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1999 DYZENHAUS

"With the benefit of hindsight"[1]

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Introduction

In October 1997 South Africa's Truth and Reconciliation Commission (TRC) held a three day hearing into the role of the "legal community" - the role of law and lawyers during apartheid. This was but one of the hearings into the role of professions and institutions during apartheid; the others included hearings into the role of the media, the health sector, business and labour, the "faith community" or religious organisations, and the prisons. These hearings were set up by the TRC in terms of its understanding of its broad mandate to establish "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights ... including the antecedents, circumstances, factors and context of such violations".[2] What made these professional and institutional hearings different from the other hearings which the TRC held is that their purpose was not to establish who is a victim or who may get amnesty. Rather, they were inquiries into how professions and institutions which on the face of it seemed no different than their counterparts in Europe or North America were deeply implicated in apartheid.[3]

Much of the focus of debate during the Legal Hearing was on the role of judges. This came about partly because judges singled

themselves out from those invited to attend the Legal Hearing by refusing to attend, though quite a few made written submissions.[4] But this absence merely intensified and made rather rancorous an inevitable concentration on the judicial role, since it is in what judges do that the central question about the rule of law - the relationship between law and justice - is manifested. Indeed, the question of that relationship was the first issue on the list of items the TRC asked its invitees to consider.

Perhaps the most powerful testimony of the Hearing was given by Paula McBride, a human rights activist, who delivered an indictment of judges for having imposed the death penalty on soldiers of the liberation movements even when they had the option of finding that there were mitigating circumstances. She dwelt on the case of Andrew Zondo, a 19 year old soldier of the African National Congress, convicted of planting a mine in 1985 which killed 5 people in a South African shopping centre. Youth was among the factors a judge could take into account in avoiding imposing the otherwise mandatory death penalty for a crime of this nature. But Zondo was sentenced to death by Raymon Leon, a liberal judge of the most liberal bench - Natal - in South Africa. After sentence was passed Zondo said:

> "I listened to the Prosecutor and I saw that he did not have any ideas about us. He was ignorant of our ways and feelings. I looked at the Judge and the prosecutor and the thought came to me that they were ants and in engaging with

them we were dwarfing ourselves. It is a curse to be a Judge when you believe that you hold the life of a person in your hand. Only God holds our lives in his hands. He gives it and He alone can take it."[5]

The question about whether judges can be more than ants is, in my view, the same as the central question about the rule of law - whether there is an intrinsic relationship between law and justice. That there is such a relationship was assumed by many of the central figures at the Hearing. For example, in his opening address Archbishop Desmond Tutu said that the Legal Hearing was the "most important of the professional hearings", almost as important as the "victim/survivor hearings".[6] And he excoriated the judges for their failure to attend. Judges, he said, were faced with moral choices under apartheid and generally they had made the wrong one. They had been faced with another choice - whether to appear before the TRC, and again they had made the wrong choice. This showed, he said, that they "had not yet changed a mindset that properly belongs to the old dispensation ..."[7]

There is a legitimate question about both the Legal Hearing's and my own focus on judges. After all, judges are but a small part of any legal order; indeed, they are a small part of any legal order's judicial system if we conceive such a system as including all those officials charged with making authoritative determinations of the legal rights of those subject to the law. The cutting edge of any legal order - the place where subject

meets the law - is going for the most part to be in the enforcement of the law by the police and in the adjudication of disputes about the law by magistrates. For this reason, some thought that the focus on judges at the Hearing distracted the TRC's inquiry from more important issues.

However, I believe such a focus to be productive. Robert Cover, an American Professor of Law, showed why this is the case in his pioneering work on a group of judges in antebellum America who, despite their commitment to the abolitionist cause, almost relentlessly interpreted laws enforcing slavery in such a way as to shore up the institution of slavery.[8]

Cover pointed out that studies of the relationship between law and justice - a relationship highlighted when one studies the role of law in implementing and sustaining injustice - for the most part accepted "the perspective of the established order".[9] For such studies took the drama of the "disobedient" as exemplary of the problem - the stories of those who appeal to a "juster justice" beyond the law to justify disobedience.[10]

Such disobedients, and any study which makes them exemplary of the relationship between law and justice, take the perspective of the established order because they assume that the law is what the powerful in that order suppose it to be. Such disobedients make their moral stand on the basis of the utter injustice of the law, an injustice created by the arbitrary will of a powerful and unjust ruler. And they therefore exclude the possibility that the law is more than the static embodiment of some ruler's will,

determinable as a matter of plain fact.

It is important, Cover thought, that a study of law and justice canvass that excluded possibility by asking whether the law provides opportunities to do justice which rulers, no matter how powerful they are, cannot completely control. Only that possibility allows that the relationship between law and justice might be an intrinsic one, one which creates tensions within the law when the powerful use the law as an instrument of oppression.

Cover argues that it is adjudication by judges which best manifests the tensions which arise out of that intrinsic relationship when law is put in the service of injustice. For judges everywhere claim that their duty is not simply to administer the law, but to administer justice. Indeed, the oath of office which South African judges swore during apartheid stated that they would "administer justice to all persons alike without without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa".[11]

As I pointed out in my own submission to the Legal Hearing, one can adopt the view that the justice of the law mentioned in the oath is simply the conception of justice which, as a matter of fact, the powerful have used the law to implement.[12] Alternatively, one can read some significance into the word justice, for example, by noting that the oath would look rather odd if one substituted for "justice" the phrase "ideology of the powerful".

Encapsulated in these two ways of viewing the relationship between law and justice is the age-old debate in the philosophy of law between legal positivists and natural law theory. Positivists argue that the relationship between law and "juster justice" or true justice is purely contingent on political circumstance, while the natural lawyers argue that there is some intrinsic relationship. The complexity of that debate, especially in its more technical aspects, goes well beyond the confines of this essay.[13]

But an important, and I would argue the principal, aspect of that debate is illuminated by a focus on the role of judges at the TRC, even though their role was confined to some written submissions. For if we are concerned with the relationship between law and justice, then, as Cover says, we cannot study that relationship without maintaining the possibility that it is an intrinsic one. The relationship has to be intrinsic if law is to provide a place where those subject to it can contest it when it is used as an instrument of brute and arbitrary power. Only if the relationship is intrinsic can law provide the basis for judges to be more than the ants whom young Andrew Zondo encountered in the trial which culminated in his judicially-ordered death.

I will argue that the conclusion one should reach is a heartening one - there is an intrinsic relationship between law and justice demonstrated by the few South African lawyers who commited themselves to finding justice within the law. Moreover,

their commitment laid the basis for a significant role for law and lawyers in South Africa's inevitably difficult transition to becoming a fully functioning and stable democracy.

However, the path to that conclusion is often a difficult one. I have already mentioned that the judge McBride condemned for his failure to find mitigating circumstances for Andrew Zondo was a liberal judge on South Africa's most liberal bench. And one of the peculiarities of the Hearing was that those few lawyers - I will refer to them as liberal lawyers - who did commit themselves to the cause of justice often came in for harsh criticism. At times it seemed that those who did most got judged most harshly. I will start by exploring that issue through the perspective of one of South Africa's most prominent disobedients.

The Case of Bram Fischer

I want to get to the paradox of how law can be used to resist law by way of the paradox of why the lawyers who did most often seemed under the harshest scrutiny. As we will see, that second paradox shows how questions about the politics of memory are entwined with questions about the politics of the rule of law. Here the case of Abram "Bram" Fischer is exemplary, one brought to the attention of the TRC through the written and oral submissions made by the federal body of South African advocates - the General Council of the Bar (GCB).[14]

At issue here was the striking off of Fischer from the roll

of advocates, a move initiated by his own Bar - the Johannesburg Bar, the most liberal component of the GCB. Fischer, as the GCB's submission notes, was son of the Judge President of the Orange Free State and the grandson of the Prime Minister of the Orange River Colony, the political entity which came into being between the end of the Boer War and the establishment of the Union of South Africa in 1910. He became one of South Africa's leading advocates, a position he maintained in the 1950s and early 1960s despite the fact that he was a prominent member of the South African Communist Party. In 1964 he was charged with various offences under the Suppression of Communism Act (1950), in reaction to which the Communist Party had dissolved itself and gone underground. Fischer was permitted to leave South Africa on bail to argue a case before the Privy Council in London since the court accepted that a man of his integrity would not estreat - break the conditions of - his bail. Fischer returned to stand trial, which commenced in November 1964. In January of 1965 he failed to attend his trial, leaving a letter for his legal representative explaining his reasons. Here are some extracts:

> "I wish you to inform the court that my absence, though deliberate, is not intended in any way to be disrespectful. ... I have not taken this step lightly. As you will no doubt understand, I have experienced great conflict between my desire to stay with my fellow accused and, on the other hand, to try to continue the political work I believe to be essential. My decision was made only because I believe that

it is the duty of every true opponent of this government to remain in this country and to oppose its monstrous policy of apartheid with every means in its power. That is what I shall do for as long as I can. ... Cruel, discriminatory laws multiply each year, bitterness and hatred of the government and its laws are growing daily. No outlet for this hatred is permitted because political rights have been removed. National organisations have been outlawed and leaders not in gaol have been banned from speaking and meeting. People are hounded by Pass Laws and by Group Areas Controls. Torture by solitary confinement, and worse, has been legalised by an elected parliament - surely an event unique in history. ... Unless this whole intolerable system is changed radically and rapidly disaster must follow. Appalling bloodshed and civil war will become inevitable because, as long as there is oppression of a majority such oppression will be fought with increasing hatred. ... These are my reasons for absenting myself from court. If by my fight I can encourage even some people to think about, to understand and to abandon the policies they now so blindly follow, I shall not regret any punishment I may incur. I can no longer serve justice in the way I have attempted to do during the past thirty years. I can only do so in the way I have now chosen."[35]

Just two days later, the Johannesburg Bar Council instructed its

attorneys to prepare an application to court for the removal of Fischer's name from the roll of advocates. Shortly afterwards Fischer wrote another letter to his legal representative, expressing his dismay at the haste with which the Johannesburg Bar Council had acted. He was also distressed by the fact that the decision had been taken without any attempt to get his side heard.[16]

In his letter, Fischer strongly defended himself against the charge of conduct "unbefitting that of an advocate" entailed in an application to strike off:

> "The principle upon which I rely is a simple one, firmly established in South African legal tradition. Since the days of the South African War,[17] if not since the Jameson Raid,[18] it has been recognised that political offences, committed because of a belief in the overriding moral validity of a political principle, do not in themselves justify the disbarring of a person from practising the profession of the law. Presumably this is so because it is assumed that the commission of such offences has no bearing on the professional integrity of the person concerned. When an advocate does what I have done, his conduct is not determined by any disrespect for the law nor because he hopes to benefit personally by 'any offence' he may commit. On the contrary, it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to

himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to do otherwise would, for him, be immoral."

Fischer went on to say that he had returned to South Africa determined to see his trial through. But his experience of facing trial on evidence extracted from detainees held under the 90 day detention law -the "gross injustice (apart from the cruelty) of this barbaric law" - convinced him that no prosecution which depended on evidence "extracted" during such detention could be considered fair. In addition, he thought he might be facing the kind of "indeterminate sentence" which the Minister of Justice had discretion to impose and of which he said "we have already seen how European [i.e. white] public opinion has failed to register any protest against this arbitrary, indefinite incarceration and has complacently accepted this total abolition of the rule of law". He thus found himself compelled, he said, into a stance of

"open defiance, whatever the consequences might be, of a process of law which has become a travesty of all civilised tradition: A political belief is outlawed, then torture is applied to gather evidence and finally the Executive decides whether you serve a life sentence or not.
I cannot believe that any genuine protest made against this system which has been constructed solely to further

apartheid can be regarded as immoral or as justifying the disbarment of a member of our profession."[19]

However, the Johannesburg Bar went ahead with its application to have him struck off. The court held that he should be struck off: he had been guilty of dishonest conduct because he had used his status as senior counsel to get bail and someone who took an attitude of defiance to the law could not serve the law.[20]

The GCB comments:

"Those who took the decision to apply for the striking of Fischer's name from the roll of advocates must have been confronted with an invidious problem. They namely recognised that Fischer had been 'regarded by the Courts of the Republic, by the members of the Johannesburg Bar and by other legal practitioners as a most honourable and trustworthy member of the Bar' who had at all times 'observed the highest ethical standards of legal practice' and had been 'in every respect a worthy and distinguished member of the legal profession'.[21] They believed that notwithstanding the esteem in which Fischer was held by all, the deception to the Court, coming as it did from a senior practitioner, justified the striking off. There is no doubt that even in 1965, the issue was painful and divisive for those involved. Many of the leaders of the Johannesburg Bar felt that their personal relationship with Fischer was such that they would not be willing to appear in the application

> for his striking off. Thus it was that the then chairman of the GCB who practises in Durban, was approached to move the application. For him, the task was a distressing one, since he too had a great respect and liking for Fischer. ...
>
> Today, with the benefit of hindsight, there is a different perspective. Fischer was confronted with an acute dilemma. He was torn between his fidelity to law, which he had served faithfully for many years and his profound commitment to opposing the injustices of apartheid. He acted not out of self-interest but from political and moral conviction. Far from securing any personal advantage, he realised that his actions would result in increased punishment."

The GCB then reported that the Johannesburg Bar Council believes now that "a grave injustice" was done to Fischer and it apologised to his family.[22]

The full presentation of the record here is to the credit of the GCB for it shows just how difficult memory's struggle is and how great is the temptation to manage it.[23] Unexplained in the GCB's submission is the phrase "with the benefit of hindsight ...". That phrase does not mean that one is engaging in a simple act of memory but that one can see things now that one was not able to see earlier. But since Fischer made the situation crystal clear at the time, hindsight is not required for gaining the "different perspective" but for understanding why the Bar chose

to evade the issues presented by Fischer. And this perspective was not unique to Fischer - Leslie Blackwell Q.C., a former judge of the Supreme Court, published an article in the Sunday Times sympathetic to Fischer's case.[24]

The GCB not only invited the question of how hindsight was relevant when Fischer, whose moral stature it recognised both in 1965 and at the Hearing, had presented the moral complexity of his situation fully at the time. It also failed to deal with the fact that Fischer's situation was morally complex in part because of legal factors. Although Fischer had estreated bail, he had not clearly estreated the conditions imposed on him when he was initially granted bail. He had come back to stand trial and, as he explained, it was his experience on his return which had led him to view his situation in a different light. More important, the argument he made based on that experience was one about the absence of the rule of law in South Africa. Not only were his concerns related to the fact that the majority of South Africa's population had no political rights and to the fact that legal political opposition had been closed to them, but also to the fact that his trial, as well as the sentence he might face, were in violation of his understanding of the rule of the law. That is, even if it were the case, as he was prepared to grant, that his decision to go underground was in violation of his initial undertaking, the reasons for his decision could not reflect negatively on his integrity as an advocate.

The "invidiousness" of the Johannesburg Bar's situation was

one entirely of their own making. Their "indecent haste", as Fischer's daughters termed it,[25] to get Fischer struck off meant that the Bar took the initiative from the government in discrediting Fischer, thus helping to obscure the message he hoped to send his fellow white South Africans. As Fischer himself said in his letter, though the GCB did not quote this particular sentence, his "contention" was that "if in the year 1965 I have to be removed from the roll of practising advocates, the Minister himself and not the Bar Council should do the dirty work".[26] The culpability of the Johannesburg Bar is only increased by the fact that their personal discomfort with this action led them to try to avoid the appearance of doing the dirty work by getting an advocate from another Bar to argue the matter in court.

To this day, the advocate who argued the application in court on behalf of the bar, Douglas Shaw Q.C., maintains that there is no basis to the allegation that the application was inspired by political motives.[27] And the GCB emphasizes in its submission that the fact that "Fischer was facing charges of a political character" formed no part of the basis for the application for striking off.[28]

But the Minutes of the Bar Council meetings on the subject of the application to remove Fischer - reproduced in volume 3 of the GCB's submission - reveal a process of communication with the Minister of Justice on this topic which suggest a negotiation about how best to play down the politics of the application.[29] And while it is true that, technically speaking, the application

for striking off referred only to Fischer's decision to break the conditions of his bail, the Bar's narrowing of the issue to one about the personal integrity of an advocate, entirely abstracted from the political context of South Africa, was a deeply political act. It was and is a way of refusing to confront the wider political and rule of law implications of Fischer's decision, implications which were intimately connected to the charges he was facing and the "legal" process of a political trial. One can only conclude that when one of the Bar's number tried to force them to see over the apartheid divide, they reacted by sacrificing him in order to avoid the view.

In my view, Bram Fischer's story is central to any account of the choices South African lawyers faced during apartheid. The history of apartheid law can be roughly divided into ten year periods: in the 1950s the apartheid divide was legislated; in the 1960s the security apparatus to repress opposition to apartheid was legislated and eventually consolidated; in the 1970s cracks in the ideology behind the divide and in the law which maintained it started to appear but were patched over by ruthless use of the force licenced by the security legislation; in the 1980s, the divide fractured, was maintained for a while by force, but was eventually destroyed, a feat in which lawyers played a significant role.

As the Legal Hearing showed, lawyers when looking back over this period like both to dwell on the period of the 1980s, when some of their number were most active in opposing apartheid, and

to claim that opposition to apartheid through the law was usually futile, as demonstrated by the fruitless representations to the government which the professional associations on occasion made.

In the case of the professional associations, the tension is most exposed for the attorneys. During the 1960s they were almost totally silent about the erosion of the rule of law. For the advocates, the tension comes about because at this same time, the most liberal of the Bars took part in the repression of one of its own - Bram Fischer. Moreover, it took that part in the face of an explicit and powerful challenge which Fischer threw down to South African lawyers.

Fischer did not simply ask these lawyers to confront their role in sustaining the injustice of the law. He tried to get them to see that there was more wrong with the law than that it was being used in the cause of unjust policies. He argued that any lawyer who wished to maintain respect for the rule of law had to question whether the ideal of the rule of law was not in fact better served by violating the law.

Fischer clearly regarded this question as an open one, to be decided by each individual. As we know, he decided that the only way he could participate in building a society founded on respect for the rule of law was to go underground in order to join the illegal armed struggle. But we also know that he hoped that his example, the example of an Afrikaner aristocrat who had established himself as one of the leaders of the legal profession, would make other lawyers rethink their role <u>within</u>

the legal order. And that was, I think, because he regarded himself as in a genuine dilemma. However repugnant he found the apartheid legal order, it remained a legal order - an order in which there were still the vestiges of the rule of law - and his respect for the law still exerted a pull on him which he found difficult to resist.

As Stephen Clingman shows in his excellent biography of Fischer, Fischer's decision to return from England to stand trial in the face of considerable pressure from his comrades in exile abroad, his courtesy to his legal representative and to the judicial officers presiding at his trial, and his great concern about the uncomfortable situation he had created for his legal representative, were all occasioned by his continuing respect for the law, even as he planned to go underground. And as we have seen, it was the complete lack of understanding of most of his colleagues at the Johannesburg Bar of his position, evidenced by their haste to join in the government's attack on him as a political dissident, which so distressed him.[30]

The rule of law dilemma which Fischer faced casts into sharp relief all the other dilemmas which South African lawyers faced. The best description of Fischer's kind of rule of law dilemma is found in an essay by the distinguished philosopher Christine Korsgaard.[31] Korsgaard says the following of a morally upstanding citizen who contemplates joining a revolution against the established order:

"When the very institution whose purpose is to realize human

> rights is used to trample them, when justice is turned against itself, the virtue of justice will be turned against itself too. Concern for human rights leads the virtuous person to accept the authority of the law, but in such circumstances adherence to the law will lead her to support institutions that systematically violate human rights. The person with the virtue of justice, the lover of human rights, unable to turn to the actual laws for their enforcement, has nowhere else to turn. She may come to feel that there is nothing for it but to take human rights under her own protection, and so to take the law into her own hands."[32]

Korsgaard suggests that such a decision is ethically different from most decisions we make. It is not the "imperfection" of justice - justice which fails to measure up to our sense of right and wrong - which is the basis for our decision. Rather the basis is the "perversion" of justice - the sense that it is injustice disguised as justice. Given the consequences that likely attend overthrowing an established order, the revolutionary cannot, she thinks, claim that he is justified in resorting to revolution. "That consolation is denied him. It is as if a kind of gap opens up in the moral world in which the moral agent must stand alone".[33] Korsgaard thus maintains that justification in such matters is always retrospective - everything depends on whether the revolutionary is successful in establishing a stable government.[34]

Where Korsgaard goes wrong, however, is in suggesting that the decision has to be made in a moral gap or void. Fischer had no doubt that whatever the future would in fact say, he was at the time justified in taking his step. The difference between his own understanding of his situation and Korsgaard's is that he does not quite adopt the perspective which we saw Robert Cover term the "perspective of the disobedient", "the perspective of the established order".[35] For although Fischer appealed, like Cover's disobedient, to a "juster justice"[36] beyond the law to justify his disobedience, his perspective on the law was not entirely external. As we have seen, his appeal was also meant to awaken South African lawyers to the possibility for them of the pursuit of the ideal of juster justice within the law. In contrast, Korsgaard's analysis seems to suggest that for the disobedient revolutionary only the external "disobedient" perspective is available. But that would mean that there was no real dilemma, at least no moral dilemma.[37]

Clingman also seems to rely on the external disobedient perspective in his exploration of the nature of Fischer's choice in 1965. He rejects the view that Fischer's life was a tragedy in the classical sense in which a great individual contributes to his fall "through some crucial error or flaw", preferring the idea that Fischer had to pay the price of an uncompromising stand on the side of right against the "unregenerate force of apartheid".[38] Here Clingman suggests that for Fischer the situation was one of a clash between opposites - evil might and

total right.

Fischer's choice had of course tragic consequences for him personally. He died in 1975 when those involved in the struggle against apartheid had few grounds for hope. And that choice committed him to an armed struggle which had tragic consequences for others, consequences, as Korsgaard suggests, which attend any decision to engage in revolution. Even if one considers the turn to armed struggle by the African National Congress (ANC) in the early 1960s as a completely justified reaction to government repression, one has to admit that the ANC's decision gave the apartheid government the excuse to engage in a no-holds barred war which escalated into the tale of human cruelty with which the TRC has had to deal. And one can give the ANC the moral high ground in this war and still hold the ANC responsible, as the TRC has, for its own gross human rights abuses.[39] Indeed, the idea for the TRC was born in an ANC initiative in the early 1990s to appoint commissions to inquire into its record of brutality to its own soldiers in ANC training camps.[40] In other words, the decision to engage in armed struggle was one whose human consequences could be predicted without having been able to predict the ultimate result. And it is unimaginable that someone as far-sighted and ethically rigorous as Fischer took his decision without accepting responsibility for these consequences.

However, at least from the institutional perspective of the rule of law, the idea of a clash between two opposites, and of a decision in a moral void, does not get exactly right the tragic

nature of Fischer's choice in 1965.

We can think of a morally tragic situation as being one in which no choice can be made without ignoring the legitimate pull of important moral considerations. We have nevertheless to choose in such situations. And we have to try to make the best choice without the comfort - however the choice turns out - that the ignored considerations will cease to be legitimate. Even when one seems vindicated in retrospect, all one can say is that one did the best one could and that one is deeply sorry about one's complicity in the moral wrongs that resulted from one's choice.

Recall that at the same time as Fischer made his choice to go underground, he hoped by it to encourage others to take a different decision. And it is worth noting that Nelson Mandela seems to have been occupied by the same issue in the 1960s. He says that at the time of the trial which resulted in his own sentence to life imprisonment, he urged Fischer - leader of the defence team - who was already considering going underground, not to take this route. Mandela says that he stressed that Fischer "served the struggle best in the courtroom, where people could see this Afrikaner son of a judge president fighting for the rights of the powerless".[41]

In other words, Fischer and Mandela did not adopt a simple strategy of fighting an illegal war against an unjust state in order to establish a just one.[42] They thought that it was important that at the same time war be fought by legal means in order to keep alive an idea put to the Legal Hearing by Vincent

Saldanha, leader of the delegation from the National Association of Democratic Lawyers which had been formed in order to provide a home for lawyers determined to use the law to resist apartheid. He had this to say about the lawyers involved in the radical opposition to apartheid:

> "[While we] took an oath of allegiance to the state, we certainly did not take an oath of allegiance to the apartheid state. If anything, we took an oath of allegiance to undermine the apartheid state, and I think a distinction must be drawn. That's why we distinguish ourselves from the establishment lawyers or the lawyers who operated within the Law Societies under the particular milieu and ideological context they did. We worked with these lawyers, we used the law as a terrain of struggle, unashamedly, and to that extent would continue to use the law as a terrain presently in furtherance of the principles and the values of the new Constitution".[43]

In order for that distinction - one between the government which brings about the enactment of the law and the law of the state to which the government itself is subject - to have any basis, right can never be entirely on the side of one who decides to overthrow an order which still contains vestiges of the rule of law. Indeed, besides the costs to human beings that follow a decision to overthrow an established order, the revolutionary has to take into account the costs armed struggle imposes on respect for the rule of law, a respect which might prove important during

the period of instability which inevitably follows the overthrow of the old order. But the revolutionary can seek to justify his actions here and now in making his decision, as long as he recognises the pull of competing considerations and thus the moral worth of the other decision.

In South Africa that other decision, the decision to use the law to oppose the law, had almost as momentous a result as the decision to turn to armed struggle. In this regard, Clingman takes care to note that lawyers who worked with Fischer and who represented him - most notably Arthur Chaskalson - continued and even extended his work in the courts. Clingman points in particular to Chaskalson's co-founding of the Legal Resources Centre in 1978 - the most important base of legal challenges to apartheid - and to his recent appointment to the Presidency of South Africa's Constitutional Court. And he records that Ilse Fischer, Bram Fischer's daughter, was employed at the Centre as librarian, and "had the pleasure of seeing, on a daily basis, her father's law library, housed at the Centre at a time when so little of Bram's life had any public legitimacy". Clingman continues: "Yet that aspect changed as well: in June 1995 Nelson Mandela gave the first Bram Fischer Memorial Lecture in Johannesburg, and one year later the Bram Fischer Memorial Library was formally opened at the Legal Resources Centre, again by President Mandela".[44]

Thus, while Fischer was a South African of altogether exceptional moral stature,[45] the way he lived his life set an

example for all other white South Africans, particularly lawyers. His choice, while tragic, was one which could be justified even at the time he made it, whatever the result. For the manner of its making opened up moral space for those who did not want to follow him, preferring to make their stand against apartheid from within the law. And, while they cannot be condemned for having decided to opt for the politics of legal opposition, they can and should be judged by how they behaved within that space.

However, those who took that stand had to cope with the moral question mark raised by the fact that one could with justification claim that the rule of law was best served by the politics of armed struggle. This was especially true for lawyers whose path of legal resistance to the law involved using the law against the law. Not only did they make themselves vulnerable to being judged by their own standards, in contrast to the vast majority of lawyers who either actively supported apartheid or who were merely content to ignore oppression while reaping the benefits of legal practice. It was also the case that the more successful they were at using the law to challenge the law, the more they legitimated the legal order by helping to vindicate the government's claim to be part of the family of states committed to such fundamental Western values as the rule of law.

In the next section, I explore the question about why that situation could arise at all, that is, why it was the case that the space existed for law to be used to resist law.

Dilemmas of the Rule of Law

In nearly all the cases which are regarded as landmark decisions by the South African courts during the apartheid era, the basic question the judges had to answer concerned whether they should impose constraints of legality on executive decisions, including decisions about how to implement apartheid policy, decisions about the suppression of political opposition and the detention of opponents, and decisions about the content of regulations made under statutory powers. Examples of the legal principles at issue included the following: the principle that policy should be implemented in a reasonable or non-discriminatory fashion; the principle that someone whose rights are affected by an official decision has a right to be heard before that decision is made; the principle that, when a statute says that an official must have reason to believe that X is the case before he acts, the court should require that reasons be produced sufficient to justify that belief; the principle that no executive decision can encroach on a fundamental right, for example, the right to have access to a court and to legal advice, unless the empowering statute specifically authorises that encroachment; the principle that regulations made under vast discretionary powers, for example, the power to make regulations declaring and dealing with a state of emergency, must be capable of being defended in a court of law by a demonstration that there are genuine circumstances of the kind which justify invoking the power and

that the powers actually invoked are demonstrably related to the purpose of the empowering statute.

It is very important to understand why such principles are fundamental principles of legality. Take the principle that no executive decision can encroach on the fundamental right to have access to a court and to legal advice, unless the empowering statute specifically authorises that encroachment. That principle became particularly important in the period after 1960 in South Africa because the government sought to insulate detention from the scrutiny of the courts by barring in its legislation access by the courts or any other person to detainees. That meant it became almost impossible to challenge the legality of a particular detention which in turn meant that the violence of the administration could be exercised without any legal control. In such circumstances, the courts cannot be said to be administering "the law" because there is no law to which one can hold public officials to account.

Moreover, the law which the courts are failing to enforce does not primarily consist of rules which owe their existence to positive enactment by a legislature or explicit recognition a court. Rather, this law consists of the principles which make sense of the idea of government under the rule of law, the idea that such government is subject to the constraints of principles such as fairness, reasonableness, and equality of treatment. One will expect such principles to be manifested in statutes and in judgments, but for the reason that it is only in making these

principles manifest that legislatures and courts can give some content to the idea of the rule of law, of the accountability of public officials to the law."

In a legal order where the legislature is supreme, judicial scrutiny of official conduct for its legality is of course to some extent conditional on the legislature not saying explicitly that it wishes its administration to act illegally. The qualification is necessary because judges, in meeting their duty to administer the justice of the law, should take pains to find their legislature not guilty of wanting to subvert the rule of law. That duty explains why judges should require very explicit expressions by the legislature of an intention to evade the constraints of legality.

Had the majority of judges applied the law in a way that made best sense of their judicial oath, the government would have had to choose one of two options. It could have openly announced that it could not both abide by the rule of law and maintain apartheid as it wanted, thus explicitly choosing a lawless course, or it could have subjected its administration to the constraint of the fundamental legal principles sketched earlier.

The first option would have significantly decreased support for the government both in the international community and at home." And had the government taken this option, judges faithful to their duty could have denounced such statutes for illegality - not for lack of compliance with some extra-legal

ideal of justice, but for failing to be law. In other words, judges could then condemn the law not simply because they disagreed with it, but because the law profaned principles fundamental to maintaining legal order. In contrast, the second option - government submission to the rule of law - would have opened up precious space for opposition to apartheid from within.

In either case, the judges would have confronted the government with a rule of law dilemma. We saw that dilemma manifest itself for Bram Fischer as he contemplated taking his fight against apartheid underground. In his case, the dilemma was a genuinely moral one. His commitment to the rule of law required him to recognise that the values which he decided to pursue by revolutionary means were put at risk by a revolutionary course, and, more important, could still be fought for by legal means. In other words, the moral quality of his dilemma stems from the fact that a commitment to the rule of law informs both of its options.

In the case of the South African government, however, the rule of law dilemma was not moral but strategic. It was a dilemma between accepting the costs as well as the benefits of operation under the rule of law or doing without the legitimacy which attaches to government under the rule of law.

In confronting the government with the strategic rule of law dilemma, judges would have affirmed their commitment to a process that "does not defer to the violence of administration";[48] rather, the process seeks to impose the constraints of legality on a state which licences that imposition by its claim to be a

Rechtsstaat - to be a state which governs in accordance with the rule of law. Such a commitment exhibits fidelity to the law because it shows that the rationale for having courts is their potential to articulate and maintain a "constitutional vision",[49] one informed by an understanding that the duty judges undertook in their oath to administer the law was one to "administer justice to all persons alike without fear, favour or prejudice".

The South African judiciary let the government escape from that rule of law dilemma and for that the judges are accountable, and not only for dereliction of duty. They are also accountable for having facilitated the shadows and secrecy of the world in which the security forces operated and for permitting the unrestrained implementation of apartheid policy. They thus bear some responsibility for the bitter legacy of hurt which has been the main focus of the TRC.[50]

To place the government in that dilemma would have been a deeply political act and judges do not like to be seen to be engaging in politics. But, as I argued in my submission,[51] when the politics in which judges engage amount to upholding the rule of law, requiring of a government that it live up to ideals which it itself - however cynically - professes, then judges are simply doing the duty undertaken in their oath of office. They are demonstrating their accountability to the law to which governments, who wish to claim the legitimacy of government through the medium of the rule of law, are also accountable.

Judges who assume that a legislature must be taken to intend to respect the rule of law do so in order to make sense of their role as one faithful to the duty to administer the law. And that tells us that the judges' duty is to moral ideals which play a role in constituting what they should take to be the positive law, even in the absence of a written constitution which gives them such authority. If judges fail to do that, the South African example shows that they fail in their duty as judges.

One must be careful here not to err on the side of over- or underestimation. Liberal judges could not have stopped apartheid and one can safely say that any significant act of judicial resistance would have been overridden by the government. But we should note that any particular act of resistance by the internal opposition to apartheid or by the liberation organisations was likely to be, and in fact usually was, overridden. Further, many white South Africans did not find it entirely easy to think of themselves as on the beneficiary side of the apartheid divide. Even when they were not enthusiastic supporters of apartheid, they needed to think that they were living in - and helping to maintain - a basically civilised society. Each time a person from within the ranks of the white establishment broke those ranks to point out how uncivilised their society was, the others were threatened with being forced to rethink their position.

Bram Fischer's example is the most striking here. And there is no doubt that a mass resignation of the few liberal judges, judges who condemned apartheid not only as a repugnant ideology

but because of its subversion of the rule of law, would have rocked the government and white South Africans.

However, I believe that the few liberal judges were right to remain in office despite the fact that once in office a liberal judge confronted a rule of law dilemma in a particularly painful way. Even the most liberal judge who took office under apartheid could not avoid implementing its law. He had often to accept that even laws whose content he found abhorrent and whose provenance he regarded as illegitimate had a claim on his duty to administer the law. He therefore not only made himself complicit in an injustice he recognised as such, but gave to that injustice the aura of legitimacy.

In other words, what made a liberal judge different from other judges was not his complicity in apartheid but his conception of fidelity to the law. His presence could help to keep alive the idea that the law provides opportunities to judges to make the law meet its aspiration to treat all its subjects equally. However, in keeping that idea alive, he also helped to legitimate the apartheid government by giving some genuine substance to the claim that the rule of law did exist in South Africa.

For the liberal judges, then, it was very much a case of "damned if you do, damned if you don't". But without them, there would have been little, perhaps no, point to the efforts of those few lawyers in the academy in the 1960s and 1970s who sought to provide their students with a critical perspective on the

apartheid legal order, or to the efforts of those few lawyers in practice - attorneys and advocates - who were prepared to use the law against the law in the fight against apartheid. The distinction between the apartheid state and the ideal state which we saw Vincent Saldanha draw depended on the efforts of all of these lawyers, but most importantly on the liberal judges, simply because without an occasional victory in the courts no such distinction could have been drawn. And without a basis for that distinction during apartheid, there would have been precious little reason for the African National Congress to take law seriously both during the negotiations about the new order and in the transition to democracy.[52]

Nevertheless, there is a salient difference between academic critics and political or human rights lawyers, on the one hand, and liberal judges, on the other. It is not that one legitimates while the other does not, for it is clear that the participation of all serves to legitimate. Rather, the difference is that liberal judges often could not help but allow the injustice of the law to speak through them. Further, this feature of their role was not confined to occasions when they had no choice but to interpret the law as the government wanted it interpreted. Even when a liberal judge had some room for interpretative manoeuvre it was usually the case that he could only mitigate to some extent the injustice of the law.[53]

I have noted that no South African judge accepted the TRC's invitation to testify at the Legal Hearing. Two reasons seemed paramount in this judicial boycott, a claim that judicial independence would be compromised and the thought that such testimony would endanger the fragile bond of collegiality that exists between judges from the old order who have kept their jobs and judges appointed under the new order.

However, the claim for immunity because of the need to protect judicial independence is hollow once one sees that judicial independence is itself an instrumental virtue: it is instrumental to ensuring the accountability of judges to the law. And the majority of old order judges had failed to show fidelity to the law, had failed to take seriously a judicial oath which required them "to administer justice". As a Canadian judge once put it when judges in Canada raised a defence of total immunity to a summons to testify before a commission of inquiry: "[w]hen there is a real risk that judicial immunity may be perceived by the public as being advanced for the protection of the judiciary rather than for the protection of the justice system, the public interest ... requires that the question be asked and answered".[54] And in regard to collegiality, one has to take into account the possibility that the kind of collegiality bought at the expense of an open and honest debate about the substance of judicial independence might be a very shallow one, unlikely to

sustain a judiciary which carries the burden of huge expectations."

Further, judges, in exempting themselves from the process of discussion at the TRC while in a few cases making written submissions, provoked a discussion from which they then held themselves aloof, thus demonstrating their sense that judges are not accountable like other citizens. Had even a few judges accepted the TRC's invitation, not only would this have imparted a different tone to the Hearing as a whole, but it would have done more for respect for the law and for the judiciary than any attempts to present their record in its best possible light. Accepting the invitation would have shown that judges acknowledged that they are not above the legal process that seeks to bridge South Africa's awful past to a democratic future. And only such an acknowledgment could have demonstrated a proper awareness that one of the things that made that past so singular was that the injustice of apartheid was implemented through what judges like to consider the vehicle for justice - the law.

In particular, such an appearance would have demonstrated that judges understand that they too are citizens in a democracy, citizens with special responsibilities, of course. But the weight of those responsibilities in the context of a fraught transition to democracy argued for their appearance. By appearing judges would have accepted their commitment to a practice, well described by Paul W. Kahn in an essay on judicial independence during transitions to democracy as the practice of the "morality

of citizenship". They would have seen themselves as part of an attempt to articulate in public a sense of responsibility for the past and the future which makes sense of the relationship between state, court, and individual.[56]

Kahn argues that the courtroom is a "political theatre" but that does not make it the "theatre of politics". There is a distinction between law and politics, which is the distinction we have already encountered between the state and government, or the state as an ideal and the state in practice. At the moment that a court accepts jurisdiction over a controversy between government and an individual, government is demoted - it loses its claim to be the exclusive representative of the state. At the same time, the individual is promoted into a public role - to one with an equal claim to represent the state. The court, then, in deciding between these claims articulates a vision of what the state is and publicly draws the line between law and politics.[57]

In order to articulate this vision, the court needs to be independent. But Kahn plausibly suggests that what matters is not the formal structures of independence, which might differ from country to country, but "the informal tradition of norms and expectations that develop around political and legal institutions".[58] In a functioning democracy, courts and political institutions support each other - the "courts provide a kind of legitimacy to the political institutions and the political institutions return the favor to the courts".[59]

Now South Africa under apartheid was not a functioning

democracy, though the courts had a kind of formal independence and were engaged in the reciprocal relationship of legitimacy with political institutions which Kahn describes. The enforced divide between racial groups in the service of white supremacy meant that it was impossible to develop an "informal tradition of norms and expectations ... around political and legal institutions" common to most South Africans.

In a fraught transition a tradition of judicial independence can at best be said to be in the process of being forged. Hence, it was incumbent on judges committed to a democratic future fully to take part in the opportunity offered them to debate both their past and their future.[60] The judges could have initiated a more general discussion which would have set the stage for sketching the legitimate role of judges in the new South African legal order, one in which the Constitution gives them enormous scope for shaping the moral direction of government. That discussion could then have framed more particular discussions about the role of the magistracy, the role of the legal profession - advocates, attorneys and public law advocacy centres - the kind of independence required by the Attorneys-General, and the type of legal education required in the new South Africa.

Such a general discussion would have to go well beyond the suggestions in which judges and others indulged in many of the written and oral submissions to the Legal Hearing that all is well now that South Africa has abandoned parliamentary supremacy for a legal order in which a written constitution, under judicial

guardianship, protects the rights and liberties of all South Africans.

The difference the new legal order of South Africa will make to South Africa's future does not so much depend on the formal differences between a legal order based on legislative supremacy and one based on a liberal democratic constitution. It depends much more on how those who staff the legal order do their jobs. And when a body is set up to bridge the old and the new in the service of constructing democracy, it is the democratic duty of all citizens, including judges, fully to assist the deliberations of that body.

Here I have suggested that Bram Fischer's story is exemplary for understanding these issues. It tells us that the authority of law depends ultimately on whether law serves justice. To use Korsgaard's terms, it is not that we should ever expect that the justice of the law will be better than imperfect - perhaps highly imperfect - justice. But when the law is used to pervert justice, used in the service of injustice, one who is truly committed to the ideal of law may justifiably decide to rebel against the law for the sake of the law.

But Fischer's story also tells us that that decision is more complex than Korsgaard supposes. She sees a dilemma there, but not that in order for there to be a dilemma the possibility of seeking justice within the law can never be wholly exhausted. Law has to maintain some link with justice in order to maintain even the barest claim to be law, to be the kind of thing that makes

sense of the idea of the rule of law.

Of course, there is no necessity that a ruler will choose to rule through law. He might decide to rule by arbitrary power. But even a cynical ruler who wishes to maintain the facade of the rule of law will find, as long as there are lawyers who understand and are committed to the relationship between law and justice, that the facade cannot be had without the potential of substance. That potential is the redemptive promise of the law; and it was that promise which was the impulse of the Legal Hearing's inquiry into the legal community of apartheid.

It is no surprise that lawyers who had been complicit in apartheid were often reluctant to admit or even discuss the extent to which they failed to redeem law's potential. But the Legal Hearing will have done its task if Fischer's example hangs over the present as a constant reminder - the reminder that accountability to the law is also accountability to principles of justice that together make up the ideal of the rule of law.

ENDNOTES

1. This essay draws together and develops various arguments from my book, Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order (Oxford: Hart Publishing, 1998), published in South Africa as Truth, Reconciliation and the Apartheid Legal Order (Cape Town: Juta & Co., 1998).

2. Promotion of National Unity and Reconciliation Act (1995), section 3(1)(a).

3. See Truth and Reconciliation Commission of South Africa Report (Cape Town: Juta & Co., 1998), volume 4, chapter 4.

4. In addition, magistrates from the old order neither attended nor made written submissions.

5. McBride Submission, 11.

6. "You see, in dealing with human rights violations, you are really concerned with justice, law, order, the disposition of power and authority and how these are regulated within conventional parameters so that they are not abused"; Transcript, 2.

7. Transcript, 8-9.

8. Robert Cover, Justice Accused: Antislavery and the Judicial Process (New Haven, Conn.: Yale University Press, 1975).

9. Ibid., 1.

10. Ibid.

11. Supreme Court Act (1959), section 10(2)(a).

12. Dyzenhaus Submission, 1.

13. I deal with some of the more technical aspects of the debate more fully in Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford: Clarendon Press, 1991).

14. The legal profession in South Africa is split between advocates and attorneys.

15. Ibid., 190-91.

16. Indeed, his daughters testified, immediately after the GCB's submission, that this action was one of the most traumatic of his life - Transcript, 243. And Fischer's life was not exactly trauma-free. In 1963, only a year before his arrest, his wife Molly died

in a car accident when he was at the wheel. After estreating bail in his trial on charges under the Suppression of Communism Act, he was captured after almost a year on the run from the police, convicted and sentenced to life imprisonment. Shortly thereafter one of his children died and he was not permitted to attend the funeral and he was released from prison only in the very last stage of a fatal cancer, to which he succumbed in 1975; see Stephen Clingman, Bram Fischer: Afrikaner Revolutionary (Amherst, Mass., University of Massachussets Press, 1998).

17. The war between the British and the Boer Republics.

18. A raid into the Transvaal Republic in December 1895, instigated by Cecil John Rhodes in a botched attempt to get rid of President Paul Kruger.

19. GCB Submission, vol. 2, 193-97.

20. Society of Advocates of SA (Witwatersrand Division) v. Fischer 1966 (1) SA 133 (T).

21. The quotations within this quote are from the founding affidavit supporting the striking off.

22. GCB Submission, vol. 2, 201-04.

23. The GCB closed its submission with a quotation from Milan Kundera - "The struggle against the abuse of power is the struggle of memory against forgetting"; Ibid., 209-11.

24. See Clingman, Bram Fischer: Afrikaner Revolutionary, at 371.

25. Transcript, 243.

26. Clingman, Bram Fischer: Afrikaner Revolutionary, 371.

27. See his memorandum, dated 2nd October 1997, in GCB Submission, vol. 3, 0134.

28. GCB Submission, vol. 2, 198.

29. See the Minutes for the 2nd November, 1965, GCB Submission, vol. 3, 0135: "Festenstein had informed the Minister of the reasons why the affidavit suggested by the Minister had not been filed by the Bar Council. The Minister advised that he understood the position".

The Minutes also reveal much about white society of the time. As Lee Bozalek pointed out to me, on the same page where the Council records its process of getting rid of the embarassment of Fischer's association with them, occurs the minute titled "Pension for Elijah", where the Bar Council discusses how best to pension off some faithful black retainer - black, we can know, because he

is not dignified with a surname. No doubt the minutes of any corporate body would have read in exactly the same way on this last topic at this time and until very recently, if not still today. But there is a special irony in that this minute appears in proximity to the minute of the striking off of a man who was seeking public recognition of the humanity of the Elijahs of South Africa. It is worth recording here that Fischer's own path from scion of an Afrikaner nationalist family to communist revolutionary began when as a student he had to shake hands with a black man at a party - see Clingman, Bram Fischer: Afrikaner Revolutionary, 50-1.

30. Clingman, Bram Fischer: Afrikaner Revolutionary, 344-56, 368-72, 389-91, 400-16.

31. Christine M. Korsgaard, "Taking the Law into Our Own Hands: Kant on the Right to Revolution" in Andrews Reath, Barbara Herman, Christine M. Korsgaard (eds.), Reclaiming the History of Ethics: Essays for John Rawls (Cambridge: Cambridge University Press, 1997), 297.

32. Ibid., 318-19, footnote omitted.

33. Ibid., 315.

34. Ibid. In Fischer's speech from the dock in March 1966 prior to the presiding judge finding him guilty and sentencing him to life imprisonment, he said much the same in explaining why he had refused to enter a plea to the charges:

> "The law, my Lord, under which I have been prosecuted, was enacted by a wholly unrepresentative body, a body in which three-quarters of the people of this country have no voice whatever. This and other laws were enacted not to prevent the spread of Communism, but, my Lord, for the purpose of silencing the opposition of the large majority of our citizens to a government intent upon depriving them, solely on account of their colour, of the most elementary human rights: of the right to freedom and happiness, the right to live together with their families wherever they may choose, to earn their livelihoods to the best of their abilities, and to rear and educate their children in a civilized fashion; to take part in the administration of their country and to obtain a fair share of the wealth they produce; in short, my Lord, to live as human beings.
>
> My conscience, my Lord, does not permit me to afford these laws such recognition as even a plea of guilty would involve. Hence, though I shall be convicted by this Court, I cannot plead guilty. I believe that the future may well say that I acted correctly."

Quoted in Clingman, Bram Fischer: Afrikaner Revolutionary, 410.

35. Robert Cover, Justice Accused: Antislavery and the Judicial Process, 1.

36. Ibid.

37. Korsgaard regards apartheid South Africa as an example of what she has in mind: "Apartheid South Africa horrified us more, perhaps, than more egregious despotisms, because of its outward forms of legality, its caricature of a modern Western democracy"; "Taking the Law into Our Own Hands: Kant on the Right to Revolution", 317. But if the forms were merely outward, if law was but a cloak for naked power, there would be no dilemma. Other elements of Korsgaard's essay also suggest the perspective of the disobedient, one which is ultimately a positivist perspective on law. As I note below, it is of course true that there are moral costs to taking the path of illegal resistance, but these are costs which have to be weighed in deciding which horn of the dilemma to embrace; they do not make the dilemma such.

38. Clingman, Bram Fischer: Afrikaner Revolutionary, 449-51.

39. See Truth and Reconciliation Commission of South Africa Report, volume 2, chapter 4.

40. See Daan Bronkhorst, Truth and Reconciliation: Obstacles and Opportunities for Human Rights (Amsterdam: Amnesty International Dutch Section, 1995), 82-3.

41. Nelson Mandela, Long Walk to Freedom (Boston: Little, Brown and Company, 1995), 472.

42. The complexity of Fischer's strategy is illustrated by his secret conduct during the Rivonia trial - the trial which issued in sentences of life imprisonment for Mandela and others. For he used his office as defence lawyer to convey exhibits from the trial - maps of likely targets for sabotage as well as plans for blowing them up - as well as ideas from the accused to the new high command of the military wing of the African National Congress. See Clingman, Bram Fischer: Afrikaner Hero, 310-11.

43. Transcript, 450. I have corrected certain inaccuracies in the Transcript from my notes.

44. Ibid., 455.

45. Mandela says of Fischer, "As an Afrikaner whose conscience forced him to reject his own heritage and be ostracized by his own people, he showed a level of courage and sacrifice that was in a class by itself. I fought only against injustice, not my own people"; Long Walk to Freedom, 389. And Clingman records this moment during Fischer's trial in the cross-examination of Piet Beyleveld, an Afrikaner who had been a leading figure in the

resistance to apartheid, but who turned state's evidence against Fischer and others: "Hanson [Fischer's advocate]" ... continued, "I don't like to put this in my client's presence, but he is a man who carries something of an aura of a saint-like quality, does he not?' To which Beyleveld's simple reply was, 'I agree'"; Clingman, Bram Fischer: Afrikaner Hero, 351.

46. See especially Etienne Mureinik, "Fundamental Rights and Delegated Legislation" (1985) 1 South African Journal on Human Rights 111 and both on this point and more generally, "Pursuing Principle: The Appellate Division and Review under the State of Emergency" (1989) 5 South African Journal on Human Rights 60.

47. It is interesting to observe here the international reaction to the Zimbabwe government's disdainful reaction to a letter from three judges about their concern that, because the government now appears to condone torture, the rule of law is under severe stress. For an account, see R.W. Johnson in (1999) 21 London Review of Books 32-3.

48. Robert Cover, "Nomos and Narrative", in Martha Minow, Michael Ryan and Austin Sarrat (eds.), Narrative, Violence and the Law: The Essays of Robert Cover (Ann Arbor, Michigan: Michigan University Press, 1995) 95, 162.

49. Cover, "Nomos and Narrative", 162-63.

50. The judges were warned of this as a likely consequence to their approach to principles of legality in the first major critique of the judiciary published in South Africa - A.S. Mathews and R.C. Albino, "The Permanence of the Temporary - An Examination of the 90- and 180-Day Detention Laws" (1966) 83 South African Law Journal 16.

51. Dyzenhaus Submission, 17.

52. For good discussion of the issues around legitimacy of participation, see Stephen Ellman, In a Time of Trouble: Law and Liberty in South Africa's State of Emergency (Oxford: Clarendon Press, 1992) and Richard L. Abel, Politics By Other Means: Law in the Struggle Against Apartheid, 1980-1994 (New York: Routledge, 1995).

53. This claim needs some qualification. Consider the following story Nelson Mandela tells in his account of his legal practice in Johannesburg in the 1950s. He was asked to represent a coloured man who had been mistakenly classified as black by a white bureaucrat on the man's return from army service during World War II. Mandela says:

> "This was the type of case, not at all untypical in South Africa, that offered a moral jigsaw puzzle. I did not support or recognize the principles in the Population Registration

Act, but my client needed representation, and he had been classified as something he was not. There were many practical advantages to being classified Coloured rather than African, such as the fact that Coloured men were not required to carry passes;"

Mandela, Long Walk to Freedom, 151. (Mandela recounts that the magistrate who heard the matter was uninterested in his evidence and arguments. He decided in Mandela's client's favour on the basis that the slope of the man's shoulders was typically coloured. Mandela comments: "And so it came about that the course of this man's life was decided purely on a magistrate's opinion about the structure of his shoulders"; ibid., 152.) There is still, I suggest, a salient moral difference between a lawyer assuming the validity of the law in general in an attempt to get a judicial officer to mitigate the injustice of a particular law and a judicial officer declaring that an unjust law is valid.

54. Judge Bertha Wilson in her partial dissent in MacKeigan v. Hickman [1989] 2 SCR 796, 808-9. I discuss the case in detail in chapter 4 of Judging the Judges, Judging Ourselves.

55. See on these issues Truth and Reconciliation Commission of South Africa Final Report, volume 4, 106-8.

56. Paul W. Kahn, "Independence and Responsibility in the Judicial Role" in Irwin P. Stotzky (ed.), Transition to Democracy in Latin America: The Role of the Judiciary (Boulder, Colorado: Westview Press, 1993) 73, 85. And see Owen Fiss, "The Right Degree of Independence", ibid., 55, arguing that the substance of independence is regime-dependent.

57. Kahn, "Independence and Responsibility in the Judicial Role", 77.

58. Ibid., 84.

59. Ibid., 85.

60. A similar point was forcefully argued by Graeme Simpson for the Centre for the Study of Violence and Reconciliation in the last oral submission of the Hearing; Transcript, 637-42.