

**UNIVERSITY OF JOHANNESBURG  
18 MARCH 2013**

Speech By:  
Advocate George Bizos SC  
Constitutional Litigation Unit  
Legal Resources Centre  
16<sup>th</sup> Floor, Bram Fischer Towers  
20 Albert Street  
Johannesburg, 2001  
TEL: +27 0 11 836 9831  
FAX: +27 0 11 834 4273  
Email: [counsel@lrc.org.za](mailto:counsel@lrc.org.za)

**DON'T BLAME THE CONSTITUTION**

It is my sincere pleasure to be with you all today as we approach South African Human Rights Day for this timely discussion of women's rights.

## DON'T BLAME THE CONSTITUTION

South Africa has one of the most inclusive and progressive constitutions in the world, drafted with an acute awareness to the injustices of the past. It prescribes all of the safeguards of a civilised society and has become a model for emerging democracies. Our Bill of Rights, born of a long and difficult struggle against apartheid, entrenches our most cherished values of dignity, equality and freedom.

However, not everyone applauds our Constitution. It is criticised by those who do not draw a distinction between rights and privileges; they yearn for the privileges enjoyed by some of us during the apartheid regime. Some say that criminality is high because it accords rights to criminals who deprive law-abiding citizens of their rights. Others criticise it for the promotion and protection of socio-economic rights and labour legislation by extolling a free market system. There are those that contend that the lack of land

redistribution and the lack of proper enforcement of the provisions relating to education and health care are also the fault of the Constitution. Some contend that our Constitution is not appropriate for an African country and that we should do things the 'African way'. These critics ignore the provisions of the African Union and the African Charter in which many provide for substantially similar rights to those contained in our Constitution.

The critics also blame the courts for being more interested in the rights of criminals than the rights of their victims. Indeed our National Commissioner of Police, when recently asked why criminals are brazen, responded by saying that they are absolutely brazen because we have the most beautiful Constitution. If there is blame to be apportioned for many of our failures it should be directed towards those who are entrusted to implement the principles contained in our Constitution. In short, don't blame the Constitution. We lawyers, in particular, who respect the rule of law, should draw attention to the fallacy of blaming the Constitution; we

should draw their attention to a passage by Pericles from Thucydides' *History of the Peloponnesian War* quoted by Professors A.S. Mathews and R.C. Albino in an article published in the South African Law Journal in 1966 at page 43:

'Indeed it is true that in these acts of revenge on others men take it upon themselves to begin the process of repealing these general laws of humanity which are here to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection.'

Would critics change their tune if they or members of their family were accused of crimes that they contend they did not commit?

## THE RIGHTS OF WOMEN

In South Africa, it is reported that a women is raped approximately every 17 seconds.

Women's rights are human rights; and like human rights, women's rights are not a recent invention. Internationally, legal recognition of women's rights began as early as 1946 with the establishment of the United Nations Commission on the Status of Women, which is responsible for some of the major developments in women's rights in international law. Subsequent human rights instruments have been specifically designed to protect the rights of women. For example, the adoption of the Convention on the Elimination of All Forms of Discrimination against Women in 1979 was a major development for women in international law.

Domestically, South Africa has enacted sexual offences and domestic violence legislation and has entrenched the right to

dignity as a foundational right within our Constitution whereby human beings are entitled to be treated as worthy of respect and concern. South African courts have even acknowledged sexual violence as a violation of the founding values of our Constitution. The Constitutional Court, the main guardian of the Constitution, held in *Carmichele v Minister of Safety and Security*:

“Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self determination of South African women.”

Despite international and domestic safeguards and our court’s vehement declarations, a study by Interpol has revealed that South Africa leads the world in rapes. Sexual violence in today’s South Africa is accepted and promoted, through silence. It has become an every day occurrence, engrained in our patriarchal culture and traditions whereby women almost expect it to happen to them.

Early this year, a BBC news reported on a rape of a 17 year old at a makeshift bar in Soweto entitled “Will South Africans ever be shocked by rape?” The article explained that the man remained at the incident as he considered the incident so trivial that he did not even attempt to flee.<sup>1</sup>

## THE CRIMINALISATION OF RAPE VICTIMS

Sexual abuse is a global issue. Worldwide, the UN has reported that one in three women will be raped or beaten in her lifetime.

The rape and murder of a student in New Delhi on December 16, 2012, followed by large public protests, have highlighted the problem of sexual violence in India and worldwide. But, historically, the study of violence against women has focused more on the female victim than on the male perpetrator. As Freda Adler

---

<sup>1</sup> Andrew Harding, Will South African ever be shocked by rape?, available at <http://www.bbc.co.uk/news/world-africa-20971240>.

once said: “Rape is the only crime in which the victim becomes the accused.”

For example, early this year, the Indian government announced the implementation of a wristwatch *for women* with a built in video camera to capture footage when the button is pressed and a distress button that messages friends, family and the nearest police station with the owner’s GPS coordinates.

And it doesn’t stop there: Not only do we focus our attention on her, we openly criminalise her conduct and treat her as a criminal.

An Indian lawyer defending three of the men charged with the rape and murder in New Delhi told reporters that the victim was to blame for what happened:

"Until today, I have not seen a single incident or example of rape with a respected lady...Even an underworld don would not like to touch a girl with respect."

He said that the victim should not have been travelling on public transit late in the evening.

Similarly, a Canadian police officer recently suggested that rape victims could avoid their fate by not dressing scandalously. This comment led to a triggering of a series of worldwide protests aimed at transforming the globally deep-rooted 'don't get raped' culture to a 'don't rape' culture.

Furthermore, up until quite recently, South African courts found it dangerous to rely on the uncorroborated evidence of complainants in alleged rape cases. In 2007, section 60 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* came into force which disallowed a court from treating the evidence of a

complainant with caution, on account of the nature of the offence. Unfortunately, the section did not have much impact on the practice of our courts and even post enactment of section 60, the rule of corroboration has become a rule of practice that has been consistently applied by our courts.

What is clear is that sexual violence against women is not simply a legal issue. It occurs as a result of embedded societal values and cultural beliefs. And while the justice system needs to respond, we need to be aware that customary laws will not always align to constitutional laws. There exists reluctance among some women to approach the legal system either due to a lack of funds or a lack of trust and they are thus forced to turn to informal systems of justice like religious supports, where they can find themselves doubly victimised. Women are thus forced to remain silent for fear of religious persecution and backlash from family members.

THE RIGHTS OF CHILDREN

It is our responsibility to protect all human rights, and children's rights are human rights.

Very recently the Pretoria High Court made a landmark ruling by decriminalising child sex. Judge Pierre Rabie declared certain sections of our sexual offences legislation regarding sexual consent between children unconstitutional. The ruling allows children aged between 12 and 16 to engage in consensual sex. And while certain changes to the Act may have been required, the implications of this ruling may lead to an increase in the rate of sexual violence among children.

It has recently been reported in City Press that at least 28% of schoolgirls are HIV positive. Health Minister Aaron Motsoaledi made clear that it was not young boys who were sleeping with these girls; it was old men. Some of the girls who became pregnant and tested positive for HIV were between the ages of 10 and 14.

## THE DEATH PENALTY IS NOT THE ANSWER

The fight in South Africa for women's and children's rights with respect to sexual violence has been an arduous and lethargic process fraught with many barriers aimed at re-victimising the complainant. Rape by a husband of his wife was not even considered a crime before 1993, until the passing of the Prevention of Family Violence Act. And only in 2007 did the Constitutional Court develop the common-law definition of rape to include non-consensual sexual anal penetration.<sup>2</sup>

It is thought that in order to put an end to the persistence of sexual violence we must bring back the death penalty. This is not the answer. In the landmark 1995 judgment of the Constitutional Court of South Africa,<sup>3</sup> Chaskalson, the then President of the Court, held that capital punishment was inconsistent with the commitment to

---

<sup>2</sup> *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*, [2007] ZACC 9.

<sup>3</sup> *S v Makwanyane and Another*, [1995] ZACC 3.

human rights expressed in the Interim Constitution. Chaskalson stated in response to the argument that the death penalty should be retained because it reduces crime:

'We would be deluding ourselves if we were to believe that the execution of the few persons sentenced to death during this period, and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime. There will always be unstable, desperate, and pathological people for whom the risk of arrest and imprisonment provides no deterrent, but there is nothing to show that a decision to carry out the death sentence would have any impact on the behaviour of such people, or that there will be more of them if imprisonment is the only sanction. The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that

which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.’

In the United States, comparative research conducted with respect to murder rates in relation to the implementation of the death penalty in certain states indicates that the murder rate in non-death penalty states has remained consistently lower than the rate in states with the death penalty.<sup>4</sup> The failure of the death penalty to act as a deterrent is exemplified by the experience in New Zealand as well. During the period of 1924 to 1962 the death penalty (for murder) was in force intermittently, as it was reintroduced and removed on several occasions. And although there were fluctuations in the murder rate during this period, they did not correlate to the death penalty.<sup>5</sup>

---

<sup>4</sup> Source: Death Penalty Information Centre.

<sup>5</sup> R Hood, *The Death Penalty: A World Wide Perspective* (1996) ch 6, esp 211-212.

The rule of law should be respected and not subverted. The real deterrent is the high probability that the perpetrator will be apprehended and, after a fair trial, that there will be a conviction and a lengthy term of imprisonment imposed for murder, violent robbery, rape or gross domestic violence. Protests within or outside the courtroom for or against the victim or the accused are not likely to influence the court from convicting the guilty or acquitting the innocence.

Certain feminist organisations blame the courts for imposing unreasonably light sentences for crimes of sexual violence. Although we need to be cautious in not acquitting the guilty, we must resist the urge to blame the Constitution and the courts for being lenient. It must be left to the courts to determine whether or not a conviction should be made.

Extrajudicial punishment against suspects should be prevented, investigated and the guilty should be punished. The sub judice rule

should be observed. It is not enough to preface reports with the word 'alleged' and set out as proven facts gory details and calling for the reintroduction of the death penalty on the identified accused.

## CONCLUSION

By way of conclusion, let me be very clear. As citizens of South Africa, we have accomplished much through political will to advance human rights. We are celebrating many years of universal suffrage, democracy and the abolishment of the death penalty, and yet, we have failed to address older, structural issues of sexual violence, rooted in power and gender relations, which crushes the potential of half the world's population.

We should, as a matter of principle, jealously guard the humanity of everyone, including women. The ANC Committee entrusted with the drafting of the Constitution of which I was a member ensured

the creation of a document which embodied the essence of human dignity and it is our duty as South African citizens to implement our hard sought after Constitution in order to foster the growth of women's rights, as human rights, at this time of dire need. It is your generation's obstacle to be tackled and I believe that you will reject the notion that the question of sexual violence is a women's issue and will insist on a radical cultural shift.

Thank you. I am indebted to Sandra Wisner for her assistance in drafting this speech.