

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

Inaugural Lecture by
PROFESSOR KADER ASMAL
B.A. (Unisa), LLB. (LSE), LL.M. (LSE), M.A. (Dublin)

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

Delivered on Monday 25 May 1992

Xz-Catwmm

PUBLICATIONS OF THE UNIVERSITY OF THE WESTERN CAPE
Series A No. 84

Copyright Reserved

ISBN a-1-86808-121-2

UWC PRINTING DEPARTM ENT
BELLVILLE
1992

Id

sxsmv: i At

i? 1
A ,
E

,aae-e ,xr - . '

3.940.;

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 pro-

duction, 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 transmission.

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 slatted

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 ascendancy 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 thralldom 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

'3'.

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, it 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 "li... 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?

n. v rmrraruemm_Mrmo-Mlmvmi u qvwsmawr-nw A .l _ _ en. . . , . r

y....-m...:u:,

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 white-washed national precedent, a past mysteriously purged of apartheid, its pristine virtues going back to the Orange Free State Grmtdwerfl's 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.

10

-Jiz;;z- u at it,

A 4:524133 ;

"N: 125m ai L

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 utotal 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 innumerable 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 indifference 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

1')

..

T E: E:

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 unelected, 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 devalued 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.

14

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 at 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 will 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 (if 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

16

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 when 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 Warsaw to compensate Polish forced labourers who had been driven 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."

18

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: t

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 "dark-

ness 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-