

Vinodh Jaichand

**Some emerging  
Human Rights Issues  
in South Africa**

**SADOCC**

## **STUDIEN ZUM SÜDLICHEN AFRIKA 8**

**Vinodh Jaichand: Some emerging Human Rights Issues in South Africa**

Lecture given on the invitation of the Southern Africa Documentation and Co-operation Centre (SADOCC) on 27<sup>th</sup> March 2003 in Vienna.

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Production: Elfriede Pekny

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ISBN: 3-901446-08-7

# *Some emerging Human Rights Issues in South Africa*

*By Vinodh Jaichand*

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Thank you very much for the invitation to speak at this SADOCC talk. I struggled with myself about what to raise under this topic and how to address the issues. While I will refer to some South African law, this is not intended to be a lecture on constitutional or human rights law in South Africa. This is largely the view of a former leader of a legal NGO on some human rights issues. The context of where South Africa is now in relation to where it was under Apartheid must be appreciated. All too often we tend to forget that as we look at South Africa as a "miracle". Even miracles do not continue for ever: they have to be sustained.

I have structured my talk in the following way: first, I will begin with a brief introduction. Then I will select a few decisions of the Constitutional Court for a brief overview. I will then tackle the right to freedom and security of the person, the right to land and the right to dignity through the issue of xenophobia. I will end with a few concluding remarks.

## **Introduction**

Some nine years after democracy in a state in which the constitution now reigns supreme, growing numbers of South Africans have little knowledge of apartheid or the ravages it wrought on the lives of millions. It is not my intention to describe to you what those conditions were like, but it is a radical shift from rule by law to the rule of law. For us to ensure that no other country has to endure similar hardship we need to make sure that history has recorded events correctly.

The South African Constitution was a negotiated one, much like the political settlement. It, however, benefited from the hindsight view of a number of constitutions and it borrowed from the experiences of the world and added a few of its own to the drafting process. It created a unitary state which was non-racist and non-sexist based on the democratic values of human dignity, equality and freedom.

The Constitutional Court was the final arbiter of our differences.

Some may question the wisdom of allowing a court to overrule the decision of the majority of elected representatives. Personally, I have no difficulty with that because human rights are inalienable. The mere election of our representatives does not give them the power (or the wisdom) to deal with that inalienable right. Recent political events around the world have shown the limited wisdom of elected leaders on human rights.

According to Prof. Christof Heyns, it would be wiser to leave the decision making of human rights in the hands of the constitutional court judges who have been elected because of their known record of impartiality. And they are women and men of proven integrity.

## 1. Recent Decisions

The Constitutional Court has been a revelation through its judgements over the past few years. It has, in an eloquent and reasoned judgement, found the death penalty to constitute cruel, inhuman and degrading punishment<sup>1</sup>. At the same time it addressed the right to health in the Soobramoney case in which it found that a

patient needing dialysis of his kidneys had an access right that was constrained by the limited resources available to the state. More recently, it questioned the reasonableness of the policy of a municipality to provide housing for the poor as a socio-economic right<sup>2</sup>. It also found the state policy on the failure to provide anti-retroviral drugs to pregnant mothers unreasonable<sup>3</sup>. What then are the current emerging human rights issues in South Africa?

## 2. Freedom and security of the person

12(1) *Everyone has the right to freedom and security of the person, which includes the right-*

*(c) to be free from all forms of violence from either public or private sources*

The newspapers continue to report a rise in crime in South Africa and a justice administration system that is hamstrung and unable to cope with crime. Crimes against the vulnerable, namely, women and children are commonplace notwithstanding excellent laws. Rape is rampant and the general public appears to be relieved that a woman has survived the horrible crime and not lost her life. Public expectancy of the criminal justice system is low.

This is a direct legacy of the apartheid state where illegitimate acts were legalised and human rights ignored. There was a general disrespect for law and human dignity.

This is compounded by the vast socio-economic disparities in the South African society. I believe that South Africa has replaced Brazil as the leading country in this area, according to recent UNDP reports. There is a forty-five percent unemployment rate in South Africa and that affords little opportunity to turn this tide of events. This is a huge challenge.

The criminal justice system is under the strain of a backlog of cases in numerous courts. New personnel have replaced the old and they urgently require training while dealing with this backlog. More than forty percent of the police service is known to be functionally illiterate. Some of that group include the "kits-constables" (instant police) of the apartheid era who have been integrated into the police service. Many cases come to court where the evidence has been gathered by old-order methods. There is no other alternative but to acquit under these circumstances and the credibility of the criminal justice system is undermined as a result. People then resort to self-help and vigilantism. The call for the death penalty to be reinstated is growing in momentum.

Even where a conviction is secured and the person sent to jail, corruption raises its head. It is not an exaggeration to say that some convicted persons have spent weekends at home during the term of her/his sentence. The Jali Commission of Inquiry on the Correctional Services has revealed that almost anything can be bought in prison if you have the money, from sex, alcohol, drugs and even better accommodation.

There is little doubt that the quickest way to address this issue is to narrow or eliminate the great gap in the socio-economic divide. That can take a long time. Jobs need to be found. In the meanwhile another right cannot be enforced and public confidence wanes.

### 3. Land

*25 (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

*(6) A person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

*(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

Underlying almost any conflict in the world is the issue of land. South Africa struggled to negotiate this provision and positions were polarised between the National Party and the ANC negotiators during Kempton Park. The three provisions quoted above address access to land from different perspectives of South African land dispossession history.

The first seeks to redress the severe imbalance in the proportions of land holdings: 85% of the land was held by less than 12% of the population, not an uncommon feature of colonial rule in Africa. Progress in this is slow mainly due to the limited resources available to buy up land owned by whites. The slow rate of delivery threatens the future. I will attempt to provide a reason for this later.

The second provision seeks to protect farm workers who have lived on the land for a long time, worked on that farm for that period and who have been the sustaining labour force. Farmers have been known to summarily dismiss workers thereby denying them a roof over their heads. Good legislation

has been enacted in response to this. However, most farm workers are illiterate and do not know their rights which must be executed quickly for them to be effective. Some NGO's have done good work in this area but there is room for a few more. Nkuzi, a NGO specializing in lan issues has done excellent work in that area. Lawyers for Human Rights have achieved success also where a husband (evicted legally) gained his right to remain on the farm through his wife on the right to family life and cutting off of water supply and electricity constitutes an eviction are but two examples of success.

The third provision seeks to ameliorate the hardships caused by the various apartheid laws that dispossessed people of the land. The law is applicable only after 19 June 1913 when the first of the laws was enacted to dispossess black people of their land. This excludes from consideration the rights of first nations or aboriginal title.

As stated earlier, to give effect to these provisions state resources are stretched. A special Land Claims Court has been set up to adjudicate these rights and it has not so far been seized of an important case which would give effect to expropriation provisions of the Bill of Rights.

In deter-mining compensation in cases of ex-propritation for public purposes the Court would have to reach a "just and

equitable” payment by considering all relevant circumstances including-

- the current use of the property (absent landlords)
- the history of the acquisition and use of the property (dubious acquisition or inconsistent patterns of farming)
- the market value of the property (“willing buyer/willing seller”)
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, (soft loans from Land Bank/ tax breaks enjoyed) and
- the purpose of the expropriation (public purpose may reduce compensation)

Many farmers are relying on market values alone, sometimes inflated market values, for the expropriation of their farms. As a result the state has to pay a high price for land which depletes the resources quickly. An amendment to our expropriation laws may be necessary at the least. (If that is not done, then the road to Zimbabwe may well be paved by good legislative intention only – some may say). This type of law was relied upon by white Zimbabweans to stymie the government to effect land reform. The issue of rights to land,

while placed in a legal system for possible solution, may yet prove to be another emerging human rights issue in South Africa if satisfactory results are not provided quickly. Perhaps there is need to target the search for an ideal case to test the expropriation law with the help of the Land Claims Commission. There is a visible growing impatience on this issue.

#### 4. Xenophobia

*(10). Everyone has inherent dignity and the right to have their dignity respected and protected.*

With the limited job opportunities in South Africa and the larger numbers of people from other parts of Africa present, there has been a xenophobic reaction.

People with darker pigmentation have been arrested because they were unable to produce identification on demand. In one instance a woman schoolteacher was arrested despite her protestations. On the way to the police station she cursed in Afrikaans and the policemen realised they had erred and let her go free.

There has been no reported case of a white person being arrested in similar circumstances. With the implementation of new legislation, and the work of a number of

NGO's, there has been some improvement. The Department of Home Affairs however has a bad record of enforcement of the rights of refugees. It has been reported that many officials have been known to be corrupt and take bribes.

The Constitution protects refugees also where it states that "everyone has the right..." or "no one may...". In addition the state has obligations arising out of a number of international conventions that it has ratified. None of these protections assisted three African refugees who found themselves in a train with people returning from a protest on joblessness. One jumped from the moving train, another was thrown out and a third tried to escape by climbing on the roof. He was killed through electrocution.

The maturity of a democracy may perhaps be measured by the way it treats the indigent, marginalised and the vulnerable in its society. Some very much older democracies are struggling with this also.

## Conclusions

The Constitution, I said at the beginning, was built on the values of human dignity, equality and freedom. The issues I have raised deal with these values. The right to the security of the person is both a freedom

and human dignity issue. The right to land is a human dignity issue keeping in mind in the way law was used or abused as a mechanism to dispossess people. It is also an equality issue because the imbalances of the past have to be redressed. And it is a freedom issue in that people are able to gain access and move freely in the land of their birth. Finally, xenophobia has been pointed out to be a dignity issue. Some may argue that it is a freedom issue also. Whether it is an equality issue is not clear because, even in Europe, talk of control dominates the discussion.

The arbiter of all these human rights issues, including socio-economic rights, is ultimately the Constitutional Court. On the justiciability of socio-economic rights, the Court has held that there is no usurping of the executive function of government when its decision has a financial implication. The same would be true if it ordered legal assistance to be paid for by the state in a particular civil and political rights case.

The Constitutional Court will continue to set the parameters of the human rights in South Africa in the near future. But it does not have the luxury of time on its side. Each time a legal right is not sustained, there is a drop in the confidence level in human rights. Ultimately, this militates against the culture of human rights from taking root. Then the value of the con-



stitution is diminished and it is treated as another piece of legislation that may be amended to stop a gap. As a new democracy South Africa has to be vigilant that that does not happen.

If I could end on a suggestion: South Africa is well on its way to becoming a leading nation in the world but it has not arrived at that destination yet. Many donor agencies make the mistake in writing South Africa off as a success story (perhaps in relation to other needs in the rest of the world, it might be that!) and withdraw their assistance. But we cannot afford the opportunity for South Africa to countenance failure – not after what it has been through!

Thank you.

### Endnotes

<sup>1</sup> Makwanyane case

<sup>2</sup> Grootboom case

<sup>3</sup> Treatment Action Campaign case

## STUDIEN ZUM SÜDLICHEN AFRIKA

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