

South Africa's Struggle for Human Rights

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Introduction

South Africa's transition to a post-apartheid democracy, so often referred to as a 'miracle', is widely celebrated as a triumph for global human rights. The country's new Constitution, its Truth and Reconciliation Commission, and the moral authority of Nelson Mandela stand as exemplary proof of this achievement. Yet, less than a generation after the achievement of freedom, the status of human rights in South Africa is uncertain. In government, the ANC has displayed an inconsistent attitude to the protection, let alone advancement, of hard-won freedoms and rights, and it is not at all clear that a broader civic and political consciousness of the importance of rights is rooting itself more widely in popular culture.

South Africa's final Constitution was intended to aid in the establishment of a post-apartheid society based on democratic values, social justice and fundamental human rights. In doing so, it was

designed not only to defend ‘natural rights’ and restrict the powers of the state over the individual, but also to play a role in building an open, democratic society, holding the government to account where necessary. The Constitutional Court’s senior judges have stressed the need for the Constitution to be ‘interpreted generously to achieve its purposes’, which include social transformation.¹

Realisation of these ideals depends on the state’s active engagement in expanding the domain of rights for the collective social well-being of the people. Yet, a government which came to power proclaiming its commitment to ‘second-generation’ social rights frequently finds itself blocking their active realisation. In power, leading government figures have shown increasing lack of regard for the independence of the judiciary, and high-level corruption suggests that the well-being of the elite prevails over the wider interests of the people. In the view of Arthur Chaskalson, first President of the country’s Constitutional Court and Chief Justice until 2005, corruption and the ‘fragility of rights’ are two linked dangers which have to be confronted. A similar point is made by the writer and public intellectual Njabulo Ndebele, speaking in 2011: ‘The greatest threat we face is the impact on the public mind of the emergent, unconstitutional culture of concealment.’²

South Africa offers a unique case study for historians of human rights. Its extended colonial history invites us to consider the development of several competing rights ‘regimes’ – liberal, Afrikaner, and African nationalist – whose political salience can be broadly correlated with distinct phases of political power.³ It is indeed hard to think of any other colonised society where distinct strands of rights discourse have been conjoined in this manner. Most histories of human rights are located at the international level. To be able to locate these different rights traditions in the national narratives of a single society presents particular challenges.

Although the struggles against British imperialism, Afrikaner nationalism and white supremacy were configured broadly to achieve ‘rights’ (or to redress ‘wrongs’), the phrase ‘human rights’ seldom features in either the texts or the indexes of key works of history. This immediately raises the question about the status of rights in South African history. The premise here is that struggles over rights in South Africa have helped to shape its emergence as a nation-state over a long period, though there is no suggestion that the objective of securing rights has been consistent or that rights claims have always been to the fore. In exploring how deeply entrenched rights thinking is in South African political thought, this book makes two claims

which, on the surface, may seem contradictory: first, that a legacy of rights thinking – however episodic, fragmented or attenuated – *can* usefully be traced back over two centuries in South Africa; and second, that the embrace of human rights discourse by South Africans in the post-1990 era is, notwithstanding the former claim, surprising.

The term ‘human rights’ is difficult to track with precision, in part because the formulation is anachronistic and has come to acquire a much more expanded meaning in recent years, but also because its usage is unstable and not conducive to rigorous definition. The domain of rights overlaps with concepts of citizenship, constitutionalism, natural rights, civil rights, minority rights and the ‘rule of law’.⁴ It is coextensive with a long tradition of theological thought around human dignity and the integrity of the person. And it is also interwoven with claims to social rights, which are nowadays seen as a natural extension of first-generation rights – unlike the situation in South Africa under segregation and apartheid, when they were offered as *substitutes* for civic and political freedoms.

That the apartheid government exhibited active hostility to the concept of individual human rights is undeniable. This attitude followed from the brand of conservative anti-humanism and neo-Calvinism

which led its ideologues to equate the notion of liberal rights-bearing individuals as a fearsome challenge to God's primacy and therefore as coextensive with other secular heresies, communism most especially.

The first apartheid government came to power in 1948, the same year that the United Nations adopted its Universal Declaration of Human Rights. Already the target of severe criticism by the General Assembly, South Africa was one of only a very few countries that refused to ratify the UN Declaration, a decision that helped to single it out as an international pariah. South Africa was not the only country in the world to deny rights to its citizens but it was alone in according rights to only some of its citizens. Within the country, the new apartheid government used the law to roll out its radical programme of racial exclusion. When the law stood in its way, as was the case in 1955–6 when the removal of Coloureds from the common voters' roll conflicted with entrenched clauses of the 1909 South Africa Act, constitutional protections were simply swept away. Throughout its period in power the apartheid government displayed unremitting hostility towards civil liberties.

The African National Congress (ANC), by contrast, claimed political rights from its foundation in 1912 and espoused wider democratic rights from the 1940s, in line with its reading of the Atlantic Charter of 1941.

But its commitment to this ideal receded from the mid-1950s, just as Coloureds were losing all vestiges of their voting rights, and it was only in the mid-1980s that the organisation's active engagement with rights revived. This renders questionable the repeated claim by the ANC politician and legal specialist Kader Asmal that South Africa's post-apartheid Constitution is a logical outcome of the ANC's long 'human rights tradition'.⁵ The teleological implications of this telescoped history are difficult to sustain. It would be historically more accurate to say that the 1980s saw the ANC reclaiming an inheritance that it had distanced itself from for at least 30 years. This legacy was substantially shaped by an eclectic mix of liberal, humanist, Gandhian and social democratic ideas with which it had grown acutely uncomfortable, especially during its long period of existence underground and in exile from 1960.

Thus, if there was one issue uniting Afrikaner and African nationalisms through most of the second half of the 20th century, and throughout the Cold War, it was a mutual suspicion of liberal ideology and of individual-based human rights. A decade before the 1994 accord which formally ended apartheid, it would have been impossible to imagine – let alone to predict – that the accord would be substantially based on a shared acceptance of political (and economic) liberal

tenets grounded in a new global vogue for rights and constitutionalism.⁶ This required two antagonistic nationalist movements, proceeding from different premises and with differing objectives in mind, to rethink their respective pasts in order to conceive of a common future.

Perhaps this late embrace of human rights is not so surprising. In a major new study Samuel Moyn argues that the emergence of modern human rights thinking as a global phenomenon can be dated only from the 1970s. They came ‘seemingly from nowhere’. Moyn also notes, in passing, that not enough is known about the ‘changing terms of resistance to apartheid in South Africa’ as regards the shift from an ‘anticolonialist optic’ to a ‘human rights struggle’.⁷ By contrast, Robin Blackburn’s rebuttal of Moyn’s ‘magic moment’ approach reinstates a much longer history going back to the Enlightenment, highlighting anti-colonial and anti-slavery movements in particular. For Blackburn, the ‘struggle against apartheid South Africa was an icon of the anti-imperialist movement and surely had an absolute claim to the banner of human rights.’⁸ Elizabeth Borgwardt, similarly, identifies Nelson Mandela as a key interpreter of the modern view of human rights when she counterposes the 1941 Atlantic Charter of Mandela’s ‘aspirations’ (namely, a global statement of universal principles applying

to individuals as well as nations) to the much more restrictive Charter of Winston Churchill's 'intentions'.⁹

This book seeks to fill in the gap identified by Moyn in respect of the history of political thought in South Africa. It is in broad agreement with Moyn that the mid-1970s was a key moment in the process of linking anti-apartheid struggles to the international human rights movement, which, as Karel Vasek argued in 1977, was then entering its third-generational phase as 'rights of solidarity'.¹⁰ It also seeks, like Blackburn, to redress the European- and American-centric ways in which the intellectual history of human rights is so often written, albeit by avoiding the inference that the liberation movement in South Africa was wholly committed to the banner of human rights. This entails reading traditions of human rights thought over more than two centuries with an emphasis on the ways in which ideas, circulating in a global sphere and with claims to universality, were adopted and reshaped for particular uses in local contexts.

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