

PAPER PRESENTED BY ADV. A M (DULLAH) OMAR WHICH FORMED THE BASIS OF AN ADDRESS TO THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION (LITIGATION SECTION) AT CHICAGO ON TUESDAY, 7 AUGUST 1990

Chairperson, Ladies and Gentlemen

Thank you all for the warm reception. Thank you for inviting me to address you. In many ways it is a great privilege to be here.

Let me begin by stating some basic propositions:

1. In S.A. we have never had a real Constitution enjoying any status above other legislation.
2. We have no tradition of Constitutionalism i.e. a Constitution as a point of reference.
3. We have never had a Bill of Rights.
4. We have never had any mechanism to protect human rights.
5. We have never had an independent judiciary.
6. We have never had a system which established legality or the Rule of Law.
7. We have never had a legal order enshrining equality and human values as a priority.
8. We have never experienced democracy in our land.

We need

1. Democracy
2. Self determination
3. Equality
4. Social and Economic Justice
5. Protection of Human Rights
6. Non Discrimination
7. A just and humane legal system
8. A Bill of Rights
9. An independent judiciary

In short

We need a real Constitution  
We need Constitutionalism  
We need to build a rights culture.

Let me now proceed.

All of you are no doubt aware of historic events unfolding in our country. Lawyers in South Africa are today presented with a historic opportunity to make a contribution towards the process of democratization of their country. The legal fraternity in South Africa number about 12,000 persons. Over 90% of them come from the ranks of the "white" group as defined in the Population Registration Act. There are less than 1000 black lawyers. [This includes "Coloured", "Indian" and

African]. I should clarify that, together with others in the liberation movement, I reject South Africa's classification laws. We are Africans and want to be known as such. Insofar as the legal profession is concerned, the question today is whether the organized profession in our country will be able to rise above its own limitations and make a contribution towards the shaping of a new democratic future for all South Africa's people. The organized legal profession cannot boast any kind of democratic tradition. Generally speaking, it has a record of helping to make Apartheid work. At best, the profession hid its complicity or its cowardice behind the doctrine that Parliament was sovereign and the notion that the duty of the court was to APPLY the law, not to MAKE the law. Because of the Apartheid tradition of the organised legal profession over the years, and also because the basic role of the judiciary was to apply the law - not to make it - black lawyers (though few in number) over the years have refused to participate in the structures of the organized legal profession. I say this with due regard to those members of the profession for whose integrity and work I have a high regard. Today, the judiciary and indeed the whole legal system, is perceived by the overwhelming majority of black South Africans to be illegitimate and essentially an instrument in the hands of an oppressive regime.

Historically, South Africa has always had a whites only parliament which made the laws, and a whites only judiciary which applied the laws. The legal system and system of justice have throughout South Africa's history remained instruments in the hands of successive segregation or Apartheid governments. Only in the 1980's, when the whole Apartheid system was plunged into crisis, did the regime seek to co-opt people classified "coloured" and "Indian" into its tricameral apartheid parliament. Today also, the absence of blacks on the judiciary is recognized as a factor which contributes to the illegitimacy of the judiciary. Blacks have refused to serve on the judiciary precisely because they would be lending legitimacy to it and also because they would be required to apply unjust and Apartheid laws. Bluntly, we have a society which is divided between masters and servants. For the servants to serve on the judiciary would mean doing the dirty work of the masters (slave owners). In fact the two organisations to which almost all black lawyers belong, the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL) disqualify any person who served in such capacity from membership to the organizations. All black South Africans suffer national oppression and discrimination. Even those blacks who have chosen to collaborate with the regime also suffer national discrimination. The overwhelming majority are also economically exploited. The struggle of the oppressed majority is a struggle for national liberation. The Union of South Africa which was formed in 1910, was the culmination of conquest and colonial subjugation. Union was imposed on the black majority. Their protests were brushed aside and ignored by the creators of Union - namely the British.

Ever since then our national liberation movement has frowned upon those collaborated with the regime. It is in this context, too, that serving on the judiciary has been seen by us as an act of collaboration while in any normal society serving on the judiciary would have symbolized achievement.

The organised legal profession served the Apartheid system well from the very beginning. Speaking at the Annual General Meeting of NADEL in Durban just a few days ago, the Deputy President of the African National Congress, Mr Nelson Mandela, spoke about the role of the legal profession and reminded us of a very instructive reported case to which I also take the liberty to refer, viz the case MANGENA v LAW SOCIETY, 1910 Transvaal Provincial Division 649. Alfred Mangena was the first African to be admitted as an attorney in South Africa. Not surprisingly, he received his training outside his motherland. He was, incidentally, one of the founding members of the African National Congress when it was formed in 1912 and become one of its first four vice presidents. The case itself relates to his application for admission as an attorney. The court admitted him. What is of particular interest to us is that the Law Society of the Transvaal opposed his application. The report reads as follows:

"Application for admission as an attorney. Applicant possessed the necessary statutory qualifications but was a native. The President of the Law Society filed an affidavit in which he stated that in the present state of society in the Transvaal, there was no possibility of a native finding work as an attorney among white people; and that he would have to make a practice among the natives; that the policy of the government was to discourage litigation among them and to encourage them to have their grievances settled by the Native Affairs Department or by means of the native courts; that it would not be in the interest of the natives of the Transvaal to create among them a class of native practitioners, and that such a practitioner would be beyond the control of the Law Society, who would find it difficult to exercise discipline over him". Mangena was admitted as an attorney but black practitioners to this day recount the innumerable difficulties faced by them, the discrimination which they have suffered and contempt with which they were so often treated. They will also tell you of the historical silence and acquiescence - and at times the complicity - of the Apartheid-Conscious legal profession, as Mr Mandela recounted in his speech to Nadel.

In South Africa, therefore, the organised legal profession has never been a fighter for democracy. All the more meritorious is the role played by a handful of white lawyers from time to time - who sacrificed much to champion the cause of the downtrodden and to fight injustice in and out of the courts. Often subjected to victimization and regarded as "verraaiers" (traitors) to the white 'volk', they were idolized by the blacks.

Like everywhere else I suppose, in South Africa, too, lawyers have acted for those who sought their services - and more important - who paid for them.

It was natural, therefore, that in South Africa, lawyers served the system, the wealthy, the property owners - and because they came from the same ranks, lawyers generally served the white community. Even when they acted for blacks, few would have dared to act in a way which challenged the status quo. Lawyers were generally inaccessible to those who needed them most, namely the blacks. Incidentally the record in the Mangena case shows that he represented himself.

Over the years, from a situation of virtually no black lawyers, we still have a situation that black lawyers constitute only about 5% of the legal profession. Their organisations, the BLA and NADEL, are rooted in the Anti-Apartheid national liberation struggle in our country. There is a third lawyers organisation - Lawyers for Human Rights - which consists mainly of a very small group of democratically-minded white lawyers. These three organisations - making up less than 10% of the legal profession - today work in close cooperation with each other. In the defiance campaign against Apartheid laws in 1989, they mounted joint campaigns against detention, against the death penalty and against police violence which to this day remains one of the dominant feature of South African life.

South Africa and its people have now moved into a new situation. This is not the occasion to deal with the various factors - national, continental and international - which, taken together, have given rise, in the words of the OAU Harare Declaration of 21 August 1989, to a conjuncture of circumstances which make it possible to end Apartheid through peaceful means. Negotiations is now a priority on the agenda. The ANC and the mass democratic movement insist that negotiations must be for the total dismantling of the Apartheid System, not for its reform, and for the establishment of a single non-racial, non-sexist and democratic society. The question is: Do we as lawyers have a role to play and if so, what is that role.

The ANC and the mass democratic movement believe that the only road to lasting peace in our country is the establishment of a non-racial democratic society with a multi-party system based on universal suffrage and one person one vote. We stand for an open democratic system. We regard the major political and civil rights which were won in Europe during the great anti-feudal bourgeois democratic revolutions, to be of universal application. Therefore, the MDM is unqualifiedly in favour of enshrining those rights in a new constitution and entrenched in a justiciable Bill of Rights. The removal from the statute books of all Apartheid laws would certainly be a step in the right direction but wholly inadequate to remove social, economic and even political inequalities which are now deeply

embedded in South African life. It must be understood that despite talk of negotiations, Apartheid is very much in place and that the inequalities between white and black have actually worsened.

Whites still live in affluence in posh luxury suburbs whilst blacks remain penned in in blacks-only locations. Ten times more money is spent on the education of the average white child than on the average black child in the homelands. Ten times as much money is spent on the health of the average white child than the average black person in the homelands. The same is true in respect of facilities and amenities. Seven million blacks out of a total population of nearly 40 million South Africans live in shacks and have no homes. More than two-thirds of the black population have no running water or electricity in their homes. Unemployment is structural to Apartheid and to the homeland system. The unemployment figure, according to the Congress of South Africa Trade Unions (COSATU) now stands at 5 million. Skills are entirely monopolized by a small minority which is almost wholly white. South Africa's economy is dominated, not by private enterprise, but by huge monopolies. The four largest companies effectively control four-fifths of the capitalized value of the Johannesburg Stock Exchange. Anglo-American Corporation controls 45%, Rembrandt 19%, Sanlam 10%, A.A. Mutual 10% and the rest 16%.

The need for redistribution becomes more obvious if one appreciates that whites in South Africa today control 90% of South Africa's productive wealth, that 65% of whites earn more than R2,000 per month, that only 2,4% of blacks earn that much, that over 70% of black households earn less than R700 month (which is less than the household subsistence level of R840 per month), that the average household income for whites is R3,300 per month, that for blacks it is R520 per month; and that the average income of whites is therefore six times that of blacks. All those inequalities remain in place. When you picture Apartheid, you should not picture separation simply along vertical lines. The line is a horizontal one. Occupying the top place in the apex of our social triangle is the white minority which continues to enjoy all the privileges, property, ready access to skills, education and amenities. At the bottom of the triangle, occupying the base, is 80% of the population who are black, impoverished, landless and rightless with hardly any access to skills, education and amenities. There is a great deal of rhetoric about ending Apartheid. But when will the actual dismantling begin, ask the vast majority of blacks. Simply passing a law to make international hotels equally accessible to a millionaire and a pauper does nothing to reverse the real inequalities which is the essence of Apartheid.

A new South Africa will have to sweep away Apartheid in all its forms and establish real political equality. In addition, it will have to bring about and create mechanisms to ensure a

redistribution of wealth, land, property and skills; it will also have to create mechanisms to ensure that the terrible imbalances historically created by the Apartheid system will be corrected. Without economic redistribution, the mere abolition of Apartheid laws will make little impact on the social and economic inequalities discrimination and domination which are the hallmarks of the Apartheid System.

In the present period, lawyers who uphold human rights, democracy and are committed to end in violence, should ask the question: What factors are present in South Africa which are favourable for the democratization of South Africa and therefore worthy of support. On the other hand, what are the factors which hamper or obstruct the democratization process. I suggest that a critical examination of South African history over the last 50 years will reveal two contradictory developments or processes.

1. in white politics, a movement away from democracy; and
2. in the mass democratic movement building for democracy.

On the one hand we observe the position of the white ruling bloc. Over a long period of time it had reduced blacks ("African", "Coloured" and "Indian") to the position of second and third class citizens. Our observation reveals that the white ruling bloc has over the years retreated and moved away from democracy. In the period prior to 1960, the white ruling bloc had completed the process of establishing a dictatorship over blacks. To maintain political, social and economic privileges, white political parties it could not afford to extend those democratic rights which they themselves enjoy to those over whom they lorded. It was a case of democracy for whites and dictatorship for blacks.

Between the 1960's and the 1980's the white ruling bloc retreated even from this distorted form of democracy -resulting ultimately in 1983 in the system of the dictatorial presidency and a toothless tricameral parliament of the 1983 period. To preserve existing privileges the white ruling bloc was prepared to throw overboard even its own democratic rights. The tricameral system has been characterized by the regime and its allies as a form of power sharing. It was in fact no power sharing at all. In essence the Republic of South Africa Constitution Act of 1983 shifted the locus of power from a white parliament to an all-powerful white State President who was not accountable to parliament.

The tricameral parliament was designed to provide a naked Presidential dictatorship with a cloak of respectability.

In 1985 this all-powerful State President declared a state of emergency and by and large, the country has been ruled by decree ever since. The State President in declaring a state of emergency did not need the consent of parliament. With this, the retreat from democracy and movement towards dictatorship in white politics was complete.

the MDM launched its defiance campaign. Hundreds of thousands of people, including whites, throughout the country responded and began to make Apartheid itself unworkable.

I am respectfully suggesting to you today that a major contributor to the establishment of democracy in South Africa has, in fact, been the MDM.

How do lawyers fit into this picture? Lawyers have an important role to play because the drawing up of a new constitution for our country is now on the agenda. The

position of the MDM, including the African National Congress, is that the people of South Africa as a whole should participate in the process of drawing up the constitution. This, of course, cannot be done except through organised structures. Lawyers can facilitate this process. There are many aspects of a new constitution which need to be worked out. As lawyers, we have the privilege of participating in the shaping of all aspects of a new constitution.

As part of a new constitution, we will be called upon to assist in the process of reshaping the whole legal system in South Africa and to bring into being a system of justice which is fair, humane and accessible. It is also agreed that we should have a Bill of Rights enshrining basic human liberties and freedoms. These are exciting tasks which await our profession.

We also believe that not only the establishment of democracy is important but that the process in reaching that end should, in itself, be an exercise in democracy. Hence, the mechanism for drawing up a new constitution for South Africa should be a Constituent Assembly. We say that there should be non-racial elections in the country to determine the representatives who shall make up such Constituent Assembly as representatives of all South Africa's people for the purpose of drawing up the new Constitution.

It is our view that the test of whether any party or group subscribes to democracy or not, is to be found in part in the mechanism which it suggests for the drawing up of a new Constitution. If the end product is to be democracy, then the process of reaching that end should also be democratic.

Lawyers today have the singular privilege of helping to create institutions and platforms to ensure that this process takes place in an orderly way and that a Constitution is created of which we can all be proud.