

There's agreement on the principle
but major issues still need settling . . .
and the details should not be left to the politicians

SECURING RIGHTS FOR THE INDIVIDUAL

A BILL of rights is an essential feature of any liberal democracy.

It safeguards all members of society from the possible tyranny of majoritarian government by ensuring that fundamental human rights and freedoms are protected in an independent and objective manner by the courts.

It is for this reason that the fact that the introduction of a fully justiciable bill of rights is supported by major players in a future South African political scenario is to be welcomed by all who wish to see the country transformed into a just and truly democratic society. However, just because major political players indicate that they support a bill of rights it does not mean those who are concerned about the future political dispensation can now simply relax and leave the question over to politicians.

It is for this reason that the Liberal Democratic Association convened a conference to deal with certain aspects of implementing such a bill.

The conference focussed on two particular aspects:

- On the practical aspects of implementation of a bill of rights — How a bill of rights was to be drafted? Who was responsible for drafting it? How and when should such a bill be implemented? Should there be an interim bill of rights to see the country through the transitional phase?

- On developments overseas — This was important because among South Africans the issues tend to be emotive and parties look for motives and hidden agendas in each others viewpoints. For instance, many black people question why whites should suddenly become interested in a bill of rights now that black majority rule is just around the corner. They suspect that this could be to preserve the status quo. It is also important to move away from the perception that the situation in South Africa is totally unique.

The conference got off to a good start when Professor Jeffrey Jowell, of the

University College London, laid the foundation by examining the role a bill of rights plays in a democracy.

This is important in a South African context since there is a perception among some in the community that a bill of rights could have the effect of impeding the majority will.

M.G. COWLING, senior lecturer in Law at Natal University, reports on the Liberal Democratic Association's conference on a Bill of Rights.

Professor Jowell pointed out that democracy is something more than majoritarianism. It implies participation of all members of society in the various aspects of government at all times — not only at elections. To this end freedom of speech and assembly (in the form of the freedom to disagree with and criticise the government of the day) are vital components of a true democracy. Hence they must be protected from the majority in order to preserve the essence of democracy.

Both Professor Jowell and Professor James Cornford (from the Institute of Public Policy Research in London) stressed the need to limit the powers of a democratically elected legislature in order to protect fundamental human rights for all. This raised the problem of conferring upon unelected judges the power to test legislation.

They drew on the British experience to show that although Britain had managed to develop a human rights culture without a bill of rights, human rights protection had gone into something of a decline in recent times. This was because Britain was no longer as racially homogenous as it used to be as well as because of the rise of modern terrorism: For this reason the Institute of Public Policy Research was proposing a bill of rights for the United

Kingdom.

However, it is one thing to champion the protection of fundamental human rights over majoritarianism. It is quite another to ensure that the majority supports and accepts the idea.

The question of legitimacy of a bill of rights was addressed by Professor Denis Davis, the director of the Centre for Applied Legal Studies at Wits. He said such a bill must articulate the moral values of society otherwise it would fail. It was conceded that this would be a difficult task in South Africa which did not have a deep tradition of a human rights culture.

He pointed to other problem areas regarding legitimacy: On the one hand liberalism had always remained as part of the political discourse but many were now latching onto it for different reasons. For example, the government supported the concept of a bill of rights out of fear and distrust of majority rule. On the other hand it was essential that the legacy of apartheid be addressed and a bill of rights could only play a limited role in this respect. There would have to be a balance between majoritarianism and a bill of rights since reliance on either the State or the market would prove inadequate.

Professor Marinus Wiechers (of Unisa) who took part in the Namibian constitutional negotiations and was also responsible for drafting the Bophuthatswana bill of rights, said, South Africans should not shy away from copying other documents. There were scores of bills of rights in existence and recourse should be had to them. He cited as an example the fact that the principles embodied in the Universal Declaration of Human Rights served as a precondition for Namibian Independence and were thus embodied in the Namibian bill of rights.

On the other hand drafting could not stand isolated from the rest of the constitutional process.

This was clear from the Bophuthatswana experience where the bill of rights

GROUP FREEDOMS AN EXTREMELY SENSITIVE ISSUE

could not be faulted from the point-of-view of technical draftsmanship and yet it failed to have any significant impact on the political and legal system. Professor Wiechers attributed this in large part to the fact that the Bophuthatswana government had never permitted truly democratic opposition.

It was thus important to ensure that the new constitution would see a break from South Africa's previous constitutional tradition and ensure that the protection of fundamental human rights and freedoms would take precedence over the existence of the State and becomes firmly embedded in the national psyche.

Professor Johan van der Westhuizen of the University of Pretoria, outlined three options as far as timing was concerned:

- The immediate introduction of a limited bill of rights implemented by the present government on a gradual basis.
- The immediate implementation of a full bill of rights.
- Wait until the new constitutional dispensation was negotiated on the grounds that it would be premature to implement such a bill into an apartheid society. Professor van der Westhuizen said there were advantages and disadvantages in all three but supported the option of waiting for the reason that real protection of human rights was something that could only be won through struggle.

The second day of the conference started with a panel discussion by politicians representing the ANC, NP and Inkatha. What was remarkable about this session was the extent to which the major players on the political scene appear to be in agreement that any new constitution should contain a fully justiciable bill of rights.

Thereafter two sessions were devoted to what the organisers considered to be major problems concerning the implementation of a bill of rights: the issue of protecting group rights, and socio-economic rights in a bill of rights.

On group rights, Mr Bede Harris, University of Natal, Pietermaritzburg, dealt with the protection of the identity of different cultural groups in the light of the principle of non-discrimination. This

is an extremely sensitive issue in South Africa since any attempt at group exclusivity (even on a private basis, for example, by creating racially exclusive schools and clubs) could well be perceived as a form of apartheid. And yet if the right of association (which logically incorporates a right to disassociate) were to be entrenched in a bill of rights, the courts could end up thwarting any attempts by a future government to outlaw this type of activity. This, of course, could create major problems in a future South Africa.

Professor Charles Dlamini, of the University of Zululand, raised the very pertinent problem that although South Africa is a deeply-divided plural society most of the groups classified by the system of apartheid did not receive any benefit from such classification. Thus any attempt at classification in the future was bound to be viewed with suspicion and most likely rejected as a resuscitation of apartheid. However, he stressed that groups were entitled to rights over and above mere individual rights.

Lessons learnt

The third speaker in this session, Professor Dawid van Wyk of Unisa, said apartheid had prejudiced discussion on group rights and account must be taken of the adverse effects of apartheid (such as feelings of superiority and inferiority) in discussing this issue. He also warned that ethnic, racial and group tensions were beginning to dominate the international political scene. He advocated a framework of protection of group rights that should be incorporated into the constitution — and not necessarily a bill of rights which was essentially geared towards protecting individual rights.

So what lessons were learnt from the conference? Professor Jeffrey Jowell, in his summing up, sounded a warning that constitutions (and especially bills of rights) should not be weighed down by the excess baggage of general policy-making. A constitution should provide the basic structure and framework of government and stipulate what the government could not do: for example, transgress individual rights and freedoms. But it should not stipulate what a government should undertake by way of

general policy decisions.

This raised the issue of socio-economic rights and Professor Jowell asked whether judges were able to decide polycentric problems in the realm of social and economic policy-making?

The same could be said for the question of group rights. Professor Jowell pointed out that a bill of rights was essentially designed for the protection of individuals — and not minorities — yet it was necessary to ensure that the fact of group identity was recognised.

What was noticeable during the conference (and was pointed out by Jeffrey Jowell) was the extent to which there was common ground between major political parties.

This obviously gives cause for optimism but one must caution against over-optimism. A human rights culture is not suddenly going to appear once apartheid has been eradicated. It is an ongoing process that needs to develop over time.

Neither can a bill of rights be expected to function automatically on implementation. Instead we are going to have to work at ensuring that it succeeds.

And this is something that all those who desire a functional and fully justiciable bill of rights can begin working on. Not only did the conference provide certain solutions but it raised a number of questions (such as ensuring legitimacy, the mechanics of implementation, group and social-economic rights, etc) that need to be addressed.

To a certain degree it is also going to be necessary to depoliticise the concept of a bill of rights to avoid it becoming a political football. An important development in this respect occurred when Mr Bulalani Ngcuka of the ANC constitutional committee, stated that the ANC had no objection to the introduction of an interim 'mini' bill of rights prior to the formulation of a new constitutional dispensation.

If sufficient effort and pressure could be exerted in this regard it would mean that a nascent bill of rights culture would already be in place at the time of a constitutional convention. Not only would this have important educational benefits for the population as a whole but it would also avoid wasting valuable time. ●