

2. Bill of Rights

Since the founding of the Liberal Party 36 years ago Liberals have insisted that an essential element of a non-discriminatory post-apartheid society must be a legally enforceable Bill of Rights. Now all sorts of other people are coming round to that view.

The ANC's new constitutional guidelines call for a Bill of Rights and affirmative action to tackle the legacies of inequality which we inherit from our past. That is very welcome.

Surprisingly, and equally welcome, is the fact that the Government's own Law Commission, set up under Mr Justice P. J. J. Olivier to examine the question of the desirability of a Bill of Rights for South Africa, makes exactly the same recommendations. The Olivier report backs up its recommendations with reasoned and detailed arguments. Most interesting of all, it dismisses the case for the

entrenchment of group rights, insisting that if individual rights are properly protected, those group rights which are of particular concern to minorities, such as language, culture and religion, will be effectively protected too.

Nationalists will have difficulty accepting this proposition but they must somehow be persuaded that it in fact does offer the best possible protection, in the long term, for those aspects of Afrikaner culture which they are understandably so anxious to preserve.

Judge Olivier has not only produced a well-reasoned and very detailed report, he has backed it up with a draft Bill for the introduction of a comprehensive Bill of Rights which could be passed into law tomorrow. That will not happen yet but the passing of such a Bill into law has become a cause which all those who support the concept of a Bill of Rights must start to fight for now. □

by HEATHER HUGHES

HUMAN RIGHTS IN A DIVERSE AND DIVIDED SOCIETY

Report on the Lawyers for Human Rights International Conference, University of Stellenbosch, January 1989.

At the end of the first day of the conference, there was a cocktail party. For those who were accustomed to such occasions, it was a fairly ordinary cocktail party: well-organised, good food beautifully presented, more than enough Cape wine to drink. City professional people probably attend a good many such functions (or at least one could be forgiven for believing that by the nonchalance with which they treated this one). Poor people from rural areas, however, are not as used to the sight of fancy food. A young activist from KwaNdebele took one look at the spread and exclaimed in wonderment, "I will **never** see food like this again!" He told me that it is difficult for his family to afford sufficient maize and potatoes — their staple diet — most months. He explained that for school leavers like himself, the only hope of employment was on the lowest rungs of the bantustan bureaucracy, and there were too many in his position for the available jobs. That was why he had become an activist — to change things in KwaNdebele. He seemed hopeful about the future, but for the moment, he just wanted to eat. He said that this fare would keep him going for weeks. He left the party carrying several serviettes bugging with leftovers of the feast.

Somehow, in a very stark way, the different attitudes to the food reflected the very different attitudes to human rights represented at the conference. There were those, trained in the ways of tolerance and fair play, who assumed that everyone should share exactly their notion of human rights; there were those — perhaps who had had to struggle most of their lives to achieve what they had — who questioned the very meaning of human rights and all the guarantees that supposedly protected them.

FORMAL SESSIONS

The five formal sessions of the conference all had the same format: an eminent speaker who delivered a keynote address; a panel whose members responded thereafter, followed by open discussion from the floor.

The first speaker was Prof Laurie Ackerman, who occupies the Harry Oppenheimer Chair of Human Rights at Stellenbosch University. In a wide-ranging address, dealing directly with the conference theme, he argued for the rights of minorities to enjoy their own culture but not to opt out of the body politic; he traced the histories of some human rights traditions and philosophies, and made a strong case

for the recognition of economic and social rights as being as important as civil and political ones. (The Universal Declaration of Human Rights does recognise these categories, but Prof Ackerman went further in his argument by adding that private property was a form of protection against government.) He ended his address by calling for a Bill of Rights and a system of full judicial review for South Africa.

In the panel discussion, it was noted, *inter alia*, how the State of Emergency had stifled the ability of people to organise themselves to better their own lives, that there was growing despair over the ability of the courts to protect human rights, and that there was a need to extend the discourse of human rights beyond the professions and outwards into communities. One speaker suggested that the only way in which a human rights culture could grow in this country was by looking at indigenous concepts, such as **ubuntu** (“humanity”), and that such a culture would be born out of a long and hard struggle.

MINORITY RIGHTS

The second session provoked the liveliest discussion, on the subject of minority rights. The speaker was Prof Kevin Boyle (Professor of Law, University College, Galway, Ireland; founding member of the civil rights campaign in Ulster; Director of Article 19, a research and information centre on censorship). In this country, he said, the difficulty was that there was no agreement as to who constituted minorities. He further pointed out that there was in fact no internationally agreed definition of a minority. He provided the following provisional one: “a numerically smaller, non-dominant group in a state, distinguished by ethnic, racial, religious or linguistic attributes.” He added that of course, the existence of minorities implied majority rule. The situation in South Africa was rather special because, unlike in many states where minorities were struggling for their rights, here there was a whole series of manufactured minorities, which the government was trying to protect rather than ignore. This enforced pattern of minorities was the basis of segregation; it was an imposed identity. There was as yet no opportunity for a self-defining minority position.

He concluded by discussing the issue of reverse discrimination, such as quotas at universities, the encouragement of black people in certain job categories, etc. This was acceptable as it was not designed to constitute separate groups along racial lines, but was a temporary measure to correct the wrongs of the past. This was considered quite acceptable in international law.

Even though this had been a strong argument for the recognition of minorities in a post-apartheid South Africa, the panel was unanimous (though for a variety of reasons) in its rejection of the entire concept of minority rights, expressing the view that individual human rights would answer all requirements. (One got the impression that this was — partly at least — because the model of a minority in everybody’s head was that of white Afrikaners.) Clearly for the moment, the observation that this government has totally discredited the concept of minority rights (irrespective of merits and demerits of the concept) was borne out by the many strong feelings voiced in discussion time. One or two speakers pointed to the need for some minority guarantees, but one felt that they themselves were in a minority.

The second day began on a sombre note: the news had just reached the conference that Soweto doctor Abubaker Asvat had been gunned down in his surgery, and everyone observed a minute’s silence in his memory: it was a stark reminder of the gross violations of human rights being perpetrated daily.

CONSTITUTIONAL GUARANTEES

Prof Albert Rosenthal (formerly Dean of the Law Faculty at Columbia University; member of New York State Revision Committee and of Executive Committee of the Bar Association of the City of New York; author of several books) delivered the keynote address in the third session. He addressed the question of constitutional guarantees of human rights and drew on the American experience to illustrate his talk. He began by pointing out that “constitution” meant many things: Was it law? Was it a hope or ideal? Was it supreme over legislation, or subject to repeal? In the United States, the constitution protected individuals against the excesses of government; in this way, issues could be taken out of the realm of politics. But the US constitution applied to actions of government, not those of the private sector — perhaps, he suggested, South Africa needed a different approach. He pointed to limitations of even these constitutional guarantees: for example, though racial discrimination had been removed from the constitution, the USA was still a racist society. The point was that constitutional guarantees were only a beginning.

Prof Rosenthal discussed too the question of judicial review and the entrenchment of rights. Judicial review supposed an independent judiciary, and a belief in the rule of law. Entrenchment of rights depended on a difficult amendment process, so that the constitution was very difficult to change.

He made the important point that what was more meaningful than any constitutional guarantee was societal acceptance of the notion that government should protect human rights — in other words, the need for a human rights culture, otherwise bits of paper would mean very little.

He then sketched a brief history of the US constitution, explaining the way in which these matters had been dealt with.

In the panel discussion it was stressed that constitutional guarantees were not self-enforcing. People created them and could destroy them. Human rights had to be respected; this could not be left to lawyers. Respect was the best guarantee of protection, since people had in fact become very suspicious of the power of things written in documents.

The case of Pietermaritzburg was raised: there, the courts were no longer able to provide any measure of protection, and nor were the police. A system had therefore been instituted which bypassed these official channels — the independent adjudication board. It depended on a measure of co-operation between Inkatha and Cosatu/UDF in order to function. What this case illustrated was the complete destruction of the belief that the law could protect human rights.

ADMINISTRATIVE STRUCTURES

The next session, on administrative structures for the protection of human rights, opened with an address by Prof Jochen Frowein, Director of the Max Planck Institute for Comparative Public Law, and Professor of Constitutional

LAWYERS FOR HUMAN RIGHTS

INTERNATIONAL CONFERENCE ON HUMAN RIGHTS IN A DIVERSE AND DIVIDED SOCIETY



- * What are Human Rights?
- * How are Human Rights protected Nationally and Internationally?
- * What do the terms "Human Rights ethic" and "Rights Culture" mean?
- * What can a Bill of Rights achieve?
- * What is the relevance of the Universal Declaration of Human Rights?
- * What about "Individual Rights", "Group Rights", "Minority Rights"?

These and many other questions will be discussed.

and Public International Law at the University of Heidelberg. He is also Vice-President of the European Commission of Human Rights.

Prof Frowein began by distinguishing between those human rights which were indisputable (e.g. freedom from torture, arbitrary death) and those which were open to discussion. Again, there were another two categories of rights: those which the courts could and could not protect. For example, courts could protect civil liberties but could not provide food.

He suggested that in Africa, economic and social rights had taken precedence over civil and political ones, which meant these latter had been neglected. Over the past decade there were signs that this imbalance was being redressed.

Prof Frowein discussed numerous kinds of administrative structures, and among those relevant to South Africa were the ones concerning the care of detainees: e.g. regular medical examinations, access of detainee to lawyer. These did help in ensuring the well-being of a detainee — but he added that even in Europe, there was no universal acceptance of such administrative procedures. Nor, in Europe, was there a consensus about the role of the courts in ensuring that administrative actions were followed. Court control was only effective if police would obey the courts.

The office of the ombudsman in Scandinavia was held up as an example of a method of coping with complaints (not necessarily only legal ones) in a flexible manner. Although the ombudsman was not part of the administrative structure as such, the office was very important and could be a good model for South Africa.

Prof Frowein concluded by discussing a number of problem areas in Europe, among these the use of force in arrest/detention by army and police (sometimes their powers were far too wide); the "state of mind" of an officer

in the event of an attack on an individual; and the question of censorship of information.

In the panel discussion, the merits of a Bill of Rights were once again argued, and it was pointed out that under the State of Emergency, effective judicial review was impossible. Again, the example of how the courts had been bypassed in Pietermaritzburg was raised, in an effort to quell the violence. A similar strategy was being contemplated as a way of dealing with the new Labour Relations Act.

A Western Cape lawyer gave some fascinating examples of how state administrative structures had been used effectively — against the interests of the state. He gave the examples of welfare payments (a case of a disability grant being terminated when the recipient was detained) and of removals in Lawaai-kamp and Port Nolloth, where municipalities had now been sensitised to the issue of removals under the threat of media exposure.

COMMISSION

The final session of the conference was about the setting up of a human rights commission in southern Africa. Mr Vinodh Jaichand, Senior Lecturer in Private Law, at the University of Durban-Westville, traced the history and structure of a number of commissions, international, regional and local. Among these were the United Nations Commission on Human Rights, the Inter American Commission on Human Rights, the European Commission on Human Rights, and the Australian Human Rights Commission. Mr Jaichand concluded by supporting the establishment of a commission in this region, an idea also supported in the panel discussion, on the grounds that it would spread awareness; investigate individual cases of violation; pressure the government into respecting human rights; and promote the adoption of progressive legislation.

The conference endorsed the formation of such a commission, and this was a concrete proposal to be taken away and implemented by Lawyers for Human Rights, in order to continue the work begun over these two days.

The ending of the deliberations was marked by a sumptuous feast at the Boschendal Estate, which far outshone even the delicacies of the previous evening. If we did not leave any better equipped with civil and political rights, at least no-one left hungry.

The very wide diversity of the 400 or so delegates — from professors and judges to students and activists — made the conference theme live up to expectations in every way. Quite apart from the very profound issues raised by each of the speakers, were the concerns voiced by the unenfranchised, those who have always been excluded from the process of making and carrying out the law. They spoke eloquently of their problems whenever the chance arose. They questioned the very notion of "the law", they asked who the law was really protecting, and they were sceptical of those who sat in judgement being able to reconcile their work with any notion of human rights. As one of them put it, "We have a problem but we've run out of solutions."

The responses of the legal fraternity (a male term, but the conference **was** very male) varied. Some got very defensive and protective; others were a bit stunned; others, more in touch with popular attitudes, showed sympathy. Having such a huge division of opinion in one conference hall, and having all shades of opinion aired, was at once an achievement in itself, a great learning experience, and an indicator of how difficult the road to human rights will be. □