



BRAM FISCHER MEMORIAL LECTURE



Ninth Bram Fischer Lecture - Beatrice Mtetwa SC (2015)

This is not a lecture in the true sense of the word as I do not think that I am qualified to lecture an audience of the legal luminaries here present. I am therefore going to speak more from my experiences as a lawyer practicing in a jurisdiction that is not known for its scrupulous observance of the Rule of Law.

As most of you are aware, the legal profession this June celebrated 800 years of the coming into existence of the Magna Carta which no doubt has impacted the development of human rights over the centuries. With 800 years behind us, one would have thought that the journey towards the attainment of basic human rights would have ended and that rights would be enjoyed as a matter of course without a fight. Regrettably, our everyday experiences show that the journey remains very long and that it might in fact never end, which is why I am advocating for constant vigilance by all of us to ensure that the rights given to us are translated into actual practical enjoyment.

It is common cause that during apartheid, there was a concerted effort from diverse groupings to end that evil system and I do not remember during that period anyone complaining that the fight to dislodge apartheid should have been left to any one particular group, be it the PAC, ANC, AZAPO, the Black Consciousness Movement, the Trade Unions, the Council Of Churches, the UDF, the Black Sash and many of the other organizations which were involved in the struggle for democracy. Although some espoused Black Consciousness more than others, membership was to a large extent open to believers in the eradication of apartheid. Neither did I hear from the liberation movements any calls for the exclusion of persons from this fight on the basis that they were not black, were of a different class, gender, colour, etc. This is why the liberation movements, the Communist Party, etc, had the Bram Fischers, Joe Slovos, Albie Sachs and others as active members.

This was not a position exclusive to South Africa. Zimbabwe had an equally mixed group fighting for the end of minority rule in Rhodesia. These struggles for democracy were not limited to Africans in the region or continent. We had the Anti-Apartheid Movement which was largely active in the United Kingdom and which was predominantly white and not once at the time did I hear the liberation movements complain that this movement was interfering with Black people's right to fight minority regimes on their own or that they had other colonial agendas meant to subjugate the region forever.

And so it was that Zimbabwe attained its independence in 1980 and South Africa was ushered into democracy in 1994. Our leaders in both countries were fully committed to the observance of human rights, the rule of law and the strict separation of powers. Indeed, in its 1992 'Ready To Govern' document the ANC specifically stated that, and I quote:



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“The Bill of Rights will be enforced by the courts headed by a separate newly created Constitutional Court, which will have the task of upholding the fundamental rights and freedoms of all citizens against the State or anybody or person seeking to destroy those rights. The judges will be independent and will consist of men and women drawn from all sections of the Community on the basis of their integrity, skills, life experience and wisdom”.

These ideals were not abandoned when the ANC took the reins of power. Instead they were incorporated into the Constitution and, true to their promise, they went on to establish the Constitutional Court. So, our national constitutions generally reflect the ideals for which our leaders waged liberation struggles and these ideals are repeated in regional, continental and international bodies to which our countries belong and in most instances, they have ratified the protocols and treaties emanating from these bodies. Both Zimbabwe and South Africa subscribe to the rights in the African Charter, which is a document wholly drafted by Africans for Africans. However, in both our countries, we have increasingly heard the mantra “African solutions for African problems”, sovereignty has become the buzz word by our leaders, any challenges to the excesses we see every day are categorized as regime change agendas inspired by the West and any Black person who tries to uphold the very ideals for which our leaders took up the armed struggle is seen as a sell-out who is being used by Whites – this is despite the fact that victims of the deficiencies in governance are almost always poor Black people.

So, when did our leaders stop subscribing to these ideals? When did human rights stop being “African” and become Eurocentric and impositions from elsewhere? And why do we have the African Charter with the extensive rights that it has? And with the very clear pronouncements in the Ready to Govern document, why have judges suddenly become counter-revolutionaries and a threat to the country’s democracy when they interpret the very rights it was agreed would be exclusively interpreted by members of the judiciary? And why are human rights defenders always labelled as sell-outs and agents of the West? Isn’t this the same as labelling all those who fought apartheid Communists? And how do organizations which litigate to give poor South Africans basic rights such as an education become agents of the West when the rights sought to be enforced accrue to the very constituencies for which democracy was sought? Why should White people be denigrated for participating in politics if they do so outside our ruling parties when they were welcome to fight side by side with Africans in the liberation struggle? If Abram Louis Fischer was good enough to be part of the struggle against apartheid, why should anyone’s freedom of association be questioned on the basis of colour if this is exercised outside the ruling parties?

In Zimbabwe, we made the mistake of taking our eye off the ball at independence. Human nature being what it is, we made the mistake of assuming that once independence or



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democracy was attained, all would be well going forward and that the covenants made by way of our constitutional provisions would be respected. South Africa should not fall into this trap. Neither should it fall for the usual divide and rule tactics where citizens are divided through apartheid-style profiling. And whatever label is thrown at Black human rights defenders, they should do everything necessary to ensure that rights guaranteed in the Constitution are enjoyed.

In Zimbabwe, minority groups largely withdrew from public life after independence and have since taken a back seat in all aspects of political and public life. I believe that this was a mistake that South Africans should not repeat. If the law in South Africa allows all citizens to fully participate in the affairs of the country, everyone should participate without the fear of being branded. Those black people who have been branded 'coconuts' who are singing for their supper should continue to loudly sing for their supper in as much as those who were appointed to influential positions and thrive on patronage sing for their supper by turning a blind eye to the twin evils of corruption and bad governance. If everyone must sing for their supper, then let it be, particularly where the song reiterates the observance of the Rule of Law and the Supremacy of the Constitution.

As lawyers, civil society activists and human rights defenders, we must persistently and without apology work towards attaining greater transparency and accountability in all facets of life. Corruption has been the bane of Africa and there can be no doubt that this is one of the biggest impediments to economic growth and where it rears its ugly head, however slightly and from whoever, it must be fought with all the tools we have and as lawyers our tool is largely the law. You will of course be called names – 'elitist', 'regime change agents', 'anti-African' – and this is deliberately designed to stop you asserting rights that are given to you by the law. A failure to defend, articulate and enforce these rights would, in my view, constitute dancing on the graves of Bram Fischer and those others who held freedom, democracy and equality close to their hearts.

In my view, patronage in our countries has become the new apartheid. Like apartheid before it, it is a system built on inequality and access to those who hold the reins of power and for this system to fall, it must be fought and resisted with the same force and vigour with which apartheid was resisted. The current beneficiaries of the patronage will in due course know that anything built on an unequal foundation, like apartheid, is not likely to last and it is necessary that we constantly remind them that in another few years, they will be out in the cold with new beneficiaries feeding at the trough as we have seen with some once powerful people now being the hounded and hunted. If these evils are not vigorously resisted, South Africa risks being in perpetual turmoil like its northern neighbor where inequality has become so entrenched that it appears to be official policy and it is worth every label that will be thrown at you to ensure that you live in a country where there will be a semblance of



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democracy in practical terms where access to power, resources and basic amenities will not be limited to a few.

To defend your hard-won democratic space, you need to fiercely fight for the independence of the legal profession, an area we normally overlook as we tend to over-emphasize the need for an independent judiciary. Although the South African judiciary is seen as largely independent, there is very little that judges can do to enforce the Bill of Rights if no-one brings challenges to court. It is only a brave and independent legal profession that can litigate on sensitive issues such as the Al Bashir case which has generated disagreements even within the profession. South Africa is a constitutional state and citizens have the inalienable right to approach the courts for relief if they believe that their constitutional rights are being infringed whether by the State or by any other entity. And once the courts have made their pronouncements, that ought to be the end of the matter – and anyone who deliberately defies a court order should be hauled before the courts for contempt.

Your country is blessed with a Constitution that has given you oversight institutions that are supposed to strengthen your democracy. Do not weaken these by allowing politicians to piss on them. Strengthening these institutions can only enhance your democracy and I believe that a strong democracy can only promote economic growth and development which would ultimately improve the lives of ordinary men and women. When the judiciary's role is undermined by the refusal to enforce court orders, it is absolutely crucial that as civil society activists we condemn this in the strongest terms possible. The deliberate defiance of the court order in the Al Bashir matter should not be looked at as a small matter confined to one political issue. If this kind of defiance is allowed to take root without the legal profession and the courts stamping their authority, South Africa will truly be on its way to ruin.

We have seen how a failure to decisively deal with such defiance has brought Zimbabwe to its knees. A failure to decisively deal with such defiance might signal a death knell for South Africa's constitutional democracy and you might wake up to find that the Constitution has become subservient to Parliament and the Executive. We have seen the spectra of selective application of the law rearing its ugly head and there can be no doubt that these are tentative steps towards undermining the Constitution. If decisive action is not taken here and now, you will look back 20 years from now and wonder why you did not do more now.

Our vigilance should also include interrogating every statement made using populist jargon such as 'wholesale transformation' and promoting 'interdependence of the three arms of government'. This is an attempt to dilute the separation of powers that the ruling party deemed non-negotiable only some 20 years ago. It is reassuring to note that the judiciary has come out guns blazing in defense of its independence but attempts will continue to be made to undermine the judiciary, civil society and the many oversight institutions you have. It



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is absolutely crucial that you remain vigilant all the time as taking your eye off the ball, even for a minute, could result in dire consequences for the people of South Africa. Those of your institutions which have remained strong and effective such as the judiciary, your Electoral Commission, the Public Protector, need all the support that they can be given to ensure that they go from strength to strength. The attempts to undermine and dilute the effectiveness of these institutions will continue at even more heightened rates as the political landscape changes and the ruling party majority in Parliament is reduced – I have heard many South Africans saying what happened in Zimbabwe could never happen in RSA – well, that is what Zimbabweans used to say about Zimbabwe and what had happened in other African countries. We had a Constitutional Court that was the envy of the Commonwealth and we were certain that it would protect all the rights that the Constitution gave. Much as that court tried to protect rights, we know that it was the insistence to protect rights that was ultimately its undoing. Strengthening your judicial appointment procedures therefore ought to be of utmost importance at all times.

As the Public Protector's term comes to an end, it ought to be every South African's concern that her replacement builds on the strong foundation that she has rebuilt that institution on; the saying that 'if it aint broke don't fix it' simply should not apply when it comes to strengthening the institutions that enhance your democracy. The vilification that the Public Protector gets is simply because she has used her office for the purpose for which it was created. Her predecessor was never subjected to any vilification and this is because of how he conducted the affairs of his office, which perhaps explains why the South African public believes Thuli Madonsela is the first Public Protector.

The arrival of the new South Africa was the beginning of the long process of democratization. It is therefore necessary that this process be under constant surveillance and nurtured as the fight for democracy has no end. It is the duty of each one of us to translate the legacies of people like Bram Fischer into reality by ensuring that the rights in the Constitution are translated into actual enjoyment by the masses for whom they were intended. Doing it any other way would lead to the bloodshed that Bram Fischer warned should be avoided – Marikana might just be the beginning of that bloodshed and each one of us has the responsibility and obligation to stop a second apartheid of the haves against the have nots.

Thank you.