

THE FRAGILITY OF RIGHTS

By Arthur Chaskalson



“Obsequious and servile spirits are the worst guardians of people’s rights”.¹

John Warr was writing at the time of the English revolution, three hundred years before the adoption by the General Assembly of the United Nations of the Universal Declaration of Human Rights. In the introduction to their publication of his writings in *A Spark in the ashes*,² Sedley and Kaplan refer to Warr’s “appreciation of individual worth” and how he develops from this “the entitlement of people to overthrow a government which has broken its compact with the people and turned to tyranny”.³ We hear an echo of this in the preamble to the Universal Declaration, which begins with the claim that “the inherent dignity and ...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, and goes on to proclaim that it “is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.

The Universal Declaration reflects the aspirations of the founders of the United Nations who sought to promote an international legal order in which there would be peace between nations and respect for human rights and fundamental freedoms for all people. Although the United Nations has had an important role in attempting to promote international cooperation, peaceful international relations, and an international legal order based on respect for human rights and fundamental freedoms, the aspiration

¹ John Warr, “The corruption and deficiency of the laws of England”, in *A spark in the ashes*, Stephen Sedley & Lawrence Kaplan, eds. (London: Verso, 1992): 93.

² *Ibid.*, n.1.

³ *Ibid.*, 5.

that there should be peace in the world and respect for such rights and freedoms has not been realised. We know from our own history how, for half a century after the founding of the United Nations, political power in South Africa was wielded oppressively to promote the interests of a small privileged group.

History, both before and after the time John Warr was writing, and since the founding of the United Nations and the adoption of the Universal Declaration of Human Rights, is replete with examples of aggressive wars, and unjust regimes. We know that this has happened at different times and in different ways in all parts of the world; that there will be resistance to unjust laws, and that sooner or later unjust regimes are liable to be overthrown by popular revolts. As I write this, we are witnessing popular uprisings and protests against the denial of freedoms and fundamental rights in parts of North Africa and the Middle East. What the outcome of these uprisings will be is uncertain; history warns us to be cautious. There have been more failed revolutions than successful ones.

Warr knew this. He warned that although the interest of the people is “the true and proper interest” of any commonwealth, corrupt interests, once having gained power, could advance themselves, “pretendedly to exalt this”, and might succeed in doing so. For:

He which hath the worst cause may sometimes have the best success, for time and chance happen to all, and thus liberty may be worsted by privilege as having less specious advantages in the flesh.⁴

We need to be conscious of this lesson of history.

Not long before the adoption of the UN Charter and the Universal Declaration of Human Rights, which he did not live to see, Franklin Roosevelt delivered his now famous “four freedoms speech”, in which he said:

⁴ Warr, *A spark in the ashes*, 79.

~ *The fragility of rights* ~

The basic things expected by our people of their political and economic systems are simple. They are: equality of opportunity for youth and for others, jobs for those who can work, security for those who need it, the ending of special privilege for the few, the preservation of civil liberties for all.

Importantly, Roosevelt considered “freedom from want” as one of the four essential freedoms necessary to achieve these goals. The others were:

freedom of speech and expression, freedom of every person to worship God in his own way, [and] freedom from fear which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour — anywhere in the world.

Freedom was not, however, limited to these rights; “freedom” he said “means the supremacy of human rights everywhere”.

Though he was talking at a different time in a distant country, which since his demise has not always seen the world through this lens, his remarks deserve our attention. What they tell us is that freedom is not the preserve of those who can afford it; it is the entitlement of everyone. Without freedom from want, there can be no real freedom.

These are concerns of which the founders of our Constitution were conscious. In the preamble to the Constitution four primary goals are set. They are to:

- ~ Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- ~ Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- ~ Improve the quality of life of all citizens and free the potential of each person; and

- ~ Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Our Constitution provides the framework within which this must be done. The preamble sets the goals to be achieved. Chapter 2 of the Constitution entrenches a Bill of Rights, which:

is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.⁵

The rights include fundamental freedoms such as respect for human dignity,⁶ the achievement of equality,⁷ the prohibition of discrimination,⁸ freedom of expression,⁹ freedom of association,¹⁰ fundamental political rights,¹¹ and other civil and political rights. They also include social and economic rights which oblige the state to take reasonable measure within available resources to enable citizens to gain access to land on an equitable basis,¹² to have access to adequate housing,¹³ to have access to health care, food, water and social security,¹⁴ and education.¹⁵ These rights provide the foundations on which our democracy exists. They are an essential component of an open and democratic society which is the framework provided by our Constitution for the achievement of these and its other goals. The state is required by the Constitution to “protect, promote, and fulfil”

⁵ Section 7(1) of the Constitution.

⁶ Section 10 of the Constitution (“everyone has inherent dignity and the right to have their dignity respected and protected”).

⁷ Section 9(2) of the Constitution.

⁸ Section 9 (3) of the Constitution.

⁹ Section 16 of the Constitution.

¹⁰ Section 18 of the Constitution.

¹¹ Section 19 of the constitution.

¹² Section 27(5) of the Constitution.

¹³ Section 26 of the Constitution.

¹⁴ Section 27 of the Constitution.

¹⁵ Section 29 of the Constitution.

these rights.¹⁶ It is our duty as citizens to ensure that the government does so.

Our rights based Constitution could have created the impression that with the demise of apartheid all had changed and that we were assured of a future in an equitable society. Indeed, for a time, that was the prevailing public mood. However, given our history of oppression and dispossession it was never going to be easy to achieve the goals we set ourselves in our Constitution. We have made considerable progress since the end of apartheid and our country is now a far better place than it used to be. The Constitution and progressive legislation enacted to replace old apartheid laws are upheld by the Courts, which are now to a significant extent more representative of the community than they were under apartheid. We are a rule of law state in which government is held strictly to account for its action or inaction,¹⁷ and the common law is being developed to reflect constitutional values.¹⁸ In this process the Constitutional Court has emphasised that at the heart of our new constitutional order:

is the recognition that under our Constitution all human beings regardless of their position in society, must be accorded equal dignity.¹⁹

That is fundamentally different from the legal order that prevailed under apartheid. But it is only part of the story. The past still hangs over us, profoundly affecting the environment in which we are living. Looking at our country today, can we say that there is freedom from want? That there is equality of opportunity for youth and for others, jobs for those who can work, security for those who need it, and the ending of special privilege for the few? The sad

¹⁶ Section 7(2) of the Constitution.

¹⁷ For example, *Pharmaceutical Manufacturers Association of South Africa* n. 8 above (holding that the exercise of all public power is subject to constitutional control).

¹⁸ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)

¹⁹ *Hoffmann v SA Airways* 2001 (1) SA 1, at para 27.

truth is that we continue to be one of the most unequal societies in the world, with great disparities between rich and poor. Despite the provisions of our Constitution there are still millions of landless people without access to adequate housing, health facilities, clean water or electricity, who have not had the benefit of a good education and are either unemployed or have limited employment opportunities. And children are growing up in these conditions.

Can we really say, as our Constitution requires, that ours is a society in which there is equal dignity, when so many people live in degrading conditions without access to basic needs, and without immediate prospects of securing a better life? We need to acknowledge that we have a long way to go to achieve social justice, to improve the quality of life of all citizens, and to free the potential of each person. These are not only moral concerns; the widespread poverty, and the disparities in wealth and privilege which continue to exist, are fault lines in our society. They must be addressed by the government in the interests of all of us, lest ours be another failed revolution.

What is presently of particular importance for this endeavour is education, to address the skills deficit, public health, to address illnesses such as HIV and Aids and the basic health of people living in poverty, and other needs of poor communities such as access to land and housing for communities migrating to urban areas in search of employment, job opportunities for those seeking work, and public safety and law enforcement which affect everyone. These issues are increasingly gaining greater attention and becoming the focus of pressure upon the government to take effective action to address them.

This is not only a concern of government; it is a concern of everyone. If we do not become a more caring society than we presently are, and do not press our government to address the widespread poverty and deplorable conditions in which so many of our fellow citizens are compelled to live, we will have only ourselves to blame for the consequences that will be the inevitable result. In doing so we must be conscious of two dangers which have to be confronted. Corruption, and the fragility of rights.

In the *Scorpions* judgment the Constitutional Court has recently reminded us of the danger of corruption.²⁰ It said:

There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.²¹

The judgment goes on to recall the words of Kofi Anan, former secretary-General of the United Nations, at the time of the adoption of the United Nations Convention Against Corruption:

This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic underperformance, and a major obstacle to poverty alleviation and development.²²

Developing countries, such as ours is, where there is competition for scarce resources, are particularly vulnerable to the threat of corruption. Corruption does not exist in a vacuum. It depends on the complicity of those involved in the corrupt acts or practices, and an environment in which this is tolerated. It flourishes in closed and authoritarian so-

²⁰ *Hugh Glenister v The Republic of South Africa* [2011] ZAC 6.

²¹ *Id* Para 166.

²² *Id* para 167.

cieties, and it is constrained in open and democratic societies, where the law is respected, and there is a culture which promotes fairness and integrity.

Our Constitution proclaims the values of “an open and democratic society”.²³ It entrenches the rule of law and respect for human rights. All law, including the common law, must be developed and legislation must be interpreted to promote the spirit of the Bill of Rights,²⁴ the core values of which are declared to be human dignity, equality and freedom. As the Constitutional Court has said

No-one could miss the significance of the hermeneutic standard set. The values urged upon the Court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.²⁵

These values are precious assets that we must do all we can to protect.

The rule of law and respect for human rights are indispensable building blocks for a democratic society. They are interconnected. The rule of law, properly understood, is not simply the application of the law whatever it may be, just or unjust. Properly understood, and this is the sense in which it is understood by our Constitution, it includes respect for fundamental rights, and an independent judiciary empowered to ensure that this happens. One of the virtues of the rule of law, and the civil and political rights that are found in our constitution alongside the socio-economic rights, is that they provide the infrastructure for an open society, in which the needs of communities can be articulated and political contestation can take place. They offer protection against the abuse of power and

²³ Section 39(1): “When interpreting the Bill of Rights , a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.

²⁴ Section 38(2) of the Constitution.

²⁵ O’Regan J in *S v Makwanyane* 1995(3) SA 391(CC) at para 322.

corruption, and provide tools for the communities themselves to take action to assert the rights given to them by the Constitution.

In the judgment on corruption to which I have referred the Constitutional Court held that the Constitution requires the state to establish an independent anti-corruption unit to investigate allegations of corruption. When established, this will be an important institution to combat corruption. There are other deterrents in the Constitution to corruption. In particular, freedom of expression, which includes freedom of the press and other media,²⁶ provides space for investigative journalism, and the making public of corrupt dealings, as do political rights and parliamentary privilege. They are buttressed by other rights, concerned with access to information,²⁷ just administrative action,²⁸ access to courts,²⁹ an independent judiciary,³⁰ and state institutions supporting constitutional democracy — which include the Public Protector, the South Africa Human Rights Commission and the Auditor General.³¹ These rights and institutions are interconnected, reinforce each other, and together are stronger than any one of them alone.

But rights are fragile. John Milton, who like John Warr, also wrote at the time of the English revolution, warned of this. He asked how a nation having won its liberty:

should be so heartless, and unwise ...as not to know how to use it, value it, what to do with it, or with themselves [than] ...to run their necks again into the yoke which they have broken, and prostrate all the fruits of their victory for naught.³²

²⁶ Section 16 of the Constitution.

²⁷ Section 32 of the Constitution.

²⁸ Section 33 of the Constitution.

²⁹ Section 34 of the Constitution.

³⁰ Section 165 of the Constitution.

³¹ Chapter 9 of the Constitution.

³² John Milton, “A ready & easy way to establish a free Commonwealth”, in *Milton’s prose writings* (London: Everyman’s Library, 1958): 227.

No one can say that has happened in South Africa. We are as I have already said, a far better country than we were at the time of apartheid; a rule of law state, in which the Constitution is supreme, and rights are entrenched and enforced by the Courts. Whilst it is correct that no one can say that we are about to run our necks into the yoke that has been broken, and prostrate all the fruits of the victory for naught, no one can say that this cannot happen. It can happen anywhere, in any country, anywhere in the world. It happened in the past in Germany under Hitler, in Russia under Stalin, and in many other countries in the course of history. It is happening now in many countries in different parts of the world, including countries where the people had earlier rebelled against oppression and claimed the freedom to which their citizens were entitled.

Rights are fragile. They are easily respected by governments while the going is good, but they become vulnerable when society is under stress. That is the lesson of history. Governments are not the natural protectors of rights. When they have to take difficult decisions that may be unpopular and give rise to dissent, there is a temptation to respond by curtailing some of the rights that were demanded by the people and embraced by them when they were freed from oppression. We need to resist this temptation and to be conscious of the consequences of giving in to it. The first incursions into rights are the most dangerous, for they open the way for other incursions, until bit by bit rights are lost. Looking back we can see that this is how the security state was established under apartheid. It is the responsibility of all of us to ensure that this does not happen again. The loud public debate at the time draft anti-terrorism legislation was submitted to parliament, and then withdrawn, and the protests against the disbanding of the Scorpions, and the draft legislation making provision for the classification of information, shows that there is a public will to protect rights. It is important that this should transcend political allegiances and become part of the culture of our society. The existence of such a culture is the greatest protection against the erosion of rights.

Stuart Saunders is not an “obsequious and servile spirit”. He is a defender of freedom; an enemy of corruption, and an advocate for the promotion of socio-economic rights. It is right that this should be acknowledged in the publication to honour him, and that we should thank him for what he has done and continues to do in the interest of our country, and all of us who live in it.



ARTHUR CHASKALSON joined the Johannesburg Bar in 1956, took silk in 1971, and from 1979 to 1994 was the Director of the Legal Resources Centre, which challenged the implementation of apartheid practices, and provided legal advice and assistance to vulnerable and marginalised communities. In June 1994 he was appointed as the first President of South Africa’s new Constitutional Court and was the Chief Justice of South Africa from November 2001 until his retirement in 2005. He has received numerous awards for his work in promoting human rights, is the recipient of nine honorary doctorates and the award of Supreme Counsellor of the Baobab [gold], a national honour, for his service to the nation in respect of constitutionalism, human rights and democracy. On his retirement in 2005 he was described by the then President Mbeki as a “giant among the architects of our democracy”.

