WHERE IS THE VOICE OF AFRICA IN OUR CONSTITUTION?

Paper 8
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February 1996

INTRODUCTION

Picture one of those wine-tasting functions where people wear blindfolds and then try to identify the cultivar, vintage, and estate of the wine. Only this time they are not sampling wines: they listen to someone who reads sections from new constitutions, and have to guess where these constitutions come from.

Suppose the working draft of the new South African constitution is being read: Do you think the discerning listeners who have not seen it before would be able to detect the South African spirit in it? Would they say: "Wait a minute, I know these people; only one history and one nation could have given birth to such a text?" To be sure, the listener might be highly impressed by the technical quality of the drafting, and the simplicity of the language that is being used, but would he or she, by breathing in the aroma and savouring the taste, be able to say this has sprung from African soil?

Consider, for example, the reception the Bill of Rights is likely to receive. One could easily picture a connoisseur of constitutions who, in trying to identify the origins of this new sample, leans back and reasons to herself: "This is a typically Western-style Bill of Rights, complete with a Canadian-cum-European Convention limitation clause, hence it must be Northern and Western Hemisphere. Now let us now try to locate the country." Would it be a major embarrassment if she hazarded a guess that this is the new draft Bill of Rights for Bosnia, or a proposal for Quebec?

If the picture sketched above is accurate, I think it is a serious matter which warrants serious and urgent attention. Remember how, in the bad old days, we used to say our new constitution must be truly legitimate; it must reflect the soul of our nation; it must be an expression of our history and of our deepest values, because only then will it have the spontaneous support of all our people? And to do this it must surely be rooted in African soil. Yet here we are on the eve of accepting our "final" constitution, and one has the uneasy feeling that people might describe it as a Checkers no-name brand, generic product.

Of course, the Interim Constitution does mention the word "ubuntu" and the new one might also do that. However, at least in the Interim Constitution this one indigenous element is introduced right at the end, almost as an afterthought, in a section with an uncertain title and an even more uncertain application. Sounds nice, but what does it really mean, some might ask. Too little, too late, others would say.

So, while there is still a little time, let us consider the possibilities. What would qualify as typical African values which could potentially be included in our new constitution?

TYPICAL FEATURES OF AFRICAN BILLS OF RIGHTS

The obvious starting-point for such an enquiry would be the African Charter on Human and Peoples' Rights, as well as the national constitutions of the different African states.

Sceptics might point out that the provisions of these documents in many instances reflect ideals rather than realities. However, we can then at least say they reflect true African ideals or values. The problem with many of the African constitutions does not lie with their content; it lies more with the failure in actual practice to give expression to the values which they profess to cherish. Even if the political practices in many of these countries do not warrant imitation, the ideals they put forth deserve to be taken seriously.

What is unique about the jurisprudence expressed in these documents? At least two outstanding features may be identified: The position of prevalence of the group and the fact that, in addition to rights, duties are also recognised.

The Importance of the Group

The importance of the group in African tradition is reflected already in the title of the African Charter. Because the group ? or "people" ? is considered to be the basic unit of society, in contrast to the West where the individual plays the predominant role, this document, which has been ratified by almost all Africans states, is entitled the African Charter on Human and Peoples' Rights. The Charter recognises inter alia peoples' rights to equality (art 19); to existence and self-determination (art 20); to dispose of their wealth and natural resources (art 21); etc.

There is an overwhelming body of literature and other evidence that the emphasis on the group - the idea of communitarianism - is indeed a distinct feature of traditional African culture, but it is difficult to say how it could or should be translated directly into constitutional terms.

In going through the national constitutions of the different African states, one does not come across much evidence that the concept of "group" or "people" has found its way, in so many words, into these documents, or at least into the bills of rights. However, it will be argued later that this value does indeed play an important indirect role in African human rights jurisprudence, through the notion of duties.

The Notion of Duties

The point is often made that each right has a corresponding duty: the right of an individual implies the duty on the part of society to respect that right. This is a purely logical point, which describes an inherent feature of any human rights provision. The unique feature of African constitutions is that they also recognise the concept of duties in a more substantive sense: In addition to the fact that people have rights, it is recognised that the same people also have duties towards society, which compliments or, as will be argued, limit those rights.

The African Charter recognises a host of such duties, or phrased differently, responsibilities and obligations, on the part of individuals. For example, article 27 of the Charter states: "Every individual shall have duties towards his family and society, [and] the State ...". It further provides that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

This trend is also reflected in African national constitutions, as should be evident from the appendix attached to this paper, which lists all references to duties, responsibilities and obligations in African constitutions that could be found during a study of these constitutions. The extracts represented in the appendix provide evidence that the notion of duties, in one form or another, plays a major role in African constitutions.

It will be noted from studying this appendix that, as is the case with rights, different types of duties could be identified. Some could be classified as positive duties, requiring the citizen to do something specific. In the Constitution of Ghana (article 41(k)), for example, the duty to protect the environment is recognised. Likewise, the duty of citizens "to fulfil all of their civic and professional responsibilities" is recognised in the Constitution of Benin (art 33).

An example of a negative duty, which requires people not to do something, is contained in the Constitution of Ghana, where the duty "to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons" is recognised (art 41(d)).

The concept of duties may also be found in the new draft constitution of South Africa. Section 2 states that every South African citizen is equally "subject to the duties, obligations and responsibilities of citizenship". However, the critical difference is that in the African constitutions duties are invariably juxtaposed to rights, and are more often than not included in the Bill of Rights itself.

Many people might feel their gut tightening at the very mention of the word "duty" in a bill of rights. Doesn't it bring back the memories of the powerless and indeed fraudulent "bills of rights" of the countries of Eastern Europe in the communist era, where duties prevailed, and is the over-emphasis on duties not exactly what is wrong with human rights in many African countries still today?

Let us consider the matter with an open mind, and ask ourselves what the implications really are if the notion of duties is contained alongside rights in a bill of rights, and whether this is not needed in the South African Bill of Rights.

THE IMPLICATIONS OF RECOGNISING DUTIES IN A BILL OF RIGHTS

What is the effect of recognizing "duties" in a bill of rights? Consider, for example, the situation where a bill of rights contains a clause recognising freedom of expression as a basic right, and it also poses the duty to respect the dignity of other people. A criminal case dealing with hate speech now reaches the court, and the accused invokes his or her right to free speech as a defence.

In determining to what extent this defence in fact protects the accused, the court is bound to say that the right of free expression is balanced by the duty to respect the dignity of other people. In other words, the duty determines the boundaries of the right. In some instances a court might find that rights are trumps; in other cases duties might be trumps and will prevail. Rights are limited by duties, and conversely, duties are limited by rights.

As will be illustrated below, this does not automatically mean that the duty of respect should

override free speech in the hypothetical that was posed; the example used merely illustrates where the weight on the respective sides of the scale come from.

It is consequently submitted that the presence of duties in a bill of rights amounts to nothing more, and nothing less, than the presence of a limitation mechanism.

See the constitutions of Algeria (art 60), Cape Verde (art 80(2)), Congo (art 56), Ghana (art 41),Sao Tome & Principe (art 20), Sierra Leone (art 13(e)),Tanzania (arts 29(5), 30(1) and (2)) and Zimbabwe (art 11).

LIMITATIONS ON RIGHTS: PROBLEMS WITH THE PRESENT SITUATION

Of course, the idea that rights are limited is not a strange concept. There is for all practical purposes universal agreement that no rights are absolute, except in a limited number of instances, for example in the case of the right against torture. In fact, lawyers who specialise in these matters know that the limitation provisions in a bill of rights such as ours are at the very heart of that document, since they determine the scope and indeed the weight of all rights. The question is how the limitation should be provided for: which mechanisms should be used.

In our present constitution the rights listed in Chapter Three are limited inter alia by section 33 (the general limitation clause), by section 34 (dealing with the suspension of some rights during states of emergencies), by so-called internal modifiers and by the rights of others. A similar pattern is followed in the new working draft.

There are, however, several problems with this type of limiting mechanism. One of these problems relates to clarity, another to the overemphasis this places on the role of the individual.

The Problem of Clarity and Frankness

It is the stated and admirable aim of the writers of our constitution to make this document transparent and understandable not only to lawyers who specialise in these matters, but also to ordinary people. However, as things are at the moment, these ordinary people are promised the sun and the moon in the first part of the Bill of Rights, in ringing and categorical phrases such as "Every person shall have the right to equality before the law ..." (sec 8(1)). It is only towards the end of the document (where one normally finds the fine-print in the type of contracts which have given lawyers a bad name) that one is confronted with the news that all these promises could mean nothing, if it is "justifiable in an open and democratic society ..."

How is an ordinary person to understand this? To most people the present structure and wording of the Bill of Rights will not conjure up the image of a scale, the idea that rights are balanced. What will stick in their minds is the rights. But even if their common sense or education tells them that rights have to be balanced, they are likely to be confused by the fact that on the one side of the scale there are very concrete rights, the basic thrust of which most people can comprehend fairly easily, but this can be outweighed by an abstraction of the vaguest kind on the other side of the scale. What do the words "limitation ... that is ... justifiable in an open and democratic society" mean to members of the broader public who do not read German and Indian cases in their free time? This is precisely what the "plain language" approach is supposed to counter: We should not be ruled by an anonymous force

which, like the sword of Damocles, can drop at any time, for reasons which we cannot comprehend.

Moreover, the all-important fact that one's rights are limited by the rights of others is not even mentioned anywhere in the Bill of Rights, except when it pops up as a surprise in the clause on language and culture (sec 30 of the new draft). Does the appearance of this provision only in reference to one right mean that in exercising other rights one is entitled to violate the rights of other people? Those who have not studied John Stuart Mill or John Rawls should presumably deduce the fact that their rights are also limited by the rights of others from the general limitation clause.

The Problem of Overemphasis of the Role of the Individual

The balancing of the concrete with the unknown is not only problematical from the point of view of the ordinary citizen. It also poses distinct philosophical, or rather ideological problems, especially in our context.

A model which emphasises rights so much ? which places rights on the one side of the scale, and only the vague idea that these rights do have some kind of vanishing point on the other side of the scale ? is premised squarely on the hidden assumptions of libertarianism.

The view of humanity which this model reflects, is that of the individual whose unfettered liberty is the highest good that can be pursued. It glorifies the type of boundless freedom which people like Friederich Hayek and Robert Nozick have propagated, in which the state is relegated into the role of a nightwatch, who simply sees to it that we don't steal from one another and that we do not engage in other forms of serious harm to one another. The dictates of reality that the free individual must act within certain confines, is an embarrassment which libertarianism would prefer to hide in an obscure and abstract general limitation clause such as the one we have now.

On the one side of the scale they place the individual, surrounded by the glaring light of limitless rights. But on the other side of the scale there is no matching, real figure, bound by the need to observe some duties as part of his or her social responsibilities. There is no entity of substance on this side of the scale, but merely the absence of rights ? a gaping hole. Where are the interests of society? This type of limitation provision is at most a reluctant and grudging admission that we are not yet in heaven, where the individual will be completely free from bondage to other people, but keep faith, we are still on course.

This glorification of the individual hardly fits in with a world view in which the group is of fundamental importance and a culture in which duties also play a prominent role. In fact, this is where the indirect influence of the traditional African emphasis on groups on African constitutions become apparent: The explicit recognition of duties in African human rights instruments is in fact a different way of expressing respect for the role of the group.

But it could also be argued that the one-sided emphasis on human rights does not serve the classical theory very well on which the liberal, Western conception of the state is built, namely the social contract theory. The core idea of the social contract theory is that one accepts the obligation to obey the state, on condition that one's basic rights are protected by society. The duty of obedience is the quid pro quo for the protection of rights. The idea of

rights being tied to duties or obligations is consequently central to this most enduring theory about the basis of the modern state.

Perhaps the historical reason why liberalism chose to emphasise only rights in its constitutions, and used the language of libertarianism in doing so, was that the age-old predominance of the state, backed up by the awesome power of natural law thinking, had to be countered to establish a new balance in modern society, at a time when the introduction of rights was a novel idea. The main threat to human rights at the time when these constitutions were introduced was the over-powerful state, and the pendulum had to be swung to the other side.

Be that as it may, the idea of rights has now largely been established, and a new era has dawned, rendering the old approach obsolete. A new threat to human rights is now emerging in some societies, namely the failed or failing state, where the state is too weak to protect its citizens, as is the case for example in Rwanda and Bosnia. It now becomes clear that there are two sides to every society: that of rights and duties.

PROPOSED ALTERNATIVE APPROACH: RECOGNISE DUTIES ALONGSIDE RIGHTS

But what, then, in concrete terms, are the alternatives to the shortcomings of the present approach in respect of the limitation provisions? It is submitted that many of the problems pointed out above can be avoided if we use the concept of duties in our Bill of Rights to play the role of the limitation provision. But how could this be done, and what are the likely consequences?

One option would be to have a list of duties in the constitution, alongside the list of rights. There might, however, be problems with this approach. The first relates to the fact that it would be difficult to identify all the relevant duties and to have a numerus clausus. What if one is inadvertently left out? How long should this list be?

The second problem is that this could swing the emphasis too much to the other side, and erode the protection which the Bill of Rights offers against excessive state power. Given the vastly superior power of the state, with its armies of specialists in the use of force, and the wide spectrum of laws which already places duties on the individual - like the criminal law and tax law, to name but two branches of the law - the balance in the constitution must ultimately still favour civil society.

It is proposed that the proper solution would be to place the limitation clause at the beginning of the Bill of Rights, and to write the fact that rights are limited by duties into this provision, without specifically naming a fixed list of such duties. The formulation of this first section could then be something along these lines:

(1) The state must respect and protect the rights set out in this Bill of Rights.
(2) These rights may be limited [by law of general application, etc] only to the extent that this is justifiable in accordance with those duties which are acceptable in an open and democratic society based on freedom and equality, including the duty to respect the rights of others.
The benefit of this approach is that it places what we are dealing with, when it is said that rights are limited, squarely, honestly and openly on the table, and it does so in a way which links up with the basic values of a large section of our people. Of course, the proposed

approach does not take us all the way to a document which is completely clear and precise. Exactly which duties are acceptable in an open and democratic society will still be subject to interpretation. But at least it takes us further than the present formulation, because it gives recognition to the fact that there is something real, something about which people already have an intuitive understanding, on both sides of the scale.

Educational Impact

The educational implications of this emphasis on the link between rights and duties needs to be emphasised. As is accentuated by the plain language effort, the way in which the constitution is formulated sends out an important message about what people can expect from their society, and what is expected from them in turn. The constitution is the most authentic expression of the core values on which our society is built. The state is expected to protect and to promote the values enshrined in the bill of rights, and specialised agencies, such as the Human Rights Commission, are formed to supplement the general effort in this regard. In addition, thousands of NGO's carry the message further, and it is picked up in all arenas where education take place.

Should rights be coupled to duties in the Bill of Rights, this will provide the correct basis for such education, avoiding a situation where the impression is created that citizens only have rights. One is often confronted, in speaking about human rights to the public, with questions regarding the absence of references to duties in the Bill of Rights. Since it is implicitly there already, in the limitation clause, we might as well spell it out.

It will also help to avoid the situation where people are lured by posters and T-shirts listing their rights, into believing "anything goes" in the name of human rights, just to be told by the warders, as the prison doors slam closed behind them, that these rights are balanced by a vague notion of "limits".

It is often said that the only real solution to ensure respect for the law is through education, and by acknowledging the existence of duties, society at large will be given a more balanced view of what citizenship entails. In effect the implications of the social contract are spelled out.

Effect on Judgments of Courts

An important question is whether the inclusion of the notion of duties in the general limitation clause would make a difference to the way in which our courts decide cases. Would the result of such an approach lead to greater, or less, protection of basic human rights? Would the introduction of the notion of duties not lead to cases being decided more easily in favour of the state?

It is submitted that the proposed approach, if introduced today, will most likely not make a big difference to the outcome of any particular case which is pending before the court at the moment.

It has been argued by some of the technical experts in the Constitutional Assembly that it is unlikely to make much of a difference whether the words "necessary" or "reasonable" is used as the operative criterion in the limitation clause. Whether or not that is correct in respect of

the reasonable/necessary debate, it certainly seems true in respect of the proposed introduction of the concept of duties.

The relevant phrases under both the present and the proposed limitation systems are so open-textured, so indeterminate, that one does not need to be a reborn realist to know that judges are going to decide these cases, whatever system prevails, largely according to their gut feelings about the proper political balance in society.

If there is a difference in the discretion which the two approaches leave to judges, the duty-based approach might in some instances in fact be more protective of rights. Under the general limitation system which is at present in the constitution, the criterion ? ("justifiable in an open and democratic society") ? is so abstract that almost anything could potentially be interpreted to meet this requirement, if judges wish to do so, whereas it might be harder to establish the existence of a concrete duty.

But does the constitutional recognition of the concept of "duties" in the Bill of Rights not in itself place a new weight on the other side of the scale, which would exercise a gravitational pull outbalancing the weight attached to rights, because the legitimacy of the state's claims on individuals is so openly recognised?

That might be the case if one is under the impression that all duties are what was earlier described as positive duties, such as the duty to work. (See, for example, the constitution of Libya, art 4.) However, in view of the rider that the duties must be acceptable in an open and democratic society, it is highly unlikely that our courts will recognise such duties. Our courts are much more likely to work with negative duties, such as respect for the rights of others.

The existence of negative duties illustrate that the assumption that rights and duties are necessarily antagonistic concepts, is largely unfounded. By enforcing the duty to respect the rights of other persons against one person, one is in effect protecting the rights of those others. This may be called the secondary protection of human rights, through the enforcement of duties. In fact, the state's duty to respect and protect human rights, which is recognized in the new draft, would also require it to ensure to this form of protection.

Support for the view that the inclusion of duties is not likely to have an immediate and negative impact on what is traditionally regarded as the basic rights of litigants now before the court, could be found by comparing two decisions of the European Court of Human Rights and the Canadian Supreme Court on the issue of hate speech.

In Jersild v Denmark 19 E.H.R.R. 1, the question had to be decided whether the right of freedom of expression protects a journalist who had broadcast hate speech on Danish television. His conviction was upheld by the highest court in Denmark, on the basis that his conduct violated the dignity of the complainants.

Freedom of expression is protected by article 10 of the European Convention, which is the only article in this Convention in which it is stated that the right in question carries with it certain duties and responsibilities. This formulation did not prevent the European Court from overruling the Danish court, and finding that the journalist was in fact exercising his right to free expression.

The European system, which does recognise the idea of duties in respect of speech,

consequently followed a more pro-free speech approach than was followed in the Canadian case of R v Butler [1992] 1 SCR 452, even though duties are not recognised in the Canadian Charter. In that case the Canadian Supreme Court found that the dissemination of certain forms of pornography could legitimately be prohibited by the state, in spite of the constitutional protection of free speech, on the basis of the general limitation clause. That was the case because the Canadian community regarded the distribution of such material as degrading to women.

The difference in these two decisions illustrate the open-textured nature of both types of systems.
Why, one might very well ask, are we then wasting our time talking about introducing duties into the constitution if it is unlikely to make much of a difference to the way in which actual cases, which are pending before the court today, will be decided? Are the educational advantages spelt out above enough to justify the inclusion of duties?

It is perhaps worth considering that the presence of the word "ubuntu" in the constitution also probably did not make a big difference in the outcome of cases such as S v Makwanyane and Another 1995 6 BCLR 665 (CC) on the death penalty, but this did not prevent a number of justices from considering this constitutional value at length, and relying on it. In this way the concept is becoming part of our jurisprudence, and in the long run it might influence the way in which cases are decided in a positive manner, more accurately reflecting our national spirit.

It is submitted that the same is likely to happen if the concept of duties is introduced in the limitation clause of our Bill of Rights. And when that happens, as was argued above, it might well be that the notion of negative duties could lead our courts to grant greater protection to the rights of others.

WIDER IMPLICATIONS OF THE PROPOSED APPROACH

We started out by saying we want more of the African spirit in our constitution, and then proceeded to argue that this could be done by introducing the notion of duties into the limitation clause. Let us, in conclusion, come back to Africa.

In the first place, the question needs to be asked whether by adopting the concept of duties, are we not taking over precisely that which has caused the violation of human rights in so many countries in Africa, where totalitarian states only recognise duties on the part of their citizens?

However, what is proposed for South Africa is not that only duties are recognised, but instead that rights are recognised in full, as limited by duties. Moreover, only those duties which are acceptable in an open and democratic society should be recognised, a formulation which is likely to exclude most of the strong, positive duties. Open and democratic societies do not regard work as a legal duty.

In the second place, an important advantage of the proposed approach, which has not thus far been highlighted, needs to be canvassed. If South Africa gives constitutional life to a jurisprudential concept which is widely prevalent in Africa, it will greatly increase the possibility of cross-references between us and the rest of the continent.

One part of this would be an increased opportunity for South Africa to exercise effective leadership in the development of an indigenous human rights jurisprudence in Africa. In this way the South African constitution could form a bridge not only between the old and the new South Africa, but also between Africa and the Western world.

This applies not only on national level. The decision was recently taken by the Organisation of African Unity to establish an African Court on Human Rights, which will enforce the African Charter. It will probably take some years for the Court to be established, but one of the problems which the Court is likely to face, once it comes into existence, is the fact that the rights listed in the Charter are not only severely curtailed by the so-called claw-back clauses, which are in effect internal modifiers, but also by the recognition of a wide array of duties. Many of them could be interpreted to be of the strong and positive kind.
If a rich and nuanced South African jurisprudence on the proper scope and limits of duties has been developed by the time that this Court comes into existence, it could play a highly positive role in the process of interpreting the duties contained in the African Charter in a way which is protective of human rights by the yet to be established African Court on Human Rights.

CONCLUSION

The above is an attempt to take the African context of our constitution seriously. Those who find the proposed approach unpalatable, are challenged to come up with another proposal which will achieve this goal. If they cannot do so, or at least cannot do so in time, they are encouraged to reconsider this proposal, and to ask themselves whether their objections are as well-founded as they might seem at first.

The above of course also constitutes only one possibility, albeit one which almost jumps at the reader off the pages of African constitutions. There must be many other equally or more compelling alternatives open to the framers of our new constitutional order.

Or are we going to be satisfied with putting foreign wine into our own bottles; or, to put it differently, to drive an imported car, merely with our own choice of the standard optional features?