# Umbutho Wamalungelo Obuntu
# CIVIL RIGHTS LEAGUE
## Burgerregteverenigging

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## Contents



## Patrons of the Civil Rights League




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# EDITORIAL

All of a sudden it seems as if everyone is in favour of human rights. The South African Law Commission celebrated human rights in 1991; the ANC lauded them in 1992; and now the National Party has become the latest to jump on the rights-bandwagon in 1993. Of course the Civil Rights League has no copyright on the notion of human rights, but it nevertheless remains difficult to avoid feelings of cynicism (or, worse still, smugness) at this sudden explosion of rights-talk.

The point is that there is a lurking sense that human rights might be becoming a kind of chocolate vermicelli that is effortlessly sprinkled over the political cake as a sweetener or decoration. This is a dangerous tendency because it radically demeans the currency of human rights. Rights are claims that must involve a social cost if they are to be taken seriously. That cost takes the form of a limitation that is placed upon the pursuit of an unbridled majoritarianism or utilitarianism. Those who are serious about rights will be prepared to pay that cost since they place a sufficiently high premium on the value of personal self-determination that is staked out on the perimeter by the language of rights. Those who are not serious about rights will simply try to appropriate the language of rights in order to entrench their positions of power.

In assessing the merits of all the Bills of Rights that are suddenly competing for our attention, a good starting point might be to consider the extent to which the organisation proposing the Bill has demonstrated a commitment to the deep-level values of rights in its past dealings with South Africans. A second question might be this: is there a rich notion of human rights that lies embedded beneath the ritual incantation of rights-clichés that forms the staple fare of so much contemporary South African political debate? We should not be taken in by any organisation that can use a word-processor to slap together a number of clauses under a heading 'Charter of Rights'.

This edition of the newsletter tries to make some sense of all the rights-talk that is suddenly about us. Margot Pienaar asks the puzzling question 'What makes a right a human right?', and Candy Malherbe reviews an instructive recent contribution to the Bill of Rights debate. The right of women not to be discriminated against is considered in Melanie Thomas's article, while Theunis Roux discusses the right not to suffer disadvantages on the basis of what part of the country one happens to live in. Karin Chubb suggests what steps will have to be taken in the run-up to the first democratic election in order to give real substance to the right to vote. In a slightly different vein, Raylene Keightley assesses the current position in regard to the release of political prisoners.

Finally: please note that membership subscriptions are now due for those who wish to renew their membership or those who wish to join the League. Please would you return the enclosed membership form with your payment as soon as possible.

Alfred Cockrell

## LETTER FROM AMERICA: STARS, BARS AND HURRAHS

(Professor Rodney Davenport, a member of the Civil Rights League Committee, is currently spending time in the USA. In this recent letter to the Committee, he gives us an account of his first week in the United States.)

To arrive in America a week before a presidential inauguration was bound to be at least interesting, the more so when the "baby boomers" were coming into their own with something of the flourish which had greeted J.F.K. and Jackie. (One has to insist on the dual appearance, though there is certainly a difference of outlook between the first ladies!)

Apart from the pageant of the inauguration and the other "royal" appearances on that day, we have been unable to escape an extraordinarily intense and extremely public demonstration of how the presidential system works at a moment of maximum exposure. We have been treated to a series of very intense press conferences, first by Marlin Fitzwater fencing off inquiries about Bush's awkward decisions, and now by the brisker, cheekier resourcefulness of George Stephanopoulos, who was clearly one of the more colourful members of Clinton's campaign team. This gets very close to direct democracy.

Several of these press conferences and follow-up televised discussions between journalists and congressmen, academics or ordinary people-in-the-street have been about issues which matter to the Civil Rights League. The following issues in particular spring to mind.

Firstly, the Supreme Court ruling which upheld the right of Free Life devotees to block access to abortion clinics in the name of freedom of expression - which could perhaps open the door for Congress to legislate to protect freedom of choice.

Secondly, the confrontation between President Clinton and the Joint Chiefs of Staff over the issue of gays in the armed forces. In his presidential campaign, Clinton expressed the intention of guaranteeing the right of gays to serve in the armed forces in face of a Defence ruling that they should have no such right. It looks as if some kind of face-off is in the offing, and one hopes that, even if the issue goes to Congress, it will be dealt with as a civil rights issue rather than a disciplinary one.

Thirdly, the much publicised case of Zoë Baird, Clinton's preferred choice for his Attorney-General who eventually asked to have her name withdrawn on account of very widespread public protest - not because Clinton had announced his intention of appointing a woman to the post, but because a couple of years ago she and her husband had appointed Puerto Ricans who had no right to work in the States as child-minders (under very understandable circumstances). The interesting thing here was the conflict between the very real sympathy for Zoë Baird, arising out of a widespread feeling that jobless immigrants deserve this kind of break, and the much more widely expressed view that - however good a lawyer Zoë Baird is and however lousy might be the law that she broke (and apologised for breaking) - in a post like that of Attorney General the law really has to be seen to have been observed with scrupulous and vigilant correctness. In my view the majority were right and she was under an obligation to pull out. (I wish this for Sooth Africa!)

And finally, as a kind of curtain drawn across the end of a memorable week, the death of Judge Thurgood Marshall, the first Supreme Court black judge in the USA, and a leading advocate of the N.A.A.C.P. cause in the fifties who was plaintiff's successful counsel in the famous Brown case of 1954.

Truly, this has been a week to contemplate the importance of Civil Rights!

# Eliminating Discrimination Against Women in South Africa: Can the Leopard Change its Spots?

**By Melanie Thomas**

*A few weeks ago South Africa became a signatory to the **United Nations Convention on the Elimination of All Forms of Discrimination against Women**. Despite the fact that it has not, as yet, been ratified and despite widespread reaction to the signing as a cynical manoeuvre by the National Party to colonise the women's vote, the Convention might nevertheless emerge as a significant feature on the human rights landscape of the future and certainly merits a cursory glance at its terms. In this article Melanie Thomas highlights the most significant features of the Convention. Melanie Thomas teaches in the Law Faculty at the University of Cape Town.*

The United Nations Convention on the Elimination of All Forms of Discrimination against Women is, in the nature of such an instrument, marked by an effusion of rhetorical grandeur on the one hand, but with a fairly toothless set of enforcement mechanisms on the other.

The starting point of the Convention is the concept of "the principle of equality of men and women". However, it does not leave matters there, but goes substantially beyond the artifice of formal equality with a comprehensively articulated commitment to pro-active change. For example, Article 10, which deals with education, commits signatory states not only to providing equal access for women to educational opportunities, but also to the revision of textbooks and school programmes to eliminate "stereotyped concepts of the roles of men and women". Article 4 specifically provides for "temporary special measures aimed at accelerating de facto equality between men and women". The language of the Convention throughout situates itself firmly within the parameters of an equality of results philosophy rather than of process.

There are extensive sections in the document (dealing with, inter alia, employment, legal capacity and the position of rural women) which are certainly pertinent, but there is one feature which might be of special significance to South African feminists.

In Article 2, states party to the Convention undertake the obligation of instituting appropriate measures "to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" (my emphasis). This theme is picked up and extended in Article 5 which enjoins states parties to take measures to modify social and cultural patterns in order to eliminate customary and all other practices which are based on the idea of the inferiority or superiority of either sex or on stereotyped sex roles. Against this backdrop the explicit deference to customary law in the National Party's Charter of Fundamental Rights and Freedoms and its refusal to impose so-called "alien values" on "the law, culture and customs of indigenous minorities and tribes", is clearly in conflict with international human rights law and must be rejected if white women are not the only ones to receive the fruits of liberation.

As is the case with most international human rights instruments, enforcement mechanisms in the Convention can hardly be described as draconian. States parties are obliged to report to the Committee on the Elimination of Discrimination against Women, within a year after the treaty comes into force and every four years thereafter, detailing the legislative, judicial, administrative or other measures adopted to give effect to the Convention. The Committee in turn reports to the United Nations General Assembly.

Despite the lack of an enforcement skeleton on which to hang the flesh and blood of the Convention, it would be wrong to dismiss it as a linguistically opulent but pragmatically meaningless document. The institutions of patriarchy are ever susceptible to becoming prisoners of their own rhetoric and it is furthermore in the nature of international law that its significance and impact cannot always be appreciated within the narrow confines of traditional legal paradigms of justiciability.

# Political Prisoners and the Indemnity Process

**By Raylene Keightley**

*The granting of indemnity for 'political prisoners' has been a major political issue over the past few months. In this article, Raylene Keightley examines the legal framework which governs the indemnity process and assesses the current state-of-political-play regarding releases. Raylene Keightley is a senior lecturer in the Law Faculty at the University of Cape Town.*

One of the legacies of the apartheid era in South Africa was the large number of people imprisoned for anti-government political activity. With the commencement of negotiations between the government and formerly banned organisations such as the African National Congress, it became necessary to address the issue of what was to be done with those political prisoners. Obviously, a break with the political past and the quest for reconciliation between opposing forces was not possible so long as those imprisoned for their political opposition to the apartheid order remained incarcerated. As it turned out, the question of political prisoners proved to be one of the key issues in the negotiations process.

To date approximately 1 400 prisoners have been released from prison as a direct result of the indemnity procedures established to deal with the release of political prisoners[1]. These releases have not occurred without controversy and the many acrimonious exchanges between the government and the ANC over the release of political prisoners have been well publicised in the media. However, while the ordinary person in the street might be well aware that indemnity exists as an 'issue', he or she probably knows very little about the indemnity process itself. In discussing the indemnity procedures as they apply to political prisoners in South Africa, this article highlights some of the many problems which have beset the process.

At the outset a distinction must be drawn between two caregories of political prisoners. The first category comprises those convicted of what may be called 'pure political offences' (such as treason, membership of a banned organisation etc). This category did not pose much of a problem, and the release of such prisoners was accepted by the government at an early stage. The second category of prisoners gave rise to many more difficulties. These prisoners comprised those who had committed 'common crimes' (such as murder, assault, public violence etc) with some connection to political activity or political motive in the execution of the offence. The task of distinguishing genuine 'political offences' from 'non-political offences' in respect of this category of prisoners proved to be very difficult.

To facilitate the identification of genuine political prisoners, the government and the ANC formed a working-group at their first meeting at Groote Schuur. The workinggroup report, which was accepted at the second meeting between the parties in Pretoria, contained a list of criteria which were to be used as a means of determining whether or not an offence could be categorised as 'political'[2]. The workinggroup report also recognised that 'in certain circumstances a "common crime", even a serious one such as murder, may be regarded as a political offence'[3]. When the government translated the workinggroup report into law in the form of the 'Guidelines for Defining Political Offences in South Africa' [4]it adopted the criteria as laid down in the report. However, the government failed to give the same acknowledgement in respect of common crimes as had been made by the workinggroup. Instead, it sought to link the release of prisoners convicted of offences involving violence to political concessions made by the ANC in the course of negotiations. This heralded the beginning of a breakdown in consensus between the government and the ANC.

Further disagreement between the negotiating parties followed. Allegations by the ANC that certain political prisoners (such as Robert McBride) had been refused release were met by the government with the assertion that: 'All prisoners who committed political offences...and who qualified for release in terms of the South African Guidelines for defining political offences have been released'[5]. There appeared to be no dispute concerning the actual criteria for defining political offences. Some of these criteria – such as the motivation of the offender; the commission of the offence as

part of an uprising or political disturbance; and the nature of the political objective - would appear to support the release of prisoners like McBride. However the remaining criteria, including the gravity of the offence and whether the offence was directed primarily against the political opponent or against private citizens and their property, proved problematic for the ANC. Many of the violent crimes that were committed as part of the broad struggle against apartheid involved civilian victims. This obviously militated against certain prisoners being classified as 'political offenders' in terms of the guidelines.

The dispute between the government and the ANC over the release of political prisoners culminated in the ANC suspending negotiations in August 1992. Only after agreement had been reached on the release of further prisoners, including McBride and the'Messina bombers', were negotiations resumed. New grounds for the granting of indemnity were formulated to justify these releases. In terms of the Further Indemnity Act[6] political motivation is the sole criterion for determining whether or not an offence is political. This paved the way for the indemnity of offenders who had been found guilty of high profile, violent crimes against civilians. Apart from McBride and the 'Messina bombers', these included the notorious 'Wit Wolf', Barend Strydom.

The release of prisoners like McBride and, in particular Strydom, did not find wholesale support from the general public. Indeed, if the indemnity programme was intended to promote the cause of reconciliation, this objective was arguably severely undermined by these releases. Even if the general public were able to accept that such releases were necessary, the political manoeuvering by both negotiating parties in implementing the indemnity process prevented any understanding of how or why prisoners were being released.

Further confusion was sown with the release of gang-member Lucky Malaza. He had been convicted on charges arising out of a robbery in which a person was killed and he was one of a large number of common criminals who applied for indemnity on the off-chance that they would be released. Lucky proved to be aptly named in that his application succeeded even though the government admitted after his release that he did not qualify for indemnity. The massive task of trying to co-ordinate and process the thousands of applications for indemnity may be blamed for Lucky's release. Certainly, neither the government nor the ANC could escape blame in this case as Lucky Malaza's name had appeared on lists of political prisoners drawn up by both parties.

Other factors also served to confuse the indemnity issue in the eyes of the public. One such factor was the proliferation of mechanisms available for the release of prisoners. Apart from releases in terms of the indemnity provisions, certain prisoners (such as first-time offenders) were granted remission of sentence under three general amnesties proclaimed by the State President between December 1990 and July 1991. These amnesties were geared towards ordinary criminals rather than political prisoners, but the large-scale release of these prisoners - an estimated 60 000 or three quarters of the convicted prisoner population - at the same time as the release of political prisoners did nothing to clarify the issue of indemnity.

The mechanisms established to implement the indemnity provisions were not conducive to facilitating a better understanding on the part of the general public. The release of political prisoners has essentially been a power reserved for the executive. Thus it is the State President who ultimately decides whether indemnity should be granted or not. In the Pretoria minute it was agreed that a body would be established to assist the State President in this task and to offer him 'wise advice'. Unfortunately, the bodies that were created by legislation to carry out this function, viz. the indemnity committees and later the Indemnity Council, are very limited in their powers. They may only make recommendations to the State President about individual applications for indemnity and the State President is under no obligation to give reasons for his eventual decision. Furthermore, the proceedings of the committees and Councils are secret, with anyone appearing before the them being required to take an oath of secrecy. Thus public access to the way in which decisions are made with regard to the release of prisoners has effectively been denied.

In the final analysis, the indemnity procedure has been fraught with a variety of problems leaving an extremely blurred picture of how political prisoners have gained their freedom. Given the extremely sensitive nature of the issue it should have been dealt with in a clear and rational manner by those negoriating our political future. Their failure to do so surely bodes ill for the prospect of reconciliation in South Africa.

## ENDNOTES

1.This figure was given by the Director of the Office for Indemnity, Immunity and Release in the course of a telephonic conversation on 11 February 1993.
2. Paragraphs 6.2 to 6.6 of the Report of the Working Group Established Under Paragraph 1 of the Groote Schuur Minute.
3. Paragraph 6.5.2(c) of the Report of the Working Group
4. GN R2625 GG12834 of 7 November 1990.
5. Business Day of 19 May 1992.
6. No 151 of 1992
7. Business Day, 19 May 1992

# Focus on Regional Equalisation

**By Theunis Roux**

*In his latest book,* **Advancing Human Rights in South Africa,** *Albie Sachs writes as follows: "Equal protection means (amongst other things) that a person's chances in life should not be unduly affected by what part of the country that person is born in. Without a constitutionally directed policy of regional equalization there cannot be meaningful equal protection in South Africa." These sentiments formed the basis for a Seminar on Regional Equalisation which was held in Cape Town on 15 February 1993. The Seminar was organised by the UCT Institute of Development Law, in conjunction with the UWC Community Law Centre. In this article Theunis Roux (a researcher at the UCT Institute of Development Law) summarises the proceedings of the Seminar and suggests how the issue of regional equalisation should be carried forward.*

The immediate aim of the Seminar was to examine ways in which regional equalisation has been implemented internationally in the hope that a framework could be created for a discussion of regional development issues locally.

Several modern federal constitutions, including those of Australia, Germany and Canada, contain provisions in terms of which the federal government, or individual provinces within the federation, may be obliged to make so-called "equalisation payments" to poorer provinces aimed at redressing regional imbalances in the provision of public services. In all these countries regional equalisation is based on the underlying premise that the federal constitution of the country concerned guarantees each citizen equal enjoyment of the nation's wealth.

The seminar was accordingly addressed in the morning by two overseas speakers. In the first of these sessions Hubert Schillinger, in his capacity as Director of the Friedrich Ebert Stiftung (who funded part of the cost of the seminar), delivered a paper written by Dr Wofgang Rentzch, an economist and expert in the field of "Finanzausgleich" attached to the Ministry of Finance, Brandenburg, Germany.

## The German Experience

In Germany, where federalism in its purest form is apparently on the decline, fiscal equalisation occurs both vertically and horizontally. The tax-structure in Germany is such that the Bonn government is able to recover from the citizens of Germany as a whole more revenue than it requires for the tasks appointed to it in terms of the Basic Law. By contrast, the Länder governments are not able to finance the provision of public services from the revenues they recover on the regional level. So-called vertical fiscal equalisation amounts to the filling of the resultant "fiscal gap" by means of equalisation payments to the Länder from the surplus monies held by the central fiscus.

Poorer states, after receipt of their equalisation payment, are typically able to meet 95% of the cost of providing public services comparable with the national average. Payments made directly to the poorer Länder by the richer regions - horizontal fiscal equalisation - make up a further 4%, leaving even the poorest Land in a position to budget for per capita expenditure amounting to 99% of the national average.

Given that the newly incorporated East German Länder, because of their narrow tax bases, have each been able to recover only 40% of the average per capita revenue recovered by the Länder as a whole, "Finanzausgleich" would appear at first blush to constitute regional equalisation on a grand scale. The success story which is apparent from these figures is, however, belied by the fact that the manner in which 93% of each Länder's budget is spent is dictated to it in some form or another by the central government. In real terms, therefore, richer Länder (who have a budgetary capacity 102% of that of the national average) enjoy

up to 50% more autonomy in respect of public expenditure directly under their control.

## Australia

In Australia, where equalisation payments have been made on the advice of the Commonwealth Grants Commission since 1933, a far greater level of sophistication has been reached with regard to fiscal equalisation, although the policy is largely confined in that country to its horizontal avatar. Members of the Grants Commission are appointed by the Governor-General in Council and are usually drawn from the ranks of the judiciary and academic economists. Every year the Commission is asked to apply a basic formula in terms of which each of Australia's six states may become entitled to an equalisation payment. The weighting of each state's share is in turn decided at a public enquiry, staffed by the Commission, on the basis of submissions by the state governments.

The procedure followed at the various public enquiries is a relatively adversarial one, with the state government concerned bearing the onus of proving its expenditure needs. According to Cheryl Saunders, Professor of Constitutional Law at the University of Melbourne and the second speaker at the seminar, regional equalisation in Australia has as a result unfortunately become something of a political football in the ongoing interstatal struggle for resources and prominence in that country. Although the suggestion has been made, no principles exist as yet according to which a state could be penalised for not actually improving its level of public services. The emphasis of Australian fiscal equalisation still falls heavily on regional capacity rather than regional performance. It is not surprising, therefore, that, apart from the Commonwealth Grants Commission's own five-yearly methodology review, there are at least two other major enquiries underway at present aimed at reform of the current system.

## Regional equalisation in South Africa

Regional equalisation has, of course, never existed as such in South Africa (although some might argue that the homelands policy had as one of its goals a perverse form of regional development). That the policy is definitely on the constitutional negotiations agenda, however, is clear from Article 10 of the ANC's Draft Bill of Rights which provides that, "in order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas."

The seminar's afternoon session accordingly took the form of a panel discussion concentrating on just how money could be diverted to poorer areas in a future South Africa. The panelists were Dr Heribert Adam, a well known political scientist presently attached to the Graduate School of Business in Cape Town; Hanlie Croeser, Deputy Director, Intergovernmental Fiscal Finance; Dr Bax Nomvete of the Africa Institute for Policy Anaysis; and Philip Van Ryneveld of the University of the Western Cape's Economic Policy Research Unit.

It soon became clear during the course of the discussions that there are several preliminary issues that need to be decided in South Africa before the character of our own regional equalisation policy can be settled. First, the precise content of the individual's constitutionally entrenched right to demand from the future South African state that s/he be provided with a level of public services comparable with that found elsewhere needs to be discussed. Like so many other apparently fundamental rights, this right needs to be defined within a broader developmental framework which is mindful of the state's capacity to meet the constitutional demand set by the Bill of Rights.

Second, regionalism will never be a purely developmental question in South Africa. It is clearly inextricably linked to the power struggle around ethnic autonomy in this country. As long as the constitutional nature of the future South African state remains uncertain the regional equalisation model which best suits local conditions cannot be finally agreed upon. Which is not to say that agreement cannot be reached in principle. The feeling was expressed at the seminar that,-although regional equalisation is characteristic of federal constitutions (born as it is of a perceived need to compensate fiscally for the potential negative economic effect of regional autonomy), it would be unwise to become enslaved to the unitary/federal state dichotomy. For example, there is no reason in theory why some form of regional equalisation could not exist in a unitary state as a means of encouraging rural development for its own sake.

***"regionalism will never be a purely developmental question in South Africa. It is 'clearly inextricably linked to the power struggle around ethnic autonomy in this country"***

Perhaps the most serious stumbling block in the way of the implementation of regional equalisation in South Africa is the fact that the infrastructure necessary to support what is a relatively sophisticated development policy almost certainly does not as yet exist in this country. The civil service, in particular, will have to be radically transformed as a prerequisite to the efficient transfer of wealth from richer to poorer regions. Should this not occur, regional equalisation could simply become a counterproductive bureaucratic nightmare plaguing the economic recovery of the country as a whole.

# Voter Education and Election Monitoring

**By Karin Chubb**

*One of the more surprising aspects of the current political scene is that, with a one-person-one-vote election a matter of months away, there is not much more public urgency about voter education and election monitoring. In this contribution, Karin Chubb makes some suggestions about how we should be preparing for the run-up to this country's first democratic election.*

The term "voter education" is used as a general label for all the processes that have to happen before people can make an informed and independent political choice. Voter education should not be understood as merely meaning that the hitherto disenfranchised are being familiarised with the mechanics of balloting. As was pointed out in the UN Secretary General's report on the Namibian election: "Elections in and of themselves do not constitute democracy. They are not an end but a step, albeit an important and often essential one, on the path towards the democratisation of societies and the realisation of the right to take part in the governance of one's own country as enunciated in major human rights instruments. It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country." (A46/609/76)

"Education for democracy" is a more accurate definition of the aims of voter education. It seeks to restore civil society to its proper role in a process which involves gaining knowledge of the political system and of citizens' rights and responsibilities within that structure. It is as important to know why one votes as it is to know how one votes. Within this context NGOs have an important role in voter education.

All political parties undertake their own programmes of voter education. It is in their interest to use all possible tactics to persuade potential voters to support their candidates rather than those of the opposition. For example, a sample ballot used in the voter education programme of a political party would be marked with a cross as a "sample" vote for that political party, perhaps without even showing the names and symbols of any of the others. Party slogans and colours would feature equally prominently. The focus of an NGO voter education programme, as far as the ballot paper is concerned, would be to explain the entire ballot paper to voters, giving attention to all parties and their symbols.

Similarly, a particular party will exhort potential voters to vote for X as the only reasonable and possible choice. This message is reinforced with banners, posters, colours, symbols and the like. Depending on the resources of a party, this can easily create the impression that a party is dominant in a particular region - whether or not this is in fact the case. Supporters of other parties may feel intimidated by such a show of force - to the extent of not casting their ballots, or intentionally spoiling their ballot papers. (This reaction to intimidation was observed in the course of the Angolan election.) In such a situation NGOs have the crucial function of strengthening voter confidence by emphasising the secrecy of the ballot long before the day of voting - and by their visual presence and effective monitoring actions on election day.

Other areas on which NGOs should focus their voter education programme are on the voters' rights to critical questioning of candidates and on the careful scrutiny of electioneering promises. It would be disastrous if, for short-terms gains, politicians were allowed to make unrealisable promises in the name of democracy. The subsequent disillusionment would quickly undermine faith in the democratic system itself.

The development of a culture of political tolerance is an essential part of voter education. Churches and other religious groupings can play an important role in this regard. It should be remembered that political intolerance and thuggery are well entrenched in South African political life and are not the prerogative of any one group. No South African, black or white, has ever taken part in a democratic election in his or her own country. Freedom of speech and of dissent, the freedom to make informed political choices on an individual basis, the right to unbiased public media - all these basic democratic principles and practices have yet to be developed.

But there are more ways in which the churches should become involved - urgently. Only the churches have the infrastructure, at present, to reach almost all potential voters to encourage them to apply for identification papers, and to monitor the way in which these are issued. There are 2.8 million potential "black" and "coloured" voters in the northern, southern and western Cape alone - in the rural parts of which there is little organisational infrastructure other than the churches. Voter education material needs to reach these people, and the Department of Home Affairs needs to be encouraged to send mobile units to groups of ID applicants in the rural areas. Such registration sessions could be held under the auspices of the local churches. This would have the advantage that the church could monitor the process and could be supportive of applicants who have every reason not to trust a government department.

Abuses can best be monitored by domestic groups with a thorough knowledge of local conditions. The Black Sash advice offices, for example, are already receiving reports of misinformation about voting procedures. Farmers in a certain region are reported to inform their workers that "on a ballot paper you mark all the wrong parties with a cross". This tactic (which was also used in Namibia) is quite effective, as anyone will know who has ever had sums marked wrong at school.

Much has already been said about the involvement of international organisations in election monitoring. Without a large, well-trained force of domestic monitors these are at best less effective, at worst a mere rubberstamp on a possibly deeply flawed election process. The alacrity with which government officials welcome the possible presence of international observers on election day is remarkable. But international monitors can at best strengthen local monitors - they cannot replace them. The UN success in Namibia was not brought about by a small group of monitors who flew in just before the elections. It was secured by a huge, well-resourced UNTAG force which is simply not an option for the coming elections in South Africa.

There will be about 7 000 polling booths on election day. Unless NGOs start now to build a well-trained domestic monitoring network of at least 25 000 independent monitors I do not believe that it will be possible to monitor the coming elections effectively. Religious groupings and other NGOs must, as organs of civil society, become involved in a process that will begin to take us towards a democratic and peaceful society.

**REVIEW ARTICLE:**

# *'A Charter for Social Justice'*

***A plethora of proposed Bills of Rights currently vies for our attention. One of the more recent of these Bills of Rights was published in December 1992 by a group of eight Western Cape lawyers:* A Charter for Social Justice - A Contribution to the South African Bill of Rights Debate *by Hugh Corder, Steve Kahanovitz, John Murphy, Christina Murray, Kate O'Regan, Jeremy Sarkin, Henk Smith and Nico Steytler. In this article, Candy Malherbe (a member of the Committee of the Civil Rights League) reviews this comprehensive proposal.***

Here, in under 70 pages, is an easy-to-read and illuminating exposition of the nature and concerns of a Bill of Rights. The proposed charter consists of a Preamble and 27 articles, with 'A possible property clause' appended. What the authors call 'Directives of State Policy' express certain policy goals which, it is felt, belong in the constitution itself. The book is uniquely valuable on account of the attention given to human rights debates, its wide-ranging references to other charters and covenants, and the clear setting out of the lines of reasoning which shaped this set of proposals.

Two earlier documents were taken as starting points: the Interim Report on Group and Human Rights of the South African Law Commission (1991) and the ANC Bill of Rights for a New South Africa (1992). Now the National Party has produced a draft 'Charter of Fundamental Rights'. Among the many reactions it has evoked is one ('Rights charter "good in parts"', Weekend Argus, 6/7 Feb. 1993) co-authored by Hugh Corder, a contributor to the book currently under review.

The traditional 'function of bills of rights is to regulate the relationship between individuals and the State'. The authors argue that an approach which permits 'private individuals and institutions' to 'arrange their affairs without regard to the values enshrined in a Bill or Rights' is inadequate. They have framed a clause (Art. 27) which brings behaviour by private parties in conflict with the bill of rights within the ambit of a constitutional court. The two 'charters' differ sharply on this count, the NP's formulation having at its heart the 'severance of the public from the private domain' (Weekend Argus).

At several points, these lawyers make a case for avoiding the lists of rights which other bills include as a matter of course. Among the four reasons they present is one which holds that 'itemizing constitutional rights and freedoms ... may have the unintended effect of actually limiting the protection they will provide'. The millions who have been oppressed by racial or gender discrimination (or both), and the scores of interest groups who insist that the rights of, say, the disabled should be specifically expressed may well be skeptical regarding this. Nevertheless, they and their leaders should give some thought to the cogent arguments supporting this approach.

Of great importance to current Bill of Rights debates is the discussion about social and economic guarantees - what have been called second and third 'tier' or 'generation' rights. In arguing for a set of 'Directives of State Policy' which is part of a new constitution, the authors explain why they depart from the (very different) approaches of both the SALC and the ANC. They also make some telling points with respect to the pitfalls and inappropriateness of empowering judges to enforce socio-economic guarantees in a justiciable bill of rights.

With this book to hand, we will be in a position to peruse the next two-page newspaper spread of closely written text purporting to define our rights with insight and confidence.

A Charter for Social Justice - A Contribution to the South African Bill of Rights Debate is jointly published by the Public Law Departments of UCT and UWC, and by the Legal Resources Centre in Cape Town. Copies of the book may be purchased from any of these institutions.

Candy Malherbe

# When Does a Right Become a *Human* Right?

**By Margot Pienaar**

*Human rights are firmly on the political agenda of the New South Africa, and many South Africans are likely to be wondering what exactly human rights are. Just political slogans? Empty promises? Protection for the wealthy? In this article, Margot Pienaar makes some suggestions regarding the criteria to be used in deciding what makes a right a human right. Margot Pienaar was a member of the Committee of the Civil Rights League for 1992; she is currently working for the Legal Resources Centre in Pretoria.*

The origins of human rights go back much further than the drafting of the Universal Declaration of Human Rights in 1948. From the earliest times, communities have drafted declarations of rights. From the Magna Carta of 1215, through to the British bill of rights of 1688, to the declarations of the French and the Americans of the 18th century, these declarations have served to entrench what was considered by communities to be basic standards of regulation for their particular societies. The signing of the Universal Declaration is a noteworthy event, not only because it was the first international recognition of human rights, but because it was the point at which the development of international human rights theory and practice took on a momentum and a direction which it had not had before.

One of the foremost reasons for the drafting of the Declaration was the promotion of peace. This has been reiterated time and again by Professor John Humphrey, who was one of the co-drafters of the Universal Declaration. It is understandable when one considers that the declaration was drafted in the post-war context with the horrors of the Nazi death camps still painfully fresh in the minds of the drafters. Hopefully the bill of rights for the New South Africa will play a major role in the promotion of peace in this country.

The Universal Declaration of Human Rights asserts "a common standard for all peoples and all nations" and declares that "all human beings are born free and equal in dignity and rights". The rights recognised in the Universal Declaration were rights which to a large extent had already been recognised in national declarations of rights.

Since the drafting of the Universal Declaration, several new rights have been recognised by the UN General Assembly. Rights which have already been recognised include the right to development, the right to peace, the right to popular participation, and the right to a clean environment.

There is also a "waiting list" of "rights" which certain people believe should receive recognition. These include the right to sleep, the right to coexistence with nature, the right not to be killed in a war, the right to social transparency, and the proposal of the World Tourism Organisation that tourism has become a basic need and therefore a human right.

If a claim can create a right, then the community could get together and make claims to any number of situations which it believes would be essential components of human dignity - a right to a three day week, or to gourmet food, or to symphony concerts once a week, or to coffee in bed every morning (and I always maintain that coffee in bed certainly does a lot for my dignity)... the possibilities are endless.

If the state passed a law proclaiming the right to gourmet food for all citizens, it would be a legally recognised right in South Africa, but would it be a human right? What transforms a claim to a human right? What makes its recognition valid? It is clear that there is a need to identify the criteria by which to evaluate the recognition of human rights.

Fortunately, suggestions for criteria against which to determine the recognition of a claim as a human right have already been made (see the 1984 American Journal of International Law). The new human right should:

- reflect a fundamentally important social value;
- be relevant (to varying degrees) in a world of diverse cultural values;
- be an interpretation of UN Charter obligations, or a formulation or reflection of general principles of law found in most states;
- achieve a high degree of international consensus
- be precise enough to give rise to identifiable rights and duties.

Human rights are the glue that can hold society together. They adhere to every person and form a shield against the state, which has a duty to respect and uphold them. They are the instruments of power of the individual. Human rights are claims by human beings against the state. They are inherent rights, held by virtue of being human. The fulfilment of these rights is necessary to uphold human dignity and promote peace.

The most important criterion of all is that human rights are not flippant claims against a paternal "father Xmas" state with a sack full of gifts for the self-indulgent. And in the New South Africa, I suppose this means I will have to make my own coffee every morning. But at least I'll have my dignity, because to claim a human right is to assert a universal moral right which all people at all times ought to have, which they may not be deprived of without a grave affront to justice, and which is owing to every human being simply because he or she is human.