

RELIGIOUS PHILOSOPHY, PRACTICE AND THE CONSTITUTION

THE THIRD HAYMAN RUSSEL BOTMAN MEMORIAL LECTURE

Presented by Justice Zak Yacoob, Retired Judge of the Constitutional Court of South Africa
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Introduction

Programme Director, Dr Beryl Botman, distinguished guests, ladies and gentlemen,

I am particularly privileged and humbled to give this talk commemorating a very special human being. Professor Hayman Russel Botman has made a significant contribution to the struggle for our constitutional democracy and, unknown to me, was my contemporary and true comrade. Born in Bloemfontein five years after me,¹ he was a member of a community that was a victim of the evil of apartheid and suffered very significantly under its oppressive and exploitative impact.

He was, however, not merely a passive sufferer: he contributed immensely and courageously to the struggle against the oppressive regime. His activism and contribution to the struggle for democracy began early in his life and, like mine, when he was at university pursuing his first degree. In 1976, he became the public relations officer of the Student Representative Council at the University of the Western Cape (UWC). This young student, under the apartheid thought control regime as a so-called coloured person, ought never to have even thought about the sufferings of black African children a thousand miles away in Soweto, let alone lead a protest in solidarity with them. Yet, he led the students in protest against apartheid in solidarity with the Soweto student mass action and its resultant police brutality. Russel was consequently detained and interrogated but this did neither frighten nor stop him. This early humane, courageous beginning heralded the Professor's sustained commitment to humanity – a determination that at once guided and was guided by his religious philosophy and practice. I argue that Russel truly embraced the values of our Constitution.

And, this may surprise many present here, Professor Botman and I were also brothers in the field of law!

He was awarded two honorary degrees in law – an LLB and a Masters Degree in Legal Studies by the University of Aberdeen. It is no wonder that Dr Beryl Botman, before delivering on his behalf an address that had been prepared conscientiously by him at the graduation ceremony a mere twenty days after he had passed on,² paid this warm, and wonderful tribute to him:

"He was an activist, a peacemaker, a theologian, an academic and a thought leader of note and a great husband and father too!"

Religious Philosophy and Practice

¹ 1953

² On 18 July 2014

Professor Botman's religious philosophy, religious practice and the values embraced by him are reflected in what he wrote, did and said.

He completed his first degree at UWC in 1978, having majored in Psychology, Afrikaans-Nederlands and Biblical Studies. I was struck by the fact that only one of these majors was about religion. But there is something more revealing about the selection. The chosen majors were varied, being concerned with the health of the mind, with language and with the law. It does certainly seem that in his early years, Russel did indeed already understand that these forces are all intertwined, dynamic and integral to life itself.

We all know, I hope, that the eighties and the early nineties of the last century represented one of the most important periods of the struggle of our people for democracy. During this vital time, Reverend Botman served, according to his job description, as a minister of religion in the Wynberg congregation of the then Dutch Reformed Mission Church.³ This is a complete understatement of his considerable achievements at the time. He was much bigger and achieved much more than the description of him as a minister in the church conveys. The work, responsibilities and commitment of the Professor went beyond the conservatively understood responsibilities of a cleric. All of it was about the struggle against the apartheid evil. There were direct and indirect anti-apartheid efforts.

I start with what may be called the indirect contribution though I understand the problematics of the distinction that is posited. The Professor not only founded a community development project in Parkwood and managed an educational institute, he was also the manager of a community arts centre. What is more, this arts centre was racially transformed as a direct result of his huge and sensitive efforts. And this, most remarkably, before the Constitution's clarion call for transformation began to reverberate across our country! I might mention that Russel was later⁴ also the chairperson of the Klein Karoo National Arts Festival! All this shows that his religious philosophy entailed a wide definition of religion – religion was not limited to preaching in a church. Religious practice for him was about participating in the affairs of the community, about racial transformation, about art, about education and every other aspect of life and change.

Now, for the direct contribution during this time. He was integral to the intensifying struggle against apartheid. I remember with awe and pain the contribution made by the church in general, and the South African Council of Churches (SACC) in particular, to the struggle against apartheid and for democracy. Professor Botman was a member of the executive of the South African Council of Churches for much of this time (we must remember that he was officially a minister in a church at the time) and was instrumental to the SACC's immense contribution through its amazing and effective stance and actions in support of a non-racial democracy. This contribution was crucial, for without it, our struggle would have taken much longer.

I have no doubt that it was only because of these anti-apartheid activities that he was not only once again arrested and imprisoned in terms of emergency legislation but was also the victim of banning orders for several years. The Professor's religious philosophy embraced an awareness of the need for, and his complete commitment to, struggle and sacrifice in the war against our evil oppressors.

Russel fought side by side with all of us while he was a pastor in the church – fought side by side with us to make our new constitutional order.

And even when the new order was in sight and the Interim Constitution was adopted giving everyone the right to vote, Russel did not rest. He coordinated, ran and participated in voter education programmes in the process of the implementation of our Constitution. He knew the importance of the right to vote and

³ Later the Uniting Reformed Church in Southern Africa

⁴ From 2007

the need to exercise it on an informed and objective basis, and was prepared to work and sacrifice to make this happen. We should remember this and contribute towards effective voter education as we painfully and inexorably struggle on the dangerous and potentially deceptive journey to our next election. This is perhaps the best way to remember the Reverend/Professor, not by talking, but working with courage and dedication towards a fair process and result in the historic 2019 elections!

Russel's foresight and understanding of the importance and impact of the new constitutional order in our country, before the Interim constitution was adopted in that very year, is demonstrated by the content of the doctoral thesis he completed in 1994, obtaining the degree with distinction (or cum laude as they pedantically continue to say). The Professor certainly foresaw that transformation would become necessary in every sphere of life to make our new order a reality. The thesis was entitled: "Discipleship as transformation? Towards a theology of transformation." In my view, the Professor saw religion as a flexible power that could and should promote the transformation necessitated by the new constitutional order. Our work towards the transformation of our society would certainly be greatly enhanced, enriched and quickened if theologians commit to transformation through religion as Professor Botman did.

Russel's efforts towards the achievement of a real and equal democracy did not cease when our Constitution was adopted in 1994. So what did Professor Botman do after the new order came into effect in 1994?

During the first five years of our democracy, Russel was a senior lecturer in practical theology at UWC. This points to a philosophy that embraces practice rather than theory. He did many good things there which I do not have the time to detail. I would emphasise that he was deeply involved in the constitutional objective of racial transformation, conflict resolution and the public discourse on democracy. In the pursuit of the constitutional vision of equality, Professor Botman organized conferences on anti-racism and on ethnicity and religion. But he went far beyond conferencing on these vital topics and beyond promoting a single religion. He established and nurtured relationships between many churches purposefully crossing denominational, religious and racial barriers.

The Professor spent the last fourteen years of his life at this University, first as Professor of Missiology, Ecumenism and Public Theology,⁵ then as Vice Rector (teaching) for five years⁶ and, finally for seven years as Vice Chancellor.

Before he became the Vice Chancellor of the University in 2007, he was involved in additional activities of a Constitutional variety. He worked hard on the conception and planning of the language policy and chaired the employment equity forum at the university. In my view, his most important work at this time was as convenor of the faculty's research and planning team on Theological-ethical studies on poverty in South Africa. His contribution as Vice Chancellor was by all accounts exceptional. I refer only to two important aspects of Russel's revitalizing approach which consolidated the theme of poverty.

The first concerns the notion of academic excellence. We have all heard university bosses piously proclaim the virtues of so-called academic excellence as if this were the sole criterion by which a tertiary institution could be evaluated. Russel thought differently. In a paper read on his behalf by Dr Beryl Botman at the University of Aberdeen's honorary award mentioned earlier he said:

"When I was first appointed Rector and Vice-Chancellor in 2007, I inherited a first-rate institution – a tower of academic excellence and world-class research. But it was clear that there were pressing needs in society all around us – caused by poverty and sickness and oppression and violence and pollution. We had to ask ourselves, what use would all our knowledge be if it did not make a difference to people's suffering? So, I challenged Stellenbosch University to move "from success to significance." We had to

⁵ 2000-2002

⁶ 2002-2007

become more relevant to society –especially its most vulnerable members. I am glad to say my colleagues and students responded positively. Even some of our **most sceptical** professors agreed that to "change the world" would not be such a bad thing after all."

The second concerns Professor Botman's conviction that poverty was a scourge in society that needed to be addressed urgently. He has written, organised conferences on the subject and ensured that this institution participated in community development. He wrote on this topic for presentation at the honorary award just mentioned. He referred to the decision of the Constitutional Court of this country in the case of *Grootboom*⁷ in which the Court said that the state is

"obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing". He went on to say:

"No country is exempt (from poverty) as we have seen in the wake of the recent World Financial Crisis. The lives of hundreds of millions of people worldwide are degraded by poverty. And this threatens social cohesion and political stability across the globe."

Professor Botman, in possibly this last presentation prepared by him during his lifetime, challenged all the graduates present to use the law as an instrument of hope, and to defend socio-economic rights and all other human rights. It is against this background of the Professor's religious philosophy and practice that we can now turn to the Constitution and discuss the attainment of its vision in the context of what he would have regarded as important.

The Constitution

We begin by looking at the preamble of the Constitution in the same way as Professor Botman did in his Aberdeen address. The relevant part of this preamble commits all the people of our country to:

"Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

I would emphasise here our commitment to improve the quality of life of all our people.

I would next point to some important values that our Constitution enjoins in Section 1:

"(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

I must say something more about the values mentioned in Section 1(a). I would suggest that our Constitution is not simply a liberal Constitution in which freedom or liberty is a self-standing and vital component. It is significant that the values emphasised are those of dignity, equality and freedom - NOT freedom alone. This approach is also taken in Section 36 of our Constitution which permits a limitation of the rights conferred by the Bill of Rights only to the extent that the limitation is justifiable "in an open and democratic society based on human dignity, equality and freedom". The democratic society to which we

⁷ Government of the Republic of South Africa v *Grootboom & Others* 2001 (1) SA 46 (CC)

must have reference is certainly not one based on freedom alone but on dignity, equality and freedom. In my view (and Professor Botman would agree) the notion of freedom in our Constitution is qualified by human dignity and equality. In other words, to permit freedom at the expense of human dignity or equality would be inconsistent with the values of our Constitution. And both human dignity and equality are, unlike freedom, protected by self-standing provisions of our Bill of Rights. Freedom is protected only in the context of the freedom and security of the person.⁸

It is now appropriate for us to move to the equality clause⁹ that was close to the Professor's heart and is crucial to the achievement of a true socially just democracy.

Section 9 consists of five subsections all of which must be read together. I will not refer to all of them. The first subsection simply asserts that everyone is equal before the law and has the right to equal protection and benefit of the law. The reference to equal protection and benefit over and above the notion of simple equality is probably a pointer to the fact that our Constitution is about substantive, not mere formal equality.

The two sentences of subsection 2 are really powerful. The first broadens the ambit of equality pronouncing that equality includes the full and equal enjoyment of all fundamental rights and freedoms. All of our people are ultimately to enjoy fundamental rights and freedoms.

The second sentence of this powerful provision is perhaps the most important reconstructive provision in the whole Constitution. It was hotly debated and took months to negotiate. It authorizes "legislative and other measures" (not legislative measures alone) "designed to protect or advance" people who have been disadvantaged by past discrimination. But this is not the only objective that these measures must be designed to achieve. The measures must also be designed to promote equality. The Constitution recognizes that not all measures that protect or advance people who have been disadvantaged in the past, would necessarily promote equality.

Many doubters of the affirmative action provision often ask what they consider to be a question which they perceive will result in an answer destructive of the whole affirmative approach. They ask: "But when will affirmative action end? Will it go on forever?" The answer is simple. The measures taken must promote equality and will therefore end as soon as there is complete equality.

Professor Botman believed in and was committed to the achievement of equality through affirmative action. His determination to contribute towards ridding society of the scourge of poverty is also implicated here. This is because much of the poverty in South Africa is plainly a disadvantage visited upon millions of people on account of past discrimination and certainly invites appropriate and programmatic measures by the state to advance poor people and to achieve equality.

⁸ Section 12 of the Constitution

⁹ 9. Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

We must remember the Professor by committing ourselves to the achievement of substantive equality through affirmative action.

The third and fourth subsections are aimed at ensuring non-discrimination. Two lessons must be learnt from these injunctions. The first is gleaned from the fact that the obligation not to discriminate on one or more of certain grounds is imposed not only on the state but also on everyone. None of the other provisions of the Bill of Rights expressly places obligations on the people in our country –in other words all the other provisions of the Bill of Rights expressly apply vertically. They all apply vertically in the sense of placing obligations on the state alone unless circumstances defined in Section 8 of the Constitution require otherwise. The fact that the instruction not to discriminate is the only one that places obligations on the state and all the people underlines the importance of this command. Professor Botman would commend all of us both to obey this injunction in its letter and spirit and to advocate its obedience by everyone. This is essential to achieve the vision of the Constitution.

The second learning arises from the categories of people who are not to be discriminated against as deduced from the grounds mentioned in subsections 3 and 4. These include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. I would urge that each of these grounds refers to categories of vulnerable people. I give some examples. The category of race refers not to race groups that are powerful and privileged, but is intended to afford protection to vulnerable people. The same applies to the grounds of sex and gender which are obviously aimed not at protecting powerful and dominant men but vulnerable women. The ground of religion is not there for the protection of majority religions which essentially protect themselves-it refers inexorably to vulnerable minority religious groups that are susceptible to domination and oppression. The grounds of sexual orientation, age and disability are likewise aimed at the protection of gay and lesbian people, young children, older people and human beings who have disabilities, all weak and or vulnerable members of our society.

The categories of people protected convey a deep message. Our Constitution signals a decisive leap away from the law of the jungle in which the rich, the strong and the powerful run rough shod over vulnerable, weak and poor people. On the contrary, we are required to treat weak, vulnerable and poor people with care and concern and to protect and empower them where this is appropriate and possible. And we commit ourselves to this course not because we feel sorry for weak and vulnerable people. We do so for our own sakes because WE do not wish to live in a society that wantonly tramples over weak and vulnerable people. The Professor would have agreed.

Finally, I speak briefly to the social and economic rights embraced by Sections 26¹⁰ and 27¹¹ of our Constitution. The Professor talked to these rights and referred to the case of Grootboom.¹² These two sections, besides providing protection for people occupying their homes and for emergency medical treatment, oblige the state to take reasonable legislative and other measures to give effect to the rights of access to adequate housing, health care, food, water and social security. The most important contribution made by the Constitutional Court in the Grootboom case was to say what was meant by “reasonable legislative and other measures”. In my view, material aspects of the explanation of this term are:

First, there must be legislative and other measures; legislation by itself is not enough.

Second, the measures cannot be ad hoc, and must comprise a programme that is well coordinated, implementable and reasonable.

Third, a programme is reasonable only if it takes account of the people who are most in need and vulnerable, ensures that a reasonable part of the housing budget is dedicated to emergency situations where people are in urgent need, and ensures that everyone is treated with care and concern.

Fourth, every step taken in the process of the development and provision of housing must be reasonable.

A number of cases have followed that gave the Court an opportunity to develop its jurisdiction. I will not go into them except to say that, in my view, the state has begun to adopt a technical and evasive attitude in relation to the fulfillment of its Constitutional obligations and the Court has had to compel it to do so on a number of occasions. The implementation of these rights is essential to the reconstruction of society and, as the Professor pointed out in his Aberdeen lecture, instrumental in the alleviation of poverty. Our government has not fully embraced the importance of the delivery of these services.

There was a time when academics made a distinction between three generations of rights in a way that implied that one category of rights was more important than another. So they spoke of first, second and third generation rights. First generation rights were all the civil and political rights like the right to dignity, the right to vote, the right to various freedoms and so on. Social and economic rights were classed as second generation, while environmental rights were regarded as third generation rights. This distinction implied, quite wrongly in my view, that social and economic rights were somehow less important than civil and political rights. By the time the Constitution was written, however, academics were agreed that there neither was, nor could be, any hierarchy. All rights, it is now said, are interrelated and indivisible. In my view, however, social and economic rights are more fundamental and important. This is simply

¹⁰ 26. Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.¹⁰

¹¹ 27. Health care, food, water and social security

(1) Everyone has the right to have access to

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.¹¹

Government of RSA v Grootboom and Others 2001 (1) SA 46 (CC)

because a person who has no food, water or home will never be in a position to exercise her or his civil and political rights. A minimum standard of availability of these essentials is an absolute prerequisite to the effective exercise of civil and political rights.

Poverty, which the Professor was rightly concerned about, deprives people of their civil and political rights almost completely in a very real and destructive way. The failure of the state to implement social and economic rights constitutes a significant violation of all of the civil and political rights in the Constitution. This is an egregious affront to, and inconsistent with, Section 7 of our Constitution that commands the state to “respect, protect, promote and fulfill” each and every right in the Bill of Rights.

I have to say that one of the important reasons why the state has been so remiss in its compliance with the provisions of Sections 26 and 27 is our government’s endemic, deeply cancerous and treasonable corruption. I conclude by addressing this topic briefly.

I start by making the obvious point that the absence of corruption would mean that more money is available for the fulfillment of the rights in the Bill of Rights and the reduction of poverty. I do not wish to bore you by describing the incidents and the extent of corruption in our government and the ruling political party. It is enough to say, as I have said before, that if I said that our President was an honest man, he would be the first to laugh at me or to deride me justifiably for my utter idiocy. I do not want to be charged with this offence if the NPA or the President invents it. So, to keep my record clean, I do not and cannot say that the President is honest and a person of good repute. We must not forget that the President became President after charges of corruption were, in my opinion, undoubtedly improperly, withdrawn at a time when his co-conspirator was serving a term of imprisonment for the same corruption charges – the man in prison was part of the corruption effort while our President was the person who received the money for doing certain things. So how can we expect a clean administration in the circumstances?

I must not be understood to say that our President is the only corruption culprit. In my opinion, corrupt elements riddle government and the political party in power. This needs no substantiation. The President himself has admitted that the scourge of corruption must be dealt with.

If the Professor were here today, he would be at the forefront of the fight against corruption, whatever the consequences. We must speak out courageously, take part in anti-corruption activity, strengthen civil society and oppose corruption at every turn. This is what Professor Hayman Russel would have done.

I conclude by saying that, to remember Professor Botman, all of us must continue to work with zeal, courage, determination and sacrifice towards the vision of our future society envisaged in our Constitution. We will all work towards equality, support and deepen affirmative action, dedicate ourselves to do all we can to hasten the transformation of our society, empower weak and vulnerable people and contribute to the elimination of discrimination.

And those of us who are lawyers will heed the Professor’s plea to use the law as an instrument of hope: to ensure that the constitutional vision is achieved.

Thank you very much.