

20 YEARS OF DEMOCRACY: THE STATE OF HUMAN RIGHTS

IN SOUTH AFRICA¹

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It is a great honour to be invited to give this lecture. I follow a long line of very distinguished speakers, people of great wisdom and learning. I am very pleased to be able to acknowledge the presence of Mrs Beryl Botman. I did not know Professor Botman personally, but of course I knew of him by his reputation. The outpouring of tributes after his untimely death spoke volumes for the respect and affection in which he was held.

For me, giving a public speech at Stellenbosch brings back rich and varied memories. While I have been to the University many times, I think the last time I spoke at a public event was just over 40 years ago. I had been President of the SRC at UCT, and had held office in the National Union of South African Students (NUSAS). I particularly remember the Stellenbosch SRC of 1972, with which we had a stimulating and collegial relationship. Not everyone approved of that. One of those who disapproved was the Prime Minister, B J Vorster, who was also Chancellor of this University. One of the Stellenbosch students who had been involved has described what followed:

¹ The Annual Human Rights Lecture, Faculty of Law, University of Stellenbosch, 2 October 2014.

From the Afrikaner establishment our group ... was attacked in public and labelled by Vorster, in a public speech as 'slaprug-Afrikaners'. He ordered our students' representative council to his office and scolded us like children. He asked whether we were unaware that we were being misled by the English and the liberals to crack the Afrikaner wall.²

It is now twenty years since our first democratic Constitution came into force, and we achieved a Bill of Rights. It is a good time to take stock of where we are, and where we are going.

There are many reasons for us to be concerned about the state of our nation. But those concerns arise in a country in which we all have the right to vote, which we are able to exercise freely; in which we are all able to speak, which we do vigorously and noisily; in which we have the right to life, the right to freedom and security of person, and the rights to privacy, freedom of association, freedom of movement and residence, and many others. For lawyers, there is particular interest in the right to administrative justice, the right of access to information, the right of access to courts, and the right to a fair criminal trial. They underpin a democratic legal system.

These rights were not won easily or cheaply. They are not illusory. Each them represents a powerful repudiation of our history of apartheid, racial domination and repression.

² Joha Louw-Potgieter *Afrikaner Dissidents: A Social Psychological Study of Identity and Dissent* (Multilingual Matters, 1988) 45.

Perhaps the most remarkable achievement is that our national life is now pervaded by the discourse of constitutionalism and human rights. The constitutional project has taken root with a speed and a depth which I would never have anticipated. When one watches developments in the United Kingdom, where the enactment of the Human Rights Act and the application of Europe-wide human rights standards are the subject of heated debate and repeated attempts at regression, one begins to appreciate just how remarkable an achievement this is. It may reflect the abhorrence of our apartheid past, and the persistence of the consequences of apartheid in our present. We made promises to each other when we adopted our Constitution, and we insist on holding one another to that standard, however imperfectly we achieve it. That is a matter for profound celebration.

Thus far, I have deliberately referred only to what are sometimes classified as civil and political rights. One of the most striking aspects of our Bill of Rights is that it does not stop there. We have comprehensive social and economic rights, which the State is obliged to fulfil, and which are enforceable in our courts. Those rights, too, flow from our history. They, too, were fought for and achieved at great cost. And they, too, are not illusory. There have been extensive state programmes of provision of housing, water, and electricity. Millions of South Africans now have some of the basic facilities which they were denied under apartheid.

And yet: despite all of this, the words of Justice Chaskalson in Soobramoney remain true today, nearly seventeen years after they were written:

*We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*³

In this lecture, I address three matters. Two of them bear directly on what we might do to give the rights in our Constitution a full meaning in the lives of all South Africans. The third deals with the role of institutions in enabling us to achieve the promise of the Constitution. In what I say, I focus particularly on litigation. It is important, however, to remind ourselves that this is far from the only site of struggle for our rights.

Implementing the right to equality

There is debate about what is the correct way to measure inequality. For example, in South Africa there is substantial State expenditure on housing, social grants, etc, which has to be brought to account as a form of social wage. But there can be no doubt that however inequality is measured, we are one of the most unequal societies

³ Soobramoney v Minister of Health KwaZulu Natal 1998 (1) SA 765 (CC) para [8].

in the world. The inequality finds expression not only in the amount of money which people have at their disposal. Inequality pervades access to the facilities which are fundamental to a dignified and decent life – land, housing, health services, water, and – a fundamental causal factor in perpetuating inequality - education.

Not surprisingly, people have looked to the social and economic rights in the Constitution for redress. In the courts, that has met with mixed success. On the one hand, there has been great success in using those rights to protect people against arbitrary eviction, and against the cutting off of basic services and benefits. This is a major achievement of the Grootboom judgment. But attempts to use the rights to compel the State to take positive action to provide access to these facilities and services have been less successful.

One of the reasons for this is that with the exception of the right to education, the social and economic rights define the positive obligation of the state as follows: it is an obligation to “take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realisation” of the right.⁴

Litigation has therefore focused on whether the measures taken are “reasonable”.⁵ In Grootboom, the Court developed criteria for answering this question.⁶ The Court held that a court considering reasonableness does not enquire whether other more

⁴ Sections 26(2) and 27(2).

⁵ The Court has declined to adopt the “minimum core” approach, in terms of which the right is held to have a minimum content, below which service provision is inconsistent with the Constitution: Grootboom and Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 (5) SA 721 (CC).

desirable or favourable measures could have been adopted, or whether public money could have been better spent. A State could adopt a wide range of possible measures to meet its obligations. Many of these would meet the requirement of reasonableness. The jurisprudential premise which underlies this approach was explained in the Mazibuko case:

...[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.⁷

The result is that it is very difficult to persuade a court to order the state to provide specific benefits to specific people. When that claim is made, the court asks whether it is for the court to decide priorities for the allocation of resources, and in particular to answer two fundamental questions – “how much?”, and “who first?”.

⁶ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 paras [41] – [44].

⁷ Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC) para [61].

The purpose of this part of my lecture is not to debate whether the path which the Court has taken is right or wrong. Rather, I want to say something about the implications for practitioners - by which I do not mean only legal practitioners - and the strategic options for the way forward.

It seems to me that part of the answer lies in a more direct attack on systemic inequality. All of our rights are underpinned by the right to equality. The achievement of equality is one of the founding values of the Constitution.⁸ The Constitution says that everyone is equal before the law and has the right to equal protection and benefit of the law.⁹ It says that equality includes the full and equal enjoyment of all rights and freedoms.¹⁰

Those words are mocked by the inequality which we see all around us. Inequality is both a cause and a consequence of the lack of enjoyment of social and economic rights.

Most of the litigation on equality has focused on the question of when it is unfair to favour particular people or groups in the employment context or in relation to other benefits. We now have a fairly well developed jurisprudence on the meaning of unfair discrimination.¹¹ That however has limited impact on the transformation of society at large. Affirmative action measures will do little to change the living

⁸ Section 1(a).

⁹ Section 9(1).

¹⁰ Section 9(2).

¹¹ Most recently elaborated in South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23 (2 September 2014)

conditions of poor South Africans who are without decent homes, adequate health services, effective education, and other basic services.

Because the Constitution creates explicit rights of access to these services, litigation on these services has focused on those rights. When equality is raised as an issue in litigation of this kind, it is usually at best an adjunct, and often an afterthought. We need to re-think that approach.

In some countries, it is necessary to make a careful analysis of the relationship between poverty and what Sandra Fredman has called “the traditional constituency of equality rights, namely inequality on the grounds of race, gender or other status”.¹² In South Africa, the matter is much simpler. Poverty and inequality stand together, and they have a racial quality. In the words of the Cape High Court:

*The modern history of this country is characterised by over 300 years of rule by a racial oligarchy. The result is that poverty remains racially distributed. In the circumstances, discrimination on the grounds of poverty would inevitably lead to indirect discrimination on the grounds of race, which is prohibited by the Constitution*¹³

¹² Sandra Fredman “The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty” 22 *Stellenbosch Law Review* 3 (2011) 556.

¹³ *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape, and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 448.

In most cases, it is not difficult to demonstrate that unequal access to benefits and facilities has a racial basis, whether directly or indirectly.¹⁴ Racial discrimination, whether direct or indirect, is prohibited by the Constitution. It is time that applied the equality right to the systemic inequality and discrimination which we see in our public services and facilities. It is time to take equality seriously.

What would be the benefit of an equality-based approach? Some of the strategic advantages have been identified in a recent study by the Equal Rights Trust.¹⁵ I have taken over some of what they say, and have added some of my own.

First, and perhaps most fundamentally, the duties on the State under the right to equality are not qualified by the proviso that the State must take reasonable measures, within available resources, to achieve the progressive realisation of the right. The equality right is unqualified. This enables one to bypass much of the argument about judicial deference with regard to reasonable measures, the allocation of resources, and policy choices.

Like other rights, the equality right is of course subject to the limitation clause, s 36 of the Constitution. However, it is difficult to imagine that a court would uphold discrimination on the grounds that this is necessary to save money. The mere saving of costs cannot justify discrimination. The Supreme Court of the UK has held as follows:

¹⁴ This makes it unnecessary to go into the question whether the prohibition of discrimination on the grounds of "social origin" includes a prohibition of discrimination on the grounds of social class.

*... the European cases clearly establish that a member state may decide for itself how much it will spend upon its benefits system, or presumably upon its justice system, or indeed upon any area of social policy. But within that system, the choices it makes must be consistent with the principle of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost. No doubt it was because the Court of Justice foresaw that the ministry would seek to rely upon considerations of cost when the case returned to the national courts that it took care to reiterate that budgetary considerations cannot justify discrimination.*¹⁶

Second, the implementation of the equality right is likely to have a ratchet effect. If prohibited discrimination has been proved, the State may in theory be able to equalise by levelling upwards or levelling downwards. But levelling downwards entails taking benefits away from those who have had them, and who expect them to continue. By and large, those are the people who have most “voice” – after all, that is why they receive the greatest benefits – and they are likely to resist very effectively any attempt to level downwards. This raises the possibility that the advantaged will become the allies of the disadvantaged in pressing for increased benefits for the disadvantaged. The practical result is that levelling upwards is more likely than levelling downwards.

¹⁵ At this stage only the Executive Summary has been published: Equal Rights Trust “Litigation Strategies of Using Equality and Non-Discrimination Claims to Advance Economic and Social Rights” 12 *Equal Rights Review* (2014) 51 – 58.

¹⁶ *MOJ v O’Brien* [2013] UKSC 6 para [69].

Third, levelling downwards may be impermissible in some circumstances. The State is obliged to take reasonable measures to achieve the *progressive* fulfilment of the rights. That creates an obstacle to any attempt to regress, by removing benefits which have previously been provided.

Fourth, this strategy avoids a direct confrontation with the fact that these issues have significant resource implications. For reasons of separation of powers, judges find it understandably difficult to answer the question: “How much does the Constitution oblige the State to provide?” Some doubt that this is a question which they can answer at all. The equality right offers a way through this dilemma. It offers a simple answer to the question “how much?” - “as much as other people receive”. The State may equalise either upward or downward (assuming that this is permissible), but it must equalise. When this happens, questions of resource allocation are left to those who have been elected to make those decisions.

In giving this answer to the question of “how much”, the courts will do what Charles Black urged in a slightly different context:

When we are faced with difficulties of ‘how much’, it is often helpful to step back and think small, and to ask not, ‘what is the whole extent of what we are bound to do?’ but rather, ‘what is the clearest thing we ought to do first?’¹⁷

¹⁷ Charles L Black *A New Birth of Freedom: Human Rights, Named and Unnamed* (Yale University Press, 1997) 137.

The power of this approach was demonstrated in the Khosa case.¹⁸ The Social Assistance Act provided for the payment of social grants and child support grants. It excluded permanent residents from these grants. If permanent residents had sued for an old age grant purely on the basis of the s 27(1)(c) right to social assistance, they would inevitably have been met with the answer that the State's duty is to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of the right - and that the question whether old age grants should be paid, and if so in what amount, is not a matter which the courts can decide. However, the permanent residents had an answer to this: if you provide this benefit to citizens, they said, then you are obliged also to provide it to us, because there is no justifiable basis for differentiation or discrimination: in other words, you must provide to all or provide to none. The Court held that the exclusion of permanent residents was a breach of the guarantee of equality and the right to social security. The State chose to extend the benefits to all.

Another example is found in the challenge which was raised to the unequal provision of old age grants in respect of women and men. Women qualified for an old age grant at the age of 60, whereas men did so at the age of 65. This was challenged by some men. The State chose not to attempt to justify the discrimination. It accepted that it had to equalise. Some of us feared that the result might be that a new age of (for example) 62 or 63 would be set for all - a "levelling down" for women, who would have to wait longer to receive their grants. But the government chose otherwise: it remedied the breach of the equality right through legislation which had the result that in time, men qualified at the age of 60, as women had always done.

¹⁸ Khosa v Minister of Social Development 2004 (6) SA 505 (CC).

The equality principle is potentially a powerful tool for transforming our society. Using it is not simple. Much of the inequality arises from the privatisation of the services used by the relatively wealthy. And it will not be simple to devise the appropriate remedy to put an end to systemic inequality in the provision of services. However, neither of these difficulties is a reason why the foundational equality right should be abandoned, as it largely has been in this sphere of our legal life.

Using the Constitution to regulate private power

The decision of the Constitutional Court in the Pharmaceutical Manufacturers case contains a powerful dictum:

*I cannot accept [the] ... contention, which treats the common law as a body of law separate and distinct from the Constitution ... There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.*¹⁹

The Constitution tells us that the Bill of Rights applies to all law.²⁰ A provision of the Bill of Rights binds a natural or 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

¹⁹ Para [44].

²⁰ Section 8(1).

imposed by the right.²¹ The Constitution makes a clear and deliberate choice. It recognises the correctness of what H L Hale wrote almost 80 years ago:

*Those who wield [State] power we have subjected to some sort of responsibility to a democratic electorate, and to various constitutional limitations. Yet much of this recognised political power is not different in kind or degree, from much of the power that some individuals and private groups can lawfully exercise against other individuals.*²²

The attempt to insulate private law and “private” relationships from the Constitution is a conservative project. Karl Klare has pointed out that:

*The core ideological function served by the public/private distinction is to deny that the practices comprising the public sphere of life – the worlds of business, education and culture, the community and the family – are inextricably linked to and at least partially constituted by politics and law ... The primary effect of the public/private distinction is thus to inhibit the perception that the institutions in which we live are the product of human design and can therefore be changed.*²³

Closer to home, the point has been made penetratingly by Justice Cameron:

²¹ Section 8(2).

²² H L Hale “Force and the State: A Comparison of ‘Political’ and ‘Economic’ Compulsion” *Columbia Law Review* (1935) 149, quoted in Andrew Clapham *Human Rights in the Private Sphere* (Oxford University Press, 1993) 126 – 127.

*The distinction between public and private law comes to us from Roman law. To the extent that the distinction rested on the dual assumptions that public law dealt with unequal power relationships and was political in nature, while private law was apolitical law between equals, it needs better justification...*²⁴

In a modern society, private power is pervasive. As Otto Kahn-Freund pointed out, law is a technique for the regulation of social power.²⁵ Law empowers and it disempowers, in the “private” sphere as much as in the “public”. All of that law is subject to the discipline of the Constitution.

We have begun to apply the Constitution to private law, but the steps we have taken are somewhat timid when one has regard to the breadth and depth of the constitutional command. In delict we have Van Duivenboden²⁶ and its progeny.²⁷ In contract we have Barkhuizen²⁸ and its progeny. Dennis Davis has contended that in relation to contract, the courts have ignored the fundamental challenge: that they have “*either eschewed the significance of the Constitution or simply nodded in the direction of the Constitution, before proceeding in the opposite direction*”.²⁹ Sandra Liebenberg has shown how the principle of participatory parity could inform the

²³ Karl Klare “The Public/Private Distinction in Labor Law” *University of Pennsylvania Law Review* (1982) 1358 at 1360, 1417.

²⁴ KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others 2013 (4) 262 (CC) para [92].

²⁵ Otto Kahn-Freund Labour and the Law (Stevens, 1972) 4.

²⁶ Minister of Security v Van Duivenboden 2002 (6) SA 431 (SCA).

²⁷ The developments are succinctly summarised by FDJ Brand in “Influence of the Constitution on the Law of Delict” *Advocate* Vol 27 No 1 (April 2014) 42 – 45.

²⁸ Barkhuizen v Napier 2007 (5) SA 323 (CC)

²⁹ D M Davis “Developing the Common Law of Contract in the Light of Poverty and Illiteracy: the Challenge of the Constitution” 22 *Stellenbosch Law Review* 3 (2011) 845 at 846.

application of socio-economic rights to contractual relations, which would have results going far beyond the steps which the courts have taken thus far.³⁰

We need a fundamental re-evaluation of our approach not only to contract and delict, but also to family relations, property, privacy and trade. The area in most pressing need of fundamental re-evaluation is customary law. Apartheid-era approaches to traditional authority and to land rights are now being used to dispossess rural people of their land rights, and of their claim to the mineral wealth beneath the surface of the land they occupy.

The founding values of our Constitution are human dignity, achievement of equality, the advancement of human rights and freedoms, and non-racialism and non-sexism.³¹ The constitutional transformation project will be limited in its impact unless those values are applied to all of our law.

Building and protecting effective institutions of state

The rights in the Bill of Rights are not self-enforcing. They depend on a network of institutions, which are created or supported by the Constitution. Without robust and independent institutions, the rights are likely to fail.

³⁰ Sandra Liebenberg "Towards and Equality-Promoting Interpretation of Socio-Economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition" forthcoming vol 2 *South African Law Journal* (2015) (typescript pp 24 – 26).

³¹ Sections 1(a) and (b).

A disturbing feature of recent years has been the weakening and undermining of those institutions. We have had too many appointments in which a key qualification for appointment seems to be a willingness to protect those in power, or loyalty to a particular faction.

One of the most important institutions in our legal system is the prosecution service. It is the arm through which the State exercises much of its coercive power. Independence, integrity and competence are critical. Section 179(4) of the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. Independence is a constitutional requirement, and it is guaranteed.³² The national legislation is the National Prosecuting Authority Act.³³ Section 9(1)(b) states that any person to be appointed as National Director, Deputy National Director or Director of Public Prosecutions must *“be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned”*.

We all know the sorry tale of the firing of Vusi Pikoli, the appointment in his place of Menzi Simelane, the removal of Mr Simelane by order of court,³⁴ and the shambles which has followed. The Supreme Court of Appeal has recently spoken in harsh terms about the conduct of the then Acting National Director of Public Prosecutions in the interlocutory litigation in relation to the review of the decision not to prosecute

³² Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) para [146].

³³ Act 32 of 1998.

³⁴ Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC).

Mr Zuma. A dispute arose as to what materials the NDPP was obliged to disclose to the applicant. The SCA described the conduct of the Acting NNPP as follows:

... (I)t is to be decried that an important constitutional institution such as the office of NDPP is loath to take an independent view about confidentiality or otherwise, of documents and other materials in its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the High Court or this Court is baffling. ... This conduct is not worthy of the office of NDPP. Such conduct undermines the esteem in which the office of NDPP ought to be held by the citizenry of this country.³⁵

It must be heart-breaking for the many people in the NPA of competence, independence and integrity, to watch the leadership of the organisation dissolve in political, factional dispute and intrigue. This undermines the Constitution.

It is important, I think, to note that the constitutional requirement of independence should not be seen as in conflict with the constitutional principle of accountability of public power. In an important recent paper for the Institute of Security Studies, which explores mechanisms for prosecutorial accountability, Martin Schönteich puts it as follows:

Prosecutorial authorities must be sufficiently independent from external influence to permit the fair and impartial application of the law and prosecution

*policy. Yet prosecutors should be sufficiently transparent and accountable to the public to help ensure that prosecutorial authority is not abused.*³⁶

One has to wonder whether we will achieve either of these goals, for so long as the person who appoints the NDPP has a direct and personal interest in the decisions made by the person who is appointed.

I am not one of those who believe that appointments should be made as if political views and commitments are irrelevant. In key positions, technical skill is not enough. It is legitimate to enquire whether candidates are committed to the transformative project of the Constitution, and have demonstrated that commitment by word and deed. It is legitimate to disqualify them if they are not able to show that this is the case. So this is not a plea for “neutrality”. To the contrary, it is a plea for commitment, but a commitment to the constitutional project, not a commitment to particular office-bearers or to particular political factions.

Our first Constitutional Court was of a stellar quality. One reason for this is that the end of apartheid resulted in the availability of outstanding people who either had never been considered for appointment, or would never have accepted appointment. Under apartheid we could never have a Judge Langa or a Judge Chaskalson. Another reason is that a demonstrated commitment to human rights was a prerequisite for appointment. Each of the Justices, in his or her own way, could

³⁵ *Zuma v DA* (836/2013) [2014] ZASCA 101 (28 August 2014) para [41].

³⁶ Martin Schönleich “Strengthening prosecutorial accountability in South Africa” Institute of Security Studies Paper 255 (April 2014) 2.

claim to be a human rights activist. That was entirely appropriate under a Constitution in which a commitment to human rights suffuses the founding values, and in which the Chapter on the Bill of Rights follows immediately upon the Chapter dealing with the founding provisions.

One has to wonder whether the Judicial Service Commission still regards this as a qualification for appointment to judicial office. There is reason to suspect that the position is the opposite. One member of the Commission, Deputy Minister Chohan, appears to regard a strong commitment to human rights as at best suspicious, and at worst a disqualifying feature. In the most recent (April 2014) interviews, she said that she had a “slight discomfort” with would-be Judges who had an activist background as human rights lawyers. She found it “a bit disturbing” that some candidates wished to be appointed as judges “while espousing very vehement human rights activist tendencies”. She was “discomforted” by the prospect of a judge “from an activist background” sitting in a case between an indigent person and the State.³⁷

This attitude demonstrates a failure to understand that the rights in the Constitution are at the heart of the transformative project which is mandated by the Constitution. The rights can be enforced against the State and private parties. They provide protection against challenges to state action in support of the transformative project.

³⁷ Franny Rabkin and Niren Tolsi “Few Magistrates Make the Grade with JSC” *Business Day* 10 April 2014; Chris Oxtoby “A Week in the Life of the JSC” *The Con* 9 June 2014.

I cannot restrain myself from noting that the Deputy Minister's Department is famous for its repeated and callous disregard of human rights, particularly the human rights of refugees. To its credit, the Parliamentary Portfolio Committee last week noted that the recent Samotse judgment "*brings to three the number of rulings against the department by a court of law and a Chapter 9 institution within the past few weeks. It is concerning that all three judgments point to an incessant breach of the Constitution by the department.*" Last week there was a further such judgment in the SCA.³⁸ One can understand why the Deputy Minister would not want to have human rights-minded judges examining the lawfulness of what her Department has done.

The list of important institutions which have been weakened and undermined is sad and dispiriting. In this context, it is impossible not to refer to the avalanche of attacks on the Public Protector for doing her duty. Of course, the reports and recommendations of the Public Protector are not above critique or criticism. We are all entitled to say that we disagree with them. And there is room for legitimate debate as to the extent of the remedial powers of the Public Protector. But organs of State have a constitutional obligation to the Public Protector. In the words of s 186(3), they "*must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of*" the Public Protector and the other Chapter 9 institutions. The attacks on the Public Protector, for doing her job bravely and effectively, are a disgrace. One waits to hear someone in authority say that, and say so clearly.

³⁸ <http://www.gov.za/speeches/view.php?sid=48812>. Samotse and Another v Minister of Home Affairs and Others (NGHC 23 September 2014) deals with the treatment of people living in South Africa who are wanted for trial in a country where they may face capital punishment. Last week's judgment was Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism (48/2014) [2014] ZASCA 143 (26 September 2014)

A “klip in die bos”

Finally, recognising that I am at Stellenbosch, let me throw a “*klip in die bos*”. We all know that corruption is a threat to our democracy. It has been said so well by so many others, that it is superfluous for me to repeat it.

A prerequisite for dealing with corruption is the political will to do so. The difficulty of this has been explained by Bertrand De Speville. He was appointed Commissioner of the Independent Commission Against Corruption in Hong Kong, at a time when corruption was widespread in Hong Kong. His efforts, those of his Commission, and the support of the Hong Kong government, turned the situation around. In addressing how to achieve the necessary political will, he says:

Those who realise they are risk from an effective drive against corruption will do what they can to ensure that it never flies. At an earlier stage, as our leaders contemplate the realities of effective action, they themselves may feel their anti-corruption fervour fading. The thought that such action may affect political allies and colleagues, perhaps even friends and family, has a dampening effect. It may extinguish the initiative completely. ... The political will to defeat corruption is liable to be undermined by those in positions of influence who could be adversely affected by effective action against the problem.³⁹

³⁹ Bertrand De Speville (De Speville & Associates 2010) Overcoming Corruption: The Essentials 33-34.

He proposes the strategy of creating independent institutions to investigate corruption, and then drawing a line under the past: making a fresh start by declaring that matters occurring before the date of the new law will not be investigated.

This approach worked in Hong Kong. But it flies in the face of the “truth and reconciliation” approach which South Africa pioneered. It will be a bitter pill to swallow. But it may well be that it is the only medicine which will cure the cancer of corruption. Unless we take that medicine, we are at risk that the disease will destroy us. The experience of Hong Kong demonstrates that properly implemented, this approach can work. It is time that we had a serious debate about this. If we cling to a principle which we cannot actually implement, namely that there must be full accountability for all past acts of corruption, we may disable ourselves from dealing with the matter at all, with potentially disastrous results.

CONCLUSION

South Africa in 1994 was not a promising place for constitutional democracy. Virtually none of the population, none of the judiciary and none of the legal profession had any experience of constitutional democracy. We had no practical experience of how a genuine democracy operates. We had to learn while the system was being constructed and operating. The achievements of the past twenty years are genuinely remarkable, and we do ourselves a disservice if we fail to recognise that.

But this is no basis for complacency. I do not think it is alarmist to say that we are now in the midst of a struggle about whether we will remain a genuine constitutional democracy. There are a number of symptoms of this. Key institutions of state have been undermined and weakened. Attempts are made to capture and use state institutions for anti-constitutional purposes. (One need only look at the factional intrigue in state intelligence to justify that assertion.) There is an *“emerging trend towards security-statist approaches to governance”*.⁴⁰ Corruption is a real problem. In critical areas, Parliament is failing to perform its constitutional function of oversight of the executive, preferring instead to protect those in power.

This is no time for complacency - but it is also not a time for panic. Our task is to ensure that the Constitution does its job. Ultimately, the best protection for the Constitution is the recognition by South Africans that the Constitution and the rights which it contains are a vital means of building a society in which all can live in dignity – in shorthand, a society in which there is a better life for all. Law and the lawyers have an important role to play in building this recognition.

⁴⁰ Right2Know “R2Know Secret State of the Nation Report” (2014) 2. The enactment in due course of the Protection of State Information Bill will be a significant marker in this process.