

For life and action¹
Justice, Reconciliation and the Work of Memory

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The new Constitutional Court building is built on a hill in Johannesburg. It stands on the site of four notorious prisons. The first and oldest is the Fort, originally built as its name suggests as a fort by President Kruger in the years immediately before the Anglo-Boer War or Tweedevryheidsoorlog to defend the city of Johannesburg. Not long after the war, as is the way with many forts, it became a prison that held Mahatma Gandhi and decades later, Nelson Rolihlahla Mandela. Around it three other prisons sprang up: the women's gaol to its west, and to its north, the native gaol and the awaiting trial prison. Three of the four

¹ The title of this address is taken from one of Friedrich Nietzsche's *Untimely Meditations* "On the uses and disadvantages of history for life" (Cambridge University Press, 1997). The full quote is: "We need history, certainly, but we need it for reasons different from those for which the idler in the garden of knowledge needs it, even though he may look nobly down on our rough and charmless needs and requirements. We need it, that is to say, for the sake of life and action ...". (at 59). I am grateful to my law clerks, Kgomotso Mokoena and Nicholas Friedman for assistance with completing the footnotes in this paper; and to my colleague Edwin Cameron for his insightful comments on an earlier draft.

prisons still stand on the hill: They are brick-and-mortar memorials of the role that law has played in our history.

The fourth, the awaiting trial block, was demolished to make way for the new court building. Its bricks, however, were preserved, and they have been used throughout the court building, most notably in the court room itself, where packed into a dry stone curving wall they serve both as a reminder of the prison walls they once were, and of the early Mapungubwe civilisation of this region.

Justice is a complex and contested concept in most societies. In societies that are in transition from an oppressive or brutal past, this is particularly so as is nowhere more evident than South Africa. Justice is a normative concept constructed politically and socially in each society. In that construction, history plays a significant role.² It is the role of history in the construction of a democratic conception of justice in post-apartheid South Africa which is the focus of my remarks this afternoon.

In a society in which the past has been deeply unjust; and the law and judges have been central to that injustice, establishing a shared

² For a discussion of the construction of the conception of justice in periods of political transition, see Ruti Teitel *Transitional Justice* (Oxford University Press, New York 2000) initially at 3-4 and then throughout the book.

conception of justice is particularly difficult. There is a need to remember the injustice, to analyse and understand it where possible. But we need to be cautious about the purpose to which we put these memories. The purpose must be, as the title of this address (drawn from Nietzsche's essay on the uses of history) suggests, "for life and action".³

Memory must assist us in the present, burning task with which we are engaged, the building of a better future. A history of evil presents particular difficulties, as Nietzsche again reflects: "It is always a dangerous process, especially so for life itself: and men and ages which serve life by judging and destroying a past are always dangerous and endangered men and ages. For since we are the outcome of earlier generations, we are also the outcome of their aberrations, passions and errors, and indeed of their crimes: it is not possible wholly to free oneself from this chain. If we condemn these aberrations and regard ourselves as free of them, this does not alter the fact that we originate in them. The best we can do is to confront our inherited and hereditary nature with our knowledge and through a new, stern discipline combat our inborn heritage and implant in ourselves a new habit, a new instinct, a second nature, so that our first nature withers away."⁴

³ See note 1 above.

⁴ Id at 76.

There are four strands to the conception of justice in modern South Africa which draw directly on our memory; and which affect how justice is conceived today. I am going to speak briefly of each. Then I am going to speak of our Constitution as, in part, an acceptance of and, in part, a rejection, of these strands of memory. Finally, I shall consider some of the challenges going forward for developing a democratic conception of justice which is both compassionate and principled and makes the best sense of both the past and the constitutional vision for our future.

The role of law in achieving the policies of apartheid

Apartheid was maintained through a plethora of unjust, discriminatory laws. Every day ordinary South Africans were arrested and imprisoned in terms of apartheid laws. For example, between 1968 and 1971, according to the South African Institute of Race Relations Survey,⁵ more than 600 000 people were arrested annually on pass law offences – this, at a time, when the population was approximately 20 million. Those convicted would generally be sentenced to imprisonment for 90 days, which often involved prison labour. In addition to the pass laws, apartheid was underpinned through a host of other laws – the Immorality Act,⁶ the

⁵ Muriel Horrell *A Survey of the Race Relations in South Africa* Vols 24, 25, 26 and 28 (South African Institute of Race Relations, Johannesburg)

⁶ Immorality Act 23 of 1957.

Mixed Marriages Act,⁷ the Separate Amenities Act,⁸ the Group Areas Act,⁹ the Land Act¹⁰ and many others. Nearly all these pieces of legislation contained criminal provisions which resulted in people being arrested, prosecuted and convicted for manifestly unjust purposes.

Each of these 600 000 annual arrests was a stone dropped in a pond. The ripples can still be felt. Let us stop and think of each arrest for a moment. A police van draws up at the corner of a suburban street. Two (probably young) police officers jump out and accost the woman they have seen passing in the street. “Dompas” they shout. The woman, who has no “dompas” on her may demur or seek to explain, perhaps she thinks momentarily of flight. Perhaps not. She is placed in the back of the van. That evening, her family or friends who were expecting her will find she does not arrive. They may assume she has been arrested and spend some days searching police stations and prisons to find her. They will be angry or anxious or resigned and will have seen the law and its enforcement processes for what it was, unjust.¹¹

⁷ Prohibition of Mixed Marriages Act 55 of 1949.

⁸ Reservation of Separate Amenities Act 49 of 1953

⁹ Group Areas Act 36 of 1966.

¹⁰ Natives Land Act 23 of 1913.

¹¹ In this regard see the comments by Chief Justice PN Langa in his submission to the Truth and Reconciliation Commission reproduced in (1998) 115 *South African Law Journal* 36-41 at 38.

The young policemen will probably not think much of this arrest at all. They will drive to the police station, lay the charge and commit the arrested woman to the cells. The next morning, probably, she will be taken to court staffed by a magistrate, a court orderly, a prosecutor and an interpreter. There will, in all probability, be no defence lawyers. The process of conviction will be extremely quick and efficient; and the sentence will probably be something like R90 or 90 days' imprisonment. It is unlikely that the convicted woman will be able to pay a fine and so she will go to prison.

Each prosecution and conviction involved policemen, prosecutors, interpreters and magistrates -- many thousands of people working to enforce unjust laws. When I look at the bricks of the awaiting trial prison in our court room, I think that each one of those bricks must represent dozens of people who were imprisoned within that very prison, having been arrested on the basis of the pass laws. But each brick represents too one or more of the lawyers who prosecuted or convicted or drafted the wicked laws which gave effect to apartheid.

The manner in which law supported apartheid and its implications for our modern South African conception of justice raises two questions: the first is what are the implications of the arrest and imprisonment of so

many South Africans for deeply unjust reasons over so many years for our modern attempt to establish a shared conception of justice in a constitutional democracy founded on the rule of law? Those implications must, at least in part, be the absence of a deep, value-based commitment to respect for law in our society and deep scepticism about the possibility of justice. The enforcement of unjust laws with the effect of sending hundreds of thousands of people to jail over many years must have weakened any sense that law-breaking or imprisonment are of and in themselves wrongful. Establishing a communal commitment to respect for law and a sense of confidence in the possibility of justice will take time. Laws, and the process of law enforcement, need to earn the respect from which confidence in justice will grow. It is this task to which our Constitution commits us, a matter to which I return in a moment.

The second question as formulated by David Dyzenhaus¹² is “How was it that [lawyers] implemented without protest and often with zeal, laws that were so manifestly unjust?” Indeed, how many of them will have thought of this at all? This is a question that must be asked of any unjust legal system. In the last section of my remarks, I shall return to both these questions.

¹² David Dyzenhaus *Judging the judges, judging ourselves: Truth, reconciliation and the apartheid legal order* (Hart Publishing, Oxford 1998) at 27.

Amnesty: the Truth and Reconciliation Commission

The mandate of the Truth and Reconciliation Commission was to establish: “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights . . . including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations by conducting investigations and holding hearings.”¹³ “Gross human rights violations” were defined in turn as “the killing, abduction, torture or severe ill-treatment of any person”.¹⁴

The Truth and Reconciliation process in South Africa has been much examined.¹⁵ Today there are three aspects of it that I consider relevant to this strand of our memory and to the construction of a democratic conception of justice. The first is that “gross human rights violations” did not capture the “daily violence” of apartheid imposed through the

¹³ Section 3(1)(a) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

¹⁴ Section 1(1)(xix) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

¹⁵ See, for example, Alex Boraine *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Cape Town 2000); Kader Asmal, Louise Asmal and Ronald Suresh Roberts *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance* 2ed (David Philip Publishers, Cape Town 1996); Daan Bronkhorst *Truth and reconciliation: Obstacles and opportunities for human rights* (Amnesty International, Amsterdam 1995); Martha Minow *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston 1998) and David Dyzenhaus above n 9.

enforcement of its laws and which I have already discussed.¹⁶ The definition of gross human rights violations in the TRC legislation focussed on the “extraordinary” violence of the apartheid era. In a real sense, this focus meant that the TRC missed engaging fully with the full evil of apartheid: its devastating impact on ordinary people in their everyday lives. This impact was, indeed, the banality of evil – the phrase Arendt coined to describe how the authoritarian Nazi state destroyed private lives, as well as political opposition.

Secondly, the primary focus of the TRC legislation was to establish the truth about the past. The scheme, simply stated, was to encourage those perpetrators of gross human rights violations to come forward and tell their story in full. Full and frank disclosure entitled a perpetrator to apply for amnesty within the scheme of the Act. Amnesty, of course, meant that a perpetrator escaped prosecution, conviction and punishment. The absence of punishment means vengeance is not exacted. Although we might be uncomfortable with the notion of vengeance, it is in one sense “a deeply moral response to wrongdoing. ... Through vengeance [or retribution] we express our basic self respect. ... Vengeance is also the wellspring of a notion of equivalence that animates justice.”¹⁷ The

¹⁶ David Dyzenhaus’ term, above n 9 at 6.

¹⁷ Martha Minow above n 12 at 10.

principles of criminal law and punishment recognise that retribution is just. As Martha Minow notes:

“Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights. Retribution motivates punishment out of fairness to those who have been wronged and reflects a belief that wrongdoers deserve blame and punishment in direct proportion to the harm inflicted.”¹⁸

In affording amnesty to those who confessed to gross human rights violations and described them in full detail, the Act foreswore retribution in favour of truth. Moreover, the extent to which those who were not prosecuted were leaders particularly in the apartheid state, the message sent by amnesty or the absence of prosecution was the message of impunity – the reverse of accountability.

Thirdly, the legislation underpinning the Act operated on a basis of equivalence between those gross human rights violations which had been perpetrated in support of apartheid and those violations which had been perpetrated to overthrow apartheid. This equivalence, of course, was a product of the political compromise and related also to the amnesty rules. It sits uneasily with our recognition that apartheid was an unjust,

¹⁸ Id at 12.

oppressive system and that seeking to dismantle it was a morally just cause.

Indigenous law and justice

The third strand of memory that relates to justice is the history of indigenous law and justice in many South African communities.

Although there are differences from community to community, the traditional pattern of dispute resolution is public and participative. It often takes place in the open under a tree. In a recent study of traditional courts in Limpopo province, a court operating under in the Berlyn settlement is described as follows:

“The messenger announces the court date and time by walking through the settlement and blowing a horn, calling out the particulars of the meeting, which is always on a Sunday morning in Berlyn. The court starts early to give people a chance to attend church services later in the day. When men and women are seated outside the headman’s house in separate groups under and near a tree, the headman and his committee enter and everybody stands up. ... The seating arrangements symbolise the status differences in the social hierarchy. ... The complainant talks first, then the defendant, then the witnesses that were brought and then

the members of the community. ... When the matter draws to a close, someone sums up the matter and then the headman gives his decision.”¹⁹

This simple account of a traditional court procedure makes it clear that a principle of open, participative justice is deeply etched in our memory and practice. Indeed, it is a living aspect of justice in modern South Africa. It was in recognition of the importance of the practice of justice to then in communities throughout South Africa that the Constitutional Court chose as its seal, the representation of a tree with people clustered under it, rather than the more commonly used symbols of a set of scales or of the figure of “blind justice”.

On the days when a case of importance to a community is heard in the Constitutional Court, the tradition of public and participative justice is re-enacted in part. The courtroom is packed. People travel often overnight in buses to attend the hearing of the Court. The purpose of attendance is not to view the hearing in a non-participative way, but to demand of the judges who are sitting accountability. Through silent participation, community members remind judges that their constitutional task is to do justice. This is not a new phenomenon. During the 1980s as an attorney

¹⁹ C S van der Waal “Formal and Informal Dispute Resolution in Limpopo Province, South Africa” in Manfred Hinz (ed) *The Shade of New Leaves Governance in Traditional Authority: A Southern African Perspective* (Lit Verlag, Berlin 2006) at 141-2.

for rural communities and workers, clients insisted on their day in court, because they wanted the judges to see them and know that the decision they were making on the case was of importance to the people in front of them. And that that decision should be a just one.

This strand of our memory is important. A legal system is unlikely to be just in the absence of an expectation that it will be just. The long tradition of indigenous public and participative justice, therefore, is an important strand of memory in the construction of a democratic conception of justice in post-apartheid South Africa.

The use of law in the period of struggle

The fourth strand of memory that I think is relevant to the construction of a conception of justice is the extent to which legal strategies were adopted by those seeking to oppose apartheid. In the last decades of apartheid, legal strategies were pursued for a variety of purposes: to promote the rights of workers;²⁰ to defend communities from forced removals from their land and homes;²¹ to defend those prosecuted of political offences;²²

²⁰ See D du Toit et al *The Labour Relations Act of 1995* 2ed (Butterworths, Durban 1998) at 9-11.

²¹ Christina Murray and Kate O'Regan *No Place to Rest: Forced Removals and the Law in South Africa* (Oxford University Press, 1990).

²² Richard Abel *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994* (Routledge, New York 1995).

to limit the operation of the pass laws;²³ to undermine the consolidation of the grand apartheid programme of Bantustans;²⁴ and to defend those opposing conscription.²⁵ The strategic use of law to promote just ends was often the topic of fierce debate. In the context of worker rights, for example, the fear was that the use of law would undermine workers themselves by affording power to lawyers in a manner that would weaken shop-floor militancy.²⁶

In his fascinating account of the era, *Politics by other means: law in the struggle against apartheid 1980 – 1994*, Richard Abel concludes that law did make a difference.²⁷ However, he notes it had severe restrictions.

“Law”, he comments, “is far more effective in defending negative freedom than conferring positive liberty; it can restrain the state but rarely compel it.”²⁸ He concludes finally that

“the recognition that South Africa in the 1980s was exceptional and law alone was not decisive should not mislead us to deprecate its importance.

Human rights lawyers, like other progressives, too often frame the issue

²³ Id.

²⁴ *Government of Lebowa v Government of the Republic of South Africa* 1988 (1) SA 344 (A).

²⁵ *End Conscription Campaign and Another v Minister of Defence and Another* 1989 (2) SA 180 (C).

²⁶ See, for example, Bob Fine, Francine de Clercq and Duncan Innes “Trade Unions and the State: the question of legality” (1981) 7 (1 & 2) *SA Labour Bulletin* 39 – 68; General Workers Union “Reply to Fine, de Clercq and Innes” (1981) 7 (3) *SA Labour Bulletin* 16 – 25; Fink Haysom “IN search of Concessions: Reply to Fine et al” (1981) 7(3) *SA Labour Bulletin* 26 – 41; Hirsch and Nicol “Trade Unions and the State: a response” (1981) 7(3) *SA Labour Bulletin* 42 – 50.

²⁷ Abel above n 19 at 533.

²⁸ Id at 538.

dichotomously. Law either makes all the difference or no difference at all. . . . most paralyzing is the anxiety that limited victories will co-opt the masses. Some activists argue that only progressive immiseration can stiffen resistance. All the evidence contradicts this. Hope is necessary for struggle. Legal victories, far from legitimating the regime, demonstrate its vulnerability and erode its will to dominate.”²⁹

The use of law to undermine the functioning of the apartheid state was not an unmitigated success, yet it did provide insights and lessons that remain of importance today. Perhaps the most important lesson drawn from the era was the lesson that law can serve as a constraint on the abuse of power.

As EP Thompson concluded in a memorable passage at the end of his famous examination of the Waltham Black Act of 1723 – An Act that created offences aimed at curbing poaching and hunting in Waltham Forest³⁰: “there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from

²⁹ Id at 549.

³⁰ E P Thompson *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1977).

power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. ... It is to throw away a whole inheritance of struggle about law, and within the forms of law, whose continuity can never be fractured without brining men and women into immediate danger.”³¹

Why did EP Thompson's account of a recondite piece of eighteenth-century English legislation come to be widely read by South African human rights lawyers? Many opponents of the apartheid state, schooled in Marxism, expected that the use of law to oppose the apartheid state could never succeed. The reality of what happened in the 1980s, however, was different. Law did at times produce just outcomes. Not as often as human rights lawyers would have liked, but neither as rarely as a theoretical assertion that law is the tool of the ruling class could accommodate. The experience of South African human rights lawyers, thus, echoed the conclusions that EP Thompson had drawn from his historical analysis of the eighteenth century legislation. Thompson's statement that “The forms and rhetoric of law acquire a distinct identity which may on occasion inhibit power and afford some protection to the

³¹ Id at 266.

powerless”³² struck a chord with human rights lawyers in South Africa and came to be widely discussed and acknowledged.

Each of these four strands of memory contributes to our modern conception of justice. The first two, by and large, weaken the project of constructing a sense of justice, while the latter two, again by and large, strengthen it. The most important contemporary contributor to that conception, though, is our Constitution. And it is to the Constitution, and the manner in which it engages with these strands of memory to which I now turn.

The Constitution

Our Constitution engages directly with justice: in so doing, it sometimes builds on strands of memory and sometimes rejects them. The first aspect of the Constitution to be emphasised is that it seeks to establish a society, as section 1 states, founded on explicit values. Those values include human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law and a multi-party system of democratic government, to ensure accountability,

³² Id at 266.

responsiveness and openness.³³ Human rights are given specificity in chapter 2 of the Constitution which contains a Bill of Rights. In this regard, it should be emphasised that the Constitution makes plain that it seeks a transformed society, one in which the divisions of our past are healed and based on democratic values, social justice and fundamental human rights. It is not a “business as usual” Constitution.

Secondly, the Constitution creates a very strong supremacy clause, stating that law or conduct inconsistent with the Constitution is invalid; and that obligations imposed by the Constitution must be fulfilled.

The Constitution thus responds sharply to the first strand of memory by making clear that law must be founded on democratic values and may not be used for unjust purposes. It is the South African version of “never again”. Courts are empowered through the supremacy clause to be guardians of the values established in the new Constitution, a matter to which I shall return in a moment. Of course undoing the deep scars inflicted by the implementation of unjust laws during the apartheid and colonial period will not be quick. The damage done to our common understanding that law can indeed be just will only be remedied by the evidence that in our new constitutional democracy, law and courts are

³³ Section 1 of the Constitution.

concerned with justice. Such an understanding will only develop over time.

Secondly, the Constitution recognises explicitly that the truth and reconciliation process provided for in the legislation is to be deemed part of the Constitution. This is achieved in the 1996 Constitution in a technical fashion by stating that the epilogue to the 1993 Constitution is to be deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 34 of 1995 (the TRC Act).³⁴ That epilogue read, in part, as follows:

“The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violence conflicts and a legacy of hatred, fear, guilt and revenge.

³⁴ Item 22(1) of schedule 6 to the 1996 Constitution.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past...”

The epilogue thus explicitly foreswore vengeance in relation to the gross human rights violations of the apartheid era. In so doing, of course, the justice values of retribution and accountability that are served by prosecution and conviction was lost. It was almost certainly the price that had to be paid for the new democratic dispensation. In assessing its implications for the development of a conception of justice it cannot be overlooked. The counterweight is of course the emphasis of a common South African citizenship and a need to avoid victimisation in a spirit of *ubuntu*. In this respect too it should be noted that the Constitution emphasises “accountability” as one of the founding values of our Constitution. The theme of accountability is reflected in many aspects of our Constitution, a matter beyond the scope of our discussion today.

Thirdly, the Constitution acknowledges the importance of both customary law and traditional justice, while making clear that both, like the common law, must be consistent with the Constitution.³⁵ Moreover, there are at least two further constitutional principles which reflect the traditional commitment to public participative justice. The first is the constitutional commitment to open justice endorsed on several occasions by the Constitutional Court³⁶ in terms of which the right of the public to observe the process of justice is strongly affirmed. The second is the right of people other than litigants to come to court as amici curiae (friends of the court) or intervenors to assist the court with its deliberation on constitutional matters.³⁷ These are both contemporary constitutional principles which carry forward the tradition of public participative justice exemplified in indigenous law.

Finally, our Constitution seeks to establish procedures which facilitate the use of litigation to ensure that law indeed does serve the ends of justice.

There are a range of procedural aspects of constitutional litigation which

³⁵ Sections 211 and 212 of the Constitution; and also section 39(2) of the Constitution.

³⁶ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC); *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC).

³⁷ Rule 10 of the Constitutional Court Rules. See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 4; *Hoffmann v South African Airways 2001 (1) SA 1 (CC)* at para 63; *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at paras 3-5; *Richter v Minister for Home Affairs and Others*. [2009] ZACC 3.

seek to build on the litigation practices of the 1980s in which civically minded institutions and individuals sought to ensure that law was indeed just. The Constitution contains a broad standing provision which permits a wide range of individuals and institutions to come to court to obtain effective relief where they establish a threatened or actual infringement of a constitutional right.³⁸ The law of costs has been revised to ensure that those who genuinely raise constitutional points of substance should not fear that, if unsuccessful, they will be forced to pay the costs of the state who opposed them.³⁹ The Constitution also recognises that it is not only public power that bear the risk of abuse, but also private power and it accordingly and where applicable imposes constitutional obligations upon citizens and private organisations to observe the constitutional rights of others. This is a complex matter upon which I can say no more this afternoon. All these aspects of our Constitution, I would argue, enable the

³⁸ Section 38 of the Constitution provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

³⁹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 38.

use of litigation to safeguard the possibility of justice in our new constitutional order.

Challenges for the future

There are many challenges facing our nation as we seek to negotiate the transition between an unjust past and a just future in which the divisions of the past have been healed, the quality of life of all has been improved and the potential of each person freed.⁴⁰ There are two I wish to mention today. They arise from the questions I posed relating to the first strand of memory. The first relates to the difficulty of establishing faith in a system of law and justice given the extent to which law was used to further unjust ends under apartheid and colonialism. The second relates to the question of what is required of judges and lawyers to ensure that they remain faithful to the values of the Constitution. In part at least, this requires some consideration of David Dyzenhaus' question of how could

⁴⁰ In the language of the Preamble. The Preamble of the Constitution provides, in part:

“We, the people of South Africa
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as 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.”

it be that lawyers could have connived as they did in the achievement of the policies of apartheid through the use of law.

The extent to which law was used to further unjust ends under apartheid means inevitably that the legitimacy of law remains contested. Law undoubtedly was used for evil ends. That fact means that the commitment to the rule of law for just ends, upon which our Constitution is premised, may itself remain contested. Indeed most of the calls for the transformation of our justice system are premised quite understandably on the memory of past injustice inflicted by the justice system. The use of law for unjust ends in the past should serve as a constant reminder to those involved in the legal system of the possibility that law can be used to serve unjust ends and lawyers and judges need to develop a rich imagination (what Hannah Arendt, drawing from Immanuel Kant calls “enlarged thought”) to give effect to these values.

The dilemma face is that alluded to by Nietzsche “we originate in the aberrations of our past.” Simply adopting a new constitutional order does not mean that the unjust habits of the past will wither away. We need as Nietzsche says to combat our heritage actively by seeking to cultivate a new habit and new way of life. There is still much to be done to achieve this. We have taken the first steps to do so: the adoption, for example, of

the principle of *Batho Pele* (people first) as the watchword for the civil service has not meant that people are indeed treated with human dignity. The thousands of people who struggle to obtain social grants, or identity documents, are testament to the fact that the new habits have not yet been instilled. People are still treated without dignity by police officers and in courts. We need to recognise this and to renew our efforts to build a new habit, a new way of being.

We should also be alert to the risk that the question mark that hangs over the legitimacy of the legal system and which arises from the bitter memory of past injustice should not be permitted to pervert justice in our new democratic era. With EP Thompson, it is my view that the rule of law is “an unqualified human good”. We must strive to build a common conception of justice that recognises the value of the rule of law. With EP Thompson too, it remains clear that the rule of law and legal processes can be used for improper purposes.

Constructing a South African sense of justice will require vigilance and memory. The laws passed by Parliament must be continually scrutinised, as must the work done by the courts. We must hold Parliament, the courts and the other agencies of government to their constitutional duty, which is to promote the values entrenched in our Constitution. Where

they do not do so, citizens should not remain silent. On the other hand, we must be alert to the possibility of spurious allegations of the injustice of the legal system which would equally undermine our constitutional project.

The second issue to which I wish to turn is the role of lawyers and judges in our new constitutional era. There can be no doubt that the first question we must answer is the one posed by David Dyzenhaus -- how was it possible that lawyers connived to use law to promote apartheid? Answering this question, will enable us to guard ourselves in the future against a similar blindness.

There are two things that need to be said in response to this question. The first is that it is unfortunate that lawyers and judges did not use the opportunity provided by the Truth and Reconciliation Commission at its hearing on the legal system to explore the possible answers to this question.⁴¹ It is certain, of course, that no definitive answer would have been found, but the lost opportunity has created distrust amongst members of the public as to whether lawyers and judges care about the answer at all.

⁴¹ Several judges and lawyers made written submissions to the Truth and Reconciliation Commission. Most of the major submissions were reproduced in (1998) 115 *South African Law Journal* at 17 – 101. No judges, however, made oral submissions to the Commission.

There is some truth in David Dyzenhaus' conclusion that one of the reasons judges and lawyers did not grasp the opportunity afforded them by the Commission was because of the need to build unity in the judiciary and the legal profession at the time. Other answers include the timing and manner of the query from the Commission. Perhaps another answer lies in the fact that the questions identified by the Commission were difficult and contested; and because judges are not used to answering questions save in their judgments. It is not rare in argument for a lawyer grappling with a question put by a judge to respond with a question of his or her own. The judge's response in a hearing is normally simply to say, the hearing is for me to put the questions and for you to answer them. Institutionally then, a judge answers questions in a judgment not in an enquiry. Whatever may have been the reasons for the judges' failure to attend to the TRC enquiry, I need only say that it was unfortunate in retrospect, as it has been interpreted as an unwillingness or failure by judges to answer the two questions our history asks of each judge and lawyer. Why did judges and lawyers collude with injustice in the past? And how can we avoid their doing so in the future? It is to those questions I now turn.

There are two answers commonly given to the first question. They are that judges colluded with injustice because they moved in circles which were blind to the injustice because the injustice did not affect the judges directly themselves. The second is that a doctrine of legal positivism made it easy for judges to be blind to the immorality of the laws they were called upon to enforce. I shall deal with each separately.

In her illuminating book, *Eichmann in Jerusalem*, Hannah Arendt explores the conscience of Eichmann, the official of the Third Reich who was in charge of the extermination camps. She remarks as follows:

“As Eichmann told it, the most potent factor in the soothing of his own conscience was the simple fact that he could see no one, no one at all, who actually was against the Final Solution.”⁴²

There can be no doubt that if one is surrounded by people who think that something is just or right, it is less likely, in the consequence of human nature, that one will think it to be unjust or wrong. In his famous analysis of the British judiciary, JAG Griffiths points to the fact that most of the British judiciary at the time (the early 1970s) were upper-class white men

⁴² Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 1977) at 116.

who had attended Oxford or Cambridge⁴³ and he argues that this is one of the reasons that British law at the time tended to serve the interests of a narrow class. This insight was no doubt of application in South Africa during the apartheid era. In 1994, of the 150 judges in South Africa all but four were white and male.

Our Constitution has learnt this lesson. It is no accident that it calls for our judiciary to “reflect broadly the race and gender composition of South Africa.”⁴⁴ There is an extensive literature on why it is appropriate for a judiciary to be diverse,⁴⁵ but for me two reasons stand out. The first is that a diverse bench enhances the legitimacy of the judiciary in the eyes

⁴³ J A G Griffiths *The Politics of the Judiciary* insert reference.

⁴⁴ Section 174(2) of the Constitution provides:

“The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

⁴⁵ Davis and Williams “Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia” (2003) 27 *Melbourne University Law Review* 819; Gleeson “Judicial Selection and Training: Two sides of the One Coin” (2003) 77 *Australian Law Journal* 591; Hale “Equality and the Judiciary: Why should we want more Women Judges” (2001) *Public Law* 489; L’Heureux-Dubé “Making a Difference: the Pursuit of a Compassionate Justice” (2000) International Bar Association Joint Session on “Women on the bench” 20 September 2000; Graycar “The Gender of Judgments: Some Reflections on ‘Bias’” (1998) 32 *University of British Columbia* 1; Nedelsky “Embodied Diversity and the Challenges to Law” (1997) 42 *McGill Law Journal* 91; Omatsu “The Fiction of Judicial Impartiality”(1997) 9 *CJWL/RFD* 1; Devlin “We Can’t Go on Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R v R.D.S*” (1995) 18(2) *Dalhousie Law Journal* 408; Graycar “Law reform: Taking Gender into Account” (1995) Paper presented at Australian Law Reform Agencies Conference Brisbane 23 September 1995; Cooney “Gender and Judicial Selection: Should there be More Women on the Courts?” (1993) 19 *Melbourne University Law Review* 20; Minow “Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors” (1992) 33 *William and Mary Law Review* 1201; Wald “Some Real-life Observations about Judging” (1992) 26(1) *Indiana Law Review* 173; Mendes “Promoting Heterogeneity of the Judicial Mind’: Minority and Gender Representation in the Canadian Judiciary” (1991) in Ontario Law Reform Commission’s *Appointing Judges: Philosophy, Politics and Practice* 91; Minow “Equalities” (1991) 88 *Journal of Philosophy* 663; Wilson “Will Women Judges Really Make a Difference? (1990) 28(3) *Osgoode Hall Law Journal* 507; Sherry “Civic Virtue and the Feminine Voice in Constitutional Adjudication” (1986) 72 *Virginia Law Review* 543; and Nedelsky “Embodied Diversity and the Challenges to Law” in Beiner and Nedelsky *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Rowman and Littlefield, 2001).

of the broader community. It is important in a diverse society that the bench is not seen to be the preserve of a particular group or elite, or this will damage the institution. Within this reason, however, lurks a danger that can be described as the siren of identity determinism. Your identity determines your judgments. If you are a black male judge, you will sympathise with a black male accused/complainant and your judgment will reflect this. The notion extends further: if you are a black male judge, you have an obligation to see the world in a particular way; and if you do not, you are to be criticised for that. Such reasoning must be rejected vigorously.

The second purpose of requiring the judiciary to reflect our national demographics is to ensure that unlike Eichmann, South African judges will be drawn from diverse backgrounds with different experiences. They will not all think the same. The purpose of this diversity thus is not that judges will represent the groups from which they come: a crude form of identity politics. No, diversity will foster self-awareness to ensure an enlarged consciousness of others which, it is to be hoped, will reduce the risk of judges being blind to the injustice of laws. In his direct and honest statement to the Truth and Reconciliation Commission, my former colleague Justice Ackermann remarked:

“Judges who believe that they are wholly free of prejudice delude themselves. It behoves us all to seek out rigorously, painful as that might be, our own particular prejudices and of whatever nature. We need to keep these constantly in mind and to endeavour actively and persistently to counteract them. Furthermore, we all need to understand the insidious influence of institutional culture and to appreciate the powerful effects of the class, social and political environments in which we live and work, and the potential that this has for making us insensitive to the context and views of others.”⁴⁶

So requiring diversity on a collegial court enables judges to interrogate their own prejudices or blind-spots. The more alike judges are, the more likely that they will mistake prejudices for simple truths; the more different they are, the more likely that they will interrogate the correctness of their assumptions. However, it is not only diversity that will promote that self-awareness, but judicial independence itself. By being independent, judges should remain sensitive to the risk of the abuse of power. They must be sensitive both to the proper and legitimate democratic power of the legislature and the executive on the one hand but

⁴⁶ Ackermann “Submission on the Role of the Judiciary” (1998) 115 *South African Law Journal* 54.

astute too to their role which is to ensure that that power is only exercised in a constitutional manner.

The second common answer to the question why lawyers and judges were willing to enforce the laws of apartheid is to be found in the answer given by John Dugard in his book *Human Rights and the South African Legal Order*.⁴⁷ He blames a peculiar South African version of “legal positivism” for the willingness of lawyers to apply unjust laws. The doctrine of legal positivism posits a division between law, on the one hand, and morality, on the other. The doctrine that Dugard identifies might perhaps more accurately be described as formalism in which judges were unwilling to consider whether the laws they applied are just at all.

There is no doubt that judges considered that they had to give effect to the clear intentions of Parliament. In *Re Dube*,⁴⁸ Didcott J (one of the first judges on the Constitutional Court, and one of the luminary, liberal voices of the apartheid judiciary) confronted with the infamous section 29 of the Black (Urban Areas) Consolidation Act, 25 of 1945 (the key piece of legislation giving effect to influx control) remarked:

⁴⁷ (1978: Princeton Univ Press) at 393 – 402.

⁴⁸ 1979 (3) SA 820 (N) at 821

“Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way Parliament can ever make legislation just, is by making just legislation.”⁴⁹

During the apartheid era, there were vigorous debates about the extent to which there were possibilities for judges to avoid unjust outcomes on the text of law or the provisions of the common law. Many judges did not show an enthusiasm for seeking just outcomes. Perhaps one of the most egregious exemplars of such judicial conduct was the conviction of Barend van Niekerk for contempt of court. Torture in apartheid jails was widely alleged, and has indeed since been admitted. Judges were repeatedly faced with accused persons who sought to have statements they had made to the police while in detention excluded on the grounds that they had been tortured. The common law would exclude any statement that had been exacted through duress. The difficult question in each case was whether the accused had indeed been tortured. Ordinarily, there would be two versions: that of the accused, and that of the police.

⁴⁹ Id at 821. It should be added for the record that Didcott J set aside the conclusion of a commissioner that Mr Dube was an “idle person”. His task as a judge was to certify that what the commissioner had done was in “in accordance with justice”. He concluded that although it may have been in accordance with the legislation, it was not in accordance with justice.

Professor van Niekerk gave a speech in which he proposed a solution to this conundrum on the basis that as solitary confinement itself was unjust and cruel, judges should refuse to give any evidential weight to confessions or admissions made by accused persons during solitary confinement.⁵⁰ Professor van Niekerk made this proposal at a time when a court in Natal was hearing a case in which accused persons sought to have statements they had made to the police excluded on the basis that they had been tortured. Van Niekerk made no mention of the pending trial, but had invited defence counsel in the matter to his speech. He was nevertheless found to have been guilty of contempt of court.

It may be that one of the reasons that judges implemented apartheid laws was that they thought they need not be concerned with the morality of the law. Similar arguments have been raised in relation to the judiciary of the Third Reich.

But a recent voice has been raised to dispute the centrality of legal positivism as an explanation for the connivance of the judiciary in the Third Reich. In his influential book, Inge Müller has argued that it is

⁵⁰ The actual words used were: "Cannot our Judiciary go even further and in effect kill one aspect of the usefulness of the Terrorism Act for our authorities? They can do so by denying, on account of the built-in intimidatory effect of unsupervised solitary confinement, practically all creditworthiness to evidence procured under those detention provisions." *S v Van Niekerk* 1972 (3) SA 711 (A) at 716H-717A (per Ogilvie Thompson CJ).

historically inaccurate to lay the blame at the door of a jurisprudence of legal positivism.⁵¹ He argues instead that most of the judges of the Third Reich actively supported the policies of the Nazi government; and that the commitment of judges during this period was to the project of national socialism and not to the rule of law. Müller concludes that:

“Justice as an ideal disappeared from Germany with the ‘elimination’ . . . of the Jewish, socialist and democratic members of the legal profession, who made up one fifth of the total number and were the group at which Hitler’s attacks were chiefly aimed. What remained was a mutilated and perverted sense of justice, characterised not by ‘positivistic mis-education’ but by glorification of power, brutalisation of the climate of opinion and inhumanity; and which shared Hitler’s aversion to all ‘legal-mindedness’. He had always objected strongly to the German ‘mania for objectivity’ and had demanded a ‘ruthless and one-sided attitude’ toward all enemies, particularly those within his country’s own borders.

Adopting this approach to a large extent, German judges and legal scholars began to develop ‘constructions’ of laws that left only their outer shell, and in many cases not even that. At the same time, however, these constructions were not necessarily ‘typically national socialist’, but

⁵¹ Ingo Müller *Hitler’s Justice: The Courts of the Third Reich* (Harvard University Press, 1991).

simply conservative, authoritarian, anti-Enlightenment and pre-democratic in their spirit.”⁵²

It is Müller’s argument that positivism has come to be blamed for the failure of justice in the Nazi legal system to protect those judges from the more serious charge of active connivance with national socialism. Today is not the day to re-evaluate why so many South African judges during the apartheid era thought that they should give effect to apartheid’s laws without seeking to limit their harmful effect. That task would require great research and analysis. My reading of Müller’s account of the events of the Third Reich, however, suggest to me that it may well be that at least some South African judges simply identified with the apartheid project. Their application without question of apartheid’s unjust laws arose not because they believe in a sharp distinction between law and morals but because they did not question the laws because their sense of justice was not offended by the apartheid project.

What lessons can be drawn from this? Our Constitution has drawn one: which is to make it clear that the purposes and means of law may not infringe fundamental human rights. Courts may not turn a blind eye to the impact that a law has on the rights of a citizen. Instead, courts are

⁵² Id at 296.

given the awesome power to declare laws enacted by a democratically mandated legislature to be inconsistent with the Constitution. No South African judge may answer to a litigant challenging the constitutionality of a law that the law must be applied simply because it is the will of a democratic legislature. The law must be scrutinised for constitutional consistency.

The second lesson is one for judges. It is to recognise the risk of partiality that flows from our own experience and values. Impartiality is not a natural attribute conferred automatically with judicial office. It is a habit, one that is only established with anxious and persistent application.

Judges (and lawyers) need to listen to colleagues and to argument with as much openness as can be mustered. We need constantly to seek to disabuse our minds of the certainties that power tends to cultivate. The habit of impartiality requires conscientious attention to the risks of self delusion.

Conclusion

In closing then, I would like to emphasise that we are in a transition: the Constitution holds before us the vision or promise of a transformed society based on democratic values, social justice and fundamental human rights. To achieve that vision, we must draw direction from the

strands of memory which I have discussed today. The task is not an easy one, as Nietzsche has warned. Ariel Dorfman, the Chilean author, made a similar admonition in his afterword to his remarkable play *Death and the Maiden*.

“A multitude of messages of the contemporary imagination, specifically those that are channelled through the mass entertainment media, assure us, over and over, that there is an easy, even facile, comforting answer to most of our problems. Such an aesthetic strategy seems to me not only to falsify and disdain human experience but in the case of Chile or of any country that is coming out of a period of enormous conflict and pain, it turns out to be counterproductive for the community, freezing its maturity and growth. . . . How does memory [both] beguile and save and guide us? How can we keep our innocence once we have tasted evil? How to forgive those who have hurt us irreparably? How do we find a language that is political but not pamphletary?”⁵³

These are the questions that we must answer if we are to move forward and find a conception of justice consonant with our constitutional vision. To establish that new conception will require hard work and discipline. It is not an easy or facile process. But as lawyers and judges if we commit

⁵³ Ariel Dorfman *Death and the Maiden* 1991: Nick Hern Books, London at 49.

ourselves to a habit of doing justice, it is just possible that a new
compassionate and principled conception of justice will be wrought,
founded in our constitutional recognition of the equal worth of every
person, and committed to life and action.
