# "WE THE PEOPLE OF SOUTH AFRICA. . . ADOPT THIS CONSTITUTION SO AS TO . . . IMPROVE THE QUALITY OF LIFE OF ALL CITIZENS AND FREE THE POTENTIAL OF EACH PERSON"

**Address to Winter School, Faculty of Theology, Stellenbosch University**
**Reforming the Church, Society and Ourselves**

Her name is "Baby Tshepang".
That, of course, is not her real name, but that is how we got to know her. She was a mere 6 weeks old when her 17 year old mother's boyfriend raped her, both vaginally and anally. At that time her mother was consuming 3 beers at a nearby tavern. The rape was brutal – he ripped apart her insides, the perineum (the channel between her vagina and anus) was gone, all that was left was a gaping hole. He ripped her apart to the extent that she required a series of reconstructive surgical procedures. He ripped her apart, but the story was worth reporting only on page 5 of the local newspaper. He ripped her apart and he ripped apart that community and broader society too. . .

Her name was Courtney Pieters.
She was 3 years old when she went missing. Her body was found shortly thereafter – she had been raped twice and buried in a shallow grave. She was the 19th child murdered in this province this year. And we are not even halfway through the year. When she was buried in that shallow grave, so too was a part of our dreams and aspirations as a nation. . .

Her name was Karabo Mokoena.
She was only 22 years old and had extraordinarily beautiful features. Her boyfriend assaulted her, killed her, set her body alight and dumped her. Traces of acid was found all over her body. She was burnt beyond recognition. One of her unfinished tasks was to set up a NGO to help underprivileged people . . . as the acid tore apart her beauty, so too did her horrific death tear apart our moral fibre as a nation.

It is a singular honour and privilege to have been invited to speak to such an august gathering of clergy and laity. But it is immensely daunting too, to be required to speak about moral and ethical socio-political issues to those who usually minister me on moral and ethical issues. Usually I would be sitting with other colleagues as an appellate panel on a raised level looking down on advocates, their attorneys, litigants and members of the public. But today I am

standing down here looking up at you. But perhaps that is utterly appropriate because not only I, but society in general, look up to you as the church for moral, ethical and spiritual guidance during these troubled times. Usually I would be required to listen and to ask the occasional question in challenging assertions made by the lawyers arguing their appeals; today I have to speak and field questions from you. My brief is to speak on the reformation of society by focusing on how the justice system can contribute to the creation of an equal, just and caring society. I shall endeavour to do so by referencing primarily the constitution, the supreme law of our country. I must at the outset emphasize that I speak here in my personal capacity and not on behalf of the South African judiciary.

Reformation 500 is axiomatically an enormously significant milestone in our history, not only for Protestants, but for all of Christianity. And, I would suggest, its reach is far beyond Christianity – it impacts on society across religious, class and demographic boundaries. John Calvin profoundly stated that "all men [and women] were created to busy themselves with labour for the common good". The Reformation is neatly summed up in those words: it is about ordinary folks doing right in the eyes of God for the common good. But how can law and the courts contribute to this? The answer, I suggest, must be found in our supreme law, the Constitution.

A constitution is a solemn social compact between people and its government. It entrusts rule to democratically elected public representatives under strictly enforced guidelines. In turn, it requires of those representatives not only to exercise their powers within the parameters of that contract, but also to honour the rights and liberties enshrined therein, particularly in the Bill of Rights. A constitution also represents the shared aspirations of a nation. Our constitution has as its primary nuclear foundational values first human dignity, followed by equality and freedom. In the *Grootboom* case, Justice Zak Yacoob poignantly observed that "the constitution's promise of dignity and equality for all remains for many a distant dream"[1]. And in *Makwanyana* Justice Kate O'Regan remarked that "without dignity, human life is substantially diminished"[2]. *Grootboom's* case concerned the plight of a woman, a resident of Wallacedene, not very far from here, who, having lived under the most intolerable conditions imaginable, in sheer desperation turned to the courts to secure proper housing from government. In *Makwanyana* the Constitutional Court had unanimously ruled the death penalty as unconstitutional since it constituted "cruel, inhuman and degrading punishment".

[1] *Government of the RSA and others v Grootboom and others* (1) SA 46 (CC) para 2, delivered on 4 October 2000

[2] *S v Makwanyana* 1995 (3) SA 391 (CC) at para 26, delivered on 6 June 1995.

My presentation will dwell largely on two aspects: the death penalty and "Ubuntu" as an integral part of our constitutional values and principles.

The death penalty is, understandably, a very emotive and contentious issue. As violent crime escalates, both in quantity and gruesomeness, so too does the clamour for the death penalty to be reinstated. In the Baby Tshepang case my colleague who imposed the maximum sentence permitted by law, namely imprisonment for life, observed that if he had the power to impose the death penalty he would have done so. That, ladies and gentleman, is a sentiment I do not share. And I strongly suspect that many Judges, particularly Black Judges, differ from the Baby Thsepang Judge. But why, you would rightfully ask. Surely, so you may contend, that is the only effective deterrent? In all fairness, so I can hear you arguing, if you kill unlawfully you too must be killed?

That, my dear friends, is the law of the jungle: an eye for an eye, a tooth for a tooth. It does not belong in a civilised society, under a constitutional democracy. It constitutes the deliberate annihilation of the life of a person, systematically planned by the State, as a mode of punishment. It lowers the State to the killer's level. And if we do apply this law of the jungle, then we should surely rape the rapist and burn down the arsonist's house. Studies in the United States have shown that it has very little, if any deterrent value.[3] It is open to judicial abuse as was graphically demonstrated by apartheid courts, particularly in political trials. And, above all, it is deadly (excuse the pun) final and irreversible once that penalty has been executed. How many of you know that when DNA evidence became available in the USA during the early 1980's, a striking number of Death Row inmates were proved by that evidence to have been innocent? To put it in proper technical terms: many of them were with a 99.9% certainty excluded by the DNA evidence as perpetrators. How would their convictions have been reversed after their hanging / fatal injection / gas chamber executions? I mention the death penalty not only to demonstrate its negative aspects. I do so, most importantly, to demonstrate that our Constitution recognizes that the State should never be empowered to take life away as a form of punishment. The primary rationale for that decision in *Makwanyana* was that it infringed the right to life and the right to dignity. And, significantly, the court observed as follows:

"An outstanding feature of Ubuntu in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as

[3] See: Peterson and Bailey*, Murder and Capital Punishment in the context of the Post-Furman era* (1988) at 66; United Nations: *The Question of the Death Penalty and the New Contributions of Criminal Sciences to the matter* (1988) at 110.

valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of Ubuntu. Thus heinous crimes are the antithesis of Ubuntu. Treatment that is cruel, inhuman or degrading is bereft of Ubuntu."[4]
And that, ladies and gentlemen, brings me to the concept of "Ubuntu".

Since the first enunciation of this principle in *Makwanyana,* Ubuntu has become an integral part of our constitutional values that inform the interpretation of the fundamental rights in the Bill of Rights. Ubuntu simply means caring for each other – it encapsulates the notion that no person is an island. It encompasses the fundamental principles of respect, communalism, conciliation and inclusiveness. In *Makwanyana,* Justice Thole Madala said in a separate, concurring judgment that Ubuntu is "a concept that permeates the Constitution generally and more particularly chapter three which embodies the entrenched fundamental human rights"[5]. Writing in a separate, concurring judgment, Justice Yvonne Mokgoro said that, "in interpreting the Bill of Fundamental Rights and Freedoms. . . an all-inclusive value system, or common values in South Africa can form a basis upon which to develop a South African Human Rights Jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines, is the value of Ubuntu . . ."[6]

Ubuntu is closely associated with moral values. In a sense it echoes constitutional precepts such as dignity and equality. It carries with it the ideas of humaneness, social justice and cohesion and fairness. Our courts have over the past two decades since the judgment in *Makwanyana,* consistently espoused the value of Ubuntu as a bedrock of our Constitution. How then do we as a justice system provide solace to the family and friends of Baby Thsepang, Courtney Pieters and Karabo Mokoena? How do we restore the innate values of dignity and equality to a society devastated by ever increasing violent crime of the most heinous nature imaginable? We do so, I suggest, by practising the values embodied in our Constitution. We refuse to pander to the whims of an angry populace who increasingly lobby for the return of the death penalty. We refuse to countenance the thirst for retribution of the kind which would assert the law of the jungle.

Allow me to digress briefly to demonstrate my point. Bail is often wrongly regarded by the public as a punitive measure. It is not. Quite often we experience members of the public

[4] *S v Makwanyana,* supra, at para 225.
[5] *S v Makwanyana,* supra at para 237.
[6] *S v Makwanyana,* supra at para 306.

demanding that suspected perpetrators of serious crimes be refused bail. The moral indignation of our society is manifested at times through the unreasonable demand that the suspect (who, incidentally, is always presumed innocent until guilty) “rot in jail” until his or her trial begins and concludes. The assessment of whether a suspect should be released on bail and under what conditions, entails a careful weighing up of a number of relevant factors. The gravity of the offence is but one of them. What is arguably of more importance is the question whether the suspect has a propensity to commit further crimes while out on bail. And the question of flight risk deserves equal weight in such an assessment. Regrettably, many judicial officers, particularly magistrates in communities where high profile crimes are committed, have occasionally been swayed by public sentiment in refusing bail when it was legally proper to grant bail. Sometimes a magistrate, sitting in a court in a small community, say in Ceres, would refuse bail in a controversial high profile case. He or she would think (but would never say so in public) – ‘let the high court in Cape Town on appeal grant bail – those Judges do not live in this small community as I do’. That, ladies and gentlemen, is human nature, but it remains quite regrettable. Judges and magistrates uphold their constitutional oaths of office under very difficult circumstances. Equally problematic is the imposition of sentence. The public pressure for severe sentences is enormous, particular in cases of heinous crimes committed in sensational circumstances. While courts are duty bound to have regard to the interest of society as one of the elements of sentencing, they cannot blindly pander to the cries of an outraged society.

I return to the main discourse by referring briefly to restorative justice as part of Ubuntu. In *P E Municipality*, an eviction case, the Constitutional Court had to balance the rights of illegal occupiers to have access to adequate housing and the right not to be unlawfully evicted from their homes, on the one hand, with the landowner's property rights, on the other. Writing for a unanimous court, Justice Albie Sachs explained that the relevant constitutional provisions and applicable legislation required the balancing of these competing interests in a "principled way" to promote "the constitutional vision of a caring society based on good neighbourliness and shared concern"[7]. In addition to the founding values in the constitution, Justice Sachs said that '[t]he constitution and PIE confirm that we are not islands unto ourselves. The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and

[7] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

operational declaration in our evolving new society of the need for human interdependence, respect and concern'[8].

In criminal cases too, restorative justice has emerged quite forcefully in the consideration of appropriate sentencing options. It has been imposed for, amongst others, theft and breach of a protection order for domestic violence. That sentence is particularly apposite where the offender does not present a danger to society and where he or she can make recompense to society and to the victim in particular, through community service or payment of compensation. Thus Judge Eberhard Bertelsmann has described it as follows in S v Maluleke:
"*restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist in the process of their ultimate reintegration into society thereby...In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender and the community and the offender. It may provide a whole range of supple alternatives to imprisonment. This would ease the burden on our correctional institutions*"[9].

And lastly, on this topic, the Constitutional Court had regard to Ubuntu in the context of a civil claim for damages for defamation in the case of The Citizen v McBride[10]. There the present Chief Justice, then an ordinary member of the court, said in his judgment that Ubuntu gives recognition to the Biblical injunction that a man should do unto others as he would have them do unto him. Ubuntu and the right to human dignity, said Justice Mogoeng, should "colour the spectacles" through which we view defamation claims.

In any civilised society, the courts are entrusted with the adjudication of disputes. Society also entrusts us with the arduous task of determining the guilt of criminal offenders and to impose punishment. We carry a heavy burden. But I contend that our courts remain a beacon of hope even in these difficult times. When a magistrate releases on bail white accused persons charged with an offence with racial overtones in a seemingly racially divided small town in the Northwest Province, he does so under enormous public pressure, but he remains true to legal dictates and precedent. When a court of appeal replaces the conviction of murder with one of culpable homicide in a case where a taxi driver has caused the loss of life of several young children in his taxi while trying to jump a railway crossing, that court acts after careful

[8] Ibid.
[9] *S v Maluleke* 2008(1) SACR 49(T) paras 33-34.
[10] *The Citizen v McBride* 2011(4) SA 191(CC).

deliberation and in accordance with sound legal principles. It cannot be beholden to the angry clamour for retribution from a strident public.

Ultimately, ladies and gentlemen, the courts must act as the constitution demands of us. We must remain true to the foundational values of, amongst others, dignity, equality and freedom. We must assist individuals who assert their fundamental constitutional rights. The message that we must send to our people is that we not only propound Ubuntu, but we practise it. Our judgments must speak eloquently of the shared values which we all hold dear. We must be seen to be appropriately severe in sentencing but also properly empathetic in deserving cases. The courts are the guardians of Constitution and the ultimate guardian is the Constitutional Court. In a recent judgment I said:
"Judges wield enormous power in their courts. Judges decide, sometimes conclusively, the rights and the obligations of the parties before them. They are independent, subject only to the constitution and the law, which they are constrained to apply impartially and without fear, favour of prejudice. But these powers must be exercised with great responsibility and with abundant caution. The overriding consideration in every matter must indubitably be the interests of justice. The blindfolded Lady Justice balancing the scales in her left hand and holding a sword in her right hand personifies the moral force of justice"[11]

The South African courts remain true to their constitutional duty. Recent statistics have shown that the courts are one of the few public institutions still trusted by citizens. We speak through our judgments. We cannot sit in ivory towers, ignorant of the plight of citizens or of the turmoil engulfing our country. But we must remain loyal to the constitution and the law. We have earned trust and respect the hard way. That trust and respect must permeate all sectors of society, so that we can help steer our nation back to the laudable normative values of the Reformation, so admirably encapsulated in the constitution.

"Thsepang" means "hope" in the Setswana language. That ravaged baby was named "Hope" for good reason. It meant looking to the future, not getting bogged down in the past. By all accounts she has grown up to be a lively, lovely young lady. She is now in a loving home adored by her adoptive parents. When the apostle Paul wrote to the congregation at Corinth: "And now abideth faith, hope, charity, these three; but the greatest of these is charity"[12] (called 'love' in other versions), he was speaking the language of Ubuntu. Obeying the second great commandment to love thy neighbour as you love yourself encapsulates the recognition of the

[11] *Cathay Pacific Airways Ltd and another v Lin and another* [2017] ZASCA 35, delivered on 29 March 2017.
[12] 1 Corinthians 13 verse 13 – King James version.

dignity of our fellow human beings. The courts cannot change society alone. But they can play a pivotal role in restoring the ethos of dignity and equality. That, my friends, is the joint effect required from all of us.

I thank you.