which has as its basis a bill of rights. A country which recognises and respects fundamental rights and permits the courts to enforce them, even against the will of parliament, is likely to produce a more just and a more humane society than a country which does not. It is also likely to create a more peaceful society. Moreover, the very existence of a bill of rights, if it is accepted and respected by the population, exerts an influence over parliament and the legislation it passes. Legislatures will be slow to pass laws which are likely to be struck down by the courts. Court decisions help shape public opinion and legislation struck down by court can lead to the legislatures being discredited in the eyes of the public. Legislatures are therefore careful to avoid the possibility of this happening and a bill of rights can therefore not only protect individuals but on the whole it is likely to produce better legislatures. Now, having said this, I must also say that I am not persuaded that the present time is opportune for the introduction of a bill of rights in South Africa. For a bill of rights to have any meaning it must be enforceable by a court and it must recognize entrenched fundamental rights such as the freedom of association, the freedom from arbitrary arrest, freedom of speech, the due process of law and the right of all citizens to participate on equal footing in the political process of the country. Despite Professor Dawid van Wyk's brave attempt to persuade us that politicians must be taken to mean what they say, I do not think that circumstances which exist in South Africa today meet these conditions. If a bill of rights were to be introduced now, which afforded no protection to individuals against apartheid laws and security legislation, it would be discredited. It would be better in my view not to introduce a bill of rights than to raise false hopes by introducing legislation, which is ineffective and ultimately discredited for that reason. An essential precondition to the

introduction of a bill of rights is the political will on the part of the government to dismantle the discriminating legislation and to open up the political process to all citizens. Although I wish it did, I doubt whether that political will exists yet but if and when the political will is shown to exist, I would share the views of those who believe that a bill of rights could play an important role in helping to create and preserve a just society in South Africa.

I would like to make three observations about the content and implementation of a bill of rights. Firstly, the content of a bill of rights should call for the identification of acceptable values. Values, in other words, which are acceptable to all sections of the community and this will not be an easy task in South Africa. If it is to be successful it must be undertaken in a manner which enjoys the support of all sections of the community. It cannot be imposed by the dominant group. If it is imposed, its chances of being accepted by the population as a whole are remote. Instead of being a binding force in society, it may become a source of division. We should be careful at all costs to avoid this. Secondly, the power to enforce the bill of rights should be vested in a court. The judiciary in South Africa is presently an all-white judiciary. If the court enforcing a bill of rights is to enjoy the support of the population as a whole, it must reflect the values of all sections of the population and not merely the section which for so long has been the dominant group. This may be achieved more easily by the appointment of a special constitutional court. And although I am in principle opposed to the institution of special courts, and normally favour the vesting of all judicial powers in the ordinary courts of the land, I would favour it in this case. I think that in the peculiar circumstances of South Africa the special court may, in fact, turn out to be necessary.

Finally, the question of who should have access to the court must be discussed. Here, I support Judge Ackermann in that access should be as broad as possible rather than narrow. And it should be creative and use its power to make itself accessible to all who seek its protection. We should try to move away from the narrow confines of the *locus standi* doctrine as it originally developed in England and has been adopted in South Africa. The English courts themselves have shaken off some of the shackles of the *locus standi* doctrine. I hope our courts will start too.

I believe strongly in promoting the concept of a bill of rights, so that it gains acceptance within the community at large. I also share with Judge Ackermann the view that it is necessary to demonstrate that courts have the capacity to protect individual rights and to promote social justice. Publicize law suits, spur debate on issues of public importance and it is only when the public at large can see and believe that courts, in fact, play the role that they will have to play in upholding the values and principles enshrined in a bill of rights, that the public confidence necessary for the acceptance of a bill of rights can take root and grow. This means, as Judge Ackermann has pointed out to us, that access to justice must be made to be not merely formal but to be effective.

Adv ED Moseneke

I start off by thanking whoever invited me to be here – a significant move in many ways but which I do not propose to talk about at this point. What

I am going to try to do is to convey to you the feeling of my people as honestly as possible. In this way I hope it will lead to an appreciation of the full extent of the obstacle which I think faces all South Africans, but even more so the South Africans in power.

Each time I have been asked to talk about human rights I have had this one difficulty that every time I look at any standard declaration of human rights I have found that each and every one of them is violated in this country. Central to all rights that any society would afford its citizens, is the right to influence the political process. Whatever embroidery follows therefrom, is a matter that gets negotiated and it is a matter which, given the history of various declarations of human rights drawn up throughout the world, would and should be a simple exercise. The cardinal problem in our country is not about whether we should have a bill of rights or not. It is whether, in fact, we should extend to all the people of this country the ability to determine, through structures that can be negotiated, the way we are going to live. The point I am trying to make is that you are going to find very little support in my community for a bill of rights at this point in time. Although this sounds paradoxical, it is honest.

The ground rule, therefore, would be to create a democratic society and one doesn't need to define such a society any further with terms such as 'non-racial' or 'equal' as 'democratic' covers the range. If it does not, it falls short of what black people are going to settle for in this country. Therefore, my emphasis is going to be on the most basic of all human rights, namely equal participation in the political process. Having done that, you would, in fact, have dealt with each and every difficulty which Professor Devenish raised. It is unthinkable to have a bill of rights and a 1913 Land Act on the statute books. You can run the whole series taking them in historical order, to see how thoroughly a people has been dehumanized to the point that very few of our people would trust any institution that the present government were to introduce. When I speak of dismantling the present system and replacing it with a new system it does not necessarily imply revolution.

Quite often in such debates I think judiciary is discussed at too great a length. The judiciary is analyzed as being either for pro-executive or for pro-individual rights. This exercise although valuable, has its limitations in our context. Judgments in cases such as *Rasool v Minister of Post and Telegraphs, Mkize and other* or even *Hurley's* case, serve to illustrate that the judiciary battles against a system that is inherently unjust and which could not be saved by any liberal pronouncement.

In a sense, then, the debate between Professor Dugard and Professor Mathews, on the one hand and Professor Wacks on the other, on whether the judiciary should resign or not becomes irrelevant. In other words, the argument that Roman-Dutch law has certain basic liberal values and that our courts are able to solve the problems of society by falling back on these values is in my view untenable because over these values is superimposed an unjust statutory structure. It is impossible to make our courts a bastion of human rights in a situation which does not permit it.

The next point which I want to make is that we should look at the source of the problem and until we have, we are not going to have black support

for a bill of rights. A bill of rights has the one obvious danger, which Professor Davis has mentioned in that it gives a semblance of a safe and changed society.

Another point which I would like to make, is that my statements should not be interpreted to mean that we do not need any major reform because reform may very well prepare the stage for a changed society. It is too readily accepted by persons on the left, that the change that is called for, of necessity implies flames and destruction and the end of an orderly society. Indeed, it is a call for an orderly society.

The final point I want to make is that often in a discussion like this the emphasis is exclusively on political and civil rights. If after 300 years of exploitation and racial segregation, you address yourselves to merely political and civil rights you are leaving behind millions of people who haven't had these rights and privileges for years and the problem would not have been solved. I suggest therefore, a bill of rights should address itself to creating social and economic rights, as well. The right to development, for my people, is probably more crucial than the right to vote; not as a favour which somebody hands out, but a right that you can claim and enforce. Most speakers have indeed said we should not incorporate such rights to a bill of rights, but anything less than that is going to in effect perpetuate the present system. Bridging that gap would require legislation that would ensure a reasonable welfare to those who have had the least out of this country.

I conclude that the call for a bill of rights is premature and in many quarters it is seen as an attempt to subvert and to misdirect attention from issues which are more cardinally important. Our energy should be focused on ensuring that the transition to a truly democratic society be peaceful.

Mr GM Pitje

Allow me to desert the ranks of the lawyers and to speak for the man in the street. You bring a group of lawyers together, add to them a sprinkling of judges and compound the picture by bringing in academics from law schools and then get a conference like this one. I was not here yesterday, but I have gathered enough today to realise that at the end of the day one is left wondering if anything has been achieved. In many cases we have given the professors some fresh notes to give to their students as well as some that will be filed away. As far as I am concerned, there are certain basic things that we must bear in mind and consider before we go for a high-flown principle, such as that of a bill of rights. Let us look at what the American Constitution provides. It simply states that all men are equal. I want to suggest to you that it is today in South Africa premature to talk of a bill of rights. You may have spoken of a bill of rights some decades ago, but not in 1986. I suspect that in this country when you make a statement like 'All men are equal', the average white man would say, 'but are we really equal?'. If you consider the history of this country and the way personal relations have been bedevilled and the way whites and blacks have taken different paths, then you will realize that we are playing around with words, showing our learnedness or otherwise but achieving nothing. I think that what we need in the first place is a course in humanism, in human relations, man to man.

But I am encouraged here by a number of things, because as far as I am concerned, the process of education has already commenced. Firstly, if that process had not commenced, it would not have been possible to have a Moseneke and a Motshekga in this hall – the holy of holies, Pretoria University. This was a place that, as a student, one was even afraid to mention, because it was just impossible to get near, unless you were a sweeper or somebody dusting the walls for the next lecture. That in itself, when Advocate Moseneke says, 'I am privileged to be here', I suspect is what he has in mind. Today, one finds multi-racial schools where black children and white children are studying side by side and I have not heard as yet of any untoward disasters because of these private schools. Gradually, South Africans are beginning to see people as individuals rather than being either white or black. Look at the National Party which has for years and generations carried the torch of the 'witmens se baasskap' in the land. Today, however, we have the president and a foreign minister speaking quite a different language. I am indebted to Professor Van Wyk, who this morning gave us a treatise of how the changes have occurred and of the stage we have reached in the thinking of the party that is now in power – the party that could tomorrow with or without a bill of rights, change the face of this country, the party that has been bold enough, without any bill of rights, to repeal the Immorality Act. Recently, the influx control measures and the pass laws have been abolished. In the past we were told that if we removed influx control, the towns would be flooded overnight. Two weeks have passed now and even in Pretoria I have not heard of the flood from the north, Lebowa or Gazankulu. What interests me is that the same people who were yesterday saying that influx control could not be abolished, today admit they were wrong.

Next I think we should be realistic. I noted with interest the applause my friend, Professor Dlamini received when he stated that there wouldn't be a temptation to seek retribution with a change of power. Is this being realistic? If there were a black government tomorrow, would it not have the temptation to solve problems the way the white man has taught it? You have got to be realistic and in order to avoid a repetition of what has happened in the past, you must admit that, human nature being what it is, the temptation for retribution is going to be very strong. We must start now to prepare a counter against that.

Reference has been made to the *Freedom Charter*. I look around this hall and wonder how many people were lawyers at the time that the *Freedom Charter* was formulated in 1955. Perhaps I am one of the few who were there when this particular document was proclaimed at Kliptown. I have a nagging suspicion that when we talk about bill of rights here, we are, in fact, saying that we as lawyers are going to be asked to draw up a document for South Africa and we are going to give South Africa a bill of rights – we as lawyers. How was the *Freedom Charter* put together? It came from the grass roots. There was an open invitation for everyone, regardless of his educational standard, to make a contribution or suggestion.

The people put that document together and it was given a stamp of authority at Kliptown in 1955. Therefore, I think, that in this country we do not need a bill of rights. What we need, is to work for an open society – a society in which colour or race will not count and no bill of rights is going to give us such an open society.

Prof MP Vorster

Vandag is ek net in 'n akademiese hoedanigheid hier en u moet my verskoon as ek die titel van die hoofreferaat 'n bietjie te letterlik opgeneem het.

As ons na die internasionale posisie kyk, voel ek dat ons in die eerste plek al veel smaad verduur het, vanweë die gedurige aantygings dat ons sisteem nie aan internasionale standaarde voldoen nie. Die tabulering van sulke veelvuldige menseregte, handveste en verklarings wek die indruk dat ons met 'n geïntegreerde sisteem te doen het.

Die Suid-Afrikaanse stelsel word voorgehou as 'n voorbeeld van 'n reddelose vertrapping van menseregte. Ons kan miskien onmiddelik erken dat ons sekerlik daartoe bygedra het. Die Suid-Afrikaanse beleid het nie net slegs neergekom op 'n verbreking van hierdie norme nie, maar in vele gevalle het dit so lynreg daarteen gegaan, dat 'n mens moet sê dat dit eintlik op die ontkenning dat hierdie norme bestaan, neerkom.

Dit is seker beide waar en begryplik dat die internasionale gemeenskap aandag gee aan die feit dat dit nie hier in ons stelsel nagekom is nie, maar die wyse waarop dit gedoen is, wek nog steeds verbasing. Dit wil skyn asof die internasionale gemeenskap eintlik as't ware Suid-Afrika wil kolonialiseer en wil voorskryf presies welke maatreëls hier getref moet word. Ek wil sê dat behalwe in ons skuld, is hierdie optredes van die wêreldgemeenskap miskien ook te vind in strukturele veranderings in die volkereg self en in die volkereggemeenskap.

Na die Tweede Wêreldoorlog het 'n nuwe paradigma ontstaan of ontwikkel, naamlik dat die skeidslyn tussen die interne en eksterne politieke sfere geminimaliseer is, terwyl die interne konflikte geïnternasionaliseer word. Daar is alreeds 'n bietjie ontnugtering oor die internasionalistiese tendense en dit word gevrees dat dit nie eintlik 'n beter wêreld sal bring nie.

Suid-Afrika word gesien as 'n soort van 'soft target' waar die toepassing van hierdie beginsels, indien dit slaag, 'n goeie rendement sal oplewer. Dus word daar meer gekonsentreerde druk op ons uitgeoefen. In vele gevalle vind mens dat die reëls juis gebuig word om by die Suid-Afrikaanse situasie in te pas.

Behalwe hierdie strukturele skommelinge is daar ideologiese verskille tussen die akteurs wat vandag miskien uitgeloop het op 'n pluraliteit van volkeregsisteme. Dit bring mee dat daar ook veel druk uitgeoefen word op die menseregte-elemente van die volkereg.

In vele geskrifte oor die volkereg vind 'n mens dan ook dat die skrywers worstel om hierdie diverse en soms teenstrydige tendense te versoen. Miskien is dit 'n uitsluiting van Europese menseregte-akte en die toepassing daarvan in daardie bepaalde streek.

Shafter wys daarop dat hierdie toestande tot 'n aantal teenstellings lei soos eerstens, die verhouding tussen internasionale vrede en menseregte. Sommige hou vol dat die toepassing van menseregte 'n voorvereiste is vir internasionale vrede. Dit is egter ook moontlik dat juis die afdwinging van die toepassing van menseregte tot konflik en stryd mag bydra. Dit sou 'n kwade dag wees as die leiding van die mensdom nog vererger word, juis deur die maatreëls om daardie lyding te verlig.

Tweedens, al is daar die beginsel dat elke staat sy eie politieke, sosiale en ekonomiese bestel mag bepaal, is daarteenoor nog steeds internasionale aandrang op die nakoming van bepaalde norme al beteken dit dat geweld uitgeoefen is om dit moontlik te maak.

Derdens, is daar die onderskeid tussen individuele en kollektiewe regte waaraan hier alreeds geraak is.

Laastens, kom die verskil tussen regte en doelstellings ter sprake en die gevolglike vraag betreffende eise om selfbeskikking, sosiale en ekonomiese ontwikkeling.

Dit is duidelik dat hierdie ekonomiese, sosiale en politieke regte nog nie duidelik vasstaan nie en nog nie geïntegreerd is nie. Daar is ook klagtes dat juis hierdie sosiale en ekonomiese regte die voorhand begin kry in die handelings en verklarings van die Verenigde Volke. Die vraag is dan egter weer wat ons vir ons toestand hier kan aflei.

Terwyl ons sekerlik aandag moet gee aan hierdie aktes, verklarings en deklarasies van menseregte op die internasionale sfeer, skyn dit tog vir my asof hierdie stelsels nie vir ons klaargaar resepte kan verskaf vir toepassing in ons omstandighede nie. Dit skyn vir my in elk geval of die ongekwalifiseerde toepassing van die meeste norme in hierdie handveste en verklarings waarskynlik sou lei tot die ineenstorting van 'n groot aantal van die politieke sisteme dwarsoor die wêreld op hierdie stadium. Hoe die bestel ook in Suid-Afrika moet wees en welke aansprake en belange hier die status van menseregte dan moet kry, moet na aanleiding van ons belange en ons behoeftes beslis word.

In teenstelling met baie van die ander sprekers, glo ek wel dat selfs 'n beperkte menseregte-akte tot die oorskakeling in ons situasie kan bydra. Ek sou aanbeveel dat daar 'n ondersoek gedoen word, gesamentlik met die RGN om die sienings en verwagtings van alle burgers ten aansien van 'n menseregteakte in Suid-Afrika te peil. Dit skyn in elk geval tog dat die beswaar teen die instelling van menseregte-akte, sover ek dit waarneem, gaan oor die legitimiteit van hierdie regering en die omstandighede op die oomblik eerder as prinsipiële besware teen 'n akte as sodanig. 'n Menseregte-akte sal sekerlik internasionale propagandistiese waarde hê, maar moet nie net op die propagandistiese vlak opereer nie.

Ten slotte, vanweë die onsekerheid en die probleme wat menseregte nog op die internasionale terrein ondervind, lyk dit nie vir my moontlik om op hierdie stadium in Suid-Afrika 'n sisteem op die been te bring waar menseregte in verskillende streke toegepas en uitgebou word nie. In hierdie verband is dit miskien tog belangrik dat ek daarop wys dat 33 van die 51 lede van die OAE nog nie die *African Charter on Human and People's Rights* geratifiseer het nie.

Prof M Wiechers

Ek het my afgevra aan die einde van twee dae se verrigtinge wat daar is wat ek kan sê wat nie reeds gesê is nie. Ek gaan nie eers probeer om iets nuuts te sê nie, maar gaan net my kollegas se bydraes hier saamvat en 'n paar opmerkings maak soos ek sekere dinge sien.

As ek luister na die opvatting of die stelling wat gemaak word, wat sê: "Kyk, ons is nie teen 'n menseregte-akte nie, maar nie onder hierdie omstandighede nie – regtig, met so 'n regering en so 'n stelsel, asseblief, dit is nie nou tyd vir 'n *Bill of Rights* nie", dan dink ek aan die storie van die predikant wat onverwags by die huisvrou besoek gaan aflê het. Toe hy daar aankom vind hy haar omring van 'n klomp kinders – haar kinders. Die een is siek, die ander skreeu terwyl een die kat verwurg. Die predikant is gegroet met dié woorde: "Wel, dominee, jy moet my maar vat soos ek is, maar ek sê vir jou, vandag is ek op die punt dat ek hierdie blêrrie kinders se nekke omdraai, almal van hulle, as die een weer skreeu dan doen ek dit." Die arme predikant is toe redelik verleë en hy sê: "Regtig suster, 'n mens praat nie so lelik nie, want eintlik, as jy werklik daaroor dink, is hulle ligstrale in die lewe. Hulle is tog waarvoor ons hier is en eintlik is hulle gawes van Bo." Sy sug en sê: "Dominee, dit is goed en wel vir jou om te praat van gawes van Bo. Ek sê vir jou dis maar net alles my man se nonsens."

Dit is dieselfde met die menseregte-akte. Ek verstaan wanneer my kollegas sê dat ons nie moet praat van menseregte en alles wat van die oertyd in die regstelsel is nie; dit is alles die regering se nonsens as gevolg waarvan ons vandag sit waar ons is. Dit kos net 'n bietjie begrip om te sien waar die meeste van ons landsburgers werklik sit. Hulle sit hier oorkant die bulte in kettings, waarvan die meeste mense nie weet nie. Ons is miskien besig om die belangrike sake nie raak te sien nie. Menseregte en 'n menseregte-akte is hier verbreek en verkrag en dit is nie nagevolg nie. Dit wil nie sê dat 'n menseregte-akte, in watter vorm ookal, nie altyd geldig is nie, of 'n ewige waarde in ons orde het nie. Die vraag wat wel eintlik gevra moet word, is na die vorm van afdwingbaarheid in die huidige hervormingsprogram. Welke werklike afdwinging kan ons stelsel dra? Dit is belangrik. Ek voel altyd moedeloos om te sê dat ons nou in 'n slegte situasie is, maar dat ons net so 'n klein handvessie moet aanvaar, net om 'n bietjie menseregte te kry. Dit is soos swangerskap. 'n Mens kan nie net 'n bietjie swanger wees nie. 'n Menseregte-akte spreek die mens met sy volle aktiwiteit as 'n maatskaplike, ekonomiese en politieke wese aan. Die praktiese vraag bly wat die moontlikhede van effektiewe afdwinging is. Ek kan nie aanvaar dat daar 'n staat is wat geen menseregte benodig of regverdig nie, in al sy voorskriftelikheid. Geen staat eis eers die rewolusie om die hemel op aarde te bring sodat menseregte dan kan floreer nie. Menseregte is met ons en geen mens of geen regering se 'nonsens' mag ons daarvan weerhou in die daaglikse toepassing en die praktiesmaking daarvan nie.

I was listening to my colleague speaking of what the South African government had done on its side as far as international laws dealing with human rights are concerned. We have often been told and still are told even today about international human rights and double standards. Many other countries, we are told, are not adhering to the international laws regarding human rights and it is asked why South Africa is the scapegoat. As if human rights as an international norm can be diluted or can be less worthwhile.

Ek wil afsluit deur te sê dat u sal kom en gaan, dié konferensie sal gaan, en hierdie regering sal gaan en die rewolusie sal kom en gaan. Bo die bestel, want dit word gevoed deur hierdie bestel, is daar eenvoudige, gewone mense se aansprake om menswaardig gelyk te wees en volle geleenthede te hê. Regsgeleerdes kan waarskynlik slimmer en soms meer gesofistikeerd as ons afskryf, maar gewone mense van ons land, glo ek, sal die taak en die roeping om menseregte te bevorder nooit versaak nie.

13 Oop bespreking / Open discussion — 2 Mei 1986 / 2 May 1986

Voorsitter **Sy Edele Regter**
Chairman **The Honourable Mr Justice JC Kriegler**

Chairman

The organizers of this symposium patently have a well-developed sense of humour. By this stage, having heard what I have heard, and having read what I have read of what has been said, I am certain that judges are regarded as an endangered species, if not a species held in contempt. In those circumstances they saw fit to ask a judge to preside at the last session. I sincerely hope that you have run out of eggs and tomatoes.

Prof WH Olivier

Ek het besondere waardering vir Professor Wiechers se opmerking, toe hy verwys het na Aristoteles se een groot – mag ek dit so stel – stelreël, dat die mens 'n ekonomiese en maatskaplike wese en daarom 'n politieke wese is. As ons praat van 'n handves van menseregte, dan gaan dit tog oor die beskerming van die regte van ons as enkelinge, nie as engele nie, maar as enkelinge in die totale sin van ons menswees. Daarby wil ek graag aansluiting vind. Nou wil dit vir my lyk uit die besprekings wat tot op hierdie stadium gevoer is en uit die bydraes van verskeie sprekers, dat die grondprobleem in Suid-Afrika 'n politieke sisteemprobleem is. Hieruit voortspruitend wil ek die veronderstelling meld dat ons nie werklik 'n menseregtehandves kan hê wat onderworpe is aan rasseklassifikasiesisteme, gekwalifiseerde stemreg, of 'n kamer wat 20-miljoen mense verteenwoordig, maar 'n kwart aandeel aan die besluitneming het nie. Vandaar my vraag aan die paneel en in die besonder aan Professor Wiechers: Sou u sê dat dit moontlik is om 'n sinvolle menseregtehandves in hierdie land te hê binne die *status quo*, of selfs binne die onmiddellik-voorsienbare ontwikkeling wat vanuit die sentrale magsbeheergroep in Suid-Afrika uitgaan? Moet asseblief nie van my vraag aflei dat ek enigsins die *status quo* sou wou handhaaf nie.

Prof M Wiechers

Ek stem heeltemal saam dat ons gevangenes in die politieke sisteem is en dit laat ons verkeerd dink, soos jy bewys het. 'n Menseregte-akte is 'n voorskriftelike, normatiewe stelling van menseregte. 'n Mens kan verskil byvoorbeeld, oor interpretasie, formulering en die beslag of ontwikkeling van mense, maar menseregte is daar, dit is deel van ons gemenereg en so aan. Die bestaan van 'n menseregtehandves, of wat ookal, is nie afhanklik van 'n politieke sisteem nie. Die politieke sisteem, soos in ons land, maak hom oneffektief, onwerksaam, onafdwingbaar en tot 'n groot mate buite die bestek van die

sisteem. Met ander woorde, die sisteem ruïneer die akte. As mense sê dat ons politieke sisteem dit nie kan dra nie, dan sê hulle in effek net dit: Ons politiek vermoor menseregte in baie opsigte. Geen politieke sisteem is onveranderbaar nie. Die vraag is hoe kan ons sisteem verander word om die bestaande erkende menseregordes wat oor eeue ontwikkel het, effektief te maak. Daar is verskillende maniere. Ek sou nie vir 'n oomblik sê dat baie van die waardes nie in ons regspraak en in ons hele daaglikse toepassing nagevolg word nie. Dit is waar dat in die idioom van menseregte, die liberale tradisioneel-demokratiese idioom, baie van hierdie politieke of publiekregtelike aansprake nie geld nie, soos die aanspraak op vrye verteenwoordiging. Hoe word dit gewysig? Dit is die hervormingsproses. Dit is wat ek bedoel het. Daar is nie so iets as 'n klein menseregte-akte nie. Daar is oor 'n menseregte-akte waarin sekere elemente nie effektief is nie, nie werksaam is nie en beter geïmplementeer kan word. Die regering kan, byvoorbeeld, môre oor 'n menseregte-akte in sy volle omvang onderhandel en aanneem en vyf jaar vir onderhandeling op alle vlakke stel. Dit is inderdaad wat in Natal in die Indaba gebeur. Daar is 'n menseregte-akte op die tafel. Die Indaba het klaar besluit dat dit deel van die konstitusionele bestel sal wees. Hierdie soort hervormings of strategieë sal op alle terreine ontwerp moet word. Die besigheidsmense wat 'n menseregte-akte aanvaar het, het nie net skielik heilig geword nie. Nou sal hulle moet begin werk om te kyk in hulle arbeidsverhoudings en hulle maatskaplike en ekonomiese verhoudings hoe hulle dit werksaam moet maak. Daar is oneindige moontlikhede om die bestaande regsorde beter te implementeer.

Mr A Cager

Vroeër vanoggend is daar kritiek teen die howe uitgespreek. Ek dink dat die kritiek nie geheel en al geregverdig is nie. Positivisme kan nie geblameer word vir die situasie wat nou bestaan nie. Dit is so, dat daar verskeie beslissings is wat teen die menseregtekonsep indruis, maar daar is ook ander. Ek dink nie dat die positivisme iets daarmee te doen het nie. Ek voel dat die regbank miskien onbillik beskuldig is dat die rede hoekom hulle posisie nie so geloofwaardig is soos wat 'n mens graag wou sien nie, is omdat hulle bepaalde wetgewing moet implementeer. Nog iets wat ek nie kan verstaan nie, is hoe mense kan argumenteer dat die regbank soos 'n tipe opposisie teen 'n regering of teen die uitvoerende gesag moet optree. Daar is geen land in die wêreld, behalwe miskien die VSA, waar die regbank se posisie veel sterker as in Suid-Afrika is nie. Daar is geen land ter wêreld waar die regbank as 'n soort opposisie teenoor die uitvoerende gesag optree nie. Dit is ondenkbaar. Ek dink die oplossing is 'n politieke een en nie 'n aanval op die regbank nie.

Adv ED Moseneke

I understand the concern that positivism is being blamed for the mechanical approach which the judges have adopted when interpreting laws where, in fact, they could make available certain rights to individuals or protect certain rights. But what one fails to understand, in my point of view, is that in any society there is a certain relationship between structures in that society and the judiciary. The extent of control which the judicial function would be allowed to have, would depend on a whole range of things. The difficulty

is not the integrity or the capability of persons who are judicial officers. We have a system which is potentially capable of protecting human rights, namely Roman-Dutch law. A superimposed system, in fact, does exactly the opposite. In Professor Wiechers' words, it literally 'murders human rights'. This results in the tension that one finds when one talks about the credentials of the judiciary. If you take a judgment like *Hurley* and the beneficial effect that results, it leaves the fundamental injustice of a section 29 detention alive and well. One has to recognize that. The criticism is not so much about the judiciary *per se*, but whether in fact one should look to the courts for solutions. I say 'no'. On that point we agree, but for different reasons. My reason is just that it is absolutely ineffective in certain areas. You have to focus on other things, because in its very nature the judicial function is limited. The criticism that is levelled against the judiciary, flows directly from the inadequacies of the system itself.

Prof MP Vorster

Ek wil met die vraesteller saamstem. Ek is ook bekommerd oor die aanval op die regbank. Dit lyk vir my dat dit deel is van hierdie hele deligitimeringsproses van ons stelsel en ek dink dit is besonder gevaarlik. Ek stem saam met advokaat Moseneke dat die funksie van regters beperk is en ek het eintlik so half en half die indruk gekry in hierdie twee dae dat daar te veel gevra gaan word van die regbank. Dit is onmoontlik om van die regbank te verwag om al die foute of al die probleme deur middel van 'n menseregte-akte of andersinds reg te stel. Selfs in die Amerikaanse stelsel sou dit onmoontlik wees vir die howe om op hul eie sulke dinge reg te stel. Dit is in samewerking met ander wetgewing van hulle wetgewende liggame, wat die howe en die stelsel dit regkry om sulke regte te beskerm.

Prof AC Cilliers

In my opinion, the judiciary as a group has been criticized somewhat unfairly and for this reason I feel I must make two points. Firstly, I think that criticism of judicial utterances should be made in very restrained language as the judiciary is not in a position by reason of strong convention to answer such charges. Secondly, the system which we have inherited has two main aspects which make it impossible for the judiciary to move outside the ambit of the present activities. The factors which are relevant here are the doctrine of sovereignty of parliament (still a fundamental part of our constitutional law) and the very strong doctrine of precedent in our system. I would also like to make one or two statements and ask Professor Wiechers or any other panellist to reply. In other spheres of law all rights are to be qualified and have correlative duties. If people have equality of opportunity in all fields, they should accordingly then fulfil their duties towards society. Of course, the question that then arises is: 'What are one's duties?'. Very often demands are clothed as rights and when the demands are denied, the denial is regarded as illegal. That, in itself, is morally indefensible. However, the real question should be whether the demands are justified. The criteria whether they are justified or not, lies outside the ambit of the law. The Human Sciences Research Council on inter group studies reports that there should be a proper

balance between individual and group rights. My view is that group rights are not to be too categorically defined. There should be freedom of association, which in itself is an individual right. Race or ethnicity should not be the basis for determining the boundaries of the group. If we move in that direction and first try to address the tension in society, outside the scope of a bill of rights, only then would the ground be ready for introducing such a bill of rights.

Prof M Wiechers

Firstly, I agree that all bills of rights qualify rights and freedoms of the people. Secondly, as I understand my colleague, he says some people have access to rights and freedoms, so they have more opportunities to have rights and freedoms. Some people have fewer opportunities and therefore – and this is what I don't understand – they can be a little irresponsible, because, poor people, they don't have and didn't have those opportunities. I disagree. The rights and the freedoms are the opportunities. I have lately heard students saying: 'We may be as racist as we want to be and kick out white students, because we never had the opportunity of having good educational systems, so therefore the system allows us to be racist.' Of course, the system didn't allow them to exercise their full potential. But, I maintain, in order to achieve a full potential of rights and freedoms, you don't oppose other people's rights and freedoms with racism, because you didn't have the same so-called opportunities. That is the point. Thirdly, on group rights and individual rights, I maintain that there are no group rights which transcend a collectivity of organized individual rights. There could be ethnic values, of course. People say that Zulus all speak Zulu and ask whether you are going to deprive them of their right to be Zulus. Not at all. But what binds them? I would say accepted ethnic values, such as language, culture and religion. If that is true, then what do you protect? The group can protect itself; it should be allowed to protect itself according to the right of association.

Adv A Chaskalson

I was not here when the judges were criticized and I am not quite sure what was said, but I would like to make two observations in regard to what is being said today on that issue: I have always been a little troubled about the debate around the doctrine of positivism. Sometimes it seems to me that if judges were to follow subjective approaches, the subjective views of a particular judge may not be my subjective view and, in fact, the final result, as far as I am concerned, may turn out to be worse than if the judge had to follow what was regarded as a positivistic approach. So the question of subjectivity doesn't always lead to the decision which favours what I might perceive the human rights or civil rights result which I would desire. Secondly, I think it is quite wrong to say that people are suggesting or that that any one has ever suggested that judges should take on the role of an opposition. I have always understood the argument to be that there are certain common law principles which run through the law and principles which all lawyers observe and respect and feel to be correct as far as individual basic rights are concerned. It is simply that the judges, when they get on to the bench,

should strive to protect those values which are inherent in our law. In other words, they should play their role as lawyers irrespective of whether the law is one which is passed by a political party which they support or oppose, because in most societies political parties change and governments change. We have just had this rather unusual experience of having had one government for some 40 years. If judges are consistent and apply basic principles, it does not matter which government is in force. Whenever a government comes in and starts eroding a common law principle, the judges can keep to that principle and say that they as lawyers know this is right and that this is how they are going to interpret the law. I also think that the failure by judges to criticize invades the basic principles, and that silence, where there is a need to talk, may also at root be a political decision. It may be a political decision to remain quiet, when you should speak out. I think it would be much better if the judges could be absolutely consistent in their application of what I conceive to be basic principles and to speak out when they see those principles being contravened. Finally, as far as group rights are concerned, it seems to me that if individual rights are respected, then all groups are protected and that one does not need any special laws to protect any special group.

Adv MS Motshekga

I take it that there is a need to search for a common value system for South Africa, which will replace calls for group values which I believe have the effect of generating unnecessary tension in society. South Africa needs a common society, not a fragmented society governed by so-called values, rights and systems. I think, therefore, that in a search for this type of value system it is important to note that the speakers in favour of a bill of rights, such as Judge Didcott and Professor Basson, have been recommending a transplant of the American system. I disagree with them. There is no need in this country to transplant the American bill or any other bill, but there is a need for this society to discuss our own situation in the light of our own problems and see whether we cannot learn from other international institutions and instruments. However, a precondition for approaching the problem is that we note that there is a Calvinistic approach, a liberal Western approach (which is rejected by blacks) and an African approach. The African approach is a people-orientated approach. We should first attempt to reconcile these three approaches. I submit that such a reconciliation is possible if we look at the concept of humanism. Here we must distinguish between the atheist European type of humanism and the theistic African humanism. I recommend the latter, because it accommodates all other interests. In conclusion, I want to call upon the universities in this country to distance themselves from an approach to education which only teaches European philosophy as if Africans cannot philosophise and therefore I call upon them to immediately introduce a course in African philosophy. I am no philosopher, but am available to act as a consultant in the development of such a curriculum.

Prof DM Davis

I am intrigued that an attack on positivism has suddenly emerged in Pretoria. The reason is that it seems to me that positivism is quite alive and well at

this conference in a very different way. Obviously, one of the great problems that this conference has faced is the fact that the bill of rights issue is not a legal issue. It might offend our sensitivity as lawyers, but, the issue is that the whole problem and the interest in it must be analyzed in terms of the political developments that are taking place in South Africa today. What I am trying to say, is that the kind of limited bill of rights that is being demanded, would, to my mind, act as a veto power on the majority of the population in this country. It would prevent them from the attainment of power in a democratic fashion. They are the majority and therefore they should participate as a majority. Blocking that particular demand, which is a perfectly reasonable and acceptable demand, cannot go hand in hand with any legitimate bill of rights at all. I am reminded of what Prime Minister Begin once said in respect of the Israeli situation: 'Israel would be a splendid country and would have no problems, if we did not have 15-million Arabs surrounding us. But the fact is, we do.' It is about time we realized in this country that the majority of the population, whether it offends people or not, does not happen to be white. Any bill of rights which tries to trick that particular situation and arrive at a position which blocks the aspirations of the majority, really, to quote the Minister of Law and Order in a different context, is not worth the paper it is written on. This is the kind of thing we are seeing in the Indaba in Natal at the moment – a sort of little talkshop between Chief Buthelezi and some others, a kind of situation where the vast majority of the population in the country would not regard it as a legitimate exercise. It is that kind of exercise which seeks to build up some kind of black petty bourgeoisie to talk to white capital, which is really the problem with any kind of attempt of that nature. As far as a limited bill of rights is concerned, yes, on the one hand it is going to create space. It will create space for people to defend themselves, for organizations to develop politically in perhaps a little less fear than they might well have at the moment. But if people believe that that kind of bill of rights is going to achieve an equilibrium in this country and that the majority of South Africans is going to be satisfied with that, that is the height of naïvety. I think it is about time that this conference, and any other conference, recognizes that reality.

Finally, on the issue of positivism in the judiciary: To blame the issue of judicial conservatism on this misconstrued nature of positivism, is absolutely academically unsound. Professor Basson this morning called for rejection of a positivistic theory of law, according to which judges merely apply acts of Parliament in a mechanical manner. The problem in South Africa is that they *don't* apply the acts of Parliament very often in a mechanical manner because judges are influenced by their values. What is required, is indeed a change of climate, substantial changes which alter the values system. As a result thereof, one would get a judiciary more in accord with the aspirations and the feelings of the majority of the population. I agree entirely with what Advocate Motshekga said earlier. It is high time – and it will be one of our great challenges – for the law faculties of South Africa to change their legal education so dramatically, that judges will be able to accord with the spirit and the tenor and the traditions of a future South Africa.

Finally, I am delighted to hear that Professor Wiechers agrees that group rights of an imposed kind just cannot work. That quite clearly indicates that the 1983 Constitution is exactly as many of us though it was in 1983.

Prof SC Jacobs

Ek voel eintlik 'n bietjie skaam om tussen baie veralgemenings 'n bietjie meer tegnies te praat. Voordat ek tegnies praat – want dan sal die positivisme seker dalk weer na vore kom – wil ek tog ook net 'n baie kort bydrae maak in die lig van wat my kollega hier sopas gesê het. Uit die aard van die saak is dit die daaglikse werk van die juriste om regters te kritiseer, maar ons moet darem seer sekerlik in gedagte hou dat die reg normatief is. Daar is 'n norm waarvan ons uitgaan en alles word aan daardie norm getoets. En die norm is nou maar eenmaal nie soos ek graag daardie norm wil hê nie, want dan praat ons oor die *lex ferenda* en nie oor die *lex lata* nie. Nou kan ons natuurlik oor die *lex ferenda* praat, maar dan moet ons sê ons praat oor die *lex ferenda*. As ons egter oor die *lex lata* wil praat, moet ons uitgaan van 'n normatiewe wetenskap. Ons verwag van die regbank om sekere dinge te doen wat ek nie dink binne die raamwerk van die magtigende wet of van die gewoontereg vir hulle moontlik is om te doen nie.

Met betrekking tot die tegniese opmerking wat ek wil maak, is in die referaat van Regter Ackermann verwys na die baie bekende *Filatiga*-beslissing. Dit kom nie voor in die gedeelte wat Regter Ackermann aan ons voorgehou het nie dat hierdie beslissing internasionaal baie sterk gekritiseer word. Daar is 'n baie goeie rede waarom die beslissing gekritiseer word. Trouens, daar is stemme in die VSA wat ernstige probleme met hierdie beslissing het. Die agtergrond van die beslissing is die volgende: Die appellante was nie burgers van die VSA nie. Trouens, dit waaroor hulle kom kla by die hof in die VSA het heeltemal buite die grense van die VSA plaasgevind. Die regsimplikasie is dat die territorialiteitsbeginsel in sy wese en in sy strekking geweld aangedoen is. Vandaar dan ook die standpunt van die hof dat hy sê dat hy nie jurisdiksie het nie. Dit is iets wat baie duidelik hier beklemtoon moet word. Die implikasie met betrekking tot *locus standi*, wat voorheen aangeraak is, is voor die hand liggend. Enige hof wat vir hom jurisdiksie opeis wanneer die daad waaroor gekla word nie binne die grense plaasgevind het nie, net omdat hy beweer dat dit nou in stryd met die gewoonteregtelike volkereg sou wees, gaan sy magte te buite.

Dr H Corder

Professor Vorster earlier this afternoon agreed that we should start with procedural rights in a bill of rights. That is fine as far as he took it. What he did not do, was to complete the sentence with which I started talking about procedural rights. I said that procedural rights should exist not only on paper, but in reality. In other words, if there is a right of legal representation, that should be a real right, available to every single individual who appears in court. Rights that are accorded in theory at any rate, by the Criminal Procedure Act and the other acts which have to do with procedure, should be made rights in fact. I also coupled that to the institution of one substantive right, namely the right of freedom of association. That considerably widens the scope of procedural rights.

Mr FC Bam

I am provoked to reply to two questions. The one relates to the expression 'the rarest of occasions' when *pro deo* defence was not available. I have come

across such rare occasions and these are not so rare in my experience. The practice is that very often in murder cases in the part of the country I come from (the Transkei and Port Elizabeth) the accused person himself says he doesn't want *pro deo* counsel, either because it is a government lawyer, or because it is a white lawyer. Whenever this happens, the judge is, in fact, faced with a problem. The constitution allows him to go ahead with the case as the case can go ahead without it being defended. One notices then that each time there is a political reason and basis to the accused's objection to being defended by a particular kind of lawyer. So, whether you like it or not, it always goes back to the political question of apartheid, back to the fact that people distrust each other, in this country.

That brings me to another question. Nothing has been said about how a bill of rights operates or does not operate. In fact Bophuthatswana did pass a bill of rights and it is still in operation there. With respect, I have not yet come across any of the commentators who have said that the quality of justice in Bophuthatswana is any different from the quality of justice in the Transkei and the Ciskei. And I was wondering whether one of the panellists could comment on that.

Adv ED Moseneke

I would like to make some remark about that, precisely because I do from time to time practice in Bophuthatswana. People in Bophuthatswana are not in a position to actually enforce the constitution through the courts, for reasons which are quite obvious. These are practical reasons and they relate to what I have said earlier, when I talked about the contents of a bill of rights. Most of these rights are present on paper and it goes no further. These rights have been violated, I think, very openly, over the last 12 months. In one of the shootings that occurred there, 19 people lost their lives and nothing has really come out of it. I am aware of applications that have been made around the whole issue of violation of rights by the police in Bophuthatswana, but I don't think it has brought about any particular enhancement of rights as a result of the presence of the bill of rights. They have had detention without trial in Bophuthatswana. I don't think anybody has cared to enforce any of those rights up to now.

Prof M Wiechers

I think we must distinguish between a few things here. I agree with what Ernest Moseneke has said about the violations in the actual system of government there, but they are highlighted in a sense that people talk about it and know that they can refer to the actual provisions of the bill of rights. It is a legal yardstick of what they are doing. It is also an educational process. I have been involved in court cases where a whole class of school children would sit in the court and follow the argument about the bill of rights in front of them and listen to the advocates. I have never heard or seen such a thing in this country. Any counsel appearing before a Bophuthatswana court would immediately go to the bill of rights and check to see whether something is in accordance with the bill and so it becomes a workable instrument. A bill of rights is not a static thing. It is the cherry on the top. There is no

perfect system in the world. There are lesser, better and worse systems. Democracy at its best is also not an untainted system. In our South African legal system the only worthwhile recent human rights decisions are those under the Bophuthatswana bill of rights.

Prof D Basson

Daar is 'n stelling gemaak dat daar 'n aanval op die howe was. Dit was beslis nie in my referaat gewees nie, want ek het die howe aangeprys in al die sake wat ek bespreek het, juis vir hulle aktivistiese uitsprake in die lig van die aangesig van die wetgewing wat hulle moes interpreteer. Daar was nie sprake van enige aanval of kritiek op die howe nie. Die kritiek waarna ek verwys het, was uit vorige navorsing. Ek het ook nooit die stelling gemaak dat die howe opposisie vir die regering is nie. Ek het van die standpunt uitgegaan dat die howe tans binne 'n sekere staatsregtelike opset opereer en in daardie opset kan hulle nie 'n opposisie vir die regering wees nie. Daarom het ek gesê dat slegs in hierdie eng gebied waar menseregte nou ter sprake kom by hierdie toepassing van hierdie wetgewing wat ek bespreek het, die howe aktivisties kan optree. Dan is die stelling gemaak dat ek die positivisme aangeval het. Ek het aan die begin van my lesing gesê ek kan nie nou ingaan op die positivisme nie. Ek wil nie nou die hele teorie bespreek nie, maar daar staan in my lesing van die gesofistikeerde positivisme. Forsyth se oplossing het ek aangehaal, naamlik die herroeping van die wette en die huidige stelsel. Met my afsluiting het ek gesê die howe sal slegs hulle rol as arbiter kan vervul wanneer 'n nuwe sisteem in werking getree het, nie in die huidige stelsel nie. Dit is nie waarvoor ek 'n beroep gedoen het nie. Ek het bloot 'n paar uitsprake ontleed en aan die hand daarvan het ek sekere gevolgtrekkings gemaak, naamlik dat die howe in Suid-Afrika in staat was om menseregte te beskerm. Ek het hulle geluk gewens.

Prof G Devenish

I believe that a constitution is a dynamic phenomenon. If one looks at the American experience, one finds that there are low water marks and high water marks. A bill of rights is not a panacea. If one looks at the experience in Bophuthatswana, we also have low water and high water marks in our constitutional and political development. The constitution of Bophuthatswana is a living and dynamic phenomenon. People have to be educated and we hope that as people are educated and become more conscious of the bill of rights, they are going to enforce their rights in the court and that in future the bill of rights will be more effective. The mere fact that we have a disappointing case is not the end of the story as far as Bophuthatswana is concerned.

(A number of student speakers from the University of the Western Cape, the University of Pretoria and UNISA exchanged views about the *Freedom Charter*, the *FCI Charter*, the state of emergency, the 1983 Constitution, the aspirations of the majority of South Africans, the lack of legitimacy of the

South African state, people's courts and the formation of the Intervarsity Law Students' Council and the Democratic Lawyers Anti Bill of Rights Committee.)

Voorsitter

Ek will namens ons almal en veral diegene van ons wat een of ander historiese verbintenis met hierdie universiteit het, ons innige waardering, my persoonlike verbasing en aangename verrassing uitspreek. Ek wil namens die organiseerders teenoor die bywoners dank uitspreek. Dit was nie eendragtig nie, daar was nie konsensus nie, maar ons is nie bymekaar gebring omdat ons eendersdenkendes is nie. Dit was te alle tye openhartig, positief en met 'n gevoel van wedersydse lotsgebondenheid. Ek het geen vrees vir die toekoms nie as mense op 'n breë vlak – en daar is baie breë vlakke hier teenwoordig – dié gees vorentoe gaan uitdra.

14 Slotrede
Closing address

Sy Edele Regter
The Honourable Mr Justice **JC Kriegler**

Toe ek die program sien en ek sien die Babelse verskeidenheid menings wat stellig by die simposium gerig sou word, was ek bly dat ek nie 'n streep hoef te probeer trek wat bymekaar gebring moet word nie. Dit wys 'n mens nou net hoe liederlik die snoer vir jou kan val. Dit het toe my lot geword om te probeer saamvat wat oor die laaste twee dae gebeur het. Dit is nie maklik nie. Die onderwerp is snuif getrap. Daar was werklik aan alle gesigspunte oor die prinsipiële vraag, 'n menseregtehandves, besin. Daar is uit verskillende gesigspunte menings gelug oor die uitvoerbaarheid daarvan en die wenslikheid daarvan en die gesprek was by tye betreklik uiteenlopend en dit is nie 'n taak wat ek selfs myself beny om te probeer saamvat nie.

I would also beg for your indulgence. The time has been too short for proper mature consideration in order to distill an essence from what has been said over the last two days. It is too soon for that. What I intend presenting, are personal marginal notes. The lawyers amongst us will know that marginal notes are not to be considered in the interpretation of the essence of the statue.

I am going to deal with the material under three main heads: firstly, broad impressions; secondly, such trends as I was able to discern and thirdly, I have arrogated unto myself the privilege of making certain personal conclusions.

Eerstens dan die breë indrukke: Dié sou ek graag onder ses woorde wou saamvat. Die eerste is werklike verbasing – verbasing, verdwasing, verrassing. Dat dit hoegenaamd moontlik was vir verrigtinge van hierdie aard om in ons tyd, in ons samelewing, en by hierdie sentrum van behoedende Afrikanerdom plaas te vind. Die tweede is bewondering – bewondering vir die waagmoed van diegene wat aanvaar het om die kongres te reël. Dom is hulle bepaald nie. Die risiko's daaraan verbonde was hulle wel deeglik van bewus. My bewondering strek ook sover as diegene wat bereid was om aan 'n dialoog deel te neem in 'n tydvak waar gesprek haas begin opdroog en waar diegene wat hoegenaamd deelneem aan 'n gesprek uitgeskryf word van alle kante van die politieke spektrum as 'sell outs', 'kafferboeties', of wat ookal dergelik as lelike skerp woorde gebruik wil word. Die derde is waardering – waardering vir die gees waarin dit geskied het; waardering vir 'n gees waarin mense van die wydste moontlike uiteenlopende meningskoling nietemin dit moontlik gevind het om sinvol met mekaar te kommunikeer. Die vierde is 'n diepe nederigheid – nederigheid by die aanskoue, die waarneem en, sover moontlik, die inneem van kundigheid, van talent van die vrugte van arbeid waarby ek verstom gestaan het. Die vyfde is dankbaarheid – dankbaarheid dat ek die geleentheid gehad het om dit te kon meemaak; dankbaarheid dat daar 'n geleentheid was waar baie soos ek kon luister en kon leer. Die sesde en vir my die belangrikste is: my slotindruk van die geheel van wat plaasgevind het, is een van hoop. Ek weet dat dit nou modieus geraak het om wanhoop in nuwe welsprekende slagspreuke te uiter. Ek besef dat

hoop en geloof en selfs liefde deesdae as ouderwets beskou word. Dit was vir my die laaste twee dae 'n bersieling gewees en 'n oproep tot nuwe hoop by die aanskoue en die aanhoor van die goue draad van begrip en verdraagsaamheid, wat ten spyte van die wyd uiteenlopende menings nietemin waarneembaar was.

Secondly, I would like to underline some of the trends that I perceived in the discussions. It was particularly noteworthy that there was a distensible conflict between the academic, the learned, the strictly legal evaluation of the subject under discussion and, on the other hand, a passionate barely suppressed anger on the part of our black participants – cool academic analysis on the one hand and suppressed anger on the other. The discussion concerned the purpose of a bill of rights. I think that I express the general consensus when I say that we reject a bill of rights as a universal panacea for all social, political and economic ills. We are not that naïve. I don't think anybody who attended the symposium holds the view that in a bill of rights we have a key to that happy upland of which we all dream.

The view was expressed and well articulated that a bill of rights could serve as an interim strategy in a society in transition – that it could act as an easing agent from one regime to another. The view was also strongly supported that it could serve as a vehicle for educating the whole of the body politic – that is from the man in the street of all social and ethnic varieties to the legislator. Professor Wiechers, in particular, articulated the point of view that, however deficient it may be in practice, a bill of rights serves a useful function as a set of norms against which we can continually evaluate our performance as a community – virtually a Dorian Gray picture against which we can compare ourselves, to see precisely how ugly our faces are, in comparison with the ideal.

The debate also dealt with the contents of a bill of rights. Here the main points of view were firstly, an adherence to the nineteenth century traditional liberal *laissez-faire* bill of rights, characterized in the main by phrases that appeal to the sentiment more than to the mind. Secondly, at a more pragmatic level, it was argued that a bill of rights would serve a useful function, if it were to be a limited set of rules recognizing the ugly realities of the society in which we live. That bill of rights could grow as society grew into an appreciation of what it means to live together in harmony and to recognize the worth of all creatures of the Lord. A third school of thought was that a bill of rights, in order to be of any value, had to be a socially activist document, in which the very real inequalities in our society were recognized, confronted and sought to be overcome. Hence, a mere recognition of the right to achieve that which is theoretically obtainable, is of no value, unless society actually exerted itself and articulated in the bill of rights its preparedness and determination to achieve true social justice – equality in practice not merely in theory.

I found the interchange between different social and cultural perceptions of the society in which we live fascinating – the *laissez-faire* perception as opposed to the neo-Marxist while on the other hand self justification (which seems to have become the fashion amongst whites) and the barely suppressed anger to which I have already referred. To somebody who wasn't there, this would sound like an awkward situation. It was not that. It was indeed an

enlightening and encouraging two days, because I found throughout a frankness which is easy in expression and more difficult in the listening. As I saw the audience, they were frank in their ability to listen to somebody who differed from them radically, honest with themselves and prepared to consider different points of view.

Daar was diepgaande meningsverskil oor die konsep van 'n handves van menseregte. Daar is met aansienlike nadruk en hartstog verwoord dat 'n handves van menseregte te min is, dat dit te laat sou wees, andersyds dat dit voortydig is, dat dit doodgebore is. Die agterdog is uitgespreek dat dit bloot 'n skuifmeul is onder die dekmantel waarvan apartheid in 'n ander gedaante nietemin die toekoms ingedra sou word. Daardie agterdog is verwoord, soms al sou dit nie die mening van die hoflike spreker wees nie, maar as sou dit die persepsie van die swartes daarbuite wees. Ek moet ook sê dat ek ietwat teleurgesteld is om in hierdie tyd nog steeds dieselfde aanmatiging te hoor wat ek gehoor het toe ek 'n kind was, dat 'n individu homself kan aanstel as 'n kenner van en 'n segsman vir die sogenaamde swart meerderheid. Ek het my sterkste bedenkinge oor selfaangestelde segslui en interpreteerders van die mening van miljoene.

Dit is ook welsprekend en treffend gestel dat 'n handves van menseregte die laaste bolwerk is, waaragter 'n kleinburgelike blanke bewind probeer wegkruip en dat dit derhalwe 'n hindernis op die grootpad na bevryding is, wat uit die pad gevee moet word. Dit klink, wanneer 'n mens dit hoor, oorspronklik. Diegene van ons wat oud genoeg is om die pionier van die bevryding van die swartman in Afrika destyds te kon hoor, weet dat Kwame Nkruma baie jare gelede reeds gesê het: 'Seek ye first the political kingdom'. Daar is eintlik nie veel nuuts bygevoeg onder daardie besondere hoof nie. Wat my wel getref het – en ek erken ruiterlik dat dit 'n subjektiewe siening sonder die geleentheid tot nugtere nabetragting is – is 'n essensiële paradoks. Die paradoks setel daarin dat daar met drif aangevoer is dat dit nie nou die tyd vir 'n handves van menseregte is nie. Sorg eers dat ons die spanninge, die ongelykhede, die ongeregtighede, die gedrogte in ons samelewing, uit die weg ruim en wanneer ons dan die beloofde land van gelyke vryheid binnegegaan het, dan is dit die tyd vir 'n handves van menseregte. Die paradoks lê natuurlik daarin dat diegene wat dit beproef, eintlik sê ons het 'n handves van menseregte nodig slegs dan wanneer dit oorbodig geword het. Op 'n ander vlak en iets waaroor veral my medeblankes ernstig kan nadink, is die standpunt wat gehuldig is, dat ons moet waak daarteen dat ons 'n handves van menseregte uitsluitlik op 'n erosentriese lees gaan staan en skoei. Die standpunt is gestel (en ek meen dit regverdig diepe bepeinsing deur ons) dat daar uit die Afrika-filosofie 'n wesenlike bydrae te maak is tot die begrip menseregte en dit wat beskerming van die kant van die gemeenskap verdien. Dat daar opnuut en ernstig gedink moet word oor wat die filosofie van ons swart medeburgers ten aansien van samesyn beteken, het vir my duidelik geword in die bespreking.

'n Ander belangrike aspek wat na my mening na vore gekom het, is die oënskynlike teenstelling tussen groepsbeskerming, oftewel die beskerming van groepregte enersyds en, oënskynlik andersyds, die beskerming van die regte van die enkeling. Ek meen dat daar heelwat lig vir ons opgegaan het. Die konklusie waartoe ek geraak het, hoewel na kort oorweging, is dat daar geen teenstelling is nie en dat daar nie werklik as regslui sinvol gepraat kan word

van groepregte en die beskerming daarvan sonder dat daar eers erken word dat individuele regte beskerm moet word nie. Groepsbeskerming groei uit individuele regte. Daar is ook by geleentheid 'n interessante gesigspunt gelug wat in die druk van die bespreking na my beskeie mening nie voldoende aandag geniet het nie. Ek meen dat ons vorentoe moet erken dat daar 'n teenstelling is tussen die twee groot beginsels waaroor ons almal so klam in die oog raak: gelykheid en vryheid. Daar is 'n potensiële spanning en teenstelling tussen die twee. Ek meen ook dat daar 'n gevaar is dat ons vryheid dalk mag gebruik as 'n valse vaandel waaronder ons ongelykheid wil verewig. Daardie twee grondbeginsels van 'n demokratiese bestaan moet behoorlik en opnuut in samehang met mekaar oorweeg word.

'n Ander faset van die bespreking wat my besonder geïnteresseer het, was die rol van die regsprekende gesag in 'n regstaat waarin daar 'n handves van menseregte werklik funksioneer.

I think that I would not be unfair if I were to say that the views expressed as to the willingness and the ability of the judiciary to fulfil a controlling function varied from the sceptical to the highly suspicious. There were those who suggested that in our society, particularly in view of our history, the judges have neither the will nor the ability to fulfil this function. The point of view was put across with a great deal of emphasis – and I may say with considerable justification – that, by virtue of its composition, our judiciary is simply not sufficiently representative of the broad spectrum of society to fulfil the essential function of an umpire in the political game, that we are going to face in the next decade or two. On occasion the language was strong. I never felt that the language was hostile. Criticism of this kind can only be to the benefit of all of us. So much for the trends that I perceived.

Finally, if you will permit me a few more minutes for my personal conclusions: I heard in the course of discussion not once, but on several occasions, a view expressed which I, as a lawyer, regard as a heresy. I heard the suggestion made that a debate about a bill of rights is really misplaced amongst lawyers. The view was expressed in the modern idiom that it was for the politicians to get their act together and not for lawyers. I regard it as a heresy and I regard it as a particularly pernicious heresy. I have held for many years, and I still hold the view which I fear I will take to my grave, that the law has an essential role to play in conflict. The role of the law in individual face-to-face conflict is an essential one. The role of the law in inter group, inter ethnic and international conflict is no less an essential one. Since time immemorial, it is the function of the law and of those of us who have the privilege to call themselves practitioners of that discipline to act as the lubricants when the machinery seems to be grinding to a halt, when confrontation should be eased and when ways of making the whole process get on the road again are essential. I want to express in the strongest possible terms my opposition to the heresy that it is not the function of lawyers to get involved in issues which may sound political. You cannot divorce an issue such as this from politics, nor can you divorce it from the role and the field of the responsibility of law. I believe too, that it is a pernicious heresy to suggest that because the face of our body politic has been perverted, lawyers have no role to play in seeking some fundamental cosmetic change. And when I speak of 'cosmetic', I do not mean on the surface only, but true change.

Om te sê dat ons 'n verwronge samelewing woon, en dat ons derhalwe met ons hande gevou moet sit, en wag vir Armageddon, is nie 'n gedagterigting waaraan ek deelagtig wil wees nie. Ek glo dat wanneer die krisis op sy hoogste is, die plig van diegene wat die begrip het om dit in te sien, ook die hoogste is. Ek meen ook dat daar weinig onder ons is, wat nie besef dat ons 'n nabye toekoms van snelle sosio-politieke verandering tegemoet gaan nie. Dat daardie verandering gepaard sal gaan en noodwendig gepaard moet gaan met horte en stote en haakplekke en spanning en, ja, selfs doodslag, is onvermydelik. Dit beteken egter nie dat die noodsaaklike versoeningsrol van die reg irrelevant geword het nie.

I detect in the rhetoric of the revolutionary a fundamental flaw. I hold it to be an inviolable truth that the way of peace, negotiation, reason and reconciliation is preferable to the way of violence. Therefore I am not prepared to accept those who glibly tell me that the time for reconciliation has passed, that the clock has struck 12 and therefore that we may as well abdicate our responsibility.

Al sou dit waar wees dat die tyd my ingehaal het en daar werklik nie meer tyd is vir die noodsaaklike opvoedings- en versoeningstaak nie, dan gaan ek eerder die ewigheid in met die wete dat ek probeer het om my plig te doen, al was dit te laat, eerder as dat ek my hande gewas het en gesê het: 'Dit is te laat.' Ek glo nie dit is nie en ek glo in ieder geval dat as daar twyfel daaroor is, diegene tussen ons wat werklik ernstig is oor ons toekoms, nie daardie oppervlakkige slagspreuk kan aanvaar nie, naamlik dat ons oorbodig geword het nie. Ek meen dat, as dit werklik ons erns is, die woord van ons lippe die oordenkinge van ons hart moet weerspieël en, meer belangrik, dat dit vergestalt moet word in die werk van ons hande.

Mag ek, sonder om hoegenaamd enige bybedoeling daarby te hê, sê: Nkosi Sikelel'iAfrika.

APPENDIX 1 Legality and struggle: towards a view of a bill of rights for South Africa

D M Davis
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(This paper was submitted by Professor Davis at the panel discussion held on 1 May 1986)

Some years ago I published an article evaluating the doctrine of human rights and its applicability within the South African context. The thrust of my argument was that law has no intrinsic value of its own. Irrespective of whether its content is devoid of human rights, on the one hand, or embraces all the human rights. I have adumbrated, law remains a mechanism utilized by the power bloc in society for its own needs. It is essentially because the law is a tool of power that the cry for human rights to be written into a legal system is so futile.[1] Hence the conclusion was reached that the 'purpose of the entrenchment of human rights, far from being that of reducing conflict in society, is to contain and confine that conflict within acceptable boundaries'.[2]

Reflecting upon this argument which caused a heated debate at the time,[3] it is clear that the basis for my contentions was founded upon an instrumentalist view of law which conceived of law as a mere tool to be used by the dominant social actors to continue to promote their objectives.[4] Such an approach failed even to pose the question of the specific form of law and the manner in which such form articulated with the overall requirements of the South African social formation within which these social actors function.

This paper is an attempt to extend legal theory beyond the instrumentalist approach as well as the dominant strand within radical legal theory, namely reductionism in which the law is located as part of the superstructure which in turn is reflective of the economic base, in order to canvass questions of rights in South Africa of the present and future. Such a view is founded upon the idea that, in the social production of their life, men enter into relations of production. The sum total of these relations of production constitutes the economic structure of society, the real foundations, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual process in general.

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1 Davis "Human Rights: a re-examination" 1980 *SALJ* 94, 101-2.
2 *Ibid.*
3 See eg Forsyth "Human Rights and Ideology: A First Examination" 1980 *SALJ* 103.
4 See in this connection Bankowski & Mungham *Images of Law* (1975).

Both the instrumentalist and reductionist approaches afford inadequate frameworks for analysing law because:

(a) there is no analysis of the relationship between law and other social institutions (namely the superstructure except as a passive reflection of the superstructure);

(b) there is no explanation of the functions of law or of why law needs to express the relations of production;

(c) the manner in which conscious action arises, that is, do individuals only create laws that directly reflect the economic bases and its reproduction? In short, reductionism helps to develop a satisfactory explanation of the link between base and superstructure. In terms of this analysis the reform of South African law could only occur when the needs of the economy so dictated; political action would play no role in such change;

(d) there is no analysis of the differing forms and effects of law.

All too often there has been a tendency[5] to be over-concerned with economic conditions, to overlook the historical specificities of the class struggle, and to ignore the actual social consciousness of people and classes because such consciousness would necessarily correspond to the development of material productive forces. Raymond Williams puts the point superbly in relation to cultural studies:

> Any modern approach to a Marxist theory of culture must begin by considering the proposition of a determining base and a determined superstructure. From a strictly theoretical point of view this is not, in fact, where we might choose to begin. It would be in many ways preferable if we could begin from a proposition which originally was equally central, equally authentic: namely the proposition that social being determines consciousness. It is not that the two propositions necessarily deny each other or are in contradiction. But the proposition of base and superstructure, with its figurative element and with its suggestion of a fixed and definite spatial relationship constitutes, at least in certain hands, a very specialized and at times unacceptable version of the other proposition. Yet in the transition from Marx to Marxism, and in the development of mainstream Marxism itself, the proposition of the determining base and the determined superstructure has been commonly held to be the key to Marxist cultural analysis. We have to revalue 'determination' toward the setting of limits and the exertion of pressure, and away from a predicted, prefigured and controlled content. We have to revalue 'superstructure' towards a related range of cultural practices, and away from a reflected, reproduced or specifically dependent content. And, crucially, we have to revalue 'the base' away from the notion of a fixed economic or technological abstraction, and towards the specific activities of men in real social and economic relationships, containing fundamental contradictions and variations and therefore always in a state of dynamic process.[6]

In my reassessment of the nature of law I have been influenced considerably by the last work of Poulantzas, *State, Power and Socialism*. His view of the state as a condensation of the power relationship between classes implies that the state apparatus becomes an *intense site* of political struggle. For the

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5 See my 1980 article as well as Raymond Suttner "Law, justice and the nature of man" 1973 *Acta Juridica* 173 as instrumentalist conceptions of law.

6 Wiliams "Base and superstructure in Marxist cultural theory" 1973 *New Left Review* 3 at 6-7.

administration is "caught between the hammer of the governmental apex and the anvil of social struggles. In every country with which we are now concerned we can see the exercise of direct, rank and file democracy. These struggles exhibit a characteristic *anti statism* and express themselves in the mushrooming of self *management centres* and networks of direct intervention by the masses in the decisions which affect them".[7]

Poulantzas has succeeded in introducing the vital element of class struggle into an analysis of law and state. Each state apparatus can be analysed in these terms to include the differential presence of *class forms* – each apparatus is subject to and influenced by political struggle. Such an analysis provides the potential for developing a critical theory of law which transcends the limitations of the instrumentalism and reductionism mentioned above. In short, the capitalist mode of production constitutes the population of a society in terms of classes having differential access to the means of production. Whilst class positions can be designated at the level of the relations of production, there is no prototypical form of the class struggle. The struggle of the masses may take on different forms according to the conditions of the labour process and the discourses through which it constructs its interests and organises its objectives at a particular moment. If the mode sets the mould for class divisions, political struggle does not passively reflect the economic base but operates in terms of the wills of the political actors within the mould set by the capitalist mode.

Poulantzas' analysis can be extended beyond traditional reductionism in that, although there is a region called "economy" which exists prior to and independent of specific political and ideological conditions, this economy, as with all "regions" of the social formation is a terrain of political struggle and cannot be understood in terms of a simple logic of reductionism but by means of an articulation of a complex of social relations. Consequently, political struggle and its effects upon the social formation need to be treated not as a Pavlovian response to the demands of a clearly situated, monolithic base but in terms of an acceptance that the material reproduction of society results from a complex series of practices articulated in diverse ways; hence the primary position of politics within the economy itself.

Mathieson affords a suitable conclusion in respect of this discussion:

> It is important to recognize here that the system of ideas as such does not have a changing effect on the material structures; the system of ideas as they exist in the heads of people, and only there, are in fact not very effective; material conditions cannot be thought away through intelligent thoughts . . . The given system of ideas must come out of the heads of people and be turned into concrete interventions, concrete struggle, in the material structures. By coming out of the heads of people, by being turned into concrete struggle in materiality, the system of ideas is in turn also changed – in and through the dialectical process or . . . it is under particular material conditions that the system of ideas are disseminated among people and turn from thought into action.[8]

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7 Poulantzas *State, power and socialism* (1978) at 44.
8 Mathiesen *Law, society and political action* (1980) at 182-3.

1 IMPLICATIONS OF THIS ANALYSIS FOR THE BILL OF RIGHTS DEBATE IN SOUTH AFRICA

On the basis of an instrumentalist premise I dismissed human rights as a "bourgeois obfuscation" in my 1980 article. Applying the far more sophisticated framework developed by way of Poulantzas, there is a need to examine the matter afresh. The nature of law, as well as the form of state apparatuses is not a given object to be read off from the economic base, perceived as a fixed economic or technological abstraction. Rather, they are "the specific activities of men in real social and economic relationships, containing fundamental contradictions and valuations and therefore always in a state of dynamic process".[9] The state and law is shaped by the level and intensity of the political struggles within a social formation. As Poulantzas expressed it "the dominated classes exist in the state not by means of apparatuses concentrating a power of their own but essentially in the form of centres of opposition to the power of the dominant classes; for the dominated classes to take power through struggles which are inscribed in the strategic field of the mechanisms and apparatus of power".[10]

Two implications flow from this argument, namely (1 1) the status of civil liberties and the rule of law depends on the impact of the struggles of the dominated classes upon the legal and political structures and (1 2) whilst law legitimates and mystifies class rule, the continued effectiveness of the legal system depends on its ability to express the rights, powers and interests of subordinate classes.

1 1 The first implication can be illustrated by a brief reference to the development of the post-1948 South African state.

The conventional wisdom within radical South African sociology has been to periodise the post-1948 state into three stages, namely 1948-1961 during which period extra-parliamentary struggle was protected by law; 1961-73 in which the state outlawed all forms of extra-parliamentary struggle and 1973 to the present in which following the 1973 Durban strikes, increased trade union activity forced concessions from the state culminating in the re-emergence of extra-parliamentary opposition to the state.

Although the post-Sharpeville period was characterised by apparent calm, the explanation thereof can surely not be found exclusively in terms of an omnipotent state able to utilise repressive instruments with impunity. On the basis of this theory developed there is a need to examine the nature, intensity and organisation of political struggle during this period in order to understand how civil liberties and scope for legally protected extra-parliamentary struggle were destroyed. In short this periodisation is far too instrumentalist to explain the changes in conditions for political activity during the 1960s, whilst ironically in analysing the 1970s in this way any reference to the state and concentrates upon the effects of economic struggle upon the legal and political struggles is omitted.

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9 Williams at 6.
10 Poulantzas at 151.

It is beyond the scope of this contribution to analyse the political struggles pre- and post-Sharpeville but an analysis by Lawrence Schlemmer of mass organisations in 1969 provides clear support for the points made above, particularly when he suggests that "government and police action had crushed the intellectual leadership of African and other non-white opposition groups, and in so doing had left these groups voiceless. These leaders had, however, been marginal in non-white society, and were removed before any coherent political organisation with grass-roots involvement could come into being".[11] Schlemmer's analysis focussed upon an important aspect in explaining the rise of authoritarianism in the 1960s.

When civil liberties and the rule of law are evaluated, it is inadequate to analyse changes in the social formation in terms of the whim of the ruling classes manipulating the state as a blunt instrument of repression or as a genial mechanism of co-operation. Rather the state must be seen as a material condensation of political struggle; hence the scope for the struggles of the dominated to influence the shape of the state, thereby ensuring some form of protection by way of a legally guaranteed terrain for extra-parliamentary political activity. Compare, for example, the state of emergency in 1960 and that in 1985. In 1960 the state succeeded within a relatively short period to crush the major political opposition organisations, the PAC and the ANC. Although militarily weaker than at present, the state effectively destroyed its opposition which had not developed an effective mass base and grass-roots organisation by the end of the 1950s. By contrast the 1985 emergency was lifted without any sign of a state victory. It has been suggested that the decision to declare a state of emergency was a fatal blunder, for despite a brutal exercise of repression the state has been unable to curb the growth of political opposition. That it damaged extra-parliamentary organisational infrastructure is one thing, that it failed to stem the tide of opposition is another, more significant matter. More organised opposition operating within the context of a different (more monopolistic) mode of production has meant that repression on its own will not bring the state a victory – indeed if all the state's military power is unleashed, the only consequence will be a wasteland in South Africa.

The political struggle will take place on a terrain on which legal protection will not entirely disappear and on which one reform package or other will be presented as a solution to the political disequilibrium.

In analysing the difference between the 1960s and the 1980s it must be conceded that changes in the capitalist mode towards monopoly capitalism, played an important role in creating the more favourable conditions for the changes which were wrought post-1973, the importance of the necessary intensity of political struggle cannot be under-emphasised. For this reason care must be taken not to dismiss the re-emergence of the extra-parliamentary terrain as a form of subtle repression, affording no scope for a further intensification of political struggle.

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11 Schlemmer 'The Negro ghetto riots and South African cities' *Institute of Race Relations* (1969).

The ascendancy of monopoly capitalism together with increasing levels of struggle as workers in particular developed more sophisticated forms of organisation has had a profound effect upon the state. As Stanley Greenberg has noted:

> The racial-state ideology forged during the 1950s and 1960s has yielded from the mid-1970s to widespread disunity. The dissolution of the ascendent ideology is apparent in the disintegration of thematic unity and the emergence of conflicting perspectives within and outside the State.[12]

Within the constraints imposed by a changing mode of production, the state has attempted to reconstruct a hegemonic project by way of the reform strategy. In this it has attempted to draw in not only whites but coloureds and Indians within a constitutional framework in which future political battles can be fought. Inevitably, spaces for organisations have opened up as has the ability to enforce a few limited legal rights; a conclusion which leads to the second implication of the theoretical section.

1 2 Law cannot be analysed in one-dimensional terms. The effectiveness of law as an ideological force and as a means of cementing and protecting ruling class hegemony depends upon the legal system encapsulating a consensus which is present in economic, cultural and political practices. Even a repressive state requires an ideological alliance between the ruling and subordinate classes without which law cannot be considered as naked power.[13]

It follows from the above that law (as opposed to naked power) creates spaces and rights which cannot be dismissed as "bourgeois illusions" created by the state to co-opt and emasculate the blind and stupid masses.

Where does this take an analysis in respect of a bill of rights for South Africa? The answer is dependent upon dividing the discussion into two, namely:

1 2 1 South Africa at present: Some thirty years ago Professor Ben Beinart wrote that only in democratic states will human rights truly exist. For him the first basic right is the franchise for all people who are capable of participating in it. By contrast, "undemocratic states are not in a position to guarantee or even tolerate civil rights for those rights are not compatible with the position of the rulers. These states may sometimes be prepared to confer such rights in the most glowing language but they will not be prepared to see to their implementation".[14]

In South Africa today there is much talk of a bill of rights within the context of the 'reform' policies. Within the undemocratic framework of South Africa at present, the introduction of a bill of rights is likely to ensure "built-in" protections appearing in the forms of minority rights but which are intended to safeguard the position of whites. For example, the Buthelezi Commission favoured separate representation for culturally defined segments in the executive and block representation in the legislature as well as minority

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12 *Race and State in capitalist development* (1980) at 208.
13 Summer *Reading Ideologies* (1979) at 264-5.
14 Cape Times 11/10/55.

vetos in educational and cultural matters. Through such mechanisms, the black majority can be prevented from acting as a unified force in the struggle for tangible redistribution of power and the amelioration of socio-economic inequalities. A consociational model seeks to share, diffuse, separate, divide, decentralize and limit power and ensure that there are areas from which the parliamentary majority is banned. "Where there is minority rule over the minority itself in a specific area – either a geographical or functional area – that is the minority segments' exclusive concern".[15]

For all these reasons a bill of rights in the present South African context can hardly be considered as a panacea for the ills of our society. Instead, such a constitutional instrument will aid the development of a black middle class as well as the interests of white owned business but could well prove a fundamental obstacle to changing the undemocratic structure of our society by affording whites with a sufficiently extensive veto power to ensure that change does not affect the substance of the South African social formation. Indeed, it is possible that the bill of rights could be coupled with an extension of first tier government in which all races are represented but by nomination and not election. The bill of rights would then be an added control possessed by whites.[16]

The question of what would happen if an unequivocally liberal bill of rights, for example on American lines, was introduced into present South Africa, naturally arises. Such a constitutional instrument would be revolutionary within the context of our present constitution as it would allow a successful action to be brought to abolish the Population Registration Act and the Group Areas Act on the grounds of racial discrimination (differentiation). The security legislation system would also be abolished on the grounds of infringement of the freedom of the individual. Expressed in these terms it is highly unlikely that the government would even consider such a bill of rights as it would effect a complete change of the South African ground norm.

Such observations do not mean that a more limited bill of rights will have no effect upon democracy. In terms of the analysis developed above, if such a bill safeguarded procedural rights, the bill could be used to provide protected spaces to further the struggle for a truly democratic society.

The advantage of the introduction of even a limited bill of rights in the context of present South Africa is that it might convince people, especially the embittered disenfranchised who perceive our legal system to be extremely repressive, that rights and civil liberties are important and can work to their advantage. If this is the result, a bill of rights could help to preserve a tradition of democracy which will be carried forward into a future South Africa. At present there is a tendency amongst opposition groups to dismiss all rights as cynical manipulations by a crumbling white hegemony. If such a view dominates in a future South Africa, we would have only succeeded in replacing one repressive regime with another. Thompson, particularly in *Whigs and Hunters*, was the first contemporary radical author to warn against this simplistic and crude view of law. For Thompson, civil liberties are not simply

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15 *Buthelezi Commission vol II* at 125.
16 See Daryl Glaser *Weekly Mail* 4/4/86.

a political expedient towards socialism but are a central and constitutive element of socialism itself. Thompson can be criticised for his unqualified acceptance of the merits of civil liberties and his submission that the rule of law is a universal good. However, the point is neither to dismiss the rule of law nor to make a fetish of it but to develop a commitment to the importance of strategies which emphasise the importance of defending formal civil liberties along with a transformative commitment to the development of popular democratic practices which emphasise new forms of direct and participatory democracy.[17]

Ernesto Laclau summarises the point well when he writes:

> The advance towards a real democracy is a long march which will only be completed with the elimination of class exploitation. But this elimination must run parallel with the rejection of such exploitation by the 'majority' of the population, that is by the creation of a historic subject in which both socialism and democracy would be condensed. The alternative lies in the bureaucratic socialism of Eastern Europe.[18]

Laclau's warning is particularly appropriate within the African context, hence the importance of the struggle to defend formal civil liberties and to simultaneously transform them, perhaps along the line of the Freedom Charter.[19]

1 2 2 South Africa of the future: This brings me to a bill of rights for a future South Africa. The position of a bill of rights in this context is very different. As is implicit in the quotation from Laclau's work, there is a need to develop a critical theory of legality which rejects the hopelessly inappropriate concept of the "withering away of law" in a socialist society. Whilst I would readily concede that a preoccupation with human rights and justice may serve "ideological purposes by blinding us to the possibility of changes in production that will dissolve them",[20] I cannot accept Marx's conclusion that notions of right and justice found under capitalism are themselves indications that society is characterised by persuasive conflict and scarcity which makes the call for justice necessary, and that under communism interpersonal relationships will be so harmonious that rights and concepts of justice will be "obsolete verbal rubbish".[21]

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17 Hunt 'The politics of law and justice' in *Politics and Power* at 4, 13.

18 Laclau *Politics and ideology in Marxist theory* (1977) at 107.

19 See in particular Raymond Suttner *The Freedom Charter – peoples charter in the nineteen eighties* (1984). In particualr see 23 where Suttner argues "if the democratic organizations struggling for a realization of the Charter, develop a working-class leadership and they convince themselves and other classes that there is a place for all under socialism, then it is likely that the democratic gains will deepen into socialism. It will be a deepening of both the national and the democratic character of the struggle." See in more general terms Leeson "Capitalism, statism and socialism' in Prior (ed) *The popular and the political* (1981) where he argues "an interpretation of what most socialists would hope for from the socialist mode of production would say that on the basis of public property there would be the maximum development of the forces of production by technical advance and by education. The relations of production would be such as to require the thoroughgoing democratisation of all aspects of public life via the development of popular participation at all levels and in all aspects of economic and political affairs."

20 Buchanan *Marx and justice – the radical critique of liberalism* (1982) 156.

21 Buchanan at 57.

To suggest that a modern industrial society can be democratically organized by command from a single centre or by devolution of all power to popular democratic bodies is to contradict the reality of the third world and is to ignore the need that there inevitably are numerous decision making centres which require co-ordination in a modern industrial society.

Interestingly a recent analysis by Albie Sachs of legal struggles in South Africa concludes by describing a broad framework for a bill of rights in a democratic South Africa. However, Sachs suggests that the manner in which a democratic South Africa is established is a matter for the new sovereignty. If this implies that the struggle for democracy can take place without any clearly stated democratic objectives including the protection of human freedom, and that all considerations of freedom are to be put aside until power is gained then I must respectfully disagree with Sachs. The analysis of present South Africa hopefully makes it clear that an extensive bill of rights will not be introduced by the state within the present historical conjuncture. The only bill which could conceivably extend democratic rights, is one which flows from the agenda of the mass based organisations opposing the state. This presupposes a complete change in power and a new and democratic constitution.

However, for a democracy to emerge in South Africa in which the arbitrary excesses of central state power are curbed, and in which participation in the political process is extended to all 'capable of participating in it', a tradition which emphasises the importance of rights and democracy must be built and strengthened even before political power is gained. To a large extent the Freedom Charter represents a framework of rights deemed important by political organisations of the 1950s who represented a tradition of almost half a century of struggle for majority rights.

The Freedom Charter was and is still a progressive document but its many vague notions need to be clarified in order to reflect a clear vision of a future South Africa which is presently being built through struggle. Such classification can only assist to strengthen a democratic tradition.

When power is gained by the majority of South Africans it is to be hoped that the tradition of democracy and consideration of rights is so deeply entrenched that it is deemed sufficiently important to protect such democracy by a clear statement contained in a bill of rights. For this reason there is a need to reject the notion of the Freedom Charter being an empty vessel into which one can pour a socialist content after the attainment of power. In other words, a democratic future for South Africa will be dependent upon the nature of the political opposition and its traditions built up prior to taking power. To ensure that rights are deemed important in a future South Africa, there is a need to build a democratic 'hegemonic' project.[22] This entails a political movement harnessing to its support popular discontent with apartheid, neutralising opposing political forces and building a new democratic common sense.

If such a project succeeds a bill of rights would be present on the political agenda and could play an important role in promoting national reconstruction, in particular of harmonising the social programmes necessary for the

22 See the incisive analysis of hegemonic projects by Stuart Hall 1985 *New Left Review* 115.

restoration of the land, wealth, dignity and general social rights of the dispossessed, with the legitimate personal needs and anxieties of all the individuals who make up the South African people. Such a charter of rights for the future can play an important role in unifying disparate opposition groups and ensuring that a political hegemony, alternative to the state's is constructed. This becomes particularly important because the transformation of South Africa will not be achieved primarily by war but by the intensive opposition of a growing internal opposition. Analysts such as Giliomee, who have borrowed uncritically from Theda Scopcol's work on revolutions, argue that whilst the South African military apparatus remains cohesive, the country will survive, adopt a short term view and ignore the causes of the developments of the past ten years. Change will occur through struggle, mainly political and economic and it is to this struggle that one must turn to see the possibility of democracy in the future. If the change which occurs emerges out of a democratic tradition, it is possible that respect for democratic rights will be deeply embedded within the new common sense. In this event the reconciliation between extending power as widely as possible and curbing abuse of power can be achieved.

2 CONTENT OF A FUTURE BILL

Sachs has listed a number of rights which he considers should be contained in a bill of rights including the following:

(a) Declare all apartheid law and practices to be unlawful and punishable, so that citizens may freely claim their place in society irrespective of race or ethnic origin.

(b) Commit the new state to a programme of social, cultural and economic reconstruction so that access to the benefits of society should be made equally available to all citizens.

(c) It should, in the context of respect for the principles of democracy and equality, affirm the general political rights of citizens, and guarantee processes designed to ensure that power is truly exercised by the people and not by some group usurping the name of the people.

(d) Clearly set out what the personal rights which each person is entitled to enjoy for example, the right of respect, to walk freely in the street and feel secure in one's home; the right and duty to work, to contribute one's skills and energies towards the re-building of the country and to be appropriately rewarded; the right of respect for one's family, or to live outside of a family; the right to equal treatment in all spheres of life, independently of sex, religion or social background.

One can also envisage an important set of clauses dealing with group rights, such as the right to use one's language, the right to cultural expression and the right to worship. Stripped of its association with race and political dominance, cultural diversity becomes an enriching force, which merits constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole.

The rights already reflect a political tradition of the opposition. Given the experience of the majority of this country it is unlikely that any document

listing rights will be based on a classical liberal premise. Already research indicates a growing acceptance of a more socialist thrust in the extra-parliamentary opposition. I am in agreement with this direction. Modern liberal theory itself has been critical of classic liberalism which advocates a system of natural liberty allowing a more or less unrestrained free market to operate. Rawls, for example, has contended that an unrestrained market mechanism permits distributive shares to be influenced by social contingencies which are arbitrary from a moral point of view.[23]

From a different tradition, Marx condemned the bourgeois notion of equal rights on the basis that every right is a right of inequality. Marx and Rawls, from different perspectives are suggesting that unfettered equal rights recognise unequal endowment as natural privileges. There will not be much guarantee of social justice in South Africa if one set of arbitrary privileges based on race is replaced by a similar set entrenched through the market mechanism. The premise upon which a bill of rights must be based is on a closing of the distance between self and ends and which brings the self once more within the reach of politics. As Sandel puts it "to imagine a person incapable of constitutive attachments . . . is not to conceive an ideally free and rational agent but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command which carries consequences none the less for my choices and conduct".[24]

In South Africa a constitutional framework for the future cannot afford the luxury of ignoring the history of the society. A programme for a future South Africa has to understand and redress the past. For example, one cannot pretend to be ignorant of the fact that in 1980, income of Africans per head represented 9,9% of Whites compared to 7,8% in 1970. Nor can one ignore that in 1984, for example, household incomes for Blacks was R272 per household compared to R1834 for Whites.[25] As the comparative figures were R136 and R912 in 1980, the gap has remained fairly static during the high years of government reform. For a bill of rights to play a role in society, it has to be respected and supported by a substantial portion of the people, whether by genuine belief or ideological construct. The tradition of mass struggle in South Africa makes it more likely than not that some form of socialism will be essential for a bill to have legitimacy.

CONCLUSION

All talk of rights will be irrelevant if the political opposition does not succeed in dispersing and extending democratic principles in its present struggle. For the success of a bill of rights will depend on whether popular organisations are themselves committed to the preserving of a tradition which the

23 See Sandel *Liberalism and limits of justice* (1982), Nigel Simmonds 'Pushukanis and liberal jurisprudence' 1985 *Journal of Law and Society* at 135.
24 Sandel at 179.
25 1984 *Race Relations Survey* at 241-2.

South African state and its white and black allies have destroyed in so determined a fashion over the past 25 years. A bill of rights added to a constitution which emerges out of a non-democratic tradition will arguably be as limited as one introduced into the present context. That is why the express or implied commitment to a two stage theory of change in which the first stage challenges the anti-democratic state and only at the second stage the questions of economic and social equality, is potentially so dangerous a programme to the future of democracy in South Africa.

Let there be little doubt about it, the future of human rights in this country is dependent upon the preservation of a democratic tradition, even under the difficult circumstances of present South Africa. Given the record of the state, a huge burden lies upon the extra-parliamentary opposition.

APPENDIKS 2 APPENDIX

Opgesomde biografiese besonderhede van sprekers en voorsitters
Brief biographical details of speakers and chairpersons

LWH Ackermann

Gebore te Pretoria op 14 Januarie 1934; skoolopleiding te Pretoria-Oos en Pretoria Boys High School; studeer te Stellenbosch (BA LLB) en Oxford (BA Hons); begin in 1958 aan Pretoriase Balie praktiseer; word senior consultus

in 1975, asook lid van die Pretoriase Balieraad en van die Algemene Raad van die Balie van Suid-Afrika; neem in 1983 deel aan die simposium oor International Human Rights en in 1984 aan die simposium oor Justice and Society, beide in die VSA; bestuurslid van Regslui vir Menseregte en 'n trustee van die Pretoriase Regsentrum; regter van die Hooggeregshof van Suid-Afrika (TPA).

D Basson

Formerly attached to the Law Faculty of UNISA, 1977-1984; graduate of the University of Pretoria (BA Law (1974) LLB (1976) (both *cum laude*)); graduate of UNISA (LLD (1981)); graduate of the University of Pretoria (LLD (1984)); author of more than twenty articles in legal scientific journals; co-author of a textbook for students on South African constitutional law; adviser to the International Centre for Constitutional Studies; adviser in Namibia; undertook research for the HSRC; committee member of the Pretoria Branch of Lawyers for Human Rights; advocate of the Supreme Courts of South Africa and Lesotho; at present, associate professor in constitutional law in the Department of Public Law at the University of Pretoria.

A Chaskalson

Born in Johannesburg on 24 November 1931; graduate of the University of the Witwatersrand (B Com (1951) LLB (*cum laude*) (1954)); admitted to the Bar in 1956; appointed as senior counsel, 1971; chairman of the Johannesburg Bar Council, 1976, 1982; member of the Johannesburg Bar Council, 1967-1971, 1973-1984; vice-chairman of the International Legal Aid Division of the International Bar Association, 1983; member of the National Bar Examination Board since 1979 and convenor of this Board since 1981; honorary professor of law at the University of the Witwatersrand since 1979; member of the Board of Control of the Centre for Applied Legal Studies at the University of the Witwatersrand since 1979; member of the national council of Lawyers for Human Rights since 1980; Claude Harris Leon Foundation award for community service, 1984; University of the Witwatersrand

Alumni Honour Award for exceptional service to the community, 1984; elected an Honorary Member of the Bar Association of the City of New York, 1985; at present, member of the Johannesburg Bar, director of the Legal Resources Centre and vice-chairman of the General Council of the Bar of South Africa.

RB Cleaver

Gebore te Delareyville in die Wes-Transvaal in 1936; skoolopleiding aan Pretoria Boys High School; studeer aan die Universiteite van Stellenbosch (BA) en Pretoria (LLB); toegelaat as prokureur in 1960, ook as Notaris en Aktevervaardiger; 'n vennoot in 'n prokureursfirma in Pretoria sedert 1962; dien as komiteelid van die Pretoriase Prokureursvereniging, as voorsitter van die Pretoriase Prokureursvereniging, as lid van die Raad van die Prokureursorde van Transvaal en as President van die Orde; lid van die Regs-Subkomitee van die Staande Advieskomitee oor Maatskappyaangeleenthede; dien ook as lid van verskeie staande komitees van die Vereniging van Prokureursordes van Suid-Afrika; lid van die redaksiekomitee van *De Rebus*; tans die president van die Vereniging van Prokureursordes.

HM Corder

Graduate of the University of Cape Town (B Com LLB), of Cambridge (LLB) and of Oxford (D Phil); research interests: law and the courts in the state; advocate of the Supreme Court of South Africa; chairman of the national council of Lawyers for Human Rights, 1984-1985; author of *Judges at Work* 1984; member of editorial boards of *Responsa Meridiana, SA Journal on Human Rights* and *Natal University Law and Society Review*; senior lecturer in the Department of Public Law at the University of Stellenbosch.

DM Davis

Graduate of UCT and Cambridge; at present, associate professor in the Department of Commercial Law at the University of Cape Town; author/editor of *Crime and Power in SA* (with Mana Slabbert), *South African Estate Planning* (with Gavin Urqhuart) and Gordon and Getz *SA Law of Insurance* (3rd ed); presently working on a book entitled *The Rise of the Apartheid State 1948-1961*.

GE Devenish

Born at Roodepoort in 1941; matriculated at Krugersdorp High School; graduate of the University of the Witwatersrand (BSc); graduate of the University of South Africa (LLB (1972)); professor in Private Law at the University of Fort Hare, 1973-1974; professor in Public Law at the University of the Western Cape, 1976-1981; at present, professor in Public Law at the University of Natal; author of articles on constitutional law; presently working on his thesis entitled *Constitutional change and reform in South Africa*; main interests: race relations, South African and international politics.

JM Didcott

Born in Durban on 14 September 1931; matriculated at Hilton College, Natal, 1948; graduate of the University of Cape Town (BA (1951) LLB (1953)); president of the Students' Representative Council, 1952-1954; president of NUSAS, 1954-1955; awarded an Abe Bailey Travelling Scholarship, 1953; admitted to the Bar in Cape Town, 1954; Supreme Court reporter for *The Cape Argus*, 1954-1955; practised at the Bar in Durban, 1956-1975; appointed senior counsel, 1967; chairman of the Society of Advocates of Natal, 1973-1975; delivered the Richard Feetham Academic Freedom Lecture at the University of the Witwatersrand, 1978, the Professor Malherbe Memorial Lecture at the University of Stellenbosch, 1981 and a Graduation Address at the University of Natal, 1983; visiting scholar at the Law School of Columbia University, New York, 1984; addressed gatherings at the following law schools: Harvard, Cambridge, Yale, Stanford, University of California, Berkeley and many more; at present, a judge of the Natal Provincial Division of the Supreme Court of SA.

CJR Dugard

Graduate of the University of Stellenbosch (BA LLB (1958)); graduate of the University of Cambridge (LLB Diploma in International Law LLD); advocate of the Supreme Court of South Africa; appointments held: visiting professor of law, University of California, 1981; dean, Faculty of Law, University of the Witwatersrand, 1975-1977; visiting professor of law, Duke University, 1974-1975; visiting professor of Public and International Affairs, University of Princeton, 1969; presently professor of law and Director of the Centre for Applied Legal Studies at the University of Witwatersrand; president of the South African Institute of Race Relations, 1978-1979; publications: *The South West Africa/Namibia Dispute* (1973); *Introduction to Criminal Procedure* (1977); *Human Rights and the South African Legal Order* (1978); several articles in scholarly journals in South Africa, Britain and the USA; main interests: international law, jurisprudence, human rights law, constitutional law and criminal procedure.

LM du Plessis

Gebore op 31 Mei 1949; studeer aan die Potchefstroomse Universiteit vir CHO (B Jur et Comm (1970) LLB (*cum laude*) (1972) B Phil (*cum laude*) (1974) LLD (1979)); outeur van verskeie wetenskaplike artikels in vaktydskrifte en enkele monografieë naamlik *Die Professionele Gedrag van die Juris* en *Textbook on the Interpretation of Statutes*; hoofredakteur van die Potchefstroomse Reformatoriese tydskrif, *Woord en Daad* en in hierdie hoedanigheid 'n sterk pleitbesorger vir ingrypende politiek-staatkundige hervorming in Suid-Afrika; belangstellings: sake van die dag en kwessies rakende die politieke situasie in Suid-Afrika; was aktief betrokke by die RGN se Sportondersoek en Ondersoek oor Tussengroepverhoudinge; tans professor in en hoof van die Departement Regsfilosofie aan die PU vir CHO.

SC Jacobs

Gebore op 12 Oktober 1943 te Worcester; skoolopleiding aan die Hoër Seunskool Worcester; studeer aan die Universiteit van Stellenbosch (BA Regte (1965) LLB (1967)); staatsadvokaat in die Kantoor van die Prokureur-generaal in Pretoria, 1969; gegradueerde van die Vrije Universiteit Amsterdam (Doct Iuris (1970)) met die onderwerp: *Die beginsel pacta tertiis nec nocent nec prosunt van die algemene volkereg en artikel 2(6) van die handves van die VVO*; senior lektor in die departement Publiekreg van die PU vir CHO, 1972; hoof van hierdie departement, 1972; navorsing aan die *Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht* in Heidelberg, Duitsland; aangestel op die Regshersieningskommissie van die regering van Bophuthatswana in 1978; publikasies: *'n Nuwe Grondwetlike Bedeling vir Suid-Afrika: Enkele Regsaspekte* (1981); *Grundrechte und Verfassungsreform in Südafrika*.

DJ Joubert

Studeer aan die Universiteit van Pretoria (BA LLB LLD); voltydse dekaan van die Fakulteit Regsgeleerdheid, Universiteit van Pretoria; navorsings- en publikasiewerk handel oor kontraktereg, verteenwoordiging en die huweliksreg.

GPC Kotzé

Gebore op 29 September 1918 op die plaas Roodepoort, distrik Bethal; skoolopleiding te Afrikaanse Hoër Seunskool, Pretoria; studeer aan die Universiteit van die Witwatersrand (B Com LLB); toegelaat as advokaat van die Hooggeregshof, 1946; tree toe tot die praktyk aan die Balie van Johannesburg, 1946; dien as lid van die Johannesburgse Balieraad; verkies tot onder-voorsitter, 1962-1963 en tot voorsitter, 1963-1964; word senior consultus, 1962; aangestel op die regbank van Transvaal, 1965 en die Oos-Kaap, 1967; voorsitter van die Kommissie van Ondersoek re Sciëntologie, 1969; woon die vergadering van die World Assembly of Judges by te Abidjan, Ivoorkus, 1973; permanent aangestel as appèlregter, 1976; tree uit as appèlregter, 1985; van voorneme om eersdaags in Kaapstad te vestig en steeds aktief te wees.

JC Kriegler

Gebore te Pretoria op 29 November 1932; skoolopleiding te Pretoria-Oos, Hoër Volkskool Heidelberg en King Edward VII, Johannesburg; studeer aan die Universiteit van Pretoria (BA (1954) en UNISA LLB (1958)); lid van die Johannesburgse Balie, 1959; senior advokaat, 1973; voorsitter van die Johannesburgse Balieraad, 1976, 1979, 1983; regter van die Hooggeregshof (TPA), 1984; eerste voorsitter van Regslui vir Menseregte 1981-1983; Transvaalse direksie, Stedelike Stigting, 1981-1984; trustee, Legal Resources Trust, 1974-1986.

G Kruger

Graduate of the University of Stellenbosch (LLB (1968)); articles of clerkship, Cape Town, 1969-1971; Cluver and Markotter, Stellenbosch, 1976; assistant secretary, Ciskei Commission, 1979-1980; co-ordinator, Lawyers for Human Rights, Pretoria Branch, 1985.

W Malan

Behaal die graad LLB aan die Universiteit van Pretoria; Nasionale Party LP vir Randburg.

ED Moseneke

Born on 20 December 1947 in Pretoria ; graduated at UNISA (BA (1969) B Iuris (1973) LLB (1977)); admitted and practised as an attorney from 1978; admitted as an advocate, 1983 at the Pretoria Bar; member of the Society of Advocates (TPA); advocate of the Supreme Court of Bophuthatswana; founder member, General Secretary and Executive Member of the Black Lawyers Association, 1979-1983; member and secretary of the Trustees of the Black Lawyers Association Legal Education Centre; serving as a resource person for Amnesty International for the Region SA; lecturer to part-time law students under the auspices of the South African Council for Higher Education; executive member of several black community organisations; visited the USA on an international visitor's programme, 1983; visited the United Kingdom on a programme by the British Foreign Office, 1985; delivered a paper at the American Bar Association Conference on *Apartheid and the Law*, 1985; participant at a seminar on *Justice and Society*, Aspen, Colorado, 1985; visiting lecturer at Columbia, New York, 1986; served a sentence of 10 years in Robben Island Prison, 1963-1973; served with a banning order 1973-1978.

MS Motshekga

Born in Duiwelskloof in 1949; matriculated at Setoteloane in 1969; clerk and relations officer at the University of the North, 1970-1976; admitted as an attorney of the Supreme Court of South Africa; B Iuris (1975) LLB (1977); passed oral examinations LLD (1979); attained a German Academic Exchange Scholarship for Study at the Max-Planck Institute for International and Foreign Criminal Law; conducted research for his LLD thesis at the University of Leiden; graduate of the University of Harvard (LLM (1981)); winner of a *Max-Planck Gesellschaft* Scholarship, a second German Academic Exchange Scholarship; lectured at the Universities of Bayreuth, Freiburg, Klassenburg and Graz (Austria); author of several legal essays; working on a doctoral thesis entitled *The Principle of Legality*; speaker at international conferences in France and Berlin, 1985.

PJJ Olivier

Gebore en getoë Suidwester; skoolopleiding Paul Roos Gimnasium, Stellenbosch; militêre opleiding te die Gimnasium, Voortrekkerhoogte; studeer aan

die Universiteit van Pretoria (BA Regte LLB); dosent aan die Universiteit van Pretoria, 1961; professor in privaatreg aan die Universiteit van Port Elizabeth, 1966; professor in privaatreg aan die Universiteit van die Oranje Vrystaat, 1969; studeer aan die Universiteit van Leiden (LLD); mede-outeur van *Die Onregmatige Daad in die Suid-Afrikaanse Reg*; outeur van *Die Suid-Afrikaanse Persone- en Familiereg*; praktiseer in Bloemfontein as advokaat, 1973-1985; aangestel as regter van die Oranje-Vrystaatse Provinsiale Afdeling van die Hooggeregshof in 1985; tans gesekondeer na die SA Regskommissie as heeltydse lid.

GM Pitje

Former teacher now lawyer; founder member and first chairman of the Black Lawyers' Association until 1985; became director of the Legal Education Centre of the Black Lawyers' Association.

IM Rautenbach

Studeer aan die Universiteit van Pretoria (BA LLB) en aan die Universiteit van Suid-Afrika (LLD); dosent aan die Universiteit van Fort Hare en die Randse Afrikaanse Universiteit in Publiekreg tot 1980; verbonde aan die Kantoor van die Eerste Minister en die Departement Staatkundige Ontwikkeling en Beplanning; vanaf 1985 weer verbonde aan die Randse Afrikaanse Universiteit; proefskrif handel oor die reg op bewegingsvryheid.

L Schlemmer

Sociologist; Director of the Centre for Applied Social Sciences, University of Natal; author of numerous publications.

JC van der Walt

Gebore te Theunissen in 1939; matrikuleer aan Grey Kollege, Bloemfontein; gegradueerde van die Universiteit van die Oranje-Vrystaat, (BA Regte (*cum laude*) (1959)) en die Universiteit van Suid-Afrika (LLB (*cum laude*) (1962) LLD (1974)); eerste professor in Regsgeleerdheid aan die RAU, 1967; eerste dekaan van dié fakulteit in 1970; eerste redakteur van dié regsfakulteit se tydskrif *TSAR* in 1976; lê gereeld oorsese navorsingsbesoeke af tydens sy akademiese loopbaan; gasprofessor aan die Universiteit van Leiden, 1977; gegradueerde van die Universiteit van Keulen en Bonn, 1978; besoek in 1979 die Hebreeuse Universiteit en die Universiteit van Tel Aviv met die oog op navorsingsadministrasie; besoek verskeie universiteite in Amerika, 1981; besoek Australië ten einde navorsing oor professionele opleidingsprogramme te doen, 1982; lid van verskeie rade, byvoorbeeld die Raad van die Universiteit van die Noorde, RAU, die FAK, die SA Akademie vir Wetenskap en Kuns en dien in 1980 as President van die Vereniging van Prokureursordes; dien tans as regsadviseur van die RGN en voorsitter van die RGN se Advieskomitee vir Staatswetenskaplike Navorsing; president van SANRA vanaf 1985; skrywer van *Delict* in *LAWSA* en *Delict: Principles and Cases*;

mede-outeur van *Die Suid-Afrikaanse Persreg* en mede-redakteur van die *Indeks tot die voor-1947 Hofverslae*; outeur van meer as vyftig wetenskaplike bydraes.

JV van der Westhuizen

Gebore te Windhoek; behaal BA (*cum laude*) (1973) LLB (*cum laude*) (1975) en LLD (1980) aan die Universiteit van Pretoria; vanaf 1976 senior lektor en vanaf 1980 professor en departementshoof, Departement Regsgeskiedenis, Regsvergelyking en Regsfilosofie, Universiteit van Pretoria; doen navorsing in Europa in 1978 en as Alexander von Humboldtbeurshouer in 1983; neem deel aan Duits-Anglo-Amerikaanse werkswinkel in verband met strafreg in Duitsland, 1984; gee lesings te *Max-Planck-Institut für ausländisches und internationales Strafrecht*, Freiburg en te Augsburg; advokaat van die Hooggeregshof van Suid-Afrika; redaksielid van *De Jure*; outeur van verskeie artikels; LLD-proefskrif handel oor noodtoestand as regverdigingsgrond in die strafreg; belangstellingsgebied: regsfilosofie; menseregte; sensuur; aspekte van strafreg; aspekte van regsgeskiedenis.

DH van Wyk

Gebore in Heidelberg, Transvaal; matrikuleer aan die Hoërskool Windhoek; gegradueerde van die Potchefstroomse Universiteit vir CHO, die Randse Afrikaanse Universiteit en die Universiteit van Suid-Afrika; verbonde aan die departement Staats- en Volkereg, UNISA, sedert 1975; bevorder tot professor in 1979; hoof van die Departement Staats- en Volkereg sedert 1986; mede-redakteur van die *Suid-Afrikaanse Jaarboek vir Volkereg*; waarnemende voorsitter van die UNISA Regshulpkomitee; komiteelid van Regslui vir Menseregte (Pretoria); vise-president van die Vereniging van Universiteitsdosente in die Regte; voorsitter van die Lynnwoodrifse Adviessentrum; publikasies het 'n staats- en administratiefregtelike karakter; tans besig met die publikasie van 'n *Suid-Afrikaanse Tydskrif vir Publiekreg* in samewerking met prof HP Viljoen van die Universiteit van Pretoria.

HP Viljoen

Gebore en getoë te Pretoria; gegradueerde van die Universiteit van Pretoria (BA LLB (1966)); toegelaat as prokureur, notaris en aktevervaardiger 1969; regsassistent, Kamer van Mynwese, Johannesburg, 1970-1972; gegradueerde van die Rijksuniversiteit Leiden (LLD (1975)); tans professor in Publiekreg aan die Universiteit van Pretoria; outeur van verskeie artikels; mede-outeur van *Studentehandboek vir die Suid-Afrikaanse Staatsreg*, 1986.

MP Vorster

Studeer aan die Universiteit van Pretoria en die Rijksuniversiteit Leiden, Nederland; begin akademiese loopbaan te Durban-Westville, 1962; aangestel as senior lektor, Universiteit van Pretoria, 1966; professor in Publiekreg en hoof van die Departement Publiekreg vanaf 1971; gesekondeer na die Departement van Buitelandse Sake, 1984.

M Wiechers

Skoolopleiding te Pretoria; studeer aan die Universiteit van Pretoria (LLB (1960) LLD in (1965)); professor in die regte aan UNISA vanaf 1966; skrywer van talle boeke en artikels oor die staats-, administratief- en volkereg; dien as lid in verskeie besture en komitees.

Z Yacoob

Born in Verulam, 1948, as the son of a priest; graduate of the University of Durban Westville (LLB (1972)); practised at the Bar in Durban; actively involved in several welfare organizations, for example The National Council for the Blind and the National Council for Child and Family Welfare; politically active as a member of the executive of the Natal Indian Congress and a former member of the national executive of the UDF.

BUTTERWORTHS

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