# Judicial Accountability under Apartheid

Submission to the Truth and Reconciliation Commission

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## 1. Why the judges should account

Judges are accountable to the law and nothing else. Their duty is to apply the law as impartial and independent adjudicators. During apartheid, the judicial duty was stated in the oath which judges took in terms of the Supreme Court Act 59 of 1959, s. 10(2)(a). They swore to 'administer justice to all persons alike without without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa'.

So South African judges placed themselves under an apparently more onerous duty - the duty to administer justice to all legal subjects. That duty was, of course, not to some ideal of justice that comes from outside of the law. The duty was to find justice in the law, justice which met the circumstances of particular cases. Still, it is worth emphasizing that the legislature saw fit to mention justice separately. It could have formulated the oath in a different fashion, for example, by saying that the judges should 'administer law to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the customs of the Republic of South Africa'.

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While the separate mention of justice is significant, it serves mainly to make explicit something that all would agree is implicit in the second fashion of formulating the oath. No judge would take office, swearing to administer the law, if he thought that administration of the law would serve the cause of injustice. It offends against common sense and the logic of morality to suppose that one could solemnly undertake a moral obligation in the service of immorality. So we can amplify our first statement of judicial accountability to say that the judicial duty is to apply the justice of the law.

There are two different kinds of criticism one can level at the judges of the apartheid era. First, one can criticise them for taking office at all, since the laws they had to apply so manifestly served an immoral cause. But this criticism does not so much address the way they carried out their judicial role as the moral mistake they made in taking on that role. It is not a criticism that addresses the issue of judicial accountability to law.

The second criticism assumes that there was justice to be found in the law but that the majority of the judges of the apartheid era failed to apply it. Because their dereliction of duty was one in respect of the law as well as of justice, they may legitimately be criticised. It is that criticism which I wish to elaborate in this submission.

Now this occasion is not the first on which such judges have been criticised in these terms. But accountability means more than being subject to criticism in academic journals and monographs and in the media. It means being required to respond to the criticism, to defend oneself against charges or to rebut them, in short, to account for one's conduct. The Truth and Reconciliation Commision has provided an occasion perhaps unique in the history of scrutiny

of the judicial role. It is an occasion where judges who served an oppressive regime could be made accountable without being put on trial.

It may be said that for judges to be made accountable in this fashion will politicise their office, and so undermine public confidence in the ability of an independent judiciary to play an important role in the new order. It may also be said that public confidence will be undermined and relationships between judges harmed if divisions are made explicit between the judges of the old order - divisions between the good and the bad. Both of these claims are without substance for the following reasons, which can be summed up as follows: If our judges fail to take up this opportunity, they will demonstrate their reluctance to be held accountable to that which alone can give us confidence in their office.

First, if there is any public confidence in the ability of an independent judiciary to play an important role in the new order, it is because there was a small minority of judges in the old order who were true to their role, who understood that their duty was the one stated in their oath. Highlighting the role that they played can only serve to inspire public confidence. Even more important, such highlighting can only assist the development of a public understanding of why it is crucial to have an independent and impartial judiciary for the application of the laws of the new legal order. If there is, as I shall show to be the case, a political aspect to the judicial obligation of fidelity to law, it is crucial for the public in a free and democratic society to be aware of the politics of the judicial role.

Second, if the judges who were derelict in their duty are not to be accountable for their dereliction, their influence will persist, whether they continue to hold office or continue to set an example to those who follow them in office. If one needs convincing on the pernicious

effects of trying to sweep the judicial past under the table of future legal progress, one should read the account by a serving Geman judge of the German postwar experience - Ingo Mueller, Hitler's Justice: The Courts of the Third Reich (Cambridge, Mass.: Harvard University Press, 1991).

Third, if judges absent themselves from the process of moral accounting put in place by the Truth and Reconciliation Commission, this will leave a large gap in the illumination of the context and content of moral choice under the difficult circumstances of apartheid. Judges had an important and privileged position in the institutions of apartheid. I will deal with their importance when I make the case for widespread dereliction of duty. In regard to privilege, one need only reflect briefly on the contrast between the judicial world and the world of 'security' which has been a principal focus of the Commission.

The security world was one of shadows and secrecy. It was populated by people on the ground who performed appalling acts often, it seems, with little understanding, even now, of the moral consequences of their action. It was also populated by those who gave them orders, whether their direct superiors, or those in the highest echelons of security, or their political masters. And these people were either complete ideologues, impervious to moral argument, or had complex views about the moral justification for deeply immoral acts. But what united them all was, first, that the only law in the world of shadows and secrecy was the order or command of one's superior. Second, disobedience to command could be followed by fatal consequences, but, at the least, would mean the end of one's career.

Judges during the apartheid era operated in almost the exact converse of the security world. First, they sat in open courtrooms, listening to carefully reasoned arguments often from

the most distinguished members of the bar, and their qualification to do that job required university degrees that trained one in argument and practical experience in making such arguments. Second, they had the benefit of exposure to the academic writings in professional journals and in monographs which analysed their role, writings which gave them the opportunity to reflect out of the courtroom about their duty in it. In this regard, the majority, who served apartheid rather than the law, also had the benefit of exposure to the judgments of the minority of their brothers; and this exposure was particularly important since it showed them that one could do otherwise in office. Third, while judicial advance through the ranks under apartheid usually depended on winning the favour of the politicians, as judges at any level they were guaranteed the complete security of tenure and generous salary thought appropriate to maintaining the independence and impartiality of the judiciary. Finally, they were given an unique opportunity to observe at close quarters both those who led the struggle against apartheid and its footsoldiers. Other white South Africans were subjected to a one-dimensional picture of the opponents of apartheid as the devil's fanatical followers. But judges had the opportunity, often over months, to carefully and impartially observe and listen to people whose moral case for opposition is today recognised as unassailable and many of whom are regarded today as moral exemplars of the human spirit under stress.

In short, judges were doubly privileged. They could carry out their duty without fear of personal repercussions and their duty was not one which required following orders - it required careful consideration of argument and careful attention to the particulars of cases. The reasons for the failure of most of them should thus be especially instructive if we are to

understand the question, 'Why apartheid?'. But that question can be properly answered only if they will come forward to tell us why most failed.

## 2. Judicial Dereliction of Duty

It is important to be clear about what is involved in the grave charge of judicial dereliction of duty. Judicial dereliction of duty is not at stake when judges are criticised for having got the law wrong, for not having understood the policy of a statute, for failing to defer to a tribunal more expert than they, for sentencing too harshly, or even for being swayed by prejudice about women, race, or sexual orientation. In all these situations save that of prejudice, their duty is not at all in issue. And in the situation of prejudice, one is pointing out that they have permitted the exercise of their duty to be swayed by considerations ruled out by their oath. They have, that is, failed to understand the scope of their duty in an important way but they are not (at least until they offend again) in dereliction of their duty.

Things are different when the judiciary, especially the members of the highest court of the land, is accused of being collaborators in a 'war against law',[2] of conniving at the 'lawless' exercise of state power,[3] of 'a betrayal of the principles to which it owes its existence'.[4] In this

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[2] N Haysom and C Plasket, 'The War Against Law: Judicial Activism and the Appellate Division' (1988) 4 South African Journal on Human Rights 303.

[3] G Budlender, 'Law and Lawlessness in South Africa' (1988) 4 South African Journal on Human Rights 139, at 139-40.

[4] E Mureinik, 'Pursuing Principle: The Appellate Division and Review under the State of Emergency' (1989) 1 South African Journal on Human Rights 60, at 62-3, commenting on Omar v Minister of Law and Order 1987 (3) SA 589 (A) and Staatspresident v Release Mandela Campaign 1988 (4) SA 903 (A).

situation, judges are accused not of a failure to understand the scope of their duty, but of acting outside of that scope - of foresaking or abandoning their duty altogether.

Under apartheid, the process of judicial dereliction of duty began in 1957, when the majority of the Appellate Division bowed to intense government pressure, including the crude packing of the court with executive-minded judges. For in that year the court, Schreiner JA dissenting, upheld the validity of the Senate Act of 1955, which inflated the number of senators in the upper house in order to give the government the two thirds majority it required to take coloured voters off the common roll.[5] After that, with very few exceptions, the court in decision after decision proved itself alert to assist the implementation of apartheid policy and to give the executive and the security forces the free hand the government wanted them to have in dealing with opposition to apartheid. While the judges of the Appellate Division had for the most part the assistance of the majority of judges in the courts below, they also had from time to time to reckon with powerfully reasoned judgments from those courts, especially from the Natal bench, and, occasionally, with a vigorous dissent from one of their own number.

In nearly all these cases, the basic question the judges had to answer concerned whether they should impose constraints of legality on executive decisions, including decisions about how to implement apartheid policy, decisions about the suppression of political opposition and the detention of opponents, and decisions about the content of regulations made under statutory powers. Examples of the legal principles at issue included the following: the principle that policy should be implemented in a reasonable or non-discriminatory fashion;

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[5] Collins v The Minister of the Interior 1957 (1) SA 552 (A).

the principle that someone whose rights are affected by an official decision has a right to be heard before that decision is made; the principle that, when a statute says that an official must have reason to believe that x is the case before he acts, the court should require that reasons be produced sufficient to justify that belief; the principle that no executive decision can encroach on a fundamental right, for example, the right to have access to a court and to legal advice, unless the empowering statute specifically authorises that encroachment; the principle that regulations made under vast discretionary powers, for example, the power to make regulations declaring and dealing with a state of emergency, must be capable of being defended in a court of law by a demonstration that there are genuine circumstances of the kind which justify invoking the power and that the powers actually invoked are demonstrably related to the purpose of the empowering statute.

It is very important to understand why such principles are fundamental principles of legality. Take the principle that no executive decision can encroach on the fundamental right to have access to a court and to legal advice, unless the empowering statute specifically authorises that encroachment. The right to legal advice, like its close relation in the right to have access to the courts, is a fundamental right because without it the law cannot be effectively enforced. The doctrine that such fundamental rights may not be encroached upon without specific legislative authorisation exists because, without it, the idea of a legislature enacting enforceable law becomes incoherent. Since, that is, the courts pronounce on what the law is when there is controversy on that issue, to bar someone from access to legal advice and to the courts is to preclude the enforcement of law.[6]

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[6] See especially E Mureinik, 'Fundamental Rights and Delegated Legislation' (1985) 1 South African Journal on Human Rights 111 and both on this point and more generally, 'Pursuing Principle: The Appellate Division and Review under the State of Emergency'.

All the other principles have a similar role - they are principles which in one or other way uphold the most important requirement of the rule of law, the requirement that officials must be able to show that their conduct is in accordance with the law.

In a legal order where the legislature is supreme, judicial scrutiny of official conduct for its legality is of course to some extent conditional on the legislature not saying explicitly that it wishes its administration to act illegally. The qualification is necessary because judges, in meeting their duty to administer the law, should take pains to find their legislature not guilty of wanting to subvert the rule of law. That duty explains why judges should require very explicit expressions by the legislature of an intention to evade illegality and why they are prepared to read the most explicit such intention - an ouster clause which seeks to oust judicial review for legality - out of the statute in which it is contained.

In the 1960s and 1970s, the majority of South African judges began to chip away at the content of their duty. In decision after decision, they found more or less implicit indications that the legislature wished its administration to act unconstrained by fundamental legal principles.[7] Academics who commented on this process warned them in very clear terms that the process of chipping would result eventually in a complete dereliction of their duty. But the majority of judges ignored these warnings and by the late 1980s, with PJ Rabie at the helm, the judiciary had reached the point at which it had betrayed the 'principles to which it owes its existence'.

[7] They also often distorted the rules of criminal law and evidence in evaluating the defence on criminal charges of opponents to apartheid - see M Lobban, White Man's Justice: South African Political Trials in the Black Consciousness Era (Oxford: Clarendon Press, 1996).

In this process, the judges adopted an approach to the interpretation of statutes which I have termed in other work a 'plain fact approach'.[8] Plain fact judges hold that the judicial duty when interpreting a statute is always to look to those parts of the public record that make it clear what the legislators as a matter of fact intended. In this way, the judges merely determine the law as it is, without permitting their substantive convictions about justice to interfere. And in South Africa, the facts of the public record was very clear as to what the National Party majority in Parliament wanted. Indeed, judges knew from the record that if they required observance of the principles of legality, the government would quickly amend statutes to make plain the intention that these should be implemented unconstrained by these principles.

In seeking to understand the judges who were in dereliction of their duty, it is useful to distinguish between two groups. The first group thought they had a moral reason for interpreting statute law in the way they did.[9] They adopted the view that their duty as judges was to adopt the plain fact approach because it is most likely to determine what law in fact is in accordance with the actual intentions of the majority of the legislators who voted for the statute. The legitimacy of that approach though depends on a democratic theory which says that the people speak through their elected parliamentary representatives, and thus the statutes enacted by the legislature must be applied by judges so as best to approximate what those representatives actually intended. In other words, the legitimacy of an approach which requires

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[8] D Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford: Clarendon Press, 1991), 57. The term was coined by R Dworkin, Law's Empire (London: Fontana Press, 1986) 6-11.

[9] For an example of a judicial defence of the plain fact approach which seems to exemplify more the attitude of this first group, see N. Ogilvie Thompson, 'Speech on the Centenary Celebrations of the Northern Cape Division' (1972) 89 South African Law Journal 30.

judges to ignore at the level of interpreting the law their substantive convictions about what the law should be requires a substantive commitment at a deeper level about the intrinsic legitimacy of that law. Since the parliament whose statutes they interpreted was illegitimate by the criteria of any democratic theory, the substantive justification had no purchase. But because the plain fact approach operates in deliberate detachment from the substantive values which justify it, it had come to assume a life of its own in democratic legal orders in which the legislature was considered supreme. And those South African judges who adopted the approach because it seemed right for judges to ignore their substantive convictions about the law may seem less culpable than the others, if only because they did not think that it was their moral duty to support apartheid. But once it was pointed out to them in different ways - by academics, in the judgments of their brother judges, by the lawyers who appeared before them, and by the opponents of apartheid whose fate turned on their decisions - that the substantive justification for their approach was missing, they should have reconsidered.

There was much more wrong with this group's adoption of the plain fact approach than a missing substantive justification for it. First, in the context of a democratic legal order, proponents of a plain fact approach not only can supply a justification for the approach, but the approach will not generally be tested in the same way as it was under apartheid. The powerful in a democratic legal order will, as a matter of character and accountability, not wish to test the limits of legality in their statutes. As a result, while there might be much to criticise in the actual decisions reached by plain fact judges in a democratic legal order, these decisions will not usually put the judges at risk of dereliction of duty. But adjudication in the apartheid context showed what is wrong with the plain fact approach on its merits as an approach to

legal interpretation. Under abnormal conditions - under conditions which are the opposite of those in which the approach is designed to work - it is destructive of legality. For that reason, judges who adopted the approach in this first group should have dropped it once its consequences had been vigorously pointed out to them.

Second, this group's allegiance to the plain fact approach helped to provided an important smokescreen for an illegitimate government which, though generally defiant of the moral condemnation of its policies, craved legitimacy. This point is best made by considering the other group of judges who adopted a plain fact approach; they did so because the approach so clearly served apartheid and its security apparatus.

This group equated the 'customs of the Republic of South Africa' with the customs of the unreformed National Party, to the extent that one of their legal pioneers, LC Steyn, as the first National government appointed Chief Justice, was prepared to inject racial prejudice into South Africa's courtrooms because of his sense of justice - his regsgevoel.[10] It is only this group's ideological commitments that can explain the fact that benches were put together systematically in order to secure at least majorities, preferably unanimities, for the result that conduced best to government policy.[11] For such machinations were no different than the actions of the various National Party Ministers of Justice who sought to pack the courts with

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[10] R v Pitje 1960 (4) SA 709 (A), analysed in RJP Jordan, 'Separate Tables', (1961) 78 South African Law Journal 152, E Cameron, 'Legal Chauvinism, Executive-Mindedness and Justice: LC Steyn's Impact on South African Law' (1982) 99 South African Law Journal 38, at 62-4, Dyzenhaus, Hard Cases in Wicked Legal Systems, 76-9. There were, of course, much earlier examples, notably Lord De Villiers's judgment in Moller v Keimos School Committee 1911 AD 635 and Beyers JA's judgment in Minister of Post and Telegraphs v Rasool 1934 AD 167. For analysis, see Hard Cases in Wicked Legal Systems at 53-63.

[11] See E Cameron, 'Nude Monarchy: The Case of South Africa's Judges' (1987) 3 South African Journal on Human Rights 338; J Dugard, 'Omar -Support for Wack's Ideas on the Judicial Process?' (1987) 3 South African Journal on Human Rights 295 and 'The Judiciary and National Security' (1982) 99 South African Law Journal 655, and G Bindman, South Africa and the Rule of Law (London: Pinter Publishing (International Commission of Jurists), 1988).

judges they thought could be relied on to produce the right results. Nevertheless, when the judges in this group felt compelled to defend their record in the face of academic criticism, they quickly retreated into the other, claiming that all they were doing was applying the law as they found it.[12]

When they took this step, they mimiced their political masters, who saw that one cannot coherently claim both a commitment to the rule of law and that the judicial duty is to follow the orders of the government. In other words, since the politicians wanted the legitimacy that goes with the claim that one is governing in accordance with the rule of law, they too adopted the plain fact approach - the judge's duty is to put aside his substantive convictions about justice when interpreting the law.

Put differently, since the plain fact approach offers an interpretative approach to law which leads to the results the National Party government desired, it became quickly apparent to politicians that the appointment of plain fact judges from whichever group would allow the government to have its cake and eat it too. It could enact statutes which were not altogether explicit about the underlying unjust policies, thus not embarrassing too much the conservative politicians in the West on whose support it relied. And in the same cause of maintaining support and, of course, its own self-esteem,[13] it could claim that, whatever else was said in criticism of its policies, at least it was committed to something considered crucial to legitimate

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[12] See for example, LC Steyn, 'Regsbank en Regsfakulteit', (1967) 30 Tydskrif vir Heedendaagse Hollandse-Romeinse Reg 101 and the interview with then Chief Justice Rabie, Sunday Star (3 May 1987), quoted in D Davis 'The Chief Justice and the Total Onslaught' (1987) 3 South African Journal on Human Rights 231.

[13] For sensitivity of both government and judiciary on this issue, see the reaction to criticism described and analysed by E Mureinik, 'Law and Morality in South Africa', (1988) 105 South African Law Journal 457.

government in the West - the rule of law. For in South Africa independent judges interpreted the law, including the law which pertained to the legality of executive decisions.

I said earlier that judges had an important and privileged position in the institutions of apartheid. And I have now explained most of the issue I postponed - why their position was important. All that remains in this regard is to quickly to consider what would have happened had the majority of judges not acted in dereliction of their duty.

Had the judges done their duty and applied the law in a way that made sense of their judicial oath, the government would have had to choose one of two options. It could have openly announced that it could not both abide by the rule of law and maintain apartheid, or it could have subjected its administration to the constraint of the principles sketched earlier. The first option would have significantly decreased support for it both in the international community and at home.[14] The second would have opened up precious space for opposition from within.

The South African judiciary let the government escape from this dilemma and for that it is accountable not only for dereliction of duty. It is also accountable for facilitating the shadows and secrecy of the world in which the security forces operated and for permitting the unrestrained implementation of apartheid policy. It thus bears responsibility for the bitter legacy of hurt which has been the main focus so far of this Commission.[15]

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[14] And had the government taken this option, judges faithful to their duty could have denounced the statutes for illegality - that is, not for lack of compliance with some extra-legal ideal of justice, but for failing to be law.

[15] The judges were warned of this as a likely consequence to their approach to principles of legality in the first major critique of the judiciary published in South Africa - AS Mathews and RC Albino, 'The Permanence of the Temporary - An Examination of the 90- and 180-Day Detention Laws' (1966) 83 South African Law Journal 16.

3. Judging the Judges and Ourselves[16]

We need to inquire into the judicial record under apartheid for several reasons, most of which I have already mentioned. One set of reasons pertain to the past.

South Africans are entitled to know how and why the majority of judges failed so miserably in keeping to their oath of office. They need to know how men in so privileged a position, with such an important role, and with so much space to do other than they did, made the wrong moral choice, one clearly in dereliction of their duty. For that inquiry can only help to illuminate the important issue of the moral choice of all of us who, under apartheid, enjoyed positions of privilege and comfort.

South Africans also need an accounting from the judges because the consequences of the majority choice made over the years were not only severe, but clearly pointed out to the judges from an early stage in the process of judicial dereliction of duty.

Finally, one should not forget that the judicial world, and the world of the legal order in general, was not wholly untouched by the world of secrets and shadows. South Africans need to know what messages and intimations were passed from politicians to judges, from judges to politicians, and between senior and junior judges, in the cause of maintaining a bench supportive of government policy.

For the future, it is important for South Africans to understand and debate the politics of the judicial role. The rule of law is not an apolitical doctrine. It imposes constraints on

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[16] I take this title, though not necessarily all the arguments, from my earlier publications on this topic: 'Judging the Judges and Ourselves' (1983) 100 South African Law Journal 496; 'Judging the Judges and Ourselves II: The Just Judge and Other Subversives' (1984) 101 South African Law Journal 553; 'Judging the Judges and Ourselves III: The Just Judge and Other Subversives' (1984) 101 South African Law Journal 733.

government, the constraints of government in accordance with the fundamental principles of the rule of law. That there was a small minority of judges prepared to uphold the rule of law under extreme pressure is surely what permitted the idea of an independent judiciary to retain legitimacy in the new political order. A judicial accounting for the apartheid years can only help us to understand the ideals which we should ask judges to uphold, as we open up the process of judicial appointment to public scrutiny, as we work out the criteria for the composition of the bench, and as we evaluate the performance of the judges.