

Justice & Memory: South Africa's Constitutional Court

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Abstract: In a society such as South Africa in which the past has been deeply unjust, and in which the law and judges have been central to that injustice, establishing a shared conception of justice is particularly hard. There are four important strands of history and memory that affect the conception of justice in democratic, post-apartheid South Africa. Two of these, the role of law in the implementation of apartheid, and the grant of amnesty to perpetrators of gross human rights violations, are strands of memory that tend to undermine the establishment of a shared expectation of justice through law. Two others, the deep-rooted cultural practice of justice in traditional southern African communities, and the use of law in the struggle against apartheid, support an expectation of justice in our new order. Lawyers and judges striving to establish a just new order must be mindful of these strands of memory that speak to the relationship between law and justice.

The new Constitutional Court building is built on a hill in Johannesburg.¹ 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 Paul Kruger in the years immediately before the Anglo-Boer War, or what in Afrikaans is called the Second Freedom War, to defend the city of Johannesburg. Not long after the war, as is the way with many forts, it became a prison. Mahatma Gandhi and then, some decades later, Nelson Rolihlahla Mandela were both imprisoned there. Around the Fort, three other prisons sprang up: the women's jail to the west, and to the north, the native jail and the awaiting trial prison. Three of the four prisons still stand on the hill: brick-and-mortar memorials of the role that law has played in South Africa's history.

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

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walls they once were and of the early Mapungubwe civilization 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 in South Africa. Justice is a normative concept constructed politically and socially in each society. In that construction, history and memory play a significant role.² In this essay, I consider the role of history and memory in the construction of a democratic conception of justice, and the establishment or “invention” of the new Constitutional Court in post-apartheid South Africa.

In a society in which the past has been deeply unjust, and in which the law and judges have been central to that injustice, establishing a shared conception of justice is particularly difficult. There is a need to remember the injustice, to analyze and understand it where possible. But we need to be cautious about the purpose to which we put these memories.

Memory must assist us in the present, urgent task with which we are engaged: the building of a better future. A history of evil presents particular challenges, as Friedrich Nietzsche reflected:

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.³

There are at least four strands to the conception of justice in modern South Africa that draw directly on our memory, and that affect how justice is conceived today. All four of them play their part in the establishment of South Africa’s new Constitutional Court, and I outline each here. Then I briefly illustrate how these strands of memory were considered and addressed in the building of the Court and in the establishment of its practices and procedures, mindful of the need to develop a democratic conception of justice that is compassionate and principled and that makes the best sense of both the past and the constitutional vision for our future.

The first strand of history and memory relevant to constructing a shared conception of justice in South Africa is the fact that 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,⁴ more than six hundred thousand people were arrested annually on pass law offenses – this at a time when the population was approximately twenty million. Those convicted would generally be sentenced to imprisonment for ninety days, which often involved prison labor. In addition to pass laws, apartheid was underpinned by a host of other laws: the Immorality Act,⁵ the Mixed Marriages Act,⁶ the Separate Amenities Act,⁷ the Group Areas Act,⁸ the Land Act,⁹ and many others. Nearly all these pieces of legislation contained criminal provisions that resulted in people being arrested, prosecuted, and convicted for manifestly unjust purposes.

Each of these six hundred thousand 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

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van pulls 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.¹⁰ 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 that she does not arrive. They may assume she has been arrested, and then 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

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 a court staffed by a magistrate, a court orderly, a prosecutor, and an interpreter. There will, in all probability, be no defense lawyer. The process of conviction will be extremely quick and efficient, and the sentence will probably be something like 90 Rand or ninety 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 from the old awaiting trial prison in our courtroom today, I think that each one of those bricks must represent dozens of people who were held within that very prison, having been arrested on the basis of the pass laws. But each brick also represents one or more of the lawyers who prosecuted or convicted or drafted the wicked laws that gave effect to apartheid.

The manner in which law supported apartheid raises an important question:

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 skepticism 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 in and of 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.

The second strand of history and memory that I want to discuss relates to the mandate of the Truth and Reconciliation Commission (TRC), which 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.”¹² “Gross violations of human rights” were in turn defined as “the killing, abduction, torture or severe ill-treatment of any person.”¹³

The Truth and Reconciliation process in South Africa has been much examined.¹⁴ 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 violations of human rights” did

not capture the “daily violence” of apartheid imposed through the enforcement of its laws, which I have already discussed.¹⁵ The definition of gross human rights violations in the TRC legislation focused 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, to use Hannah Arendt’s phrase, the banality of evil.

Second, 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. 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, we express our basic self respect. . . . Vengeance is also the well-spring of a notion of equivalence that animates justice.”¹⁶

The principles of criminal law and punishment recognize that retribution, which to some extent serves a similar purpose to vengeance, 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.¹⁷

In affording amnesty to those who confessed to gross human rights violations and

described them in full detail, the Act fore- swore retribution in favor 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.

Third, the legislation underpinning the Act operated on a basis of equivalence between those gross human rights violations that had been perpetrated in support of apartheid and those violations that had been perpetrated to overthrow apartheid. This equivalence, of course, was a product of the political compromise, and did not reflect the moral or ethical differences between those who sought to maintain apartheid and those who sought its end. This artificial equivalence also governed the amnesty rules and sits uneasily with our recognition that apartheid was an unjust, oppressive system, and that seeking to dismantle it was a morally just cause.

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 participatory, and it focuses on restoring harmony. The administration of justice in traditional African communities often takes place in the open under a tree. In a recent study of traditional courts in Limpopo province, a court operating 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 head-

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man'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.¹⁸

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.

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 reenacted in part. The courtroom is packed. People often travel 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 accountability of the judges. Through silent participation, community members remind judges that their constitutional task is to do justice. This is not a new phenomenon. During the 1980s, while I was serving as an attorney for rural communities and workers, my clients insisted on their day in court because they wanted the judges to see them and know that the decision they handed down was of importance to the people in front of them. And through their silent participation, they reminded the judges that the 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 fourth strand of memory that 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,¹⁹ to defend communities from forced removals from their land and homes,²⁰ to defend those prosecuted of political offenses,²¹ to limit the operation of the pass laws,²² to undermine the consolidation of the grand apartheid program of Bantustans,²³ and to defend those opposing conscription.²⁴ 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.²⁵

In his fascinating account of the era, *Politics by Other Means: Law in the Struggle against Apartheid*, Richard Abel concludes that law did make a difference.²⁶ However, he notes that the use of law does have 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."²⁷ He concludes:

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 dichotomously. Law either makes all the difference or no difference at all. . . . [M]ost 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.²⁸

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 important today. Perhaps the most important lesson drawn from the era was the lesson that law can, and often does, serve as a constraint on the abuse of power.

As E. P. Thompson concluded in a memorable passage at the end of his famous examination of the Waltham Black Act of 1723, an act that created offenses aimed at curbing poaching and hunting in Waltham Forest²⁹:

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 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 bringing men and women into immediate danger.³⁰

Why did E. P. 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, often schooled in Marxism, expected that the use of law to oppose the apartheid state could never succeed. What happened in the 1980s, however, did not match this prediction. Law did at times produce just outcomes; not as often as human rights lawyers would have liked, but not as rarely as the theoretical assertion that the law is the tool of the ruling class could accommodate. The experience of South African

human rights lawyers, thus, echoed the conclusions that E. P. Thompson had drawn from his historical analysis of the eighteenth-century legislation. Thompson's statement that "[t]he forms and rhetoric of law acquire a distinct identity which may on occasion inhibit power and afford some protection to the powerless"³¹ struck a chord with human rights lawyers in South Africa and came to be widely discussed and acknowledged.

I do not suggest that these are the only memories of justice and injustice that will inform our constitutional project. There will be others. These four, however, are important, and each will contribute 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. In inventing both the practice and procedure of the Constitutional Court, as well as its physical building, these four strands of memory and history could not be ignored. Instead, we had to build on those aspects of our memory that are conducive to a new shared conception of justice, while leaving behind with "stern discipline" those aspects of our history that imperil the possibility of justice.

The constitutional negotiations that culminated in the first democratic elections in April 1994 brought one major change to the judicial system: the establishment of a new Constitutional Court with the mandate to protect and enforce the values of the new constitutional order. All other courts remained unaffected, and all existing judges remained in office; but the newly established Constitutional Court was placed at the apex of the system with respect to constitutional matters.

The eleven members of the Constitutional Court met for the first time in Johannesburg in October 1994. Of the first bench, six had been judges under the old

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order, although all six were recognized for their commitment to human rights and the rule of law. The other five judges, including myself, were drawn from the ranks of the legal profession and the academy. In all, seven judges were white, four were black; nine were male, and two were female. In a judiciary that at the time had approximately 150 judges of whom 146 were white and male, the new Court was noticeably diverse. Today, the Court's race diversity has increased markedly. Now, in early 2014, there are eight black judges and three white, but it is a matter of deep concern, given the express constitutional commitment to racial and gender diversity on the bench,³² that there are still only two female judges.

As a new court, the agenda for that first week-long meeting was extraordinary. Nearly everything had to be decided and initiated: modes of dress and address, rules of procedure, jurisprudential register and style, a building found or built, arrangements for the inauguration of the Court and the swearing in of the judges, and working methods, including the use of information technology and the decision whether to introduce a system of law clerks in judicial chambers.

The recurrent theme in addressing the various items on the agenda was the question of justice, or the possibility of justice in the light of our deeply unjust history and the fragility of our perceptions of justice. Again and again in the discussion that ensued, questions arose as to how best to foster the belief in the possibility of justice through adopting practices and processes that would resonate with the strands of memory that held out the possibility of justice.

So in designing the logo or official seal of the Court, in recognition of the importance of the practice of justice in communities throughout South Africa, the Constitutional Court chose 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." This image is now widely used throughout South Africa to represent not only the Court but the Constitution. It is an apt image of shelter and protection that draws on the memory (and present practice) of traditional justice.

Implicit in the metaphor of the tree are the principles of openness, civic participation, and simplicity, principles that inform the best practices of traditional justice that so many South Africans would understand. The metaphor of the tree, and the principles of openness, civic participation, and simplicity, came to be the informing principles of the new court building, which was finally completed in 2004.³³

The design of the Court is the antithesis of the grand neoclassical architecture that characterizes so many courts. Neoclassical architecture is whole and strong, asserting a confidence in the association of power and justice that is, for the reasons I have described above, absent in South Africa. Our building is fragmented, a low cluster of beautiful modern buildings that a citizen can enter without experiencing a sense of submission to authority or power. The Court stands adjacent to the old native jail, preserved as a historic site, and the juxtaposition of the two buildings is a constant dialectical reminder of the different possibilities of law.

The courtroom, too, is simple. Its walls are constructed from the unadorned bricks of the demolished awaiting trial prison, as I have described. Members of the public who enter the courtroom sit on raked benches, so that they are at eye level with the judges or looking down on them. There is no sense in the courtroom of the "majesty" of the law. Instead, it is a tentative room, almost incomplete. The brick wall is hemmed by a narrow glass window that permits those in the courtroom to see the

passing feet of citizens in the street outside. The main decoration in the courtroom is a large South African flag on the wall behind the bench, made in traditional bead work.

Throughout the building, the metaphor of the tree is reproduced: in the judges's meeting room, the wooden table is large and round, made of strips of wood to represent the rings of a giant tree; the foyer of the court is held up by pillars at unusual angles, representing the idea of a clearing in a woodland; both the court and the foyer are lit by irregular skylights that produce a dappled and changing light as the sun passes overhead.

The principles that inform the metaphor are also principles that inform the practice and procedure of the Court. The text of the Constitution seeks to establish procedures that facilitate the use of litigation to ensure that law does indeed serve the ends of justice. Many of these procedures are built on the learning from anti-apartheid litigation in the 1980s, in which civic-minded institutions and individuals sought to ensure that law was just. Many, too, are drawn from the experience of constitutional and public law litigation in the United States. For example, the Constitution contains a broad standing provision that 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.³⁴ From the start, the Court also permitted *amici curiae* (friends of the Court), and interveners, to participate in constitutional litigation to help the Court understand more fully the implications of the cases it was deciding.³⁵ This practice had not been widely used in South Africa before 1994, but has become an important part of constitutional litigation. The Court has also been slow to accept that a case should not be decided because the matter has become moot,³⁶ or on the

other hand, is not ripe. The view has been that it is important to address serious constitutional questions that arise in order to provide guidance to citizens and the government on the interpretation and application of the Constitution.

The Court has also repeatedly affirmed the principle of open justice,³⁷ asserting the importance of public access to observe court hearings, both in person and by way of radio and television broadcast. The principle draws on the practice of traditional justice in which community members observed, and at times participated, in the process of the administration of justice.

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.³⁸ All these aspects of our constitutional practice have been designed to enable the use of litigation to promote the possibility of justice in our new constitutional order.

Substantively, of course, the text of our Constitution engages directly with justice. First, the Constitution espouses explicit values that reject the injustice of the past. Those values, found in section 1 of the Constitution, are 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 multiparty system of democratic government, to ensure accountability, responsiveness, and openness. Human rights are given specificity in chapter 2 of the Constitution, which contains the Bill of Rights. The Constitution makes plain that it seeks a transformed democratic society, in which the divisions of our past are healed. It is emphatically not a "business as usual" Constitution.

The Constitution thus responds sharply to the strand of injustice in our memory by making clear that law must be founded on

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democratic values and may not be used for unjust purposes. It is South Africa's emphatic assertion of "never again," and courts are empowered through the supremacy clause to be guardians of the values established in the new Constitution.

South Africa's Constitution holds the vision or promise of a transformed society based on democratic values, social justice, and fundamental human rights. That vision cannot be achieved without acknowledging the complexity of our memories of justice and injustice. The task of establishing a just society in the aftermath of injustice is not easy, as Nietzsche warned. Ariel Dorfman, the Chilean author, made a similar admonition in the 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?³⁹

These are the questions that we must bear in mind 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 process, nor is its outcome assured. But if, as lawyers and judges, we commit ourselves to a habit of doing justice, it is just possible that a compassionate and principled conception of justice will be wrought, mindful of our history and founded in our constitutional recognition of the equal worth of every person.

ENDNOTES

- ¹ The first section of this essay is adapted from an address given by the author at the Nelson Mandela Foundation in Johannesburg on April 2, 2009. That address was entitled "For Life and Action: Justice, Reconciliation, and the Work of Memory." The text of that address was published in the South African legal magazine *Without Prejudice* in the same year.
- ² For more on the construction of the conception of justice in periods of political transition, see Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 3–4 and throughout the book.
- ³ Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life," in *Untimely Meditations* (Cambridge: Cambridge University Press, 1997), 76.
- ⁴ Muriel Horrell, *A Survey of the Race Relations in South Africa*, vols. 24–26, 28, South African Institute of Race Relations, Johannesburg.
- ⁵ Immorality Act 23 of 1957.
- ⁶ Prohibition of Mixed Marriages Act 55 of 1949.
- ⁷ Reservation of Separate Amenities Act 49 of 1953.
- ⁸ Group Areas Act 36 of 1966.
- ⁹ Natives Land Act 23 of 1913.

- ¹⁰ In terms of the influx control legislation enforced by the apartheid government, African people had to carry a “pass book” or “dompas” containing their personal details and a photograph; the pass book was meant to indicate whether a person was lawfully entitled to be in an urban area. The hated pass laws were repealed only in 1986.
- ¹¹ In this regard, see the comments by former Chief Justice PN Langa in his submission to the Truth and Reconciliation Commission (the TRC), reproduced in the *South African Law Journal* 115 (1998): 38. For a full discussion of the TRC’s investigation of the role of judges under apartheid, see David Dyzenhaus, *Judging the Judges: Judging Ourselves* (Oxford: Hart Publishing, 1998).
- ¹² Section 3(1)(a) of the Promotion of National Unity and Reconciliation Act 34 of 1995.
- ¹³ *Ibid.*, sec. 1(1)(xix).
- ¹⁴ See, for example, Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Cape Town: Oxford University Press, 2000); Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid’s Criminal Governance*, 2nd ed. (Cape Town: David Philip Publishers, 1996); Daan Bronkhorst, *Truth and Reconciliation: Obstacles and Opportunities for Human Rights* (Amsterdam: Amnesty International, 1995); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); and Dyzenhaus, *Judging the Judges*.
- ¹⁵ David Dyzenhaus’s term; see *ibid.*, 6.
- ¹⁶ Minow, *Between Vengeance and Forgiveness*, 10.
- ¹⁷ *Ibid.*, 12.
- ¹⁸ C. S. van der Waal, “Formal and Informal Dispute Resolution in Limpopo Province, South Africa,” in *The Shade of New Leaves Governance in Traditional Authority: A Southern African Perspective*, ed. Manfred Hinz (Berlin: Lit Verlag, 2006), 141 – 142.
- ¹⁹ See D. du Toit et al., *The Labour Relations Act of 1995*, 2nd ed. (Durban, South Africa: Butterworths, 1998), 9 – 11.
- ²⁰ Christina Murray and Kate O’Regan, *No Place to Rest: Forced Removals and the Law in South Africa* (Oxford: Oxford University Press, 1990).
- ²¹ Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980 – 1994* (New York: Routledge, 1995).
- ²² *Ibid.*
- ²³ *Government of Lebowa v. Government of the Republic of South Africa* 1988 (1) SA 344 (A).
- ²⁴ *End Conscription Campaign and Another v. Minister of Defence and Another* 1989 (2) SA 180 (C).
- ²⁵ See, for example, Bob Fine, Francine de Clercq, and Duncan Innes, “Trade Unions and the State: The Question of Legality,” *SA Labour Bulletin* 7 (1 – 2) (1981): 39 – 68; General Workers Union, “Reply to Fine, de Clercq and Innes,” *SA Labour Bulletin* 7 (3) (1981): 16 – 25; Fink Haysom, “In Search of Concessions: Reply to Fine et al.,” *SA Labour Bulletin* 7 (3) (1981): 26 – 41; and Hirsch and Nicol, “Trade Unions and the State: A Response,” *SA Labour Bulletin* 7 (3) (1981): 42 – 50.
- ²⁶ Abel, *Politics by Other Means*, 533.
- ²⁷ *Ibid.*, 538.
- ²⁸ *Ibid.*, 549.
- ²⁹ E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth, U.K.: Penguin, 1977).
- ³⁰ *Ibid.*, 266.
- ³¹ *Ibid.*

³² Section 174(2) of the Constitution stipulates that “[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

³³ See Bronwyn Law-Viljoen, ed., *Light on a Hill: Building the Constitutional Court of South Africa* (Parkwood, South Africa: David Krut Publishing, 2005).

³⁴ 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.”

³⁵ 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), para. 4; *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC), para. 63; *In re Certain Amicus Curiae Applications: Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 713 (CC), para. 3–5; and *Richter v. Minister for Home Affairs and Others* [2009] ZACC 3.

³⁶ See *President of the Ordinary Court-Martial NO v. Freedom of Expression Institute* 1999 (4) SA 682 (CC).

³⁷ *South African Broadcasting Corp Ltd v. National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC); and *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).

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

³⁹ Ariel Dorfman, *Death and the Maiden* (London: Nick Hern Books, 1991), 49.