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IN May 1996, the Constitutional Assembly adopted a final Constitution containing a Bill of Rights hailed as the most progressive bill of rights in the world. Numerous books and articles have been written on both the interim and the final Bill of Rights. However, none of the authors on the Bill of Rights has attempted to trace an historical background to the Bill of Rights debate in South Africa, and in particular the role played by the African National Congress (ANC) in the developments leading to its adoption.

Orange Free State Constitution [1854]

The 1854 Constitution of the Orange Free State contained certain human rights and the courts had the power to test the validity of the laws passed by the Volksraad [Dugard J 'Changing attitudes, towards a bill of rights in South Africa' in Van der Westhuizen and Viljoen *A bill of rights for South Africa* (1988) 29].

The testing powers of the courts were confirmed in the case of *Brown v Leyds NO* (1897) 4 Off Rep. 17. This court decision was criticised by the then President Kruger who was strongly opposed to the courts being granted testing rights. He, in fact, referred to the testing powers of the courts as 'the principle of the devil.'

Union Constitution 1910

Any hopes for a constitution containing a bill of rights were dashed when the Union was formed in 1910. The Union Con-

A Bill of Rights for South Africa: An historical overview

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stitution did not contain a bill of rights. This was due to the following factors: the South African constitutional process was heavily influenced by the British constitutional system; the main role-players like J Smuts and Merriman were in favour of the English system based on the sovereignty of Parliament.

The Role of the ANC in the Bill of Rights debate

The African Bill of Rights (1923)

Since its formation in 1912, the ANC co-campaigned vigorously for the recognition and protection of human rights for the people. On 28-29 May 1923, during the annual conference of the ANC in Bloemfontein, the conference adopted, *inter alia*, a resolution on a bill of rights.

Content of the 1923 Bill of Rights

Clause 1 read as follows:

'That the Bantu inhabitants of the Union have, as human beings, the indisputable right to a place of abode in this land'. [See Karis and Carter *From Protest to Challenge: A Documentary History of the African Politics in South Africa 1882 - 1964* (1972) Volume 3 297].

This clause called for equal treatment of all people. Today, constitutions of a number of countries contain the equality clause.

Clause 2 read as follows:

'That all Africans have, as the sons of this soil, the God-given right to unrestricted ownership of the land in this, the land of their birth' [Karis and Carter 297].

The ANC demanded access to land,

thereby calling for the protection of the right to property. Again, property rights are entrenched in a number of national constitutions, including ours.

Clause 3 read:

'That the Bantu, as well as their coloured brethren, have, as British subjects, the inalienable right to enjoyment of those British principles of the "liberty of the subject, justice, equality for all classes in the eyes of the law" that have made Great Britain one of the greatest world powers' [Karis and Carter 297].

The ANC demanded equality before the law. Clause 5 demanded, *inter alia*, that the African people should be accorded direct representation by members of their own race in all legislative bodies of the land, otherwise, there would be 'no taxation without representation' [Karis and Carter 297]. This was also a clear demand for participatory rights (voting rights).

The African Claims (Bill of Rights) 1943

After the signing of the Atlantic Charter in 1941 by President F D Roosevelt and Prime Minister W Churchill, Dr A B Xuma, the then leader of the ANC, felt that Africans in South Africa needed to respond to the Atlantic Charter. He argued that the Atlantic Charter should be analysed from the 'African's point of view' [Meli *A History of the ANC: South Africa belongs to us* (1988) 94].

A committee known as the Atlantic Charter Committee was formed with the mandate, *inter alia*, to draw up a Bill of Rights reflecting the post-war demands of the African people. The committee tabled a report entitled *African Claims in South Africa*. Xuma sent a manuscript to Smuts and asked for an interview with

him. Smuts, through his private secretary, refused to grant an interview and in a letter to Xuma stated:

'Your study is evidently a propagandist document intended to propagate the views of your Congress. As such it is free to you to do your own publicity to secure support for your views. The Prime Minister cannot agree to be drawn into the task by means of an interview with him. He does not agree with your interpretation of the Atlantic Charter and with your efforts to stretch its meaning so as to make it to apply to all sorts of African problems and conditions.' [Walshe *The Rise of African Nationalism in South Africa* (1987) 274]

Smuts's private secretary's reply was read at the annual congress of the ANC in 1945, which adopted the *African Claims*, also known as the 1943 Bill of Rights.

Content of the 1943 Bill of Rights

What is the content of the *African Claims* document? What was it that Smuts rejected?

- **Full Citizenship Rights and Demands**

The preamble demanded full citizenship rights for the African people. The Bill of Rights calls for the 'abolition of the political discrimination based on race' and also universal adult suffrage (clause 1) [see ANC Department of Information and Publicity 'The ANC and the Bill of Rights 1923 - 1993: A seventy year survey' (1993) 5].

The Bill provided for 'the right to equal justice in courts of law, including nomination to juries and appointment as judges, magistrates, and other court officials' (clause 2).

This clause called for equality before the law and, interestingly enough, the clause also alludes to the transformation of the judiciary and, in a way, called for the implementation of affirmative action.

The Bill provided 'freedom of residence' (clause 3) and also for the African farmers to be subsidised like their European counterparts. Provision was made for the freedom of

movement (clause 4). On the other hand, the Bill provided for the freedom of the press (clause 6). Other clauses provided for were: the security of home as a right to every family (clause 7); the right to movable and immovable property (clause 8); the freedom of trade (clause 9); the right to work (clause 10); the right of every child to free and compulsory education and access to tertiary institutions (clause 11).

- **Education**

The other rights were: the right to education, calls for provision of education to all by the state, and that Africans should be represented in education-governing bodies.

- **Industry, Labour and Commerce**

African Claims demanded freedom of trade and occupation, equal pay for equal work, the right of the African worker to collective bargaining and labour legislation to cover all workers, including farmworkers, domestic and civil servants. It is now history that the labour legislation was only extended to farmworkers and domestic servants in the 1990s, whereas the ANC called for their legislative protection as early as 1943.

- **Public Health and Medical Services**

African Claims called for the provision of adequate medical and health facilities for all people, and for a drastic overhauling and re-organisation of medical systems with emphasis on preventative medicine.

- **Discrimination**

African Claims called for the abolition of discrimination, and therefore demanded the repeal of all discriminatory legislation.

It is clear from the above that the 1943 Bill of Rights contained provisions on many rights and freedoms found in modern constitutions.

The Freedom Charter 1955 and human rights

In 1955 the ANC influenced the adoption of the Freedom Charter. The Charter addressed fundamental human rights. Of particular importance is the

fact that the Freedom Charter contained the so-called first, second and third generation of human rights. The following were the first generation of human rights: freedom of movement, the right to equality, including gender equality, the right to a fair trial, the right against inhuman and degrading punishment, freedom of expression and association, the right to privacy, the right to family, the right to property, freedom of economic activity, freedom of conscience, freedom of religion and finally the right to language and culture. The second-generation of human rights were: the right to education, workers' rights, children's rights, land rights, the right to housing, the right to health, disability rights, the right to leisure, rest and recreation.

The third generation of human rights were the right to peace and the right to self-determination.

Bill of Rights and the Progressive Party

The Progressive Party was formed during the constitutional crisis (1951-1955) and it immediately attempted to resuscitate the idea of a Bill of Rights. It appointed a Commission of Inquiry headed by Molteno QC, which, *inter alia*, recommended that a Bill of Rights should be introduced. Attempts by the Progressive Party to effect such an introduction failed, hence, the 1961 Constitution did not contain a Bill of Rights.

ANC's Constitutional Guidelines 1986

In 1986 the ANC's Constitutional Committee produced a document called the 'Constitutional Guidelines'. This document envisaged a constitution containing 'a Bill of Rights based on the Freedom Charter' (Clause h). The document provided for property rights, land rights, workers' rights, women rights and children's rights.

In 1990 the ANC's Constitutional Committee released a comprehensive Bill of Rights, containing the three generations of human rights. [See ANC

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tion and practical implementation. In a constitutional state, appellate advocacy at its best, therefore, necessarily includes argument about values; *argument about who we are and wish to be, and what society we wish to live in.*

The enactment of a constitution as the supreme law in effect means that the number of arguable propositions about what is good for humans in human society is exponentially increased.

In the Bram Fischer Memorial Lecture, Chief Justice Ismail Mahomed, has recently stated:

“The orthodoxy of yesterday often becomes the heresy of tomorrow. It is therefore necessary that even in the case of very deeply held and common convictions about what is moral or immoral, just or unjust, the voice of the dissident, the unorthodox and even the apparent maverick must not be suppressed.”¹⁰

The importance of skilful and well-trained advocacy to this search is pivotal: particularly in a country as diverse and fragmented as ours, where we are “one nation” only in our commitment to our common future, but in every other sense – in terms of culture, language, race, and social background – are many nations.

One of the primary functions of the advocate will always be to defend the role of the heterodox, which will often be the role of the weak and the defenceless. If attributing this role to advocacy sounds over-ambitious, I make no apology for it. Unless we are ambitious – perhaps even unrealistically and unreasonably ambitious – in our hopes and expectations and demands, our experiment in constitutionalism has little chance of succeeding.

The Bar’s initiative in committing it-


self to training has had many beneficial effects. Not the least of these has been a re-emphasis upon the public duties of the senior members of the profession. Under the apartheid government, many of the senior members of the Bar of the highest stature were denied judicial appointment, or would if it was offered to them for good reason have refused it. This contributed I believe to corroding amongst some the belief that the highest virtue of the advocate was in public service.

The Bar training initiative reasserts that commitment. It is exemplified by our friends from abroad, particularly from the Inns of Court, who regularly devote enormous amounts of time to training. They have given much of their time also to our fledgling scheme, and have done so with unstinting generosity.

Their visits and contribution re-establish and re-emphasise an aspect of practice which is vital to the success of our fragile constitutional experiment: the Bar’s commitment to public interest investment in pro bono work. In doing so, they have set the tone for the advocacy in South Africa to establish itself at the core of our constitutional enterprise, and therefore at the heart of our constitutional enterprise: one that seeks the common good through justice and equality under the law.

Endnotes

- 1 See *Mabo v Queensland [No 2]* (1992) CLR 1 and *Wik Peoples v Queensland* (1996) ALR 129, discussed by Mr Justice GE Fitzgerald in (1997) 114 SALJ 486 at 487-488.
- 2 Constitution of the Republic of South Africa Act 108 of 1996, as adopted on 8 May

- 1996 and amended on 11 October 1996.
- 3 See *S v Makwanyane* 1995 (3) SA 391 (CC) (death penalty’s unconstitutionality).
- 4 *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) (presidential prerogative subject to scrutiny).
- 5 For instance, in striking down reverse onus provisions: see *S v Zuma and others* 1995 (2) SA 642 (CC); *S v Bhulwana* 1996 (1) SA 388 (CC); *S v Julies* 1996 (4) SA 313 (CC); *S v Ntsele* (1997) 11 BCLR 1543 (CC); *S v Mbatha* 1996 (2) SA 464 (CC); *S v Coetzee and others* 1997 (1) SACR 379 (CC); and *Scagell and others v Attorney-General of the Western Cape and others* 1996 (2) SACR 579 (CC).
- 6 Cite latest Nedcor/Institute of Security Studies *Crime Monitor* (First Quarter, 1998).
- 7 See my discussion in “Rights, Constitutionalism and the Rule of Law: The Alan Paton Memorial Address” (1997) 114 SALJ 505.
- 8 Instances include *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A); *East Rand Administration Board v Rikhoto* 1983 (3) SA 595 (A) (pass laws); *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) (detention without trial); *S v Toms*; *S v Bruce* 1990 (2) SA 802 (A) (military conscription).
- 9 When the Labour Relations Act 28 of 1956 was in 1980 deracialized and the industrial court system introduced and vested with unfair labour practice jurisdiction.
- 10 In *The Bram Fischer Memorial Lecture*, delivered in Cape Town on Tuesday 3 February 1998, at page 10 of the typescript. 

Nthai Bill of Rights

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Constitutional Committee ‘A Bill of Rights for the New South Africa’, Centre for Development Studies (1990) 1-37] The Draft Bill of Rights was used during the negotiation process that led to the adoption of the interim Bill of Rights, followed by the final one contained in the 1996 Constitution.

Conclusion

It is clear from the above that the earlier ANC’s human rights documents influenced the acceptance of the idea of a Bill of Rights in South Africa. I must also point out that during the negotiation process, almost all political parties tabled their own draft Bills of Rights which, to a certain extent, shaped the present Bill of Rights. However, it is undisputable that

the ANC pioneered and agitated for the adoption of a Bill of Rights a long time ago. Some of the readers may dismiss this argument as merely a party-political view or a “propagandist” view but nothing could be further from the truth than that. This is, indeed, part of our history. It is contained in documents which have only recently been made accessible. 