Collective Rights, Transformation and Democracy: Some Thoughts on a New Constitutional Dispensation in South Africa

Jennifer Clare Mohamed*

Résumé: *En Afrique du Sud, les débats actuels sur la forme constitutionnelle sont houleux. L'exercice du pouvoir ainsi que la capacité de garantir une transition démocratique privilégiant la notion de droits collectifs et individuels sont intimement liés à la forme que revêt la constitution. Les enjeux fondamentaux actuels portent sur le "concept de droits des groupes politiques" qu'encourage le gouvernement et qui légalise un statut de privilégié garanti à une minorité raciale qui, même modifié, n'en continuera pas moins de perpétuer des clivages ethniques et d'être un obstacle au système unitaire de gouvernement. D'autre part, il y a la lutte du mouvement de libération de la nation pour mettre fin à un système dans lequel la race ou l'ethnicité confère des droits juridiques et des privilèges. La nouvelle Constitution sud africaine devra accorder à l'ensemble des Sud-africains le droit à l'égalité qui implique également le droit "à la différence", autrement dit la reconnaissance de l'identité multi-culturelle et la création des conditions de développement de cette mosaïque de cultures.*

As the debate in South Africa about a new constitutional dispensation unfolds, the issue of central principles has gone through various manifestations. For the oppressed and exploited, the central principle informing their choice about the nature of the constitution is whether any given construction will assist in the eradication of exploitation and oppression. For the liberals and civil libertarians, the central concern is the creation of a constitution which stipulates the ideal of equality (without necessarily creating the tools for the rehabilitation of that ideal) and that secures the freedom and rights of the individual. For the government and those in power, the central concern is that the new constitution continues to perpetuate the existing *status quo*. Given this contestation of ideas, the struggle for a constitution that gives expression to the values and ideals of the majority is a crucial aspect of the struggle for national liberation.

Questions and debate about constitutional form and principles are or at least ought to be of central concern. The issues of bicameral parliaments, proportional representation, justifiable bill of rights, collective and individual rights have just been some of the key issues. However the depth of analysis

Africa Development Vol. XVII, No. 1, 1992, pp. 5-35

is not always what it should be, the debates about these issues have been left primarily to the corridors of legal academics. For the most part, other sectors of the national liberation movement have been left outside the debate. The legal profession has created the impression that provided equality clauses exist, and adequate mechanism for their enforcement are created, the transition to social equality should be possible and smooth. Activists have broadly been willing to accept this explanation. The result is that activists have been very happy with constitutional proposals that are *prima facie* egalitarian and non-racial. We need to push the debate beyond this to an investigation of the implications of particular forms of government. We need to address the implications of proposed models within the context of socioeconomic reality.

Too often we have witnessed the creation of *prima facie* democratic institutions and forms of government that have resulted in little change for the people. This is a story well known to us - it exists not only within Western democracies but throughout the developing world. It is time to look at the lessons of independent Africa and to realize that the hopes and aspirations of the people at independence have seldom been fulfilled. Whilst this is partly attributable to the nature of government to a lack of democratic accountability, and economic dependence, it is also due to constitutional and legal framework in which these countries work. Again and again we have seen the oppressed give away the keys to the treasury in return for sitting on the throne[1]. This has been achieved through a combination of economic and constitutional manoeuver. In Zimbabwe, we witnessed the acceptance at Lancaster House of a constitution that gave whites a percentage of guaranteed seats for a seven year period and entrenched the protection of private property for ten years. The combined effect of these provisions was that:

> *their (white) control of the economy increased and to this day they dominate farming, industrial, commercial and mining sectors and indeed all but 12 out of the 200 top executives in Zimbabwe's leading companies are whites*[2].

If any semblance of real transition is to exist in South Africa, the oppressed need to ensure that the constitution is drafted in such a manner so as not to simply assert their values and aspirations but to actually promote, enhance and protect them: constitutions are not ideologically neutral

---

1 Coleman, K. (1990) "Some Economic Considerations for a Group Rights formula" p. 8 Paper presented at Cold Comfort Farm Trust's Group Rights Conference. Harare, 30 June.

2 Ncube, W. and Nzombe, S. (1987) - "The Constitutional Reconstruction of Zimbabwe; Much ado about Nothing" *Zimbabwe Law Review* 2, 1987 p. 11.

documents. They are not simply the means through which state power is regulated, or the means to ensure individual rights are not encroached upon as the liberal theorists[3] would have us believe. They are tools for the realization of power of a particular social group and a means through which social change can be achieved. The form the constitution takes has important implications for the exercise of power and the ability to ensure democratic transformation. This paper aims to examine just one issue pertinent to the drafting of a new constitution - that is the position of "collectives" in a new dispensation.

The Position of Collectives in South Africa

The struggle in South Africa is essentially the struggle of the majority to win and assert their democratic and economic rights - hence the struggle goes beyond one for individual and civil rights, it a struggle that is not simply a demand to be included or to be considered equal. It is a struggle that demands the re-examination of the entire legal system and every strain, component and facet thereof.

This struggle has been waged on many fronts and in numerous terrain. We have witnessed the formation of organizations defined in ethnic, gender, religious, age, and cultural terms; others have found their constituencies in specific terrain such as education, rural, urban, and professional arenas. This organizational diversity is evident in the multiplicity of collectives fighting to redefine social relations and to assert their right to participate in the national process. Thus a key constitutional question is how one gives expression to these interests.

The issues of what kinds of rights ought to be given to collectives needs to be addressed. The mere existence of "collectives" does not presuppose that they should be given rights in law. The issue of what kind of rights ought to be given to "collectives" needs to be addressed in the context of the positions such collectives occupy, the nature of social relations in society, and the kind of society one is striving to create.

It is in the context of the struggle to change/maintain existing social relations that the issue of collective rights has become pertinent. One of the central constitutional issues has been the status that "group and collective rights" should occupy in a new dispensation. At the early stages of the debate about constitutional form the government began to push for some legal recognition of political racial group rights. Despite the fact that it currently does not occupy the centre stage - it continues to inform

---

3 See for example Kendell, F. and Louw, L. (1990) - *Let the People Govern*, p. 125 (Amagi Publications South Africa); Godsell, B (ed) *Shaping a Future South Africa* p. 22 (Tafelberg Human and Rousseau, South Africa).

government thinking. The government's new position is partly attributable to the consistent resistance to and rejection of the concept of political group rights by all sectors of the national liberation movement[4]. In the latter part of 1990 the government began to move away from insisting upon any simplistic group rights formula and instead began to use the concepts of "proportional representation", "devolution of power" and "bicameral parliaments" to achieve the same ends. Despite these more sophisticated manoeuvres by the government, we cannot assume that the theory of group rights no longer informs their thinking. In the section of this paper entitled "legal development of group rights in apartheid South Africa", it is shown that it has been a driving force in legal development and reforms for well over 50 years. There is no fundamental break in government thinking, or socioeconomic reality that indicates a changed position.

The history of revolution and social change alerts us to the fact that those in power do not willingly relinquish power. Indeed the lessons of independent Africa must alert us to the fact that numerous colonial regimes instituted legal forms that would ensure that any radical change to the socioeconomic conditions would be difficult. There is no reason to assume that in these broad terms the interests of the South African regime are any different.

Neither can we assume that the issue of group rights will not re-emerge in a more direct form. The potential for it to re-emerge in a direct form will to some extent depend on the strength of the liberation movement as well as the potential for government to divide the oppressed. We have in recent months seen an increase in violence between competing political interests. The government has largely been successful in portraying this conflict as an ethnic conflict; an explanation that appears to be increasingly accepted by the West. We ought not underestimate the role and influence that these issues will have on the form that the political settlement will eventually take. The existence of "Ethnic violence" increases the likelihood of an insistence by the government, and sections of the international community, as well as some groups in South Africa that group rights be protected. Already Jac Buchner, Kwazulu Police Chief, asserts the potential for a white-zulu alliance[5].

---

4 The term, here is used in its broadest possible sense to include all forces opposed to the current government who have waged their struggle primarily through extra parliamentary mechanisms, it therefore include the (ANC) African National Congress, (PAC) Pan Africanist Congress, the (MDM) The Mass Democratic Movement, (UDF) United Democratic Front, (AZAPO) Azanian People's Organization, (SACP) South African Communist Party etc.

5 *Sowetan*, July 31, 1990.

Other conservative groups, as well as groups that feel they are or will be marginalized by a new political dispensation may demand some legal group recognition even if it is not in the form of direct political representation in a lower house of parliament. It is not inconceivable that religious groups or language groups will push for representation in an upper house of parliament.

The issue of group and collective rights is one that extends beyond the rights of racial groups trying to enforce a system of privileges. There are undoubtedly other collectives, such as workers and women that are striving for a recognition of their rights. The national liberation movement has realized that the recognition of certain collective rights (such as workers rights) are intrinsic to a realization of the struggles of the oppressed and the creation of a democratic order. We need to address seriously how collective rights can be used to end the oppression of these groups. This paper seeks to make suggestions about how collective rights should be dealt with in a new dispensation.

Racially Defined Collectives as a Basis for Group Rights

Whether or not racially defined collective should have positive rights in law cannot be determined simply by reference to the position of racial groups in international law or by how racial groups have been dealt with in other national legal systems. The South Africa government continues to make comparison to the granting of rights to national groups in other states in order to justify its demand for "Group Rights". The demand for such rights needs to be examined historically in order to:

- illustrate the continuum between current formulation and Apartheid's legal history;
- to identify specific problems that need to be addressed in a constitution given this experience.

The Legal Development of Group Rights in Apartheid South Africa

The legal definition of "group" in South Africa is a product of:

- political struggle;
- objective reality of the existence of distinct communities during the early colonial period.

It has not only reflected the particular social, political and economic relations of the historical conjuncture, but has also served to shape these relations. Thus the process of definition has constantly been in flux. For example, the establishment of administrative structures over already existing and spatially separate pre-colonial communities, the subordination of indigenous law, politics and culture, and so on provided the political and legal foundation for the racial positioning of subjects on the arena of

production[6]. Similarly the further racialization of the productive sphere becomes the catalyses for further racialization of the political and legal sphere. The particular nature of capitalist development in South Africa meant that groups were defined by the dominant ideology primarily in racial terms.

Whilst having an objective basis, the legal definition is a product of struggle. In South Africa, as in all situations of conflict, fact, myth and propaganda intervene to enlighten, confuse and conceal, with different interest groups coming to have their own particular viewpoint heard and accepted as the conventional "wisdom"[7] and strive to ultimately have it implemented as official policy. Thus in the struggle for power, different political forces have manipulated group identity in order to achieve this end and promote their own political interests. Group identity is constantly being shaped and reshaped by an interplay of struggles between the oppressed and the oppressor and also by struggles internal to the two groups.

The use of racial legislation did not emerge after the election of the Nationalist Party but was an element of the previous era. One of more important constitutional developments in the early period of union was further legal dis-empowerment of the black people, "In 1930 white women were given the franchise, but not 'Non-White' women which resulted in the voting power of 'Non-Whites' being virtually halved"[8]. In 1931 the voting power was further diluted, by the removal of the property and income voting qualification with respects to whites.

In 1936 the first inklings of a group rights approach to voting is evident. The Representation of Natives Act of 1936, placed African voters on a separate voter's roll. The effect of which was that African representation was limited in the upper base to four indirectly elected white senators.

By 1948, South Africa had a system in which political and economic control was exercised by a white minority. The victory of the Nationalist Party in 1948 was not simply an electoral victory, but a victory aimed at containing the growing black opposition and the proletarianization of black people. Both these had threatened the interests of white farmers and the privileged position of the white working class. The direct legal consequences of this victory was the intensified entrenchment of racial inequality. This inequality was entrenched politically, ideologically and economically. At an ideological level, the state seized control of African education by the Bantu

---

6 Wolpe, H. (1988) - *Race, Class and the Apartheid State*, 57 (James Currey, London).

7 Riddell, R. (1988) - "The Regional Crisis", 77 In Longsdale, J. (ed) *South Africa in Question* (James Curry, London).

8 Blaustein, A. and Hantz, G. - "South Africa" p. 4 In Blaustein, A. and Hanz, G. *Constitutions of the Countries of the World*, Vol. XIV.

Education Act, 1953, in a bid, "to gain ideological control over black intelligentsia"[9].

The policy of influx control was used to control migration to the cities and hence protect both white farmers and workers and meet the needs of the manufacturing sector.

The process of control entered into by the state was based on a policy of separation of racial groups, as defined in the Population Registration Act of 1950. This policy of separation was founded on the ideological premise of black inferiority. In order to secure their political power, this racialization of the legal sphere and therefore social relations was coupled with a legal onslaught against political opposition. The suppression of Communism Act, the Public Safety Act, legal limitation on the exercise of judicial discretion, and shifting of the burden of proof in certain offences to the accused are just some of the mechanisms used. The suppression of Communism Act although purported to prohibit the advocacy of communism, was used against both communists and non-communists as the definition was wide enough to encompass most radical opponents of the *status quo*[10]. Simultaneously the regime developed an elaborate structure of administrative control over the press and organizations and expanded the strength and powers of the security branch of the police force[11]. The legal space in which political opponents could operate was dramatically narrowed.

The overall aim of the legal - political system developed in the immediate post 1948 period was not to protect or facilitate the development or racial/ethnic groups but to ensure at all costs the entrenchment of the system of white superiority and privilege.

Only in the post 1960 period, after the massacre at Sharperville, is a policy of purported separate development and the concept of group right developed more fully by the regime.

The period is distinct from the earlier period in that provision is no longer made for African people in the central state. The process of creation of parallel and distinct structures in every realm is entered into. This occurs primarily as a result of developments in the extra-parliamentary political terrain. The events at Sharperville were a culmination of a decade of resistance. The regime responded by declaring a state of emergency, outlawing the African National Congress and Pan Africanist Congress, arresting and imprisoning thousands of political activists. This internal crisis

---

9 Marks, S. and Trapido, S. (1978) - "The Politics of Race, Class and Nationalism" In Marks, S. and Trapido, S. (ed) 1987, The *Politics of Race Class and Nationalism in Twentieth century South Africa*, (Longman).

10 Wolpe, H. (1998) 67.

11 Dugard, J. (1987) - *Human Right and the South Africa Legal Order*, p. 155 (Princeton).

resulted in the flight of foreign capital. In order to woo international capital back and to appease and control the black population, the state began to restructure the political arena, this restructuring included the development of the policy of 'separate development' and that which came to be known as a 'Group Rights' formula. Clearly the formula was developed in the context of entrenching exploitative and oppressive relations.

The central articulated principle of this new system was that each racial group was entitled to exercise political rights with respect to the affairs of that group. However the previous ideology of white superiority continued and the resultant system was one where only a semblance of political rights was accorded to the black population.

In the political terrain, this separation of rights was achieved through the abolition of parliamentary representation in 1960 and provincial council representation from mid 1961. This implied the creation of the Bantustan system for Africans and the 'Representative' structure for Coloureds and Indians. The African population was divided into ethnic groups broadly coinciding with primordial ethnic groups and each having a territory. The territories assigned, the Bantustan were carefully designed so as to ensure that the country's wealth continued to be channelled to "white South Africa".

Although the government portrayed this policy as giving African people political rights, it must be emphasized that these rights were very limited. The whites continued to act as overseer of the political process, and the decision maker in crucial areas. Given this reality it is fair to conclude that the aim of this policy was control and denationalization as opposed to the extension of democratic practices[12].

The basic method of dealing with African political aspiration did not change significantly until 1989-90; in the interim there was a steady increase in the power awarded to the Bantustans. In 1971, the autonomy to proclaim legislative assemblies was given to the central cabinet by virtue of the Bantu Homelands Constitution Act. Although such assemblies where given original legislative power, a bill required the assent of the central cabinet to become law. Neither were they given powers to repeal any other enactment. There was a further widening of the power of Bantustan authorities in the post 1976 period, by allowing these "States" to become self governing. This was partly as a product of the struggles of African people but was also a means of control and an attempt at appeasement. Increased authority was given in respect of the military, administration, education, the judiciary and also

12 A primary motivation of this policy was control of urbanization of the African people. Charles Simkin's calculated that in 1960 39.1% of the total population lived in the Bantustan by 1980 that had increased dramatically to 52.1%.

economic policy. Elected legislative assemblies were also provided for. Despite this increase in power in the Bantustans, Africans were excluded from central government and only very limited rights were given to urban Africans. In 1977 provision was made for the formation and election of community councils. These councils were rejected by the African communities, as they failed to address their central concerns. In 1982, a more sophisticated version, the Black Local Authorities was established by an act of the same name. The representation given to the respective sectors of the black population were seen as grossly inadequate in that it failed to address the question of power and the right to full participation in government.

In 1980, as a result of this dissatisfaction, the government abolished the Coloured Persons Representative Act and replaced it with a nominated Coloured Persons Council, which again was rejected as an inadequate form of representation. By the end of 1980 the government abandoned all plans thereof. The provision that Coloureds and people of Indian origin be represented in central government structures existed initially because ethnically they could not be linked to a primordial tribal group with a land base[13]. In 1964 the Coloured Peoples Representative Council (CRC) was formed by an act of that name.

It eventually came into effect by proclamation in 1969. Two-thirds of its membership were elected and one-third nominated powers on matters pertaining to Coloured education, local government, community and welfare matters. Such legislation had to be approved by central cabinet. This made any power of CRC totally ineffectual. In practice this meant they could not legislate in a manner repugnant to existing legislation.

The process of political disempowerment of the Coloured and Indian People took similar though distinct roads. Initially attempts to remove Coloured and Indian voters from the common voters roll failed, but by some crafty constitutional manoeuvering, this was eventually achieved. The separate Representation of Voters Act, 1951 was successfully enacted and the entrenched clauses of the constitution effectively circumvented. This was achieved by the device of increasing the membership of the Senate to the point where the government could command a two-thirds majority in joint session of both Houses of Parliament[14] and hence pass the desired legislation. Hence from this date, representation of these groups was severely limited in the lower and upper houses. In 1970 this representation

---

13 J.C. Heunis, Minister of Constitutional Development and Planning Hansard Feb 2, 1983, Col. 212.

14 Wade, H. - "This Senate Act Case and the Entrenched Sections of the South Africa Act", p. 160 in 1957 (54) SALJ 1960.

was completely abolished. This rejection resulted in the reforms embodied in the South African Constitution Act 110 of 1983, which continued to perpetuate the idea of separate government but differed substantially from existing forms of political representation in that, legislation aimed to incorporate Coloured and Indian, however, nominally into central government. The principle aim according to then Prime Minister, P. W. Botha, was to move away from the Westminster system with its one man one vote within a unitary state[15]. The Act recognized that "groups" as defined by the Government had the rights to administer their "own affairs" and also to participate in the running of the "general affairs" of the country. Chris Heunis then, Minister of Constitutional Development, said that the essence of the constitution was that:

> *the whites will no longer be able to decide about the affairs of other groups, nor will they be able to decide alone where matters of common interest are at stake. The government premises in this connection are... firstly domination by one group over another must be eliminated and every group must be given an effective say in matters which affect it, secondly the self determination of every group in matters pertaining to that group alone must be insured and thirdly co-responsibility must be achieved in matters of common interest*[16].

Africans continued to be excluded from the new constitutional dispensation, purportedly because of the impracticalities of having ten additional chambers and it was argued that the creation of separate black states was able to cater sufficiently for their needs[17].

Despite the *de jure* recognition of the right of "groups" to control their own affairs, in-built constitutional procedures meant that effective control over these areas was also impossible. The notion of administering groups own affairs included social welfare, education, art, culture and recreation, health matters, community development, agriculture, water supply, appointment of marriage officers, elections of member of the house in question and finance. The provisions relating to finance are particularly important although each house was given power to raise money, impose levys, and accept donations. They excluded the power to levy taxes and receive loans. Thus in effect revenue control remained in the hands of central government. The determination of the budget was a "general affair", and hence given the composition of the house the white house retained effective control. This meant that the hands of the House of Representatives

---

15 Hansard, Feb. 1, 1983. Vol. 131 cited in Blaustein (1989), p. 22.
16 Chris Heunis, Hansard.
17 Blaustein, p. 22 op. cit.

(Coloureds) and the House of Delegate (Indians) were effectively tied, in introducing reforms in certain crucial areas. The definition of education as an own affair for example also meant that these houses were unable to even begin to fulfil the demands of the South African people for a single educational system.

Further in the event of a dispute about what constitutes an "own affair", the State President in terms of S16 shall decide. Thus giving wide powers of discretion to the State President. Issues deemed to be general affairs are placed before all three houses. If there is disagreement among the houses, the Bill may be referred to a Joint Select Committee. The Joint Select Committee is formed on the basis of proportional representation of the houses. If such a committee is unable to achieve consensus and no agreement is reached, the State President may refer the matter to the President's Council for its decision. The President's Council is empowered to decide whether or not to present such a bill to the State President for his assent[18]. A bill of which the President Council has approved is deemed to be passed by parliament[19]. The effect of this is to give the President's Council 'legislative power'. A revised bill will go back to the houses. In the event of continued deadlock, the President may abandon the bill or make a revised edition. This gives the President immense power. Given the procedure of election of the President, she/he is likely to share the views of, if not come from the White House. This in effect means that real and effective power rests with the White House of Assembly and the President. The Judicial Power of Review is also curtailed by the constitution. S34 (3) provides that, "no court of law shall be competent to inquire into the validity of an Act of Parliament"[20].

Whilst, *prima facie*, this constitution appeared to be more egalitarian, in that it now included Coloured and Indians and gave them legislative power, it, like its predecessors, placed whites in a position of power and privilege. This time the domination was more subtle, achieved by the procedures described above and the granting of greater power to a new executive State President.

De Klerk's 2 February formulation broadly sticks to the same pattern with respect to the definition of groups. It recognizes (as does the Five Year Plan) that South Africa is one undivided state in which people should have a common citizenship and that the groups as presently constituted are not necessarily legitimate. In spite of this the government remains fairly

---

18 S. 78 (5).
19 S. 32 (4).
20 See also provision in S. 18.

committed to the concept of group protection[21]. It appears that although the government is willing to define groups, the belief that ethnicity/race is a central factor in social relations and hence crucial to the definition of groups continues to prevail in government thinking. The National Party's 1989 Action Plan stipulates that there should be individual freedom of association and disassociation, but that the recipient group would have to consent and that groups have a right to maintain and protect their own identity.

Political guarantees of the right to self determination, rotation of authorities and devolution of power were also recommended. This centrality of group is also maintained in policy changes the National Party has accepted in 1990[22].

The desire to perpetuate the *status quo* continues to inform the government's constitutional thinking. Continued struggle has meant that obvious racial rights are less evident in the government's thinking - various other formula seemingly non racial have been proposed. The historical experience of legal development and change in South Africa must lead us to a careful and critical analysis of new directions in governmental constitutional thinking.

Protecting Racial Interests through Non-racial Means

There have been various indications that the government is interested in a bicameral parliament. Interestingly the ANC's constitutional proposals also advocate a bicameral system of government. These proposals have received much support from a cross-section of South Africa. We do however need to consider the dangers of such a system.

An upper house may be a positive attribute in that it potentially extends the arena of debate about new legislation by allowing for the revision and indepth consideration of Bills emanating from the lower house. Where the upper house has some independence from political parties and has specialist knowledge, it may play a legally innovative role. At times this innovative role has been evident in the British context. The "lack of constituency pressures makes it easier for the lords to raise controversial subjects. They can thus raise public discussion of social issues in such a way that the commons and the government may take an interest and successful legislation may follow. This was true of abortion and homosexuality in the 1960s and of sexual discrimination in the 1970s[23].

---

21 BAC focus on Africa - 5 September 1990.

22 Star 30/6/90 and 1990 Nationalist, vol 9-8 cit ed. in Cloete, F., "Minority Rights and Interest Groups" Paper presented at Conference Issues in a New South Africa UNISA conference 1990.

23 Griffin, J.A.C. and Ryle, M. - Parliament, its Functions and Procedure, p. 483 (Sweet and Maxwell, 1989).

The ability of an upper house to push forward democratic debate will depend on how that house is constituted, its powers, and functions.

Despite the innovation role the British house of Lords has played, sometimes, amendments emanating from the house has generally been conservative[24], reflecting to a large extend the party affiliations of its members. Indeed this is one of the greatest shortfalls of bicameral parliaments, where it is constituted as a conservative force, it may effectively block legislation emanating from one lower house.

The government is likely to advocate the existence of a bicameral parliament of which the upper house is constituted on the basis of interest groups. Such a formulation will not necessary move away from *de facto* racial privilege. Thus the issue of bicameral parliament will need to be seriously addressed. We shall later return to the problem of race and ethnicity as criteria for identifying collectives.

The government's Group Right Formula is organized around a distinction between "own" and "general" affairs. Such a distinction is quite erroneous as it presupposes that the interests of particular groups are not the interests of the nation as a whole. Such a distinction will create numerous problems for national development, as it implies wastage of resources. The multiplicity of education departments at the moment is a case in point. There are currently 16 departments of education "one for each ethnic/language group plus some coordinating departments"[25]. It also has the potential to create the space in which groups can undertake activities that are counter-productive to the national interest under the guise of own affairs. The initial object behind the distinction was to ensure that key areas of white social political and economic life remained in white hands. The government has recently developed an alternative model of devolution of power to local administrative structure. Given the inheritance of an apartheid social structure and depending on how local authorities are defined, such devolution could potentially reinforce the existing socioeconomic reality. Local administrative structures could potentially be used to hamper the process of integration of educational, welfare and social facilities, as well as economic redistribution and therefore ensure that the country's resources continue to reproduce white privilege.

Lessons for Group Protection in a Future South Africa

This peculiar history of "Group Rights" has important implications for constitutional settlement in South Africa. The concept of "Group Rights" has been developed not in order to protect a minority or to evoke a harmonious

---

24 Ibid. p. 480.
25 Coleman, K. (1990) 16.

interaction of groups but to legalize and entrench a privilege position of a racial minority.

The question thus arises as to how this particular history will affect the position of groups in a post-apartheid society. It is important that any constitution deals with the problems created by the earlier systems. A constitution which gives any group special privileges vis-a-vis another group is likely to entrench inequalities.

Even if an ethnic formulation could be worked out that accorded equal rights and opportunities, it will continue to perpetuate and entrench ethnic divisions, and hence fail to achieve a central objective of the struggle of the national liberation movement which is to end a system where race or ethnicity attract legal rights or privileges. For these reasons such a formulation is unlikely to be workable.

Similarly any attempt to protect ethnic/racial groups by giving them separate political representation is likely to be treated with suspicion, given the historical experience of such formula being used to perpetual privilege not only in South Africa but in independent African countries. In Zimbabwe this did not only entrench white privilege[26] but also served to create a climate of hostility:

> *The specially entrenched racial clauses (i.e. those guaranteeing white representation) by continuing to flag the issue of racism became a source of bitterness and instead of allaying white fears racial clauses actually fanned those fears... The inclusion of racial clauses in the constitution not only exacerbates the already poisoned relationship predating independence, but also served as a peg around which other citizens (not white) conveniently hang their grievances, in such a poisoned atmosphere an attack on the racial clauses or special protection clauses is too often misconstructed by the group enjoying the privilege as an attack on the persons constituting the group*[27].

A primary aim of the struggle of the South African people has been to destroy the Bantustan system which sought to divide and control the African people, and to create a unitary South Africa. Given this struggle against the balkanization of South Africa, any constitutional system which is constructed around ethnically constituted geographical areas will fail to address a primary demand of the liberation movement.

In summary the historical constitutional experience of South Africa will mean that:

---

26 Ncube & Nzombe, op. cit..

27 Chinamasa, P. Attorney General of Zimbabwe Opening Address to Cold Comfort Farm Trust's Group Rights Conference, 29 June 1990, 21.

- the new constitutional dispensation cannot use race/ethnically as criteria for giving political rights or privileges;
- the system of government must be a unitary one.

The constitution will have to give the right to all South Africans to be equal - that is to exercise their political rights without reference to race, ethnicity, gender or class. However this right to be equal does not suggest the creation of a homogeneous nation. To use Sachs' terms, encompassed in the "right to be equal" is the "right to be different"[28]. In order to create a new dispensation the issue of what the differences are amongst the South Africa people and how these differences are to be accommodated constitutionally has to be addressed.

Having addressed some of the difficulties that would be encountered through the adoption of clauses which protect racial groups, we need to return to the question of whether racial identity is a basis for granting positive rights. Hence the nature of ethnicity in South Africa needs to be examined.

We need to address the question of what the nature of that identity is. This is important because different types of group identity attract different kinds of legal rights in international law and hence create different obligations on the domestic state. Also the nature of the groups and the relationship between them will have important implications for the potential to create a climate of peace and stability under which development can occur.

Racially Based Collective Rights in a Future South Africa

Addressing the issues of ethnicity and race is imperative. How these factors affect group identity has important implication for the constitutional formula is adopted. Broadly there appear to be 3 possible reasons why ethnicity important constitutionally:

- where ethnicity/race are synonymous with identity as a nation or a nationality or where they constitute a minority;
- where ethnicity is synonymous with cultural identity;
- where ethnicity is synonymous with political interests.

In international law it is clear that nationalities have rights. These rights are political, cultural and economic. Thus the issue of whether or not racial

---

28 Sachs, A. (1990) The Future Constitutional Position of White South Africans: Some Initials Ideas (London).

groups in the South African context constitute Nationalities or minority groups is of crucial importance.

Ethnicity, Race and Status as Nationalities

Shivji[29] has argued that where groups are nationalities they have a right to self determination. He argues that in the African context, states are often constituted by many nationalities. He has also examined the historical problems of domination in the post-independence period and on this basis argues that nationalities should be allowed to exercise their right of self determination.

This entails the right to internal democracy and hence an obligation on the state to create constitutional framework for active and full participation of all its people. This may mean the right to separate representation or in the final instance the right to secession.

It is clear that "in line with prevailing international value systems, cultural, linguistic and religious minorities may request special status, but not racial minorities"[30]. Thus ethnicity can not be the sole criteria for group definition. The government has urged that ethnic groups in South Africa are of such a nature that they constitute nationalities and hence are entitled to self-determination in International law. Initially they defined four groups. White, Indian, Coloured, African. As a result of the development of the Bantustan policy, a further legal segmentation of the African people took place.

Ethnicity and nationality are not static concepts, the identity of groups is constantly in flux. Ethnicity and nationality are phenomena that are constantly manipulated in pursuit of power or in a bid to retain power. Kafsir[31] has argued that many ethnic groups in the African context were constructed during the colonial period. This was the case in Nigeria with the creation of Yoruba and Ibo. In Kenya with respect to the creation of the Lunyia he points to a decision in 1944 by a group of individuals to create a tribe as this would give them greater political clout. Golden[32] has drawn similar conclusions about the creation of coloured identity in the Cape.

> *The exclusion of Coloureds from the artisan crafts led non-Bantu-speaking people to distinguish themselves from the Bantu-speaking people who had been previously labelled as Coloured.*

---

29 Shivji, I. (1990) *The Concept of Human Rights in Africa.*

30 Cloete (1990) 17.

31 Kafsir, N. (1989 *Ethnicity and Constitutions - Some Cross - National Comparisons*, p. 4. Paper presented to Columbia Conference on Human Rights in Post-Apartheid South Africa Constitution.

32 Golden, I. (1978) "The Reconstruction of Coloured Identity in the Western Cape" In Marks and Trapido op. cit. See also Golden (1987) Making Race - (Longman).

> *In addition to their shared experience of exclusion and their shared class position "artisan" many speak a common language (proto - Afrikaans) and shared a common religion, (Islam). Spurred by the threat of the deskilling of their jobs and impoverishment, it is not surprising that the wealth of and shared experience was mobilized in support of a reconstructed ethnic identity which bound the aggrieved individuals in defence of their embattled position*[33].

Similarly Hofmeyer[34] has shown how the development of Afrikaans as a language was parallel with the development of Afrikaner nationalism.

The construction of nationalism and ethnicity therefore cannot be separated from its historical context. The identity as a nation, is a subjective and historical construction. Thus in the context of a national liberation struggle, both oppressor and oppressed and their allies may take on identities as nations.

The white population is constituted from a number of "ethnic" groups (English, Afrikaners, Portuguese, Germans and other); a number of language groups, a number of religious groups. These differences have often resulted in marked and hostile conflicts of interests. The common basis amongst these groups being political privilege as opposed to any primordial base. This process of the creation of white national identity has been coupled with a process of division and separation of the black groups. Clearly, in this context, the concept of nationality in the historical reality of South Africa and as advocated by the whites is linked to power. It must therefore be rejected as it could only be used to entrench inequalities.

It is also important to note that the nature of ethnicity in South Africa is not collapsible into its legal definitions. The legal and social exclusion from certain forms of social interaction does not guarantee the growth of ethnic identity or ethnic group function. Instead ethnic identity is a complex matter of social definition - an interplay of self definition and the definition attributed by other groups.

Whilst Government has sought to entrench ethnic division, anti-apartheid organizations and struggle have emphasized a unity of the South African People and in practice has fostered a common identity amongst black people across ethnic boundaries. This common identity has been reinforced by workers struggles which have also taken place across ethnic divisions. Thus ethnicity, as a result of struggle is not a primary criterion (at a national

---

33 Golden, I 1987) 160.

34 Hofmeyer, I. (1987) "Building a Nation from Words" Afrikaans Language, Literature and Ethnic Identity" In Marks and Trapido op. cit.

level) for self definition. This is particularly true of the urban areas. Mayer[35] argues that:

> *Exclusive tribal patriotism seems to have almost died in Soweto... Ideologically it is race and class conceptions that were claimed to matter or simply shrugged off". Given these developments 'in at least urban South Africa it is not appropriate to argue that ethnicity is equivalent to nationality.* '

Perhaps it is because of the realization of these problems implicitly in their concept of "nationality" that the government has recently begun to move away from its instance on the national status of ethnic groups. They have said that the constitution of these groups is open to negotiations. Given this development, the government can no longer make claims based on international law provisions relating to nationalities.

The concept of ethnicity however remains central to their definition of group. They propose a system in which ethnic groups and an additional "non-racial group" exist.

The claim to "Group Rights" have thus taken a different base, that is that the whites constitute a minority and hence in accordance with international law provisions they have a right to special protection. It is worth citing relating to the protection of minorities. Article 27 of the International Convent on Civil and Political Rights, 1966 states:

> *In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

This must be read with the provisions relating to racial discrimination in its sister covenant, the International Convent on the Elimination of All Forms of Racial Discrimination, which prohibits discrimination. The achievement of the rights embodied in Article 27 cannot take place in a racial form that perpetuates discrimination. The second thing that is evident is that the nature of the "white minority" as presently constituted in South Africa does not form an ethnic minority (it is composed of numerous ethnic groups), religious or linguistic minority but is a political minority and not entitled to claim protection under these provisions. Finally the provision gives cultural and not political protection. Hence there is no basis for white minority rights.

---

35 Mayer, P. (1975) "Class, Status and Ethnicity as Perceived by Johannesburg Africans". p. 142: In Thompson. L + Butler, J. Change in Contemporary South Africa (Berkeley).

Ethnicity and Cultural Identity

It would be legitimate to use ethnicity as a legal definition where it is synonymous with cultural identity. In order to secure the rights set out in Article 27.

The nature of South African society is that cultural factors such as language and religion cut across ethnic, and racial categories and are not ethnically specific. Not only are cultural factors in contemporary South Africa non reducible to race and ethnicity but they are also by their very nature fluid concepts and hence there is a level of absurdity in trying to protect and develop culture through a rigid formulation. Hence it is inappropriate to use separate representation mechanism to protect these interests.

Even if they were identical identities, separate political representation poses further problem in that in all its forms it will necessarily entail legal entrenchment of ethnic differences. This is problematic as it fails to resolve an important demand of the South African people, that is the right to be equal.

Similarly, systems which use a rigid definition of ethnicity whether for political or cultural purpose may have the effect of entrenching difference and making ethnic identity a point of conflict. A case in point is the Indian constitution and its protection of minorities through a schedule, which was adopted in order to give protection to and encourage the development of disadvantaged minorities. However those peoples listed are perceived and treated in a condescending and patronizing way. As is well illustrated in a case commented by Judge Mukwerjera:

> *The scheduled tribes as is well known are a backward and unsophisticated class of people who are liable to be imposed upon by shrewd and designing people..." given this, it is not a firm basis from which equality could be created.*

In the context of South Africa it is inappropriate to designate groups ethnically as it entrenches ethnicity and collapses ethnicity into cultural identity hence treating ethnicity and culture as static, rather than as dynamic factors changing through struggle and interaction. Whilst this is not *per se* an obstacle to majority rule, it clearly poses problems for national development. For these reasons it is inappropriate to treat culture as a basis for political recognition of ethnic groups even if they are synonymous identities.

Racial Identities and Political Minorities

It is arguable that where race/ethnic identity is equivalent to a minority political identity, there should be some form of protection for the political

one in order to ensure that they are not effectively excluded from the democratic process.

Two issues arise in the South African context:

a) is racial identity synonymous with political identity?
b) is entrenched political representation the best way to deal with political minorities?

The Relationship Between Racial and Political Identity

It is argued by government that racial and ethnic identity has important implications for political identity and that ethnic or racial groups have strong common interests by virtue of that identity, so that special legal provisions need to be made for such groups.

However it is disputable whether there are correlations between ethnic/racial identities and political opinion that should be protected positively in law. On the one hand it is clear that race is not synonymous with political opinion. In various areas there have emerged cross-ethnic identities and alliances. These have taken place in the social, political and economic arenas. The emergence of a strong national trade union movement which does not use ethnicity as a mobilizing factor is a partial evidence of this. As is the overall pan-South African identity of the liberation movement. There has been a broader, albeit a minority, participation of whites in the struggle, this has meant that a national as opposed to a black identity is in the process of emerging. This and the creation of predominantly white political groups opposed to the government (on the right and left) have also undermined the identity of whites as a political group.

There have been areas in which ethnic identity has been used as a basis for the creation of political positions; Inkatha, Afrikaner Weerstans Bewering (AWB) and the Nationalist Party (until the recent decision to integrate it) are all organizations which have been ethnically based. However the fact that political alliances have been drawn across ethnic and racial lines indicates that they are not collapsible into each other.

Mechanisms to Protect Political Minorities

Further there is a certain degree of illogicality in trying to protect political identity through a rigged concept of identity.

The most appropriate (and indeed internationally accepted) way of dealing with political minorities is through a multiparty system as opposed to through racial seats in parliament.

The assistance of a bill of rights would certainly add to ensuring that political minorities are not discriminated against. Other possible means of protection are through the entrenchment of the rights of Judicial Review, that is the right of the court to review legislation and to ensure that it is consistent with the provisions of the constitution and bill of rights.

It is sometimes argued that in order to prevent such conflict, minority representation should be established. Earlier we saw racially guaranteed seats become an area of conflict in Zimbabwe. The experience of conflict arising from racially specific categories is by no means limited to Zimbabwe. The Nigerian Federal experience, based on ethnic states, intensified the ethnic and socio-economic problems nationally[36].

Whilst conflict does not inevitably arise from racial provisions, it is certainly not a certain method for its prevention. The experience of Africa must alert us to the ability of counter - revolutionary and imperialist forces to manipulate cultural phenomenon in an ethnic manner so as to generate internal conflict[37].

However, the potential for such manipulation depends on the social relations of production in a given society. Factors such as who controls state structures and production will be of great importance. The nature of society is also of paramount importance, as is the nature of democracy and the ability for political and social organization to exist and organize freely.

In a post-apartheid South Africa the potential for such conflicts is low given the high level of ethnic integration in the urban areas and the ethnic homogeneity of most rural areas. Other factors undermining the potential for ethnic conflict include the number of ethnic groups. However, it ought to be noted that where differences exist, they can be used to generate conflict. The dangers are enhanced if ethnic identity gives special privileges either legal or *de facto*. An effective way of dealing with this is to ensure the existence of democratic structures rather than by using separate political representation of ethnic groups.

Given the historical experience in South Africa, as discussed in the concluding part of the section on legal history of group rights, the use of racial identity is an inappropriate means of protecting political interest.

Summary

I have argued that given the specific historical experience of "Group Rights" in South Africa racial identity cannot be a criteria for political rights. I have also shown that there is no basis in international law for the white minority to make such claims, neither is it a viable political alternative. However this does not mean that race will never be a legal relevant factor.

---

36 Nabudere (1990) "Imperialism and Ethnicity in Africa" presentation to Cold Comfort Farm Trusts Conference on Group Rights.

37 This is not to reduce ethnic conflict to that generated by solely by these forces. Indeed such ethnic conflict may also be the form in which class struggles are played out.

Collective Rights in an Anti-Discrimination or Equality Clause

One area in which race is clearly important is in the area of discrimination. An equality clause in the constitution does not necessarily have to be described on valid grounds of distinction. It however may be useful to do this, if one wants to make it 100% clear that unequal treatment on the grounds of race or some other factor will not be tolerated.

Whether the rights embodied in an equality clause are individual or collective rights is an important issue. How we see this will stem from how we understand issues of racism and sexism. It is evident that a new non-racial political dispensation will not bring about an end to discrimination and racial oppression. It will end formal and state discrimination. However racism is not limited to these areas and hence is likely to be a problem in a post-apartheid state. In Zimbabwe, for example, in the post-independence period, racial practices in the area of housing continued to be a problem. Such practices could not be challenged under the bill of rights, given its formulation as a document of the relationship between the state and the individual. Separate legislation had to be introduced in order to curtail this reality. Similarly the US constitution does not make racist or discriminating private practice illegal. This fact has been seen as fundamental to the continued disadvantageous position of the African American community[38]. Indeed the "classical" construction of a bill of rights - as a document regulating the relationship between the state and the individual - fails to address the systematic nature of racism (and sexism) and is not merely the manifestation of individual prejudice. If it were individual, bills of rights might be adequate. Racist and sexist acts are thus not simply a violation of an individual's rights, but play a crucial part in the continued oppression of a group. In so far as these enfringments affect the rights of a collective, we need to provide a collective right of action. By winding the requirements of *locus standi* we would be providing a more effective means for combating racism. Similarly arguments could be applied to other forms of oppression.

The systematic nature of racism makes it necessary for us to reconsider the formulation of other provisions in a bill of rights. The issue of the dichotomy between the public and private needs serious consideration, as alluded to above.

Similarly a constitution would need to make provision for affirmative action. It is often argued that a constitution and a bill of rights should be a

---

38 Interview with David Scott, Chief of Staff, Rolando Costa, Deputy Commissioner for Law enforcement, NYC, Commission on Human Rights, March 1991. Interview with C. Rutherford, Head of Black Woman's Employment Project of the National Association for the Advanced of Coloured People (USA) March 1991.

general statement of principle, so that it can survive various era, and that the place to deal with these kinds of concerns is in subsidiary legislation. This argument may be attacked on the grounds that it assumes that racism, sexism and other forms of oppression are easily removed. The historical reality is that despite "democratic constitution", they have remained important factors in many, if not all countries over generations. Given this reality we ought to use as many available means as possible to strive for their eradication. Secondly the value of a constitution lies not in its definition of an abstract ideal but also in creating the framework for the realization of that ideal.

Collective Cultural Rights

In the South Africa context there are clearly established cultural interests. These cultural factors are not collapsible into ethnic identity, neither are they identifiable with distinct groups. There is a strong recognition from a cross section of South African society that cultural interests ought to be protected and developed. This multi-cultural identity has been recognized by all sectors of the liberation movement. Within the Congress tradition[39] a great deal of emphasis has been placed on the right to develop, and use one's language, religion and culture. In fact the struggle to exercise these rights has been a key element of the national liberation struggle.

The right to use and develop one's culture is also a right well established within international law as stipulated in Article 27 of the International Convenant on Civil and Political Rights of 1966, cited above. Also the Africa Charter of Peoples and Human Rights recognizes rights of social and community character.

Given this recognition, in South Africa and internationally, of the right to use and develop one's culture, as well as the fact that this has been a central demand of the struggle of the South African people, a new dispensation needs to recognize cultural differences and create the condition for the development of diverse cultures, without creating the potential for future conflict, the question thus arises as to how one deals constitutionally with this multi-culturalism. We need to address constitutional formula for protecting cultural values.

> *In a multi-cultural, multi-faith country such as ours, (South Africa) a correct approach to harmonizing the right to be the same (politically) with the right to be different (culturally) is fundamental to any constitutional scheme*[40].

---

39 See Freedom Charter, 1956: ANC Constitutional Guidelines.

40 Sach, A. (1989) "A Bill of Rights for South Africa: Areas of Agreement and Disagreement" in (21) *Columbia Human Rights Law Review*, p. 13 at 26.

There are a number of constitutional formulae which could be adopted. There is a strong tendency in the progressive movement to assume that a bill of individual rights is an adequate constitutional means[41]. Thus we have examined the value/shortcoming of a bill of individual rights and the implications thereof. There are a myriad of other mechanisms that could be considered; these include cultural charters (as interpretative instruments) and advisory councils.

A Bill of Individual Rights

It has been suggested that effective cultural protection can be attained through a bill of rights. It has been argued that a bill of rights through giving individual protection is the most effective mechanism for protecting the interests of collectives[42]. Such an interpretation overestimates the ability of an individual protection mechanism to give group protection and the arguments made above in respect to racism apply.

In assessing the viability of any constitutional formulae regard has to be paid not simply to the substantive law but also to procedural and enforcement aspects. The conventional theoretical divide between substantive law and procedural law results in a misunderstanding or only conceptualization of the scope, implication, limitations and nature of the law. In practice Bills of rights have seldom been able to give effective protection. bills of rights exist in many African countries including those with high records of human rights abuses[43]. The existence of a bill of rights cannot be equated with the ability of the people to enforce the rights afforded. Even where bills of rights are coupled with anti-discriminatory legislation they have not always effectively protected cultural rights or been effective anti-discriminatory mechanism. The shortcoming of a bill of rights is that it gives rights to an individual who is often unable to enforce them. The United States is a case in point. In spite of the existence of a bill of rights and anti-discriminatory legislation, African Americans and other minorities are continually discriminated against. Access to the courts is extremely limited and hence the question of accessibility needs to be addressed. Whilst this is not *per se* a constitutional question it can be addressed constitutionally by allowing for group action, or public interest litigation.

---

41 Cold Comfort Farm Trust Conference Report 1990. "Groups Rights and Minority Protection in South Africa - Entrenchment of White Privilege of an Asset to Democracy?"

42 Jana, P. "Minority Rights" presentation to Cold Comfort Farm Trust Group Rights Conference 1990. Omar, D. "Minority Rights" presentation at CCFT's Group Rights Conference.

43 Including Kenya and Nigeria.

In the South African context it will not be the minority (the rich, the powerful or whites) primarily who will need to protect their cultural rights. Discrimination in all forms is likely to continue to be a problem despite the creation of a post-apartheid State. The Zimbabwe experience has adequately illustrated that transition to a more equitable system does not mean that previously privileged groups lose control of important arena.

We need to take cognizance of this. We can well imagine a situation where a cultural right, for example the right to use and develop one's language, is undermined by racist publishers who refuse to publish certain works or where property owners refuse to hire halls etc. to language groups that have previously been discriminated against.

The resolution of such discrimination needs to go beyond mere criminal sanction, and provide for a collective right born in the bill of right and in anti-discriminatory legislation. It may well be argued that a constitution need not address all these detailed questions and that it should just provide the basic principles, in the context of which appropriate subsidiary legislation can be adopted. Whilst this is a possibility, it must be stressed that there is a substantial difference in status between Constitutional Law and subsidiary Statute Law. Thus although the constitution need not examine each eventuality it must create the framework for dealing with each eventuality and making the right effective. It is our argument that to make these rights effective in law, the right to legal action must be extended beyond an individual to a collective, so that any member of that group may take legal action.

An additional issue arises as to whether the bill of rights is the best place for such provisions. This will depend on the status of the bill of rights. If it is an entrenched and justifiable part of the constitution it should be adequate, if it is not, one needs to look at making direct provisions in the main body of the constitution.

Collective Cultural Rights in the Constitution

Many constitutions recognize the right of all people to use their own language, religion and to develop their culture. These include the Benin Constitution, the Indian Constitution, the Canadian Constitution.

Article 3 of the Benin constitution provides:

> *The Popular Republic of Benin is a unified multi-national state. All nationalities are equal in rights and duties. Consolidating and developing their union is a sacred duty of the state, which shall assure to each one a full development in unity, a just policy toward nationalities and an inter-regional balance.*
>
> *All acts of regionalism shall be rigorously prohibited.*

All nationalities shall be free to use their spoken and written language and to develop their own culture.

The state shall actively aid those nationalities living in undeveloped areas to attain the economic and cultural level of the country as a whole.

There are clearly differences in the nature of the right sought to be protected - in Benin it is the right of nationalities, in the South Africa context it is the right of cultural groups. Such rights deserve the highest recognition in law that is constitutional recognition given the long history of subordination and discrimination. The right to use and develop ones language, religion and culture is a right held in community with others. This right has to some extent been acknowledged in the ANC's constitutional proposals that all languages be given equal status. Language and culture by their very nature are practiced collectively. The way in which a collective right is defined has important implications for the way in which these rights are enforced. In this instance it means that any member of the group (language, culture, religion) will have the right to introduce an action where an individual has been discriminated against. That involves a wider definition of *locus standi* than normally used.

Such a provision is also open to potential difficulties. It could create the basis for people to organize around these phenomena and to use such organization in a anti democratic or non progressive way. Sachs draws attention to the following problem. There are cultural associations with a primarily ethnic basis and hence language could potentially be used to restrict membership of an organization and could thus be used as "covers for ethnic divisiveness and racist mobilization"[44]. Although language may have a predominantly ethnic basis, it is not exclusively so, and hence an organization of Afrikaans speakers would not be limited to white Afrikaans - speaking people. A means of dealing with this problems is by imposing limitations on organization through anti-racist, anti-sexist and anti-fascist clauses in the constitution.

There may however be additional economic problems, as giving cultural rights may impose a duty on the State to ensure the exercise of the rights. It may severely limit the economic planning ability of the state and result in the wastage of resources. The problem for example with the right to use ones language is whether this includes the right to mother-tongue instructions, as well as the right to use ones language in parliament, in court and in a myriad of other public places. This needs serious and detailed

---

44 Sachs (1989 28.

attention and thus we are not at this stage advocating imposing a correlating duty on the State. The constitutional provision that is being advocated at this point, is the exercise of this collective rights, and the enforcement thereof at the expense of the collective and other public interest bodies.

The issue of supplementary mechanisms that enhance the ability of collectives to use their rights will need to be seriously addressed if these rights are to be made effective (whether provided for in a Bill of individual and Collective Rights or in the main body for the Constitution). Procedures that will need to be considered include those that relate to instituting court proceedings. Litigation in the Supreme Court, where the enforcement of constitutional rights is dealt with is normally very expensive and hence inaccessible. Alternative methods of petitioning the court would have to be considered. For example, the procedure adopted in Indian courts, that allows for the initiation of proceedings simply by a letter to the court, as opposed to filing papers could be adopted.

Collective cultural rights are a desirable addition to the constitution as:

- it ensures or provides a means to ensure that old discrimination is not continued by extending rights to collective and hence making enforcement thereof easier;
- it creates the climate for the development of a multicultural society and hence provides a means to protect and develop all cultures;
- it reduces white fears of cultural domination in a post independence period. It is important to deal with white fears as it has been these fears that have been mobilized by the present government in their bid for "Racial Group Rights". By making such provision (which are also not in conflict to our own aspirations) we are able to undermine the support basis for the government's insistence of an implementation of group rights system which is tantamount to group privileges. Such protection does not derogate from the rights of the majority to rule as it does not accord any special political privileges to groups. They are also politically in line with the overall policy of the liberation movement to facilitate the development of all the languages, cultures and religions of the South African people. In this sense these provisions are in our interests as well as undermining any claims to "group rights" which will endanger the process of constitutional settlement;
- it will undermine the ability of counter-revolutionary forces to manipulate cultural identity in order to create ethnic conflict in a post independence period.

For these reasons, it is submitted that such a constitutional mechanism for protecting collective cultural rights will be in the interests of the South Africa People as a whole and hence should be adopted.

Collective Rights of Workers and Business

It is generally recognized within law that the granting of collective and minority rights is done in order to protect disadvantaged groups[45].

Given the structure of capitalist society and the nature of the labour process, labour is in a weaker position vis-a-vis capital. The strength of workers arises only from their collective power, whereas the strength of employers is by virtue of their ownership of property. This history of the struggle for workers rights is long, but it is this fact that has been the basis for recognizing in law that workers have collective rights. The issue then arise that if workers have such rights should business not also have protection rights.

Collective Rights of Business

The constitutional recognition of business' rights will only serve to re-create or perpetuate the old inequality which the granting of workers rights sought to correct. One of the key factors preventing transformation in many newly independent countries to a more equitable economic system is the age old recognition of the right to property.

It is important at this stage to make a distinction between kinds of property. Property may broadly be divided into two categories:

- personal property which includes clothes, books, houses, cars etc.
- productive property which is property through which production takes place i.e. factories, farms etc.

The right to personal property is an individual right, and something that all (albeit unequally) have access to. Whilst the right of productive property is a collective right exercised by a particular class. It is by failing to make this distinction that the right to property is dressed up as an individual right. The constitutional protection of the right to personal property will not necessary prohibit the transformation of society. Any constitution protection of productive property necessarily entrenches the inequitable social relations currently existing.

In the Zimbabwe context the constitutional protection of property had the disastrous effect of entrenching racial and class inequalities. Clearly given this, to protect the right to property will effectively curtail the power of the new government to introduce reforms and hence should be avoided.

---

45 Palley, C. Constitutional Law and Minorities p. 1 (Minority Rights Group London).

Collective Workers Rights

There is international recognition of certain collective rights of workers (e.g. the right to strike). The question arises which collective rights of workers deserve protection and what form such protection should take.

(COSATU) Confederation of South Africa Trade Union has proposed that a new constitution should include the right to organize, and the right to strike[46]. It has not however agreed as to whether socioeconomic rights should be incorporated into a new constitution[47].

The right contained in the (SACTU) South African Congress of Trade Unions worker's charter[48] includes: (1) The right to work; (2) The right to form and join trade unions and to freely organize; and (3) The right to equal opportunities for all workers. The South Africa Communist party adds the following (4) The right to family life; (5) The right to health and safety; (6) The right to security[49].

Whilst all these things need to be created, the issue of whether they can be enforceable rights is quite another. The SACP charter recognizes that a "worker charter must impose a duty on the state to undertake development in such a direction so as to ensure the ultimate attainment of these objectives"[50]. In this sense whilst the unemployed will not have an action against the state for failing to provide work, they will have an action against the state for failing to take account of these things in their planning. This is a desirable effect and provided that these rights can be succinctly phrased and it is made clear that these are directives, they should be included in a constitution. There are however workers rights which should be entrenched and enforceable rights in Law. These rights will not impinge on State resources and hence there is no reason why they should simply serve as directives.

The status of directives also needs to be clarified; they could be included in a document which serves as an interpretative instrument or they could be entrenched in the constitution so as to create obligations on the State.

Finally the question of who has *locus standi* needs to be addressed. Workers rights need, in order to be most effective, to be framed in collective terms, so that any worker or body of workers may take up a case of another worker.

---

46 Devan Pillay "The Workers Charter Campaign" in SALB vol 15 No. 5 Jan. 1991, p. 40.
47 Ibid. p. 42.
48 SACTU draft in "Workers' Charter" in WIP 62/63, p. 44 - 45, (1990).
49 SACP draft charter in "Workers Charter" In WIP 62/63, p. 42-43, (1990).
50 Ibid.

Collective Women's Rights

Whilst it is often recognized that the discrimination that women have faced needs to be addressed, it is equally often assumed that equality can be achieved by broad anti-discriminatory and equality legislation and "gender neutral" law.

Legal history makes it blatantly clear that equality has not been created through these mechanisms. All the limitations of equality theory in eradicating women's oppression cannot be discussed here[51]. As with racism, how we provide for women's rights will depend on how we understand women's oppression. In so far as women's oppression is not the sum total of individual acts of prejudice against women, but a systematic form of oppression, women ought to have access to collective means to eradicate it. Given the form and consequences of women's oppression, women ought to have the collective right to affirmative action, not simply to address past wrongs but also continual and present wrongs. For affirmative action to be meaningful, government policy must generally be directed towards the elimination of oppression. Thus a constitutional statement of equality must be enforceable against government, in the sense that government policy must at all levels be geared towards the creation of equality. For such a clause to be effective it must create an obligation on the State and put the onus of proof on the State to show that their action/policy is consistent with the equality clause.

Sachs[52] suggests that in providing for women's rights only the basic principles need to be set out in a bill of rights and that a "Charter could be adopted as a legislative code with special status, responding to the many concrete questions needing solution". However, for it to be effective this 'special status" needs to include entrenched and enforceable rights. Again the problem of State resources arises and a distinction on the basis of practical research between areas that ought to be directives but impose obligation on the state as discussed above and those which ought to be enforceable *per se* may need to be made. A woman's charter will need to consider in detail the specific nature and form of oppression in various areas and specifically create the tools for eradicating oppression in that area. As with racism and culture the rights conferred upon women need to be collective rights, so that the right to legal action is not confined to the

---

51 Sachs (1989), op.cit., p. 42.

52 Thus for example in the area of employment it would not be adequate to simply state the principal of "equal pay for work of equal value". The issue of how work is to be evaluated will have to be addressed, particularly since there are areas of employment which are predominantly female and no obvious legal comparison to an area of male employment can be made.

woman suffering the "injury" but so that any woman or a public interest body may take up her case.

Conclusion - Collective Rights a Necessary Part of a Democratic Order

Clearly procedural issues need to be considered in order to make the right effective. The ideas expressed in the section of cultural rights clearly apply.

The role of a new South African constitution will be to create social harmony, redress inequality and provide the space for significant social transformation.

We have argued in this paper that certain kinds of collective rights-political racial rights - will fail to address the challenges of new order and will serve to perpetuate the old order. We have shown that there is no basis in international law or with respect to the South African reality for the protection of such rights.

There are however, other categories of right which will need collective protection in order to make them effective. This is so because of the collective nature of the rights (e.g. language, religion) or because the individuals belonging to the group, experience the effect of their membership of that group collectively (e.g. women and workers). With respect to the latter, because one is trying to change the position of a group, and because historical experience has taught us that individual protection is an inadequate means of redressing the situation - we have in this context argued for the recognition of collective constitutional rights.

---

* University of Zimbabwe, Harare, Zimbabwe