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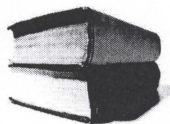
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# Precedent & Possibility

The (ab)use of law in South Africa

Dennis Davis  
Michelle le Roux



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## PRECEDENT & POSSIBILITY

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Contents

Acknowledgements . . . . . iv

Foreword      *by Cyril Ramaphosa* . . . . . v

Chapter one:    Introduction . . . . . 1

Chapter two:    Who can rid me of this troublesome court?  
                      The first instalment . . . . . 17

Chapter three:   The *Rivonia* trial: Competing visions for  
                      South Africa . . . . . 36

Chapter four:    The challenge to the pass laws: The  
                      beginning of the end; or they did not even  
                      know his name . . . . . 60

Chapter five:    Exposing detention without trial . . . . . 81

Chapter six:     A bridge over our troubled waters? . . . . . 100

Chapter seven:   A break with the past, a view of the future 121

Chapter eight:   Activism, denialism, socio-economic rights  
                      and beetroot . . . . . 141

Chapter nine:    A special relationship . . . . . 159

Chapter ten:     Conclusion . . . . . 178



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Dennis Davis, Michelle le Roux — September 2008



## Foreword

Apartheid made many South Africans ambivalent about the law. A legal system, we believed, should protect all citizens against the abuse of power from whatever quarter. The law, we felt, should serve the interests of the powerless and not of the ruling elite.

Yet we experienced the law under apartheid as a repressive instrument. It provided the foundation for a system that denied rights on the basis of race, and it was abused to crush legitimate political opposition. At the *Rivonia* trial it came perilously close to sending Nelson Mandela and Walter Sisulu to the gallows.

Even in those dark times, many of us retained our faith in the potential of the law. We recognised that it could be abused to entrench an evil political system. But we also saw that the rule of law could be turned against our enemies and used to constrain the arbitrary exercise of their power.

As general secretary of the National Union of Mineworkers in the 1980s, I discovered that laws intended to oppress us could also be used to curtail the violent and inhumane abuse of power by mine managers.

In those years we looked on, enthralled, as brilliant lawyers like Arthur Chaskalson used legal reasoning to fight back against the pass laws and detention without trial.

Apartheid's legal battles drew attention to issues at the heart of the country's political struggle and contributed to a new constitutional order with human rights at its centre.

Our Bill of Rights, however, has changed the character of the battle for justice rather than ending it. The courts remain sites of intense contestation in which the moral and political conflicts of our society continue to be fought out.

In the past, as is revealed in the cases described in this book, a number of lawyers and litigants displayed great courage during the tumultuous apartheid years by standing up for justice and equality. Fundamentally at odds with the dominant ideology of legalised oppression and dispossession, many of these South African patriots paid a heavy professional and personal price for their convictions.

role of  
lawym

It is a tribute to the tenacity and intellect of these people that, even within the constraints of a legal system moulded to sustain an unjust regime, they were able to challenge the abuse of power and the violation of the rights of the individual.

An ambitious Constitution such as ours, however, should not and ultimately cannot be protected by lawyers and judges acting on their own. Citizens in general need to respect the obligation upon the courts to defend the values that our Constitution embodies, even when this defence results in judgments that are widely and profoundly unpopular.

Political leaders, likewise, need to respect the spirit of the Constitution and to abide by the culture of justification it seeks to promote. Leadership in a



constitutional order must rest on persuasion and justified action and not upon the bald compulsion of state or party power.

This informative and instructive work is a welcome addition to the growing body of South African legal knowledge. It also stands as a tribute to the courageous men and women who have been prepared to fight to reclaim the law for the people of South Africa.

Cyril Ramaphosa — September 2008



## Introduction

Law is deeply embedded in popular culture. Daily headlines announce developments in the latest murder trials that grip the public imagination. Movies like *Michael Clayton* and television series like *Boston Legal* attract huge audiences. The arguments of counsel and decisions of judges in high-profile cases are dissected over cups of coffee and dinner tables across the country.

The law has also played an important role in the history of this country. But do we ever consider the precise manner in which that law shaped the politics and economics of our society?

During the long night of apartheid, courts were often sites of vigorous political struggle, being the places where different visions of the country were presented to the public by the competing litigants, usually the state against accused persons or applicants whose rights were at stake. Since 1994 and the advent of constitutional democracy, similarly significant contests have taken place in our courts. There is, however, a major difference: Litigation now takes place within the context of the Constitution which provides a vast range of rights for all who live in this country. This book seeks to examine some of the crucial cases in which battles for justice in its various forms have been fought.

But first, we venture into the terrain of the theoretical and the conceptual. Hopefully some readers will join us to consider the reasons for our selection of the cases and the links between the old and the constitutional order. Before taking this detour, may we offer this guidance to readers who are more interested in the cases themselves: They should feel free to skip ahead to Chapter 2 and avoid the conclusion as well, where we move beyond the stories to speculate about the future of our constitutional democracy.

### The cases—a difficult choice

Our primary reason for choosing the cases that appear here is that all of them, as we shall show, contributed to a change in the South African political landscape. In other words, they were chosen on the basis of their legal and political importance to South Africa at the time of their contest in the courts, as well as because of their implications for the nature and development of South African society.

There are, of course, many cases which assumed critical legal and political importance to South Africa at the time that they were litigated. The choice

Do we - an you  
going to have them?  
Rampff "Statutory  
Communism"

Paul Harris - 66  
Judy de Klerk -  
Belmer 4

do we see me  
back & later  
sentenced me to  
life

Rampff found vs  
guilty - the  
Defence Trial &  
acquitted us -  
the Treason  
Trial

Solomon Nsamenang  
T.T. Steyn 1  
Emergency - lawyer  
withdraw

Yester - in Secular  
trial - then in  
Rivonia

Failed to sent  
to jail in Secular  
Came back to give  
us life



### *Precedent & Possibility*

therefore proved to be very difficult, particularly in a one-volume work of this nature. Ultimately, we chose cases for which it truly can be said that the country held its breath awaiting the courts' decision.

Legal cases are no more than stories. This may sound strange to some readers in that laws are framed in arcane texts and legalese, or professional jargon, which courts interpret and apply to the facts of the case. Of course, these stories are mediated through these legal texts and a process which uses a particular language. Cases take place within a particular political and moral context. But the unfolding of the case and its outcome is a narrative which directly affects the lives of individual litigants and, possibly indirectly, millions of citizens in this country.

The cases in this book are thus stories that tell of our past, present and future. We have attempted to tell these stories without the legalese that complicates them, and with due recognition to the individual role players, being the lawyers and judges who were responsible for the outcomes, and the litigants whose life experiences were the source of these cases.

When all of these and similar cases are considered together, they reveal a remarkable faith in the process of law, even during the decades of determined efforts by successive racist governments to destroy the very normative foundations of the legal system. Naturally, these cases also reveal the presence of many lawyers who sought during the apartheid era to maintain a racist *status quo*. But, at the same time, they highlight the role of others who strove to use the law in an effort to mitigate the worst effects of that government policy. Each of these cases held implications, at the time often unknown, for the possibility of a constitutional democracy for South Africa. When that time finally came, a tangible faith in law's possibility was rewarded.

*By their nature,  
laws can both  
promote and  
constrain the  
exercise of power*

Solomon  
Nseben

### **Law and the government: the past fuses into the future**

Within a decade of democracy, litigation was again launched based on the claim that government failed to listen to the people. Ironically, those who allegedly refused to listen to the claimants were often government leaders who had made similar demands of the apartheid state.

To many, this assertion of the link between the law of the past and future may seem decidedly incorrect, in that today's legal dispensation bears little resemblance to its apartheid predecessor. But consider the following: during apartheid, the law created the very foundations essential to the construction of the system that allocated and denied rights and privileges on the basis of race. The cruelty of apartheid was maintained by volumes of laws and regulations. But, by their nature, laws can both promote and constrain the exercise of power. In other words, litigation can be used to undermine the law itself. Let us first examine law as a form of struggle during apartheid.



## Introduction

Many of these legal struggles were based upon the following idea: A law may be introduced by government to achieve a pernicious purpose yet be employed by a resourceful litigant for an opposite end. Of course, the outcome may also depend on the approach to law of the particular judge before whom the case is heard. Take the case of Dullah Omar, later to become the first Minister of Justice in a democratic South Africa.<sup>1</sup> He was detained without the benefit of a trial under a draconian piece of legislation called the Public Safety Act. His legal representatives argued that, unless the Public Safety Act expressly authorised the State President to issue emergency regulations which included a denial of so important a right, the regulations could not deny a detainee the right to make representations to the authorities as to why he or she should not be detained.

The majority of the Court rejected this argument, holding that the State President was granted the implied power to promulgate regulations which excluded the rights of detainees to make these kinds of representations. In a significant minority judgment, Judge Gerald Friedman insisted that a right as fundamental as that of being heard when rights to liberty are affected by an adverse decision, could be removed expressly only by an Act of Parliament. The pro-executive judge was prepared to accept anything that the government called law, but a judge like Friedman insisted that the bedrock of law is the protection of the rights of citizens which can be taken away only by an express legal provision, not by reading an ambiguous text to negate the protection of rights.

In a country where the courts claimed adherence to the principle of the rule of law, certain judges took these claims seriously. But Judge Friedman was in a minority. From time to time, however, his approach did prevail. On occasion, the government was held accountable leading to unexpected outcomes. Judges would read apartheid statutes in ways that revealed their open texture or ambiguity in their meaning. This finding then allowed these judges to favour an interpretation that could produce an outcome which minimised the impact upon the existing rights of individual citizens. They read the law to mean something other than the interpretation claimed by the government. In the early 1950s, the courts often adhered to this model of adjudication. In 1950, for example, the Appellate Division held that a regulation authorising racially separate railway coaches in circumstances where only black passengers were subjected to criminal sanction for travelling in the 'wrong' coach was illegal because it promoted unequal and partial treatment.<sup>2</sup>

This approach, as we shall see, became rare as the apartheid state gained strength but the possibility of similar victories was never completely extinguished. Throughout apartheid a contest between legal results which either preserved or destroyed rights took place in the courts. In a work that heavily influenced a generation of progressive lawyers in this country to conceive of a legal theory that could justify human rights litigation, the English social historian Edward

*The bedrock of law  
is the protection of  
the rights of  
citizens*

*Recusal of Lushington  
Kennedy - harsh  
judge.*

*Appellate Court in  
Natal - must provide  
alternatives  
- Landau  
Natal - Gendin*



### *Precedent & Possibility*

Thompson in *Whigs and Hunters* clarified the difference between a system of power which claimed adherence to the rule of law and one based on pure arbitrary power, absent any recourse to law. The key passage of his text reads thus:

The inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth and a true and important cultural achievement . . . The notion of the regulation and reconciliation of conflicts through the rule of the law—and the elaboration of rules and procedures which on occasion made some approximate approach towards the ideal—seem to me a cultural achievement of universal significance . . . I am not starry eyed about this at all . . . I am insisting only upon the obvious point, that there is a difference between arbitrary power and the rule of the law. We ought to expose the shams and iniquities which may be concealed beneath this law. But the rule of the law itself, the imposing of effective inhibitions upon the power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.<sup>3</sup>

Thompson understood well that power worked through law but that the power-holder was, on occasion, held accountable to a legal text which, given the nature of that text, was open to a litigant's interpretation. For this reason, governance under apartheid was sometimes vulnerable to challenges in the courts. Legal battles continued to rage throughout the period between 1948 and 1994. In most cases, the battle was fought without much success for the powerless. Sometimes, however, significant and surprising results were achieved. These victories were the product of many interrelated factors: the quality of lawyering, the ideology of the presiding judges, the political context in which the cases were fought, the intensity of political struggle at that time and the nature of the factual and legal materials relevant to the particular case.

### **Law and strategy**

Lawyers who understood the nature of law in this way developed their litigation strategy to exploit the law's contradictions and to help create space for both political activity and the curbing of gross excesses of state power, all the while undermining the efficacy of government policy.

The then Chief Justice, Pierre Rabie, who, as we shall later see, was the leader of an excessively executive-minded judiciary during the 1980s and whose court was described as having declared a war on law during the states of emergency of the 1980s, commented on the way in which lawyers, who brought cases in many different courts challenging the state of emergency declared by P W Botha in 1985 and again in 1986 and 1987, appeared to have coordinated their legal strategies.<sup>4</sup> To an extent, he was correct—the human rights Bar certainly knew it was in a ferocious fight and each case litigated was followed carefully by other litigators anxious to explore any possibility for a rights-based defence which emerged from previous encounters.



## Introduction

The adverse context in which these legal fights took place is well illustrated by the approach adopted by the senior judiciary, particularly Rabie. Rabie presided over a court which was determined to reduce the space for any legal challenge against government repression. An interview conducted by Steve Mufson with Rabie, published in the *Sunday Star* of 3 May 1987, threw a bright light over this approach adopted by the overwhelming majority of the judiciary at that time: “[Rabie] seemed unperturbed by the Government’s encroachment on the rights guaranteed by Roman-Dutch common law; that is, rules of law inherited from our Roman-Dutch and English heritage and fashioned by our courts over a century to meet the perceived needs of the country. As far as Rabie was concerned, there was no question of more than one outcome in a case because, once Parliament enacted a law, ‘It is the law,’ he said. He viewed a Bill of Rights with scepticism and said that, in the United States, ‘It has produced a bit of a shambles.’ To him, the United States represented ‘freedom run mad’. He then went on to tell Mufson: ‘We must be realistic. We have strangers coming in across the borders with bombs and mines. There is nothing in the common law to deal with a situation like that. The ordinary law of criminal procedure would require that a man be charged within 48 hours so that you can’t question him any more after that. We must get information from people we arrest, especially when they are carrying weapons from the Soviet Bloc, otherwise we can’t defend ourselves . . . The situation in the country is pretty near that of a civil war. It is naïve to think you can quell it by bringing people to court.’”

*Judge Rabie  
at justified  
go day*

Contrary to the Rabies who dominated the bench, there was a small group of exceptional judges who were prepared to listen to arguments about abuses of rights and to read oppressive and racist legislation as narrowly as possible in order to give effect to the values of the common law.<sup>5</sup> According to this reading, the law, at its core, protected and promoted human rights such as the freedom of the individual and the civil rights of all citizens. Lawyers continued to use Thompson’s theory of law in their litigation strategies, knowing that some judges might see law as a limitation on unaccountable state power.

*‘We have strangers  
coming in across  
the borders with  
bombs and mines’*

## Challenging the state of emergency

An unusual example of this judicial approach which demonstrates a belief in the possibility inherent in this form of litigation occurred at a conference held in 1986. It was organised by Professor John Dugard, the then Director of the Centre for Applied Legal Studies, an important human rights institution housed at the University of the Witwatersrand. Dugard is truly one of the heroic figures of the South African academy and a pioneer of human rights jurisprudence in this country. He had organised the conference so that lawyers, both in practice



*Precedent & Possibility*

and in academic life, could meet to discuss the possibility of legal challenges that could be mounted against the declaration of the state of emergency. It was a time of great despair. The effect of the emergency had been to drastically circumscribe the space available for open political activity and dissent against government. Thousands of people had been rounded up and detained without trial. Chief Justice Rabie presided over the highest court in South Africa and had made his legal intentions clear. Vigilante organisations, whether directly or indirectly established by the government and buttressed by the police and army, had taken charge of many black townships, crushed political opponents, all under the cover of national legislation which empowered the declaration of a state of emergency and consequent suspension of many legal safeguards.

It was not surprising, therefore, that the conference began in muted terms. But, at this conference, a judge who, more than any other, represented the possibility of an independent, courageous and principled judiciary had been invited by Dugard to give the keynote speech. He was Judge John Didcott. Imagine the situation: a sitting judge comes to the University of the Witwatersrand to give an address in an open forum to a group of progressive lawyers, no doubt infiltrated by a number of security police spies. Didcott would

*John Didcott  
would have been  
aware of the risk  
he was taking in  
speaking so boldly  
in public*

have been aware of the risk he was taking in speaking so boldly in public. But he was not a person who was easily intimidated. He spoke of the need for lawyers, more than ever, to find innovative strategies for challenging government action in general and the emergency regulations in particular. He urged lawyers not to give up at this time because the very future of the legal system, which had the potential to underwrite a democratic country, was at stake.

Any potentially progressive element of the existing legal tradition could disappear if the government had its way. He reminded the lawyers present that there were available potential legal challenges to the emergency regulations. Of course, he reiterated that it would be inappropriate for him to discuss the details of these avenues as he wished to be available to sit as a judge in some of those cases.

It was an extraordinary call to legal arms. A judge appointed by the apartheid regime was urging the best of South African human rights lawyers, with a brave, principled articulation of the innermost commitments of law, to be true to their calling. This speech was made at the very time when even the most progressive of South African lawyers were beginning to doubt the utility of their activities.

Didcott was almost unique on the South African bench. There were, however, other judges who were also prepared to adhere wherever possible to the underlying principles of the common law, including Gerald Friedman, Richard Goldstone, Ray Leon, Johan Kriegler, John Milne and Laurie Ackers-

*Tribute to  
Judge Didcott*

*other judges*



mann.<sup>6</sup> It is within this context of the contradictory qualities of law that the cases that were fought during the apartheid era and discussed in this book are perhaps best understood.

### The bridge

The history of litigation before 1994 helps us understand the constitutional era that was born out of the legal rubble created by apartheid. The very form of constitutional democracy that took hold in South Africa after 1994 represented not so much a rupture of the old and a construction of the new but, as Etienne Mureinik wrote in a justly heralded article<sup>7</sup>, the building of a bridge between a terrible past and the potentially liberating future. Mureinik wrote thus:

If the new constitution is a bridge and this bridge is successfully to span the open sewer of violent and contentious transition, those who are entrusted with its upkeep will need to understand very clearly what it is a bridge from, and what a bridge to . . . If the new constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

1996 Constitution  
is a bridge from old to new

Mureinik saw the new Constitution as a bridge designed to transport a country away from a culture of authority to what he termed a culture of justification, that is, a culture where every exercise of power has to be justified by the power holder. Under apartheid, decisions of the government were based on fear which was, in turn, inspired by the force at its command. Mureinik argued that leadership of government under the new Constitution had to rest on the cogency or persuasive quality of the case which it offered in justification of decisions it made. The bridge would assist in the journey which society undertook to travel away from arbitrary and brutal exercises of power to decisions which could be subjected to debate, deliberation, public examination and, above all, justification.

The rich metaphor of the bridge needs to be extended beyond its use as offered by Mureinik. The bridge also represents the model of transformation that was followed in South Africa. There was no revolution, no violent rupture from the past. The old was, in many instances, to remain although the substance of the old would be changed in incremental stages. This path of negotiated evolution rather than violent, sudden revolution can be illustrated by the manner in which the bridge was constructed.

The constitutional bridge was to be created mostly by bridge-builders who were fluent in the old legal traditions. Their construction was undertaken



with the only tools in their possession, namely our inherited legal traditions, together with a constitutional mandate to engage in reconstruction of these traditions through the new text. Here we mean the inherited legal traditions, such as the structure of the Bar, the side Bar, the form of the judicial institution in this country that was inherited from Britain with black gowns and frilly bibs, and much reference to 'M'Lord' and 'M'Lady' and to 'my learned friend'.

The dominant conception of the common law is that of a timeless, universal body of truth inherited from the days of the Dutch occupation of the Cape. Through this, precedent retains its tenacious hold on progress as courts, in the main, follow decisions handed down in the distant past. A court is not free to decide a case without constraint. An earlier decision by the higher court which set out a rule of law or interpreted a provision of legislation which is applicable in the case before the later court is now binding and therefore must be followed. All these legal rules and conduct form the traditions of which we speak. But it now becomes mixed with the new constitutional text and the interpretive moves of the courts in giving meaning to the new text. In this way, fresh legal material is manufactured which, in turn, is employed in the construction of the legal bridge.

### **Models of adjudication for a constitution**

In addition there is the not insignificant matter of models of judicial adjudication. As will be illustrated in this book, before 1994, the performance of the judiciary broadly can be explained by way of two models. Until the late 1950s, the courts, particularly the Appellate Division in Bloemfontein, were staffed by judges who were essentially libertarian: they distrusted state interference in the private lives of citizens. For them, the State was a night watchman which operated to guarantee the negative liberties of all citizens.

*Old styles of  
adjudication  
proved unsuitable  
for the new  
challenge of legal  
transformation*

After 1960, the courts endorsed the law as a tool of social engineering by the state, no matter the effect upon individual freedom. Neither of these models was suitable to the adjudication of a constitutional text which endorsed social democracy, meaning guarantees of negative liberty together with positive obligations of the state to ensure a minimum floor of goods and services for all who lived in the country. Whatever the chosen model, change was clearly a necessity. Old styles of adjudication proved unsuitable for the new challenge of legal transformation.

The bridge is also constitutive of the new society that is to be constructed by and with laws. As apartheid had built a legal system powered by race, so too was the new democracy to be created by laws sourced in the Constitution.



## *Introduction*

Hence the bridge continues to be constructed whenever Parliament enacts legislation; each new transformative statute is like another span in the bridge.

This metaphor of the bridge has still further implications for our story: the crossing of the bridge never really ends. At best, the journey is a movement by society away from the past and in the direction of a community prefigured in a coherent reading of the constitutional text. That idea of community is never attained completely. The journey itself becomes an essential part of the transformative exercise. As the constitutional custodians, the judiciary therefore moves into critical focus.

## **The effectiveness of the judiciary**

An important implication arising from the *Harris* cases, dealing with the constitutional crisis of the 1950s, is that when judges are isolated by governments and faced with negative public opinion, their role as potential instruments in the struggle to retain rights under attack, let alone transformation, are truly limited. A constitution is not merely the sum of the provisions contained in its text. This text must be given life by the decisions of the courts. If the text constitutes the design of the bridge, the courts begin to build the bridge in terms of their particular conception of the design.

Of course, the construction of a constitutional bridge can only happen successfully if the community continually accepts the efforts of the court in building the bridge. With this kind of acceptance, the bridge gains legitimacy when it is increasingly viewed by the population as a viable means to be used for the journey away from the apartheid past.

Legitimacy and efficacy are the very cement of the project. Efficacy means that the decisions of the courts are recognised and rendered effective by those in power. After all, it is now trite to parrot the American constitutional theorist, Alexander Bickel,<sup>8</sup> who observed that the courts are the weakest arm of government with no police or army to command in order to enforce their orders. The process of enforcement depends upon the cooperation of the other arms of government. It is mainly the police force which is used to enforce court orders, if necessary, and the police are under the control of the executive. Efficacy is reinforced by legitimacy; that is, the more the public respects and regards the importance of court decisions, recognising that their content broadly reflects the moral convictions of the community, the more legitimate the courts become as an institution. In turn, this level of public regard develops into a form of public practice which does not take lightly to manipulation of the constitutional system.

By this, Bickel means that the institution of rule by constitutional law is then defended by the public in the face of executive or legislative attempts to

*Legitimacy and  
efficacy are the  
very cement of the  
project*



### *Precedent & Possibility*

curb the power of the courts. If the public, mainly through institutions of civil society and the media, defends the legal institutions, government becomes more wary about interference. With a legitimate institution as the key agency of construction, it is possible for the bridge to transport society in a direction away from that which existed prior to its construction. However, if there is fundamental public disagreement about the construction, the project becomes stillborn, like the bridge on the Foreshore in Cape Town depicted on the cover of this book, waiting in a forlorn fashion to be connected to some other part of the city. With this background, we turn to our selection of cases.

### **The coloured vote cases**

This book canvasses cases from both the apartheid past and democratic South Africa. In each of these cases, the stakes were enormous. The trilogy of coloured vote cases heralded the end of the liberal legalism that had flickered throughout the first part of the 1950s. With the decision in *Collins*, the last of this trilogy of cases, the South African legal system finally and definitively eschewed the idea that a common law, which placed the freedom of the individual at the centre of the legal enterprise, should trump legislation which took away these rights, save where the legislation in question made a denial absolutely clear. In the wake of the first two cases in the trilogy, the National Party responded to its legal defeats by altering the composition of the Appellate Division in order that its judgments would increasingly reflect the will of the (white) people of South Africa. Not only did this help give it eventual victory in *Collins* but it destroyed the last vestiges of a liberal court which may have challenged the executive.

In summary, these cases tolled the bell for the burial of liberal legalism, albeit of the weak kind that endured into the 1950s. Thereafter, it would be rare for government's race laws to be overturned by a court determined to preserve the rights of individuals, even those long existing in the common law of the country. By the time the final decision in the trilogy was made to approve the constitutional changes that disenfranchised the coloured voters of the country, the National Party had gained control of the Appeal Court. Its campaign to alter the composition of the Bench had borne fruit which it harvested for more than two decades. Thus the institution of an independent judiciary was seriously jeopardised.

### **Rivonia**

Next up is the *Rivonia* case, a quintessential political trial as defined by the Frankfurt School political scientist, Otto Kirchheimer,<sup>9</sup> in that it adopts the form of criminal law to vindicate the existing social and political order by imposing criminal sanctions for the political actions of legitimate political opponents. In



## Introduction

these ways, political acts designed to criticise the government or to organise opposition to government policy are subjected to a criminal censure. By censure, we mean the attempt of government to categorise this political activity as nothing more than criminal conduct devoid of 'legitimate political purpose'. After all, the courts impose severe sanctions upon people convicted of criminal conduct. The possibility is then open for government to equate this 'criminalised' political conduct with, for example, common law murder or robbery.

*Rivonia* was a trial of the political ideas of those leaders who represented the majority of the country. The state sought to present the leadership of the African National Congress as no more than a group of violent criminals. Of course, as in any political trial, the 'accused' contested this attempt of the state to invoke a criminal censure with all the vigour that their testimony and legal team could muster. But the ultimate conviction of the accused held the possibility that South Africa's greatest leaders, including Mandela and Sisulu, could have been hanged. That alone was cause for the country to hold its breath. The trial also represents the story of a diminishing faith in the law. The defence lawyers well knew of these limitations as they confronted a more confident, oppressive state and increasingly pro-executive judges. The scope for legal resistance had narrowed. *Rivonia* was not only about Nelson Mandela and the other accused, but it was also about Bram Fischer, lead counsel for the accused, and his journey after *Rivonia* from a leading senior counsel at the Johannesburg Bar to a full-time revolutionary. In brief, it appears that, not long after the end of the trial, Fischer recognised that the existing legal system could hardly be employed meaningfully to effect significant social change.

*Rivonia*  
- Bram

## Residence and relocation

The two other cases litigated during the apartheid era discussed in this book represented far more strategic and less defensive conceptions of litigation. In these cases, the law was used to curb the excesses of apartheid in key areas of state policy. Even before 1948, influx control had diminished the freedom of movement of most South Africans on the grounds of race alone. By the late 1970s, literally hundreds of thousands of black South Africans had been made criminals in their own country by attempting to live with their families or work in urban areas from where they were barred by a system of laws designed to prevent their permanent residence in the urban centres. Millions of people worked in exploitative conditions for the benefit of an economy controlled by the few. The system of influx control empowered government officials to treat millions of South Africans as pawns on a giant chessboard.

Along came two tenacious litigants, Messrs Komani and Rikhotso, and the Legal Resources Centre (LRC). In two separate cases, the director of the LRC and future Chief Justice of South Africa, Arthur Chaskalson, managed to

*Pass laws*  
*Arthur*



### *Precedent & Possibility*

persuade a National Party-appointed Appellate Division that the administration of these pass laws was illegal. By the end of this litigation, the pass laws could no longer be properly enforced and the way had been cleared for black South Africans to live and work in urban South Africa. Not only did Messrs Komani and Rikhotso succeed in their quest to live legally where they had resided for years but the outcome justified the choice of a legal strategy during the height of apartheid rule where the very laws attacked in a conservative court had been designed as a main strut in the apartheid edifice.

N.B.  
Arthur &  
pass laws

### **Atrocities in incarceration**

From the 1960s, the government employed a system of detention without trial to incarcerate its political opponents. As is the case today in the United States and Britain, governments seek to bypass the law in their 'war against terror'. The South African government employed the justification of a 'communist onslaught' against its alleged 'civilised standard of life' to incarcerate people without any proof of an offence which could be tested by a legal system. The police were not prepared to be rendered accountable to even a generally sympathetic judiciary which government had carefully appointed.

During the early 1960s, the system of detention began with incarceration without the authority of a court for a maximum defined period of 90 days. Within a decade, this period had been extended to indefinite detention. The cloak of secrecy and lack of accountability that was thrown over the system did not prevent the regular publication of allegations of police torture of detainees.

*The Wendy Orr  
case was a piece of  
strategic litigation  
designed to expose  
the system of  
detention without  
trial*

But it was only when a courageous district surgeon came forward to expose the atrocities committed by the police, invariably denied or covered up by government and rarely believed by the courts, even when they were confronted with detailed allegations of torture, that the sheer horror of the system was exposed to the nation through litigation. The *Wendy Orr* case was a piece of strategic litigation designed to expose the system of detention without trial. The use of existing law and legal procedure to achieve this aim within the context of a state of emergency, where the country was controlled by police and not the courts, is a remarkable illustration of strategic human rights lawyering.

Wendy Orr &  
90 day law

These four cases were part of a legal tradition upon which constitutional democracy during the late 1980s and early 1990s could be based. These cases showed that there was value in a rights-based legal culture and that the promise of a transformed jurisprudence had never been destroyed in its entirety.



## Cases based upon a Constitution

The cases that were litigated after the advent of constitutional democracy and which are discussed in this book all illustrate the manner in which the bridge has been constructed since the designs were approved by the Constitutional Assembly. Each of these cases represented a challenge for the nascent South African constitutional project. On each occasion, the Constitutional Court, an institution created by the same new Constitution, was tested by the challenge of taking the law into uncharted territory, thus extending the bridge a little further towards the society promised in the constitutional text.

The very first case heard by the Constitutional Court concerned the legality of the death penalty. The death penalty had been employed with increasing regularity in South Africa. Between 1978 and 1987, 1218 people were hanged; in 1987 alone, the figure was 164. By the 1980s, the issue had become the subject of great political controversy. The death penalty was a punishment of first choice. As a prominent political commentator, Herman Giliomee, noted in 1988: '[a]lmost unnoticed South Africa has got itself in a situation where it is hanging people at a rate which would cause even the most sordid banana republic to hang its head in shame.'<sup>10</sup>

In the late 1980s, South Africa experienced its own *intifada*. During this period of resistance, a number of apartheid bureaucrats who did the government's bidding in the townships were killed in the unrest. The State then employed the legal doctrine of common purpose to charge groups of people who were present at these killings with murder—the rationale being that as the 'mob' made common purpose with the unidentified killer(s), any member of the 'mob' was guilty of murder. In a case which became known as the *Sharpeville Six*, the six accused were convicted and sentenced to death. The application of the doctrine of common purpose enabled the state to obtain convictions without proving that any of the individual accused had been directly involved in the murder. The decision was upheld by the Appellate Division. Few decisions of this kind have prompted such discord. The lives of the six men were spared not only by way of a legal challenge heroically led by their counsel, Jack Unterhalter and Edwin Cameron, the latter now a leading member of the Supreme Court of Appeal where he had fought so hard to save the lives of the six, but primarily due to political campaigns which aroused local and international pressure.

By 1990, the campaign against the death penalty had reached fever pitch as a result of cases like the *Sharpeville Six*. F W de Klerk, then President of the country, placed a moratorium on all executions. However, no agreement could be reached by the constitutional negotiators as to whether the death penalty should be declared unconstitutional. The decision was left to the Constitutional

death  
penalty

employment of  
doctrine of  
"common  
purpose"  
Sharpeville 6  
sentenced to death  
saved by  
pressure

In the late 1980s,  
South Africa  
experienced its own  
*intifada*

decision by  
constitutional  
court



### *Precedent & Possibility*

Court which decided the matter in the very first case argued before the court. The case of *Makwanyane* is not about the way brutal murderers succeeded in their argument that the death penalty was unconstitutional. The accused hardly featured in the arguments before the court. Rather, in their judgments, the newly appointed justices of the court not only reflected on the history of the death penalty as a metaphor for a brutal history of government in which life and dignity, particularly of black South Africans, was not respected, but asserted the importance of constitutional democracy and the vision the constitutional text held for the future of the country. The case was not about an individual criminal; it concerned the articulation of the core commitments of the new Constitution.

Constitutional  
Court ~  
death  
penalty

HIV/AIDS, together with crime, is arguably the single most pressing social problem confronting democratic South Africa. Faced with a government that has steadfastly adopted policies which have failed fully to acknowledge or address the problem, civil society, mainly through the Treatment Action Campaign (TAC), contested government's inaction with great vigour, courage, innovation and some significant success. As part of this campaign, the TAC took the government to court to compel it to provide pregnant mothers with anti-retroviral drugs to prevent the transmission of HIV to their children. The case finally reached the Constitutional Court. The successful litigation by the TAC

HIV aids  
TAC +  
Con court  
decision

*The TAC took the  
government to  
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pregnant mothers  
with anti-  
retroviral drugs*

represented a victory in a new form of political trial. The Constitutional Court asserted that residents of this country could approach the court for basic goods and services as promised in the Constitution. This case is a story of a new form of human rights litigation in a democracy accompanied by great official hostility where government initially indicated that it was not prepared even to abide by the decision of the court.

The Constitution and its centrepiece, the Bill of Rights, mandated constitutional scrutiny not only of the relationships between the state and the individual but also, where applicable, relationships between private actors exclusively. It also empowered the courts to extend the principle of accountability by the state to its citizens.

Alix Carmichele was subjected to a brutal attack by a man who should have been behind bars awaiting trial. Prosecution and police negligence allowed him to roam free so that he could brutally confront Carmichele in the idyllic setting of Knoetzie beach in the Western Cape. Like Messrs Komani and Rikhotso, she pursued her rights with great courage and tenacity. Five courts later, she established an important legal principle in that our law of delict<sup>11</sup> required adaptation through the guiding spirit of the Bill of Rights to entitle Carmichele and similar victims to sue the state for damages as a consequence of its failure to protect her.



## Introduction

The transition to democracy is never easy. The law and hence the judiciary can also be used by those who wish to subvert the new enterprise. The crossing of the bridge was challenged by both left and right. Hence two further cases merit examination. When Louis Luyt, the president of the South African Rugby Union, challenged a government-appointed commission of inquiry into rugby, Nelson Mandela found himself summonsed by one of the most conservative judges in the country to explain why, as President of the country, he had appointed this commission. When the case went on appeal to the Constitutional Court, many judges of that court were impugned by Luyt who called for their recusal claiming that they would be biased against him. The SARFU case represented an attack by the old order on key instruments of the new democratic system of government. It is a story of political contest with a very different result from the previous time Mr Mandela appeared in court, at the Rivonia trial.

The left also resisted a key design of the bridge. Critical to the process of change was the Truth and Reconciliation Commission (TRC). The legislation that brought the TRC into existence guaranteed a process of amnesty for those who had committed and fully disclosed political crimes.<sup>12</sup> If they were granted amnesty, the Act granted applicants criminal and civil immunity. A number of families, including those of great South African leaders, Steve Biko and Griffiths and Victoria Mxenge, challenged the constitutionality of this provision. In what is now known as the AZAPO case, the Constitutional Court, palpably torn by the moral dilemma of the case, found that the postamble to the interim Constitution had provided expressly for such immunity. Without this provision, the court opined that the construction of the bridge could have been blown up at its very inception; hence the families had to lose their application.

All these cases raised critical social and political questions. Each affected many who lived in the country. Each shows the contested nature of the law, as well as the different claims and visions of those who litigated these cases. For many readers, the recitation of these cases may serve to tell some of our history and the inherent drama of the law. And that is a purpose of this book. But the deliberate linkage between the old and the new tells another, equally important story: of a constitutional democracy like South Africa built on the old, whether because the text of the Constitution responds to the old or because the old continues to haunt our attempts to move beyond it. More than that, it reveals that constitutional democracy cannot be imposed—its values must be continually asserted and justified. The bridge must be diligently and continually built. Indeed the bridge may prove to be too limited a metaphor, for constitutional democracy is rather a journey which never ends.

Louis Luyt &  
SARFU vs  
Mandela in  
Court

Truth  
Commission  
Challenge by  
Biko &  
Mxenge  
families



### Endnotes

- 1 *Omar and Others v Minister of Law and Order and Others* 1986 (3) SA 306 (C). By contrast, see the judgment of Judge Goldstone in *Momoniati and Naidoo v Minister of Law and Order* 1986 (2) SA 264 (W). Mr Omar at the time was one of the most tenacious and courageous human rights practitioners in the country.
- 2 *R v Abdurrahman* 1950 (3) SA 136 (A).
- 3 E P Thompson *Whigs and Hunters, The Origin of the Black Act* (1975) 265-266. There was also a liberal approach to law that proved equally influential. See, for example, E Mureinik 'Dworkin and Apartheid' in H Corder (ed) *Essays in Law & Social Practice* (1988).
- 4 Nicholas Haysom and Clive Plasket 'The War against Law: Judicial Activism and the Appellate Division' (1988) 4 *SAJHR* 303.
- 5 When we refer to the common law, we mean that body of law which is not sourced in legislation and which, rather, is drawn primarily from Roman-Dutch and English law, itself a reflection of our colonial past. This body of law was then adopted by the courts to meet the judicially perceived needs of the country. Thus the rules developed by the courts, together with the legal materials of both the Roman-Dutch and English legal systems to which courts may have recourse, constitutes the structure of the legal system upon which is built a superstructure of legislation which amends, corrects, repeals and adds to the existing body of common law. Today, the common law ultimately derives its authority from the Constitution which is also the source for judges to effect changes to the common law. For a detailed discussion, see Francois du Bois (ed) Wille's *Principles of South African Law* (9ed) ch 4.
- 6 Laurie Ackermann later left the bench to promote human rights as a law professor, heading up the first human rights centre at Stellenbosch University.
- 7 Etienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) *SAJHR* 31, 31-32.
- 8 Alexander Bickel *The Least Dangerous Branch* (1962).
- 9 Otto Kirchheimer *Political Justice: The use of legal procedures for political ends* (1961).
- 10 *Sunday Times* (27 August 1988).
- 11 Briefly, the law of delict is that body of law which seeks to afford a right of compensation to a person who, as a result of an act of another person performed in a wrongful and culpable way, has suffered harm.
- 12 Section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995.