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# *The Quest for a Liberal Democracy in South Africa\**

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## I INTRODUCTION

In modern South Africa it has become fashionable to discredit liberals and liberalism. Political forces on both the right and the left dismiss the values and ideals of liberalism as irrelevant to the future of South Africa and deride the efforts of liberals to create, by means of the advancement of civil rights, a political environment for a negotiated settlement. The 'right' has never been enthusiastic about human rights and has devoted much of its energies over the past forty years to the suppression of basic rights. Now the 'left' has undermined the value of civil rights as an instrument of change by claiming that national liberation will not be brought about through an extension of civil rights.<sup>1</sup> Unhappily, it is not only the liberal contribution to the process of change that is denied. Increasingly the institutions of liberal democracy, embodying the values of liberalism, are denounced as unhelpful to the construction of a just South African society.

It is not the purpose of this paper to extol the part played by liberals in the defence of human rights and in the debate over constitutional options in South Africa. This is the task of the historian. Nor is it intended to pursue the argument<sup>2</sup> that an extension of basic rights—particularly the freedoms of speech, assembly and association and equality before the law—is the only peaceful way to create a political environment in which free negotiations can take place to resolve the present political deadlock. Instead, it will be contended that the institutions and principles of liberal democracies offer the best hope for a new South Africa; and that it is therefore incorrect to dismiss the relevance of the liberal contribution at this stage in our history.

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<sup>1</sup> A Sachs 'Toward the constitutional reconstruction of South Africa' (1986) 2 *Lesotho Law Journal* 205.

<sup>2</sup> This is the essential thesis of the present writer advanced in *Human Rights and the South African Legal Order* (1978). See too, this writer's views on the advantages of an interim Bill of Rights in 'Changing attitudes towards a Bill of Rights in South Africa' in H P Viljoen and J van der Westhuizen (eds) *A Bill of Rights for South Africa* (1987).

## II THE INSTITUTIONS OF A LIBERAL DEMOCRACY

Liberals are principally concerned with planning a society in which liberal values will be protected and advanced: that is, with establishing and maintaining a political order that guarantees equality before the law and due process of law, that advances basic civil and political liberties, that allows equality of opportunity to all, and that fairly distributes the resources of society. Liberals are not concerned with the mobilization of power and the harnessing of power to serve a particular political ideology.<sup>3</sup> Rather, they seek to tame power in order to ensure that it is not used to suppress liberty. The manner in which this taming of power occurs must, however, enjoy the support of the majority of the people. It must be premised on some kind of social contract of the kind envisaged by John Rawls in his *Theory of Justice* in order to confer it with legitimacy.

In modern times the liberal ideal has been most nearly achieved in States termed liberal democracies. Different political systems and constitutional devices have been employed to achieve the liberal ideal. Some have chosen territorial federalism, others have invoked the principles of consociationalism—proportional representation, coalition governments and minority vetoes—and many have adopted Bills of Rights. Britain has secured its position as a liberal democracy by other means. It has retained the Westminster model—majoritarian rule in a unitary State—with checks and balances rooted in tradition rather than law. That it has succeeded can be attributed to the homogeneity of the population and the strength of history and tradition as political forces and not to the largely unwritten constitution upon which the Westminster system is founded.

There is, therefore, no constitutional form that completely embodies the tenets of liberalism, that stands as a model 'liberal constitution'. On the contrary, a liberal constitution is one that best advances the goals of democracy having regard to the peculiar circumstances of the society that it serves. Consequently the tenets of liberalism do not dictate any constitutional form. They leave it to each society to choose a constitution that will best serve the liberal democratic ideal.

The question to be addressed in this study is 'What institutions and principles of constitutional law will most advance the values of a liberal democracy in the South African setting?' In seeking to answer the question, I shall attempt to position myself as an observer at an imaginary national convention at which all the main political groupings, including both the African National Congress (ANC) and the National Party, are represented. It is not the purpose of this study to predict how or when such a convention will be held, or how much blood the participants will have on their hands when they meet. Suffice it to say that a liberal democracy

<sup>3</sup> See on this subject, C Simkins *Liberalism and the Problem of Power* (1986) Alfred and Winifred Hoernlé Memorial Lecture, SA Institute of Race Relations.

will emerge only from such a meeting: it will not be produced by the self-serving constitutional manipulations of the National Party, nor will it be created by a victorious revolutionary power that has completely destroyed the existing institutions of State. The imaginary convention designed to create a legitimate political order premised on the contractarian principle will therefore not be dominated by any single grouping. Instead it will be attended by groups emotionally unwilling to relinquish power but compelled by circumstances to take their seat at the conference table; and by groups aspiring to power that can no longer be suppressed by military force. The institutions that such a convention might agree upon to create a society to accommodate the expectations and to overcome the fears of the participants and their constituencies is the focus of this study.

It seems highly probable that the agenda of such a convention would read as follows:

- (1) Unitary or federal State;
- (2) Constitutional checks and balances;
- (3) A Bill of Rights;
- (4) Affirmative Action;
- (5) Redistribution of wealth and land.

It is these issues that will form the focus of the present study.

#### (1) *Unitary or federal State*

Partition and territorial fragmentation are defeatist Afrikaner dreams that are unacceptable to the majority of South Africans, who are determined to retain the territorial integrity of the country and to regain the 'independent homelands' excised in pursuance of the fantasy of Grand Apartheid. This means that the only realistic constitutional options before South Africa are a unitary State or federation.

A unitary State with universal suffrage and a strong central Government supported by the majority of the population is an ideal which many<sup>4</sup> cherish. But it is not an ideal that would be favoured by most of the participants in our imaginary national convention. The National Party, which scorns right-wing Afrikaner talk of partition but still flirts with territorial fragmentation<sup>5</sup> and dreams of a confederation of States in Southern Africa, is not yet ready for federation. A fortiori it views a unitary society as totally unacceptable. Transkei, Bophuthatswana, Venda and Ciskei (the TBVC States), which ideally would be represented at such a convention, would also be unwilling to sacrifice their quasi-independence. While a confederal arrangement would probably be

<sup>4</sup> See Alan Paton *Federation or Desolation* (1985) Alfred and Winifred Hoernlé Memorial Lecture, SA Institute of Race Relations 6.

<sup>5</sup> That the National Party has not abandoned the policy of territorial fragmentation is demonstrated by its support for 'independence' for KwaNdebele.

their first choice, there are suggestions that they would consider entering a federation.<sup>6</sup> Clearly they would be unprepared to enter a unitary State and subject themselves to the political rule of those who have ridiculed their existence as separate 'States'. The leaders of the two major self-governing National States—KwaZulu and Lebowa—have indicated their support for a federal formula,<sup>7</sup> as has the leader of the Labour Party, the Reverend Allan Hendrickse.<sup>8</sup> The Progressive Federal Party (PFP) has been committed to a federation since the adoption of the Molteno Commission Report in 1962<sup>9</sup> and, although the New Republic Party's concept of 'corporate federalism' or 'race federalism'<sup>10</sup> differs from ordinary principles of territorial federation, it is more akin to federation than unitarianism.

Support for a unitary State is mainly forthcoming from popular political movements such as the African National Congress (ANC), Pan-Africanist Congress (PAC) and the United Democratic Front (UDF). Unfortunately none of these bodies has produced a constitutional plan, so it is not clear what they mean by 'unitary'. Some of the statements by spokesmen of these bodies suggest that the term 'unitary' is to mean nothing more than 'undivided' or 'unfragmented',<sup>11</sup> which has led Arend Lijphart to conclude that the demands of these bodies for a unitary South Africa

'entail a rejection of partition, especially the establishment of ethnic homelands; they definitely do not entail a rejection of federalism'.<sup>12</sup>

This seems to be wishful thinking. Certainly much of the UDF rhetoric is hostile towards federalism. It must therefore be accepted that there is a division of opinion between the smaller political groupings, mainly with an ethnic or regional base, and the larger popular national movements over the constitutional form of a future South Africa. Territorial federation is, however, the most likely compromise between

<sup>6</sup> In 1983 K D Matanzima, then President of Transkei, said that he would be prepared to rejoin South Africa in a federal arrangement: K P Magyar 'Federation versus confederation in southern Africa: the neglected economic dimension' (1983) *International Affairs Bulletin* 18.

<sup>7</sup> For the views of Chief Ministers Buthelezi and Phatudi on federation, see M Forsyth *Federalism and the Future of South Africa* (1984) SA Institute of International Affairs, Bradlow Series No 2 p 8.

<sup>8</sup> Ibid 9. The Du Preez Commission report of 1979, which was adopted by the Labour Party, did, however, give support to a unitary system: see L J Boule *Constitutional Reform and the Apartheid State: Legitimacy, Consociationalism and Control in South Africa* (1984) 112–14.

<sup>9</sup> *A Rigid Constitution, the Decentralization of Government and the Administration of Justice*. A Report prepared for the Progressive Party of South Africa by a Commission of Experts ('Molteno Report', vol 2).

<sup>10</sup> See Forsyth (n 7) 5–6.

<sup>11</sup> *Power-sharing in South Africa* (1985) Policy Papers in International Affairs No 24, Institute of International Studies 23–4.

<sup>12</sup> Ibid 24.

confederation and 'race federation', on the one hand, and a unitary State on the other. At the same time, the experience of other liberal democracies suggests that it is the most effective constitutional means of taming power.

A number of factors explain the National Party's hostility towards federation. While white domination was assured the concept of federalism was rejected as a strategy aimed at the weakening of National Party rule. Moreover, Nationalists were able to rationalize their dismissal of federation by pointing to the failures of the Federation of Rhodesia and Nyasaland and of federal Nigeria.<sup>13</sup> In more recent times, since it has become abundantly clear that white control cannot continue indefinitely, the National Party has groped for new constitutional models to replace the Westminster system, but stopped short of federation—probably because of the close identification between liberalism and federalism in South Africa.<sup>14</sup> However irrational this explanation may appear, it cannot be discounted. The sad truth is that the National Party's hatred for liberals is unparalleled and it finds it too painful to admit that the liberals may have been right all along.

Popular political movements reject a federation for other reasons, of which the following are the most important:

(a) *Federation is confused with confederation*

A *federation* is a union of State-like bodies in which legislative and executive power is divided between a central or federal legislature and executive, on the one hand, and the legislatures and executives of the constituent parts, on the other. For the purposes of international law such a union is only one State. A *confederation*, on the other hand, is an alliance between a number of sovereign, independent States, based on a treaty, which serves to advance a number of common goals, such as defence or economic co-operation. The separate existence of the members as States under international law is in no way affected. The United States of America and West Germany are federations while the European Economic Community is a confederation. These examples demonstrate the vast difference between the two concepts. However, in South Africa, such a clear distinction is not always apparent as a result of the National Party Government's use of the vague term 'constellation of States' which

<sup>13</sup> F van Zyl Slabbert & David Welsh *South Africa's Options: Strategies for Sharing Power* (1979) 135–6. The authors explain why the failure of these two federations cannot be blamed on federalism but on the manner in which they were structured.

<sup>14</sup> Prominent liberals who have supported federalism include: W P Schreiner & Olive Schreiner *Closer Union* (Constitutional Reform Association) 2; Donald Molteno QC Molteno Report (n9); L M Thompson *The Unification of South Africa 1902–1910* (1960) 482–3; Leo Marquard *A Federation of Southern Africa* (1971) and Paton (n 4).

some incorrectly translate as federation, when the Government clearly has a confederation in mind.<sup>15</sup>

This confusion has led some to believe that a federation could be used to advance the further fragmentation of South Africa into separate ethnic States. This is clearly not envisaged under a federal arrangement which would retain the statehood of a single South African State; and, one hopes, secure the merger of the TBVC States into such a single State.

*(b) Federation will perpetuate ethnicity*

There is some substance in this objection as two types of federation would, in the South African context, undoubtedly serve to perpetuate ethnicity. First, Carl Friedrich's idea of 'corporate federalism',<sup>16</sup> which contemplates a federation based on ethnic groupings rather than territorial divisions, would lead to a 'race federation'. Secondly, a federation in which the boundaries of the component parts were drawn exclusively or largely in accordance with racial considerations would differ little from a corporate or race federation.

The question whether a South African federation should emphasize ethnicity in the drawing of the boundaries of the component parts or provinces is disputed. Some, notably Professor Arend Lijphart,<sup>17</sup> argue that political harmony would be most advanced in South Africa by a federation comprising provinces created to take account of ethnic groups. Such a federation would recognize the TBVC States and the six self-governing National States as separate provinces, together with what remains of the Transvaal, Cape, Natal and Orange Free State, and possibly additional provinces to accommodate Coloureds and Indians. Others<sup>18</sup> contend that to recognize and institutionalise ethnic divisions in this way would heighten the potential for conflict between provinces. Consequently, it would be preferable for each province to reflect the racial divisions of the whole State. This would allow ethnic differences and tensions to be addressed in a smaller unit where, one hopes, reconciliation might be more attainable.

*(c) Federalism will discourage national unity*

It is unlikely that a federation of provinces reflecting the ethnic divisions in South African society would promote national unity. Similarly, it is unlikely that a federation consisting of a multiplicity of

<sup>15</sup> See the statement by P W Botha to this effect cited in Paton (n 4) 8.

<sup>16</sup> *Trends of Federation in Theory and Practice* (1962). Discussed in Boule (n 8) 52.

<sup>17</sup> 'Federal, confederal and consociational options for the South Africa plural society' in R Rotberg & J Barratt (eds) *Conflict and Compromise in South Africa* (1980) 55-60. Marquard (n 14) 81 suggests that: 'In delimiting autonomous regions of a federation, racial composition might well be a factor, always provided that it is not the sole criterion'.

<sup>18</sup> S M Lipset *Political Man: the Social Bases of Politics* (1960) 91-2. Other authors who favour this view are discussed by Lijphart (n 17) 55-7.

provinces or cantons would advance this goal. For this reason, it is difficult to consider seriously the suggestion advanced by Leon Louw and Frances Kendall that South Africa be fragmented into a Swiss-style federation with 306 cantons based on the present 306 magisterial districts, each with an average population of 80 000.<sup>19</sup> A federation based on the pre-1976 provincial structure would not, however, undermine the cause of national unity. Most South Africans, of whatever colour or language group, feel some attachment to the province in which they live without this detracting from their commitment to South Africa as a unity. If these provinces were to be given greater constitutional powers it is improbable that national unity would suffer.

\* \* \* \*

Two powerful emotional strains are likely to emerge at our imaginary national convention: first, hostility to any form of ethnicity, as a reaction to apartheid; secondly, the fear of racial domination in a unitary State. These two forces would be best accommodated in a federal structure which limits the power of the dominant majority group without invoking ethnicity as a shield. The form of federation contemplated therefore is one premised almost completely on the pre-1976 provincial boundaries. The only alteration suggested is the creation of a fifth province in the Witwatersrand area, which would also serve as a federal capital. Such a federation would offer a number of advantages which, it is believed, would advance the ideal of a non-racially structured society in which political power is contained.

(i) *It would not be premised on ethnicity*

The territories that became the four provinces of the Union of South Africa in 1910 were the old trekker republics and the British colonies, which had been established largely without regard to ethnicity. Thus each province reflected, broadly, the racial divisions of the Union as a whole. The Witwatersrand region, the most cosmopolitan and ethnically integrated part of South Africa, owes its identity to industrialization and could be added to the federation as a separate province without any suggestion of pandering to ethnicity. If the TBVC States chose to rejoin a federal South Africa they would have to abandon their present separate identity and reintegrate into the provinces of which they once formed a part. While such a surrender of autonomy would not be welcomed by the TBVC States, it would probably be more acceptable than subordination to a central authority in a unitary State. However unpopular such

<sup>19</sup> *South Africa: the Solution* (1986). Cf the enthusiastic support for this 'solution' in an editorial entitled 'After apartheid' *Wall Street Journal* 11 March 1987 (p 30).



re-integration might be, it is the only way in which ethnic provinces could be avoided.

(ii) *It would signal the destruction of the Apartheid State*

A return to South Africa's pre-1976 historical divisions would constitute a repudiation of the fragmentation of South Africa along ethnic lines, and, by necessary implication, proclaim the end of apartheid.

(iii) *It would result in the creation of provinces of substantially equal size*

There is considerable support<sup>20</sup> for the view that for a federation to succeed it should be made up of provinces of roughly equal size, population, wealth and power. Indeed, the failures of the Nigerian federation of 1963 and the Central African Federation are generally explained on the ground that one region was allowed to dominate the others.<sup>21</sup> If substantial parity is to be achieved in a federal South Africa it will be necessary to reduce the power of the Transvaal. Hence the creation of a new province for the Witwatersrand area. In terms of population,<sup>22</sup> this would result, roughly, in the following divisions:

Cape Province (including Transkei and Ciskei, and part of Bophuthatswana) .....	9 000 000
Natal (including KwaZulu) .....	6 000 000
Orange Free State (including QwaQwa and part of Bophuthatswana) .....	2 000 000
Transvaal (excluding Witwatersrand but including Venda, part of Bophuthatswana, Lebowa, Gazankulu, KwaNdebele and KaNgwane) .....	10 000 000
Witwatersrand .....	2 000 000

Although the Witwatersrand, Natal and the Orange Free State would have much smaller populations than the Cape Province and the Transvaal, they would probably compete with the larger provinces in economic terms.

(iv) *It would solve the problem of a divided capital*

The present system of separate legislative, administrative and judicial capitals is financially wasteful and politically unsound. The only way in which existing rivalries and claims could be overcome is by creating a

<sup>20</sup> Forsyth (n 7) 19.

<sup>21</sup> The Nigerian federation began with three regions of which the Northern Region comprised 75 per cent of the land area and 60 per cent of the total population. See Van Zyl Slabbert & Welsh (n 13) 135-6. In the case of the Central African Federation, Southern Rhodesia was the politically dominant region.

<sup>22</sup> These population figures are based on the 1985 population estimates for the Republic of South Africa and the TBVC States. See further *Race Relations Survey* (1985) 1.

new capital city with which all sections of the community could identify. Johannesburg is the obvious choice as it is the most truly South African of all cities. The Witwatersrand would not, however, be purely a federal area, as is the case with the District of Columbia in the United States of America. In addition it would be a province of equal status with the Cape, Natal, Orange Free State and Transvaal. This new province, with no dominant ethnic loyalty, would one hopes, serve as a model to the other provinces and thereby promote national unity.

(2) *The division of powers in a federation*

In deciding which subjects are to fall within the exclusive domain of the provinces guidance might be sought from the old provincial system as this would placate anti-federalists unwilling to see a radical departure from the constitutional structure of 1910. Primary and secondary education should probably be returned to the jurisdiction of the provinces as was the case before the passing of the Bantu Education Act<sup>23</sup> in 1953. New matters that might be transferred to the provinces are the maintenance of law and order (including the prisons service) and the administration of justice. Although a federal Bill of Rights (to be discussed below) would contain standards dealing with fair-trial procedures and police powers applicable to the provinces, it is desirable that the ordinary civil and criminal courts be placed under the jurisdiction of the provinces and that provincial police forces be established. Although federal courts would be created to try federal matters and a national security service be created to ensure the security of the federal government, it is essential that a national police force, such as the present South African Police (SAP), be avoided. As early as 1962, before the politicization and militarization of the SAP, the Molteno Commission recommended that the control of the police force be made a provincial subject. It declared:

'A centralized police force, organized on semi-military lines, is capable of being used as an engine of political oppression, and hence of presenting a threat to freedom. There is much, indeed, in the history of the South African Police, and the manner in which it has been used in the past, that illustrates the reality of this threat.'<sup>24</sup>

Events during the past twenty five years abundantly confirm this conclusion and make it imperative that the SAP be disestablished and provincial police forces created in its place.

As far as federal powers are concerned, it is sufficient to stress that certain matters must of necessity be allocated to the central government. These include external affairs, defence and internal security, shipping, currency, taxation for federal purposes, borrowing on the credit of South

<sup>23</sup> Act 47 of 1953.

<sup>24</sup> Op cit (n 9) 29.

Africa, immigration and emigration, foreign trade, customs and excise, railways, civil aviation and mines.

(3) *Constitutional checks and balances: the techniques of consociationalism*

Universal adult suffrage or one-person-one vote at both the federal and provincial levels is an essential requirement for a liberal democratic South Africa. Although the likelihood of majoritarian domination would be reduced by the division of power along federal lines, additional constitutional techniques aimed at the avoidance of majoritarian domination might be employed at both federal and provincial levels of government. The techniques most frequently suggested today are the instruments of consociational engineering advocated by Arend Lijphart—namely government by coalition, the minority veto, proportionality (including proportional representation) and segmental autonomy.<sup>25</sup> ‘Segmental autonomy’—or territorial federation along ethnic lines—has already been rejected on the ground that it introduces an undesirable ethnic element into the constitutional structure.<sup>26</sup> The notion of a minority veto<sup>27</sup> to safeguard the interests of a particular ethnic or linguistic minority is unlikely to be accepted by our imaginary national convention for the same reason. Indeed the inclusion of a minority veto in the KwaZulu Natal Indaba Constitutional Proposals<sup>28</sup> has resulted in charges of ethnic engineering being levelled against these proposals. The principle of proportionality of representation in both legislature and executive might however be introduced in order to take adequate account of political divisions, even if these divisions are drawn partly, or largely, along ethnic or linguistic lines. Proportional representation would in all probability result in a system of coalition politics that would secure the protection of minorities.

(a) *The Federal Government*

At the federal level, portional representation might be used in order to constitute both legislature and executive.

A bicameral legislature is best suited to a federal arrangement as it allows equal representation of the provinces in an upper house (Senate) and representation in accordance with population numbers in the lower house (Assembly). The Senate might, for instance, consist of fifty members with ten representatives from each province, elected either by members of the provincial legislatures or directly by popular vote in each province. In either case the system of proportional representation should

<sup>25</sup> See (n 17) 60–1; (n11), especially 80–1; Boule (n 8) 46–51.

<sup>26</sup> See n 17.

<sup>27</sup> See further on this topic, Van Zyl Slabbert & Welsh (n 13) 153–4.

<sup>28</sup> See ‘The Provincial Legislature’ III: 5 (A).

be employed to ensure that the representatives in the upper house reflect the political divisions within each province. The Assembly, on the other hand, might be elected directly by voters by means of the list form of proportional representation, without regard to provincial boundaries. This system allows any group to nominate lists of candidates and to have its candidates elected in proportion to the share of the total vote that the list receives.<sup>29</sup> This would ensure that the electoral support for each political party in the country is reflected in the composition of the Assembly.

An executive president not responsible to the legislature is not suited to a federation for a plural society. Such a system requires a parliamentary executive responsible to the lower house.<sup>30</sup> In order to avoid a single party executive the cabinet might be chosen on a proportional basis by the lower house. Alternatively, the Chairman (Prime Minister), after being elected by the Assembly, might appoint members of his cabinet in proportion to party representation in the Assembly.<sup>31</sup> Provincial representation in the cabinet could be ensured by a stipulation that the cabinet include at least two residents from each province. In this way a coalition government representing the different factions in the Assembly might be achieved.<sup>32</sup>

Obviously a federal State, with consociational features of the kind suggested, could be created only by means of a constitution with an onerous procedure for amendment, in which the provinces have a role to play. Thus the constitution might provide that any amendment requires a two-thirds majority vote in both chambers of the federal legislature and a majority vote in three of the five provincial legislatures. Consideration might also be given to the possibility of obtaining an international guarantee for the maintenance of this constitution for a limited period of (say) five years from three States, drawn from the Western and Eastern blocs and the non-aligned States. The constitution should not, however, be regarded as immutable and provision might be made in the constitution itself for a conference to review the constitution to be held every five years.

<sup>29</sup> This system of voting is advocated by A Lijphart & D R Stanton 'A democratic blueprint for South Africa' (1986) 57 *Business & Society Review* 28. See further on the advantages of the list form of proportional representation: Boule (n 8) 60. A highly sophisticated 'list form' of voting is contained in the KwaZulu/Natal Indaba constitutional proposals, which aims to ensure, by employing both a provincial list and a constituency list, that each party receives that number of representatives in the legislature which accords with the percentage of the vote it receives. See 'The Electoral System' I: 2 (E1).

<sup>30</sup> Van Zyl Slabbert & Welsh (n 13) 148-9.

<sup>31</sup> This is the method suggested by the PFP. See Boule (n 8) 110-1.

<sup>32</sup> Such a coalition-type executive is provided for in the KwaZulu/Natal Indaba constitutional proposals: 'The Provincial Executive' V: (G1).

(b) *The Provincial Governments*

The constitutional structure of the provinces should be decided by the provinces themselves, preferably by means of a conference along the lines of the KwaZulu Natal Indaba, at which all political groupings and existing regional structures are represented. Provincial constitutional structures would, however, be subject to the standards contained in the federal Bill of Rights. Thus, while the provinces would be free to employ consociational principles in the structuring of both their legislatures and executives they would be obliged to recognise the principles of universal franchise and non-discrimination on grounds of race. As the allocation of human rights (including the franchise) on grounds of race would be outlawed by the Bill of Rights, it would not be possible for the provinces to adopt constitutional structures premised on racial classification. Consequently the KwaZulu Natal Indaba proposal for the constitution of an upper legislative house comprising representatives from different ethnic groups<sup>33</sup> would be unacceptable.

(4) *Bill of Rights*

The legal protection of individual rights by constitutional means has long been cherished as an ideal by liberals in South Africa. Moreover, although there are federations without an entrenched Bill of Rights,<sup>34</sup> most successful modern federations do contain constitutional safeguards for individual liberty.<sup>35</sup> As a liberal and a federalist, I therefore incline strongly towards the inclusion of a Bill of Rights in any future constitutional arrangement for South Africa. Indeed, I believe that even if the imaginary national convention were to opt for a unitary State, there would still be a need for a Bill of Rights. Although I am an unrepentant believer in a Bill of Rights and judicial review, it is still necessary to consider such an institution on its merits. In the course of this enquiry I shall describe the type of Bill of Rights that I believe would best serve the causes of liberty, justice and national unity in South Africa.

Seen in historical perspective,<sup>36</sup> the idea of a Bill of Rights for South Africa is one that emanates from the centre/left of the political spectrum. The first, and only, popular Declaration of Rights, normally the precursor to a Bill of Rights, is the Freedom Charter, adopted at Kliptown by the Congress of the People on 26 June 1955.<sup>37</sup> In 1962 the Progressive Party gave its approval to a Bill of Rights in its policy

<sup>33</sup> 'The Provincial Legislature' III: (D1).

<sup>34</sup> For example Australia.

<sup>35</sup> For example the United States, West Germany and, since 1982, Canada.

<sup>36</sup> For an account of the history of a Bill of Rights in South Africa, see Dugard in Viljoen & Van der Westhuizen (n 2).

<sup>37</sup> This meeting was attended by 2 884 delegates representing a diversity of organizations from throughout South Africa. It was sponsored and co-ordinated by the African National Congress (ANC), the South African Indian Congress (SAIC), the South African Coloured Peoples Organization (SACPO) and the Congress of Democrats (COD),

programme,<sup>38</sup> on the recommendation of the Molteno Commission.<sup>39</sup> Thereafter a Bill of Rights became the political darling of the liberal cause, but the ANC at no stage renounced its support for the legal protection of human rights.<sup>40</sup> In 1986, *mirabile dictu*, the Government itself stimulated the debate over a Bill of Rights for South Africa when the Minister of Justice directed the Law Commission to investigate the role of the courts in the protection of group rights and individual rights and to consider the desirability of introducing a Bill of Rights.<sup>41</sup> This attempt on the part of the Minister of Justice to align himself with the liberal centrist position has succeeded in alienating political forces to the left of centre, which have rejected the Government's initiative as a move aimed at protecting group rights and white privilege.<sup>42</sup>

Those who have recently denounced the very concept of a Bill of Rights on account of the Government's apparent support for such an instrument fail to remember two important things. First, the Government's support is more apparent than real. An examination of the Government's record on this subject, particularly its emphatic rejection of a Bill of Rights in 1983 when the new Constitution was enacted, and its repressive rule by emergency since 1985, makes it clear that it is not much closer to a 'human rights policy' today than it was in 1948.<sup>43</sup> Secondly, the notion of a Bill of Rights has impeccable constitutional credentials, as evidenced by modern constitutions throughout the world, and thus requires serious consideration by any group or individual concerned about the political future of South Africa. Despite these strictures, I shall examine the desirability of a Bill of Rights from the perspective of the objections from the 'left', given the fact that at present most objections to this institution emanate from that quarter.

(a) *Objections to a Bill of Rights; and some rebuttals*

(i) *Only the oppressed may create a Bill of Rights*

Some of the great Bills of Rights, such as Magna Carta and the US Bill of Rights, were drawn up by the victims of oppression as a guarantee

collectively known as the Congress Alliance. See further on the Freedom Charter, Gilbert Marcus *The Freedom Charter: A Blueprint for a Democratic South Africa* (1985) Centre for Applied Legal Studies, Occasional Papers 9.

<sup>38</sup> The resolution of the National Congress of the Progressive Party taken in November 1962 appears in vol 2 of the Report of the Molteno Commission (n 9) 6–13.

<sup>39</sup> *Franchise Proposals and Constitutional Safeguards* Molteno Report vol 1 (n 9) 50–67.

<sup>40</sup> Although the Freedom Charter is a 'Declaration' of rights it does, clearly, aim at securing legal protection of basic rights. See, in particular, the section of the Charter entitled 'all shall be equal before the law' and 'All shall enjoy human rights'. The text of the Freedom Charter appears in Marcus n 37.

<sup>41</sup> House of Assembly Debates cols 4014–15 (23 April 1986).

<sup>42</sup> For some of these criticisms, see A J G M Sanders 'The Bill of Rights issue: good government first' (1986) 11 *Tydskrif vir Regswetenskap* 212.

<sup>43</sup> See Dugard 'A Bill of Rights for South Africa: can the leopard change its spots?' (1986) 2 *SA Journal on Human Rights* 275.

against the revival of oppression. This has led to the argument<sup>44</sup> that a genuine Bill of Rights can be adopted only by the formerly oppressed after they have won their freedom. It cannot be introduced by the oppressor to perpetuate his privileges, to obstruct change, and to protect himself against the oppressed when the latter come to power.

While this argument may have substance in respect of the present attempt to protect group (that is, Afrikaner) rights by means of a Bill of Rights, it cannot apply to a Bill of Rights accepted by a national convention which includes both oppressor and oppressed. It is surely not necessary to wait until the oppressed emerge as total victor, with the potential to oppress others, before a Bill of Rights becomes a possibility. In any event, the argument in question fails to take account of Bills of Rights that have been produced by a process of political negotiation such as those of West Germany and Canada. Moreover, the constitutions of decolonized countries often include a Bill of Rights negotiated by the colonial power and the erstwhile oppressed.<sup>45</sup>

(ii) *A Bill of Rights must be popularly acclaimed to give it legitimacy*

A Bill of Rights must, so it is contended, reflect the will of the people and not the views of an elitist group of constitutional lawyers if it is to enjoy legitimacy. Although this argument will in part be met by obtaining the endorsement of a Bill of Rights from a representative national convention, it must be conceded that ultimately any constitutional instrument of this kind will be the work of specialists who will draft its provisions in the light of our own legal system and the experience of human rights conventions and other Bills of Rights. In order to overcome the charge of elitism, every effort should be made to incorporate as much of the Freedom Charter as possible into a Bill of Rights. While much of the Charter, as befits a Declaration of Rights, does not lend itself to inclusion in a legally enforceable instrument, there are some provisions which could be adopted without change into a Bill of Rights. In this way the influence of the Freedom Charter would be apparent. The Bophuthatswana Bill of Rights, the Namibia Bill of Rights<sup>46</sup> and the KwaZulu Natal Indaba Bill of Rights have all missed an important opportunity by failing to borrow from the Freedom Charter. The Freedom Charter, as the only indigenous Declaration of Rights with popular support and hence legitimacy, must serve as a guide to the drafters of a truly South African Bill of Rights.

<sup>44</sup> A Sachs *A Bill of Rights for South Africa: Re-locating the Debate* (1986) (unpublished address, New York).

<sup>45</sup> For example that of Botswana.

<sup>46</sup> Annexure 1 of Proc R101 GG 9790 of 17 June 1985 (*Reg Gaz* 3819).

(iii) *A South African Bill of Rights will protect group rights and entrench ethnicity*

The main objection to the present initiative in favour of a Bill of Rights is that the protection of 'group rights' seems assured. Indeed the Law Commission has been directed to address this very question. Consequently, it is argued that the whole object of a Bill of Rights at this stage in our history is to protect white privilege and Afrikaner group rights. This is a serious objection which must be heeded if a Bill of Rights is not to be viewed as simply a legal method of entrenching white privilege.

In the first instance it is difficult to see how group rights per se can be protected by a Bill of Rights. Some conventions such as the 1966 International Covenant on Civil and Political Rights<sup>47</sup> and the African Charter on Human and Peoples Rights (Banjul Charter)<sup>48</sup> contain provisions that aim to protect the group rather than the individual. However, it is difficult to see how such provisions could be enforced by a court of law at the instance of the group. Indeed the same can be said of the clause in the Freedom Charter that 'All national groups shall be protected by law against insults to their race and national pride'. Unless groups are to be given statutory recognition by some form of group classification, not dissimilar from race classification, and granted locus standi to assert their rights, it remains the individual who will be required to enforce *directly* his own rights and *indirectly* those of the group to which he belongs. Thus it is surely wiser to confer on the individual the right to use his own language (provided it is an official language), the right to educate his children in the language of his choice, the right to practise his own religion and the right to enjoy his own culture. The Indaba Bill of Rights in Article 8 accepts that only an individual will be empowered to enforce such rights but couches its protection in language that suggests the retention of a group right.<sup>49</sup> Great care must be taken

<sup>47</sup> Article 27 reads as follows: 'In those States in which ethnic, religious or linguistic minorities exist, *persons* belonging to such minorities *shall not be denied* the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language' (italics added). Despite the 'group' language employed here, ultimately it is the individual person whose right is infringed.

<sup>48</sup> This Charter contains a number of provisions asserting 'peoples' rights'. The meaning of the term 'people' is not clear in this Charter: at times it seems synonymous with "nation", but at times it seems to be used to cover a people within a State and in this sense it seems to be indistinguishable from "group". See K N Blay "Changing African perspectives on the right of self-determination in the wake of the Banjul Charter on human and peoples' rights" (1985) 29 *Journal of African Law* 147; R M D'Sa "Human and peoples rights: distinctive features of the African Charter" *ibid* 72.

<sup>49</sup> This article, modelled on art 27 of the International Covenant on Civil and Political Rights (n 47), reads: 'A *person* belonging to an ethnic, religious or linguistic group *shall not be denied* the right to enjoy his own culture, to profess and to practise his own religion or to use his own language' (italics added). Thus only a 'a person' and not a group will be able to enforce this provision.



in the drafting of a Bill of Rights to ensure that there are no references to groups and, in particular, that there are no criteria laid down for the identification of groups—racial, linguistic or cultural. Only in this way will the suspicion that a Bill of Rights seeks to protect white group rights be allayed. The right to practise one's own language, religion and culture should be recognized—but as rights pertaining to the individual and not to any statutorily defined group. Care should be taken, however, to ensure that generous rules relating to legal standing are recognized to enable individuals to enforce group rights.

(iv) *A Bill of Rights will be used to entrench white property rights*

Perhaps the most difficult problem that will face a post-apartheid society is the redistribution of land and wealth. An absolute prohibition in a Bill of Rights on the expropriation of land or on the nationalization of industries without proper compensation would severely obstruct the movement towards a just society. At present the white minority owns nearly ninety per cent of the land. It would be a strange Bill of Rights that ensured that eighty per cent of the population renounced its right to own land because to do so would violate the acquired rights of the twenty per cent.<sup>50</sup>

A guarantee of property rights is not an essential feature of a human rights convention or a Bill of Rights. While the Universal Declaration of Human Rights of 1948 recognizes the right to own property and declares that 'no one shall be arbitrarily deprived of his property',<sup>51</sup> the International Covenant on Civil and Political Rights of 1966 is silent on this subject. The European Convention on Human Rights of 1950 provides no guarantee for property rights but leaves it to a protocol to affirm this right.<sup>52</sup> The Canadian Charter of Rights and Freedoms of 1982 makes no mention of property rights.<sup>53</sup>

The right to own property and the concomitant right not to be deprived of that property without compensation is not therefore a preferred freedom that must necessarily be guaranteed in a Bill of Rights. However, in the South African context it seems clear that there will be strong demands for some provision on this subject. It is suggested that any such provision should recognize the competence of the State to expropriate property, provided it is done in the public interest and does

<sup>50</sup> Sachs n 44.

<sup>51</sup> Article 17.

<sup>52</sup> Protocol 1 of 1952 provides that: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

<sup>53</sup> Arguably, art 26 covers such a right. It provides that: 'The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.'

not discriminate on grounds of race, language or political opinion. The Indaba Bill of Rights,<sup>54</sup> in proposing that 'prompt', 'equitable and fair' compensation be paid, in accordance with the traditional international law test for the compensation of expropriated property belonging to aliens,<sup>55</sup> imposes too severe an obstacle in the way of a scheme for the redistribution of wealth. If past injustices are to be redressed adequately, immediate compensation may not always be possible without placing too heavy a burden on the State. Provision should therefore be made for fair compensation to be paid except where the expropriation is part of an affirmative action programme aimed at redressing past injustices. In such cases compensation may either be delayed or reduced, after judicial determination that the expropriation is genuinely in the public interest and part of an affirmative action programme. Such a provision would act as a brake on the redistribution of wealth without obstructing it completely.

(5) *Equality before the law will protect 'haves' at the expense of 'have-nots'*

A clause guaranteeing the equal protection of the laws, such as appears in the Fourteenth Amendment to the US Bill of Rights and the Indaba Bill of Rights,<sup>56</sup> will be used to entrench the position of the privileged and to ensure that they remain more equal than others.

This argument takes no account of the jurisprudence of the US Supreme Court on affirmative action programmes. Although the Court has not given blanket approval to reverse discrimination it has been accepted that historically disadvantaged groups may be treated more benevolently than others in order to redress past discrimination or to overcome a 'manifest imbalance' in the workplace.<sup>57</sup> A South African Bill of Rights should forestall protracted constitutional litigation on this subject by expressly exempting affirmative action programmes from a provision dealing with equal protection of the laws. Here it might learn from the 1982 Canadian Charter of Rights and Freedoms which provides that the clause guaranteeing equal protection of the law:

'does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'<sup>58</sup>

<sup>54</sup> Article 7.

<sup>55</sup> According to this test expropriation is to be 'prompt, adequate and effective'. This test is no longer generally accepted. See M Akehurst *A Modern Introduction to International Law* 4ed 91-94.

<sup>56</sup> Article 1(2).

<sup>57</sup> See *Regents of the University of California v Bakke* (1978) 438 US 265; *United Steelworkers of America v Weber* (1979) 443 US 193. The most recent decision of the Supreme Court on this subject, the *Johnson* case, is reported in *Time* 6 April 1987 p20.

<sup>58</sup> Article 15(2).

The redress of past injustices and inequalities will be a major goal in the reconstruction of South African society. Although affirmative action is already practised on a voluntary basis in the private sector<sup>59</sup> and some educational institutions, there will clearly be a need for affirmative action programmes backed by law<sup>60</sup> to ensure that no branch of South African society remains segregated. The civil service has not only retained its predominantly white character but also persisted in a policy of 'Afrikanization' at a time when the private sector has embarked, however gingerly, upon a course of desegregation. The desegregation of the civil service will thus be a principal task of any non-racist government. The law should be constructed to encourage rather than discourage such action.

(vi) *A guarantee of free speech will protect the advocacy of racism*

The guarantee of free speech in the US Bill of Rights has been held to permit the advocacy of racist views, such as those propagated by the Ku Klux Klan and the American Nazi Party.<sup>61</sup> A clause of this kind would therefore permit the advocacy of doctrines of racial superiority and thereby hinder the reconstruction of society.

Although this objection is real, it is easily surmounted. International human rights conventions outlaw racist propaganda,<sup>62</sup> as does the Indaba Bill of Rights.<sup>63</sup> Although a Bill of Rights should guarantee freedom of speech it would not be unusual, judged by international standards, for it to restrict free speech in order to obstruct the re-emergence of racism of any kind. Here it might borrow from the Freedom Charter, which declares:

'The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime; all apartheid laws and practices shall be set aside.'

(viii) *The judiciary as presently constituted is not the appropriate body to monitor a Bill of Rights*

The suitability of the judiciary as presently constituted to act as guardians of a Bill of Rights has been questioned on a number of grounds. As all judges are white, they inevitably, consciously or

<sup>59</sup> K Hofmeyr 'Black advancement—a close case for affirmative action' (1986) 2 *Human Resource Management* 23.

<sup>60</sup> W H B Dean 'The role of the law in the elimination of racial discrimination' 1976 *Acta Juridica* 157; M Edmunds 'The pragmatic and ethical viability of affirmative action for South Africa' (1986) 6 *Responsa Meridiana* 126.

<sup>61</sup> *Brandenburg v Ohio* (1969) 395 US 444.

<sup>62</sup> Article 20(2) of the International Covenant on Civil and Political Rights; art 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>63</sup> Article 11(2) provides: 'Any advocacy of national, racial or religious hatred or aggression between groups that constitutes incitement to discrimination, hostility, violence or political animosity is prohibited.'

sub-consciously, reflect the racial attitudes of the white community.<sup>64</sup> In addition, their legal education and training renders them 'psychologically incapable of the value-oriented, quasi-political functions involved in judicial review'.<sup>65</sup> In these circumstances a case may be made out for the creation of a special constitutional court consisting of those judges who are capable of exercising review powers in a 'value-oriented, quasi-political manner' and other lawyers with a specialized knowledge of constitutional law and human-rights law.<sup>66</sup> Such a reconstitution of the Court of Appeal for the purpose of hearing constitutional disputes would provide a means of ensuring the representation of racial groups not presently on the South African bench. Members of this court, and indeed of other federal courts, should be appointed by a process which involves at least the upper house in the federal Parliament.<sup>67</sup>

There are serious objections to creating a special constitutional court.<sup>68</sup> In particular, there is substance in the argument that it may result in the politicization of the bench. The creation of such a court would, however, be the only way of ensuring the representation of all communities on the court as the slow advance of potential judges from disadvantaged communities through the ranks of the conservative bar would seriously delay the proper constitution of such a court.

For a Bill of Rights to enjoy legitimacy and to have any prospect of adoption by the postulated national convention it should draw its inspiration from the Freedom Charter, protect individual and not group rights, avoid absolute guarantees against expropriation of property without compensation, cater for affirmative action programmes, outlaw the advocacy of racism and secure the establishment of a court composed of judges drawn from the different communities of South Africa. As it is envisaged that such a Bill of Rights will be enforced by courts of law with the power of review, the emphasis will fall upon the protection of civil and political rights. The freedoms of person, speech, association, assembly, movement, religion and privacy, the right to a fair trial, to family life and to vote, and equality before the law should be guaranteed to all without distinctions based on race, gender, creed or political

<sup>64</sup> See Dugard (n 2) 366-88.

<sup>65</sup> This description of European career judges by M Cappelletti in *Judicial Review in the Contemporary World* (1971) 63 is equally apposite to South African judges: See J Dugard 'The judiciary and constitutional change' in D J van Vuuren & D J Kriek (eds) *Political Alternatives for Southern Africa* (1983) 332-3.

<sup>66</sup> See further on this subject Dugard (n 2).

<sup>67</sup> In the United States judges are nominated for appointment by the President but must be confirmed by the Senate.

<sup>68</sup> See the paper delivered by Mr Justice J M Didcott at the Symposium on a Bill of Rights for South Africa held at the University of Pretoria 1-2 May 1986, published in Viljoen & Van der Westhuizen (n 2). See too the reasons advanced against such a court by the Minister of Constitutional Planning and Development, Mr J C Heunis, in the debate on the 1983 Constitution: House of Assembly Debates col 11491 (17 August 1983).

opinion. The Bill of Rights should be incorporated into the constitutional compact that establishes the federation and be binding on the legislature, executive, administration, and judiciary of both the federation and the provinces. In this way it would prescribe standards of political conduct for both the federal and the provincial authorities. Such a Bill of Rights might, like the US Bill of Rights, become a source of national pride and thereby contribute to national unity.

It is unlikely that any constitution will usher in the millenium for South Africa. Although a political structure of the kind envisaged in this paper will, it is believed, provide a better framework for peace and progress than other possible systems, it is not improbable that situations will arise that demand a departure from the normal rules of government, and, in particular, that require the imposition of restraints on political activity and personal liberty. A Bill of Rights should therefore anticipate the need for emergency measures but, at the same time, regulate them to ensure that they accord with accepted international standards. The European Convention on Human Rights,<sup>69</sup> the International Covenant on Civil and Political Rights<sup>70</sup> and the American Convention on Human Rights<sup>71</sup> restrict emergencies to situations which threaten the life of the nation, require that measures which derogate from a State's human rights obligations 'be strictly required by the exigencies of the situation', and prohibit derogation from certain rights, notably the freedom from torture and inhuman or degrading treatment. Moreover, the European Commission<sup>72</sup> and Court of Human Rights<sup>73</sup> have claimed the authority to review the declaration of a state of emergency to ensure compliance with these obligations. It is suggested therefore that a provision of the following kind appear in the Bill of Rights:

1. In the event of a situation threatening the life of the nation or a province, the federal executive, or the executive of a province, may declare a public emergency and impose measures derogating from the rights contained in this Bill of Rights. Such measures shall, however—
  - a. be strictly required by the exigencies of the situation;
  - b. not derogate from the prohibition on torture and inhuman or degrading treatment or punishment;
  - c. require the approval of the federal or provincial legislature, as the case may be, every six months.

<sup>69</sup> Article 15.

<sup>70</sup> Article 4.

<sup>71</sup> Article 27.

<sup>72</sup> The Greek case *Yearbook of the European Convention on Human Rights* (1969) 75. See, further, *States of Emergency: Their Impact on Human Rights* (1983) International Commission of Jurists 451.

<sup>73</sup> The Lawless Case (merits) *European Court of Human Rights Series A*, vol 3, Judgment of 1 July 1961, para 30.

2. The federal constitutional court shall have the power to decide whether the situation warrants the declaration of a state of emergency and whether the executive has complied with the requirements prescribed in 1(a)-(c).

While freedom of political expression is a value that must be protected and encouraged, it is obvious that it must be subject to certain restraints. Consequently, human rights conventions<sup>74</sup> and Bills of Rights<sup>75</sup> recognize the permissibility of imposing such limitations on this freedom as are justified in a democratic society. Such a qualification justifies measures aimed at the suppression of political forces on both the left and the right which seek to use the freedoms of expression, assembly and association to advance ideologies aimed at the denial of human rights. While it would be essential for a South African Bill of Rights to recognize the possibility of such restraints as are justified in a democratic society being imposed on freedom of speech, it might be desirable to go even further and include a provision such as that found in the European Convention on Human Rights which prohibits the 'right to engage in any activity . . . aimed at the destruction of any of the rights and freedoms'<sup>76</sup> set out in the Convention. Such a clause might enable the police authorities to take action against the proponents of authoritarian and totalitarian ideologies at an early stage and thereby limit the necessity for emergency measures.

(b) *Economic and social rights*

The Bill of Rights here advocated is one that is to be enforced by a court of law. As economic and social rights are not easily justiciable<sup>77</sup> the emphasis will inevitably fall on civil and political rights. However, economic and social rights will occupy so important a role in any new political compact that the constitutional instruments creating such an order will have to make some provision for the promotion of these rights. This is particularly necessary in a constitutional scheme of the kind suggested in this paper as there is a widespread, albeit erroneous, belief that federalism is a device aimed at obstructing redistributive economic policies.<sup>78</sup>

In order to affirm the commitment of the new order to progressive economic and social policies it would be wise to attach a non-justiciable

<sup>74</sup> Article 10, European Convention on Human Rights art 19. International Covenant on Civil and Political Rights.

<sup>75</sup> Article 1 Canadian Charter of Rights and Freedom.

<sup>76</sup> Article 17. See too art 5 of the International Covenant on Civil and Political Rights.

<sup>77</sup> See in this connection criticism of art 8(4) of the KwaZulu/Natal Indaba Bill of Rights which declares a 'right to public education': C Divaris 'Education and a Bill of Rights. The Indaba takes a wrong turn' (1986) 15 *Businessman's Law* 245.

<sup>78</sup> Van Zyl Slabbert & Welsh (n 13) 143 rightly stress that 'there are no inherent reasons why federalism should be incompatible with redistributive policies'.

Declaration of Economic and Social Rights to the Bill of Rights along the lines of the International Covenant on Economic, Social and Cultural Rights of 1966. Such a Declaration might provide that its provisions are to be used as a guide to the interpretation of the Bill of Rights and the Constitution.

(5) *The role of the law in a new South Africa*

The National Party Government has done incalculable harm to South African law and legal institutions over the past four decades. It has used the legal process to prescribe and enforce racist and repressive policies and, in so doing, it has destroyed respect for the law among the majority of the population and seriously undermined the reputation of the judiciary. The majesty of the Roman-Dutch law has been replaced by an evil legal order which is widely compared with the legal systems of slavery, colonialism and fascism. Law is no longer seen as an independent system of inherited rules, principles, values and traditions designed to regulate society and curb governmental excesses, but as an instrument to further the ideology of the National Party.

One of the major tasks facing a post-apartheid South Africa will be the restoration of respect for the law and its institutions. Inevitably there will be a strong temptation on the part of those who have suffered most under apartheid to use the processes of the law as a means for legitimating revenge and for imposing new ideologies on the populace. This must be resisted at all costs. But it will only be achieved by the creation of political institutions premised on the Rule of Law and respect for human rights that constitute an unequivocal repudiation of the National Party's philosophy of law. The ideas advanced in this paper in support of liberal democratic institutions do constitute such a repudiation. Inherent in the suggestions for a federation of South Africa and a Bill of Rights is a rejection of racism, ethnicity, inequality and repression, and an acknowledgement of the need for government by consent and not coercion. It is not enough, however, to repudiate past evils. The new institutions must guard against the re-emergence of authoritarianism and secure the advancement of basic rights. An institutional commitment to the extension of personal liberty and the sharing of resources will do much to restore confidence in the law—without which a just society will remain unattainable.