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ALBIE SACHS ON A BILL OF RIGHTS FOR SOUTH AFRICA

"For those of us who have suffered arbitrary detention, torture and solitary confinement, who have seen our homes crushed by bulldozers, who have been moved from pillar to post at the whim of officials, who have been victims of assassination attempts and state-condoned thuggery, who have lived for years as rightless people under states of emergency, in prison, in exile, outlaws because we fought for liberty - the theme of human rights is central to our existence." Albie Sachs, 1990.

Very few South Africans know what a Bill of Rights (BoR) is. The battle for human rights in our country has essentially been a struggle for the vote, and not for a BoR. To the extent that Bills of Rights have appeared on our legal scene, they have done so in the most negative possible context, namely as declarations in Bantustan constitutions. Here an inverse relationship has appeared to emerge between the adoption of a BoR and respect for human rights - the more grandiose the language of the bill, the more likely it is that rights will be abused.

There are however, lessons to be learned from the Bantustan BoR experience, and they are:

- in order to be meaningful, a BoR must be associated with democracy, and not with a verbal pretence covering an authoritarian regime;
- the people affected by the BoR must be involved in the process of its formulation, so that they can see it as their own;
- the contents of the BoR must correspond to the deepest aspirations of the people, and have a manifestly just quality;
- the people must have confidence in those who guard over the BoR.

Two recent events have completely transformed the nature of the discussion on a Bill of Rights for South Africa:

- In 1986, and later in its Constitutional Guidelines, the ANC accepted a justiciable BoR for South Africa, and proposed how it would fit into the constitutional picture and how it would relate to affirmative action programmes;
- The SA Law Commission published an interim report on the viability of a BoR for South Africa, which report advocated a Bill of individual Rights for South Africa.

While many differences were readily evident and will be spelled out later, these two very different processes nevertheless came to some similar conclusions, and recommended some similar points of departure. A wide democratic and anti-apartheid consensus is beginning to emerge in South Africa, representing the coming together of personalities that would previously have little to do with each other. This consensus centres on the agreed need to end apartheid, and to establish, in its place, a parliamentary democracy subject to a BoR. As a point of departure, this consensus has agreed on the following universally recognised fundamental principles:

- the equal dignity and worth of all South Africans, irrespective of race, colour, sex, origin or creed;
- the inviolability of the person, the home and correspondence;
- freedom of movement, residence and travel;
- the right to vote, stand for elections and engage in political campaigns;
- freedom of expression and the right to information;
- freedom of conscience and the right to practise one's religious faith;
- the outlawing of torture, and of cruel, inhuman and degrading treatment;
- the prohibition of servitude, slavery or forced labour;
- the requirements of due process of law in relation to any deprivation of liberty or imposition of penalties.

CONTROVERSIAL ISSUES

Suspicious about blacks that any BoR will be a subterfuge to protect the interests of the white minority against a future black majority government. Rather, a BoR should be a major instrument in guaranteeing to the black majority and the whole population the effective realization of the rights which they have been denied for so long. This approach opens up eight areas of controversy.

1) The appropriate process whereby a BoR may be adopted

Historically Bills of Rights (the Magna Carta, the US Bill of Rights, the French Declaration of the Rights of Man) were all formulated and adopted by the former victims of oppression as a measure of controlling the power of former oppressors - they were documents adopted not by ousted authorities but by victorious freedom fighters.

Applied to South Africa, this would mean essentially that the BoR would be adopted largely at the behest of the former oppressed, after freedom had been won, and as a means of ensuring that that oppression was not restored in old or new forms.

In South Africa we already have a document that embodies the key elements of a BoR, a document born out of struggle, one that responds directly to South African conditions, expresses the aspirations of many oppressed people and meets with internationally accepted criteria of a human rights programme - the Freedom Charter adopted at the Congress of the People in 1955.

A BoR can be either copied, defined (by using a think tank of experts), negotiated or constructed, the last of which is the favoured method for South Africa.

A constructed BoR will, of course, copy from other models; it will eventually be a coherent and well defined document drawing on the advice and experience of all the thinkers of the world, and it will involve important elements of negotiation. But in addition it will have the characteristics of:

- being built up over a period of time rather than drafted at one moment;
- being constructed in sections and layers rather than as a single, unique document;
- being the product of active involvement of the widest strata of the population and not just a few experts.

In this process a BoR is built up, stage by stage, starting with agreements on general principles, and moving to specific institutional arrangements. The embryos of important sections of a future BoR are already emerging in the work of the NECC, the programmes of COSATU and SACTU; the declarations of activist religious leaders, programmes of the women's organisations, and so on. The Freedom Charter itself is, of course, the fundamental document already in existence, and on its foundation, a BoR could be gradually constructed, drawing upon all the input of all the different sectors - in a process, not an event.

2) The Bill of Rights must extend rather than restrict democracy in South Africa

A BoR should be used to enlarge rather than to freeze the area of human rights, and to eliminate rather than to perpetuate racial distinctions and the fruits of such distinctions. What is needed to be done is to turn the BoR concept from one of a negative blocking instrument, into one of a positive, creative mechanism that would encourage orderly, progressive and rapid change in the direction of real equality.

To take one example: what would be more important: the right to sue your doctor or the right to health? The former, litigation-orientated right might have significant justification in other countries: in South Africa what is urgently needed is the imposition of a duty on the State and the private sector to ensure that conditions are created to ensure people's health.

3) A Bill of Rights must take in the Three Generations of Rights

There are three generations of rights:

- **First Generation Rights** are civil and political rights, and rights to due process, and so on.
- **Second Generation Rights** are social, economic and cultural rights. These rights impose on others (mostly on government) the duty to provide the rights holder with, for example, adequate food, education and health care.
- **Third Generation Rights** include the right to development, peace, social identity and a clean environment.

When the majority of South Africans look to the complete elimination of apartheid in all its shapes and forms, what they are longing for are the rights as formulated in all three generations. The people of South Africa want to be free, to live decent lives, to be a community with their own personality and culture and to live in peace and with dignity with each other and the world; no more, no less. The ANC tradition as evidenced in the Freedom Charter, is to regard first and second generation rights as closely interrelated and mutually supportive, both needing empowerment in a future BoR.

On the other hand, most academic lawyers regard only first generation rights as justiciable rights. Their unease about the inclusion of second generation rights in a BoR is for two reasons:

- such rights, by their nature, are not justiciable (second generation rights are normally included in documents like the Universal Declaration, which are statements of governmental objectives rather than of positive law);
- their inclusion leads to a dilution of first generation rights.

There are points of reconciliation between these positions:

- 1) Whatever approach is adopted, the commitment to first generation rights must be total and unequivocal. Second generation rights add to, but do not diminish, respect for civil and political rights.
- 2) Parliament must be the basic mechanism for dealing with second generation rights issues.
- 3) If the constitution is silent on second generation rights, this leaves Parliament free to adopt any measures it sees fit in the socio-economic arena, or adopt a wide variety of choices of positions on socio-economic issues and rights.
- 4) The constitution would include the principle of equal protection under the law. Such a constitutional principle would serve both as a shield against discrimination, and as an active instrument for guaranteeing real equal opportunity. Thus, when schooling or other social services are grossly unequal as a legacy of apartheid, the problem is not only a social or economic one, but is also a constitutional one that would receive due consideration.

4) The Bill of Rights must be centred around a programme of affirmative action

Without a constitutionally structured programme of deep and extensive affirmative and corrective action, a BoR in South Africa is meaningless. It would be a hollow victory if the people had the right every five or so years to emerge from their forced-removal hovels and second-rate Group Area homesteads to go to the ballot boxes, only thereafter to return to their inferior houses, inferior education and inferior jobs.

To adapt Anatole France, if the law in its majesty were to give equal protection to a family of 10 occupying a two roomed shanty, and a family of two living in a ten-roomed mansion, it would not be enlarging the area of human freedom in South Africa. Whatever attitude is taken to unused or under-used accommodation, the failure to impose a legal duty on the State and the private sector to reduce inequality in living conditions would be to deprive the Bill of true meaning in this important area - and the same applies to health, education, work, leisure, etc.

5) Free Speech - Unlimited or Qualified?

The problem around free speech is how to reconcile two competing considerations: the right to absolute free speech, and the need to save the country from the promotion of racial hatred and division.

The constitution can take one of three positions: it can protect the right to make racist statements; it can leave the question entirely to the legislature; or it can expressly outlaw incitement to racial hatred and division. If it adopts the third position, further questions arise as to how best to combat the promotion of racial hostility - whether to rely on the criminal law; or civil restraints; or voluntary codes of conduct affecting the media and political organisations; or whether to include provisions in the electoral law which forbid the creation of parties on racist principles, or campaigning on the basis of racist or tribalist emotion.

The final position is that the constitution will be anti-racist. Race will only enter the constitution as a negative principle, that is, to the extent that the constitution is not only non-racial but anti-racist.

The anti-racist character will be guaranteed by provisions expressly referring to race, which:

- outlaw racial discrimination;
- prevent the dissemination of racist ideas and the organisation of racist parties; and
- ensure that measures are taken to overcome the effects of past racial discrimination.

6) The Question of Group and Cultural Rights

The question may be asked as to what guarantee would exist against persecution of minorities by majorities?

Three sets of constitutional devices may be distinguished, each different in character, but all having the common objective of preventing arbitrary or unjust treatment or harassment on the basis of race, appearance or ethnic origin.

- 1) A Bill of Rights will entrench the basic individual rights of all citizens. Any individual discriminated against on the grounds of belonging to a group, will have appropriate legal recourse. This is the **guarantee of equal individual rights**.
- 2) A general non-discriminatory provision will outlaw any discrimination against any group on the grounds of race, colour or ethnicity. This is the **guarantee of non-discrimination**.
- 3) Groups will be permitted to develop certain aspects of what they might call their own way of life. This is the **guarantee of equal rights for all national groups**.

Within the framework of an equal and undivided citizenship, there will be full recognition of linguistic diversity (there will be one South African citizenship with a single suffrage, but many South African languages). There will be unfettered freedom of religious-cultural association. What will not be permitted is the basing of political rights on socio-cultural formations, nor attempts to restore apartheid by political mobilization based on setting group against group. Group rights will exist, but they will be the rights of workers, women and so on, not of racial groups.

7) Charters of Workers' and Women's Rights

The ANC Constitutional Guidelines expressly guarantee the right of workers to form trade unions which are independent, and explicitly recognise the right to strike. There is no reason why these constitutional safeguards should not be supplemented by a more detailed Charter of Workers' Rights.

Such a document could take the form of an entrenched legislative code which consolidated the gains made by the workers in years of hard struggle in relation to organising rights, collective bargaining procedures, working conditions, unfair dismissals, health, compensation for injury, unemployment insurance, holidays and so on.

Likewise, today any constitution should include a general declaration of equal rights between men and women. The Constitutional Guidelines go further - requiring affirmative action to eliminate inequalities and discrimination between the sexes. The BoR would set out the basic principles, and a Charter of Women's Rights would be adopted as a legislative code with a special status, responding to the many issues relating to education, health, employment, etc. The active involvement of the women's movement would be the greatest single guarantee that appropriate formulations would be found.

8) Mechanisms for applying the Bill of Rights

Rather than use a body of highly trained and elderly judges to interpret and operate the BoR, another kind of body, more involved in social rather than semantic factors, would make decisions around the BoR.

The kind of body that might provide a bridge between popular sovereignty on the one hand, and the application of highly qualified professional and technical criteria on the other, would be one similar to the Public Service Commission. A carefully chosen Public Service Commission with a wide brief, high technical competence and general answerability to Parliament, could well be the body to supervise affirmative action in the Public Service itself. Similarly, a Social and Economic Rights Commission could supervise the application of affirmative action to areas of social and economic life. Finally an Army and Security Commission could ensure that the army, police force and prison service were rapidly transformed so as to make these bodies democratic in composition and functioning (perhaps the hardest and most necessary of all the tasks facing those who wish to end apartheid in South Africa).

IN SUMMARY

The oppressed and all true democrats in South Africa have a great interest in promoting a Bill of Rights for the country, and in welcoming it as a progressive phenomenon. But such a Bill of Rights has to be created over a period of time with the active involvement of the people; it has to be located in the heart of the democratic process and not be seen as a foreign object imposed upon it; it has to be structured around a strategy of affirmative action; and its implementation has to be entrusted to institutions that are democratic in their composition, functioning and perspective, and that operate under overall supervision of the people's representatives in Parliament.

Such a Bill of Rights, born out of the struggle for freedom, would live for decades, perhaps centuries, and enrich the international patrimony of human rights.

THIS SUMMARY OF ALBIE SACHS' WRITINGS
HAS BEEN MADE BY



Albie Sachs on Constitutional Guarantees

Those who have traditionally defended apartheid are now saying that they accept the following core principles:

- an undivided South Africa;
- no domination of any group over any other group;
- universal suffrage.

At first sight these principles appear acceptable - but when you turn them into constitutional proposals, they often boil down to giving saliency to race. And of course this is the difference - the anti-apartheid position is to eliminate race as a constitutional determinant, while the approach of the authorities is to turn race into a fundamental factor. Between these positions there is no compromise possible - a bit of slavery cannot be allowed in a slave-free society - a bit of racism cannot survive within a non-racial democracy.

Six different constitutional schemes are being proposed with the common objective of preserving a privileged position for the whites in a future South Africa. They are intended as a package, and yet each one on its own could have the effect of frustrating the development of a non-racial democracy in South Africa. The basic argument used to justify them is that whites would be swamped by a black majority unless they received special constitutional protection.

It is contended that this argument is false, and that non-racial democracy offers a far more secure position for all South Africans, the whites included, than do any of the special schemes.

The six abovementioned schemes are:

Firstly, four group rights constitutional schemes:

The group rights approach is based on the assumption that as far as political rights are concerned, the fundamental unit in the constitutional structures is the race group and not the individual citizen. The constitution is thus constructed around categories of race, thereby entrenching white privilege.

The group concept reflects itself in four major dimensions:

- territorially - in schemes for fracturing society on a spatial basis (federal variants);
- electorally - through separate voters' rolls;
- thematically - through "own affairs" in Parliament with its procedural Siamese twin of race group vetoes; and
- institutionally - constitutionalising private law devices for maintaining segregation.

All of the above arrangements have the effect of dividing rather than uniting the future South Africa. Take for example "territorial group rights" - federalism. All the evidence suggests that black South Africans wish to opt in rather than out of a common society. Economically, South Africa has always been a common society. Business, sport, religion, political parties, trade unions, security forces, governmental bodies, transport services, electricity grids - all are integrated and national, not federal, in nature. Drawing federal boundaries would accordingly be a highly artificial exercise, that would cut through highly integrated areas and populations. This model cannot escape the criticism that it is an attempt by whites to opt out of a united South Africa, taking with them, by fortuitous coincidence, the great bulk of the country's wealth.

All of the above proposals leave a future government in a position where it cannot govern. It would be a case of all check and little balance. Government would at best be paralysed by systems of race group accountability, and the market, theoretically non-racial but in practice white-dominated, would rule.

Secondly, two schemes for indirectly entrenching white privilege:

There are two non-racial ways of entrenching white privilege:

- firstly, to constitutionally freeze the economic and social status quo; and
- secondly, to ensure constitutional protection for privatised apartheid.

Both schemes would leave a future black parliament emasculated since the resources needed to bring about any major improvement in black living conditions would be constitutionally under white lock and key. As such both schemes are merely recipes for the continuation of apartheid-related social turmoil.

While whites may feel alarm at the prospects of majority rule, the best way to allay these fears is to ensure that democracy and its institutions are firmly planted in South Africa; the worst way is the above six schemes which undermine democracy and subvert it with a complicated and unworkable set of institutions based on notions designed to keep racially defined groups locked in endless battle.

A NON-RACIAL DEMOCRACY

The virtues of non-racial democracy would seem to be self-evident in South Africa, and yet experience shows that they have to be spelled out. The basic scheme is a simple one. It represents the application in South Africa of universally held views and corresponds to the vision long projected in the Freedom Charter.

In essence, it presupposes a constitutional structure based on the following inter-related principles:

- Equal rights for all South African citizens, irrespective of race, colour, gender or creed;
- A government accountable at all levels to the people through periodic and free elections based on the principles of universal suffrage on a common voters' roll;
- Political pluralism, a multi-party state and freedom of speech and assembly;
- A mixed economy;
- Protection of fundamental rights and freedoms through a justiciable Bill of Rights;
- A separation of powers including an independent and non-racial judiciary entrusted with the task of upholding the rule of law and the principles of the constitution.

In the light of the pro-democracy upsurge in many parts of the world, the above positions would, in most countries, be regarded as axiomatic and unassailable for the creation of a genuine democracy in South Africa. But, for white people, there are three areas which need further address, for it is here that sensitive, controversial and difficult fears lurk. These areas are:

- loss of identity;
- loss of property; and
- loss of freedom.

1) Fears of a loss of identity fall into three categories

- **political and cultural rights.** These boil down to the right to be the same (the demand for political equality) and the right to be different (the demand for cultural rights). The new South African constitution will begin with a premise of equal rights for each and every citizen - and thereafter it will favour diversity and an open society. It will recognise that the emerging South African nation will be made up of many different groupings, with a multiplicity of languages, histories and cultures. Cultural diversity and political pluralism will be constitutional objectives - but they will not be merged by basing political rights on cultural formations. This is a guarantee of a future of warring racial and ethnic blocs.
- **the public domain and private rights.** No future constitution would prescribe whom people should not marry, and have to dinner. The constitution will guarantee to each individual his right of such choice - the right to privacy. At the same time, the constitution could not allow a right to bar people from a restaurant because of the prejudice of the manager - the right to equal protection would apply here.
- **the gender question.** The equal rights clause in a new South African constitution would be unambiguous in outlawing any discrimination or exclusion based on gender. True equality would also allow men and women to speak in their own voices.

2) Fears of loss of property

A future South African constitution ought not to commit itself to, nor foreclose, any particular economic programme like capitalism or socialism. What it should do is to guarantee fairness under the chosen economic policy - this fairness would have three components:

- it would necessitate some degree of redistribution to make up for past dispossession and discrimination, by, for example, special investment in housing, training, health and education, as well as providing for just access to land;
- it would demand the opening up of the economy in the face of racial or restrictive practices;
- it would require that any intervention would be governed by law, be subject to the principles of public interest, and ensure that both the criteria and procedures be just.

The worst thing that could be done is to attempt to block off redistribution by constitutional techniques - more realistic by far is to aim at policies that acknowledge the need for structural adjustment away from apartheid, and accompany this with manifestly fair procedures.



Affirmative Action (AA) would be the principal technique for redistribution. In the normal understanding of the term, AA is a strategy which sets out a series of special efforts, or interventions to overcome or reduce inequalities which have accumulated as a result of past discrimination. It acknowledges that the ordinary processes of law or of the market or of philanthropy are insufficient to break the cycle of discrimination, which replicates itself from generation to generation. It will, in South Africa, be required in the public service, in the security sector, in health, in education and housing, in relation to land, and in respect of both the public and private sectors of the economy. It would not be necessary to determine in the constitution all the details of the scheme - what would be laid down are certain principles which would govern the application of affirmative action as a modality for change.

Also, the constitution would see workers' rights consolidated in, amongst other provisions, a Charter of Workers' Rights.

3) The last fear - and the last word - is freedom

The one theme that unites all the above discussion is that the guarantees felt necessary to safeguard whites' interests are really not guarantees to whites at all - but guarantees to the whole population. This really is the guarantee of guarantees for whites - that their deepest interests coincide with the deepest interests of their fellow citizens.

Any new constitution must be first and foremost an anti-apartheid constitution. The great majority of the people will measure their newly won freedom in terms of the extent to which they feel the arbitrary and cruel laws and practices of apartheid have been removed.

Yet if anti-apartheid is the foundation of an essential precondition for freedom in South Africa, it is not in itself a guarantee of freedom.

There can, of course, never be absolute guarantees in history. What we do know for sure is that attempting to defend minority privileges by force of arms, whether through the present system, or whether by means of a constitution based on group rights, can only result in continuing strife and violation of human rights. The only system that has a chance is that based on non-racial democracy. What we need to do is strengthen the prospects as best we can, for it to be brought about as swiftly, securely and painlessly as possible.

An effective Bill of Rights can become a major instrument of nation-building. It can secure for the mass of the people a sense that life has changed and that there will be no return to the oppression of apartheid; while at the same time it can give to those who presently exercise power the conviction that their basic rights can be guaranteed in the future without recourse to group rights schemes.

In South Africa we must have one constitution with one generalised set of provisions guaranteeing basic rights and freedoms to all.

Each set of provisions will be important in itself. The classic civil, political and legal rights - the so-called first generation of human rights - need to be autonomously defended through the classical mechanisms of elections, free speech and judicial review. The second generation of rights - social, economic and cultural rights - will be attended to by appropriate mechanisms, in which Parliament will play a key role. The third generation of rights, namely the rights to peace, development and respect for the environment, will also be integrated into the constitution.

Spelt out in terms of constitutional principles, one can envisage the following cluster of entrenched guarantees:

The constitution will be designed in such a way as to ensure full and equal participation in political and civil life for all South Africans, irrespective of race, colour, gender or creed.

Discrimination on the basis of race etc will be outlawed, and machinery created to prevent insult, abuse, or ill-treatment on such grounds.

There will be a multi-party system with freedom of speech and assembly and periodical elections to choose Parliament and the government.

There will be a Bill of Rights guaranteeing fundamental human rights and liberties to all citizens. This Bill of Rights will be entrenched in the constitution and will be justiciable, that is, persons alleging infringements of their rights will be able to seek a remedy by recourse to the courts. Provision should be made to ensure equal access to the courts independently of financial means.

The application of the doctrine of the separation of powers will establish a system of checks and balances between Parliament and the executive, and guarantee that the judiciary is independent in fulfilling its functions of upholding the rule of law and defending the principles of the constitution.

Steps will be taken to ensure that there is vigorous government at the local and regional levels subject to the principles of permanent accountability and active community participation.

Within the context of a single citizenship and a common patriotism and loyalty, the diversity of the South African population will receive constitutional recognition through provisions guaranteeing the free expression of religious, cultural and linguistic rights.

The opening up of equal opportunities for all and the process of redistribution of wealth in the country will be conducted according to constitutionally defined principles covering public interest, affirmative action and fair procedures, with the courts having the power of judicial review in relation to the defence of these principles.

These are not provisions for black South Africans or for white South Africans, but for all South Africans; the last word goes to freedom.