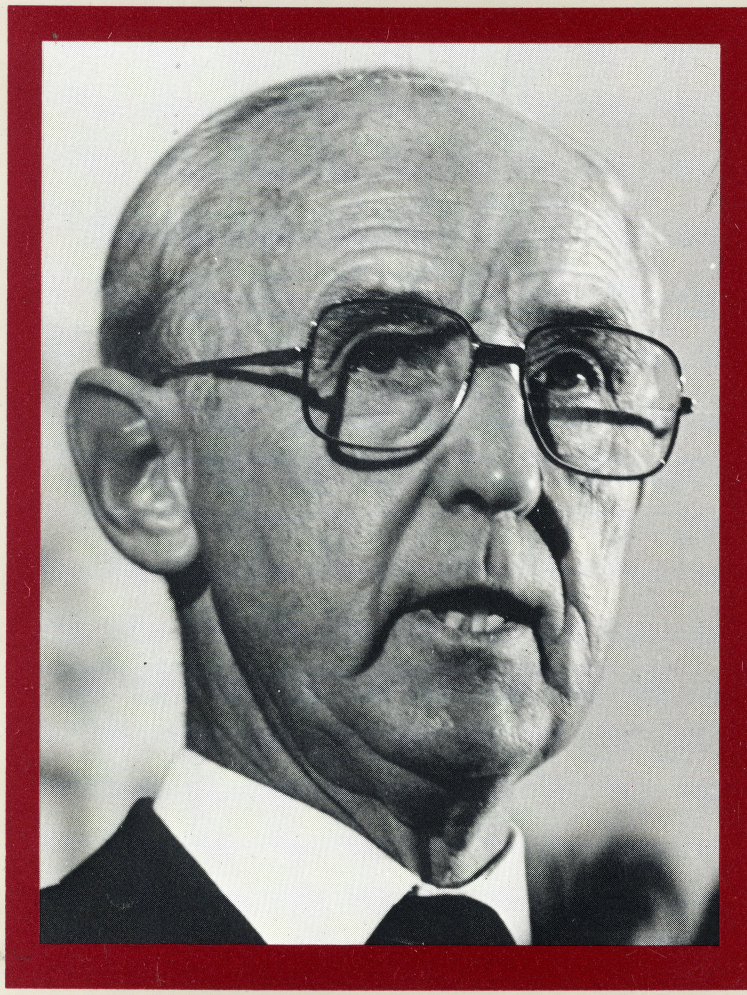
Guaranteeing Fundamental Freedoms in a new South Africa



Chief Justice M M Corbett

Published by the South African Institute of Race Relations
Auden House, 68 De Korte Street,
Braamfontein, Johannesburg, 2001 South Africa

PD 12/90
ISBN 0-86982-375-2

Printed by Galvin & Sales, Cape Town

Part of the huge crowd, estimated at 1 000, which attended the Alfred and Winifred Hoernlé Memorial Lecture, delivered by Mr Justice M M Corbett in Johannesburg, in May 1990

Pictured under the logo of the South African Institute of Race Relations, Mr Justice M M Corbett spells out the need to guarantee fundamental freedoms in a new South Africa. Seated at the table are Mr David Gevisser, Chairman of the Executive Committee of the Institute, and the Institute's Executive Director, Mr John Kane-Berman

PREVIOUS HOERNLÉ LECTURES

J H Hofmeyr, *Christian principles and race problems* (1945)
E G Malherbe, *Race attitudes and education* (1946)
I D MacCrone, *Group conflicts and race prejudice* (1947)
A W Hoernlé, *Penal reform and race relations* (1948)
W M Macmillan, *Africa beyond the Union* (1949)
E H Brookes, *We come of age* (1950)
H J van Eck, *Some aspects of the South African industrial revolution* (1951)
S H Frankel, *Some reflections on civilization in Africa* (1952)
A R R Brown, *Outlook for Africa* (1953)
E Ross, *Colour and Christian community* (1954)
T B Davie, *Education and race relations in South Africa* (1955)
G W Allport, *Prejudice in modern perspective* (1956)
B B Keet, *The ethics of apartheid* (1957)
D Thomson, *The government of divided communities* (1958)
S Biesheuvel, *Race, culture and personality* (1959)
C W de Kiewiet, *Can Africa come of age?* (1960)
D V Cowen, *Liberty, equality, fraternity—today* (1961)
D E Hurley, *Apartheid: A crisis of the Christian conscience* (1964)
G M Carter, *Separate development: The challenge of the Transkei* (1966)
K Hancock, *Are there South Africans?* (1966)
M Fortes, *The plural society in Africa* (1968)
D H Houghton, *Enlightened self-interest and the liberal spirit* (1970)
A S Mathews, *Freedom and state security in the South African plural society* (1971)
P Mayer, *Urban Africans and the bantustans* (1972)
A Pifer, *The higher education of blacks in the United States* (1973)
M Buthelezi, *White and black nationalism, ethnicity and the future of the homelands* (1974)
M Wilson, "... *So truth be in the field* ..." (1975)
M W Murphree, *Education, development and change in Africa* (1976)
G R Bozzoli, *Education is the key to change in South Africa* (1977)
H Ashton, *Moral persuasion* (1978)
A Paton, *Towards racial justice: Will there be a change of heart?* (1979)
L Sullivan, *The role of multinational corporations in South Africa* (1980)
A Paton, *Federation or desolation?* (1985)
C Simkins, *Liberalism and the problem of power* (1986)

THE ALFRED AND WINIFRED HOERNLÉ MEMORIAL LECTURE

The Alfred and Winifred Hoernlé Memorial Lecture commemorates the work of Professor R F Alfred Hoernlé, president of the South African Institute of Race Relations from 1934 to 1943, and his wife Winifred Hoernlé, president of the Institute from 1948 to 1950 and again from 1953 to 1954.

Reinhold Frederick Alfred Hoernlé was born in Bonn, Germany, in 1880. He was educated in Saxony and at Oxford and came to South Africa at the age of 28 to be professor of philosophy at the South African College. He taught in Britain and the United States of America from 1911 to 1923, returning to become professor of philosophy at the University of the Witwatersrand, where his South African wife was appointed senior lecturer in social anthropology. His association with the Institute began in 1932, and it was as its president that he died in 1943. His Phelps-Stokes lectures on South African native policy and the liberal spirit were delivered before the University of Cape Town in 1939.

Agnes Winifred Hoernlé entered the field of race relations after the death of her husband, joining the Institute's executive committee in 1946. She worked for penal reform and to promote child welfare and the welfare of Asians.

Contents

1990
Diamond Jubilee
Alfred and Winifred Hoernlé
Memorial Lecture

Delivered in Johannesburg on 7 May 1990

Guaranteeing Fundamental Freedoms in a New South Africa

M M CORBETT
Chief Justice of the Republic of South Africa

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS
JOHANNESBURG
1990

FIVE YEARS AGO, almost to the day, the late Dr Alan Paton delivered the Hoernlé lecture for 1985. It was entitled: 'Federation or Desolation?' I was not present when the lecture was delivered, but I have since read it in its published form. It is an intensely moving cry from the heart; full of sorrow for what was then happening to his beloved country, full of reproach for those he deemed responsible for the then current state of affairs, and yet not entirely devoid of hope for the future. Near the beginning of his lecture Dr Paton said:

> 'This is my 83rd year and it has been one of the most sorrowful of my life, and I would think it has been one of the most sorrowful of many of your lives also. What have we done? How have we got ourselves into this sorrowful condition, of hatred, bombs, stonings, shootings, and deep anxiety? Can we get ourselves out of it? That is the question to which I am going to address myself.'

Later he developed the theme that South Africa's salvation lay not in an existing party or organisation but in a new form of constitution and he expressed the view that:

> 'Federation is the only possible form of constitution that holds any hope for this country.'

I venture to think that had Dr Paton been living today he would have been agreeably surprised. He would still find much of the 'hatred, bombs, stonings, shootings and deep anxiety' of which he spoke so sorrowfully in 1985. That is a melancholy, but inescapable fact of contemporary life. But at the same time he would find a state president and a government who are, I believe, totally and unreservedly committed to the achievement, in the near future and by negotiation, of a new political dispensation for South Africa founded upon democratic principles. He would find an African National Congress released from the shackles of proscription and its leaders free men again, willing to negotiate the future of South Africa. He would find the restrictions previously imposed on other political organisations and persons now removed. He would find the majority of

South Africans hopefully, purposefully and, if one is to be totally frank, to some extent apprehensively joining in this broad stream of human movement towards the creation of a new South Africa. He would, admittedly, find some persons and groups of persons heading upstream; and some who still stand aloof from the negotiation process. But they, I believe, are in the minority. He would find himself, together with his compatriots, standing on the threshold not only of a new decade, but possibly a new era in the history of the country; and he would see ahead of him the dim yet undeniable vision of a new South Africa.

As Alan Paton rightly observed, South Africa's future lies in a new constitution. It must be one which will realise the democratic ideal, but which at the same time will take account of the plurality of our society and the fervent desire of minority groups not be be dominated or overwhelmed. Whether his preference for a federal system is one which will find favour with those who eventually decide these matters is, of course, a moot point; but a new constitution there must and will be. And it is necessary that it be a constitution thrashed out by representatives of *all* the various interest groups in South Africa. The negotiation of such a constitution will be no easy task. That I readily recognise. It will demand from all concerned tact, wisdom, expertise in these matters, perception of the other man's point of view and above all a willingness to compromise. When I was at the Bar and spent much time settling cases, I found that a good compromise was one that never wholly satisfied either party; and I imagine that much the same principle must apply to constitutional negotiation. And, above all, as a prerequisite to the negotiation process, there must be peace in our land. The senseless, vicious violence, murder and arson which has plagued the townships and the black rural areas for so long must cease. And it behoves black leaders, at all the different levels of society, to make their first priority the achievment of a cessation of such conduct. And they must realise that every minute, every hour, every day that is lost in getting down to the task of bringing about peace means greater loss to life and limb, greater damage to homes and property, and greater difficulty in stopping the cycle of violence. The urgency of the task is manifest: the responsiblity of the leaders, and their followers, grave.

One aspect upon which many commentators on the current political scene are agreed is that, part and parcel of the new constitution, there should be a bill of rights capable of guaranteeing the fundamental freedoms of all South Africans. And it is upon that topic that I have been invited to deliver this year's Diamond Jubilee Hoernlé Memorial Lecture. And I do so happily and with a full appreciation of the great honour thus accorded to me. I have been a member of the Institute for many years and have a great admiration for the work done by it. And at this stage I would like to take the opportunity to offer my congratulations to the Institute on

its first 60 years and to express the hope that it will continue to fulfil its unique and essential role for so long as race relations in this country remain a topic for study and analysis and comment. To borrow from current idiom: 'Viva the Institute!'

My own interest in a bill of rights for South Africa goes back to 1967. In October and November of that year my wife and I visited, for the first time, the United States of America. It was a leadership exchange trip, during which we were privileged to meet many interesting and important Americans. 1976 was the bicentennial year and, in addition, a presidential election was taking place. I arrived in the United States abysmally ignorant of many matters concerning the country, including its legal system and its constitution. I was soon struck by the very large number of lawyers in America. At the time I worked it out that per head of population there were in the United States about seven times the number of lawyers that there were in South Africa; and nearly four times the number in England and Wales. I was also struck by the all-pervasive influence and power of the law. It governed many aspects of the lives of ordinary people; and it seemed to make court cases out of matters which at home in South Africa were non-issues. It humbled Presidents – Watergate was then very recent history; and even legislatures (including the United States Congress) had at times to bow to its will. In fact, in many areas it appeared that ultimate power vested not with Congress, nor with the President, but with the courts. And heading this hierarchy of courts stood the US Supreme Court, confident, within its own sphere omnipotent, secure: a 'supreme court' in the fullest sense of the term.

To digress for a moment, let me tell you briefly of some cases which came to my notice while we were in the United States in 1967 and which illustrate this all-pervasive influence of the law. One was a decision of the US Court of Appeals (9th Circuit) in which it was held, by a majority of two to one, that a minimum height requirement (of 5 feet 7 inches) as a condition of employment by the Los Angeles county fire department was unconstitutional in that it discriminated against Mexican Americans, many of whom failed to satisfy this requirement. Another was an order by a US District Judge that the City of Philadelphia submit within 90 days a plan which would promote racial integration in public housing within the city. Another, heard in the US Supreme Court (which sitting I attended), concerned the infliction of corporal punishment upon students in public schools, the constitutionality of which was challenged on the ground of failure to afford students notice and a chance to respond before inflicting the punishment; and on the ground that it was a cruel and unusual punishment, in terms of the 8th amendment. And finally there was a ruling by a US District Judge in Newark, New Jersey that a woman who believed that she had lost her job for rejecting the amorous advances of her boss

could not sue him for damages under the US Civil Rights Act of 1964!

Of course, as I soon discovered, central to this dominance of the law and the courts were the first ten amendments to the Constitution of the United States of America adopted in 1791, and certain other amendments, adopted in subsequent years. Together they comprise the so-called 'Bill of Rights'. But the Bill of Rights by itself is no more than a Utopian statement. To be effective it needed machinery for its enforcement. This was supplied by the courts themselves. In the landmark decision of *Marbury* vs *Madison*, in 1803, the United States Supreme Court laid down three fundamental propositions:

(1) that the Constitution of the United States of America is the supreme law of the land;

(2) that all legislation, be it of Congress or any State legislature, which is repugnant to the Constitution is void and of no legal effect; and

(3) that the courts of the United States have the power, by way of a process known as 'judicial review', not only to give redress against illegal executive or administrative action, but also to declare invalid legislation which is contrary to the Constitution.

This concept of judicial review is America's great contribution to constitutional law.

You will recall that 1976 was the year of what are now often referred to as 'the Soweto riots'. It all started in June of that year and while we were in the United States the news from South Africa continued to feature prominently violence, unrest, destruction of property and the large-scale detention of persons. Viewing the situation from a distant perspective, I gained the impression that the social, political and economic structures of our society and the policies upon which they had been built, had been shattered forever; and that in due course they would have to be replaced by something new. As one pondered the situation one realised two things: (a) that sooner or later – and the sooner the better – a new political dispensation would have to be negotiated in South Africa by *all* interested parties; and (b) that this new dispensation, while giving full rights of citizenship to all, would have to take account of the plurality of South African society and the fear of minority groups of being dominated. It then struck me with all the force, suddenness and clarity of a spiritual revelation that, especially as regards the latter, the answer was possibly to be found in the American example; and that a South African bill of rights, reinforced by a power of judicial review vested in the Supreme Court of South Africa, might form a very useful, indeed probably essential ingredient of any new

dispensation. A few years later I gave voice to these thoughts at a human rights conference held at the University of Cape Town.

Since then the idea seems to have caught on. The concept of a legally enforceable bill of rights for South Africa has been discussed at a number of conferences and symposia over the past ten years; and all this has culminated in the investigation conducted, at the request of the government, by the South African Law Commission, an independent body of judges and lawyers. Last year the commission issued a preliminary report, called a working paper, setting forth its views on the matter and including a draft bill of rights. The working paper was widely distributed and the commission called for comments from all interested parties. I have been informed that some 60 bodies and persons submitted comments and these are now being evaluated by the commission with a view to the compilation of a final report.

The working paper – which for convenience I shall call 'the report' – is, in my view, an outstanding piece of work. The commission's terms of reference were to investigate and make recommendations on the definition and protection of group rights in the context of the South African constitutional set-up and the possible extension of the existing protection of individual rights, as well as the role the courts play in connection with the above. The commission tackled this task in an erudite, but at the same time essentially practical manner. It considered the classic theories concerning human rights, the international protection of human rights and the protection of human rights in various national states; it studied, comparatively, the bills of rights of different countries of the world; and then it proceeded to analyse the position in South Africa and the views for and against the protection of human rights, including group rights, in this country by means of a justiciable bill of rights. It concluded, inter alia:

- that it was necessary to provide better protection for individual human rights in South Africa and that this could best be achieved by the introduction of a bill of rights;
- that in regard to group rights, it was necessary to distinguish political group rights and other group values, such as culture, religion and language;
- that the protection of minorities was essential if endless conflict were to be avoided;
- that the cultural, religious and linguisitic values of groups should be protected, not as group rights but as individual rights, in a bill of rights; that political group rights should be protected in the constitution itself, subject to the principle of equality; and
- that the bill of rights should be justiciable in the various Divisions of the Supreme Court of South Africa.

The report's draft bill of rights consists of 33 articles, arranged in two parts. Part A, which comprises 29 of these articles, is designated 'Fundamental Rights' and these are stated to be the rights to which every person in the Republic of South Africa shall be entitled and which, save as provided in the bill itself, no legislation or executive or administrative act of any nature whatever shall infringe. The fundamental rights so protected include the right to life; the right to human dignity and equality before the law; the right to a good name and reputation; the right to spiritual and physical integrity; cultural, economic and commercial rights; the right to privacy, including freedom from arbitrary entry and search of one's home, seizure of possessions and interception of correspondence; the right not to be held in slavery or subjected to forced labour; the right to freedom of speech; the right to carry out scientific research and to practise art; the right to freedom of choice with regard to education and training; the right to the integrity of the family and freedom of marriage; the right to freedom of movement and residence within the Republic, and to carry on any lawful business, occupation or trade; the right not to be arbitrarily refused a passport or exiled or expelled from the Republic or prevented from emigrating; the right freely and equally to engage in economic intercourse; the right to private property; the right to freedom of association and disassociation; the right to form and conduct political parties and trade unions; the right to peacefully assemble; the right of franchise; the right of freedom of the individual to practise his culture or religion and to use his language, and freedom from discrimination in regard to culture, religion or language; the right to personal freedom and safety; the rights (which are set forth in detail) of a person under arrest; the rights (again set forth in detail) of an accused person; the rights (set forth in detail) of a convicted criminal serving a sentence of imprisonment; the right to go to court to settle civil disputes; the right to have natural justice applied in administrative and quasi-judicial proceedings; and the right that the South African law shall apply to all legal relations before a court of law. Some of these rights are circumscribed by qualifications.

Part B of the bill, comprising articles 30 to 33 inclusive, relates to the entrenchment and enforcement of the fundamental rights. Article 30 provides that under certain circumstances, which I shall detail later, these fundamental rights may be limited or curtailed. Article 31 gives the Supreme Court of South Africa jurisdiction to determine the validity of legislation or executive or administrative acts, tested against the terms of the bill of rights. Article 32 prescribes the applicability of the bill, ie to all existing and future legislation and to all future administration and administrative acts. Article 33 deals with the amendment or suspension of the bill, prescribing therefor a three-quarters majority of these members who are entitled to vote in each House of Parliament and who have been

directly elected by the electorate, provided that the addition of further fundamental rights or the extension of existing fundamental rights may be effected by a simple majority.

In the course of arriving at its conclusions and in the formulation of this draft bill the commission had to consider and take a decision on a number of questions of principle. I propose to dwell on some of these. They illustrate to a certain extent the problems and complexities of constitutional entrenchment and constitutional adjudication.

The initial problem that the draftsman of a bill of rights faces is how to describe the rights which it guarantees: whether to adopt terse, general terms or whether to delineate the rights and their limitations specifically and in detail. The contrast between these two approaches may be illustrated by comparing the provisions relating to freedom of speech contained in, on the one hand, the first amendment to the Constitution of the United States of America with, on the other hand, section 12 of the Constitution of the Republic of Botswana. The relevant portion of the first amendment reads:

> 'Congress shall make no law . . . abridging the freedom of speech or of the press.'

Section 12 of the Botswanan Constitution provides:

> 12. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
>
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in

confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or

(c) that imposes restrictions upon public officers, employees of the local goverment bodies, or teachers,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

The approach of simplicity, exemplified by the first amendment, has the advantage of flexibility and adaptability as the norms and attitudes of society and facts and circumstances change over the years. And this simple 18th century formulation has been the basis for an elaborate overlay of constitutional adjudication as to, for example, what in the modern age of radio, movies and television constitutes the 'press'; as to when freedom to speak or to publish may be restrained or qualified on grounds of libel or obscenity (and what constitutes obscenity: an elusive and protean concept) or on the ground that it is a call to violence or other unlawful conduct; and the application of the doctrine of fairness in the allotment of time by radio and television broadcasters to the presentment of different points of view in the discussion of public issues. The disadvantage of the simple approach is that its very flexibility makes it imprecise and provocative of much debate as to what it means. It correspondingly increases the burden and responsiblity, and of course, the power of those charged with the duty of interpreting and applying such a bill of rights. Hence the preference in many constitutions for the more detailed, more specific type of formulation.

In its report the Law Commission refers to the fact that the Roman-Dutch is not a casuistic system and states that, therefore, if we wish to remain true to the Roman-Dutch tradition, a South African bill of rights should be drafted on a broad basis of general principle, leaving it to the courts to apply it in practice. Having considered the arguments for and against the two different approaches the commission concludes that:

'the bill should be formulated on a basis of concepts and principles, which will make it possible for the courts to protect individual rights and group interests in a dynamic way.'

A comparison between the draft bill produced by the commission and the American bill of rights shows, however, that in many clauses the commission's draft is a good deal more specific and detailed that the American model. I think that in its formulation the commission has in fact steered a middle course between simplicity and elaboration; and wisely so.

Another matter of basic general principle debated in the commission's report is whether and, if so to what extent a bill of rights should guarantee economic and social rights, the socalled 'second generation' human rights. Such economic and social rights would include, for example, the right to work, the right of protection from unemployment, the right to leisure and paid holidays, the right to an adequate standard of living, medical care, housing social services, the right to free and compulsory education, the right to freedom from poverty, etc. There are some who, I understand, even advocate the entrenchment of a particular economic policy, such as socialism, in a future bill of rights.

May I say at once that I do not believe that an economic policy based on socialism or Marxism, call it what you will, would be to the overall benefit of a new South Africa. I think that most of us, at some stage of our lives, have been attracted by the economic and social theory of socialism, with its praiseworthy aims of the equitable distribution of wealth, the prevention of capitalistic cartels and of the concentration of economic power in the hands of a few, of the elimination of poverty, and in short of health, wealth and happiness for all. I am not an economist but the evidence, particularly that emanating from eastern Europe in recent times, would seem to show conclusively that the actual practice of socialism has never been able to match the theory. Bureaucratically controlled industry and commerce, lacking the stimulus and competition of the free market system, have proved inefficient, wasteful and corrupt. There has been little or no wealth to redistribute. The rich have become poor and the poor poorer. Economic stagnation, poverty, hopelessness and unhappiness have been the hallmarks of a socialist society. Hand in hand with this has gone an inability, and an unwillingness, on the part of those in political control to allow political dissent; and at the same time there has been the emergence of a ruling political caste, privileged in many ways above others, cushioned by privilege from the privations of their fellow citizens, often incompetent and corrupt, and having a powerful vested interest in the perpetuation, if necessary by force, of the status quo.

Consequently, what I do believe is that what the new South Africa needs is not socialism, but an enlightened form of the free market system, which ensures economic growth instead of stagnation, efficiency instead of incompetence, the creation of new wealth instead of impoverishment and which, in short, stimulates and harnesses all the creativeness, inventive genius and spirit of enterprise which is to be found in the human race. Only

by means of the free market system can the economy grow sufficiently to create the jobs needed to provide our burgeoning population with employment, economic security and domestic stability. Only by means of the free market system can sufficient wealth be generated to provide for the socio-economic reconstruction which will be necessary in the new South Africa. For while I put my faith unreservedly in a free market economy, I recognise that a goodly portion of the wealth created by it must be ploughed back into society, in the upliftment of communities, in the creation as far as possible of minimum standards of living, in the encouragement of entrepreneurship, in education, in housing, in the creation of recreational facilities and, in general, in redressing the social imbalances inherited from the past.

But I have digressed somewhat from my theme, which is the entrenchment of socio-economic rights in a bill of rights. Here I am inclined to ally myself with Mr Justice J M Didcott, whose views on the subject, as expressed at a symposium which took place at the University of Pretoria in May 1986, are quoted extensively in the report. In his address on this occasion Judge Didcott warned against what he termed 'the problem of overreach' in a South African bill of rights. He pointed out that a bill of rights is not a political manifesto: it is primarily a protective device which states what may not be done rather than what should be done. With reference to a suggestion that a South African bill of rights should 'commit the new state to a programme of social, cultural and economic reconstruction' he stated:

> 'To expect from a bill of rights goods which it cannot deliver, will not merely be futile but will subject it to strains damaging perhaps to its capacity to perform the work it can do well.'

I agree.

As pointed out in the report, however, there are certain basic socio-economic freedoms, capacities and competences which can and should be protected in a bill of rights in the same way as other human rights are guaranteed, viz in the negative sense of prescribing what legislation and executive and administrative action shall not infringe. This concept has been translated into various provisions in the draft bill, notably article 5 which reads:

> 'The right to be recognised legally, economically and culturally as having rights and obligations and as having the capacity to participate in legal, commercial and cultural affairs;'

and article 14 providing for:

'The right freely and on an equal footing to engage in economic intercourse, which shall include the capacity to establish and maintain commercial undertakings, to procure property and means of production, to offer services against remuneration and to make a profit.'

This latter article would, of course, appear to entrench the principle of a free market economy.

Article 18 of the draft provides for the right of citizens freely to form political parties, to be members of such parties, to practise their political convictions in a peaceful manner and to be nominated and elected to legislative, executive and administrative office. I believe this to be of prime importance. There is a trend in Africa towards what is termed 'one-party government'. I believe that it is an unhappy trend, unsuited to the complexities and diversities of South African society. In this connection I can do no better than to quote an African constitutional authority, Prof B O Nwabuleze of Nigeria, who in his work entitled *Constitutionalism in the Emergent States* wrote:

'One-party government has tended in almost every case to produce one-man rule. Since it imposes a unity of purpose among the government, the assembly and the party, the leader becomes *the* political power in the country, presiding over the state and party as chief executive, legislator and party boss . . .

One-party government, with its corollary one-man rule, not only negates freedom of individual action which is the cardinal element in the whole concept of limited government, but also erodes the supporting mechanisms of constitutional government. Where an electorate has no choice between competing sets of candidates, what role could an election have in sanctioning the accountability of the rulers to the governed? Furthermore, to whatever extent powers may have been separated in the constitution, could this be effective in practice, given the absolute control of the legislative and executive organs by a single party and the unity of goals which this imposes upon these organs? An election under such a system, whatever other functions it may perform, cannot enable the electorate to throw out a government of whose policies it disapproves.'

And, in the final analysis, that seems to be to be unanswerable.

Another problem dealt with in depth by the report is the question of affirmative action, ie programmes designed to remedy the continuing consequences of past wrongs and deprivations. In a sense it constitutes discrimination in reverse, but it is an internationally recognised device for

the equalisation of opportunity and finds expression in the United States, India, Canada, Zimbabwe and Malaysia and in article 23(2) of the Namibian Constitution. The commission concluded, after considering the arguments for and against, that the draft bill should contain an affirmative action clause, which permitted the legislature to make laws granting a group which had been discriminated against in the past temporary advantages with the object of achieving equality. Such a clause is contained in article 2 which reads as follows:

> 'The right to human dignity and equality before the law, which means that there shall be no discrimination on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic: Provided that such legislation or executive or administrative acts as may reasonably be necessary for the improvement, on a temporary basis, of a position in which, for historical reasons, persons or groups find themselves to be disadvantaged, shall be permissible.'

Affirmative action is clearly a policy to be pursued with tact and circumspection, but that is the task and responsibility of the legislature or other authority which implements the policy. I have no doubt that the policy is justifiable – past inequalities and discriminations cannot be denied – and that a South African bill of rights should be so drawn as to permit of it, within reasonable limits.

The draft bill of rights, like many of its kind, proclaims most of the human rights which it entrenches in absolute terms. Yet it is generally recognised that in certain circumstances the rights of the individual must yield to the need to protect the safety of the state and the public good. As the commission's report points out, this does not involve a conflict of legal principles, but rather a weighing and demarcation of interests. The rights of the individual must be protected, but only up to the point where the interests of the community become dominant on the ground that its continued existence is threatened. These concepts are in accordance with our common law. And in this connection the report makes reference to the decision of the Appellate Division in the case of *Krohn* v *The Minister for Defence and Others*, 1915 AD 191. This case provides an interesting glimpse into South African history. It arose from the well-known rebellion that started in October 1914 and involved a number of prominent South Africans, including certain high-ranking officers of the Defence Force. The object of the rebels was to overthrow the South African government and to establish a republic in South Africa. The government responded by proclaiming martial law throughout the country; and the proclamation created certain offences, including the use of seditious language (defined

in the proclamation), and provided for special military courts to try and punish offenders under martial law. The appellant Krohn, a building contractor resident in Pretoria, was arrested and charged upon a number of counts of having used seditious language. The words imputed to him were of what the court called 'an aggravated nature'. Krohn applied to the Transvaal Provincial Division for an interdict restraining any form of trial proceedings by the special court on the ground that that body had no authority to exercise judicial functions, there being no statutory foundation for the issue of the proclamation. The application failed, as did Krohn's appeal to the Appellate Division. In his judgment in the latter court the Chief Justice, Sir James Rose-Innes, stated (at p197):

> 'Every subject, high or low, is amenable to the law, but none can be punished save by a properly constituted legal tribunal. If any man's rights or personal liberty or property are threatened, whether by the government or by a private individual, the courts are open for his protection. And behind the courts is ranged the full power of the state to ensure the enforcement of their decrees. But there is an inherent right in every state, as in every individual to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the courts depend and upon which the constitution is based is itself challenged. Under such circumstances the state may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger. Such a condition of things may be brought about by war, rebellion or civil commotion; and the determination of the state to defend itself is announced by the proclamation of martial law.'

As the report points out, however, a bill of rights, while recognising these principles, must strive to achieve a balanced relationship between human rights and state security; and it is the extent to which the security of the state is threatened or endangered that determines the degree of curtailment of human rights. The report adopts the principle that it is only where the continued existence of the state is at stake that extraordinary steps impinging on individual rights may be taken.

The report proceeds to accept that similarly limitations on the protection of human rights should be permitted on the grounds of the public order, the public interest, good morals, public health, the administration of justice, the rights of others or the prevention of disorder and crime. The formula adopted is that contained in article 30 of the draft bill, which reads:

'The rights granted in this bill may by legislation be limited to the extent that is reasonably necessary in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others and for the prevention of disorder and crime, but only in such measure and in such a manner as is acceptable in a democratic society.'

There is much in this formulation which can be debated, especially the 'democratic society' test, which is to be found in many bills of rights throughout the world, but considerations of time cause me to pass on to the next topic, which is that of the actual introduction of such a bill of rights in South Africa.

This was regarded by the commission as 'one of the most difficult aspects' of its investigation. It was concerned about questions such as the legitimacy of the bill, especially among the black citizens of South Africa; the need for a preliminary process of educating society, including legislators, legal draftsmen, judges and people in general, in the concept of a bill of rights; and the purging of the statute book of laws which would infringe the bill of rights. To some extent this aspect of the report has been overtaken by recent events and what is now in contemplation by many is the introduction of a bill of rights as part of a constitutional settlement arrived at as a result of the negotiating process which has already been set in motion. This will give the bill a binding force that could never have been achieved by simple parliamentary legislation.

But it is not intended that such a bill would be totally immutable. And thus the draft provides, in article 33, powers of amendment or suspension along the lines that I have indicated. This clause would, of course, depend for its precise formulation on the type of legislature erected by the constitution itself.

Finally, there is the question of justiciability. Justiciability in a court of law by way of judicial review there obviously must be. There are evidently in various countries of the world bills of rights which are not justiciable in this way, but they must be hollow, worthless things. It is of the essence of a bill of rights that it should be justiciable, otherwise there is no real guarantee of the rights which the bill purports to protect. But in which courts?

In the United States of America the power of judicial review is vested in the ordinary courts of the land and the majority of countries having a justiciable bill of rights have followed the American example. In a number of other countries, however, the interpretation and enforcement of the bill of rights has been entrusted to a special constitutional court. One of the best-known constitutional courts is the *Bundesverfassungsgericht* of West Germany. In Zimbabwe constitutional adjudication is vested in the

Appellate Division of the Supreme Court, which is given original jurisdiction in this sphere. Constitutional questions arising in other courts may be referred by the presiding judicial officer to the Appellate Division for decision and individuals may apply direct to the Appellate Division for redress against contraventions or threatened contraventions of their guaranteed rights. The report provides for a judicial review jurisdiction to be vested in the various divisions of the Supreme Court, but I understand that representations have been made to the commission proposing that original jurisdiction in constitutional matters should be vested in a specially-created Constitutional Division of the Supreme Court, with an appeal to the Appellate Division. This is probably a sensible compromise, especially if it is intended that, as in West Germany, litigants will be entitled to approach the court and have their cases adjudicated on an informal basis.

That is what a bill of rights entails and those are some of the problems and points of debate that will have to be considered if and when one is drawn up for a new South Africa. But before I conclude I think that I should repeat the warnings that are invariably given on occasions such as this. A justiciable bill of rights provides no infallible guarantee that human rights will be respected or that, if infringed, the infringement will be redressed. It all depends upon the attitude of the people. If they accept the concept of human rights and their enforcement by the courts and if all those in positions of power, legislators, government executives, administrators, are willing to bow to the superior authority in this sphere of the courts, that is, if the courts enjoy the power of legitimacy, then a bill of rights can provide a unique form of protection for rights of the individual in a new South Africa.

VOTE OF THANKS TO THE CHIEF JUSTICE, THE HON MR JUSTICE M M CORBETT, BY THE EXECUTIVE DIRECTOR OF THE SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, JOHN KANE-BERMAN

THE INSTITUTE began its diamond jubilee year with appropriate modesty. Although some racially discriminatory laws had been repealed, others remained in force. The country was in a state of emergency, and most other countries seemed bent on forcing it to its knees. That the Institute had survived the long dark night of rigid apartheid was cause for satisfaction but there was not much about the situation in the country at large that justified celebration.

Our president, Dr Stanley Mogoba, disagreed. I quote from his presidential address last year: 'There is one thing that we as an Institute can indeed celebrate in this our diamond jubilee year: it is that the trend away from apartheid is irreversibly established.'

Tonight's proceedings are the climax of our diamond jubilee year, which in fact expires tomorrow. The lecture which you have just heard, ladies and gentlemen, is the 35th Hoernlé lecture and the only one delivered by someone holding such high office since the very first one, given in 1945 by Jan Hendrik Hofmeyr when he was minister of education and finance. Hofmeyr of course held numerous offices, including that of acting prime minister. More important than any of these, he was vice-president of the Institute. I cannot think of a great many persons of cabinet rank that we would have wanted as Institute vice-presidents in the 45 years since then. Still less can I think of very many that would have accepted nomination from us had we invited them. But who knows: now that the new South Africa has dawned, maybe things will change!

In thanking Mr Justice Corbett for his lecture tonight, I would like to refer very briefly to some of the points he made. First, a new constitution must take account of the desire of minority groups not to be overwhelmed. Secondly, the new constitution must be thrashed out by representatives of all the various interest groups in South Africa. Thirdly, he called on all black leaders to make a cessation of violence their first priority. Fourthly, a bill of rights must not be merely a utopian statement, but needs machinery for its enforcement, in particular judicial review.

It is immensely gratifying that the notion of a legally enforceable bill of rights 'seems to have caught on' in South Africa, as Judge Corbett said. I am particularly pleased that our chief justice drew attention to article 18 of the South African Law Commission's draft bill of rights, which enshrines the right to form political parties. He said that this was of prime importance, given the trend in Africa towards one-party government. His quotation from Professor Nwabuleze of Nigeria in warning against this

could not have been better chosen or more timely. Indeed, the Council of the Institute at its last meeting passed a resolution declaring the Institute's commitment to a multi-party democracy. We intend to promote this commitment vigorously.

Ladies and gentlemen, the lecture that we have heard this evening is a marvellous climax to the Institute's diamond jubilee year. Ten years ago it would have seemed inconceivable, to me at any rate, that South Africa would now be moving not only towards the final disappearance of statutory racial discrimination, but also the restoration of the rule of law and the establishment of just law in which the enactment of a bill of rights plays no small part. Even so, the road ahead for South Africa will not be easy: the price of liberty is always going to be eternal vigilance. The country is fortunate indeed in having Judge Corbett at the head of its judicial system. It is deeply indebted to him for the leading role he has played over the past ten or twelve years in helping to put a bill of rights on to the South African political map.

Judge Corbett, on behalf of your many fellow Institute members present and our very large number of guests tonight, it is my pleasure and privilege to thank you for delivering this, the 35th Hoernlé lecture, and to wish you well in the years that lie ahead. We look forward to seeing you preside over a court which has been vested with the power of judicial review.

South African Institute of Race Relations
Recent Publications

Mauritz Moolman, *From Town to Township: RSCs Assessed* (1990)
Steven Friedman, *Options for the Future: Government Reform Strategy and Prospects for Structural Change* (1990)
Paul Hendler, *Paths to Power* (1989)
Stanley Mogoba, *A New Africa* (1989)
Stanley Mogoba, John Kane-Berman and Ronnie Bethlehem, *Sanctions and the Alternatives* (2nd edition 1989)
Harry Mashabela and Monty Narsoo, *The Boksburg Boycott* (1989)
Paul Hendler, *Politics on the Home Front* (1989)
Steven Friedman and Monty Narsoo, *A New Mood in Moscow: Soviet Attitudes to South Africa* (1989)
Harry Mashabela, *Fragile Figures: The 1988 PWV Township Elections* (1989)
Harry Mashabela, *Townships of the PWV* (1989)
Paul Hendler, *Urban Policy and Housing* (1988)
Monica Bot, *Training on Separate Tracks* (1988)
Charles Simkins, *The Prisoners of Tradition and the Politics of Nation Building* (1988)
Claire Pickard-Cambridge, *Sharing the Cities: Residential Desegregation in Harare, Windhoek and Mafikeng* (1988)
John Dreijmanis, *The Role of the South African Government in Tertiary Education* (1988)
Chris Heymans, *The Politics of Creation: An Assessment of Government-Created Bodies for Africans in South Africa* (1988)
Chris Heymans, *Akkommodasie sonder Demokrasie: Regerings-liggame vir Swart Politieke Verteenwoordiging in Suid-Africa* (1987)
Ben MacLennan, *Glenmore: The Story of a Forced Removal* (1987)
These are available from:

The Publications Department
South African Institute of Race Relations
P O Box 31044
2017 Braamfontein

The South African Institute of Race Relations is a non-profitmaking organisation seeking to foster non-violent processes of change towards democracy in South Africa. It has no party political affiliations. Membership is open to all, irrespective of race, colour, creed, nationality, or country of residence.

The occasional publications listed elsewhere in this book are supplemented by *Quarterly Countdown* and *Social and Economic Update* (published every four months) and the annual *Race Relations Survey*.

If you would like to join the Institute and/or receive regular copies of our publications please write to the Membership Manager, South African Institute of Race Relations, P O Box 31044, 2017 Braamfontein.