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VICTIMS, SURVIVORS AND CITIZENS — HUMAN RIGHTS, REPARATIONS AND RECONCILIATION

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Inaugural Lecture by

PROFESSOR KADER ASMAL

PUBLICATIONS OF THE UNIVERSITY OF THE WESTERN CAPE

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Inaugural Lecture by
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On his installation as Professor of Human Rights Law
at the University of the Western Cape

Delivered on Monday 25 May 1992

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FOREWORD

The professorial inaugural lecture is for the university an occasion to celebrate - celebrate in the full meaning of the word, i.e. to perform publicly and duly, to observe and honour with rites and festivities, to publish abroad, praise and extol. Through the custom of the inaugural lecture the university celebrates and affirms its basic function, that of creating, preserving, transmitting and applying knowledge, particularly scientifically-based knowledge.

The university appoints to the position of professor one who has attained excellence in the handling of knowledge in her or his discipline, and through a jealous watchfulness over the dignity and esteem of this time-honoured position of excellence amongst scholars, defends the capacity of the university to advance human knowledge and human progress.

The University of the Western Cape is particularly honoured to celebrate by way of this address the inauguration of its first ever Professor of Human Rights Law. We take pride from both the position and the incumbent: the post demonstrates our commitment to scholarly relevance, the incumbent to the pursuit of excellence.

This university has distinguished itself amongst South African educational institutions for the way that it has grappled with questions of appropriate intellectual and educational responses to the demands of the social and political environment. That search involved debates and contests over what constitutes knowledge or valuable knowledge, over the nature of the process of knowledge production, over the relationship between theory and practice, about autonomy and accountability, about the meaning of "community" and about how the activities of a university are informed by the definition and conception of "community". The decision to establish a chair in Human Rights Law was arrived at as part of that process of searching for the appropriate forms of curricular transformation.

South African society with its history of colonial conquest and latterly apartheid rule is one bereft of a rights culture; and where the discussion of a bill of rights and the general establishment of an awareness of human rights had been started in recent times, it has often been motivated by a concern with the protection of traditionally advantaged sectors of society. A university like ours has an obliga-

tion to contribute to the debate about and the promotion of human rights in ways which will also be concerned with healing, reparation and reconstruction in this severely brutalised nation.

In this address marking his formal assumption of the University of the Western Cape's Chair in Human Rights Law, Kader Asmal gives testimony of the depth of scholarly rigour and the breadth of humane concern brought to and emanating from this position. The integral coming together of Asmal the international scholar, the anti-apartheid activist of long standing, the seasoned international solidarity worker, the spirited publicist is evidenced in this address which is sure to stand as a signal point of reference in our national debate about this complex subject.

The University had been privileged to attract to its staff some of the finest scholars from the ranks of the formerly exiled South Africans; this inaugural ceremony provides the institution with the opportunity to welcome into its midst one of those in the person of Kader Asmal.

G J GERWEL
RECTOR AND VICE-CHANCELLOR

VICTIMS, SURVIVORS AND CITIZENS - HUMAN RIGHTS, REPARATIONS AND RECONCILIATION

INTRODUCTION

It is a source of intense pleasure to me that I have the honour to speak to you tonight as Professor of Human Rights Law at the University of the Western Cape. The University has established this chair at a time when the legal landscape in South Africa remains littered with racist and discriminatory laws, the shameful detritus of a constitutional order which virtually denied the existence of the majority of our countrywomen and men.

This University has been a beacon of hope in the quest for basic human rights and self-determination. It is also an honour to return from exile to an institution that has inspired us.

It is therefore appropriate that this chair should be inaugurated here at a time of transition from the vile policies of apartheid which have so devastated our country to a rights-based democratic society.

On a more personal note, to give this lecture is in itself a challenge. I have attended numerous inaugural lectures over the past thirty years in Britain and in Ireland, which veered from the esoteric to the obscure, from the learned to the witty. All however attempted to be scholarly and detached.

But there can be no detachment or neutrality about the dialogue concerning human rights in our country. We live in a wounded, divided and deeply scarred society. We have had a history of wars of annexation and extermination, slavery and racial discrimination. Nevertheless the South African experience has also produced a vision of human relations that is the antithesis of the apartheid heritage.

This lecture is therefore a celebration of the alternative moral order which has played an indispensable part in the struggle for the freedom and dignity of the people of South Africa. For decades we have endured the ascendance of a corrupt value system associated with discrimination and racial exploitation; now at

last it is being forced to give way to an alternative perspective of governance based on democratic, non-racial values.

It would have been tempting but facile to have responded to white racism with an alternative and exclusive emphasis on the rights and needs of blacks. Instead, throughout the history of the resistance movement, the emphasis has been on the golden thread of non-racialism, which has been the foundation of the struggle of the victims and the oppressed. In practical constitutional terms, our liberation movement was the first organisation of its kind anywhere in the world which, as early as 1943, in the middle of the anti-Nazi war, laid stress on the need for a Bill of Rights; this, it was hoped, would provide the minimum protection for all South Africans, including those adhering to the perverted, bigoted and exclusive ideology of General Smuts' "racial discrimination with justice."

We are therefore celebrating the remarkable generosity, compassion and humanity of those who now come to the negotiation table not as victors after a war to lay down a set of prescriptions to be accepted by the vanquished, but as upholders of an alternative vision which seeks to forge a social contract based on law. The tyranny of the minority is to be replaced by a constitutional order which accommodates, recognises and includes the political, cultural and religious mosaic of traditions in our country. This is a victory for constitutionalism which has few parallels in the world.

Today is also Africa Liberation Day. Long before the establishment of the Organisation of African Unity, the 25th of May was celebrated as a day of dedication to freedom from colonialism. Many of us who were in exile cut our teeth on the campaigns for the liberation of the colonies of Portugal, France and Britain. We recognised the anti-colonial struggle as essentially the same struggle against overlordship, racialism and exploitation as our own. The countries of Africa took their rightful place in the international community in the sixties. Some began the task of reconstructing their societies from the thraldom of under-development due to colonialism. For some, the task of combating unequal relations was too great.

Few can doubt that the freedoms won by subject peoples have added to the legal and political patrimony of humanity. It is to Africa in particular that we owe the great emphasis on combating racial discrimination, now codified in the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, as well as the emphasis on non-discrimination and its correlative, equality. Since 1960, the liberated countries have provided the impetus for expanding the right to self-determination and to including the right

to development. It is the African Charter on Human and People's Rights which shows that humanity is not solely composed of selfish, self-centred individuals where that abstraction - the market - regulates all features of our lives; instead, the Charter displays a communitarian tradition of social solidarity of rights and duties which the eurocentric tradition of human rights marginalises, if it does not actually oppose it.

But, as Richard Falk has suggested, there is a need to refocus our perspectives on human rights. He was concerned with the use and abuse of human rights in the pursuit of US foreign policy. There are resonances in his evaluation for us in South Africa as we emerge from our darkness, especially as regards the way that the Reagan Administration and now, international agencies, attempt to treat free market principles as an indispensable ingredient of human freedom.

Many things have gone wrong in Africa, not least in the area of human rights. There must be a continuous process of assessment and re-assessment by human rights lawyers in order to get to grips with the malaise which has afflicted Africa and the present optimism associated with current trends on the continent.

I want therefore to use Falk's insights to address a matter of supreme importance to us in South Africa.

DEALING WITH THE PAST AND HUMAN RIGHTS

The acknowledgement that a culture of human rights must be developed in South Africa is one of the great triumphs of a rights-based approach to political life. But our insights are largely provided by a static state-based approach where it is assumed as an article of faith, that restricting the authority of a future state is the best guarantee of individual rights or the only real issue.

I therefore raise the query as to whether this is an adequate or satisfactory response to the pathology of apartheid and whether it is a satisfactory basis on which to build for the future. Should we not be looking at community expectations and community needs, examining what is needed and required of the law and, in particular, how to deal with the humiliation, brutality, deprivation and degradation of the past?

Even lawyers must recognise that history cannot simply be sealed off when a chapter such as the one we are leaving comes to an end and certainly not when to do so would be to ignore the suffering and injustice done to millions.

If formal or statutory apartheid has been consigned to the dustbin - although there are many limbs of the monster still to be shoved into the brimming bin - is it not necessary for our society to come to terms with just what that system was in order that we may establish our new order on firmer grounds? Is it not necessary to identify how the old order continues to manifest itself in our political, economic and social life? Is it not necessary to look at the legacy of apartheid both in its physical form and in the hearts and minds of our people?

If we look around the cities of our country, the eye settles easily on the enormous success of the grand design of group areas with their careful demarcations, each area cordoned off by strategic highways, which consign the majority to the grim townships and seclude the minority in splendid suburbs, protected by walls and rottweilers. If we look at the homelands, the dumping grounds for "surplus people" - the horrible success of one of the greatest demographic movements of people in our time - we will see the poverty and deprivation arising from forced removals and the rigorous application of the Land Acts.

If the Bill of Rights is not to become a bill for whites, it must help us to thrash out a reconstruction accord to deal with one of the most unequal societies in the world, the result of deliberate policies based on racial discrimination.

Apartheid, unlike feudalism, resulted from the deliberate pursuit of man-made policies. We cannot blame "divine providence" for what Allan Boesak has called "structured sinfulness". The question that needs to be asked now concerns the way we hope to make our fledgling human rights based system work: is it simply by a formal commitment to constitutionalism or should we take into account, as other countries are doing, the pain, humiliation, alienation and the need for justice of the dispossessed, the tortured, and the victims of our aggression in Angola and Mozambique?

Nelson Mandela has recently asked us to remember that the "... grievous wrongs, distortions and inequality established and maintained by apartheid have to be addressed, redressed and removed in an orderly fashion." Both political and legal remedies, he said, must be provided to deal with these wrongs; otherwise, there will not be a firm foundation for the development of human rights in our country.

Is there, therefore, a need for what Vaclav Havel has called the moral sense of personal responsibility or will the constitutional settlement that emerges from negotiations simply provide the general solidarity of exculpation that linked all Germans at the end of the Second World War?

WHY THE PAST CANNOT BE IGNORED

Coming to terms with the past is a difficult and, for some, a painful matter. We will have to close the book on the past, but before we begin to do it, we must not suppress it.

I offer the following ten reasons why the book must remain open now and for some time after a settlement has been reached.

First, there has to be a recognition of the illegitimacy of the system which has operated up to now. There will be formal democratic change; the structures of government and social institutions may accommodate themselves to such changes but the life-force, assumptions and the "old ways" will not change overnight. By closing the book on the past, the language of our rights discourse will remain trapped in the wreckage of the past. We will not understand why urban violence and decay have occurred and will continue to do so. We will deal with the symptoms, especially of dissidence, without understanding their cause. This approach will also be reflected in the way some will continue to assert the absolute relevance of the symbols, flags, logos and anthems of the apartheid era through a collective amnesia of the past. The past, therefore, in all its manifestations, had no place for the majority: it did not belong to us.

Second, the newly-acquired veneer of democracy by the previous upholders of apartheid - with their fancy formulae for minority rights - enables political conservatives and neo-racists to anchor their undemocratic ideologies in whitewashed national precedent, a past mysteriously purged of apartheid, its pristine virtues going back to the Orange Free State *Grondwet*.This sanitized version of history does not even expect forgiveness because the necessity for exculpation never arises.

A new democratic order cannot be based on the continuation of unrepresentative institutions which by their very nature lack impartiality and representativity and cannot continue as our common patrimony.

Third, the neglect of history will kindle resentment and may induce a chauvinist response. In order to consolidate the new democratic order, we cannot afford to deny the effects of the old order; below the surface, the old antagonisms may fester. The generosity of the majority must not be interpreted as allowing the minority to believe in their collective innocence.

We need a revival of moral conscience if we are ever to build from out of our diversity a common citizenship and a common national consciousness. The bonding will only come and our country can only be healed if we reject the euphemisms for separation such as "maintaining norms and standards" and protecting "community values" and attempt to reach out in a way to enable common values and standards to develop.

Some may be so dazzled by a South African cricket victory in Australia or the prospect of a gold medal for Elana Meyer in Barcelona that they forget, if they ever knew, what reaching out to forge non-racial unity really means. Reaching out means seeking black athletes in the townships, understanding the legitimate expectations of a Cape Flats unemployed youngster and the painful demand of a Namaqua farmer for the return of her land.

What we need is a time of debate and opening up. Through this we may enter what the Chileans call *reconvivencia*, a period of getting used to living with each other again. Our territorial separation, our master-servant relations, the waging of war on the populace, the criminalising of personal relations, have all prevented us from working, living and loving together. Our freedom of expression has been savagely suppressed in the past, but this must not make us afraid of dispute and disputation, especially on fundamentals.

Consensus, if it comes from the avoidance of debate, is a false consensus, and is highly dangerous. Such a consensus is like Pinochet's *amarre*, the political knot that he tied to keep the civilians in line.

We must not be afraid of raising the question of responsibility for the evils of apartheid. The question of guilt is another matter. There is sometimes a need, as George Orwell remarked, to add up two and two to see that they make four. Up to now, no one has put two and two together, so no one knows what they came to. Above all, it was not regarded as the sort of question we should ask.

Let us therefore ask the question. Otherwise, warlords of one kind or another will take without asking any question at all.

Fourth, it is essential that we confront the roots of violence in our country if we are ever to eradicate its effects. Routine condemnations and the establishment of special quick-reaction law and order forces, much beloved by bureaucrats, are not likely to reach even the symptoms. For us, this evening, it is necessary to recognise that there are two types of violence, both equally oppressive.

One type is the direct violence that kills immediately, especially in a war waged against the people. The State, with its panoply of powers and its secret armies and services, is the principal instrument. We have yet to grapple with the legacy of a murder machine orchestrated by the "total strategists' who, in the anonymity of the State Security Council, ordered and may still continue to, the elimination of all dissent. Accounting for the past in this area must include the dissolution of the national security state.

The second is the structural violence that kills slowly, through exploitation and repression.

A human rights statement is concerned with both types of violence. And not with the situation at present but also with the future and the past. Justice must not be limited to the formalities of procedure and due process, important as these are but must encompass a state based on equity and social justice.

A human rights agenda cannot be a recipe for the maintenance of the *status quo*. It cannot deal successfully with the symptoms of the disease without attacking the cause. It must attempt to prevent disease and, indeed, overcome the traumas of the past if it is ever to heal the wounds of the present.

Fifth, there is the argument that comes from Gramsci. If the old order is dying and the new is not yet born, can there be reconciliation simply through an assertion that new structures and new arrangements will be set in place? Is reconciliation between victim/survivor and the overlord possible on the basis of a Caliban and Prospero relationship, between master and servant?

Theologians focus on the need for confession and atonement in order to obtain forgiveness. This is a requirement which in South Africa should result in legal redress and compensation for prior wrongs. The Confession of 1982, better known as the Belhar Confession, adopted by the Synod of the Dutch Reformed Mission Church in October of that year, denied that there could be any moral or theological grounds on which to defend apartheid; the resulting breach in the wall of apartheid had remarkable consequences. For lawyers, liberation and justice should be the prerequisites for an effective agenda for human rights and for establishing the new order.

The sixth reason for accounting with the past is the necessity to avoid the revenge factor. In other so-called advanced countries, there have been traumatising acts of individual and collective revenge, often aimed at people at the

margins of society and power, while the real culprits escaped. We should not fall into the trap of making a whole community into a scapegoat for the policies of the past. Conversely, imposing collective guilt on what the Czechs call the *nomenklatura*, the officials of the old regime, effectively translates into society's collective innocence. This may be convenient for some but harmful to the ends to be achieved. We may have to identify those who have been guilty of heinous crimes, not for the purpose of prosecution but to acknowledge the nature of the system we are leaving.

We therefore need a revival of a moral consciousness that will accept the need for a New Deal in our country, encompassing much more than Roosevelt's public works or a welfare programme, and extending to a social contract involving a holistic view of development.

There is no place for revenge or purges in this, but without an understanding of the past, there cannot be a social and moral dividend for the future.

Seventh, there is the catharsis argument which calls for an outlet of emotion, and through an act of purgation allows for change without violent disruption. Milan Simecka, Czech writer after the so-called "velvet revolution" recently asked:

"Is it enough for the King to become just another citizen, without any privileges, or would it be more salutary to chop off his head, so that the people could watch the blood flow?"

His response was that any revolution or transformation act must stop at a certain point so as not to erode the social fabric of the community. But to stop the running sore of demand and counter-allegation, there has to be a formal act of renunciation. Catharsis cannot occur if there is an evasive approach reflected in the sentiment that we all have much to forgive and be forgiven for, in the indifferentism reflected in the banal statement that we are all guilty of malfeasance and wrong-doing.

The eighth reason is the truth and justice argument. It has been argued that the pursuit of those guilty of systematic abuse of human rights or systematic venality or crookedness may result in destabilising democracy. In Chile, for example, one reason for setting up the Commission for Truth and Reconciliation in 1990, soon after the dictator Pinochet stepped sideways, but not down, was to get to

the truth behind the thousands of "disappearances". The new Chilean president warned that it was necessary to balance the virtue of justice with the virtue of prudence. The experience of other countries, he said, has shown that rather than carry out punishment for past crimes, the stability of the democratic system is the best guarantee that there will not be violations of human rights in future.

The rationale for sacrificing justice for truth is the need to consolidate democracy, to close the chapter on the past and to avoid confrontation. Those who actually suffered were never consulted, and the mothers of the "disappeared" never agreed with their president. However, justice prevailed as even the Chilean courts, which had earlier surrendered their independence to the dictatorship, have now regained their courage and have begun to allow challenges to the amnesty law and the prosecution of senior military staff.

In South Africa, we have neither democracy to consolidate nor yet the truth.

In any event, the idea that one can in some way buy justice by paying money to those who were tortured - as is now happening in Argentina - is inadequate but may be necessary. Neither stability, democracy nor justice is served by this kind of pay-off.

To absolve the South African military or police of capital crimes, torture and ill-treatment through a general amnesty law which may emerge as part of the settlement, places its members above the law; its members are exempted from punishment for what would ordinarily be crimes.

This double standard in law enforcement cripples the principle of equality before the law which must underlie a future democracy and provides a hostage for the future. It is an argument against democracy itself. It presumes that a non-elected, authoritarian institution and not the popularly elected body has the final say in applying the law of the land.

The stability of a democracy is not built by granting concessions to the military on issues pertaining to its violent intrusions into civilian life. In any event, the exoneration of those guilty of truly heinous crimes perpetuates the culture of fear and intimidation that has prevailed in our country since 1948. Time and again the apartheid state has bestowed immunities, both prospective and retrospective, on police and military action, and in so doing has debased the coinage of the criminal law and encouraged state lawlessness. This can only create a precedent for future crimes.

The Argentinians call their immunity provisions "Impunity" laws. Immunity, as the Argentinian democrats have learnt, encourages recidivism. It is a ghastly legacy to hand to a democratic South Africa.

Finally, there is the protection of property argument. As we shall see, in Germany, property is being returned to the former owners of what used to be the German Democratic Republic because their property was confiscated or expropriated in breach of the generally-acknowledged right to property. As there will be a property clause in our Bill of Rights, the cynic should not be encouraged in his belief that the primary purpose of such a clause is to preserve property for those who obtained it under minority rule, regardless of whether it was obtained by fair means or foul.

The issue that arises is whether property rights in a future Bill of Rights can be used to protect the profits of apartheid. Would a Bill of Rights forbid reparations or affirmative action and thus prevent redress?

The answer, which I adopt, is provided by Professor Renfrew Christie, Dean of Research at UWC, in his usual irresistible fashion. Having traced the way the Land Acts, the group areas legislation and restrictions on black entrepreneurs deliberately impeded and retarded black progress, in favour of whites, he says that it is not morality, nor capitalist ethics in themselves which will prevent a Bill of Rights from being used to protect property.

Christie says:

> "It is a fact that no settlement will hold, no peace will be sustained, no treaty will work, no interregnum will be stable and no agreement will be valid which does not include some form of redressing of the ill-gotten gains of apartheid. A settlement cannot be achieved without adjusting apartheid's property patterns. The economy will not grow properly if property is completely illegitimate. Capitalism will not survive well in South Africa unless ownership is made legitimate."

A Bill of Rights is necessary for us, and it is only practical politics if compensation is exacted for unjust enrichment and for illicitly obtained and retained property. Reparations (private and public, taking various forms where the measures are systematic, orderly and fair) are the price for a Bill of Rights, not only morally, but pragmatically.

Such an approach will also avert economic warlordism.

It is ironic that this section of my lecture concludes, not with a moral argument, but a pragmatic one.

OTHER PLACES, OTHER REMEDIES

Many countries in recent years, faced with a transition from dictatorship to a democratic order, have tried to grapple with the past, partly to heal the wounds and partly to provide concrete redress for the offences of the past. Retribution has rarely been the primary motivating factor. In the majority of these countries, where the change has not been fundamental, as it will be in our country, an attempt has been made to ensure a surer basis for the new democratic order.

In Argentina, after a military dictatorship from 1976 to 1983 resulted in the disappearance or death of over 300,000 people, some of the torturers and murderers and the leaders of the armed forces were prosecuted in order to purge the horrors of the dictatorship. The Impunity Law subsequently passed created a great deal of controversy. More recently, compensation of 5,000 US dollars has been paid to the families of the "disappeared' and individuals who were tortured are beginning to receive compensation for each day of detention.

Even in Chile, while Pinochet retains the formal trappings of power, there has begun a slow attempt to bring to book some of the more evil men who destroyed the democracy of Allende. The Chileans say that reconciliation cannot occur without truth; justice, not punishment is being proposed in order to compensate the victims of past wrongs. But there is increasing pressure in all Latin American countries which have had military dictatorships to respect the obligation of successor democratic governments to investigate, prosecute and punish the crimes of former regimes. In Chile the Supreme Court has re-opened the issue of the validity of immunity legislation. In April 1992 the courts made break-through judgments ordering the arrest even of members of Pinochet's junta on kidnapping and murder charges. At the Inter-American Court of Human Rights there are challenges against Uruguay and Argentina over laws which have the effect of precluding such investigations.

In the Soviet Union, the past is being exhumed so that some insight can be provided into the degradation which gripped the former subjects of the Soviet Union. The files of the KGB are being made available and in different

republics, action is being taken against or bans are being placed on former state officials in order to break with the past. The newly-established Constitutional Court is at present investigating the record of the CPSU in order to determine whether the ban on the party imposed in 1991 has any validity.

In Czechoslovakia, a "Lustration" Law - a convenient way of avoiding the Kafkaesque word " purge" with its historical undertones - was passed in October 1991. This forbids a whole range of former officials from being employed in schools and from holding governmental positions for five years. These officials include agents and members of the former secret police, officers of the Communist Party above the level of district secretary and members of the people's militia. A new electoral law will soon forbid these groups from standing for election to the Czech parliament.

This has a ring of victimisation and revenge, as does the decision in Germany that a number of university lecturers and professors from the former East Germany should be dismissed because they are professionally tainted. Like the Czech "Lustration" law, these far-reaching laws and practices try to solve the problem of the past with a simple stroke of the pen, too simple a solution to a complex matter.

The German Government has only recently set up a commission of inquiry to investigate the responsibility of individuals in East Germany and attempts have been made to organise the return of the former head of state so that he could stand trial. But such trials of the top stand on shaky ground because of the implication that if Honecker is convicted, then the majority are absolved from responsibility for dutifully casting in their lot with tyranny. In a similar vein, the Hungarian parliament in November 1991 passed a law for the prosecution of former Communist leaders.

It is in Germany, though, that the law has continued to provide a safeguard against any form of collective amnesia concerning the Nazi years. Apart from the trials of war criminals which took place under Allied auspices and the process of denazification - stopped by the inauguration of the cold war and subsequently renewed in fits and starts - Germany has a remarkable record of compensation for past wrongs.

The German word for restitution - Wiedergutmachung - means "to make good again". Both the Federal Republic and the individual German states have attempted to make good the history of the National Socialist era - inside and

outside Germany - to those who suffered because they were politically opposed to the Nazis, or because they were prisoners-of-war or simply because they were Jews.

It was the Western Occupying Powers who enacted the first laws restoring property confiscated by the Nazis to the original owners. If such restoration was not possible, then compensation had to be paid. But there was no provision for the pain, suffering or general personal damage done to the victims of Nazi persecution, especially by medical experiment or forced labour. This came later.

The "new" Germany admitted that it had a duty to pay reparation to those inside and outside Germany for what the then Chancellor Adenauer called "unspeakable crimes". As late as September 1991, Kohl entered into an agreement with Walensa to compensate Polish forced labourers who had been forced into slavery in Germany.

Over 80 billion marks have been paid in compensation in the past 40 years. The duty to compensate arose, in the main, from the violation of fundamental human rights and for the vindication of such rights - a surer basis for the enhancement of human rights than any declaratory statement.

The German experience ought to have been raised by theologians and lawyers in South Africa because it has important implications for us. It is not simply a question of money. It is the acknowledgement which is vital to the process of rehabilitation.

After the collapse of the GDR in 1989 the German Government went even further when it began to grapple with the question of land and property appropriated by the former GDR regime. The general approach of the law in Germany is that land and property must be returned to the previous owners or to their heirs, on the principle that the German Basic Law protects property rights and that expropriation or confiscation was always contrary to German law. If the property cannot be returned, then there is a duty to pay compensation. Special machinery has been set up to deal with the return of such property to its owners and their heirs.

Obviously there have been some poignant personal crises for owners who had purchased property in good faith from the previous regime, and these cases have not always been dealt with sensitively. The principle of return, however, remains valid.

In addition, as in Argentina, the German Government has decided to compensate Germans unjustly imprisoned by the DDR. Such detainees are entitled to between 300-600 DM per month of imprisonment, on the grounds that their loss of freedom was a monstrous evil. Even the United States has now decided to compensate Japanese Americans who were detained after Pearl Harbour attack in 1941, at a time when large-scale internment of German-American citizens would not have been countenanced.

First year international law students will remember, though, the appalling judgment of *Fujii v. The State of California*, where the Supreme Court of California refused any remedy to the hapless US citizens; in this instance it was struggle rather than the courts which brought a remedy to the ex-detainees. There is a moral here for lawyers...

South Africa has made original and innovative contributions to the vocabulary of politics in the past, apartheid being the most significant. We do not have to be creative or innovative in order to provide redress to the victims of apartheid. They have survived and, ought, as citizens, to be compensated. We have enough precedents for this.

But what has been the response of those who are still in authority over us?

THE OFFICIAL RESPONSE

The response has been one of a deafening silence. It is the silence of insensitivity. We cannot build a culture of rights and respect for a new constitution, or even bargain in good faith for a settlement, unless there is some understanding and acknowledgment of the grievous wrongs committed in the name of apartheid.

There has been none. We have been told, on the highest authority, that apartheid has proved to be "irrelevant", "outdated", "inefficient" or, most recently by Mr de Klerk, that it has "come to a dead end". No Minister, past or present, has yet come to grips with the dire effects of apartheid. There have been statements of regret, extending from the very first such expression from the then junior minister, Leon Wessels, in February 1992: "We failed to listen to the...crying of our fellow countrymen - that must never happen again" to Mr de Klerk's seminal utterance in an obscure Japanese newspaper in October 1991: "We are very, very sorry for the pain which was caused by that period in our history and we are glad that the period has passed."

These are weasel words, forced out through pressure, uttered in foreign countries, intentionally obscuring a fundamental heresy, which can still even now claim that there was an ethical basis for apartheid. For example, in the passionate euphoria of the referendum victory of March 17, 1992, when Mr de Klerk said that the whites, who "started this long chapter in our history, were called upon to close the book on apartheid", he showed no understanding of what had happened in the previous 42 years.

With a barefaced audacity which historians may parse and analyse Mr de Klerk said:

> "What started as idealism in the quest for justice - because that was the starting point of the policy of separate development - could not attain justice for all South Africans and therefore had to be abandoned and replaced by the only viable policy that can work in this country and that is power-sharing, co-operation in the building of one nation in one undivided South Africa" (*Cape Times* 19 March 1992).

Contrast this self-serving approach to that of the National Conference of Church leaders where, in the Rustenburg Declaration in 1990, they denounced apartheid "...in its intention, its implementation and its consequences as an evil policy."

Willem de Klerk, in his biography of his brother, described apartheid as "darkness masquerading as light". For him apartheid could not prevail, not because it was unworkable, but because it was criminal. The one regret he expresses about his brother is "...that there has been no public or forthright confession that apartheid has been a fallacy. I think F W owes South Africa that confession, which would be a confession of guilt, ... the guilt of greed, alienation, rejection and arrogance."

It is clear why such a statement has not been made. It would deny the very basis of the order of which the National Party is the fountainhead. It would raise fundamental questions about land grabbing, confiscation of property compensation and the extent to which what is called "powersharing" is really an attempt to maintain the status quo. This approach also retards the necessary process of education of those who are confused and uncertain about their future but who, up to now, relied on the certainties of apartheid.

On the other hand, we have heard it asserted, and persistently invoked at Codesa by President de Klerk downward, that the apartheid regime is the properly con-

stituted and lawful government of a sovereign independent state and should not therefore have to surrender any of its powers to an interim government of national unity. On the same grounds, they also stoutly resist international participation in the process of change.

This is an attempt to roll back the whole tide of legal and political history since the fifties. The policies of apartheid have been universally condemned not because the world did not like the violations of human rights; other countries also violate rights, as successive South African foreign ministers from Eric Louw to Pik Botha have been quick to point out. White South Africa became a pariah because the policy of apartheid conflicted with legal rules and societal norms of great importance among the international community; and because the denial of self-determination, crimes against humanity, genocide, the systematic or mass violations of human rights, all combined to create the one great crime, the crime of apartheid. The cumulative effect of these crimes was to create one of the few examples of an international consensus.

These acts are forbidden under international law. They are the most serious crimes in the body of international law. It is for this reason that the highly prestigious international body, the International Law Commission, still included apartheid in its list of Crimes against the Peace and Security of Mankind in its recent draft of July 1991.

In effect, the ILC draft implies that a government which has practised such criminal activity is a criminal conspiracy and cannot speak for or represent its country. It is an illegitimate entity, even though it has *de facto* control over the state. The International Law Commission, reflecting what happened at Nuremberg at the trial of the nazi war criminals in 1946, refers to the individual responsibility of persons for such crimes. Whatever South Africa's law may have said, the description of such a crime arises independently of the internal law of a state, and the draft emphasises that the fact that apartheid was not punishable under South African law as it could not be, as the perpetrators were in charge, does not affect the criminal nature of the acts nor their punishment.

It is necessary to draw attention to the application of these rules of international law to our situation because a veil cannot be drawn across the vile and unspeakable acts committed in our country.

South Africa continues to have an apartheid state and a racist government. The National Party would like the state to stay as it is, with formal modifications,

freed of overt manifestations of racism. But the struggle against apartheid was never a simple matter of replacing one government with another. The new democratic order for which we strove requires a recognition of the act of self-determination which will take place when, for the first time, the excluded majority can play their rightful part in their destinies.

We must therefore hold out the hope for change. However, the National Party's constitutional proposals of September 1991 will maintain the status quo. There will be no reparations, no affirmative action, and real change will be impossible because the presidency and the government will only be able to decide by consensus. In other words, small parties will be able to veto any change.

'Power-sharing' - superficially attractive - is a device to ensure continued economic and social domination.

These proposals must be rejected because they will block all progress towards reconstruction. They will discredit democracy and undermine constitutionalism. Reconciliation cannot be initiated on such a political and constitutional quicksand.

CONTINUITY

In other words, there will have to be a break with the past, not simply a modification of the old order. We must take the past seriously as it holds the key to the future. The issues of structural violence, of unjust and inequitable economic and social arrangements, of balanced development in the future cannot be properly dealt with unless there is a conscious understanding of the past. "Power-sharing" can never provide the answer.

Rather, we should listen to what Professor Johan Galtung tried to say about the language associated with the theory of continuity:

> "Whatever the terminology, the function is always the same: make past wars and oppression, present forward deployment and inequalities look so natural and normal that they will be reproduced in the future."

As far as criminal responsibility for the past is concerned, there can be little doubt that there is an adequate legal and moral basis for the trial of those who

organised, aided and abetted, counselled and procured the crime of apartheid, and crimes against humanity. The Nuremberg Tribunal for Nazi war criminals not only gave the world the concept of prosecution for gross violation of human rights and for the inhuman conduct of war, but also the important principle of individual responsibility for illegal acts. You cannot therefore hide behind the state or plead superior orders.

To a large extent, though, the Nuremberg and Tokyo Trials were an example of victor's law, the capacity of the allies to prescribe the way in which the defeated would be treated. Very few Germans and Japanese were tried. There were problems as to whether all those in charge - the Japanese Emperor Hirohito, down to the infamous camp commanders - were all to be charged. In the event, there were compromises, which were not edifying.

Our road of change through negotiations is inconsistent with the idea of a Nuremberg-type trial of those who were in government, and the political masters who engineered apartheid would therefore be safe. There will be no Nuremberg-type trials.

Nonetheless, we cannot afford to close the book on those government agents guilty of the most heinous crimes, who continue to order killings. We must also give notice that there can be no legal or other cover for those who continue with hit-squad activities, conspire in assassinations and act through surrogates.

Law students know, as an article of truth, that some crimes are so terrible that the criminal law does not close the whole book on them; there is responsibility and accountability for them for an indefinite period. Murder is a classic example. There is no statute of limitations in favour of the murderer and against the victim.

Some crimes are even graver than murder. These are war crimes and crimes against humanity, which are the most serious crimes in international law.

Because some states attempted to impose a restriction on the prosecution of those alleged to have committed such crimes, the United Nations adopted the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity in 1968. These crimes can be committed in time of war or in peace, and include genocide and, significantly, inhuman acts resulting from the policy of apartheid.

We must therefore guard against the government-sponsored attempts to extend the idea of a general amnesty for those who opposed apartheid to cover the lia-

bility of those who maintained apartheid through killings, disappearances, and torture. Dawie in *Die Burger* implies that there is "cross-party political support for the idea that a general amnesty be extended to all offenders who committed such abuses." He cites the then "syndrome of total onslaught" in justification. (*Cape Times,* 22 May, 1992) It has even been suggested that Captain Brian Mitchell of the Trust Feeds massacre is likely to be treated as a political prisoner and pardoned (*Guardian Weekly*, 10 May, 1992).

This is an unconscionable effort to equate acts and motives which were protected by international law and morality to the deeds of an immoral system. An amnesty for those who opposed apartheid is necessary for the normalisation of political life. This has happened in other countries. Motive, intent and proportionality are the guiding factors.

Democrats and those who care for the health of our country must oppose any such moves towards a general amnesty for state ordained acts of violence and torture in pursuit of apartheid policies. In any event, a general amnesty on these terms may not bind a future government, which could still initiate prosecutions for crimes against humanity. These will, I hope, become specific offences in South African law, as has occurred in recent years in Canada, Australia and France. It may be possible to pull the shutters down on South African law. But international law may yet be invoked. Amnesty does not mean amnesia.

AFFIRMATIVE ACTION

What we may call negative action, the repealing of apartheid laws, and the renunciation of apartheid norms, will not in themselves suffice to build the new South Africa. We have to understand how race and sex have consciously and deliberately been used to hinder the participation of the mass of our people in the areas of employment, education, land and property; and then we have to use that understanding in positive, concrete ways.

To suggest that "market forces" and free competition are able on their own to deal with the distortions of the past is pure obscurantism. Our playing field is not just uneven; it was fragmented into unequal pieces in which the majority of players were not allowed on the field and were prevented from learning the rules. No market forces will give access to employment, land, housing and education to those who have been so absolutely deprived.

The introverted provincialism of many of the so-called experts (which in fact obscures huge vested interests) continues to deny the validity of the equality

principle. Yet there are major international conventions dealing with race and gender discrimination (adopted in 1965 and 1979 respectively) which permit, if not encourage, states to take special measures for the sole purpose of enabling deprived groups to advance and to enjoy the equal exercise of human rights and fundamental freedoms.

Such measures must not be considered discriminatory against others. There is no reverse discrimination, as is alleged. Careful and orderly programmes are necessary through an over-riding clause in the Bill of Rights to permit remedial measures as part of the reconstruction of our society.

This is equally true in relation to land and land rights. How can anyone guarantee respect for personal property rights, such as your home, your small farm and personal belongings, unless the victims of the forced removals and the group areas and those whom the land acts reduced to penury are able to obtain compensation or the return of that which was stolen from them?

Even the Urban Foundation - not notorious for its radical positions - calls for a "recognition that South Africa cannot move forward unless it deals with the injustices of the past".

The Government's response, in its White Paper on Land Reform of 1991, was very clear:

> "The interests of peace and progress [demand] that the present position should be accepted and that the opportunities afforded by the new law should be accepted. Any attempt to return to the previous order (?) will only disrupt the country's pace of development to the detriment of all."

It was only in the face of overwhelming opposition from the churches, organs of civil society and foreign governments that the government relented to a limited extent, setting up an advisory commission on land allocation. But in case this raised any false hopes, Hernus Kriel made it clear that "a programme of restitution is not practical or financially viable". The limited advisory role with restricted jurisdiction of this body is a response to pressure. It cannot deal with the enormity of the problems associated with land and property confiscation.

Land restoration, especially of those large portions still owned by government departments, would be the first step, as the Association of Rural Advancement puts it, in the healing of apartheid's scars.

Neither revenge nor victimisation should be on the agenda, as we see them occurring in certain European countries. However, compensatable wrongs cannot be ignored. The denial of land rights from 1913 onwards to blacks requires special machinery to deal with the access to land and the recognition of those with special interests in the land such as tenants and share-croppers. The victims of Group Areas must be compensated by the return of their property or by suitable financial reparation.

Slowly, there is a modest debate beginning on the topic of restitution for injustice. Business Day, representing a special alignment in our tradition, recently acknowledged that "It is widely accepted that part of the solution [to apartheid] includes reparations for past wrongs". But the Law Commission in its 1991 report on human rights has remained silent on this point.

We must address the issue now, if we expect constitutional rights and human rights to be observed in the future. The injuries caused by apartheid cannot all be undone immediately. The cost of forced resettlement, the infant mortality of millions, the lost opportunities through job reservation, the humiliation of the pass laws, cannot be undone or requited.

But the fruits of apartheid must not be left permanently in the hands of those who profited from it.

ECONOMIC, SOCIAL AND WELFARE RIGHTS

The battle lines for the debate on the content of our future constitution are now being drawn. One major issue of contention is clearly the relevance of economic and social rights and their place in the constitution. Some claim that these are not real rights but are either "directive principles of state policy" as in the Namibian Constitution, or simply "ideals" as the South African Law Commission called them.

This is not the occasion for a full discussion on this issue. But I would like to relate it to tonight's theme. To deny the existence of any rights except the ones associated with political freedoms, to marginalise rights which some lawyers may consider as non-justiciable, is to accept the bias in favour of the powerful; it is to accept a truncated view of humanity; it is like throwing a rope of sand to the poor and the dispossessed.

In accordance with international standards of human rights, we must assert the indivisibility of human rights. To promote civil and political rights alone is to

create an appearance of equality and justice, while leaving socio-economic inequality untouched and even entrenched.

Put in another way, as the Indian Supreme Court has described it, we must view the two generations of rights as two wheels of a chariot, each indispensable to the other. Our legislature must be under a constitutional duty to respect and enhance both sets of rights and the Constitutional Court must protect and vindicate them.

OUR NEIGHBOURS

Our new constitution will, all of us hope, have detailed references to international relations and something to say about the objectives of our foreign policy. We will ratify over two score of human rights treaties, resulting in a benign and acceptable form of external restriction of our sovereignty. We will also in this way enrich our patrimony and sensitise the post-settlement administration to new and higher standards of behaviour. It is only then that we will have moved from being a pariah to being a partner, especially to our neighbours.

But before this happens, there will have to be an acknowledgement of the enormity of the crimes committed by the predecessor government against Angola and Mozambique and their peoples in particular. There will have to be an accounting for the past.

It is a rule of international law that a succeeding government is bound by the acts of its predecessor. This is not a moral choice - most governments try to evade moral choices - but a matter of legal obligation. A post-settlement South African government, if it is to observe a higher standard in our relations with our neighbours, must recognise what has been done in our name.

Under international law, breaches of obligations impose a duty to pay reparation. Such reparation may take many forms, not the least of which is an apology which acknowledges and expiates. This will be a concrete sign of atonement and will help to overcome the pain of the devastation that our direct invasions and occupations and our creation or succouring of murderous groups have caused.

Undoubtedly it will be said that we cannot afford any form of reparation. But as Albie Sachs would have said, ask a wrong question and you get a mercenary

answer. "Affordability", the new South African word that has entered our dictionary of politics, comes trippingly from those who can most afford some sacrifice. It is not a question raised by the victims who survived apartheid because Mozambique and Angola gave us refuge and placed their territory at the disposal of the freedom struggle in Namibia and in our homeland. For us, it is a matter of justice.

In any event, there is no call on us to match the gesture, 46 years after the war, of the Federal Republic of Germany which in December 1991 settled over 500 million marks for the Polish victims of fascism: former concentration camp inmates, prisoners of war who were ill-treated and persons subjected to forced labour.

Instead we could give most-favoured-nation treatment to the products of Angola and Mozambique or make special arrangements in the trade preference area. We need not limit our response to State action. If our major companies see these countries as markets for the future, they should also assist in settling the account of the past. It would be a concrete example of atonement, and would help overcome the fears of a continuing hegemony by South Africa. It would also provide an assurance of practical assistance for the reconstruction of these devastated countries.

CONCLUSION

Nearly sixty years ago, the famous American black historian, W.E.B. Du Bois, drew attention to one of the great inescapable facts of our time, the exploitation and rejection of women and men of colour, when he stated that: "The problem of the twentieth century is the problem of the colour line".

We live at a time when the spectre of racialism is raising its head again in a number of European countries. We live at a time when, as Martin Walker put it recently in *The Guardian* concerning Los Angeles:

> "One of the world's richest cities, for so long the ultimate lure in the land of opportunity, has torn itself apart. America's free market has its costs, its democracy fails to embrace so many of its poor, and the high temple of consumer capitalism has been pillaged by its own excluded worshippers".

We live at a time when some, but not all, of the great colonial countries are slowly beginning to understand the nature of their relationship with their former colonies. It has, for example, taken a recent film by two Frenchmen, *War without a Name*, to make the French people understand the nature of the war they preferred to forget, and which was officially described as "an operation to maintain law and order". Who can doubt that French society and its relations with Algeria were deeply flawed by the collective sweeping under the carpet of a war in which nearly a million people died, and where many of the conscripts were not even aware that they were doing anything wrong.

We also live at a time when racialism dare not use its name in official circles in South Africa, and in a country where one part of the population waged an undeclared war against the rest.

The central human rights issue is still, as in Du Bois' time, the question of the capacity of the United States and other countries with black minorities to work out arrangements where black and whites can live together in mutual respect and under equal justice.
This question remains open, not only because such a society has not been achieved in the United States or Britain or France, but because it has not been achieved in any country where whites dominate.

The struggle for liberation in South Africa set the agenda for the removal of race and ethnicity as the primary determinants of political, economic and social rights. The liberation of South Africa and the removal of the legacy of apartheid will therefore provide the catalyst for the achievement by people of colour of a proper place in the sun, and their entry into the patrimony denied by slavery, colonialism, racism and exploitation.

In this sense, our struggle in South Africa is part of the world-wide struggle for freedom, equality and human rights for the victims of colonialism.

A human rights based culture is based on a special goal. That goal is a shared understanding, a shared history, not the simple imposition of a victor's vision of a united South Africa. History is littered with examples of noble visions imposed by a victorious party or by a state. This goal is necessary in order that we can work out a shared, not a fractured future. In order to achieve it, we cannot be content simply to come to terms with the past, important as this is.

The struggle for human rights is a struggle of humanity against the misuse of power. It is also the struggle of memory against forgetting as Milan Kundera, in

his opening to the *Book of Laughter and Forgetting* puts it, and as I have tried to show in this lecture. We must therefore ensure that memory is victorious.

Many countries are now setting up rehabilitation centres for the treatment of torture victims. Germany's only treatment centre for such victims is on the third floor, House 6 of an old redbrick building at Berlin's Westend Clinic. Its unwritten credo is Jean Améry's axiom about torture victims in the Gestapo jails. Its aptness to South Africa is clear:

> "The victim of torture can no longer make the world his home. He will always see his fellow humans as opponents and can never look out into a world in which the principle of hope prevails."

We must therefore ensure that through our future constitutional arrangements and structures, the victims of apartheid - our version of the tortured - can look us in our eyes with a hope born from the knowledge that justice has been done and will continue to be done. In this way, hope would have prevailed.