
Follow this and additional works at: http://repository.law.miami.edu/umiclr

Part of the Comparative and Foreign Law Commons

Recommended Citation
Available at: http://repository.law.miami.edu/umiclr/vol1/iss1/20

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
SUMMARY OF THE MOST IMPORTANT CONCLUSIONS AND RECOMMENDATIONS

1. Theories of Human Rights

Our survey of the main, currently relevant, schools of thought has shown that the idea of the existence of certain fundamental human rights is a recurring theme on most philosophical movements. It is only in the extreme form of positivism, where moral considerations are placed outside the science of law, that there is no room for the existence of fundamental human rights.

2. International Protection of Human Rights

The international community has certainly given concrete shape, in many different ways, to the idea that every individual has fundamental rights that must be respected by the state. The protection of the individual’s rights has become a universal demand and is recognised even where no enactments, conventions of treaties exist under positive law. It has become part of the modern international legal consciousness and of the contemporary law of nations.

3. The Position of South Africa

We come to the following conclusion:

(A) Our common law was strongly rooted in the protection of human rights and this premise still applies today.

---

*Editor’s Note: The South African Law Commission was established by the South African Law Commission Act of 1973. It consists of members of the judiciary, the legal profession, academic lawyers, members of the magistrate’s bench, and officials of the Ministry of Justice. On April 23, 1986, the Minister of Justice, Mr. H.J. Coetsee, requested the Commission to investigate and make recommendations on the definitions and protection of group rights in the context of a South African Constitutional set-up, and the possible extension of the existing protection of individual rights as well as the role the courts play or should play in connection with such an extension. On February 2, 1990, President De Klerk announced during the opening of the South African Parliament that he had requested the South African Law Commission to investigate (a) the identification of the basic matters and institutions to be provided for in a future constitution for the Republic of South Africa; (b) the identification of the main types or models of democratic constitutions that are to be considered for a future South Africa; (c) an analysis of the different ways of protection of the individual rights of all the citizens and of the rights of collective units, associations, minorities and nations in each such type or model; and (d) a discussion of the possible methods by which a future constitution can be safeguarded and guaranteed in a legitimate way. This working paper was prepared for the Commission by researchers of the Commission under the direction of Supreme Court Justice P.J.J. Olivier. The working paper was approved by the Commission under the Chairmanship of Justice G. Viljoen, and the Deputy Chairman, Justice H.J.O. Van Heerden. The Commission released this working paper with the express object of eliciting further comment, contributions and suggestions. The editors of the University of Miami Yearbook of International Law undertake to publish this working paper in the hope that it will serve as a point of departure for scholarly discussion on the future of South Africa and its emerging constitutional framework.
(B) The idea of unbridled parliamentary sovereignty is foreign to our common law. The 1854 Constitution of the Orange Free State, which contains guarantees for the protection of fundamental rights is a much more faithful reflection of the philosophy of our common law than the Transvaal Constitution of 1858, which does not contain such guarantees.

(C) In view of our system of parliamentary sovereignty and the denial of a testing right for the courts on the basis of fundamental human rights, the courts are severely hampered as regards the protection of individual and group rights in the face of legislation which curtails these rights.

(D) Treaties signed or ratified by South Africa do not become a part of our law until such time as they are given statutory sanction by legislation. The only ‘human rights’ document to which the South African Government is a signatory is the Charter of the United Nations. But these provisions have never been promulgated as law. There is therefore, no international charter, document, convention, or manifesto relating to human rights in South Africa which has statutory force and can be enforced by the courts.

(E) A human rights norm as enshrined in international law can indeed become part of our law and be applied by our courts if it has the consent of our country or if it enjoys universal recognition. But in practical and realistic terms it cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part - let alone a significant part - in the decisions of our courts. The salvation of the protection of group and human rights in South Africa therefore does not lie in the hope that our courts will apply the norms of international law in this regard, but in the establishment of an own South African mechanism.

4. South African Views on Individual Human Rights

Evidence and submissions, in writing and orally on the topic were received by the Commission from a great number of South African writers and interested parties. Their views can be summarized as follows:

(A) There is almost universal acceptance and insistence that human rights should be recognised and respected in this country as rights or interests that merit protection.

(B) The grounds for this view are found in:

- A strong religious justification
- The recognition of norms of Western civilisation
- The idea of justice
- Necessity

(C) A small group of South Africans has objections to a Bill of Rights.
(D) The Southern African human rights provisions which have already come into being, or which are now proposed, show a large measure of agreement, and show that South Africans are not unacquainted with or apathetic towards human rights. These provisions are:

- The Free State Statute Book of 1854
- The Freedom Charter
- The SWA Bill of Fundamental Rights and Objects
- The Bophuthatswana Declaration of Fundamental Rights
- The Ciskei Declaration of Fundamental Rights
- The Business Charter of Social, Economic and Political Rights
- The Kwazulu Natal Bill of Rights

(E) There is a large measure of agreement among witnesses and respondents regarding the rights that should be protected in such a bill, with equality (non-discrimination) heading the list. A survey by the HSRC also shows that equal rights protected by law are favoured by 60% of white respondents, 92% of Indian respondents, and 88% of coloured and black respondents.

5. Conclusion and Provisional Recommendations Concerning the Desirability of a Bill of Rights for South Africa

(A) After considering and weighing the pros and cons of providing a bill of rights for this country, we are of the opinion that the advantages, indeed the necessity, of such a bill outweigh the alleged disadvantages and dangers. The disadvantages and dangers can all be eliminated by adopting a cautious approach and employing the correct processes and techniques.

(B) The Commission is convinced that there is strong support in this country for the idea that individual human rights ought to be better protected in this country that has hitherto been the case.

(C) The Commission feels that the following considerations make it necessary to provide better protection for individual human rights in this country:

(I) The need to satisfy Western philosophical tenets.
(II) The religious base of our society.
(III) Such protection satisfies the sense of there being a social contract between subject and ruler.
(IV) It meets the requirements of the concept of the rule of law.
(V) It meets the social norms and expectations of the black population.
(VI) It meets international standards.
(VII) It will be effective.
(VIII) It will strengthen confidence in the courts.
(IX) It will create a climate of respect for human rights and
therefore of mutual respect among individuals.

(X) It can play a very important role in reconciliation in the constitutional sphere.

(XI) It can serve as an economic stimulus.

(XII) It can create legal certainty.

(D) The objections to a bill of rights have been considered, but they can be surmounted by judicial means. The objections do not weigh up against the above-mentioned advantages.

(E) Other possible measures for the protection of human rights were considered, but the Commission is satisfied the best way of protecting individual rights in our country is to introduce a bill of rights.

6. Group Rights or the Protection of Minorities - The International Scene

(A) Internationally, group rights manifest themselves in the form of protection of minorities.

(B) Article 27 of the International Covenant on Civil and Political Rights recognises the protection of culture, religion and language.

(C) In the politico-constitutional sphere there is a strong-held view, which is also translated into practice, that minorities - even ethnic minorities - are to be protected by giving them a say in the process of government.

(D) Therefore, the recognition of group or collective or minority rights is an accepted and familiar concept in the international arena.

7. South Africans on Group Rights

The following appears from South African literature on this subject and from evidence and submissions to the Commission.

(A) In our country there are many who advocate the protection of group rights. The protection of groups or minorities in our heterogeneous country is in fact regarded as essential by them in the interests of continued existence.

(B) The rights for which these persons or groups seek protection range from political rights to the protection of language, religion and culture.

(C) There are also persons and groups who raise objections to the idea of group rights mainly for two fundamental reasons. These being that it may lead to domination by one group and because it may produce racism.

8. Group or Minority Interests: Evaluation
The Commission's own conclusions in this regard are as following:

(A) The Commission considers that it is necessary to distinguish between political group rights and other group values. The latter include culture, religion and language. The latter values should be protected in the bill of rights: the former in the constitution.

(B) The Commission considers that the protection of minorities in this country is essential, since to ignore the rights of minority groups would be to invite endless conflict.

(C) The aim of the said protection should be to make it possible for all groups to live side by side and together with one another in peace, preserving the character of each. This can be done only if discrimination against minorities is eliminated and minorities are protected.

(D) In our legal system and in the bill of rights cultural, religious and linguistic values should not be protected as 'group rights', since a group is not a legal persona. These 'rights' should be protected in the bill of rights as individual rights. Therefore, these 'rights' can be protected without identifying a group because each individual who claims that one or more of the said values have been infringed by legislation or executive or administrative acts will be able to approach the Supreme Court for protection. The Court will have to determine according to the facts whether such a value has been infringed. The rights of other individuals and groups will be taken into account. Therefore, it is unnecessary to define a group, even less to introduce race or colour as a distinctive characteristic.

(E) Political group rights, that is to say, the question of the nature, composition and subdivisions of the legislature should be protected in the constitution itself, subject to the principle of equality. The question of political group rights - that is to say the so called constitutional question in South Africa - was not part of the Commission's mandate. However, this question cannot be solved without a solution of the problems concerning individual rights and cultural, religious and linguistic values. They should all form part of one new constitution.

(F) The content of the cultural, religious and linguistic values to be protected in a bill of rights should be determined by the courts and not by the legislature. The legislature can lay down the principle, but cannot foresee all situations.

(G) The weighing of conflicting group and individual interests should also be left to the courts, and not to the legislature.

(H) Whatever the nature of the protection of political group rights or the nature of the political constellation may be, the Commission's proposals imply that the other human rights shall have legal force country-wide.
9. The Nature and Content of, and Problems and Sundry Matters Affecting the Formulation of a Bill of Rights in South Africa

9.1 Socio-Economic Rights:

The Commission is of the opinion that basic socio-economic freedoms, capacities and competencies should in fact be protected in a bill of rights and then in the same way as all the other rights. That is to say, in the negative sense that legislation and executive acts shall not infringe them. A bill of rights is not the place for enforcing positive obligations against the State.

9.2 State Security and Public Order

The Commission considers that the human rights described should be made subject to legislation and authorised executive acts which sanction infringement owing to considerations of State security and public order. Such a limitation must, however, itself be limited: even security legislation should have limits.

The limitation that we find the most acceptable, and one that does in fact occur in bills of rights, is that the said security measures must be of such a nature that they conform to the accepted norms of democratic society.

9.3 Affirmative Action

The Commission considers that an affirmative action clause can be included in a bill of rights, but then once again to the same legal effect as all the other limitation clauses: it cannot force the legislature to act, but can permit it to make certain laws to grant a minority group which has been discriminated against certain advantages temporarily with the object of achieving equality and not with the object of giving one group an advantage over another.

9.4 Justiciability

The Commission’s unqualified standpoint is that a bill of rights in our country should be justiciable and then only by the Supreme Court. This means the Supreme Court receives the right to test legislation and executive and administrative acts according to the bill of rights. Should they be in conflict with the bill of rights, they shall be declared invalid. In this way only can individual rights (which include group values) be protected meaningfully. New laws and acts which conflict with the bill can be declared invalid by the Supreme Court.

9.5 Legislation in Conflict with the Bill of Rights

The Commission recommends that the statute book first be purged of provisions inconsistent with the bill of rights and that the bill then be instituted with application to all existing and future legislation and future executive and
administrative acts.

9.6 Entrenchment

The Commission considers that in our country it should be made difficult, once a bill of rights has been adopted, to derogate from the recognised rights, but that it should be made easy to add new rights. It is recommended that a 3/4 majority of those who are entitled to vote and who have been elected directly by the electorate in each house of Parliament be required for an amendment which in any way derogates from the rights granted in the bill, which entrenching provision should itself be capable of amendment only by a 3/4 majority. So far as additions to the bill or extensions to existing rights are concerned, a simple majority in each house of Parliament (if there are houses) is sufficient.

9.7 Franchise

The Commission considers that equal and equivalent franchise for all citizens of the country over the age of 18 years, men and women irrespective of colour, should be recognised in the bill of rights. This is an universal norm without which the bill will not have any credibility or legitimacy.

In the bill of rights it must be laid down that the constitution shall provide for the composition of the Parliament or legislative assembly within which equal and equivalent franchise can be released. Consensus on this issue must be attained in the political arena.

10. Draft Bill of Rights

The following Bill of Rights is Proposed for Consideration

Part A: Fundamental rights

The rights set forth in this part are fundamental rights to which every person in the Republic of South Africa shall be entitled and, save as provided in this bill, no legislation or executive or administrative act of any nature whatever shall infringe those rights.

Article 1

The right to life, provided that legislation may provide for the discretionary imposition of the sentence of death in the case of the most serious crimes.

Article 2

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.

Article 3

The right to a good name and reputation.

Article 4

The right to spiritual and physical integrity.

Article 5

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

Article 6

The right to privacy, which shall also mean that a person's property or place of residence or employment shall not be arbitrarily entered, that he shall not be arbitrarily searched, that his property or possessions shall not be arbitrarily seized and that there shall be no arbitrary interference with or interception of his correspondence or any other communication used by him.

Article 7

The right not to be held in slavery or subjected to forced labour, provided that legislation may provide for such labour as may be prescribed to be performed during detention resulting from a person's being sentenced to imprisonment by a court of law, or such compulsory military service as may reasonably be accepted in a democratic State.

Article 8

The right to freedom of speech and to obtain and disseminate information.

Article 9

The right freely to carry out scientific research and to practise art.

Article 10
The right to freedom of choice with regard to education and training.

*Article 11*

The right to the integrity of the family, freedom of marriage and the upholding of the institution of marriage.

*Article 12*

The right to move freely within the Republic of South Africa and therein to reside, to work, or to carry on any lawful business, occupation, trade or other activity.

*Article 13*

The right of every citizen not to be

(a) Arbitrarily refused a passport.
(b) Exiled or expelled from the Republic of South Africa.
(c) Prevented from emigrating.

*Article 14*

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.

*Article 15*

The right to private property, provided that legislation may in the public interest authorise expropriation against payment of reasonable compensation which shall in the event of a dispute be determined by a court of law.

*Article 16*

The right to associate freely with other groups and individuals.

*Article 17*

The right of every person or group to disassociate him or itself from other individuals or groups, provided that if such disassociation constitutes discrimination on the ground of race, colour, religion, language, or culture, no public or State funds shall be granted directly or indirectly to promote the
interests of the person who or group which so discriminates.

**Article 18**

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, and to form and become members of trade unions, provided that no person shall be compelled to be a member of a political party or a trade union.

**Article 19**

The right to assemble peacefully, to hold demonstrations peacefully and to obtain and present petitions.

**Article 20**

(a) The right of all citizens over the age of eighteen years to exercise the vote on a basis of equality in respect of all legislative institutions at regular and periodical elections and at referendums.

(b) Subject to paragraph (a) hereof, the composition of the legislative institutions shall be determined in the constitution.

**Article 21**

The right of every person, individually or together with others, freely to practise his culture and religion and use his language.

**Article 22**

The right of every person to be safeguarded from discrimination against his culture, religion or language and to be safeguarded from preferential treatment of the culture, religion or language of others, provided further that when in proceedings instituted by an interested person or persons it is alleged that legislation or an executive or administrative act infringes the culture, religious or linguistic values of any individual or group of individuals, the court shall in adjudicating such allegation have regard to the interests of other individuals or groups of individuals.

**Article 23**

The right to personal freedom and safety, which shall also mean that not person shall be deprived of his freedom, save in the following cases and in accordance with a generally applicable prescribed procedure whereby his fundamental rights
to spiritual and physical integrity are not denied.

(A) Lawful arrest or detention of a person effected in order to cause him to appear before a court of law on the ground of a reasonable suspicion that he has committed a crime or whenever it may on reasonable grounds be deemed necessary to prevent the commission of a crime.

(B) Lawful detention upon conviction by a court of law or for non-compliance with a lawful order of the court.

(C) Lawful detention of a person in order to prevent the spread of infectious disease.

(D) Lawful detention of a person who is mentally ill or who is addicted to narcotic or addictive substances, with a view to his admission, in accordance with prescribed procedure, to an institution or rehabilitation centre.

(E) Lawful detention of a person in order to prevent his unauthorised entry into or sojourn in the Republic of South Africa or with a view to the extradition or deportation of a person in accordance with prescribed procedure.

Article 24

It shall be the right of every person under arrest:

(A) To be detained and fed under conditions consonant with human dignity.

(B) To be informed as soon as possible, in a language which he understands, of the reason for his detention and of any charge against him.

(C) To be informed as soon as possible that he has the right to remain silent and that he need not make any statement and to be warned of the consequences of making a statement.

(D) Within a reasonable period of time, but no less than forty eight hours or the first court day thereafter, to be brought before a court of law and in writing to be charged or in writing to be informed of the reason for his detention, failing which he shall be entitled to be released from detention, unless a court of law, upon good cause shown, orders his further detention.

(E) Within a reasonable period after his arrest, to be tried by a court of law and pending such trial to be released, which release may be subject to bail or guarantees to appear at the trial, unless a court of law, upon good cause shown, orders his further detention.

(F) To communicate and to consult with legal representatives of his choice.
(G) To communicate with and receive, in reasonable measure, visits from his spouse, family, next of kin or friends, unless a court of law otherwise directs.

(H) Not to be subjected to torture, assault or cruel or inhuman or degrading treatment.

Article 25

The right of every accused person:

(A) Not to be convicted or sentenced unless a fair and public trial before a court of law has taken place in accordance with the generally applicable procedural and evidentiary rules.

(B) To be treated as innocent until the contrary is proved by the state.

(C) To remain silent and to refuse to testify during the trial.

(D) To be assisted by a legal representative of his choice and, if he cannot afford this, and if the case is a serious one, to be defended by a legal representative remunerated by the state.

(E) Not to be sentenced to inhuman or degrading punishment.

(F) Not to be convicted of an offence in respect of an act or omission which did not constitute an offence at the moment when it was done and not to receive a penalty heavier than that which is applicable at the time when the offence was committed.

(G) Not to be convicted of a crime of which he was previously convicted or acquitted, save in the course of appeal or review proceedings connected with such conviction or acquittal.

(H) To have recourse by appeal or review to a court superior to the court which tried him in the first instance, provided that if a division of the Supreme Court of South Africa was the court of first instance it may be prescribed that leave to appeal shall first be obtained from that court or from the Appellate Division.

(I) To be informed as to the reasons for his conviction and sentence.

Article 26

The right of every person convicted of a crime and serving a term of imprisonment in accordance with a sentence of a court of law:
(A) Not to be subjected to torture, assault or cruel or inhuman or degrading treatment.

(B) To be detained and fed under conditions consonant with human dignity.

(C) To be given the opportunity of developing and rehabilitating.

(D) To be released upon expiry of the term of imprisonment imposed by the court of law.

**Article 27**

The right to cause civil disputes to be settled by a court of law and to appeal to a court of law by way of review against executive and administrative acts and against quasi-judicial decisions.

**Article 28**

The right to have rules of natural justice applied in administrative and quasi-judicial proceedings and to have reasons furnished for any prejudicial decision.

**Article 29**

The right that the South African law, including the South African private international law, shall apply to all legal relations before a court of law, provided that legislation may provide for the application of the law of indigenous groups or the religious law of religious groups in civil proceedings.

**Article 30**

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 or for the prevention of disorder and crime, but only in such measure and in such a manner as is acceptable in a democratic society.

**Article 31**

The Supreme Court of the Republic of South Africa shall have jurisdiction upon application by any interested person acting on his own behalf or on behalf of a group of interested persons to determine whether any legislation or executive or administrative act violates any of the rights herein set forth or exceeds any of the limitations herein permitted and, if so, to the extent that the violation or excess takes place, to declare invalid the legislation in question or to set aside the executive or administrative act in question, provided that finalised executive and administrative acts by which effect has been given to legislation declared invalid and which are not the subject of the proceedings concerned, shall not
automatically become void.

**Article 32**

The provisions of this bill shall apply to all existing and future legislation and to all executive and administrative acts done after the date of the introduction of this bill.

**Article 33**

The provisions of this bill, including this article, shall not be amended or suspended save by a three-quarter majority of those 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.

11. Introduction of a Bill of Rights in South Africa

**A. Introduction**

The question of how a bill which protects individual rights and group values should be introduced and become part of a new constitution was one of the most difficult aspects of our investigation, since there is so great a diversity of factors which have to be taken into account and which often entail conflicting solutions.

**B. Standpoints of South Africans**

There are three standpoints regarding the introduction of a bill of rights in our law, namely: (a) it must be introduced as the outcome of negotiations; (b) a limited bill must be introduced immediately; and (c) a full-statured bill must be introduced as a matter of urgency. The majority of writers and contributors are in favor of solution (a).

**C. Special Considerations**

In considering the various possibilities regarding the question of introducing a bill of rights in our country, it is necessary to single out some basic considerations and to adopt a standpoint on these.

(A) The question of the legitimacy of such a bill. - Like a refrain, the warning was sounded by numerous witnesses and contributors that a bill of rights must have unimpeachable legitimacy. Further points made under this head are the following:

(I) Such a bill will have a chance of being generally accepted and respectfully observed only if it is accepted and trusted by a considerable majority of the population as a whole.
(II) To be accepted and trusted, such a bill will have to be an honest piece of work which is not merely cosmetic in character. Where there are unfair advantages or infringements at the moment, matters will have to be objectively and honestly put to right.

(III) To be accepted as legitimate, such a bill should, least of all, protect the position of one group, for example the whites. Absolute fairness and equal treatment are essential, or else the whole effort should be abandoned. To use such a bill for dishonest ends, for example to ensure domination by one group, will irreparably damage South Africa's name; such a bill could give rise to widespread unrest and even civil war.

(IV) In the final analysis, legitimacy is ensured by open acceptance of the bill by the great majority of the population, and this can best, and perhaps only, be attained through a referendum in which all the inhabitants of the country over a certain age, say, eighteen years, have an equal vote.

(V) A bill of rights will not be accepted as legitimate if the black people in South Africa are not given the vote. The present constitutional deadlock on the black vote will therefore have to be resolved to the satisfaction of all if a bill of rights is to have credibility, for the simple reason that the right to vote is one of the fundamental human rights that must be enshrined in any constitution. Until that is done, the creation of a bill of rights will be suspect. The creation of a parliamentary system that will satisfy everyone is therefore a prerequisite.

(VI) It follows, therefore, that the highest possible degree of national consensus must be reached on the franchise question in conjunction with the bill of rights. The reaching of consensus could usher in a memorable era in this country's history in the political, social and economic sphere. Such consensus would at the same time serve to guarantee that the constitution and the bill of rights are treated with respect, and would therefore also guarantee law and order and be the best entrenchment possible for the constitution and the bill.

(VII) Finally, legitimacy also demands that, so far as the content of the bill is concerned, it shall not be unilaterally formulated by one group and simply submitted for approval. All population groups must work together in preparing such a bill and the greatest possible measure of consensus must be reached before it is laid before the nation for approval.

B. The Question of an Educational Process

A considerable number of commentators, contributors and witnesses were of the opinion that the provision of a bill of rights would be doomed to failure if it was not preceded by a process of active education through which the entire population could be educated with regard to a bill of rights.

The point was made that never within living memory has statutory protection
for human rights been granted in this country in the form of a bill and that the introduction of a bill of rights would call for a completely new orientation on the part of the population, Parliament and the courts.

The population would have to be taught the role, function and content of such a bill and what changes it would bring about. Respect for the constitution and the bill of rights would be the outcome of such a process. If it was not done, such a bill would not become part of the nation’s legal conviction and its eventual entrenchment would lapse.

The legislature, the legal draftsmen and all those concerned with legislation would have to get used to the idea that parliamentary sovereignty is limited and that not laws, but the law, rules.

The bench would have to control and interpret a new constitutional instrument, and advocates, attorneys and law students would have to become acquainted with a whole new field. It is strongly recommended that every university should consider and establish a chair of human rights.

C. Purging the Statute Book

This country, and particularly the government, is often reproached for having so many laws that infringe basic human rights. Among the more widely criticised laws that are under attack on that score are the Republic of South Africa Constitution Act of 1983, which makes no provision for a parliamentary vote for black persons; the Population Registration Act of 1950,** which classifies people according to race; the Group Areas Act of 1966, which controls ownership and occupation of land on a racial basis; and aspects of security legislation, for example, prolonged detention without trial, etc. Apart from these there are other important examples of discriminatory measures that conflict with the non-discrimination principle of any bill of rights.

If a full-statured justiciable bill of rights were simply to be introduced in this country now, the courts would be able to declare laws of the above-mentioned kind invalid. However, a court lacks the capacity to put anything in the place of a law that is declared invalid. Therefore, such decisions may create gaps in our society on a fairly large scale. This may give rise to uncertainty and confusion in the community. It may also create the wrong impression that there is large-scale conflict between the legislature and the courts.

For purely practical considerations, therefore, it appears to be necessary to purge the statute book of provisions that are likely to be declared invalid by the courts. Once that has been done, a bill of rights can be put into operation

---

** In June, 1991, the Population Regulation Act of 1950 was repealed by the South African Parliament.
without large-scale disruption or a rush on the courts.

It follows, therefore, that a full-statured bill of rights cannot, as proposed by those in favour of solution (c) above, be introduced immediately.

Those in favour of solution (b) above envisage the immediate introduction of those provisions of the bill of rights in relation to which the conflicting laws can be readily and speedily repealed. The rest of the bill can then be brought into operation once the laws that conflict with it have been repealed.

The problem with this solution is that of legitimacy. It would appear that a limited bill would have no credibility, particularly if the clauses that are brought into operation are of a non-controversial nature. It would probably be said that such a bill paid lip service to the idea of human rights protection without addressing the real problems.

In our view the bill of rights should be brought into operation only after such legislation as is likely to be inconsistent with the bill has been removed from the statute book or amended.

The Commission has expressed its views above regarding the requirement of legitimacy for a bill of rights and the way in which legitimacy can be achieved. We have indicated that such a bill should be a negotiated bill which should be approved by the entire nation, regardless of race and colour. We consider that the formulation of the bill and the purging of the statute book provisions conflicting with the bill should go hand in hand in the process of negotiation. We consider that, as consensus is reached on each clause, the legislation conflicting with it should be reviewed and consensus reached on the repeal or amendment of such legislation. The process of negotiation would, after all, create possibilities for compromise as regards both the formulation of the bill and the repeal or amendment of legislation.

We believe that this process of negotiation, offering as it would the possibility of compromise, would in fact result in a bill being arrived at which would rest upon national conviction, and in any laws that give rise to tension and unrest being removed.

However, we have no illusions that such a process of negotiation can be other than difficult; it would have to be conducted with patience. Nor should consensus be expected on every point. In cases where consensus is not reached the bill of rights would have to be modified, and it would have to be left to the normal political process to point the way for the future. Consensus and compromise are the cornerstones of many bills of rights - to mention only one example, the Bill of Rights of the U.S.A.

Therefore we plead for a South African-negotiated bill of rights which gives expression to the needs, fears and aspirations of the people of this country.
Towards a New South African Bill of Rights

From the South African literature, from the respondents' contribution and from evidence, our impression is that there is a pressing need for such a bill and that to a large extent the good will needed to bring it into being already exists.

D. A Plan of Action

In the light of its terms of reference - the protection of group rights and individual rights - the Commission would not have completed its task if it did not translate into concrete terms its ideas on the introduction of a bill of rights and submit a plan of action. This plan is only a tentative suggestion, and further contributions would be welcome. Our proposal provides for different phases, but we would emphasise that these phases need not necessarily be consecutive; they could run concurrently.

A. Phase 1: Acceptance in Principle by Parliament that a Bill of Rights be Adopted in the Future

The very first, and essential, step towards the eventual adoption of a bill of rights in the Republic of South Africa would be a statement of policy by Parliament that it is in favour of the protection, in a bill of rights, of the generally accepted individual rights and cultural, religious and linguistic values. The reason for such a statement is obvious: it is Parliament that has in its hands the initiative to provide such a bill and it is Parliament that should take both the credit and the responsibility for translating the idea of such a bill into reality. In addition, such a statement would be a powerful sign of Parliament's good faith. It would convey the message, both in this country and abroad, that it is Parliament's earnest desire to achieve democracy and to secure the protection of human rights, as befits any civilised country at the end of the twentieth century. This would be a most important message as regards constitutional reform on its own.

Parliament is not asked in this phase to commit itself in any way to a particular bill of rights - not even the draft prepared by the Commission, since, as has been said, the eventual bill must be written after, and as the outcome of, a process of thorough negotiation and formulation. All that is asked of Parliament is that it endorse the idea of such a bill as part of a future South African constitution.

It is suggested that such a motion be introduced at a joint sitting of the three houses of Parliament.

This statement, it is proposed, should be made as soon as possible after the tabling of the commission's final report, due allowance being made for a reasonable time for parliament to study the report.

B. Phase 2: The Repeal or Amendment of Legislation Conflicting with a Bill of Rights: Preparing the Way
The phase that logically follows next is that of going ahead with preparation for the repeal or amendment of existing legislation that would be inconsistent with the proposed bill of rights.

The question of eventual repeal of amendment of legislation inconsistent with the bill of rights has been discussed above. This will be a major task, and there is no need to defer the preparatory work any longer. The legislation that would have to be considered should be identified, and it should be determined to what extent it conflicts with the basic principles, for example, as embodied in the Commission's draft. This task comprises the essential groundwork for an eventual process of negotiation.

We suggest that the task be assigned to a parliamentary committee, possibly the joint committee on constitutional affairs, which can invite submissions and proposals.

The commission itself has already identified some of the legislation in question in the course of its investigation and is prepared to make a submission.

C. Phase 3: The Education Process

It is necessary to launch a thorough educational process to inform the population on the role and value of a constitution of which a bill of rights forms a part. In this regard we would refer to the example of Brazil, which ran an educational programme of this kind for some years as a precursor to its adopting a new constitution. It is said that even school courses were offered and booklets were published to explain what a constitution is, what its advantages are, how it should be respected and how it works in practice to protect the individual, the group and the state. At the very least we ought to do the same.

It is suggested that the churches and educational institutions and those organisations and individuals that have responded favourably to the Commission's invitation be approached to assist in this task.

D. Phase 4: Reaching Consensus on a Future Constitution and Finalising the Bill of Rights

Whoever rejects violence as a solution to this country's constitutional problems must necessarily believe in a peaceful, consensual solution. This is the road already indicated by Parliament in passing the Promotion of Constitutional Development Act of 1988, in which a council is envisaged in which all interest groups can co-operate.

We suggest that this council - or any other body that may come into being in the future with a similar mandate - should consider the question of the composition of a South African legislature and executive and the question of a bill of rights as part of the Constitution, and together with that, the repeal or
amendment of legislation that would conflict with the provisions of such a constitution and bill of rights.

We suggest that, since the bill of rights would be concerned with fundamental values, it might be appropriate to begin with the provisions of such a bill. The Commission's report and draft bill could then be submitted to the council, merely to serve as a point of departure.

E. Phase 5: Legitimation, by Referendum, of a New Constitution Which Includes a Bill of Rights

We believe that the legitimation of a new constitution, including a bill of rights, must take place by way of a single general open referendum which is not restricted to and does not discriminate among voters of particular groups or races, because this, like no other process, will give legitimacy to a constitution. Particularly from the point of view of human rights protection, such a process cannot be recommended too strongly, because it could mean the difference between success and failure as regards the legitimacy, credibility and life of such a bill of rights.