

Power sharing in the context of religious, cultural and linguistic communities

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Introduction

Human rights have become the defining language of our times. Over the past 60 years the international human rights movement has grown phenomenally and there hardly is a serious discussion about the many challenges facing our world without some reference to the human rights framework and norms that may be applicable. In that time human rights have become a source of inspiration and empowerment in many national struggles for justice and liberation and the concept of universalism, which at its very core is about the recognition of shared humanity, powerfully connected diverse and different peoples and underpinned the idea of human solidarity. So human rights have indeed been empowering and have enabled us to develop a vision of a world different to the one we live in – one shaped by values of respect, tolerance and understanding and committed to advancing the outcome of social justice.

At the same time there have been tough questions and criticism levelled against the human rights discourse as being disempowering, subservient to the dominant political, social and economic forces of our time and unable to fundamentally change the course of global developments. Prof. Thomas Pogge, writing in a recent UNESCO publication, *Freedom from poverty as a human right*, opines: “When they are vague and fuzzy, proclamations of human rights easily become a substitute for real progress. Great battles are fought, and glorious victories won, over rhetorical details that in the end make precious little difference to the real world.”

Thus while we should recognise the positive, normative role that human rights have played and will continue to play, we should at the same time be mindful of their limitations as well as the constraints that are often occasioned by context. It would be romantic to hold up the Bill of Rights and proclaim the arrival of a human rights culture. The contours of power and influence still decisively influence how and to what extent rights are realised and this is the reality that Prof. Robert

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Falk of Princeton alluded to when he said that “the power of rights, though a much more potent reality than would have been imagined a century ago, is still no match when it comes to the rights of power”. So for human rights advocates around the world the ongoing challenge remains not just to make peripheral gains but to demonstrate that, when properly used and when communities are empowered and mobilised, rights can indeed change the social reality of our times and the architecture of our social priorities.

While there are hundreds of extensive and often technically complex treaties, conventions, charters and declarations of and on human rights, human rights at their core remain simply about the ‘right to be human’. They are about the physical, spiritual, cultural and other needs of the human condition and about creating the space and the support for those common needs to be met.

Culture, language and religion as integral to human rights

For a long time the idea that rights were universal and were based on the concept of our shared humanity often militated against claims for the recognition of culture, language and religion as part of the rights package. There were and remain concerns that such recognition would lead to clashes of identities, to clashes of civilizations and would ultimately undermine the commitment to universality which was at the heart of the modern human rights movement. It became evident, however, that unless one recognised them as vital components of human development, it would be impossible to advance any universal idea of human rights across nations and cultures without recognising the centrality of language, religion and culture in the human makeup and how intrinsic they are to the right to be human. I was privileged to be part of an expert reference group convened by the UNDP on the occasion of its 2005 report entitled “Cultural liberty in today’s diverse world”. The report eloquently captures the challenge for modern and globalised communities in the following observation: “Cultural liberty is a vital part of human development because being able to choose one’s identity – who one is – without losing the respect of others or being excluded from other choices is important in leading a full life. People want the freedom to practise their religion openly, to speak their language, to celebrate their ethnic or religious heritage without fear of ridicule or punishment or diminished opportunity. People want the freedom to participate in society without having to slip off their chosen cultural moorings. It is a simple idea, but profoundly unsettling.”

I imagine it is unsettling because nation building and nation-states have become a dominant political objective in our time and

nations strive to achieve and articulate a common national identity. For many recognition of multiple and diverse identities within the nation-state is seen as diluting the common identity and possibly sowing the seeds for future conflict as those distinct identities all seek articulation, recognition and support. The reality is that there has been a rise in identity politics as people demand to have their identity recognised in a globalised world.

What is required is not to set the challenge of national identity against the demands of group identity based on either language, religion or culture, but to carefully navigate these imperatives. National identity cannot be a basis to deny groups that which makes them different or unique, while group identity cannot serve as a basis to opt out or to elevate group interests above everything else. There is no magic formula for dealing with challenges such as these. What they require is conscious internalisation of the idea that the modern state is both mature and practical enough to recognise diversity as a source of richness and empowerment rather than a threat and for cultural and other groups to see their own destiny as interconnected with those of others, demanding willingness to share and to compromise.

The South African context

In South Africa's own tragic and often tortured history language, culture and religion were for far too long a dominant part of the state apparatus and a key weapon in its attempts to rule. The White minority government not only chose to retain political power for itself, it went on to impose the language, culture and religion associated with it on the black majority. It deliberately denigrated and neglected the languages, religions and cultures of the diverse peoples that constituted the majority. The insistence on the use of Afrikaans as medium of instruction precipitated the 1976 student uprising while the *NG Kerk* was often referred to as the National Party at prayer, distorting the biblical text to justify the existence of apartheid. Of course, a people's language, culture and religion exist separately from its political identity, but in the context of apartheid South Africa there was an integral intertwining of the political, the cultural, the religious and the linguistic that generated considerable but understandable hostility towards those aspects of Afrikaner existence and identity. Fifteen years into democracy I do believe that we have progressed sufficiently to recognise the claims of those communities to respect and protection under our new constitutional order, notwithstanding the tainted history of how language, culture and religion became instruments of oppression during those dark years in our country's evolution.

The drafting of a new constitution and the place of culture, language and religion

As it became evident that the apartheid government's resistance was finally crumbling, ideas on how a new constitution would accommodate the various claims of cultural, linguistic and religious groups began to emerge. In its 1987 "Statement on negotiations" the African National Congress committed itself to the creation of a society predicated on commitment to equality and articulated its principled opposition to the protection of group or minority rights. In his statement to parliament in February 1990, on the other hand, former president F W de Klerk, in committing his government to a just constitutional dispensation, argued strongly for a system that would protect both individual rights and the rights of minorities or groups. A difference in approach on this issue was already clearly evident.

In the final constitution there is recognition of both individual rights and a strong commitment to the rights of religious, cultural and linguistic communities. It is noteworthy that the terms 'minority' or 'group' do not appear but rather the concept of communities that would make common cause around a common language, culture or religion, as opposed to recognition of the rights of groups that were formed and existed as part of the architecture of the apartheid state.

Some key constitutional provisions

- Section 1 affirms commitment to the values of equality, human dignity and the advancement of human rights and freedoms.
- Section 6(2) recognises the historical neglect of indigenous languages and compels the state to take measures to elevate the status and advance the use of such languages.
- Section 15 recognises the right of everyone to freedom of religion, conscience, belief, thought and opinion, as well as systems of personal and family law under religion or tradition.
- Section 31 guarantees cultural, religious or linguistic communities' right to form associations and to enjoy their culture, and religion provided such rights are not exercised in a manner inconsistent with any provision in the Bill of Rights.

It is clear that while the drafters managed as comprehensively as possible to include the necessary protections and guarantees relevant to culture, language and religion, it has been crafted in manner that ensures broad fidelity to the values of the constitution and is not to be seen as a system parallel to and competing with the one envisaged by the constitution. Instead it envisages that culture, language and reli-

gion will find expression, be given protection and be allowed to flourish within the broad ethos of the constitution. It is also clear that the notion of a community envisaged in the constitution is not one that is simply determined numerically but rather with reference to a common objective.

Given that the constitution is also seen as transformational, it must be understood that commitment to equality does not relate to a formal concept of equality that does not recognise historical disadvantage, but rather that in seeking to advance equality, there should be proper recognition of the historical context with a view to ensuring equality of outcome as opposed simply to equality of opportunity.

Accordingly in the context of this meeting, the question of how power is to be shared against the backdrop of a society in transformation and in the face of historical disadvantage is vital, particularly with regard to the role of language, religion and culture.

As alluded to earlier, some languages, cultures and religion enjoyed preferential treatment under apartheid and were not merely allowed to flourish – there was a parallel process of undermining and diminishing other cultures. The result was that the spaces occupied, the resources appropriated and the development of our worldview as South Africans were unduly and unfairly shaped by the dictates of the regime and religion; language and culture were key instruments in this process. I recall as a young primary school student how we were compelled to learn and sing Afrikaans folk songs extolling the successes of the Afrikaner and hardly anything was said about the rich heritage and culture of the Indian subcontinent from which we originated. The arrogance and deep neglect cannot simply be corrected by some jurisprudential repudiation of the past – it requires processes for those cultures, languages and religions to be afforded the space previously denied them. This in turn may require others whose culture, language and religion were dominant because of state patronage to recognise that historical disadvantage and be gracious in both making the necessary space for other voices and views, and if need be vacate some of those spaces that were created at the expense of others. Of course such a process may bring with it anxiety and insecurity. Some may see it as a threat to their identity and the future of their status as a distinct community, but viewed in the context of where we are heading, the best guarantor for any community is to see its future inextricably intertwined with that of other communities. It is this maturity and sense of justice that must underpin the difficult dialogues we are likely to continue having on these matters. Power sharing by definition requires ‘sharing’ – simply holding on to what one may have is not sharing!

Harmonising state interest and individual rights with the rights of religious, cultural and linguistic communities

While the constitution provides what may be described as a balanced and principled approach to accommodating the demands of culture, language and religion in a secular state, case law that has emerged over the past years has demonstrated just how formidable an exercise it can be in practice. There is no fixed formula or magic wand to deal with instances when matters of faith come into conflict with public policy. What the cases demonstrate is that what may be required at times is a measure of compromise or accommodation, while at other times hard choices have to be made when it is not possible to reconcile competing imperatives.

In the matter of *Adams vs the Department of Correctional Services*, the dispute centred on the claim by a female official in the department to wear a head scarf to work on religious grounds. The department argued that as there was a standard uniform in the Department, the wearing of a head scarf would violate such a policy. In addition it was argued that the policy was applied equally to all. After much dispute before various tribunals, it was finally resolved by allowing Ms Adams to wear a head scarf in colours matching those of her uniform, thus accommodating her religious belief and recognising that it carried no adverse consequences for the operations of the department. The case highlighted how policies that on the face of it do not discriminate may have adverse consequences in their operation, and further that finding a balance required flexibility as opposed to rigidity.

The matter of *Pillay vs MEC Education, KwaZulu Natal* involved the wearing of a nose ring to school by a young Hindu learner. While the school claimed that the wearing of the nose ring conflicted with its disciplinary code, the learner's case was that her right to her religion and culture required her to wear the nose ring and had to be accommodated. The matter was finally resolved in the Constitutional Court, which ruled in favour of the learner. In the judgment delivered by Justice Kondile in the High Court, he argued that difference and diversity should not be tied to prejudice and disadvantage but rather that they be affirmed and celebrated as a central feature of the right to be different.

In the *Christian Schools vs Minister of Education*, the association of Christian schools argued for the right to have corporal punishment as a punishment option at Christian schools run by the association. Their view was that corporal punishment was biblically sanctioned and thus their right to religion should afford them the right to use that form of punishment. The government, while accepting the

principle that religious communities had the right to form and regulate religious schools, pointed out that the best interests of the child principle required the state to take the necessary measures to act in the best interests of children and that in this instance such a principle should override the right to religion claimed by the association. The Constitutional Court agreed with the State and found that to allow Christian schools to inflict corporal punishment would make deep inroads into the values of the constitution and the commitment to act in the best interests of the child. In this matter a compromise was not possible and the Court had to choose between two separate and conflicting imperatives.

What emerges from these cases is the recognition of what has become known as the 'right to be different' and the challenges it will continue to create in both state and private institutions. In addition reconciling religion and public interest is no easy matter. The former is based on faith while the latter claims to be based on reason - very different criteria indeed. In addition in a secular state such as ours simply deciding which issue is religious and which is secular in itself may pose problems. The recent litigation involving a gay organist in the *NG Kerk* is a case in point. The church sought to dismiss him on the basis that his sexual orientation conflicted with its teachings, while he argued that his employment as an organist was a secular matter as it did not involve belief, but simply skills and ability, which were not in question. The court ruled in favour of the organist in a judgment that may well be tested in the future.

Conclusion

South Africa's progressive constitution has been widely acclaimed across the world and while we should take great pride in it, transacting the constitutional journey has proved a formidable task. Internalising the values of equality and human dignity and recognising the right to be different, even and especially when it conflicts with our own value and belief systems, requires a special, concerted effort by all. At the very least it demands that we be accommodating - but accommodating someone or something is such a neutral, dispassionate stance. Rather we are all required to recognise the rich diversity of this young nation, to see our own culture, language and religion forming a variegated tapestry with the others that exist, to embrace the possibility that as we share a new constitutional space we permit the possibility of learning from each other, of enriching each others' lives and of giving meaning to what we sometimes glibly describe as a shared humanity. The amazing journey that we have transacted from a closed and oppressive society to one that recognises the inherent worth and value of

each of its citizens and the remarkable personal sacrifices made by so many thousands for this nation to be born, require from all of us that simple commitment to shared citizenship and a shared future.

