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MY RIGHTS!

YOUR RIGHTS?

- Let's talk!

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PROLOGUE



UNKNOWN, UNLOVED

When Hendrik Biebouw stated, famously, about 300 years ago, ‘I am an Afrikaander!’ he surely could not have foreseen that we, so many years later, still would be asking, ‘But, what does this mean?’ Herman Gilliomee says that historians still cannot say with any degree of certainty what Biebouw had meant at the time. Did he mean that he was a native of Africa, or did he imply that Afrikaners from a European heritage had certain rights which the immigrant magistrate Johannes Starrenberg had to respect in dealing with him?¹ This question, as well as later and recent debates about the Afrikaner/Afrikaans, has never really interested me. I am an African out of the Afrikaner laager, for Johannes Wessel(s) had already established himself in South Africa in the year 1660. I have never felt the burden of European baggage to weigh heavily on me, even north of the Limpopo River – the real albatross had been apartheid.

A visit to Belfast, Northern Ireland in 2003 unexpectedly recalled and brought forgotten thoughts to my mind. Upon my arrival at the airport I tried to identify others who would attend the same conference. Those from Africa and Asia were easily identifiable. When my luggage eventually did appear on the turntable, the other delegates to the conference had already left in small groups and I had to take a taxi to our joint destination. It did not bother me at all, because we were all strangers to one another and, indeed, I looked like a local and not like a colleague or friend out of Africa.

At this week-long conference about the workings of the human rights commissions of the world, delegates from North and South America, Western and Eastern Europe, Asia and Africa got to know one another very well. To my surprise, someone asked if I really was from South Africa. I

1 Gilliomee Hermann, *The Afrikaners*, (Tafelberg) 23.

explained that I knew no other loyalty and that my forebears had adopted the country as their own centuries ago. Another wanted to know how many of the South African Human Rights Commission's commissioners were white. This question caught me unawares, because at the Commission we had long ago learnt not to judge one another by appearances.

My CV tells of various roles in the administrations of former presidents PW Botha and FW de Klerk, in peace and constitutional negotiations and as a current member of the South African Human Rights Commission. In this regard, one delegate remarked that we made him jealous, because in his own country they were not equally accommodating and forgiving of one another. This statement led to long, informal discussions about the processes surrounding the new democratic South African constitution as well as the Truth and Reconciliation Commission. However, interesting though the discussions were, the shortcomings of processes and the enormous hindrances that we still have to overcome in this country are of no interest to outsiders at all. They judge that something wonderful has happened in this southernmost point of Africa that appealed to their imaginations and that was that. Finish.

In my conference paper I explained how the Commission undertook formal, legalistic investigations, but how we often achieved the best results when resolving problems by taking recourse to informal talks. The Israeli participant there-upon carefully cross-questioned me. Among others, he wanted to know: 'Tell me, considering where I come from, does this phenomenon of dialogue and negotiations have a Christian basis?' My spontaneous reaction was: 'No! The flopped negotiations between Gerry Adams and David Trimble, which hog the headlines in Irish newspapers at present, proves my point. The negotiation and dialogue phenomenon is typically African, with special South African content. The idea of indaba (let us talk) had been inherently African long before the eye-to-eye constitutional negotiations in South Africa began.' I do not know if the Israeli made sense of my reaction at that stage.

In Belfast, the Africans often sat together. We laugh in the same manner – from the pits of our stomachs, in contrast to the British 'stiff upper-lip' smiles. And, when far off, we smile about the same things, such as the endless reportage on the embarrassments of the British royal family. During the conference we talk the same language about poverty and adult

illiteracy in the rural areas. Discussion about a wide range of subjects followed. The delegate from Malawi thanked me for my remarks about the Commission's socio-economic reports and how often we measured the progressive realisation of socio-economic rights, 'because,' he said, 'these people do not listen to me when I speak on this subject'. My respected friend from Ghana then recounted how he had openly burst into tears, upon visiting Robben Island. His emotions had been stirred not only by Nelson Mandela's wasted years on the island, but also because of the many Africans elsewhere on the continent who had not been able to overcome similar circumstances. This reminded me of a conversation I had had in deep Africa years ago when somebody had remarked, 'You Afrikaners are special Africans. You lock up Mandela and release him then, knowing full well that he will campaign against you politically and that it will result in your loss of power.' In contrast, my Ghanaian friend remarked that for him, personally, it was a South African miracle that Mandela could walk out of jail after so many years, healthy in body and spirit, and become head of state.

At the end of the conference we all said our farewells as friends. The Africans say farewell with the honest wish to meet again, well knowing that we share much more than just the same continent. We also know that we share a past and a future. Being an African means so much more than enjoying Africa's natural beauty. You also have to be able to identify with the people of the continent. You have to understand, or at least try to understand, the challenges and obstacles facing the continent.

At some stage, the delegate from New Zealand referred to a part of that country's population as 'people of European extraction'. This statement was anathema to me. Our own South African history with its entrances and park benches for 'Europeans' and 'non-Europeans' recalls bad memories. In the face of Europe's isolation policy towards South Africa, but especially as a result of the acid Dutch and British attitudes, I have no interest in being a European. After all, Africa is where the future is at.

While waiting for my connection at Heathrow Airport in London, I had heard more Afrikaans being spoken than in Johannesburg's central business district. During this short visit to the British shores, I had run into Afrikaners everywhere; in the pubs, on the trains, wherever I went. Even with their South African accents they were like fish in water – the old

colonial reserve and apartheid stumbling blocks do not exist any longer. They look exactly like the locals. One is happy for them, for the opportunity to have adventures in Britain and to be paid in British pounds for their contributions. However, the question is: will we ever again hear them and their Afrikaans within the business districts of South African cities and rural towns? Or will their talents be lost to us for ever?

After much soul searching I have to admit to being something of a Euro-African out of the Afrikaner walk of life. To me, this Euro sticker feels like treason against Africa. But, on that day in Belfast when my colleagues turned their backs on me because I looked like a local, the Euro point was brought home to me. However, it was only the later interaction between me and my African friends and colleagues that proved without any doubt that skin pigmentation does not have to be an impossible stumbling block if you want to be an African. It is your heartbeat and the colour of your blood that count. It makes matters more difficult to be a Euro-African in South Africa, but by no means impossible. At best, it is a point of departure and not the final destination – even though we Euro-Africans are far removed from the peaks of our potential. The fact that we still are so close to our polarised past can sometimes be troublesome. Tragic incidents, on both sides of the cutting edge, often force us to step back. The urge to turn your back on the past and to look forward only, also does not help. Therefore, until such time as we make peace with the old truism that the past is never over, we will move forward at a snail's pace only. Incapacity to look the past and the resulting sensitivities in the face is delaying the necessary and relaxed acceptance of the diversity of our society.

The colour of my skin is not unimportant. On official forms assessing equitable employment practices we are regularly required to denote who is White, Coloured, Indian or African. It grates me to be defined and classified in this way and to see how we bumble along, reverting to the racial brush to define one another.

My roots are in South Africa and Africa feeds my spirit. Until fairly recently Africa had been a closed book to me – our aircraft were not even allowed to fly over Africa. Now our people race and chase all over Africa in their 4x4s. Unknown 'dark' Africa, which used to house the 'terrorists', has changed. We have changed too, and so have I.

If this had not been the case, my anguished vision which rose from my years of involvement in the Afrikaanse Studentebond (Afrikaans Student Union – 1972/1973), the carefree years as a National Party backbencher (1974), first in the Provincial Council of the Transvaal and later in the House of Assembly (1978) under the staunch leadership of Administrator Sybrand van Niekerk and, later, Prime Minister John Vorster, I would have stumbled. I do not deny this past – this is the road I took.

I am what I am – a Euro-African with a National Party and apartheid past. There does not seem to be many of us left, because everyone now claims that deep down he/she had been a closet freedom-fighter and simply had had no inkling of all the atrocities and the evils. However, even with all this baggage I personally wish to live in harmony with my environment as a complete South African. And this is possible! Armed with this disposition and the knowledge of who I am and where I have come from, I look backwards – as well as into the future.

INTRODUCTION



*THE RIGHT TO SWING MY FIST
ENDS WHERE YOUR NOSE BEGINS.¹*

Over the past ten years much has been written about human rights. These books are voluminous. The three leading books are, on average, 720 pages long, written in English and in very formal legal language. The purpose of *this* publication is to open up the human rights environment to the lay person. This book is not meant to strengthen legal arguments in courtrooms or in lecture rooms, but, rather, to add content to the many conversations on these issues around *braai* fires and coffee kettles.

South Africans are quick to claim their rights (**MY RIGHTS!**) but slow to respect the rights of others (**your rights?**). The human rights dispensation is about much more than my favourite rights. It also is about those rights that impact on me, even if I do not like them. My security is important, but what about another person's right to a fair trial and reasonable punishment?

Many Afrikaans speaking people are hostile towards human rights as they have the perception that the realisation of human rights is depriving them of power. On top of it, they experience hostility with regard to their language and cultural rights. This feeling of powerlessness leads to frustration and apathy. This negative attitude can only be softened and transformed into positive energy by informed participation when you insist on your rights.

The first part of this book, POINTS OF DEPARTURE, explains the existing human rights environment. In the second part, YOUR AND MY RIGHTS, specific rights are examined. The heart of the right is highlighted every time and then applied to specific and true-to-life situations to indicate how the Constitutional Court and the Human Rights Commission (hereafter, the Commission) work with the law in practice.

1 Justice Oliver Wendell Holmes, Jr.

Debates on human rights often elicit strong emotions and are rarely settled to the satisfaction of all participants. The same holds for this book – this is my and my interlocutors’ interpretation of events; sometimes jointly and sometimes individually. However, many questions remain open to answer during social and informal “court sessions” and “parliamentary debates”. May it take place in the disposition of the emblem of our own Constitutional Court. People are sitting under the protection of a tree and are having an indaba – meaning, let us talk. This image of justice is in contrast with the one which we had inherited from Europe – the blind-folded goddess of justice, Justitia, impartial and fearless, ensuring that the scales representing justice and injustice remain in balance. This she does with the sword of justice.

Let us talk!

Leon Wessels
8 October 2007
Krugersdorp
Mogale City

This book had initially been written in Afrikaans for Afrikaans readers. Colleagues and friends suggested that the book should be translated into English. The Afrikaans manuscript, presented to the publishers on 8 October 2005, was translated without any updates or additions. January 2007

POINTS OF DEPARTURE

THE RULES



FROM AN EYE-FOR-AN-EYE CONFLICT TO EYE-TO-EYE NEGOTIATIONS

The thoroughfare from the autocratic order where the majority of the minority in the country had ruled the majority in the country, into a complete democracy was built upon 34 constitutional principles. One of those principles determines that:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution (My own emphasis).

The run-up to *this* agreement was a steep and difficult road.

The mid-Eighties of the previous century were marked by conflict and battle with reproaches being bandied about freely on who actually was responsible for the violence. It was the position of both the South African government and the National Party that destabilisation and lawlessness would not be tolerated. Such actions were met with the full force of security legislation and emergency regulations. Certain organisations and publications were prohibited. Freedom of movement and the public activities of many individuals were affected. Important leaders (Nelson Mandela and his comrades) were serving long jail sentences and others (Thabo Mbeki and his associates) were in exile.

The liberation movements intensified the armed struggle as well as other forms of conflict. Mass meetings, boycotts, people's courts and so-called necklacings were the order of the day in an attempt to make the country ungovernable and to sink the ship of government.

However, prominent international visitors who had held talks over the entire political spectrum, found that nevertheless, they could not find anyone who was prepared to wage the struggle to the bitter end. This was also the reason why serious introspection had begun on both sides of the struggle about ending the conflict. The **eye-for-an-eye** conflict had begun exacting its toll despite the wide support for freedom movements in the 'townships' or the South African government's ability to continue its resistance. The international community together with many other interest groups, organisations and individuals brought pressure to bear on the role-players in many different ways, pointing out that a political solution was possible. Governments in Southern Africa – the so-called Frontline States – also were very active in this regard; indeed, peace and stability was also in their own interest. Behind the scenes, guarded and searching talks began. An ANC stalwart says this happened because they had come to realise that it would not be workable to take Pretoria 'with smoking guns' in order to take over the government. On the other side of the conflict the effects of international isolation, economic sanctions and political instability also had begun to pinch.

Preparations for **eye-to-eye** negotiations then began in all earnest. The central question was how the violence could be ended before constitutional negotiations could begin. In the midst of all this turbulence, two other aspects had to be resolved before there could be any talk of a complete political settlement. There had to be reflection on how constitutional security and stability could be assured during a period of constitutional development, and on how democratic claims could be realised without upsetting the boat through fears and prejudices.

In August 1989 an ad hoc committee of the then Organisation for African Unity (OAU) met to end the conflict in Southern Africa. The ANC and PAC also participated in this meeting. The result of the meeting was the so-called Harare Declaration. This proposed several steps on how to create a climate that was conducive to constitutional negotiations. Among others, it was proposed that South Africa should be a united, democratic

state in which everyone would enjoy 'universally accepted rights, freedoms and civil rights'.

The Harare declaration and FW de Klerk's assumption of the office of president in September 1989 irreversibly changed the political landscape. One politically dramatic event after the other was announced on the front pages of South African and international newspapers.

The idea of constitutional principles upon which a constitution could be built originated with the process that had been followed in Namibia. The Security Council of the United Nations had circulated a set of constitutional principles in 1982 which had been regarded as an internationally authorised framework for the election of a 'Constituent Assembly' to write a constitution for an independent Namibia. Namibia would be a unitary state with a constitution that would contain a declaration of fundamental rights. This constitution would be the highest law of the land and could only be changed by pre-agreed processes.

In South Africa, the ANC initially wanted to restrict the constitutional principles to as few as possible. Also, the ANC did not want to become involved with these details, because their position was that involvement would amount to premature negotiations

Nineteen political parties, organisations and 'homeland' governments of South Africa met in December 1991 at Kempton Park during Codesa (Convention for a Democratic South Africa) and agreed upon a Declaration of Intent in which six constitutional principles were mentioned. These six principles later would form the core of the 34 principles upon which the final constitution was based:

- ◊ South Africa would be one united, democratic, non-racial, non-sexist state in which the sovereign authority would be exercised over all of the territory;
- ◊ The constitution would be the highest law of the country and an independent, non-racial and impartial judiciary would keep watch over it;
- ◊ There would be a multiparty democracy with the right to form political parties and to join such parties. There would be regular elections on the basis of universal suffrage and a common voters' role and the basic election system would be one of proportional representation;

- ❖ There would be a separation of powers between the legislature and the executive authority, with appropriate checks and balances;
- ❖ The diversity of languages, cultures and religions of the people of South Africa would be recognised;
- ❖ Everyone would enjoy universal human rights and civil freedoms, including freedom of religion, speech and assembly. These rights would be entrenched in a Bill of Human Rights.

Early in 1992, one of the Codesa working groups began developing these principles to propose a method whereby South Africa could gain a new, democratic constitution.

Initially, *this* process progressed smartly, but to the surprise of many observers, it eventually collapsed. In spite of the Codesa mess, the Boipatong tragedy which claimed the lives of many people, the participation of thousands of people in mass action, as well as accusations and demands that were bandied about, there remained a firm conviction that the Codesa parties would return to the negotiating table. During an informal discussion, Chris Hani, a leading freedom fighter, gave me lots of food for thought when he said, 'A constructive disposition towards negotiations can only be cultivated once you realise that you have never succeeded in checking the spirit of liberation in the townships – and from our side we would have to concede that we have never succeeded in breaking the back of the South African Security Forces.'

On 26 September 1992 an agreement was reached between the South African government and the ANC which opened the door to further negotiations. Among others, it was decided that a democratically elected Constitutional Assembly would write the constitution and that this assembly would be bound only by the constitutional principles agreed to by the parties.

In 1993 the Multiparty Negotiation Process, the successor of Codesa, developed 33 constitutional principles on the basis of 'give and take'. This phase was marked by much greater singleness of purpose from both the South African government and the ANC to carry the process through negotiations and general elections. These principles and attitudes played important roles in facilitating the transition from one constitutional dispensation to another. They provided certainty during the constitutional

negotiations. The role of the Constitutional Court to certify that the new constitution was reconcilable with the constitutional principles was a later development that gave additional confidence in taking this calculated leap.

The ANC foresaw a short transitional process. The international community had to oversee the transitional process that would be managed by a nominated body which would take decisions and execute them by decree.

However, the South African government would not agree to a constitutional vacuum under international supervision. A complete constitution had to be in place at all times. The acceptance of this idea paved the way for further transitional measures that made the first democratic elections possible.

NOVEMBER 1993

The interim constitution was signed during the small hours of 18 November 1993. The road that the negotiators had travelled over the foregoing number of years had been wearisome. Nobody was left untouched by the intense rubbing of shoulders.

After the formal signing of the interim constitution the very same people who had grown to know one another so well stood around quite stiffly, sticking out their hands rather shyly. We did not quite know how to handle the moment – should we hide our happiness, would a severe Calvinist handshake do? Some were even openly sulky about the compromises agreed to.

I found this sulky rigidity disappointing. Negotiators really had gotten to know one another very well over the previous number of years – long nights of working together, fighting with each other, arguing – yet again and again we had to bury the hatchet because the luxury of protracted differences simply could not be afforded. Every time we had been forced back to the negotiating table yet again, searching for constructive solutions from bogged-down positions. That had been what our principals and our country had demanded of us.

What we had achieved here was an important milestone and had created room for a peaceful settlement. For the youth, it had fashioned the possibility of a future without violence and the opportunity to sail into

the world without the encumbrance of a polecat epithet. The space had been created for the first democratic elections in which all South Africans could participate. In future, South Africa would be a democratic, constitutional state.

For me, it had been the end of an era. Nothing would ever be the same again. Spontaneously and intensely I hugged Albie Sachs – human rights activist and current respected judge of the Constitutional Court, physically disfigured by the struggle.

Tim du Plessis, present editor of the Afrikaans Sunday paper *Rapport*, would recount later that South Africa was divided in two: those who had been at Kempton Park and those who had not been there.

It was my son Willie's 16th birthday. A special birthday party also was arranged for Cyril Ramaphosa who also had his birthday on that day.

Robert von Lucius of the *Frankfurter Allgemeine Zeitung* described the events of that historic day to his German readers on 20 November:¹

Former enemies reluctantly embraced one another

The birthday cake arrives four hours late. The minister gives a speech in which he honours the secretary-general of the opposition movement that only four years ago had been a banned organisation, but that would take over the government within a few months. Thereafter, ministers and future ministers started dancing until sunrise. The disc jockey plays 'The long journey' as first cut of the evening. The ANC secretary-general, Cyril Ramaphosa, says he is very happy because on his birthday a country has been born that from that day on would begin its travels towards democracy and national unity.

After months of negotiations, the ANC and 19 other political parties had signed the interim constitution on Thursday, shortly after midnight. This constitution would be in place for five years. The appearance of the leaders in the negotiations, however, is very graphic of the energy that had gone into the talks. During the early morning dance Roelf Meyer, Minister of Defence (sic) also participates ... clearly exhausted.

1 Translated from the German by Prof Frank Diedrich.

Next to Meyer Joe Modise, the huge commander of the ANC's military units, is also swaying his hips, although even a short time ago he had been regarded as one of the state's arch enemies.

After President De Klerk and his newly designated successor, Nelson Mandela, had held short speeches about the importance to South Africa of those matters that had been concluded that night as a result of the negotiations, they leave the hall at about four 'o clock in the morning. Reluctant embraces follow.

Leon Wessels, Minister of Labour, as usual taking the lead in reconciliation with the political opponents, is the first to approach one of the ANC politicians. He is followed by Meyer, Minister of Defence and Dawie de Villiers, Minister of Public Works (sic). The ANC politician, Albie Sachs, says it is the first time that such embraces are taking place. To him, it depicts unity, relief, but also confidence.

The almost incredible ripeness for reconciliation is the basis on which the regularly praised "new South Africa" can come about. The question arises if the political figures of the ANC are taking their easy/approachable attitude with them to parliament where they certainly will be after the elections this April. Only a few months ago, rightwing whites had charged into the World Trade Centre in Kempton Park with armoured vehicles and had threatened delegates with heavy ammunition. In the light of the present, however, this feels like years ago in the past.

The acceptance of the constitution in December 1993 had left certain Afrikaner groupings bewildered and embittered. In certain sections the question was not limited to whether they should participate in the elections in April 1994 or ignore it; rather whether they should wage war or not.

The Constand Viljoen/Pieter Mulder group was convinced that war was not an option. They realised that the only way the idea of an Afrikaner national state ('volkstaat') that had been raised during the negotiations could be furthered after 27 April 1994, was to add a principle that would allow for Afrikaner self-determination.

After a range of bi- and tri-lateral negotiations between the group of Afrikaners, the South African government and the ANC, this principle was written into the law. In this way, the door was opened for the Freedom

Front also to participate in the elections. It was clear at the time that the principles agreed to would be taken very seriously.

The fact of an election on 27 April 1994 led to a last desperate round of negotiations between the Inkatha Freedom Party, the South African government and the ANC. On 19 April an agreement was reached that led to the principle regulating provincial government to be amended in such a way that it also allowed that party to participate in the elections.

The constitutional principles were developed over a long period of time under extremely fluctuating and turbulent conditions. Direct and difficult negotiations took place at various places and in a variety of institutions. The principles and the process were inclusive and were fully supported and underwritten by all the political parties. Nobody queried or deplored the fact that the Constitutional Court had been asked to certify that the new constitution was reconcilable with the principles the parties had agreed to. This certification took place at the end of 1996. On 10 December 1996 Nelson Mandela as head of state signed the new constitution in Sharpeville. The date and time was no coincidence – indeed, 10 December is International Human Rights Day; the settlement between Britain and the Boer warriors (1902) was signed at Vereeniging; and one of South Africa's most infamous human rights tragedies had played out itself in Sharpeville in 1960.

In this way South Africa achieved a new constitution and a human rights dispensation: a modern constitution with one of the most comprehensive human rights manifestos on the globe – one negotiated principle had produced no fewer than 27 rights. We are now engaged in arm wrestling about the interpretation and implementation of these rights. This is much better than casting stones or tossing teargas at one another.

In spite of shortcomings, political commentators still regard the constitution as the greatest unifying and common factor in our land – after years of negotiations for which many people had died.

The constitution is the highest law in the land and binds all people and institutions – the government, parliament, the local branch of Prevention of Cruelty Against Animals, the management of the old age home and the crèche. Today, no-one may live outside the constitutional framework.

The idea of Afrikaner self-determination as a universal human right as well as associated group rights frequently surfaced during the Kempton

Park negotiations. Those who made claim to this right at the time did so without any interest in any of the other existing universal rights. Such was the passion and dedication devoted to this that it was as if no other right existed. On the other side of the human rights debate the enthusiasm for socio-economic rights and the stipulation of equality in the constitution was clearly audible as if these were the only rights in the constitution. Victims of crime condemn the Bill of Rights as if the right to life, in accordance with which the death penalty as a form of punishment was prohibited, is the only stipulation in the constitution and as if the misery of crime will disappear should this single section be amended.

The answer lies locked up in the constitutional directive of the Kempton Park principle, namely that the constitution had to be built on this keystone, 'that all South Africans have to enjoy all universally acknowledged fundamental rights, freedoms and civil rights'. Indeed, it is about much more than any person or his or her favourite rights. It also has to do with those rights that do not always favour you. South Africans are inclined to be quick to claim a right for themselves (**MY RIGHTS!**) when they are the beneficiaries of such rights. However, they are slow when it boils down to the obligation of respecting the rights of others (**Your rights?**).

The prejudices of many people often threaten to upset the applecart because their prejudices weigh heavier than their loyalty to the agreed constitutional rules. Thus we continue to work against one another – the one group complains that affirmative action is unjust and that it boils down to punishment; another group charges that the stipulations on property rights are too limiting and that they are being sentenced to perpetual serfdom. The constitutional rules are not meant to last for ever and a lifetime, but it is there to be respected, while it can only be altered by and along orderly means – the constitution makes proper provision for such debates and parliamentary processes.

CONSTITUTIONAL VALUES



*REMEMBER THE SOURCE WHEN YOU DRINK WATER.*¹

The constitutional values represent the source from which our human rights dispensation was derived; they impart contents to the 27 rights contained in the Constitution; they supervise when court dramas are played out in the Constitutional Court and give guidance when conflicting rights are balanced. People may ask, for instance, whether freedom of movement is more important than my right to security. It is precisely through such questions that the possible limitation of rights and the balancing of different rights are brought to the fore. It is important to realise that the constitutional values play an important role when the limitation of a right is considered. You may argue that, 'I can say what I want because all of us now enjoy freedom of speech.' However, such an argument unfortunately does not hold water – *all* rights may be restricted; therefore, YOU can **say** whatever you like, but you may for instance never in doing so impair MY **dig-nity**.

The South African constitution is not unique in being anchored in a set of values. Against the background of Germany's tragic history in the run-ups to both the First and Second World Wars, it was agreed during peace negotiations that the new, post-war constitution of Germany would make it clear that Germany would be a federal republic and that human dignity would be sacrosanct. Therefore, all laws in Germany must be interpreted and applied in terms of this basic value, namely human dignity.

It is praiseworthy that a country's constitutional dispensation is moulded in a set of values. However, these values may sometimes surface in unexpected forms and may cause embarrassment. The abuse of power by American soldiers in Iraq came as a shock. The pictures of Iraqi prisoners stripped of both their clothing and dignity, were sickening. President

¹ Chinese proverb.

George W Bush had to apologise publicly and had to undertake that those who had been guilty of such abuses would be prosecuted. 'They do not represent the values of the American people,' he said. A closer look at the American constitution shows that justice, peace, public welfare and freedom may be described as the fundamental principles to which Bush referred. It is clear that those who violated the rights of Iraqis had not taken the stipulations of the American constitution to heart in spite of the fact that these values form the basis of a democracy that is centuries old.

The values contained in a constitution are the result of a country's history. They also indicate the type of community that the people of the country wish to achieve. South Africa wants to move away from a closed, repressive, racially-based oligarchy towards an open, democratic society anchored in the values of human dignity, equality and freedom.²

During the constitutional negotiations someone posed the cynical question, 'If you call me "sir", does it mean that you are respecting my human dignity?' The negotiations were noted for an insistence on much more than a simple emphasis on human dignity. Therefore, the South African Constitution today spells out the relevant values³ in detail: *South Africa is one, sovereign, democratic state based on human dignity, the attainment of equality and the elaboration of human rights and freedoms, non-racism, non-sexism, the supreme authority of the Constitution and the sovereignty of the law as well as a representative, democratic government which is attuned to openness and accountability.*

The fact that these values are protected by increased majorities is indicative of the serious intent with which the authors of the constitution had regarded the question already at that time. The section⁴ can only be amended if 75 per cent of the National Assembly and at least six provinces are in support of such an amendment.

Today, people are arguing and asking what the keynote value is and if a keynote value exists at all? Some are of the opinion that human dig-

2 Chaskalson A, 'Human dignity as foundational value of our constitutional order', *South African Journal on Human Rights*, Volume 16 Part 2 (2000) 199. (Hereafter 'Dignity').

3 William Faulkner, American author, (1897 – 1962).

4 Section 74.

nity⁵ is the conclusive value while others are convinced that equality⁶ does not get sufficient recognition and is attenuated unnecessarily by human dignity. However, it is important to keep in mind that the basic value is not equality as such, but ‘the attainment of equality’.⁷

A case is also being made out that no hierarchy of values exists and that any tension that possibly may come about between the various values should be handled by the courts when a specific question is considered.⁸ A proper weight ought to be awarded to every value, while it should be attempted to construe the values in harmony with one another.⁹

In different judgments by different judges the Constitutional Court has left no uncertainty about the importance attached to the constitutional values when judgment is considered:

- ◆ The constitution demands that the courts should develop human rights in terms of a set of values that is inherent in open, democratic societies.¹⁰
- ◆ The values of all sectors of South African society should be heeded in the development of our jurisprudence. However, these values may not clash with the values of the Constitution.¹¹
- ◆ The Constitution must be interpreted against the background of the South African past and the administration of justice should be aimed at building a society based on those values that had brought about the transition.¹²

5 Goolam NMI, ‘Human dignity – our supreme constitutional value’, Potchefstroom Electronic Law Journal 2001 volume 1.

6 Gutto S, *Equality and Non Discrimination in South Africa*, New Africa Books (2001), 128.

7 Chaskalson A, ‘Equality as a Founding Value of the South African Constitution’, 8th Oliver Schreiner memorial lecture, 22 February 2001, (unpublished). (Hereafter ‘Equality’)

8 Chaskalson, ‘Dignity’.

9 Chaskalson, ‘Equality’.

10 *State v Makwanyane*, 1995 (3) SA 391 (CC), (par 302).

11 *Ibid.*, (par 361 and par 383).

12 *Ibid.*, (par 322 and par 323).

Human dignity and equality also exist as two separate rights. It is important to understand the difference – values give content to the constitutional expectations; the rights are the instruments being used to bring these into effect.¹³ While rights can be limited, values can never be diminished as rights may be diminished. However, constitutional values play an important role when consideration is being given as to whether a right may be limited. When a right is limited, a set of rules come into force and a systematic approach is required. One standard that should apply is that the limitation of a right ‘is justifiable in an open and democratic society based on human dignity, equality and freedom’.

Freedom is mirrored in terms of various rights. However, this does not amount to unbridled freedom. In a democracy, the legitimate claims of all members of society as well as the values of the Constitution have to be considered.¹⁴

The legal boffins have roles to play, but the responsibility of imparting content and bringing into force the constitutional values is too important to leave to legal practitioners alone. This is the reason why the Constitution is written in layman’s terms and why every judgment of the Constitutional Court is accompanied by a brief, media-friendly statement.

South Africa is striving towards a value driven society built on set rules. These rules can only be applied if they are true to the constitutional values. The challenge is not limited to courts and legal proceedings only, as it encompasses the total South African reality.

Where does civil society stand in this debate around values? During elections there is competition for power and people are elected to parliament to protect and to promote these values. Parliamentary laws and action programmes have to be in harmony with the constitutional values and rights. If this is not the case, then the Constitutional Court may declare it as unconstitutional. The Court has done this quite often.

Jack and Jill Public should be bold enough to take a stand on these values in everyday situations. Indeed, the Constitution is the highest law in

13 Albertyn C, ‘Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality’, *South African Journal of Human Rights*, (1998) 14, 249.

14 Chaskalson, ‘Dignity’.

the land and any legal dictate or action that clashes with it, is invalid. This responsibility also holds in cases where the public lay claim to service from the public and private sectors and where decisions are arrived at in school governing bodies, church councils or any other forum – the values actually are the overseers! This means that John and Jane Everybody may appeal at any time in terms of the values of the Constitution. These values are not beyond the reach of the clerk, the houseworker, the learner, the criminal in jail or the soldier in training.

We view the reality around us through the lenses of values – property rights, language, religion, poverty, suffrage for prisoners and the administration of justice gain a special meaning in this way. However, the problem is that all our lenses are not polished in the same way. Therefore, the results of what each person sees or wants will often differ – our emphases vary. Our lenses are polished by our experiences; by who we are. One person does not understand why there is a constant harping on the earlier days when apartheid existed. Another person again cannot grasp why people do not understand that although apartheid was removed from the statutes it was not necessarily removed from people’s hearts. They believe that the outcomes of apartheid and the years of the ‘struggle’ against apartheid still have not been undone.

These divergent approaches are played out in South Africa every day, even if we are using the same value-lenses to view the same constitutional rights and the South African reality:

- ◆ From the farmer’s front stoep the value-lenses of human dignity, equality and freedom give you another perspective than it would a worker’s view of the farm house, farm and South Africa. The one says, ‘This is my house, this is my farm that was not stolen from anybody and in this country I have worked for what is mine.’ The other says, ‘My forefathers were buried on this farm and I never had the opportunity to own land in the land of my birth.’
- ◆ The Afrikaans-powerless civil servant looks helplessly at the client who insists on being served in Afrikaans. Needless to say, they do not find one another. The one says, ‘Doesn’t he grasp that I cannot understand him? I speak many languages, but Afrikaans is not my preferred language. Also, he does not even attempt to assist me in my embar-

rassment.' The other says, 'What a stupid, mischievous official is this? He despises my language!'

- ◆ The judge and the magistrate, after considering the facts and applicable legal principles, arrive at an unpopular conclusion. The accused is freed on bail or not, or is convicted or found innocent. One group says, 'The judiciary is not representative; the judicial processes and rules are inappropriate and these date from the colonial era. When am I going to see someone on the bench who looks like me and who understands my problem?' The other says, 'We have no justice any more – the judiciary is loaded against us.'

Some time ago our newspapers reported on the aggrieved client of a commercial bank who released five poisonous snakes in a bank. One security official was bitten in the hand by a snake. Three people from different backgrounds reacted to the event in the following manner:

- ◆ The snake can be happy that it did not bite the banker, otherwise it would have died.
- ◆ I will never leave this country – where else in the whole wide world will you find such a front-page report? South Africa is the most interesting place on earth.
- ◆ Now you can see how the banks anger people.

To one person, a strict bank which protects its investment is laudable, while for the other it is the epitome of hard-hearted, capitalistic superiority.

The debate around human dignity, the attainment of equality and the expansion of human rights and freedoms will never be dull, because it is people with everyday experiences who drive the debate. The dynamics of our diverse society will also guarantee that this debate will not be exhausted in the next decades. The problem is that we seldom leave our shelters in order to discuss these matters with others, because it is much easier to talk *about* than to talk *with* one another.

BRANDPUNT



A RADIO PULPIT PROGRAMME ON HUMAN RIGHTS, LED BY
DS JANNIE PELSER
29 APRIL 2005

DS JANNIE PELSER: Good morning. South Africa has a poor human rights record, or so the Human Rights Index of the American State Department has found in a recent poll. Do the Cross events offer any way out? What difference can the church make? Today, Brandpunt examines this question and we are in touch telephonically with Dr Alan Boesak, he is a minister of the Uniting Reformed Church at Piketberg; with Dr Leon Wessels, he is a Human Rights Commissioner; with Dr Ben du Toit of the Parliamentary desk of the Dutch Reformed Church, and with Dr John Childs, a lecturer at the George Whitfield College who is involved especially with ethics and theology and who also has a political science background.

PELSER: Thank you so much. Reverend Childs, perhaps we can start with you, what does the Bible say about human rights, what perspectives do we get from the Bible when we talk of human rights, please?

CHILDS: Yes, the way I would like to see human rights is to look at the big picture of the Bible, starting with creation, going to the fall and redemption, and I would argue that human rights are founded in God's creation of man. He has made us in God's image, and we have a certain status and dignity and value before God. Then, because of the fall of man into sin, man became a sinner and man has abused his fellow man and has stolen his property and so on, and so ... what was implicit in the Creation – various rights – because of who we are, has now become explicit when God gives the law to mankind. So, I would argue that the Decalogue is the Charter of Human Rights. Not that human rights are not found elsewhere in the Scripture, but the Decalogue or the Ten Commandments are not

put in the form of rights, they are put in the form of responsibilities or duties; but duties and responsibilities are co-relative. So where it says that thou shall not murder, because man has a right to life, for his life is not to be taken; thou shall not steal, because man has a right to his own property, then I would argue, bring in the gospel side. The gospel reaffirms what is implicit in creation and what is explicit in the law and the gospel does something else – it creates what we call a human rights culture. It changes people. We are sinners, we abuse our fellow human beings, we do not love them as we should and the gospel changes our hearts so that we love and respect our fellow man so that we are not self-centered at all, and the gospel empowers us to keep God’s law and to love our neighbours as ourself, and so that Christians coming together in the church are then able to demonstrate what it is to love one’s fellow man and to be salt in life and in society. So that would be an overall Biblical perspective and, of course, human rights will only be completely fulfilled in the new creation, when all sin and violence will be abolished.

DU TOIT: I thought that one should say, perhaps, that human rights as a concept is a political type of concept. I don’t think one would find it back exactly in the Bible as it exists in the humanistic concept; I would rather that we speak from the Biblical point of view, of the dignity of people. It may sound like the same thing, but I think there is a small difference in it because the dignity of a person also is given by the Gospel through the fact that God had become human in Jesus Christ, the humanisation of God; and I think it is a very strong message of the Bible that man’s human dignity has been restored again, and we see it in Jesus’ conduct, that he assembled around him those very people who were on the fringe of society and that he restored the dignity that society and the structures had taken from them. I think it is a very, very strong Gospel message, more in terms of a theological vision of it than necessarily making a political concept of it which, being a humanistic approach, may just make many people in the church very wary of it. So, I would like to say that human dignity is a very strong theological concept.

BOESAK: I would see the Bible more as the Book from which we learn how God is protecting and uplifting those values which God Himself had

put into mankind and that this is the crux of the matter for us: the fact that we are the bearers of the image of God; this is the foundation of human rights. I also would like to say that the Bible teaches us that God is the One who stands up for the rights of people, for the poor, for example, and the weak. We see this time and time again in the Psalms, that God says that He, God, is aware that people have a right to human dignity, to the fulfilment of their human potential and everything that goes with it, also in a material sense, that these rights sometimes are drastically affected and that in such a case God will act against such a violator.

PELSER: Really, it is such a beautiful point of departure to be able to say that a man has value because he was made in the likeness and image of God, because God says through man: here is a piece of myself and that it has to be treated with the greatest empathy and responsibility.

WESSELS: When we look at the Constitution, the essence of it is human dignity. You can do many things, you may abrogate rights, but the one thing you may never do is this: You can never, and never dare to, violate one's dignity. Put differently, you have to love your neighbour like yourself and when you do to another that which you want him to do to you, you never will have any problem with all of the 27 rights which the Constitution contains.

BOESAK: The right of the poor to be treated as equal people in South Africa, and I think our inability to address this terrible situation of poverty in South Africa, to me is a direct violation of people's rights. As I said just now, we learn from the Bible that one of the first things we get to know about God is that God is the protector of the rights of the poor. That, for me, is one matter.

Other matters that concern me is the way in which we in South Africa sin against the rights of women and the rights of children, the abuse of women and children. This is an atrocity which we in South Africa cannot deny. I mean, where in the world does one find so many instances of grown men raping little two and four-year-olds and giving them terrible hidings, etcetera?

WESSELS: It all centres on the fact that one has to bring the weaker ones among us into our protection. The authorities must do it and those who are strong must do it and when one looks at our society, in truth, there are the women, children and the poor. Now, when you speak about the poor among us, then there is a distorted picture of this and that image exists because those who are stronger do not know what the situation is like among the poor, be it that this is caused by economics or by power. Our people do not bow down and try to develop an understanding of the incredible predicament in which the poor of this country find themselves.

PELSER: Reverend Childs, who should address these matters? Whose responsibility is this?

CHILDS: I think it should be all levels of society; but if you think of the role of the church – we have our congregations, our people and we must preach the gospel, which entails a certain way of living: that we love our neighbour as ourselves, that we imitate our Lord Jesus Christ; and God has always had a concern for the poor, and the oppressed, the aliens, the orphans, the widows, and we should demonstrate such a lifestyle to our people. I think one of the problems in our country is that under the old regime, with apartheid, we had all become dehumanised to some extent, we did not value other races and now we are not valuing other people sufficiently, we become selfish and we are all out for our own wealth or our own power and the church needs to radically change that. There is an individualism and a selfishness and I think ethics is not really being practised sufficiently in our churches.

PELSER: To end off, I would like to get a final comment from each of you.

CHILDS: I just want to make two points: Jesus died to liberate us, God loved us so much and valued us so much that Christ gave up his life that we might have life and life in all its fullness; so that reaffirms the value of human beings. And the second thing I would like to say is that all through Christian history, Christians have given up their rights so that others can hear and receive the gospel. They have suffered and they have sacrificed, because the gospel is the greatest thing – it brings us life in relationship

with God and enables us to love one another. So, the gospel shows our values, but it also shows that we can give up our own rights to help others and serve and love others.

DU TOIT: The church has the calling to get people to the God of grace and when we get to the God of grace, then the integrity of it all will become apparent; if we will then accept one another as brothers and sisters and as the family of God and recognise our human dignity.

WESSELS: To me, there are only two universal concepts that can guide one over these human rights debates and that is, namely, love for your neighbour, and justice. When the Christian loses his way with regard to these two concepts, then he does not only lose his way as to the extent to which he unsuccessfully practises human rights, but I also am convinced that he is on a convoluted road regarding his practice of his Christian religion.

BOESAK: I just want to state three things. The incarnation of God in Jesus is the most intimate identification with man, but then, secondly, what was that identification? How did Jesus become man? He came as unattractive man, as the one who is shunted aside; and he also identifies himself with those who are on the fringe, with the frailest and the most injured and the most vulnerable people in society. Thirdly, it means that he gave up his right to remain God as well as his right to avoid suffering on the cross; then this is for that very reason the guarantee of the right of man to retain his human dignity, because this is what Christ could return to him. If the church understands this, then we will not debate about which rights or about from which western or third world angle we look at reality, but that we look at the value man has in the eyes of God, which becomes clear to us in Jesus. Then we shall do our duty in terms of this with regard to the rights of people, to protect them.

PELSER: Brothers, thank you very, very much for your participation. Good-bye.

END OF DISCUSSION

CLOSE THE BOOKS



*PAST IS NEVER DEAD, IT ALSO IS
NEVER PAST.¹*

South Africa's past just will not let us be in peace.

Freek Robinson, a well known television personality, asks challengingly and penetratingly of his guest, gentle theologian Prof Piet Meiring, 'What are white people to do? Are they to be on their knees all day and every day, asking forgiveness for the old days, with the chequebook at the ready?' Maybe it is an admissible question if you want to elicit a discussion, but it definitely is an oversimplification considering the complex past and the difficult path of the settlement process we have negotiated. Although we want to settle the past, there can be no future without an understanding of the past.

The brief answer to Robinson's dual question is 'no' – the time for begging apology for the past has come and gone. The sulky and finely formulated apologies of the past did not always impress and often fell well short – they are noted now as chances that were trifled away. To cast a rich man's chequebook into the debate now is simplistic and shall not buy the good dispositions wanted. What our fellow-countrymen had longed for was an admission that apartheid had scorched our land, that we are aware of it and that we want to join in building a better future, as equal partners. Charity that is not offered in honest spirit and in sincerity will drop into a bottomless pit. The good disposition of all South Africans now can only be gained through working shoulder to shoulder; by playing together, and by helping to build a shared future.

Collective remorse about the past was in truth never offered, because 'we had not known about the evils and had meant so well with the events of the days of old', some of us explain.

1 William Faulkner, American author, (1897 – 1962).

If the old evils had been exposed as crudely in our newspapers and on TV as have been the case with the repugnant human rights violations of American soldiers in Iraq, even the most loyal National Party supporter, who at that time would not voice any repentance, would have protested – the unconvincing ‘I did not know’ political defence could, at least, not have been offered. Many people did not *want* to know.

The American lesson is clear – it does not matter how old your democracy is or how deeply seated your culture of human rights happens to be: human rights violations will occur the moment when you lower your guard. Power, more so unchecked power, makes people’s heads swell to the extent that they lose perspective as well as their sense of values. The many cases before our courts and before the Truth and Reconciliation Commission have shown that conflict and the struggle for power had placed human rights low on the agenda.

Let us admit in all honesty – we did not know our country and its people; we also did not know our history, before or during apartheid. A group of senior Commonwealth statesmen who visited South Africa in 1985 found that at that stage only about ten per cent of all white South Africans knew what was happening in the townships. Hardened policemen and soldiers had remarked in those years of struggle that they would have been revolutionaries if they had to live in the townships. The very old story: ‘we’ knew ‘them’ because ‘as children we played and swam in farm dams together’, was to disparage the fact of ‘our’ ignorance about ‘them’.

Ten years into the new democracy the Institute for Justice and Reconciliation found that 23 per cent of South Africans almost never associated across the colour line and 46 per cent had never associated with anyone across the colour line. Few dare to get to know the people on the other side of the colour line.²

I was astonished when I met former exiles and political prisoners. The picture inside my head and the reality confronting me did not equate. They were no giants – much less bombastic orators. On the contrary, they put forward their points of view mostly in a courteous and controlled man-

2 Institute for Justice and Reconciliation, www.ijr.org.za/barometer/nl2.1.pdf. *Beeld*, 6 July 2004.

ner. It was my privilege to witness some of these leaders in action on stages abroad and I soon developed a comprehension about why they were greeted with so much respect overseas. International leaders came to listen to pugnacious freedom fighters. Their old-world charm and courtesy simply overwhelmed the world leaders. No wonder some of them were elevated to the level of aristocracy.

Who would have predicted 20 years ago that Nelson Mandela, in jail then for sabotage and for preaching violence, would become the favourite public figure of Afrikaners or that *Time Magazine* would describe Thabo Mbeki, an exile and freedom fighter at the time, as the most important man in Africa?

Already during the middle eighties of the previous century, significant voices in the international community had declared apartheid a crime against humanity. The implementation of apartheid and separate development had left nobody untouched. Many South Africans of different persuasions by then had explained what its effects on their lives had been. This past still haunts us – some do not want to be reminded of it, while



others, again, want to cash in on it because they believe a 'struggle' past is a passport to richness and power. Both these groups, then, read the Constitution, and the equality provisions, from a one-sided perspective.

The residues of colonialism and apartheid are still there. A few democratic elections cannot undo this. This question does not only revolve around those things that lie behind us, but also around the values and rights that we now want to adopt as part of our daily existence. These new values spring from our past, and they form the basis from where we reach out to the new future.

In the old days, the National Party government had an unfriendly and rigid relationship with the supreme authority of the law. Judges could not speak out about the validity of legislation. The discretion of the executive authority, exercised in accordance with security legislation, could not be tested in the courts. The argument was that judges were above politics. If they could overturn decisions of parliament or the cabinet, it would place them foursquare in the political arena.

The restriction of individual freedoms and the wide powers vested in the executive authority was founded on a phrase from Roman Dutch law – the safety of the state is the supreme law. There seldom was frank debate inside or outside of parliament about the security circumstances or the abuses of power in the country after this doctrine had been proclaimed.

It is only now that it is generally accepted that this approach had led to the abuse of power. South Africans are shocked and feel ashamed about all the horror stories that emerged during the hearings of the Truth and Reconciliation Commission. From this evidence it became clear that members of the security forces had purposely misled probing judges. No wonder that they did the same to politicians and other leaders who had been tardy to ask penetrating questions. We did not want to know.

During negotiations the question had to be answered – how would South Africa deal with its past? Should it be discussed or would we try to ignore it and just push ahead? It was clear that the past could not be ignored. However, one also could not deal with it in a spirit of revenge.

In May 1990, in the course of a long and highly delightful conversation with Breyten Breytenbach, his remarks about the past astonished me. 'All of us only act with the insight we have about events at a specific point in time. The main question to which South Africans still have to provide an

answer is how they will deal with the past – will we talk about it or will we try to ignore it, like the Germans did?’

Years later, during visits to different countries, it became clear to me that people’s requests to let the past be were falling on deaf ears. People want to know what happened and victims want to tell their stories. History can never be locked away – even if the security files are shredded.

When the Epilogue to the Transitional Constitution was accepted in a late stage of the negotiations in 1993, many breathed a sigh of relief. The relief was that the truth now would be revealed in an orderly way and not in a spirit of revenge. The Epilogue made it possible for many to support the 1994 democratic elections as well as the subsequent handing over of power.

A country has to know its history. We have wounded one another and the time had come to heal old divisions. It was the beginning of a journey through the past which South Africa simply had to take in order to arrive at an acceptable future.

The drafters of the Transitional Constitution³ realised that the transition to a democratic order would only be possible if there was a commitment to reconciliation and national unity. It was realised, too, that certain aspects of the past could not be put right and that sometimes it would be necessary just to keep on walking the new road. This is the reason why the Epilogue in the Transitional Constitution was accepted under the headline of ‘National Unity and Reconciliation’ after the National Party government and the ANC had come to an agreement about it:

This Constitution provides a historical bridge between the past and a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

3 Act 200 of 1993.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflict and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a *need for understanding but not of revenge*, a need for reparation but not for retaliation, a need for ubuntu⁴ but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before to 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments, we the people of South Africa, *open a new chapter in the history of our country.* (My own emphasis.)

This paved the way for Parliament to pass the legislation in terms of which the Truth and Reconciliation Commission was brought about. The instruction was to paint as complete a picture as possible of the gross human rights violations that had taken place since the Sharpeville tragedy on 21 March 1960 when protesters had been shot at and 69 people had tragically died.

Applications for amnesty also had to be considered. Such an application would succeed if the applicant fully disclosed all the relevant facts about the human rights violation and if the action had had a direct political aim. The law determined a set of criteria that had to be considered in judging an application, among others the relationship between the crime

4 *Ubuntu* = common humanity.

committed and the political aim as well as the proportionality of the crime and the political aim.

An appearance before the TRC was no game. Skeletons which could jump right out of the security cupboards of the former government, or possible surprises that the TRC had in store, enhanced the torture. It was not a pretty sight to see proud soldiers and police officials on their knees before the TRC's Amnesty Committee. I cannot defend their actions, but I also cannot condemn these people – indeed, we had been on the same side of the conflict. Although every decision in which I had participated in the bygone era will withstand the test of daylight, it definitely will not withstand the test of a constitutional examination today.

This is how far the Epilogue and the TRC could take us – now we must get on. It had been a process of reconciliation. It had not been a perfect process, but it did take us forward.

South Africans on both sides of the conflict are critical – former rulers, especially the security forces, feel humiliated. Those who had been on the wrong side of apartheid feel that they had gained nothing from the process – their spirit of forgiveness had brought them nothing tangible, considering that the process for reparation is still stuttering ahead with stops and starts. Connoisseurs, mostly those who had never really participated in the struggle, have much to say about the 'messy settlement' because they feel that amnesty for the perpetrators of human rights violations was unjust and that it did not properly consider or compensate the victims.

It was messy, because it was a give-and-take situation that had to end the conflict and the injustice in order that new space could be created for all of us.

Contrary to with the general discontent in South Africa, foreign observers from all over the globe are astounded. Their admiration for – and inquisitiveness about – the constitutional negotiations knows no bounds. A well known expert on Africa, Ali Mazrui of Kenya, says the fact that the settlement process is still standing after ten years is a miracle in itself.

At the time there was not much interest inside South Africa to talk about the abuses of power – it was easier to look the other way. Today it is almost impossible to speak about the matters of old. People, especially young people, are unaware of what had happened and are not really

interested because these things do not touch them personally and, in any case, they are busy building their careers.

For me, the most wonderful remark about the current time comes from actor Ian Roberts, 'When I look at my children (15 and 11 years of age), then I see that they are free. And it shows.'

He also says about the old days of compulsory military service, 'Those were rough years. When we came out of the army, all of us were pretty crazy.'

Barney Pityana, former University of Cape Town lecturer and Commission chairperson, relates how a student confronted him during one of his lectures because he had dared to present apartheid worse than it really was when he stated that freedom of movement had not been a common right and that even with the 'dompas' one could not go where one wanted. Barney was forced to take his old 'dompas' along to the next lecture to convince the sceptical student.

When David Kramer's musical *District Six* was performed at the former Rand Afrikaans University, students wanted to know, 'Which district is being referred to – is it close to Sewende Laan?' They were totally in the dark about the highly emotional forced removals from District Six in Cape Town and all the bitterness that move had caused at the time.

Truth is that in large parts of our country and in segments of our society the people of South Africa are still far apart from one another. People jump up and down in their chairs if someone dares say that we are living in two worlds. 'You emphasise the past and don't allow us to move ahead.' During recent chat programmes on two radio stations about human rights the reactions of listeners had been light-years apart – 'two worlds', to put it mildly.

- ❖ The one side is burdened about crime that is thriving under the human rights dispensation; children who have left the country because they cannot find work because of affirmative action; property rights and language rights that are nothing more than 'patient' words on paper.
- ❖ The other side only wants to talk about poverty and high levels of unemployment, and they ask aggressively, 'Wessels, do you know what you are talking about? Have you ever been to one of our townships? There can never be any possibility of reconciliation if one half must continue to live in such squalor.'

RECONCILIATION

The healing process is long and trying and there are dangerous curves along the road. The family of Amy Biehl, the American student who was murdered so violently in Cape Town for political reasons, say, 'You are searching for closure of the tragic event and you only want to go on ahead. However, there really never is closure – you have to find another way of living with your past.'

The high point of the whole process of liberation and normalisation in South Africa for me was on Sunday, 8 May 1994. I was instructed to represent President F.W. de Klerk at a special service of thanksgiving that had been arranged by Christian churches in Johannesburg's FNB Stadium.

The most prominent church leaders attended: Archbishop Desmond Tutu, Dr Stanley Mogoba, the Reverend Peter Storey, the Reverend Frank Chikane, Bishop Trevor Huddleston, Prof. Pieter Potgieter, Dr Beyers Naudé and many more. Mr Nelson Mandela, then president-elect, had come from Cape Town for the service. He had to fly back there that evening, because the next day was the official selection of the President.

As part of the event the organisers had arranged a ceremony around a wooden cross in the middle of the stadium. Representatives of the churches presented their commitment to reconciliation. Thereafter, all participants offered one another a hand of friendship.

Later a journalist told me how his mother, who had witnessed the event on television, had been moved when President Mandela and I – representative of the fighting factions – spontaneously embraced one another.

To me the most intense personal experience was when Beyers Naudé, for many years an exile from the Dutch Reformed Church and the Afrikaner community, reached me a hand of reconciliation, without any reproach or reserve.

To me, reconciliation does *not* mean

- ◇ a grey sameness;
- ◇ that there never will be a difference of opinion;
- ◇ a false acceptance of other standpoints, and
- ◇ an insincere, patronising attitude.

Reconciliation is an undertaking to

- ◇ accept one another's good faith;
- ◇ resolve differences through discussion;
- ◇ develop understanding for the other side of the argument;
- ◇ put communalities first and to build upon those;
- ◇ never launch little petty-minded fights, and
- ◇ not get stuck in the past, but to forge forward, together.

THE BOOK IS OPEN

*Life must be lived forward, but should be understood backwards.*⁵

On 27 April 1994 South Africa became a constitutional state with a complete Bill of Rights. Only human rights violations that were perpetrated after this date are adjudicated by the courts and by the Commission. The TRC effectively closed one chapter of South Africa's history after it had been opened and interpreted. The South African Constitution has opened up another chapter that is taking us forward. People from a variety of backgrounds and political persuasions regularly request the Commission to investigate human rights violations allegedly perpetrated in the 'old days'. They are hugely surprised to learn that the Commission cannot deal with their matters and that the TRC's duties have been fully discharged. Not everyone is prepared to accept this. They still feel aggrieved about many things.

However, we are advancing – in tune with the past, without stumbling over it and without fighting for a better past. We do not have to live in the past, but we also cannot live without the past – the past is part of our reality.

5 Sören Kierkegaard.

MY RIGHTS



HUMAN RIGHTS NOT ONLY ARE A STRUGGLE FOR MY RIGHTS, BUT ALSO A STRUGGLE FOR THE RIGHTS OF ALL WHO LIVE WITH ME.¹

People often claim their rights without considering the nature of the specific right as encompassed in the Constitution. After a long explanation about why they feel so aggrieved, their argument usually ends in the words, ‘So, what can you do for me? Because I feel my human rights are being violated.’

Sometimes the complaint is about the negligent actions of a doctor or of hospital staff – the wrong knee of the plaintiff has been operated upon and the cartilage of the healthy knee has been removed; or an advocate allegedly wasted the person’s money because he had asked the wrong questions and, ‘I have lost my case’; the church council will not listen to his side of the matter, or there is an argument in a crumbling marriage.

The fact that a specific complaint cannot be brought home directly under the chapter of human rights does not mean that no legal basis exists to obtain relief for such a person:

- ❖ The doctor immediately admitted his mistake and the necessary damages were paid out without any problem.
- ❖ The advocate was reported to his professional body (the Bar Council) which investigated the matter.
- ❖ General legal measures can be taken against the church council to adhere to all the rules of natural justice. Fair and correct administrative measures are a human right.
- ❖ Arguments within a marriage belong with marriage counsellors or in the divorce court.

1 Fanie du Toit, Institute for Justice and Reconciliation.

Someone writes to the Commission that Kobus Wiese and Joost van der Westhuizen are violators of human rights on their programme *Super Rugby* which is broadcast on the pay channel kykNET – the pair does not respect freedom of speech because people who speak in English are cut off; so too are all who wish to promote transformation. In fact, Kobus and Joost ostensibly are opposed to transformation.

The Constitution provides for freedom of speech. However, this does not mean that we all have to agree. During conversations as part of chat shows or around the braai fires, things are apt to get rough when we talk about rugby or transformation. kykNET was created for the Afrikaans viewing public with private capital. The presenters have no constitutional obligation, for example, to agree with all of their listeners or to respect all the official languages. kykNET and its presenters are free, therefore, to steer or start discussions and not everyone needs to agree with it.

CORNER-STONE²

The Bill of Rights is the corner-stone of democracy. It does not only protect my rights, but also the rights of all the other people in our country.

The State, that is to say all departments of government – the receiver of revenue and the traffic officer – have to respect, protect and promote all of my rights. My employer, banker and people with whom I do business all have to keep my rights in mind when they take decisions that affect my life, because these rights do not only apply between the state and its subjects, but also between ordinary citizens.

2 Section 7.



Rights may be applied to individuals – Jack and Jill Public as well as legal persons, that is, companies and associations. The nature of the right and the nature of the obligation brought about by the right are important – the industry in your home town cannot lay claim to the right to life or the right to basic education, but it can be forced to put an end to pollution because everyone has a right to an unpolluted environment.

Legal persons, like the industry in your town, now also have claim to rights in the Bill of Rights to the extent to which the nature of the rights and the nature of that legal person make it possible or just. There may, for example, not be discriminated against the industry, or the town council can be forced to repair a dangerous drainage system which endangers the lives of the industrial workers.

Primarily, human rights are aimed at containing the power of the state. Jack and Jill Public previously had to protect their rights along other routes, through private law or common law. Now the country's courts have a constitutional obligation to develop the common law by paying close attention to the Bill of Rights. In the old days my freedom of expression had been contained by the rules pertaining to common law on libel – I had to respect your good name. Those rules are now enriched and strengthened by the constitutional values and rights that control the freedom of expression, and human dignity.

ENFORCEMENT OF RIGHTS

The Constitution wants to make it as easy as possible for all of us to claim or enforce our rights. It is not essential that you should have a direct interest in the matter. You can act either in your own interest, or in the interests of someone else who is unable to act in his or her own interests.

You can also act in the interests of a group or a class of persons or in the public interest. An association may act on behalf of its members' interests. The net is cast wide and reaches further than the person who has a direct interest in the violation of the right. Powerless people – people in distant areas, the illiterate, children and the aged – can now be easily assisted. Others can act on their behalf. The idea is to put as few obstacles as possible in the way of any person who wants to claim or enforce his or her rights.³

You may approach a proper institution or court by alleging that your rights are being violated or that a violation is threatening. Such a court or

3 Constitutional Assembly, October 1995, 259.

institution then can render the applicable assistance or explain what the legal position is.

INTERPRETATION⁴

The Bill of Rights casts the net as widely as possible in order that through interpretation and use, content (South African content) may be imparted to it. The success of long existing human rights dispensations, like those of India and the United States, is attributed to this mechanism. Those rights are continuously being interpreted and applied to everyday situations.

The courts are encouraged to look outside the country's borders when rights are interpreted. During argument in our courts the international human rights conventions and fitting judgments in other democratic societies are studied too. This is done so as to ensure a well considered interpretation, based on proven democratic and international experience.

The obligation to bring also the constitutional values into consideration when rights are interpreted breaks with the old tradition where the interpreters of the country's laws often had been slaves to the letter of the law.⁵

LIMITATION⁶

None of my rights is an unassailable right that cannot be limited. I have the right to freedom of movement, but this right is limited when I want to rush around in an environmentally sensitive area in my 4x4.

Strict directives are valid, however, when rights are limited:⁷

- ◆ The limitation has to be governed by a generally valid legal norm. This comes down to a law, judicial rule or policy that is applicable to all.

4 Section 39.

5 Constitutional Assembly, October 1995.

6 Section 36.

7 *S v Bhulwana* 1996 (1) SA 388 (CC) par 18. (The Court places the aim, effect and importance of the limitation of the legislation on the one side of the scale and the nature and effect caused by the limitation on the other side of the scale. The greater the impact on fundamental rights, the more convincing the grounds for justifying the limitation must be.)

- ◇ Furthermore, the limitation must be reasonable and justifiable.
- ◇ All relevant facts have to be considered, such as the nature of the right, the importance of the purpose of the limitation, the nature and scope of the limitation as well as a less limiting way of achieving the aim.

Should my right be limited to the extent that it is destroyed to its core, the limitation will be invalid. My freedom of movement can be limited by the directive that my vehicle should be roadworthy for driving on public roads. However, if I were to be forbidden to drive on public roads in my roadworthy vehicle – and that without reasonable explanation – the limitation will be invalid.

SUSPENSION⁸

During a national crisis, for example when violence erupts or at times of national disasters, a state of emergency can be declared and my rights can be suspended in total – a curfew may be introduced and after sundown no-one is allowed out on the streets. Under such circumstances my rights not only are limited, but they are suspended completely – for instance, freedom of expression may be suspended, no public meetings or publications (radio and newspapers) are allowed. For this to happen, very strict preconditions must be adhered to.

In South Africa, with its unacceptably high level of crime, people often appeal that a state of emergency should be declared to combat crime. Such a plea can only succeed if the following standards are met:

- ◇ States of emergencies may only be declared when the life of the nation is threatened – the facts have to show that the crisis that precipitates the state of emergency is real or threatening, that it is exceptional in nature and that it has an effect on the organised life of the state. The functioning of a constitutional entity such as the judiciary or parliament must be threatened or the flow of vital supplies held up and ordinary measures must be inadequate to handle the crisis.

8 Section 37.

RELINQUISHING OF RIGHTS

Can I relinquish my rights? Can I declare voluntarily that I am not interested in claiming some of my rights or to be protected by them? Can I undertake never to appeal to my constitutional rights?

Can a first-year student undertake to participate voluntarily in initiation and welcoming programmes and in the process be manhandled by seniors on the campus without knowing in advance exactly what this will entail? Is it possible for a Springbok rugby player to agree to subject himself to the physical and spiritual challenges of 'Kamp Staalraad' without his constitutional rights being implicated at all?

The question whether someone can relinquish his rights by way of an agreement is a subject about which people are not in complete accord.⁹

I land up in situations almost every day in which it is expected of me to relinquish certain rights; searches at airports (right to privacy), in the Small Claims Court where I have to relinquish my right to legal representation, during certain administrative processes sometimes I relinquish my right of appeal or my right that reasons should be supplied to me should the process turn out to be unfavourable to me.

It is possible to relinquish certain rights, but here strict conditions also apply:¹⁰

- ◆ explicit permission has to be granted;
- ◆ the person who gives the permission must understand the nature of his permission, that is, the person has to understand the nature and scope of the right that is being relinquished as well as the consequences thereof.

To determine if the right was relinquished legally, the proportion of power in the relationship between the two parties has to be considered – the farm worker who undertakes not to participate in an

9 De Waal J, Currie I and Erasmus G, *The Bill of Rights Handbook*, Juta (2001) (hereafter De Waal) 42-44; and Hopkins K, 'Constitutional Rights and the question of waiver: how fundamental are fundamental rights?' SA Public Law V16 (2001), 122.

10 *Mohamed and another v President of RSA* 2001(2) par. 62.

election or not to join a union is in a very poor position in relation to the employer who demands this of him – if his ‘request’ is not complied with, then possible dismissal and eviction from the farm may follow.

The first-year student who ‘voluntarily’ participates in distasteful orientation practices under pressure from both seniors and peers have not necessarily considered the nature and scope of all of his rights. In all probability it also was not explained to him or her, much less is such a person completely aware of the consequences of his or her permission or refusal.

Sometimes differentiation is drawn between the so-called personal freedom rights (the right to expression, the right to vote) and fundamental rights (the right to life and human dignity) with a view that a person may relinquish his rights to freedom, but not his fundamental rights. However, the connection between the two has to be considered. Certain freedom rights, for instance, can have an impact on my fundamental rights and thereby increase their importance. Under certain circumstances I may decide voluntarily, however, not to exercise my right to freedom of expression or to remain silent or not to participate in an election.

Under other circumstances the decision to relinquish may be forced and may boil down to a violation of someone’s human dignity – a senior bully threatens a first year if he tells the hostel manager why his body is black and blue, or someone chases me away from the polls at election time. Therefore, the circumstances under which I relinquish my rights are of crucial importance, even though it is not a fundamental right that has come under pressure.

As yet, our courts have not spoken the final word on this subject.

In a certain private school religious instruction is compulsory. A parent does not want to abide by this and insists that her child may not participate. The court found that the parent had relinquished her rights when she had enrolled the child with the school, well knowing what the rules, regulations and practices at the school were.¹¹

11 *Wittman v Deutscher Schülverein*, Pretoria 1998 (4) SA 423 (T).

In another case before the Cape High Court an Islamic association argued that the Constitution does not allow the relinquishing of a fundamental aspect of one's religion.¹² The association had bought land and undertook not to use amplifiers when calling their members to prayer meetings. The court decided that usage of amplifiers when calling their members to prayer meetings was not a fundamental guideline for the Islamic faith and that the original agreement does not undermine their constitutional right to practise their religion.

The Commission unsuccessfully challenged the SABC and e-tv before the Independent Broadcast Authority because they had announced a minor's HIV/Aids status on television. The argument that was raised centred on the opinion that the minor's privacy, human dignity and the best interests of the child had not been considered. The tribunal found that because the child's parents had given permission, they had relinquished the child's constitutional rights on his behalf. Furthermore, it was found that even if certain rights of the child had been violated it had been in congruence with the limitations of the limitation clause and, therefore, the actions had been reasonable and justifiable.

Therefore, it is clear that there is no hard and fast rule about the contractual relinquishing of constitutional rights. Every case will have to be judged on its own facts and merits.

The fact remains that when all the obstacles are considered that have to be overcome to validate the relinquishing of human rights, the organisers of 'Kamp Staalstraat' and of certain initiation ceremonies of first year students may probably stumble and, in the process, be guilty of violating human rights.

12 *Garden Cities Inc Association v Northpine Islamic Society* 1999 (2) SA 268 (C).

GUARD DOG OR LAPDOG?



I know exactly how Breyton Paulse, crack Springbok rugby player, must have felt after having played more than 50 tests for the 'Boks and still being regarded as a quota player. His talent, skill and experience did not count – what mattered was that without him, the Springbok team was too white. Hopefully this matter has now been settled, with general acceptance that he was a member of the team because he could play rugby and seldom, if ever, had a poor game.

After I had played in 'fifty tests' – post-graduate study, research abroad, international conferences, appearances in the Constitutional Court – a group of plaintiffs phoned up Barney Pityana (at that stage he was chairperson of the Commission) and demanded that he replaces me as appointed go-between in their particular matter with someone else who looked like them and who would understand them. I was annoyed.

Barney's resolute reply cut them down to size, 'All Commissioners are appointed by the President, on the recommendation of Parliament. They take an oath of allegiance to the Constitution before a judge of the Constitutional Court. It is expected of them that at all times they will see to it without fear or favour that Constitutional ends and aims are maintained. Your request is refused – Wessels is your go-between or you are on your own.'

The community of Pimville in Soweto have protested with placards, 'We want Piet' – that is, ace detective Piet Beyleveld. They petitioned the authorities to appoint the successful investigating officer of many murder cases – also in the widely reported Leigh Matthews case – to investigate the killing of two teenage girls in their neighbourhood.

To me, Breyten Paulse and Piet Beyleveld are an inspiration – it is the quality of your work that counts and not your appearance. It is the only way in which you can remain standing firm in the Commission when com-

plainants and violators of human rights first start barking at one another, and then at you, when they cannot get their way.

Complainants often describe the Commission as a lapdog because the Commission, otherwise than a court, can not make orders, but can only issue recommendations to violators of human rights.

Violators, however, feel a bit differently about it because they can be taken to court should they not respect the Commission's recommendations. Therefore, to them the Commission is a dog with both bark *and* bite. Violators, who are tempted to ponder whether the Commission is a lapdog or a biting dog, quickly change their minds when negative media publicity starts rolling and when the first legal documents are served on them. This is the reason why recommendations of the Commission are seldom ignored.

In terms of the Constitution it is expected of the Commission to:¹

- ◇ promote respect for human rights
- ◇ promote the protection, development and attainment of human rights, and
- ◇ monitor and assess the observance of human rights.

1 Section 184 (1).

WHAT DOES THE ATTORNEY SAY?*



AN RSG PROGRAMME:
THE HUMAN RIGHTS COMMISSION
5 JANUARY 2004

ANTHEA WARNER: This is the first broadcast of 'Wat sê die Prokureur?' for 2004 and today it is my privilege to present the programme. The regular presenter and contributors to this programme will be back by the middle of the month.

Now, with a new year and a new beginning awaiting us all, I have thought it a good idea to invite Leon Wessels of the Human Rights Commission to chat with us today about human rights. Good morning, Leon.

WESSELS: Hello, Anthea.

WARNER: It is nine years now since the inception of the Human Rights Commission. Could you give some background on how this body was established?

WESSELS: The Commission is a creation of the Constitution. Ten years ago, a meeting was held under the auspices of the United Nations in Paris, France, during which a series of principles were developed that had to serve as future guidelines as to how human rights ought to function internationally – the institutions should be established by law, preferably by the Constitution; the members of the Commission should be representative of the composition of the population and the Commission should be independent, that is, detached from the government of the day, able to take its own, independent decisions in accordance with its own judgment on strategic goals and be able to exercise its discretions without fear or favour.

* A regular, popular Afrikaans programme on various aspects of the law on Radiosondergrense: 'Wat sê die prokureur?'

The South African negotiations at Kempton Park were under way while these international debates were taking place. The proponents for the establishment of such a Commission in South Africa were well aware of the international schools of thought. There are now about a hundred such commissions world-wide.

WARNER: To what extent is the Constitution of South Africa intertwined with what you are doing in the Human Rights Commission?

WESSELS: They are deeply interwoven with one another. We are like a fish in a bowl of water – we cannot live outside the bowl of water. In other words, we have no jurisdiction to function outside the framework of the Constitution.

WARNER: Nine years on, what does the history of the Human Rights Commission tell us? The matters in which you became involved, how successful were you in exerting an influence and could one say that the Human Rights Commission in South Africa is a body with teeth?

WESSELS: Anthea, as I have indicated, the movement is ten years old and the same question is now being put internationally: Do these commissions just exist or are they effective? A group of academics of Queens University of Belfast in Ireland has done eighteen months of research to try and determine how effective these commissions are.

South Africa was one of the Commissions which enjoyed their specific attention. Broadly speaking, they found that the South African Commission is functioning well, but that there are some shortcomings. Among ourselves, we also recognise that there are shortcomings.

We do not always perform as one would wish, in spite of the fact that we have attained a series of successes. Effective functioning always remains a challenge, but perfection is seldom attained.

WARNER: Are you often at loggerheads with the Government? How big an influence do you have on the government, seeing that they pay your salaries?

WESSELS: You have asked a critical question. We report to Parliament. We do not report to Government. When we appear before Parliament annually, all the political parties are present. Therefore, all the political parties hold us to account for what we do and don't do. These sessions take place in public. We do not have to report to Government.

You have to understand, too, that often things happen that force us to work with the Government. Today we work with the Government, and tomorrow we criticise them. And they do not like criticism. In general, politicians do not like to be criticised. There is a healthy distance and a healthy tension between us.

WARNER: If I as an ordinary citizen of South Africa wish to appeal to the Human Rights Commission to take my case further, where does the process begin and which process is then followed?

WESSELS: Well, Anthea, today is blue Monday in the new year, so all of us are slowly, but surely, getting our acts together for the year.

Just this morning I received a call from a South African in Maputo. A South African with problems in Maputo. This person picked up the telephone and called the Human Rights Commission at 011-484-4300. It happens every day. People pick up the phone or they walk into our provincial offices.

WARNER: Is every matter, small or big, treated the same?

WESSELS: Every matter is dealt with in precisely the same way. Someone phones, walks in, contacts us through our website or however this may happen. Then the legal officials take a look at the matter, individually or in a group, depending on the level of difficulty of the matter.

Sometimes matters are resolved in writing, through correspondence. Sometimes the parties just have to be brought together to have a chat in order to clear up a misunderstanding. However, the problem can run so deeply or widely that a formal investigation has to be launched. Also, the Commission can in its own name, or on behalf of others, take matters to Court.

WARNER: What would it cost an individual to appeal to the Human Rights Commission?

WESSELS: It does not cost the individual anything, because we are an institution of the state and function with ratepayers' money.

WARNER: What about the bureaucracy? Do the wheels turn a bit slowly?

WESSELS: There definitely are officials who do their duty. However, we sometimes find ourselves blocked by officials who, in the words of Trevor Manuel, simply do not live up to the spirit of *Batho Pele* – the people first. Their dedication can be questioned.

WARNER: Crime is a problem. Surely, another matter is racism in post-apartheid South Africa?

WESSELS: Whenever we talk about human rights violations in general, our focus is always distracted and our attention fixed on the big questions of crime. We have opinions about effective service delivery in the fight against crime and we are concerned about it. Whenever anyone's right to property or life is affected, a human right of such an individual is violated.

The second question you raised touched on racism. The problem with racism is that people are denying its existence. Naturally, we do not know racism today in the year 2004 in the same way as we knew it before our Constitution was drafted.

The country is not structured on the basis of race. You marry, live, move where you will. There is no law prohibiting it. In fact, there is a right to marry, to live and to move where you will. Often, though, it revolves around this deep, I almost want so say inbred, racism in us which is so subtle that people deny its existence.

An incident which recently played itself out in the Defence Force is a practical example. People are forbidden to play draughts. It transpires that there is no malicious intent, the white people play chess, the other troops play draughts and there is a bar on draughts. You may not play draughts.

The young soldiers feel aggrieved – why can the white soldiers exercise their choice of relaxation, chess, but those who had not learnt to play chess, but who are accomplished draughts players, are forbidden to play their game of choice. Suddenly, you are faced with a racial situation and racial conflict.

If the parties had only talked to one another quietly, explaining where they were coming from, the matter could have been resolved and then there was no need for churning up matters to high levels of tension.

WARNER: We are not only talking about accusations by black people about white racism, but also about the converse.

WESSELS: Well, we also receive such complaints. There is a feeling among some people that only whites can make themselves guilty of racism. Indeed, this is not correct. You find prejudices being played out on both sides.

WARNER: Leon, unfortunately our time is up. Go well and good-bye.

END OF DISCUSSION

YOUR AND MY RIGHTS

SPECIAL RIGHTS

HUMAN DIGNITY



'KAMP STAALDRAAD' AND STREAKERS

Many years ago Thomas Jefferson said that his people were naturally free and that this had not come about through favour on the part of the local 'magistrate', or the authorities. The Constitutional negotiators tried to capture something of this by declaring that every person has a right to 'inbred' dignity.¹

The most important international human rights documents such as the Universal Declaration of Human Rights as well as the African Rights Charter acknowledge and define human dignity as an inalienable and unassailable right. Different constitutions also describe human dignity as the key to a human rights dispensation.

In the new South African democracy the sentiment was aired early on already that the right to life and human dignity were the two most important rights. They form the basis to a range of personal rights and even other rights. People have a right to respect and protection.²

Everyone, that is, every person, regardless of citizenship or status, has a right to human dignity. Human dignity does not know any borders. Everyone is entitled to this simply because they are human. Asylum seekers and strangers in our country also have a right to be treated humanely.

One morning in the Free State all these learned words developed a special meaning for me when Jerry Nkeli, a member of the Commission, had to address barefoot children at a small farm school. I had wondered

1 Section 10 – 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

2 *S v Makwanyane* 1995 (3) SA 391(CC).

how he would retain their attention as I suspected that they would rather play than listen to these city people, but it was a ceremony from which they could not escape.

I was greatly surprised when they found his speech so absorbing. His words simply built upon the right to human dignity.

‘Remember and please do not ever doubt it, you are important. The fact that we are here this morning, confirms that you and your rights are important to us. You are important, because you have ‘inborn’ dignity – it is so written in the Constitution. The Constitution is the highest law of the country; everyone stands under this law – the President, your traditional leaders, your parents, your teachers, everybody! Nobody ever dares maltreat or abuse you – not your parents, not your family or friends, not these teachers sitting up here on the stage with us (suppressed laughter), not the farmer on whose farm the school stands, nor the farmer on whose farm you live. You have a right to be respected. You also have a place under the sun. What is more, others have to respect it.’

He went on and told them that corporal punishment was impermissible (great amusement), cautioned them against sexual abuse as well as abuse by people in positions of authority and trust and that child labour was illegal. The children thoroughly enjoyed this, as if he had hit the nail right on the head with each statement – to the great discomfort of all the respectable teachers and community leaders on stage who often shifted nervously in their chairs.

Human dignity takes on many forms, and ever so often it also makes an appearance when other rights are considered – poverty, unemployment, language rights, religious rights and equality. Almost all rights can be connected with it. As a value, human dignity often has to be considered when rights are interpreted, balanced or limited.

Human dignity as a right was introduced into the courts when the death penalty, corporal punishment, libel and methods of criminal investigation were considered.

Human dignity as an independent right is open to limitation that takes place in terms of the usual rules of limitation. The businessman who, for instance, is serving a jail sentence for white-collar crime, cannot claim that his human dignity is violated because he is not allowed to wear his expensive tailored suits in jail. He also complains that he finds it humiliating to

wear jail garb whenever friends and colleagues come to visit. Under the circumstances, the actions of the authorities are permissible because it is reasonable and reconcilable with similar actions in other open, democratic societies. However, he may not be treated by way of exception for special discriminatory attention simply because he has a strong bank balance.

Even under states of emergency human dignity cannot be suspended. Therefore, no crisis in a country can be so great that someone's dignity is taken away or is completely ignored. During a state of emergency no-one may, for example, be stripped of his or her clothes to prevent him or her from escaping from custody.

In the old days when nobody had a constitutional right to 'inborn' human dignity and the constitutional dispensation had not been founded on the constitutional values of, among others, human dignity, you could participate richly in name-giving during initiation ceremonies in university hostels. On parades, young men were informed just how pathetic they were. The drill instructor could display his crudest language and get away with it. Although criminal and civil measures could be taken then, this difficult road was seldom embarked upon. Should the same happen today, it will have grave constitutional implications with many public institutions monitoring the situation. It becomes even more urgent and aggravating if the person on the receiving end does not look like you.

Ms Nosimo Balindlela, Eastern Cape MEC, now premier of that province, sued Ms Erika de Beyer in a civil suit because she had called Balindlela a baboon. 'Nobody has the right to denigrate another person's dignity in such a manner. I cannot leave it there,' Balindlela said. De Beyer was fined R1 500 in a magistrates' court for *crimen injuria* and Magistrate Elmarie Potgieter cautioned her that in future she had to think before she spoke.³

In the course of a heated discussion about affirmative action and the fact that women often enjoyed the inside track when vacancies were filled, the chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Language Communities, Mongezi Guma, remarked mischievously, 'Luckily this is not a problem that the

3 Rapport, 28 March 2004.

Springbok rugby team have to contend with.’ ‘Why would that be?’ everyone wanted to know, surprised. ‘Women don’t want to practise with the Springboks because they practise without clothes.’

The picture of the group of Springboks – shocked, naked and with washed-out eyes – that had appeared on the front pages of newspapers without their permission, or the naked first-year students driven through town by drunken senior students like so many animals, never will be able to stand the test of ‘inborn dignity’.

Supporters of this type of activity battle to understand *this* and do not grasp that their actions will not be protected by the Constitution.

The Constitutional Court has pointed out that human dignity is the focal point in the debate about the prohibition of ‘unfair discrimination’ – this means that people have to be treated in appropriately different ways so as not to violate their claim to dignity. Also, human dignity and freedom are closely interwoven – human dignity without freedom has little meaning.⁴

Some-one who is the head of beauty training at a technical college phoned the Commission, short of breath, ‘There is a young man standing outside my door who insists on being trained as a beautician. I explained that it was impossible, because the instructors are women, the students are women and the clients are women. There never has been a man here, there is no place for a man here.’

‘No’, said the aspiring student, ‘you are old-fashioned. We now have a Constitution, which stipulates that you may not discriminate against me. I want to be trained as a beautician and I want to work in the film industry. One day a South African Hollywood is going to be established in this country and I want to be part of it. You have to train me. I will return every day until you agree to train me.’

‘What am I to do?’ the anxious voice on the other end of the line asks, ‘we are only women here, we do things here that only one women can do to another without causing discomfort. What am I to do?’

4 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Ferreira v Levin* NO 1996 1 SA 984 (CC).

I consult with Barney Pityana, then chairperson of the Commission. We test the circumstances against the constitutional provisions. Discrimination is out – they cannot discriminate against him simply because he is a man, so they have to accommodate him as far as possible. Or can one argue that the discrimination is reasonable and fair? Women’s dignity also has to be respected, and where their dignity comes into the equation, their dignity will have to be upheld. The classes or practical exercises that cause discomfort will have to be duplicated – however, is it fair and plausible to expect this of them? We decide that equality and dignity have to be weighed up, but that the women’s claim to dignity weighed the heaviest.

Human dignity has to be given true South African content. *Ubuntu* (common humanity – I become more through other people) has to be practised. ‘To be a complete human you have to acknowledge the human dignity of others. Begin with yourself and discover the good in others. Don’t complain that others do not understand you. It is your duty to make yourself understood. And when you are fulfilled and empowered you will not have the time to denigrate or hold others back.’⁵

Human dignity is not acquired – you are the carrier of it, it is not granted to you. This is not so easy in some cultures, my Zulu speaking interlocutor tells me. In the Zulu culture, the same as in the Afrikaner culture, it is difficult because respect and dignity has to be earned – your age and your status in the family determine to how much respect and dignity you are entitled.

This may be so, is my reply, as far as rank and place in the structure of authority goes, but that does not authorise you to treat anyone else, also not your inferiors, with disrespect, because then it clashes with the provisions of the Constitution and with the spirit of *ubuntu*.

5 Mark Matabane, author of *Kaffir Boy*, as quoted in *Rapport* 30 May 2004.

EQUALITY



FIRST AMONG EQUALS, OR JUST EQUAL?

‘Everything has changed, I am nothing in the land of my birth,’ says the unsuccessful job seeker with reference to affirmative action.

‘Nothing has changed, I still am nothing in the land of my birth,’ says the unemployed who in spite of his matriculation certificate never has enjoyed formal employment.

RACISM

During a visit to Eastern Europe I found it striking that there were no communists to be found over there – everybody wanted to wish away the old order and nobody wanted to accept responsibility for it. My interlocutors tell me how racial prejudices and crude racism are now breaking out in that region. In South Africa you do not find any racists, but many who are supporters of the communist ideology. As in Eastern Europe, in South Africa people want to wish away the old days and nobody wants to accept responsibility for it. Just recently someone said on a radio phone-in programme that the government of the day had made laws and that the people simply had to go along with it. It is exactly the same sort of argument that is raised in Eastern Europe regarding the communist rulers. *They* had made the laws and we had to follow.

To be earmarked as a racist in South Africa these days is akin to being declared a leper. Nobody wants to bear *that* label. Also, nobody wants to admit that we have come from a racist past. This is so even though our political dispensation had been built on racism and we had been fed it with our mothers’ milk, so to speak. ‘No,’ in the defence, ‘it had not been a policy of racism, but, rather, a policy of nations. It took into account the ethnic realities of Africa and the rest of the world. Furthermore, it was not racism that had been preached, but love for one’s own and for our diversity.’

Those on the other side of the colour line argue, 'You made us obsessed with race and colour, because it had been the colour of a person's skin which determined whether that person would enjoy privileges or would be denied them.'

I am not brave enough to declare myself a non-racist – I have to struggle daily with my own prejudices and antipathies and often catch myself that I allow my instincts to take over.

At dusk in my vehicle at a robot I closely watch all pedestrians who do not look like me, but I relax when I see someone of my own pigmentation. The shock to my system was huge when a colleague was hijacked from the parking area of a fancy Johannesburg hotel by one of 'my people' and a little later had to make emergency calls to colleagues and friends for support.

The first step to a greater racial forbearance and understanding of one another is to acknowledge that the evil of colour-consciousness is alive and well among us, and then to deal with it.

Of course, this also goes for some people among our fellow-citizens who deny that blacks can be racist. They allege that racism is seated in power and preferential treatment and that these elements are found primarily among whites – blacks simply are not predisposed to racism. It does not matter how finely this argument is tuned, I often run into people on that side of the colour fence who are obsessed with colour and do not succeed at all in hiding their colour prejudices.

An esteemed mother complains that the university is discriminating against her son because he is black. In the course of the investigation into the matter the black professor who had been tasked by the university to deal with the matter, remarked, 'I never thought that exam papers had to be marked through the lenses of human rights. I want to put it to you straight – it is my impression that the student and his group of friends are looking for excuses for their poor achievements.' This did not mark the end of the debate and the matter only came to rest after a heavyweight in the black ranks had stated, 'I know that professor (the white professor at the centre of the allegations), he may be a difficult man, but he is by no means a racist.'

RACISM IN AND AROUND OUR COURTS

The monster of racism also often raises its head in and around our courts.

Tragically, someone dies in a road rage accident. The accused is given a 12-year sentence with the right of appeal. The angry family says, 'The lives of blacks are worthless. The right to appeal was granted because the judge (white) wants the accused (white) to be home at Christmas time.'¹

The judge's seniority, his careful judgment after consideration of the facts and the legal principles did not carry any weight – his skin colour was different to that of the victim and, therefore, the judgment was wrong.

A well known lawyer, Thokwane Moloto, alleges that the case against him is racially driven – the plaintiff, the prosecutor and the magistrate all are white. He insists on having a black magistrate, if not, then there should be two assessors of whom one should be a woman and the other a member of the Black Attorneys' Association. This request was not supported by either the Department of Justice or the Commission.

The experiment to use lay assessors in certain criminal cases such as murder, rape and indecent assault, was aimed exactly at removing such prejudices. For people who do not go to court often, it is a traumatic experience. They want so see someone on the bench who will understand their circumstances and who will listen to them sympathetically. To my mind, it is daft to sit alone, without assessors, in highly emotional cases and then to be accused by emotional victims or the accused of being prejudiced. The practice run of making use of such assessors, deserves to be given a fair chance.

LAUGHING AT OURSELVES

The outrage of racism still remains so close to us that we lack the maturity to laugh at ourselves – every question becomes a war. We are too obsessed with colour. Even though colour is a reality, we must remember that without colour a rainbow, also the rainbow nation, is simply impossible.

1 *The Citizen*, 13 Desember 2003.

Someone has remarked, sarcastically, that we have now taken the matter of political correctness and of colour too far, since one of these days waiters will not be allowed to ask if one wanted white or black coffee, but only with or without milk!

We were sitting around chatting during a break at a high level university meeting, under the paintings of the watchful, strict eyes of the big guns of yesteryear who had reigned there with iron fists and stony eyes. We were talking about how the world in which we functioned had changed and, also, had not changed.

One said, 'If my grandparents could have walked in here now, they still would have called you "baas".'

'I'd rather not say what *my* grandparents would have called *you* if they could have walked in here right now!' another retorted among general mirth.

Late one cold evening in a rural town a colleague asked if he could not have a cup of tea in his room. Apparently, this request for tea and room service at that time of night was very uncommon – when the tea was brought to him, there was a friendly request, 'Enjoy the tea, but please don't take the tea set, it is the only one we have.'

The mayor and the chief of police of one of our big cities became involved in a public spat. The one accused the other of racism. The parties filed complaints with the Commission and asked us to intervene. It is a matter that only can be resolved through talks and does not belong in any court. The parties are brought together in the Council offices and read the riot act – the Commission is impartial and must see to it that the Constitution is respected. None of them had acted in the spirit of the Constitution. Being the public figures that both of them were, they set a poor example to the public.

After this admonishment there is an unexpected request, 'Will you please excuse yourselves so that we can talk to one another?'

'Certainly, we will wait in the hallway.'

My young colleague who initially attended to the matter on his own, asks with eyes as big as saucers, 'How could you grant the request? They hate each other and it is possible that they only wanted to get us out of the way so that they can fight. Did you notice that the police officer was armed? What is going to happen if he shoots the mayor?'

‘Well, in that case, the matter will not be settled through mediation,’ I answered, pretending to be calm.

After what had felt like an eternity, the two men emerged from the room; the sour expressions and unapproachable attitudes had made way for big smiles. ‘We want to thank you for having forced us to talk to each other. It was one big misunderstanding. You may return home, everything has been resolved.’

At a bundu court session in Mamelodi the suspects were lectured because they had stolen a TV set from the community. Then came a surprising reply to the presiding officers’ angry question, ‘Where did you steal the TV?’ which caught all of them by surprise.

‘In Waterkloof,’ the suspects said.

‘Well, in that case this court has no jurisdiction. You may go.’

AFFIRMATIVE ACTION

Years ago, in the mid-eighties, when compulsory military training for young white males still was an everyday phenomenon, a few young lads approached me. My son, Willem, was part of the deputation. All of them were children of senior civil servants and politicians loyal to the government of the day.

‘Tell me, *Oom*, is it true that one does not have to go to the army if one is married?’ the spokesman asked. The question was surprising, given that their average age was about 12 years. I talked to them, avoiding the point of their question so as to try and understand what they were about. Then the truth hit me in the pit of the stomach – these youngsters had no vision of peace and they did not want to be shot to pieces one day.

In South Africa we had grown up with the idea that there always would be conflict and, therefore, compulsory military service. I realised that the ideal of bringing the conflict to an end so that there would be only voluntary military service could become a reality if a political settlement – a just dispensation in which all of us could share equally – came about. None of that small delegation of the mid-eighties ever had to do military service – they never experienced war on our borders or the violence of warfare in the way those older than they had done.

About 20 years later I was visiting a friend who is well known and respected in our community for the positive and constructive roles he had played to help make the country work. He informed me that his 12-year-old son, as a result of internet communication with his cousin who was living in Europe, and because of further internet investigations he had undertaken about countries with similar questions as ours in South Africa, had made the upsetting remark that there was no place for him in South Africa.

It was the same blow to the solar plexus as I had experienced 20 years earlier. However, this time I felt it much more intensely. We have made peace in this country, but young people who in the past would have been canon fodder, do not feel part of this peace.

How can it be possible? What had happened? With military service everyone – parents, family, school, university, church and government had positively assisted in developing a feeling of patriotism and loyalty regarding compulsory military service. That was the price that had to be paid to limit the communist wolf to our borders and to keep the *swart gevaar* (black power) from the cushions of power.

This is not the case with affirmative action; parents are encouraging their children to obtain qualifications and to master other European languages. Between 1993 and 2003 almost 59 000 Afrikaans learners disappeared out of the system – possibly to English medium and private schools – in all probability to enable them to leave the country.

Now and again a member of government communicates sympathetically to help alleviate the alienation of affirmative action. These utterances are not really received with enthusiasm, as at grass roots level reality is pinching.

A colleague asks me about the reason for the 12-year-old's pessimism about a future in South Africa. Is it personal safety? Is it the safe lifestyle of children in Europe who can roam the streets until late at night? Is the fact of affirmative action really such a horror?

There are few sympathisers for affirmative action from among those who are at the receiving end of the policy. One of the few positive remarks brings food for thought. A wise man related how his family was hit by affirmative action and then he remarked, 'Affirmative action shouldn't be blamed for the fact that my two sons are unemployed. This is the price we

are paying now for the injury that apartheid had caused people. Apartheid was a sin. The system of apartheid had stripped people of their dignity. The price we are paying is very small if you think what could have happened and from what we have been saved. We will overcome these setbacks.'

Affirmative action dramas play themselves out around us every day.

A friend had to handle an arbitration process because a disagreement had arisen about the appointment of a senior official at a city council. Two candidates competed for the position: one of Indian heritage and the other white. After having studied the racial composition of the organisation's staff, it became evident that both the Indian and the white employee were extraneous to the aims of the organisation since both groups were already over-represented – the principles around affirmative action was therefore not applicable and the appointment had to be done on the candidates' merits. His argument was that you could not argue differently, because affirmative action had never been intended to penalise whites, but to adjust the imbalances from the past. The white candidate won the competition and was appointed. Needless to say, this argument was highly unpopular in some circles.

Affirmative action originated in the United States and refers to a series of programmes that were aimed at putting right inequalities that had been the result of discriminatory practices. Broadly speaking, it shows two forms – policy to change the composition of the work force, and policy to ensure that government, public committees and educational institutions become more representative.

However, there are fundamental differences between the situations of South Africa and the United States. In South Africa, those favoured by affirmative action are in the majority. This gives rise to debates around the weight that has to be awarded to unfairness, and questions about how long affirmative action will have to be maintained in order to remove inequalities.

Affirmative actions is like bitter medicine – a form of medication that South Africa will have to take if we want to have a peaceful and prosperous future. It is an extraordinary programme with which we try to put right extraordinary circumstances. The other side of the spectrum, again, is of the opinion that too much emphasis is placed on representation – more

accent should be placed on economic growth and on training the previously disadvantaged.²

The more I listen to these debates, the more I have come to realise that the two parties talk past one another – they listen, but hear nothing, because the one side seldom succeeds in convincing the other. ‘We were disadvantaged and the matter has to be set right now’ as against, ‘We are all equal now, but you discriminate against me because I am white.’

However, there are those on the receiving end of affirmative action who believe that affirmative action can be applied fairly – it should not be applied absolutely rigidly and those who are harmed by the policy should be assisted with training and alternative career choices.³

Flip Buys of the trade union Solidarity tells of two interesting experiences. A bank awarded 30 bursaries, all of them to affirmative action candidates. This left a matric pupil with 11 distinctions without a bursary. The matter was resolved only after Nelson Mandela had interceded personally.

White police officials, explosives experts, were denied promotions because they were white. The matter was successfully brought before the Labour Court. There was nobody else with the right qualifications available to be promoted. The existing members would assist in training new members, especially those who previously could not qualify for the posts.

In this disconsolate affirmative action posturing I notice something – a new sound that is going to lend a new tone to future debates. Often, I listen with a smile when my young, black, male colleagues are complaining when their applications for some position had been turned down in favour of an ‘affirmative action’ candidate – a woman. Ambassadors on home-leave in South Africa say that they do not always have the answers when young people abroad complain about their fate under affirmative action. In spite of wordy public pronouncements on the issue there are indications that the time may have come for a more rational, coolheaded discussion of this subject.

2 Salie Manie en Dirk Hermann in *Rapport*, 25 July 2004.

3 Flip Buys, during ‘Equality Indaba’ (hereafter Indaba), organised by the Commission, 24 & 25 June 2004.

RACE CLASSIFICATION

Sometimes we still chastise one another with a racial whip. At the time of the scrapping of the Immorality Act and the Mixed Marriages Act I gained firsthand knowledge of the heartache that those laws and race classification had brought. I would never have imagined then that people would act so insensitively about these issues today, 20 years later.

Is it still necessary today to classify one another as in the days of old; this even while the Constitution is promoting 'non-racialism'? Even new legislation still refers to the same old categories and divisions that had characterised the previous regime – African, Coloured, Indian and White.

It seems to me as though the proponents of the idea that the old classification should disappear favour *formal* equality – we all are equal, full stop. Those who are supporters of the old classifications usually back *substantive* equality – the past is not simply swept under the carpet, because the injuries and inequalities of old can only be rectified once you know who had been disadvantaged by discrimination and how they are progressing up the ladder of equality.

Academics say race classification will remain important for the immediate future, as an attitude of colour blindness would amount to a disregard of the social reality. It is acknowledged that affirmative action contributes to an awareness of race, but it is a lesser danger than to ignore it.⁴

The Deputy Minister of Justice, Johnny de Lange, says it is difficult to create a new society and, at the same time, to do away with former inequalities. The old inequalities can only be dealt with if you make use of the classifications of the old days.⁵

However, Judge Kate O'Regan is of the opinion that such classification should be used with the greatest possible care and that it is only possible to use it as a measuring instrument, and as an instrument with which to determine direction, or if progress is being made with the realisation of the 'attainment of equality' in order to increase the pace where necessary

4 Dupper O, 'In defence of affirmative action in South Africa', *The South African Law Journal* (vol. 121 Part 1) 187.

5 Indaba.

to unravel the past. HIV/Aids can serve as an example. It is a ghastly illness and an awful stigma is attached to it. However, it cannot be treated if the existence of the disease is not acknowledged. First, it has to be determined who is suffering from it before the patients can be treated.⁶

Had someone told me in the eighties of the previous century that members of the inclusive, non-racial, United Democratic Front would 20 years later make do with race classification, I would not have believed it possible. Prof. Jakes Gerwel – in his day one of the former leading lights of the UDF – says race has become a commodity. The new beneficiaries of race classification are putting up with it without argument and the former beneficiaries of race classification now rebel against it.

The aims as spelled out by O'Regan may sound credible, but it is not convincing. Surely, there are other methods by which to measure progress on the transformation curve – everyone knows which schools are falling apart physically, where the exam results are saddening, where no or little parent or community participation in schools are to be found, then why should learners be tainted with the racial brush in order to determine what progress is being made with transformation in education?

DIVERSITY

It does not matter what background you have and where you come from, we still struggle to understand one another. The black police official tells the Commission how a white farmer prevented him from arresting a criminal on his farm, because he does not allow strange blacks onto his property. I reject this unconvincing argument and ask the police official why he did not show his identification documents? If the farmer persisted with his recalcitrance, he should have arrested him on the spot for defeating the ends of justice. 'The thought never entered my head,' the policeman replied.

I am not impressed with this argument and take up the matter with some of my colleagues. This is how racism works, they inform me. During white-black interaction whites are self-confident, even superior, and blacks

6 Indaba.

are subservient, inferior. I find this explanation hard to swallow, but decide that in future I will keep my eyes peeled for what is happening around me.

During our travels, at roadhouses – in little hotels – I carefully watch events. Yes, treatment is not the same. Mostly, I receive preferential treatment from people pigmented like me and the relationships with others are somewhat strained. Often I have to intercede to assist and even to establish some calm in order to avoid embarrassment – a tone of voice and body language can reveal so much.

This matter of superiority-inferiority and inverse arrogance does exist when you look carefully – after all, it is *this* South Africa where supremacy had been based on skin colour and not on merit. Greying men and women had addressed children as ‘baas’ and ‘madam’ simply because the children were white. Today it is supposed to be a taboo, but we are still struggling to overcome the results of centuries of prejudice.

People often write about the diversity in our country and give advice:⁷

- ◆ Diversity is what it is about in this country.
- ◆ It is understandable why we are as we are. We are busy overcoming our racist past – to deny this is to deny our pre-1994 history.
- ◆ Racism entails much more than prejudice and attitude. It is how we understand and define ourselves as people.
- ◆ Racism is not what it used to be – it has become much more subtle.
- ◆ We have to talk about these matters and take stock of our actions.

There are overtones of frustration in our land that are not always understood. Before these ‘I-know-all’ quick judgments are passed, it may pay off to apply the old wisdom: Before criticising someone, you first have to walk in his or her veldskoens.

Nobody wants to be a second class citizen in his or her own country of birth and it may just pay off to understand exactly how the other person comes to feel about an issue the way he or she does. If you position yourself on the other side of the debate and simply look at how the world appears from that vantage point, you may just have to scale your wisdom

7 *Fair Lady*, January 2004.

down a bit; it may bear fruit when you are just a little more modest about your own point of view.

- ❖ Why should a bureaucrat transfer white women to a police office in the name of fair employment practice plans if they are totally disempowered in the language of the region – they cannot speak or understand Xhosa and has no knowledge of the culture?
- ❖ Why should someone insolently insist on being served in Afrikaans if the person who has to help have no inkling of the language?
- ❖ In earlier times it was quite something to see generals of the defence force whiling away hours in card playing during idle hours. Recently, Sergeant Mnwana took umbrage against his commanding officer, Major-General Laubser, because the Defence Force recognised chess as a sport, but not draughts and *morabaraba*. *Morabaraba* is an indigenous ‘board’ game played with 12 pebbles.

It is not wrong to be different. To judge and condemn another person on the basis of physical differences such as colour, actually represents an indictment of oneself. It is indicative of a lack of self-knowledge. There has to be mutual respect and understanding among people for one another’s culture and values. A multicultural situation can only come about if there is respect for all value systems.⁸

THE CONSTITUTION, LEGISLATION, LAWYERS AND THE ADMINISTRATION OF JUSTICE

It is impossible to give justice to the debate about equality without entering the field of the lawyers – the law is what the judges say it is. Indeed, the Constitutional Court has the final say about constitutional matters; its interpretation of the Constitution is conclusive.

Equality provisions overarch our whole society – job seekers, businesses tendering for work, sports people, effective or ineffective service delivery by the civil service, nobody can escape it. Therefore, the field cannot be reserved for lawyers alone – all of us ought to enter it.

8 Ms Gail Wrogemann from GCW Consultants in Johannesburg, as quoted in *Rapport*, 30 May 2004.

THE CONSTITUTION

The importance of the equality provisions in the post apartheid constitutional order was evident, because the old social and legal order had been built on inequality and discrimination.⁹ Blacks could not own property where they wanted and could not move where and how they wanted. These people were denied senior positions; entry to certain schools and universities was not possible; transport, public parks and libraries and many shops had been inaccessible to blacks. The remains of this system can still be seen.¹⁰

Our past is the very reason for the right to equality being the first right of the Constitution. Many frills are included in this constitutional provision. The courts are struggling to give meaning and content to this constitutional jigsaw puzzle, because our involved history and our still deeply divided society cannot be set right by a few sentences written into the Constitution.

Ours is not the traditional equality provision, because it strives to such equality as includes the full and equal enjoyment of all rights and freedoms.¹¹

To many people the equality provision does not bring joy, and that has various reasons. For some it opens the door *too* wide in attempting to right our warped society at *too* high a price. For others the rules that arise from the Constitution are *too* limiting and the gap through which they can move on to a better future is *too* narrow – according to them the race discrimination of the past ages should be addressed in a more dynamic manner. The government has been too lax in this and should intervene directly in order to put matters right.¹²

The rectification of old inequalities is not regarded by some as an equality provision, but rather as punishment for the actions of forebears.

9 De Waal J, Currie I and Erasmus G, *The Bill of Rights Handbook*, Juta (2001) (hereafter De Waal) 199.

10 *Brink v Kitshoff* 1996 (4) SA (CC).

11 Johny de Lange, Indaba.

12 Dali Mpofhu, Indaba.

Others, again, see it as a means for settling accounts – to make good the past.

This provision, which must keep all sensitivities and anger in check and at the same time, should unlock the future, is the origin of quite a bit of litigation in our courts. And it will be so for the foreseeable future, because the rub is that what had happened in the old, old days cannot be undone in an instant.

Whenever the matter of equality is raised, it is done as a comparison. Where are you in comparison with another? So you find *direct discrimination*: a club's membership is open to all, except for people with blue eyes, or a bank refuses to grant loans to any woman, while men can obtain loans without difficulty. *Indirect discrimination* goes further than this and its fall-out can be found in the consequences of a policy. A special unit of the Police Service do not really want women as members, but it may not make this a condition of membership. Now length and weight is made a condition, well knowing that women cannot easily meet these extraordinary conditions.¹³

The courts cannot strive to attain *formal equality* only – everyone is treated in exactly the same way. The constitutional values, historical and social factors have to be considered when the equality provision is interpreted. Therefore, the aim is *substantive equality*.

Formal equality only will confirm existing inequalities and will not attempt to undo the discrimination of the past. *Substantive equality*, therefore, is an attempt to reach out to a future where there will be equality for the total South African community.¹⁴

During training sessions people use the example of the jackal and the stork who may both drink milk out of a flat plate – it is an equal opportunity. In the end, the jackal will not only have all the milk, he will also eat the stork, so there can be no suggestion of an equal opportunity.¹⁵

Another often used example is about two athletes – the one athlete without spikes, without training and with a poor diet does not really stand

13 Davis D, Cheadle H & Haysom N, *Fundamental Rights in the Constitution – Commentary and Cases*, Juta (1997), (hereafter Davis) 53-57.

14 Devenish GE, *A Commentary on the South African Bill of Rights*, Butterworths (1999), (hereafter Devenish), 37-38.

15 Thule Madonsela, Indaba.

a chance against the professional athlete with his expensive equipment and internationally tested training programme. The first has a need of special aid and assistance.

Our Constitution acknowledges that the discrimination of the past cannot be corrected unless positive action is taken. 'The effects of discrimination will continue indefinitely unless there is a commitment to set it right.'¹⁶

The equality provision can be understood and properly applied only when the socio-historical context in which the Constitution is applied, is taken into consideration. The interpretation of the provision has to take place in the South African context and will thus develop a South African content. Our history and our people differ from those of other countries.¹⁷ Legal application from those countries, therefore, has to be treated with the greatest circumspection.

Also, it is important to realise that unfair discrimination is prohibited by the Constitution. Three yardsticks must apply in determining whether discrimination is unfair:¹⁸

- ◆ What is the nature of the group being disadvantaged by discrimination?
- ◆ What is the nature of the authority in terms of which the application is applied?
- ◆ What is the effect on the interests of the persons who are being discriminated against?

Put differently – the more vulnerable a group is, the more a group is disadvantaged by discrimination; and, the greater the impact on a group's interests the more likely it is that the discrimination will be regarded as being unfair.

16 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC) para 74.

17 Kate O'Regan, Indaba.

18 *Ibid.*

EQUALITY LEGISLATION

The Constitution supplies the broad legal framework within which equality has to be achieved, but it is the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁹ which supplies the details of the constitutional ideal.

In terms of this Act, a person can be prohibited from doing something or ordered not to do something – a restaurant may not discriminate against anyone on the basis of race. A person can also be asked to apologise for something discriminatory he or she has said or done. In terms of the law, recommendations can also be made to another authority, for instance, if a bus service discriminates against you. The court can make a recommendation that the bus service is not granted a licence unless the discrimination is abandoned.

EQUALITY COURTS

The aim with these courts is to consider equality matters quickly and in informal fashion. Therefore, matters can also be referred to other proper institutions with a view to mediation. These courts can cause great discomfort to transgressors.

The Equality Court in Lephalale (formerly Ellisras) ordered Andrew van der Westhuizen to pay his colleague Elliot Senwamadi R10 000 in damages after Van der Westhuizen had sent round an e-mail at work in which he had published in very offensive language a repulsive recipe on ‘how to make black people’.²⁰

The inaccessibility of the courts for handicapped legal practitioners was challenged in the Germiston Equality Court by Esthe Muller, an attorney in a wheel chair. The Department of Justice and the Department of Public Works have undertaken to rectify physical access to the buildings.

Section 9 (1)

Everyone is equal before the law and has the right to the equal protection and benefit of the law.

¹⁹ Act 4 of 2000.

²⁰ *Weekly Mail & Guardian*, 6 May 2004.

The Constitutional Court very soon had the opportunity to give content to this provision.²¹

It was alleged that the state discriminated against or was making a distinction between people living within fire control areas and those living outside of it. Persons living outside a fire control area were burdened, because they were always suspected of having been negligent when a fire started in their area, while people living within such an area were not so burdened.

The Court found that it was expected of the state to make rational and not arbitrary distinctions. There always has to be a valid aim when the state takes such measures. Irrational differentiation will not pass the constitutional test.

When the above principle is applied to this case, it becomes clear that there is a rational basis for distinction. South Africa is for the most part a very dry country. This means that veld fires are a continual threat. The control and prevention of fires therefore is a justified government aim. A further question which has to be answered is whether there is any link between this aim and the burden carried by landowners living outside fire control areas.

In controlled areas obligations are prescribed to prevent fires from spreading. The regulations placing these obligations on landowners do not apply to owners outside the controlled areas. Therefore, a need exists that people outside the controlled areas will be vigilant at all times and will be held responsible if they act negligently and cause fires to spread from their land. It is clear that there is a connection between the aim of the state and the burden that it places on landowners.²²

Therefore, differentiation cannot be regarded as unreasonable discrimination if it is rational and if there is a connection between differentiation and the aims of the state.

21 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

22 Compare *Devenish* p. 41 and p. 54, as well as *De Waal* p. 208.

Section 9 (2)

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The principle of substantive equality is confirmed in this sub-section. Equality should echo in all the rights defined in the Constitution.²³ Fair discrimination is allowed, but unfair discrimination is impermissible.

The door to affirmative action is opened in the Constitution. Otherwise than in most other countries, affirmative action is taken up in the Constitution itself. Therefore, affirmative action is not in contradiction with the equality provision of the Constitution and, therefore, cannot be regarded as an exception with regard to equality because it is aimed 'at promoting the achievement of equality'. It is not aimed as much at setting right the inequalities of the past as at establishing more acceptable social patterns. Therefore, it is an instrument for involving the previously disadvantaged in a democratic society.²⁴

This presents people of previously disadvantaged groups with the opportunity to realise their full potential. Impairment here is linked to social-economical (no access to water, education or health services) as well as political-judicial (detention because of political utterances, unfair trials) aspects.²⁵

STUDENTS

The University of Natal's admission policy to the medical school is challenged in court. Only 40 members of the Indian community were accepted. Black Africans have to enjoy priority in selection. The Court finds that this is not unfair discrimination.²⁶

23 Davis p. 61.

24 Dupper O, 'In defence of affirmative action in South Africa', *The South African Law Journal* (Vol 121 Part 1) 187.

25 Devenish p. 45 en p. 62.

26 *Motala v University of Natal* 1995 (3) BCLR 374 (D).

This finding was criticised and critics believe that the court at least should have considered the following questions:²⁷

- ❖ How did the University arrive at the total of 40?
- ❖ Was the total of 40 a guideline or was it a rigid rule?
- ❖ Were the socio-economic circumstances of the students considered?
- ❖ What is the demography like of the area where the medical school is situated?
- ❖ Did the broader community benefit from this decision?

STATE ATTORNEYS

The Department of Justice and Constitutional Development,²⁸ on the face of it, had a policy that white men could not apply for certain advertised positions. The factual situation was that it was mostly white men who worked in this Department – women and blacks could apply for specified positions.

In this case, the Court regarded this, a matter of affirmative action, as an exception to the rule. The policy only to appoint either women or blacks was put together hastily and haphazardly.

This decision of the Court also is criticised. Critics say that if this approach is taken, most affirmative action programmes will bite the dust.²⁹

PARLEMENTARIANS

The Constitutional Court recently put its own stamp on the affirmative action debate in a directive matter.³⁰

At the end of the first term of the democratic parliament, parliament accepted a pension scheme for its members. The employer's contributions were not the same for all its members. The difference in the employers' contributions was the reason for the court battle – for members who had

27 Govender as quoted by Devenish 64.

28 *Public Servants' Association of South Africa v Minister of Justice* 1997 (3) SA 975 (T).

29 Govender as quoted by Devenish 64.

30 *Minister of Finance v Heerden* 2004 (11) BCLR 1125 (CC).

been members of the previous parliament, the employer contributed 10% and in the case of new members, depending on age, the contribution was as high as 17 %. All members contributed 7,5 % of their salaries to the fund.

The Court confirmed that the scope of the equality provision in the South African Constitution is determined by our history and by the values of the Constitution. Therefore, it goes much further than formal equality. The effect of discrimination may continue indefinitely unless there is a commitment to end it.

To fall within the effect of section 9(2), the measure had to overcome three obstacles:

- ❖ Was the measure introduced for persons or categories of persons who had been disadvantaged by unfair discrimination?
- ❖ Was the measure intended to protect or to promote such people or categories of people?
- ❖ Does the measure promote the attainment of equality?

The Constitutional Court was unanimous that Van Heerden's case had to be rejected – the parliamentarians were not robbed of either their dignity or their purse. They also were not penalised for having been part of the apartheid dispensation, they only were excluded from certain benefits granted to new members of parliament, most of whom could not have participated in the previous pension scheme. Some judges, however, were of the opinion that the matter had to be judged in terms of section 9(3) and not section 9(2), but they were in the minority.

Section 9 (3)

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

In order to attain substantive equality, emphatic provision is made for the prohibition of unfair discrimination, direct or indirect.³¹ The 17 funda-

³¹ Devenish 49.

mentals which are emphatically mentioned are not the only prohibitions against discrimination, but they are regarded as so important that they are mentioned direct.

HIV/Aids is not mentioned as one of the 17 fundamentals, but it has already been labelled as one of those discriminatory practices that impacts on people's dignity and that it qualifies to be one of the fundamentals foreseen in section 9(3), because society reacts with prejudice to the fact that they are intensely disadvantaged. This group is stigmatised and marginalised.

MUNICIPAL TAXES

Somebody has lodged a complaint because a local authority charged a fixed tariff in the black suburbs (Kagiso and Munsieville) for municipal services, while residents (mostly white) of the adjacent Krugersdorp had to pay higher tariffs based on usage of services rendered.

The one side reasoned that it was being discriminated against on the basis of race and the other side argued that there was no intent to discriminate on the basis of race, but simply because of practical considerations. The Court found that whites, in fact, were discriminated against indirectly, although it had not been the aim to discriminate against them. However, the discrimination cannot be regarded as being unfair, because it was temporary in nature and was introduced because of practical reasons. It was done because there were inadequate metering facilities and after endemic boycotts in the townships.³²

Two policies of the Pretoria City Council also became the subject of an investigation in the Constitutional Court.³³ In old Pretoria, ratepayers were expected to pay use-based tariffs for water and electricity supplied by the Council. The use was measured by meters placed on each property. As opposed to this, the residents of Atteridgeville and Mamelodi paid a fixed tariff, regardless of how much electricity and water they used.

The argument before the Court was that the residents of old Pretoria were subsidising the Atteridgeville and Mamelodi residents. Furthermore,

32 *Beukes v Krugersdorp Transitional Council* 1996 3 SA 467 (W).

33 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

it was alleged that the Council took legal measures against those in old Pretoria who failed to pay their taxes to the Council, but that the Council did not do so in the case of the Mamelodi and Atteridgeville residents.

The majority in the Constitutional Court found that the Council discriminated indirectly on one of the stipulated fundamentals when it expected residents of old Pretoria to subsidise the residents of Atteridgeville and Mamelodi. However, it was not regarded as unfair discrimination. To charge tariffs in the townships on the basis of use would be unscientific because not all the suburbs had meters. The dignity of the plaintiffs also was not violated.

However, the selective way in which the Council recovered arrears was regarded as unfair as it had nothing to do with the ability to pay or with financial circumstances. In this instance, the Council could not succeed in proving that the discrimination was not unfair.

DISCRIMINATION AGAINST MEN?

On 11 May 1994 the President granted a pardon to all mothers with children younger than 12 years of age who were in jail on that date. A father with a child who was younger than 12 years was of the opinion that he was being discriminated against.³⁴

The majority in the Constitutional Court judged that it was not unfair discrimination. In South Africa it is mainly the task of mothers to raise children. This places a special responsibility on them and can be characterised as one of the most important causes why women in our society find themselves in an unequal situation. If the decision of the president had been reversed, that he had granted a pardon to men and not to women, it would have been tantamount to unfair discrimination.

The President wanted to grant pardon to the vulnerable people in our society – the handicapped, the youth and mothers of young children. In the past, especially the handicapped and women with young children had been discriminated against.

The discrimination concerns a group, fathers, against who there had

34 *President of the Republic v Hugo* 1997 (4) SA 1(CC).

not been discriminated in the past. It cannot be argued that the President's decision violated the dignity of fathers.

Not all the judges agreed. One argued that the judgment confirmed an old stereotype, namely that fathers cannot raise children and that this violated their dignity as well as their claim to equality – therefore, it is unfair. However, the rights may be limited and under the circumstances the President's actions would be permissible.

Another was of the opinion that the release of mothers with children was praiseworthy, but that it strengthened the old view that mothers are responsible for raising children. This view is one of the reasons why women find themselves in such an unequal situation in our society. The benefit that a few women could gain from the President's pardon does not weigh heavier than the disservice rendered to gender equality. Therefore, the action is inherently unfair.

Section 9 (4)

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

This is an interesting and enriching provision because it shows that discrimination can go further than simply between authority and subject; the citizenry may also not make itself guilty of discrimination. The 17 fundamentals as well as other similar fundamentals, therefore, prohibit direct or indirect discrimination not only between government and subject, but also between ordinary people – thus it also is applicable horizontally.³⁵

Section 9 (5)

Discrimination on one or more of the grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair.

35 Davis 61.

This provision changes the burden of proof when it is alleged that someone is being discriminated against on the basis of one of the 17 categories. This means that a person who stands accused of being responsible for unfair discrimination, has to prove that the discrimination is fair. If someone takes a matter to court on the basis of one of the 17 fundamentals, it is suspected that the discrimination is unfair.

Juveniles complain that certain public places do not allow them to enjoy alcoholic drinks and that they are being discriminated against on the basis of their age. Now unfair discrimination is suspected. The State then shall have to argue that the prohibition was not unfair – something that they certainly should be able to do without difficulty.

SOMETHING TO MULL OVER

Critical voices often are heard: ‘The Constitution contains pretty-sounding words about racism and equality, but in reality it means just about nothing’, or, ‘The Constitutional Court has legalised discrimination through its judgments’.

The constitutional ideal is the ‘attainment of equality’ and the Constitutional Court strives towards ‘substantive equality’. This is an indication that matters are just a little bit more complex than the soap box commentators would have it.

Lawyers have fun with all these legal distinctions. However, we will gain nothing from such distinctions as it is the ordinary people and their views that matter most. Until such time as South Africans, regardless of looks or heritage, show the desire to understand one another and to discuss these matters while directed at the future, the pot shall call the kettle black – the one will say: ‘You are nothing but a bunch of racists’, and the other will say, ‘You are a bunch of new racists’.

THE RIGHT TO LIFE¹



GIVE HIM THE LONG POLE!

‘Arrest them and hang them’, the election poster proclaims. A young man, who could cast his vote for the first time in 2004, had decided just after becoming a new addition to the crime statistics that he was going to vote for *this* party because they best summed up his anger. The fact that after the elections this party has no representation in Parliament shows that in spite of the public’s disgust with the crime situation in the country, it was not the only question enjoying their attention. However, it mirrors the public’s dissatisfaction with the unacceptable crime levels – especially of violent crimes. Time and time again when the community mobilises to protest against violent crimes, pleas are heard that the ‘long pole’, or the death penalty, should be reinstated.

Enthusiasm for human rights can only be sparked with great difficulty in the course of discussions on human rights, because most of the interlocutors have been victims of crime themselves, or know someone who has been a victim.

At one of the occasions when I was speaking on human rights, a young man said, ‘I bet you a bottle of whiskey of your choice, *Oom*, in this Sunday’s newspaper we are going to read about at least two new cases of violent crime – one of them on a farm. What are the functions of all these human rights if you cannot even guarantee the most important human right of all, the right to life? How could you ever have allowed the death penalty to be removed?’

So it goes at every occasion – in discussions, conferences or radio talks.

This anger among the public has shrunk the initial support for abolition of the death penalty. Prominent campaigners for the abolition of the

1 Section 11 – ‘Everyone has the right to life.’

death penalty have amended their position on this issue and are now pleading that the death penalty be reintroduced.

‘No further,’ Francis Bosman, a respected advocate and former protagonist for the abolition of the death penalty wrote recently. ‘The thugs in our community are undeserving to be qualified as “human” ... Rehabilitation in our overflowing prisons is an opium dream and many wardens clearly first have to be rehabilitated also.’²

The most important reason for this position of Bosman and others is that crime will not be curbed unless the death penalty is reintroduced and that without it the public’s safety cannot be guaranteed. They are of the opinion that the death penalty, as deterrent, remains the only way by which matters can be set right.

However, the position of the government and of the majority party in parliament also cannot be wished away, namely that in the lifetime of the current parliament the death penalty will not be reintroduced. To agitate that the reintroduction of the death penalty will stop the wave of crime, well knowing that it is not going to happen now under this government, is to blow against the Southeaster. Therefore, other methods also *have* to be considered to overcome the problem.

NEGOTIATIONS

Bright and early one morning after the umpteenth late night, the small task team from the number of the negotiators at Kempton Park got together, dog tired, to finally settle the stalemate situation surrounding the right on life and the death penalty – it could not carry on like that. Joe Slovo remarked tiredly, ‘Years ago, in Lusaka, we had all the answers. Here we are now, tired to death and we do not know how to go forward.’

It was clear then that no-one wanted to give up – the right to life and the death penalty were too emotional a question and the supporters on both sides would not accept a compromise. ‘Let us write the right of life into the Constitution without any qualification and leave it open for the

2 *Beeld*, 5 August 2003.

Constitutional Court to interpret this right.’ So the term ‘constructive ambiguity’ was born – everyone could claim a victory, and the fight was postponed to another day and another forum. Proponents of the death penalty could say, ‘We did not give in – we are going to put our case to the Constitutional Court. We have so much confidence in our case that the court will admit that we are right.’ Proponents for the abolishment of the death penalty could say the same. There simply was no other way to get out of this emotional trap within the given time-frames.

CONSTITUTIONAL COURT

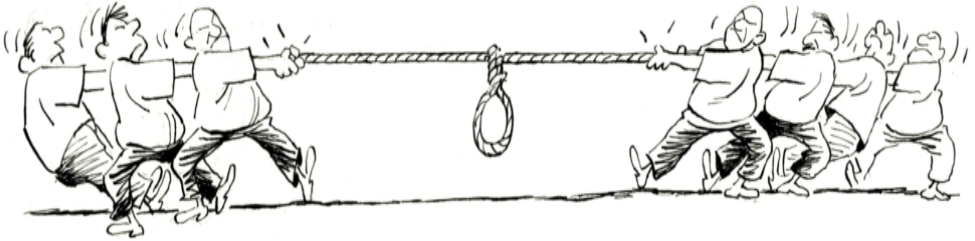
‘Another day’ and ‘another forum’ had come to face the death penalty challenge. The 11 judges of the Constitutional Court were unanimous – there is no place for the death penalty in the new state order. Each judge gave a separate judgment and via different routes they all had come to the conclusion that the death penalty was unconstitutional.

The state has to set the example by respecting the right to life and human dignity, also the life and dignity of the criminal. Life and human dignity enjoy a special place in the Bill of Rights and can be described as the source of all other personal rights. Life and dignity also are in step with the philosophical foundation of *ubuntu*, in terms of which you have to regard the life of another just as valuable as your own.³

Judges, also former Chief Justice Arthur Chaskalson, cannot side-step the debate about crime and the death penalty in media interviews and is regularly questioned about it, ‘My opinion is based on legal principles, not on political policies. However, keep in mind that although it remains high, murder statistics have been coming down consistently since 1995. Also, as yet I have not seen a convincing study that proves that the death penalty is an effective deterrent for murder. But a lot of emotion is involved in the debate. People often are asking for the death penalty out of a sense of revenge. And that is a totally different argument.’⁴

3 *S v Makwanyane* 1995 (3) SA 391 (KH).

4 *Rapport*, 4 April 2004.



One of the latest additions to the Constitutional Court, Justice Johann van der Westhuizen, already had to do a skipping act about the issue even before he could take up his seat properly. 'Many people easily blame the Constitution for crime, saying it is the Constitution which gives too many rights to criminals. Such allegations are without foundation and do not keep reality in mind. For the criminal law system to function properly there has to be a fair and just hearing. The principles of a just trial and the fact that an accused does have certain rights, is not new to the new Constitution. This also applied in our courts before 1994.'⁵

The protection of life is a broad concept with far reaching social implications that go further than the death penalty. It is also pertinent when abortion and euthanasia are considered.

When euthanasia is considered to end the life of someone who is terminally ill, the values surrounding the protection of life and respect for the dignity of the individual definitely will come into play and will have to be balanced.⁶

5 *Rapport*, 18 January 2004.

6 Davis D, Cheadle H & Haysom N, *Fundamental Rights in the Constitution – Commentary and Cases*, Juta (1997) 63.

Abortion is an equally emotive issue and still has to be settled fully. It is a debate between the freedom of conscience and the right to privacy on the one hand and the right to life on the other.⁷

OTHER EYES

It does not matter where in the world you go, at one stage or another everyone talks to you about crime and violence – a little abashedly, but very inquisitively.

Paul Theroux,⁸ prize-winning author of many travelogues, writes in a gripping book of his many interesting experiences during his cross-continent travel from Cairo to Cape Town in trains, buses and taxis. Of course he also writes about the crime in South Africa.

The bus in which he is traveling from Harare, crosses the border at dusk at Beit Bridge. In Mussina, a young woman from Lesotho boards the bus and after a few courteous remarks, she cautions him that 'Jo'burg' is a dangerous place. During the night ride he is astonished about all the lights – nowhere else in Africa has he seen so many lights. They arrive at Johannesburg station at daybreak. He buys a morning newspaper before heading away. The crime reportage scares him so much that he is too afraid to leave the station before the sun had properly dawned. The newspaper stories about murder and rape rattle him. When the taxi drops him off at his hotel later that morning, he is thrilled to still be alive.

His visit to South Africa goes well. A journey to Cape Town, visits to game parks and interesting talks with South Africans make him relax. He is endlessly impressed with South Africa – to him, South Africa is a place where almost everything is working, even the political system. Just before his departure home, he has all his Africa memorabilia – including his flight tickets and other valuables – locked up at the hotel while he makes a quick detour with only the basics such as his overnight clothes and manuscript at hand. On asking for the return of his valuable possessions, he has

7 Devenish GE, *A Commentary of the South Africa Bill of Rights*, Butterworths (1999) 104.

8 Paul Theroux, *Dark Star Safari*, Penguin Books (2003).

to find that they have disappeared without trace. His manuscript is all he retains of his African safari.

A group of advocates were relaxing in their common coffee room, chatting about this and that – cases they were working , court dramas, et cetera. One person told about a criminal case in which he had been asked to defend a few men who were accused of having stolen goods from a chain store. ‘If I win this case, I will know that the system has fallen to pieces – the state’s case simply is too heavily loaded with damning evidence.’

The same little group met again a few weeks later, talking around the same coffee table. ‘Incidentally, what happened to your case of theft?’ someone asked. ‘There never was a case, it was withdrawn because all the evidence was stolen,’ was the astonishing reply.

This example has nothing to do with the Bill of Rights whatsoever, but everything with messy criminal prosecution that disgraces both the police and the prosecuting authority.

The community of Swartruggens made itself audible recently because farm murderers had been acquitted. They demanded that the case is taken on revision urgently. They asked that special attention be paid to how certain police officials acquitted them of their task, and pointed to the lack of commitment on the side of the prosecution authority. Mr Justice JB Shongwe, the trial judge in the matter, was sharp in his criticism of the police for their ‘slipshod’ investigation. ‘It is high time that the police develop a more positive attitude towards their work and that they again study the Bill of Rights as well as the Constitution and take it to heart.’⁹

What is to be done, then, with the criminals who do not respect the rights and lives of others? They have to be arrested, brought before the courts and punished – that is the sober answer. They embark upon their daring and violent actions because they believe that chances are remote that they will be brought to book.

At a conference on crime where the Commissioner of Police, Jackie Selebi, and I appeared, I experienced some of this frustration – he is wont

9 *Rapport*, 5 July 2004.

to fire from the hip, but never before had I been so in his sights as on that particular day.

I sat on a chair in the back when I awaited my turn to speak. Commissioner Selebi spoke just before lunch. He used the opportunity to announce the police's Plan of Action. He called it 'a small war against crime'. He entranced the audience with his strong standpoints, and often elicit enthusiastic applause:

- ◆ He did not expect his police officials to memorise the Universal Declaration of Human Rights.
- ◆ When was the country going to pass laws that are appropriate to Africa?
- ◆ These 'human rights people' have bound the hand of his police officials!

A police general from the previous dispensation got onto his feet and declared that he was so enthusiastic about what he has heard that he almost had the urge to join the Police Service again.

At the lunch interval, many acquaintances came up to greet me with just a touch of willfulness, 'He really lay into yo"', 'Would like to know what you have to say to *this*', 'I am glad I am not the one to reply to him. He really told you off.' It was clearly not popular to be talking about crime and human rights.

The audience waited with courteous skepticism to listen to my side of the matter. To break the ice, I told them how the wheels in the country had turned.

My father had been a policeman. I had been a policeman when Selebi had been a freedom fighter and human rights activist – now he was very dapper in his blue police uniform; the same blue that my father and I had worn. My experience at the Commission had prepared me to understand just how big Selebi's achievement had been when he, as South Africa's Permanent Representative at the United Nations in Geneva, could act as chairperson of the UN's Commission for Human Rights and also to be regarded as one of the most successful chairpersons of that Commission. It was during the Selebi years that South Africa became a signatory to important human rights conventions. That day it was my task to see to it that South Africa respected its international treaty responsibilities – also those

treaties that had been signed in the Selebi years and that were applicable to the police. This made me wonder: Which of us was the human rights activist? Selebi surely was going to remind me of my apartheid past and I would continue to remind him of his successful years as a human rights activist and as a human rights diplomat. I was comfortable in my new role and was planning to continue the good work that Selebi had begun.

My speech addressed other sentiments than Selebi's had. The immediate challenge and question still remained: How was crime to be combated without abdicating from the ideal to promote a culture of human rights?

It had never been the intention that the letter of the Constitution be cast in steel and that no debate would be allowed about it. The Constitution provides for an annual process of revision by a joint Parliamentary committee.¹⁰ Along this route the door is opened for urgent debate about Constitutional matters, for better comprehension of Constitutional principles. Room is also provided to develop in an orderly way a supple Constitution that is sensitive to everyday matters.

This has to happen without doing away with the fundamental values upon which the Constitution is founded. Therefore, it is of material importance to understand those fundamental values; in other words, what non-negotiable values are. The non-negotiables in the Constitution are democracy, the idea of a constitutional state, human dignity and the equality of people. The negotiables in the Constitution and the legal dispensation, with a view to fighting crime, are: Brisker and more thorough legal processes; more severe punishment; stricter and safer custody of suspects and convicts; more thorough police investigation as well as greater cooperation between the public and law enforcers. The non-negotiables and the negotiables dare not pull in opposite directions when it comes down to combating crime.

This process of revision or public debate has to be employed so see which adjustments, if any, are needed to overcome the evil of crime. Par-

10 Section 45 (1) (c).

liament ought to utilise this process in order to point the way. Lawyers, law enforcers, the police, correctional services, the defence force, prosecutors and human rights practitioners should debate head-on and eye to eye inside this forum. The South African community has to participate in this. This is the only way in which the level of debate about combating crime can be lifted. However, the evil of crime will not be dealt with while gossip is doing the rounds that the Bill of Rights as well as human rights practitioners are stumbling blocks in the fight against crime. Experience world-wide has shown that the protection of human rights is not always popular, but that preservation of human rights is an essential prerequisite for political and economic stability.

Should concessions be made to appeals for popular instant solutions such as *bundu* courts, extravagant sentences and excessive powers in the hands of investigating officers, emotion will continue to rule over common sense. It represents a sliding shute to the centralisation of power and the abuse of power.

MAPOGO A MATHAMAGA

This appellation comes from the Northern Sotho proverb '*Ge ole nkwe ke lepogo ka moka re mathamaga*', which means: 'If you are a leopard, then I am a tiger – I am as strong as you are.' Sometimes it is also translated as to mean: 'If you (the criminal offender) act like a leopard, remember: your victim can change into a tiger.' The organisation was established in August 1996 – originally as an organisation that would protect business people and their property.¹¹

Recently, Selebi also launched an attack on whites who made use of the Mapogo a Mathamaga vigilante group.¹² Whites who make use of this group show characteristics of racism and intolerance – the underlying supposition was that crime was committed by black people, he said. He was astounded at how many whites supported this group, including his immediate neighbour.

11 See <http://www.mapogo.co.za>.

12 *Business Day*, 25 May 2004.

The post 1994 years have taught me to read the fine print every time when someone plays the racial card, because sometimes it is true. Racism always makes me cringe, because I have to work so hard on my own prejudices. However, the racial brush is often applied by people who want to trip lightly over complicated facts or when such a person wants to apply the old-old debating trick: when you run out of arguments, create doubt.

There is little doubt that there may be an element of truth in the Selebi statements – there are many whites who make use of Mapogo who are inclined to racism. It can also be said with as much conviction that Selebi has not spoken the whole truth – there are many white people who make use of Mapogo who are not necessarily racist.

During the Commission's investigation into human rights abuses on farms, one police delegation after another gave evidence on how they could not do their work to their own satisfaction because of a shortage of staff and vehicles. In certain areas they were incapable of rendering a 24-hour service; sometimes police offices were closed at night.

One farmer related how his stud cows had been stolen and slaughtered on his own farm three times without a satisfactory police investigation. Their reaction time had been so slow that the police could not make headway at all. Their defence always was that they had no vehicles to drive the 20 kilometres out to the farm. Out of desperation the farmer then asked the police what he was supposed to do. The police official's advice was that he had to join Mapogo.

He consulted his farm workers and they also encouraged him to join Mapogo. However, before the Mapogo could come to the farm, some of his employees suddenly disappeared without reason. A direct result of the police advice and the subsequent events was that 17 farmers in that immediate vicinity joined Mapogo.

It is not known whether Selebi had had a talk with his neighbour and whether the neighbour indeed was a racist. In my neck of the woods there are many friends and family who have joined Mapogo simply because their experiences of crime and security considerations had left them with no other choice. The racial label cannot be applied successfully to them.

However, the rise of Mapogo is disturbing because a country's security responsibilities cannot be privatised. With more small arms in the hands of

security companies than in the joint hands of the police and the defence force, the situation is worrying. Why do the public join these companies? The answer to this question is obvious – they are visible and they react to calls! Selebi cannot each time he notices the emblem of a security company or that of a vigilante group simply interpret that as a gesture of racism or as one of enmity against the police and the state. Rather, it is a cry of distress from the public to be protected and safeguarded.

Talks with observers have shown that without any doubt Mapogo is guilty of serious human rights abuses. Therefore, both Mapogo and the crime situation in this country cannot simply be wished away. However, it is of critical importance that they and other vigilante groups be brought under the law, not outside of it. They ought to be prosecuted for their human rights violations.

Selebi also says that he has never witnessed Mapogo giving a thrashing to or punishing a white person. However, this organisation is not supposed to flog or punish *anybody*. Mapogo members ought to be arrested and punished themselves should they punish any person, regardless of whom or what he or she may be.

After his attack, agricultural leaders strongly rebuked Selebi and pointed out that vigilante groups seldom operated with success in countries where the state was able to maintain law and order. Their final retort was that this vigilante group was not their first choice, but simply their only choice.

It certainly can do no harm to remind Selebi of what an Appeal Court judge said years ago, 'In South Africa, our freedom is being curtailed drastically, ironically not by the state as in the days of apartheid and through unchecked state actions, but because of the inability of state agencies to act to get crime under control.'¹³

13 Edwin Cameron, *Sunday Times*, 8 June 1997.

A STATE OF EMERGENCY AGAINST CRIME?

Political commentators are asking the government to declare a state of emergency in order to deal with crime. They argue as if fundamental national questions can be resolved through declaring a state of emergency. It is not always clear if the proponents of the state of emergency idea know quite clearly what the Constitutional and international requirements are for doing so. It is currently far more difficult to declare a state of emergency than before.

Advocates of a state of emergency as an instrument for combating crime have very high hurdles to clear. It is highly unlikely that facts and emergency measures could be compiled now to satisfy the conditions for the declaration of a state of emergency.¹⁴ The answer to the crime question will have to be found elsewhere.

COMMISSION SCRATCHES ITS HEAD

I remark to colleagues that I have no confidence in the official crime statistics and that these violent crimes are messing up all attempts to promote human rights. No, comes the reply, things are definitely better now. There were times in Soweto when people just knocked on your front door and then explained with a gesture that you had to hand over your car keys. I am told that this was a regular occurrence.

This crime and accompanying phenomenon of violence is a cause of concern to the Commission because it really bedevils the promotion of human rights. Therefore, in an attempt to find sensible solutions the Commission organised a closed meeting to which important role-players were invited to air their grievances. The police, prosecuting authority, correctional services and important non-government organisations working in this field participated.

The aim was to stimulate dialogue and to present an opportunity to all to establish – divorced from official positions – which Constitutional

14 See My rights – suspension of rights, *supra*.

and institutional stumbling blocks, if any, stood in the way of rooting out the crime monster.

This important meeting did not make a single suggestion that even one aspect of the Constitution needed to be amended in order to deal with crime. Sound, practical suggestions were put forward. Furthermore, it was the consensus view of the meeting that role-players had to stop pointing fingers at the Constitution, the politicians and to one another. Fresh, new thoughts were needed on how to deal effectively with crime.

BEHIND BARS

*When you send people to prison, you deprive them of their freedom; you are not supposed to deprive them of their dignity.*¹⁵

If criminals are arrested and punished for their crimes, the question is raised: What, then, happens in our country's 241 prisons? The argument is often heard that the prisons are more like five-star hotels. Far from it, says Mr Justice Hannes Fagan of the Independent Inspectorate of Prisons in a recent report to Parliament. These places have now developed into universities of crime and at this point people are being deprived of their humanity:¹⁶

- ❖ 60 % of the prison population is men younger than 30 years of age.
- ❖ At least ten of the country's prisons are 280 % over populated.
- ❖ 13 000 awaiting trial prisoners are there simply because they cannot afford bail. One such an example is someone who is suspected of having stolen three mangoes, but who cannot pay the R500 bail.
- ❖ Overcrowded prisons lead to frustration, health risks, lack of exercise and impedes the rehabilitation of prisoners.

Fagan believes that serious consideration has to be given to alternative means of punishment since imprisonment definitely is not the only option available.

15 Anna Bosman, Human Rights Commission, Ghana.

16 *The Citizen*, 6 July 2004 and *Beeld*, 7 July 2004.

Christina Landman, theologian of Unisa and regular columnist in Afrikaans dailies, says South Africans 'are so sick and tired of crime that we see jails as our salvation'.¹⁷ She recounts her experiences when she began working as a volunteer in the prisons:

- ◊ 38 beds to 80 people.
- ◊ 60 women in one cell. One toilet. One shower. No hot water.
- ◊ No lights are switched on at night, because water drips onto the lights.
- ◊ A rat had gnawed at some of the blankets as well as the prisoners. (In another article Stephanie Nieuwoudt wrote: 'The rats frighten cats. At night we put blankets under the doors, but they eat the blankets. The rats come in, crawl over us and bite us.'¹⁸)

'I understand that the community is angry at these people for what they had done to society. But has the time not come for us to become angry about what is being done to these people now?' Landman asks.

According to her 'you don't control crime by throwing people into jail. You prevent crime by building up society. You do it by fighting poverty and hopelessness, by encouraging good relations and helping to develop values such as dignity and responsibility'.¹⁹

The cycle of poverty, illiteracy, moral decay, crime, anxiety and depression because of our overflowing prisons is a stain on our society. No-body can remain neutral.

RIGHTS OF VICTIMS

Often, the Commission stands accused that the rights of victims are treated shabbily in the favour of criminals. This point was brought home to me, loud and clear, when a plaintiff related the following story:

'My wife was murdered and the accused was brought before court, was found guilty and is now serving his jail sentence. The state could not

17 *Beeld*, 31 January 2004.

18 *Beeld*, 29 June 2004.

19 *Beeld*, 16 February 2004.

protect my wife's right to life and nothing is being done to support my traumatised teenage son. I am paying for all the medical expenses out of my pocket and I simply cannot afford it any longer. Indirectly, as taxpayer, I am also paying for the criminal who I believe also has a medical condition that comes from the tragedy, but the state pays for his.'

The Commission developed a report on the rights of victims that was made available to the Department of Justice and Constitutional Development. This department, in conjunction with other interested parties, has finalised a Charter of Rights for Victims that, among others, contain the following rights for victims:

- ❖ The right to be treated fairly and with dignity and respect for privacy.
- ❖ The right to offer information and, if necessary, to participate in proceedings, whether during bail applications, the trial, sentencing or during parole applications.
- ❖ The right to receive information on all the services and assistance offered by the state, such as fees for witnesses and protection programmes. Victims are entitled to be furnished with information regarding their rights as victims, and that information with regard to the matter are passed on to them and explained, if necessary.
- ❖ The right to reasonable protection against the accused throughout the process of prosecution as well as to be free of intimidation and harassment.
- ❖ Victims with special needs have a right to support and ought to be treated with sensitivity.
- ❖ Victims have the right to apply for compensation for the loss of property or damage to it as a result of the crime that was committed against them.
- ❖ The right to the return of property that was unjustly taken away from them.

Certainly, this Charter is not the final word on the matter, but it represents a few steps of progress at least.

Recent court cases had a strong influence on the debate about the rights of victims, with far-reaching implications to the state. Negligent conduct by state officials may be pointed out and they may be called to account.

Carmichele²⁰ was cruelly assaulted by Coetzee, someone with a history of violence. At the time of the attack Coetzee was a suspect in a case of rape. Interested parties had tried to no avail to convince the police as well as the prosecutor that Coetzee should not be allowed out on bail or on his own recognisance. He attacked Carmichele while he was enjoying this freedom.

In the Constitutional Court both the Minister of Justice and Constitutional Development and the Minister of Safety and Security received a dressing down, because the police and prosecutors can in principle be called to account for this type of negligent conduct. The Constitution as well as international law protect people against discrimination on the basis of sex and are attuned to protecting the dignity, freedom and security of women. It is important for women to be free of the threat of sexual violence.

Ms K. was raped by three police officials, in uniform, and while they were on duty. The Constitutional Court rejected the state's explanation that the officials had not been occupied in police work when they had raped her, because the court held that the state at all times has a responsibility to protect the public against crime.²¹

FRUSTRATION

The fact that criminals often are not arrested and punished is heading for a serious situation. Every time the police come up victorious in a wild west-style gun battle or when the community chases and hunts down robbers, murderers and rapists, the public cheers – they call it privatised sentencing or privatised death penalty. The conclusion can be drawn that if the community is not secured by the state, they will simply do it themselves. It is a serious matter, because it undermines the essence of a constitutional state and this necessarily leads to more lawlessness. It is a vicious

20 *Carmichele v Minister of Safety and Security and Another* BCLR 2001 (10) 995 (CC).

21 *Me K v Minister of Safety and Security* BCLR 2005 (9) (CC).

circle that causes yet more violence which end in retribution, revenge and reprisals.

The promotion of human rights means, among others, that criminals must pay for their crimes against the community through the application of the law. Indeed, every criminal act represents the disregards of someone else's rights. The impairment of the community's freedom cannot be left unpunished. The victims of crime also cannot be treated simply as state witnesses in court trials without the necessary support.

The government has to be reminded all of the time that the crime situation in our country represents a serious stain on South Africa's report card. Favourable statistics cannot soften the senselessness of violent crimes.

GIVING ACCOUNT



REKENSKAP,
RADIO DISCUSSION PROGRAMME ON
THE RIGHTS OF VICTIMS OF CRIME
RADIOSONDERGRENSE
13 JUNE 2003

MAGDALEEN KRUGER: Good afternoon and welcome to 'Rekenskap', our Thursday afternoon appointment. It is eleven minutes past three. I am Magdaleen Kruger.

At the time, the instructions to the drafters of the Constitution during the Kempton Park negotiations were that the Constitution had to be built on the keystone that everyone in South Africa has to enjoy universally recognised fundamental rights, freedoms and civic rights. Therefore, the Constitution is about much more than a person's individual rights. This is an excerpt from Dr Leon Wessels, now a Commissioner of the Human Rights Commission and, at the time, one of the Codesa negotiators, from his inaugural speech as Honorary Professor in Public Law at the University of Potchefstroom last year.

In the meantime, the Constitution has been negotiated and certified and the requirement which had just been mentioned, is now part and parcel of the Constitution. Every citizen, whether you were a victim or perpetrator of crime at some stage, can now claim the protection of the Constitution and, more specifically, of the Human Rights Charter.

In recent times there have been forceful pleas as a result, among others, of the crime situation in the country, that the rights that transgressors, or criminals then, enjoy in terms of the Constitution have to be looked at afresh. The big public complaint is: the perpetrator enjoys better treatment than does the victim. And even Deputy President Jacob Zuma recently was reported to have said in Mitchells Plain that it is a contradiction that criminals can invoke the Constitution after having violated other people's rights. He is also reported to have taken a jibe at the legal profession,

that is, attorneys and advocates, as though they would be part of the problem because they were prepared to represent criminals and to get them freed by the courts.

This afternoon I am going to listen to what my guests have to say about the situation. Must a fresh view be taken of the Constitution and, should we fiddle with the rights that we have, should the balance be upset a little bit? Less for perpetrators and more for victims? Or is the problem to be found outside of the Constitution?

And my guests are advocate Johan Engelbrecht, a senior advocate from Pretoria and good afternoon, Advocate.

ENGELBRECHT: Good afternoon, Magdaleen, good afternoon listeners.

KRUGER: And then, also, Dr Leon Wessels.

WESSELS: Good day.

KRUGER: Now, the public does not like the Constitution, and this is a generalisation. They say the Constitution protects the perpetrator and not the victim. Are you going to listen to them and reduce the rights of the perpetrators?

WESSELS: No, unfortunately we are not going to do that, Magdaleen, but the fact that people are very concerned about crime because of the evil of crime does not mean that there are no other remedies for dealing with the situation. However, when one listens to the debate, you come to realise that the road ahead has developed a fork.

On the one hand you have those who argue that the Constitution represents the supreme authority of the law, that is, there is a solid set of legal rules that have to be dealt with and according to which we should live. Offenders and violators of those legal rules have to be examined and weighed objectively by the presiding officers. This is the road we must take and we should act within the framework of the Constitution, also when punishing criminals.

The turn-off which beckons, we can see when we look at the actions of vigilante groups. That is an extremely dangerous route. It leads to public

executions, it leads to the amputation of body parts and it leads to loose pronouncements by leaders. It is a route which will make the combating of crime extremely difficult.

KRUGER: At the moment, the Constitution says everyone has equal rights, whether you are a criminal or a victim. So, what many people want is that there has to be a bit of fiddling and that the balance should be disturbed a little, a little more rights for the victims and a few less for the criminal and that this ought to be written into the Constitution. Is it out of the question? It cannot happen? What do you say?

WESSELS: No. Indeed, the victim also has specific rights. We have organised a workshop about the rights of the victim and the result of this workshop was forwarded to the Department of Justice, which is busy finalising it. These are important matters. The victim is much more than a mere witness in the court process and also has to be treated with dignity, has to be informed about the course of the court case and also is open to trauma. Indeed, the whole process begs for attention.

You have to look at the rights of the victim and you also must look at the rights of the person who violated the law. You must find the balance within that context. A single example, this week, yesterday, actually – on the front page of a Cape Town paper there was a headline – 20 times there had been a session of court, but there had not been a single hearing. In other words, the victim, the witness most likely often had to go to court. The judge in that case removed the matter from the roll on the basis that the prosecution first had to issue a certificate that they were ready to proceed with the case before he would take it onto his roll again. Now all these things contribute to what I want to call the gossiping about the Constitution. It simply is poor administration on the side of our administration of justice to postpone a case 20 times and yet not to be ready for it to be heard.

KRUGER: It is not the fault of the Constitution?

WESSELS: It has nothing to do with the Constitution at all, it has everything to do with poor administration.

KRUGER: Something else about the rights, and then I want to put a question to advocate Engelbrecht. A hierarchy of rights, I think you also use the expression in that piece I referred to earlier. Is that not possible? That one has a hierarchy of rights which you write into the Constitution? This one a little bit more, that one a little bit less. Could that not be legal?

WESSELS: Look, the Constitution is moulded in a set of values and the rights as contained in the Constitution arise from these values. However, these rights often have to be weighed and balanced. Rights can be reduced, that is, they can be made fewer, they can be scaled down, but it always has to happen in balance with other rights and the values of the Constitution.

KRUGER: Can the legal process scale down those rights or must it be in the Constitution? Before people such as advocate Engelbrecht can do it?

WESSELS: What can happen, for example, is that the authorities, the Department of Justice, Police, Prosecuting Authority or whoever, can indicate that a certain right should be scaled down. This can be done by way of ordinary legislation. It still happens within the framework of the Constitution.

KRUGER: But the Constitutional Court has to allow that law.

WESSELS: That is quite correct. It is the safety mechanism which exists to ensure that such things don't just happen at will.

KRUGER: Good. Advocate Engelbrecht, let us get to the legal process and the people. The public – and I am generalising now – accuse the Constitution, the rights given to people, and say offenders have more rights than victims. Do you agree that this is so in the legal process?

ENGELBRECHT: Magdaleen, with great respect, I cannot agree with that statement. With few exceptions, no new legal principles have stemmed from the Bill of Rights as far as criminal cases are concerned. What is said in the Bill of Rights was laid down in our Appeal Court years ago. Just not

under the same name of a fair trial or the right to privacy, but it was already laid down. And what the Bill of Rights in reality has done, and more so Section 35, basically is to codify the existing law.

KRUGER: So, you are satisfied. Look, you cannot speak on behalf of your profession, but where you have to deal with this as an advocate, are you satisfied that both the offender and the victim get out of the matter quite well? It is those who do not know the circumstances who are leveling the criticism?

ENGELBRECHT: No, with respect, Magdaleen, I think the Constitution, and especially Section 35, is an equitable provision which gives effect to age-old principles in force in England and in the United States and in Canada. It codified those rights that existed already.

The offender does not have more rights than the victim has. We have to be very careful not to blame the process, that is, the Bill of Rights. How is a case investigated? How is the case presented to court? In other words, was the matter properly investigated?

KRUGER: You say it is not the Constitution. There are enough rights available to all people. I also tested this against other people in the legal profession, and there will be a number of attorneys and advocates who will say yes. Some also say no.

Now, if you say that there is no problem with the right balance, the sharing of rights, why is it that most members of the public, I almost want to say 98 per cent of them, are pointing fingers at the Constitution, saying offenders enjoy more rights? From where does this perception arise, then?

ENGELBRECHT: Then, in order to conduct this conversation sensibly, we must first reflect on which part of the public, in other words, which part of society has this perception? Are we talking about the uninformed person who does not have full knowledge about the facts of the matter? But who reads a little report here and there in the press or hears it on the radio, this or that has happened; or are we talking about the informed person who is fully acquainted with all the facts of the matter? Somebody who was present when judgement was passed?

WESSELS: I think we have to acknowledge that crime levels in our country has taken on such high proportions that people are reacting emotionally to it.

A debate has been carrying on about whether crime statistics should be made public or not. For the purposes of my argument I do not have to rely on that debate or on the absence of statistics.

I simply look at my colleagues and I look at my circle of friends. There is not a single one of them who cannot tell, directly or indirectly, of some or other crime. This aspect bedevils the whole debate about the balancing of the rights of the criminal on the one hand and the rights of the victim on the other. This makes the debate highly emotional and then it bedevils everything.

KRUGER: So, people who directly or indirectly had contact with someone who had been a victim will possibly react emotionally different from people who did not have any contact with a crime situation.

Advocate, you were talking about the people who are not informed, but the greatest part of the public will never be able to become informed to that level. They cannot be at the court and study every judgment, they do not have a legal background, what then?

ENGELBRECHT: Yes, Magdaleen, but may you criticise, then? If you don't know, and we must not generalise and give a general opinion, but we have to look at specific matters. Can I blame the Constitution for the result of a trial if I do not know what had happened there? If I am not acquainted with the facts?

KRUGER: Should it not be expected of the legal profession, perhaps, to communicate more about why there had been a certain judgment? Can something like this happen?

ENGELBRECHT: I know of many judges and magistrates who, when they pass judgment and they do it in Afrikaans or English and the interested community uses another language, ensure that the full judgment is interpreted into the language that the victim and the community will understand.

WESSELS: It is of importance that when a judgment is passed that does not conform to the expectations of that particular community, that the judgment is then explained in such a way that the victim and the specific community understand why the judge had come to his conclusions.

KRUGER: Is it necessary, perhaps, for the victim and the family to be present at judgment?

WESSELS: They must hear the reasoning, they must understand the reasoning. This is the route we have to follow. We must pass sentences on criminals who have committed crimes. The community has to understand why some people are acquitted and why sentences are passed that do not meet their expectations.

KRUGER: It's been the first time that criticism has been levelled at such a high level, as by Deputy President Jacob Zuma. Well, yes, Advocate Engelbrecht, Zuma said you guys should not represent criminals; these are my own words, you know, but he said something like you should not get people who are guilty free by pleading ...; that story. What is your reaction to it? Is it a bit of an over reaction from their side too?

ENGELBRECHT: Magdaleen, I do not know my colleagues' reaction to it, but let me put it very clearly. If that is what the Deputy President had said and that he is of the opinion that criminals have no right to legal representation, let me kill off the myth right now: no advocate or attorney pleads any client free. That is nonsense. What they do, is they conduct the case in accordance with the instructions they receive from their client. He fights the case on the basis of his client's account. But no attorney or advocate can buy facts.

KRUGER: So, if the legal representative is certain and the man or the woman pleads guilty, what do you do then? Are you going to try and get such a person freed if it is a serious crime?

ENGELBRECHT: Then you are still justified to test the strength of the state's case through cross questioning without making a false presentation

to court that the accused had not committed the crime. And you still have the right to test the identity, if the matter revolves around that aspect.

KRUGER: When I spoke to them, someone also said to me you just should not lie.

ENGELBRECHT: Correct.

KRUGER: You may not lie on your client's behalf.

ENGELBRECHT: Yes, therefore, I question Zuma's remarks and I would like to enter into debate with him on the matter. If that is what he means, then most certainly he did not take a look at American law or English law or the Canadian law. And I don't expect such a remark from someone in his position.

KRUGER: As politicians do, he has already begun backtracking and at one stage or another the media would be blamed for quoting him wrongly. I must mention that the media has at times been criticized for not giving the correct information about a court judgment to the public.

And there are very few good court reporters who maintain that context. I think Philip de Bruin was mentioned in one report as one of the few who does. We will continue our talk a little later. I just want to say that we have just learnt that the Reserve Bank has lowered its lending rate by one and a half percentage points to 12 per cent. It is expected that the banks will soon lower their lending rate to the same extent and that will bring relief to people with bonds and other loans. Well, yes, decide for yourself if it is bad news or good news, depending on which side of the line you are on. I do not know if it is good or bad news to you gentlemen.

WESSELS: I still don't think that this good news will undo Deputy President Zuma's ramblings.

KRUGER: Dr Wessels, reaction, then, on what I had said about Zuma?

WESSELS: I read that speech of his, as it had been reported, very carefully. There are elements of truth in it. To the extent that one wants to understand the anger of the public when a criminal claims his rights when it suits him. But what we cannot allow is that an undefined, unfocused debate takes place in the way Deputy President Zuma has brought it up. A few days after his alleged statements were made, he did say that his criticism was not leveled at the Constitution, but at the criminals. This already is an important explanation.

KRUGER: What are we doing about it?

WESSELS: This is the problem that has to be addressed. It has to do with aspects around the Constitution, and we cannot walk away from it. Now, nobody is launching attacks on specific provisions of the Constitution. It is loose talk here and there about bail, it is loose talk here and there about the fact that criminals have a right to legal representation, it is loose talk here and there about the sentences imposed upon criminals. My attitude is that this is too loose, it is too vague, it is not really based on a set of sound facts.

I think that when we look at combating crime, we have to look at the broader picture. The statements that judge Chaskalson made recently are jewels. He says there is a chain of activities in the criminal law process and the combating of crime. The whole system is as strong as the weakest link in it. And in between there is a long chain which we have to study and consider.

KRUGER: Now, I think, Advocate Engelbrecht, that you feel strongly about this. We have just determined that the problem does not lie with the Constitution. Where does it lie then? Is it to be found in the processes?

ENGELBRECHT: Before I answer that question, may I give one example? At present, the bail conditions are under attack. I am telling you, the bail conditions now are more draconic than they had been before the Bill of Rights was implemented. For some offences it is almost impossible to get bail now. And I am especially thinking about Appendix 6 crimes. Those serious misdemeanours of armed robbery and such.

KRUGER: Rape and assault.

ENGELBRECHT: A group gets together to commit a murder or for a gang rape, et cetera. It is much more difficult now. We have to start by looking at the heart of the problem.

KRUGER: Where is this to be found?

ENGELBRECHT: The problem lies, and I do not want to put it as a general rule, but the problem is, among others, with our police force. With our investigating officers who probably are carrying too many dossiers and then cannot give proper attention to the investigation of the case. Then we have to take it a step further.

KRUGER: That is to say, if the criminal or the suspect is arrested. First, he has to be arrested and I think the public also says that they are not being arrested.

ENGELBRECHT: I think unsolved crimes are in the minority.

KRUGER: Is that so?

ENGELBRECHT: In most of the cases the perpetrator is arrested. I do not have statistics, but I can say it from experience.

WESSELS: I just want to raise the point that the victim is now of importance. When the victim reports the matter to the police, what is the environment like in which he or she has to report the matter? Is it a friendly reception at the police station? Is it a person in an emergency situation. Is this person properly supported? Is his statement taken down in a sympathetic manner? There is evidence that ladies who have become victims of rape and sexual offences have to live through a second trauma because of the way in which the matter is handled. Indeed, there is a case to be made out for the sympathetic treatment of a victim. One cannot generalise, but I think this is also what Judge Chaskalson said: this is where the chain begins. Was the investigation into the matter conducted properly?

ENGELBRECHT: Yes, but this does not lie with the Constitution.

WESSELS: Exactly.

ENGELBRECHT: The Constitution protects the victim, but now we go further. The case comes to court. Except for the higher courts, the case usually comes on on the day when it was placed. But in the regional court, in the lower courts it does not come on on the first day. Now the witness has to come, say 70 kilometres to attend court and has to sit there all day and at four o'clock the case is postponed to the next day. He is a working person and the employer already is beginning to raise his eyebrows, because already it is the third and fourth time, and I have statistics to prove it. We can go to any magistrate's court and pull out a case, then we will see how many times it is postponed. Now the victim loses interest. He does not return to court. You cannot blame him. So, we have to restart at the beginning.

KRUGER: Then the victim often is just as guilty of the delay?

ENGELBRECHT: Correct. Or the victim disappears without leaving a name and address with the police where he had filed the complaint. How do you trace him now?

KRUGER: Or he withdraws the complaint?

ENGELBRECHT: Then they have to withdraw the matter. You know, I think all these cases I have highlighted are not being distinguished between properly.

KRUGER: So, who has to resolve those problems now? Look, you are in court. You have to deal with such frustrations. Who should solve these problems for you? The politicians or the civil servants or should the Human Rights Commission intercede or what should be done?

ENGELBRECHT: The politicians cannot solve that aspect. I think we have to return to the drawing board. Police have to be properly trained. There

has to be provision for enough police officials to do policing and to undertake investigations.

And then we have to give training to public prosecutors and state advocates. However, there also are very good and experienced public prosecutors and advocates for whom I have the greatest respect.

KRUGER: Fine, I want us to listen to what Dr Irma Labuschagne, a forensic criminologist of Pretoria, has to say about the matter. Can a little more emphasis be placed on the victim, et cetera? But let us listen to what Dr Irma Labuschagne has to say.

LABUSCHAGNE: It has always been a huge hope of all of us who work in that field: that more attention will be paid to the victim than has been the case to date. It is a very, very important aspect and it cannot be ignored.

KRUGER: Would you say that the offender is now in a better position in South Africa, if one looks at the Constitution and the legal processes et cetera, than the victim?

LABUSCHAGNE: Not necessarily, no. I think each one has to be looked at separately and that we should not actually make comparisons. What I do say is that there are matters such as victim compensation, you know I do not want to compare apples and pears here. Rather, I would like to look into getting a better dispensation for victims. Not necessarily at something else's expense, but we are still lagging behind other countries regarding, for example, restitution or fines for compensation.

Fines go to the state easily and the victim is left high and dry and this is an aspect that needs a lot of attention. Further, where serious harm has been done, the victim's suffering also ought to be heard in court in order that the person who has to pass sentence will have a better picture of what harm is under consideration.

KRUGER: So, if I understand you correctly and if we look at what the public and even legal people have to say, that the offender must have fewer rights. You are changing the emphasis. You are saying: rather give more rights or assistance to the victim?

LABUSCHAGNE: Yes.

KRUGER: Without taking away from the offender?

LABUSCHAGNE: Look, I do not mean the offender has to be wrapped in cottonwool. But I think they have to be heard sort of equally. His side and the side of the victim are equally important.

KRUGER: You have mentioned that people should know of, or should know more about, the victim's suffering?

LABUSCHAGNE: Yes.

KRUGER: That one should do more to give a better dispensation for the victim? What would the upshot of it be?

LABUSCHAGNE: Yes, to make the punishment more constructive. I am strongly behind the idea of victim compensation. If you steal from someone, you may as well work for the rest of your life and compensate the victim himself. A corrective supervision order, would the offender be a candidate to be punished within the community. Often they just have to go to jail. But if there is a possibility that the person remains working within the community, he remains in house arrest, but part of what he earns goes directly to the victim. I like such a punishment a lot.

KRUGER: Would it be possible to improve the system if, for example, one says that the victim should have a say in the punishment meted out by the judicial process to the offender? Or is it too risky?

LABUSCHAGNE: I think it is a bit risky, because a victim can be unbelievably subjective. As far as the punishment is concerned, I do not think one should ask the victim what punishment he would choose. But I think the victim has a right to be heard. The presiding officer will then be in a better position to decide on the punishment.

KRUGER: Let us close the programme with an example. You mentioned to me, when I had arranged with you for today's talk, the case of John Theboes. Please share your thoughts on this with us.

LABUSCHAGNE: Suppose that in our country there had not been a very fair and careful legal system in place, one could have witnessed how an innocent man simply was convicted of a crime he had nothing to do with.

KRUGER: Can you quickly give the background to it. This is the person who originally became involved in the murder of Marike de Klerk when he was implicated by Boniswa, the real murderer. John Theboes was from the Cape, but completely innocent?

LABUSCHAGNE: He was innocent, and through grace we had a careful and fair system which determined that it was so. We always have to remember that if it had not been such a fair and careful system, anyone of us so easily could have become a victim, in the sense of being accused of something and then not being heard at all.

KRUGER: That, then, dr Irma Labuschagne. She is a forensic criminologist who do a lot of work with victims.

ENGELBRECHT: As to sentencing, I support her there. I think we ought to make more innovative sentences or sentence options available to the judge and the magistrate so that he can look at the offender, the offence and the interests of the community and then weigh up the aims of meting out punishment. Within that framework we have to give him sentencing options that can compensate the victim in fitting cases. However, this only comes up after conviction.

KRUGER: Thank you for your participation.

END OF DISCUSSION

FREEDOM OF ASSOCIATION; LANGUAGE, CULTURAL AND RELIGIOUS RIGHTS



ASSOCIATION

*I LEAVE YOU IN PEACE AND YOU LEAVE ME IN
PEACE!*

In a radio interview about Equality and Freedom of Association the well-known radio personality of the chat radio station 702, John Robbie, asked me if his colleague Jenny Crwys-Williams could join the Freemasons. Apparently, Jenny is always asking him prying questions about the organisation. It evidently gives John great pleasure when he tells her that he may never share the secrets of the organisation with her as an outsider or as a woman.

I had never thought about this question, even though the Commission had done an investigation of Equality and Volunteer Organisations. Therefore, I was groping around without a clear-cut answer.

If Jenny is of the opinion that she as a woman is being discriminated against, at first glance it is constitutionally speaking impermissible – the Constitution identifies 17 fundamentals according to which you may not be discriminated against. Sex is one such principle.¹

The next step would be to inform the Freemason movement about the allegation against them and to give them the opportunity to explain why the discrimination should not be regarded as unfair.

According to the Promotion of Equality and the Elimination of Unfair Discrimination Act, a series of factors have to be considered when such a matter is adjudicated:²

1 Section 9 of the Constitution.

2 Section 14 of Act 4 of 2000.

- ◇ What is the context within which the discrimination is played out?
- ◇ Does it affect the dignity of the plaintiff?
- ◇ What is the effect of the discrimination on the plaintiff?
- ◇ What is the plaintiff's position in society? Is the plaintiff or the group to which the plaintiff belongs exposed to such impairment?
- ◇ What is the nature and extent of the discrimination?
- ◇ Is the discrimination systemic by nature?
- ◇ Does the discrimination serve a legitimate purpose?
- ◇ Does the discrimination serve its purpose?
- ◇ Are less limiting measures likely to achieve this purpose?
- ◇ Did the respondent/interrogated person take steps that under the circumstances are reasonable to (1) address the injustice or to (2) accommodate the diversity?
- ◇ Does the discrimination differentiate in a fair and justifiable way between people on the basis of objective criteria?

Years ago, women in the state of Minnesota in the United States felt aggrieved that they were excluded from the Jaycees movement – only men between the ages of 18 and 35 could become members. Women participated in various activities of the organisation, but could never enjoy full membership or the right to vote. The aim of the organisation was to promote a disposition of Americanism and to provide opportunities for personal development as well as for intelligent participation in community activities at national and international level.

After much wrestling in different courts, the American Supreme Court judged that admission of women, with full franchise, would in no way impair the organisation's aims. The exclusion of women impaired their dignity and denied the organisation the opportunity to have greater participation and to listen to more perspectives on questions of national interest.

However, nothing would prevent the Jaycees from excluding people who favoured other ideologies and philosophies from their organisation.

In one of the typical old traditional British clubs where men meet to smoke cigars, to gossip and to talk about sport, politics and the stock exchange, a member told me smugly that Margaret Thatcher, then Prime

Minister of Britain, could visit the club, but that she may not become a member. In the course of time, many of these traditions have quietly fallen away to change.

Certainly, it is still possible to establish exclusive male movements to the exclusion of women. The Welsh Male Choir will pass the test – the aim to organise deep bass and tenor voices in a choir singing definitely is not constitutionally contentious.

However, these matters cannot be dealt with haphazardly. In a constitutional dispensation they can much less be quietly left to the course of time. People want to know where they stand. The Constitution, relevant legislation and court judgments have to be interpreted and digested in order for the old uses to be measured and fitted against firm guidelines. Nobody will make voluntary adjustments without these guidelines.

Whenever the state touches voluntary organisations that are organised on the basis of creed, language, culture or sex, people become hot under the collar. These days, freedom of association is even more complex than the view of the old days had been – that which I claim for myself, I also grant others. So, leave me alone, because I want to be among my own people and I grant you the space to move among your people.

With this attitude, and without taking constitutional consideration into account, nobody will be able to get ahead these days.

One of the cornerstone principles agreed during the constitutional negotiations reads as follows:

- ❖ Collective rights to self-determination to form and maintain organs of civil society shall be recognised and protected on the basis of *non-discrimination* and freedom of association. (My emphasis)

There was no opposition to this principle throughout the constitutional negotiations and, as a result, it was approved in the subsequent certification process.

Freedom of Association, therefore, means that:³

- ❖ As a general rule, individuals will be protected against government or private interference when they establish institutions in accordance

3 See Section 18, 30 and 31 of the Constitution.

with the principle of free association. However, it does not mean that someone has the right to join just any organisation or body.

- ❖ An organisation has a great measure of autonomy to arrange internal matters such as decision-making, membership policy and management affairs without interference by outsiders.
- ❖ There also is space *not* to associate – you cannot force someone to endorse certain persuasions.

A voluntary organisation is an instrument that people can use when they want to act in concert to attain common aims. Among the most prominent voluntary organisations are trade unions and political parties. As groups they make a bigger impression on employers and on the electorate than they would as individuals.

These organisations do not exist in a vacuum, because they find their place next to other individuals and organisations in society.

Many voluntary organisations are religion-related. Religion is a very intimate and personal matter – people believe in what they believe, and the state ought not to interfere with this. The Constitution also guarantees freedom of religion, but the state simply cannot remain sitting with hands folded when people use churches to proclaim hate speech or when humans or human foetuses are sacrificed in the name of freedom of religion or when children are forbidden to attend school. Consequently, even freedom of religion has limits.

The big question is: where do you draw those limits?

Voluntary organisations are the lifeblood of any healthy democracy. Well-organised religious movements, culture groups, trade unions, economic groupings and political parties are important role-players and make big contributions to public debates and in promoting the interests of their members.

However, the aims and subsequent activities of such an organisation in attempts to attain its goals, are of conclusive importance.

A crime syndicate will never be able to claim constitutional protection. The argument that they have a right to organise as a voluntary organisation can never enjoy constitutional protection, because their aims are not lawful. They can try and explain that they function in accordance with the Robin Hood principle, that they do not commit crime to make a profit

and that they share the ‘fruits’ of their labour only with the poor. Such arguments will be to no avail.

For argument’s sake, the organisation that is established to study Zulu literature and poetry, at first glance has praiseworthy aims that ought to enjoy constitutional protection. However, they decide not to allow Johnny Clegg, the singer who has been described as ‘the white Zulu’ because of his knowledge of the Zulu culture and language, as a member of the organisation. In other words, they arrange their internal affairs and membership in such a way that they – in the words of the Constitutional Court – use language and culture as a shield with which to fend off constitutional aims and to undermine human rights.⁴

A closed club accepts a booking by a group of journalists to spend the day at a holiday resort. They have a nice braai under the trees and later the little group moves to the pool where they frolic in the water. Unexpectedly, the manager of the resort insists that a member of the group, the only black person, must get out of the water.

‘Why?’ is the surprised question.

‘You are not allowed to swim here. It is a rule of the resort.’

‘You did not tell us this when we made the reservation, nor this morning when you took our money on our arrival.’

‘Sorry, those are the rules of the resort and I cannot change it. This is a voluntary organisation and we make our own decisions on internal rules and membership.’

‘In that case, we all will leave and we will report you to the Human Rights Commission, to boot.’

This drama played itself out before the advent of the Equality Courts.

A similar voluntary organisation mistakenly thought that it could get away with another such incident, but after these courts had been established it had to pay a fine of R10 000 in similar circumstances.

The Afrikaanse Taal en Kultuurvereniging (ATKV) is accused by individuals of the Muslim faith of discriminating against them because they cannot become members of the ATKV and, therefore, never can qualify

4 *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC).

for a discount at the resorts of the ATKV. Their argument is that they are regular visitors to the Goudini holiday resort and, therefore, want to become members of the resort, but that they do not see their way open to endorse the aims of the ATKV, namely the promotion of the Afrikaans language and culture on a Christian basis.

The ATKV's defence is that their membership policy does not discriminate against anyone on the basis of colour. Anyone may visit their resorts or participate in their projects. However, membership is reserved for those who endorse their aims and fundamental principles, because their members determine their policy and give direction to their projects. Should they accept an open-membership policy, it would water down their principles to an extent where it would be meaningless – with the necessary support, those who held differing views could even change their fundamental principles.

The discount which members receive at resorts is subsidised by the monthly membership fee which members pay and the profit made from the resorts are used to fund projects that were instituted to promote the ATKV's ideals.

In spite of continued emotional resistance, the ATKV's approach will in all likelihood, pass the Constitutional and legislative tests of the Equality Courts.

The Jewish community owns an old age home in Cape Town. Membership of the home is limited to members of the Jewish community. It is done in this way because the food has to be prepared in accordance with Jewish religious uses and the cutlery have to be handled in a specific way. If people of other religious persuasions are admitted, it would make the manner of worship in the home difficult, if not impossible. The organisation does not receive any state subsidy. The aims and activities of this organisations are most likely to overcome Constitutional and legal obstacles.

South Africa's past, built on exclusion and exclusivity, contributes to making matters awkward today. Without a doubt, it contributes to the suspicion and prejudices with which our society has to cope with today, also when it comes down to the exclusivity of voluntary organisations and the reasons behind it, however well motivated they may be.

Repeatedly, when calculated measures are taken with which to exclude people, some members of our community feel deeply hurt.

With the inception of the Tri-Cameral Parliament there were three dining rooms for members – no backwards and forwards visiting would be allowed in *those* dining rooms. This was opposed with determined resistance. After long consultations this measure was scrapped – without any significant change in the eating and visiting trends in those dining rooms. Parliamentarians seldom visited outside their known and intimate groupings. In the new parliament and during the negotiations it also was like this.

I can think of no reason why the broad public will act differently than do members of parliament or the constitutional negotiators. People of the same background, culture and language readily club together.

LANGUAGES



‘LET US PRACTICE UNTIL OUR TONGUES ARE LOOSE, IN ORDER THAT WE CAN HELP HEAL THE WOUNDS OF THE PAST THROUGH OUR BEAUTIFUL, RAW, RHYTHMIC LANGUAGES.’¹

The hourglass is running out for the negotiators, because the May 1996 deadline for the completion of the Constitution is just around the corner. The language clause still remains a stumbling block. Late night finds a small task team putting heads together in search for a solution to the problem.

Moodily, one asks of the other: ‘What is the problem?’

English cannot get constitutional recognition as the only official language. Recognition of other languages with English as the language of record – in the courts, on official documents and official correspondence – will not do. There must be space for Afrikaans too.

‘We are tired of this language struggle you Afrikaners are waging against English in the name of multilingualism. Fact is, other languages always are being snubbed. The promotion of language is a sham to which you pay lip service – it always is just about Afrikaans. We are not interested in the axes you still have to grind against the English. Afrikaans is an important language, but you must understand that just as you will not accept that English is given a special place in the Constitution, just as surely we will not accept that a special place for Afrikaans be created in the Constitution.’

Come, let us create space for Afrikaans as well as the other indigenous languages – English is a world language, it is the greatest common factor among us and will remain standing without special assistance.

1 Matthews Phosa, *Deur die Oog van 'n Naald* (Tafelberg), 10.

The excitement about the new status of the indigenous languages and the special place for the smaller languages, especially, cannot be hidden. One of the participants declares excitedly, 'Just think that my language is now getting constitutional recognition; it is up there alongside English and Afrikaans!'

The language clause reads as follows:²

- ◇ There are 11 official languages that will accommodate by far the major part, deep into the 90 per cent, of the population.
- ◇ The onus is now placed on the state to promote the use of indigenous languages.
- ◇ All official languages enjoy equal status.
- ◇ Municipalities should check on the language preferences of their residents when they develop local policy. It is possible, therefore, to have another policy than that of the Provincial Government or than a neighbouring municipality. They also ought to be alert to the general language construction of the language clause.³
- ◇ National and provincial governments have to arrange the use of official languages through legislation.

Eight years after the completion of the constitutional negotiation process, Naledi Pandor, then in her position as Chairperson of the National Council of Provinces, delivered an address at the first parliamentary conference on multilingualism that was received enthusiastically by members of parliament. It was as though she had used the minutes of the bi-lateral talks of the time in preparing her speech:⁴

- ◇ The promotion of multilingualism has nothing to do with the status of Afrikaans within the South African community.
- ◇ Any appeal for extraordinary status for Afrikaans or any other language will be difficult to justify in a democratic South Africa.
- ◇ It will not be possible to justify the undermining or neglect of any language, including Afrikaans.

2 Section 6.

3 Strydom HA & Pretorius JL, *Journal for Juridical Science* (hereafter Strydom & Pretorius).

4 *Beeld*, 24 February 2004.

- ❖ One of the popular myths in the South African language debate is that multilingualism centres in main around a bilingual paradigm – English against Afrikaans.
- ❖ English and Afrikaans have been at each other’s throats for more than a century and in the process they both had trodden the other indigenous languages into inferiority.

The language debate in South Africa will not be settled easily, because language is something that grabs at one’s heart. The fact that people speak the same language (Afrikaans) does not mean, however, that their hearts are beating warmly for one another.

After the Afrikaans Language Summit, Annie Olivier of *Beeld* asked:⁵ “How do we aim ourselves as to the future of Afrikaans if, apparently, we have not even begun to talk about her past yet? White Afrikaans speakers will have to start asking themselves in whose interest it really is to forget about the past. Certainly, it cannot be in the interest of Afrikaans speaking people that one section of her language community is trying to shut up the others about a matter that is close to heart for both groups and cannot be divorced from their understanding of the language? White Afrikaans-speakers cannot decide on behalf of brown and black that the discussion is over if they have never even asked their language partners exactly what they have to say.”

At a Commission seminar a participant related the following to me:⁶

‘I learnt Afrikaans at school, but I cannot speak it because of my prejudices against the language. I always have seen it as the language of the oppressor. Today, I feel disempowered because I cannot speak Afrikaans. I wish I could speak the language. When Afrikaners make all this noise about Afrikaans, we gain the impression that you wish to remain in the dominant position. It may be just an impression, but you will have to address it. The question is: what are you doing about it? You have the resources and you ought to do something to help people like me, who are positive about Afrikaans now, to master the language.’

5 *Beeld*, 3 September 2004.

6 ‘Equality, Cultural and Religion’, seminar organised by the Commission, 10 December 2003.

Language is mentioned eight times in the Constitution:⁷

- ◆ Section 6 – The status of languages is spelled out.
- ◆ Section 9(3) – You may not discriminate against any person on the grounds of language.
- ◆ Section 29(2) – Right to education in an official language or language where that is ‘reasonably practicable’.
- ◆ Section 30 – Everyone has the right to use the language of his or her own choice ... nobody who exercises this right may do so in a way that is untenable in relation to any stipulation of the Bill of Rights.
- ◆ Section 31(1) – Members of a language community may not be denied the right to use their language or to form language associations.
- ◆ Section 35(3)(k) – An accused has the right to be heard in a language that such a person can understand or, if this cannot be done, that proceedings will be interpreted into such a language.
- ◆ Section 35(4) – An arrested person, someone in detention or an accused have the right to receive information in the language such a person understands.
- ◆ Section 235 – Recognition is given to language and cultural communities.

Too accurate formulation and specific expositions in a Constitution makes for a static document. However, the ideal is that it should be a living document – people should use it and everyone in a position of authority should respect it. There has to be a will to give issue and meaning to the constitutional terms. At this stage, however, it would seem as though this does not apply to the language clauses. Many people do not see it as an urgent priority.

7 Venter F, ‘The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa, 1996.’ Unpublished speech delivered on 9 May 1998 at a conference organised by the National Human Rights Trust and the Konrad Adenauer Foundation.

The challenges around poverty, housing, job creation, integration of state structures and the civil service, the establishment of provincial and local governments with which the government is faced, have contributed to the fact that little attention has been given to the directives on language. The lost place of Afrikaans and the concern of Afrikaners about language usage just do not carry the same weight as the other questions with which the authorities are battling now.

The fact that there is a language policy, but no language legislation as yet, shows that it is not the primary focus of the government. During the first democratic parliament (1994-1999) 789 pieces of racially-based legislation were scrapped.⁸ This alone tells you where the sentiments of that parliament had been.

The Cabinet already has accepted a concept Language Act, but it still has to be tabled in Parliament. In accordance with this legislation, all government departments will be obliged to use six languages, among which are English, Afrikaans, Venda, Tsonga, a Sotho language and an Nguni language.

In the absence of a Language Act, practical considerations often have caused the undermining of Constitutional aims. Small wonder, then, those municipalities are neglecting the constitutional directives and are reverting to old language patterns⁹ or that government departments have become among the biggest trespassers who are ignoring the other ten official languages in the Constitution and are using English only as official language for 'practical reasons'.¹⁰

Afrikaners cannot claim language rights on behalf of the users of other languages – they have to do it for themselves. This is something they do a bit reluctantly, seeing the struggle so many people have just to obtain water and shelter. The official recognition of your language in official documents is not nearly as important as water out of a tap or a flush toilet.

Afrikaans people are the most vociferous as far as language rights are concerned. In the financial year of 2000/2001 only 11 per cent of the complaints receive by the Pan South African Language Board had been on

8 Judith February, 'Human Rights Review: First Decade of Democratic Governance'. Conference organised by the Commission, 10-11 June 2004.

9 Strydom & Pretorius.

10 *Beeld*, 4 Mei 2004.

behalf of African languages. An investigation revealed that just 50 per cent of the participants were of the opinion that the government had to spend more on developing formerly disadvantaged languages. The other 50 per cent believed that the government should make money available for housing and job creation. Therefore, it appears that language development has to be linked to broad development programmes, otherwise it becomes an unaffordable luxury in the face of poverty, a housing shortage and under par education.¹¹

However, there are indications that the need for multilingual communication by the state and other official forums is being brought home and that attitudes are slowly changing, even if only in fits and starts. Therefore, South Africa is not following the example of some African states that seized a policy of monolingualism shortly after independence, usually the language of the colonial power, in an effort to promote national unity and national integration.¹²

The Minister of Social Development, Dr Zola Skweyiya, was interviewed on 1 December 2003, (International Aids Day) on Radio 702 by the television and radio personality Tim Modise. He referred to the ignorance of our people about HIV/Aids and then made the following statement that may have far-reaching consequences for multilingualism: 'Our own people do not understand us when we talk to them about these matters, because we speak in a language, English, which they do not understand.' It is as though he understands what others have said before that 'a multilingual country with a monolingual government cannot be called a democracy'.¹³

One of South Africa's judges-president, Mandla Hlope, recently also spoke in the same vein when he said that there could be no equal treatment in the courts of the country unless all eleven languages were used there. The use of some languages in court to the detriment of others is 'unconstitutional and untenable'. Aspiring judges ought to be encouraged

11 Cynthia Marivate, 'Human Rights Review: First Decade of Democratic Governance'. Conference organised by the Commission, 10-11 June 2004.

12 Strydom & Pretorius.

13 Gerrit Brand of the Multilingual Action Group, *Rapport*, 25 May 2004.

to master at least one of the languages in the divisions where they want to serve as judges.¹⁴

In the deep Northern Cape a farmer told of his farm workers who speak Afrikaans only. 'Many of them have never been in our cities. Therefore, they do not have any frame of reference of the wide world in which we live or of the life of our President. They see him on television, they know who he is, but they do not understand him when he speaks directly to them on television.' He said that local politicians realised the predicament they were in and increasingly were trying to communicate with them in the language of the local community.

At local authority level councillors mostly use English during council meetings because translation services are alleged to be too expensive. In the lobbies people are beginning to grumble, because in order to be an effective councillor you now have to be able to speak English. 'What about a community leader who is not as fluent in English?' one of the leaders asks behind closed doors, but he will not make a public issue of it, because then he speaks the same 'language' as the Afrikaans language drivers and he does not want to be in that camp at all.

On Africa Day, 25 May 2004, traditional leaders discussed at a conference organised by the House of Traditional Leaders the problems of unauthorised initiations that sometimes cause the tragic deaths of young men. For them it is a subject of importance, because these initiations lie at the heart of the African culture.

These vitally important debates all took place in English – sometimes the speakers struggled to communicate in English and then the rest of the speech was concluded in an African tongue. This scene took place in the face of serious allegations that the continued domination of Western culture and the heritage of colonialism has brought about that the African languages and cultures still find themselves in inferior positions.

In answer to the question as to why they do not use translation services, even simultaneous interpreting, the embarrassed reply was, 'We have not thought of it, but the matter will have to be addressed.'

14 *Beeld*, 13 April 2004.

LANGUAGE DIVIDES

An attorney, well known for his fine articles in English in legal magazines, contacts the Commission and has to leave a message. The enthusiastic, but inexperienced and language unempowered secretary is apologetic about the shortcomings of her report: 'I am sorry. He is speaking Afrikaans, so I can't hear (*sic*) what he says.' This question arose automatically: Did the Afrikaans language upholder force a gap for Afrikaans or did he lose a potential friend for Afrikaans?

I listen to a public argument in Afrikaans; the Afrikaans of the person behind the counter of the fast food outlet is bad. The client is angry. 'You have to learn Afrikaans, because we do not live in England!' The one on the other side of the counter smiled embarrassedly. Wish I knew what she was thinking.

The Xhosa-speaking clerk in municipal offices in a town in the Western Cape, however, made it clear at a public meeting what he thought about it: 'How do the heads of you Afrikaners work, then? The Afrikaans client insists on being served in Afrikaans. He hears that I am battling, but he does nothing to help me.'

On the other side of the scale one is astounded by the arrogance of a municipal official who refused to accept a cheque offered by a resident because it was in Afrikaans. He insisted it had to be in English. It is unnecessary to say that the council quickly repudiated him and was willing to accept the cheque completed in Afrikaans.

LANGUAGE UNITES

Often I am filled with wonder at people who have tongues loose with practice across language barriers. Such people often buy unprecedented goodwill.

Louise Eksteen, commanding officer of the detective branch in Kagiso on the West Rand – the only white and the only woman – is making a success of her career. She is able to do so thanks to her knowledge of Tswana, Zulu, Xhosa as well as North and South Sotho. She declares spontaneously, 'To me, Kagiso is a wonderful place in which to work. It gives

me a new estimation for people, because of their appreciation for what you are doing for them.’¹⁵

Her tale is in sharp contrast with the police official who came to the Commission, complaining that she had to take up a forced transfer to one of the deep Eastern Cape townships – she either had to accept the transfer or resign. She wanted to remain in the Police Service and therefore moved on to the new posting, with disastrous consequences for her health – language and cultural differences was a stumbling block and increased her stress to unhealthy levels. She was not capable of rendering proper service to the community.

Why do the authorities not empower such people, for example, by sending them on crash language courses? Whenever diplomats are posted abroad, arrangements are made for them to start learning the language of their destination before their departure.

Surely, a Xhosa English speaking police officer in the Northern or Western Cape is just as disempowered there as an Afrikaans English speaking officer would be in deep Eastern Cape or KwaZulu-Natal. The obstinacy to continue with such transfers, without language empowerment, in spite of local language and culture sensitivities, must have an effect on service delivery.

During a Commission investigation one of the Tswana police officials related how he had written in the incidents book in Tswana. His white colleagues could not understand what he had written and he was brought before a disciplinary hearing. The reason behind his action? He wanted the Commissioner of Police to take note of his frustration that in his environment there had been no transformation in terms of race or language. The Constitution provides for the use of Tswana, but the official registers and statements still are done in Afrikaans and English only for the benefit of his white colleagues who cannot understand the Tswana language.

PAN SOUTH AFRICAN LANGUAGE COUNCIL (Pansat)

The purpose of the Council is to promote multilingualism in South Africa by creating conditions for the development and equal use of the official languages, to develop respect for all languages and to encourage their use.

15 *Beeld*, 12 June 2004.

Pansat can, on its own initiative, launch investigations into complaints received in writing in connection with alleged violations of any language right, language policy or language practice. Any person, body or state institution can be subpoenaed to give evidence in the course of such investigations.

The Pretoria Supreme Court found that the Commissioner for Compensation, which is part of the Department of Labour, was in breach of Section 6(3) of the Constitution and of Pansat Council Law 59 of 1995 by accepting a decision that English would be the Commissioner's only language of communication. Pansat described this court decision as an important milestone in the development of language rights in South Africa. The court case was preceded by drawn-out negotiations during which Pansat had been unsuccessful in convincing the Commissioner to adopt a multilingual policy.

CONCLUSION

During an investigation into human rights violations against the Khomani San community, the community makes my Afrikaans toes curl with pleasure. There on the sand dunes of the Kalahari I asked Oupa Dawid Kruiper what language we had to use with one another. 'English, my friend, is like a .22 hunting rifle. Very fast. It comes in one ear and leaves by the other,' he said in Afrikaans.

In this way, we let the conversation flow and my sensible, but Afrikaans unempowered, colleague had enough common sense not to insist on interpretation there and then. The Commission's report on human rights violations against the Khomani San later was published in both Afrikaans and English. However, the sad part is that it could not be done in Kruiper's mother tongue, which is fast declining and with only a few individuals who can still speak it. A handful of people is fighting for the survival of that language.

There is a place for big speeches in conference halls and for ingenious legal argument in the courts, but the future of languages will not be determined *there*. Multilingualism has to be lived in our parks and on our squares. A little bit of caring for the language of another person results in appreciation for *your* language.

CULTURE



YOU CAN LOVE WHO AND WHAT YOU ARE, WITHOUT
HATING WHO AND WHAT YOU ARE NOT.¹

To be who and what you are, to enjoy the culture of your choice, to visit cultural associates and to organise cultural events/festivities is your constitutional right.² The well known qualification – as long as it does not clash with other provisions of the Constitution – though, is one which always makes the hair of culture boffins, here and abroad, stand on end.

Then, it is argued, my cultural rights all come to nothing, because it is made subservient to the ‘transformation agenda’ of the government, or, as others argue, this Constitution contains too many Western values that has nothing to do with us Africans.

A man fails to understand at all why he is suspected of doing something untoward when the Commission hauls him before court for rape. All he had done was to *twala* a 14-year-old girl with her parents’ consent – that is, he had kidnapped her to marry her. Her supposed husband often assaulted and raped her and later she was returned to her parents in order to teach her manners. The parents gave her the necessary ‘treatment’ and returned her to her husband. When she still refused his sexual advances, he sent her to a spiritual healer who took her to a doctor who, in turn, filed a complaint with the Commission.

His subsequent conviction of statutory rape caused a great commotion in the community, because the practice of *ukutwala* had been part of their culture for generations. The Commission’s stumps were stirred and special efforts had to be made to explain that the Constitution now was the highest law in the land and that many things had changed since the adoption of the Constitution – including the practice of *ukutwala*.

1 Kofi Annan, Secretary-General of the United Nations.

2 Article 30 and 31.

The waiter incurs the displeasure of his employer because he refuses to remove from his wrist the *isipandla* – a piece of cattle skin with hair and all. The *isipandla* is part of his cultural tradition and it protects him.

Just when the Commission was taking this matter under consideration, a few of us visited the Constitutional Court. We were highly surprised, what with the *isipandla* having been brought to our close attention, to notice that one of the esteemed judges himself was the wearer of an *isipandla*. Those of us who were not familiar with the practice then realised that this was not a piece of fringe culture, but that it was a deep-seated practice in certain communities.

Fired up by this experience we ask the employer about the nature of his problem with the waiter's *isipandla*. 'Look, this raw thing stinks while it is drying on the man's arm. On top of it, it is also shedding hair. Visitors to my restaurant will not be happy with such a state of affairs and it is also against health regulations. I have nothing against black people, but he either has to remove the piece of skin or skedaddle.'

Taking into account that people in government and even judges wear the *isipandla* as part of their cultural tradition, he ought to reconsider his position and redeploy the man elsewhere until the *isipandla* has become completely dry and is not shedding hair any longer. Sulkily, the employer accepts the proposal.

Are human rights in Africa cast in a Western mould?

South Africa and Africa are not the only people to believe that their situation is unique and that international human rights, as contained in international human rights conventions, cannot simply and indiscriminately be transplanted onto home ground.

At an international conference in China where human rights practitioners of five continents participated, the theme of 'the Universality of Human Rights and Cultural Diversity' became threadbare from use. These debates strongly reminded me of the constitutional negotiations in South Africa. People always tend towards the known, that which they know, and, therefore, that which is propagated from other sources is accepted with difficulty.

On own soil, and often to my amazement, I listen to arguments that make propaganda for the Africanisation of constitutional rights. These apolo-

gists are in harmony with some arguments which I had to listen to in China. Some Afrikaners and some traditional leaders, too, promote these arguments in South Africa.

During an investigation of initiation practices at academic institutions and the subsequent investigation into cultural initiations during which many young men die annually, both Afrikaner and traditional leaders argued that their cultures and cultural rights were not properly understood. The Commission found that undesirable initiation practices are in conflict with the spirit of constitutional provisions regarding human dignity, equality and freedom and that many questions remained unanswered regarding cultural initiations.

Many matters, such as the position of the woman during *lobola* negotiations and *ukutwala* as it is practised in the Eastern Cape, are examples of unacceptable cultural traditions which will not survive constitutional testing.

The Constitution rejects the domination of one person over another and allows you the freedom to take your own decisions or to act on your own behalf. Traditionalists are in strong opposition to this.

It raises the question – are the practitioners of culture first among equals or simply equal?

Phrased differently – do we pay lip service to constitutional provisions around equality when they are in our favour, but do we resist them when they work against us? Is the Constitution respected when we claim our own rights, but do we choose to forget, for the sake of convenience, of the provisions of the Constitution when the rights of others have claim to respect because of it? There is room for practising your culture, but it is important that the dignity, freedom and equality of others be protected – and this includes the fragile among us: women, children and the aged.

Recently, I was confronted with the argument that I propagated the Constitution as though it was gospel, but that I did not understand the 'African family' or 'African traditions'. The head of the family is a man, only he can speak on behalf of the woman and children who are in his care.

The Constitutional provision is clear – you may practice your culture, but it has to be done in harmony with the Constitution. Culture has to be practised within the framework of the Constitution. Those who promote

respect for the Constitution have to interpret and apply cultural practices with the greatest circumspection and wisdom.

The questions surrounding culture and Constitution are not as clear or simple as the cultural practitioners would have us believe. The world has changed, and so has South African society. Culture is forever developing and reacts to internal and external influences. Societies outgrow and reject patterns of behaviour. This is the reason why women in Switzerland now have suffrage, something which was unthinkable 30 years ago, and it is the explanation why women do not wear hats any more when they attend Afrikaans churches. These days, women are the heads of households, are successful breadwinners, care for children and take important decisions on behalf of those in their care. Time has caught up with and bypassed the African tradition that a woman may not participate in public debate with men.

In accordance with its uses and traditions the Bafokeng tribal court rejected a woman's claim that she should inherit her parents' property in preference to a male family member, in this case her cousin. She had never married and had cared for the traditional family home for years. The Commission entered into discussions with the Royal Bafokeng authority, which reversed the tribal court's decision. It was so decided, because she was the only heir and she had the full right to evict her cousin who, in the meantime, had moved into the family home.

Let us not forget the words of caution of former Senegalese President Leopold Sedar Senghor, to the people who drafted the African Charter of Human Rights. He encouraged them 'not to draft a charter of the right of "the African man" but to capture African values and also uphold universal principles'.

His advice is solidly imbedded in our Constitution under which cultural practices can be enjoyed, but everyone's dignity and claim to equality must be respected.

The final word on this subject has not been spoken, either in South Africa or elsewhere in the world. In our times, human dignity must have a special meaning if it is considered that scholars³ already have argued con-

3 Thandabantu Nhlapo, 'The African customary law of marriage and the rights conundrum' in *Beyond Rights Talk and Culture*, Mahmood Mamdani (ed.). David Phillips Publishers (2000) 136.

vincingly that ‘... there may be conceptions of human dignity that are distinctly African’ and that it is not a discovery of Europe or the United States of America.

The balancing of cultural practice with other constitutional values is involved, because cultural practices are deeply seated in people’s hearts. However, it can never be used as excuses with which to undermine constitutional values.

RELIGION



CHRISTOCRACY OR DEMOCRACY?

Dr Isak Burger, well known church leader of the Apostolic Faith Mission of South Africa, writes an open letter to Arthur Chaskalson, then still chief justice of South Africa. In this letter, he points out the fact that according to statistics the vast majority of South Africans are Christians and that this majority does not agree with the view which the courts hold on gay marriages.

The Constitutional Court's judgments about the death penalty, gay marriages or parliamentary legislation about abortion are often criticised from Christian groups because they do not represent the views of the majority (the Christian community). The argument is often heard that Christians are in the majority and that parliamentary legislation as well as government decisions and court decisions should follow Christian religious convictions.

Of course, this approach is not entirely new.

In 1984, a select committee of parliament had to examine those iniquitous apartheid laws: the Immorality Act and the Mixed Marriages Act. The instruction was to examine the necessity of, and the possibility for, changing these laws without detracting from the fundamental aims around which the laws were decreed.

The Dutch Reformed Church's delegation, under the leadership of the Rev. Kobus Potgieter, held the point of view that the laws could not be improved upon and that they had to remain intact. Some members of the delegation had not come to argue the case, but to intimidate members of the committee. So, the committee was informed that the delegation represented a large church organisation with 1 222 congregations, 1 700 ministers and about 1,5 million congregants, big and small.

At the time, the politicians would not budge easily unless the Church would go along.

My first exposure to other religions, Islam and Judaism, was a strange experience. At the start of formal negotiations at Kempton Park, it was

resolved that all mainstream religions would be treated equally. The spiritual leaders of those religions all would have an opportunity to participate in the opening ceremony. For practical reasons, this ceremony could not be repeated every day – least of all when the various committees were at work. Therefore, occasion was allowed at the commencement of every day’s work, for silent prayer and meditation. This allowed each and everyone to start the day’s work in accordance with personal religious convictions. This still is the practice in Parliament.

During one of the formal events at which the religious leaders of different faiths were officiating, I was struck that Chris Hani was watching it with respect, but also with some amusement. I was curious and wanted to know from him how he regarded these practices, knowing that he had publicly declared himself to be an atheist. ‘Look, I have the right not to believe. By claiming this right for myself, I create space for you and others to believe in whatever you believe. Therefore, you can practise your religions to the full, but you must leave me the space not to believe.’

We have freedom of creed, also known as freedom of religion, that is: don’t force your religion down my throat.¹

South Africa is now a democracy where the majority in Parliament governs within the framework of the Constitution. The Executive Authority and Courts also cannot move outside the Constitutional framework. The Constitution guarantees one the freedom to exercise the religion of one’s choice and also gives one the opportunity to organise one’s fellow worshippers through voluntary association.²

If Christians are in the majority, then, the question arises: why do their convictions not enjoy precedence? Is that not how a democracy works?

Nothing prevents Christians from wooing others to their standpoints or from ensuring that their members are elected to Parliament and to ensure in this way that parliamentary decisions are representative of the points of view of the Christian community.

Fact is, however, that Christians are not a homogenous group and are represented by various political parties. Christians, as represented in the

1 De Waal J, Currie I and Erasmus G, *The Bill of Rights Handbook*, Juta (2001) 289.

2 Section 15, 18 and 31.

different parties, simply do not think on the same lines about issues such as gay marriages, the death penalty or abortion legislation.

South Africa now is a *secular state*, that is, all religions are respected and no preference is given to any one religion.

In a Christocracy or theocracy of any description, such as Judaism or Islam, for example, all laws of parliament, decisions of government and court judgments have to be in line with the interpretation which the religion of the state has of the matter.

Although the Dutch Reformed Church had never been the state church officially, it had come close to being regarded so. In the past, this church took up a very special place in the people's attitude; the conduct of that particular Dutch Reformed Church delegation before the parliamentary committee made that clear.

In the new environment there are distinct avenues left to Christian society: Submissions to parliament, the influencing of and contact with religious fellows in all the political parties in parliament, and also by participating in court proceedings as friend of the court (*amicus curiae*). Public participation in parliamentary and court processes today has become a general phenomenon.

It is disappointing that church leaders are almost arguing on the same lines as the populists within the ANC's sphere – and Burger's letter was a case in point. The populist position is that the courts should reflect the views of the majority on every principle – the judicial authority has to be transformed to bring it in line with the aspirations of the masses. They also allege that some judges on the bench do not view themselves as being accountable to the masses.

Judges don't make the country's laws and their judgments are not weighed against the wishes of the majority of the masses. They interpret the laws of parliament and then apply them to the everyday situations with which they are confronted in court cases.

The Constitutional Court says freedom of religion is:

- ◆ The right to entertain such religious beliefs as a person chooses, the right to declare such beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.³

3 *S v Lawrence* 1997 (4) SA 1176 (CC).

Freedom of religion as a constitutional right means, therefore, the right to choose a religion on the basis of conviction, to declare it openly and to practise it. Of course, this is not the end of the debate, because this right often has to be balanced against other rights when the rights clash with one another or when a right possibly should be limited.

Freedom of religion cannot be used as a shield behind which to cherish constitutionally contestable practices.⁴ So, for example, the preaching of hate, the practice of torture or slavery, even if it is done in the name of religious convictions, will not enjoy any constitutional protection.

An unexpected call from the *platteland* and an equally unexpected question: ‘What is the Commission’s attitude regarding pastors who preach against homosexual men?’

‘Well, if it is done in terms of the church and their religious convictions, namely to practice freedom of religion, it is in order.’

‘Does that mean that they can say just whatever they please?’

‘No, for instance, they may not insult you and they may not have a campaign against you and in that way discriminate against you. They may say what their religious view about homosexual men is, even if it is disapproving, but they may not, for example, launch a campaign against you for you to be excluded from public posts, facilities or functions.’

In this case, there was a campaign that the men should not be allowed to visit local cinemas.

The Constitution cannot prescribe what a church should believe and also not who they should accept as ministers – gays in the Dutch Reformed Church and women as ministers in the Reformed Church, female priests in the Catholic Church and only men as Jewish rabbis. Therefore, churches can arrange their matters internally in accordance with their religious convictions. Should they enter the public domain by running old age homes, church schools and the like with tax payers’ money and in terms of their religious conviction, then the provisions of the Constitution come into play – you may not discriminate against any person. Such activities then will have to be financed without being subsidised by the rate-payers if they want to sidestep the provisions of the Constitution.

4 Section 31.

A seven-year-old boy's application was refused by four schools because the religious convictions of the parents were unacceptable to the schools as they clashed with the views held by the majority of those in the school. After the Commission as well as the Minister of Education entered the fray, the boy was placed in the school of his parents' choice.

Mrs Thumane, a widow, lived in a rural area administered by a traditional authority. After her husband's death, the authority demanded that she subject herself to certain traditional practices. Those practices clashed with her religious convictions. When she refused to subject herself to them, she was put under house arrest. Her freedom of movement, freedom of religion and freedom of association was violated. After a prolonged battle and tough settlement negotiations between the parties the traditional authorities relented and lifted the restrictions they had forced upon her.

Students of the Seventh Day Adventist Church do not want to write tests or examinations on Saturdays – it is against their religious convictions. Universities are prepared to make special arrangements: the students will immediately qualify for a supplementary exam or test. The students refuse to budge; they are being discriminated against because other students get two opportunities to pass – the first and then a supplementary examination as well. In their case, there is only one examination, the supplementary exam. The feeling is that the arrangements are practical, reasonable and justifiable and that the university is doing its best to accommodate the students and have no intention of discriminating against them in any way.

In England, a certain Stephen Copsey lost his work because he did not feel free to work on Sundays. After consulting with the trade unions, the employer had decided to have shifts on seven days of the week because they could not meet an increased demand for their product. Copsey did not want to comply with the majority decision and also refused alternative work offered to him. His position was that England was a Christian country; the monarch was the head of the Church of England and he expected, therefore, that his views on Sunday work should be respected. The labour tribunal did not agree with Copsey. They found that the employer had used the correct procedures. Also, Copsey had been free to resign from his position.

On the European continent the debates about freedom of religion have reached boiling point. France recently adopted legislation which pro-

hibits learners from wearing any religious symbol on school grounds, no matter if it is a Christian cross, a Muslim outfit or a Jewish cap.

In New Zealand, a court recently forced a Muslim woman to remove her traditional face covering when she had to give evidence in a court case. The court found that she had to show her face to the judge, the legal practitioners and the female staff in court, but not to the public, because the defence team wanted to see her reactions when she gave evidence. Although the court had been of the opinion that it still would be a fair trial if she had to give evidence dressed in her traditional garb, the defence had a legitimate expectation that they would be subject to normal court procedure.

It is clear that respect for others does not mean that you have to distance yourself from your convictions or that you cannot promote them. There still are many potholes in the road ahead that can only be bridged by cool heads. That will be the case especially when groups organise on the basis of voluntary association and when questions about possible discrimination against specific religious practices arise.

It can never be expected of people to believe in what they do not believe at all, but that which they believe also cannot be granted space so as to create an atmosphere that is ripe for conflict.

POLITICS AND CIVIL RIGHTS



FREEDOM OF SPEECH¹

THERE IS ONLY ONE WAY IN WHICH TO ENSURE THAT THE PEOPLE WITH WHOM YOU AGREE CAN HAVE THEIR SAY AND THAT IS TO SUPPORT THE RIGHTS OF THOSE WITH WHOM YOU DIFFER.²

In an era when children had to be seen and not heard, freedom of expression was the victim. That generation also was subjected to compulsory military service, when you feared the corporal more than the general, because the corporal's word was law and no backchat was tolerated.

The pre-1994 years were not only undemocratic in the broadest sense of the word, but one of the treasures of any democracy, the freedom of speech, often was the victim. The authority of parents at home, of the school or of the university were seldom challenged in debate. The art of inquisitively asking probing questions was never really learnt or mastered, as it was much easier to excommunicate the renegades than to argue with them.

However, today you may say whatever you want and ask, 'Says who?'

On a talkshow on Radiosondergrense, Lynette Francis wanted to know from me what the difference was between freedom of speech and hate speech.³

WESSELS: The definition of freedom of speech is reasonably easy. It is, namely, to grant an individual the right to take up a position or standpoint and to propagate it through the media, through publication, through scientific publications, through academic publications, et cetera. The basic principle,

1 Section 16.

2 Eleanor Holmes Norton.

3 March 2005.

therefore, is: say what you have to say, speak your mind, speak as much as you want and promote your point of view.

Freedom of speech embodies the idea of an open society where people can debate with one another when they differ on matters. South Africa has a history and against that background you can exercise your right to freedom of expression, but there are a number of things you cannot do. For instance, you are not allowed to promote war. The minute you promote war, you are taking the freedom of expression too far. You also may not instigate or promote violence. The minute you do that, you are expanding the freedom of expression principle too widely. Also, you may not preach hatred that is based, for instance, on race, ethnicity, sex or religion, to mention but a few examples.

Therefore, say what you want, but do not propagate hatred. Hate speech that causes harm to anyone or that incites people to cause harm is unacceptable. Initially, the Commission said you had to interpret this instigation to harm narrowly, namely physical violence or physical harm. This was the finding after 'Kill the farmer, kill the boer' had been sung at a public event. The Freedom Front was unhappy with this approach and



took the matter on appeal. Another panel of the Commission then investigated the matter and found that you could not only look at ‘causing harm’ in the physical context, but you also had to see it in the broader context, namely psychological harm. As far as ‘Kill the farmer, kill the boer’ is concerned, you have to accept that you are upsetting Afrikaners when this slogan is chanted. You make them feel that they are not part of society. This is the reason why the Commission now regards this slogan as hate speech.

FRANCIS: We are a very young democracy and many of us are not really used to these new rights we have. Now, all of a sudden, you are told that you can say whatever you want, as long as you do not cause affront when what you say borders on hate speech. Now, if you never have had certain powers or rights and you do not know where the limits are, then one is going to begin to scratch-scratch, shift-shift.

WESSELS: That is true. That is the way it is with a constitution and the rights it contains – you have to impart content to it. In this regard the Indian constitution is very interesting. One of the reasons why that constitution is surviving, especially those aspects dealing with the freedom of religion, is the fact that the authors of that constitution had done so in the context of the country’s history. As they move forward and grapple with one another on these issues, they impart more content to it.

One of the guiding judgments of our Constitutional Court stated that freedom of expression was one of the most important building blocks of any democracy.⁴ Like any other right, this right also has limits. Rights have to be balanced and, therefore, you cannot say that the freedom of expression is the most important right and it has to enjoy priority over all the other rights. It can never be more important than the constitutional values of human dignity, the aspirations of equality and freedom.

Leave the Constitution aside for a moment as though we were living in the pre-1994 years. You could say whatever you wanted, but you were

4 *S v Mamabola (e-tv), Business Day and the Freedom of Expression Institute Intervening* 2001 (5) BCLR 449 (CC).

not allowed to violate my good name or character. If you did so, I could bring you before the civil court. Then, already, freedom of expression had known limits, albeit different limits to what we now know. Those limits are still alive. Therefore, I can still haul you before a civil court for libel.

In our present constitutional setup we have 27 rights of which the freedom of expression is one, neatly defined. What are our aims with these 27 rights? We want to form a society where people respect one another, acknowledge one another's dignity, treat one another on an equal footing and where you also keep in mind one another's aspirations to freedom.

These values come into play when there is a clash of rights and you have to balance those rights.

FRANCIS: Do we leave enough room for difference of opinion, whether we agree with it or not?

WESSELS: Our society often excels at toy-toying when claiming its rights, but we are not always equally at home in respecting another's rights. We are good at telling one another off, but we are not proficient at debating one another. We still are not good listeners.

Freedom of expression means, therefore, not unlimited or irresponsible expression and speech. Words are often uttered that clearly are not acceptable forms of speech, but they do not qualify as hate speech. The threshold for qualifying as hate speech is high. Although a slogan or utterance may not qualify as hate speech, it may not be language that is conducive to good relations in the country. The term which the Commission coined for this is 'unacceptable language or action'.

A well known car manufacturer placed an advertisement in several magazines. It shows a woman with naked breasts that were pointed in a certain direction. This, apparently, was caused by the speed of the vehicle that had driven past her. The Commission filed a complaint with the Advertising Standards Authority who immediately banned the advertisement because women's right to dignity in this case outweighed the manufacturer's freedom of expression.

Mr HN Jansen van Rensburg decided to attend a match in Durban when the World Cup Cricket series was being played in South Africa. He

took along the old South African flag and started waving it in the course of the match. Oh no, said the organisers, this flag may not be shown *here*. We have agreed with the sponsors, and it is so stated on the ticket, that only certain flags and symbols may be shown, because we want to give our sponsors maximum exposure. The Commission found that nothing had prevented Mr Van Rensburg from showing his flag outside the stadium gates, but when he had purchased his ticket he had committed himself to abide by the conditions that had been set. Therefore, he had voluntarily relinquished his right to expression inside the stadium. The organisers' limitation was reasonable and justifiable.

Arguments often start up and then words are used that are unfitting – freedom of expression does not mean licence, now does it? This right has to be exercised responsibly and therefore you cannot always say exactly what you want and in the way you want and where you want.

In a clearly political feud General Bantu Holomisa of the United Democratic Party filed a complaint against Mr Ngconde Balfour, then Minister of Sport and Recreation, with the Commission because the latter was alleged to have said at a meeting of the United Cricket Board that he would rather watch the black players Paul Adams and Makhaya Nitini than white players such as Mark Boucher and Jacques Kallis. Holomisa was of the opinion that Balfour had been guilty of hate speech.

If the words ascribed to Balfour were correct, it will not qualify as hate speech, however these words are totally inappropriate. Without placing a damper on public debate, the Commission cautioned that public figures should refrain from making such insensitive remarks.

The results of a survey show that most South Africans do not accept degrading, racist ways of debate.⁵ In total, 74 per cent of adult South Africans indicated that they regarded 'kill the farmer, kill the boer' as hate speech. This was the position taken by 68 per cent blacks, 86 per cent whites, 63 per cent coloureds and 83 per cent Indians.

One of the major results of this survey was that 75 per cent of the people questioned believed that people who made themselves guilty of this type of degrading behaviour should be fined or should even be jailed.

5 *The Star*, 1 December 2004.

Whenever racism is mentioned, people's blood pressure rise and they are ready to do battle. When the Commission received complaints against certain newspapers about racism and decided to launch an investigation into racism in the media, everybody, across language and colour lines, shouted blue murder. Cutting and sharp remarks followed – this was the end of freedom of expression. How dare you take on the papers and accuse them of racial prejudice? So the media choir complained.

After the completion of this investigation, the media's about-turn reaction gave cause for much inner mirth.

Die Burger's spokesperson congratulated the Commission on the report and announced that all the recommendations were accepted. Among others, these recommendations also recommended that journalists should receive more exposure to the cultural diversity of our society and that aspiring journalists had to be trained in the workings of the Constitution and the human rights dispensation of the country.

The editor of *Business Day* – one of the biggest critics of the investigation – wrote the following five years after the investigation:

With hindsight, it was a beneficial process. Editors, particularly white ones, were forced to pay attention to aspects of their work which, while apparently bland on the surface, could be hurtful to black colleagues and a black market. While many were defensive and sometimes combative in testimony to the commission, the fact is that real lessons were learnt on all sides of the media education – journalists, readers and advertisers.

Freedom of expression does not mean that you have to agree with everything that you hear or read. It also does not mean that you must ignore pronouncements with which you do not agree, nor that you must try to silence them. You can have your say, but you have to remember that your opinion is not the only one around and that the other person also has a constitutional right to his opinion.

ACCESS TO INFORMATION¹



*CAN A POLITICIAN SURVIVE IF HE DOES NOT
DELIVER ON HIS PROMISES?²*

Present-day news reports about people who are protesting and throwing stones as in the pre-1994 years have caught many people off-sides. One of the reasons for these protests is the fact that people do not know what is going on in society – they simply want to understand what is happening, and why. People are searching for answers. So, they want to know what have become of the promises of a better life? What is the status of the local authority's 'service delivery' programme?

During a visit to India by one of my colleagues the people over there inquired from him time and again why South Africans used the right to protest in order to gain information instead of using the right to information. Afterwards, the Commission did a presentation for senior officials in the Eastern Cape and my colleague then relayed this story. He also informed them that in future he was going to tell the people (those whom we see protesting on television) how to use the right to information to their advantage.

The shocked officials reacted that he did not dare do it, because he would be guilty of incitement. His cold answer simply was: 'No, I am not going to whip up their emotions. I am going to teach them human rights. You officials are the ones who should get your house in order.'

At an international conference in Mexico where the right to information came under scrutiny, I had the opportunity to rub shoulders with the Indian delegation and I questioned them on their views of this right.

'Look, this right to information is a *people's right*. The people want to know how the state is spending their tax money. It is *their* money and it represents *their* claim to development. They also want to know what the

1 Section 32.

2 Indian wisdom.

officials are doing with the promises of the politicians. A politician that cannot deliver on his promises cannot survive. Therefore, we put the questions to the bureaucracy and then we go and test the replies at grass-roots level with the people. Terrible things happen. The government promises to build five dams in a certain region. Corrupt officials only build four and put the money for the fifth in their pockets. This transgression is only discovered years later when people could not make head or tail of the matter.'

In reply to a question addressed to the Information Commissioner of Quebec in Canada about what people would do if this right was taken away from them, he gave this surprising answer: 'The people will rebel. They know the law and because they are inquisitive, they will feel very deprived if they cannot ask questions and if they don't know what is going on in government circles.'

In the course of a corruption scandal in Canada one of the main figures in the drama denied ever having known of or having taken part in the corrupt events. Someone, who made use of the right to information, then applied for access to the table plan for a dinner where the corruption plot had been hatched. The plan proved that the person had, in fact, been present at the dinner.

Nobody who had participated in the Kempton Park negotiations would ever have expected that the establishment of an information dispensation would take such a long time. This principle provides for access to information ensuring open and accountable administration at all levels of government. This is a direct result of the closed society which we had in the pre-1994 years.

One has to smile when thinking back on all the 'importance' that used to go hand in hand with such secrecy. Whenever speakers were at a loss for answers during closed information sessions, a plea usually went up 'to trust the leaders, because the information cannot be shared with the general public'.

During the certification process the Constitutional Court did not regard the right to information as a basic right, but only as a right that was important to ensure good governance.

This argument does not please everybody. Much has changed in the world since 1948 when the Universal Declaration of Human Rights was

adopted. The technology and information explosion – there were more new telephone connections made in sub-Saharan Africa in the first few years of the new century than in all of the 20th century – have caused people to take a fresh look at the right to information. This right definitely has evolved into a basic right.

The idea of open and accountable government was imbedded in the Constitution right from the start, but it had to wait until 15 February 2002 and the Promotion of Access to Information Act, which brings this right into effect, before it could be implemented fully.³ It had been a long and arduous road to have brought the right to this stage. The complex nature of this right and of the legislation are some of the reasons for the delay.

The old-world phenomenon that governments and officials are not keen to share information with the public soon came to nestle down even in the post-1994 years. In 1993, when the constitutional principle was accepted, the ANC was in opposition and wanted to gather as much information as possible – they were the seekers of information. After 1994, however, they became the suppliers of information and were no longer as keen to share information with everyone. It happens all over the world: When you are in opposition you want to know as much as possible, but when you are in government you want to share as little information as possible with the public.

Recently, experts indicated that the United States government had complied with three million requests for information in one year – the highest level in the country's history – but that at the same time it had created 14 million new secrets.

In South Africa the right to information is regulated by the Promotion of Information Act. It is expected that this act will promote the constitutional values of openness, transparency and good governance. Further, it has to enable people to be informed when participating in the political debate.

The right to information goes much further than the traditional meaning that was linked to it during the period of conflict and struggle. Not only must the atmosphere of secrecy that was such a strong characteristic of the

3 Act 2 of 2000.

apartheid state be exposed to this new, fresh air, but it will also impact on the private sector. Information in the hands of employers, credit bureau's, insurance companies, banks and financial institutions has a tremendous impact on people's lives. The state also may procure information from the private sector should such information be needed for the protection of the public's rights.

In Canada, a community obtained valuable information from both private and public institutions regarding their security and traditional fishing rights when a river flowing through their region suddenly was dammed up without prior consultation.

Jakkie Wessels of the Justice Department's Training College recently argued that a student who had been unsuccessful in a High Court application to get a copy of his marked examination report, could have succeeded simply by utilising *this* law.

The Commission has to report to the National Assembly and make recommendations about the functioning of this law.⁴ It is a big challenge to shift South African society from a culture of secrecy and bureaucracy to one of transparency and accountability.

The prejudice against responsive and open government is not limited to officials of the former dispensation, as some would have us believe. The hostile reception that the Commission and non-governmental organisations receive when promoting the right to information, is cause for amazement. When the Commission explained the right to officials in the Free State, one of them confided in us over tea, 'Everything is working very well here in the Free State. Leave us alone and return to Johannesburg. Our libraries are functioning properly. There people can find all the information they need.'

The unrest that broke out in many Free State towns about local government is striking proof that the people did *not* find the information they wanted in the libraries – if, indeed, there had been libraries at all in the townships concerned.

It is important that the citizenry is informed about their right to information and that *this* legislation can work in their favour. A remark which

4 Section 84.

referees often make during rugby matches definitely is valid with regard to this right: 'Use it, or loose it'.

Through clever use of this legislation, the public can put questions to the bureaucracy that are as penetrating as any that members of Parliament can direct to ministers. To obtain information, is to obtain a little slice of government power, because you can use that information to influence decisions and to become involved in informed debates about issues that affect you.

Findings of the World Bank ought to spur on South Africans in this regard. They tried to establish what the connection was between transparency and good government and put the searchlight on 104 countries. In countries where good governance and human rights were respected, there was little corruption, if any, with strong economic growth and prosperous citizens. The opposite was true, as well. On this achievement chart North Korea fared the worst and Sweden the best.

In Sweden, with its age-old tradition of the parliamentary ombudsman who assists in combating maladministration, Richard Calland of the Open Society Advice Centre (ODAC) relates how in the blink of an eye he and a colleague could get the correspondence between the South African and Swedish heads of state for perusal. This was possible because the responsible official could see immediately that the information was harmless and he then activated a very brisk process to have the documents reclassified in order to make them accessible.

However, this is in sharp contrast to the experience of others in South Africa and of people elsewhere in the world.

Recently, a researcher battled for three years – at a cost of R18 000 – to get hold of a document that was not classified as 'secret' from the North Atlantic Treaty Organisation (NATO).

The government and South African officials have to understand that open administration can work in their favour.

After the tragedy of 11 September 2001 in New York and the subsequent investigations, experts say that according to information obtained from one of the accomplices in the attack, the attack definitely would have been postponed, if not totally cancelled, if certain information to which the American securocrats had access, had been made public beforehand. However, for a country where the oldest classified document is

one of American troop movements in 1917 which, until recently, still remained coded as 'secret', it may be too much to ask. It just points to the tendency to lock away state information in safes even if it is totally useless, and that this inclination is not easily turned around.

South Africa has to take care, or we will be walking the same road and relapse into the morass of secrecy. The more secrets you have, the more locks, bolts and soldiers you need to safeguard those secrets.

JUST ADMINISTRATIVE ACTION¹



This right affords me much pleasure. It means, among others, that you *have* to listen to the other side (*audi alterem partem*) before taking a decision in which the other person's interests come into play. It is amazing how a new picture unfolds when this is done.

Complainants approach the Commission with much self-confidence and then want decisions to be taken in their favour, right there and then, without giving the person against whom allegations are being made any opportunity of reply.

An important politician makes allegations of misconduct against senior police officers. It sounds serious and at first glance (*prima facie*) their actions are unacceptable. She is reluctant that the other side should be given an opportunity of giving his version of the matter. When the men arrive at an internal disciplinary hearing with legal representatives who put awkward questions to the politician, she now has to testify under oath and another picture becomes evident. The politician is back on the phone to the Commission – what is going on? She is the complainant in the matter and the process is making her appear like the thug in the story. The Commission's answer is simple: 'Sorry, sister, your allegations have to withstand the test of daylight and one way of doing it is to test your version through cross examination and by listening to the other side of the story as well.'

After the hearing, it is clear that none of the two sides comes out of the dispute untarnished.

Learners call the Commission anonymously, complaining about unacceptable questioning and disciplinary practices at a school after a learner committed suicide. This is followed by a call from the deceased's father.

1 Section33.

At first, the school is reluctant to share their version of events with the Commission. 'We only speak to you in court.' The Commission replies: 'If you want to make a legal battle out of this, we will gladly see you in court.'

The Commission persuades the Prosecuting Authority that we do not want to interfere in the usual post mortem, the process which determines whether someone is criminally responsible for the learner's death. We simply wanted to determine if there had been any human rights violations.

Armed with the Prosecuting Authority's approval and after a light demonstration of power when we revealed all the arrows in our legal quiver to the school's legal representatives, we persuaded the school to retreat from its position and to co-operate in our investigation.

It appeared that the learner, together with some other learners, had been using alcohol on the school grounds. After intensive questioning on different occasions by different teachers he had been subjected to a 'disciplinary hearing' that almost had been an inquisition. He was subjected to further questioning by six teachers without any assistance for him from any person. There had been no real attempt to establish his version of events, but rather one to wring a confession out of him. No minutes were kept of the meeting; days later someone made a few notes about it.

Without any proper explanation the learner was later informed that he had been suspended from school. The school allowed that there may have been a misunderstanding about their intention with the suspension – that he would be allowed to complete his academic year, but that the following year he would not be allowed back at the school.

The principal had realised that a misunderstanding had arisen, but his representative who was to relay the 'softer' version of the decision, could not trace the learner at the hostel. It was evident that no energetic attempts had been made to find him. They then let the matter rest until the next day. That night the learner committed suicide.

The school principal admitted that the investigation, the method of questioning, and punishment had not been conducted as a fair process.

Every aim of the right to 'just administrative action' was undermined by the process followed.

The aim of Administrative Law is to regulate state authority and to ensure that the person who exercises the power does so in a just, fair and equitable process. These fundamental principles are ordered through the Constitution and relevant legislation.²

Just administrative action revolves around the control of state authority in order to ensure that the civil service is indeed in the service of the public.

On the one hand, civil society has the right to fair administrative action and every person whose rights are affected by administrative action is entitled to, among others, written reasons for the decision. In this way, the doors are opened for a closer investigation and the state administration is forced to defend its decisions.

Even when application is made for a state pension an explanation can be insisted upon if it is denied. This is an opportunity that the public has to seize. By doing this, we are assisting in building a culture of administrative responsibility.

The courts have already indicated that refusal to supply reasons undermines a person's right to fair and just administrative action.³

On the other hand, the state administration has the constitutional obligation, among others, to strive to achieve the following values and principles:⁴

- ❖ A high standard of professional etiquette.
- ❖ The economic and effective utilisation and application of resources.
- ❖ Rendering services without any prejudice.
- ❖ Encouraging the public to participate in shaping policy.
- ❖ Public administration should be accountable.
- ❖ Transparency must be promoted by providing the public with timely, accessible and correct information.

The control of state authority had earlier depended on judicial review. The principles that had formed the basis for judicial review – that the

2 Section 33 and Act 3 of 2000.

3 *Transnet Ltd v Goodman Brothers* 2001 (1) SA 853 (SCA).

4 Section 195.

state had to act in good faith and the decision-making process should be lawful – had been embedded in the common law.

This principle is now enshrined in the Constitution, and is aimed at making the state administration as well as the law controlling it more user-friendly.

School mates and school masters

I told the story of the suicide tragedy at the school to one of my old school mates when we ran into each other between the shelves of a super market. An old schoolmaster, who always had been quick to use the cane when we had been up to mischief in the hostel, while only dressed in our pyjamas, unexpectedly joined us.

My school mate from the olden days, now much braver than then, but still very respectful, said, 'Now, Sir, admit that you will not be able to teach in today's environment. At the time, you did not know how to handle us without the assistance of a cane. You also knew nothing of these involved legal processes.'

For the first time ever I saw my former schoolmaster look a bit embarrassed when he shamefacedly had to grant the argument.

In defence of that generation of schoolmasters I have to admit freely that I never received an undeserved hiding and also not before I had the opportunity to state my side of the matter (*audi alterem partem*). It was never withheld from me and always was respected. Unfortunately it did not always serve to help me avoid a meeting with Mr Paddywhack!

The lack of a proper decision-making process when deciding to give corporal punishment or not, the sometimes very violent nature of the hiding, the abuse of power as well as the indignity linked to the action of the one meting out the corporal punishment are some of the reasons why corporal punishment is prohibited in schools today.⁵

5 Devenish GE, *A Commentary on the South African Bill of Rights*, Butterworths (1999); *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC).

Faithful servants

We must have no patience with civil servants who regard themselves as pen pushers or who are stealing from the state to enrich themselves. Also not with bureaucrats who think that they may disregard Batho Pele and who therefore turn up late for work, do as little as possible and go home as early as possible.

Thabo Mbeki⁶

A senior official from Sweden shared an interesting fact during a visit to South Africa. The responsibility of officialdom to assist the public is regarded in a very serious light in his country. If an official would decide to pop into his office quickly at a weekend and a member of the public sees him doing it, then that official is obliged to open the door and attend to that member of the public. The argument that the official is at the office outside office hours, that he is not on duty and therefore has no responsibility to assist the member of the public, will hold no water.

Similar stories of faithful servants can be told about South African officials too.

The ex-official, still young of spirit and years and successful now in the private sector after having landed under the wheels of the transformation train, says of his new life, 'I was a born civil servant. My father was a civil servant. I was taught that it was my duty to render service. My biggest adjustment in the private sector was to write fees. In the civil service our joy was service delivery, now it is about profit – I do not like it and do not know how to write fees. Can you help me to get back into the civil service? I want to share my years of experience with newcomers.'

Unfortunately, his request did not get very far. There are other similar stories – some have had a happy ending and, fortunately, some people still are in the civil service. Unfortunately, there also are those who are caught in a trap in the civil service and who do not get the opportunity to fulfil their 'faithful servant' roles fully in accordance with their talents and experience.

6 Opening of Parliament, 6 February 2005.

One of the most tragic tales I listened to recently concerned an official who had accepted a severance package. With that money, he bought himself a little farm. After having started farming successfully, he developed skin cancer and on medical advice he had to stay out of the sun – he could not farm any more and was without an income. He put the farm up for sale, but was informed that he could not do so as a land claim had been registered against the farm. Stranded without income, he applied for a state pension and was turned down because he was too well-off – he was the owner of a farm.

These are the harsh realities of South Africa today to which the leader corps do not always have ready answers. The debates are not nearly over yet and the solutions are also not easy to find, because a civil service has to resemble the people it serves. Furthermore, many admit that there is not enough experience among the ‘faithful servants’ for them to take the initiative in essential service delivery.

Batho Pele and Rona Pele

There is little doubt that there are very competent and diligent civil servants around who definitely do not qualify for the very negative picture which the President has painted of some of their colleagues. They are clear examples of the lofty principles contained in the *Batho Pele* – the people first – principles.

The sad condition of the University of Umtata disappointed everyone who visited it a few years ago. I asked one of my young colleagues who had studied there, ‘What happened here? Why does the place look like this?’ His reply, ‘It is a result of Bantu Holomisa’s dictatorship in Transkei and of *Rona Pele* – us first’.

I failed to understand. ‘Look, when Holomisa and his generals governed here, he trampled dissidents into the ground. He tolerated no opposition. So, when democracy came, people said: now it is *our* time, now we look after *our* interests. That was the beginning of strikes, frivolous wage demands, lawlessness and vandalism.’

The double damage, first by a military dictatorship and then through undisciplined actions after freedom and democracy had set in, will not be restored overnight.

So the pendulum of just administrative action swings from the old Transkei and the old South Africa to the new South Africa; from the one extremity to the other, before balance and soberness triumphs.

PRIVACY¹



LEAVE ME ALONE!

According to an old English saying, a man's home is his castle. There, *he* is the king. Or phrased differently: In my home I am in charge and the king has to leave me alone.

A Nelspruit golfer recently could have told the Afrikaans author of *Sonde met die Bure* (Trouble with the neighbours), C.J. Langenhoven, a lesson or two. As can be expected, golfers do not always hit the ball where they are aiming. This golfer's ball landed in the garden of a property bordering the golf course. To the utter annoyance of the housewife this man trespassed in her garden, looking for his ball. In vain she shouted at him that it was her garden and that he had to stay out of it. After picking up his ball, he quietly continued with his game. Thereupon she followed him in her pickup and pelted him with eggs.

Privacy in my home and on my property is a serious issue.

The people of *Sewende Laan*, with their illegal *mampoer* or *moonshine* still, discovered that you cannot always do as you please on your own property. Your right to privacy, your 'leave-me-alone' right has limits. Your actions not only have to be lawful, but other's rights, as in the case of their safety, also come into play.

People yearn for privacy. Among others, this right also revolves around the choice of the individual to determine as he wishes whether to allow others into his private space. Privacy is, therefore, very closely linked to a person's claim to human dignity.

Interference by the state and by other people is not abided easily.

The courts have ruled that it is illegal to use a picture of someone for advertising purposes without his or her permission and that a doctor does have the right to inform a third party about someone's HIV status.

¹ Section 14.

When the relationships and activities of people in public life are affected, the right to privacy is considerably reduced.²

The greater the security and health risks of a business, so much less such an undertaking can lay claim to privacy when health inspectors pay unannounced visits.

ABORTION

The Supreme Court in the United States ruled that Texan legislation which prohibited most forms of abortion – only abortions which saved the lives of mothers were allowed – went too far and that it interfered with the right to privacy.³

This debate about abortion, the interlacement of freedom of conscience and privacy on the one hand, with the foetus' potential right to life on the other, still has not been dealt with comprehensively in South Africa.

In most liberal democracies abortion is regarded as a fair and justifiable option for women. In most third world countries it comes down to a conflict between the quality of life of the population as a whole and the potential life of the unborn foetus.⁴

MEDIA

To what extent ought the media be allowed to publish stories about public figures before this publication clashes with the right to privacy of those persons? Untrue stories can open the media up to libel. The truth, however trying and hurtful it may be, is another matter altogether – the public figure who is loud in his self-praising about his public record of service and his unimpeachable integrity, is in the public domain. His actions, including his private behaviour, are newsworthy and liable to public examination.

However, private people enjoy greater protection.

2 *Bernstein v Bester* NO 1996 (2) SA 752 (CC).

3 *Roe v Wade* 410 US 113 (1973).

4 Devenish GE, *A Commentary on the South African Bill of Rights*, Butterworths (1999), 144.

FINGER PRINTS

A man complains that his right to privacy as well as a range of other rights are affected because he has to be fingerprinted in order to obtain a passport. He says the limitations which the practice of taking finger prints place on his rights are unreasonable and cannot be justified in an open and democratic society.

The taking of finger prints involves intimate intercession by the state into someone's private sphere, namely bodily integrity. Every person has a right to privacy in his or her private sphere.

He argues further that there is no rational connection between the taking of finger prints and the aim of ensuring the security of the passport. Also, there is no empirical evidence that the practice of taking finger prints will prevent people from abusing the system.

The Department of Home Affairs explained that it had a responsibility to protect the integrity of the South African passport. At the same time they had to ensure that South African passports were accepted internationally.

After careful consideration of all the factors surrounding the limitation of rights and, among others, the nature and aim of the limitation, the Commission was convinced that the limitation of the complainant's rights was a fair and essential limitation. The point that the taking of finger prints encroached on the private sphere of a person and his or her body, was granted.

Indeed, a person's privacy is violated in the process of taking finger prints. However, finger prints are taken so often and without undue discomfort that it has become a common occurrence. It will be impossible to have effective passport control without using finger prints.

STUDENTS

A certain tertiary institution requires its students, who want to take medically related courses, to undergo medical examinations in order to determine their HIV status. The doctor of a student, who tests positively, asks the Commission if the student's right to privacy may be made subordinate to the institution's right to know the student's status.

The Commission allows that it may be important to test students for their HIV status, also in the interests of their fellow students.

However, it has been determined that there is no set policy for the testing of students – it is being done haphazardly.

The institution agrees that a comprehensive policy must be formulated in which the interests of the institution and those of students (public interests) as well as the rights of students (private and non-discriminatory) is specified and respected.

This matter was raised at a time when there was great uncertainty about what was allowed and what was not allowed. These days, the opinion is that no testing will be tolerated. No justification can be found for it. General preventative measures should be taken continuously and on behalf of everybody. This makes testing impermissible.

HOUSE WORKER

An employer insists that her house worker undergoes a medical examination before she can be considered for a permanent appointment.⁵ The medical test reveals that the worker is HIV positive and that she also has contracted Hepatitis B. Her employer gives her written notice on the same day, ending her employment, and gives her a R600 severance package, stating that she entailed a health risk to the employer's children.

The employer is brought before the labour court because the Fair Employment Practices Act lays down strict conditions for HIV testing – it can be allowed only when a person's physical condition prevents him or her to meet the essential requirements of the job.

The employer argues that she wants to have peace of mind that the children will be safely looked after while she was practising her profession. According to her, this will be impossible with someone who is HIV positive and also had Hepatitis B.

However, expert evidence in court documents asserted that the transfer of HIV in the workplace was irrelevant, because generally accepted practices existed to protect anyone against infection, such as wearing gloves to cover broken skin, for example.

5 *Mail & Guardian* 25 June – 1 July 2004.

Experts also indicated that HIV and Hepatitis B were mostly transferred by sexual practices.

The employer sounded the retreat in the course of litigation and settled the whole matter out of court and in favour of the plaintiff.

The house worker's right to privacy, under these circumstances, was regarded as so important that the law prohibits her name from being published in the media.

CRIME

When the Scorpions, Hollywood style, jump over high walls and burst through doors, they can only do so within the framework of the law after the public interest and the rights of the public, as well as the right to privacy, have been taken into account.

High profile cases, such as the prosecution of Jacob Zuma and Shabir Shaik, make one wonder how private you really are behind your fax machine, computer, cellular phone, in your own car or in your office.

It is important to keep in mind that one's right to be left alone prevails, unless a number of legal prescriptions are met.

Investigations of homes and business premises, as well as the confiscation of goods, must take place in accordance with the law and within clearly demarcated limits. It is important that the authorisation for searches and confiscation is clearly defined. Forceful public goals have to exist otherwise they will not be tolerated. An independent tribunal has to grant this authorisation.⁶

A suspect in a matter has a bullet in his leg. This bullet is needed as evidence in a court case. The suspect has many complaints and stories, because this bullet can seal his fate. The court ignored all his lamentations as well as his right to privacy and ordered that the bullet be removed.⁷ Public interests and his right to privacy were weighed and the latter had to succumb.

6 De Waal J, Currie I en Erasmus G, *The Bill of Rights Handbook*, Juta (2001), 270.

7 *Cape Times*, 27 February 2002.

BEDROOM

Today, it is not as important who is spending time in whose bedroom as it had been in the days when the police had gone after people who had ventured over the colour line.

Sometimes this right goes further than the bedroom. People do not want to express their feelings only in the bedroom. Sexual orientation is a private matter that goes far beyond the bedroom. People want to have space also to express their private life choices in public. Disparagement of this represents impairment of their human dignity.⁸

Privacy, also in the bedroom, can be limited. The possession of pornographic material may be my own business, but the possession and duplication of child pornographic material may be so damaging that prohibition is admissible.⁹ Public interest, regardless of the individual's right to privacy, will be victorious in this instance.

8 See Edwin Cameron as quoted by De Waal 272.

9 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

FREEDOM OF MOVEMENT¹



'It's bloody outrageous! Who the hell do the *priscillas* (police) think they are to tell us what to do? It is pure jealousy because we look so fabulous, I'm telling you! I think the *queens* should rise and show that they can stand up for themselves.'

This was the angry reaction of a drag queen when the Johannesburg Metropolitan police threatened to arrest people if they were to participate in their costumes during the annual 'gay and lesbian' parade. The police had invoked the Public Gatherings Act and demanded that participants may not disguise themselves or conceal their identities by dressing up.

Reason won the day during the subsequent negotiations in which the Mayor of Johannesburg, the MEC for Security and the Commission had given their blessings for the march, and the parade was allowed.

In the old days strict rules had been applied – people could not come and go freely.

Those who experience the sweat and camaraderie of the Comrades Marathon, know what it means to be supported by someone when your legs turn to rubber.

In the early years of this taxing 90 kilometre ultra-marathon only a handful of people participated in this 'fun run' between Durban and Pietermaritzburg. With the end still some kilometres away, one of the back markers was losing steam. Then a stranger, who was not a participant, came running up to him from behind. 'Where do all these people come from and where are they going?' he asked. The two fell to talking and sort of shuffled along together while the runner was able to develop the pro-

¹ Section 21.

verbial second wind. Thankful, the runner asked the stranger to accompany him into Pietermaritzburg, because he wanted to reward him for running with him for a few kilometres and for supporting him when he was 'out of it'. The reply carries the stamp of those times, 'Sorry, I cannot do that, because my "pass" does not allow me into Pietermaritzburg. They will arrest me there.'



These days, you can easily get the worst of it if you order people around or prescribe to people where and when they may or may not go.

The lawn in front of the Over-de-Voor men's hostel on the Potchefstroom campus of the Northwest University has been 'holy ground' forever. Non-residents who dared walk on this lawn, were apprehended and punished by pushing them under a cold shower, for example.

The new human rights dispensation has brought about that hostel kings who reigned their territory with an iron fist would have to bend the knee when someone takes them on under the Constitution.

When four hefty men 'forced' Ms Louis Postma, a University librarian, to get off Overs' grass, this was the last straw. You have the right to go freely on public land – also, women are to be treated with dignity and respect. The Overs tradition could, therefore, not stand the test of time – the men apologised in public.

Two hobos' right to earn an income and their right to freedom of movement recently weighed heavier with the Cape Town Supreme Court than did the Victoria and Alfred Waterfront (Pty) Ltd and the V&A Waterfront company's right to property.

The two men had made themselves guilty of bad behaviour over a long period of time by, among others, intimidating Waterfront officials, becoming abusive when requested to leave the place and by disturbing people's peace begging at restaurants.

The court imposed a ban on causing visitors and businesses unlawful damage. Therefore, when requested to leave restaurants and premises, the beggars had to do so. However, the court could not see its way clear to impose a total ban on the beggars begging at the Waterfront. The order, therefore, did not prevent them from earning their daily bread.

Whenever you participate in human rights debates, the evil of crime does not escape you. Even in this way the freedom of movement is highlighted.

Mr Nick Karvellas of the Open City Forum complains to the Commission that booms in residential areas 'create the impression that people are not welcome there. Crime is used as an excuse to create exclusive security villages in order to increase the value of property and to exclude people'.

Mr Alan Chenik, owner of a security services company and resident in a security residential area in Edenvale, does not agree. According to him, only two car highjackings occurred in two and a half year's time in this area, while an average of seventeen highjackings per month had been the norm before the area was made secure.

The Commission debates the matter and have differing points of view. It is decided to invite all interested parties to a public debate where every-

one will be given the opportunity to put his case so that an informed decision can be taken. For two consecutive days thirty experts get the opportunity to put their case, and emotions run high.

On the one hand – the state does not protect residents. Therefore, they have to protect themselves.

On the other hand – it appears that black people are stopped and badgered more often at these booms than are whites. It is not right that public roads are summarily closed to the public.

Without speaking the last word on the subject, the Commission tries to give direction in this debate:

- ◊ It is possible to erect booms and to effect road closures within the framework of municipal by-laws. However, there is ample evidence that the conditions in this regard are not always met. In July 2003, and in Johannesburg alone, there were 1 127 illegal booms.
- ◊ The use of booms have the potential to violate several rights. While these violations mostly are contrary to local government policy, there is little evidence that any legal relief or remedies are available for those whose rights were violated.
- ◊ Residents have to secure their properties in co-operation with the authorities. More resources for policing, more police presence and visibility, effective community police forums and fast police response *can* make a difference.

The 'dompas' which used to regulate the freedom of movement of blacks had been such a hateful document that the older generation who had to submit to this, rejects anything that resembles it with all their might and reclaim their undiluted right to freedom of movement.

Younger people do not know what or how it was and only want to move on. They want to come and go as they please.

When civil servants, political parties and visitors are refused access to farms without prior notice, they become hot under the collar – their freedom of movement is affected. They do not always understand that this right can also have limits. It simply is not possible to give strangers untrammelled access to farms and houses. Political parties, civil servants who want to visit farms and homes simply will have to grasp this fact: In

our times reasonable and non-discriminatory measures of access control can be introduced rightfully.

City people do not always understand what the security situation is like in rural areas. One dusky evening my colleague Tom Manthata and I sat, safely 'locked up' behind electrified fences and with giant dogs keeping a watch, chatting with a farmer on his farm.

For us, then, an agricultural leader's comments made good sense: 'We want the criminals behind bars and not the farmer behind bars on his farm.' A farmer's fence and the limitations that this placed on the freedom of movement of others simply have become necessities and can be defended – even if they limit some people's right of movement.

PROTEST¹



South Africa's democracy was preceded by struggle – mass meetings and protests during the years of political resistance against an unrepresentative government were the order of the day. The aim was to make the country ungovernable and to draw the world's attention to South Africa.

The pictures of a dying Hector Peterson during the uprising of the children in 1976 had been flashed all over the world. This was the start of a new era of resistance. The National Party government never would overcome that tragedy, as it also never could overcome the Sharpeville tragedy in the sixties when 69 people were killed during mass resistance against pass laws.

The white parliamentary politics also knew the mobilisation of people and mass meetings and these did not always happen peacefully. Disagreements about participation in the First and Second World Wars, the miners' strike in the 1920s and the measures to broaden democracy with the establishment of the Tri-Cameral Parliament often were very stormy.

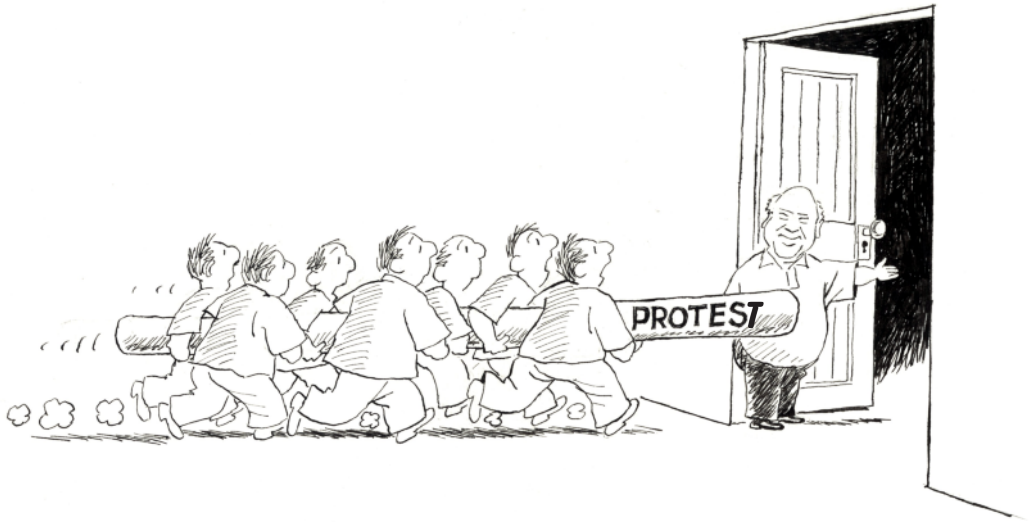
During the negotiations with a view to establishing a complete democracy, the public reacted divergently – some turned to mass action whenever the negotiations got bogged down or proceeded too slowly to their liking. Others resisted the speed of the negotiations.

Two occasions of protest deserve special mention.

In 1989, after the elections for the Tri-Cameral Parliament and with F.W. de Klerk assuming the reins of office as President of South Africa, there was an unprecedented determination that South Africa had to have a fully representative government. To demonstrate this determination, one of the biggest protest marches that Cape Town had ever known, was organised.

1 Section 17.

In the run-up to the march, De Klerk made it clear that the organisers of the march were pushing against an open door – his door was open for discussions with a view to constitutional negotiations. This took the worst aggression out of the march.



Confidential talks between De Klerk's representatives and the organisers of the march resulted in an understanding that thousands of people could participate in a peaceful demonstration without any visible policing or threats of water canons, police dogs, batons or sjamboks. In return, the organisers had to do their bit and accept responsibility for the peaceful progress of the march.

This was the beginning of a bridge-building action between people who did not know one another and who were very sceptical about the other party. It also provided the grounding for that which is now written in the Constitution – the state will not interfere in peaceful protests where no arms are evident.

Hereafter, one event followed another at a hectic rate until the old enemies met each other in face-to-face constitutional negotiations.

With constitutional negotiations strongly on course, the Afrikaner Weerstandsbeweging, under the leadership of Eugène Terre'Blanche, felt excluded and bitter. They wanted to demonstrate to the world that large numbers of Afrikaners were not being heard during the negotiations.

When they broke through the fences of the World Trade Centre where the negotiations were held, and people charged at the centre in great numbers, panic broke out.

Some of the participants anxiously watched the storming crowd and screamed, 'Where are the police? Why don't they stop the protesters by shooting them as they always do in the townships?'

Terre'Blanche sympathisers among the negotiators shouted at the thin line of police officers, 'Don't shoot! It is *our* people!'

Moments later an AWB armoured vehicle crashed through the glass doors of the World Trade Centre. A handful of police officers took up positions in the corridors with cocked arms in order to protect the negotiators, most of whom had been bundled into offices.

The armed AWB leader ran up the escalators in the direction of the negotiators to do goodness knows what. At that point, the table was laid for a bloody tragedy. Then one of the unsung heroes of that day stepped forward to accept responsibility far beyond his years and officer's rank.

The AWB leader wore insignia on his shoulders. The young sergeant spoke respectfully, but urgently, 'Colonel, are we going to shoot one another, or are we going to talk? I want to go to the rugby tomorrow.'

The 'colonel', having heard the sincere question of the young man, hesitated. This created an opportunity for dialogue. It also meant the turning point in the AWB's unannounced visit to the negotiators at the World Trade Centre. Afterwards, everyone was more sober in their approach – the uninvited guests had made their point and withdrew peacefully. The negotiations were resumed as though there never had been such a visit.

The armed and undisciplined nature of that protest march will not stand today's constitutional tests, namely to protest peacefully and without arms.

SHAKESPEARE

*All the world's a stage, and all the men and women merely players.*²

Not many people would have been able to picture the change in roles that the new South Africa would bring about.

The activist Trevor Manuel, with characteristic black cap and T-shirt or polo neck jersey was always in the forefront when protest notes were handed to the government of the day or when the masses were prepared for protest. He looked comfortable – like the proverbial fish in water. Years later the same Manuel, as Minister of Finance, in elegantly tailored suits and swanky ties, initially looked somewhat stiff and uncomfortable when his erstwhile co-strugglers mocked him about the pitiful salaries that the government paid its civil servants. However, he quickly mastered the skills which his role as statesman demands and he often criticises lazy officials whose achievements are not up to expectations.

It would appear that most people manage this transformation from activist to statesman with ease.

Portly, in academic and ecclesiastical robes, Jakes Gerwel, Franklyn Sonn, Desmond Tutu, Franch Chikane and Alan Boesak led many a protest march. These days, they have roles in the state administration, the business world and civil society as though they have been doing it all of their lives.

When Marinus Wiechers, former professor of law and later principal of Unisa, exchanged his dignified academic dress for informal protest clothes to join the trade union Solidarity as well as the singer Steve Hofmeyer and icons of Blue Bulls rugby in protesting the name change of Pretoria, they made a point. The right to peaceful protest must be used as a way of participating in the public debate. It is a way of joining the forces of different interest groups across party political divisions in order to bring home an argument.

This form of debate is foreign to many. When novices *toyi toyi* together with those with much practice, they look stiff and uncomfortable, but not at all unwilling to learn the new rhythm.

2 William Shakespeare, *As you like it* Act II, scene 7.

THE CONTENT OF THE RIGHT³

Protesting, meeting and picketing are among the constitutionally protected forms of expression. It is a way of overcoming poor political representation and of stopping the power of the majority. It offers the opportunity to shine the spotlight on a specific subject and to draw the government's attention.

The crux of this right of protest is that the action must take place peacefully and without arms.

Cultural weapons remain a contentious subject in South Africa. Cultural weapons that are carried at cultural events are acceptable. However, when such weapons are carried at political or protest meetings, they seem dubious.

In Germany, such a high premium is placed on peaceful, unarmed protest that even the police are prohibited from wearing special helmets or shields when they supervise protest events. This is because protective headgear may lead to unnecessary provocation of the protesters.

STRIKING⁴

The right to strike is closely interwoven with the right to protest and the freedom of speech.

These days, the right to strike is being regarded as a universal right and it is contained in most constitutions. However, it goes much further than collective bargaining in the workplace when employees flex their muscles against the employer.

Strikes may also have socio-economic aims. Such actions may, however, not clash in light-hearted, petty-minded or hot-headed fashion with the interests of the greater community.

3 Devenish GE, *A Commentary on the South African Bill of Rights*, Butterworths (1999) (hereafter Devenish) 222; De Waal J, Currie I and Erasmus G, *The Bill of Rights Handbook*, Juta (2001) 333.

4 Devenish, 318.

The employer's anti-pole to a strike is dismissal, which is regulated by labour legislation.

CONCLUSION

The experienced practitioners of *toyi toyi* often complain to the Commission that the police are unnecessarily hard-handed, just as in the 'old days', when dealing with protests. This leaves a bad taste in the mouth.

On their part, the police complain about the taunting, destructive and even violent nature of protests that they have to contain with soft hands.

Every matter has to be dealt with on its own merits, because the culture of peaceful protest has not been with us for long in South Africa. There is still too much anger in our society that cannot be curbed easily.

The lawless nature of some protests, and the vandalism accompanying them, is an indication that many protesters do not understand that the right to protest also have limits – it certainly does not mean a right to force your will onto others, only that you claim your right to protest in order to make your point audible and to participate in the debate in this way.

It also does not mean at all that you have the right to deprive others of the right to participate in the debate. It is a violation of the other person's right to freedom of speech, which means, in turn, that sometimes you have to listen to utterances with which you do not agree. A clear example of this type of intolerance is the way in which the representatives of the World Bank were shouted down at the recent Land Conference.

Police and protesters have a long way to go before the art of peaceful protest as a form of debate will be mastered, because it is clear that both sides of this debate are guilty of unacceptable behaviour.

POLITICAL RIGHTS¹



Who would have thought, a mere ten years after the first democratic elections, that one of the foremost campaigners abroad against apartheid would be shocked to learn that young people in South Africa did not want to vote?

‘Don’t they know, then, how we fought for *their* democracy? Do they forget so quickly or have they never been taught to treasure the right to vote?’ the former Swedish activist asked of me at a human rights convention in Europe.

The long queues in April 1994, where people so patiently and respectfully awaited their turn to vote, almost belong to oblivion. New frustrations have been building up and here and there these frustrations are boiling over impatiently, because the cross at the ballot has not brought about the results people had wished for. One person says, ‘My language is not being protected.’ Another says, ‘There is no improvement in the housing shortage or in the standard of our children’s education.’

On a visit to the countryside, a stranger, an aged *tannie*, addressed me early one morning at the hotel where I was staying. ‘I know you, Sir.’

‘It is possible, because I often visit these parts.’

‘No, Sir, this is not what I am referring to. You were one of the people who sat talking day after day, night after night at Kempton Park. We watched it with great interest.’

‘What did you think would happen?’

‘We prayed night after night that something good would come of it.’

‘And did something good come from it?’

‘Yes, Sir, everything is not as it should be yet, but at least our own people can now speak on our behalf.’

This is the meaning of participatory democracy – you do not get all

1 Section 19.

that you want, but you get representatives who are your intercessors and who must guard your interests.

The abuses of power and 'hands in the till' by so many politicians and civil servants have left many of the homeless and the young people sceptical about politics and about what political leaders may and can achieve in our democracy. At many levels money-making become the highest priority and the values of idealists' dreams in the Constitution are pushed aside.

An experienced academic in economy tells of how lecturing at his university has changed over the past decades. The outcomes of the lecture should be realisable in money-making, or the lecture is useless.

However, the materialistic drive and the influence it exerts is not only limited to South Africa.

At a human rights conference in China where the delegates were showered with the wisdom of Confucius, I asked the young people about all the Confucius wisdoms and about the fact that there was a McDonald's fast food outlet round every corner. 'There is room for Confucius, but otherwise than for our forefathers, money-making has become important to us. You can open a McDonalds in any place in China and you will make money, regardless of the anti-American sentiments.'

The posters of the Herstigte Nasionale Party (HNP) calling on white voters in the 1994 elections not to vote had not meant anything to anyone. So it will also be for the materialism – driven young people who ignore the ballot. These apathetic vacuums are always filled, not necessarily by honourable idealists. It means nothing to stand on the political sidelines while you are petulantly complaining. There are opportunities to participate and to assert yourself on the protection of your interests.

Regular elections, the right to establish political parties and to promote political aims are the lifeblood of any democracy.²

One of the values on which the Constitution is founded, and is protected with a 75 per cent majority in the National Assembly, is universal franchise for all adults; as are a common voters' roll and a multiparty system of democratic government.³

2 Section 19.

3 Section 1 and 74.

CONSTITUENCIES vs PROPORTIONAL REPRESENTATION

Constituency politics where candidates asked the electorate's support in their own name and then kept in touch with the voters between elections now belongs to South Africa's past. The report-back meeting in the town hall after every session of Parliament during which supporters and opponents took one another on is something which the new generation of political representatives do not know at all.

President Mbeki's *imbizo* meetings⁴ and other meetings in which party leaders participate is the nearest you get to that.

There are hundreds of politicians in the National Assembly, Provincial Legislatures and Local Authorities. They are extremely passive as regards work among the electorate in the constituency. The active ones, from different political parties, always catch the eye and impress with their commitment.

South Africa, with its illiterate and unemployed people who do not have access to the printed media or television and who have to rely mostly on the 'wireless' for news, deserves better attention by the politicians. No wonder people are throwing stones again because they do not know what is happening, or that Mbeki has to rebuke the politicians and bureaucrats about poor service delivery to the people.

During a visit to Germany, a commentator explained to me that the absence of parliamentarians from their Council Chamber was a barometer of the state of democracy in their country. An empty chamber did not mean idle representatives – they usually were busy working in the constituencies with their people or directing pleas to the authorities on behalf of their voters or receiving delegations from their constituencies. The German politicians use every possible opportunity to serve their constituents. Whenever dictators ruled, the members of parliament used to sit there shoulder to shoulder, ready to cheer the Big Man and to try and impress party bosses. A successful democracy does not only exist of hosannah-

4 These *imbizo* meetings create an opportunity for dialogue between the President and the voters.

choirs who are perpetually singing the praises of their leaders and who forget about the people who had sent them to the political council chambers to represent them.

In the United States I once witnessed a senator standing on his own on the senate floor delivering a well-prepared speech – he had, in fact, been speaking to himself. ‘How is this possible?’ I asked.

‘The other senators and their staff are in their offices, working,’ the reply came. ‘They are listening to him on the intercom system. They definitely will reply to him.’ This just goes to show, diligent and service oriented politicians are people who have mastered much more than the art of oratory – they never forget their voters.

Then, if the constituency system has so many advantages, it may well be asked why the proportional system of representation is being supported. The main reason is certainly that it results in better representation of the voters. Every vote counts and it offers smaller parties the opportunity to have representation in Parliament.

When the National Party achieved its historic victory in 1948, it had garnered fewer votes than the United Party had, but it had won more constituency seats. Through the years, the HNP mobilised thousands of people to vote for them. In the two decades during which they competed for parliamentary power, they could win a seat only once. The secondary effect of this was that all the people who had supported them through the years never had parliamentary representation. There was nobody at that level who could intercede for them, in spite of their votes.

FLOOR CROSSINGS

One of the big propaganda weapons in the arsenal of constituency politics, when some-one turned coat to join another party than the one that had supported him or her, used to be the challenge: ‘Resign your seat and see if the voters will follow you in the subsequent by-election.’

With proportional representation you can turn coat in the middle of a term, without any serious consequences. The voters look on at this ‘change of heart’, completely powerless. It causes them to become very sceptical about the integrity of politicians.

GROUP REPRESENTATION

Group representation on the basis of race or ethnicity did not gain a foothold in our new democratic dispensation. The prejudice against the heritage of the Tri-Cameral Parliament with its houses for Whites, Coloureds and Indians as well as the ethnic basis of the former homelands regularly checked all arguments for such representation during the constitutional negotiations.

The debate about group representation that has become hackneyed for now may be reopened some time in the future. This will happen when the winds have blown over the tracks of apartheid and when the debate on group representation is not an exclusively black/white debate any longer.

In our diverse society, there are groups who in the course of time may just listen with renewed attention to such debates.

THE NEW ENVIRONMENT

Regular elections are important in any stable democracy, but participating democracy revolves around much more than elections. Public participation in state administration and in shaping policy lends it further content.

The hopelessness of people when they do not know how to deal with certain problems, leads to great frustration. Their powerlessness when they come to face the gigantic state machinery, not knowing which door to knock at, is a potential threat to democracy.

Many matters that land on the desk of the Commission are matters that ought to be dealt with by energetic political representation. The reason why this does not happen is ever so often: 'I do not know who my political representative is' or 'I cannot get hold of him/her'.

Participating democracy should not be limited to classic appeals to your member of parliament. There are many other routes by which you can take your matter further. In this, you can go it alone or together with your political representative or sympathetic non-government organisation

(NGO) or one of the so-called Chapter 9 bodies⁵ established by the Constitution to assist with the promotion of democracy.

The public ought to use the following rights more often when they battle poor service delivery by the bureaucracy: freedom of speech, the right to meeting and protest, access to information and just administrative action. Remember, also, that state organs have a constitutional duty to cooperate in order to ensure smooth service delivery.⁶

5 Public Protector, Commission for Gender Equality and the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities,

6 Section 41(1)(d).

SOCIO-ECONOMIC RIGHTS



WE NEVER DARE GET USED TO POVERTY, THE SAME AS OUR FOREBEARS NEVER BECAME USED TO SLAVERY AND COLONIALISM.¹

‘Welcome to No Man’s Land, Sir,’ the spokesperson of a small group of people in the Northern Cape greeted me on my arrival.

‘Why No Man’s Land?’ I asked.

‘Because nobody comes here. Nobody is interested in us, not even the politicians when they are fighting elections. Here we have worked in the earth like moles, now we are old and we still have just about nothing. So it has always been, ever since the time of Jan Smuts.’

In another region, the mayor in his grand car and the team of the Commission were accompanied by a small group of traditional leaders on their horses to a school where four thousand people had come to attend the meeting. I rode on horseback together with the proud men. One of the traditional leaders had, after some negotiations and with the assistance of intercessors, exchanged places with me – I was on horseback among the string of horses and he in the car in the procession.

Thousands of people cheered exuberantly while the traditional leaders wielded their sjamboks in the air with some showmanship. I entered the area last of all on a slender white horse, one which carries the name Terre’Blanche. I had to wonder quietly what Eugène’s reaction would have been had he heard about the white horse deep in the Eastern Cape that carried his name.

The people were packed together in and around the tent that had been erected for the meeting. At this school there is no water or toilets, there is no question of electricity. The school’s feeding programme is poor and irregular – a slice of bread and jam now and then.

1 José Manuel Barosso, President of the European Commission.



The formal proceedings are concluded with a feast. The children have to wait aside for their turn. It is no pretty sight to see hungry children scampering for food after the adults have eaten.

Amid this sea of poverty you had great difficulty understanding the people's excitement and enthusiasm for life, because they had nothing. A dignified old man sincerely thanked me for all our trouble. 'But we have done absolutely nothing,' I protested. 'But you have come to us, and we know now that we are no longer alone.'

Weeks later staff of the local super market in my hometown told me excitedly that they had seen me riding the horse together with the traditional leaders. They hail from that region. 'Why do you work here, then, so far from your home?' The answer is straight and simple: 'There are no jobs *there*.'

HOW RICH ARE WE?

Experts often tell us how poor the poor among us really are. About 42 % are unemployed and, according to a United Nations report, 22 million people are living below the breadline of R354 a month. In most countries it is regarded as a crisis when the unemployment figure rises above ten per cent.

The question also can be turned around: How rich are we? (Eight million people live in excessive luxury, car sales have shot up and property prices have attained unprecedented heights.) A growing black elite shares in this prosperity.²

According to Sampie Terréblanche, veteran economist from Stellenbosch, one third of the population shares in the feast of progress. The middle third of the South African population is vulnerable and the lower third (about 15 million people) are sinking away in misery.³

There are about 300 000 whites among the poorest of South Africa's poor. It is estimated that between two to six per cent of whites subsist on R1 000 per month or less.⁴

These issues are sometimes dealt with in an extremely flippant and insensitive manner.

The DJ of a popular radio station asks of his colleague if he knows where the beggars at the traffic light go to have a bath? The reply is that they are most likely to jump into the nearest river. The first DJ reacted: 'The next time they ask you for money, give them a bar of soap.'

Someone said on a radio chat show that it was not true that blacks were poor. 'Just look at how many of them are driving luxury vehicles on our roads.' Someone else hits back, 'This is just typical of you whites, you are jealous and don't want us blacks to have anything. This is a racist thing; you don't know how to deal with rich blacks.'

Of course, both arguments are nonsense.

There are many rich and poor people in this country. Travellers through Africa will tell you that there is a great deal of poverty on the continent,

2 *Rapport*, 28 Desember 2003; *The Star*, 6 May 2004.

3 *Rapport*, 23 January 2005.

4 *Rapport*, 23 January 2005.

but that the gap between rich people and poor people is nowhere as big as in South Africa. The only other place in the world where the gap is as big as in South Africa is in Brazil.⁵

The statistics given by educated researchers are overwhelming and can knock you over.⁶ Those who doubt these figures only have to visit the townships to see all the unemployed young people and the misery in which people have to live.

Dr Hastings Banda, then president of Malawi at the time, told me that black South Africans were the best dressed blacks in Africa. He must have noticed that I was enjoying this, so he tackled me directly because then we would not release Nelson Mandela from prison. He said accusingly that the Tri-Cameral Parliament in which we had accommodated Coloured and Indian people politically was an insult to black people both in South Africa and in the rest of Africa.

At the time we were dreaming that Soweto would become the most beautiful city in Africa. When the acceptable housing in Soweto was shown to a Mozambican diplomat, he was asked what he thought of this 'luxury' compared to the poverty in his own country – one of the poorest in the world. His reply was, 'The people in my country are free. Freedom cannot be suppressed by neat houses, matchbox houses. If I have to choose, I prefer freedom.'

South Africa and its people are free. The housing is still better than that of Maputo and elsewhere in Africa. The poor people of our country do not compare themselves with the poor elsewhere on the continent, but with South Africa's rich people. To those who are poor and hungry it means nothing if one says, 'You should be thankful, you have it much better than the hungry people elsewhere in Africa and the world.'

We like to tell people ever so often that more people in South Africa have access to electricity and we own more cars than in any other state in Africa. This is meaningless. People see the situation inside this country – who has something and who has nothing. This is the reason why workers go on strike – they look at the profit margins of the company and at the

5 Chris Landsberg, *Beeld*, 28 Julie 2005.

6 *Beeld*, 6 May 2006.

bonuses paid to managers and then urge for raises through their unions. That is all there is to it, never mind what is happening in other companies or elsewhere in Africa or the world.

In the old days, much more money was spent on the education of white children than on that of blacks. To argue, now, that “our blacks” had received better education than those in the rest of Africa, is an insult and irrelevant. Today, people simply establish where the advantaged schools are and where the schools without equipment, water, electricity, toilets or sports fields are to be found. It is established whose parents can make a contribution to the improvement of the school and whose cannot.

A small group of young unemployed men and I search out the protection of the sunny side of a community hall and we discuss the previous Saturday’s losing test against the All Blacks. There, Naas Botha’s nuggets of wisdom are brought up like gospel. To me, it is strange to experience supporters of both the Springboks and the All Blacks in that group – it was not only Trevor Manuel who had supported the Kiwis. The All Black loyalty comes from the years when these communities often were wounded and subjected to trauma. It was a form of protest, I am told. I find it hard to swallow this bitter All Black pill. But there is light-hearted banter between the All Black and Springbok supporters.

However, the sad part of it is that none of those young men have ever worked, in spite of their school training. There simply are no job opportunities in that area.

Community leaders say that adult illiteracy in that area is as high as 70 per cent. A farmer once told the Commission how this helplessness mortified people – adults whose educated children are not at hand to help, while the impatience of intolerant civil servants strip illiterate people of their self-respect. Their inability, for instance, to fill in forms for their old age pensions often leaves them stranded.

POLITICIANS or JUDGES?

To whom do you want to entrust the cares of your poverty – politicians or judges? That was the question during constitutional negotiations – should socio-economic rights be included in the Bill of justiciable rights, that is, rights over which the courts have supervision?

Politicians have a tendency only to pretend to listen during political debate without really doing so – they are actually considering their reply to you. Judges, most of them, listen to what you say in court. To them, what is being said in court is important. Usually it is of less importance *how* things are said. In spite of the assurance that you will get a fair opportunity to plead your poverty case in the courts and that you will be listened to intently, it costs a small fortune to fight your way through the courts, right up to the Constitutional Court. It is extremely expensive and unaffordable for most people to put across their pleas of poverty in this manner.

Politicians, on the other hand, control the state's financial coffers. Relief from poverty has to come from that source. In terms of old political dogma judges must keep their hands out of those coffers. It is the prerogative of the government to put together a country's budget and to determine the priorities for that budget. The politicians also have to carry out the judgments of judges. The final agreement was that the politicians would care for the poor, but that the judges must look out that it is done in a reasonable manner.

For the National Party's delegation who had participated in the negotiations at the time, it was an intellectual exercise, because none of them knew the crude South African poverty from own experience – all of us knew stories about how poor our parents and forebears had been, but were representative of a generation whose people had overcome it. Many were farm owners and not share-croppers as their forebears had been. The rest were professional people. Our supporters were the advantaged group – afraid of losing that what they possessed and not filled with expectation of what they would gain. Not many of that group of supporters actually were beating the drums because we would be rid of the yoke of apartheid, because they had not really suffered under that burden. Also, there were aspirations to continue in power in the years to follow, so the state treasury should not become overburdened with unrealistic and justiciable constitutional rights.

Next to this, the ANC delegation was knee-deep into the poverty question – the parents of some of them were illiterate or only had a rudimentary education and lived in very humble homes. Of course, there also were people who had been raised in highly educated prosperous homes.

The limitations on where you could live, where and when you could move, had forced them, however, to gain excellent first-hand knowledge of the country's poor, displaced and homeless people in spite of their affluence.

ANC supporters regarded their leaders not only as political liberators, but also as front runners in the battle against poverty. That also became the flag under which they would sail – a better life, also economically-speaking, for all.

The differences in approach were, by nature, deeply philosophical. The one side wanted to limit the state powers and, therefore, opposed the inclusion of socio-economic powers. The other side wanted extended state power and, therefore, was in support of including socio-economic rights. Also, it was felt that the traditional divisions of power between the executive authority, Parliament and the courts would become unnecessarily vague with the inclusion of such rights. The undemocratically elected elite, the judges, would be given too much power through such a step.⁷

The argument was that there was a growing international tendency that human rights ought not to be seen in a negative light only, that is, the state may not interfere with my rights, but also should be viewed positively, that is, I can lay claim to and force the state through the courts to do certain things for me – for example, to look after my socio-economical exigencies. There is wide acceptance internationally for the idea that all human rights, political and civil rights as well as socio-economic rights, are interdependent and inseparable.

In countries such as China and Cuba they believe differently and there the point of view exists that socio-economic rights hold sway. All other rights are reduced to nothing.

At an international conference in China a Cuban delegate preached their point of view with great conviction. While delivering her address, she choked and indicated with panicked gestures that the Chinese chairperson should pour her some green tea. After having had some of the tea, she regained her voice and continued her address.

7 De Villiers B, in Van Wyk et al., *Rights and Constitutionalism*, Juta (1994) 599; Devenish GE, *A Commentary on the South African Bill of Rights*, Butterworths (1999) 358.

When I had to put across the point of the interdependency and inseparability of human rights, I made reference to this incident. The Cuban lady's need for green tea (representative of socio-economic rights) would have come to nothing if a limit had been placed on her. See! Those rights are inseparably intertwined, I told them, like some fancy magician.

The audience, of which the vast majority was Chinese, smiled courteously as if to say, 'Good point, but you will not convince us to part from our tried and tested ways that easily. Also, you are not as clever as either Confucius or Mao.'

A CLASHING OF HEADS

As with so many things in modern South Africa, the wheels also have started turning in the area of socio-economic powers. These rights are contained in the Constitution and are justiciable as the ANC had requested. Now the ANC have to perform in accordance with this. That is a weighty task.

The current politicians, same as the politicians who preceded them, do not like it when they are reprimanded by the courts whenever their policies and administration fall short of constitutional expectations. They also do not like it when the people who still remain poor brand them as fat cats.

The constitution opens the way for the courts to tell the Government, 'Justify your decision.' It is not for the court to say which policy or which budget allocation will be the best. However, the court will have the power to say to the Government, 'Justify your military expenditure in the light of growing starvation and poverty.' However, the court will not be able to prescribe a specific programme for poverty relief.⁸

I am a member of a four man delegation who has to conduct talks with Eastern Cape Premier Nosimo Balindlela about a very negative judgment passed in the Supreme Court against incompetent administration in that province's payment of welfare grants.

One of the last people at the Commission to wish us luck with our talks, remarks good-naturedly, 'If the Premier offers you tea, then you mush

8 Denis Davis, Unreported address before the Commission in 1999.

decline it. You have to talk business only and return. My parents live in that province and service delivery is pathetic.'

On our way to the Premier's office the female official who accompanied us there says loudly to bystanders, 'Isn't this delegation really gender insensitive?' In the modern South Africa this is a deadly sin. Therefore, we start off, already on the back foot.

It is to the Premier's credit that she was not happy with the performance of her officials and that she did not hesitate to reprimand them.

However, the same spirit was not evident when a high political figure, after the first really big case in the Constitutional Court on socio-economic rights, the so-called Grootboom case, referred to it as 'that stupid case'.⁹ The person could not hide his irritation that the Court had taken the state to task because its policy regarding homeless people was inadequate. This gap in policy was unreasonable, because the people's human dignity and claim to equality was being ignored.

The court considered the validity of the Oostenburg Municipality's actions to have a group of homeless people removed from private property (that had been earmarked for low cost housing) with the aid of a court order, bulldozers and rubber bullets.

The court adjudged that not enough proper provision had been made for temporary shelter for the Grootboom squatters of Mooitrap. Irene Grootboom was the leader of the Mooitrap people, a muddy patch near Kraaifontein and so named because you had to step gingerly not to find yourself stepping in mud. Later, the Grootboom squatters were given a place at Wallacedene.

It was a historic judgment which reverberated throughout the world. Abroad, the applicable constitutional provisions and the fearless approach of the Constitutional Court in the matter are mentioned with admiration.¹⁰

The state has a responsibility (negative) not to leave people homeless through evictions without providing them with alternative housing.

The state has a further responsibility (positive) to address the urgent need for housing through appropriate legislation and other measures or

9 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR.

10 *Rapport*, 28 July 2002.

programmes. There definitely will be major differences of opinion on what would represent the most fitting programme, but the state has to explain its choice to the public. The state will also have to prove to the court that the policy is reasonable.

In the Grootboom matter, the state had fallen short of its responsibility to take temporary care of the people. However, every case will have to be considered on its own merits.

The Grootboom squatters still are without housing and this leaves them vexed and frustrated. One says, 'We have won the court case, but I still do not have a house. We were so excited. I am tired of complaining. My people do not understand.'

Books and articles have been written about the Grootboom matter. This forced one of the Wallacedene residents to refer to a researcher who had regularly visited them. 'When she was writing the book about us, she always came here. Now that her book has been finished, she does not come here any more. She has a book – but still we do not have proper housing.'

The people were temporarily cared for, but now they have to wait their turn to obtain proper housing. You cannot squat and then expect to jump the line to the front of the housing queue.

WHO IS PAYING?

The radio advertisement of the 85-year-old man who lived through the pass laws, who saw how the Freedom Charter was drafted at Kliptown, who experienced the anger of the children in 1976 and who has lived to celebrate eleven years of democracy in a free South Africa, but who still does not have a home, tells it all. Constitutional words on paper are very patient, but it means nothing if it does not lead to practical application. The state will have to pull up its socks and John Citizen will have to dig into his pocket.

Already the court has decided that it could not be expected of the state to render services – the provision of expensive medical support – when there are not sufficient financial resources for it.¹¹ Here the state

11 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

successfully showed that it had acted reasonably on its responsibilities. However, it does not mean that the state can relax ever, but that it should take immediate, progressive steps within its means to realise socio-economic rights.

The court cannot levy taxes and, therefore, also does not have money to spend. The state remains the only instance than can do it. It is of prime importance for the continued existence of the democratic, constitutional state that the socio-economic needs of people, such as the housing shortage and the HIV/aids pandemic, should get proper attention.

The possibility that the poor will rise against the rich if their needs are not fulfilled is not that far-fetched. The sporadic eruptions of people resisting poor service delivery and corruption are the first symptoms of this.

CONCLUSION



*UNCEASING VIGILANCE IS THE PRICE OF
FREEDOM.¹*

We never were a lawless society. Everything was always done in an orderly and legal way – exactly in accordance with the law and regulations. The courts had looked on, with hands tied, without the power to intervene. Through legislation their role was excluded or much attenuated.

We still are an orderly, rule-bound society. The big difference is that now the rules are weighed against the values and rights contained in the Constitution. All rules, also those issued by the President and by Parliament, can be challenged in the courts by any one, regardless of how insignificant he or she may be.

This is a positive development. However, a country is not governed by the courts. An independent judiciary is an important instrument to ensure that the legal rules are adhered to – also by the government – but they are not the agent for service delivery.

Poor political competition and racial prejudice in the political arena causes the courts to play roles today that are not always desirable. The arm wrestling between the courts and the government is food for the legal eagles, but it is not healthy for sound government of the country. Poor state administration must be punished by the voters at the polls and by political parties in the political council chambers.

Many things have changed – our thinking about human rights, too.

In the ‘old days’, under the guidance of church leaders, it used to be said that human dignity was an unbiblical and unacceptable glorification of man. Now, under the guidance of church leaders, we say that because God loves man, man has dignity and his dignity should be respected.

1 John Philot Curran; JM and MJ Cohen *The Penguin Dictionary* (1960), p.128.

From a human rights perspective, this is the first commandment – you must respect the human dignity of the next person. Human dignity can never be subject to anything else, least of all attitudes of superiority.

Also, it is very important that you should know and defend your rights – *all* of your rights. Nobody else will do it for you. Others may assist you, but you have to demand your rights. It cannot be expected of the government to establish a human rights culture in South Africa all by itself and without support, because the government itself often is guilty of being a violator of human rights. It is ordinary people who should watch over the human rights dispensation, because human rights instruments have to protect them against the actions of the government.

Human rights are not static and are developing continuously.

The values and rights are closely interwoven; the one influences the other and the one strengthens the other. This is what makes such debates so lively. How to balance the rights with one another is a magnificent challenge. The courts, the legal profession *and* ordinary citizens should continuously be involved in this.

Words have meaning, but human rights have to obtain content. Therefore, we have to talk about them; they have to be weighed and they have to be harmonised with each other – **MY RIGHTS AND YOUR RIGHTS.**

EPILOGUE



DO WE KNOW ONE ANOTHER?

One of the last South Africans with whom I had a conversation before my departure to Ghana in 2004, asked, 'Are they fighting over there?'

One of the first Ghanaians with whom I spoke, asked, 'Does everyone in South Africa have guns?'

'No, but why do you ask?'

'Because here on television we see that even taxi drivers carry firearms and sometimes shoot at each other.'

This made me realise how little we as Africans know one another.

In the country of Kwame Nkrumah, foremost fighter against colonialism and leader of a one-party state; of Jerry Rawlings, military dictator who led his country to democracy; and of current president John Kufuor, who in 2000 defeated the ruling party at the polls for the first time in the country's history, I could not help but to remember Paul Kruger's passionate words when he had been fighting the battle against colonialism: "Africa shall be free."

Kruger could never have foreseen our circuitous route, neither that Afrikaner revolutionary Bram Fischer would have found inspiration in those words in his struggle against the apartheid government.

In Accra, at the University of Ghana, my friend Prof Kofi Kumado, whom I had first met in Belfast, introduced me as a true son of Africa. This honour gave me unexpected heartburn, because just before my departure I had been part of a committee who, on behalf of the Northwest-University, had to complete the annual Fair Employment Practice forms – those forms that denied by definition that I am an African. On the form there was room for only four categories: African, Indian, Coloured and White.

Maybe, one should remember that Albert Nothnagel, a former member of parliament, had said 20 years ago already that Afrikaners were the white children of black Africa. He, too, had said this in another context

and could not have foreseen the exact scope of it, even less that it would become true in such a way in Ghana.

A day before my departure for Ghana, I attended the unveiling of the statue of Khosi Mogale, forefather of the Tswana people, in front of the Krugersdorp town hall. The town hall itself bore silent witness of the many former battles between white political parties. The British royal house and Oom Paul also had left their traces in this same area. Now Mogale stands there prominently, right in front.

'Magaliesburg' and the 'Magalies' mountains I had always accepted as given, never realising that 'Magalies' had been a distortion of 'Mogale'. At school and in the years thereafter I had heard many stories of Oom Paul's visits to Krugersdorp as well as of the British royal houses' visit to the town. The fact that nobody had ever informed me about Khosi Mogale does not mean that he had never existed.

In Accra, looking back on the Mogale function, I came to realise that Africa is on our own doorstep, and not elsewhere outside our borders, as we so much like to imagine.

During the Mogale ceremony one of the speakers had said, smilingly, 'We all are Africans, white and black. You want to imagine yourselves to be Europeans, but you are Africans, because the Cradle of Humankind is in Mogale City – we all come from here.'

All of us are dragging baggage along. My hostess at the Human Rights Commission in Ghana is Anna Bossman. Her forebear, Willem Bosman, became William Bossman under English influence. We both laugh about our Dutch forebears – and I tell her of the many Herman Charles Bosman stories. In this way, the Dutch built interesting bridges between South Africa and Ghana which are not limited to our legal heritage, Roman Dutch Law.

South Africa's Truth and Reconciliation processes also echo in Accra. A Commission for National Reconciliation was appointed that had to take a look at human rights violations in the 'unconstitutional eras' and delve into the past. It took my breath away to be standing in the old Parliament where Nkrumah and the military leaders had governed and where the Commission for Reconciliation years later heard evidence from the victims of dictatorships. The contention that we simply should let the past be

was proved incorrect in both South Africa and Ghana and also shall be proved wrong in other places. People want to know what had taken place and victims also want to relate their stories.

An Afrikaner's European heritage and appearance are not unimportant, but because his permanent address is in Africa, and specifically in South Africa, they present no stumbling blocks. As a matter of fact, elsewhere in Africa they are a recommendation. However, in South Africa it will take some while yet before those Fair Employment Practices forms which irritate me so much, are changed.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

CHAPTER 2 BILL OF RIGHTS (AA 7-39)

7 Rights

- (1) This Bill of Rights is a 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.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8 Application

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) 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.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
 - a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9 Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person

- (1) Everyone has the right to freedom and security of the person, which includes the right –
 - a. not to be deprived of freedom arbitrarily or without just cause;
 - b. not to be detained without trial;
 - c. to be free from all forms of violence from either public or private sources;
 - d. not to be tortured in any way; and
 - e. not to be treated or punished in a cruel, inhuman or degrading way.

- (2) Everyone has the right to bodily and psychological integrity, which includes the right –
 - a. to make decisions concerning reproduction;
 - b. to security in and control over their body; and
 - c. not to be subjected to medical or scientific experiments without their informed consent.

13 Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

14 Privacy

Everyone has the right to privacy, which includes the right not to have –

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

15 Freedom of religion, belief and opinion

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that –
 - a. those observances follow rules made by the appropriate public authorities;
 - b. they are conducted on an equitable basis; and
 - c. attendance at them is free and voluntary.
- (3) a. This section does not prevent legislation recognising –
 - i. marriages concluded under any tradition, or a system of religious, personal or family law; or
 - ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

16 Freedom of expression

- (1) Everyone has the right to freedom of expression, which includes –
 - a. freedom of the press and other media;

- b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
- a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17 Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18 Freedom of association

Everyone has the right to freedom of association.

19 Political rights

- (1) Every citizen is free to make political choices, which includes the right –
- a. to form a political party;
 - b. to participate in the activities of, or recruit members for, a political party; and
 - c. to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right –
- a. to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - b. to stand for public office and, if elected, to hold office.

20 Citizenship

No citizen may be deprived of citizenship.

21 Freedom of movement and residence

- (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.

22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or pro-

fession freely. The practice of a trade, occupation or profession may be regulated by law.

23 Labour relations

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
 - a. to form and join a trade union;
 - b. to participate in the activities and programmes of a trade union; and
 - c. to strike.
- (3) Every employer has the right –
 - a. to form and join an employers' organisation; and
 - b. to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right –
 - a. to determine its own administration, programmes and activities;
 - b. to organise; and
 - c. to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

24 Environment

- Everyone has the right –
- a. to an environment that is not harmful to their health or well-being; and
 - b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

- i. prevent pollution and ecological degradation;
- ii. promote conservation; and
- iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

25 Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
 - a. for a public purpose or in the public interest; and
 - b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
 - a. the current use of the property;
 - b. the history of the acquisition and use of the property;
 - c. the market value of the property;
 - d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - e. the purpose of the expropriation.
- (4) For the purposes of this section –
 - a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - b. property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is enti-

ted, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection (6).

26 Housing

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27 Health care, food, water and social security

- (1) Everyone has the right to have access to –
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

28 Children

- (1) Every child has the right –
 - a. to a name and a nationality from birth;

- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - c. to basic nutrition, shelter, basic health care services and social services;
 - d. to be protected from maltreatment, neglect, abuse or degradation;
 - e. to be protected from exploitative labour practices;
 - f. not to be required or permitted to perform work or provide services that –
 - i. are inappropriate for a person of that child’s age; or
 - ii. place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
 - g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - i. kept separately from detained persons over the age of 18 years; and
 - ii. treated in a manner, and kept in conditions, that take account of the child’s age;
 - h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - i. not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child’s best interests are of paramount importance in every matter concerning the child.
- (3) In this section “child” means a person under the age of 18 years.

29 Education

- (1) Everyone has the right –
- a. to a basic education, including adult basic education; and
 - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
 - a. equity;
 - b. practicability; and
 - c. the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
 - a. do not discriminate on the basis of race;
 - b. are registered with the state; and
 - c. maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

30 Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31 Cultural, religious and linguistic communities

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
 - a. to enjoy their culture, practise their religion and use their language; and
 - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

32 Access to information

- (1) Everyone has the right of access to –

- a. any information held by the state; and
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33 Just administrative action

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

- (1) Everyone who is arrested for allegedly committing an offence has the right –
 - a. to remain silent;
 - b. to be informed promptly –
 - i. of the right to remain silent; and
 - ii. of the consequences of not remaining silent;
 - c. not to be compelled to make any confession or admission that could be used in evidence against that person;
 - d. to be brought before a court as soon as reasonably possible, but not later than –

- i. 48 hours after the arrest; or
 - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - f. to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right –
- a. to be informed promptly of the reason for being detained;
 - b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - f. to communicate with, and be visited by, that person's -
 - i. spouse or partner;
 - ii. next of kin;
 - iii. chosen religious counsellor; and
 - iv. chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right –
- a. to be informed of the charge with sufficient detail to answer it;
 - b. to have adequate time and facilities to prepare a defence;
 - c. to a public trial before an ordinary court;

- d. to have their trial begin and conclude without unreasonable delay;
 - e. to be present when being tried;
 - f. to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - g. to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - h. to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - i. to adduce and challenge evidence;
 - j. not to be compelled to give self-incriminating evidence;
 - k. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - l. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - m. not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - n. to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - o. of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

36 Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - a. the nature of the right;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose; and
 - e. less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

37 States of emergency

- (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when –
 - a. the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
 - b. the declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only –
 - a. prospectively; and
 - b. for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

- (3) Any competent court may decide on the validity of –
 - a. a declaration of a state of emergency;
 - b. any extension of a declaration of a state of emergency; or
 - c. any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that –
 - a. the derogation is strictly required by the emergency; and
 - b. the legislation –
 - i. is consistent with the Republic’s obligations under international law applicable to states of emergency;
 - ii. conforms to subsection (5); and
 - iii. is published in the national Government Gazette as soon as reasonably possible after being enacted.
- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
 - a. indemnifying the state, or any person, in respect of any unlawful act;
 - b. any derogation from this section; or
 - c. any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1	2	3
Section Number	Section Title	Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: – subsection (1)(d) and (e); – the rights in subparagraphs (i) and (ii) of subsection (1)(g); and – subsection 1(i) in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: – subsections (1)(a), (b) and (c) and (2)(d); – the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) – subsection (4); and – subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

- (6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:
- a. An adult family member or friend of the detainee must be

- contacted as soon as reasonably possible, and informed that the person has been detained.
- b. A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
 - c. The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
 - d. The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
 - e. A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
 - f. A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
 - g. The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
 - h. The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.
- (7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

- (8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

39 Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.