# Business and Human Rights in South Africa

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# Introduction

The founding and development of a human rights culture does not, and cannot, take place in a vacuum; it is closely related to and dependent upon the various powers and influences that shape a society at a given time.

South African society is currently showing the signs of a society in transition (some might say transformation); on the one hand, it has to cope with what remained of its apartheid past, while on the other, demands pursuant to its newly found freedom constitute a source of strain on society's mental and physical resources.

The quest for human rights, based on our very fine Bill of Rights, appears to be caught in the grip of the opposing forces and demands that currently dominate our society; high levels of crime, alleged and real corruption, racial tensions, extravagant demands, low productivity, prejudices inherited from the past, and the like, are not factors conducive to the nurturing of a human rights culture.

The National Human Rights Trust believes that organised business (i.e. from the factory floor up to the highest levels of management) bears the crunch of these centrifugal forces which currently dominate our society. It is, furthermore, an unassailable fact that business has a vital role to play in the successful transition/transformation of society to that of a fully-fledged democracy. Business has to therefore be assisted in the awesome task facing it in that regard. One way of so assisting business, is to create opportunities where leaders from business may raise their concerns, share their experiences, air their views and, hopefully, also learn from one another and from others how these challenges may be met.

It was with this purpose in mind that the National Human Rights Trust, ably supported and assisted by the Konrad Adenauer Foundation, presented a two-day seminar on 30 and 31 October 1999 at the HSRC in Pretoria, on the topic "Business and Human Rights". Papers were delivered by prominent and leading South Africans, both from within business and from other spheres of society.

It is hoped that the publication of these papers may contribute towards the ongoing debate concerning the founding of a proper and well-balanced human rights culture in South African society.

*Dr Johan Kruger*
*Chairperson*
*National Human Rights Trust*

# Welcoming Remarks

*Michael Lange*

## INTRODUCTION

I would like to extend a warm welcome to you all on behalf of the Konrad Adenauer Foundation (KAF). This is the second time that KAF has prepared a colloquium of this nature in conjunction with the National Human Rights Trust and we are delighted at our continued involvement. This conference is part and parcel of KAF's ongoing efforts to contribute in a meaningful way to democratic transition in South Africa.

## 1. BRIEF BACKGROUND

For those of you who do not know about KAF, allow me to provide a brief background to the German political foundations and to outline some of the activities we are involved in in South Africa.

The German political foundations are a unique feature of today's democratic culture in Germany. The move behind their creation, which dates back to the 1960s, was the belief that political or civic education would help develop and consolidate democracy in post-war Germany.

Both in Germany and abroad, the foundations seek to further develop and encourage people to play an active part in the political and social lives of their communities. They assist in strengthening the concept of human rights and help to implement social justice and the rule of law.

KAF is one of Germany's five political foundations and is closely affiliated to the Christian Democratic Union Party of former German Chancellor Helmut Kohl.

KAF has been cooperating with partners throughout the world for more than 35 years. Some 85 Foundation representatives working abroad oversee approximately 200 projects and programmes in more than 100 countries. It therefore comes as no surprise that international cooperation accounts for about half the Foundation's total budget. In this way, KAF is actively assuming a share of responsibility in shaping international relations.

As a result of the work undertaken by KAF, especially in developing countries, the Foundation has adopted the promotion of democracy as its most essential mission abroad. We have become convinced that the creation and consolidation of a democratic political framework is one of the essential conditions on which any development process depends.

The strengthening of institutions and structures that guide the development of a constitutional and legal order and favour the consolidation of the rule of law has been gaining importance among the Foundation's activities – especially since transformation processes all over the world have been offering greater opportunities for direct involvement.

The implementation of individual human rights, democracy and the rule of law is one of the foremost objectives of our work in South Africa.

As this is not to be achieved simply by transplanting Western European models. Our intention must be, and is, to popularise, strengthen and promote human rights everywhere, in conjunction with the strengthening of basic elements of democracy through seminars such as this as well as through other educational activities.

## 2. KAF IN SOUTH AFRICA

In South Africa, KAF cooperates in this respect not only with political parties and their respective think-tanks but also with reputable education and research institutions, as can be seen from today's event. Some of our main projects concentrate on constitutional development at national, provincial and local levels, good governance as well as the training of government officials and especially local government councillors.

The Foundation aims to explain the fundamentals of a liberal democracy from a Christian Democratic viewpoint and to enhance political competence among citizens.

In KwaZulu-Natal, KAF is engaged in civic education programmes in cooperation with the Institute for Federal Democracy, promoting democratic and socio-economic development and providing support, specifically for the rural areas.

In the Northern Province KAF assists the provincial government in its attempts to unify the different local administrations. Expertise are provided from Germany and training is facilitated for different groups of government employees.

In each case, we utilise the tools available to us to further our objectives. These tools include international and national seminars such as this one; short-term expertise; study tours to Germany; research programmes and, where appropriate, publications through our series of seminar reports and occasional papers.

## 3. CORRUPTION

South Africa is quickly learning that corruption is one of the major impediments to effective development. The great openness that democracy has brought to this country since 1994 offers new opportunities to deal with this problem in the context of the country's new constitutional values.

While the government has on many occasions, and again recently during the Anti-Corruption Conference in Durban, publicly stated its determination to eradicate corruption, it has been struggling to shape a consistent and coherent approach, in conjunction with business and civil society. There still seems to be a distinct need for a clear conceptualisation of the problem, an understanding of its implications and direction about how it can be addressed.

The causes of corruption are varied and would have to be understood in specific contexts, but a few general observations regarding some of these causes might be appropriate:

- Corruption is closely linked to an official's discretion over financial means and the degree of accountability in executing such discretion.
- In the absence of clear rules and codes of ethics, discretionary power is more open to abuse.
- Lower level civil service salaries and poor working conditions are strong incentives for corruption.
- The less effective a government is, in general, with slow budget procedures, lack of transparency, inadequate strategic vision and weak monitoring mechanisms, the more fertile the environment for corrupt practice.
- If political leaders and top bureaucrats set an example of self-enrichment or ambiguity over public ethics, lower level officials and other members of the public might be tempted to follow suit.

It is in the rules and practice of governance that the foundations of sustainable development are shaped, or undermined.

The World Bank has, I believe, rightly stated in a recent report on the "State in a Changing World", that the very basis of development becomes compromised when these rules and practices are not effectively monitored and applied.

Development suffers in particular, where the rules of governance allow arbitrary resource allocation and the diversion of public resources in defiance of the public good and to the exclusive benefit of corrupt officials, politicians and their collaborators.

## 4. THE CONSTITUTION: THEORY AND REALITY

Concerns about corruption have intensified in South Africa in recent years. Despite the promulgation of one of the world's most elaborate constitutions – based on a long list of human rights, and revolving around executive accountability to the legislature, an independent judiciary and decentralised governance within a unitary state – the South African Constitution also provides for special institutions such as the Public Protector, the Constitutional Court and the Auditor General. Jointly, these facets of the new constitutional order create the means for

accountable government in the best tradition of democracy.This is the theory, now the reality.

In 1996, 7427 civil servants were arrested on corruption charges. The following year, the number of similar cases decreased to 4082. By August 1999 the Heath Special Investigating Unit was considering 1048 cases where state employees have allegedly been drawing pensions as well as salaries. This was estimated to involve more than R53 million, equivalent to approximately 10 000 individual pension beneficiaries. In the notorious Northern Province, a recent review of 95 000 beneficiaries of welfare grants showed only 3000 to be legitimate claimants.

As much as it may be true that the apartheid era was marked by a culture of secrecy and patronage, where rules flew in the face of honest and accountable government, can one say that today's corruption is a result of apartheid only?

Recent calls for greater efficiency, transparency and integrity in the business of public institutions are driven by a number of factors:

- There is an increasing realisation that the achievement of economic, political and social objectives seem only possible by improving good governance and preventing corruption.
- Corruption threatens economic growth, social development, the consolidation of democracy, and the national morale.
- Public sector corruption and maladministration reinforce the unequal distribution of opportunities, and thus serve to undermine basic human rights.

In South Africa, as in most countries, citizens and businesses see it as their right to seek ways of minimising their tax liability, provided that they do so within the confines of the law.

The boundaries between legal tax minimisation and illegal or improper tax evasion are often not very clear. The best measure to counter corruption around taxation is therefore to create a simple, moderate and uniform tax regime with few complex exemptions. South Africa has engaged in an extensive tax reform process, which covers both a fundamental reassessment of the basis for taxation and the management of the tax system. The formation of the independent South African Revenue Service has been a significant step in the fight against tax evasion and tax corruption.

Success is already visible with a collection of 6% more in income tax than the government had planned for for 1998.

A number of developments to address both perceived and actual corruption are currently under way in South Africa. The government has launched an anti-corruption initiative that has as its main objectives to:

- improve the investigation and prosecution of corruption
- rationalise the agencies combating corruption
- review legislation
- improve discipline at all levels of government
- protect whistle-blowers and witnesses.

## CONCLUSION

South Africa is today considered by many observers to be a legally consolidated democracy, in which development towards a constitutional, pluralistic state ruled by the new law of the land, appears to be irreversible. But by transforming white minority rule to black majority government, only the foundations of a peaceful democratic society have been laid.

Building and maintaining a strong and enduring democracy on these foundations will furthermore depend on a continuing commitment by all segments of South Africa's diverse population to reconciliation and far-reaching economic and social transformation. KAF is willing to play a role in nurturing the transformed elements of South Africa's civil society and political life.

This seminar is designed to stimulate debate on business and human rights and I can only hope that you will find it enjoyable, interesting and worthwhile.

# Opening Remarks

*Albie Sachs*

## INTRODUCTION

Round about 1992 I had an interesting and rather unexpected experience. At that time I was a professor at both the University of Cape Town (UCT) and the University of the Western Cape (UWC), and I gave a lecture to law students at each of these institution on the theme "A Future Bill of Rights for South Africa".

What was interesting was that when I spoke at UWC, the audience there saw a bill of rights as a document that was going to open up doors to possibilities that had previously been forbidden. To these students, a bill of rights held out the prospect of being able to enjoy dignity that had been denied in the past; it held out enormous promise.

The next day I spoke at UCT. Now, UCT Law School is becoming much more open and representative than it used to be, but in those days it was not all that different from what it was when I was there forty years earlier.

I again spoke about a bill of rights, but to that audience its meaning was very different. They wanted to believe that a bill of rights was going to provide guarantees; that it would ensure there would be no going back on matters regarded as necessary and good in society, for example, freedom of speech, the right to vote, the right to not be dispossessed of our homes. It was seen as a bulwark against any retrocession.

To put it bluntly, the black students saw a bill of rights as something that opened up prospects for the future, whereas the white students, generally, saw a bill of rights as something to ensure that they would not be treated as others had been in the past.

What was so useful for me, was to realise that I could not speak about a bill of rights for black students on Monday and another bill of rights for white students on Tuesday. This would be dishonourable and it would also undermine the very meaning of a bill of rights – a bill of rights is for all seasons, for all people, and that is its strength. It must contain elements of such rationality, fairness and justice in the context of our society, that everybody feels protected by it. Whether one belongs to the oppressed community that suffered so much in the past, now looking forward to the enjoyment of rights in the future, or whether one belongs to the privileged section of the community, now welcoming change but anxious that transformation might cause disturbance and possibly lead to new injustices, both groups need the same document, the same bill of rights.

And I suspect that even at this very conference, looking at the diverse participants, the Constitution could have different significance for different people here.

Some may be wondering: will business really open up to give us a chance? Will the whole ethos change enough so that we can truly feel free, and believe we have a real equal chance with everybody else. And others who have grown up in another context may be wondering: is the government going to start interfering in everything, telling us what to do and commanding us to be politically correct? And maybe some individuals are feeling a bit of both.

The point, however, is that despite these differing opinions, we must be talking about the same Constitution, the same bill of rights. We are all South Africans and it is the same business, functioning in the same framework.

## 1. THE CONSTITUTION

How does the Constitution fit in? Let me tell you some things that a constitution cannot do. A constitution cannot make you happy. It cannot make you clever or rich or safe. It is a document, a set of ideals that governs the structure of government, of elections, of an open democracy. It has a variety of institutions to ensure that these principles and processes are adhered to. But it is just a framework that does not purport to grant happiness, prosperity and safety to everybody *per se*. It is not, in that sense, self-executing.

A constitution provides the overall framework of principles in a bill of rights, structures in terms of the forms of government and how they are accountable, as well as institutions to make it possible to facilitate people being happy, prosperous and safe. But it does not do all this in and of itself. If things go wrong, don't blame the constitution.

A constitution simply gives us the possibilities, the guarantees and a sense of political security, if you like, to enable us to achieve the things that we want to achieve. So if we are not as free in the streets and in our beds as we would like to be, it is not the fault of the constitution. Rather, we have not developed our society sufficiently, and the instruments referred to in the Constitution for guaranteeing security, have not been perfected sufficiently. As a society, our moral development has not been intense enough to achieve those things that we need.

## 2. RIGHTS

When I speak of a constitution as a framework, what impact does this have on, or for, business?

I will deal first with the framework of rights. Just for fun, I connected up some words that apply here, all beginning with PR, all Bill of Rights protections for business.

Firstly there is the right to privacy. The police cannot barge into your home, and they cannot just burst into your office and start going through all your documents and materials without a warrant, and a warrant is something that requires a reasonable suspicion and is issued by a judicial officer. The system of warrants is the way one balances the need of the community to investigate crime against the rights of people not to have their lives and activities interfered with by the state, and businesses also can benefit from that protection.

The second is property. The clause on property is quite extensive in our Constitution. It is not like the Zimbabwe Constitution where it took up half the Constitution and caused endless problems. What our Constitution does, essentially, is to guarantee people against arbitrary deprivation of property.

If there was a right to property, it could be interpreted in two ways: those who have property have a right to get more, and/or those who do not have property, have a right to get some. A right to property could be transformatory, even revolutionary, but in any event there is no right to acquire property or to hold property in our Constitution.

There is, however, a right not to have your property taken away. I think that that is sufficient for business purposes. A general right to have property attracts too many qualifications regarding taxing and regulations. But we all know that the right not to take away property means that the state cannot just come along and take what it wants. If any property is to be taken at all, it must be for public purposes, which is more or less defined as being in the public interest, and compensation has to be paid. The kinds and amounts of compensation to be paid are qualified. When it comes to land reform, there is a sophisticated "menu" of factors that have to be taken into account. These factors take cognisance of the historical way in which people were dispossessed of property in the past, but also that investment has been put into property, that market value has to play a role, etc. These are matters that could be tested in the courts in future.

Thirdly, profession. In the Interim Constitution there was a right to take part freely in economic activity. This right was, however, heavily qualified. People felt that the qualifications were so extensive that it was not really useful to have that right. Instead, it would be better to have a strong right to practise your profession, but a right is subject to regulation.

Regulation is actually built into the right itself. So, for example, you have a right to become a doctor. One cannot be excluded from that right, but at the same time there can be regulations. The medical profession cannot have anyone going around purporting to be a doctor and working with very sick people. This aspect gets quite complicated in South Africa, however, since we have traditional medicine, non-sci-

entific forms of alternative healing and the regular profession. There might be problems in future, but in any event this is a constitutionally protected right.

The right to practise your profession is a very important right of autonomy, of choice in relation to economic activity, and I assume that the right to be a business person would be a right to a profession. Another aspect of the professional rights as constitutionally protected is the right to establish professional organisations, employers' organisations.

Lastly, process. The right to process comes in in a number of different ways. There is a constitutionally protected right to Just Administrative Action. This right covers all sorts of dealing with government and is especially important for people wanting planning permission. The right lays down certain procedures of basic fairness. What it boils down to is this: if anything is being done by a government official that affects your rights or your legitimate expectations, at the very least, you must be given proper notice and a chance to have your say. Reasons must then be given and there has to be a connection between the reasons given and the outcome. And, of course, the courts are in the background for judicial review. This is a very important brake on government. Indirectly it is also a brake on corruption, because there has to be a process of justification by government officials.

Another aspect of process is in terms of labour and labour disputes, labour rights. Here, employers organised in terms of federations, and employers acting individually on their own, have constitutional rights to participate in collective bargaining, to be organised. There is no right to lock-out, but there are strongly protected rights acknowledging that the labour field has a bilateral, and usually a trilateral, component, with workers and employers having their own rights. The government is usually involved here through Nedlac which, if I remember correctly, is not constitutionally protected, but rather a legislated three-way kind of structure. In any event, bargaining takes place within a constitutionally created framework, and within that framework employers/ businesses have a constitutionally protected position.

The last point I would like to mention under the concept of process, it that everybody has a right to have their disputes settled in a court of law. The Constitutional Court is currently dealing with a case involving the Land Bank. The Land Bank offers loans at much lower interest rates than commercial banks. In return, it gets mortgage control over the farm equipment. If the farmers do not pay up in time, having been given proper notice, the Land Bank can get the sheriff to go on to the property, seize the goods and sell them at public auction. This is being challenged on the basis that it either excludes the court from a meaningful position at all, or that it allows for some kind of self help. The argument is that the Land Bank, being a state institution, should set an example of only seizing property through the courts and not doing it direct.

This is an example of the principle of taking one's disputes to court being tested. Again, it is a very important protection for openness, fairness and legality in society – a constitution not backed up by courts could be no more than a piece of paper.

All the rights I have mentioned are subject to reasonable limitations. In the Land Bank case, it was argued that we might be attenuating the right of access to court, but it is not unreasonable to do so. Here, we are dealing with public money and a revolving fund, and the goods are identified. When people enter into the transaction, they know full well that this is the risk they run, and that was the justification. In limiting any of the rights that have been mentioned, we have to decide if the limitation is reasonable, justifiable in an open democratic country, and based on dignity, equality and freedom.

In deciding this, the Constitutional Court looks at the practice all over the world. We frequently look to Germany, where we have found the decisions of that country's Constitutional Court to be extremely helpful; the decisions are focused on contemporary society and are intellectually coherent. (The Constitutional Court plays a big role in German society and I am told that it has the highest prestige of all public institutions.)

We also look to Canada, India, Namibia, the United States (US) and the European Court of Human Rights. We do not look to these country's to copy what they have done, but rather to get a sense of what the judges are saying, what the correct kind of balance is, what is seen as fair, reasonable and just in democracies in various parts of the world. And I am happy to say

that other countries are starting to look at our decisions. South Africa's is one of the newest Constitutional Courts. This country has, I think, a brilliant Constitution that is sophisticated and clear. I have outstanding colleagues at the Constitutional Court. We are a strong team and I can proudly state that our judgments are viewed with increasing respect abroad.

## 3. RESPONSIBILITIES

Having discussed the protections for business, we now move on to the responsibilities. Looking through the Bill of Rights, the rights that seem to affect business the most relate to equality, the anti-discrimination principle. In this sense the South African Constitutional Court has followed the Canadian approach rather than the US approach. US law on equality is very technical and extremely controversial, and it is difficult to get a coherent picture from the majority/minority positions in that country's Supreme Court.

In Canada, however, equality law has focused on the human rights aspect of equality – ie, which groups in society are vulnerable? Which groups have been unfairly treated in the past or are likely to be unfairly treated because of what they are? That is, because they are black, or because they are white, or because they speak this or that language, have this or that belief, or no belief, or because they are gay or straight, male or female, married or unmarried. The focus in the South African Constitution is very much on equal protection relating to the anti-discrimination principle.

The Employment Equity Act will eventually have to be embraced by all. As I understand it, the Act is not based on formal, rigid quotas created by external bodies, but on targets established by the enterprises themselves. There is, however, an accountability of follow-up in relation to these targets, and in order for there to be real transformation, it is going to be essential that this accountability, firstly, happens, and secondly, is handled well. It is important that the process be done fairly and in an equitable manner, and there will no doubt be much litigation.

The next important responsibility for business is to respect the right to fair labour practices. One can no longer just hire and fire staff. Contemporary labour law throughout the world recognises that there has to be an element of fairness in the employer–employee relationship – here it is a constitutionally protected principle. Workers, of course, also have certain guaranteed rights – ie., to organise, to strike, to form unions.

At a more crude level, forced labour and servitude are forbidden. I heard of an interesting case in this regard. In one of the rural areas of South Africa, a dispute of 60 years has been resolved and the local king has been enthroned. The community have come together and are drafting a constitution for that particular area. Somebody raised the question about voluntary work on the king's land every Thursday afternoon – as is tradition. A community member said in response that this was against the prohibition on servitude and forced labour, to which somebody else added that it was not forced labour because it would be voluntary. Another community member then raised the issue of what would happen to those who did not want to volunteer: would they be penalised in any way and would this be a violation of the Bill of Rights? For me, it is wonderful to hear of such debate and that the Constitution is being taken seriously in a rural area among very poor people.

Then there are also prohibitions on child labour, evictions, etc. These are factors that can impact on the imperious position that employers once had. Constitutional protections dealing with very basic human rights against exploitation are spelt out.

Another right which can be very positive for business is the right to information. In terms of this right, one can get information from government. It also might mean, however, that business must provide information, and this is an area where South Africa does not measure up to international practice. Secrecy has been integral to our practices. South African business, like English business, is still very closed and secret. In many other countries, however, businesses, especially if they are public companies, must provide much more information than is required in South Africa.

The right to a clean and healthy environment could also have extensive implications for business.

The abovementioned are therefore the rights, or framework of rights, that will impact in favour of business, but will also impose responsibilities on business.

## 4. STRUCTURAL VERSUS BILL OF RIGHTS PROTECTIONS

In terms of structural elements, I think there is a need for both bill of rights protection and structural protection. In South Africa we have structural protection through the separation of powers and through guaranteed provincial powers.

The Constitutional Court is currently dealing with the Liquor Bill that was sent to it by former President Mandela. The Bill was passed by the National Parliament but Mandela felt that it perhaps went too far, intruding on the exclusive powers of the provinces to deal with liquor licences. In dealing with this issue, the Constitutional Court has to look at the economic relationship between the provinces and the centre. A theme that emerges here is the strong principle of economic unity throughout the country. We are not presupposing provinces with separate economic regimes, but rather a common market principle. This is constitutionally quite strongly protected, and can have some bearing on how we look at the division of powers, responsibilities and competencies in relation to liquor. The case deals with the tension between the common market principle and the autonomy granted to provinces.

As far as the tax system is concerned, we also follow, to some extent, the German approach. Taxes are nationally collected – except property taxes, ie., rates paid at local level for local government – and are then distributed from the centre to the provinces. In Germany, I understand, this distribution is done according to a mathematical formula. We do not have such a formula in South Africa, but we do have the Finance and Fiscal Commission which makes recommendations according to a number of constitutionally specified criteria. In short then, the national government collects and the provinces spend: about 60% or 70% of state expenditure is administered through the provinces and not through a big national bureaucracy. Generally, however, the national government provides the framework of laws in terms of how this is to be done.

## 5. THE INSTITUTIONAL FRAMEWORK

Mention has already been made of the Auditor General and the Public Protector. Both of these are important bodies to oversee state revenues and to prevent corruption.

One can even mention the Reserve Bank as playing some kind of role to prevent over-populist action on the part of the government. It has an important constitutionally assigned delicate balancing. The Bank is autonomous, but not completely separate; it must work with government and be associated with government, but at the same time it has a certain measure of independence.

And finally, the Constitutional Court. Our role is not just to settle disputes as any court does. We are laying principled foundations for government, for decades – maybe even centuries – to come.

Although we do not have a huge volume of cases by international standards, we work hard on each case. The number of cases is growing and will surely increase in the future – when the Constitutional Court was set up in Germany, its caseload was not that great, and in the US the initial figure was even less. However, each case we handle is a foundation stone and we must therefore be extremely careful. We have tried hard to reach consensus where possible, not by forcing any judge to give in on a question of principle, but by working our way through to the right answer, by persuading each other.

As an example, I wrote a judgment on privacy in a case that dealt with the question of whether or not medicine inspectors needed warrants to enter doctors' surgeries or pharmacies to inspect medicines. Very wide powers had been given; these inspectors could even enter people's private houses without a warrant.

It was, however, a tricky question. If the Court misjudged the issue, it could thereby render it impossible for factory inspectors, health inspectors, etc., to do their ordinary work. In any event, my computer showed that the draft went through 27 different versions. Perhaps 10 of these were purely for stylistic improvements, but at least 12 versions were reformulations on the basis of comments from colleagues.

The judges at the Constitutional Court take our work very seriously. We are quite different in terms of life experience and background, but we all have – I would like to believe – a human rights heart, and a concern to ensure that the wonderful achievement of negotiating a democratic pluralist South Africa, is sustained in a principled way.

## 6. BUSINESS AND REPARATIONS

What role can business play in restoring or cre-

ating an economic balance, in attempting to uplift those who have been disadvantaged?

Reparations can be a purely technical, monetary matter, or it can involve legal rules stipulating when compensation has to be paid, how it is to be computed, etc. I am, however, not terribly comfortable with either approach.

I think it would be wonderful if business contributed to a fund for identified victims of apartheid who have gone before the Truth and Reconciliation Commission. But in terms of "reparations" on a larger scale I do not think that monetary compensation is required as much as human repair.

I believe that what is needed is to create a sense of real respect for all, to give dignity and to move away from stereotyping. This, however, involves capacity building. It requires a two-way flow in cultural terms and a searching for talent. It also involves a genuine commitment to the employment equity concept. Instead of dwelling on how the impact of employment equity could be minimised, business should see it as an opportunity to transform the culture and practice of business.

I have no doubt that employment equity will be economically beneficial and liberatory. It will release much energy and creativity, reducing unnecessary conflicts.

One of South Africa's biggest problems at present is that it lacks a large middle range of skilled and highly skilled people drawn from all sectors of society. Transformation in this arena is an enormous task facing business. People from this pool will eventually become the leaders of business. It is no good just having a lot of people at the bottom doing unskilled work, and then a few people at the top being empowered/enriched. It is the middle area that provides the link, the ladder, and it is at this level that resources are stretched. The transformation and rectification of this imbalance should be embraced enthusiastically by business and not seen as some kind of burden.

## 7. THE ADVANTAGE OF A HUMAN RIGHTS CULTURE TO BUSINESS

It is the human rights culture that holds this country together. If it were simply power that held South Africa together, then business would be vulnerable, because counter powers would arise. Previously, business had a cosy relationship with the state and could just rely on the state in terms of crackdowns, police action, informers, the passing of laws, etc. Those days are gone and I think that, in the long-term, business will be actually much more secure, because it will no longer depend for its survival on a form of physical force.

Business gets protection from the Bill of Rights. The very concept that we are living in a free and democratic country and working towards a society where everyone feels protected through the Constitution, provides the foundation on which business can function and prosper.

# Introduction to the Bill of Rights from a Commercial Perspective

*Theuns Eloff*

## 1. THE STRUCTURE OF THE BILL OF RIGHTS

- Chapter 2 and sections 7 to 39 of the Constitution.
- Two introductory sections on rights and application – primarily the state, but also natural and juristic persons under certain circumstances.
- List and descriptions of 27 rights.
- Finally, four sections on the limitation of rights, states of emergencies, enforcement and interpretation.
- Section 7 is the cornerstone of democracy in South Africa. It enshrines the rights of all people in this country and affirms the democratic values of human dignity, equality and freedom

## 2. RELEVANCE AND APPLICATION TO BUSINESS

- Two possible approaches: rights and obligations.
- Section 8(2) makes the Bill of Rights binding on business in certain circumstances: "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".
- The issue of vertical and horizontal applicability:
  - *vertical: binding the state and its organs*
  – the right to citizenship or just administration
  - *horizontal: also binds private individuals (including companies)*
  – discrimination on the basis of race or gender.

## 3. THE DIFFERENT RIGHTS AND BUSINESS

- The problem of the diversity of business.
- Rights underlying business activity include:
  – freedom of trade, occupation or profession, property
  – labour relations, assembly, demonstrate, picket and petition.
- Rights that have an impact on business include:
  – equality, dignity, life
  – freedom and security of person, privacy
  – freedom of expression, environment, access to information.
- Socio-economic rights include:
  – housing, education
  – health care, food, water and social security.

## 4. RIGHTS UNDERLYING BUSINESS ACTIVITY

- *Section 22:* "Every citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law".
- *Section 25:* "(1) No one may be deprived of property except in terms of law of general application of law, and no law may permit arbitrary deprivation of property".
- *Section 23:* "(1) Everyone has the right to fair labour practices. (2) Every worker has the right to ... form and join a trade union ... to strike. (3) Every employer has the right to ... form and join an employers' organisation".
- *Section 17:* "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions".

## 5. RIGHTS IMPACTING ON BUSINESS

- Equality (sec 9)
  – horizontally applicable in terms of 9 (4)

  - employment equity
  - promotion, remuneration
- Privacy (sec 14)
  - privacy of communications (sec 14(d))
  - information technology
- Environment (sec 24)
  - horizontally applicable?
  - impact on environmental policies and practices

## 6. BUSINESS AND SOCIO-ECONOMIC RIGHTS

- Second generation rights: justiciable, impose positive obligations on the state

  *Section 26:* "(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 ..."

  *Section 27:* "(1) Everyone has the right to have access to – (a) health care services ... (b) sufficient food and water; and (c) social security, including ... 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 ..."

  *Section 29:* (1) Everyone has the right – (a) to a basic education ...; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible".
- The state's duties
  - limited by "available resources" and "progressive realisation"
  - negative duty to respect
  - positive duty to protect, promote and fulfil
  - obligation of conduct and result
- The duties of the business community
  - section 8(2): applicability and nature of right and duty
  - negative obligation to respect (e.g. arbitrary eviction, environment)
- Even positive obligation (e.g. emergency medical treatment)
  - the latter tot widespread.

## 7. ISSUES NEEDING FURTHER DISCUSSION

- How does the Bill of Rights affect the environment in which business operates?
- How can business bring its "internal activities" (labour relations, environmental policies and practices) in line with the Bill of Rights?
- And its "external activities" (marketing and selling of products)?
- Can business agree on whether or not and the way it should/could assist the state in the "progressive realisation" of socio-economic rights?

# Understanding the Synergy Between the Bill of Rights and Commercial Activity

*Reuel Khoza*

## INTRODUCTION

If we look at the number of lawyers earning an income from the legal work generated by the Constitution, there can be no doubt that it is an engine of commercial activity. For this reason, I wonder if there is any need to discuss this topic further.

The Bill of Rights as enshrined in the Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter "the Bill of Rights") is a fundamental cornerstone of democracy in South Africa which "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".[1] It is, unfortunately, viewed by some to be idealistic in certain respects, and to that extent it is regarded as a hindrance or limitation to growth and development in South Africa.

This view was, or still is, to a large extent shared by the business sector.

The Bill of Rights contains certain rights that are regarded as first generation rights – ie, those fundamental basic human rights that are essential in a democratic society, for example, the right to life. It also contains what is referred to as second generation rights. These are usually rights of an economic nature and usually impose positive obligations on the state, for example, the right to education, housing or health care. It is in the context of second generation rights that the debate about the synergy between the Bill of Rights and commercial activity usually arises. Is the obligation to provide housing, health care, education, etc. a stone around the neck of our economy?

I have no doubt that the Bill of Rights is an essential part of democracy in South Africa and that it is the foundation for growth and prosperity in our country. In my view, the differing interpretation of its implications do not flow from the content of these rights, but rather from the lack of understanding of the nature of those rights.

I will argue that there are synergies between the Bill of Rights and commercial activity but that these synergies can only be appreciated if we understand that the Bill of Rights presupposes the balancing of competing interests and rights. If seen in extremes – as individual entitlements to the exclusion of other legitimate rights or interests, on the one hand, or as an unwelcome burden on the economy where entitlements need to be satisfied notwithstanding capacity and resources of the country to do so – we will find that the Bill of Rights would present a possible conflict with commercial activity. I will demonstrate that such a conflict does not exist on the correct application of the Bill of Rights. These rights are not absolute and it is imperative that an appropriate balance be struck in the application of the Bill of Rights in a manner that allows competing interests to be balanced, in the national interest. In addition, these rights need to be viewed and understood in terms of longer term goals and objectives.

## 1. CONSISTENCY WITH THE OBJECTIVES OF THE BILL OF RIGHTS

The Bill of Rights is not an end in itself. Its overarching objective is to promote and to secure growth and prosperity for all.[2] Commercial enterprise and activity thrives when there is growth and prosperity. Increased commercial

activity can also assist in delivery on some of these rights. There is, therefore, clearly synergy in this regard between the objectives of the Bill of Rights and commercial activity.

## 2. STRIKING A BALANCE – GUIDING PRINCIPLES

Before proceeding to discuss some of the principles impacting commercial activity, I would like to refer to a Constitutional Court case which sets out certain principles that are instructive as to how the Bill of Rights will be interpreted.

Some time ago we saw reported in the press the plight of Mr Soobramoney, which aptly illustrates some of the challenges that we have to face.

In terms of the facts in the reported judgment,[3] Mr Soobramoney was a 41-year-old diabetic suffering from inschaemic heart disease, cerebro-vascular disease and irreversible chronic renal failure. His life could be prolonged by means of regular renal dialysis. He sought dialysis treatment from the Addington state hospital in Durban but was not admitted to the hospital's dialysis programme. Because the hospital did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure, its policy was to admit automatically to the renal dialysis programme those patients suffering from acute renal failure who could be treated and remedied by renal dialysis.

Mr Soobramoney, relying on ss 27(3) (right to emergency medical treatment) and section 11 (the right to life), made an urgent application to a Local Division of the High Court for an order directing Addington to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. The application was dismissed.

It was argued that everyone requiring life-saving treatment who was unable to pay for such treatment herself/himself was entitled to have the treatment provided at a state hospital without charge. The court found that such a construction would make it substantially more difficult for the state to fulfil its primary obligations to provide health care services to "everyone" within its available resources.

In the judgment, the court stated that:

> "One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources: he is not and has to look to the state to provide him with the treatment. But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities and social security.
>
> The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."

If there was any doubt as to how the provisions of the Bill of Rights were going to be interpreted and applied in South Africa, this decision by the Constitutional Court has given clear direction in that regard. While upholding the tenets of our Constitution, these rights will be interpreted in a manner that balances the various competing interests, and in a manner that takes into account the longer term objectives that are sought to be achieved. In doing so, the available resources is a factor that needs to be taken into account.

## 3. THE BILL OF RIGHTS

Against the background of these principles, let us now turn to examine some of the specific rights set out in the Bill of Rights. I do not have the time to deal with each and every section in the Bill of Rights, but I have chosen a few examples to illustrate my view.

### 3.1 Labour relations[4]

Issues relating to labour have been most controversial. Attempts to raise labour standards and the granting of these rights in the Bill of Rights are viewed by some as factors that would erode the economic and commercial advantage that certain businesses have. It is argued that the

raising of labour standards, for example, would raise the cost of production and accordingly result in a particular product becoming less competitive on the world market. This is obviously undesirable as it would restrict economic growth and development. However, this is a short-term perspective. If one takes a longer term view, the response to such an argument would assert that the raising of fundamental labour standards is itself a catalyst for growth. For example, safer working conditions and a better working environment would lead to a more productive work force, and hence a more competitive business in the longer term. Viewed from this perspective, the rights as set out in the Bill of Rights and commercial activity are complementary rather than conflicting.

### 3.2 Environment[5]

It has been well established that commercial activity as a driver of economic growth, has highly positive spin-offs for environmental protection, conservation and sustainability. The greatest contribution to environmental degradation throughout the world is poverty. This causes hugely negative impacts in terms of local air pollution, soil erosion due to overgrazing, overutilisation of resources, starvation, water depletion, etc.

One only has to look at developed countries to see how development has improved the environment – especially in terms of human health and the natural environment. We are particularly well positioned in South Africa in that we can now learn from some of the mistakes made in the rest of the world and benefit from more cost effective measures towards sustainability.

As an example, the electrification programme can be viewed as realising major environmental improvement, while catalysing commercial activity. We need to look for more of these win-win examples. It should at the same time be stressed that gratuitous environmental actions can only detract from commercial activity and compromise sustainability. As such, consideration of unique local issues and conditions, and taking into account lower term objectives are essential.

### 3.3 Education[6]

Once again, if we look at the issue of education as set out in Section 29, it is clear that a better educated and skilled nation would lead to increased productivity and make South Africa competitive in the global market. The most competitive countries in the world are those that are able to employ the best people. We therefore need to increase our pool of expertise so as to create a pipeline of skills that is available into the future. The sustainability and viability of our commercial activities depends on the availability of the best people – professionals, managers and specialists. This has to be seen as a longer term objective as it cannot be achieved overnight, although investments in the education of our children and the training and development of our workforce will have to be made now.

If we take a shorter term view, this would appear to be a drain on our finances. However, it is important that we view such expenditure as an investment in the future as our country and our businesses will not be sustainable and competitive if we do not make these investments at this stage.

The raising of general education and skills levels in South Africa will also have a multiplier effect in terms of improving, in general terms, the state of our economy and reducing poverty and unemployment. The same argument is also applicable to some of the other rights, such as the right to housing and health.

### 3.4 Freedom of trade, occupation and profession[7]

Freedom of trade, occupation and profession gives every citizen the right to choose his/her trade, occupation or profession freely. This is one of the sections that is an exception to my earlier comment that certain rights may appear to be in conflict with commercial activity. It is clear in my mind that this right supports and encourages commercial activity in the most open and unrestrictive manner, and cannot be interpreted as anything but consistent with commercial activity.

### 3.5 Property[8]

The section dealing with property has also been the subject of much debate. There were concerns in some quarters prior to the finalisation of the Constitution that the rights dealing with property would provide for nationalisation or, in some other way, severely prejudice property owners. If we turn to the final wording in the Bill of Rights we find that it in fact does the

opposite; it provides that no one may be deprived of property except in terms of a law of general application, and it further provides that compensation will be payable if any person is so deprived of his/her property.

### 3.5 Electrification

There is no specific reference to the provision of electricity in the Bill of Rights, but one can draw comparisons to the delivery of housing or health care. Eskom's electrification programme has contributed significantly to the delivery of electricity to the disadvantaged communities in South Africa. This has been undertaken at a huge cost, with projected returns over a lengthy period.

In addition to improving the quality of the lives of millions of South Africans, there have been demonstrable benefits for the economy. It has provided the opportunity for people to be more productive, and has also led to the creation of large numbers of small businesses in newly electrified areas. More importantly, the total benefit of electrification has not yet been realised.

## CONCLUSION

This paper has attempted to demonstrate that any perception of a conflict between economic and commercial activity on the one hand, and the rights set out in the Bill of Rights on the other, is just that – no more than a perception. It is up to us as citizens of this country, as members of the corporate and business world, to adopt an approach and understanding that allows our Bill of Rights to be applied in a manner that contributes to growth and development in South Africa.

If we do not strike an appropriate balance, there is a danger that certain adverse consequences in the implementation process could arise.

If legislation provides for additional obligations or the creation of infrastructure at additional costs, which may ultimately be passed on to the consumer, without a commensurate benefit to the intended beneficiaries of those rights, this could result in inefficiency.

We should therefore ensure that our enthusiasm to uphold some of these rights does not lead to implementation which results in diminishing returns.

It is therefore essential that the legislator, together with other stakeholders – including business and labour – ensure that the appropriate balance is maintained.

## ENDNOTES

1) Section 7 of Chapter 2 of the Constitution of the Republic of South Africa, 1996.
2) This can be deduced from the Constitution, and in particular from the preamble where there is a reference to "improve the quality of life of all citizens and free the potential of each person;..."
3) *Soobramoney v Minister of Health*, *KwaZulu-Natal*, Constitutional Court, 1998(1) SA 765.
4) Section 23 of Chapter 2.
5) Section 24 of Chapter 2.
6) Section 29 of Chapter 2.
7) Section 22 of Chapter 2.
8) Section 25 of Chapter 2.

# Making the Workplace Human Rights Friendly

*Mandla Seleoane*

## INTRODUCTION

When I was asked to prepare a paper on making the workplace human rights friendly, I thought that it would be a simple task. On reflection, however, I conclude that I was mistaken. The workplace, I soon found out, is the place where all the human rights converge. Whereas other spheres of social life would be content to grapple with civil and political rights, and to take the attitude that a special case has to be made for socio-economic rights, the same is not true for the workplace. The workplace is the locus where issues around socio-economic rights are fought out to their full extent. But at the same time it is also the site of struggle for civil and political rights.

The workplace is in a sense unique in that it is affected directly, on the one hand, by the provisions of the constitution[1] and, on the other, by those of labour law[2] insofar as human rights are concerned. Although it is not customary yet to think of the rights guaranteed by labour law as human rights, I suggest that this is a mistaken view.[3] It is mistaken, I believe, for three reasons.

First, as Alan Rycroft and Barney Jordaan write, labour law "is 'a place where law, politics and social assumptions meet in a man'".[4] This "man" in whom law, politics and social assumptions converge, is a bearer of human rights. We cannot deal with "him" and not reflect on how "his" rights fare at the workplace.

Second, Chapter Two of the Constitution refers to "labour relations" and then spells out the fundamental rights of workers, employers and trade unions.[5] The old Labour Relations Act[6] and the old Basic Conditions of Employment Act[7] already guaranteed the rights in question when the Interim Constitution[8] was passed. The fact that these rights are now part of our Bill of Rights places them firmly in the family of human rights. They should therefore be accepted for what they are – i.e. human rights within the meaning of the Constitution.[9]

Even if, however, they were not part of our Bill of Rights, it would not follow that they were therefore not human rights. Consider the following example. The Basic Conditions of Employment Act lays down that an employee is entitled to a minimum rest period of 12 consecutive hours between one working day and the next.[10] It stipulates further that the employee is entitled to a weekly rest period of at least 36 consecutive hours, such rest period to include, preferably, Sunday.[11] Hanna Bokor-Szegö writes that such weekly day of rest (more than one day in our case) is a well-known example of a social right, which is already firmly established throughout the world.[12] Therefore if our Bill of Rights had said nothing about labour relations, this right would not be less of a human right merely for that reason. Indeed, Bokor-Szegö is not making the statement referred to above in the context of any bill of rights. Quite the contrary, her argument is that this is an example of a socio-economic right which is "possible and desirable right now". The right to a rest day as set out by Bokor-Szegö undermines to some extent the customary distinction between socio-economic rights and civil and political rights, which claims that the former rights are not enforceable because they are not capable of immediate realisation.[13]

## 1. WHAT IS A HUMAN RIGHT?

### 1.1 The Bill of Rights

For many, it may seem fairly straightforward what a human right is. We might, for example, do what lawyers are very good at, and say that a human right is any right which a person has in terms of the Bill of Rights.[14] However, there are problems with this.

The first problem relates to something I have never really understood about lawyers and logic. Logic scholars would say that one cannot define a concept by means of the very terms one is required to define. Therefore it would be illogical to include the term "right" in the definition of the term "human right" unless one has already defined the term "right" separately.

Maurice Cranston attempts to break away from this circularity when he writes:

> "[T]here is a sense in which to have a right is to have something which is conceded and enforced by the law of the realm. To say that I have a right to leave the country, a right to vote in parliamentary elections, a right to bequeath my estate to anyone I choose, is to say that I live under a government which allows me to do these things, and will come to my aid if anyone tries to stop me."[15]

Cranston refers to rights such as these as positive rights because "they are recognised by positive law, the actual law of actual states".[16] I think that Cranston's formulation is more helpful in that he does not say a right is a right. He tells us that a right is a claim that you make against something in the expectation that the state will come to your assistance, should that be required. But Cranston's formulation leads us to the second problem about lawyers' conception of human rights. In order to make the statement that a human right is what the law says, one has to overcome the argument that a right is logically prior to any law. Montesquieu formulated the matter in the following instructive words:

> "Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal."[17]

In order to make the argument that Cranston makes, one has to overcome the problem that we assert our rights the more so in those situations where the law denies them. Marie-Bènèdicte Dembour argues:

> "As soon as you try to capture something, for example by putting it on paper, it is because you have already lost it ... Very often, constitutional documents present themselves as constituting a break from the past. In fact, they follow directly from the past. They arise because things can no more be taken for granted, because values and attitudes do not go without saying any more. In this sense, each declaration of rights encompasses a loss, as well as a promise."[18]

The *Dèclaration des droits de l'homine et du citoyen*, 1793, specifically stated, with reference to the rights to express one's opinions and thought, to hold meetings and to subscribe to whatever religion one chooses, that "[t]he necessity of proclaiming these rights presupposes either the existence or the recent memory of despotism".[19] But for the fact that he considers the law as the source of rights, AV Dicey came very close to this position when he wrote:

> "[T]he law of the constitution, the rules which ... form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts."[20]

So seen, we do not have rights because the constitution says so, although it makes our lives a lot easier if the constitution recognises our rights. On the contrary, the constitution proclaims our rights because we already have them. It is interesting to note that the Interim Constitution stipulated that in limiting any right entrenched in the Bill of Rights, the law "shall not negate the *essential content* of the right in question".[21] It is obvious, of course, that the Interim Constitution contemplated only the rights that it entrenched, and no other rights. Equally obvious, however, is the fact that the Interim Constitution did not define the *essential content* of the rights it entrenched. It left that for the courts. It would not be unreasonable in my view to suppose that the Interim Constitution recognised the fact that the essential content of those rights is – to borrow a term from Lone Lindholt – "supra-regulatory".

Although the importance of this statement might not be instantly obvious, I suggest that its profundity is established by the preceding discussion. If we have rights because the constitu-

tion proclaims them, we can have only as many rights as it proclaims. We can have no principle argument with despots when they ensure that the constitution proclaims few or no rights.

This is the distinction, in the end, between a positivistic and a normative approach to human rights. The positivist will assert that we have the rights only which already are embodied in law. The normativist will assert that we are entitled to those rights too, which the law does not yet recognise. In my view the weight of opinion in the human rights discourse favours a normativist approach to human rights, rather than a positivist approach. And there are good reasons for that. But to accept the proposition that we have rights before the constitution or the law proclaims them, merely invites the question again: what is a human right?

### 1.2 The Universal Declaration of Human Rights

Faced, now, with such a problem, we may wish to fall back on the Universal Declaration of Human Rights (UDHR) and all the other international human rights instruments. We may wish to argue that human rights derive from these instruments whether or not individual countries pass legislation to that effect.[22]

My view is that this approach would not shift the inquiry much further. All it does is to shift the problem from the national level to the international sphere. But the fundamental question as to what a human right is, remains unanswered. It is by no means clear to me that if the question was valid in the national domain, its validity disappears by the sheer act of internationalising the subject.

It is significant that Dembour and Mbaya cite international human rights instruments as examples of the point they are making. They argue, for instance, that the extent of human rights violations during World War II inspired the drawing up of the UDHR.[23] If this is so, it must remain possible to ask even at this stage, what is a human right?

Let me say that I do not find the cataloguing of rights a useful tool for answering the question at hand. One could, in my view, accept the catalogue, but legitimately still ask the original question. In other words, life, freedom of expression, administrative justice and all the other rights mentioned in our Bill of Rights and in the UDHR, why are they human rights? From a philosophical standpoint, a document does not justify itself. Therefore the mere fact that the UDHR says so, does not seal the debate. Quite the contrary, it invites the question: why does the UDHR say so?[24]

### 1.3 Natural law

Tore Lindholm suggests that the term "human rights" hardly formed part of the English vocabulary until after World War II. "Natural rights" and "the rights of man" were more current terms.[25] Cranston suggests that the term "human rights" might in some sense be ascribable to Winston Churchill. When the United Nations was formed, Cranston writes, "one of the first and most important tasks assigned to it was what Winston Churchill called 'the enthronement of human rights'".[26]

For current purposes I suggest that the pre-World War II terminology implies the source for what we were later to call human rights. An examination of the writings of some philosophers in the 18th and 19th centuries would reveal that they perceived "the rights of man" as springing from nature.

In *Leviathan*, Hobbes wrote that freedom can only prevail in circumstances where the ruler has absolute power and the subjects unhesitatingly submit to his authority. He approached the question in more or less the same manner in *Elements of Law*, where he argued for undivided sovereignty. He was of the view that, in his natural state, "man" was warlike and therefore lived in constant fear. The only way in which "man" would enjoy freedom, so Hobbes argued, was to tame his natural propensity for war by subjecting him to the absolute power of the sovereign. Thus, although Hobbes argued a fundamentally undemocratic proposition, he presented it nevertheless as the framework within which freedom was possible. And nature, man's natural propensity for war, was the platform on which he built his theory of the state and, thus, of civil liberties.[27]

In *The Two Treatises of Government*, Locke proceeded on a premise diametrically opposed to Hobbes. He argued that, contrary to Hobbes, "man" in his natural state was happy and peaceful. "Man" did have some inconveniences, which included lack of clear rules. To solve these, he entered into a "social contract" as a result of which the sovereignty was established. It was inconceivable, therefore, that the sover-

eign, being the product of a voluntary contract of free men, could now have absolute power over them.[28] But in any event, Locke argued, the notion of an absolute sovereign was incompatible with the *laws of nature* which impose limits on everyone willy nilly, including the sovereign.[29]

Montesquieu argued in *The Spirit of the Laws*, that the nature of a country determined what form of government was best suited for that country. In *Emile*, Rousseau argued that children are naturally good and that, therefore, they should be given freedom. In *The Social Contract* he argued that liberty is as important to the human being as fresh air.

It is possible to cite other philosophers who wrote in this period, but I do not think that is really necessary. It seems clear that a significant body of thinkers in the period held the view that rights are given by nature. The documents on the "rights of man" that were produced at the time also proceeded on the basis that these rights are given by nature. I have already referred to some of these, and wish to add just two more.

The Constitution of New Hampshire stated in articles 5 and 6 that some of "these natural rights" are "by nature inalienable since nothing can replace them". The Constitution of Pennsylvania stated in article 9:

> "All men have received from nature the imprescriptible right to worship the Almighty according to the dictates of their conscience, and no one can be legally compelled to follow, establish or support against his will any religion or religious ministry. No human authority can, in any circumstances, intervene in a matter of conscience or control the forces of the soul."[30]

Dembour writes that even in our times the concept of human rights emanates from natural law theories, since it is "conceived as being 'inherent' to the human person".[31] In South Africa, this view received the unequivocal endorsement of John Dugard, on all accounts a distinguished jurist. He cites Gustav Radbruch where the latter writes:

> "When laws consciously deny the will to achieve justice, for instance if they grant or retract human rights from people according to arbitrary caprice, such laws are devoid of validity, and the people owe them no obedience and even lawyers must then find the courage to deny them the nature of law."[32]

Dugard then comments:

> "This idea, that a law contrary to the principles of natural law is not a law, has impeccable jurisprudential roots and finds support in the writings of Cicero, St. Thomas Acquinas, and Grotius. In recent times it has received endorsement in a limited form from the American jurist, Lon Fuller of Harvard."[33]

If that is accepted, it might provide an escape from the absurdity of ascribing human rights to the law in circumstances where the evidence seems to suggest that human rights are logically prior to the law. We would not, then, have to explain where human rights come from when faced with regimes whose laws constitute a denial of human rights.

In fairness, however, one must state that the theory of natural rights has also been clouded by much controversy. Hegel argued, for instance, that the notion of natural rights is defective to the extent that it is contingent upon the concept of natural man. And the problem about the concept of natural man was that it is arrived at by a level of abstraction which incorrectly leaves out of consideration the very factors that it should be analysing. Hegel wrote:

> "[Locke and Hobbes degraded the individual by peeling away the layers of society and culture] until, finally, one comes by analysis to the abstraction called natural man. If one thinks away everything which might be regarded as particular or evanescent, such as what pertains to particular mores, history, culture, or even the state, then all that remains is man imagined as in the state of nature or else the pure abstraction of man with only his essential possibilities left."[34]

Bruno Bauer argued that there is nothing natural about "natural rights" – i.e. they are not innate. They arise, he argued, out of the manner in which history evolves and in relation to concrete struggles by people. He wrote:

> "For the Christian world, the idea of the rights of man was only discovered in the last century. It is not innate in men; on the contrary, it is gained only in a struggle against the historical traditions in which hitherto man was brought up. Thus the rights of man are not a gift of nature, not a legacy from past history, but the reward of

> the struggle against the accident of birth and against the privileges which up to now have been handed down by history from generation to generation. These rights are the result of culture, and only one who has earned and deserved them can possess them."[35]

Karl Marx attacked the theory of natural rights, calling it a façade for concealing the interests of those who owned and controlled the means of production. To the working class, on the other hand, the concept is like an empty shell since, without the means to enforce them, natural rights were of no consequence to them.[36]

Cranston argues that all talk about human rights outside of positive law, and thus the concept of natural rights, comes down to metaphysics. He writes:

> "There is certainly something suspicious about the things which are said by many champions of natural law. Consider, for example, a remark made from the writings of the18th century jurist William Blackstone: 'Natural law is binding all over the globe; no valid human laws have any validity if contrary to it'. Now if the word 'valid' means what it commonly means for lawyers, this statement is simply untrue. For by a valid law, lawyers commonly mean a law which is actually upheld and enforced by the courts, a law which is pronounced valid by a duly established judge. A great many laws contrary to natural law were upheld by courts in different parts of the globe in the 18th century when Blackstone wrote those words. For instance, there were the laws which authorised slavery, an institution which Blackstone himself regarded as being contrary to natural law. Laws even more at odds with natural law were upheld by duly constituted courts in Germany at the time of the Third Reich ..."[37]

If Cranston had written this critique of natural law, and therefore of natural rights, before the Nuremberg Trials, there might be a point in engaging with the sentiments he expresses. But then he wrote it after the Nuremberg Trials, and it seems to me that the issue is fairly settled now: the Germans who enforced and upheld the positive law he refers to, were called upon to answer to a higher order than the positive law they enforced.

More recently, Dembour has made a more interesting critique of natural law and natural rights:

> "Natural law [from whence spring natural rights] is a problematic idea ... in that it assumes that everyone would arrive at the same conclusion as to what is natural ... through adequate exercise of reason. But what appears natural to one person may not appear so natural to another. This is very clear when one considers different epochs and different societies. But even people belonging to the same society often hold different views on a particular issue ... Examples which are often mentioned in this respect include the practice of slavery ... and the subordination of women up to the end of the 20th century. If slaves were slaves and women subordinates, it was of course in accordance with their so-thought true nature with so-deemed biological facts.
>
> It appears that what is conceived as 'natural' is often nothing else than what happens to be 'mainstream'. As a consequence, natural law theories can often be criticised for justifying the status quo by mistaking what is at the moment ... for what ought to be."[38]

These challenges to natural law, and thus to natural rights, are very significant. They remind us how all too often the ideologies and interests of people and of classes are sanitised, universalised and then presented as objective reality. They are a useful tool for analysing the conditions under which any claim is made about human rights. But I am not sure that one can reject the notion of natural law and of natural rights completely on that account. The discourse on human rights is bound to have an element of ideology, since it speaks to the manner in which people should be governed. The critics of natural rights theories are also influenced by their belief about how society should be ordered. It is important to remain alert to the intrusion of ideology in our definition of rights, so that we do not unduly circumscribe people's rights. I remain of the view that it is possible to speak of natural rights in a non-metaphysical sense.

Once it is admitted that both the proponents and the opponents of natural law (and therefore also of natural rights) theories proceed from where they stand ideologically, we can try and shift the debate forward a little. We can try and

find some common ground between the opposing schools. I think that Asbjørn Eide begins to move us in that direction when he writes:

> "Ideological divisions on the issue of rights have dominated Western societies since the time of Marx, yet much of this controversy ought to have been overcome by the Universal Declaration. It transcends both Marxist and liberal ideologies in several ways: first, because the present human rights system includes both economic and social as well as civil and political rights; second, because it emphasises that the full and free development of any person's personality is possible only when she or he forms part of a community and observes her or his duties to it. Collective sovereignty and individual autonomy ideally reinforce each other under the contemporary human rights systems."[39]

If we accept that the UDHR addresses some of the concerns raised by Dembour about natural law theories being pro–status quo, and some of those Marx raised, the question as to the meaning of the term "human right" still seems to me pertinent.

**1.4 Human rights as human needs**

I incline towards the proposition that human rights should be defined in terms of human needs. Lone Lindholt formulates the matter in the following words:

> "A more scholarly approach, seemingly a paradox, is one of defining human rights concepts according to human needs and basic principles rather than according to their legal form or subjects ... [T]his approach has the opposite effect of generalising and narrowing down the scope of human rights to a handful of essential all-encompassing principles expressing basic human requirements."[40]

She also writes:

> "In the centre[41] we find the basic principles of human rights, expressed as customary supra-regulatory norms and issues considered to be of such vital importance that they must be protected by international law. Examples hereof are the right to life and sustenance, freedom from violation of one's mental and physical integrity, the availability of opportunities to develop one's personal capacities, and access to form and maintain relationships with others at both an individual and collective level."[42]

In a similar vein, Johan Galtung writes:

> "[A human right must be] conceived of as a norm, concerning, indeed protecting, the rock-bottom of human existence. There is a link to basic human needs which potentially would make human rights applicable to human beings everywhere."[43]

Galtung also argues that there must be "no hard, positivistic assumptions about the 'nature' of human rights except that ultimately they are supposed to serve basic human needs".[44]

I find this approach appealing because, among others, it is not pretentious. It is down to earth in the fashion argued by George Whitecross Paton about law, that "it should not claim too lofty a justification for acts the reason for which is necessity rather than morality".[45] This approach suggests that as human beings we have certain needs and that, to ensure that they are not denied us, we express them as rights. And then we insist on their observance.

Further, this approach grounds the theory of natural rights and renders it less metaphysical. Human needs are natural.[46] If it is accepted that human rights are an expression of human needs, then the connection between human rights and nature becomes apparent. Because human needs are not static, human rights must also, if they are based on human needs, be dynamic.

It remains possible, however, to object to this conception of human rights too. I can well imagine that Dembour might argue validly that different people perceive human needs differently. She might validly still confront us with the objection of "unwanted rights".[47] Although Dembour would in my view be correct, the validity of the approach must survive her. And let me say why.

I have already made reference to Asbjørn Eide, where he suggests that the UDHR somewhat bridges the ideological gulf between liberal and radical theories of human rights. Now, the question of enforcement – which Karl Marx argued – is still pertinent. It is still so, that poor people lack the money and the know-how needed in order to enforce their rights. It would therefore still be correct to argue that for them, the rights listed in the UDHR often do not bring a profound difference to the quality of their lives. As Hanna Bokor-Szëgo states it, albeit in

a somewhat different context, the question is legitimate "whether a person lacking even rudimentary education is in a position to use his political rights consciously, in accordance with his interests".[48]

But the question about the content of these rights is a different matter. If one proceeds from the list of rights named in the UDHR,[49] it seems to me that one can no longer argue that these rights as such are pro–status quo. One can no longer argue that, as a body, they represent the interests of the owners of capital.

If that is accepted, then we cannot, it seems to me, raise the argument against these rights that, as a body, they are suspect because someone else might think differently about them. We could argue, to be sure, that it is possible to improve them and that the list should never be closed. That is a different matter.

And so is the question whether everyone they are available to, wants them. The fact that the rights are available to a person means that, if he/she chooses to exercise them, he/she can do so. If he/she chooses otherwise, they do not cease to be rights on that account. The whole thing is about choice. And even so, the efficacy of these rights is often independent of the choices we make. So, even if I thought nothing of my right to life, I continue to enjoy the protection afforded by that right because others take it seriously.

The children studied by Heather Montgomery might reject the rights the United Nations Convention on the Rights of the Child accords them in a given set of circumstances. They might invoke them in another. To attack the right because, in a given set of circumstances, the holder of the right disregards or waives it, would in my view not be a sound proposition. All of us do not always act consistently in respect of the rights we have, but that is not an adequate basis for questioning the validity of those rights *per se*.

In the end, this is really a question about how society functions politically. Even if the people concerned under no circumstances welcomed the rights accorded them, those rights would in my view remain valid. A parallel can be found in Jean-Jacques Rousseau's reconciliation of freedom with democracy. He argues:

> "The citizen gives his consent to all the laws, including those which are passed in spite of his opposition ... The constant will of all the members of the State is the general will; by virtue of it they are citizens and free. When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will ... Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day, I should have achieved the opposite of what was my will; and it is in that case that I should not have been free."[50]

Rousseau's views have to be approached, needless to say, with a measure of circumspection. Things are not quite as simple as he suggests. It is not, for instance, always a matter of choice where one will reside. I think, however, that the fundamental point he makes is valid, namely that, in the normal course of events, the validity of a law is not threatened by the fact that some people reject it. If it so, then the validity of a right embodied in a law is also not threatened by the fact that some people reject it.

## 2. THE LAW AND HUMAN RIGHTS

Nothing I have said should be read to suggest that the law has no place in the discourse on human rights. It is quite obvious that the law has a tremendous impact on human rights. The question is therefore not whether the law is relevant in the human rights discourse – it clearly is. The issue is rather to understand what the law does when it proclaims rights.

The ideal situation should, in my view, be likened to the Brownian movement in physics. So seen, the law is like a liquid and people like particles moving around in the liquid. The liquid, which is the law, regulates their movement so that they do not collide. But at the same time it takes its shape from the particles whose movement it regulates. Every now and then it will expand according to the direction the people it regulates are pushing it and so, perhaps, recognise other rights. In order to prevent any collision, the law may occasionally withhold some rights. It may occasionally narrow the scope of some rights. But the purpose must at

all times be to eliminate or to reduce the potential for collision. If the law withholds rights or reduces them for any other purpose, we resist that fact precisely because the rights do not derive from the law. The law, therefore, is like a medium in which and through which we enjoy and exercise our rights.

I suggested that this would be the ideal situation. In real life things are not nearly so neat. Rodolfo Stavenhagen writes:

> "While contemporary wisdom holds that all human rights are equally fundamental and none ranks higher than any other, in reality certain rights do hold priority over others. When conflicts between rights occur, the solution is more often than not neither technical nor moral, but political. In other words, conflicts seldom occur between rights in the abstract, but between holders or claimants of rights. The question is not so much which rights are in conflict, but who holds the rights and how much political (or military) power does he have to impose his claim. If such conflict occurs between individuals in a democratic polity, then usually the state has the means to impose a more or less satisfactory or fair solution. If, however, the conflict occurs between individual rights and collective rights, other than those of the state itself, or between holders of competing collective rights, then solutions are not always easy and may lead to political showdowns."[51]

An understanding of this reality increases the urgency of coming to terms with what the law does when it proclaims rights and is crucial for an assessment of the options that are available to us. But it does not in my view render the law irrelevant to the human rights discourse. If we accept that rights are not the product of the law, and that we assert them even where the law denies them, we still have to operationalise them. We still have to define their scope and find ways to harmonise them. In my view that is the proper place of the law in the human rights discourse.

## 3. ARE HUMAN RIGHTS UNCONDITIONAL?

There is a sense in which, by accepting, however remotely, the proposition that rights are given by nature, one is condemned to assert that they are therefore unconditional. They depend on nature, and on nature alone. John Locke, who is generally recognised as a leading theoretician on natural rights, wrote: "the binding force of the law of nature is permanent, that is to say, there is no time when it would be lawful for a man to act against the precepts of this law". He also wrote that even though we do not always act according to the law of nature, that does not mean we are entitled to "act against the law".[52] Edward J Harpham comments: "In other words, there is no time in which an individual in the state of nature could entertain a hostile disposition toward others without violating the precepts of natural law."[53]

By Locke, therefore, it is clear that rights, even if it is accepted that they issue from nature, are not for that reason unconditional. They are qualified, in the first instance, by nature itself – one is not at liberty to do what the natural law forbids. And they are qualified, in the second instance, by our obligations to fellow human beings. Locke was influenced by his theological outlook to formulate our obligations to one another in the manner that he did.[54] However, I think that it is possible to arrive at the same conclusion from a non-theological angle as well. It is a condition of our existence that we are in the world. And to be in the world, as Anita Craig would argue, is to be bodily placed before others[55] or, as Louis van Schaik might put it, to be in a state of human relationship.[56]

Our bodiliness before others means that we are limited in what we can do by the presence of others. The human relationship we have with others means we have responsibilities to other human beings. Arguing the African case on human rights, Josiah Cobbah writes:

> "Even if man was originally in a pre-political condition, such a condition is inevitably replaced by a condition in which human beings give recognition to each other and recognise rights as correlative to duties."[57]

Therefore we cannot have unconditional rights. And it is as well since, in the words of Rousseau, if every citizen could do just as s/he pleases, nobody would be free – every citizen would then have the same power.[58]

I must hasten to add that I am not concerned here with Rousseau's implication that the limits the law sets to our rights are correct, a proposition I cannot lend unconditional support to. The correctness of any limits the law sets on our rights is something to be evaluated on a case-

by-case basis, and I do not think that one can make an *a priori* endorsement thereof. The view that I argue is that the limitation of our rights is an ontological matter. It flows from the way we are in the world. Therefore we cannot argue with integrity that in principle our rights ought to never get limited.

## 4. THE OBLIGATIONS OF HUMAN RIGHTS

It is generally accepted that a right creates obligations for all those against whom it is claimed. These obligations may be borne by the state or by other persons, depending on whom the right is addressed to, and on the circumstances of every case.[59]

The nature of the obligation created by the right depends on the nature of the right itself, but it also depends on the terms in which the right is expressed. A right might impose an obligation to carry out a particular act, or to act in a particular way. It might impose an obligation to refrain from a particular act or from acting in a particular way.[60]

So conceived, rights create obligations for the addressee. What is not often grasped with enthusiasm is that rights create obligations for their bearer as well. Both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights stipulate in their preambles:

> "Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and the observance of the rights recognised in the present Covenant."[61]

In Article 5, both covenants direct the state as well as the individual to avoid actions the result of which might be the destruction of any right mentioned in the covenants. Bokor-Szegö has commented:

> "In accordance with the global and national interests determined by the social and economic conditions of our age, in our days the selfish, egotistic man is replaced by the ideal man 'having duties to other individuals and to the community to which he belongs' ... by a person who can make use of his rights only so as not to destroy any of the rights and freedoms of others ..."[62]

Article 29 of the African Charter on Human and Peoples' Rights also conveys the notion that rights come with obligations for their bearer:

> "Each person has the duty to preserve and respect his/her family, parents and nation. Each person must protect the security of his/her State and work for national solidarity and independence. Each person must work and pay lawful taxes, and promote positive African values and African unity."

It is possible to disagree about the specific obligations the Charter lays down for the bearer of a right, but that is not what we are concerned with here. It is crucial, especially in South Africa today, to cultivate a human rights culture which emphasises both conceptions of obligations. We have to insist on the obligations attending the addressees of our rights. But we must insist just as strongly on the duties imposed by those very rights on their bearers. No one must be allowed to use the rights they have in order to destroy the rights of others. And there is a sound philosophical basis for that insistence.

If we accept the proposition that our bodily existence in the world places us in a state of human relationship with others; that, as John Mbiti would say, "I am because we are, and because we are therefore I am,"[63] we must accept that those others have rights too. We must accept that their rights are as important to them as ours are to us. But even if we thought nothing about our own rights, we must be prepared to accept that other people's rights may mean the world to them. And that, therefore, we have obligations to them. These obligations flow, not so much from the law as from the method of our existence in the world. So seen, our obligations are an ontological matter. In the words of Maurice Cranston, "[t]o say that a man has a right ... is to convert that demand into a kind of moral imperative, that is, to impose on all men a reciprocal duty to abstain from injuring their neighbours".[64] As Hobbes saw it, this mutual obligation to refrain from injuring one another was a precondition for us to be in the world as we are. It is not possible to insist on the observance of our rights if we trample on the rights of others. It is sheer hypocrisy to pretend that a human rights culture can be built on any other foundation. Therefore, the basis on which we can demand and expect that others will respect our rights, is that we ourselves are committed to respecting the rights of others.

## 5. MAKING THE WORKPLACE HUMAN RIGHTS FRIENDLY

In this section I propose to try and relate the issues that I have raised in this paper to the workplace. I propose to suggest how they might contribute to, or militate against, the workplace becoming human rights friendly. To that end, it is perhaps fitting to recap. I have argued that:

- rights are not a creation of the law, but that they are logically antecedent to it
- the proper place of the law in the human rights discourse is the operationalisation of rights and the demarcation of their boundaries and scope so as to avoid or lessen conflict
- our rights, to the extent that they express our basic human needs, are an ontological fact
- our mutual obligations, to the extent that they flow from the method of our existence in the world, and from the fact that we are bearers of rights, are also an ontological fact.

Our attitude to these views will influence whether we shall do anything in order to make the workplace human rights friendly. It will also influence the specific things we shall do, should we decide that we want to make the workplace human rights friendly. We may, for example, approach human rights in a narrow, legalistic way: that would be an indication of the attitude we have adopted to human rights. It will then also determine the specific things we shall do by way of recognising rights at the workplace, and the lengths to which we shall go on that course. On the other hand, we can approach human rights as a broader, existential question, with the same sort of implications.

### 5.1 The legal route

Here, people will generally ascertain what the law requires of them, and then perhaps strive towards that. Often, they will do the barest minimum in order to avoid being on the wrong side of the law. They will also often weigh up the means of those whose rights are involved and whether, therefore, they are in a financial position to enforce their rights. If the means of the bearer of the rights are meagre, the addressee of the right might be prepared to take a chance in the hope that the bearer of the right can have no redress. It is quite obvious that in such a case the workplace cannot become human rights friendly.

It will be characterised by understandable anger and tension on the part of those whose rights are violated. They will come to realise that they cannot effect protection to their rights through the law, but they can never be expected to accept the legitimacy of that position.

History abounds with evidence that, in such a case, those whose rights are denied will resort to extra-legal methods of redress. Such extra-legal measures as they may take will unavoidably lead to a violation of the rights of those they are reacting to. But once they do that, a reaction can be expected from those whose rights are now being violated. And then there will be a spiral of human rights violations and recriminations. A human rights friendly environment cannot come out of such a situation.

Even if, however, the bearer of a right has the financial muscle to enforce it, turning rights purely and only into legal questions might still be counter-productive. The law fills, as I have already argued, an important place in the human rights discourse. But I am not sure that to approach human rights only from the standpoint of the law would lead to the establishment of a human rights friendly environment at the workplace. To see human rights only in terms of the law carries, I think, the risk that the actors will inevitably get locked in adversarial relations.

By definition law is regulative. And then there comes a point where regulation invites resistance, where it is seen as an obstacle to be overcome. This will unleash legal battles. In these battles there will be winners, and there will be losers. There might be compliance with the letter of the law or with the orders of the courts. I am not sure that any of that will lead to human rights friendliness at the workplace. Legal wrangling is not an ideal medium for constructing a friendly atmosphere.

At the same time, however, only the extremely naïve will think that goodwill alone is sufficient to build respect for human rights. Anyone who has learnt anything from history will know, as Robert Bolt might say, that we do not live in a world where we can begin to cut our hedges down and rely on the goodwill of humanity. Anyone who has taken even a fleeting moment to pay attention to people's capacity for cruelty towards one another will know, as Ayi Kwei Armah might say, that the beautiful ones are not yet born. And so we have to be realistic and say, together with Martin Luther

King junior, that the law cannot make you love your fellow human beings, but it can stop you from acting out your dislike for them.

Therefore I suggest that we need to maintain a dialectical tension between two positions. We have to work tirelessly towards creating a climate where people's rights are respected almost as a matter of course. But at the same time we need to maintain an effective legal machinery in order to keep those who need some assistance before they can show respect for the rights of others in check.

**5.2 A broader, existential approach**

The proposition that rights express the basic needs of people should have profound implications for our approach to the subject. It should profoundly transform the nature of the debate on human rights. We should have to ask a significantly different set of questions from the ones that have engaged us till now. Earlier in this paper I referred to Rousseau's argument that liberty is as important to the person as fresh air. I also referred to Van der Westhuizen's argument that civil and political rights are natural in the sense that normal people want to do the things signified by those rights. And then I also referred to Bokor-Szegö's argument regarding the organic connection between the realisation of civil and political rights on the one hand, and socio-economic rights on the other.[65]

If we accept the views expressed above, it becomes instantly clear that it was silly to have debated the question whether people should have rights or not. Our energies should rather have been channelled into questions around the operationalisation of those rights.

**5.3 The implications of an ontological approach to human rights for the workplace**

An acceptance of the proposition that rights and obligations are an ontological fact can present special problems at the workplace. If one follows this statement slavishly, one risks making the kind of pro–status quo argument that Dembour criticised in respect of natural law theories. One has to be sensitive to the fact that an employment relationship is not based on equality, but on subordination.[66] Therefore by its very nature it is antithetical to a number of the rights that the worker has. But for that very reason it is essential that employers embrace the view that workers, as human beings, have rights of an ontological nature. Rights, therefore, the removal of which goes against the grain of humanity. To embrace this view is to accept that there are demands which one cannot make of another person, however weak the position of that other person might be. Therefore, in extracting the bargain, the employer has to know that there are rights which he/she cannot remove from the worker without dehumanising him/her. Rights, indeed, to demand the waiving of which would dehumanise the employer himself/herself. Allowing, however, for the natural tension that must exist between the employer and the worker, we can still insist that:

- employers will accept that workers have certain rights, the content of which constitutes obligations for the employer
- workers will accept that employers have certain rights, the content of which constitutes obligations for the workers.

**5.3 Which rights, and which obligations?**

Employers and workers have a number of rights and obligations which I cannot presume to discuss exhaustively in this paper. Relative to one another, their rights and obligations flow from the employment contract and from the law. The employer, however, also has rights in relation to the worker which flow from the fact that he/she is the owner of property. The employer's right, for instance, to command the worker flows in part from ownership of property.[67]

*5.3.1 The employer's rights: the worker's obligations*

The employer takes on the worker so that the latter will render a service. The employer, therefore, is entitled to:

- the services of the worker
- the faithfulness of the worker
- control and to direct the worker while at work.

The obligations which arise for the worker from these rights are that he/she must render the service(s) contracted for. He/she must render the service(s) at the times and in the manner stipulated by the contract. If the contract does not stipulate that, he/she must render the service(s) in accordance with the directives of the employer. Faithfulness to the employer means, among other things, that the worker must:

- perform his/her duties to the best of his/her abilities
- prevent a conflict of interests arising between him/her and the employer
- generally be trustworthy.

The worker is also required to obey the lawful and reasonable instructions of the employer.

*5.3.2 The worker's rights: the employer's obligations*

The rights of the worker are elaborated, generally, in the Basic Conditions of Employment Act, the Labour Relations Act and the Employment Equity Act. There are other laws which deal with the rights of workers, but the three mentioned above are in my view the most important.

The rights of workers elaborated in these three acts can basically be summed up in the statement that workers are entitled to fair labour relations. This right is further entrenched in section 23 of the Constitution. As a rule these laws also protect the rights of employers. But I think it would be correct to say that, as a general proposition, their primary aim was to protect the rights of workers and to tame the common law power of the employer.

The obligations of the employer in terms of these rights include, among others, to:

- treat workers in a fair way and avoid unfair discrimination
- remove obstacles which stand in the way of fair play at the workplace
- make equity a reality by putting in place mechanisms and systems that are necessary in order to enable those previously discriminated against to catch up.

## CONCLUSION

I have indicated that the workplace is the centre where all human rights converge. Formally, the law might prescribe rights and obligations for the workplace. However, if we take the view seriously that rights are an ontological matter, it seems to me we must be prepared to sometimes go beyond the law in respecting people's rights.

## ENDNOTES

1) The Constitution of the Republic of South Africa Act, Act 108 of 1996, section 8(2) provides that the provisions of the Bill of Rights are binding on natural and juristic persons. In applying the provisions of the Bill of Rights to natural and juristic persons, account must be had of the nature of the right and of the nature of the duty imposed by the right.
2) In particular, the Labour Relations Act, No. 66 of 1995; the Basic Conditions of Employment Act, No. 75 of 1997 and the Employment Equity Act, No. 55 of 1998.
3) See Gutto SBO, "Beyond Jusiticiability", in *Buffalo Human Rights Law Review*, Vol. 4, 1998, p 97, where he argues that failure to conceptualise labour rights as an important part of socio-economic rights is a "reflection of the poverty of the prevailing legal theory". See also De Villiers B, "Social and Economic Rights", in Van Wyk, Dugard, De Villiers and Davis (Eds), 1994, *Rights and Constitutionalism: The New South African Legal Order*, Juta, p 609.
4) Rycroft A & Jordaan B, 1992, *A Guide to South African Labour Law*, Juta, p 10.
5) The Constitution of the Republic of South Africa Act, *supra*, section 23.
6) Act No. 28 of 1956 as amended, sections 1 (unfair labour practice); 17 (establishment of and powers of the Industrial Court); and 35, 43 & 46(9) (resolution of unfair labour practice disputes).
7) Act 3 of 1983.
8) Act No. 200 of 1993.
9) I shall in due course debate the question whether rights are creations of the law or not. Therefore I should not be read to be taking that matter for granted in the statements I have made thus far.
10) Basic Conditions of Employment Act, No. 75 of 1997, section 15(1)(a).
11) *Ibid.* section 15(2)(b).
12) Bokor-Szegö H, "The Classification of Certain Types of Human Rights and the Development of Constitutions" in *Questions of International Law* Volume 5, 1991, Akadèmiai Kiadó, p 21.
13) As to which distinction see De Villiers B, *supra*, p 608.
14) See, e.g., Malan K, 1996, *Fundamental Rights: Themes and Trends*, Butterworths, E1 – 3 & 4. I believe that this approach is also implicit in Lindholm T, "The Plurality of Normative Traditions and the Need for Cross-Cultural Legitimacy of Universal Human Rights", in Arnegaard TJ and Landfald L (Eds) *Human Rights: Universal or Culture-Specific?*, Information Bulletin No. 1, 1998, North/South Coalition, Oslo *supra*, pp 12-13. Lindolm suggests that people's freedoms and dignity should be protected "by means of universal legal rights to be called 'human rights'" citing, as it were, the Universal Declaration of Human Rights preamble. The problem, of course, is not with the requirement that such freedoms and dignity be protected by law. The problem relates to the fact that these rights, which are so protected, must be called human rights. See also Eisler R, "Human Rights: Toward an Integrated Theory for Action", in *Human Rights Quarterly*, Volume 9, Number 3, 1987, p 288.
15) Cranston M, 1973, *What Are Human Rights?* The Bodley Head, p 4.
16) *Ibid.* p 5.
17) Montesquieu, 1949, *The Spirit of the Laws*, Hafner Press, p 2.
18) Dembour M, "Universalism as Arrogance, Relativism as Indifference: The Need for an Unstable In-between Position", in Arnegaard TJ and Landfald L, *supra*, p 168. See also Mbaya E, "The Compatibility of Regional Human Rights Systems with International Standards" in Eide A & Hagtvet B, (Eds) 1995, *Conditions for Civilised Politics: Political Regimes and Compliance with Human Rights*, Scandinavian University Press, p 65. On p 74, Mbaya specifically argues that the "non-exercise of a duty [should under no circumstances] be used as an excuse to suspend or abrogate a right". See further Asbjørn Eide, "National Sovereignty and International Efforts to Realise Human Rights" in Eide A & Hagtvet B, *supra*, p 6.
19) Marx K, 1975, "On the Jewish Question", *Collected Works* Volume 3, International Publishers, p 161.

20) Dicey AV, 1965, *Introduction to the Study of the Constitution*, Macmillan, p 203.
21) Act 200/1993/33(i)(b). This stipulation is not part of the current constitution. However in *State v Makwanyane and Mchunu* 1995 3 SA 391 (CC), the Constitutional Court was firm in the view that a right could not be limited in a manner that negated its essential content. Although this judgment was made in terms of the Interim Constitution, it is doubtful that the courts might accept a limitation of a right under section 36 of the current constitution if it denies the essential content of the right – see Malan K, *supra*, pp E1 – 7 & 10 et seq.
22) See Pienaar M & Liebenberg I, "Human Rights and Covert State Activity" in Schutte C, Liebenberg I & Minnaar T, 1998, *The Hidden Hand: Covert Operations in South Africa*, HSRC, p 413. Although the authors suggest that human rights pre-existed the UDHR, they still attribute them to documents, such as *Magna Carta* and the *British Bill of Rights* of 1688.
23) See also Pienaar *supra*, *loc cit.* And see, indeed, the UDHR preamble which leaves no doubt that the UDHR was drawn up as a result of "disregard and contempt for human rights" and that the said disregard and contempt had led to "barbarous acts which have outraged the conscience of mankind". It further recognises "the inherent dignity" of the person and so does not claim to be the source of such dignity.
24) See, for example, Marx K, *supra*, p 162, where Marx interrogates the meaning of the term "rights of man" as it is used in the *Dèclaration du droit de l'homme et du citoyen*.
25) Lindholm T, "The Plurality of Normative Traditions and the Need for Cross-Cultural Legitimacy of Universal Human Rights", in Arnegaard TJ and Landfald L *supra*, p 15; Cranston M, *supra*, p 1. See, indeed, the *French Dèclaration du droit de l'homme et du citoyen* of 1789, 1791 and 1793; and the *Virginia Bill of Rights* of 1776.
26) Cranston, *supra*, p 3.
27) See Berki RN, 1977, *The History of Political Thought: A Short Introduction*, JM Dent & Sons, pp 132-140; Cranston, *supra*, pp 25-26; Eide A & Hagtvet B, *supra*, pp 8-9.
28) See Harpham EJ, 1992, *John Locke's Two Treatises of Government: New Interpretations*, University Press of Kansas, pp 15-29; Eide A & Hagtvet B, *supra*, pp 9-10; Berki RN, *supra*, pp 142-150.
29) L Duguit in *Archives de philosopie du droit*, cited by George Whitecross Paton made a very similar argument, save that he was opposed to an *a priori* approach to law and to rights. See Derham D P (Ed), 1964, *A Textbook of Jurisprudence*, Oxford University Press, p 89. Duguit argues that the foundation of the law is not the individual's rights. Law arises because people live together and it is essential to regulate their relations. Neither, as Duguit saw it, does law depend on the will of the sovereign, who is himself "bound hand and foot by a law which he cannot change".
30) Both constitutions cited by Marx, *supra*, p 161.
31) Dembour, *supra*, p 153.
32) Dugard J, 1978, *Human Rights and the South African Legal Order*, Princeton University Press, p 399.
33) *Ibid.*
34) Quoted by Cobbah JAM, "African Values and the Human Rights Debate: An African Perspective", in *Human Rights Quarterly* Volume 9, Number 3, 1987 pp 316-317. Cobbah cites Hinchman's elaboration on the point made by Hegel: "Hegel distinguishes between the characteristic Lockeian question, 'What is the origin of X' … and 'What is X'? What X is may in fact only come to light when we take into account the developed and articulated form of 'X', including all the supposedly contingent elements of history, custom, the state, etc., which the state of nature approach peels away. In 'taking apart' existing society, studying its 'parts', then reconstructing it, Hobbes and Locke have left something out – not something accidental, but the very essence of man's social and political relationships. For this reason their project of grounding human rights in man's pre-political state appeared to Hegel fundamentally mistaken ... Only

if one could purge human memory of everything not included in Hobbes' and Locke's state of nature, could one possibly re-condition men to think and act as the liberal theorists say they do ..." (*ibid.*)

35) "Die Judenfrage", 1843, cited by Marx, *supra*, p 146.
36) See Eide A, *supra*, pp 10-11.
37) Cranston, *supra*, pp 11-12.
38) Arnegaard TJ and Landfald L *supra*, pp 153-154. See also Chimni BS, "Marxism and International Law: A Contemporary Analysis" in *Economic and Political Weekly*, February 6, 1999, p 338. Chimni is not here dealing with rights as such. He deals with international law and argues that it represents the interests of powerful nations and masks inequalities in international relations. He writes: "[The] international legal system possesses its own internal structure and dynamics which shapes its content and discourse. It develops ... only through certain organised 'sources of international law'. The particular form international law thus assumes defines its boundaries; anything falling outside it is designated as non-law. Its distinctive nature has served to sustain the status quo and prevent the substantive transformation of the content of international law in favour of third world states". Although this is not a direct attack on any theory of rights, it has a bearing on the attitude one must take towards international human rights instruments to the extent that they represent international law.
39) Eide A, *supra*, p 11.
40) Lindholt L, 1997, *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique*, Ashgate, pp 29-30.
41) Of flat circles within circles representing rights in order to move away from a hierarchical view of rights – MS.
42) Lindholt L, *supra*, p 6.
43) Galtung J, "The Universality of Human Rights Revisited: Some Less Applaudable Consequences of the Human Rights Tradition", in Eide A & Hagtvet B, *supra*, p 153.
44) *Ibid.* p 154.
45) Derham D P (Ed), *supra*, p 321.
46) Some may wish to argue that some rights are not natural in the sense argued above, and that they evolve, rather, out of the way in which history has progressed. An example of such rights might be the right to freedom of expression. In this regard, however, see Van der Westhuizen J, "Freedom of Expression" in Van Wyk *et al*, *supra* pp 267-269. See especially p 269, where he argues that "... The desire to communicate ... is an essential characteristic of human nature" and that "Normal human beings want to speak, sing, write, or display colours and insignia ..." Van der Westhuizen then concludes, and I think rightly, that freedom of expression is a natural right. Note that he likens it to other civil and political rights and that, therefore, the naturalness of free expression is not peculiar.
47) Dembour – pp 156-157 – refers to a study by Heather Montgomery with the title *Must Children have Rights they don't Want?* The study happens against the background of the United Nations Convention on the Rights of the Child of 1989. Among others, the Convention directs states to take measures "to protect the child from all forms of sexual exploitation and sexual abuse". In her study, Montgomery finds that prostitution can be a rational choice for the child prostitute. If they did not prostitute themselves, they might be forced by exigencies of life to engage in other economic activities which offer lower financial returns and which might expose them to other forms of harm. One 12-year-old that was interviewed by Montgomery even hoped that, in the life hereafter, she might be rewarded "for looking after my parents" with the proceeds of prostitution. The question therefore arises whether people should be forced to have rights which they do not want – rights, in effect, which might impoverish them.
48) Bokor-Szegö H, *supra*, p 22.
49) The protection of which rights is amplified in, and based on the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. (See Bokor-Szegö H, *supra*, p 29.)

50) Rousseau J, 1973, *The Social Contract and Discourses*, Dent Dutton, p 250
51) Stavenhagen R, "Universal Human Rights and the Cultures of Indigenous Peoples and Other Ethnic Groups: The Critical Frontier of the 1990s", in Eide A, *supra*, p 150. See also Bokor-Szegö H, *supra*, p 25.
52) See Harpham EJ, *supra*, p 22.
53) *Ibid.*
54) *Ibid et seq.*
55) Craig A, 1997, "Postmodern Pluralism and Ourselves" in *Theory and Psychology*, Vol 7(4), Sage Publications, p 517.
56) Van Schaik L, "The Concept of Care" in Macnamara M, 1977, *Meaning in Life*, AD Donker Publisher, p 149.
57) Cobbah JAM, *supra*, p 318.
58) Rousseau J, *supra*, p 150.
59) See footnote 1 of this document. But even without the Bill of Rights this would have been true.
60) See Bokor-Szegö H, *supra*, pp 28 & 29.
61) See also Article 29 of the UDHR.
62) Bokor-Szegö H, *supra*, p 30.
63) Quoted by Cobbah JAM, *supra*, p 320.
64) Cranston M, *supra*, p25.
65) See also Katarina Tomasevski (Ed), 1987, *The Right to Food: Guide Through Applicable International Law*, Martinus Nijhoff Publishers. See in particular at p 4 how the Universal Declaration on the Eradication of Hunger and Malnutrition links the right to food to civil and political rights.
66) See Rycroft A & Jordaan B, *supra*, pp 20-21; Brassey M *et al*, 1987, The New Labour Law, Juta, pp 5-6, 161-164, 310; Crogan J, 1993, Collective Labour Law, Juta, p 3.
67) Rycroft A & Jordaan B, *supra*, pp 10-12. One must of course be nuanced here since, in our age, the owner is often not the one directly involved in commanding the worker. It seems to me true, however, that whoever actually commands, does so in the name of the owner and must be presumed, if not repudiated, to do so also in the interests of the owner.

# Charting the Statutory Implementation of the Values of the Bill of Rights in the Business World: Past and Future

*Dennis Davis*

## INTRODUCTION

There has not been much constitutional consideration given to a significant amount of recent South African litigation. To a large degree, many of those who litigate are completely ignorant or apathetic to the implications of our Constitution such that the Constitution has generally passed by much litigation. I say this by way of deduction. One would think that if counsel knew a judge to be a constitutional lawyer, they would raise a constitutional issue at some point - and I am constantly surprised how little this occurs.

By way of example, I recently heard a case where Cape Town City Council had obtained an interim interdict (temporary relief) against a company that constructs third-party advertising – ie., those large billboards that can be seen on roadsides and at public places. These billboards are often erected on other people's premises and there construction has become extremely profitable.

The City of Cape Town was understandably anxious to protect the natural beauty of the city. There is therefore a by-law prohibiting third-party advertising , prohibiting the construction of billboards that advertise products except, of course, where the billboard is on the premises of the person who produces the product. So, if you manufacture widgets, you are perfectly entitled to have a big sign at your factory reading: “Widgets sold here”. The by-law, however, does not allow you to erect a billboard on somebody else's premises reading: “Widgets sold there”.

In the case I heard, a particular group first put up a billboard for a popular fastfood chicken outlet. It proceeded to construct two other billboards. When digging began in order to lay the foundations for one of these billboards, the construction crew hit some cables, cutting off electricity to a whole area of Cape Town. This annoyed the City Council even further, and resulted in it obtaining an interim interdict, effectively prohibiting the company from proceeding with the construction of any further billboards.

Only when it came to the “return day” – that is consideration as to the granting of a final order restraining this company, or any other company for that matter, from constructing billboards in the environs of Cape Town – did this particular company raise a constitutional issue. At this late stage of the hearing, they raised the point that an absolute prohibition by-law on third-party advertising was a constitutional infringement in terms of Section 16 of the Constitution (the freedom of expression clause), because commercial speech is protected under the Constitution.

Advertising is therefore protected under the Constitution, they said, and a blanket ban on this form of advertising was effectively constitutionally invalid.

One might argue for the limitation clause, but the problem here (and this has broader implications for business) was that the Cape Town City Council itself had in fact developed its own policy document in which it stated that this by-law was not satisfactory for the new needs of the city. It conceded in its policy document that in certain areas of the city, third-party advertising by way of billboards was legitimate, but that there should be areas of

maximum control where no advertising of this kind should be allowed, for example, where such advertising obstructs picturesque views of Table Mountain.

By virtue of their own policy document, the City Council therefore effectively destroyed their own case on the limitation ground. This is because it was clear that the existing by-law could not be held to be a reproach which would impair the right to freedom of speech to the minimum needs.

Accordingly, counsel for the City Council correctly said that they had been put at a disadvantage because a constitutional defence had been raised at the last minute, and they had not been given enough time to prepare a proper argument.

In this particular case, I found the by-law to indeed be unconstitutional and gave the City Council six months to correct it, but prohibited any third-party advertising from taking place during the six months, in this way giving the Council some relief.

The point I am trying to make is that this case highlighted to me just what can result from ignorance of the Constitution. In pursuit of the third-party advertising company, the Council had clearly not considered the constitutional implications of its own by-law, either in its own documentation or indeed in the process of obtaining the earlier interdict. I should add that the case was superbly well argued by counsel but the point remains that earlier consideration should have been given to constitutional issues.

This case proved to me that there is widespread ignorance of the Constitution in our society, and further, that there is a widespread ignorance insofar as litigation under the Constitution is concerned.

Let us therefore examine some of the areas where I think the spirit, and indeed the real substance, of this Constitution impacts upon the commercial world and the business community. There are many elements that could be discussed here, but I will highlight three separate components: the question of horizontality; the implications of attacks on statutes which raise consequences for private institutions; and lastly, advertising and freedom of expression, because I see this as an intriguing topic that has all measure of interesting implications for the business community in terms of the Constitution.

## 1. HORIZONTALITY

The horizontality question is to be found in section 8 of the Constitution. Section 8.1 provides that the Bill applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state. It is equally clear that all persons are bound by the Bill because in Section 8.2, a provision in the Bill binds the natural juristic person, if and to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

The provision goes on to say that a court, when applying a provision of the Bill to a natural juristic person, must apply or where necessary, develop the common law, to the extent that legislation does not give effect to that right.

In such development of the common law it may also limit the ambit of the rule to limit the right, provided the limitation is in accordance with the limitation provisions of the Bill.

What does this all mean? I do not have a clear answer because it is as if the provision was never included in the text. By this, I mean that there is absolutely no direct jurisprudence on this extraordinary radical provision of the Constitution. And it is radical.

The provision is radical because it does something profound; indeed, no other constitution in the world has gone this far. It effectively says that power – whether sourced in the public or private sphere – is subject to constitutional scrutiny.

This is an enormously significant move. There is no reason why, at the end of the 20th century, we should not see multinational companies as being able to exert even greater power over individuals than is in fact the case with the state – for example, Bill Gates is richer than South Africa. In other words, if multinationals have the capacity to exert extraordinary influence over the lives of individuals, why then do we still persist with a laissez-faire division between public power and private power? I accept that the argument for this is because there are vast areas where the state and law should not interfere, where privacy should pertain. But our Constitution seeks to question the watertight compartments that have traditionally been drawn between, on the one hand, public power and, on the other, private power. And perhaps because it is so innovative, nothing has happened about it.

It is not so radical that it mandates an enquiry of a horizontal kind because it says: "A provision binds a natural juristic person if and to the extent that it is applicable." One must therefore ask oneself which of the provisions of the Bill of Rights are applicable to the relationships between private persons.

Obviously, certain rights that perhaps deal with questions such as civil and political rights, do not deal with private institutions. It might well be that there, specific provisions are made for the state to do things. It could be argued that some of the socio-economic rights are issues which pertain only to the state. But what has been asked is, not that there is an automatic application of the Bill of Rights to all private institutions, but rather that a court, in considering a right, has to ask: does this particular right actually apply to a relationship between a natural juristic person? Is it applicable or is it suitable? Is it the kind of right which should apply to private relationships? If indeed this is the case, one must go one stage further and ask: is there a law in South Africa at present, which gives content to that constitutional right? If the answer here is no, then the court must either create a new right, or develop the common law to ensure that that constitutional right is now part of our ordinary common law. As you can see, this is a very radical provision.

Professor Frank Michaelman of the University of Harvard told me that he gave a talk at the American Academic Association conference a couple of years ago, in which he took the words of Section 8 (the ones I have tried to briefly analyse here) and, without revealing the source thereof , asked a group of American law teachers at the conference, what they would do if this was now part of the United States (US) Constitution. How would they actually deal with the law they taught their students?

Professor Michaelman said that the reaction was extraordinary. People realised that much of what they were teaching, would have to be rethought. But this has not happened in South Africa – and the reasons why are issues to ponder .

In order to gain some insight, let us examine the provision in terms of, for example, insurance law.

**1.1 Horizontality and insurance law**

There was a particular case in Canada in which a single, 20-year-old male wished to take out an insurance policy and applied for such policy with a particular insurance company. He alleged, however, that young, single, male drivers have to pay rates that exceed the rates paid by young, single, female drivers, by young, married, male drivers as well as those paid by any driver 25 years of age or over. (Similar premium levels exist in South Africa when one applies for motor vehicle insurance.)

This man took his case first to the Ontario Human Rights Commission. Not having had satisfaction from them, the matter finally went to the Canadian Supreme Court.

This man's argument was that the manner in which drivers were classified amounted to discrimination against them on the basis of age, sex and marital status in terms of the Ontario Human Rights Code.

The insurer accepted that the classification system on which premiums are based constituted an infringement of the Human Rights Code, but that the infringement was a distinction, an exclusion, a preference which was based on reasonable grounds and therefore essentially fell to be saved by the limitation clause within the Code itself.

When it came to the US Supreme Court, Justice Sopinka said the discriminatory practice was reasonable, if it was based on sound and accepted insurance practice and if there was no practical alternative.

The practice of charging premiums that are commensurate with risk is sound insurance practice and is desirable to adopt for the purposes of achieving a legitimate business objective. The availability and practical alternatives is a question of fact. The court therefore held that the insurer had proved that there was a statistical correlation between the use of discriminatory criteria and the occurrence of loss and risk in terms of motor accidents. However, the court said that the mere existence of this statistical evidence is not enough to satisfy the required reasonable test. The court then went on to say that to allow discrimination simply on the basis of a statistical average, would only perpetuate traditional stereotypes. The insurer responded that there was no other practical alternative available in order to reduce risk. In the absence of practical alternatives and together with statistical evidence, the majority of the court held in favour of the insurer.

The minority differed, holding that reasonableness requires that a causal connection, through a distinction of insured risk, had to be established, and secondly, there had been no alternative means available to assess the risk. The minority said that the insurance company had failed to prove both these requirements, and should set aside the practice.

Although this was only the minority decision, it indicates that – and in the ordinary case of an insurance policy, which is clearly a private relationship – issues of equality in particular, have the potential to bite home.

Taking this concept a little further, Professor Havenga has raised similar issues regarding health insurance. The article stated that insurers have used four principle strategies to try to reduce Aids related costs. Insurers:

- exclude HIV and Aids as covered conditions
- use the HIV antibody test to screen out HIV positive applicants
- screen out certain sections of the population considered to be high risk
- refuse to insure a person with HIV and against illness related to the condition.

Professor Havenga adds:

> "It is beyond doubt that an argument can be made out that each and every one of these strategies is an infringement of the equality clause on the basis of, for example, race, gender, sex, marital status, sexual orientation or disability ... Whether insurers will succeed in the argument that the discrimination is reasonable and justifiable, remains to be seen."

Another interesting case comes from Australia. Here the complainants were a gay couple and they lived with the son of one of them. Both men contributed to, and were long-time members of a health benefit insurance scheme. They applied to the insurer for a concessionary family premium; the two of them and the son. Needless to say, the insurer refused, stating that they did not constitute a family. The court had no hesitation holding the discrimination on the grounds of homosexuality by the insurer against the complainants, in refusing them access to the concessional rate, and set aside the decision.

The insurance industry – and this includes all types of insurance – is therefore ripe for a reconsideration of its practices on the grounds, particularly, of equality within the context of the horizontality implications of the constitution .

### 1.2 Horizontality and exclusionary business practices, hiring practices and private institutions

Let us deal with other discriminatory practices. Again, we will see here that it is the horizontality provision with the equality provision, that bites.

Take the question of red-lining and exclusionary lending practices by banks. Unquestionably, banks and other financial institutions will have to begin justifying their practices. They will have to show that any discrimination on the grounds of, for example, living in a particular area – which might well be an indirect form of racial or other discrimination – can be justified rationally.

Take hiring practices. South Africa has new labour legislation but there is no obligation to hire anybody. Equality issues therefore arise in hiring practices, in the way in which people are introduced and brought into a firm – interview schedules, the notion of IQ tests, the whole basis of questionnaires. Here, for example, my students often have to suffer through questions such as: do you play golf? Or there are sexist assumptions such as: what are you going to do when you have a child? Then there is the question: what does your father do? – working on the assumption that more affluent parents could bring a flow of work into a law firm.

What I am saying is that the gamut of these hiring practices is open to challenge. Take the rather personal; I can claim that the reason I was not hired is because I am too short. I may then be asked where in the Constitution such a protection exists. I can then say that section 8.2 of the Constitution orders the court to ask itself: does the right of equality become applicable in this case? I say, why should it not? Is there anything which suggests that the hiring practice of a private institution should not be subject to scrutiny? We can therefore say it is applicable.

The court must then decide whether this applies in this particular case since shortness is not effectively a physical disability. The question therefore arises as to whether some form of adaptation of the common law should in fact take place in order to provide a right to me, which previously would not have been the case.

The courts have not seen any litigation of this

kind. I am not suggesting that such litigation would necessarily win in court, but we instinctively know that there is a possible argument, and the better run business organisations are doing something about it.

Then there are aspects around the Equality Bill. This particular Bill is very difficult to understand and it is presumably, when it sees the light of day, going to deal with some of these questions. But take the instance of private institutions such as private schools and clubs. Where do these types of institutions stand in relation to the equality provision?

An interesting situation therefore develops between the privacy argument and the equality argument – there are some things which we are entitled to do.

I recently addressed a "men's only" organisation in Port Elizabeth. I was not aware of this when they invited me to speak, although on this particular occasion they had what they called a "ladies' evening", which meant that women – or as they were called here, ladies – were present. I mentioned that perhaps the women, if they ever wanted to join such a club, would like to have a constitutional challenge, since their exclusion raises a range of issues in this regard.

**1.3 The Bill of Rights and corporate governance**

Gower, who wrote a wonderfully elegant treatise on modern company law, says that there are four rules which govern the fiduciary relationship of directors to a company. They are as follows:

- Directors must act in good faith and in what they believe to be in the best interests of the company.
- Directors must not exercise the powers conferred upon them for purposes different from those which they were conferred.
- Directors may not fetter their discretion as to how they should act.
- Directors may not, without any informed consent of the company, place themselves in a position in which their personal interests and duties to other persons are liable to conflict with their duties to the company.

These are traditional statements regarding corporate governance.

However, I recently read an intriguing article by Michelle Havenga on the implications of the Bill of Rights for corporate governance.

Corporate governance raises issues about the fiduciary relationship of what is in the best interests of company directors and what is in the best interests of the company. What is in the best interests of the company, may not necessarily be in the best interests of shareholders. We say that company directors must act in good faith, and this "good faith" is determined based on the mores of society which, inevitably, are sourced now in the Constitution.

On this point, Professor Havenga writes:

> "safety, environmental protection, the removal of gender and racial discrimination, the fair treatment of suppliers, and the maintenance of employees' health and safety, are areas which in a sense are intertwined with good faith, because they are all sourced in the Constitution."

She goes on to say that "the equality clause contained in Section 9 states that no person may unfairly discriminate directly or indirectly against anyone of the following, on the following grounds ..."

Havenga further states that:

> "environmental concerns are regulated by Section 24 which provides that everyone has the right to an environment that is not harmful to their health or being, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other means that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development in the use of natural resources, while promoting justifiable economic and social development ...
>
> Directors who regard these provisions may, in addition to the possible sanctions imposed by specific statutes or other common law liability, be in breech of their fiduciary duties to the company. It may thus be expected that the public policy will demand broader considerations of these concerns than was hitherto contained in the fiduciary doctrine of directors to companies."

This is an imaginative argument that directors need to start thinking about, because the model of the company as merely a stakeholder model where the company serves only the shareholders, is already under question in South Africa. The Labour Relations Act, for example, makes it quite clear that workers' interests have to be taken into account. Indeed, the whole idea of

workers' councils was to suggest that when it came to mergers and acquisitions, workers have certain rights of pre-information with regard to these particular developments which, placed four square in our corporate model, means that workers have a direct interest in the nature of the company. The nature of corporate governance therefore has to re-examined.

This is therefore another way in which the spirit of the Constitution, means one has to look more carefully at the way companies actually go about their business.

## 2. IMPLICATIONS OF ATTACKS ON STATUTES

There are implications of attacks on statutes for private organisations, and these attacks happen all the time. Note that this is not horizontality – it is simply the question of whether you as a company, can suddenly find yourself actually being involved, notwithstanding that it is a vertical attack.

Take for example the recent case of *Jooste vs Score Supermarket Trading*. This was a case dealing with Section 35 of the Compensation for Occupational Injuries and Diseases Act of 1993. A provision in this Act bars employees from instituting any action against their employers for the recovery of damages in respect of any occupational injury or disease covered by the Act.

The employee wanted to get more compensation, and accordingly sought to argue that this section infringed his rights to equality by depriving him of his common law right to claim damages from his employer, thereby placing him at a disadvantage to persons who fell outside of the Act and who still retained their common law right.

This argument succeeded before his Lordship Mr Justice Zietsman in the Eastern Cape Provincial Division. However, if the section is set aside; suddenly, an employer now has a common law action against him for substantial damages and is no longer protected by the Act – it is interesting how, even under a vertical attack, an employer/ business community can find himself/herself at the blunt end.

In this particular case the Constitutional Court set aside Judge Zietsman's judgment and said as follows:

> "... whether an employee ought to have retained the common law right to claim damages either over and above, or as an alternative to, the advantage conferred by the Compensation Act, represents a highly debatable controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make. The contention represents an invitation to this court to make a policy choice under the guise of rationality review – an invitation which is firmly declined. Section 35.1 of the Compensation Act is logically and rationally connected to the legitimate purposes of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases, sustained or contracted by employees in the course of their employment."

The point thus, is that it should not be thought that only horizontal attacks have a direct consequence for the business community.

## 3. ADVERTISING AND FREEDOM OF EXPRESSION

The whole issue of advertising fascinates me and I believe we are going to get all sorts of interesting challenges in this regard – I look forward to the Tobacco Bill coming before the Constitutional Court.

Take, for example, the absurd decision of the Advertising Standards Authority in relation to the Charlize Theron "Real men don't rape" advert: who knows what they were thinking when they banned this advert! This kind of absurdity clearly falls under the Constitutional provision, section 16, but so do all other forms of advertising one way or another, whether they are offensive on the one hand, or whether they are socially harmful on the other. All of these issues are now up for consideration.

In the 1970s the question of cigarette advertising came up in an American case. In 1965, in an attempt to alert the general public to a document on the dangers of cigarette smoking, the US Congress enacted legislation requiring a health warning to be placed on all cigarette advertising. By 1969 it was clear that if the government was to achieve its aim, more stringent controls were necessary. Congress therefore enacted the Public Health Cigarette Smoking Act of 1969, which stated that it should be unlawful to advertise cigarettes in any medium of electronic communication, subject to the jurisdiction of the Federal Communications Commission.

Petitioners took the issue to court, but the court concluded that Congress had information sufficient to believe that the ban covering only the electronic media would be an appropriate response to the problem of cigarette advertising. In other words, there was a rational basis for placing a ban on cigarette advertising while allowing such advertisements in the print media. Evidence showed that the most persuasive advertising was conducted on radio and television, and that this type of advertising was effective, particularly with children. Owing to concerns regarding health and smoking, Congress was therefore correct.

In a minority judgment, one of the judges actually said:

> "This is not an ordinary free speech case. It involves expression which is ostensibly apolitical, advertising a particularly noxious habit through a medium which the government has traditionally regulated more extensively than any other modes of communication. But the unconventional aspect of the problem should not distract from the basic First Amendment principles involved. Any statute which suppresses speech over any medium for any purpose, begins with a presumption against its validity. If the government is able to come forward with constitutionally valid reasons why this presumption should be overcome, then of course the statute should be allowed to stand. But whereas here, the reasons offered are inconsistent with the purposes of the First Amendment [the free speech protection in the US], it becomes the duty of the court to invalidate the statute."

The judge said that in this particular case there was insufficient evidence to suggest that this fundamental infringement could be justified in terms of the Constitution.

The relationship between freedom of speech and advertising is fascinating indeed. It is often said that advertising should be given less constitutional protection than other forms of speech, but this is problematic because advertising is really nothing more than a persuasive form of speech. But then one can also say that political speech is a persuasive form of speech, and so too is religious speech, especially evangelical forms of religious speech where one is being persuaded to move in a particular religious direction.

This raises serious problems which need to be addressed. Advertising is a form of publication which clearly has implications for various aspects of our society. Obviously we know that the right to freedom of speech does not protect advocacy of hatred based on race, ethnicity, gender or religion, etc., however, all other forms of speech are protected. The question therefore arises as to when they can be curbed.

## 4. WHAT THIS MEANS FOR BUSINESS

Each of the points I have mentioned are topics on their own, but what I have tried to say in a short space of time, is that if one looks at the gamut of business intercourse in this country, one sees that there is almost nothing in Chapter 2 of the Bill of Rights that does not actually implicate business one way or another. Even a standard challenge to a statute such as the Compensation for Occupational Diseases Act, has a direct implication for the business community – besides the horizontality arguments.

Where does this leave us in terms of chartering the implementation of the Bill of Rights?

We have not yet reached the point where the horizontality implications of the Bill of Rights have bitten. We do not yet have a statute such as the Civil Rights statute, but something similar is apparently on the drawing boards.

What I do know is that, sooner or later, these constitutional provisions are going to be used, and when they are, they will draw one fundamental implication for the business community – that is, that power in our society can only be exercised on a rational basis.

What the Constitution essentially says is that when one exercises power and it has implications for one's fellow citizens, then one must have a justification for exercising that power when the power impacts upon one or other, or more, of the entrenched rights which individuals have under this Constitution.

I believe that what the Bill of Rights is saying to the business community is that it must do a self audit of its own practices. One must examine whether in fact one's practices breach the equality provision, or whether they discriminate on one or more of these grounds.

Do your practices actually perform in a congruent manner with the real morals of our society, as now sourced in the Constitution *vide* the fiduciary responsibility of directors, as indicated earlier?

All these areas must be examined because, at the end of the day, your actions and the exercise of your power can now be tested against the Constitution, and the onus is on you to justify why it is that your power has ridden roughshod over all of these rights and whether in fact this can be justified accordingly.

## CONCLUSION

One cannot change all society's laws in a day. South Africa went through a radical revolution in 1994, and I believe that it will take a new generation of lawyers emerging from our law schools and young lawyers in practice, to start forcing an increasingly new judiciary to deal with the purport and objects of our Constitution.

This will happen perhaps quicker than some of us think. My impression is that when it does happen, the business community will be caught short in many areas of its dealings with the public, particularly in its hiring practices and more generally in the way in which it exercises power in society. I can only hope that the spirit of this conference percolates through the business community.

# The Role of the Business Community in the Evolution of a Human Rights Culture in South Africa

*Mahlaphe Sello*

## INTRODUCTION

The Constitution of South Africa is a mere four years old and is struggling to ensure the full realisation of its intent. Development – politically, economically and otherwise – is key to the realisation of the provisions of our Bill of Rights. Failure to apply and respect the principles of a democratic government have been shown to be a serious obstacle to development. Who then should be tasked with the responsibility to ensure the application and respect of a democratic government? Does the business community have a role to play in this regard and if so, what is this role?

The business community undoubtedly has a role to play, and a vital one at that. In this paper I attempt to highlight the various roles that can and should be played by the business community in the development of a human rights culture in South Africa.

## 1. WAYS IN WHICH BUSINESS CAN CONTRIBUTE

The ways in which the business sector can participate in and contribute to the development of a human rights culture in South Africa, can loosely be classified into four distinct categories:

- Giving full effect to those rights that have a clear and direct application to business:
  - – labour-related rights
  - – other general rights that guard against discrimination of any kind
  - – rights external to the operation's business but intricately linked and affected by the conduct of the business community.

  The first two are internal and relate to the promotion and protection of human rights in the workplace, directly affecting those in the employ of business. The third is external and affects the rights of all who have no commercial, employment or other formal relationship with business.
  - – Exercise of appropriate corporate governance.
- Active participation in the establishment of social cohesion:
  - – formation of business partnerships
  - – direct and active involvement by the business sector in communities where they operate
  - – social responsibility.
- Promotion of the right to development (realisation of socio-economic rights)
  - – private-public partnerships
  - – concern for job creation through innovative plans
  - – economic upliftment and empowerment
  - – establishment of self-regulatory mechanisms and codes of conduct for members of the business community to guard against abuse of human rights by members.
- Direct and unconditional support for organs of civil society promoting human rights and protecting against abuses.

## 2. GIVING FULL EFFECT TO THOSE RIGHTS THAT HAVE A CLEAR AND DIRECT APPLICATION TO BUSINESS

The clauses in the Constitution provide a framework for the business community to conduct its activities in a manner that does not infringe on other rights. The systematic infringement of such rights may have direct and immediate redress, but in certain instances this may not be the case.

**2.1 Labour-related rights**

- Freedom of association and the right to organise for collective negotiations. All employees should have the right to organise without first having to obtain authorisation from the employer. Employees should also have the right to organise and negotiate without repercussions.
- Non-discrimination. All employees should not be subject to discrimination based on race, colour, nationality, sex, religion or other beliefs, political or other opinions.
- Regulation of child labour. No employee should be younger than 14 years old, or younger than the legal working age in the cases where the age is above 14 years old.
- Regulation of slavery, servitude and forced labour.
- Right to health and safety at work. All employees should work in good hygienic conditions, in a safe environment, and should not be exposed to factors or elements that put their health or life at risk.
- Right to administrative action.

These are mainly labour-related clauses for which relevant legislation has been enacted. They enjoy a form of dual protection. Their infringement therefore gives rise to immediate action, either by the party whose rights have been infringed or by the state. Governance of the promotion of these rights and protection from abuse is, in comparison with other classes of rights, direct and hence very little ambiguity exists as to the role the business community can play in fostering a culture of human rights, as relates to this category. The same, however, cannot be said of other rights such as the rights to equality.

**2.2 Other general rights that guard against discrimination of any kind**

- *Access to information.* The citizen's ability to access information is a vital right. Though the obligation to grant such access is placed by the Constitution on the state, the inability to access information at the workplace is an impediment to workers to exercise their rights. South Africa has 11 official languages. Although the law provides for situations where language barriers can constitute an infringement on rights, the business community can and must take all reasonable steps to ensure that employees have access to information, by providing such information in the preferred languages. It is not suggested that every notice be in all 11 languages, but it is suggested that business units operate in different locations and must be sensitive to the commonly spoken languages in the area in order to ensure that access is guaranteed, free and fair. To rely on the provisions of the law as regards access will not inculcate a sense of respect for human rights in those to whom access is limited.
- *Access for the differently abled.* Business has to be seen to be sensitive to the needs of all who have dealings with it, and so provision of services for differently abled persons is paramount. The inability to access business premises for legitimate purposes as a result of a physical shortcoming flies in the face of a commitment to develop a human rights culture.

**2.3 Rights external to the operation's business but intricately linked and affected by the conduct of the business community**

*2.3.1 Protection of the environment*

Externally – environmentally – the right of everyone to an environment that is not harmful to their health or well-being is a well accepted and justiciable right in our Constitution. However, our history has its fair share of cases where environmental rights were transgressed by businesses long before the drafting of the Constitution. The question that arises is, even where no legal redress is available to those so affected, is there no moral responsibility on those whose activities today have harmful consequences for health or well-being to seek ways – though maybe not to reverse or redress – to arrest further deterioration and threat to health? Such voluntary action on the part of business would make clear the regard in which human rights are held by business.

*2.3.2 Waste management*

In a young and economically developing country such as ours, it is accepted that our legal and institutional framework does not currently extend to all eventualities to protect human rights. Consequently, we all have a moral responsibility to ensure that our actions do not inadvertently jeopardise the rights of others and to accept that certain groups are more vulnerable – specifically the poor and children. Extra

measures have to be taken to guard against contact with industrial waste where such contact may be harmful. In today's world, unfortunately, waste scavenging by poor citizens is a common sight. Though scavenging is due to economic circumstances that cannot be overcome overnight we could, however, minimise the negative impact of such unfortunate activity. This requires an attitude and mind shift – the objective being the guide – where the objective is not to comply with minimal legal requirements, but is to protect those that should not, due to economic circumstances, come into contact with products that may be detrimental to their health. This therefore means that the issue of waste management cannot only be concerned with the minimum adherence to legal requirements, as the latter – particularly in developing societies – may itself not be sufficiently developed, and thus fail to protect our most vulnerable citizens.

### 2.4 Corporate governance and appropriate codes of conduct (monitoring and evaluation)

It is important for South African businesses to have and adhere to a strong set of corporate governance standards and guidelines not only in keeping with the legal, regulatory and institutional framework but also to be used as a reference point by policy makers as they examine and develop their legal and regulatory frameworks that reflect the country's social and legal circumstances. Adopting a position that aims for greater transparency, accountability and accounting integrity has a domino effect and contributes to the evolution of increased levels of acceptable conduct on the part of businesses at all levels, various stakeholders, government structures and society at large. The importance of avoiding illicit operations, bribery, money laundering and corrupt practices which undermine morality, the rule of law and hinder the economic and social development of a country, cannot be overemphasised.

The corporate governance framework extends to such issues as business ethics and corporate awareness of the environmental and societal interests of the communities in which businesses operate. A sound set of standards and guidelines cannot be divorced from addressing the importance of respecting the environment – both physical and social. Our free market enterprise system depends on a moral culture and a moral culture has its roots in the respect for and promotion of human rights.

Corporate governance is affected by the relationships among participants in the governance system. Controlling shareholders can significantly influence corporate behaviour. As owners of equity, institutional investors are increasingly demanding a voice in corporate governance. Creditors play an important role in some governance systems and have the potential to serve as external monitors over corporate performance. Employees play an important role in contributing to the performance and success of the corporation. The role of each of these participants and their interactions is a powerful contribution to making corporate governance an effective tool for protecting and promoting human rights.

Codes should preferably be voluntary and not driven by legislation. However, the government should play a participatory role in the administration of the codes to the end that this will give credibility; to the extent that the codes are upheld, legislation should not be introduced.

These codes should address all activities of a company, and all sectors of each industry. Sanctions should be imposed in cases of non-compliance by a company or its subsidiaries (starting with self-imposed sanctions). Levi Strauss did this. When it discovered that workers in one of its Chinese plants were being maltreated, the company – without legislative pressure – closed the plant. This was, of course, harmful to the community and also affected the company's bottom line, but the regard for proper human rights–sensitive conduct was deemed paramount.

## 3. ACTIVE PARTICIPATION IN THE ESTABLISHMENT OF SOCIAL COHESION

One of the main aims of the Bill of Rights has to be the development of good public governance, which is not possible without a responsible society. Being a vital sector of the South African society, business has a critical role to play in building a responsible society in a partnership between state, labour and society at large – a partnership with unity of purpose and coherence of action.

There are various ways business can give effect to the foregoing, but I will dwell on just three of these:

### 3.1 Formation of social partnerships

By forming social partnerships with stakeholders such as labour, government and community/society, the private sector is drawn into debates about public policy priorities and accepts social responsibilities. The input of the business sector into these debates has to contribute to the growth and development of the standards of such organisations, the effective attainment of set objectives and the sustainability of the initiatives. These policy debates ensure sound policy making and implementation and because such organisations represent a community of interests, the deliverable objectives are intricately linked to human rights adherence. Today we are faced with acute social dilemmas that are the responsibility of society as large. The negative impact on society of the consequences of these dilemmas require the business community to play an active role in finding solutions – cases here include the growing number of street children and the Aids epidemic. As Buddhist scholar Sulok Sivaraksa said: "Twenty per cent of the people in Bangkok itself, live in slums. And many people don't even live in the slums, they live under bridges, etc. And yet people feel these are not human rights issues."

Millions of children are, in the near future, expected to be orphaned as result of the Aids epidemic. The question is: as social partners what can we do as business to help society deal with this catastrophe? How many children must end up on the streets and under bridges? What can be done to arrest the increasing spread of Aids and to minimise its impact on society?

For these reasons, the milestones achieved by Nedlac should be supported and enhanced, and further capacity should be built into organisations to assume wider responsibilities.

### 3.2 Direct involvement in communities

At its most simple, the case for business taking an interest in the community is that no company exists outside of a community. Active engagement with councillors and community leaders ensures a common understanding of issues needing to be addressed and encourages common effort in seeking their solutions. This encourages good citizenship and makes a positive contribution to the communities in which a company operates. Such business involvement extends to support for local non-governmental organisations in addressing critical areas. Such conduct by companies contributes to the strengthening of a human rights–sensitive culture if it is recognised, valued and exemplified by all employees.

### 3.3 Social responsibility

Companies do well in healthy, thriving communities that respect the rule of law. The conflicting demands placed by various needs on public resources puts an impossible burden on public finances. The business community as a major stakeholder in society is under constant and critical scrutiny by the other stakeholders. A perception that it has no regard for human rights creates a "jungle mentality" within civil society. Furthermore, business loses the moral high ground to ensure that human rights abuses by others, particularly the state, have to be curtailed. This creates an impression of serving own interests and alienates other social partners that are pivotal in its crusade for the protection of human rights, to the long-term detriment of all. It is important that the business community engages seriously and vigorously all human rights issues and not only those that directly affect business. To create such a perception would be to imply that the Bill of Rights is an exclusive instrument of the rich and powerful for protecting their vested interests. It is imperative therefore that the business community is seen to be engaging actively in social programmes for the benefit of all without discrimination. While the starting point for business social responsibility programmes is usually commitment from chief executives, the quickest and most efficient route to expanding social responsibility is to involve large numbers of employees in practical community work.

In the new century, and with globalisation dominating the agenda, the most competitive regions will be those that are most cohesive. Social cohesion is becoming a key component of economic success and this is something the private sector, as much as government, should take into account.

## 4. SOCIO-ECONOMIC RIGHTS (THE RIGHT OF DEVELOPMENT)

The South African Constitution recognises the interdependency of all human rights – civil and political, economic, social and cultural rights.

The Bill of Rights' inclusion of socio-eco-

nomic rights as justiciable rights makes the redress of poverty a fundamental constitutional concern. This inclusion confers upon non-state organs a moral and ethical responsibility to promote and protect these rights, as their realisation are necessary to ensure the effective enjoyment of civil and political rights such as free speech and participation in the political process. Systematic erosion of socio-economic rights places at risk the full enjoyment, not only by those whose socio-economic rights are not being realised, but by members of society at large. As a result, deviant behaviour increases. As Judge Chaskalson observed in *S v Makwanyane*: "The level of crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution." This conferment gives the business sector a wide scope of participation in the evolution of human rights.

The focus here is on those rights that aim to protect and advance access to basic human needs and to improve people's quality of life.

If human rights and democracy are to be meaningful it is critical that society attains an adequate standard of living. Civil and political rights must go hand in hand with equally important economic and social rights. The mere introduction of political pluralism is not enough to turn a poor society into a prosperous one. These are the usual words in the debate over the right to development. Indeed, human rights and development and the right to development are current topical issues.

The inclusion of socio-economic rights as justiciable rights in the South African Bill of Rights makes the redress of poverty and disadvantage a matter of fundamental constitutional concern. These are such rights as the right to housing, health care, food, water, social security, education, children's socio-economic rights, etc.

The argument put forward is that the protection of socio-economic rights is necessary to ensure the effective enjoyment of political rights such as the right to equal protection of the law, free speech and participation in the political process.

The primary responsibility to protect and fulfil these rights rests with the state, as it is required to take positive legislative and other measures to assist individuals to obtain access to these rights. The issue here, however, is not one of obligation *viz-à-viz* the business community, but that of what role, if any, the business community has in the realisation of these rights, as contribution to the development of a human rights culture in South Africa. For respect of human rights to be safeguarded, it is an advantage also to have corresponding economic and social development.

**4.1 Public-Private partnerships**

With organs of state involved in public-private partnerships (PPPs) – such engagement helps broaden access to basic needs such as education, health, water and housing – accepting that the rights enshrined in the Bill of Rights are undoubtedly the responsibility of the state, the capacity of such state to realise these rights is, and can, for the foreseeable future be expected to be limited. This limitation has dire consequences, and in areas such as education, unless addressed, will not only perpetuate the divide in levels and quality of education but would, in the long-term, lead to the creation of a "subclass of functional illiterates". The business sector can engage with government to find mechanisms of delivery in appropriate circumstances. The widening of access to such mechanisms strengthens society and lays a foundation upon which economic development can take place.

**4.2 Concern for job creation through innovation plans**

Worldwide, business provides three quarters of the world's employment and possesses enormous resources. Consequently, it has a critical role to play in solving the problems that impede development of society to one that is more prosperous, sustainable and equitable by finding ways to increase employment, which is an absolute condition for a prosperous economy.

**4.3 Economic upliftment and empowerment**

Extreme poverty is a threat to the realisation of human rights. It is a threat to the right to life and it is a condition that prevents the most vulnerable groups from exercising their human rights. The extension of participation to the majority of citizens in the economy and means of production, ensures a direct and defendable interest in the rule of law, and consequently in the deepening of a human rights culture. Pover-

ty and deprivation impede the exercise of the right to human dignity, equality and freedom. The inability to enjoy these rights creates an alienated section of the population. A perception that such rights as human dignity and equality are unattainable has a hollow ring to the alienated beneficiaries when divorced from their economic and social context. Consequently, the respect of human rights in general becomes a factor of little importance. A society with nothing to lose is a threat to the principles of human rights and impedes the development of a culture of respect of human rights. Outsourcing non-core functions, development of emerging entrepreneurs and support for initiatives aimed at developmental programmes are all ways that the business community can give effect to economic upliftment.

**4.4 Codes of conduct**

It is essential to ensure that all business entities have a code of conduct that respects socio-economic rights; and property owners are therefore obliged to respect the right of access to adequate housing by refraining from interfering through arbitrary evictions and without due process of the law in people's legitimate enjoyment of their accommodation. A requirement for strict adherence to the accepted codes of conduct will act as pressure on all members to promote human rights issues if a strict requirement includes that failure will result in the business community curtailing commercial links with the business so guilty. Voluntary initiatives should reflect the following principles:

- Provision of a safe and healthy workplace.
- Responsible environmental protection and environmental practices.
- Compliance with the national laws promoting good business practices, including laws prohibiting illicit payments and ensuring fair competition.
- Maintenance, through leadership at all levels, of a corporate culture that respects free expression consistent with legitimate business concerns, and does not condone political coercion in the workplace.
- Maintenance and transparency of human rights practices records through monitoring and evaluation based on codes of conduct.

Many view voluntary codes sceptically: typically, voluntary codes are seen as a response to real or perceived threats of, for example, a new law or regulation; of competitive pressures or trade sanctions; or of consumer pressures or boycotts.

A 1978 United Kingdom study of advertising codes of ethics from around the world came to similar conclusions. It found that industry will dedicate resources to code administration only if it expects benefits such as consumer goodwill or the removal of government regulation; industry will pay lip service to codes but may not change its behaviour where profits are at issue; code enforcement mechanisms are more likely to be clandestine and prone to conflict of interest problems than are government regulations.

These critiques suggest that corporate codes of conduct have both strengths and significant weaknesses. If the human rights movement is shifting its focus from governments to private corporate actors, this move should be accompanied by a systematic attempt to resolve the contentious issues surrounding the use of codes and to spell out strategies available to human rights advocates to ensure that adoption of codes is not counterproductive. These were the findings of a research study conducted by the Canadian Lawyers Association for International Human Rights in late 1996.

In concluding their study of child labour and codes of conduct in the United States (US) apparel industry, the US Department of Labour described corporate codes of conduct as:

> "... a new and promising approach that can contribute to the elimination of child labour in the global garment industry. They involve the private sector – rather than governments and international organisations – in developing solutions to this complex problem."

At the same time, the study cautioned that it is important to keep in mind that codes of conduct are not a panacea. The warning is particularly significant in light of the limitations on actual implementation and enforcement of codes identified by the study and other observers. Though not a panacea, codes of conduct have a significant role to play, particularly in a fledgling democracy such as ours. It is expected that other forms will complement and support these codes.

Ethical behaviour and adherence to, and promotion of, international human rights norms – some observers argue – is in the corporation's

best interest as human rights abuses lead ultimately to unstable economic and business environments.

> "If human rights and democracy are to be meaningful, it is critical that developing countries be assisted in attaining an adequate standard of living. Civil and political rights must go hand in hand with equally important economic, social and cultural rights."

As US delegate J Kenneth Blackwell told the Commission on Human Rights, a government that protects political and civil rights creates the most nourishing environment for development. In his opinion, political and civil rights are the foundation on which economic and social welfare of the individual should be construed.

We should build a partnership between the state, business and society to promote human rights based upon ideals of shared responsibility.

## 5. STRONG AND OVERT SUPPORT FOR ORGANISATIONS WHICH ENSURE THAT HUMAN RIGHTS ARE NOT UNDERMINED

There is growing concern worldwide regarding the relegation of human rights in the face of conflicting interests and agendas. Organs of civil society play a pivotal role in addressing this concern. The business community must actively support legitimate and credible organisations that protect human rights from abuse by the state, domestic businesses, multinationals and other stakeholders. It is easy to disregard the important role these organisations can play. At any stage of development, when interests of a particular grouping are mainly common, it is easy to identify a common enemy. However, development itself results in the birth of a different set of interests that, with time, begin to conflict. It is usually at this point that the role of independent bodies is appreciated. (Domestic business vs multinationals, imports vs locally produced goods – all this is about protecting the domestic economy.) These organisations cannot be expected to function only when such conflict arises. To effectively engage in these complex issues and therefore to play a role in society, they must have developed over time.

The capacity of these organs should be enhanced. More often than not, they are the only voice of a large section of our population, and their inability to function not only places the most vulnerable at risk of abuse, but impoverishes society. A society without independent and effective human rights protection groups is a society unable to defend itself in the face of threat. It is imperative that the independence of such organs is not compromised to guarantee effectiveness. Equally, it has to be accepted that activities of such organs may clash with the immediate interests of their benefactors. However, the long-term negative – and at times irreversible – effects of human rights abuse gives rise to an expectation that any short-term gains should be overridden in favour of the long-term interests of society at large.

The world is fraught with examples of collusion between the most powerful stakeholders in society – government and organs of state – in issues that undermine the constitution and eliminate effective enforcement of government agency over the activities of certain sections of the population. This is clearly not in the long-term interests of business and society as a whole, as it threatens the establishment of a sound economy.

## CONCLUSION

Systematic, voluntary and committed engagement in all the issues discussed above inculcates in society an understanding, appreciation and strong respect for human rights. Failure to voluntarily act raises the need for legislative intervention which, although well intentioned, is not always in the best interests of society. Over-legislation invariably pits one set of rights against the other, stifles the exercise of rights and itself can become a threat to the development of human rights. It is imperative that this be avoided where possible. And business has not only the ability to ensure that this does not happen, but also a vested interest.

The role identified above becomes imperative and unavoidable if one is to accept as a truism the words of Bangladesh's Foreign Minister, Mostafizur Ruhman, that:

> "Without democracy, a people's potential for socio-economic progress cannot flower. Equally, without improved standards of living and a vision of the future that cannot sustain hope, democracy will wither."