HUMAN RIGHTS IN THE 21st CENTURY IN AFRICA

RHODES UNIVERSITY GRADUATION CEREMORY
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HUMAN RIGHTS ARE UNIVERSAL!

I graduated in 1953 at Wits together with seventeen others. My alma mater proudly held itself out as an open university. There was only one black man and no women amongst us. The composition of the student bodies in Rhodes, Cape Town and Natal were substantially similar. Happily it is no longer so at any of the universities in South Africa because of the advent of the democratic state and the adoption of a Bill of Rights as part of its Constitution. And yet some say that nothing has changed.

Human Rights are not a recent invention. They were known as Rights of Humanity in ancient times, the Magna Carta, the African Demands by the ANC in 1943 and the Freedom Charter in 1955.

We should start with the Atlantic Charter adopted in 1941 during the early part of the Second World War. We were promised not only would it be a war to end all wars, but colonialism would come to an end. The adoption of the UN Charter and the Universal Declaration of Human Rights in the mid and late 1940s created great expectations amongst the African people.

The scramble for Africa by the European Powers is described by Martin Meredith in his book *The State of Africa*

> "The maps used to carve up the African continent were mostly inaccurate; large areas were described as *terra incognita.* When marking out the boundaries of their new territories, European negotiators frequently resorted to drawing straight lines on the map, taking little or no account of the myriad of traditional monarchies, chiefdoms and other African societies

> that existed on the ground. Nearly one half of the new frontiers imposed on Africa were geometric lines, lines of latitude and longitude, other straight lines or arcs of circles. In some cases, African societies were rent apart."

If you want proof of this, look at the map of Botswana, Libya, Tunisia and a number of other countries throughout Africa. Similarly a number of Arab states were created in the Middle East after the demise of the Ottoman Empire.

This is often relied on as an excuse not to adopt democratic Constitutions and adopt fundamental human rights. We hear that we must seek African solutions for African problems; that human rights are Eurocentric notions and that democracy should not be imposed on African countries. We are also told that we should not interfere with the internal affairs of sovereign states irrespective of the legitimacy of their governments, an argument used by the apartheid regime.

The South African Constitution was enacted by more than 80% of the democratically elected parliamentary representatives in 1995 and certified by the Constitutional Court as compliant with the 34 democratic principles agreed to by the delegates of more than 20 political parties and other organisations at Codesa, the negotiation forum at the end of 1993. After the democratic elections in 1994 the National Assembly enacted the Constitution which was submitted and eventually ratified by the Constitutional Court.

Shortly after his release, Mr Nelson Mandela visited the small committee drafting a proposed Bill of Rights and Constitution for a united democratic state. His advice to us was that we must make sure that the Constitution was good for all the people of South Africa, not only a particular political party nor any ethnic or tribal group. It must provide that if any party lost an election the provisions would enable it to win the next one. His view prevailed both at the negotiating table in Codesa and the Constituent Assembly after the first democratic election. It is not

cast in stone. A number of amendments have been adopted by the necessary two-thirds majority. None of the foundational principles have been altered. We must all make sure that they are not.

Various structures have been established by the Constitution to bring about the aspirations of its founders and the people of South Africa. The word “reasonable” appears no less than thirty two times as a guiding principle of its implementation. Above all it guarantees the independence of the judiciary and by clear implication the independence of the legal profession. In the main, we have followed the example of Mr Mandela, who after his government lost an important case before the Constitutional Court rushed to the television and radio stations to declare that they were disappointed that they lost the case, but in our constitutional democracy they would obey the order of court. May that always be the case.

The Constitutional Court in South Africa is the main guardian of the Constitution. Its judges are enjoined to do justice without fear or favour and that they must be independent. In addition, Chapter 9 of the Constitution calls for the establishment of the offices of the Public Protector and various commissions accountable to the National Assembly that are expected to report on their activities and performance of their functions at least once a year. They are expected to protect the people’s cultural, religious and language rights of the various communities and individuals; the office of the Auditor General; the Electoral and Gender Commissions and other Organs of State have to protect and promote the rights enshrined in the Constitution.

There are legitimate grievances in relation to the lack of delivery, in relation to the elimination of poverty, the lack of educational and health services, the absence of adequate housing and opportunities to find decent employment. Those who argue that it is partly the fault of the Constitution that these promised rights have not been achieved are misguided. We must concede that much more should have been done and much more has to be done. We may be blamed for not having foreseen that we could not within a period of sixteen years wipe out the

injustices perpetrated for over three centuries to the vast majority of the people of South Africa. Some who have lost privileges wrongly complain that they have been deprived of their rights.

My generation's hopes were not fulfilled. Millions lost their lives during the war. The Cold War, the Atomic Weapons race, the wars in Algeria, Korea, Vietnam, in the Middle East and elsewhere caused the death of hundreds of thousands. The promised fundamental human rights were abrogated in the name of State Security and combating terrorism. International Conventions were violated. Detention without trial, torture and murder by hit squads were justified. The jurisdiction of the courts was ousted. The independence of the judiciary was no longer respected. These failures did not prevent many of us and more particularly young people from striving for a better world. The efforts of students throughout the world helped to bring down the Apartheid Regime which some expected to last for a thousand years.

The states of Africa were influenced by the Human Rights Declarations, Charters, Protocols and Treaties. They adopted their provisions with minor alterations.

The Constitutive Act of the African Union in its preamble and article 3 set out its main objectives particularly in subparagraphs (a) and (e)- (f):

> "(a) Achieve greater unity and solidarity between the African countries and the peoples of Africa;
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> (e) Respect for democratic principles, human rights, the rule of law and good governance;
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> (f) Condemnation and rejection of unconstitutional changes of governments."

The African (Banjul) Charter on Human and Peoples Rights, the protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

referred to in the Constitutive Act of the African Union and the Protocol of the Court of Justice of the African Union refer to the provisions contained in the United Nations Charter. Articles 60 and 61 of the African Charter provide:

> " The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.
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> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine".

Despite these provisions, a number of the 53 states whose representatives signed the Constitutive Act of the African Union, the African Charter and other documents must have crossed their fingers when they signed. They maintain that the doctrine of human rights is Eurocentric and not suitable for the people of Africa. One wonders whether they have ever read the documents. Although one may subscribe up to a point to Mahatma Ghandi's dictum: "*The spirit of democracy cannot be superimposed from the outside, it must come from within",* this does not absolve the signatories it may apply to the Iraq and Afghanistan situations, but not to those who have signed and purport to be democrats. The

debate about what is happening on the Northern African areas and Middle East States ignores the provisions of the African Documents they signed.

An example of this attitude is to be found in the argument of the Attorney General of Botswana in the case *The Attorney General of the Republic of Botswana v Unity Dow*, popularly known as the Citizenship Case and decided in 1991. I can do no better than set out the facts and the main issue in the case by quoting from the judgment of the President of the Court of Appeal Austen Amissah:

> "The applicant, Mrs Unity Dow, was born in Botswana of parents who are members of one of the indigenous tribes of Botswana and is herself a citizen of Botswana. The applicant's husband is a citizen of the United States, although, having lived in Botswana for nearly 14 years, he qualifies for registration as a citizen of Botswana pursuant to Sections 10 and 11 of the Act. Prior to their marriage on 7 March 1984 a child was born to them in October 1979; after their marriage, two further children were born in March 1985 and November 1987 respectively. The family has established their home in Raserura Ward in Mochudi".

The effect of Section 4 of the Citizenship Act is that the respondent's first child, who was born out of wedlock and who was a citizen at the time of commencement of the Act, is and remains a citizen of both Botswana (by birth and descent) and of the United States of America (by descent). Respondent's second and third children, however, who were born in wedlock after the commencement of the Act are citizens of the United States and not of Botswana.

The respondent claimed in the proceedings in the court below that the Provisions of Sections 4 and 5 of the Citizenship Act Cap.01.01 were *ultra vires* the Constitution on the grounds that they discriminated against women contrary to the provisions of Section 3 of the Constitution read in conjunction with Sections 5, 7, 14 and 15 of the Constitution.

Section 3 of the Constitution provides as follows:

> "3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following namely:
>
> (a) life, liberty, security of the person and the protection of the laws."

The main question was whether or not the Constitution allows the legislature to discriminate on the grounds of gender. The Attorney General argued that it did because "Botswana is a patrilineal and male oriented society." His argument is summarised in one of the judgments:

"Mr Kirby, in an able and well researched argument submitted that one of the reasons why the Constitution should be interpreted as allowing gender discrimination against women to quote his words, "the whole fabric of the customary law in Botswana, is based upon patrilineal society, which is gender discriminatory in its nature". He also drew our attention that only adult men participated in the proceedings of the Lekgotla, an assembly presided over by the Chief in which the affairs of the community are discussed and decided upon and which at times act as a Court. We were told that women do not participate in these proceedings unless they are personally involved when the Assembly sits as a Court. Mr Kirby quoted numerous other examples in customary law, the Roman Dutch Common Law and the Statute Law of Botswana in which gender discrimination is to be found."

If such an argument is advanced on behalf of the Government of Botswana we may not be surprised if male citizens still believe in it.

The Attorney General also argued that the mother had no *locus standi* to bring the application. Both arguments were rejected by a majority of the five Appeal Court judges.

> "The strength of the bond between a mother and her children does not require discussion. Whatever may aggrieve the children directly affects her. To say that she has no *locus standi* to protect her children's right to citizenship of the country of their birth because their father is an alien, finds no support in the law of Botswana."

The struggle for recognition and enforcement of Human Rights is not new. Tyrants, Kings and Queens, Emperors, Generals, Commissars, Presidents and Prime Ministers through the ages have claimed the right to rule for life. They want to appoint or at least have a say in who is to succeed them, usually a member of their family. The people, particularly young people of the world are saying no to them. They are even prepared to die that their fellow citizens should be free.

I believe that your generation will reject the fatuous reasons often advanced for abrogating the rights of freedom, equality and dignity of all the people in our world. We should not accept that the main principles of democracy are mere words. We should insist that Human Rights should be respected, promoted and obeyed. The Executive or the Legislature have no right to interpret them. That is the function of independent courts. I am confident that your generation will do better than mine.

We must remember and strive for a world in which all the people deserve to enjoy the human rights prescribed in the various documents. Don't let us be misled into believing that they re not valid throughout the world.

You deserve to make a decent living as a lawyer but remember that justice for all cannot be achieved unless at least some of us help not only those who can afford to pay high fees.