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CHAPTER 1

HUMAN RIGHTS AND NATION-BUILDING

THE CIVIC STATE VERSUS ETHNO-NATIONALISM

The quest to build a 'culture of human rights' in South Africa after the multi-racial elections of 1994 needs to be understood in the context of a sea-change in global politics, and the rise of human rights as the archetypal language of democratic transition. A revived language of liberal democracy became increasingly prevalent in the mid-1980s, and was accentuated by the demise of the former Soviet Bloc and the rise of ethno-nationalist conflict in the Balkans. Since 1990, nearly all transitions from authoritarian rule have adopted the language of human rights and the political model of constitutionalism,¹ especially in Latin America and the new states of Eastern Europe.²

The end of the Cold War and the threat of irredentist nationalism led many intellectuals in Europe from a variety of political traditions to promote human rights and a return to the Enlightenment project. Among them, those as recondite as Jürgen Habermas (1992), as erudite as Julia Kristeva (1993) and as media-friendly as Michael Ignatieff (1993) advocated the establishment of constitutionalist states based upon the rule of law. All converge on the view that nations must not be constituted on the basis of race, ethnicity, language or religion, but should be founded instead on a 'community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values' (Ignatieff 1993:3-4). In this formulation, human rights are portrayed as the antithesis of nationalist modes of nation-building.

Habermas made one of the most influential constitutionalist statements of the 1990s in his paper 'Citizenship and National Identity' (1992). Here, he sees political change in Eastern Europe as having restored an older Enlightenment political tradition and recaptured the language of rights. Rights must do a great deal in Habermas' formulations: they underwrite an Aristotelian conception of participatory citizenship; they create a barrier to the totalitarian pretensions of states; and they resolve the awkward relationship between citizenship and nationalism:

The meaning of the term 'nation' thus changed from designating a pre-political entity to something that was supposed to play a constitutive role in defining the political identity of the citizen within a democratic polity. The nation of citizens does not derive its identity from some common ethnic and cultural properties, but rather from the praxis of citizens who actively exercise their civil rights. At this juncture, the republican strand of 'citizenship' *completely parts company* with the idea of belonging to a pre-political community integrated on the basis of descent, a shared tradition and a common language [my emphasis]. (1992:3)³

Habermas' aim is to recover a republican tradition of rights from the grasp of the nationalist traditions which once seemed to own it. In his formulation, the rule of law and the 'praxis of citizenship' transcend nationalism in its cultural and tradition-bound form. The allure of rights in the post-Cold War era is that they prescribe basic human rights as an antidote to ethnic nationalism. As Ignatieff states: 'According to the civic nationalist creed, what holds society together is not common roots but law' (1993:4). The concrete practice of claiming citizenship rights creates a political culture which displaces ethnic nationalism and deflects the romantic politics of ethnicity, culture, community or tradition.

Constitutionalist discourse among political commentators within South Africa bears a close resemblance to its European counterpart. South African constitutionalists also see democracy as the antithesis of any sort of nationalist project, which is associated solely with the previous apartheid state.⁴ Supporters of constitutionalism argue that an overarching moral unity cannot be achieved through cultural symbols since there is no 'ethnic core' in South Africa around which an overarching ethno-nationalism could be built, even if this were desirable. Instead of creating unity and identity out of cultural nationalism, the state should create a culture of rights based upon an inclusive and democratic notion of citizenship.

Some South African writers have gone a step further than their European colleagues by arguing that human rights should not be a form of nation-building at all. They argue that nation-building is not a guarantee of democracy, and they point to the failure of nation-building in other parts of Africa and the checkered history of nationalism in Europe. Instead of nation-building, they encourage the state to build legitimate and representative state institutions which respect fundamental human rights. Rather than attempting to build a nation, the new regime should build a working constitutional democracy so as to replace destructive nationalist sentiments with constitutional

patriotism to a civic state. Fundamental rights and their protection by state institutions are an alternative to nationalism, but they perform similar functions – by creating national reconciliation and a sense of belonging and unity.⁵

National identity unfolds not through ancient symbols but through the practice of claiming basic rights. As Johan Degenaar wrote: 'In one sense we can still speak of the nation as the congruence of culture and power, but now culture has shifted from a communal culture to a democratic culture' (1990:12). South African constitutionalists were generally quite confident that the constitutionalist state would enjoy legitimacy and this would lead to a civic national identity. Over time, as the Bill of Rights, backed up by the legal system and Constitutional Court, protects citizens in a neutral manner, then a national consciousness and sense of belonging will emerge 'naturally' over time.⁶

Finally, human rights have the capacity to resist the limitation of rights to any one group of people; that is, they are seen as pan-ethnic, and irreducible to forms of ethnic particularism. The individualism of human rights chimes with the Charterist non-racialism professed by the ruling African National Congress⁷ which won the 1994 and 1999 elections. Both political philosophies assume South Africa to be a society of individual citizens, not a society of racial communities with group representation and minority rights.

LEGAL IDEOLOGY AND NATION-STATES

My reservations about constitutionalism concern its sociological blindness to the pressures forcing transitional regimes to pursue a program of bureaucratic legitimization. Constitutionalists usually assume that national manifestations of human rights will remain true to their international orthodoxy, but instead human rights are dramatically redefined to suit national political constraints.

In the years following the first multi-racial elections there was a remarkable degree of consensus in elite circles that popular conceptions of democracy could be channeled into building a constitutional state based upon a bill of rights and the power of judicial review. Within this line of thought, there was a worrying unanimity of opinion that a constitutionalist project could be wholly distinct from expressions of 'pre-political' nationalism. Against this view, it will be argued that constitutionalism, state-building and the creation of what is termed a 'culture of human rights' cannot be separated so easily from classic, communitarian forms of nation-building. Instead, human rights were subjected to the imperatives of nation-building and state formation in the 'New South Africa'.

Political scientists writing on constitutionalism often operate with a set of over-rigid dichotomies; between nationalism and constitutionalism, between political society and civil society, and between the social processes involved in constructing a 'state of rights' and ethno-nationalist versions of culture. This means that they are often blind to how human rights talk is integrated into the nation-building project. Human rights talk does not, in the earlier phrase of Habermas, 'completely part company' with nationalist understandings of community. To the contrary, human rights talk has become a dominant form of ideological legitimization for new nation-building projects in the context of constitutionalism and procedural liberalism. Nation-building is not an end in itself, but a way to engender the necessary pre-conditions for governance. By contributing to the construction of a new notion of the 'rainbow nation', human rights advance certain pressing imperatives of the post-authoritarian state, namely the legitimization of state institutions and institutional centralization in the context of legal pluralism (which is explored in Part II).

Some constitutionalist conceptions of rights can involve a certain legal fetishism in that they often rely upon a conception of law as pristine and unsullied by surrounding discourses on culture, ethnicity and nationalism. This is apparent in recent debates on the character of judicial decision-making of Constitutional Court judges, between literal approaches aligned with Joseph Raz and interpretive frameworks influenced by Ronald Dworkin. A literal reading of legal texts such as the Constitution, has, for commentators such as Dennis Davis (1998:128), resurrected legal positivism in the South African context.⁸ The main advocate of an ordinary-language approach to judicial decision-making, Anton Fagan (1995), draws upon Joseph Raz to say that legal texts are the source of all rules and that judges must do no more than give the text its ordinary meaning. Fagan advocates an apolitical vision of law as made up of universal and timeless principles where law is insulated from societal moralities, since moral reasoning must be guided solely by the moral position inherent in positive rules. Dennis Davis (1998) draws upon Ronald Dworkin to reject eloquently these positivist claims and states a political view of law close to the one being endorsed here:

My argument is that there is no single meaning within the text and that the limits to meaning are not only imposed by the language chosen to be contained in the text but also in terms of legal and linguistic conventions, themselves informed by politics. Constitutional law is politics by a different means but it remains a form of politics. (p. 142)

¶ Contrary to the myth of legal neutrality, the law is always a form of politics by other means, as it is normative as well as merely formal, rational and self-referential. Legal meaning is enmeshed in wider value systems, and is caught between other competing normative discourses which are political, cultural, and more often than not, nationalist.⁹

¶ Against a view of law as a value-free process, legal ideology is a form of domination in the Weberian sense which is embedded in historically constituted relations of social inequality. In a legally plural context, as in South Africa where there are many competing justice institutions (such as township courts, armed vigilantes and customary courts), state law is one semi-open system of prescriptive norms backed by a coercive apparatus. If we conceive of law as an ideological system through which power has historically been mediated and exercised, then in a society where power is organized around racial/ethnic and national identities, we can expect rights talk also to be ensnared by culturalist and nationalist discourses. Constitutionalists hoped that a culturally-neutral Bill of Rights would transcend particularistic nationalist ideology, but in practice the reverse is often the case: rights are subordinated to nation-building.

HUMAN RIGHTS IN THE NEGOTIATIONS

In order to understand fully how human rights became enmeshed within a wider South African nation-building project, we have to look at the rise of human rights talk in the peace process between the years 1985 and 1994.¹⁰ During this period, human rights emerged as the unifying language to cement the two main protagonists in the conflict: the ruling National Party (NP)¹¹ and the African National Congress (ANC). Human rights talk became the language not of principle but of pragmatic compromise, seemingly able to incorporate any moral or ideological position. The ideological promiscuity of human rights talk meant that it was ill-suited to fulfil the role of an immovable bulwark against ethnicity and identity politics. Because of its role in the peace negotiations, human rights talk came to be seen less as the language of incorruptible principles and more as a rhetorical expression of an all-inclusive rainbow nationalism.

By the end of the 1980s, the armed conflict between the anti-apartheid movement and the apartheid regime had reached a stalemate where neither side could annihilate the other. Key ANC leaders realized that a revolutionary victory could only be a pyrrhic one, where there would be little remaining of the country's infrastructure for building a new multiracial society. On the opposite side of the political spectrum, the rigid anti-Communist stance of the NP government began to soften

after negotiations with the Soviet Union led to the withdrawal of Cuban troops in Angola and to an agreement on Namibian independence. The fall of the Berlin Wall further challenged the National Party elite to revise its ideological commitment to fighting the 'international Communist threat' which had for so long been the mantra to justify state repression. After the Cold War, authoritarian regimes across the South were coming under greater international pressure to liberalize.¹² Tentative talks between the government and opposition began in 1986 and gathered pace until they were formalized in 1991 in the Convention for a Democratic South Africa (CODESA) talks at Kempton Park, outside Johannesburg.

In the negotiations, constitutionalism emerged as the only viable political ethic that could bridge the chasm between seemingly incommensurable political traditions. The writing of the new Constitution at the Multi-Party Negotiating Process in 1993 functioned as a cement between the main actors. Despite the apparent discontinuities between National Party and anti-apartheid political thought, rights talk was indeterminate enough to suit the programs of both the NP and ANC, who came together to form a power-sharing arrangement. The ascendancy of human rights talk thus resulted from its inherent ambiguity, which allowed it to weld together diverse political constituencies. Constitutionalism became the compromise arrangement upon which the ANC and NP could agree a 'sufficient consensus'.¹³

During the negotiations, the NP was forced into significant concessions, notably to shift its position away from group rights to individual rights. Until late 1993, the NP had clung to an ideology of consociationalism which would entrench 'minority rights' through a compulsory coalition government. After the Record of Understanding¹⁴ on 26 September 1992, liberal ideas of constitutionalism began to gain the upper hand over other strategies for power-sharing and 'group rights' for whites. The NP realized that a permanent white minority representation in government was not a realistic goal and the ANC would accept nothing less than a unitary state, full civil rights and majority rule.

The NP turned to a strategy of individual rights with liberal 'checks and balances' to secure the interests of a white minority and protect its economic and social privileges. The prospect of a political order based upon human rights reassured the business elite since they practically demanded a liberal political economy.¹⁵ In the Bill of Rights of the 1993 interim Constitution,¹⁶ classic individual rights (for example, of movement, free expression, and residence) are well entrenched, whereas those concerning socio-economic and welfare rights are weak and muted. The Constitution enshrined the right to private property and placed severe limitations on expropriation and nationalization.

The Left also went through its own Pauline conversion, with the social democratic current gaining preeminence over revolutionaries who had viewed rights with a Stalinist antinomianism.¹⁷ In the late 1980s, many elements within the anti-apartheid movement espoused a 'people's war' in order to create a Soviet-style command economy. Rank and file activists as well as important leaders expressed cynicism towards a Bill of Rights, and Communist Party intellectual Joe Slovo wrote in 1985: 'In the South African context, we cannot restrict the struggle objectives to the bourgeois democratic concept of civil rights or democratic rights'.¹⁸ (*Sechaba*, February)

Activists swung behind the constitutionalist position as the 1992 mass mobilization campaign fizzled out after several months. An awareness of the limitations of mass strategies led many activists in the ANC and South African Communist Party away from the insurrectionary seizure of power, thus marginalizing radicals and reinforcing the impetus for compromise and negotiation. The result, however, would be a very different kind of political order than the objective of popular democracy which many anti-apartheid activists had struggled for in the 1980s. Constitutionalism defines the law-government relationship in a specific way that is distinct from other models, such as straightforward Westminster parliamentary sovereignty. Constitutionalism places significant limitations on the exercise of governmental power, forcing legislation to comply with rules laid down in the Constitution as interpreted and enforced by the Constitutional Court.¹⁹ Section 2 boldly states the supremacy of the Constitution: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.' However, according to section 74, the National Assembly can amend the Constitution if a bill has a two-thirds majority, and it has done so on numerous occasions since 1996.

The negotiations in 1991-3 leading to the new South African political order were among the most participatory and accountable seen in any recent transition from authoritarian rule. In the CODESA I and II talks, political parties and civil groups were able to intervene in significant ways in order to advance their agenda. The shape of the political system of the new South Africa (that is, the relationship between parliament and the Constitutional Court) and its economic structure (for example, whether private property should be protected in a Bill of Rights) were all hotly debated.

Yet the dilemma of how to deal with politically motivated human rights violations of the apartheid period was not subjected to the same process of democratic dialogue. In particular, the decision to grant amnesty to human rights offenders was eventually decided by an exclusive political deal between the NP and the ANC. The CODESA II

talks did not address the issue²⁰ and outside the talks there was very little popular or open political party debate on amnesty. At the end of the Kempton Park negotiations on 17 November 1993, when all other issues were resolved and the interim Constitution was agreed, the question of amnesty was still outstanding. The National Party desperately wanted an amnesty, more so than the liberation movement which was in an advantageous position legally because of the two earlier Indemnity Acts.²¹ At that point, Chief NP negotiator Roelf Meyer and ANC representative Cyril Ramaphosa mandated 'Mac' Maharaj (ANC) and Fanie van der Merwe (NP) of the negotiators' technical committee to draft a postscript to the Constitution²² which would contain an amnesty clause. This occurred outside the official consultative process, in the hiatus between the end of the formal constitutional talks and the Constitution going to parliament in December 1993. NP negotiator Roelf Meyer reflected, 'At that point, there was just agreement that there should be an amnesty. There was a principle of agreement, but no details, apart from the point that both sides be given equal status. Apart from that, we left it up to the technical committee' (personal interview, 16 February 1999).

The interim Constitution, with its last-minute postscript requiring an amnesty mechanism, went to parliament after 6 December 1993. There was never any open deliberation of the postscript at the plenary session of parliament, since it arose from a closed and secretive deal between the NP and ANC leaderships. Recognizing the exclusive character of the political deal done on amnesty is important as there is a strong moral argument that such an amnesty arrangement can only be entered into by victims themselves or their legitimate representatives and not by others on their behalf and with very little consultation.²³

The statement on amnesty and reconciliation was criticized by smaller parties such as the Democratic Party, who denounced it as a cover-up pact. Roelf Meyer defends the exclusiveness of this process, saying, 'The Constitution wouldn't have gone through if the amnesty question had gone to other parties and through the consultation process at Kempton Park' (personal interview, 16 February 1999).

The 1993 Constitution's postscript was titled, appropriately enough, 'National Unity and Reconciliation', as was the act passed in 1995 to establish the Truth and Reconciliation Commission (TRC). The Constitution's postscript explicitly rejected retribution and called for past injustices to be addressed 'on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation'. The central meaning of 'reconciliation' was an amnesty law, rather than the later formulations advanced by the Truth and Reconciliation Commission. The TRC's motto would be 'Reconciliation Through Truth', not, as it happens, 'Reconciliation Through

Indemnity', which was more true to the 1993 Constitution's postscript. Early on, the Bill of Rights announced many new rights which could only be abrogated in extenuating circumstances, but the postscript unraveled the Constitution's commitment to human rights. In the postscript, the invocation of human rights did not express the determination to protect individual citizens as much as it did the willingness to sacrifice individuals' right to justice in the name of 'national unity and reconciliation'. The entreaty to human rights talk came to represent the final compromise of the negotiations; that is, amnesty for perpetrators of human rights violations.

After a turbulent negotiations stage, characterized by extremely high levels of political violence, a new Constitution was finally ratified in December 1993, leading to the first non-racial elections in South African history. In April 1994, the elections led to a 'Government of National Unity' (GNU), dominated by the ANC, but including high-ranking NP ministers such as Vice-President F W de Klerk. This limited power-sharing arrangement was to prove unstable and it collapsed in 1996, leaving the ANC to rule alone.

HUMAN RIGHTS, *UBUNTU* AND THE AFRICAN COMMUNITY

God has given us a great gift, *ubuntu* ... *Ubuntu* says I am human only because you are human. If I undermine your humanity, I dehumanize myself. You must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That's why African jurisprudence is restorative rather than retributive.

Desmond Tutu (Profile: *Mail and Guardian*, 17 March 1996)²⁴

After the 1994 elections, the connections between human rights and nation-building became clear in the discourse of the Constitutional Court on reconciliation, restorative justice²⁵ and 'African jurisprudence'. One African word, *ubuntu*, integrates all these dimensions. *Ubuntu*, a term championed mainly by former Archbishop Tutu, is an expression of community, representing a romanticized vision of 'the rural African community' based upon reciprocity, respect for human dignity, community cohesion and solidarity. After the TRC was established in late 1995, the language of reconciliation and rights talk more generally became synonymous with the term *ubuntu*. *Ubuntu* became a key political and legal notion in the immediate post-apartheid order. It first appeared in the epilogue of the 1993 interim Constitution in the following famous passage: '... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for

ubuntu but not for victimization.' This same passage also appeared in the preamble of the 1995 National Unity and Reconciliation Act which established the Truth and Reconciliation Commission.

The term *ubuntu* also appeared extensively in the first Constitutional Court judgement on the death penalty (the State versus T. Makwanyane and M. Mchunu, 1995 (6) BCLR 605 (CC), hereafter *S v Makwanyane*), particularly in the judgements of Sachs, Mahomed, Mokgoro and Langa.²⁶ In all of these cases, as in the Tutu quote above, *ubuntu* was used to define 'justice' proper versus revenge; but the subtext instead reinforced the view that 'justice' in the new culture of human rights would not be driven by any desire for vengeance, or even by legally sanctioned retribution.²⁷ In *S v Makwanyane*, Judge Langa claims that *ubuntu* 'recognizes a person's status as a human being, entitled to unconditional dignity, value and respect ...' (224) and sees the concept as 'a commendable attribute which the nation should strive for'. Judge Mokgoro seeks to create a nationally specific South African jurisprudence by referring to *ubuntu* as an indigenous South African value which militates against the death penalty and as a multicultural unifier; as 'a golden thread [which runs] across cultural lines' (307).

Judge Sachs' *S v Makwanyane* judgment relies upon an image of the static, ahistorical and remarkably compassionate African community. According to Sachs, African customary law did not invoke the death penalty except in the case of witchcraft, which Sachs saw as to do with spontaneous religious emotion rather than indigenous law (375-381). The existence of capital punishment in 'African communities', from witch-killing to necklacing in the 1980s, to mob lynchings in the 1990s, is more the product of irrational crowd hysteria than routine customary court justice, according to Sachs.

This interpretation of capital punishment in African communities results from a time-honored tradition in jurisprudence where the jurisdictional boundaries of law are defined by reference to law's opposite. Law excludes certain categories of persons (children, the mentally ill, and, in colonial contexts, slaves) and actions (violence without due process) from its purview. Law is cool, rational, and impartial, therefore the 'wild justice' of political cadres necklacing suspected police informers, of mob burnings of car hijackers, or customary courts killing convicted witches simply are not allowed to be 'law'. *Ubuntu* expresses his rejection of revenge, and is explicitly linked in the TRC final Report to restorative justice (Vol.1, pp. 125-128), defined not as punishment but as resulting from reparations for victims and the rehabilitation of perpetrators.

However, there is a further slippage in the use of *ubuntu* that goes beyond simply supporting restorative justice in order to justify amnesty

for perpetrators of apartheid-era human rights abuses. *Ubuntu*'s categorical rejection of revenge also includes a rejection of the more moderate form of justice as 'retribution', even if it is based upon due process. *Ubuntu* is used to define just redress so as, in Tutu's words, to go 'beyond justice' to forgiveness and reconciliation (*Mail and Guardian* 17 March 1996). In this view, human rights justice is restorative justice is African justice. According to Tutu, 'Retributive justice is largely Western. The African understanding is far more restorative - not so much to punish as to redress or restore a balance that has been knocked askew' (quoted in Minow 1998:81).

Creating a polarity between 'African' *ubuntu*/reconciliation on the one hand and 'Western' vengeance/retributive justice on the other closes down the space to discuss fully the middle position - the pursuit of legal retribution as a possible route to reconciliation in itself. The constitutional right of citizens to due justice, to pursue civil claims against perpetrators, is taken away by amnesty laws, which preclude both criminal and civil prosecutions. This was justified in terms of a uniquely African form of compassion, or *ubuntu*. By combining human rights and *ubuntu*, human rights come to express compromised justice and the state's abrogation of the right to due process.

To see African law (or common understandings of justice in 38 states of the US, since *Gregg v. Georgia* 428 US 153 (1976), for that matter) as completely excluding violent revenge is an act of wilful romantic naïveté on the part of Sachs. Courts administered by Africans have often applied the death penalty for certain categories of persons (informers, witches and, in the 1990s, car hijackers) in numerous and successive historical contexts. The South African papers constantly report such cases of 'rough justice'.

Why, then, did the Constitutional Court judges express such romantic notions, given the actual historical record? After 1994, the Constitutional Court was seeking to legitimate its position as the sovereign institution in the land, and the judges were faced with the difficult task of making an extraordinarily unpopular first judgement. Judges invoked *ubuntu* to try to demonstrate that the Court was sensitive to popular values and to claim that these values were opposed to vengeance (even though every opinion poll showed overwhelming support for the death penalty).²⁸

The judges adopted the strategy used by the authors of the interim Constitution's postscript; they sought to express the new 'culture of rights' in a popular idiom. In so doing they reinforced a wider propensity of state officials to connect rights and reconciliation to nation-building through an appeal to Africanist ideas of unity and community. As Elsa van Huyssteen has argued, human rights are the 'main site

for the reconciliation of constitutionalism with the aims of popular democracy' (1996:294). The concept of human rights, redefined as pan-Africanist reconciliation, is a bridge between an arid constitutionalism with little political purchase in South African society and the idea of popular sovereignty and representation.

Although the ANC consciously avoided constitutionalizing race in its first term, it still appealed to a pan-African identity to garner support for its policies, particularly among those who had highest expectations from the collapse of apartheid. Heribert Adam acknowledges the dominance of social democratic Charterists over African nationalists within the ANC (1994:45), but admitted that, 'A counter-racism would have great emotional appeal among a frustrated black township youth'. There is pressure from the ANC's politicized social base to adopt an increasingly African definition of the nation. Given the enormous expectations among impoverished black citizens coupled with the lack of a massive program for the redistribution of wealth and, therefore, the likelihood of a continued material disparity between whites and blacks, the pressure to adopt an Africanist language has been growing. Since 1994, Robert Price notes the growing salience of race politics as an important basis for political mobilization, the rise of racially exclusive forms of political association (black management groups, black chambers of commerce, Black Editor's Forum etc.) and 'the increased reliance on group rather than individually based notions of rights and rewards' (1997:171-2). By 2000, one commentator went so far as to state that 'African nationalism [has] triumphed as the philosophy of South Africa's new petit-bourgeois political elite' (Bond 2000:6).

According to Alfred Cockrell, *ubuntu* is indicative of 'the saccharine assertions of rainbow jurisprudence' in the new South Africa, 'Which state blandly that *all* competing values can, mysteriously, be accommodated within the embrace of a warm fuzzy consensus [his emphasis]' (1996:12). Instead, argues Cockrell, human rights and constitutionalism require hard choices to be made between the positions of citizens who will inevitably disagree about the common good. This truth seems to have been forgotten by judges in their effort to ideologically legitimate the Constitutional Court. 'African values', he continues (p.25), do not justify themselves by virtue of their being 'African', but have to be subjected to the same kind of second-order moral and legal scrutiny that any societal values receive. Critically, they must 'surmount a threshold of constitutional consistency' and be commensurate with international human rights law. Cockrell is right to object, and could go a step further to argue that human rights must become a language not of compromise and a phony reconciliation, but instead the means to pursue a well-defined political will guided by a program of social justice.

It is tempting to ask, Where did *ubuntu* originate – which is its true and authentic meaning from the diversity of uses? To attempt a definitive conceptualization of *ubuntu*, particularly one based upon real or imagined African communities, would be to reproduce the language of nationalism. One can only trace the trajectory of its concrete and ideological usage between the circles of human rights organizations, religious leaders, Constitutional Court judges and in popular usage. In a sense, it does not really matter where and how *ubuntu* originated, since one of the main characteristics of nationalist ideology is to historicize and naturalize 'cultural' signs as they are incorporated into the rhetorical repertoire of state discourse. To draw on a formulation of Althusser, *ubuntu* is just another 'always-already there' element of pan-Africanist ideology. *Ubuntu* should be recognized for what it is: an ideological concept with multiple meanings which conjoins human rights, restorative justice, reconciliation and nation-building within the populist language of pan-Africanism. In post-apartheid South Africa, it became the Africanist wrapping used to sell a reconciliatory version of human rights talk to black South Africans. *Ubuntu* belies the claim that human rights would have no culturalist or ethnic dimensions.

TRUTH, RECONCILIATION AND NATION-BUILDING

The Commission of Truth and Reconciliation. It is the creation of a nation.

Constitutional Court Judge Albie Sachs.
(Quoted in Boraine 1995:146)

The Truth and Reconciliation Commission (1995–2001) was the archetypal transitional statutory body created to promote a 'culture of human rights' in South Africa. It was a key mechanism to promote the new constitutionalist political order and the reformulation of justice in human rights talk as restorative justice.²⁹

The TRC was geared not only towards building a state of right, but also towards using human rights talk to construct a new national identity. This is illustrated in the discursive associations drawn between truth, reconciliation and nationalism. It is striking how, in documents such as the 1993 Constitution and the 1995 National Unity and Reconciliation Act, as well as in the proceedings of conferences on the South African TRC, discussions of truth seem to lead naturally into questions of reconciliation, national unity, and nation-building. This is a general feature of truth commissions worldwide. The final document of the Chilean Rettig Commission states that, 'only upon a foundation of truth [is] it possible to meet the basic demands of justice and to

create the necessary conditions for achieving *national reconciliation*' (Ensalaco 1994:658).

Despite their assertions to the contrary, rights-based narratives bear many formal attributes of other nationalist narratives on the past and tradition. Truth commissions, like all nation-building processes, construct a revised national history and, in the words of José Zalaquett of the Chilean Commission, write into being a new 'collective memory'. Truth commissions are more than simply the correct functioning of a legal process – they are a national history lesson and, as Benedict Anderson (1991) has argued, the formulation of a shared national past is simultaneously the basis of the assertion of a shared national future.

There is a close affinity between nationalist history-writing and the construction of a new notion of the South African self, as illustrated in former ANC provincial minister Jessie Duarte's assertion: 'The main view within the ANC is "Let's have the truth and use the truth to build a nation" ... People need to know what happened to their loved ones and why – that's a South African *cultural dynamic*' (personal interview, September 1995). Looking at experiences in other countries, it is evident that a 'need to know' is not culturally unique to South Africans, but in the 'new South Africa' national personhood became tied up in how to respond to past human rights abuses. Being authentically South African comes to mean sharing the traumas of apartheid and uniting in the subsequent process of 'healing the nation'.

Whereas other countries may have a Day of Remembrance to memorialize valiant national martyrs who fell defending the mother/fatherland from foreign invaders, South Africa now has a 'Day of Reconciliation' on 16 December which commemorates a new group of national martyrs who died at the hands of fellow South Africans. The TRC had its first meeting on this day in 1995, and Archbishop Desmond Tutu in his opening address stated: 'We are meant to be a part of the process of the healing of our nation, of our people, all of us, since every South African has to some extent or other been traumatized. We are a wounded people ... We all stand in need of healing' (1999:87). The notion of the South African citizen as victim of trauma was then welded to other more culturalist visions of national identity when Tutu went on to refer to 'we, this rainbow people of God', which portrays the nation as the multicultural amalgam of distinct racial colors (which are united but still distinctive).

Here we can see an intriguing discourse unfolding linking suffering, the body and the nation. Firstly, the nation is conceived of as a physical body, as a generically South African (that is, not generically human) individual projected onto the national scale. What type of body is it? A sick one – one that is in need of healing. Healing the nation is the

popular idiom for building the nation. What is the healing treatment prescribed? Truth-telling and, flowing from this, forgiveness and reconciliation. How do these treatments heal the national body? They open the wounds, cleanse them and stop them from festering.³⁰

Seeing the nation as a body is important for nation-builders, as it creates the basis of a new 'we', and it incorporates the individual in a collective cleansing. The TRC constructed a collectivist view of the nation as a sick body, which could then be ritually cured in TRC hearings. This is something which no South African could escape – as Tutu stated, 'we *all* stand in need of healing'. Individual psychological processes cannot be reduced to national processes dedicated to 'healing', since the 'nation' is not like an individual at all. The nation, according to Ernest Gellner (1983), is a political fiction invented by nationalists, who conjure up tenuous concepts such as a 'collective memory' or a 'collective psyche'. Nations do not have collective psyches which can be healed and to assert otherwise is to psychologize an abstract entity which exists primarily in the minds of nation-building politicians. Nevertheless, it is remarkable how widely accepted this nationalist language is in the literature on truth commissions and post-Communist truth-telling.³¹ Michael Ignatieff rightly challenges the notion of national psyches when he writes:

We tend to invest our nations with conscience, identities and memories as if they were individuals. It is problematic enough to vest an individual with a single identity: our inner lives are like battlegrounds over which uneasy truces reign; the identity of a nation is additionally fissured by region, ethnicity, class and education. (1998:169)

All of these elements – truth-telling, healing, nation-building, history writing – were integrated by the South African TRC into a potent mixture. This process is not wholly unique, as national politicians have redefined human rights in expedient ways in many other countries. Philip Roth (1993) writes insightfully about how the trial in Israel of John Demjanjuk, a Ukrainian allegedly involved in mass murder of Jews during the Holocaust, became a theatrical public spectacle to 'educate the public'. Its message was not only part of the founding nationalist narrative of the state of Israel but also constituted an expression of the power of the Israeli state over its past oppressors. It theatricalized that shift in national identity from victim to adjudicator and broadcast the message live nationally. Demjanjuk was there to maintain the nationalist mythology of the state of Israel, and was part of the relentless institutionalization of the Holocaust, according to Roth.³² Similarly, the trial of the high-ranking Nazi official Adolf Eichmann in Israel in 1961 was

harnessed to the construction of Israeli national identity in various ways; for example when it was interrupted by two minutes' silence to those fallen in the creation of the Israeli nation (Douglas 2000), or when the prosecutor, Gideon Hausner, focussed upon harrowing personal experiences of victims in order to 'design a national saga that would echo through the generations' (Tom Seger cited in Osiel 1997:16). Despite the appeals to values of truth, justice or reconciliation, embattled politicians simply cannot resist the imperative to institutionalize past abuses in order to manufacture legitimacy for national bureaucracies.

The power of truth commissions is ultimately symbolic: they cannot prosecute and the evidence found or disclosed to them cannot be used in later prosecutions, so they can make only a weak claim to carry out 'justice'. They have little institutional power to carry out reforms of judiciary; they can make recommendations, but these are often ignored (as in El Salvador) and truth commissions cannot usually follow through on their recommendations. The symbolic impact of these commissions lies in how they codify the history of a period, the theme of the next chapter. Popular memories of an authoritarian past are multiple, fluid, indeterminate and fragmentary, so truth commissions play a vital role in fixing memory and institutionalizing a view of the past conflict.

Truth commissions publish reports which share a similar form with nationalist narratives in the way they render a discontinuity with the past.³³ The creation of historical discontinuity and periodization is part of the relational dimension of national identity-forming processes. It has been widely noted that nationalism constructs the nation in opposition to other nations through a variety of signs: flags, a place on the map, fallen heroes, landscapes, animal totems, rugby teams, deploying a proliferation of symbolic forms to distinguish itself. Every ethnic or national identity needs an 'other' against which to oppose and, therefore, define itself: it is what the other is not and will find difference no matter where it looks. The most significant site of otherness for the new South Africa has not been other nations, it has been itself. The relationality of constitutional nationalism is often constructed in an opposition between the present self and the past other. The old nationalism was based upon a particular view of history/culture/race/truth/rights, etc., which is ritually rejected in favor of revised formulations of those concepts.

Unlike some nationalist visions of the past in, say, Britain or France, the new South African nation is not naturalized by reference to its ancientness, but in its affirming of the uniqueness of the present. The new South African identity is constructed upon a discontinuous historicity, where the past is not a past of pride, but of abuse. The past

history of the nation *qua* nation of rights is a history of a catalog of violations, and pride is only to be found in resistance, by those struggling to recover an 'authentic' democratic tradition. The TRC codified the official history of the martyrs of that struggle in order to institutionalize those shared, bitter experiences of apartheid, which were silenced before, as a unifying theme in the new official version of the nation's history.

MANUFACTURING LEGITIMACY

There is a deep crisis of legitimacy of our political institutions. The moral fabric of society has been torn. Expediency and principle have been blurred. Society is now held together by obstinacy, goodwill and good luck, instead of an inclusive moral base.

Johnny de Lange, ANC MP, Chair of the Select Committee on Justice of the National Assembly. (Cedar Park Conference, 21 September 1995)

Having established, contra procedural liberalism, that human rights talk is enmeshed in culturalist discourses on community and becomes an integral part of nation-building, we must then ask what is this nation-building for? It is not an end in itself, but a means to another end, which is to consolidate a new form of bureaucratic governance. The ANC, when it inherited the battered shell of an authoritarian and illegitimate state, became motivated less by a vision of popular sovereignty than by bureaucratic imperatives. Nation-building allows other processes to be carried out, such as the legitimization of the apparatus of justice which still remains tainted by the authoritarian past.³⁴ Legitimizing the state's justice system in turn promotes a process of state-building, as the post-apartheid state has embarked upon a project of unifying the diversity of justice institutions in state and society.

The legitimacy of constitutionalism depends in turn upon the legitimacy and the capacity of the criminal justice system to deliver swift justice. Constitutionalism, in short, necessarily assumes a strong and developed state apparatus. As Ignatieff asserts: 'The only reliable antidote to ethnic nationalism turns out to be civic nationalism, because the only guarantee that ethnic groups will live side by side in peace is shared loyalty to a state, *strong enough*, fair enough, equitable enough to command their obedience' (1993:185) (my emphasis).

If civic nationalism requires strong states, then a general problem besetting transitional regimes is that they often inherit a significantly debilitated state in crisis, with unstable, illegitimate and impaired institutions (see Huyse 1995). Therefore the most immediate problems for constitutionalists concern both the lack of citizens' respect for rights

talk, legal institutions and the judiciary, and an inadequate infrastructure of courts which cannot hope to respond fully to the demands of a new rights-based political dispensation.

Many fundamental rights in the 1996 Bill of Rights are simply beyond the capacities of the legal system, including 'just administrative action' (section 33), universal rights to access to courts (section 34) and state-provided legal representation (section 35.b-c). The constitutionalists' reliance on the praxis of citizenship as the basis of civic patriotism does not make a realistic assessment of the lack of material preconditions and institutional capacity in South Africa for that 'praxis' to take place. For example, after the 1994 elections, the Legal Aid Board budget expanded from 56 million Rand to 307 million in 1998.³⁵ Yet this figure is generally recognized, even within the Justice Ministry, as not even approaching the levels required to actualize the new range of constitutional rights.

The strain on the legal order emanating from its inability to even partially respond to the demands made upon it is exacerbated by the bureaucratic character and power base of the democratizing state. The rise of constitutionalism has been coupled with the emergence of a new bureaucratic class whose power is primarily exercised through the law and the institutional power of state. Thus the continued control of the economy by a traditional white elite and transnational corporations means that the state bureaucracy has become the most important site for the exercise of political power in the transformation of South African society. And so the importance of legitimate legal institutions takes on an even greater significance in South Africa than in Chile or Argentina, since South Africa has invested so much political capital in a constitutional arrangement, whereas Latin American regimes sought to establish strong executives.

The importance of legal-technical mechanisms in pursuing societal transformation renders necessary an equally strong program of bureaucratic legitimization. In a context where state power relies so heavily upon legality, one would expect the state to concentrate resources in seeking to legitimate the law. Yet a program of legitimization which relied upon formal rationality and a dry technocratic ethos would only appeal to intellectuals and bureaucrats. In South Africa, adherence to the rule of law alone would hardly mobilize the masses to identify with the state. Therefore it should not be surprising that state officials seek to identify the Constitution with popular conceptions of culture, community and nation, in a bid to construct overarching metaphors of national unity. Thus, we have to recognize how the weakness of the state, coupled with the rise of a new bureaucratic class, necessitates that state-building and nation-building remain conjoined in the 'New South Africa'.

TRUTH COMMISSIONS AS LIMINAL INSTITUTIONS

Truth commissions are one of the main ways in which a bureaucratic elite seeks to manufacture legitimacy for state institutions, and especially the legal system. How specifically do truth commissions generate legitimacy for democratizing regimes? They occupy a 'liminal' space, *betwixt and between* existing state institutions. I take the term used by sociologist Arnold van Gennep (1908) to describe rituals of transition (such as life-cycle rituals), during which individuals move from one status with its incumbent rights and obligations to another. This idea was developed further by Victor Turner (1967:93-5), writing about the Ndembu of Zambia, who saw liminality as an ambiguous process of 'becoming' which was 'interstructural' and transitional between two states (in our case, between apartheid and post-apartheid). During the period of liminality, the core moral values of society would be restated and internalized (it was hoped) by those participating in the process. Importantly, the ritualized and moral features of rituals of transition were the result of the failure of secular mechanisms (such as the law) to deal with conflict in society. These ideas have not only been applied to life-cycle rituals in African societies, but also to pilgrimage, hippies, and institutions such as asylums, the military and prisons (Morris 1987:260).

The South African TRC also exhibited a number of ambiguous and liminal characteristics which made it neither a legal, political, nor a religious institution. For a start, it was a transitory and fleeting statutory body functioning in its entirety for only three years.³⁶ It was poised in time between the apartheid era and the post-apartheid epoch. It was not the sole product of any one government branch and it was nominally independent, but it was located in an interstructural position, in between all three major branches of government.

The Commission had an ambivalent relationship to the legal order: it was not exclusively a legal institution in that Human Rights Violations hearings were not constituted as a court of law. It could not carry out prosecutions nor could it sentence. In fact the TRC bypassed the legal process by naming perpetrators before they had been convicted in a court of law and by granting amnesty before a perpetrator had been indicted or convicted. The amnesty hearings were an unusual kind of inversion of the law, as amnesty Judge Bernard Ngoepe described to me in an interview:

The [Promotion of National Unity and Reconciliation] Act does not encapsulate the principles of common law, therefore we don't find guidance for legal precedent ... I can tell you that I find it strange that I as a judge should listen to the gory details of how someone killed, cut the throat of another person and then

ask that I let him go. Normally, I should punish him instead of grant *political* immunity (my emphasis). (Personal interview, 17 December 1996)³⁷

Amnesty hearings, in contrast to the Human Rights Violations hearings, were constituted as court hearings with legal consequences; either a granting or refusal of immunity from prosecution. Procedurally, the amnesty process mimicked a court but did not use standard legal rules of evidence;³⁸ the Amnesty Committee sought to establish truth by hearing testimony primarily from perpetrators and information proposed by the TRC evidence leader who attempted to ensure that 'full disclosure' had in fact occurred.

The liminal character of the truth commission granted it a certain freedom from both the strictures of legal discourse and the institutional legacy of apartheid. This allowed it to generate a new form of authority for the post-apartheid regime. The amnesty hearings were a theatricalization of the power of the new state, which compelled representatives of the former order to confess when they would rather have maintained their silence. Perpetrators were compelled to speak within the confines of a new language of human rights, and in so doing to recognize the new government's power to admonish and to punish.

This theatricalization of power gives us one clue as to why democratizing governments set up truth commissions rather than relying upon an existing legal system: truth commissions are transient politico-religious-legal institutions which have much more legitimizing potential than dry, rule-bound and technically-obsessed courts of law. The TRC's position as a quasi-judicial institution allowed it to mix genres – of law, politics and religious – in particularly rich ways. This makes it a fascinating case to study in order to understand how human rights talk interacts with wider moral and ethical discourses. However, I shall argue that the mixing of different genres undermined the TRC's ability to carry out certain functions (such as writing an official history of apartheid) effectively. In particular, the TRC's liminal status facilitated a contradictory mixing of a narrow legalism and an emotive religious moralizing.

Legitimation is not only an end in itself, but a prerequisite for pursuing other state objectives in the post-apartheid order. The quest for legitimation needs to be understood within a wider context of centralization and consolidation in the area of justice. With regard to the areas where centralization affects the work of truth commissions, we must consider how state law is involved in a constant process of creating its own boundaries, its own area of jurisdiction, defining that which is 'justiciable' from those areas of social regulation which fall outside its

purview (Strathern 1985). Law draws upon and maintains a distinction from other domains of social control and consent. To this extent, human rights bodies such as the TRC are part of an extension of those boundaries of the justiciable to incorporate, and expunge, that which stands in the way of a state strategy of centralization, unification and standardization.

The establishment of the rule of law is fundamental to the consolidation of state power as defined by a monopoly over the means of violence. Although they are not legal institutions, truth commissions have implications for the process of judicial reform. An explicit motivation for setting up truth commissions is, according to Aryeh Neier 'establishing and upholding the rule of law' (1994:2). Since 1994, successive ANC governments have engaged in a program of eradicating and assimilating other coercive structures. They defended criminals and former human rights violators from lynch mobs and local courts, not solely out of compassion, but in order to defend the principle of the complete and unchallenged sovereignty of the state. The truth commission was part of a general and long-term orientation within state institutions which asserted the state's ability to rein in and control the informal adjudicative and policing structures in civil society. This is explored in detail in Part II.

THE STRUCTURE OF THE TRC

The work of the TRC, which commenced in December 1995, was divided into three committees: the Human Rights Violations Committee, the Reparations and Rehabilitation Committee and the Amnesty Committee.

Throughout 1996 and early 1997, the Human Rights Violations Committee (HRVC) held 50 hearings in town halls, hospitals and churches all around the country, where thousands of citizens came and testified about past abuses. This process received wide national media coverage and brought ordinary, mostly black, experiences of the apartheid era into the national public space in a remarkable way. The TRC took more statements than any previous truth commission in history (over 21,000). The HRVC faced the daunting task of corroborating the veracity of each testimony, choosing which would be retold at public hearings and passing along verified cases to the Reparations and Rehabilitation Committee (RRC). The TRC also took an investigative role and, by issuing subpoenas and taking evidence in camera, it built up an expansive view on the past. In its final report published in October 1998, the TRC produced findings on the majority of the 21,298 cases brought before it, and it named the perpetrators in hundreds of cases (unlike the Argentine and Chilean commissions)

The efforts of the Reparation and Rehabilitation Committee to facilitate 'reconciliation' presented the weakest of the three committees' activities. Part of the problem was structural and lay in the fact that the TRC had no money of its own to disburse to survivors; instead it could only make unbinding recommendations to the President's Fund with regard to monetary compensation, symbolic memorials (e.g. monuments) and medical expenses. The TRC made it clear that victims should expect little from the process and only a fraction of what they might have expected had they prosecuted for damages through the courts. Such pronouncements were internalized by victims, many of whom have severe material needs. At the Human Rights Violation (HRV) hearings one often heard, for instance, a woman recount the murder of her husband or son by the security forces and then meekly request a tombstone as compensation. It remains to be seen whether the reparations process, a key element in reconciliation, will even begin to address the needs and expectations (however lowered) of survivors.

In the 1998 final *Report*, the TRC recommended that an estimated 22,000 victims should receive an individual financial grant of between 17,029–23,023 Rand (approximately US\$2,800–3,500) per year over a six-year period. In late 1998, 'urgent interim relief' payments of about US\$330, the first tranche of reparations, were made to about 20,000 victims. At the time of writing, no further reparations payments had been made. A year after the publication of the TRC's findings and recommendations, survivors' groups were demonstrating outside the Department of Justice offices in Johannesburg as reparations policy had still not been discussed in parliament. The reparations issue was very far down on the list of priorities of all major political parties. Many victims were still waiting for their urgent interim reparations. In the press release by the survivors' organization, the Khulumani Support Group, their frustration was apparent:

The TRC has compromised our right to justice and to making civil claims. In good faith we came forward and suffered the re-traumatization of exposing our wounds in public in the understanding that this was necessary in order to be considered for reparations. We now feel that we have been used in a cynical process of political expediency. (Khulumani press release 27 October 1999)

In January 2000, the Mbeki government stated its intention to offer only token compensation of several hundred US dollars (Rand 2,000), instead of the US\$21,000 which the TRC recommended should be given to apartheid-era victims. Duma Khumalo spoke for many victims

when he protested bitterly: 'We have been betrayed. The previous government gave the killers golden handshakes and the present government gave them amnesty. [But] the victims have been left empty handed' (*Guardian* 3 January 2000)

Finally, the South African TRC was unique in bringing an amnesty process within the truth commission, whereas in other countries it has been a separate legal mechanism. The TRC had received over 7,000 applications and at the time of writing, about 568 people had been granted amnesty and 5,287 denied.³⁹ To receive amnesty, the applicant had to fulfil a number of legal criteria. The act had to have been committed between the dates 1 May 1960 and 10 May 1994. The applicant had to convince the panel that the crime was political: i.e., not committed for personal gain, malice or spite. Crucially, the applicant had to fully disclose all that was known about the crime, including the chain of command ordering the act. Perpetrators were not required to express any remorse for their actions. If a perpetrator was facing legal proceedings at the time, these would be suspended until the appeal for amnesty was heard. If amnesty was refused (for example, because it was found that the applicant did not fully disclose all information relevant to the case), then the applicant could face criminal or civil prosecutions in future.

Although it faced public disapproval and violated victims' desire for punishment, the South African amnesty process had the most stringent legal requirements of any recent amnesty and will probably be seen as model for other countries. Rather than a blanket amnesty (as in Chile and El Salvador), it was individualized and applicants had to prove that the violation had a political objective and had occurred within a specific time period, and they had to fully disclose the nature and context of their actions. In the context of an unreliable judicial system, which in 1996 convicted security policeman Eugene de Kock (and sentenced him to over 200 years in prison) but acquitted former Defense Minister General Magnus Malan,⁴⁰ the amnesty process was probably the best opportunity for the majority of ordinary survivors and their families to learn more about their cases.

Yet the amnesty arrangements also had their drawbacks. The amnesty mechanism created a clash between the criminal justice system and the TRC over specific perpetrators, as in the case of five security policeman (Cronje, Hechter, Mentz, van Vuuren, and Venter) from the Northern Transvaal security branch. The Attorney-General, Jan d'Olivera, had carried out extensive investigations into the men's crimes and had issued warrants for their arrest in connection with 27 cases of murder, attempted murder and damage to property, when the men fled to the TRC Amnesty Committee (AC). The criminal investigation had to be

suspended and in the end the security policemen received amnesty for their crimes (which included torturing an ANC activist with electrical shocks before electrocuting him to death), thus undermining the laborious efforts of the criminal prosecution service.

Behind amnesty for individuals was the less obvious program of indemnifying the state itself. The granting of amnesty extinguished citizens' constitutional right to sue for civil damages in compensation from the perpetrator and state: if a former agent of the government was granted amnesty by the Amnesty Committee, then the state is also automatically indemnified for damages. In the amnesty process, the state became a silent partner, shadowing perpetrators who came forward and benefiting when their amnesty request was successful. The state then would consider what reparations it wished to make to survivors. In this way, the slate would be wiped clean and state ministries would no longer bear responsibility for past actions of their agents.

The degree to which perpetrators came forward was generally disappointing since many believed that they would never be successfully prosecuted. Applications from the former South African Defense Force (especially Military Intelligence and Special Forces) and the Inkatha Freedom Party were particularly sparse. In many cases, such as the hearings of seventeen IFP applicants in 1998-9 on the Boipatong massacre, the lawyers for the victims seemed justified in arguing that applicants were not revealing the full story and were protecting their leaders.⁴¹ Thirteen applicants were granted amnesty by the AC, however, in November 2000.

Yet there were also some breakthroughs and revelations. In the case mentioned above of Brigadier Cronje and four other former members of the security police, information never made public before was divulged about a covert body known by its Afrikaans acronym, 'TREWITS'. Trewits was an intelligence co-ordinating body which reported to the State Security Council (SSC) over which the State President and civilian ministers presided. The structure of TREWITS showed the direct links and integration of military and police intelligence and the involvement of high-ranking National Party leaders in everyday counter-insurgency matters. At the same hearings, former Police Commissioner General van der Merwe admitted that in 1989 President P W Botha ordered the bombing of Khotso House, the head office of the South African Council of Churches, and the unofficial ANC headquarters in the country. This revelation led to ten amnesty applications in January 1997 and further insights into the apartheid security police apparatus.

There were benefits of placing the amnesty process within the TRC; for instance, information could be pooled between the various committees. Yet combining amnesty with truth-finding functions created a number of strategic and ethical problems, which might have been

avoided if amnesty had been a separate legal mechanism, unrelated to the TRC. There was a large gap between survivors' expectations of justice and the reality, as they saw perpetrators getting amnesty straight away while their meagre reparations were many years away. Perpetrators could obtain amnesty without even expressing regret – since the Act did not legally require an apology. Many repeated worn apartheid-era ideological justifications for their actions with little self-reflection and analysis. The much vaunted truth of amnesty hearings was often the truth of unrepentant serial murderers who still felt that their war was a just one.

Public opinion surveys have shown a great deal of opposition to granting amnesty. The research of political scientists Gibson and Gouws based upon a national survey in 1997⁴² concluded that: 'Only a minority is able to accept the view that those clearly engaged in the violent struggle over apartheid should be awarded amnesty' (1998:28). Indeed, where blame is established, the overwhelming majority of those interviewed preferred not forgiveness or amnesty, but punishment and the right to sue through the courts.

This dissonance between popular understandings of retribution/punishment and the version of restorative justice proposed by national political figures was one of the main obstacles to manufacturing legitimacy for constitutionalism using human rights talk. The redefinition (and some would say deformation) of human rights during democratic transitions to mean amnesty and reconciliation not only conflicted with widespread notions of justice in society, but also, it could be argued, with a state's duty to punish human rights offenders as established in international criminal law. International criminal law is highly ambivalent on the question of amnesty and the tension between national amnesties and international human rights treaties has a long history.⁴³

In Latin America, the most important recent exchange was between the Argentine human rights leader Emilio Mignone (Mignone, Estlund and Issacharoff 1984), arguing for prosecutions of human rights violators to the full extent under international law, and Carlos Santiago Nino (1985), legal adviser to President Alfonsín on trials of military officers in Argentina's 'dirty war'. This debate was repeated in the pages of the *Yale Law Journal* between Nino who argued for a pragmatic acceptance of national political constraints on justice (1991) and legal scholar Diane Orentlicher who reiterated the international legal imperative to punish that transcends national political contexts:

... the central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes ... international law itself helps assure the survival of fragile democracies when its clear pronouncement

removes certain atrocious crimes from the provincial realm of a country's internal politics and thereby places those crimes squarely within the scope of universal concern ... A state's complete failure to punish repeated or notorious instances of these offenses violates its obligations under customary international law. (1991:2540)

I am persuaded that Orentlicher has articulated correctly the ideal relationship between international human rights and national processes of democratization and the establishment of the rule of law. The international character of human rights laws and institutions exists to reinforce national processes of delivering retributive justice for victims of human rights violations.⁴¹ The rule of law cannot meaningfully be said to exist if it is predicated upon impunity for gross human rights violations committed in the authoritarian past, since as Orentlicher states:

If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? ... Societies recently scourged by lawlessness need look no further than their own past to discover the costs of impunity. Their history provides sobering cause to believe, with William Pitt, that tyranny begins where law ends. (2542)

The appropriation of human rights by nation-building discourse and their identification with forgiveness, reconciliation and restorative justice deems social stability to be a higher social good than the individual right to retributive justice and to pursue perpetrators through the courts.⁴⁵ This image of human rights undermines accountability and the rule of law and with it the breadth and depth of the democratization process. The empirical evidence from other democratizing countries shows that retributive justice can itself lead to reconciliation (in the sense of peaceful co-existence and the legal, non-violent adjudication of conflict) in the long run.

John Borneman's comparative study of the post-socialist countries of Eastern Europe (1997) concluded that where there was little or no prosecution of the former authorities for past crimes, societies (in Russia, Romania and the former Yugoslavia, in particular) were characterized by high levels of violence, much of it sustained by the previous communist elite. Borneman argues that where there is no retributive justice there is no legitimacy to the rule of law, leading to 'serious internal criminalization' (1997:104). High levels of criminality have also been conspicuously in evidence in post-apartheid South Africa, as well as enclaves of ungovernability; for example, in KwaZulu-Natal and some townships of Johannesburg. Borneman advises that 'to avoid a cycle of retributive violence, it may be wise to go through a longer phase of

painful historical reckoning with the past, that is, of retributive justice in the present' (1997:110). Tellingly, where there were successful prosecutions against high-ranking communists, the initial passion for retributive justice seems to have subsided and even disappeared, which suggests that trials lead to a 'thick line' being drawn under the past through the ritual purification of the political center.

The strategy of drawing upon international human rights to reinforce criminal trials of perpetrators within South Africa would not only have the advantage of fortifying the rule of law and indirectly addressing wider criminalization in society, but would also have linked human rights to popular understandings of justice and accorded human rights-oriented institutions much greater legitimacy in the process. This could in turn have helped resolve the wider legitimization crisis of post-apartheid state institutions in a more effective manner. A policy of allowing more prosecutions of offenders would have made the transformation of the judiciary clearer and more evident. My own ethnographic research in the townships of Johannesburg had led me to the conclusion that, contra the established view within the Truth and Reconciliation Commission, retributive understandings of justice are much more salient in South African society than versions emphasizing reconciliation as forgiveness. As Michael Walzer has noted, 'victims ... make elemental claims for retributive justice' (1997:13). This argument is developed more fully in the rest of the book, and especially in chapters 6-7 on the prevalence of ideas of vengeance and local institutions of retribution among urban Africans.

The above argument does not imply that any form of amnesty was unjustifiable during the negotiation process - it may well have been politically indispensable at the time. Again, it must be recognized that the amnesty arrangement brokered in the South African negotiations placed much greater legal limitations and obligations on perpetrators than amnesties in democratizing countries of Latin America. However, had there been a more widespread and open public debate of the issue, other alternatives may have been explored, such as a mechanism where the state could grant amnesty from criminal prosecution but not from civil prosecutions, which could have been brought by families of victims such as the Ribeiros, the Mxenges and the Bikos. Leaving open the possibility of legal action would have made the category of citizenship more meaningful in practice.

TRUTH COMMISSIONS AND IMPUNITY

The reality that post-authoritarian law is subjected to the systemic imperatives of nation-building and the centralization of the state does

not mean that we should reject constitutionalism in its entirety. The constitutionalist agenda of democratizing regimes is decidedly preferable to that of states founded upon ethno-nationalist 'blood and land' myths of nation. Constitutionalism has important strengths, including its division of powers between different branches of government and the ways in which it provides the institutional structure to defend individual rights, an aspect so lacking under authoritarian legality.

Yet in addition to recognizing the desirability of constitutionalism's goals, we are required to develop an analysis of the systematic pressures upon human rights and what the consequences of this might be for writing official versions of the past and advocating certain notions and institutions of justice and reconciliation. Liberal readings of human rights often ignore some important truths, such as the fact that state officials continue to speak the rhetoric of cultural difference and nationalism even though the democratizing state is significantly more procedurally rational, accountable and representative than its autocratic predecessors. The ideological needs of new regimes do not go away, but are even exacerbated by political transitions. Constitutionalist visions can underestimate the very real crises of legitimacy which new regimes find themselves in; crises which push the emergent bureaucratic elite into subordinating individual rights to the goals of the new bureaucracy: stability, legitimacy and a new image of the nation.

This observation is more widely applicable if we compare the South African experience to the position of human rights in Latin America.¹⁷ After decades of military dictatorship, many Latin American governments now vaunt their respect for human rights and have generated a plethora of new agencies to monitor and uphold them, including truth commissions, procurators and congressional ombudsmen. Yet the development of human rights bureaucracies is not to be universally applauded, argues Francisco Panizza (1995:181), since these agencies can serve as a substitute for a government's lack of commitment to the rule of law and independence of the judiciary.

At worst, new human rights agencies deflect responsibility and criticism away from governments. Panizza uses the notion of 'legal fetishism' to describe this phenomenon, which

refers not only to the excessive legalism in which public debate is conducted in most countries of the region, but to the combination of legal provisions that regulate every aspect of social life, including constitutional and legal provisions for the protection of human rights, with the practical disregard for the rule of law ... as a rule, the return to democracy in most Latin American countries has not brought about judicial reform or resulted in a more assertive and independent judiciary. (1995:183)

In South Africa, the concept of legal fetishism has utility in referring to the increasing legalization of political issues and the chasm between constitutional rights and the ability of the legal system to deliver. There are very important rights contained in the Constitution, especially the right to legal representation, administrative rights, and a number of provisions against discrimination on the basis of sex, race and sexuality which, if realized, would alter the nature of really existing horizontal and vertical human rights in the country.

Despite the promises of rights talk, I would urge us not to engage in the mistaken separation of law, human rights, truth commissions and reconciliation from questions of nation-building, legitimization and the centralization of state power. Ignoring the ideological dimensions of transitional justice is the quickest route to entrenching legal fetishism. Ernest Gellner (1988) referring to the historical precedent of the French revolution, points out how 'Liberty, Equality and Fraternity' very quickly became 'Bureaucracy, Mobility and Nationality'. Without a critical understanding of the reformulation of human rights in the hegemonic project of states emerging from authoritarian rule, we run the risk of ignoring the conjunction between state-building and nation-building, and thus becoming inured to the real pitfalls on a constitutionalist and rights-based route to a new democratic order.

Although truth commissions have legitimization as an objective, it is not clear at all that these commissions actually can or do legitimate state institutions. The TRC's actual ability to generate legitimacy was questionable, and its implications for impunity were mixed. On the one hand amnesty allowed perpetrators indemnity from previous convictions or allowed them to escape the closing net of the attorneys-general, thus undermining accountability. And yet amnesty forced a minority of perpetrators to confirm important truths about the past and reveal new ones.

In many Latin American countries, the political constraints created by a negotiated settlement curtailed the search for truth and justice and ultimately led to the erosion of legitimacy. For instance, the *Report of the Truth Commission* (1993) in El Salvador recommended an extensive program of judicial reform, which was patently ignored; and the amnesty law passed shortly afterwards undermined its potential as an instrument for reform of the security apparatus. Because of this and similar experiences, Panizza writes,

It would be tempting to sum up the legacy for human rights of the processes of transition to democracy in Latin America in a single word: impunity ... Politically impunity eroded the legitimacy of the new governments by blatantly violating the principle of

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equality before the law which every democratic government is bound to uphold. (1995:175)

Whether a truth commission challenges impunity and generates legitimacy for the legal system depends on the contribution it makes to a process of legal reform and, more specifically, whether it enhances the capacity of the criminal justice system to pursue prosecutions of human rights abuses. Yet often truth commissions are established as a substitute for prosecutions and represent the compromises made on human rights during the peace negotiations. Nation-building and a version of justice as reconciliation then come to inhabit the vacuum of impunity left by amnesty laws. This means that human rights function in the opposite way to which they were intended in international conventions, and can actually undermine the rule of law, the legitimacy of constitutionalism and the rights of citizens.

CHAPTER 8

CONCLUSIONS: HUMAN RIGHTS, RECONCILIATION AND RETRIBUTION

The South African Truth and Reconciliation Commission came at a remarkable juncture in global politics and this is one reason for the international fascination with it. Around the world, governments and non-governmental organizations championed human rights institutions in post-apartheid South Africa as they desperately wanted to see a success story at the end of a truly horrific twentieth century. The century had begun with the unprecedented industrial annihilation of millions in a conventional war in Europe, culminated mid-century with a fascist genocide and ended with an upsurge in violent ethno-nationalist conflicts in Rwanda and the former Yugoslavia. In the dying embers of the twentieth century, South Africa represented a positive scenario, where a white supremacist regime gave way to non-racial constitutionalism in the absence (it seemed) of widespread retaliation and revenge. Out of the ashes of ruined Afrikaner nationalism, a new human rights commission led by a figure of unquestioned moral authority, former Archbishop Desmond Tutu, was explicitly dedicated to building a culture of human rights and an inclusive 'rainbow nation'.

South Africa's transition became yet another example of the triumph of liberalism as it also coincided with the end of the Cold War, the subsequent demise of socialist ideologies and the rise of *laissez-faire* economics. Since global conditions were much less conducive to the defiant third world nationalism prevalent during the decades of decolonization, national elites in democratizing countries turned to human rights talk as the hallmark of a new democratic order. The incorporation of international human rights laws into a national constitution was seen as coterminous with democracy, freedom and the creation of a new social contract with citizens.

The globalization of human rights talk meant that human rights dominated political and economic life more than at any other point in history. Globalization in the 1990s also meant an expansion in the range of claims made within the language of human rights. For many political leaders, human rights talk seemingly had the ability to create a fully-blown moral-ethical code, to forge a moral unity and to legitimate the new democratic order. The difficulties experienced in the



implementation of these new formulations of rights derive in part from the success of the idea of rights. The constant expansion of the functions of human rights institutions had at some point to reach an upper limit, beyond which it becomes apparent that the capacities of rights have been overreached.

This book has taken the view that human rights are best conceptualized as narrow legal instruments which protect frail individuals from powerful state and societal institutions.¹ During the transformation from an authoritarian regime, human rights can play a vital role in establishing accountability and the rule of law. It is misguided to fetishize rights and treat them as a full-blown political and ethical philosophy, as only the most anemic moral system could be constructed from a list of rights. Human rights are important preconditions of liberty and freedom but they are too narrow to define liberty itself. They are instruments for realizing common goods such as legal and political accountability, but they cannot entirely define the common good and may even impede certain visions of it which emphasize socio-economic redistribution. Understanding the limits of what the instituting of rights can achieve is the only way to understand why the reformulations of human rights by South African political and religious leaders did not gain rapid legitimacy.

We must therefore be more cautious about what human rights discourses and institutions in democratizing countries can accomplish, and give greater attention to a realist investigation of what social actors and institutions actually do with rights, and what level of legitimacy their actions have. This critical attitude requires us to look closely at the motivations of governmental elites establishing new human rights commissions and at the sociological consequences of attempts to build a 'culture of human rights'. Governments do not exalt the language of rights solely because it contains fine liberal principles, but also because it allows them to pursue nation-building and to centralize state authority in a legally plural context.

Throughout this book, we have seen that the societal consequences of human rights talk are ambiguous and paradoxical. On the one hand, human rights ideals are progressively modernizing and encourage a critical reflection on authority, tradition and patriarchal notions of community. Human rights commissions create a space which did not exist before where narratives of suffering could emerge and become incorporated into the official version on the past. Public recognition of formerly repressed narratives allowed greater mutual understanding between the sections of South African society separated by the racialized boundaries of apartheid. This made possible a greater 'fusion of horizons', a base line of understanding, and it defined the parameters

of discussion of the past. No one can now claim that apartheid was a well-intended policy of good neighborliness that somehow went wrong. Nor can they deny that tens of thousands were killed by the operatives of an abhorrent political system. The range of permissible lies is now much narrower because of the work of the TRC.

At the same time, human rights are an intrinsic part of the legality of the modern state apparatus and as such they constitute an element in the onward march of legal domination identified by the sociologist Max Weber in the late nineteenth century. They subordinate the lifeworld² of social agents to the systemic imperatives of nation-building and the centralization of the legal and bureaucratic apparatus. Rights transform political problems into technical ones and thereby remove them from the reach of parliamentary legislation.³ The combination of scientism, legal positivism and human rights seeks to create the conditions for greater legitimacy by raising truth out of the realm of political struggle and negotiation into the rarefied ether of scientific objectivity.

Human rights are entwined with a project of modernist rationalization, and this book has explored some of the consequences of rationalization for the production of an official version of the past.⁴ Human rights place normative restrictions upon citizens' subjectivities, narrowing them and squeezing into the allowable categories of legal positivism. Human rights forms of investigation and documentation are too legalistic for adequately recording and reflecting upon past violations. The instrumental rationality of law and rights systematically transforms the lifeworld, rather than being a sensitive device for listening to subjectivity on its own terms. By extending legal domination into ever more areas of social life, human rights institutions can close down the space for popular forms of understanding the past. We saw how the South Africa TRC restricted both the narrative form and the content (especially, excluding revenge) of deponents in a process of legal colonization of the realms of personal experience.

Although human rights are part of the iron cage of rationalization, not all truth commissions are inherently doomed from the start. Instead, the question is more how to strike the right balance between legal-forensic investigations and historical approaches to truth. Those truth commissions which have been more successful in my view are those which have abandoned the trappings of law, allowed the courts to administer amnesty provisions, and concentrated more on truth-finding. They are designed more as a history project, rather than a court of law.

Some Latin American commissions have used a more reflexive and historical approach to truth in order to produce a more coherent account of the past which could be used as a charter for future reforms

of the state and society. The Guatemalan Historical Clarification Commission (CEH),⁵ which delivered its report *Guatemala: Memoria del Silencio* on 25 February 1999, had no amnesty functions and was precluded from 'individualizing responsibility'. Its revelations could not have any legal consequences and it could not name perpetrators. This clearly had unfavorable implications with regard to the wall of impunity surrounding the security forces, but the Guatemalan commission turned necessity into virtue and produced a bold and persuasive historical account of the country's violent past. Freed of the need to make legal findings, it could subordinate statistics to a sophisticated explanatory account of the past. *Guatemala: Memoria del Silencio* went much further than the South African report in identifying the structural causes of violence, beginning with colonial history and the creation of a racist and authoritarian post-independence state, the exclusionary nature of the economic model of development chosen, the militarization of the state, the rise of a Doctrine of National Security and the consequences of US intervention in the twentieth century.⁶

There is a general point here which might be borne in mind by those setting up human rights commissions in other parts of the world, and that is that different institutions must carry out clear and distinct tasks which they are designed to carry out. Truth commissions do not function well if they are overloaded, as the South African TRC was, with a variety of tasks including holding public hearings, writing a report on the past, recommending reparations policy and granting amnesty. Many South African human rights activists have realized that human rights talk has spun out of control and the editorial of a Human Rights Committee publication in April 2000 stated: 'the situation facing us is an unwelcome cocktail. The blend of a great number of rights institutions together with wide mandates may instead of providing for an effective and efficient system of promoting rights ... actually result in a flailing around ... We have the suspicion that too many institutions are trying to be too much to too many with the result that they are doing too little for too few' (Human Rights Committee of SA 2000:2).

Turning now to consider efforts by the TRC to create national reconciliation, we can see that this undertaking shared many of the characteristics of the truth-writing project. Reconciliation talk sought to transform the lifeworld according to systemic imperatives in order to displace revenge, retribution and physical punishment in popular views on the 'just desserts' of human rights offenders. Reconciliation talk had as its aim the centralization of justice and the augmentation of the state's monopoly on the means of coercion. The post-apartheid program of state-building involved drawing adjudication institutions from their many multiple sites (local township courts, armed gangs,

Special Defense Units) into those institutions sanctioned by the state. The establishment of the TRC and a number of human rights institutions was therefore only intelligible in terms of the hegemony-building project of the new state in the area of justice.

The TRC's objectives of centralization, state-building and reducing legal pluralism were only partially fulfilled. For all their media coverage, TRC hearings were often little more than a symbolic and ritualized performance with a weak impact on vengeance in urban townships. The transfer of values from an elite to the masses was uneven and equivocal. In the same way that the rationalization of truth production created a dissonance between bureaucratic and popular understandings of the past, the rationalization of justice created new relational discontinuities between institutional and informal justice. These discontinuities centered around widespread practices of revenge which were demonized by the human rights constituency as dangerous to the well-being of the new rainbow nation.

There was an acute lack in the TRC of concrete mechanisms to pursue conflict resolution and it interacted with local communities primarily through progressive mainstream church networks. Churches represent a significant urban black constituency, but there was no attempt to connect up with the punitive structures at the local level – warring party political branches, township courts or Special Defense Units. Although the use of physical punishment by neighborhood courts was an unpalatable reality for Commissioners, human rights institutions ignore popular conceptualizations of justice at their own peril. Nor was there any attempt to facilitate victim-offender mediation between individuals, either by the TRC itself, or through the many conflict resolution non-governmental organizations available.

The TRC was not particularly effective in creating a new culture of human rights or greater respect for the rule of law. As long as human rights institutions function as a substitute for criminal prosecutions, they will be resisted by some victims and denounced as a 'sell-out' by informal justice institutions. There are other more important state-institutions to consider here, namely the criminal justice system itself, which has only received a fraction of the international interest shown in the TRC. In this context, the TRC deflected attention from the more serious project of the transformation of the legal system in order to make it more representative, quick and fair.

We should not just blame the TRC for not achieving what it never had the capacity or political backing to achieve single-handedly: a shift from an ethic of revenge to an ethic of retributive justice and the legitimation of justice institutions. Our disapprobation is also allayed by placing the TRC within a wider context of the legacy of apartheid and

a long-standing legal pluralism which meant that any new language of justice, such as human rights, could not have a uniform impact. By taking into account these systematic constraints, we can have a more balanced view of what truth commissions can and cannot achieve. What they can achieve well, if carefully designed, is a sophisticated historical account of a violent past which integrates a structural analysis with the consciousness of those who lived through it. The rest should either be left to justice institutions, or to non-governmental organizations of civil society with expertise in mediation.

The most damaging outcome of truth commissions is a result of their equating of human rights with reconciliation and amnesty. This delegitimizes them enormously in relation to popular understandings of justice and can lead to greater criminal activity in society. There is growing evidence from Eastern Europe and elsewhere that it is necessary for democratizing regimes to challenge directly the impunity created during the authoritarian order, if they are going to avoid an upsurge in criminality and a lack of respect for state institutions. John Borneman's study of the countries of post-communist Eastern Europe contended that 'a successful reckoning with the criminal past obligates the state to seek retributive justice and that a failure to pursue retributive justice will likely lead to cycles of retributive violence' (1997:6).

In applying this argument to South Africa, there is evidence enough in the crime statistics and the wild justice in places like Sharpeville to assert that criminality has been exacerbated by the lack of full accountability for human rights offenders.

This view is backed up by a salient interpretation of international human rights treaties, which holds that those responsible for gross human rights violations must be brought before a court of law and held accountable.⁷ The justice advanced by some statutes contained in international human rights conventions refers to retributive justice – punishment for offenders and just compensation for victims. However, in countries emerging from authoritarian rule, human rights talk often comes to undermine accountability in favor of nation-building, and thus to signify the reverse of the requirements of many international human rights treaties. It means (individual or blanket) amnesty for perpetrators, selective prosecutions of others who do not submit to the established process, and a limited truth finding operation as a parallel compromise solution.

Human rights talk has become the language of pragmatic political compromise rather than the language of principle and accountability. This is the main obstacle to popular acceptance of human rights as the new ideology of constitutional states.

Constitutionalism purports to be the foremost political system to defend the rights of citizens and principles of justice, whereas human rights talk in South Africa or Chile or Argentina has come to be about political deals where everything is negotiable, where cut-off dates (for example, for amnesty) are always extended and seemingly resolved issues (again, amnesty) keep being placed back on the negotiating table. The perception that human rights is more about compromise than justice for offenders was reinforced time and time again. For instance, the Chair of the Human Rights Commission, Dr Barney Pitso, stated in 1999 that all further apartheid-era prosecutions should be halted: 'We [the Human Rights Commission] counsel against such a course of action [prosecutions]. The simplest solution is to say that those who have escaped the net of the [Truth and Reconciliation] Commission must receive the forgiveness of the nation' (*Sunday Independent*, 26 July 1999).

If human rights are associated instead with a principled position of accountability of key human rights offenders,⁸ then this would bring human rights into greater alliance (both discursively and in practice) with that majoritarian constituency which views justice as proportional punishment for wrongdoing. This would also connect national scenarios to a progressive trend in international human rights law, which is increasingly taking the view that there are no conditions under which a torturer or a mass murderer should go free. In the light of the establishment of the International Criminal Court, and extradition proceedings against General Augusto Pinochet in Britain in 1999, which established that heads of state do not enjoy immunity from prosecution for human rights violations such as torture, the stage seems set even more than before for international human rights law to transcend national legal systems and to prosecute those involved in gross human rights violations with greater vigor. In April 2000, the right-hand man to Radovan Karadzic and most senior Bosnian Serb to be arrested for suspected war crimes, Momcilo Krajisnik, was seized in a dawn raid at his Pale home by French troops who then sent him to The Hague to the UN International Criminal Tribunal for the former Yugoslavia (*Guardian* 4 April 2000). Only a month earlier, the same UN tribunal sentenced a former commander of Croat forces in Bosnia, General Tihomir Blaskic, to 45 years in jail on 20 counts, including breaches of the Geneva Conventions and crimes against humanity (*Guardian* 4 March 2000).

Despite the protestations of some post-authoritarian elites, these international prosecutions are seen as wholly just by many of those who lived through periods of violence, terror and authoritarianism. In an

international context where the jurisdiction of human rights institutions is intensifying and broadening, it is misguided to delegitimize human rights at the national level by detaching them from a retributive understanding of justice and attaching them to a religious notion of reconciliation-forgiveness, a regrettable amnesty law and an elite project of nation-building. Democratizing regimes should not seek legitimacy through nation-building, efforts to forge a moral unity and communitarian discourses, but on the basis of accountability and justice defined as proportional retribution and procedural fairness. The role of human rights and the rule of law in all of this is to create the bedrock of accountability upon which democratic legitimacy is built.

The many writers in law, politics and philosophy who applauded the South African TRC hoped that enlarging the definitions of human rights and the functions of human rights institutions might expand a culture of human rights. This view is well-meaning, but erroneous. We should recognize that human rights are most effective when conceived of as narrow legal instruments designed to defend individuals from political institutions and to hold accountable those responsible for violations. This formulation is simple, efficacious, and commands a great deal of legitimacy because it is usually reinforced by popular conceptions of justice. This could be the basis for establishing the rule of law in a democratizing context, rather than amnesties and reconciliation which only perpetuate impunity. Turning human rights talk into a moral-theological treatise which extols forgiveness and reconciliation in an effort to forge a new moral vision of the nation in the end destroys the most important promise of human rights; that is, its possible contribution to a thoroughgoing transformation of an authoritarian criminal justice system and the construction of real and lasting democratic legitimacy.