

**The Rule of Law  
and Human Rights in South Africa  
(Special Lecture)**

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# **The Rule of Law and Human Rights In South Africa**

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# THE RULE OF LAW AND HUMAN RIGHTS IN SOUTH AFRICA

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## 1. INTRODUCTION:

It is generally believed that South Africa has lost its moral compass. Contrary to popular belief the human rights was rooted in morality. The loss of the moral compass is the loss of the moral foundation of the Rule of Law and its underlying human rights culture.

The loss of the moral compass was exacerbated by the materialist World-View which foregrounded secular humanism and suppressed the spiritual humanism which is the fountainhead of the human rights culture.

The primary goal of this paper is to show that the loss of spiritual humanism (Ubuntu/Botho) planted the seeds of racism and racially-discriminatory policies which are a threat to the Rule of Law and human rights.

## 2. HISTORICAL BACKGROUND

The human rights culture is generally traced back to the French Revolution and the American Declaration of Independence. More specifically, the Franco-American concept of human rights was rooted in the triple values of equality, freedom and brotherhood which were preached by the Rosicrucians and the Freemasons. These were two secret societies which catalysed both the European Renaissance and the Reformation of the fifteen and sixteenth century.

More specifically the Renaissance and Reformation Movements were catalysed by Kardism (i.e. the spiritual philosophy of light) which was taught by the African Sage Khem (or Ham) popularly known as Thau Thau-Harama (greek Thoth-Hermes). Thus Karatism came to be known as Khemetic (or Hermetic) gnoisis (i.e. spiritual knowledge).

The triple values of equality, freedom and brotherhood were used as a battle cry against the feudal system based on the divine right of Kings. The feudal system was based on dictatorship of Kings and it did not admit of human (i.e. individual) rights. The overthrow of feudal Lords opened the door for the introduction of human or individual rights and the Republican form of the government.

Some colonial churches that aided European Settlers to colonise Southern African countries, notably, South Africa, Southern Rhodesia (now Zimbabwe) and Northern Rhodesia (now Zambia) thought that black and African people in particular, did not have a divine spark (i.e. inner light) that constituted the divinity of the individual which is the seat of his/her worth and dignity. They believed that Africans and black people in general did not have this divine spark (i.e. inner light) and were therefore subhuman and inferior to European people.

The colonial church and state used this racial ideology to justify the:

- Forcible dispossession of Africans including the Khoisan and the Bantu people of their land and its natural resources
- Exclusion of African people from government
- Enslavement and conversion of African people to labourers in the country of their birth
- Denying Africans the right of self-determination and human rights.

Thus, slavery and colonialism were rooted in a racial ideology which was supported by both church and state.

The inhumane systems of slavery and colonialism were institutionalised by two Freemasons, Cecil John Rhodes and Lord Milner, who were the architect of the unity between the British and the Dutch after the Anglo-Boer War (1899-1900). This unity was effected by the Treaty of Vereeniging which legalised the colour bar. This racial ideology paved the way for the formation of the racist union of South Africa in 1910. Henceforth, racism became the cornerstone of South African society

Racism in both church and state institutions catalysed the birth of the Ethiopian (i.e. independent African) Church Movement which rejected the superiority of European to African people and demanded equality and freedom of both races in church and state institutions. According to our icon, Nelson Mandela, the Ethiopian Movement was both a spiritual and political movement. The Movement was established by Rev. Mangena Maake Mokone, founder of the Ethiopian Church of South Africa. Mokone rooted his Ethiopian theology in Psalm: 68:31 which called for African Redemption or Liberation. Thus, Mokone was honoured by the South African government as the founder of the African Ethiopian Liberation theology.

In its spiritual dimension, Ethiopianism rejected the missionary interpretation of the scriptures which justified the inferiority of African to European people. In its political garb, Ethiopianism preached the values of self-worth and self-reliance of African people and drew them closer to the Pan African Movement that emerged during the Anglo Boer War (1899 – 1902). The Movement emerged at the first Pan African Congress held in London in 1900. The Congress was convened by Henry Sylvester Williams and addressed by WEB Du Bois, a pioneer Pan Africanist who warned that racism would be the problem of the 20<sup>th</sup> century.

In the same year (1900) Rev. John Langalibalele Dube formed the Natal Native Congress, modelled after the Natal Indian Congress of 1892. In 1902 Abdulrahman and Sol Plaatjie founded the African Peoples Organisation (APO). Abdulrahman used the names African and Coloured interchangeably. Between 1902 and 1906, Native Congresses were formed in the Cape, Orange Free State and the Transvaal Republic. These Congresses, in particular the South African Native Congress (SANNC), formed by Rev. Rabusana in the Cape Colony were deeply influenced by Ethiopianism and they build solidarity between the Ethiopian and the emerging congress movement.

The emerging Pan African Nationalism was reinforced by the public lecture delivered by Pixley Ka Isaka Seme at the University of Columbia in 1905. In his lecture titled “ The Regeneration of Africa” Seme reclaimed his African identity in the phrase “I am an African” which was later embraced by President Thabo Mbeki. Seme also claimed that the monuments of ancient Ethiopia (Atape) and Egypt (Hakaptah) were the products of the African genius. Last but not least, Seme called for a new and unique civilisation for Africa and Africans. As Kwame Nkrumah correctly pointed out the phrase “Africa for Africans” was not racially discriminatory of non-Africans.

After the formation of the racist Union of South Africa by the British and the Dutch, Seme and three other lawyers, namely Alfred Mangena, George Montsioa and Richard Msimang convened the founding conference of the South African National Native Congress (SANNC) which was renamed the African National Congress (ANC) in 1923.

In his opening address to the conference, Seme called for the unity of African people and the burial of demons of racism and tribalism. After agreement was reached to form the ANC on 8 January 1912, the delegates spontaneously sang “God of truth fulfil your promise” (Lizalise Idinga lakho inkosi ye nyaniso). This was a promise of African Redemption (or Liberation) contained in Psalm: 68:31. In his closing address, Seme also claimed that the formation of the ANC was the fulfilment of God’s promise to African people.

The influence of Ethiopian (i.e. indigenous African) theology on the founders of the ANC was evidenced by the National Anthem and election of three Ethiopian Christians as presidents of the ANC:

- John Langalibalele Dube (1912 – 1917)
- Sefako Mapogo Makgatho (1917 – 1924)
- Zaccheus Richard Mahabane (1924 – 1927)

In 1917 President Makgatho called for the creation of a non-racial society in South Africa.

In 1921, Rev. Zaccheus Richard Mahabane delivered a public lecture titled “We are not political children”. In this lecture, Mahabane maintained that the recovery of the African humanity (Ubuntu/Botho) is a prerequisite for the recovery of the humanity of all South Africans, both black and white. This non-racial ideology was an anti-thesis of the philosophical underpinnings of the union government. It, therefore, laid a firm foundation for a struggle for human rights.

### **3. THE BIRTH OF THE HUMAN RIGHTS CULTURE**

At its 1923 National Conference, the ANC adopted a Bill of Rights inspired by Rev. Zaccheus Richard Mahabane who was elected the third president of the ANC at this Conference. In its opening paragraph this Bill of Rights reclaimed the African Humanity (Ubuntu/Botho) and the right of African people to participate in the economic life of the country.

In 1930, Charlotte Manye Maxeke, another Ethiopian Christian and founder of the Bantu Women’s League, maintained that women’s rights are also human rights. The Bantu Women’s League was the forerunner of the ANC’s Women’s League formed in 1948. Charlotte Maxeke had studied at Wilberforce University, under professor WEB Du Bois, a pioneer Pan Africanist scholar.

The convenor of the founding conference of the ANC Youth League, William Nkomo, told a Women’s Conference in 1937 that African people are not a sub human race and that they too are entitled to enjoy the right of self-determination and human rights. During World War II, Africans fought on the side of the Allied Forces hoping that in the event of victory they would regain their right of self-determination and human rights.

On the contrary, Theodore Roosevelt, president of the United States and Winston Churchill, British Prime Minister, issued the Atlantic Charter which recognised the right to self-determination and human rights of East Europeans, not African people, who supported them in the war against German Nazism and Italian fascism.

This European powers based the concept of human rights on their racial ideology. The Atlantic Charter was the first definite and emphatic international declaration of human rights.

In response to the Atlantic Charter the ANC adopted the African Claims which amplified the 1923 Bill of Rights by extending social and economic rights to African people and, in particular, demanding the right of African people to self-determination and human rights.

The African Claims were reinforced by the adoption of the Universal declaration of Human Rights in 1948. In the same year (1948), however, the National Party came to power on the platform of Apartheid which consolidated the racial ideology and adopted a host of legislation for the enforcement of its Apartheid policy.

In 1949 the National Conference of the ANC adopted a programme of Action that demanded the right of African people to self-determination and human rights as well as the restitution of the land and its natural resources to the indigenous African people.

The 1949 Programme of Action laid the foundation for the Anti-Apartheids' popular resistance of the first half of the 1950's which culminated in the adoption of the Women's Charter (1954) and the Freedom Charter (1955).

The Freedom Charter was produced by both white and black South Africans represented by four organisations:

- the African National Congress
- the Coloured People's Organisation
- the White Democrats; and
- the South African Indian Congress

Thus the Freedom Charter contained the aspirations of all South Africans, both black and white. The Freedom Charter was a blueprint for a post-Apartheid constitutional order and Bill of Rights.



In particular the Freedom Charter re-affirmed the right of all South Africans, both black and white, to self-determination and human rights, including cultural and social economic rights.

In the 1980's there were two contending approaches to the rights discourse. They were the group rights and human rights approaches. The former was adopted by the Apartheid regime and the latter by the African National Congress and the Mass Democratic Movement. These approaches were scrutinised at a National Human Rights Conference organised by the Centre for Human Rights, University of Pretoria, on 1 May 1986.

In 1987 the ANC adopted a Statement on Negotiations which adopted the human rights approach and rejected the group rights approach. The latter justified the Bantustan (or homeland) policy. In 1988 both the ANC and the Apartheid regime issued contending proposals for a political settlement. The ANC issued Constitutional guidelines for a Democratic South Africa, informed by the Freedom Charter which led to the Harare Declaration (1989). This Declaration opened the door to a negotiated settlement in South Africa.

The democratic breakthrough of 1994 ushered in a new constitutional order based on the rule of law, human rights and social justice. The interim constitution of 1993 rooted this human rights culture in the humanist (Ubuntu/Botho) philosophy and its inherent values and principles. This humanist philosophy, permeated the final constitution of (1996) and its Bill of Rights.

The 1996 Constitution entrenches political, cultural, social and economic rights. Political rights have been achieved but there remains a long way to cultural, social and economic emancipation because this is intertwined with the land question and its natural resources.

#### **4. HUMAN RIGHTS AND THE LAND QUESTION**

During the Constitutional Negotiations it was agreed that the cut-off date for land claims would be June 1913. This agreement found its way into the section 25 of the Constitution Act of 1996. The South African Parliament also adopted the Land Restitution Act ( No. 22 of 1994) which established Land Claims Commissions and laid down procedures for Land Claims and restitutions processors. These legal and constitutional restrictions have created serious legal impediments to the realisation of cultural, social and economic rights.

The 1913 Land Act allocated only 7 percent of the total surface of South Africa to the African majority. Due to overcrowding and unsustainable livelihoods the union government increased the African Land holding to 13 percent in 1936. This means that Africans may not claim the Land lost prior to 1913 which falls within the 87 percent of the total surface of South Africa held by the State and the white minority.

The 13 percent that is open to Land Claims is part of the Native reserves created by the Land Act of 1913. The areas are barren and unsuitable for sustainable livelihood. Even the small percent open to Land claims has to be paid for. This means that the democratic government has to buy the land which was forcibly dispossessed of African people and for which thousands died for during the struggle. This has led to demands for expropriation of Land without compensation. Others are even advocating Land invasions.

The popular frustrations are even exacerbated by the slow progress made in the restitution of land to the claimants. Many land claims lodged in 1998 are still not finalised. It cannot and it is not affordable for the state to purchase the Land and for poor rural communities to retain legal practitioners for Land Claims for an indefinite period. The fund set aside to cover the legal costs of Land Claimants has been privatised and it is not available to all lawyers, especially in rural areas, dealing with Land Claims.

These funds must be transferred to Legal Aid South Africa which has the infrastructure expertise and a footprint throughout the country.

The willing seller and willing buyer policy that has dismally failed forced the government to abolish it and consider expropriation of land in the public interest. Calls have also been made for the amendment of section 25 of the constitution and the Land Restitution Act.

It has been generally realised that this Act is weighted in favour of Land Owners, not Land Claimants. The failure and/or neglect to amend this Act led to the slow progress in the Land Restitution process.

The failure and/or neglect to address the Land question has serious social economic implications. It is a constitutional imperative to build a socially cohesive and prosperous nation in which the value of every citizen is measured by our common humanity (Ubuntu/Botho). The realisation of this constitutional injunction is difficult if not impossible to achieve because of the deepening moral degeneration which is exacerbated by the triple challenge of poverty, unemployment and inequality.

The eradication of racism is a prerequisite for the establishment of the Rule of Law and the culture of human rights. Thus government launched a programme of action against racism and published a Hate Speech Bill for public comment.

## **5. PROGRAMME TO COMBAT RACISM**

The efforts to combat racism were initiated by the World Council of Churches (WCC) in the 1980's. At a consultation between the World Council of Churches and the National Liberation Movement held in Lusaka in 1987, the late president O.R Tambo announced the formation of the Department of Religious Affairs in the African National Congress.

The Department was constituted on an interfaith basis and charged with the responsibility to combat racism and contribute to the creation of a non-racial, united and democratic society in South Africa. After the 1994 democratic breakthrough, president Nelson Mandela re-established the ANC Department of Religious Affairs and renamed it the commission for Religious Affairs (CRA) within the organisation.

The Commission for Religious Affairs (CRA) facilitated social dialogues which led to the formation of the Moral Regeneration Movement, which is located within the Presidency.

Racism remains a world-wide phenomenon that threatens democratic societies. Civil society organisations in South Africa including the Nelson Mandela and Ahmed Kathrada Foundations have formed a network against racism. Recently the network and its European counterpart held a series of social dialogues on racism and its threat to democratic societies.

Racism and related intolerances are a threat to human rights culture and efforts to create a non-racial and united, democratic and socially cohesive nation in South Africa.

The legal and constitutional constraints to Land restitution make it difficult not impossible to root out the causes of racism and its effects. Racism is inimical to the Rule of Law and the culture of human rights.

## **6. MORALITY AND THE LAW**

From its inception the South African legal system was rooted in racism. Since the democratic breakthrough of 1994 a host of legislation has been passed to combat racism. This legislation has not achieved the desired effect because it addresses the effects, not the roots of racism.

Racism is rooted in the materialist World-View which sees matter as all that is. This World-View, therefore, defines humanity in terms of its material or physical appearance. Thus color has and continues to play a major role in the definition of humanity.

South Africa and the world requires a new jurisprudence (i.e. philosophy of law) that can root out racism and lay a foundation for a progressive legal system. The African humanist philosophy (Ubuntu/Botho) provides the desired foundation. African sages distinguished between spiritual and secular humanism. They taught that humanity is made up of spirit and matter. The spiritual body (Mundu) comprises the three elements of :

- M + U = NDU – Mundu
- M + U + Ntu = Muntu
- M + U + Thu = Muthu
- M + O + Tho = Motho
- M + U + Nhu = Munhu

Mind + thought + world = Higher Self

Mind + soul + body = Higher self

Spirit + soul + body = Higher self

These three constitutive elements of being are popularly known as Mind, Body and Soul.

The material or physical body comprises the four elements of water, fire, earth and air. The race and colors of human beings are matters of form, not substance, shaped by the environment. In particular the color of the skin is the product of the sunlight or lack thereof. Thus, color has nothing to do with the content and character of a human being and cannot therefore provide a rational basis for racial discrimination.

The content and character of the human personality finds expression in the concept Ubuntu.

This concept has the following variations:

- Ubuntu
- Vuthu
- Botho
- Vunhu

These concepts give expression to our common humanity which transcends race, class, gender and creed. Thus the humanist philosophy (Ubuntu/Botho) provides a rational basis for the principles of equality, freedom and justice for all.

The humanist philosophy was the cornerstone of the 1993 Interim Constitution and still permeates the final constitution of 1996. It is therefore a constitutional imperative to institutionalise and teach the African humanist philosophy (Ubuntu/Botho) as the fountainhead of the South African human and people's rights culture.

Human rights did not originate in the West. They are rooted in the Khemetic (or Hermetic) philosophy which says: "As Above, So below." This philosophy says that man emanated from and is a microcosmic image of the macrocosmos, that is God and Nature. This means that all humanity is one and the same, regardless of race, class, gender and creed.

The materialist World-View foregrounded secular humanism and created a secular state. Modern human rights scholars became oblivious of the fact that the concept of human rights is rooted in spiritual, not secular humanism. Spiritual humanism transcends race, class, gender and creed and provides a rational basis for socially cohesive communities in which the value of every individual is based on our common humanity. The concept of a secular state does not derogate from the African humanist philosophy (Ubuntu/Botho) because spiritual and secular humanism are two sides of the same coin.

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