



Umbutho Wamalungelo Obuntu CIVIL RIGHTS LEAGUE Burgerregtevereniging

VOL 36 No. 3

NEWSLETTER

JUNE 1989

CENSORSHIP

THE STATE OF EMERGENCY DECREE OF 21 JUNE 1986 BANNED THE LEAGUE AND 118 OTHER ORGANISATIONS FROM PUBLISHING ANY STATEMENT.

SUBSEQUENTLY THIS PART OF THE DECREE WAS WITHDRAWN. THE REMAINING SECTIONS OF THE DECREE STILL REMAIN. ANYTHING WHICH IN EFFECT THE MINISTER OR POLICE COMMISSIONER DEEMS "SUBVERSIVE", IS A CRIME IN TERMS OF THE NATIONALIST GOVERNMENT'S FOURTH STATE OF EMERGENCY

ONLY MATERIAL CHECKED BY OUR ADVOCATE CAN BE PUBLISHED IN THIS NEWSLETTER.

EDITORIAL:

BOOK LAUNCH

As the international spotlight on war resisters focuses this year on South African conscientious objectors, the penalizing of rights of conscience stand highlighted against the Nationalist government's fourth State of Emergency.

Superimposed on these events, the SA Law Commission's working paper on a Bill of Rights for South Africa is busy circulating (see page 9 for an exclusive commentary on this report by Prof. Hugh Corder, Dept. Public Law, UCT).

In response to this official document, the CRL will be launching a book titled: "A SOUTH AFRICAN BILL OF RIGHTS", containing the proceedings of a forum discussion held on 27 August 1988 at the University of the Western Cape. The date of our book launch is Thursday 9 June at 17h30 at The Woolstack, UCT Middle Campus (see page 7).

Find out in over 80 pages of discussion and debate what prominent academics, lawyers and Human Rights activists think

about a South African Bill of Rights. How do group rights fit the scenario? What is the status of Women's and Children's Rights in this country? And what mechanisms would be needed for their protection? Contained also in this volume is a preface by Sir Richard Luyt (CRL President), a welcome by Prof. J. Gerwel, and a concluding message by Dr. A. Boesak. The conference and the production of these proceedings was organised by Dot Cleminshaw and Brandon Proll.

This newsletter, the last of four serving to advertise our book, presents extracts of papers given in Panel C: "What Rights should be included as Human and Civil Rights in South Africa?" and "What mechanisms would be needed for their protection?". The speakers were Prof. André du Toit (Dept. Political Studies, UCT), Prof. Lourens du Piessis and Prof. Gerhard Erasmus (Dept. Public Law, Univ. Stellenbosch), and Dr. Kate O'Regan (Labour Law Unit, UCT). Prof. Hugh Corder chaired this panel.

PROSPECTS FOR HUMAN RIGHTS

by Prof. André du Toit

Serious scepticism (has been) expressed (today) on the very issue of the need for a Bill of Rights - that there are other politically more important things on the agenda. Other people responded to that, to some extent granting the criticism, by saying that there is also a case for other things that could be accommodated under the rubric of Economic Rights. If we are not careful we can end up seriously confusing the issues.

There is a widespread tendency, not just in SA, to use the language of rights for all or any social goods or political goals. So that we begin to talk about Economic Rights - speaking of "the need for the right to decent housing, or the right to proper health care, education, university admission, child care centres, employment, a minimum wage, security" and so on.

I do not want for one moment to deny that these things are very important social goals... but they are a particular kind of goal. They are goals of which we must ask - "to what extent can we afford them?" In a world of scarce resources not all of these goals can be afforded, and achieved, all at the same time. In earlier discussion the point (was raised) that so much money is going to defence and security. I agree... I think there are important resources which are being wasted on defence and other wrongheaded thinking. But even if all those resources were diverted... we would still not be able to do everything we want.

So we have to determine relative priorities in our national budget. This is what, in a very basic sense, the political process is about... weighing up the pro's and cons, the costs/benefits, the trade-

offs - coming to compromises, to critical choices in determining how we rate these various things.

Now it is important to see that the issue of Rights and a Bill of Rights is not simply one more social good, or a political goal, to add to this list of priorities. Rather the issue of rights, those things which are to be inscribed, entrenched in a Bill of Rights, is supposed to be about the whole process of weighing costs and benefits, of making trade-offs, determining relative priorities. It is a matter of principle, something which should be above considerations of costs, a political absolute or a trump.

Classically, human and civil rights which are given this kind of absolute status - rights of freedom of speech, freedom of movement, habeas corpus, classic civil and political rights - of course, also have their costs and their benefits. But the Bill of Rights tradition insists that human or fundamental rights are so important that such costs should not be a factor in considering them.

Now what should or should not be included in a Bill of Rights on these scores - should there be a Bill of Rights at all? That is the question we are facing now. What is the need and what are the prospects for a Bill of Rights in SA? I think you will agree with me that, if you consider it in that sense, this is not really a good time to answer these questions. We are looking at a government determined to deny whatever still remains of our civil and human rights. Our recent history has in a large measure been a history of the systematic abuse and violation of rights and the Rule of Law, as we have seen the

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growth of Executive power and of the security forces.

In 1988 we live in a semi-permanent state of emergency which will not recognise any rights to stand in the way of security considerations. The reality of the State of Emergency demonstrates, if nothing else does, the need for a Bill of Rights. This, of course has been the courageous response over the years of bodies like the Civil Rights League.

Looking ahead... what are the prospects for a Bill of Rights under a future democratic majority government in SA? Will such majority rule, when it comes, recognise the need for a Bill of Rights? Should it? Quite apart from familiar white fears about the lessons of Africa and so on, it must be said that even and especially in a non-racial democratic post-apartheid SA with majority rule, this is not very likely.

Such a political movement is quite likely to see a Bill of Rights as a device to protect minority privileges. We may hope that a future South African majority government's human rights record will not be too bad, but such a government cannot really be expected to give a high or overriding recognition of the need for observing a Bill of Rights. So in this perspective as well the prospects for a Bill of Rights, I take it, are rather bleak.

Are we then making a mistake in gathering here to-day to consider the question of the need and prospects for a Bill of Rights at all? I believe that the answer must be no. To see this I think we must pose the question in a different way.

If you look to the history of Rights, then historically and socially rights are not the creatures of government and the state - we are looking in the wrong direction. Rights are not founded or based on their formal

recognition by the state and in law... they are not granted by the state or the constitution, they are embedded in historical social practices, they arise through long and hard social and political struggles.

Seen in that light, I think the question appears rather different, and we can afford to be somewhat more optimistic. If we look around us, we find a number of very important (such) struggles going on: individuals and groups against the Pass Laws, against the migrant labour system, against influx control. Struggles about freedom of movement; the rights of family integrity; struggles for the right to community integrity; against group areas; against censorship, detention without trial and conscription.

If I look to that, then I see in SA now and in the near future ongoing social and political communal struggles, which are about the establishment of particular rights. And I think it is in that context that we must look for the answer to our question whether there is a need and prospects for rights. Rights struggles... taking place next to other struggles: educational, labour, political power... concerned not just with rights in the classic sense. These struggles are concerned with particular social goals and political objectives that have different priorities.

And then of course - there are other forces at work in our society: the power of the state, very powerful reactionary forces at work at various times in this society, and there are very important underlying social and economic and demographic trends which we should also not underestimate. In this larger context the struggle for human and civil rights is, I think, a serious and important one which we should consider when we talk about the need and prospects for a Bill of Rights.

REFLECTION ON GROUP RIGHTS

by Prof. Lourens du Plessis

Acceptance of the notion that individuals AND groups - do have rights, immediately raises the question of what those rights exactly entail, and how they should be defined and protected in a Bill of Rights. Rights referred to as "group rights" in a philosophical or political sense, can often in effect only be protected as individual rights.

This does not, however, detract from the fact that there are individual rights which root in a group consciousness or, more concretely, in group affiliations. A court order protecting language rights and obtained by an individual will, for example, have advantages for all speakers of that language.

There is therefore no way in which we can escape from the necessity also to think in group terms when we determine the rights that ought to be protected in a Bill of Rights. But we need a way of thinking that will help us refute the biased rightest notion that the concept of group rights mainly refers to the protection of the rights of the privileged and oppressive racial minority in SA.

Most present day, post-colonial Africans are prepared to "confess" their ethnic affiliations and to admit that ethnicity has political consequences. This sentiment is also echoed by the Freedom Charter which provides for equal rights for all "national groups". (But) for a variety of reasons, black South Africans have become cynical about recognising the socio-political relevance of ethnicity, and some of them deny it downrightly, adopting non-racialism as a basis from which to operate.

Does this mean that the rest of Africa is wrong or that the Freedom Charter is outdated? I do not think so at all. The

article in the Charter dealing with the protection of the rights of national groups, in effect advocates national unity. Ethnicity, therefore, is not regarded as the scaffolding which is to support the organisation of the new society, but as a state of affairs, a fact of life, which is to be taken into account in organising society. Ethnicity is not used as justification for maximum separation. It is rather perceived as a reality which calls for meticulous respect for those individual rights of South Africans rooting in a particular ethnic group consciousness.

I maintain that the best way to protect ethnic group rights and needs in a Bill of Rights is to allow for an optimal measure of free and voluntary association. People should in principle have a free choice where and with whom they want to live, want to be educated, want to share their social life etc. A State which decides these matters on behalf of its citizens is paternalistic.

We are badly in need of a more articulate and nuanced group concept - one which transcends the notion of ethnic or racial groups. A group for education purposes is not the same as a group for housing or welfare purposes. In the latter instances socio-economic considerations predominate and people can be divided into, say, wealthy, middle class and poor groups. In the former instance ethno-cultural factors or religious factors might prove to be of more importance.

What of course complicates matters is that some of the areas just mentioned often overlap in practice, and that the same will therefore also happen to the criteria used for the determination of groups. But precisely this reality should make one wary of any attempt to define group affiliations too rigidly in a Bill of Rights.

PROTECTING HUMAN RIGHTS

by Prof. Gerhard Erasmus

Lawyers tend to look at this problem from the viewpoint that there is a certain juridical relationship between the individual on the one hand and the state on the other hand. They focus on the mechanisms available to the individual for protecting his/her basic human rights and on the legal remedies that can be employed when these rights have been violated. For the sake of completeness it should be pointed out that there are two other areas where one should also look in this regard - the political field and the international arena.

With respect to political mechanisms, it is true that through regular elections, through the accountability of politicians, through a free press and the scrutiny provided for by open discussion in parliament, a major contribution can be made towards a political culture or process in terms of which it is possible to create an awareness among the population in respect of human rights, and hopefully to create a similar sensitivity on the part of those in government.

Then there are cases where states have come together and agreed upon international mechanisms to protect their citizens. The European Convention on Human Rights is an example. Here a number of states, sharing a certain common cultural and historic heritage, have created a supra-national organization that provides for an additional mechanism for the protection of human rights.

Focusing on the traditional mechanisms available under constitutional law within the state, we find two categories of rights: (1) general rules on civil liberties and individual rights and freedoms of the citizen; (2) those collective

and social rights, cultural and economic rights normally exercised in collective fashion. The latter are normally better protected through the political process, through elections, through the formulation of a particular political policy.

The modern state disposes of very powerful instruments such as the legislature and the executive. In respect to every one of these, mechanisms have to be developed in order to protect the individual. Therefore one first has to start with a Bill of Rights which forms part of the constitution and which lists individual rights and liberties. It must also be the supreme law of the land.

The second requirement is that in cases of violation effective remedies must be available, normally through the supreme court. Under the mechanism of constitutional review the criteria are developed through adjudication, by the court of review itself. The individual then can, in cases of violation by the state, take that matter to court. The court will declare the state action invalid

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DAVID WEBSTER

1945-1989

"EVERYONE HAS THE RIGHT TO LIFE,
LIBERTY AND SECURITY OF PERSON"
- Universal Declaration of Human
Rights (Article 3).

or order compensation. History has taught us that courts with the power of effective judicial review can make a very definite contribution towards democratic government.

The concept of judicial review is of particular importance with respect to control over the legislature. It should not be able to pass laws that violate the rights of the individual. Therefore, under a system of effective constitutional review through the courts, parliament can not be sovereign, i.e. beyond judicial control. Sovereignty of parliament (the inability of the courts to invalidate laws of parliament) is one of the grave con-

stitutional obstacles in SA frustrating the protection of human rights.

Let me conclude by saying that human rights are not absolute. Sometimes the life of the nation is threatened and the state has to exercise emergency powers. But courts of law are still the best institutions available to draw this very fine distinction between the rights of the individual on the one hand, and certain claims made by the state on the other. One thing which I believe should never be ignored in any post-apartheid society: that control over the exercise of governmental powers should never be excluded from a Bill of Rights.

PRE-CONDITIONS

by Dr. Kate O'Regan

What are the necessary pre-conditions for enforcing a Bill of Rights satisfactorily in any political system? I wish to undermine the focus on the law as the major mechanism ensuring civil and social rights in a society by looking briefly at the experience of Bills of Rights in the rest of ex-British colonial Africa.

It is interesting that Britain has never had a written Constitution nor an entrenched Bill of Rights. Nevertheless, when the Colonial Office began to realise at the end of 1950 that the flag was going to disappear out of Africa, they began to advocate the adoption of Bills of Rights in all the African colonies.

Most of the provisions in the Bills of Rights related to civil and political rights which Professor du Toit identified in his speech. There was very little coverage given to so-called economic and social rights, even in the form of

articulated social goals. Not surprisingly, these Bills of Rights were not received with an enthusiastic welcome by post-colonial states.

The history of these Bills of Rights makes us ask: why did they not work? Bills of Rights were imported into Africa by ex-colonial states. They were highly distrusted by the newly independent governments, and as a result were to an extent doomed to failure from the start. Perhaps (an) equally important explanation is the fact that there had been no campaign, no democratic campaign in the individual African countries which had been based on the promotion of Bills of Rights. They were seen as entirely irrelevant to the political organisations in those countries.

What does all this mean then for SA? I think it means that Bills of Rights imposed upon a future SA by undemocratic organisations, or those that

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MEDIA

The League succeeded in placing statements in the press on the following topics:

* Brandon Broll - AN EYE FOR AN EYE in response to the recent condemning prescriptions of the Minister of Justice, Mr. Kobie Coetsee, with regard to the death penalty (Argus, 8.05.89).

* Dot Cleminshaw - a letter FOR ALTERNATIVE SERVICE highlighting the entirely political treatment by the government of CO's who are willing to serve SA sacrificially in alternative development and service projects (Financial Mail, 5.05.89).

INTERNATIONAL
CONSCIENTIOUS OBJECTORS DAY
15 May 1989



ACKNOWLEDGEMENTS

Newsletter editor:
Brandon Broll

FOCUS ON SOUTH AFRICA

The Civil Rights League calls
* for the release of imprisoned
CO's:

David Bruce
Charles Bester
Saul Batzofin

* for alternative national
service for all CO's.
* and the unbanning of the ECC.

NEWS ITEMS

* Brandon Broll represented the League at the Cape Democrats HUNGER STRIKE WHAT NOW ? information meeting at the City Hall (10.04.89). Ex-hunger-striker Ephraim Nkoe described the motivation and camaraderie behind the strike and his escape to the West German embassy with two other fellow detainees.

* On behalf of the League, committee members Hugh Corder, Brandon Broll, Mary Burton, Dot Cleminshaw and Patrick Hill attended the various Cape Town meetings arranged by COSS (Conscientious Objector Support Group) leading up to International CO Day (15.05.89).

* Copies of the SA Law Commission Report on a Bill of Rights for South Africa can be ordered from: The Secretary, SA Law Commission, Private Bag X668, Pretoria 0001. Tel: (021) 26-1121.

* Dot Cleminshaw continues to serve our link with the FCA (Free the Children Alliance). This year the UN plans to adopt a Convention on the Rights of the Child (on this, the 30th anniversary of the Declaration of Children's Rights). Will SA adopt this Convention, having abstained from the 1959 Declaration ?

* South African Outlook is to be congratulated on its December 1988 edition (vol.118, no. 1410) titled: HUMAN RIGHTS GOD GIVEN. Backcopies can be obtained from Outlook Publications (Pty) Ltd., P.O. Box 245, Rondebosch, 7700 at R 1.50 per copy (excluding postage).

SA Law Commission Report on a Bill of Rights

by Prof. Hugh Corder

For many years liberally-minded South Africans have been calling for the introduction of a justiciable Bill of Rights in this country. The Civil Rights League has been one of the chief (and certainly the most consistent) champions of this idea. The National Party government, however, obdurately rejected such suggestions, a point of view which was authoritatively confirmed (by the President's Council) as recently as 1982. Small wonder, then, that the announcement by the Minister of Justice in April 1986 to the effect that he had instructed the SA Law Commission to investigate "group and human rights protection" was greeted with much scepticism and some fear that the government was about to hijack the idea.

In the event, and much to the surprise of most observers, I would maintain that the suspicions have proved largely groundless. The Law Commission project group, under the guidance of Mr. Justice P.J.J. Olivier, has produced a Working Paper whose general thrust, if implemented, gives a welcome boost to the cause of human rights protection in SA. The fruit of almost three years research and much written and oral evidence from a wide range of political opinion, the paper discusses the philosophical underpinnings of the human rights movement and human rights protection in the international sphere and in the UK, USA, and West Germany. It compares different Bills of Rights in content and as they are enforced in about 130 countries. After summarizing the state of human rights in SA and the various arguments for and against group rights, the Working Paper comes down firmly on the side of individual rights protection, and rejects group

rights, while at the same time proposing linguistic, religious and cultural safeguards.

The proposed Bill of Rights (which runs to 33 Articles) includes almost all the rights routinely included in the "classic liberal" rights charters, e.g. rights to life, spiritual and physical integrity, privacy, legal personality, integrity of the family, free speech, free movement, private property, free association, free assembly, personal freedom and safety, and some very detailed provisions relating to rights of those arrested or detained. Certain freedoms are also provided for: freedom from discrimination on any ground and from slavery or forced labour. Some of the more controversial proposals, perhaps, are the rights to private property and to dis-associate, as also article 30, which allows limitation in the interests of the security of the state, public order etc, but subject to the testing right of the ordinary courts. Most laudably, the Commission tackles the issue of practical implementation of its proposed Bill, linking it to the prior repeal of all discriminatory legislation and administrative measures, and the negotiation of a new constitution based on universal franchise.

Much more could be said on this matter, but space does not allow it. The Commission has requested feedback by 31 August, after which it will prepare its final report for submission to government. There are shortcomings in these proposals, and some of the language used is open to different interpretations. Overall, however, it provides a good opportunity to debate and educate about human rights. We in the League can play a valuable part in this respect.