

A New Constitution and a Bill of Rights

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Ours is a young democracy. It is a constitutional state, the supreme law of which is a Constitution that is an extremely progressive one by world standards. Like all constitutions, it sets out the basic framework of the system of governance in this country. It also provides a blueprint of the type of South Africa we aspire to become. It thus tells us, in broad terms, what we are, how we are governed, what our rights and entitlements are and also what our responsibilities or obligations are. Implicit in its provisions, however, is a vision of what we can be.

The central features of the new order are constitutionalism, democracy and a justiciable Bill of Rights. Until the first democratic elections of 1994, the political system was based on a Westminster-type parliamentary sovereignty. Although there was an elected Parliament, it was unrepresentative because the franchise excluded the majority of the population and representation in Parliament and in government was limited to the white minority. Parliamentary supremacy meant that, when legislating, Parliament could do anything, provided the necessary formalities had been complied with. It was against this background that oppressive and discriminatory laws which violated fundamental human rights were enacted by an unrepresentative minority government bent on protecting the privileged position of a privileged minority.

That was the nature of our society at the time and we are still trying to break with it. Although it is the past, we still need to keep it in perspective because the changes, the gains we have made in achieving a new constitutional order were the result of much hard work, sacrifice and even loss of life. That makes the new Constitution special. But its greatest significance, apart from the material changes which it brings about and foreshadows, is its symbolic value. The late Chief Justice Ismail Mahomed stated in *Makwanyane*, “the South African Constitution retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos”.¹

We therefore need to ensure that the rights the people of South Africa fought for and achieved are properly understood and appreciated, that

¹ *S v Makwanyane* 1999 (3) SA 391 (CC) at para 262.

they are not unjustifiably maligned and that they are not seen as the source of the problems that plague our society, rather than the solution (or part of it). The Bill of Rights is therefore also special to South Africans.

The new order is founded upon the core values of democracy, human dignity, the achievement of equality and the advancement of human rights and freedoms. A culture of coercion and autocratic rule has been replaced by democratic governance; a system which conferred exclusive privilege to a few has been substituted with one that prescribes a common citizenship for all South Africans.

What the Constitution proclaims, however, is one thing. What really matters to the women, men and children of our country is the reality of change and how the constitutional precepts manifest themselves in their lives. This is true of all constitutions. Justice William O' Douglas of the United States Supreme Court wrote in *A living Bill of Rights*:

"What our Constitution says, what our legislatures do, and what our courts write are vitally important. But the reality of freedom in our daily lives is shown by the attitudes and policies of people toward each other in the very block or township where we live. There we will find the real measure of A Living Bill of Rights."

We therefore need to examine the provisions of the Bill of Rights in the light of their impact on the lives of ordinary people. The opening section in the Chapter on the Bill of Rights tells us that:

"[t]he Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

Democracy in South Africa means that we can vote together on a common voters' roll, we can take part in regular elections and we can elect our representatives to the various forums of government. This is what the Constitution prescribes. It also provides that "[t]here is a common South African citizenship" and that all citizens are "(a) equally entitled to the rights, privileges and benefits of citizenship; and [are] (b) equally subject to the duties and responsibilities of citizenship." The Constitution then goes on to establish new structures designed to facilitate the achievement of specific democratic objectives. What the Constitution and legislation provide and prescribe can only be basic guidelines for the nurturing of the life of the nation. They provide the basic minima and indeed, they can do no more than that. It is for the people of South Africa to give content, to flesh out the concepts contained in the Constitution.

In a broader context, how do we ensure that what we have is not just a Constitution, a Bill of Rights, but a vibrant Constitution and a Bill of Rights that actually makes a difference in the lives of people it was meant to empower?

In the wake of the recent flood disaster in Mozambique, South Africans rushed in to save lives and to render aid, unselfishly, and with no expectation of reward. Many of those who could not be there physically sent donations in cash or materials. That spontaneous show of solidarity with our neighbours in their time of need was just one demonstration that South Africans are a caring people – that, in times of great need, the bond of a common humanity is strong indeed. Similarly, the recent oil spill on

the Cape coast has demonstrated a unity of purpose and compassion amongst our people that extends beyond the human species.

Such disasters however serve to remind us that there are, among us and as our neighbours, many who are unable to enjoy the things which many of us take for granted. One of the most damaging consequences of the policy of apartheid was the almost watertight compartments into which different communities were put. South Africans living in affluent areas were shielded from witnessing the abject poverty, crime and squalor in the next area. We were made to live in ignorance of the plight and desperate conditions under which many in our communities lived.

We have now destroyed apartheid. All our people are now able to exercise their right to take part in democratic institutions and to vote regularly in national and local elections. However, the new political order poses new challenges which call upon us to do much more. Quite obviously the achievement of political freedom alone is not the end of the journey. There are just too many of our people whose day-to-day lives are a constant struggle just to survive; whose lot has not been significantly improved in a material sense by the advent of democracy.

The Bill of Rights is a significant force in the shaping our nation; many members of our society are asserting their new rights, while others are getting used to the idea that there is a limit on the exercise of public power. We need to ensure that the Bill of Rights empowers everybody, particularly those who have been disadvantaged by past patterns of discrimination. In concrete terms, for example, the women among us must be able to say "we have a Bill of Rights, we feel empowered and our lives have definitely improved, we feel we are accepted as equals, normal people in a normal society". The truth of the matter is that none of us can fully enjoy our rights if others are deprived of theirs; if those alongside us, in the same country, the same towns and cities, are unable to enjoy theirs because of poverty, ignorance or disease. We cannot live in dignity if those next to us are still subjected to the indignities which are a legacy of past policies. The effort to reconstruct our society will be severely hampered if we close our eyes, or are oblivious to the horrendous conditions in which the weakest and poorest among us live. I advocate a common approach, a common effort, to deal with the challenges we face as a nation. Basically the theme is "our neighbours' problems are our problems". And quite often our neighbour is right here with us, within our own boundaries and our own yards, and has been there for generations.

One oft-expressed criticism of the Bill of Rights is that it is one-sided, that it focuses only on what the individual is entitled to, without a corresponding emphasis on responsibilities or duties. It has been said that it promotes the pursuit of selfish ends and the prioritising of oneself. The Bill of Rights has accordingly been blamed for a culture of entitlement that is antithetical to the national spirit, the moral regeneration or the common patriotism which some in leadership positions have been calling for. It has been said that the Bill of Rights assists in the process of widening the already disgracefully wide gap between the rich, the haves in this country, and the have-nots. It does this, so it is contended, by proffering the strongest protection to those who have things while at the same time

doing nothing to assist the poorest, those who have nothing with which to acquire even the most basic necessities for survival. The present HIV/AIDS pandemic is a case in point. Those who have can survive it because they can afford to pay for the correct treatment and medication, but this is out of reach of the thousands who are condemned to die from the illness because of their poverty.

I have no doubt that a correct reading and application of the Bill of Rights demonstrates that it is a document of our time, an instrument which attempts, as best it can, to meet the needs of today and of our community. It expresses rights, but rights imply correlative responsibilities. There should be no doubt about this. The right to freedom of speech, for instance, requires that members of society respect the right of others to exercise the same right and that, in so doing, the right to human dignity is not negated. The same applies to the right to life and to freedom and security of the person. These and other rights are entrenched; but that is only the beginning.

It is noteworthy too that many of the protections in the Bill of Rights pre-date the Constitution. Most of the constitutional provisions in relation to the right to a fair trial have been part of the South African legal system for a very long time. We share these principles with many countries, jurisdictions which are regarded as open and democratic.

Courts are there to see to it that disputes are adjudicated. Private individuals are not permitted to take the law into their own hands because the result would be sheer chaos. Courts determine who is a criminal and who is not; who must be treated as a criminal and who not. They do this through a process of careful reasoning and the weighing up of evidence. Courts are especially equipped to do this and the state gives them (or should give them), the necessary resources.

Standards of decency translate themselves into rights. If we claim for ourselves the right to human dignity, for instance, we have to uphold it throughout. We cannot allow it to be devalued by our actions, practices and laws simply because those on the receiving end of the treatment are different to us or have some other attribute we do not like. Unless the community itself respects and upholds the rights of individuals, and takes part in strategies and initiatives to facilitate this, many of the rights will be devalued and remain without much content to many people. In fact, respecting the individual rights of others is a constitutional obligation. According to section 8(2) of the Constitution, "a provision of the bill of rights binds a natural or a juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right".

In a society where murder is rife, domestic violence common, rape, robbery and theft prevalent, constitutional and legislative provisions aimed at protecting innocent persons and property will always be in the public eye. There is no doubt that the state must play a principal role, with effective policing, detection, prosecution and punishment of crime. As a community, however, we must rise to the challenge of developing the type of society envisaged by Constitution, in which there is no place for

crime because there is a culture of respect for fundamental rights. We need to defend rights and thereby make it difficult for these crimes to be committed. The development of a crime-free climate must involve the community, working together with the relevant organs of government.

As members of the Constitutional Court, we have time and again emphasised the important role of effective law enforcement and the apprehension of those who break the law. Those who commit crimes disregard the fundamental human rights of innocent persons. They must therefore be apprehended and given appropriate punishments by the courts. We have also stated that the determination of what is an appropriate sentence is a matter for the courts, having due regard to all the circumstances, and subject to relevant legislation and the Constitution. This is in keeping with the adjudicatory role of the courts, their impartiality and independence, without which our democracy will be severely weakened.

When South Africa adopted the Bill of Rights, it committed itself to certain standards of behaviour and to protecting a minimal content of rights even for the worst amongst us. We therefore expect each member of the community to respect the rights of others; we expect the culture of rights to occupy pride of place in the life of our society. The state cannot be exempt; the standards set under our Constitution for state action are exacting ones. They have to be, because they set the tone for a society in which the life, dignity and freedom of the individual are regarded as extremely important. Whether we like it or not, the "... government is the potent, the omni-present teacher. For good or for ill, it teaches the whole of our people by its example".

In a number of decisions commencing with the judgment in *Makwanyane* (the death penalty judgment), it has been stressed that a democratic government is required to act within the confines of the Constitution when administering its criminal justice laws. This requires that the law enforcement agencies act in a humane manner when they are dealing with the victims of violent crime. It also requires that the methods of law enforcement be consonant with the rights of individuals and that a model of policing based on torture and the obtaining of involuntary confessions be rejected. It is important, though, that the rights culture we are attempting to foster should not be seen as colliding with attempts to rid our society of criminality. The legislature has the competence to formulate laws that creatively address the problem of crime through a number of mechanisms. These must be considered with the appropriate seriousness and sensitivity by the courts considering the constitutionality of such laws.

Against the backdrop of very personal emotions unleashed by our experiences in the past, I believe in the development of an ethos that serves to create a balance between a culture which respects individuals but also regards them as part of a greater whole, a culture which stresses the interdependence of the members of a community while at the same time recognising a person's status as a human being who is entitled to unconditional respect, dignity, value and acceptance. We also need to stress the

2 Per Brandeis J in *Olmstead v United States*.

converse, however, and that is that the individual has a corresponding duty to give the same respect, dignity, value and acceptance to other members of that community. I believe there is a place for sharing and for co-responsibility in the exercise of rights.

There is no doubt that there are various areas where the efforts of government and those of civil society must complement each other. Such efforts are required to deal with other major ills in our society. The evil of racism and other forms of hurtful discrimination on the basis of gender, HIV status and other grounds which adversely affect the dignity of our fellow humans must be combated not only amongst ourselves as citizens, but also with regard to refugees and generally against our brothers and sisters from across the borders. Also, the vast socio-economic inequalities in our society need to be tackled together to ensure that all are able to live with dignity and realise their unique potentialities.

What we should never do is to forget the passion of our communities which stood up against injustice so that we could experience the dawn of this new dispensation. But having got there, it is not enough for individuals, families, religious and cultural communities to sit back and praise the virtues of the Constitution. The Constitutional Court will engage in its task of upholding the rights in the Constitution with vigour. Hopefully, the legislature and executive will do their part as well. These institutions are, however, primarily designed to create the space to enable citizens to engage with the project of building a new society. Democratic institutions lay the groundwork or 'basic structure' of our new society. It is up to citizens to flesh out this basic structure and to give content to the type of nation we wish South Africa to be. My vision is of a country where the citizens work together to fully realise the rights contained in the Constitution and co-operate to create a warm, caring society whose members are able to maximise their personal potential.