

# IBA South Africa Conference/ SBL 25th Anniversary Lecture

## The Rule of Law - Cornerstone of Economic Progress

Extracts from an address to the International Bar Association's South Africa Conference, 9 November 1995, read by the Minister of Justice, Mr A H Omar, on behalf of the President, Mr Nelson Mandela.

As a lawyer myself, I have over the years followed with profound and keen interest the activities of the International Bar Association through reports of the many events which it has convened or participated in. Its important mouthpiece and monthly magazine – the *International Business Lawyer* has been particularly useful in this regard.

That this conference should focus on it during this period of the celebration of the 50th anniversary of the UN Charter and of the United Nations itself, is singularly appropriate. For, as we all know, the dual concepts of human rights and rule of law or due process, as it is very often referred to by members of the legal fraternity, gained a unique dimension and momentum with the emergence of the UN system. It is mainly due to that system that important milestones in the fields of the promotion and protection of human rights have occurred. Not only have we seen many conferences, seminars and discussions on these concepts, but we have also been witnesses to notable results in the form of covenants, treaties, regional charters, commissions, as well as national statutes, national bills of rights and constitutional guarantees of human rights. Indeed even national, as well as international regional courts and tribunals have been set up for the sole goal of ensuring that human beings can be protected in their dignity, persons and property.

### South Africa

The vision you all shared with us was one of a nation and a country in which

we would use the resources of our country to create a society in which all our people would be emancipated from the scourges of poverty, disease, ignorance and backwardness. We are progressing well in this regard.

We, however, also want to create a South Africa that is a good neighbour to and an equal partner with all the countries of our own and other continents, one which will use its abilities and potentials to help advance the common struggle to secure South Africa's rightful place within the economic and political systems of the world.

In order to succeed in these goals we have fortunately as a nation, laid a solid foundation with the acceptance of those values and principles that will guarantee rule of law, in our interim constitution.

### Economic growth

We are all agreed that sustained economic growth is a necessity for achieving our goals. In turn, growth requires more trade, and more investment, from domestic sources and from outside. The South African government's determination to lead the country along a path of sustained growth has therefore led it to establish an economic task force, which is charged with devising a process to strategically focus the country's energies along a path of growth.

Simultaneously, we are addressing urgent challenges such as bringing crime and corruption under control; enhancing the effectiveness with which programmes for social upliftment are



implemented; and rising to the economic opportunities offered by reconstruction and development and our acceptance in the global market and village.

### Rule of law

What should be emphasised, however, is throughout all our endeavours we have been guided and will continue to be guided by a set of norms universally accepted as constituting 'Rule of Law'. The historic elections held during April 1994 presented South Africa with a unique opportunity to redress the imbalances of the past through transformation to a just and democratic order; to a legal order that makes the Constitution and its Chapter on Human Rights the highest law of the land, binding all legislative, executive and judicial organs of State at all levels of government. A legal order committed to the creation of an open and democratic society based on freedom and equality. ➤

This supremacy entrenches rule of law and brings to an end an era in our history in which the law and the rights of our people were subjected to the legal doctrine of parliamentary sovereignty, which, *inter alia*, meant that the validity of laws made by parliament could not be disputed. The task of the courts was to enforce laws made by parliament (in our country a whites only parliament), no matter how unjust such laws might be.

Our country suffered under a grossly distorted form of parliamentary supremacy – not only did an abuse of rights take place, but our economy suffered greatly. That time is over. Now it is the responsibility of the judiciary to uphold and protect the rights of our people as entrenched in the Constitution.

## Definitions

The question of the precise meaning of the Rule of Law has been much debated. At its most basic, the Rule of Law has been held to mean simply that the government is required to act in accordance with valid law. While this is undoubtedly desirable, it is not an exhaustive description of the characteristics of a system which meets the criteria of the Rule of Law. Various other, wider definitions have been proposed. These have included the requirement of procedural justice: something which is now generally recognised as part of the Rule of Law. Others have gone further and argued that material or substantive justice in all its forms is part of the concept of the Rule of Law.

Material or substantive justice is a praiseworthy goal, but the late Professor A S Mathews recognised that procedural justice is impossible unless certain basic rights are recognised. Accordingly, he defined the Rule of Law as follows:

(a) Government according to the Rule of Law means that with a view to the preservation of the basic rights enumerated in (b) below, the relevant laws shall take the form of pre-announced, general, durable and reasonable precise rules administered by regular courts or similar independent tribunals according to

fair procedures.

(b) The basic freedom of person, conscience, speech, information, movement, meeting and association shall be equally guaranteed by the law to all citizens of the society.

(c) Any limitations on the civil rights of freedoms enumerated in (b) shall be in the form of rules conforming to the requirements of legality expressed in (a).

Furthermore, restrictions on the basic freedoms shall be limited in scope and, except in times of genuine crises or emergency, shall not encroach upon the essential content of such freedoms.

Not only does 'Rule of Law' form the cornerstone of economic progress worldwide, in South Africa we had to first establish a Rule of Law anew in its full connotation so as to address violence and serious crime, create and establish accountability for human conduct and behaviour, and to ensure that a new culture based on respect for human rights is promoted within all justice and administrative structures and society in general. It also had to form the basis for our process of nation building and economic development.

## Joint effort

Fortunately, what brought our nation together is an overriding commitment to a joint national effort to reconcile our nation and improve its well-being. The unique product of our negotiations – the interim Constitution and Charter of Fundamental Rights, coupled with the reconstruction and development programme – constitute a firm foundation to meet our challenges.

## Crime and corruption

In taking concrete steps against crime and corruption we have linked hands with the community and with the business section and have simultaneously started with socio-economic programmes which are already seen as highly successful.

We have also started with the transformation of the police into an effective and legitimate service, freed from the legacy of its past role and based on community policing. They have under

adverse conditions started to successfully implement new anti-crime programmes. The national community safety plan has also registered considerable success in bringing down the levels of violent crime.

The justice system has similarly been subjected to a process of transformation so as to restructure it and its institutions so that they would be truly democratic, accessible, representative, transparent and accountable.

## Truth and Reconciliation Commission

In the process of nation building and helping to establish a culture of human rights we have also embarked on the road to reconciliation with the past. The issue of a Truth and Reconciliation commission has generated much public interest and debate. In a nutshell what is required is a means of dealing with a past that contains gross violations of human rights.

There are a number of functions envisaged for the Truth and Reconciliation commission. First there is the constitutional requirement that the law should provide for amnesty – and more particularly for mechanisms, criteria and procedures including tribunals, if any, through which such an amnesty shall be dealt with.

The second area of the work of the commission is to establish a complete picture of gross violations of human rights between 1 March 1960 and the cut-off date. This includes an investigation of its causes and the perspective of victims as well as the making of recommendations of measures to prevent future violations of human rights.

Thirdly, the concerns of victims are addressed via a special committee dealing with preparation and the rehabilitation of victims. This third committee must also decide on practical steps to be taken in an endeavour to restore the human and civil dignity of victims.

The rationale for requiring perpetrators to apply specifically for amnesty rather than granting a general amnesty is to establish the principle of accountability. Every person must be held accountable for his or her actions or

conduct. In criminal law, accountability is established through apprehending persons who have committed crimes, trying them in courts and punishing them if they are found guilty. That is the requirement of justice. The greatest deterrence to crime, as the judges of the Constitutional Court pointed out in the historic abolition of the death penalty judgement, lies in the certainty that criminals will be apprehended, tried and punished if found guilty.

Therefore the Truth and Reconciliation commission does not and cannot offer a substitute for criminal trials. Criminal trials may only be suspended pending applications for amnesty on consultation with the attorney general concerned.

We are, I believe, addressing this matter in a unique way – one which will assist the democratisation process in South Africa. It is also a way which totally encompasses human rights.

## Human Rights

Those who have followed the course of events in the sphere of human rights world-wide will recall that there have been several paradigm shifts from the initial promotional stage to the current enforcement and implementational processes. They will remember also the interesting and sometimes controversial classification of rights along generational lines into those pertaining to the civil and political endeavours of human beings and those affecting their economic, social and cultural wants. To these classifications have been added new era rights – which are of great importance to people in South Africa – such as the right to education, health, work, a clean and safe environment, food, clothing and shelter.

Suffice it to say this revolution of a human rights discourse along the lines of paradigms has unleashed certain drawbacks. For one thing it has led to the emergence of a perception that rights are divisible and that some rights are more important than others – for example, in some quarters the right to vote and to speak freely is given greater weight than the right to work, education and clean air. Indeed, even the right to counsel and

trial by an independent court is treated by some as secondary in importance to the rights of worship and movement. But, as you know, these rights cannot really be split up. For what good does it do to a person to tell her she has a right to vote or to speak as she likes when she does not have the energy to walk to the polling booth or to open her mouth? What good is a right to education where there are no schools or employment opportunities?

## Developmental programmes

Alongside the problem of untreated causes of violation has been the failure of many developmental programmes to make any significant headway. This has again been largely due to the overriding preoccupation of those programmes with macro-economic matters, to the exclusion of the human factor. Even to-

“Although there have been a number of truth commissions in different parts of the world, ours is different from all the others because it is rooted in our own historical conditions.”

day, the vast majority of economists and development planners look upon human rights issues as extraneous and largely irrelevant. The consideration of which can only hinder efficiency and provoke political controversy. Quite clearly this distinction has been a mistake and has cost the world time, resources and, most unfortunately, human lives.

That there is a necessary and inevitable linkage between human rights, the rule of law and economic prosperity is clear for all to see. In all the countries where men and women of talent are free to exercise their skills in the knowledge that wrongs against them or their property will be prevented and punished by free courts and that business needs will be promoted, protected and rewarded by a democratically elected

government – prosperity has occurred. In those places where lawlessness and corruption reign high, even the little promise of growth that might have occurred has never seen the light of day.

## Competition Law

Adherence to the Rule of Law also means government has a duty to provide a cushion against the effects of unequal forces

A major responsibility rests upon developing countries to generate through the Rule of Law at home an environment propitious to real development and prosperity. They must strike a balance between the needs of the business community and the expectation of the poor and the workers.

## Conclusion

To conclude, let me echo what Sir Shridath Ramphal also stated in his exposé of the accomplishments made so far in the world's efforts to bring about peace. On this point he said:

‘It is not only an international setting freed from war and crises that development needs, it needs in an acute degree, the application of the Rule of Law to international relations – an international legal order that upholds the objectives of economic and social justice worldwide.’

With democracy now firmly entrenched in South Africa, it is of the utmost importance that not only the government but each citizen fulfill his or her role in nurturing it. With the contribution of everyone the well-being of our people will be assured – for we have committed ourselves as a government and as a nation to a future in which human rights will not only be respected, but upheld.

South Africa is fortunate to emerge into the world in such interesting times. The irony of our late entry into international affairs is that we can reap the fruits of a world defining itself. This Conference has, in particular, indicated the importance of sharing knowledge on common issues and problems relating not only to the law, but also to economic progress.